No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

Additional plaintiffs-appellants below, respondents here by operation of Rule 12.6, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are also petitioners in No. 17-74.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of the Interior.

Intervenor-defendants-appellees below, respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a and JA200-201 (Erratum)) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. Its order denying rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. The timely filed petition was granted on January 22, 2018. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the addendum to this brief. FWS's final rule listing the dusky gopher frog as endangered appears at 66 Fed. Reg. 62993 (Dec. 4, 2001). FWS's final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012) and reproduced at JA99-199.

STATEMENT

Congress enacted the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. (ESA or Act), to provide "a program for the conservation" of endangered species and to conserve "ecosystems upon which [they] depend." *Id.* § 1531(b). To that end, Section 4 of the Act requires the Secretary of the Interior to identify endangered species and to "designate *any habitat of*

such species which is then considered to be *critical habitat*." *Id.* § 1533(a)(3)(A) (emphasis added). Section 3 defines "critical habitat" as certain areas "occupied by the species," as well as other "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service (FWS or Service) designated as critical habitat of the endangered dusky gopher frog 1544 acres of private land in Louisiana, which it labeled as Unit 1. Petitioner Weyerhaeuser operates that property by periodically harvesting and regrowing commercial loblolly pine (*i.e.*, closed canopy) forests. FWS designated Unit 1 though no dusky gopher frog has been seen on that property for more than 50 years and the frog cannot live there absent a radical change in land use because the land lacks basic features necessary for the frog to survive.

The dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. 35118, 35131 (June 12, 2012), JA152-154; 50 C.F.R. § 17.95(d), JA192.

First, for breeding, the frog needs small, isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds, where it lives for the vast majority of the year when it is not breeding. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover."

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and "abundant native herbaceous" groundcover produced by frequent fires.

These features are the "habitat characteristics required to sustain the [frog's] life-history processes." 77 Fed. Reg. 35131, JA152-153. If one is missing, the frog will not survive. *E.g.*, JA45-46. But Unit 1, the Service found, "contains one" feature only: breeding ponds. *Ibid.*, JA154. FWS conceded that Unit 1 "do[es] not currently contain" the other "essential physical or biological features of critical habitat" for the frog. *Id.* at 35131, 35135, JA154, 167.

Specifically, in a dense, closed-canopy loblolly pine forest like Unit 1, treetops meet and block out light from the forest floor. Lack of sunlight and of prescribed fires prevent the growth of the herbaceous groundcover that the frog needs to live. See 66 Fed. Reg. 62993, 62999 (Dec. 4, 2001). By contrast, widely spaced trees in fire-maintained longleaf pine forests that provide frog habitat have an open canopy, allowing in sunlight that "support[s] a diverse ground cover of herbaceous plants." 77 Fed. Reg. 35129, JA144-145.

The Fifth Circuit—over a panel dissent and six-judge dissent from denial of en banc review—upheld the Service's designation of this non-habitat as "critical habitat" for the frog. That was legal error.

Congress's command in the ESA's operative provision that the Service "shall * * * designate any habitat of [a listed] species which is then determined to be critical habitat" on its face mandates that "critical habitat" be a subset of "habitat of such species." Nothing in the definition of "critical habitat" to include both occupied and unoccupied habitat alters that foundational command. Statutory context and legislative history confirm that Congress did not intend unoccupied critical habitat to be a free-floating concept available to FWS whenever land contains a single component of a listed species' habitat, even when other

components the species needs to survive are missing. Critical habitat must first be habitat, and it should be more difficult, not easier, to deem unoccupied habitat as critical than occupied habitat.

The Fifth Circuit made a second error. The Service acknowledged that the critical habitat designation could cost Unit 1's landowners up to $34 million in lost development value. But it refused to exclude the property under 16 U.S.C. § 1533(b)(2), which allows the Secretary to exclude an area from designation if the benefits of exclusion outweigh the benefits of designation. 77 Fed. Reg. 35140-41, JA185-190. The Fifth Circuit held that the Service's decision not to exclude Unit 1 from designation is not subject to judicial review for lack of a judicially manageable standard.

To the contrary, there is a familiar standard by which courts may review the Service's determination not to exclude from designation: abuse of discretion. Here, the Service abused its discretion because it failed to consider substantial reasons to exclude Unit 1 from designation or adequately to justify its decision.

For these reasons, this Court should reverse the decision below.

A. The Endangered Species Act

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). FWS is charged with developing and implementing a "recovery plan" to achieve the conservation of each listed species. 16 U.S.C. § 1533(f).

ESA Section 7, 16 U.S.C. § 1536(a)(2), "requires each federal agency to 'insure that any action

authorized, funded, or carried out by such agency'" is "'not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary * * * to be critical.'" *Bennett*, 520 U.S. at 158.[1]

If a federal agency believes that its proposed action may adversely affect critical habitat, "it must engage in formal consultation with [FWS]," which "provide[s] the agency with a written statement" explaining "how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). The agency must then "either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 652 (2007) (*NAHB*).

Section 7 means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits" to private parties, adversely modifies or destroys critical habitat. *Sweet Home*, 515 U.S. at 692. The requirement "cover[s], in effect, almost anything that an agency might do." *NAHB*, 551 U.S. at 664.

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[1] Section 9 makes it unlawful to "take" listed species (16 U.S.C. § 1538(a)(1)), which includes "'significant habitat modification where it actually kills or injures wildlife.'" *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690-691 (1995), quoting 50 C.F.R. § 17.3 (1994). The "take" prohibition is not at issue here because it is undisputed that no dusky gopher frog is or could be present on Unit 1.

The list of federal actions that may require Section 7 consultation is a long one. It includes the U.S. Army Corps of Engineers' consideration of an application for a permit to discharge fill material into wetlands under Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. Other examples are Federal Energy Regulatory Commission "oversight of gas pipeline and powerline rights-of-way" and "Federal Highway Administration [provision of] federal funds" for "road construction." 66 Fed. Reg. 62993, 63000 (Dec. 4, 2001). And any federal contract,[2] any federal loan or loan guarantee,[3] or the provision of flood insurance by the Federal Emergency Management Agency,[4] among a host of other federal actions, could trigger Section 7 consultation. See 50 C.F.R. § 402.02 ("Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "the promulgation of regulations," "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid"); ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES 105-106 (Donald Bauer & Wm. Robert Irvin, eds., 2d ed., 2010).

ESA Section 5, 16 U.S.C. § 1534(a), authorizes the Secretary to further the Act's conservation goals by "acquir[ing] by purchase, donation, or otherwise, lands, waters, or interest therein." That provision, as this Court pointed out in *Sweet Home*, is well suited to

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[2] *E.g.*, *Defs. of Wildlife* v. *Bureau of Ocean Energy Mgmt.*, 871 F.Supp.2d 1312, 1322 (S.D. Ala. 2012) (agency approval of oil and gas leases).

[3] *E.g.*, *Buffalo River Watershed Alliance* v. *Dep't of Agriculture*, 2014 WL 6837005, at *5 (E.D. Ark. Dec. 2, 2014) (loans from the Small Business Administration and Farm Service Agency).

[4] *E.g.*, *Florida Key Deer* v. *Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008).

address land "that is not yet but may in the future become habitat for [listed] species." 515 U.S. at 703. When it enacted the ESA in 1973, Congress contemplated that "land acquisition" for "protection of habitat" on "non-public lands" would be a major component of species conservation, comprising a third of the ESA program's annual budget. S. Rep. No. 93-307, at 4 (1973), reprinted in S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 303 (Comm. Print 1982) (LEG. HIST.); H.R. Rep. No. 93-412, at 20 (1973), LEG. HIST. 159.[5]

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation requirement. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

In June 1978, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would "result in total destruction of the snail darter's habitat," the statute

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[5] Non-governmental organizations are active acquirers of land and easements for conservation. *E.g.*, Nature Conservancy, *About Us: Private Lands Conservation*, perma.cc/QB8T-WWNX. The Nature Conservancy owns or manages parts of the Mississippi critical habitat for the dusky gopher frog. *Mississippi: Explore Our Work*, perma.cc/LC2C-X9XH; see also perma.cc/U5UV-RG74.

required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

Months earlier, FWS had finalized a regulation defining critical habitat as

> any air, land, or water * * * and constituent elements thereof, the loss of which would appreciably decrease the likelihood of survival and recovery of a listed species * * *. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-875 (Jan. 4, 1978).

The Tellico Dam decision and 1978 critical habitat regulation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13 (1978), LEG. HIST. 737. House Bill 14104 responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, LEG. HIST. at 749. Though based on the 1978 critical habitat regulation, the House bill eliminated reference to "additional areas for reasonable population expansion." H.R. 14104, 95th Cong. § 5(1) (2d Sess. 1978), LEG. HIST. 715; see also S. Rep. No. 95-874, at 10 (1978), LEG. HIST. 948 (distinguishing between "true critical habitat" and designations "to extend the range of an endangered species," over which the report expressed "particula[r] concer[n]").

In its report on the bill, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, LEG. HIST. 742.[6]

Subsequent amendments to House Bill 14104, and competing Senate Bill 2899 (LEG. HIST. 1169), abandoned the 1978 regulation as a model and moved towards the current definition of critical habitat. See James & Ward, *supra*, 34 J. ENVTL. L. at 18-21.

As ultimately enacted, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

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[6] Individual legislators expressed concern about "the extremes to which the act [had been] carried" (LEG. HIST. 1006 (Sen. Garn)), including that "designation of critical habitat" operated as "zoning from Washington, D.C." *Id.* at 821 (Rep. Murphy). See James & Ward, *supra*, 34 J. ENVTL. L. at 14-15.

16 U.S.C. § 1532(5)(A).

The adopted amendments also provided that, except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." 16 U.S.C. § 1532(5)(C). See James & Ward, *supra*, 34 J. ENVTL. L. at 15-26 (detailing history of 1978 amendment). This statutory language has not changed since 1978.

Representative Murphy (a sponsor) emphasized in the hearing on the Conference Report that the end result was "[a]n extremely narrow definition of critical habitat." 124 Cong. Rec. 38665 (Oct. 14, 1978), LEG. HIST. 1221.

C. The Critical Habitat Regulations

At the time FWS designated critical habitat for the dusky gopher frog in 2012, its regulations provided that "[i]n determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection." 50 C.F.R. § 424.12(b) (2012). These features included

> (1) Space for individual and population growth, and for normal behavior;
>
> (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
>
> (3) Cover or shelter;
>
> (4) Sites for breeding * * *; and generally;
>
> (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species.

Ibid. The rule directed the Secretary to "focus" on the "primary constituent elements" "within the defined area that are essential to the conservation of the species," which may include "spawning sites, feeding sites, seasonal wetland" and "vegetation type." *Ibid.*

The regulation also directed the Secretary to designate as critical habitat "areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

In 2016 the Service amended the critical habitat rule to omit this "inadequacy" limitation on unoccupied habitat designation. 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). It asserted that "unoccupied [critical habitat] areas do not have to presently contain any of the physical or biological features" that a species needs. *Id.* at 7427. It stated—citing (only) the district court's decision in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Ibid.* The Service warned that "critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing." *Id.* at 7435.[7]

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[7] Twenty States challenged the 2016 rule as inconsistent with the ESA and arbitrary and capricious. First Am. Compl., *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala. Feb. 2, 2017) (Dkt. 30). That case settled (Dkt. 55, 56 (Mar. 15, 2018)), with the agencies agreeing to reconsider the 2016 regulations. FWS did not agree to revisit the designation at issue in this case, which was improper not as a matter of agency discretion but because it violates the ESA and the Administrative Procedure Act. No amount of tinkering with the critical habitat rule will eliminate the designation of Weyerhaeuser's property or

D. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

1. Dusky gopher frogs are "terrestrial amphibians endemic to the longleaf pine ecosystem." 77 Fed. Reg. 35129, JA144. "They spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.*, JA144-145. Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Connectivity" of "breeding and nonbreeding habitat * * * must be maintained to support the species' survival." 77 Fed. Reg. 35130, JA148.

"Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Pet. App. 85a n.7; see 77 Fed. Reg. 35130, JA149; 66 Fed. Reg. 62999 ("fire is the only known management tool" to maintain frog habitat; "Appropriate burning regimes must be maintained to prevent woody encroachment and to enhance herbaceous growth"); JA45-46.

Thus the three "habitat characteristics required to sustain the [frog's] life-history processes," or "primary constituent elements" (PCEs), FWS concluded, are ephemeral wetlands, upland forest, and upland areas connecting the two. 77 Fed. Reg. 35131, JA152-154. Essential to all three habitat elements are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*, JA153-154.

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change the plain command of the statute, which leaves FWS with no discretion to designate non-habitat like Unit 1.

Many open-canopy "longleaf pine dominated uplands have been converted to pine plantations" of loblolly or slash pine, which produce a closed canopy that blocks sunlight needed for herbaceous grasses to grow, or have been lost to urbanization. FWS, *Dusky Gopher Frog Recovery Plan* 11 (July 23, 2015), perma.cc/C9TQ-DJZU (*Recovery Plan*). Less than two percent of original longleaf pine forested habitat remains. 66 Fed. Reg. 62997. The use of prescribed fire as a management tool also has been reduced. *Recovery Plan* at 11. While "[f]ire is needed to maintain the natural longleaf pine community," it can destroy loblolly pine forests and is inappropriate for developed areas. 66 Fed. Reg. 62999.

FWS's *Recovery Plan* (at 11) explains how sites are managed to create habitat for the frog. "Prescribed fire is being used at * * * sites being managed as potential translocation sites" to create "open canopy and native groundcover vegetation." "[A]ctive management" also includes "planting longleaf pine [and] restoring native groundcover vegetation." *Ibid.*; see also JA46.

2. FWS designated the frog as endangered in 2001, estimating the extant population at 100 frogs at one site in the DeSoto National Forest in Mississippi. 66 Fed. Reg. 62995.[8] But it did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

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[8] FWS listed the "Mississippi gopher frog," observing that "surveys have been unable to document the continuing existence" of the frog in Louisiana or Alabama. 66 Fed. Reg. 62994-95. In 2012's final designation FWS renamed the frog the dusky gopher frog (*Rana sevosa*), though it remains confined to Mississippi. 77 Fed. Reg. 35118, JA102.

FWS acknowledges that the frog is found only in Mississippi. It nevertheless designated as critical habitat 1544 acres of commercial forest in St. Tammany Parish, Louisiana, known as Unit 1. Unit 1 is 50 miles from where the frog lives, and the frog has not been seen on Unit 1 "since the 1960s." Pet. App. 86a; see 77 Fed. Reg. 35146, JA194; JA58.

FWS designated Unit 1 because it contains five isolated ponds into which FWS believed "dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. 35135, JA167. But FWS acknowledged that apart from these ponds Unit 1 "do[es] not currently contain the essential physical or biological features of critical habitat." *Ibid.*[9]

FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." 77 Fed. Reg. 35123, JA122. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129, JA144-145), FWS deemed Unit 1's designation "essential for the conservation of the species." FWS reasoned that because, with many changes, Unit 1 could provide "habitat for population expansion,"

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[9] Peer reviewers FWS relied upon during rulemaking understood that the frog cannot inhabit ponds without associated upland habitat. One observed that "conservation emphasis" on "seasonal/ semipermanent wetlands" must be matched by "equal emphasis" on "the large areas of surrounding habitat used by adults (and juveniles) during the 10 or 11 months of the year when not breeding." He pointed to the frog's "unusually specific upland habitat requirements" of "open canopy longleaf pine savannahs" that are "maintained by fire." Comments of Dr. Michael J. Lannoo, JA23-26; see also Comments of William Blihovde, JA45-46.

designation was "essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery." *Id.* at 35135, JA167.

Reflecting that ponds alone cannot support the frog, FWS did not designate as critical habitat only the ponds on Unit 1, but also 1544 acres surrounding them. The Service arrived at these boundaries by starting at the ponds, then using data on the distances that dusky gopher frogs and other gopher frogs have been observed to travel, then adding a buffer zone, then connecting all these areas together. 77 Fed. Reg. 35120, 35130, JA107-108, 147-149; *Recovery Plan* at 10.

3. FWS reported in 2015 that "three naturally-occurring populations [of dusky gopher frogs] supported by four breeding ponds" have now been documented in Mississippi on federal- or State-owned land. *5-Year Review: Summary and Evaluation* 12 (2015), perma.cc/24DJ-KQHP. A fourth breeding population has been established on Nature Conservancy-owned land by translocation. *Ibid.* Fourteen ponds have been restored or created on federal, State, and Nature Conservancy land for future translocations. *Ibid.* In addition, an active captive breeding program has produced a population of 550 frogs at 16 zoos. *Recovery Plan* at 26.

E. FWS's Economic Analysis

ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* ¶ 70 (Apr. 6, 2012) ("Final Econ. Analysis"), JA80. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners undertook comprehensive planning for future development, obtaining zoning changes and local approvals. *Id.* ¶¶ 70-72, JA80-83. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." *Id.* ¶ 73, JA83.[10]

FWS recognized that designation of Unit 1 could interfere with the planned development. If ponds on the land fall within CWA jurisdiction, development would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions.[11] FWS

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[10] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 percent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis ¶ 71, JA81-82. The Parish Council opposed the critical habitat designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011), JA28-31.

[11] The Final Economic Analysis assumed (at ¶ 74) that a CWA permit is the only federal nexus that could trigger a Section 7 consultation. Roads and FERC-licensed gas pipelines that cross Unit 1, or other federal connections involved in large residential

calculated that permit conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value ("Scenario 2"). If development were prohibited altogether, the loss would be $33.9 million ("Scenario 3"). Final Econ. Analysis ¶ 87, JA91-92; 77 Fed. Reg. 35140-41, JA185-190. This "reduction in land value occurs immediately at the time of designation." Final Econ. Analysis ¶ 73, JA83. FWS did not quantify any other costs, including the cost of restoring Unit 1 to habitat.

FWS acknowledged that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. 35141, JA189. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Ibid*., JA190.

F. The District Court's Decision

The landowners brought ESA and Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, it "[r]eluctantly" upheld the designation. *Ibid.*

G. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote after an "extremely limited and highly deferential" review of the designation. Pet. App. 6a. It rejected the

and commercial developments, also could trigger consultation. *Supra*, pp. 5-6.

landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." Pet. App. 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a and JA200-201. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." Pet. App. 142a.

Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical

habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. Pet. App. 142a-150a.

Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." Pet. App. 155a.

Finally, the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*. Pet. App. 156a-162a.

SUMMARY OF ARGUMENT

The Fifth Circuit erroneously upheld the designation of Unit 1 as critical habitat.

I. Unit 1 is not critical habitat as a matter of law.

A. The ESA requires that critical habitat be habitable. Section 4(a)(3) limits designations to "habitat." Areas in which a species cannot survive are not habitat. It is undisputed that the frog cannot live in Unit 1.

The term "critical habitat" also requires habitability. It means "habitat" that is "critical" to the species. Congress intended that designations generally must be narrower than, or at most coextensive with, "the entire geographical area which can be occupied" by the species. 16 U.S.C. § 1532(5)(C). That language demands habitability.

Section 3's definition of "critical habitat" is in accord. The "occupied" clause requires habitability. And the unoccupied clause is more demanding. It focuses not on the "essential" "features" of habitat, but on "essential" "areas." Areas that lack the features

essential to species' life-processes cannot be essential for conservation.

The ESA's structure reflects a habitability requirement. Section 7 applies only to "habitat" that is "critical." This Court interpreted Section 7 in *Hill* to require the presence of habitat. Congress then added parallel language to Section 4(a)(3), demonstrating its intent for Section 4(a)(3) to be interpreted similarly. Legislative history confirms that Congress intended an "extremely narrow" definition of critical habitat.

The constitutional avoidance canon likewise compels a narrow reading of "critical habitat." Reading the ESA to give FWS power to designate non-habitat would impinge significantly on States' traditional powers over land use. And federal regulation of land on which a non-commercial species does not and cannot live raises substantial Commerce Clause concerns.

B. The Fifth Circuit's ruling impermissibly expands the scope of the ESA. It perversely makes it easier for FWS to designate unoccupied land than occupied land as critical habitat. And its reading has no limiting principles. Vast portions of the United States could be designated as critical habitat if a single feature used by an endangered species is present. There is no legal basis for this expansion of agency power.

C. A ruling for petitioner would not prevent conservation. ESA Section 5 allows FWS to purchase land, regardless whether it is critical habitat. Section 6 allows FWS to fund State conservation efforts, which often include partnering with nongovernmental organizations to purchase land or conservation easements. Section 10(j) allows FWS to work with landowners by releasing experimental populations while prohibiting critical habitat designation. Those and other tools are more equitable than designation.

They also are more effective; FWS has railed for decades about the ineffectiveness and cost of critical habitat designations.

II. The panel erroneously refused to review FWS's decision not to exclude Unit 1 from designation under ESA Section 4(b)(2).

A. Exclusion decisions are judicially reviewable. This Court so concluded in *Bennett* v. *Spear*. Bedrock principles of administrative law support that conclusion. This Court applies a strong presumption favoring judicial review of agency action, and nothing in the ESA overcomes that presumption.

B. The Fifth Circuit's reasons for barring judicial review lack merit. It erroneously presumed that FWS's actions are *un*reviewable. It incorrectly ruled that courts may review only decisions to exclude, when decisions *not* to exclude require the same cost-benefit analysis by FWS. And it failed to recognize that the familiar abuse-of-discretion standard of review is available and administrable.

C. FWS abused its discretion in not excluding Unit 1 from designation. FWS did not consider all costs. And it did not sufficiently explain its one-sentence conclusion that tens of millions of dollars in costs imposed by the designation are not "disproportionate" to the "biological" benefits. This Court should hold that FWS abused its discretion in not excluding Unit 1 from designation, or at a minimum remand for judicial review under the abuse-of-discretion standard.

ARGUMENT

I. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

This Court should reverse the judgment below because the designation of Unit 1 as critical habitat

violates the ESA and the Administrative Procedure Act. "'Congress has directly spoken to the precise question at issue'" in "clear and conclusive" terms. *Digital Realty Trust* v. *Somers*, 138 S. Ct. 767, 781-782 (2018).

A. The ESA Requires Designated Areas To Be Habitable.

The Fifth Circuit's decision rests on its erroneous holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. The ESA's language does impose a habitability requirement. The statutory structure, legislative history, and canons of construction all confirm that reading. As a matter of law, uninhabitable Unit 1 is not critical habitat of the dusky gopher frog.

1. Statutory Text Limits Designations To Habitat.

The sole provision authorizing critical habitat designations contains an unmistakable habitability requirement. Section 4(a)(3) provides that FWS shall "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The panel correctly cited this provision as the source of FWS's "statutory duty to designate" critical habitat. Pet. App. 32a. But the panel failed to recognize its import.

Section 4(a)(3) is unambiguous that critical habitat "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J., dissenting). As FWS explained, "'habitat' and 'critical habitat'" are "distinct." U.S. Br. in Opp. 22. Designated areas must be habitat because Congress required *both* "habitat" *and* "critical habitat" to be present. The "irreducible minimum" of designated critical habitat "is that it *be habitat*." Pet. App. 137a

(Jones, J.); see *Sweet Home*, 515 U.S. at 703 ("habitat that has been designated 'critical' pursuant to § 4").

Section 4(a)(3)'s "habitat" requirement must be given effect. "It is the 'cardinal principle of statutory construction'" and this Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Bennett*, 520 U.S. at 173. And Section 4(a)(3) is the "operative provision" on designations; Section 3's definition of "critical habitat" "pertains only to one term" of the operative provision. Pet. App. 137a (Jones, J.). Section 4(a)(3) prohibits the designation of "critical habitat" that is not "habitat."

The ESA does not define "habitat." But the word has an "ordinary, contemporary, common meaning." *Octane Fitness* v. *ICON Health & Fitness*, 134 S. Ct. 1749, 1756 (2014). And that "ordinary understanding" of habitat excludes uninhabitable land. *Sweet Home*, 515 U.S. at 687.

"Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976); see *Sweet Home*, 515 U.S. at 697 (consulting WEBSTER'S THIRD in interpreting the ESA); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) ("the kind of place that is natural for the life and growth of an organism").

The U.S. Forest Service defined "habitat" contemporaneously as the "natural environment" or "locality where the organism may generally be found, and where all essentials for its development and

existence are present." Charles Schwarz, *et al.*, USDA Forest Service, *Wildland Planning Glossary* 91 (1976), perma.cc/S2SU-ES2Y. Ecological texts defined habitat as "denot[ing] a rather specific kind of living space" containing "physical and biologic factors which provide at least minimal conditions for one organism to live." Rexford Daubenmire, PLANT COMMUNITIES: A TEXTBOOK OF PLANT SYNECOLOGY 4 n.* (1968). To this day, the Service's ESA Handbook defines "habitat" as "[t]he location where" an "animal lives and its surroundings," including "the presence of a group of particular environmental conditions surrounding an organism." *Habitat Conservation Planning Handbook* Glossary G-14 (Dec. 21, 2016), perma.cc/CX9A-8LMH.

International conventions are in accord. The Convention on Migratory Species states that "'[h]abitat' means any area in the range of a migratory species which contains suitable living conditions for that species." Convention on the Conservation of Migratory Species of Wild Animals, art. I, § 1(g) (1979). The Convention on Biological Diversity defines "habitat" as "the place or type of site where an organism or population naturally occurs." Convention on Biological Diversity, art. 2 (1992).

Those definitions do not cover Unit 1, where suitable living conditions do not exist and the frog cannot naturally survive. This fact is "undisputed." Pet. App. 49a (Owen, J.). The Service found that Unit 1 "contains" only "one" of three "habitat characteristics required to sustain the species' life-history processes": breeding ponds. 77 Fed. Reg. 35131, JA152-154. Adult frogs spend 8 to 17 days each year in these ponds. *Recovery Plan* at 8.

FWS recognized that Unit 1's "uplands"—where the "frogs spend most of their lives"—"do not currently

contain the essential physical or biological features of critical habitat." 77 Fed. Reg. 35130, 35135, JA150, 167. Unit 1's uplands lack the "longleaf pine[s]," "frequent" fires, "open canopy and abundant herbaceous ground cover" that provide "food, shelter, and protection" for the frog. *Id.* at 35131, JA153. Instead, "Unit 1 is covered with a closed-canopy forest of loblolly pines." Pet. App. 72a (Owen, J.). And as FWS acknowledged, "loblolly" pine "plantations" with "a closed-canopy forest" are "*unsuitable as habitat for dusky gopher frogs*." 77 Fed. Reg. 35129, JA145 (emphasis added).

Unit 1 therefore does not provide the frogs with an environment for "feeding[] and sheltering," which "are what animals do." *Sweet Home*, 515 U.S. at 710 (O'Connor, J., concurring). If dusky gopher frogs were moved to Unit 1, they would not survive. No reasonable definition of "habitat" includes this land.

Given these undisputed facts, Unit 1 cannot be designated as critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat," which is "fundamentally at odds with the ESA's text." Pet. App. 138a (Jones, J.).

2. The Term "Critical Habitat" Requires Habitability.

The statutory term "critical habitat" also requires habitability. Section 3 defines "critical habitat" to mean: (i) "occupied" areas that contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and (ii) unoccupied "areas" that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). By using the term "critical habitat" rather than "critical

features" or the like, Congress again made clear that critical habitat must be "habitat."

Although "critical habitat" is defined, the words retain "independent significance" by "showing us what Congress had in mind." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). "Words are to be given the meaning that proper grammar and usage would assign them." Antonin Scalia & Bryan A. Garner, READING LAW 140 (2012). In ordinary usage, adjectives modify and thereby limit nouns. See *Henson* v. *Santander Consumer USA*, 137 S. Ct. 1718, 1720 (2017) (adjectives "describe the present state of the nouns they modify"); *United States* v. *Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (adjectives "modif[y] (and hence limi[t]) the noun"); *Bayer CropScience* v. *Dow Agro-Sciences*, 728 F.3d 1324, 1329 (Fed. Cir. 2013) ("adjective suggest[s] a narrowing of the broader class identified by the noun"). The adjective-noun term "critical habitat" implies "habitat" that is "critical." The Fifth Circuit's holding that "critical habitat" includes *non*-habitat is an abuse of ordinary language.

3. Section 3(5)(C) Cements The Habitability Requirement.

ESA Section 3(5)(C) provides that, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." 16 U.S.C. § 1532(5)(C). The words "can be occupied"—*not* "is occupied"—shows that this provision governs occupied *and* unoccupied critical habitat. And "can be occupied" *means* habitable. Congress envisioned critical habitat to be *at most coextensive with*, and almost always narrower than, all habitable areas. The Fifth Circuit's ruling, which allows FWS to designate

critical habitat *beyond* the species' habitat, contradicts statutory text and Congress's intent.

4. The "Critical Habitat" Definition Requires Habitability.

a. Section 3's definition of critical habitat confirms this reading. The "occupied" clause presupposes that the property has the features necessary to support the species: the species could not occupy the property were it not habitable. And the property must contain "features" "essential" to conservation of the species that "may require special management considerations or protection." This definition requires "habitability," as the panel understood. Pet. App. 23a.

The "unoccupied" clause is "more demanding." *Home Builders Ass'n* v. *U.S. Fish & Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010). The text focuses not on habitat "features," but habitat "areas." See *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 119 (D.D.C. 2004) ("it is not enough that the area's features be essential to conservation, the area itself must be essential"). "Given the narrower scope of 'feature' than 'area,' it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard)." Pet. App. 144a (Jones, J.). "[A] broader and more complex investigation" is required for designating unoccupied habitat. *Id.* at 145a.

"[A]reas" that lack the features that FWS deems "essential to the conservation of the species"—here, the three "primary constituent elements" of ephemeral wetlands, open canopy, fire-maintained uplands, and similar connective pathways—cannot be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). There is nothing "essential" about land on which a

species *cannot* survive. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable"); see also *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018).

Those definitions do not cover Unit 1, which "will not support" the frog. Pet. App. 48a (Owen, J.). As 18 States explained, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there." Br. of Ala. *et al.* as *Am. Cur.* in Support of Pet. for Cert. at 4.

b. To transform Unit 1 into frog habitat, the landowners would have to

- chop down the "closed-canopy" "loblolly" trees and plant "open-canopied" "longleaf" pines;
- burn Unit 1 with "frequent fires" to "support a diverse ground cover of herbaceous plants," despite "acknowledge[d]" "landowner concern" and "negative impacts" of such fires;
- terminate century-long, "on-going timber management of the site, which precludes burning or planting longleaf pine trees";
- allow "60 percent" or "100 percent" of Unit 1 to be "managed" as "refuge for the frog," at a cost of "$20.4 million" or "$33.9 million" in "lost development value"; *and*
- agree "voluntar[ily]" to "frog translocations."

77 Fed. Reg. 35123-24, 35126, 35129, 35141, JA121, 123, 132, 145, 189. "[T]here is no evidence" that these

"substantial alterations" "will, or are likely to, occur." Pet. App. 48a (Owen, J.). FWS's mere "hope to work with the landowners" by forcing radical land-use changes at tens of millions of dollars of landowner expense does not authorize the conclusion that Unit 1 is "habitat" or "essential" to the frog's conservation. *Ibid.*; 77 Fed. Reg. 35123, JA123. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.).

The Service's designation of Unit 1 is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). Because it is at odds with the statutory text and "not in accordance with law," it violates the ESA and the APA, 5 U.S.C. § 706(2)(A).

5. The Statutory Structure Shows That Critical Habitat Must Be Habitable.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *NAHB*, 551 U.S. at 666. The ESA's "[s]urrounding provisions" and "structure" reflect a habitability requirement. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

As the panel explained, critical habitat designations operate "primarily" through Section 7 consultation. Pet. App. 9a. Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 16 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4(a)(3), Section 7 is unambiguous that *critical* habitat must be *habitat*.

This language is almost entirely original to the 1973 Act, which mentioned critical habitat *only* in Section 7. See Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). "From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat." Pet. App. 136a (Jones, J.). This Court acknowledged that fact in *Hill*. There, it read Section 7's "plain words" as providing that, if "habitat [is] destroyed," the "Act would then have no subject matter to which it might apply." 437 U.S. at 186 n.32. The Court thus recognized that Section 7's applicability hinges on the presence of "habitat."

That same interpretation should govern Section 4(a)(3)'s parallel language. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012). The fact that Congress in 1978 responded to *Hill* by adding nearly identical language to Section 4(a)(3) demonstrates its intent for Section 4(a)(3) to be interpreted similarly. "Congress is presumed to be aware" of this Court's "interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009).

Congress reiterated its focus on "habitat" in other ESA provisions. *E.g.*, 16 U.S.C. § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered); *id.* § 1537a(e)(2)(B) (requiring FWS to cooperate with foreign nations in identifying "habitats upon which [migratory birds] depend").[12]

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[12] Other provisions confirm that Congress's focus was on actual habitat. Section 4(b) instructs FWS to give notice of a

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the plain language reading that "critical habitat" must be "habitat" that "sustain[s] the species' life-history processes." 77 Fed. Reg. 35131, JA152-153.

6. Legislative History Reflects A Habitability Requirement.

The legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat." Pet. App. 137a n.4 (Jones, J.). The 1973 Act did not define critical habitat, which was mentioned only in Section 7. The agencies then defined critical habitat to include "any portion of the present habitat of a listed species, which may include additional areas for reasonable population expansion." 43 Fed. Reg. 875. Congress viewed that regulation as overbroad and amended the ESA in 1978 to limit critical habitat.

Congress was concerned that the agencies' "regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, LEG. HIST. 749. The House "narrow[ed]" the

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proposed critical habitat designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

definition and told the agencies to be "exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species." *Id.* at 18, 25, LEG. HIST. 742, 749. The Senate Report declared that there is "little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species' continued survival." S. Rep. No. 95-874, at 10, LEG. HIST. 948.

After the conference approved language that became Section 3, Representative Murphy explained that the final bill retained "[a]n extremely narrow definition of critical habitat." 124 Cong. Rec. 38665, LEG. HIST. 1221. But the Fifth Circuit's interpretation is extremely broad, allowing FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25, LEG. HIST. 749. That "is the opposite of what Congress declared." Pet. App. 149a (Jones, J.).

7. The Avoidance Canon Favors A Narrow Reading Of Habitat.

"[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

a. FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision

"signals a huge potential expansion of [FWS's] power effectively to regulate privately- or State-owned land." Pet. App. 143a (Jones, J.).

Just ask St. Tammany Parish, where Unit 1 is located. It opposes the designation for "usurp[ing]" its land-use authority. Br. of St. Tammany Parish as *Am. Cur.* in Support of Pet. for Cert. 2. St. Tammany is Louisiana's "fastest growing Parish" and the "primary refuge of thousands" who "fled their homes from the onslaught of Hurricane Katrina." *Id.* at 1-2. After a "stringent comprehensive rezoning process," the Parish rezoned Unit 1 for development as a neighborhood because the land is "out of harm's way in the inevitable event" of "hurricanes" and "flooding." *Id.* at 5-6. St. Tammany protests that the designation of Unit 1 as critical habitat "adversely affects" this development and reduces its "tax base hindering local government from meeting the needs of its growing population." *Id.* at 1; see also JA28-31.

The Parish warns too of "serious public safety concerns" over the burning necessary to create frog habitat. St. Tammany *Am.* Br. 3. Burns "have created in the past, and will create in the future, hazards" that could spell "disaster" for the nearby "community of Hickory," whose "rural fire district [has] limited equipment and manpower." *Id.* at 7. And fire imperils the "critical east-west transportation route" of Highway 36, which runs through Unit 1. *Id.* at 3. FWS gave these concerns the back of its hand, assuring that "experts" would do the burning and lost tax revenue is "not expected." 77 Fed. Reg. 35126, 35127, JA132, 135. The Parish disagrees.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*,

547 U.S. at 738 (plurality); see *SWANCC*, 531 U.S. at 174 (finding no clear congressional expression of "a desire to readjust the federal-state balance"). There is no such plain statement in the ESA. The Service's claim of authority to designate unoccupied critical habitat based on a single feature that is not sufficient to support the life of a listed species extends the reach of critical habitat designations to vast areas of the Nation, turning federal regulators in a super zoning authority. See Pet. App. 154a-156a (Jones, J.). To stretch the statutory language to allow FWS to intrude so far into state and local land use powers distorts our federalism. The avoidance canon counsels otherwise.

b. FWS's designation also tests the boundaries of federal commerce power. "The Commerce Clause empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and spend most of their lives underground. FWS found no commercial value in them or in the designation of their critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. 35141, JA189. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it

does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied non-habitat as critical habitat. *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Erroneous Ruling Vastly Expands The ESA.

The Fifth Circuit's decision to jettison habitability destroys the ESA's built-in limitations. The panel perversely "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). And its logic has no stopping point. Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" *Id.* at 49a (Owen, J.).

1. The Ruling Below Perversely Makes It Easier To Designate Unoccupied Areas Than Occupied Habitat.

The Fifth Circuit read the ESA to impose a "*less* stringent" standard for designating "unoccupied critical habitat" as compared to "occupied critical habitat." Pet. App. 142a (Jones, J.). It held that "*occupied* land" requires "habitability," but "*unoccupied* land" does not. Pet. App. 23a. On that basis it upheld FWS's designation while admitting that Unit 1 "currently lack[s] 'the essential physical or biological features of critical habitat.'" *Id.* at 26a n.17.

That "remarkable and counterintuitive" holding "conflicts with the ESA's text" and "drafting history." Pet. App. 142a-143a (Jones, J.). It also breaks from "*all* relevant precedent," which uniformly embraced the

"commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." *Id.* at 142a, 149a; see *Home Builders Ass'n*, 616 F.3d at 990 ("the standard for unoccupied habitat" is "more demanding" than the standard for "occupied critical habitat"); *Ariz. Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); *Cape Hatteras*, 344 F.Supp.2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands"). "[M]ost troubling," the panel "refused to address" how its expansive interpretation makes any sense given Congress's expressed intent to *limit* designations of unoccupied areas. Pet. App. 150a (Jones, J.).

2. The Fifth Circuit's Interpretation Has No Limiting Principles.

FWS's approach has no meaningful limit. The Fifth Circuit's failed attempts to cabin FWS's designation authority prove the point.

The Fifth Circuit first cited the regulation in effect at the time of Unit 1's designation, which required FWS to find occupied habitat "inadequate" before it considered unoccupied areas. Pet. App. 27a-28a. But by the time of the panel's decision, FWS had eliminated that inadequacy requirement. FWS determined that "the Act does not require" an inadequacy finding, which it called "unnecessary and unintentionally limiting." 81 Fed. Reg. 7424, 7434. The panel thus upheld the designation under *Chevron* based on a rationale that the agency had rejected.

Regardless, it is hardly a significant limit on federal power to say that uninhabitable land may be designated on the basis of a single feature that cannot

support the species, whenever occupied land is "inadequate" for species conservation. As the designation here shows, FWS can readily assert that the likelihood of a species' conservation improves if more land is pressed into service as critical habitat.

The panel also tried to draw a line at "land that is *objectively* impossible to use for conservation," such as "a toxic spill zone that scientists concluded could not be remediated." Pet. App. 29a n.18. That is a minor limitation at best. And with enough time and money, nearly any toxic spill zone *could be* remediated; cities could be razed; a greenhouse for tropical species could be erected in Alaska. The Fifth Circuit's "objectively impossible" test allows virtually all land to be designated as critical habitat, which courts must then review under a "most deferential" standard. *Id.* at 16a.

There also is no limiting principle in FWS's assertion that frog habitat in Unit 1 is "restorable with reasonable effort." Pet. App. 26a n.17. So-called "reasonable effort" here means that Unit 1's owners must lose $20 to $34 million before any restoration begins to take place. It then requires them to rip out their loblolly forests, terminate their century-long timber operations, plant and grow longleaf pines, actively manage the land with fire, and permit frog translocation. FWS calculated *none* of these restoration costs; it just declared them "reasonable" and then persuaded the Fifth Circuit that courts could not review its cost-benefit analysis. Under a restoration standard, any land could be designated as critical habitat because "it is theoretically possible" that "land could be modified to sustain" a species. Pet. App. 49a (Owen, J.).

Finally, the panel claimed that the "scientific consensus as to the presence and rarity" of a single

"feature" of habitat—the ponds—"justified [FWS's] finding that Unit 1 was essential for the conservation" of the frog. Pet. App. 29a. The panel held that "if the ponds are essential, then Unit 1, which contains the ponds, is essential." *Id.* at 30a n.20. As Judge Owen noted, this was "*the linchpin* to the majority's holding." *Id.* at 64a. That holding is deeply flawed.

To begin with, it "re-writes the Endangered Species Act." Pet. App. 65a. A single "feature"—out of three features the frog needs to survive—does not make an "area" into "habitat" that is "essential" to the frog's conservation. 16 U.S.C. § 1532(5)(A)(i). The panel "smuggl[ed] 'feature' into the definition of unoccupied critical habitat" and then eviscerated the requirement by saying that a single feature is sufficient. Pet. App. 149a (Jones, J.).

Moreover, the "rarity" of the ponds as a limiting principle is "illusory." Pet. App. 154a (Jones, J.). "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions" on when a feature is "rare *enough*." *Id.* at 154a-155a. The standard bestows "virtually limitless" authority on FWS considering the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting platforms,' 'forested areas within 0.5 mile'" of those trees, "'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" *Id.* at 155a. "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a. The standard is "a judicial rubber stamp on agency action." *Id.* at 155a.

So too here. The panel deemed five Unit 1 ponds unusual enough to warrant the designation, though subsequent events show that ponds can be created or restored for frog translocation (*5-Year Review* at 12, 22), and that frogs can be "raised in cattle tanks." *Recovery Plan* at 6.

In short, the panel's opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." Pet. App. 156a. The Court should reverse that decision and restore the ESA's limits on FWS's designation authority.

C. The ESA Offers Better Ways To Achieve Conservation.

Many conservation tools remain if the Court limits the ESA's critical habitat provisions to their plain terms. A ruling for the landowners would not affect the designation of critical habitat in which a species actually lives or in which it could thrive. And ESA Section 9 still would prohibit takes of endangered species, including "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3; see *Sweet Home*, 515 U.S. at 696-707.

Even for unoccupied non-habitat that FWS hopes to convert into habitat, the ESA provides solutions. As the panel acknowledged, FWS could "manage Unit 1 by purchasing the land." Pet. App. 32a. ESA Section 5 authorizes the Secretary to "acquire by purchase, donation, or otherwise, lands, waters, or interest therein" "to conserve fish, wildlife, and plants." 16 U.S.C. § 1534(a)(2). Section 5 is not limited to "habitat" and therefore is *broader* than Section 4(a)(3). It is ideally suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species," as this Court pointed out in *Sweet Home*. 515 U.S. at 703; see Richard A. Epstein, *Babbitt*

v *Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 SUP. CT. ECON. REV. 1, 25 (1997) ("acquisition of land that is not presently usable by habitat could only be accomplished under [Section 5], since no habitat is either modified or destroyed").

Congress saw Section 5 as an important conservation tool. The Senate stressed that "an accelerated land acquisition program is essential" and "[o]ften" the "only means of protecting endangered animals which occur on non-public lands." S. Rep. No. 93-307, at 4 (1973), LEG. HIST. 303. Senator Tunney, floor manager of the bill, explained that under Section 5, "we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong. Rec. 25669 (July 24, 1973), LEG. HIST. 358.

The House emphasized that Section 5 "expanded" federal authority to acquire habitat "us[ing] funds" without "specific authorizations." H.R. Rep. No. 93-412, at 9 (1973), LEG. HIST. 148. Representative Sullivan, floor manager for the House bill, explained that Section 5 enabled agencies "to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves." 119 Cong. Rec. 30162 (Sept. 18, 1973), LEG. HIST. 192. The House envisioned that a third of ESA costs would be devoted to land acquisition. H.R. Rep. No. 93-412, at 20, LEG. HIST. 159. And the Conference Report explained that Section 5 provided "adequate authority" to "acquire habitat which is critical to the survival of [listed] species." H.R. Conf. Rep. No. 93-740, at 25 (1973), LEG. HIST. 450.

If FWS wants to conscript Unit 1 into frog habitat and translocate the frog there, Section 5 provides the

appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners. And as Judge Mikva recognized in *Sweet Home*, Section 5 "suggests a type of intervention more complex and proactive than simply forbidding certain activities on private lands," and "[f]ederal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands." 1 F.3d 1, 10 (D.C. Cir. 1993) (Mikva, J., concurring).

ESA Section 6 also offers solutions. It authorizes FWS to "provide financial assistance to any State" with a "conservation progra[m]" and enter "cooperative agreement[s]" that fund up to 90% of States' conservation efforts. 16 U.S.C. § 1535(d). FWS has agreements with most States and provided $56 million in federal funding in FY2016. *Cooperative Endangered Species Conservation Fund Grants* 1 (Sept. 2016), perma.cc/4DWV-68U2. Section 6 also allows FWS to enter agreements with States to "administ[er] and manag[e]" "area[s] established for the conservation" of species. 16 U.S.C. § 1535(b). The 1973 House saw Section 6 as accounting for 29% of the ESA's costs, meaning that the *majority* of ESA expenses were intended for federal acquisitions and State grants. H.R. Rep. No. 93-412, at 20, LEG. HIST. 159.

FWS and States in addition frequently work with non-governmental organizations, which are active acquirers of land and conservation easements. The Nature Conservancy, for example, owns and manages ponds in Mississippi where the frog lives and is assisting that State with habitat restoration. *Supra*, p. 7 n.5.

ESA Section 10(j) is another tool allowing FWS to work with private landowners. It authorizes the release of "experimental populations" into unoccupied areas. 16 U.S.C. § 1539(j). But it softens the regulatory blow to landowners by "treat[ing]" these populations as "threatened"—not endangered. *Id.* § 1539(j)(2)(C). And unless the experimental population is "essential to the continued existence of a species"—which FWS never seems to have found—*Section 10(j) prohibits the designation of that land as "critical habitat." Id.* § 1539(j)(2)(C)(ii); see *Forest Guardians* v. *U.S. FWS*, 611 F.3d 692, 702 n.14 (10th Cir. 2010). Congress added Section 10(j) in 1982 to "'encourage private parties to host such populations.'" *Id.* at 705. FWS's attempt to coerce private parties into hosting such populations through critical habitat designation of non-habitat upends that congressional purpose.

If none of these voluntary options work, "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," the ESA authorizes FWS to effect a "regulated taking" and provide just compensation. 16 U.S.C. § 1532(3); *e.g.*, *Calf Island Cmty. Trust, Inc.* v. *Young Mens Christian Ass'n of Greenwich*, 392 F.Supp.2d 241, 245-246 (D. Conn. 2005).

Any of these tools is more equitable to a private landowner than critical habitat designation. That is especially so when the designation costs the landowner $20 to $34 million in lost development value for a species that was last seen on the land before the ESA's enactment and that cannot live there now.

These tools also work better than critical habitat designations. For decades, FWS has railed against designations and "seriously question[ed]" their "utility." 62 Fed. Reg. 39129, 39131 (July 22, 1997). "In

30 years of implementing the Act," FWS explained after it listed the frog, "we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources." 69 Fed. Reg. 59996, 59996 (Oct. 6, 2004); see 64 Fed. Reg. 31871, 31872 (June 14, 1999).

FWS has been "inundated with citizen lawsuits" demanding designations, which "consum[e] large amounts of conservation resources." 64 Fed. Reg. 31872. As a result, "species not yet listed" as endangered are "facing extinction while precious resources are being depleted on critical habitat litigation support." *Id.* at 31873. Designations are "driven by litigation rather than biology" and "impos[e] huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). Indeed, they are "the most costly and least effective class of regulatory actions [FWS] undertakes." *H.R. 3824, Threatened and Endangered Species Recovery Act of 2005: Legislative Hearing Before the H. Comm. on Res.*, 109th Cong. 29 (2005) (statement of Craig Manson, Assistant Secretary for FWS).

This case corroborates those views. FWS listed the frog in 2001, immediately benefitting the frog under ESA Sections 7 and 9. In 2007, respondent CBD sued FWS for not designating critical habitat. See 77 Fed. Reg. 35119, JA103-104. It took until 2012 to finalize the designation. *Ibid.* Since then, Unit 1's owners have fought in administrative and judicial proceedings the designation of private land on which the frog does not live and cannot survive. In the meantime, cooperative efforts on federal, State and conservation-group owned land—none of which appear to depend on a critical habitat designation—have brought the frog to new

sites, and a captive breeding program has increased the population five-fold.

The designation also provides no guarantee that the frog will benefit. In the first scenario posited by FWS, "no conservation measures are implemented" because Unit 1 has "no Federal nexus" to "trigge[r] section 7 consultation." 77 Fed. Reg. 35140-41, JA188. Under that scenario there is no benefit at all to the frog. Under Scenario 3, FWS finds a federal nexus and prohibits all development "due to the importance" of Unit 1, resulting in loss of $33.9 million to the landowners. *Id.* at 35141, JA189. Because development is banned under that scenario, Unit 1's owners have no incentive to "create frog habitat." Pet. App. 77a (Owen, J.). In all likelihood, Unit 1 would remain a commercial loblolly pine forest.

The intent, therefore, of a designation like this one is captured in Scenario 2. Scenario 2 requires "60 percent" of Unit 1 to be managed as frog refuge—at a loss of $20.4 million in value to the landowners—in exchange for the right to develop the other 40 percent of the land. 77 Fed. Reg. 35124, 35141, JA124, 188-189. Only the "coercive pressure" of that sort of government shakedown can benefit the frog. *Koontz* v. *St. Johns River Water Management Dist.*, 570 U.S. 595, 607 (2013). Yet there is no guarantee that the landowners will agree to being strong-armed out of 60 percent of their land. They could instead forego CWA permitting or other federal involvement and continue to operate Unit 1 as a commercial forest, with no benefit to the frog.

FWS's expansive construction of its powers inflicts severe costs on landowners and affected communities with no guarantee of any benefit to the frog. Especially given other tools that allow FWS, States, and private

organizations to work with Unit 1's owners, the Court should interpret ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent: narrowly, to exclude non-habitat.

II. The Service's Decision Not To Exclude Unit 1 From Critical Habitat Designation Is Subject To Judicial Review.

The Fifth Circuit also erred in refusing to review the Service's decision not to exclude Unit 1 from critical habitat designation under ESA Section 4(b)(2).

Section 4(b)(2) mandates that FWS "shall designate critical habitat * * * after taking into consideration the economic impact" and "any other relevant impact" of "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). It then states that FWS "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid*.

The Fifth Circuit read Section 4(b)(2) to prohibit courts from reviewing FWS's decisions not to exclude areas from designation. Pet. App. 32a-36a. It therefore refused to review FWS's decision not to exclude Unit 1, which rested on FWS's finding that the tens of millions of dollars in costs from designating Unit 1 were not "disproportionate" to the "biological" benefits. 77 Fed. Reg. 35141, JA189-190.

As six members of the Fifth Circuit recognized, the panel's approach "play[s] havoc" with settled precedent regarding the availability of judicial review and "abdicat[es]" courts' "responsibility to oversee, according to the APA, agency action." Pet. App. 156a, 162a.

A. Courts May Review Exclusion Decisions Under ESA Section 4(b)(2).

Decisions not to exclude areas from critical habitat designation are judicially reviewable. This Court so concluded in *Bennett* v. *Spear*. There, the Court agreed with the Service that Section 4(b)(2)'s language that "[t]he Secretary *may* exclude any area from critical habitat" vests the Service with "discretion." 520 U.S. at 172. But the Court also ruled that the Service's "ultimate decision" whether to exclude areas from designation under Section 4(b)(2) "*is reviewable*" for "*abuse of discretion*." *Ibid.* (emphasis added).

Bennett answers the second question presented by our petition: decisions not to exclude areas from critical habitat designation are "reviewable." 520 U.S. at 172. The Fifth Circuit did not "confront, much less distinguish, *Bennett*." Pet. App. 161a (Jones, J.).

Bedrock principles of administrative law reinforce *Bennett*'s holding. "Judicial review of administrative action is the norm in our legal system." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1656 (2015). "[T]his Court applies a 'strong presumption' favoring judicial review." *Id.* at 1651. "[T]he agency bears a 'heavy burden'" in overcoming that presumption and must show that the "statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Ibid.*

Nothing in the ESA overcomes the strong presumption favoring judicial review. To the contrary, Section 4(b)(2)'s text and context show that courts must be permitted to review exclusion decisions.

Section 4(b)(2) *requires* FWS to "tak[e] into consideration the economic impact" of designations and authorizes FWS to exclude areas if "the benefits of such exclusion outweigh the benefits" of designation.

These are not independent provisions; they must be "interpreted holistically." Pet. App. 160a n.21 (Jones, J.). Together, they make "economic consequences" an "explicit concern of the ESA" and advance Congress's "primary" "objective" of "avoid[ing] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-177. The Fifth Circuit thwarted that congressional objective by prohibiting courts from guarding against needless economic dislocation.

The Fifth Circuit's ruling also subverts Congress's requirement that FWS "shall designate critical habitat * * * after taking into consideration the economic impact" of designation. 16 U.S.C. § 1533(b)(2). That language calls for *reasoned judgment*. The Fifth Circuit's ruling reduces that statutory command to empty formalism, providing no protection when FWS capriciously refuses to exclude areas from designation though the costs of designation outweigh the identified benefits.[13]

Congress did not make economic impact a consideration in whether to *list* a species. See 16 U.S.C. § 1533(a)(1). Designation of critical habitat is therefore the only opportunity to limit "needless economic

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[13] The 1978 House Report indicates that, after *Hill*, Congress added Section 4(b)(2) to "avoid conflicts" with "Federal activities at an early stage." H.R. Rep. No. 95-1625, at 13, 16. The report states that "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." *Id.* at 17. That language shows that the House intended to confer broad discretion, but does not bar courts from reviewing FWS's exclusion decisions to determine if they are arbitrary or capricious or an abuse of discretion.

dislocation" on the front end of the regulatory process. *Bennett,* 520 U.S. at 176.

Without judicial review, "compliance with the law would rest in the [Service's] hands alone." *Mach Mining*, 135 S. Ct. at 1652. This Court "need not doubt the [Service's] trustworthiness, or its fidelity to law, to shy away from that result." *Ibid*. "We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 1652-1653. It is imperative that exclusion decisions be reviewable.

B. The Fifth Circuit's Justifications For Prohibiting Judicial Review Are Erroneous.

Without citing these precedents, the Fifth Circuit concluded that exclusion determinations under Section 4(b)(2) are unreviewable because they are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That holding rests on several errors.

First, instead of presuming reviewability, the court presumed *un*reviewability. It reasoned that, because Section 4(b)(2) "establishes a discretionary process by which the Service *may* exclude areas from designation" but "does not articulate any standard governing when the Service *must* exclude an area," the agency's "decision not to act" is "'presumptively unreviewable.'" Pet. App. 35a. That holding contradicts the "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651.

Permissive phrasing in a statute indicates that Congress has given the agency discretion. But discretion is no barrier to judicial review. *E.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency "may correct any military record" when it "considers it necessary" "are subject to judicial review"); *Dickson* v.

Sec'y of Def., 68 F.3d 1396, 1401-1402 & n.7 (D.C. Cir. 1995) ("may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"); *Beno* v. *Shalala*, 30 F.3d 1057, 1066-1067 (9th Cir. 1994) ("the mere fact that a statute contains discretionary language does not make agency action unreviewable"). Indeed, the APA expressly *authorizes* review of agency action for "abuse of discretion." 5 U.S.C. § 706(2)(A). The fact that Congress gives an agency broad latitude does not mean that it has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652.

Second, the panel reasoned that Section 4(b)(2) "articulates a standard for reviewing the Service's decision to exclude an area" but "is silent on a standard for reviewing the Service's decision to *not* exclude an area." Pet. App. 35a. The panel's recognition that courts may review decisions *to exclude* should have compelled the conclusion that courts also may review decisions *not to exclude*. Section 4(b)(2) contemplates a single, unitary designation of critical habitat (as occurred here). Whatever is "not excluded" from that designation necessarily is "included," and vice versa. As Judge Jones put it, "the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes" that "the Service's decision to include Unit 1 as critical habitat is judicially reviewable." Pet. App. 160a n.21.

In reviewing a decision to exclude that does not cause extinctions, courts must analyze whether FWS validly "determine[d] that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). That cost-benefit analysis is capable of judicial review. Courts should review that same analysis regardless of

whether the Service ultimately decides to exclude or not to exclude the area from designation.

Third, and relatedly, the Fifth Circuit's incorrectly held that courts lack a "manageable standard" to review a "decision not to exercise [FWS's] discretionary authority to exclude an area" from designation. Pet. App. 35a. The familiar abuse-of-discretion standard, adopted by this Court in *Bennett* (520 U.S. at 172), provides a manageable standard.

On review for abuse of discretion, agency action is set aside if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or is otherwise "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid*. The panel identified no reason why this standard could not be applied to FWS's exclusion decisions under Section 4(b)(2).

Finally, the panel incorrectly relied on *Heckler* v. *Chaney*, 470 U.S. 821 (1985). Pet. App. 33a-35a. *Heckler* arose in a unique context: judicial review of an agency's decision not to enforce the statute it is charged with administering. Non-enforcement decisions, this Court explained, pose unique challenges for judicial review. They turn not just on legal or factual conclusions within the agency's expertise, but also on policy judgments about allocation of agency resources and its priorities. 470 U.S. at 831. Non-

enforcement does not involve the exercise of "*coercive* power over an individual's liberty or property rights." *Id*. at 832. And non-enforcement "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict"—a decision constitutionally committed to the Executive. *Ibid*. Those considerations led the Court to conclude that non-enforcement decisions, in contrast to the mine-run of agency action, should be presumptively *un*reviewable under the APA. *Id*. at 832-833.[14]

None of those factors pertain to FWS's Section 4(b)(2) determinations. Designating property as critical habitat—or not excluding it from designation—exercises coercive power over landowners' property rights and so implicates one of the core "areas that courts often are called upon to protect." 470 U.S. at 832. Determining the scope of a designation does not involve policy judgments about how to balance limited agency resources. And there is no parallel constitutionally committed power that is immune from judicial review.

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[14] Contrary to the panel's suggestion (Pet. App. 35a), *Heckler* does not hold that permissive statutory language reverses the presumption of reviewability. *Heckler* holds only that agencies' *non-enforcement* decisions are presumptively unreviewable. 470 U.S. at 835; see *Franklin* v. *Massachusetts*, 505 U.S. 788, 818-819 (1992) (Stevens, J., concurring) ("the Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security" or "seeking review of refusal to pursue enforcement actions," "areas in which courts have long been hesitant to intrude"). Only *after* establishing that presumption did the Court examine the statute's permissive language to decide whether petitioners had overcome the presumption.

To be sure, designating critical habitat implicates the Service's expertise. But expertise—assuming that the agency acts within its statutory authority to begin with—justifies "narrow" review, not no review. *State Farm*, 463 U.S. at 43. An agency still must "articulate" a "rational connection between the facts found and the choice made," so that "*expertise*, the strength of modern government," does not "become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

C. FWS Abused Its Discretion In Refusing To Exclude Unit 1 From Designation.

This case exemplifies why judicial review of Section 4(b)(2) exclusion determinations is important and administrable.

The Service determined that designating Unit 1 as critical habitat would eliminate up to $33.9 million in present value of land, which mostly has been held by a family for generations. 77 Fed. Reg. 35140-41, JA186-190. FWS estimated "present value incremental impacts" to "the remaining units" at $102,000, meaning that Unit 1 constituted more than 99 percent of the economic impact of the entire designation. *Id.* at 35140, JA187. FWS did not point to any offsetting economic benefits from Unit 1's designation. As the dissenters below observed, the "shocking fact" was that "there is virtually nothing on the other side of the economic ledger." Pet. App. 158a.

FWS asserted that the "benefits of the designation are best expressed in biological terms." 77 Fed. Reg. 35141, JA189. And its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Ibid.*, JA190. "Consequently," FWS chose not to exclude Unit 1 from the designation. *Ibid.*

FWS's decision does not withstand scrutiny.

It is not clear that FWS engaged in the correct cost-benefit analysis. Section 4(b)(2) unambiguously requires an area-specific analysis: FWS must weigh "the benefits" of "exclud[ing] any area" (*i.e.*, Unit 1) against "the benefits of specifying such area." The Service's invocation of "biological" benefits, however, appears to relate to the designation *as a whole*. See 77 Fed. Reg. 35141, JA189 (the "benefits of the designation are best expressed in biological terms"); *id.* at 35127, JA137 ("the benefits of the proposed rule are best expressed in biological terms"). If so, the Service did not consider the correct factors and its decision not to exclude was "not in accordance with law." 5 U.S.C. § 706(2)(A); see *State Farm*, 463 U.S. at 43 (agency acts arbitrarily when it "relied on factors which Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem").

FWS also failed adequately to explain its decision. "[A]n agency must cogently explain why it has exercised its discretion in a given manner" to allow courts to conclude that it exercised "reasoned decision-making." *State Farm*, 463 U.S. at 48, 52. It must "articulate" a "rational connection between the facts found and the choice made." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). Despite declaring that "the benefits of the proposed rule were best expressed in biological terms that can then be weighed against the expected costs," FWS did not engage in any discernible weighing. 77 Fed. Reg. 35127, JA137-138. It did not quantify or explain the supposed biological benefit of designating Unit 1 except in speculative and contingent terms. Nor did it explain why it was appropriate to impose tens of millions in costs in exchange for that benefit. It simply stated that the economic costs of designation were "not dispro-

portionate" to the benefits. *Id*. at 35141, JA190. There is nothing "cogent" about that one-sentence conclusion.[15]

FWS's analysis of the economic costs of designation also was incomplete. See *State Farm*, 463 U.S. at 43 (agency must not "fai[l] to consider an important aspect of the problem"). The Service never calculated the costs of creating frog habitat in Unit 1, which includes terminating timber operations, planting longleaf pines, and applying frequent burns. FWS did not factor in the stigma costs that arise on top of lost development value because land designated as critical habitat is less desirable to purchasers. FWS did not quantify the potential loss of oil and gas production. 77 Fed. Reg. 35126-27, JA132-133; see also JA92 ¶ 88.

FWS focused solely on the costs to Unit 1's owners, even though St. Tammany Parish has slated the parcel for development and stands to lose tax revenue from the designation. FWS pointed to other supposedly developable land, but without any analysis of the Parish's plans, the comparative attractiveness of different sites for development, or the fact that this site has already been rezoned for a large development. 77 Fed. Reg. 35127, JA135.

While refusing to consider real costs, FWS speculated wildly about "biological" benefits. Any biological benefit from designating Unit 1 is far more uncertain than the costs that FWS discounted. FWS admitted that "habitat management" and "frog

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[15] The report FWS commissioned to support its economic analysis was similarly deficient. JA63-98. The report briefly discussed a handful of "weak[] and speculative" economic benefits (on which FWS did not rely), then ended "abruptly" "with no weighing or comparison of costs or benefits." Pet. App. 158a (Jones, J.).

translocations" to Unit 1 are "voluntary" and there are "no existing agreements with the private landowners of Unit 1 to manage this site" as frog habitat. 77 Fed. Reg. 35123, JA123. It did not quantify the "acknowledge[d]" costs of burning Unit 1 to create habitat because "critical habitat designation does not allow the Service to require burning" and burning was therefore "uncertai[n]." 77 Fed. Reg. 35126, JA132. Yet these are *preconditions* for obtaining *any* biological benefit out of Unit 1. FWS's conclusion that there are uncertain costs but biological benefits contradicts "the evidence before the agency" and is thoroughly "implausible." *State Farm*, 463 U.S. at 43; see U.S. Dep't of Interior, *The Secretary's Authority to Exclude Areas from Critical Habitat Designation Under Section 4(b)(2) of the Endangered Species Act* 24 (Oct. 3, 2008), perma.cc/XD97-7D4A ("the Secretary must weigh whatever benefits of exclusion or inclusion he identifies as relevant *in an even-handed and logically consistent way*") (emphasis added).

Finally, FWS's bottom-line determination that the costs of the designation are not disproportionate to the benefits is "implausible." *State Farm*, 463 U.S. at 43. A loss of tens of millions of dollars in value to land owned mostly by a family is a severe economic hardship. The loss to St. Tammany Parish of an important development in an area safe from hurricane ravages is also significant. On the other side of the balance, the biological benefits to designation are theoretical, especially when "[t]he only evidence in the record is that the owners do not plan to" modify Unit 1 to create frog habitat. Pet. App. 76a. Faced with staggering costs and speculative benefits, the Service's conclusion that costs were not disproportionate to benefits is the essence of arbitrary agency action.

The foregoing analysis shows that judicial review is not only presumptively available, but feasible in practice. The "very narrow" exception to judicial review for actions committed to agency discretion by law applies only where "it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830. It is certainly possible to discern an abuse of discretion here.

FWS's failure to consider all relevant factors or explain its weighing is manifest on the face of the administrative record. This Court may itself decide that FWS's determination was an abuse of discretion. In the alternative, this Court should remand for the lower courts to apply the correct standard of review in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY AND REGULATORY ADDENDUM

16 U.S.C. § 1532. Definitions
[ESA § 3]

For the purposes of this chapter—

* * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the

Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species
[ESA § 4]

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * *

(b) Basis for determinations

* * *

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available,

that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * *

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. * * *

* * * * *

16 U.S.C. § 1534. Land acquisition [ESA § 5]

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act,

as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to chapter 2003 of Title 54 may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

* * * * *

16 U.S.C. § 1535. Cooperation with States [ESA § 6]

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

* * * * *

16 U.S.C. § 1536. Interagency cooperation [ESA § 7]

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

16 U.S.C. § 1538. Prohibited acts [ESA § 9]

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

* * *

(B) take any such species within the United States or the territorial sea of the United States[.]

* * * * *

16 U.S.C. § 1639. Exceptions.
[ESA § 10]

* * *

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; * * *

* * *

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

* * * * *

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

> Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

50 C.F.R. § 424.19 Final rules—impact analysis of critical habitat.

Effective: May 1, 2012

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.