No. 13-15227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY; KEVIN LUNNY,

Plaintiffs - Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Yvonne Gonzalez Rogers, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA IN SUPPORT OF PLAINTIFFS - APPELLANTS' PETITION FOR REHEARING EN BANC AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae California Cattlemen's Association, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Building Industry Association of the Bay Area, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Pacific Legal Foundation, California Cattlemen's Association, and Building Industry Association of the Bay Area respectfully submit this brief amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a), in support of Appellants Drakes Bay Oyster Company (DBOC), et al., and supporting DBOC's petition for rehearing en banc and reversal of the court below.[1] All parties to this appeal have consented to Pacific Legal Foundation, California Cattlemen's Association, and Building Industry Association of the Bay Area's participation as amici curiae.

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit legal advocacy organization that litigates in state and federal courts throughout the country in favor of limited government, economic freedom, and a balanced approach to environmental regulation. PLF has a keen interest in ensuring that agencies of the United States evenhandedly comply with applicable laws in their treatment of those who rely on access to public land for their livelihoods. PLF therefore is concerned with the resolution of this appeal, which among other issues raises an exceptionally important question about the application of the National Environmental Policy Act (NEPA) to actions that exclude

[1]Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that (A) no party's counsel authored this brief in whole or in part, (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and (C) no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

private commercial activity from public lands in ways that impact the human environment.

The California Cattlemen's Association (CCA) is a mutual benefit corporation organized under California law in 1923 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the industry. Membership in the CCA is open to any person or entity engaged in breeding, producing, maturing, or feeding cattle, or who leases land for cattle production. The CCA is the predominate organization of cattle grazers in California and, acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry.

CCA has several members who ranch within the boundaries of Point Reyes National Seashore under reservations of use and occupancy and/or special use permits from the National Park Service, and these members have a strong interest in ensuring that the National Park Service complies with applicable laws when acting on future renewals of their permits. CCA also has many members who hold federally issued grazing permits in many areas of California, and the panel decision potentially impacts how the NEPA and the Administrative Procedure Act (APA) apply to agency decisions related to those permits.

Building Industry Association of the Bay Area (BIABA) is a nonprofit association of builders, contractors, and related trades and professions involved in the

residential construction industry in Northern California. A part of BIABA's mission is to ensure that there is sufficient land available for its members to build homes. BIABA represents the interests of its members in Northern California who are impacted by the National Marine Fisheries Service's designation of critical habitat for the green sturgeon. BIABA's appeal from the U.S. District Court for Northern California's grant of summary judgment to the National Marine Fisheries Service (NMFS), upholding the green sturgeon critical habitat designation, is pending before this Court, raising the issue of whether NMFS was required to comply with NEPA before designating critical habitat. *Building Industry Association of the Bay Area, et al. v. U.S. Dep't of Commerce*, No. 13-15132, Appellants' Opening Brief, Apr. 29, 2013.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on this Court's prior decision in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the panel decision in this case rules that the "Secretary's decision is essentially an environmental conservation effort" and on that basis is exempt from NEPA. Slip op. at 31-32. *Douglas County* held that the nation's fundamental environmental law, the National Environmental Policy Act, does not

[2] The Ninth Circuit currently has pending at least one other appeal which among other issues addresses the same question: *Bear Valley Mutual Water Company, et al. v. Salazar*, No. 12-57297 (Appellants' June 3, 2013, Petition for Hearing En Banc to reconsider *Douglas County*).

apply to the designation of critical habitat under the Endangered Species Act (ESA), in part on the categorical basis that federal actions whose purpose is to benefit the environment do not require NEPA review. 48 F.3d at 1506. Other circuits have found *Douglas County* unpersuasive and declined to follow it. Its use to decide the case at bar illustrates how questionable the precedent has become, and affords this Court an important opportunity to revisit the matter by granting DBOC's petition for rehearing en banc. The panel majority rules that the Secretary's decision to refuse DBOC a renewed permit to operate is not subject to judicial review under the APA because it is not constrained by any procedural or substantive legal standards. Slip op. at 15. Essential to this ruling is the panel majority's analysis, based solely on the authority of *Douglas County*, that NEPA does not apply to the Secretary's decision. Slip op. at 31-32.

This Court should grant rehearing en banc to reconsider and overturn *Douglas County*, for the reasons set forth in subsequent decisions in other federal circuits. This Court has considered rehearing en banc to be appropriate for determining whether to overrule a prior opinion. *Williams-Scaife v. Dep't of Defense Dependent Schools*, 925 F.2d 346, 347 (9th Cir. 1991); *United States v. Aguon*, 851 F.2d 1158, 1160 (9th Cir. 1988), *overruled on other grounds*, *Evans v. United States*, 504 U.S. 255, 259 (1992), *see also Aguon*, 851 F.2d at 1172, 1175-76 (Reinhardt, J., concurring) (listing factors

that en banc court considers in deciding whether to overturn circuit precedent); *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (Reinhardt, J., concurring).

Whether NEPA applies to major federal actions which affect the quality of the human environment is a question of exceptional importance, under the ESA as well as in the context of permit renewal for existing activities on public lands, such as grazing. On April 25, 2013, the U.S. Fish and Wildlife Service proposed designating 1.1 million acres of critical habitat, including 82,527 privately owned acres, for the Sierra Nevada yellow-legged frog, 78 Fed. Reg. 24,516, 24,528, as well as 751,926 acres of critical habitat for the Yosemite toad, 78 Fed. Reg. at 24,535. Designations of vast areas of land are common. Amicus BIABA's members are significantly impaired in their ability to build homes by NMFS's designation of most of the West Coast of the United States as critical habitat for green sturgeon. 74 Fed. Reg. 52,300 (Oct. 9, 2009). Additionally, the California State Office of the Bureau of Land Management (BLM) permits grazing by 572 permit holders on 699 grazing allotments covering 8.1 million acres,[3] which is of obvious importance to Amicus CCA members.

[3] Bureau of Land Mgmt., U.S. Dep't of Interior, *Grazing*, http://www.blm.gov/ca/st/en/prog/grazing.html (last visited Oct. 22, 2013).

I

DOUGLAS COUNTY HELD AS A MATTER OF FIRST IMPRESSION THAT NEPA DOES NOT APPLY TO ESA CRITICAL HABITAT DESIGNATIONS

Douglas County holds that designation of critical habitat under the ESA is not subject to NEPA, 48 F.3d at 1502, a question of first impression in 1995. *Id*. at 1501. *Douglas County* reached its holding largely by analogy to *Merrell v. Thomas*, 807 F.2d 776, 778-80 (9th Cir. 1986) (legislative history of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) amendments indicates congressional intent to dispense with NEPA compliance in FIFRA procedures). *Douglas County*, 48 F.3d at 1502-04. *Douglas County* also relies on the proposition that NEPA does not apply to federal actions that do nothing to alter the natural physical environment. *Id*. at 1505-06 ("[W]hen a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS."). Finally, *Douglas County* found that NEPA does not apply to critical habitat designations, "because the ESA furthers the goals of NEPA without demanding an EIS." *Id*. at 1506.

Douglas County offers the putative assurance that excusing the Secretary of the Interior from complying with NEPA in critical habitat designations under the ESA would not result in "unchecked discretion in making critical habitat designations," since "the procedural requirements of the ESA, combined with review of decisions possible under the Administrative Procedure Act, are adequate safeguards." *Douglas*

County, 48 F.3d at 1505. It is thus ironic that the panel majority cites *Douglas County* as authority for excusing the Secretary from complying with NEPA where the panel majority also found no applicable procedural requirements and no judicial review under the APA. Slip op. at 15.

This Court should grant DBOC's petition for rehearing en banc, because the panel majority stretches *Douglas County* far from that case's rationale. There is no statutory scheme in this case that duplicates or prevents compliance with NEPA, as *Douglas County* found ESA critical habitat designation to be. Just the opposite; the majority found that no statutory requirements or procedures apply to the Secretary's decision at all. Slip op. at 15. Moreover, removal of DBOC's facilities will change the physical environment, contrary to *Douglas County*'s premise that the federal action in question has no impact on the environment. Slip op. at 31-32. The panel majority's application of *Douglas County* rests solely on the rationale that actions intended to benefit the environment should not be subject to the "obstructionist tactic" of NEPA compliance. Slip op. at 32 (citing *Douglas County*, 48 F.3d at 1508). Given *Douglas County*'s erroneous forecast that NEPA exemption would be balanced by APA review for abuse of discretion, the precedent has clearly led to a jurisprudential *cul de sac* from which rehearing en banc in this case is the best exit.

II

OTHER CIRCUITS CLOSELY EXAMINED AND DECLINED TO FOLLOW *DOUGLAS COUNTY*

No other circuit has relied on *Douglas County* for the proposition that designation of critical habitat under the ESA is exempt from NEPA. Of the decisions that have cited to the case, the First, Eighth, Tenth, and District of Columbia Circuits have made only passing reference to *Douglas County* on unrelated standing issues. *Save Our Heritage v. F.A.A.*, 269 F.3d 49, 55 n.4 (1st Cir. 2001) (local government standing); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1040 (8th Cir. 2002) (standing of lessee to challenge Bureau of Indian Affairs' decision to void lease from tribe to lessee due to NEPA violation); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc).

By contrast, the Tenth Circuit comprehensively addressed the rationale of *Douglas County* in *Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1435-36 (10th Cir. 1996), and rejected it in all three respects. First, the court examined both statutes and found that while ESA had some similarities, it is not duplicative of NEPA's much broader reach and purpose. *Id.* at 1436-37. Next, the court found that critical habitat designation does have physical consequences, especially where the objecting party owns property which has been

designated.[4] *Id*. at 1437-38 (critical habitat designation impedes all federally regulated activities, and thereby impedes flood control efforts).[5] Finally, the court directly disagreed with the proposition that projects intended to benefit the environment should not be subject to review under NEPA, stating in essence that this begs the question that NEPA is specifically enacted to answer. *Id*. at 1437. A more recent decision of the Tenth Circuit followed *Catron County* in holding that NEPA applies to critical habitat designations. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220 (10th Cir. 2002) (Fish and Wildlife Service required to prepare EIS to designate critical habitat for silvery minnow).[6]

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[4] Members of Amicus BIABA own property which is impacted by the green sturgeon critical habitat listing referenced above, while members of Amicus CCA own private property that the Fish and Wildlife Service has proposed for designation as critical habitat for the Sierra Nevada yellow legged frog.

[5] The impact which the designation of critical habitat for the delta smelt has had on the physical environment of those parts of California's San Joaquin Valley, which have experienced significant reductions in irrigation water deliveries as a result of ESA protections for the delta smelt, is so well known that the Court could probably take judicial notice of it. Yet the critical habitat for delta smelt was designated without preparing an EA or EIS. *See* 59 Fed. Reg. 65,256, 65,275 (Dec. 19, 1994).

[6] In *Utah Shared Access Alliance v. Carpenter*, the Tenth Circuit ruled that closure of certain public lands to off-road vehicles was not subject to NEPA, and commented in a footnote that if the parties had argued that the closure were a major federal action, the rationale of *Douglas County* might apply. 463 F.3d 1125, 1136 n.4 (10th Cir. 2006). This citation is tangential at best to the NEPA holding in *Utah Shared Access*, and does not examine *Douglas County* in any depth.

The United States District Court for the District of Columbia also followed *Catron County* in rejecting the government's contention that NEPA does not apply to critical habitat designations. *Cape Hatteras Access Pres. Alliance v. Dep't of Interior*, 344 F. Supp. 2d 108, 136 (D.D.C. 2004) (because critical habitat designation significantly affects the human environment, government must "determine the extent of the impact in compliance with NEPA"). The same court also specifically rejected the Secretary of the Interior's arguments, based on *Douglas County*, that NEPA does not apply to Special Rules under Section 4(d) of the ESA, and held that NEPA requires at least the preparation of an Environmental Assessment (EA). *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 236-38 (D.D.C. 2011) (citing and applying reasoning of *Catron County* to ESA Section 4(d) Special Rules).

These decisions of the Tenth Circuit and the D.C. District Court cast doubt on the correctness of *Douglas County* and warrant this Court's reconsideration of that case.

A. ESA Does Not Duplicate or Prevent Compliance with NEPA

NEPA ensures that each federal agency "makes informed, carefully calculated decisions when acting in such a way as to affect the environment and also enables dissemination of relevant information to external audiences potentially affected by the agency's decision." *Catron County*, 75 F.3d at 1437. NEPA requires federal agencies

to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency's decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must include:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. If the agency prepares an EA that concludes with a finding of no significant impact, no EIS is required. 40 C.F.R. § 1508.9.

NEPA Section 102(2)(E) also requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). This duty is independent of the requirements for an EA or EIS.

Compliance with NEPA is only excused when there is a statutory conflict with the agency's authorizing legislation that prohibits or renders compliance impossible. *See* H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969), *reprinted in* 1969

U.S.C.C.A.N. 2767, 2770; *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). "Courts have approved noncompliance with NEPA on the basis of statutory conflict after finding either (i) an unavoidable conflict between the two statutes that renders compliance with both impossible; or (ii) duplicative procedural requirements between the statutes that essentially constitute 'functional equivalents,' rendering compliance with both superfluous." *Catron County*, 75 F.3d at 1435. There is no unavoidable conflict between the ESA and NEPA that renders compliance with both impossible. *Id.* Both statutes seek to protect the environment. NEPA paints with a broader brush, because it seeks to protect both the natural and the human environment, while the ESA focuses specifically on protection of species at risk of extinction. But there is no inherent conflict between those goals, and compliance with one does not prevent compliance with the other. *Id.* Although compliance with the ESA's requirements to identify and protect critical habitat of covered species partially fulfills NEPA's goal of identifying and evaluating the environmental impacts of proposed federal agency actions, "[p]artial fulfillment of NEPA's requirements . . . is not enough." *Id.* at 1437.

NEPA requires a particular process, rather than particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA ensures that a federal agency makes well informed, carefully calculated decisions regarding environmental consequences and, just as importantly, enables dissemination of

relevant information to external audiences potentially affected by the agency's decisions. *Id*. at 349. Amicus CCA and its members participate in NEPA processes dealing with BLM Resource Management Plans and U.S. Forest Service Forest Management Plans, while Amici PLF and BIABA frequently comment on critical habitat designations under the ESA. Assuming the protection of species through preservation of habitat is an environmentally beneficial goal, the NEPA procedure is well suited to rounding out and improving decisions regarding habitat.

B. *Catron County* and the Cases Following It Refute *Douglas County*'s Rationale That Agencies Need Not Comply with NEPA for Actions Intended to Benefit the Environment

Catron County and the cases that rely on it, particularly *Cape Hatteras*, also belie *Douglas County*'s assumption that actions intended to benefit the environment necessarily do so, thereby warranting exemption from NEPA. *Catron County*, 75 F.3d at 1437 ("effects of the proposed governmental action . . . are often . . . initially thought to be beneficial, but after closer analysis determined to be environmentally harmful"); *Cape Hatteras*, 344 F. Supp. 2d at 136 (ESA protects animal and plant habitats, while NEPA's broader purpose is to protect the human environment). In *Catron County*, the plaintiff county alleged that the subject critical habitat designation would directly interfere with flood control activities, which would adversely affect the human environment, and the Tenth Circuit agreed that these impacts should be assessed and alternatives analyzed under NEPA. 75 F.3d at 1433, 1437-38. The

Tenth Circuit also wisely observed that if an agency avoids NEPA by asserting that the project is intended to benefit the environment, the courts will be placed in the untenable position of determining (without even a NEPA document to review) whether the agency is factually correct that the project will benefit the environment. *Id*. at 1437 ("To interpret NEPA as merely requiring an assessment of detrimental impacts upon the environment . . . would cast the judiciary as final arbiter of what federal actions protect or enhance the environment, a role for which the courts are not suited.").

III

THE PANEL MAJORITY'S DECISION HAS SIGNIFICANT ADVERSE CONSEQUENCES FOR PERMIT RENEWAL DECISIONS FOR PRE-EXISTING ACTIVITIES ON PUBLIC LANDS

Amicus CCA members hold many of the 572 BLM administered federal grazing permits in California, as well as the 375 grazing permits administered by the Forest Service's Pacific Southwest Region.[7] If the courts excuse federal agencies such as BLM (a sister agency of the Park Service) or the Forest Service from complying with NEPA where the agency purports to be acting to improve the environment, agencies have an incentive to avoid NEPA responsibilities by the simple expedient of

[7] U.S.D.A. Forest Serv., *Grazing Statistical Summary, FY 2012*, May 2013, pp. 33, *available at* http://www.fs.fed.us/rangelands/ftp/docs/GrazingStatisticalSummary2012.pdf (last visited Oct. 22, 2013).

recasting the denial of a permit renewal as environmentally beneficial. The lack of a NEPA analysis in such circumstances hamstrings permit holders and members of the public in their effort to learn about the decision, provide input, and test the assertion that the decision is beneficial. Excusing agencies who permit the use of natural resources on public lands from complying with NEPA if they deny renewal of permits (while requiring compliance with NEPA for granting renewed permits) tips the balance toward nonrenewal.

This concern is doubly true for CCA and its members, where the panel majority's decision appears to apply to BLM and/or Forest Service decisions not to renew existing grazing permits, resulting in those decisions being free of both NEPA compliance and judicial review. *Compare* Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124") ("the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization"), *with* 43 U.S.C. § 315b ("Such [grazing] permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior . . . ."). The panel decision implies that decisions not to renew a grazing permit are not subject to judicial review for abuse of discretion under the APA, and not subject to NEPA if the agency is able to frame the decision as environmentally beneficial. On this basis, Amici PLF and CCA also support DBOC's petition for rehearing en banc on the ground that the panel decision is in

conflict with other decisions of this Circuit on whether there is "law to apply" to the Secretary's actions.

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant the petition for rehearing en banc and revisit the decision in *Douglas County*.

DATED: October 25, 2013.

Respectfully submitted,

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By /s/ Anthony L. François
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DATED: October 25, 2013.

/s/ Anthony L. Francois
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Anthony L. François
ANTHONY L. FRANÇOIS