No. 13-15227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

SALLY JEWELL, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of California,
No. 4:12-CV-6134-YGR (Hon. Yvonne Gonzalez Rogers)

DEPARTMENT OF THE INTERIOR'S RESPONSE TO DBOC'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

GLOSSARY

APA	Administrative Procedure Act
DBOC	Drakes Bay Oyster Company
DBOC Pet.	DBOC's Petition for Rehearing *En Banc* (Docket # 73-1)
Dissent	Dissenting opinion in *Drakes Bay Oyster Co. v. Salazar*, No. 13-15227 (Sept. 3, 2013)
EIS	Environmental Impact Statement
Interior Br.	Department of the Interior's Response Brief (Docket # 36-1)
NEPA	National Environmental Policy Act
Op.	Panel opinion in *Drakes Bay Oyster Co. v. Salazar*, No. 13-15227 (Sept. 3, 2013)
PCSGA	Pacific Coast Shellfish Growers Association
PLF	Pacific Legal Foundation
Point Reyes	Point Reyes National Seashore
Section 124	Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009)
SER	Supplemental Excerpts of Record (Docket # 36-2)

The full Court should reject DBOC's petition for *en banc* rehearing because it does not present any question of exceptional importance, nor does it identify any conflict between the panel opinion and existing precedent. Until 2012, DBOC had a specially negotiated permission to operate a private commercial business in Point Reyes National Seashore. Before that permission expired in 2012, Congress passed a statute – affecting only DBOC – giving Secretary Salazar the discretion to grant or refuse a new permit. The Secretary's decision, as well as both the panel opinion and the dissent in this Court, were based on statutes, legislative history, and a record that are all unique to DBOC and to Point Reyes. After resolving the jurisdictional issues in DBOC's favor, the panel merely applied longstanding administrative law principles to hold that the Secretary, informed by a valid environmental impact statement ("EIS"), had properly exercised his discretion. There is no broader question of law here that requires review by the full Court.

I. THE FACTUAL BACKGROUND SHOWS THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE IN THIS CASE.[1]

Drakes Estero is an important and unique estuarial ecosystem within Point Reyes National Seashore, and a valuable public resource. DBOC uses that public resource to operate its private commercial oyster operation. In 1972, the previous owner of the oyster company sold it to the United States, reserving the right to use

[1] Due to space constraints, this Response provides only a partial account of the relevant facts, with citations to the panel opinion wherever possible. For more factual background and citations to the excerpts of record, *see* Interior Br. at pp. 3-14.

and occupy part of the property for forty years (the "Reservation"). *See* Op. at 8. That Reservation, as well as an associated special use permit for adjacent areas, expired in 2012.

The Reservation provided that, upon expiration, the Park Service could issue a new permit to extend that occupancy *if* such a permit would be allowed under applicable regulations. *Id.* However, in 1976, Congress designated various portions of Point Reyes as "wilderness" and "potential wilderness." Drakes Estero was one of the "potential wilderness" areas, and Congress specified that the Secretary should convert it to wilderness when all non-wilderness uses had ended. *Id.* at 7-8. The House Report accompanying that legislation stated that Congress intended "efforts to steadily continue to remove all obstacles to the eventual conversion" of lands designated as "potential wilderness" to full wilderness status. *Id.* at 25.

DBOC acquired the oyster company (and the Reservation) in 2004, with full knowledge that the Reservation would expire in 2012 and that the Park Service did not plan to issue a new permit. *Id.* at 8. At that time, the Park Service believed it was required by law to convert Drakes Estero to wilderness. *Id* at 9. However, Congress intervened in 2009 through the enactment of "Section 124." That statute provided that "notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization." *Id.* at 9-10. Congress considered a proposal that would *require* the Secretary to grant a new permit to DBOC, but instead granted discretion to the

Secretary. *Id.* at 9-10.

Recognizing that Section 124 "granted him the authority to issue a new SUP," *Id.* at 13, the Secretary chose to prepare an Environmental Impact Statement ("EIS") to engage the public and to gather information about a possible new permit. Although the Park Service generally prepared the EIS according to NEPA, *see* 42 U.S.C. § 4332, the Secretary believed that the "notwithstanding" clause of Section 124 exempted his decision from the procedural requirements of NEPA – a view that DBOC, during the EIS process, shared. *See* Interior Br. at 11-12. Nonetheless, the Park Service completed a lengthy and detailed EIS for the Secretary's use.

Ultimately, the Secretary issued a Decision that directed the Park Service to allow DBOC's Reservation to expire without granting a new permit. Op. at 13. The Secretary made that decision based on "matters of law and policy." *Id.* He was fully aware of scientific disputes surrounding the EIS and therefore did not rely on "the data that was asserted to be flawed." *Id.* at 14. Instead, the Secretary relied on "the policies of NPS concerning commercial use within a unit of the National Park System," the policies underlying several related statutes, and Congress's expectation that nonconforming uses in Drakes Estero would be phased out. *Id.* at 13-14. In effect, the Secretary – who is charged by statute with administering the national park system for the public good – made a policy judgment that the public was better served by wilderness in Drakes Estero than by a private commercial oyster operation.

This case does not present a "question of exceptional importance," Fed. R.

App. P. 35(a)(2), because both the panel majority and the dissent based their reasoning almost entirely on this unique factual situation. The statutes and legislative history at issue on appeal are specific to Point Reyes, and indeed to DBOC itself. Section 124, which is central to this appeal, addressed *only* DBOC's expiring Reservation. That statute provides that it shall not "be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore." Op. at 10-11. The panel's jurisdictional holding rested on its interpretation of the "notwithstanding" clause of Section 124, and that issue was also central to the dissent. *See id.* at 15-18; Dissent at 44-46. Both the panel and the dissent focused heavily on legislative history that is only relevant to Point Reyes. *See* Op. at 18-19, 28-29; Dissent at 38-44. The Secretary urged the panel to adopt a broader holding about the scope of "notwithstanding" clauses, as the district court had, but the panel declined to do so. It decided this issue narrowly, such that its interpretation and holdings are highly unlikely to affect future cases.

Finally, given the unique factual circumstances here, the Secretary's decision is not likely to be a precedent for similar agency decisions. This Court has recognized that the breadth of a rule's application is relevant to whether a case presents a question of "exceptional importance." *See, e.g.*, *Planes v. Holder*, 686 F.3d 1033 (9th Cir. 2012) (Reinhardt, J., dissenting from denial of rehearing); *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 996 (9th Cir. 2003). That factor is not present here.

II. THE PANEL OPINION DOES NOT CONFLICT WITH ANY PRECEDENT.

A. The panel applied established principles of APA review.

DBOC contends that the panel misunderstood the scope of APA jurisdiction and created a "new rule" prohibiting review for abuse of discretion. DBOC Pet. at 3, 7-11. This contention has no merit because the panel agreed with DBOC, holding that it did have jurisdiction to review the Secretary's decision under the APA.

The APA does not grant jurisdiction to review final agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court and this Court have long held that this exception to APA jurisdiction precludes review of an agency action if there is "no law to apply." *See Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)); *CPATH v. Office of U.S. Trade Rep.*, 540 F.3d 940, 944-45 (9th Cir. 2008). Based on this principle, the district court had held that the "notwithstanding" clause of Section 124 made other laws inapplicable to the Secretary's decision, depriving the courts of any meaningful standards for APA review. The Secretary urged this Court to adopt the same view. Op. at 15.

The panel rejected that interpretation of the "notwithstanding" clause, holding that it applied only to trump any *conflicting* statutes. *Id.* at 17. Absent a direct conflict, the panel held that it could exercise APA jurisdiction to review the Secretary's decision for "alleged abuse of discretion involv[ing] violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." *Id.* at 16

(quoting *Ness Investment Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 715 (9th Cir. 1975)). Thus, the "notwithstanding" clause did not prevent the Court from reviewing the Secretary's decision for consistency with Section 124 and the 1976 Point Reyes statute, *id.* at 22-27; with other statutes concerning wilderness and Point Reyes, *id.* at 27-29; or with NEPA and other "applicable procedural constraints," *id.* at 16, 29-34. DBOC inexplicably criticizes the panel for narrowing the scope of APA jurisdiction even though the panel addressed the merits questions that DBOC presented.

The panel did recognize that, even when the Court exercises APA jurisdiction to rule on the merits, it may not second-guess "the Secretary's ultimate discretionary decision whether to issue a new permit." *Id.* at 15, *see also id.* at 26-27. DBOC does not cite any cases that blur this well-established boundary, which the Court routinely applies in reviewing discretionary agency action. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, 42-43 (1983) (even in applying the APA's "arbitrary and capricious" standard, "a court is not to substitute its judgment for that of the agency"); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*). Rehearing is not necessary to reaffirm this principle for an isolated permit decision.

B. The panel did not misinterpret Section 124's "notwithstanding" clause.

DBOC next claims that the panel established a "new rule" for interpreting statutory "notwithstanding" clauses, allowing agencies to undermine the will of Congress. *See* DBOC Pet. at 4-5, 12-16. With this argument, DBOC attempts to exploit the principal difference of opinion between the panel majority and the dissent

and to adopt the dissent's argument as its own. *See* DBOC Pet. at 12-15.

As noted above, the Secretary had previously construed the Point Reyes Wilderness Act to prohibit the grant of a new permit to DBOC. *See* Op. at 9. When Congress passed Section 124, the Secretary recognized that the conflicting *law* of the Point Reyes Wilderness Act was no longer an obstacle, but he weighed the *policy* behind that act as one of several policy considerations relevant to his discretionary authority. *Id.* at 13, 24. Judge Watford, however, argued that the Point Reyes Wilderness Act had *never* been an obstacle to a new permit because "continued operation of the oyster farm was fully compatible with Drakes Estero's designation as wilderness." Dissent at 41; *see id.* at 45. Assuming the "notwithstanding" clause was unnecessary to sweep aside other wilderness legislation, the dissent thought it must sweep aside only the Secretary's prior interpretation. *Id.* at 46.

The arguments that DBOC and its *amici* supporters make in reliance on the dissent's argument should be rejected for several reasons. First, although DBOC embraces the dissent's view that the oyster operation is compatible with a wilderness designation, that interpretation is contrary to all its prior arguments. Before the panel, DBOC argued that Drakes Estero *could not* be wilderness while California continues to lease water bottoms to DBOC, and that DBOC would suffer harm from a wilderness designation independently from the denial of a permit. *See* DBOC Br. at 26-27, 32; DBOC Reply at 21. The theory that DBOC could continue to operate even if Drakes Estero were designated wilderness arose for the first time in the dissent. As the panel

recognized, even DBOC "did not . . . urge us to go this far afield." Op. at 19 & n.5.

Second, there is no "new rule" here – and no question of exceptional importance – because the difference of opinion between the panel and the dissent was based on the case-specific legislative history of Section 124. To divine the intent of Congress in the "notwithstanding" clause of Section 124, the dissent argued, "a fairly detailed discussion of the [Point Reyes Wilderness] Act's legislative history is necessary." Dissent at 38. The panel opinion also cited legislative history extensively in interpreting that clause. Op. at 18-20. The panel opinion did not announce a general rule for the interpretation of "notwithstanding" clauses, but analyzed Congress's intent in this particular clause based on the history of the specific problem that Congress sought to address in Section 124.

Finally, the panel opinion fits easily within the bounds of existing precedent. The panel cited *Novak v. United States*, 476 F.3d 1041, 1046 (9th Cir. 2007) (*en banc*) for the proposition that "'notwithstanding' clauses nullify *conflicting* provisions of law." Op. at 16 (panel's emphasis). Based on that rule, the panel held that the Secretary could choose to issue a permit to DBOC despite any potential conflict with the 1976 Point Reyes Wilderness Act, *id.* at 17, but that Section 124 also gave him discretion to choose *not* to issue a permit. *Id.* at 18. A public policy in favor of wilderness is one factor that the Secretary could consider in exercising that discretion. *Id.* at 26.

Both the dissent and DBOC argue that the "notwithstanding" clause swept aside not only conflicting *laws*, but also conflicting *policies*. *See* Dissent at 48; DBOC

Pet. at 5. Their support for this argument is not based on any precedent about "notwithstanding" clauses, but only on their view that the Secretary here considered "factors which Congress has not intended [him] to consider." Dissent at 48 (citing *State Farm*, 463 U.S. at 43). The panel correctly found the flaw in this view: In 1976, Congress did not "invoke a crystal ball" to bind the Secretary's permit decision when the Reservation expired in 2012. Op. at 27 n.8. Instead, Congress at that time envisioned future "efforts to remove all obstacles" to the conversion of Drakes Estero to wilderness. *Id.* at 25. Although the Secretary was not bound by that legislative judgment in considering DBOC's permit request, it was legitimate for him to consider it as a non-binding policy matter. There is no error here to correct on rehearing.

C. The panel opinion did not rely upon or expand *Douglas County*.

Finally, DBOC finds a "new rule" in the panel's discussion of *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), in which this Court held that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." *See* Op. at 31. Comparing the expiration of the Reservation to "blowing up O'Shaughnessy Dam," DBOC contends that NEPA applies to any agency decision that has "adverse effects," and that the panel wrongly extended *Douglas County* to exclude the Secretary's decision from NEPA. *See* DBOC Pet. at 6, 17. DBOC's supporting *amicus* Pacific Legal Foundation goes even further, claiming that "based solely on the authority of *Douglas County*," the panel held "that NEPA

does not apply to the Secretary's decision." PLF Memo. at 4. These arguments do not support *en banc* review because they fundamentally misstate the panel's holding.

Before the panel, the Secretary argued that NEPA did not apply to the Secretary's decision. The panel majority reviewed three reasons, grounded in this Court's case law, why this might be true: (1) agencies are not required to produce an EIS every time they deny a permit, *see* Op. at 30; (2) not all "environmental conservation efforts" trigger NEPA review, *id.* at 31; and (3) the short-term harms associated with returning Drakes Estero to its natural state do not by themselves "significantly affect" the environment within the meaning of NEPA, *id.* at 32. Based on that review, the panel said it was "skeptical" that NEPA applied to the Secretary's decision. *Id.* at 31.

However, the panel *did not resolve* that question, nor did it apply or extend *Douglas County* to avoid NEPA review. Instead, as DBOC requested, the panel reviewed the Secretary's decision for compliance with NEPA. *Id.* at 33-34. Based upon that review, the panel held that "the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence." *Id.* at 32. DBOC was not entitled to a preliminary injunction because it was "not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required." *Id.* at 34. DBOC's argument fails to address this holding.

Even if the panel had held NEPA inapplicable to the Secretary's decision, there would be no issue worthy of *en banc* rehearing. In *Douglas County*, the Court

recognized that the scope of NEPA depends not only on the effects of a Federal decision, but also on the nature of the decision itself. Thus, the denial of a permit or license, or the denial of a request to intervene in a state program that adversely affects wildlife, does not necessarily implicate NEPA even if there are environmental impacts. *See id.* at 30 (citing *Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979)). Neither does a "federal action[] that conserve[s] the environment," even if it has some environmental effects. *Douglas County*, 48 F.3d at 1505. As the panel recognized, these principles can coexist with cases in other circuits that require NEPA analysis of "beneficial effects," because those effects were incidental to different kinds of decisions, such as Federal construction projects. *Id.* at 32 n.11. The panel considered this case law in light of the unique facts of DBOC's situation, without announcing any broader rule. Here, the Secretary decided to take no action, allowing DBOC's Reservation and the associated permit to expire according to their own terms. According to the EIS, that inaction would cause some short-term environmental impacts as DBOC removed its property, but would secure the long-term environmental benefits of conserving Drakes Estero in its wilderness state.[2] Based on existing case law, the panel was right to be "skeptical" that NEPA applied. Op. at 31.

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[2] The EIS citations that DBOC provides to support its allegations of adverse impacts, *see* DBOC Pet. at 17, generally indicate that "removing infrastructure related to commercial shellfish operations" would have "short-term minor adverse impacts" but "long-term beneficial impacts." *See* SER at 52-53 (Alternative A effects on eelgrass); *see also id.* at 54-55 (wildlife), 56-57 (fish), 58-59 (seals), 66 (water quality).

III. NONE OF THE *AMICI* PRESENT PERSUASIVE REASONS FOR *EN BANC* REVIEW.

In support of DBOC's request for rehearing, twenty-one *amici* have filed eight different briefs totaling 109 pages. Half of those briefs were written or filed with the assistance of DBOC's own counsel. The Secretary cannot respond to all of their arguments in detail in one brief of 15 pages, but a general review of the issues that *amici* raise demonstrates that there are no persuasive reasons for rehearing *en banc*.

State law and legislative history issues (Bagley, et al., Watt, Monte Wolfe Foundation). Some *amici* attempt to support or elaborate upon the dissent's theory that, in 1976, Congress intended that its wilderness designation in Point Reyes was consistent with allowing the oyster company to operate indefinitely. As noted above, *see supra* p. 9, the panel majority has the better of this argument: Congress could have simply designated Drakes Estero as "wilderness" and made an explicit allowance for private commercial shellfish cultivation, but it chose not to do so, instead opting for a transitional "potential wilderness" in which non-wilderness uses would be steadily removed. *See* Op. at 25.

These *amici* argue Congress chose to designate Drakes Estero as "potential wilderness" not because of the oyster operation, but because California retained some rights that were inconsistent with a "wilderness" designation. The majority addressed this position, recognizing that it has no foundation in the Wilderness Act itself, that California does not assert any state rights, and that DBOC's state leases are contingent on the Park Service's continued authorization of its activities. *See* Op. at 28 & n.9; *see*

also Interior Br. at 38-39. In any event, California's rights alone cannot preclude a wilderness designation, because the Park Service successfully converted the adjacent Estero de Limantour from "potential wilderness" to "wilderness," even though it is subject to the same retained rights as Drakes Estero. *See* Interior Br. at 37-38.

A more extreme version of this theory, which the dissent did not adopt, is that "wilderness" should be construed more broadly to permit commercial uses. *See* Monte Wolf Memo. at 1, 7. Setting aside the philosophical debate, that legal position is inconsistent with the Wilderness Act, which unambiguously prohibits most "commercial enterprise" within wilderness. *See Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003) (citing 16 U.S.C. § 1133(c)). The Reservation, which covered only onshore property, did not confer any "existing private right" in the waters of Drakes Estero itself, and in any event it expired by its own terms in 2012. Without Section 124, the Secretary would have had no authority to permit DBOC's operations in Drakes Estero.

CZMA issue (Bagley, et al.). No party in this case has ever argued that the Secretary's decision is invalid because it is inconsistent with the Coastal Zone Management Act. That issue is therefore not an appropriate basis for rehearing.

The scope of NEPA (Pacific Legal Foundation). Pacific Legal Foundation argues that the Court should use this case as a vehicle for overruling *Douglas County*. *See* PLF Memo. at 4. This is wrong for two reasons: First, *Douglas County* was not essential to the panel's holding here. *See supra* p. 10. Second, this is a very different

case. *Douglas County* held that NEPA does not apply to designations of critical habitat under the Endangered Species Act, *see* 48 F.3d at 1505. DBOC's case, in contrast, presents no Endangered Species Act issues and would not allow the Court to reconsider that question. Even if the Court were inclined to reconsider *Douglas County*, therefore, this case is not an appropriate opportunity.

NEPA process issues (Rolph). No party in this case has ever argued that the Secretary manipulated the NEPA comment process to overstate public support for his decision. That issue is therefore not an appropriate basis for rehearing.

The Secretary's use of scientific data (Goodman, PCSGA). Two *amici* argue that the EIS contained misleading or invalid scientific data. The Secretary strongly disputes that proposition.[3] More importantly, however, the panel correctly found – based on the Secretary's unambiguous statement – that he "was well aware of the controversies on the specific topics that [DBOC] criticizes," and that he did not rely on that controversial data in making his decision. *See* Op. at 34. The Secretary's decision was based not primarily on the environmental *effects* of oyster cultivation – whether they may be beneficial or harmful – but on whether DBOC's private operations are a better *use* for Drakes Estero than wilderness use. *See* Op. at 22, 24-

[3] *See* Interior Br. at 44-45. Although the National Academy of Science criticized the degree of certainty with which the draft EIS stated some scientific conclusions, the Park Service addressed those criticisms in the final EIS. *See* Op. at 33 n.12. The Inspector General of the Department of the Interior later investigated the Park Service's use of scientific information and found no evidence to support Dr. Goodman's allegations of scientific misconduct. *See* Interior Br. at 13 n.4.

25; *see also* Interior Br. at 13-14. For the same reason, the alleged environmental benefits of commercial oyster cultivation do not show any error in the Secretary's decision or in the balance-of-harms analysis of the district court and the panel.

Harm to DBOC's employees (Mata, et al.). The panel majority recognized that "the prospect of closing down a business is a serious hardship," Op. at 37, some of which would fall on DBOC's employees. The Secretary has authorized the Park Service to offer federal assistance to affected employees to reduce this burden. Their interest, while real, does not outweigh the potential value of a wild Drakes Estero to more than two million annual visitors to Point Reyes. *Id.* at 36.

Finally, DBOC and some of its *amici* – notably Dr. Goodman, with the assistance of DBOC's counsel – intemperately portray the Park Service and its personnel as pursuing an obsessive, deceptive, "crazed" vendetta against DBOC. *See, e.g.*, DBOC Pet. at 1, 6; Goodman Memo. at 2, 5. These accusations are baseless. Secretary Salazar personally made the decision at issue after reviewing the administrative record and hearing from all interested stakeholders, including visiting the site and meeting with DBOC's owners and employees. *See* Interior Br. at 53. His decision was based on his view of the best public use for Drakes Estero and, as both the district court and the panel majority found, it complied with all applicable laws and standards. There is no reason to add another layer of review here, and e*n banc* rehearing should therefore be denied.

Respectfully submitted,

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December 2, 2013
DJ # 90-1-1-13861

CERTIFICATES

I certify that this memorandum satisfies the requirements of Federal Rules of Appellate Procedure 32 and 40 for responses to a petition for rehearing *en banc*.

This memorandum complies with the Court's order of November 12, 2013, limiting the Secretary's response to fifteen pages. It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

/s / J. David Gunter II

9th Circuit Case Number(s) 13-15227

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