No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-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; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,
Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzalez Rogers)
District Court Case No. 12-cv-06134-YGR

AMICI CURIAE BRIEF OF ENVIRONMENTAL ACTION COMMITTEE OF WEST MARIN, NATIONAL PARKS CONSERVATION ASSOCIATION, NATURAL RESOURCES DEFENSE COUNCIL, AND SAVE OUR SEASHORE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

TRENT W. ORR, SB No. 77656
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
T: 415-217-2000 / F: 415-217-2040

Attorney for Amici

CORPORATE DISCLOSURE STATEMENT AND RULE 29(c)(5) STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), Amici Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore ("Amici") state that: 1) they do not issue stock or shares to the public; 2) they do not have any parent corporations; and 3) there is no publicly held corporation that has a 10% or greater ownership in any of them.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici further state that their counsel was the sole author of this brief and that Amici bore all costs of this brief, with no financial contributions from any party, party's counsel, or any other person not affiliated with Amici and their counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

LEGISLATIVE HISTORY

TABLE OF SHORT-FORM REFERENCES

DBOC	Drakes Bay Oyster Company
Dis.	Dissenting opinion in *Drakes Bay Oyster Co. v. Jewell*, No. 13-15227 (Sept. 3, 2013)
Interior	United State Department of the Interior
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h
1976 Act	Point Reyes Wilderness Act of 1976, Pub. L. No. 94-544, 90 Stat. 2515 (1976) (codified as 16 U.S.C. § 1132 note)
Op.	Panel opinion in *Drakes Bay Oyster Co. v. Jewell*, No. 13-15227 (Sept. 3, 2013)
Petition or Pet.	Petition for Rehearing En Banc, ECF No. 73-1
PRNS	Point Reyes National Seashore
Resp.	Department of the Interior's Response to DBOC's Petition for Rehearing En Banc, ECF No. 93
Secretary	Secretary of the Interior
Section 124 or §124	Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009)

FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(4) STATEMENT

This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a). All parties have consented to its filing.

Amici Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore (collectively, "Amici") are nonprofit environmental organizations with offices and staff in California that have worked for years to protect Drakes Estero. Each has members, staff, and/or officers who regularly visit the estero to enjoy hiking, kayaking, wildlife observation, and other quiet-use activities. Each has been deeply involved in administrative processes concerning future management of Drakes Estero, including submitting comments and offering testimony at public meetings, in order to secure its protection as wilderness. Because of these interests, Amici moved to intervene in the district court. ECF No. 18-2, Orr Decl., Ex. 1. While the district court denied their motion on other grounds, it held that Amici's "interests… are sufficiently related to the claims at issue in this action" to support intervention as of right under Fed. R. Civ. P. 24(a).[1] *Id.*, Ex. 6 at 6.

Rehearing en banc, which would delay the ultimate resolution of this matter and hold the potential for reversing this Court's affirmance of the district court's

[1] The district court's denial of Amici's intervention is on appeal to this court in Case No. 13-15390, jurisdiction over which has been retained by the panel that heard and decided the instant case. Case No. 13-15390, ECF No. 26.

denial of Plaintiff-Appellants' motion for preliminary injunction, would injure Amici Applicants' interests in securing the restoration and full wilderness protection of Drakes Estero and their staffs' and members' use and enjoyment of the estero by delaying its restoration to a natural condition and its management as a protected wilderness area.

ARGUMENT

Amici support the federal defendants' opposition to DBOC's Petition. This case does not meet Federal Rule of Appellate Procedure 35 or Ninth Circuit Rule 35-1 requirements for en banc rehearing. DBOC and its amici[2] have shown no conflict between the decision and existing precedent. Fed. R. App. P. 35(b)(1)(A). Nor have they identified any "question of exceptional importance," Fed. R. App. P. 35(b)(1)(B), or shown a conflict with another circuit that "substantially affects a rule of national application in which there is an overriding need for national uniformity." Ninth Cir. Rule 35-1. That is unsurprising, as the law at the heart of this case, § 124, gave the Secretary discretion to extend or let expire on its own terms a single permit – DBOC's – at a single site – Drakes Estero, a designated potential wilderness in PRNS. While DBOC is unhappy that the Secretary determined to let the permit expire on the terms DBOC agreed to, no rule of national application or overriding need for national uniformity is presented.

Amici address below the incompatibility of an oyster business with wilderness designation, which the dissent failed to recognize, and the adequacy of federal defendants' compliance with NEPA.

---

[2] DBOC's counsel in this appeal were authors of two of the amicus briefs in support of DBOC's petition, ECF Nos. 77 at iv, 78-1 at iii, and DBOC's counsel in a state court case, also aimed at perpetuating its Drakes Estero business, was the author of a third. ECF No. 83-1 at iv.

I. THE DISSENT WRONGLY CONCLUDED THAT A COMMERCIAL OYSTER OPERATION IS COMPATIBLE WITH THE WILDERNESS ACT.

The majority correctly held that § 124 gave the Secretary discretion to decide whether to extend DBOC's permit or allow it to expire "notwithstanding any other provision of law" that might conflict with the exercise of that authority. Op. at 15-21. It based its decision on the language and legislative history of § 124. Op. at 16-21. The majority made no new law about "notwithstanding" clauses but interpreted the clause solely in the context of the discretionary power granted by § 124. *See* Resp. at 6-9. This narrow decision offers no basis for en banc review. But, in seeking en banc review, DBOC relies on the dissent's profound misreading of the Wilderness Act, 16 U.S.C. §§ 1131-1136, which led it to further misreadings of the 1976 Act and, ultimately, of § 124. An examination of the several ways in which the dissent went wrong underscores the correctness of the panel ruling and the lack of any basis for en banc review.

A. DBOC's Operations Are Incompatible with Wilderness Designation.

The Wilderness Act was enacted to protect designated federal lands in their natural condition, free from commerce, motorized equipment, and human structures. Yet, in the dissent's surprising view, the presence of a commercial "oyster farm was not an 'obstacle' to Drakes Estero's conversion to wilderness status." Dis. at 44. DBOC operations include 95 highly visible oyster racks that

cover seven acres in the estero's midst and would measure about 5 miles if laid end-to-end. SER 10. It manages its operations with two to three motorboats that operate intermittently eight hours a day, six days a week. SER 69. It plants millions of non-native oysters and clams. ER 175. It is beyond question that these structures and commercial activities are incompatible with wilderness status under the Wilderness Act, and that Congress, in enacting the 1976 Act designating Drakes Estero potential wilderness, recognized that. The premises of the dissent's conclusions are simply wrong and provide no basis for rehearing en banc.

The dissent is mistaken that conducting a private oyster operation in a wilderness is "firmly grounded in the text of the Wilderness Act itself." Dis. at 41. This confuses the Act's requirements with Congress's power to legislate nonconforming uses in an area otherwise to be managed as wilderness.[3] The Wilderness Act defines "wilderness" as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as *an area where the earth and its community of life are untrammeled by man*, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of *undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and*

[3] Congress knows how to retain nonconforming uses in areas otherwise afforded Wilderness Act protections. *See, e.g.*, Pub. L. 111-11, 123 Stat. 1068-69 (2009) (codified as 16 U.S.C. § 1132 note) (designating wilderness in national parks while expressly exempting existing cabins from Wilderness Act requirements). It did not do so in enacting the 1976 Act that designated the estero potential wilderness.

> *managed so as to preserve its natural conditions* and which (1) generally *appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable*; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its *preservation and use in an unimpaired condition*; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (emphases added). Congress made clear that wilderness must retain "its primeval character" with no "permanent improvements" and be managed "to preserve its natural conditions" "with the imprint of man's work substantially unnoticeable." The dissent's conclusion that permitting an oyster business is "firmly grounded" in the Act would render this definition a nullity.

The dissent arrived at its conclusions by selectively reading 16 U.S.C. § 1133 of the Wilderness Act, which sets limitations on the uses of wilderness.

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be … no use of motor vehicles, motorized equipment or motorboats, … and no structure or installation within any such area.

16 U.S.C. § 1133(c). The dissent focuses on the phrase "subject to existing private rights" to wrongly conclude that, because DBOC's predecessor had private rights in the form of water-bottom leases from California, its commercial operations were

consistent with wilderness designation for Drakes Estero.[4] Dis. 42. But that conclusion does not follow from the language of § 1133(c), which simply recognizes that any wilderness designation made is "subject to existing private rights." This language does not support a conclusion that any existing private rights, no matter how inconsistent with the Act's definition of wilderness, are consistent with wilderness status. At most, it suggests that an otherwise eligible area might be designated wilderness "subject to existing private rights" where the requirements of the Act can be substantially met while observing those rights. That is not the case here, where the private rights involve highly visible oyster racks, six-day-a-week use of motorboats, and cultivation of non-native shellfish.

The dissent ignored the second phrase of § 1133(c), "except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act … , there shall be … no use of … motorboats, … and no structure or installation within any such area." These prohibitions are not "subject to existing rights." Rather, the only exception is "as necessary to meet minimum requirements for the administration of the area for the purpose of this Act." The

[4] "The plain language of the Wilderness Act states that there shall be '*no* commercial enterprise' within designated wilderness. 16 U.S.C. § 1133(c) (emphasis added)." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003). The Wilderness Act does not allow introduction of hatchery salmon in a lake in a wilderness area "to advance commercial [fishing] interests." *Id.* at 1064. Here, not just introduced oysters, but large structures, are present.

entity charged to administer Drakes Estero wilderness is the National Park Service, not DBOC. Even if this were not the case, commercial motorboat use, cultivation of non-native species, and acres of structures are antithetical to managing Drakes Estero for the purposes of the Wilderness Act.[5] 16 U.S.C. § 1131(c).

While DBOC now hews to the dissent as having correctly interpreted the Wilderness Act, it previously consistently argued that wilderness designation of Drakes Estero would preclude its continued operations there. *See, e.g.*, ECF No. 23-1 at 32 (arguing that its commercial oyster activities are "uses prohibited under the Wilderness Act"); Op. at 19 n.5.

B. The Legislative History of the 1976 Act Shows That DBOC's Operations Must Be Removed to Allow Wilderness Designation of Drakes Estero.

The dissent's – and now DBOC's – misreading of the Wilderness Act leads to a misreading of the 1976 Act's legislative history, based on the view that the oyster business is compatible with wilderness. In fact, the 1976 Act designated Drakes Estero as "potential wilderness" because it was ineligible for wilderness status. Before its passage, Interior expressly identified the oyster operations as incompatible with wilderness. While the dissent and DBOC portray Interior's position as "misreading" the law, Congress agreed, designated the estero as

[5] That the Secretary "may" permit motorboat use in a wilderness where such use occurred before designation, 16 U.S.C. § 1133(d), simply grants discretion to do so if appropriate. *See* Dis. at 42. But this cannot extend to routine use of motorboats to manage an incompatible structure for prohibited commercial activity.

"potential wilderness," and mandated its full protection as wilderness as soon as the obstacles to such protection could be removed.

H.R. 8002, the bill that eventually became the 1976 Act, in its original form proposed over 38,000 acres of PRNS for wilderness status. H.R. Rep. No. 94-1680 at 5. Interior raised concerns that some of this acreage, including Drakes Estero, was ineligible for wilderness status under the Wilderness Act. *Id.* at 5-6. Regarding Drakes Estero, Interior stated: "We do not recommend the inclusion of this additional acreage … for wilderness designation for the following reasons: … Drakes Estero[:] *Commercial oyster farming operations take place in this estuary* and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness." *Id.* (emphasis added). The dissent's analysis, while noting the reserved rights clause of this sentence, omits the first reason, the oyster operation.[6] *See* Dis. at 42.

The dissent's analysis of the legislative history focused on the bill as proposed, noting that its sponsors were aware of the oyster operation but still included Drakes Estero in their wilderness proposal. But the bill as passed, informed by Interior's concerns, designated the estero as "potential wilderness," with a mandate that it become wilderness as soon as the obstacles to such

[6] Regarding the lack of conflict between wilderness designation of Drakes Estero and California's reservation of certain rights in tidelands at PRNS, *see* ECF No. 41-2 at 8-10.

designation could be removed. 1976 Act, § 1. The legislative history the dissent cites for the proposition that the bill's proponents did not view the oyster business as "incompatible with the area's wilderness status," Dis. at 40, does not support that proposition. Rather, it reflects a proposal, never enacted, to grandfather the oyster operation into a Drakes Estero wilderness as a nonconforming use. *See, e.g.*, quotations of public testimony re original bill, Dis. at 41: oyster operation's "continuation is permissible as a pre-existing non-conforming use"; oyster operations should continue "unrestrained by wilderness designation"; "everyone concerned supports the continued operation of oyster farming in Drakes Estero as a non-conforming use." These statements agreed that the oyster business does not conform to the Wilderness Act, yet the dissent concluded that "the oyster farm was fully compatible with" wilderness status. Dis. at 41. The dissent wrongly equated a proposal to grandfather a nonconforming use, which was not enacted, with compatibility of that use with the Wilderness Act.

"Potential wilderness" is defined in the legislative history of the 1976 Act and companion legislation for PRNS as lands that "are essentially of wilderness character, but retain sufficient non-conforming structures, activities, uses or private rights so as to preclude immediate wilderness classification." S. Rep. No. 94-1357 at 3 (1976). This history states Congress's intent to remove nonconforming uses from potential wilderness areas so that they can receive wilderness status:

> As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, *with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status*.

H.R. Rep. No. 94-1680 at 3 (1976) (emphasis added); see also S. Rep. No. 94-1357 at 7 (potential wilderness "will automatically gain wilderness status" when "non-conforming uses and/or structures are eliminated"). The companion legislation specifically provided that "[a]ll lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness." Pub. L. No. 94-567, § 3, 90 Stat. 2692, 2693 (1976) (codified as 16 U.S.C. § 1132 note).[7]

C. Section 124 Was Not Intended to "Override" a Purported Misinterpretation of Law by Interior.

Section 124 granted the Secretary complete discretion, "notwithstanding any other provision of law," to extend, or not, DBOC's permit for 10 years. It did not itself override any provision of law. But the dissent's misreading of the Wilderness Act and the 1976 Act led it to a tortured interpretation of § 124, in

[7] Amy Meyer, vice-chair of the federal PRNS advisory commission in 1976, recalled: "In 1976, Congress designated 33,373 acres of wilderness within [PRNS]…. At the time of designation, 8,003 of these acres had various existing, non-conforming uses, so they were put into a sub-category of "potential" wilderness, to be added to the protected wilderness area as soon as the non-conforming uses could be removed. One of these non-conforming uses was the non-native oyster farm operation in Drakes Estero." ECF No. 18-2, Ex. 7, ¶¶ 3, 6.

which "notwithstanding any other provision of law" is not directed to *any* "provision of law" but solely to a purported "misinterpretation" of the 1976 Act ascribed to Interior.[8] Dis. at 44-45. As discussed above, the "misinterpretation" is a creature of the dissent's misreading the Wilderness Act's mandates that structures and commercial activities are incompatible with wilderness and ignoring Congress's awareness that the oyster operation was a nonconforming use when it passed the 1976 Act. Only with these mistakes and omissions could the dissent arrive at the conclusion that "Congress intended the [notwithstanding] clause to override the Interior Department's misinterpretation" of the 1976 Act. *Id.* at 45.

The majority got it right. "Section 124's 'notwithstanding' clause trumps any *law* that purports to prohibit or preclude the Secretary from extending the permit…." Op. at 17 (emphasis added). The dissent offers no scrap of legislative history of § 124 suggesting that, despite its plain language, it was actually intended to override a purported agency misinterpretation of the 1976 Act. If the dissent

[8] DBOC's assertion that the majority did not disagree with the dissent's misreading of legislative history is a red herring. Pet. at 13; *cf.* Op. at 18-21, n.5 at 19. The majority correctly rejected the dissent's attempt to interpret § 124, enacted in 2009, by reference to its reading of legislative history of a version of the 1976 Act that was not enacted. Op. at 19. The majority's phrase "regardless of the accuracy of the dissent's recitation of the legislative history of the 1976 Act" cannot fairly be read to indicate that the majority agreed with that recitation; the phrase appears in a discussion where the majority finds the legislative history of the original version of H.R. 8002 irrelevant to the interpretation of § 124, enacted over thirty years later. *Id.*; *see id.* at n.5.

were correct that "no conflicting laws actually prevented the Secretary from issuing a permit" to DBOC, the "notwithstanding any other provision of law" language in § 124 would be superfluous. Dis. at 45. Section 124 gave the Secretary unbounded discretion to extend, or not, DBOC's permit notwithstanding any other provision of *law*. In the end, the Secretary chose, for policy reasons, including the policies behind the Wilderness Act and the 1976 Act, not to extend the permit.[9]

In sum, the dissent's and DBOC's unsupported misreading of § 124's intent provides no basis for rehearing en banc. Nothing in the majority's opinion regarding the interpretation or legislative history of § 124 poses a conflict with Supreme Court or Ninth Circuit precedent. Nor does the majority's reading of § 124 present any "question of exceptional importance," or "substantially affect[] a rule of national application in which there is an overriding need for national uniformity." Regardless of local controversy about DBOC's operations, § 124 is an extremely narrow statute that applies to a single discretionary determination whether to extend a single permit to conduct commercial oyster operations at a single potential wilderness site in PRNS.

[9] Renowned oceanographer Dr. Sylvia Earle observed that the oyster operation in Drakes Estero is "in direct conflict with the Seashore's mandate of natural systems management as well as wilderness laws and national park management policies." Dkt. 18-2, Exh. 13, ¶¶ 5, 9.

II. THE RULING ON THE APPLICABILITY OF NEPA TO THE DECISION TO LET THE PERMIT EXPIRE PROVIDES NO BASIS FOR EN BANC REVIEW.

DBOC offers cursory arguments that the majority's opinion regarding NEPA supports en banc review. Pet. at 5-6, 16-17. But their arguments fail to identify any conflict between the majority's opinion and existing precedent and, in attacking the majority's discussion of *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), fail to recognize that the decision did not turn on that case.

The majority questioned whether NEPA applied to the Secretary's letting the permit expire rather than extend it: "[W]e have never held failure to grant a permit to the same standard [of NEPA compliance as granting one]…. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt." Op. at 30. The majority was skeptical "that the decision to allow the permit to expire…, and thus to move toward designating Drakes Estero as wilderness, is a major action 'significantly affecting the quality of the human environment' to which NEPA applies."[10] Op. at 31 (citing *Douglas County*, 48

[10] DBOC's overwrought hypothetical regarding a need for NEPA review of a decision to restore a flooded valley by blowing up a dam, which would destroy lives and property, bears no relation to this case. Pet. at 6. As the majority recognized, removing oyster racks to restore the estero to a natural state would pose only "short-term," "relatively minor harms" that would not significantly affect the environment. Op. at 32. The only *environmental* harm of ending its operations that the Petition advances is alleged harm to water quality from the loss of oysters filtering water. Pet. at 6. But the record shows that Drakes Estero is

F.3d at 1505: "The purpose of NEPA is to provide a mechanism to enhance or improve the environment and prevent further irreparable damage." (internal quotation marks omitted)).[11]

Douglas County remains good law, and this case offers no occasion to revisit it: Despite its discussion of the case, the majority did not rely on *Douglas County* nor hold that NEPA compliance was not required. Rather, it held that it "need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies were without consequence." Op. at 32. A draft EIS was circulated for public comment and a lengthy final EIS responded to the comments received. ECF No. 17-2 at 38. The Secretary considered the information in the EIS in making his decision. ER 121-22. The majority properly concluded that DBOC, in alleging technical violations of NEPA – failure to publish the final EIS thirty days before the decision to let the permit expire and framing the decision as a "decision

---

flushed twice daily by tides bringing clean ocean water and has no significant water quality problems. ECF Nos. 17-10, ¶¶ 4-8; 18-2, Ex. 12, ¶¶4-10.

[11] The record is replete with evidence of ongoing damage to Drakes Estero's environment caused by DBOC. *See* ECF No. 41-2 at 14-18, summarizing evidence of adverse impacts on a large harbor seal colony; native water-dependent birds; spread of harmful invasive species; and discharge of large quantities of plastic into the marine environment, as well as of DBOC's ongoing violations of environmental laws. Since taking over the oyster business in 2004, DBOC has been subject to several cease and desist orders from the California Coastal Commission, an agency charged with protecting the coastal environment, seeking to remedy violations of various environmental laws and regulations. *Id.* at 17-18.

memorandum" instead of a "record of decision" – has shown no prejudice from the alleged violations. Op. at 33-34.

In the end, the decision that NEPA was adequately observed and that DBOC has shown no prejudice from alleged technical violations of NEPA is not properly the subject of en banc review. There is no conflict between this holding and any Supreme Court or Ninth Circuit authority. The only conflict DBOC asserts with respect to NEPA is its claim that the decision conflicts with "many cases" that hold that NEPA applies to projects that may cause significant environmental harm (citing only two). Pet. at 5-6. Having shown *no* significant environmental harm that might result from restoring Drakes Estero to natural conditions, DBOC's claim of conflict fails. *See* n.10 above. Further, as discussed, the majority did not "resolve whether NEPA compliance was required" here; its discussion of *Douglas County* did not apply nor expand upon that case and thus provides no occasion for en banc review.[12] Finally, DBOC has made no showing that there is any "question of exceptional importance" regarding the majority's NEPA ruling that would merit en banc review. The decision about the interplay of NEPA and secretarial discretion to extend DBOC's lease under § 124, which applied to that lease alone,

[12] The amicus brief of Pacific Legal Foundation *et al.* ("PLF") astoundingly urges en banc review here of the relationship of critical habitat designation under the Endangered Species Act ("ESA") to the requirements of NEPA. ECF No. 81. There are no ESA issues in this case, and PLF admits that there are two appeals pending before this Court that do present that issue. *Id.* at 3.

does not implicate any rule of national application nor, in consequence, any overriding need for national uniformity.

CONCLUSION

The petition for rehearing en banc should be denied.

DATED: December 5, 2013

Respectfully submitted,

/s/ Trent W. Orr
TRENT W. ORR, SB No. 77656
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
Telephone: 415-217-2000
Facsimile: 415-217-2040

Attorney for Amici

CERTIFICATE OF COMPLIANCE

I certify that this brief satisfies the requirements of Federal Rules of Appellate Procedure 32 and 40 and Ninth Circuit Rule 29-2(c) for amicus briefs regarding a petition for rehearing en banc. This brief complies with Ninth Circuit Rule 29-2(c)(2) limiting an amicus brief regarding an en banc petition to fifteen pages. It has been prepared in a 14-point Times New Roman font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: December 5, 2013 /s/ Trent W. Orr

CERTIFICATE OF SERVICE

I hereby certify that 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 on December 5, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Trent W. Orr
TRENT W. ORR