No. 13-_____

In the Supreme Court of the United States

DRAKES BAY OYSTER COMPANY AND KEVIN LUNNY,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In reviewing an agency's denial of a permit to continue operating an 80-year-old oyster farm, the United States Court of Appeals for the Ninth Circuit held that a federal court has jurisdiction to review a discretionary agency decision for compliance with specific requirements, but does not have jurisdiction to determine whether the same decision is arbitrary and capricious or an abuse of discretion. Because of this asserted lack of jurisdiction, the majority could not evaluate whether, as the dissent concluded, the agency had relied on factors Congress did not intend it to consider, and had misinterpreted the law it relied on. Nine circuits have split five ways on this jurisdiction issue. The circuits are also split on an environmental-review issue, and are split in principle on a prejudicial-error issue.

The questions presented are:

1. Whether federal courts lack jurisdiction under the Administrative Procedure Act to review an agency action that is arbitrary and capricious or an abuse of discretion when the statute authorizing the action does not impose specific requirements governing the exercise of discretion.

2. Whether federal agencies can evade review of their actions under the National Environmental Policy Act by designating their actions as "conservation efforts", when the record shows that the action will cause significant adverse environmental effects.

3. Whether an agency commits prejudicial error when it makes materially false statements in an environmental impact statement, and then asserts that it would have made the same decision even if the false statements had been corrected.

RULE 14.1(b) STATEMENT

Petitioners are Drakes Bay Oyster Company and Kevin Lunny.

Respondents are Sally Jewell, Secretary of the U.S. Department Of The Interior; U.S. Department of the Interior; Jonathan Jarvis, Director of the U.S. National Park Service; and the U.S. National Park Service.

RULE 29.6 STATEMENT

There are no parent corporations or publicly held corporations involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Drakes Bay Oyster Company and Kevin Lunny respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the Ninth Circuit Court of Appeals (APP. 52-101) is reported at 729 F.3d 967. The amended opinion of the court of appeals (APP. 1-51) is available at 2014 U.S.App.LEXIS 915. The opinion of the District Court for the Northern District of California (APP. 104-152) is reported at 921 F.Supp.2d 972.

JURISDICTION

The court of appeal's judgment was entered on September 3, 2013. APP. 52. A timely petition for rehearing en banc was denied on January 14, 2014. APP. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court has jurisdiction under 28 U.S.C. § 1331.

STATUTES INVOLVED

The statutes involved are set out in the appendix (APP. 167-177).

STATEMENT OF THE CASE

Although this case now raises issues of importance to people and businesses across the Nation, it started as a regional dispute between modern environmentalists and wilderness extremists.

Petitioner Drakes Bay Oyster Company is supported by modern environmentalists who believe that people can, through sustainable agriculture, develop a close and symbiotic relationship with the environment. The great majority of Marin County, just north of San Francisco, has rallied around the oyster farm and its workers and their families who live at the farm. They see no good reason why respondent National Park Service should eliminate the oyster farm or create an artificial wilderness in the middle of an important and historic farming area.

Oysters and other shellfish were once abundant in the area. Oysters provide environmental benefits, for example by filtering and clarifying the water. Because of these benefits, efforts are now being made to restore oysters in San Francisco Bay, Chesapeake Bay, and New York Harbor. As a food crop, oysters provide good protein without any addition of feed, fertilizers, or pesticides.

Respondent federal agencies are supported by wilderness extremists who want to rid the area of agricultural and commercial operations. But whatever one might think of the Park Service's extreme devotion to wilderness in Point Reyes, there is nothing to recommend the means it has used to achieve its ends. It has insisted on misinterpreting the relevant law even after Congress overrode its misinterpretation, and it has hid and misrepresented

scientific data even after it was criticized by the Department of the Interior's Solicitor's Office and by the National Academy of Sciences.

A. History Of Farming In Point Reyes

Point Reyes is a coastal farming peninsula just north of San Francisco. Since the 1850s, much of the peninsula has been in beef and dairy ranching, and now produces prized organic food for the Bay Area and beyond. These ranches surround an embayment known as Drakes Estero.[1] Drakes Estero is an ideal place for oyster farming. The State of California has leased its tide and submerged lands in Drakes Estero for oyster farming continuously since 1934.

Petitioner Drakes Bay Oyster Company is the current owner of the oyster farm in Drakes Estero. Petitioner Kevin Lunny is its President. Drakes Bay is widely respected for producing some of the world's finest oysters in harmony with the environment.

B. Point Reyes National Seashore

In the late 1950s, the Park Service proposed to create a "national seashore" at Point Reyes to protect the area from being overrun with residential subdivisions. *See generally Drakes Bay Land Co.* v. *United States*, 424 F.2d 574, 575-579 (Ct. Cl. 1970) (developer prevails on claim that Park Service's proposal caused inverse condemnation). The Park Service was particularly interested in preserving the "exceptional" public values offered by the oyster farm:

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[1] Historians believe that Drakes Estero is the site of the first English encampment in North America. In 1579, Sir Francis Drake landed his ship, the *Golden Hinde*, for 36 days of repairs on his way to circumnavigating the globe.

> Existing commercial oyster beds and an oyster cannery at Drakes Estero … should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.[2]

In 1962, Congress adopted the proposal and passed the Point Reyes National Seashore Act,[3] which authorized the Secretary of the Interior to purchase the farmland and lease it back to the farmers.[4]

C. Point Reyes Wilderness Act

In the mid-1970s, Congress considered proposals to designate areas within the Point Reyes National Seashore as "wilderness" under the 1964 Wilderness Act.[5] The initial proposals, authored by members of California's Congressional delegation,

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[2] S. 476, A Bill To Establish The Point Reyes National Seashore In The State Of California, And For Other Purposes: Hearings Before Subcomm. On Pub. Lands Of The Comm. On Interior And Insular Affairs, 87th Cong. (1961) at 20 (reprinting National Park Service, Report On the Economic Feasibility Of The Proposed Point Reyes National Seashore (1961)).

[3] Pub. L. No. 87-657, 76 Stat. 538 (1962), codified at 16 U.S.C. §§ 459c *et seq*.

[4] 16 U.S.C. § 459c-5(a) (amended in 1978 by Pub. L. No. 95-625, § 318, to allow for leases in perpetuity).

[5] Pub. L. No. 88-577, 78 Stat. 890 (1964), codified at 16 U.S.C. §§ 1131 *et seq*.

would have designated Drakes Estero as wilderness because "they did not view the [oyster] farm's operations as incompatible with the area's wilderness status." APP. 40 (Watford, J., dissenting from opinion below). The civic, environmental, and conservation groups that commented on the bill all agreed, stressing "a common theme: that the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness." APP. 41 (dissent).

The only party opposed to designating Drakes Estero as wilderness was the Department of the Interior. The Department opposed *any* wilderness designation for Drakes Estero because, it argued, California had retained fishing and mineral rights that made the area "inconsistent with wilderness". APP. 43 (dissent). At the time, the Park Service's position was that wilderness areas "should not be left with the possibility—no matter how remote—that we do not completely control the property."[6]

The legislation that came out of this debate, the 1976 Point Reyes Wilderness Act ("1976 Act"), designated Drakes Estero as "potential wilderness".[7] Although "potential wilderness" was not defined in the legislation, the author of the final bill, Congressman John Burton, explained that, "[a]s 'potential wilderness,' these areas would be designated as wilderness effective when the State

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[6] Wilderness Additions—National Park System: Hearings Before the Subcomm. on Parks and Recreation of the S. Comm. on Interior and Insular Affairs, 94th Cong. 271, 329 (1976).

[7] Pub. L. No. 94-544 § 1, 90 Stat. 2515 (1976); Pub. L. No. 94-567 § 1(k), 90 Stat. 2692.

ceeds [sic] these rights to the United States."[8] The House Report stated that, for potential wilderness areas, there should be "efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status."[9] Those "obstacles" were California's retained rights, not the oyster farm: "all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status." APP. 45 (dissent).

D. Congress Overrides The Park Service

Petitioner Kevin Lunny grew up on a cattle ranch adjacent to the oyster farm, and became the first certified organic rancher in Point Reyes. In 2004, he founded Drakes Bay Oyster Company and purchased the oyster farm from its previous owners. He was aware at the time of purchase that the oyster farm (like the surrounding cattle ranches) had a lease that would need to be renewed from time to time, but the Park Service gave him no notice of any intent not to renew the lease.

In 2005, however, he received a memo from the Park Service asserting that the Park Service could not issue a permit to the oyster farm when its lease came up for renewal in November 2012. According to the memo, the 1976 Act mandated the

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[8] H.R. 7198, H.R. 8002, et al., To Designate Certain Lands in the Point Reyes National Seashore, California as Wilderness: Hearing Before Subcomm. on Nat'l Parks and Recreation of the H. Comm. on Interior and Insular Affairs, 94th Cong. (1976) (prepared statement of Rep. John Burton, at 2).

[9] H.R. Rep. No. 94-1680, at 3 (1976).

elimination of the oyster farm. APP. 44 (dissent). The memo did not identify any statutory language supporting that mandate. Instead, the memo relied on the sentence in the House report, quoted in Section C above, that referred to the removal of "obstacles" preventing wilderness designation. *Id*.

In 2009, Congress enacted what is referred to as "Section 124".[10] This statute was intended to override the Park Service's 2005 legal analysis. APP. 38 (dissent). The purpose of Section 124, expressed in a single phrase, was "[t]o extend a special use permit for Drake's Estero at Point Reyes National Seashore."[11] Section 124 provides 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" to Drakes Bay.

E. False Accusations Of Environmental Harm

In 2006, the Park Service began claiming that the oyster farm was causing environmental harm, especially to harbor seals in Drakes Estero. But the accusations did not stand up to scientific scrutiny. In 2009, the National Academy of Sciences found that the Park Service had "selectively presented, overinterpreted, or misinterpreted" the data.[12] The National Academy concluded that "there is a lack of

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[10] Pub. L. No. 111-88, § 124, 123 Stat. 2903, 2932 (2009), quoted in full at APP. 170-171.

[11] 155 CONG. REC. S. 9773 (December 24, 2009).

[12] Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California (May 5, 2009) at 72-73 (http://www.nap.edu/catalog.php?record_id=12667).

strong scientific evidence that shellfish farming has major adverse ecological effects" on Drakes Estero.[13]

The Park Service did not provide all relevant data to the National Academy of Sciences. After the Academy's report was prepared, the Park Service was found to have been hiding photographs that exonerated Drakes Bay from the Park Service's charges. These photographs had been taken, secretly, every minute of the day during the harbor-seal pupping season for the previous three years, undoubtedly with the intent of catching the oyster farm in a bad act. The photographs were taken of an area in which seals and their pups haul out of the water. Also visible at times were boats and workers who tended an oyster-farming area in the distance. The Park Service reviewed these photographs and found no evidence that the oyster boats or workers were disturbing the adult seals or their pups. The Park Service kept this information to itself.

The Park Service's behavior was investigated by the Department of the Interior's Solicitor's Office, which concluded that the Park Service's handling of these photographs demonstrated a "troubling mindset".[14] The Solicitor's Office also concluded that five employees had violated the Park Service's Code of Scientific and Scholarly Conduct.[15]

Despite these reprimands, the Park Service has continued to misrepresent facts and hide

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[13] *Id.* at 6.

[14] Dkt. 77 at 12 n.10. ("Dkt." refers to docket entries in the Ninth Circuit; the page numbers cited are those ECF-stamped at the top of the document.)

[15] *Id.*

information. When the Park Service could not find any evidence in the photographs that Drakes Bay disturbed the seals, the Park Service secretly hired a harbor-seal expert to re-analyze the photographs. The expert found "no evidence of disturbance" by the oyster boats or workers[16], just as the Park Service had found none. The expert report was not disclosed.

In November 2012, the Park Service released a final environmental impact statement ("EIS") that evaluated the environmental effects of the oyster farm. Despite the report from its own expert, the final EIS asserts that the oyster farm causes significant "adverse impacts" to harbor seals.[17]

Within 30 days after the release of the final EIS, Drakes Bay obtained a copy of the expert's report and learned that the Park Service had misrepresented the conclusion of its harbor-seal expert. Respondents have never contested the fact that the EIS "misrepresents the conclusion" of the Park Service's expert,[18] although in their briefs respondents continue to cite the misrepresentation as though it were true.

F. The Secretary's Decision

In 2010, Drakes Bay applied for the permit authorized by Section 124. On November 29, 2012, former Secretary of the Interior Kenneth Salazar issued a memorandum of decision denying Drakes Bay's permit application. APP. 153-166.

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[16] ER 286-294. ("ER" refers to Appellants' Excerpts Of Record filed with the Ninth Circuit.)

[17] SER 58. ("SER" refers to Appellees' Supplemental Excerpts Of Record filed with the Ninth Circuit.)

[18] ER 188.

The Secretary recognized that Section 124 gave him authority to issue the permit notwithstanding any other provision of law. Nevertheless, he began by asserting that he would not issue the permit because doing so would "violate" the 1976 Act. APP. 154. (The Ninth Circuit concluded that he could not have meant what he said. APP. 22-23.)

Ultimately, the Secretary declared that he based his decision to deny Drakes Bay a permit on the "public policy inherent in the 1976 act of Congress". According to the Secretary, "Sec. 124 … in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero." APP. 163. (The Secretary misinterpreted the intent of Congress as expressed in the 1976 Act, according to the dissent, and the majority did not disagree. APP. 48 (dissent).)

The Secretary also asserted that Section 124 "expressly exempts my decision from any substantive or procedural legal requirements", including the National Environmental Policy Act ("NEPA"). APP. 160. (The Ninth Circuit held that he was mistaken. APP. 15.)

The Secretary relied in part on the draft EIS and final EIS that had been prepared for the decision. Although they were "not material to the legal and policy factors that provide the central basis for [his] decision", they "informed [him] with respect to the complexities, subtleties, and uncertainties of the matter and have been helpful to [him] in making [his] decision." APP. 162. He believed that there was "scientific uncertainty" about the effects of the oyster farm. *Id*. He acknowledged that Drakes Bay had challenged some of the data and conclusions, and asserted that his decision was not based "on the data that was asserted to be flawed". *Id*. n.5.

He called out only one aspect of the environment—Drakes Estero "is home to one of the largest harbor seal populations in California"—and asserted that eliminating the oyster farm "would result in long-term beneficial impacts to the estero's natural environment." APP. 154, 162. He made no mention of the photographs the Park Service had taken, or that (in the opinion of the Park Service's harbor-seal expert) there was no evidence that Drakes Bay was disturbing the seals. At the time he made his decision, he could not have been aware of the controversy that erupted, several weeks later, when Drakes Bay discovered that the final EIS misrepresented the conclusions of the Park Service's harbor-seal expert.

The Secretary gave Drakes Bay 90 days to wind up its operations and remove its property. APP. 164. On December 4, 2012, the Park Service published a notice in the Federal Register that Drakes Estero is now "designated wilderness."[19]

G. The Litigation

On December 4, 2012, petitioners (referred to here jointly as "Drakes Bay") filed this suit in the district court. Drakes Bay alleged that the Secretary abused his discretion and violated the Administrative Procedure Act ("APA") by basing his decision on false statements and misinterpretations of law. Drakes Bay also alleged that the Secretary violated NEPA by relying on a defective EIS. On December 21, 2012, Drakes Bay moved for a preliminary injunction.

On February 4, 2013, the district court entered an order denying the motion. It held that it did not have jurisdiction to review the Secretary's decision.

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[19] 77 Fed.Reg. 71,826, 71,827 (Dec. 4, 2012).

APP. 136. It also found that although Drakes Bay would suffer irreparable harm without the injunction, the other requirements for injunctive relief were not met. APP. 136-151.

Drakes Bay appealed and moved for an emergency injunction pending appeal. On February 25, 2013, the Ninth Circuit's motions panel granted that motion. It found that "there are serious legal questions and the balance of hardships tips sharply in appellants' favor." APP. 103.

On September 3, 2013, a divided panel of the Ninth Circuit issued an opinion affirming the district court. APP. 52-101. The majority held that it lacked jurisdiction over the APA claim, but had jurisdiction over the NEPA claim. APP. 64-66; *see* Section I.C below. The majority rejected the NEPA claim on the grounds that the Secretary's decision "is essentially an environmental conservation effort, which has not triggered NEPA in the past", and that Drakes Bay had not demonstrated prejudicial error. APP. 81-82.

The dissent concluded that Drakes Bay was likely to prevail on the APA claim, and would have reversed. APP. 88-89. The dissent summarized its reasoning as follows:

> The Department had concluded, in 2005, that the [1976] Act barred issuance of a special use permit authorizing continued operation of Drakes Bay Oyster Company's oyster farm. The Department thought Congress had "mandated" that result by designating Drakes Estero, where the oyster farm is located, as a "potential wilderness addition" in the Point Reyes Wilderness Act. The Act's legislative history makes clear, however, that by divining such a

> mandate, the Department simply misinterpreted the Act's provisions and misconstrued Congress's intent. The Department's misinterpretation of the Point Reyes Wilderness Act prompted Congress to enact § 124 in 2009. In my view, by including a notwithstanding clause in § 124, Congress attempted to supersede the Department's erroneous interpretation of the Act.
>
> In the 2012 decision challenged here, the Secretary nonetheless denied Drakes Bay's permit request based primarily on the very same misinterpretation of the Point Reyes Wilderness Act that Congress thought it had overridden. As a result, I think Drakes Bay is likely to prevail on its claim that the Secretary's decision is arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

APP. 88.

On October 28, 2013, Drakes Bay petitioned for rehearing en banc. On January 14, 2014, the panel denied the petition and issued an amended opinion with minor changes. APP. 1-51.

On January 27, 2014, the panel issued an order staying the mandate for 90 days pending the filing of a petition for writ of certiorari. According to the Federal Rules of Appellate Procedure, stays pending certiorari continue in effect until this Court's final disposition of the case. Fed. R. App. Proc. R. 41(d)(2)(b).

REASONS WHY CERTIORARI IS WARRANTED

I. THERE ARE DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICTS ON THE JURISDICTIONAL ISSUE

A. Nine Circuits Have Split Five Ways

The Administrative Procedure Act ("APA") excludes from judicial review agency action that "is committed to agency discretion by law". 5 U.S.C. § 701(a)(2). In *Overton Park*, this Court stated that this exclusion "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). Nine circuits have split five ways on how to interpret the "no law to apply" test.

Confusion arises because the APA prohibits an agency from making decisions that are arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). If the arbitrary-and-capricious standard provides law to apply, then there will always be law to apply to ordinary agency decisions. The Fourth Circuit and a panel in the Ninth Circuit have followed this logic and found that § 706(2)(A) provides law to apply.[20] The Second Circuit and a panel in the Ninth Circuit have held exactly to the contrary.[21]

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[20] *Virginia* v. *Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) ("action committed to agency discretion is nevertheless reviewable under the APA for abuse of discretion"); *Pinnacle Armor* v. *United States*, 648 F.3d 708, 720 (9th Cir. 2011) ("abuse of discretion" standards of APA "are adequate to allow a court to determine whether the [agency] is doing what it is supposed to be doing").

[21] *Lunney* v. *United States*, 319 F.3d 550, 559 (2d Cir. 2003) ("the APA's 'arbitrary and capricious' standard, see

Confusion also arises because every statute has a purpose, and a statutory purpose can provide sufficient "law to apply". But how specific does the purpose have to be? If even a vague and general statutory purpose provides the necessary "law to apply", then there will always be law to apply to ordinary agency decisions. The Second, Seventh, Tenth, and District of Columbia Circuits have found law to apply from broad statutory purposes and general principles.[22] The Fifth, Ninth, and Eleventh Circuits have held, to the contrary, that for a court to

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5 U.S.C. § 706(2)(A), cannot be sufficient by itself to provide the requisite 'meaningful standard' for courts to apply in evaluating the legality of agency action"); *Oregon Nat. Res. Council* v. *Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) (rejecting argument that "there can be 'arbitrary and capricious' review under APA § 706(2)(A) independent of another statute").

[22] *Christianson* v. *Hauptman*, 991 F.2d 59, 62-63 (2d Cir. 1993) (finding law to apply in the goal of "conserving the natural resources", and because "§ 701(a)(2) did not preclude judicial review over the adequacy of an administrative investigation"); *Vahora* v. *Holder*, 626 F.3d 907, 917-919 (7th Cir. 2010) (finding jurisdiction to review agency's use of "procedural device"); *Sabin* v. *Butz*, 515 F.2d 1061, 1065, 1066-1070 (10th Cir. 1975) (finding jurisdiction to review action under statute that provides "broad authority to issue permits for the use of land in the National Forests" because authority "shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests"); *Dickson* v. *Secretary of Defense*, 68 F.3d 1396, 1400-1405 (D.C. Cir. 1995) (finding jurisdiction to review waivers under statute providing for waivers "in the interest of justice").

have jurisdiction the statute must provide specific requirements.[23]

Because the test is so indeterminate, circuits cannot consistently decide whether a statute provides "law to apply". Splits on several statutes are noted in Section I.B below.

The cases above considered whether courts have jurisdiction when there are no specific requirements (other than § 706(2)(A)) to apply. But even when there are specific requirements, several circuits have split on the "no law to apply" test. The Eighth Circuit has held that when a statute imposes specific requirements, a court has jurisdiction to review compliance with *both* the specific requirements and the arbitrary-and-capricious standard imposed by § 706(2)(A).[24]

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[23] *Ellison* v. *Connor*, 153 F.3d 247, 253 (5th Cir. 1998) (without "specific factors, the making of findings or the development of any additional evidentiary record", "the judiciary was in no position to gainsay the Secretary's determination as arbitrary, capricious or an abuse of discretion"); APP. 14 (in this case, Ninth Circuit holds that "'a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions'", quoting *Ness Inv. Corp.* v. *United States Dep't of Agriculture, Forest Service*, 512 F.2d 706, 715 (9th Cir. 1975)); *Conservancy of Southwest Fla.* v. *United States Fish & Wildlife Serv.*, 677 F.3d 1073, 1082-1085 (11th Cir. 2012) (no jurisdiction to review abuse-of-discretion claim because of "the absence of any applicable legal standard that limits the agency's discretion").

[24] *Friends of the Norbeck* v. *Forest Service*, 661 F.3d 969, 975 (8th Cir. 2011) (holding that it had jurisdiction to review abuse-of-discretion claim because Forest Service

But in this case the Ninth Circuit held, to the contrary, that when there are specific requirements, a court has jurisdiction *only* to review for compliance with those specific requirements, and *does not* have jurisdiction to assess whether an agency decision was arbitrary and capricious. APP. 14-16, discussed in Section I.C below. This version of the "no law to apply" test has also been used by panels in the Fourth and District of Columbia Circuits.[25]

The Third Circuit applies a different rule, one that evaluates concepts not explicitly considered by other circuits.[26]

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regulation provided "standards, albeit broad ones," and then applying § 706(2)(A)).

[25] *Angelex Ltd.* v. *United State*s, 723 F.3d 500, 508 (4th Cir. 2013) ("[e]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations, but they may not review agency action where the challenge is only to the decision itself"); *Milk Train, Inc.* v. *Veneman*, 310 F.3d 747, 750-752 (D.C. Cir. 2002) (court does not have jurisdiction to review for abuse of discretion an agency decision to cap the amount of production eligible for subsidy, but it does have jurisdiction to review same decision for claim that agency was providing subsidy to cover losses in years other than the prior year).

[26] *Raymond Proffitt Found.* v. *U.S. Army Corps of Engineers*, 343 F.3d 199, 205 (3d Cir. 2003) (when considering claim of unreviewability, Third Circuit considers "whether: 1) the action involves broad discretion, not just the limited discretion inherent in every agency action; 2) the action is the product of political, military, economic, or managerial choices that are not readily subject to judicial review; and 3) the action does not involve charges that the

Cases interpreting the "no law to apply" standard, therefore, can be sorted into five groups: those that find jurisdiction under the APA or from vague statutory purposes, those that refuse jurisdiction when there are no specific requirements, those that review for compliance both with specific requirements and with the arbitrary-and-capricious standard of the APA, those that review for compliance only with the specific requirements, and those in the Third Circuit.

The main issue in this petition—when a court has jurisdiction to review a discretionary agency decision for compliance with the arbitrary-and-capricious standard of APA § 706(2)(A)—is fundamental to administrative law. Courts, agencies, and litigants all deserve a clear and *uniform* national rule on jurisdiction. Perpetuating the existing situation, in which a rule that cannot be objectively applied gives some people their day in court and deprives others of that benefit, would not be consistent with fairness or due process.

Despite the complexity of these circuit splits, the jurisdiction problem can readily be resolved with a single solution, as explained in Section I.E below.

The petition for writ of certiorari should be granted.

B. The Issue Is Nationally Important

Many statutes provide an agency with a broad grant of authority to issue permits or enter into leases. The issue in this case affects how courts will

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agency lacked jurisdiction, that the decision was motivated by impermissible influences such as bribery or fraud, or that the decision violates a constitutional, statutory, or regulatory command").

determine whether they have jurisdiction to review agency action under all of these statutes.

Several of the statutes apply nationally, or to vast areas of the West. The National Park Service's organic act, for example, provides the Secretary of the Interior broad authority to enter into leases.[27]

The Taylor Grazing Act provides broad authority to the Secretary of the Interior to issue permits to graze livestock.[28] The Ninth and Tenth Circuits have split on whether a court has jurisdiction to review decisions made under this provision. *Compare Mollohan* v. *Gray*, 413 F.2d 349, 352 (9th Cir. 1969) (no jurisdiction) *with Diamond Ring Ranch, Inc.* v. *Morton*, 531 F.2d 1397, 1406 (10th Cir. 1976) (jurisdiction).

The Secretary of Agriculture is authorized to permit use of land within the national forests for hotels.[29] The Ninth and Tenth Circuits have also

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[27] "[T]he Secretary of the Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities", which includes "enter[ing] into a lease with any person or governmental entity for the use of buildings and associated property administered by the Secretary as part of the National Park System." 16 U.S.C. § 1a-2(k).

[28] "The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law." 43 U.S.C. § 315b.

[29] "The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and

split on whether a court has jurisdiction to review agency decisions made under this provision. *Compare Ness*, 512 F.2d at 706 (Ninth Circuit, no jurisdiction) *with Sabin*, 515 F.2d at 1065 (Tenth Circuit, jurisdiction); *see Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 813 (9th Cir. 1987) (noting that *Sabin* is "[c]ontra" to *Ness*), reversed on other grounds, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989).)

Many other statutes provide broad grants of authority, which have produced additional circuit splits on the question of jurisdiction. For example, the Seventh Circuit has split with the Eighth and Ninth Circuits on whether a court has jurisdiction to review the use of a "procedural device" in immigration cases.[30] The District of Columbia Circuit has split with the Eighth Circuit on whether a court has jurisdiction to review military waiver determinations.[31] The "no law to apply" test is unworkable, and needs to be replaced.

C. This Case Provides An Excellent Opportunity To Consider The Issue

This case raises all the issues that the circuits have split on, as identified in Section I.A above.

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conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests … for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety." 16 U.S.C. § 497.

[30] *Vahora*, 626 F.3d at 917 (Seven Circuit notes disagreement with Eighth and Ninth Circuits).

[31] *Dickson*, 68 F.3d at 1401 n.5 (District of Columbia Circuit notes implicit split with Eighth Circuit).

The court specifically invoked the "no law to apply" test. It asserted that § 701(a)(2) applies 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion'" and that the exception is "for circumstances where there is 'no law to apply'". APP. 14, quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) and *Webster* v. *Doe*, 486 U.S. 592, 599 (1988).

Drakes Bay argued in its briefs that the agency decision was an abuse of discretion in violation of APA § 706(2)(A). The dissent would have ruled in favor of Drakes Bay because the government's decision "relied on factors which Congress has not intended it to consider", and because the government made a "legally erroneous interpretation of the controlling statute". APP. 47, 49, quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Safe Air for Everyone* v. *EPA*, 488 F.3d 1088 (9th Cir. 2007); *see Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) (when making a discretionary decision, agency "must confront the … question free of [its] mistaken legal premise"); *see also* APP. 48 (noting that the majority did not argue that the government's interpretation of the 1976 Point Reyes Wilderness Act was correct).

The panel conceded that it had jurisdiction to determine, among other things, whether the government had complied with "applicable procedural restraints" such as NEPA. APP. 16. But even though there was law to apply, the panel held that it did not have jurisdiction to consider an APA claim of abuse of discretion:

> [E]ven where the substance or result of a decision is committed fully to an agency's discretion, "a federal court has

> jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." In such circumstances, a federal court lacks only jurisdiction to review an alleged abuse of discretion regarding "the making of an informed judgment by the agency."

APP. 14-15, quoting *Ness*, 512 F.2d at 715; *see* APP. 14 ("we agree … that we lack jurisdiction to review the Secretary's ultimate discretionary decision whether to issue a new permit").

Also, the panel reached an illogical and extreme result. How can a court lack jurisdiction because there is no law to apply, but retain jurisdiction to determine compliance with those laws that do apply? Or, in the words of the court, how can a decision be "committed fully to an agency's discretion" when there are "legal mandates or restrictions" limiting that discretion?

The holding implies that courts *never* have jurisdiction to consider whether an agency decision is arbitrary and capricious or an abuse of discretion under APA § 706(2)(A). If a court cannot conduct arbitrary-and-capricious review either when *there is* law to apply, or when *there is not* law to apply, then a court can *never* conduct arbitrary-and-capricious review. The Ninth Circuit's holding, therefore, would write § 706(2)(A) out of the APA.

The petition for writ of certiorari should be granted.

D. The Circuit Splits Can All Be Resolved By Setting Aside The "No Law To Apply" Standard

The "no law to apply" test is neither an accurate nor a helpful way to make the determination of whether a decision is committed to agency discretion. The circuit splits identified in Section I.A above can all be resolved by setting aside the test.

The usual rationale behind "no law to apply" is that a "governing statute confers such broad discretion as to essentially rule out the possibility of abuse". *Amador County* v. *Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011). This assertion rarely holds up on close inspection. For example, "[i]t is not really true that a court would have no meaningful standard against which to judge the agency's exercise of discretion" under the National Security Act of 1947. *Webster* v. *Doe*, 486 U.S. at 610 (Scalia, J., dissenting) (internal quotation marks omitted). The standard established by that act, although broad,

> at least excludes [job] dismissal out of personal vindictiveness, or because the Director wants to give the job to his cousin. Why … is respondent not entitled to assert the presence of such excesses, under the "abuse of discretion" standard of § 706?

Id.

Here, there are also meaningful standards to apply. As the dissent concluded, the government relied on factors that Congress did not intend it to consider, and misinterpreted the statute it relied on. *See* Section I.C above. Drakes Bay asserts that the government misrepresented the scientific facts. *See* Sections E and G in the Statement of the Case above.

A broad grant of authority should not generally be interpreted as a license to abuse that authority by misrepresenting facts, misinterpreting law, or acting irrationally. If an agency provided a wholly irrational reason for a decision—for example, that the moon was made of green cheese—a court should have no trouble finding jurisdiction to set aside that decision. *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action'", quoting *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43).[32]

Courts have confused the "no law to apply" test with the real question, which is whether (in the words of § 701(a)(2)) the action is "committed to agency discretion by law". The test should be set aside.

E. This Court's Analytical Framework Best Resolves The Split

The confusion caused by "no law to apply" can readily be eliminated by replacing that standard with an analytical framework developed by this Court. The framework begins with the presumption

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[32] *See also* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 707-708 (1990) (characterizing assertions that "the agency misunderstood the facts, that it departed from its precedents without a good reason, that it did not reason in a minimally plausible fashion, or that it made an unconscionable value judgment" as "'pure' abuse of discretion theories", and arguing that "[p]ure abuse of discretion inquiries do not depend on the contents of the statute under which an agency acts; therefore, it is illogical to suppose that the lack of 'law to apply' makes the inquiries unworkable").

that all final agency actions are subject to judicial review, then considers (1) whether there is evidence that Congress did not intend to have the agency's decision judicially reviewed, and (2) whether judicial review should be foreclosed because of common-law considerations.

Before considering the jurisdictional question, however, a court can consider whether the plaintiff has stated a claim. If the complaint alleges nothing more than "a faulty weighing of permissible policy factors", in the words of the dissent below (APP. 49), then a court can find that the action was not in violation of § 706(2)(A), and can dismiss the complaint for failure to state a claim.[33]

When a complaint alleges a truly arbitrary and capricious action, then the analysis should begin with the APA, which provides a right of review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see also* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). There is a "strong presumption that Congress intends review of admin-

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[33] *See Chehazeh* v. *AG of the United States*, 666 F.3d 118, 125 n.11(3d Cir. 2012) (noting that it is not the APA, but rather the "'federal question' statute, 28 U.S.C. § 1331, [that] 'confer[s] jurisdiction on federal courts to review agency action'" (quoting *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977)), and concluding that dismissal when a case is committed to agency discretion is best characterized as a failure to state a claim under the APA).

istrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

This presumption may be overcome by evidence of Congressional intent to the contrary. It "takes 'clear and convincing evidence' to dislodge the presumption". *Kucana* v. *Holder*, 558 U.S. 233, 251-252 (2010), quoting *Bowen* at 671. The presumption also "'may be overcome by inferences of intent drawn from the statutory scheme as a whole.'" *Sackett* v. *EPA*, 132 S. Ct. 1367, 1372-1373 (2012), quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

Even when Congressional intent is not clear, a court may refuse jurisdiction for reasons of tradition and policy. "Over the years, [this Court has] read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts *traditionally* have regarded as committed to agency discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993) (emphasis added, internal quotation marks omitted). In *Lincoln*, this Court emphasized the reasons of tradition and policy behind those cases holding that some categories of decisions are committed to agency discretion:

> In *Heckler* itself, we held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2). An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," and for this and other good reasons, we concluded, "such a decision has *traditionally* been 'committed to agency discretion[.]'" Similarly, in *ICC* v. *Locomotive Engineers*, we held that

> § 701(a)(2) precludes judicial review of another type of administrative decision *traditionally* left to agency discretion, an agency's refusal to grant reconsideration of an action because of material error. … Finally, in *Webster*, we held that § 701(a)(2) precludes judicial review of a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, an area of executive action "in which courts have long been hesitant to intrude."

Lincoln, 508 U.S. at 191-192, emphasis added, citations omitted, referring to *Heckler* v. *Chaney*, *supra*; *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987); and *Webster* v. *Doe*, *supra*. These cases are part of the common law of unreviewable agency action. *Webster*, 486 U.S. at 610-611 (Scalia, J., dissenting).

This analytical structure puts the focus where it belongs—on Congressional intent and on matters of tradition and policy—rather than on the unhelpful question of whether a court has "no law to apply" when an agency acts under a broad grant of authority.

The petition for writ of certiorari should be granted.

II. THE CIRCUITS ARE SPLIT ON WHETHER NEPA APPLIES TO "CONSERVATION EFFORTS"

The Ninth and Tenth Circuits have split on whether NEPA applies to "conservation efforts". The holding below effectively brings the Ninth Circuit into conflict with the Fifth, Eleventh, and District of

Columbia Circuits, which hold that NEPA applies even to actions that have solely beneficial effects.

NEPA requires a "detailed statement" (now referred to as an "environmental impact statement" or "EIS") to be prepared for "major Federal actions significantly affecting the quality of the human environment". 42 U.S.C. § 4332(2)(C). In *Douglas County*, the Ninth Circuit held that NEPA does not apply to the designation of critical habitat as required by the Endangered Species Act. *Douglas County* v. *Babbitt*, 48 F.3d 1495, 1507-1508 (9th Cir. 1995). The Ninth Circuit concluded that an EIS "is not necessary for federal actions that conserve the environment". *Id*. at 1505. These conservation actions, the court explained, are "federal actions that do nothing to alter the natural physical environment." *Id*.

The Tenth Circuit rejected *Douglas County*, and held, directly to the contrary, that NEPA applies to the designation of critical habitat. *Catron County Bd. of Comm'rs* v. *United States Fish & Wildlife Serv*., 75 F.3d 1429, 1436 (10th Cir. 1996). The Tenth Circuit disagreed with the Ninth Circuit's assumption that the agency's decision did nothing to alter the environment:

> We likewise disagree with [*Douglas County*] that no actual impact flows from the critical habitat designation. Merely because the Secretary says it does not make it so. The record in this case suggests that the impact will be immediate and the consequences could be disastrous.

Id.

In this case, the Ninth Circuit has greatly extended *Douglas County*. The panel concluded that destroying the oyster farm "is essentially an environmental conservation effort, which has not triggered NEPA in the past." APP. 30. This destruction qualifies as an environmental conservation effort, the panel concluded, because it "is a step toward restoring the 'natural, untouched physical environment'". *Id.*, quoting *Douglas County* at 1505.

There are at least five flaws in this conclusion. First, it arises from a romantic notion rather than the facts. Oysters and other shellfish are native to Drakes Estero, and were abundant before they were fished out. Farming oysters "is a step towards restoring" the natural oyster populations; destroying the farmed oysters is not.

Second, the panel seems to think that "conservation efforts" are always benign. But one could take "a step toward restoring the natural, untouched physical environment" by blowing up Hoover Dam, which forms Lake Mead (the largest reservoir in the Nation) and stores water for use in California, Arizona, and Nevada. Blowing up Hoover Dam would destroy the reservoir-adapted biota upstream, inundate people and homes downstream, and leave cities and agricultural districts thirsting for a supply of water. Here, the government's decision will, if implemented, harm local water quality (Drakes Bay's oysters filter the water), the resident workers' families (who would be kicked out of their homes), and California's shellfish consumers (Drakes Bay provides 16-35% of the oysters har-

vested in California).[34] Because this "conservation effort" and many others will cause severe adverse effects, there should be no doubt that at least some "conservation efforts" are subject to NEPA.

Third, the Ninth Circuit's rationale exposes a deep misunderstanding of NEPA. According to the court, "[t]he Secretary's decision to allow the permit to expire … protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." APP. 31, internal quotation marks omitted. But NEPA is not intended to "foreclose" human impacts; it is intended to promote conditions in which people and nature co-exist *in productive harmony*:

> The Congress … declares that it is the continuing policy of the Federal Government … to use all practicable means and measures … to create and maintain conditions under which man and nature can exist in productive harmony …

42 U.S.C. § 4331(a). To the many local supporters who are devoted to this concept, the oyster farm is the apotheosis of "conditions under which man and nature can exist in productive harmony". *See* Sections A-C in the Statement of the Case above.

Fourth, the Ninth Circuit's holding undermines the goal of informed decision-making that

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[34] Although the Ninth Circuit asserted that destroying the oyster farm would produce only minor effects, the Park Service's final EIS reported that this destruction "could result in long-term major adverse impacts on California's shellfish market", and in adverse effects on water quality, eelgrass, fish, birds, harbor seals, and special status species. SER 53-55, 57-58, 62-63, 66, 74.

NEPA was intended to promote. If federal agencies can avoid NEPA review simply by labeling an action as an "environmental conservation effort", then they will have an incentive to apply the label to as many projects as they can. They will also have an incentive to support their labeling with factual findings and demand deferential review. Many interested parties, including industry and environmental groups, may find themselves unable to challenge agency actions.

Fifth, and finally, by holding that NEPA does not apply to "conservation efforts", and implying that these efforts produce only beneficial environmental effects, the Ninth Circuit brings itself into conflict with the Fifth, Eleventh, and District of Columbia Circuits, which have held that NEPA applies to actions that have solely beneficial environmental effects. The Ninth Circuit acknowledges these holdings and the inter-circuit conflict. APP. 31 n.11; *see also Friends of Fiery Gizzard* v. *Farmers Home Admin.*, 61 F.3d 501, 504-505 (6th Cir. 1995) (Sixth Circuit holds to the contrary).

The Ninth Circuit asserts that this authority from the Fifth, Eleventh, and District of Columbia Circuits "is not persuasive here" because those cases "dealt with major federal construction projects" and "none of those cases addressed environmental conservation efforts". APP. 31 n.11. But NEPA makes no distinction that would bring those *construction* projects, but not this *destruction* project, within its scope. If there is a principled reason for excluding conservation projects from NEPA, it must be that those projects are assumed to have solely beneficial effects—which brings this case squarely into conflict with the Fifth, Eleventh, and District of Columbia Circuits.

The petition for writ of certiorari should be granted.

III. THE NINTH CIRCUIT HAS SPLIT IN PRINCIPLE WITH THE DISTRICT OF COLUMBIA CIRCUIT OVER THE HARMLESS-ERROR RULE

Here, the Ninth Circuit held that the government's non-compliance with NEPA should be excused as harmless error because the government would have made the same decision if it had complied with NEPA. The District of Columbia Circuit, however, has rejected an agency's argument that its error was harmless because it would have made the same decision anyway.

In the words of the Ninth Circuit, the government "acknowledges that compliance with NEPA was less than perfect". APP. 32. Immediately after the final EIS was made public, Drakes Bay informed the Park Service that the EIS's conclusions about noise (referred to by the government as "soundscape") were defective. APP. 33. Drakes Bay also asserted that "the absence of the thirty-day comment period denied it an opportunity to fully air its critique". *Id.* During the thirty days after the final EIS was made public, Drakes Bay discovered and reported that the final EIS misrepresented the conclusions of the government's harbor-seal expert. *See* Sections E-F in the Statement of the Case above.

The Ninth Circuit held that "Drakes Bay has shown no prejudice from these claimed violations." APP. 32. It did not matter that the data are flawed, the court reasoned, because the government "specifically referenced [Drakes Bay's report that the noise data were defective] and stated that he did not rely

on the 'data that was asserted to be flawed.'" APP. 34.

The District of Columbia Circuit has rejected an agency's argument that its error was harmless because it would have made the same decision anyway. *Gerber* v. *Norton*, 294 F.3d 173, 183-184 (D.C. Cir. 2002). In *Gerber*, the government had not provided an environmental group with a map that was needed for the group's comments on the proposed action. *Id*. at 182. The government argued that this error was harmless because it (1) knew about the comments the group would have made before it made its decision, (2) reaffirmed its decision before the group filed suit, and (3) would not have changed its decision had the group submitted its comments before the decision. *Id*. at 182-184. The court rejected all three arguments. It reasoned that if "the agency may simply thank them … and announce that it has nonetheless reached the same conclusion", that would "eviscerate the [Endangered Species Act's] notice requirements". *Id*. at 184.

If an agency could protect itself against NEPA litigation simply by saying that it would make the same decision regardless of any defects in the EIS, then every agency would make this statement, and NEPA litigation would be at an end. But that cannot be the law. NEPA is designed to force agencies to disclose the environmental consequences of their decisions, even when the agencies have no intention of changing their pre-EIS decision. When an EIS falsely reports that significant environmental harm will result from the granting of a permit application, then the permit applicant has suffered prejudice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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