No. 13-15132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA;
BAY PLANNING COALITION,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; UNITED STATES NATIONAL MARINE FISHERIES SERVICE; REBECCA M. BLANK, in her official capacity as Acting Secretary for the United States Department of Commerce; SAMUEL D. RAUCH, III, in his official capacity as Acting Assistant Administrator for the United States National Marine Fisheries Service,
Defendants-Appellees,

CENTER FOR BIOLOGICAL DIVERSITY,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Honorable Phyllis J. Hamilton, District Judge

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA, ET AL.'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Appellants Building Industry Association of the Bay Area and Bay Planning Coalition, nonprofit organizations organized under the laws of California, hereby state that neither one of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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RULE 35 STATEMENT

Plaintiffs-Appellants Building Industry Association of the Bay Area and Bay Planing Coalition (the "Appellants") submit that rehearing en banc is warranted in this case, for two reasons. First, the panel's decision involves a question of exceptional importance because virtually the entire West Coast of the United States has been designated by the National Marine Fisheries Service ("NMFS" or the "Service") as critical habitat for a species known as the Southern Distinct Population Segment of the Green Sturgeon ("Green Sturgeon"), under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* ("ESA"), thereby substantially affecting the lives and businesses of millions of Americans residing or working in the states of Washington, Oregon, and California. *See* Fed. R. App. P. 35(b)(1)(B).

Second, the panel's decision that the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), does not apply to critical habitat designation under the ESA directly conflicts with an existing opinion of the Tenth Circuit that NEPA applies to ESA critical habitat designations. *See Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429 (10th Circuit 1996). *See also* Fed. R. App. P. 35(b)(1)(B). Because there is an overriding need for uniformity among the circuits regarding whether the nationally applicable NEPA applies to the nationally applicable ESA, the conflict is an appropriate ground for rehearing en banc. *See* Circuit Rule 35-1.

BACKGROUND AND SUMMARY OF ARGUMENT

NMFS exceeded its authority when it promulgated a regulation that sweeps most of the Pacific Coast of the United States into the regulatory regime of the ESA by designating the area as "critical habitat" for the Green Sturgeon. The regulation, 74 Fed. Reg. 52,300 (Oct. 9, 2009), codified at 50 C.F.R. § 226.219, designates approximately 11,421-square miles of marine habitat, 897-square miles of estuarine habitat, and hundreds of additional miles of riverine habitat in the states of Washington, Oregon, and California. In some areas the designated critical habitat extends for many miles inland through riverine systems. *Id.* at 52,300, 52,349. (AR 022159, 02208). The area encompasses the entire marine coastlines of the states of Washington and Oregon, approximately half of the marine coastline of California, and numerous riverine systems in all three states. *Id.* The economic impacts of the designation affect millions of Americans on the West Coast.

In enacting the ESA, Congress declared its intent to achieve species conservation but not at the cost of creating needless economic dislocation. "We think it readily apparent that another objective (if not indeed the primary one) [of the ESA] is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennet v. Spear*, 520 U.S. 154, 176-77 (1997). Reflecting this concern, ESA Section 4(b)(2) requires the government to consider the economic impacts of designating critical habitat by

balancing the conservation benefits of designation against the economic benefits of exclusion from designation. *See* 16 U.S.C. § 1533(b)(2).

Here, the Defendants ignored the Supreme Court's caution against overzealous administration of the ESA. In areas the government rated as "high conservation value areas" for the Green Sturgeon, it refused to balance the benefits of designation against the benefits of exclusion. But there is no statutory exception for areas the government chooses to designate as "high value conservation areas." The failure to balance the benefits in those areas is a fatal flaw in the final rule.

In addition, NMFS impermissibly failed to take the requisite NEPA "hard look" at the implications of the critical habitat designation. NMFS has acknowledged that it did not attempt to comply with NEPA when designating critical habitat for the Green Sturgeon. 74 Fed. Reg. at 52,322 (AR 022181). But NEPA requires each federal agency to make "informed, carefully calculated decisions when acting in such a way as to affect the environment." *Catron County*, 75 F.3d at 1437. By refusing to conduct any NEPA analysis, NMFS ignored the statutory mandate to fully consider the consequences of critical habitat designation, including the potential short and long term cumulative impacts and alternatives.

Although twenty years ago a panel in this Circuit held that NEPA does not apply to ESA critical habitat designations, *Douglas County v. Babbit*, 48 F.3d 1495, 1507 (9th Cir. 1995), a year later the Tenth Circuit held that it does. *Catron County*,

75 F.3d at 1435-36. A more recent decision by the Tenth Circuit followed *Catron County* in holding that NEPA applies to critical habitat designations. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220 (10th Cir. 2002) (U. S. Fish and Wildlife Service was required to prepare an EIS for critical habitat designation of the silvery minnow.). An even more recent decision of the United States District Court for the District of Columbia followed *Catron County's* lead. *Cape Hatteras Access Pres. Alliance v. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004) (because critical habitat designation significantly affects the human environment, government must "determine the extent of the impact in compliance with NEPA").

The panel in the instant case did not have the option of examining and adopting the reasoning of the cases from the Tenth Circuit and district court in the District of Columbia because it was bound by a prior panel's decision. Slip op. at 19 (*See* Attachment). *See Hart v. Masanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved unless overruled by the court itself sitting en banc, or by the Supreme Court."). That is why the Ninth Circuit panels that decided *Bear Valley Mutual Water Co. v. Jewell*, No. 12-57297, 2015 WL 3894308 (9th Cir. June 25, 2015), and *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090 (9th Cir. 2014), were not at liberty to depart from the *Douglas County* reasoning. But this Court sitting en banc is free to reexamine *Douglas County*. Just as importantly, en banc review will aid the administration of

justice in that the inter-circuit conflict regarding NEPA potentially could be reconciled before it appears on the steps of the Supreme Court. *See generally*, Douglas H. Ginsberg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1011 (1991).

ARGUMENT

I

THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE

A. Critical Habitat Designation for the Green Sturgeon Encompass a Vast Area of the Western United States and Affects Millions of Americans

1. Most of the Pacific Coast Has Been Designated as Critical Habitat for the Green Sturgeon, Creating Substantial Adverse Economic Impacts

NMFS's critical habitat designation for the Green Sturgeon affects almost the entire Pacific Coast of the United States, from the northwestern tip of the State of Washington, southward through the entire State of Oregon, terminating approximately halfway down the coast of California, at Monterey. In some areas, the designated critical habitat extends for many miles inland through riverine systems. 74 Fed. Reg at 52,300, 52,349. NMFS has estimated that the adverse economic impacts could reach approximately $550 million per year or more, affecting such diverse activities as dredging, construction, power plant and dam operation, agricultural activity, and

fishing. *See* Economic Analysis of the Impacts of Designating Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon (Sept. 28, 2009) (ER 76, 80, 86, 89-90) (AR 010517, 010629, 010635, 010646-010647).

Among other things, the final rules designating critical habitat impact the ability of the Appellants' members to use and develop their properties throughout the San Francisco Bay Area, because much of the area has been designated by NMFS as critical habitat for the Green Sturgeon. The Appellants' members depend on the designated areas, including those considered by NMFS to be "high value conservation areas," for their livelihoods. Such areas are now no longer available for their use and development without the costs attendant to the "consultation" requirements and "take" liabilities associated with the "destruction or modification" of the designated critical habitat under the ESA. Campos Decl. ¶¶ 6, 8; Rover Decl. ¶¶ 6, 8; Coleman Decl. ¶¶ 6, 8; Dutra Decl. ¶¶ 6, 8-9. The same applies to others similarly situated throughout the West Coast of the United States. The issue is one of "exceptional importance" under Rule 35 because the panel decision upholding a rule of such broad scope and economic impact is an "issue of great moment to the community." *See* Ginsburg & Falk, *supra*, at 1025.

2. Foreclosing Judicial Review of a Rule Impacting Almost the Entire Pacific Coast Is an Issue of Exceptional Importance

The panel held that judicial review is not available with regard to NMFS's decision "not to exclude" large areas of the Western United States from critical habitat designation. That holding is of exceptional importance to the residents of Washington, Oregon, and California, three states comprising the bulk of the population subject to the jurisdiction of this Court.

"*[U]bi jus, ibi remedium* - for every right, [there is] a remedy." *Towns of Concord, Norwood & Wellesly, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). This legal principle is an integral part of the due process guaranteed by the Constitution. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2004). The fundamental right to have an independent judicial evaluation of grievances against government action lies at the heart of our system of jurisprudence, and "[a]gencies may not use shell games to elude review." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000).

The panel held that NMFS's decision under ESA Section 4(b)(2) "not to exclude" areas from critical habitat is not judicially reviewable, citing as authority it's decision made approximately two weeks earlier, in the *Bear Valley* case. Slip op. at 17-19 (Attachment) . But judicial review is presumed unless a statute explicitly

prohibits it or review is "committed to agency discretion by law" because there is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). In the context of the "no law to apply" standard, it must be "unmistakable" that there is no meaningful standard against which to judge the agency action. *Sierra Club v. Peterson*, 705 F.2d 1475, 1479 (9th Cir. 1983). Accordingly, because decisions "not to exclude" areas from critical habitat under Section 4(B)(2) of the ESA are not explicitly precluded from judicial review, review is available unless it is unmistakable that there is no law to apply. *Id.*

The Supreme Court addressed the issue in *Heckler v. Chaney*:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect [but] when an agency *does* act . . . that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

470 U.S. 821, 832 (1985) (emphasis in original). Here, NMFS *acted* when it designated critical habitat for the Green Sturgeon so as to "exercise its coercive power . . . over [Petitioners'] property rights." *Id.* Under *Heckler*, that action "can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* The artificial distinction made by the panel between inclusion decisions and decisions "not to exclude" has no place under *Heckler*, because in either case the government is deciding which areas will or will not be part of newly designated critical habitat. *See*

Slip op. at 17-18. Those decisions, area-by-area, are subject to judicial review under *Heckler*, because they constitute governmental action and not governmental inaction. Accordingly, regardless of the substantive outcome of the decisionmaking process, both exclusion decisions and inclusion decisions (or, in the terminology of the panel, decisions "not to exclude") should be reviewable on the issue of whether the government acted arbitrarily or exceeded it rulemaking power. *Heckler*, 470 U.S. at 832.

The panel relies on the fact that the second sentence of Section 4(b)(2) uses permissive language: "may exclude areas from designation". Slip. op. at 18. But simply because the statute uses permissive language does not mean that decisions "not to exclude" are unreviewable. As the panel itself acknowledges, "preclusion of judicial review is not to be lightly inferred; it must be *demonstrated* that Congress intended an agency action to be unreviewable." *Id.* (internal quotation marks and citation excluded; emphasis added). Here, no such demonstration was made, either by the parties or by the panel.

Contrary to the panel's suggestion, the use of permissive language ("may") in the second sentence of Section 4(b)(2) cannot, of itself, make decisions "not to exclude" unreviewable. *See* Slip op. at 18. For example, in *Barlow v. Collins*, 397 U.S. 159, 165-66 (1970), the Supreme Court held that a statute authorizing the Secretary of Agriculture to promulgate regulations "as he may deem proper" does not

preclude judicial review. Moreover, this Court held in *Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563, 565 (9th Cir. 1984), that a statute authorizing the Secretary of the Interior to disapprove tribal ordinances for "cause" does not preclude judicial review. The D.C. Circuit agrees. *See Envt'l Defense Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (intent to preclude judicial review "cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms"). A district court in this Circuit articulated the concept as follows: "The fact that statutory authority involves some degree of discretion is of no consequence since the agency action under those conditions may be reviewed and set aside for abuse of discretion." *City & County of San Francisco v. United States*, 443 F. Supp. 1116, 1122 (N.D. Cal. 1977).

When a petitioner is denied access to the courts, the issue is one of "exceptional importance" under Rule 35 because the ability to obtain redress of grievances is an issue of great moment to the community, especially where, as here, the community includes a vast and heavily populated geographical area within the jurisdiction of this Court. Given the panel's decision, persons in this community now have no recourse against "not to exclude" decisions that may cause "needless economic dislocation by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennet*, 520 U.S. at 177.

3. Whether the Government Should Have Unbridled Discretion To Determine the Manner in Which It Considers Economic Impacts Under Section 4(b)(2) Is an Issue of Exceptional Importance

The panel relied heavily upon a 2008 legal opinion of the Solicitor of the Department of Interior , who opined that the extent to which economic impacts are taken into account in a critical habitat designation is wholly within the agency's discretion. Citing *Skidmore v. Swift & Co.*,323 U.S. 134, 140 (1944), the panel stated that the Solicitor's "opinion is entitled to *Skidmore* deference." However, "interpretations contained in formats such as opinion letters are entitled to respect . . . but *only* to the extent that those interpretations have the power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (emphasis added) (internal citations omitted). The Solicitor's Opinion is far from persuasive.

It states that the need to consider economic impacts of critical habiat designations, as required by ESA Section 4(b)(2), is satisfied when the government gives "careful thought" to those impacts. Solicitor's op. at 14-16. The type and extent of the "careful thought" is left entirely to the government's discretion. *Id.* The Solicitor's Opinion proffers no more than a "trust me" standard, thereby manufacturing for the government almost absolute discretionary authority over the manner in which it will consider economic impacts of any and all critical habitat designations, no matter the nature and extent of those impacts. Congress would not

have made the avoidance of "needless economic dislocation" a "primary" objective of the ESA, *Bennet*, 520 U.S. at 176-77, only to provide the administrating agency with unfettered discretion as to how that objective would be achieved. *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) ("[T]he meaning of a [statutory] word must be ascertained in the context of achieving particular objectives."). Given the enormous *actual* economic impacts acknowledged by the government associated with the critical habitat designation for the Green Sturgeon, the panel's adoption by proxy of the Solicitor's "careful thought" standard is an issue of exceptional importance meriting en banc rehearing.

II

THE PANEL OPINION DIRECTLY CONFLICTS WITH AN EXISTING OPINION BY ANOTHER COURT OF APPEALS

NMFS has acknowledged that it did not undertake to comply with NEPA in designating critical habitat for the Green Sturgeon. ER 51. 74 Fed. Reg. at 52,322 (AR 022181). Relying in part on the panel decision in *Douglas County*, 48 F.3d at 1507, and in part on its own decision in *Bear Valley*, 2015 WL 3894308, at *14, the panel in the instant case held that NEPA does not apply to critical habitat designation. Slip op. at 20 (Attachment).

The Tenth Circuit's decision in *Catron*, 75 F.3d 1429, directly conflicts with the panel decisions in *Douglas County*, *Bear Valley*, and the instant case. Because

there is an overriding need for uniformity among the circuits regarding whether the nationally applicable NEPA applies to critical habitat designations under the nationally applicable ESA, the conflict is an appropriate ground for granting this petition for rehearing en banc. *See* Fed. R. App. P. 35(b)(1)(B); Circuit Rule 35-1.

"Courts have approved noncompliance with NEPA . . . after finding either (i) an unavoidable conflict between the two statutes that renders compliance with both impossible; or (ii) duplicative procedural requirements between the statutes that essentially constitute "functional equivalents," rendering compliance with both superfluous." *Catron County*, 75 F.3d at 1435. There is no unavoidable conflict between the ESA and NEPA. And they are not functional equivalents.

Although both statutes seek to protect the environment, NEPA paints with a broader brush, because it seeks to protect the overall natural and human environment, while the ESA focuses specifically on the narrow issue of protecting a species at risk. Those goals do not conflict, because compliance with one does not require noncompliance with the other. *Id*. And although designation of critical habitat under the ESA may partially fulfill NEPA's goal of identifying and evaluating the environmental impacts of proposed federal agency actions, "[p]artial fulfillment of NEPA's requirements . . . is not enough." *Id*. at 1437. That is because NEPA requires federal agencies to make carefully calculated, well-informed decisions regarding the overall environmental consequences of a proposed federal action and not just the

impacts to one species. *Catron County*, 75 F.3d at 1438. Just as importantly, NEPA mandates a full review of the alternatives to a proposed action and dissemination of relevant information to the general public potentially affected by an agency's decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). By contrast, the limited purpose of designating critical habitat to protect a species under the ESA could severely curtail future federal actions likely to affect the designated area, risking potential harm to environmental goals other than protection of a specific species. *See* 16 U.S.C. §§ 1531(b), 1536(a)(2). Here, neither NMFS nor the public could even come close to knowing the full environmental consequences and potential alternatives to the critical habitat designation unless and until the NEPA process is undertaken and completed.

The implications of the split between the circuits on this issue are substantial. If NEPA compliance is mandated for critical habitat designations in the Tenth Circuit but not in this Circuit, the public within the jurisdiction of the Tenth Circuit will receive the benefits of informed decisionmaking, alternatives analysis, and public participation afforded by NEPA, while the public in this Circuit will not, whenever critical habitat decisions are made. The question takes on even greater significance in the context of a case in which, as here, the geographic area is vast and affects millions of Americans, making the issue one of exceptional importance if there ever was one.

CONCLUSION

For these reasons, the Appellants respectfully request that the Court grant this petition for reconsideration en banc.

DATED: August 11, 2015.

Respectfully submitted,

M. REED HOPPER
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Counsel for Building Industry Association of the Bay Area and Bay Planning Coalition

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