No. 13-1244

IN THE
Supreme Court of the United States

DRAKES BAY OYSTER COMPANY, *et al.*,

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

AMICUS CURIAE BRIEF OF THE MONTE WOLFE FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIÆ* [1]

The Monte Wolfe Foundation is a California non-profit public benefit corporation with a mission to protect log cabins in our western mountains.[2] Log cabins are an iconic American vernacular architecture. However, it is not unknown for officials within federal agencies to decide, unilaterally and without notice, to burn or otherwise demolish such historic resources. Although historic resources generally benefit from a review process under the National Historic Preservation Act of 1966 (NHPA), some of them,

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1: Pursuant to Supreme Court Rule 37.6, Amicus Monte Wolfe Foundation ("Amicus") affirms that (1) the present amicus brief was authored entirely by counsel for Amicus, and not authored in whole or in part by counsel for a party nor by anyone else, and (2) no counsel or party other than Amicus and its counsel made any monetary or other material contribution to the preparation and submission of the present amicus brief.

Amicus further affirms, pursuant to Rule 37.1, that all counsel of record received timely notice of the intent to file the present brief and all gave written consent to its filing.

2: A core mission of the Foundation is to preserve the Monte Wolfe Cabin, a specific log cabin located within the Mokelumne Wilderness Area in the Central Sierra Nevada Mountains. However, since the Forest Service has determined that the Monte Wolfe Cabin is eligible for listing on the National Register of Historic Places, it is under the aegis of the National Historic Preservation Act. of 1966 (NHPA), specifically its § 106 (16 U.S.C. § 470f). The Monte Wolfe Cabin itself is thus not directly at risk from the consequences of the Ninth Circuit decision that prompted the present petition for certiorari.

having gone through NHPA review only to be found ineligible for listing on the National Register of Historic Places, do not benefit from NHPA protection. However, these otherwise unprotected historic resources should benefit from a parallel process under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. § 4321 *et seq.*). One of the goals of NEPA is to "preserve important historic . . . aspects of our national heritage." 42 U.S.C. § 4331(b)(4) [PETITIONERS' APPENDIX, "P.APP." below, p. 171]. The Ninth Circuit decision challenged here would frustrate that goal by imperiling unlisted log cabins within Amicus's scope of concern.

SUMMARY OF THE ARGUMENT

Drakes Bay Oyster Company v. Jewell, 792 F.3d 967 (9th Cir. 2013), P.APP.2-51, holds that there is no NEPA review for the decision to close the oyster farm and destroy its structures:

> [It] is essentially an environmental conservation effort . . . [b]ecause removing the oyster farm is a step toward restoring the "natural, untouched physical environment" [and it] . . . "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose."
>
> *Ibid.* at 984, P.APP.30-31, quoting *Douglas County v. Babbitt*, 48 F.3d 1495, 1505, 1507 (9th Cir. 1995).

The holding, that no NEPA review is needed where agency action seeks to restore a pristine state of nature, appears unique to the Ninth Circuit. It

means that historic resources on Ninth Circuit federal wildlands are endangered because they cannot depend on NEPA for protection. Absent other protection, they may be – indeed, given *Drakes Bay Oyster*'s reading of the intent of NEPA, should be – summarily removed.

Although the NHPA does yeoman's work in protecting the most notable of our nation's federally-owned historic resources, it cannot reach all that are worthy of protection.

Drakes Bay Oyster would have such a disastrous effect on those of us trying to preserve log cabins within our western wildlands that *Drakes Bay Oyster* has transformed us into "other litigants in other situations." And it is precisely our "other situation" that will begin the argument why the petition should be granted.[3]

However, the actual case before the Court also contains an irreplaceable, unique historic resource that would be destroyed if the oyster farm were to be removed, the "hanging cultch" oyster racks of Drakes Estero. How this precious resource slipped between the cracks of an NHPA process will be addressed below, but for purposes of this introduction, it is sufficient to affirm that many

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3 The historic resource argument in support of the question of NEPA review was not raised below until the time of the petition for rehearing. (Compare *Blonder-Tongue Labs. v. Univ. Illinois Foundation,* 402 U.S. 313, 319-320, n.6 (1971).) However, the disastrous impact of *Drakes Bay Oyster* on historic preservation in federal wildlands could well support prudential consideration. Furthermore, there would be no advisory opinion on the argument since Petitioner is actually threatened with the destruction of its own historic resource, the "hanging cultch" oyster racks of Drakes Estero.

valuable historic resources fail to meet NHPA's rigorous standards, and those that do fail are left to the protection of NEPA. Among NEPA's goals is to "preserve important historic . . . aspects of our national heritage." 42 U.S.C. § 4331(b)(4) P.APP.171. The holding in *Drakes Bay Oyster* would prevent NEPA from reaching that goal.

A: *Drakes Bay Oyster*'s implications for federal stewardship of historic resources pose an imminent threat to other litigants in other situations.

The demonstration of the imminent threat that *Drakes Bay Oyster* presents to historic resources in wildlands begins with a hypothetical example:

1: A hypothetical example of *Drakes Bay Oyster*'s threat to historic resources

Imagine a rustic log cabin that has been used since the early decades of the last century by stockmen who drive their herds to the high country every year for summer grazing. The cabin is on federal land. The agency that administers that land follows the advice of historic preservation officials by making an inventory of possible historic resources under its supervision. An historic resources professional evaluates the cabin to determine its eligibility for listing on the National Register. The agency historian finds that it would be eligible, except that several elements defeat the integrity of the resource because they are additions made within the past couple of decades. They are

thus outside the "period of historic significance" of fifty years or more, generally needed to qualify for listing on the National Register. In this hypothetical case, imagine that one non-conforming element consists of recently-installed copper tubing laid down to bring water from a spring to a sink and sideboard.[4] However, the stockmen, who use the cabin every summer, like their water system and do not see the point of removing it. As a result, an historic resource with "impeccable bones" is found ineligible for listing on the National Register.

Since *Drakes Bay Oyster,* this ineligible but valuable resource would receive different treatment depending whether it be in, for example, the Uinta Mountains of Utah and Wyoming, or the Warner Mountains of Oregon and California.

The Tenth Circuit rejects the jurisprudential line that includes *Drakes Bay Oyster*. If the agency administering the land wanted to remove the cabin, it would need a NEPA review that would bring the stockmen in on the decision. NEPA review would also bring in the historic preservation community.

In the Ninth Circuit, *Drakes Bay Oyster* would allow the agency to remove the cabin without any warning. One summer, the stockmen would arrive at their summer camp to find the cabin gone. And the historic preservation community would be confronted with the destruction of yet another irreplaceable historic resource.

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4 This hypothetical is realistic: Just such a copper tubing water system had to be removed from the Monte Wolfe Cabin site before the Forest Service historian could find the Cabin eligible for listing on the National Register.

All of the ineligible historic resources within Ninth Circuit wildlands are under imminent threat.

2: Even if the jurisprudential source of *Drakes Bay Oyster* were still good law, it would only be good in the Ninth Circuit, where the threat is posed.

Drakes Bay Oyster relies upon and enlarges the holding of the 1995 Ninth Circuit opinion, *Douglas County, supra.* *Douglas County*'s innovation was to hold that NEPA review is not triggered by the designation of endangered species habitat under the Endangered Species Act of 1973 (ESA). The rationale was that mere designation does not physically change the environment, and the designating agency cannot be asked to undertake NEPA review "in order to leave nature alone." *Douglas County, supra,* 48 F.3d at 1505.

However, from the beginning, *Douglas County* has been criticized and expressly rejected by other Circuits. The first and best example was *Caltron County v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), holding that they

> disagree with the [Ninth Circuit] panel that no actual impact flows from the critical habitat designation. . . . The record in this case suggests that the impact will be immediate and the consequences could be disastrous [by precluding proper flood control].
>
> *Ibid.* at 1436.

We will see below how the Ninth Circuit has recently backed off its position of no NEPA review

for critical habitat designation, although without backing up far enough to overturn *Douglas County*. However, the pertinent point here is that *Douglas County* has never been good law in the Tenth and other Circuits, although it remains valid precedent in the Ninth. Since *Drakes Bay Oyster* relies on *Douglas County, Drakes Bay Oyster* cannot be considered good law outside the Ninth Circuit.

With *Drakes Bay Oyster* there is an intolerable split between the Circuits.

B: Drakes Bay Oyster's NEPA holding creates an intolerable split that encourages non-acquiescence by federal agencies in their stewardship of historic resources.

Drakes Bay Oyster's NEPA holding puts administrative agencies in a bind, especially for historic resources found ineligible for listing on the National Register. If the resource is found eligible for listing, then it is primarily under the aegis of the NHPA, and NEPA becomes of subsidiary importance. If it is ineligible, the NHPA bows out of the NEPA process.

Assume that a typical federal agency with responsibility for managing federal wildlands -- the Forest Service, the National Park Service, and the Bureau of Land Management come to mind -- wants to promulgate agency procedures with respect to man-made historic resources, such as log cabins, in wildlands it administers.

Generally, the NEPA process involves first, an Environmental Assessment (EA) [see 40 CFR 1508.9, Amicus Monte Wolfe Foundation

Appendix, "MWF.APP." below, p. 12] leading to the decision either to produce a full Environmental Impact Statement (EIS) [see § 1508.11, MWF.APP.12] or to issue a Finding of No Significant Impact (FONSI) [see § 1508.13, MWF.APP.13]. However some classes of actions never even get an EA because they are the subject of a Categorical Exclusion (CE) [see § 1508.4, MWF.APP.11]

In the Ninth Circuit, the *Drakes Bay Oyster* holding would imply a CE for any removal of historic resources from wildlands, thus no EA or EIS. Beyond the reach of *Drakes Bay Oyster*, there would be no CE, rather there would be an EA and eventually an EIS. However, this difference between the circuits would have no practical consequence for historic resources that have not yet been evaluated under NHPA: As part of the NEPA review process, the NHPA requires the agency to identify possible historic resources (36 CFR 800.3(a), MWF.APP.3), a requirement that trumps any Categorical Exclusion that would otherwise preclude NEPA review. 36 CFR 800.8(b), MWF.APP.5. Thus, in the Ninth Circuit as well as in the others, the unevaluated resource would be under the protection of NHPA, at least until determination of eligibility for listing on the National Register.

Drakes Bay Oyster's threat to an historic resource would become actual only if the resource is found ineligible for listing on the National Register, thus solely protected by NEPA.

NEPA does provide for protection of historic resources independently of NHPA. In the

definition of "Significantly," the Council on Environmental Quality (CEQ) regulations require consideration of adverse effects on resources

> listed in or eligible for listing in the National Register of Historic Places ***or*** ... loss or destruction of significant ... historical resources. 40 CFR 1508.27(b)(8), MWF.APP.15. (Emphasis Supplied.)

And historic preservation itself is an explicit statutory goal of NEPA. It calls for governmental action that will

> attain the widest range of beneficial uses of the environment without degradation …; *preserve important historic*, cultural and natural *aspects of our national heritage*, … [and] enhance the quality of renewable resources.
>
> 42 U.S.C. § 4331(b)(3), (4) & (6), P.APP. 172-173. (Emphasis supplied.)

Under 40 CFR 1507.3(b)(2), MWF.APP.10-11, the typical agency promulgates procedures regarding given classes of action, for example, here, any decision to remove ineligible historic resources from wildlands.

For wildlands outside the Ninth Circuit, the agency will look to the potential effects of the action, where, for example, the effects are "ecological . . ., aesthetic, historic, [or] cultural . . .." 40 CFR 1508.8, MWF.APP.12. The agency will then be likely to determine that, given the complexity of effects, a Categorical Exclusion would be inappropriate, that there should be an Environmental Assessment that would likely lead to a full Environmental Impact Statement.

However, for ineligible historic resources in wildlands within the Ninth Circuit, the agency will be bound by the *Drakes Bay Oyster* holding: If the effect is "restoring untouched physical environment," the agency should dispense with the NEPA process. *Drakes Bay Oyster, supra,* 729 F.3d at 984, P.APP.30-31. *Drakes Bay Oyster* implies that there should be a Categorical Exclusion, precluding any EA or EIS. No NEPA or any other process would be needed to remove an ineligible historic resource from wildlands. The historic resource would face an imminent threat.

Thus, the typical federal agency would find it impossible to promulgate the same procedures for ineligible historic resources on wildlands within the Ninth Circuit as for those within other Circuits. There is an intolerable split.

C: The Ninth Circuit has recently minimized *Douglas County*'s applicability to ESA habitat designations, all the while upholding "the reasoning" of *Douglas County* and *Drakes Bay Oyster*.

It appears that only in the Ninth Circuit and only in *Drakes Bay* Oyster is there an actual holding that the "restoration" of a "natural setting," involving a change in the physical environment, need not trigger NEPA review. *Drakes Bay Oyster* is an innovative expansion of *Douglas County,* which had held that designation of critical habitat under the Endangered Species Act does not trigger NEPA review because designation does not effect any change in the physical environment. *Douglas*

County, supra, 48 F.3d at 1505. As seen above, that holding created a split, notably with the Tenth Circuit in *Caltron County, supra,* 75 F.3d at 1436.

Now, the Ninth Circuit appears to have backed away from the split, away from the *Douglas County* position regarding the inapplicability of NEPA to ESA habitat designations.

With *San Luis & Delta-Mendota Water Authority v. Jewell* , ___ F.3d ___ (9th Cir – 3/13/2014). [PACER ref: Ninth Circuit Case 11-15871; DktEntry: 118-1; Pages 1-173] [5], a Ninth Circuit panel has essentially distinguished *Douglas County* into irrelevance where the ESA is concerned. It appears to have tacitly accepted many of the criticisms of *Douglas* offered in *Caltron County* and elsewhere, thus attenuating the split between Circuits, at least regarding NEPA review of ESA habitat designation. *Ibid.* at ___ [PACER at 146-150].

Demonstrating the majority's movement away from the split, the dissent in *San Luis & Delta-Mendota* would apply *Douglas County*'s now largely superseded ESA rule. *Ibid.* at ___ [PACER at 167-168].

However, the majority in *San Luis & Delta-Mendota* does not cleanly overrule *Douglas County*: It is not sitting *en banc*. Instead, the majority affirms the validity of *Douglas County*'s "reasoning," all the while vitiating its principal practical result. It is a skillful holding that minimizes the likelihood of successful *en banc* or

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5 : Petitions for rehearing *en banc* have been filed and the court has invited opposition to be filed by June 16, 2014. NEPA does not appear to be at issue in the petitions.

certiorari challenge, at least on grounds relating to the ESA.

But in an apparent need to demonstrate that it was not overruling *Douglas* County, the panel did offer a sacrificial lamb, trussed for slaughter, through a reaffirmation of *Drakes Bay Oyster*. The *San Luis & Delta-Mendota* majority distinguishes the modest family oyster farm from the massive California Delta water project:

> Whatever effects implementing the [studies of the impact of the project on the endangered delta smelt] might have on the human environment, it is apparent that they are more complex and wide-ranging than the removal of a few buildings in *Drakes Bay Oyster*.
>
> *Ibid.* at _____ [PACER at 149]

Dismissing the impact on the "human environment" in *Drakes Bay Oyster* as "the removal of a few buildings" may be merely cavalier, or it may be callous and cruel: The farming family loses its business, the farm workers lose their livelihood, the region loses a sustainable food source that also happens to be a jewel in the gastronomic crown of the greater San Francisco Bay Area, and our national heritage loses a precious resource, the historic "hanging cultch" oyster racks in Drakes Estero. See 40 CFR 1508.14, MWF.APP.13.

A proper NEPA process, not truncated as it was here, would have helped the underlying *Drakes Bay Oyster* court formulate an opinion that accurately reflected the environmental consequences of the proposed action. It certainly would have helped the court flesh out real-world costs of what it

erroneously presented in its opinion as trivial. As it was, the only adverse effect that the underlying *Drakes Bay Oyster* panel recognized was "short-term harms such as noise associated with heavy machinery needed to remove Drakes Bay's structures." *Drakes Bay Oyster, supra,* 729 F.3d at 984, P.APP.31. The *Drakes Bay Oyster* majority drastically understated the harm inflicted by the decision

D: *Drakes Bay Oyster*'s anomalous holding is odd enough to suggest having been, in some subtle way, a result of confuting the National Environmental Policy Act with the Wilderness Act.

After *San Luis & Delta-Mendota,* all that is really left of the *Douglas County/Drakes Bay Oyster* line of cases is the isolated holding that a decision to "restore" pristine wildness does not trigger NEPA review. The decision in *Drakes Bay Oyster* has become an anomaly, a dangerous anomaly. Its oddity raises the question, where on earth could it have come from? Why did the *Drakes Bay Oyster* majority put forward such an eccentric holding?

The answer may lie in the larger context of the *Drakes Bay Oyster* case, of the Point Reyes National Seashore, and even of the environmental movement.

The nub would be divergent views about how the Seashore should be managed, and especially about the role of sustainable agriculture in it. Environmental purists believe that the entire

Seashore should be returned as far as possible to the condition in which Sir Francis Drake found it in 1579. Others remember that there would be no National Seashore if the agriculturalists had decided in the 1960's to sell their land to commercial real estate developers rather than to the National Park Service.

Given that the underlying case is embedded in this matrix, it is important to understand how the oyster farm fits into the Seashore.

The oyster farm is entirely within the Point Reyes National Seashore. The Seashore has two principal zones, the pastoral zone and the wilderness zone. The pastoral zone is generally in the western part of the Point Reyes Peninsula and includes many dairy farms. Most of the rest of the Seashore, including all the estuarial waters, is designated wilderness.

The oyster farm has two distinct parts, the onshore facilities, entirely within the pastoral zone, and the oyster beds, entirely within designated wilderness. The oyster farm's onshore facilities are analogous to the barns, outbuildings and habitations in the dairy farms. The oyster beds are the equivalent to the dairy farm pastures

The oyster beds are basically of two types: First are oyster beds that simply rest on the bottom, often covered with a layer of oyster shells, and second are the oyster beds that use oyster racks to suspend the oysters above the bottom. These are the historically invaluable "hanging cultch" oyster racks.

The National Park Service contracted a study of the oyster farm as an historic resource, the

National Park Service National Register of Historic Places Registration Form, March 21, 2011, by Caywood and Hagen, CRCS, Missoula, Montana; ("National Register study").[6] The National Register study presents the oyster racks as the central element of the overall site's historical significance:

> [T]he site is significant for its association with the introduction of Japanese off-bottom growing methods, specifically the hanging cultch method. In the early 1960s, Johnson Oyster Company successfully adapted this method to conditions in the *estero*, and in doing so, became one of the largest commercial oyster producers in the state….
>
> When considering only historical significance, Johnson Oyster Company facility would be eligible for listing under National Register Criterion A . . .. The area of significance would be Maritime History. . . .. [T]he racks in the *estero* are in their original locations, and the property's setting—the pastoral landscape surrounding the bay—has been little altered since the early 1930s. (*Ibid*., p.12)

The National Register study concluded that the site as a whole was not eligible for listing, but the reasons for the negative determination did not involve the oyster racks. (*Ibid.*, pp.12-13.) The

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6:<http://www.nps.gov/pore/parkmgmt/upload/planning_dboc_sup_background_nrhp_doe_with-shpo_letter_110804.pdf>

Amicus models its reference to a National Park Service URL on this Court's reference to a Forest Service URL in *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). Counsel for Amicus has a file copy of the document in "pdf" format, downloaded on May 10, 2014.

reasons had to do with changes that had been made to the Onshore Facilities over recent decades, including those made in response to updated public health regulations. (*Ibid.*) It may be that some of the reasons derive from a sense that the architecture, construction and upkeep of this working oyster farm are a bit too vernacular.

However, the pertinent point is that the oyster racks would be eligible if taken alone: An "historic property" includes "any historic . . . structure . . . eligible for inclusion in the National Register." 36 CFR 800.16(l)(1), MWF.APP.6. The oyster racks are eligible and should have been protected under the NHPA. If they had been , the process for removing the oyster farm would have had to go through the ACHP, which would not have let go of such a precious historic resource as easily as the Secretary of the Interior did.

Ultimately, the decision by the Secretary of the Interior to close the oyster farm was shaped by his misunderstanding of the Wilderness Act of 1964, mistakenly believing it to be only consistent with pristine wildness.[7]

The *Drakes Bay Oyster* majority's support for the Secretary's position on pristine wildness may

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7 : Focusing narrowly on the Point Reyes Wilderness Act of 1976, neither dissent nor majority evoked long-standing Ninth Circuit jurisprudence that construes the over-arching Wilderness Act of 1964 as supporting a pragmatic rather than purist understanding of "wilderness," one that implies a nuanced legal framework where the ideal of pristine wildness can coexist with a wider range of use and purpose. See, for example, *Wilderness Watch v. U.S. Fish and Wildlife Service*, 629 F.3d 1024, 1033 (9th Cir. 2010) and *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 646-648 (9thCir. 2004)

well have shaped its holding that NEPA review was not needed "[b]ecause removing the oyster farm is a step toward restoring the natural, untouched physical environment." *Ibid.* at 984, P.APP.31 (quotation marks omitted).

But NEPA does not call for the restoration of some ideal of pristine wildness. Rather, NEPA recognizes

> the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,
> (42 U.S.C. § 4331(a) [P.APP. 171])

and to that end seeks

> to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans. (*Ibid.*)

More specifically, NEPA calls for governmental action that will

> attain the widest range of beneficial uses of the environment without degradation …; *preserve important historic*, cultural and natural *aspects of our national heritage*, … [and] enhance the quality of renewable resources.
> 42 U.S.C. § 4331(b)(3), (4) & (6) [P.APP.172-173] (Emphasis supplied.)

Historic preservation is an explicit statutory goal of NEPA. "Restoration" of pristine wildness, as such, is not.

Drakes Bay Oyster's misapplication of NEPA is not merely erroneous; it is an error that creates an intolerable split between Circuits and poses an imminent threat to historic resources in federally administered wildlands.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: May 15, 2014

Respectfully submitted,

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The Monte Wolfe Foundation

AMICUS MONTE WOLFE FOUNDATION APPENDIX

["MWF.APP."]

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Excerpts from National Historic Preservation Act of 1966 (NHPA)

Excerpts from "Protection of Historic Properties" regulations implementing Sec. 106, 36 CFR Part 800

Excerpts from Council on Environmental Quality (CEQ) regulations: 40 CFR 1500-1508

Excerpts from
National Historic Preservation Act of 1966

Section 106 [16 U.S.C. 470f — Advisory Council on Historic Preservation, comment on Federal undertakings]

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 211 [16 U.S.C. 470s — Regulations for Section 106 . . ..]

The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety . . ..

Excerpts from
"Protection of Historic Properties"
regulations implementing Section 106
36 CFR Part 800

§ 800.3 Initiation of the section 106 process.

(a) *Establish undertaking***.** The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects***.** If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

* * * * * *

800.4 Identification of historic properties

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(c) *Evaluate historic significance—*

(1) *Apply National Register criteria***.** In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The

passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) ***Results of identification and evaluation—***

(1) ***No historic properties affected.*** If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency

official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

* * * * * *

§ 800.8 Coordination With NEPA.

* * * * * *

3) *Inclusion of historic preservation issues***.** Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) ***Actions categorically excluded under NEPA.*** If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

* * * * * *

§ 800.16 Definitions.

* * * * * *

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

* * * * * *

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

* * * * * *

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

* * * * * *

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

* * * * * *

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

APPENDIX A TO PART 800 — CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to §800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

Excerpts from
Council on Environmental Quality (CEQ)
regulations: 40 CFR 1500-1508

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the Federal Register, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its

procedures and before publishing them in the Federal Register for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

1. Those procedures required by Secs. 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.
2. Specific criteria for and identification of those typical classes of action:

   (i) Which normally do require environmental impact statements.

   (ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (Sec. 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

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§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.8 Effects. *Effects* include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.
Environmental assessment:
(a) Means a concise public document for which a Federal agency is responsible that serves to:
(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
(3) Facilitate preparation of a statement when one is necessary.
(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.11 Environmental impact statement.
Environmental impact statement means a detailed written statement as required by **§**102(2)(C) of Act.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) ***Context.*** This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) ***Intensity.*** This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.