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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DRAKES BAY OYSTER COMPANY,
17171 Sir Francis Drake Blvd
Inverness, CA 94937, and

KEVIN LUNNY,
17171 Sir Francis Drake Blvd
Inverness, CA 94937

Plaintiffs,

v.

KENNETH L. SALAZAR,
in his official capacity as Secretary, U.S. Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
JONATHAN JARVIS,
in his official capacity as Director, U.S. National Park Service,
1849 C Street, NW, Washington, D.C. 20240;
and **DOES 1-100**.

Defendants.

Case No. 12-cv-06134-YGR

***EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER**

Date: TBD

Time: TBD

Court: Oakland Courthouse 5 – 2nd Floor

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Pursuant to L.R. 65-1, Plaintiffs Drakes Bay Oyster Company (DBOC) and Kevin Lunny, by and through undersigned counsel, hereby request that the Court issue a Temporary Restraining Order (TRO). On December 12, 2012, counsel for Plaintiffs provided notice by telephone to Mr. Stephen Macfarlane, and notice by email to Mr. Charles Shockey, Mr. Barrett Atwood, Mr. Joseph Matthews, Mr. Charles O'Connor, Ms. Barbara Goodyear, Ms. Suzanne Carlson, and Mr. George Torgun, of Plaintiffs intent to file the *Ex Parte* Application on December 12, 2012.

NEED FOR TEMPORARY RESTRAINING ORDER

Plaintiffs seek a TRO to enjoin Defendants' from implementing Defendant Salazar's November 29, 2012, Memorandum of Decision denying Plaintiffs a ten-year Special Use Permit (SUP) and ordering Plaintiffs to cease operations and remove all personal property and physical structures within 90 days (by February 28, 2013).

Immediate relief is necessary because Defendants' actions were in violation of Pub. L. No. 111-88, § 124, 123 Stat. 2932 (hereinafter "Section 124"), the Administrative Procedure Act (APA), 5 U.S.C. §§701-706; the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321 *et seq.*; the Data Quality Act (DQA), 44 U.S.C. § 3516 Note; and the United States Constitution.

Defendants' actions to implement the Secretary's decision will cause the immediate and irreparable loss of 2.5 million oyster spat (approximately 20-25% of its 2014 crop) and the corresponding immediate layoff of one-third of its employees over the Holiday season, and it will cause the utter destruction of Plaintiffs' business, harm to the public, and irreparable environmental damage to Drakes Estero in the next 90 days. Furthermore, it is impossible for Plaintiffs to comply with the Secretary's decision because it would take much longer than 90 days for Plaintiffs to comply.

For the reasons discussed above, in Plaintiffs' Memorandum of Points and Authorities in Support of *Ex Parte* Application for Temporary Restraining Order, and below, this Court should grant Plaintiffs' request for TRO.

GROUNDS FOR APPLICATION

1 "The standard for issuing a TRO is the same as that for issuing a preliminary injunction."
2 *Walker v. County of Santa Clara*, 2011 WL 4344212, at *2 (N.D. Cal. 2011) (citations omitted).
3 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
4 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
5 balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v.*
6 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If a plaintiff shows a "likelihood of irreparable
7 injury and that the injunction is in the public interest," a "preliminary injunction is appropriate
8 when a plaintiff demonstrates that serious questions going to the merits were raised and the
9 balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v.*
10 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).
11 As discussed above, Plaintiffs face serious, imminent, and irreparable harm. The balance
12 of equities tips strongly in Plaintiffs favor because a TRO will simply maintain the status quo—
13 which has been in place for approximately 80 years—and there are no exigent circumstances that
14 would lead to injury to Defendants if this TRO is granted. A TRO is in the public interest
15 because "it is *always* in the public interest to prevent the violation of a party's constitutional
16 rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted and emphasis
17 added). Furthermore, a TRO would prevent the loss of thirty-one full-time jobs; the loss of
18 affordable housing for fifteen people, including seven children under the age of sixteen;
19 immediate environmental harm to Drakes Estero; the loss to the public of Plaintiffs' interpretative
20 and educational value; and impacts to the State of California associated with the loss of the
21 producer of approximately one-third of the State's oysters.
22 Plaintiffs are likely to succeed on the merits for the following reasons:
23 **First**, Defendants' misinterpretations of Section 124 were an abuse of discretion, such that
24 Defendant Salazar's decision must be set aside. *See* 5 U.S.C. § 706(2)(A) (the APA requires a
25 court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of
26 discretion, or otherwise not in accordance with law"); *Fargo v. Comm'r of Internal Revenue*, 447
27 F.3d 706, 709 (9th Cir. 2006) (abuse of discretion occurs when a decision is based on an
28 erroneous view of the law). If an agency "action is based upon a determination of law … , an

1 order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80,
2 94 (1943).
3 Defendant Salazar erred by concluding that if he issued Plaintiffs a SUP he would violate
4 the 1976 Wilderness Laws (Pub. L. 94-544 and Pub. L. 94-567), when in fact Section 124 was
5 enacted specifically to allow him to issue a SUP notwithstanding the 1976 Wilderness Laws.
6 Defendant Salazar also erred by concluding that Defendants did not have to comply with
7 NEPA because the plain language of the statute does not excuse compliance with federal law, and
8 there is no clear and manifest intent that Congress intended to repeal NEPA for any denial of the
9 SUP when it enacted Section 124. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).
10 **Second,** Defendants failed to comply with the substantive and procedural requirements of
11 NEPA. Defendants improperly relied on a final environmental impact statement (FEIS) that was
12 never submitted for notice and comment, as required by 40 C.F.R. §§ 1506.10(a), (b)(2). *Del*
13 *Norte County v. U.S.*, 732 F.2d 1462, 1465 (9th Cir. 1984). In addition, the FEIS contained
14 numerous scientific flaws and, as a result, grossly overstated the environmental impacts
15 associated with Plaintiffs' operations. Finally, NPS issued the FEIS despite the fact that the DEIS
16 was so inadequate so as to preclude meaningful review. 40 C.F.R. § 1502.9(a); *Natural Res. Def.*
17 *Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005).
18 **Third,** Defendants violated the APA because their actions were arbitrary and capricious
19 and manifestly contrary to statute. An agency's action is arbitrary and capricious if the agency
20 "relied on factors which Congress has not intended it to consider, entirely failed to consider an
21 important aspect of the problem, [or] offered an explanation for its decision that runs counter to
22 the evidence before the agency …." *Ctr. for Biological Diversity v. United States BLM*, 2012 U.S.
23 App. LEXIS 22016, *13 (9th Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*
24 *Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *accord Sierra Club v. EPA*, 671 F.3d 955, 963 (9th Cir.
25 2012) (agency must examine relevant data and articulate "a satisfactory explanation for its action
26 including a rational connection between the facts found and the choice made." (internal citations
27 and quotations omitted)). Here, Defendants' decision ran counter to the evidence in the record,
28 failed to consider and objectively evaluate all relevant evidence regarding the decision, and failed

to adequately explain their decision not to comply with NEPA on the last day of an 800 day NEPA process.

Fourth, Defendants' failure to comply with the DQA was arbitrary and capricious, in excess of Defendants' statutory authority and jurisdiction, an abuse of discretion, and otherwise was not in accordance with the law. 5 U.S.C. § 706(2); 44 U.S.C. § 3516 Note. The DQA requires that information disseminated by the National Park Service (NPS) meet a threshold of scientific accuracy and accountability. *See* Directory's Order #11B: Ensuring Quality of Information Disseminated by the National Park Service. The DEIS contained numerous impact conclusions on soundscapes, wilderness, harbor seals, birds and bird habitat, and visitor experience and recreation that were demonstrably false, in violation of DQA requirements.

Fifth, the Defendants violated Plaintiffs' constitutional right to procedural due process by arbitrarily depriving Plaintiffs of protected property interests without constitutionally adequate procedural protections, including by ordering Plaintiffs to remove all shellfish from Drakes Estero within 90 days and prohibiting further commercial activities where Plaintiffs have valid State water bottom leases. *See Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003). Plaintiffs were afforded no meaningful opportunity to be heard, to explain why the FEIS was fundamentally flawed, or to present evidence negating its claims. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Sixth, Plaintiffs' substantive due process rights were violated through the "arbitrary deprivation" of their property rights, *Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007), where that deprivation was the product of "egregious official conduct" that is an "abuse of power" without any "reasonable justification." *Shanks v. Dressel*, 540 F.3d 1082, 1088-89 (9th Cir. 2008).

RELIEF SOUGHT

Plaintiffs respectfully request that the Court grant this *ex parte* application as follows:

Plaintiffs request that the Court issue a temporary restraining order that enjoins Defendants, including their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from implementing and enforcing the Secretary's

1 November 29, 2012, Memorandum of Decision, or from otherwise authorizing or commencing
2 activities that would interfere with Plaintiffs' continuing operation or cause harm to Plaintiffs
3 pending Defendants' compliance with Section 124, the APA, NEPA, the DQA, and constitutional
4 due process requirements.

5 This motion is based on this *Ex Parte* Application and the following documents that are
6 being filed herewith:

7 1. Memorandum of Points and Authorities In Support of *Ex Parte* Application for Temporary Restraining Order
8
9 2. [Proposed] Temporary Restraining Order and Order to Show Cause
10 3. Declaration of William Bagley
11 4. Declaration of Scott Luchessa
12 5. Declaration of Kevin Lunny
13 6. Declaration of Laura Moran
14 7. Declaration of James Patterson
15 8. Declaration of Ryan Waterman
16 9. Complaint for Declaratory and Injunctive Relief (filed December 3, 2012, and provided pursuant to L.R. 65-1(a)(1))

17 and the complete files and records of this action, the arguments and evidence to be presented on a
18 hearing on this motion, and such other and further matters as the Court may properly consider.
19
20 DATED: December 12, 2012
21 Respectfully submitted,
22
23 By: /s/ S. Wayne Rosenbaum
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24 Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DRAKES BAY OYSTER COMPANY,
17171 Sir Francis Drake Blvd
Inverness, CA 94937, and

KEVIN LUNNY,
17171 Sir Francis Drake Blvd
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Plaintiffs,

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KENNETH L. SALAZAR,
in his official capacity as Secretary, U.S. Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
JONATHAN JARVIS,
in his official capacity as Director, U.S. National Park Service,
1849 C Street, NW, Washington, D.C. 20240;
and **DOES 1-100**.

Defendants.

Case No. 12-cv-06134-YGR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

Date: TBD

Time: TBD

Court: Hon. Yvonne Gonzales Rogers,
Oakland Courthouse 5 – 2nd Floor

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STATEMENT OF THE ISSUES

1. Section 124 (Pub. L. No. 111-88 § 124, 123 Stat. 2932) "authorized" Secretary Salazar "to issue" the permits necessary to allow Plaintiffs to continue operating their oyster farm, "notwithstanding any other provision of law." Are Plaintiffs likely to prevail on their claim that Secretary Salazar abused his discretion by misinterpreting the plain language of Section 124 as preventing him from issuing a Special Use Permit (SUP) to Plaintiffs because it would be a violation of the 1976 Wilderness Laws?

2. Are Plaintiffs likely to prevail on their claim that Secretary Salazar abused his discretion by misinterpreting Section 124 as authorizing him to deny the permits notwithstanding some federal laws, like the National Environmental Policy Act (NEPA), even though nothing in Section 124 waived NEPA?

3. Are Plaintiffs likely to prevail on their claim that Defendants acted in contravention of the procedural and substantive requirements of NEPA, including: (i) not filing the Final Environmental Impact Statement (FEIS) with the U.S. Environmental Protection Agency (EPA) as required by 40 C.F.R. § 1506.9, (ii) not waiting at least 30 days after EPA published a Notice of Availability in the Federal Register before relying on the FEIS, as required by 40 C.F.R. § 1506.10(b)(2), and (iii) not considering "every significant aspect of the environmental impact" to deny the permits as required by law?

4. Are Plaintiffs likely to prevail on their claim that Secretary Salazar violated the Administrative Procedure Act (APA), including by (i) basing his decision on erroneous interpretations of Section 124, (ii) basing his decision on factors Congress did not intend for him to consider, (iii) offering an explanation for his decision that ran counter to the evidence before him, and (iv) offering no reasoned analysis for his decision on the very last day of an 800-day NEPA process that NEPA did not apply?

5. Are Plaintiffs likely to prevail on their claim that Defendants violated the Data Quality Act by not correcting publications harmful to Plaintiffs that contained what Plaintiffs showed to be demonstrably false conclusions based on inaccurate data, vague and subjective definitions, and inappropriate baselines?

6. Are Plaintiffs likely to prevail on their claim that Defendants violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution by depriving them of protected property interests without adequate procedural protections, and by acting arbitrarily in doing so?

7. If Plaintiffs cannot immediately seed their existing immature oysters onto oyster racks, about 2.5 million immature oysters will die—approximately 20 to 25% of its 2014 crop—and they will be forced to layoff approximately one-third of Drakes Bay Oyster Company's (DBOC) thirty-one highly skilled and experienced staff. Are Plaintiffs likely to suffer imminent and irreparable harm if Defendants are not enjoined from prohibiting Plaintiffs from immediately seeding those immature oysters and ensuring that they do not die, before a motion for a preliminary injunction can be decided?

8. Does the balance of equities tip in favor of Plaintiffs, since Defendants will not be harmed by maintaining the status quo (which has existed for approximately eighty years of oyster farming in Drakes Estero), but Plaintiffs would suffer the complete destruction of their property and business before this case could ever be decided on the merits?

9. Would an injunction serve the public interest, since it will help ensure that Defendants comply with NEPA and other environmental laws, stave off the immediate loss of approximately one-third of DBOC's thirty-one full-time jobs and affordable housing for fifteen people, and prevent immediate environmental harm to Drakes Estero?

1 **I. INTRODUCTION**

2 Drakes Bay Oyster Company (DBOC) is a small, family run oyster farm. On November
3 29, 2012, Secretary Salazar announced his decision not to grant a Special Use Permit (SUP) to
4 Plaintiffs DBOC and Mr. Kevin Lunny, DBOC's President, to allow for the continued operation
5 of the oyster farm on the shores of Drakes Estero in Point Reyes National Seashore. The
6 Secretary's decision came one day before Plaintiffs' existing permits expired, although Plaintiffs'
7 request had been pending since 2010. To implement his decision, the Secretary and the National
8 Park Service (NPS) have ordered DBOC to cease commercial operations effective immediately,
9 and to wind up its business within ninety days—on or before February 28, 2013.

10 The Secretary's decision will have immediate and long-term impacts on Plaintiffs, their
11 employees, the public, and the environment. For example, the Secretary's decision requires the
12 destruction of DBOC's entire shellfish crop—approximately 19 million immature oysters and
13 1.99 million immature clams—growing in Drakes Estero, removing and destroying DBOC's
14 entire physical plant from the shores of Drakes Estero, removing and destroying 95 oyster racks
15 constituting 250,000 board feet of lumber from Drakes Estero, laying off thirty-one employees,
16 evicting 15 people (employees and their families) living in affordable housing on the farm, and
17 immediate and severe environmental impacts to water quality, eelgrass, fish, and harbor seals.

18 It is also impossible for Plaintiffs to comply with the Secretary's decision. Not only does
19 it ignore the federal, state, and local permitting and interagency coordination that must occur prior
20 to Plaintiffs begin to comply, but also it does not take into account the time necessary to
21 accomplish the tasks it requires, such as removing Plaintiffs shellfish and 95 oyster racks that
22 constitute 250,000 board feet of lumber and would measure five miles in length if laid end-to-end.

23 Plaintiffs will show that the Secretary denied the SUP because of erroneous interpretations
24 of law and flawed science provided by the NPS. By their actions, Defendants also violated the
25 National Environmental Policy Act (NEPA), the Data Quality Act (DQA), the Administrative
26 Procedure Act (APA), and the Fifth Amendment to the United States Constitution.

27 Plaintiffs seek a temporary restraining order because an immediate stay is necessary to
28 prevent the immediate and irreparable harms Plaintiffs, their employees, the public, and the

1 environment will suffer if Defendants' orders are implemented. Plaintiffs lack the means to
2 withstand the utter destruction of every facet of their business that the Secretary's decision
3 demands. Without an injunction, this case will be over before it begins.

4 **II. BACKGROUND**

5 The State of California has leased the water bottoms in Drakes Estero for shellfish
6 cultivation since 1934. In the 1950s, the State leased the water bottoms in Drakes Estero to the
7 Johnson Oyster Company (JOC), Plaintiffs' predecessor in interest.

8 In 1962, Congress authorized Point Reyes National Seashore (PRNS), but the NPS lacked
9 fee title to the area envisioned for the park. 16 U.S.C. § 459c-459c-7 (2012). NPS began to
10 acquire fee title to land and waters to create PRNS. Three years later, at the request of NPS, State
11 Assemblyman William Bagley, representative of Marin and Sonoma Counties, authored
12 legislation to convey the water bottoms in Drakes Estero to the United States. Declaration of
13 William Bagley (Bagley Dec.) ¶¶ 6-7. Assemblyman Bagley's bill, Assembly Bill 1024 (AB
14 1024), expressly retained to the people of the State "the right to fish in the waters underlying the
15 lands described in Section 1 ["all of the tide and submerged lands or other lands beneath
16 navigable waters" within PRNS]," and mineral deposits. 1965 Cal. Stat. Ch. 983; Bagley Dec. ¶¶
17 6-7 Ex. 1 § 3. Assemblyman Bagley also authored Assembly Bill 767 (AB 767) at the request of
18 the California Department of Fish and Game (CDFG). 1965 Cal. Stat. Ch. 1114; Bagley Dec. ¶ 8
19 Ex. 2. AB 767 clarified that the State's definition of "fish" includes all shellfish, including
20 oysters. *Id*. This definition was quickly recognized by an opinion of the California Attorney
21 General. 46 Ops. Cal. Atty. Gen. 68 (1965); Bagley Dec. ¶ 9 Ex. 3.

22 After AB 1024 came into effect, Charles Johnson, JOC's owner, queried CDFG whether
23 the State had jurisdiction over his operations. He received confirmation from the State that it had
24 retained jurisdiction over JOC and the State water bottoms in Drakes Estero because "the
25 conveyance by the Legislature reserves fishery rights to the State." Bagley Dec. Ex. 4. CDFG
26 Director Shannon affirmed this interpretation in a letter to California Deputy Attorney General
27 Ralph Scott. Bagley Dec. Ex. 5. On March 14, CDFG Deputy Director Robert Jones wrote a letter
28 to PRNS Superintendent Leslie Arnberger, cc:ing Assemblyman Bagley and Deputy Attorney

Scott, asking NPS to corroborate CDFG's understanding "that all State laws and regulations pertaining to shellfish cultivation remain in effect and are applicable to the operations of the Johnson Oyster Company." Bagley Dec. Ex. 6. In response, Superintendent Arnberger confirmed agreement with CDFG's interpretation of AB 1024, stating that "the [JOC] will continue operation under … [the] California Fish and Game Code as in the past." Bagley Dec. Ex. 7.

NPS again acknowledged the State's reservation of rights and their implication for continued oyster farming in Drakes Estero in a 1974 Final Environmental Impact Statement for Proposed Wilderness in PRNS (Wilderness FEIS). Although the Wilderness FEIS considered naming Drakes Estero for wilderness protection, it did not do so for one reason: "This is the only oyster farm in the seashore. Control of the lease from the California Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved by the State on these submerged lands." Bagley Dec. Ex. 6 at 56. The Wilderness FEIS concluded: "The existence of the oyster-farm operation renders the estero unsuitable for wilderness classification at present, and there is no foreseeable termination of this condition." *Id.*

In 1979 and again in 2004, the CFGC extended its State water bottom leases in Drakes Estero to JOC for a twenty-five year term. Lunny Dec. ¶ 8. CFGC confirmed in a July 11, 2012 letter to Secretary Salazar that the CFGC, "in the proper exercise of its jurisdiction . . . has clearly authorized the shellfish cultivation in Drakes Estero through at least 2029 through the lease granted to Drakes Bay Oyster Company. The Commission will continue to regulate and manage oyster aquaculture in Drakes Estero pursuant to state law." Bagley Dec. Ex. 8.

JOC operated pursuant to a 40-year Reservation of Use and Occupancy (RUO) executed in 1972, which exchanged fee title of the 1.5 acre onshore operational area to NPS in exchange for the 40-year RUO. Declaration of Kevin Lunny (Lunny Dec.) Ex. 1. The RUO provided for the possibility of a SUP after its expiration on November 30, 2012, but specified that any "such permit will run concurrently with and will terminate upon the expiration of State water bottom allotments assigned to the Vendor." *Id.* Ex. 1, Exhibit "C" ¶ 11. JOC cultivated oysters pursuant to its State leases and processed and sold them on the onshore RUO area until 2004.

/ / /

1 In 2004, Plaintiffs purchased the oyster farm from JOC, and the RUO and the State water
2 bottom leases were transferred to them. Lunny Dec. ¶ 2. At that time, NPS declined to exercise its
3 right of first refusal under the RUO. *Id.* ¶ 4, Ex. 1, "Exhibit C" ¶ 14. The State water bottom
4 leases in Drakes Estero are held by Plaintiffs and are good until 2029. *Id.* Exs. 2, 3. Within the
5 first eighteen months, DBOC invested over $300,000 to address health and safety issues that had
6 been identified while JOC was operating the oyster farm, clean up preexisting marine debris
7 attributed to JOC's operations, and bring the oyster farm into administrative compliance. *Id.* ¶ 9.
8 DBOC also informed NPS that it intended to seek a renewal of the existing SUP and
9 RUO. In 2005, PRNS Superintendent Neubacher informed DBOC that no SUP would be granted,
10 despite the RUO's renewal clause, based on the claim that NPS lacked jurisdiction to grant a SUP
11 because of the Pub. L. 94-544 and Pub. L. 94-567 (Wilderness Laws). Lunny Dec. ¶ 10.
12 Moreover, between 2007 and 2012, and through the issuance of the Final Environmental
13 Impact Statement (FEIS) on November 20, 2012, NPS staff and senior NPS management
14 campaigned to drive DBOC out of business by alleging that Plaintiffs harmed the environment.
15 *See, e.g.,* Lunny Dec. Ex. 12. Internal DOI investigations by the Inspector General and Office of
16 the Solicitor found that NPS employees had produced faulty science and violated the NPS Code
17 of Scientific and Scholarly Conduct. *Id.* Exs. 5, 6. In May 2009, the National Academy of
18 Sciences (NAS) issued a report that found that the NPS had "selectively presented, over-
19 interpreted, or misrepresented the available scientific information on potential impacts of
20 [DBOC]," and had given "an interpretation of the science that exaggerated the negative and
21 overlooked the potentially beneficial effects of [DBOC]." *Id.* Ex. 6 at 72-73.
22 The controversy provoked by NPS misconduct drew Senator Dianne Feinstein to attempt
23 to negotiate a resolution between NPS and Plaintiffs. Senator Feinstein later authored a bill
24 obviating NPS's claim that it lacked jurisdiction and explicitly giving Secretary Salazar authority
25 to issue DBOC a new ten-year SUP. Pub. L. No. 111-88, § 124, 123 Stat. 2932 (2009) (Section
26 124).
27 Section 124 provides:
28 / / /

> SEC. 124. Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit (''existing authorization'') within Drake's Estero at Point Reyes National Seashore, 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, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

In September 2010, NPS publicly began the NEPA process to analyze the environmental impacts of Plaintiffs' request for a SUP pursuant to Section 124. The major milestones of the NPS NEPA review of DBOC's SUP request include:

- September 22, 2010: NPS staff met with Plaintiffs and shared a "Draft Schedule of Major Milestones" that anticipated releasing an FEIS in June 2012, publication of a Notice of Availability (NOA) in the Federal Register and 30-day waiting period, and Record of Decision in July 2012. Lunny Dec. Ex. 7; Compl. Ex. A. NPS subsequently published a Notice of Intent (NOI) in the Federal Register stating that "[p]ursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), the National Park Service is preparing an Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company Special Use Permit … ." 75 Fed. Reg. 65,373 (Oct. 22, 2010).
- September–October 2010: NPS Scoping Period on the EIS.
- September–December 9, 2011: Draft EIS (DEIS) released for public comment. The DEIS noted that a 30-day no action period will follow publication of the FEIS, and a Record of Decision (ROD) will be issued. The DEIS stated that, "[a]lthough the Secretary's authority under Section 124 is 'notwithstanding any other provision of law,' the Department has determined that it is appropriate to prepare an EIS and otherwise follow the procedures of NEPA." Lunny Dec. Ex. 9 at 2.

- December 2011: Congress directed the NAS "to assess the data, analysis, and conclusions in the DEIS in order to ensure there is a solid scientific foundation for the Final Environmental Impact Statement expected in mid-2012." H.R. Rep. No. 112-331, at 1057 (2011) (Conf. Rep.). Instead of collaborating with the NAS per Congressional direction, however, NPS ordered its own peer review by Atkins North America. Lunny Dec. ¶ 18.
- May 2012: NPS finally asked NAS to begin its DEIS review. Lunny Dec. ¶ 19.
- August 30, 2012: NAS releases its report, "Scientific Review of the Draft Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit (hereinafter "NAS DEIS Review"). Lunny Dec. Ex. 11. The NAS DEIS Review identifies fundamental flaws in DEIS and is highly critical of the Atkins Peer Review.
- November 20, 2012: NPS released the FEIS one day before the Thanksgiving weekend and on the eve of Secretary Salazar's November 21, 2012, visit to PRNS. For the first time, NPS claimed that NEPA was not required. Instead, the FEIS edited the DEIS to read: (<u>additions</u>/~~deletions~~): ". . . the Department has determined that it is ~~appropriate~~ <u>helpful</u> to ~~prepare an EIS and otherwise~~ <u>generally</u> follow the procedures of NEPA." Lunny Dec. ¶ 22, Ex. 12 at 2.
- November 20, 2012 to present: NPS has not published a NOA in the Federal Register, issued a ROD, or submitted the FEIS to the Environmental Protection Agency (EPA) for review; EPA has not published a NOA announcing the FEIS. Declaration of Ryan Waterman (Waterman Dec.) ¶ 6.
- November 29, 2012: Four business days after the FEIS is issued, Secretary Salazar issued his memorandum of decision, claiming that Section 124 "does not require me (or the NPS) … to comply with [NEPA] or any other law. The 'notwithstanding any other provision of law' language in SEC. 124 expressly exempts my decision from any substantive or procedural requirements." Lunny Dec. Ex. 13 at 4.

Between September 22, 2010 and November 29, 2012, NPS proceeded according to NEPA for 789 days, before abandoning NEPA in the last 9 days (4 business days).

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1 Significant flaws in the DEIS itself were documented well before it was finalized in
2 comments submitted the DEIS comment period. In addition, on August 7, 2012, Plaintiffs and an
3 elected member of the NAS, Dr. Corey Goodman, filed a Data Quality Act (DQA) Complaint
4 challenging the data relied on in the DEIS. Lunny Dec. Ex. 14. By letter on October 3, 2012, NPS
5 refused to address the merits of the DQA Complaint. Lunny Dec. Ex. 15. On October 16, 2012,
6 NPS's decision was timely appealed. Lunny Dec. Ex. 16.

7 On August 30, 2012, the Congressionally-mandated NAS DEIS Review was released. It
8 found a number of fundamental flaws in the DEIS that, taken together, made the DEIS "so
9 inadequate as to preclude meaningful analysis" within the meaning of 40 C.F.R. § 1502.9(a)
10 (2012). *See* Waterman Dec. Ex. 1 at 2. The NAS DEIS Review determined that the conclusions in
11 seven of the eight "resource categories" reviewed had "moderate to high levels of uncertainty
12 and, for many of these an equally reasonable alternate conclusion of a lower [environmental]
13 impact intensity could be reached based on the available data and information." Lunny Dec. Ex.
14 11 at 3, n. 4. For example, the NAS DEIS Review challenged the DEIS's claim that DBOC has a
15 "major" adverse impact on Drakes Estero's "soundscape" and a "moderate" adverse impact on its
16 harbor seals and birds, and positing that impacts could instead be "minor." *Id.* at 5.

17 The NAS DEIS Review criticized the DEIS's use of multiple and nonstandard
18 environmental baselines, explaining that "[t]his introduces an extra level of uncertainty to the
19 evaluation … and creates asymmetry in the assessment" of the DEIS's alternatives. Lunny Dec.
20 Ex. 11 at 3. The NAS DEIS Review also suggested that the DEIS's "Impact Intensity" definitions
21 used to assess DBOC's relationship with the environment were too vague, unbounded, and
22 subjective to permit meaningful scientific analysis. *See id.* at 2-3. The NAS DEIS Review further
23 criticized the DEIS's failure to adequately assess the environmental benefits of DBOC's
24 operations, *see id.* at 2, noting that the oyster farm may have a beneficial impact on Drakes
25 Estero's water quality, *see id.* at 5, 36. The NAS DEIS Review found the DEIS's conclusions on
26 water quality to be highly uncertain and, by implication, that the precise nature and scope of
27 environmental harms to occur if DBOC was denied a SUP were unknown. *See id.* at 5, 35-56.
28 / / /

Despite these flaws, NPS proceeded to post the FEIS on the Internet late on November 20, 2012—one day before the Thanksgiving holiday weekend, less than 24 hours before Secretary Salazar's visit to DBOC, and only four business days prior to the Secretary's decision. Although Plaintiffs had scant time to analyze the data and conclusions reached in the FEIS, they identified significant errors in both the short period before the Secretary's decision and in the weeks since.

For example, Plaintiffs quickly established that the FEIS's noise analysis used inappropriate proxies for DBOC equipment to grossly overstate noise impacts. The FEIS erroneously claimed to have "unambiguously" identified the noise signature of DBOC skiffs, which DBOC disproved simply by identifying seven events where the FEIS claimed to detect boat noise on Sundays and Mondays when no boats were operating. Waterman Dec. Ex. 3 at 3. The FEIS also concluded that DBOC has a "major" adverse impact on Drakes Estero's soundscape based on assertions that noise generated by a metal "cement/mortar mixer" was "comparable" to noise generated by DBOC's 12 volt, 1/4 HP plastic oyster tumbler, and that DBOC's plastic oyster tumbler was so loud that it could be heard from a distance of 9,786 ft. (1.85 miles). Lunny Dec. Ex. 12 at 259, 448 (Table 4-2). In fact, sound measurements taken onsite by ENVIRON demonstrate that the oyster tumbler can only be heard for 140 ft. Lunny Dec. Ex. 14 at 19, 35-37. Even though doing so would have been simple, quick, and inexpensive, NPS admitted that it never bothered to measure noise generated by DBOC boats and equipment. Lunny Dec. Ex. 12 at 266. The FEIS's claim that DBOC has a "major" adverse impact on Drakes Estero's wilderness—the only other finding of a "major" impact associated with DBOC's operations—is primarily supported by its soundscape analysis. *Id.* at 443-66.

The FEIS's conclusion that DBOC has an adverse impact on Drakes Estero's harbor seals relied heavily on a report—released six days after the FEIS—presenting entirely new analysis performed by the United States Geologic Service (USGS) of over 165,000 digital photographs taken by sophisticated, high-resolution cameras as part of NPS's secret camera program. (Compl. ¶¶ 43-44, 107-09, Ex. C.) Plaintiffs later discovered that the FEIS falsely cites the USGS report for data, analysis, and conclusions that are not in that report, claiming that the USGS report "attributed" two harbor seal flushing events to DBOC boat traffic, when the USGS report did not

1 conclude that DBOC's boats caused any changes in harbor seal behavior. *Compare* Lunny Dec.
2 Ex. 12 at 33, *with* Compl. Ex. C at 20-24.
3 Further, NPS did not change any of its conclusions regarding DBOC's impact on Drakes
4 Estero's environment in response to the NAS DEIS Review and failed to mention the NAS DEIS
5 Review's conclusion that DBOC's impact on Drakes Estero's wetlands, eelgrass, bethnic fauna,
6 fish, harbor seals, birds, and soundscape could be "minor" or negligible" and that its impact on
7 water quality could be "beneficial." *See* Lunny Dec. Ex. 11 at 5.
8 Likewise, the FEIS did not acknowledge the DQA Complaint. NPS refused adopt the
9 NAS DEIS Review's suggestion to segregate impact assessments of the various alternatives and
10 indicate that they are incomparable due to the use of two environmental baselines, including a
11 nonstandard projected future baseline. Lunny Dec. Ex. 12 at Appx. G-2. The FEIS essentially
12 ignored the NAS DEIS Review's conclusions that, *inter alia*, the "Impact Intensity" definitions
13 should be more scientific and should take actual measurements of sound generated by DBOC
14 boats and equipment. *See* Lunny Dec. Ex. 11 at 52. These are just some of the problems
15 discovered in the short period since the FEIS was issued.
16 On November 29, 2012, Secretary Salazar issued his Memorandum of Decision denying
17 Plaintiffs' application for a SUP pursuant to Section 124. Lunny Dec. Ex. 13. In his
18 Memorandum, Secretary Salazar stated that his decision gave "great weight to . . . the public
19 policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness."
20 *Id.* at 5. The Memorandum further relied on the Congressional intent associated with the 1976
21 Wilderness Act to conclude that the SUP should be denied because Drakes Estero is worthy of
22 becoming designated wilderness, and should become designated wilderness. *Id.* at 5-6. The
23 Memorandum asserted that "DBOC's commercial operations are the only use preventing the
24 conversion of Drakes Estero to designated wilderness," and further asserted that after November
25 30, 2012, "DBOC no longer will have legal authorization to conduct those operations, and
26 approximately 1,363 acres can become designated wilderness." *Id.* at 6.
27 The Memorandum boldly claimed that Section 124 did not "overide[] the intent of
28 Congress as expressed in the 1976 act to establish wilderness at the estero," but it also claimed

that "SEC. 124 expressly exempts my decision from any substantive or procedural legal requirements." Lunny Dec. Ex. 13, at 4, 6. It also directed NPS Director Jarvis to notify Plaintiffs that they have 90 days after November 30, 2012 [i.e., February 28, 2013], "to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order"; notify Plaintiffs that "[n]o commercial activities may take place in the waters of Drakes Estero after November 30, 2012"; and publish a notice in the Federal Register to convert Drakes Estero from potential to designated wilderness. *Id.* at 1-2, 6.

These directives to Plaintiffs were further described in a November 29, 2012, letter from NPS Regional Director Lehnertz (hereinafter "NPS Directive"). Lunny Dec. Ex. 17 at 1. The NPS Directive provided that DBOC cannot place any larvae or shellfish within Drakes Estero after November 30, 2012, must remove all shellfish and the oyster racks from Drakes Estero, and must remove all personal property from the shores of Drakes Estero. Lunny Dec. Ex. 17 at 1-2. It also stated that "DBOC's employees who have lived onsite … may [only] continue to live onsite for a [unspecified] limited period of time afterwards" and that NPS will contact them directly regarding "relocation." *Id.* at 2.

The Memorandum and NPS Directive will immediately and irreparably harm DBOC, its owners and employees, the public, and the environment in numerous ways. First, by prohibiting DBOC from seeding existing immature oysters (spat) onto oyster racks, it will cause the demise of 20 to 25% of DBOC's 2014 oyster crop (about 2.5 million immature oysters, each of which has a market value of about $0.50), and require Plaintiffs to layoff approximately one-third of its highly skilled and experienced staff. Lunny Dec. ¶¶ 38-41, 71. Second, it will destroy 19 million immature oysters and 1.99 million immature clams that are not yet commercially viable by requiring their premature removal from Drakes Estero. *Id.* at ¶¶ 34-36. Third, Plaintiffs will be forced sell or destroy its infrastructure—including buildings, oyster racks, shellfish setting tanks, storage sheds, and mobile residences—by February 28, 2012. *Id.* ¶¶ 45-49. Fourth, Plaintiffs will be forced to pay over $700,000 to perform all the work required in the order without a corresponding income stream. *Id.* ¶¶ 48, 56, 67. Fifth, DBOC will be forced to lay off all of its highly skilled and experienced workers who have irreplaceable skills necessary for aquaculture—

1 approximately one-third of the staff immediately, and the rest within ninety days. *Id.* ¶¶ 55, 70-
2 71. Fifth, fifteen people—DBOC employees and their families who live onsite, including seven
3 children under the age of sixteen—will be forced out of their homes. *Id.* ¶¶ 45-47, 72-74. Sixth,
4 Plaintiffs will be forced to break ties with all of their customers who will then be forced to find
5 new suppliers, and it is uncertain whether the damage to these relationships would be reparable.
6 *Id.* ¶ 69. removal of DBOC "could result in long-term major adverse impacts on California's
7 shellfish market…." *Id.* ¶¶ 84-85; *id.* Ex. 12 at Table ES-4 xxv. Seventh, if DBOC is not
8 permitted to plant new oysters in the April to September 2013 period, it will incur an ensuring
9 gap in production within 18 to 24 months will cause it to lose income for a corresponding
10 interval. *Id.* ¶¶ 42-44. Finally, it is impossible for Plaintiffs to comply with the NPS Directive and
11 Secretary's decision in 90 days because those orders do not take into account permitting
12 requirements or the time necessary to physically perform the tasks required. *Id.* ¶¶ 49-50, 52, 62.
13 Defendants' actions will also irreversibly alter and cause irreparable immediate harms to
14 the environment. Removal of DBOC's shellfish racks and oysters—a part of Drakes Estero's
15 ecosystem for fifty years—has the potential to cause adverse impacts to water quality and the
16 ecosystem. Lunny Dec. ¶ 59; Declaration of Scott Luchessa (Luchessa Dec.) ¶¶ 4-14 (discussing
17 potential adverse impact on water quality, eelgrass, and fish and danger of creating beneficial
18 conditions for invasive species). As the NAS explained, "oyster filtration could be an important
19 process regulating accumulations of organic matter and nutrient recycling within Drakes Estero."
20 Lunny Dec. Ex. 11 at 36. And as the FEIS acknowledges, removing DBOC will cause short-term
21 adverse impacts to Drakes Estero, such as "adverse impacts on birds from [oyster] rack removal,
22 due to the removal of food sources and resting habitat…." Lunny Dec. Ex. 12 at xi. As the NAS
23 DEIS Review makes clear, NPS has not adequately accounted for the nature and extent of the
24 environmental harms that will occur.

25 **III. LEGAL STANDARD**

26 To obtain a temporary restraining order, plaintiffs must establish that (1) they are likely to
27 succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the
28 temporary restraining order; (3) the balance of equities tips in their favor; and (4) the issuance of

1 the temporary restraining order is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*,
2 555 U.S. 7, 20 (2008) (preliminary injunction standard); *Lockheed Missile & Space Co., Inc. v.*
3 *Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995) ("The standard for issuing a
4 temporary restraining order is identical to the standard for issuing a preliminary injunction.").
5 A stronger showing some elements may offset a weaker showing on another. *Alliance for*
6 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "'[S]erious questions going to
7 the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance
8 of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
9 irreparable injury and that the injunction is in the public interest." *Id.* at 1135.

10 **IV. ANALYSIS**

11 **A. Likelihood to Succeed on the Merits**

12 **1. Defendants' Misinterpretations of § 124 Were an Abuse of Discretion**

13 Plaintiffs are likely to succeed on the merits because Defendants' decision relies on two
14 misinterpretations of Section 124. Misinterpretation of the law is an abuse of discretion and a
15 violation of the APA. *See* 5 U.S.C. § 706(2)(A) (the APA requires a court to "hold unlawful and
16 set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in
17 accordance with law"); *Fargo v. Comm'r of Internal Revenue*, 447 F.3d 706, 709 (9th Cir. 2006)
18 (abuse of discretion occurs when a decision is based on an erroneous view of the law). If an
19 agency "action is based upon a determination of law … , an order may not stand if the agency has
20 misconceived the law." *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943).

21 Congress enacted Section 124 to resolve a dispute between NPS and Plaintiffs regarding
22 the Defendants' ability to issue a SUP after DBOC's RUO expired on November 30, 2012. Prior
23 to Section 124's passage, NPS maintained that it could not give effect to the RUO's renewal
24 clause because the 1976 Wilderness Laws removed its authority to issue Plaintiffs a new SUP.
25 Lunny Dec. ¶ 10. In response, Congress enacted Section 124 to authorize the Secretary to issue
26 Plaintiffs a SUP "notwithstanding any other provision of law." Waterman Dec. Ex. 5.

27 First, the Secretary erred by concluding that if he issued the SUP he would violate the
28 1976 Wilderness Laws, even though Section 124 was enacted to make clear that he had authority

1 to issue the SUP notwithstanding those laws. In his decision, the Secretary stated that granting
2 Plaintiffs a SUP "would violate . . . specific wilderness legislation for [PRNS]," i.e., the 1976
3 Wilderness Laws. Lunny Dec. Ex. 13 at 1. The Secretary said, in effect, that he *could not* issue
4 the SUP because doing so would violate the intent of Congress. In fact, he went so far as to assert
5 that Section 124 "in no way overrides the intent of Congress as expressed in the 1976 act to
6 establish wilderness at the estero. With that in mind, my decision effectuates that [1976]
7 Congressional intent." *Id.* at 6. But Section 124 was enacted specifically to allow him to issue the
8 SUP notwithstanding the 1976 Wilderness Laws. Therefore, Defendants misinterpreted Section
9 124, and this misinterpretation of law was an abuse of discretion and a violation of the APA.
10 Second, the Secretary erred when he concluded that Defendants did not have to comply
11 with NEPA: "SEC. 124 does not require me (or the NPS) to prepare a DEIS or FEIS or otherwise
12 to comply with the National Environmental Policy Act of 1969 (NEPA) or any other law. The
13 'notwithstanding any other provision of law' language in SEC. 124 expressly exempts my
14 decision from any substantive or procedural legal requirements." Lunny Dec. Ex. 13. at 4. This
15 assertion misreads the plain language of the statute, which authorizes the Secretary "to issue" the
16 SUP—not "to deny" the SUP, or "to decide whether to issue or deny" the SUP—notwithstanding
17 any other provision of law. *Id.*; Waterman Dec. Ex. 5. By concluding that the "notwithstanding"
18 language applied to a denial, the Secretary rewrote the statute.
19 "It is, of course, a cardinal principle of statutory construction that repeals by implication
20 are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). For a later statute
21 to repeal an earlier one, "the intention of the legislature to repeal must be clear and manifest." *Id.*
22 Here Section 124's plain language does not permit the Secretary to utilize the "notwithstanding"
23 provision if issuing a denial. Furthermore, there is no sign, much less "clear and manifest" intent,
24 that Congress intended to allow Defendants to deny the SUP without compliance with NEPA.
25 Even when Congress has used the phrase "notwithstanding any other provision of law," courts
26 look carefully at Congressional intent to see exactly what Congress intended the
27 "notwithstanding" language to apply to. *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991).
28 Here Congress wanted to remove the obstructions that (according to Defendants) prevented them

from issuing the SUP. Congress wanted to make it easy to issue the SUP. Nothing suggests that Congress wanted to assist Defendants in *denying* the SUP by allowing them not to comply with statutes they would otherwise be required to obey. Defendants' interpretation of Section 124 is therefore contrary to its plain language and well-established principles of statutory interpretation. Because of these errors of law, Defendants abused their discretion and violated the APA.

2. Defendants Violated NEPA

Plaintiffs are also likely to succeed on the merits because Defendants failed to comply with NEPA's procedural and substantive requirements. NEPA applies to any "major Federal action[] significantly affecting the quality of the human environment," as defined by 42 U.S.C. § 4332(C) and under CEQ and DOI NEPA regulations. 40 C.F.R. § 1508.18; 43 C.F.R. § 46.100(a). The FEIS acknowledged that a ten-year SUP had the potential for significant environmental effects, which qualifies it as a major federal action. Lunny Dec. Ex. 12 at xi-xv; *see Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988) (magnitude of potential environmental effects determines "[w]hether a federal agency is required to follow NEPA . . .").

NEPA "requires agencies to prepare a detailed environmental impact statement [EIS] for all" such actions. *Ctr. for Biological Diversity v. U.S. BLM*, 2012 U.S. App. LEXIS 22016, *45 n. 12 (9th Cir. 2012). When an agency fails to do so, parties whose interests fall within the zone of interests identified by the statute may bring suit. Plaintiffs' efforts to avoid the adverse consequences of removing DBOC from Drakes Estero, where it exists in harmony with the environment, are within NEPA's zone of interests. *See Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158-1159 (9th Cir. 1998) (interests in maintaining environmental integrity of club in a rustic setting fell within NEPA's zone of interests). NEPA claims are reviewed under the APA. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012).

Defendants violated key NEPA procedural safeguards designed to ensure the public's and Plaintiffs' ability to comment on the FEIS: (1) NPS did not file the FEIS with EPA, as required by 40 C.F.R. §§ 1506.9 (filing requirements), 1506.10(b)(2) (timing requirements); and consequently, (2) EPA never published a NOA for the FEIS to trigger the required 30-day public notice and comment period on the FEIS. *Id.*; Waterman Dec. ¶ 6. Due to these procedural

failures, Defendants were barred from relying on the FEIS to make a decision. 40 C.F.R. § 1506.10(b)(2). Nevertheless, on November 29, 2012, the Secretary violated NEPA by relying on the DEIS and FEIS to make his decision, despite the required thirty day period. Lunny Dec. Ex. 13 at 5 (the DEIS and FEIS "informed me with respect to the complexities, subtleties, and uncertainties of this matter and have been helpful to me in making my decision").

Defendants also violated NEPA by producing and then relying upon a DEIS and FEIS that failed to meet NEPA's standards for adequacy. NEPA's purpose is "to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (internal quotation marks and citations omitted). It requires "that agency action is fully informed and well considered." *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (internal quotation marks and citations omitted).

In December 2011, "because of concerns relating to the validity of the science underlying the DEIS," Congress directed the NAS "to assess the data, analysis, and conclusions in the DEIS in order to ensure there is a solid scientific foundation for the Final Environmental Impact Statement expected in mid-2012." H.R. Rep. No. 112-331, at 1057 (2011) (Conf. Rep.) The NAS DEIS Review's findings showed that the DEIS was so flawed as to preclude meaningful analysis.

For example, one error among many found by the NAS DEIS Review involved the DEIS's use of different baselines to analyze Alternative A (No Action) and Alternatives B, C, and D (Action). This essentially created "two separate impact assessments, one for the no action alternative and another for the action alternatives, such that there is not a common basis for comparing the potential impacts of the [alternatives]." Lunny Dec. Ex. 11 at 13. In sum, the NAS DEIS Review concluded that the alternatives "are not comparable due to use of different baselines." *Id.* at 4; *Kelley v. Sec'y of HHS*, 68 Fed. Cl. 84, 91 n.11 (2005) (NAS branch committee reports considered authoritative and entitled to deference).

The alternatives analysis is the "heart of the environmental impact statement. . . . [which] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the

1 decisionmaker and the public." 40 C.F.R. § 1502.14. Revision and recirculation of the DEIS may
2 be required where the DEIS "was so incomplete or misleading that the decisionmaker and the
3 public could not make an informed comparison of the alternatives . . . ." *Natural Res. Defense*
4 *Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (internal quotations and citations
5 omitted). Here, the DEIS precluded meaningful analysis by prohibiting a comparison of the "no
6 action" alternative with the "action" alternatives because the alternatives were built on different
7 baselines—an error that went to the very heart of the EIS.

8 The NAS DEIS Review identified so many profound and deep-rooted flaws in the DEIS
9 that it showed that the DEIS was "so inadequate as to preclude meaningful analysis," such that
10 NPS was required to "prepare and circulate a revised [DEIS]." 40 C.F.R. § 1502.9(a). NPS did
11 not do this. The FEIS therefore could not be disseminated to agency decisionmakers, let alone
12 used as a source for informed decisionmaking, due to its wholesale disregard of NEPA's
13 requirements. *See Natural Res. Def. Council*, 421 F.3d at 811.

14 The DEIS's errors and deficiencies went almost entirely unaddressed in the FEIS, which
15 added new errors that further undermined the scientific quality and utility of the document. For
16 example, the FEIS continued to use an inappropriate "no-action" baseline to compare alternatives.
17 As noted above, Plaintiffs and ENVIRON International were able to prove that the FEIS
18 "soundscapes" analysis was deeply flawed.

19 Plaintiffs are likely to succeed on the merits due to Defendants' repeated violations of
20 NEPA's procedural and substantive requirements. The DEIS and FEIS, in both their substance
21 and manner of issuance, were inadequate for the task of "ensuring that an agency has
22 'consider[ed] every significant aspect of the environmental impact of a proposed action' and has
23 'inform[ed] the public that it has indeed considered environmental concerns in its decisionmaking
24 process.'" *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774 (9th Cir. 2012) (quoting *Balt.*
25 *Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

26 **3. Defendants Violated the APA**

27 Defendants' decision to disregard congressional intent and Section 124's plain language
28 was "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with law." 5

U.S.C. § 706(2)(A). Defendants' misinterpretations of Section 124 were an abuse of discretion based on an erroneous view of the law, as explained in section IV.A.1, above. *Fargo*, 447 F.3d at 709 (internal citations and quotations omitted). If an agency "action is based upon a determination of law … , an order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943). The decision should be vacated for this reason alone.

Defendants' decision also violated the APA because it was arbitrary and capricious. An agency's action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency …." *Ctr. for Biological Diversity v. United States BLM*, 2012 U.S. App. LEXIS 22016, *13 (9th Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)); *accord Sierra Club v. EPA*, 671 F.3d 955, 963 (9th Cir. 2012) (agency must examine relevant data and articulate "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal citations and quotations omitted)).

Here, Defendants' decision was arbitrary and capricious for several reasons. When the Secretary misinterpreted Section 124's plain language and disregarded a clear congressional directive to not base his decision on the 1976 Wilderness Laws, he relied on factors that Congress did not intend for him to consider and thereby acted arbitrarily and capriciously. *See, e.g., Northwest Envtl. Advocates v. United States EPA*, 855 F. Supp. 2d 1199, 1231 (D. Or. 2012); *IBEW, Local Union No. 474 v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987) (administrative body's decision cannot be enforced if it is "base[d] … on a standard that it unjustifiably believes was mandated by Congress," notwithstanding that it "might" be able to reach same decision based on consideration of relevant factors).

The Secretary's decision was also an arbitrary and capricious "clear error of judgment" based on "an explanation that [ran] counter to the evidence before" him. *NRDC v. United States Forest Serv*., 421 F.3d 797, 806 (9th Cir. 2005). When the NAS DEIS Review analyzed the DEIS "soundscapes" section, it assigned a high level of uncertainty to the conclusion that DBOC has a major adverse impact on soundscapes for a number of reasons, including the "lack of direct

1 measurements of sound levels associated with DBOC activities," explaining that the impact could
2 be "minor." Lunny Dec. Ex. 11 at 5, 39. The FEIS's soundscapes data was no better. Plaintiffs
3 and ENVIRON International's noise expert proved that the FEIS's soundscape data—used to
4 claim that DBOC had a major adverse environmental impact—were invalid. Waterman Dec. Ex.
5 3 at 3, and ENVIRON Report 1-7. In response to Plaintiffs' evidence of flaws in the FEIS
6 "soundscapes" analysis, Defendants simply declared that the Secretary's decision was not based
7 "on the data that was asserted to be flawed." Lunny Dec. Ex. 13 at 5, n.5. But if Defendants did
8 not consider the soundscape data, then nothing supported their conclusion that DBOC's
9 operations cause major impacts to the environment. Defendants' principal environmental
10 conclusion is therefore not supported by the evidence, in violation of the APA.

11 Defendants' failure to meaningfully consider and objectively evaluate all relevant
12 evidence regarding DBOC's relationship with Drakes Estero, including the NAS DEIS Review,
13 DQA Complaint, and ENVIRON data and analysis also rendered the Secretary's decision
14 unlawful. The APA requires a reasoned consideration of relevant factors. *See Native Ecosystems*
15 *Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012).

16 The Ninth Circuit recently addressed the extent of agencies' APA obligation to consider
17 relevant data in *Sierra Club*. In that case, EPA based a decision on vehicle emissions data
18 gathered and analyzed in 2002, but refused to consider updated air emissions data gathered and
19 analyzed in 2007. *Sierra Club*, 671 F.3d at 965-66. The court held that "EPA's failure to even
20 consider the new data and to provide an explanation for its choice rooted in the data presented
21 was arbitrary and capricious." *Id.* at 968. Here, as in *Sierra Club*, Defendants' refusal to
22 meaningfully consider the wealth of high-caliber, objective, independent data and analysis
23 demonstrating that their conclusions were wrong and to provide a rational, scientifically plausible
24 explanation for its choice rooted in the data, constituted a violation of the APA.

25 Fourth, Defendants' decision to reverse course and claim that NEPA does not apply at the
26 eleventh hour—literally on the last day of an 800 day NEPA process—was also arbitrary and
27 capricious in violation of the APA. If an agency adopts a rule that changes the agency's prior
28 position, the agency is "obligated to supply a reasoned analysis for the change." *Motor Vehicle*

1 *Mfgs. Ass'n*, 463 U.S. at 42 (citations omitted); *accord California Trout v. FERC*, 572 F.3d 1003,
2 1022-23 (9th Cir. 2009). Defendants publicly expressed their intent to comply with NEPA from
3 September 2010 when they initiated the process and published a timeline (Lunny Dec. Ex. 7),
4 through the September 2011 publication of a DEIS, until abruptly reversing course on the very
5 last day in the Secretary's decision memorandum. Lunny Dec. Ex. 13 at 4.

6 As discussed in Section IV.A.1, Section 124 does not exempt Defendants' decision to
7 deny Plaintiffs' SUP from NEPA. Yet even if it did, when Defendants "departed irrationally
8 from" the NEPA process without reasoned explanation they acted arbitrarily and capriciously. *Id.*;
9 *see AFL v. Chertoff*, 552 F. Supp. 2d 999, 1009 (N.D. Cal. 2007) ("[A]gency action … [that]
10 departs from agency precedent without explanation … [and] reasoned analysis indicating that
11 prior policies and standards are being deliberately changed, not casually ignored," is arbitrary and
12 capricious. (citations omitted)); *California Trout*, 572 F.3d at 1022-1023 (APA requires "agencies
13 to deal consistently with the parties or persons coming before them").

14 **4. Defendants Violated the Data Quality Act**

15 Plaintiffs are likely to prevail because Defendants' failure to correct the systemically
16 flawed DEIS and publication of a FEIS with similar infirmities violated the Data Quality Act. 44
17 U.S.C. § 3516 Note. Suits for DQA violations are brought under the APA, 5 U.S.C. § 702, and
18 judicial review may be available if the agency's information-quality standards are "judicially
19 manageable" and "allow meaningful judicial review to determine whether an agency properly
20 exercised its discretion in deciding a request to correct a prior communication." *Delta Smelt*
21 *Consol. Cases v. Salazar*, 760 F. Supp. 2d 855, 962 (E.D. Cal. 2010) (quoting *Salt Institute v.*
22 *Thompson*, 345 F. Supp. 2d 589 (E.D. Va. 2004)).

23 NPS Director's Order 11B establishes information-quality regulations that provide that
24 NPS publications—like the DEIS, FEIS, or Atkins Peer Review—must meet a threshold of
25 scientific accuracy and accountability. Waterman Dec. Ex. 7. If a DQA complainant shows "a
26 reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does
27 not resolve the complaint prior to the final agency action" and early consideration will not
28 "unduly delay issuance of the agency action or information," then NPS must give expedited

1 consideration to the complaint prior to final agency action. *Id*. at part IV.E.

2 On August 7, 2012, Plaintiffs filed a DQA Complaint demonstrating that the DEIS's
3 impact conclusions on soundscapes, wilderness, harbor seals, birds and bird habitat, and visitor
4 experience and recreation were demonstrably false and based on inaccurate data, vague and
5 subjective definitions, and inappropriate baselines. Lunny Dec. Ex. 14 at 2-5. Plaintiffs' DQA
6 Complaint established that they faced a reasonable likelihood of suffering actual harm if NPS did
7 not correct the errors in the DEIS, and that making such corrections would not unduly delay
8 agency action. *Id.* NPS perfected its DQA violation by publishing the FEIS without responding to
9 the merits of the DQA Complaint. *See* Waterman Dec. Ex. 7 part IV.E; 42 U.S.C. § 4331 *et seq.*

10 **5. Defendants Violated Plaintiffs' Procedural Due Process Rights**

11 Plaintiffs are likely to succeed on the merits because Defendants arbitrarily deprived them
12 of several protected property interests without constitutionally "adequate procedural protections,"
13 in violation of the Fifth Amendment. *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003).

14 Defendants deprived Plaintiffs of valid property interests by ordering them to remove their
15 shellfish from Drakes Estero within 90 days, and by prohibiting them from engaging in any
16 "commercial activities … in the waters of Drakes Estero after November 30, 2012," in
17 contravention of their valid State shellfish leases. Lunny Dec. 13 at 6. Moreover, Defendants
18 prohibited DBOC from "plant[ing] or plac[ing] any additional larvae or shellfish within Drakes
19 Estero" after November 30, 2012, even though DBOC's State water bottom leases—M-438-01
20 and M-438-02—are valid until June 2029. Lunny Dec. Ex. 17 at 2. Plaintiffs' leases are
21 unquestionably property interests, as are Plaintiffs' immature shellfish growing in Drakes Estero,
22 which Defendants readily acknowledge to be Plaintiffs' personal property. *See Dep't of Hous. &*
23 *Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002) (leasehold interests are protected property); *see,*
24 *e.g., Keniston v. Roberts*, 717 F.2d 1295, 1298 (9th Cir. 1983); Lunny Dec. Ex. 13 at 2.

25 The Fifth Amendment guarantees Plaintiffs the minimum process of meaningful notice, a
26 meaningful opportunity to respond, and an unbiased decisionmaker before the government may
27 deprive them of protected property interests. U.S. CONST. amend. V; *see Buckingham v. Sec'y of*
28 *the USDA*, 603 F.3d 1073, 1081-1082 (9th Cir. 2010). Defendants deprived Plaintiffs of these

1 protected property rights without affording them any meaningful opportunity to be heard, to
2 explain why the FEIS's content was fundamentally flawed, or to present evidence negating its
3 claims. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (establishing balancing test for
4 determining whether administrative procedures satisfy due process).

5 Plaintiffs meet all three parts of the familiar *Mathews* test. First, Plaintiffs were deprived
6 of their private interest in their livelihood. Second, the absence of any meaningful opportunity for
7 Plaintiffs to respond to the FEIS's claims or to present contrary evidence negating the FEIS's
8 conclusions created a high risk of erroneous deprivation. Safeguards that might have provided
9 such opportunity to respond—such as the NEPA-required 30-day notice-and-comment period (40
10 C.F.R. § 1506.10(b)(2))—were ignored. Third, merely requiring Defendants to comply with
11 NEPA's procedural requirements would not impose any new administrative burdens or
12 administrative costs that Defendants were not already legally obligated to bear. Defendants'
13 actions deprived Plaintiffs of their property without clearly established process of law.

14 **6. Defendants Violated Plaintiffs' Right to Substantive Due Process**

15 An "arbitrary deprivation" of a property right can create a "viable substantive due process
16 claim," *Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd.*, 509 F.3d 1020, 1026 (9th
17 Cir. 2007), where, as here, that deprivation was the product of "egregious official conduct" that is
18 an "abuse of power" without any "reasonable justification." *Shanks v. Dressel*, 540 F.3d 1082,
19 1088-89 (9th Cir. 2008) (internal quotation marks an citations omitted). By following the NEPA
20 process for 798 days before asserting on the last day that their actions were "exempt[] . . . from
21 any substantive or procedural legal requirements," Lunny Dec. 13 at 4, and asserting that the
22 1976 Wilderness Laws trumped the specific legislative intent of Section 124, Defendants' actions
23 were "arbitrary in the constitutional sense," in violation of the Fifth Amendment. *Shanks*, 540
24 F.3d at 1088-89 (internal quotation marks an citations omitted).

25 **B. Imminent and Irreparable Harm**

26 Plaintiffs are likely to suffer imminent and irreparable harm because the Secretary's
27 memorandum and NPS Directive require the complete destruction of Plaintiffs' business.

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American Passage Media Corp. v. Cass Communications, Inc., 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm.").

Defendants' order will cause the loss of approximately 2.5 million oyster spat—approximately 20 to 25% of Plaintiffs 2014 crop—if Plaintiffs cannot immediately transition those oyster spat from the mesh bags where they currently are located to oyster racks. Lunny Dec. ¶¶ 38-41. By the same token, Plaintiffs will be forced immediately to layoff its employees that perform those tasks—approximately one-third of its highly skilled and experienced employees who are irreplaceable—if it is not allowed to process those oyster spat. *Id.* at ¶¶ 70-71.

By February 28, 2013, the NPS Directive requires Plaintiffs to dismantle its oyster processing and canning operation, and destroy its entire shellfish crop of twenty-one million shellfish—19 million oysters and 1.99 million clams—that are not yet commercially viable. Lunny Dec. ¶¶ 32-34. Plaintiffs will be forced to sell or destroy its other personal property, including an office trailer, three mobile homes, five shellfish setting tanks, and storage sheds, because it has no place to store it. *Id.* ¶ 45. If DBOC cannot continue to cultivate oyster and clam seed by engaging in normal planting activities between April and September 2013, it will have no crop for harvest in 2014-2015. *Id.* ¶¶ 42-44. Plaintiffs estimate it would cost at least $722,125 to comply with Defendants' orders, which would cause them irreparable harm. *Id.* ¶¶ 48, 56, 67-68.

Ceasing operations will also irreparably harm Plaintiffs' long-lasting commercial and personal relationships, including the intangible value of the good will they have earned, because their customers will seek alternate shellfish suppliers and there is no guarantee that Plaintiffs could reestablish those relationships at some point in the future. Lunny Dec. ¶ 69. Plaintiffs will be forced to lay off its highly skilled and experienced employees—a number of whom have decades of experience—who have skills that are irreplaceable. *Id.* ¶¶ 70-71.

The Secretary's order to NPS to publish a notice in the Federal Register to convert Drakes Estero from "potential wilderness" to "designated wilderness" poses as imminent and irreparable harm to DBOC's right pursuant to its State water bottom leases to continue to cultivate shellfish in Drakes Estero. Lunny Dec. ¶¶ 77-79.

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1 Plaintiffs are also subject to imminent and irreparable harm because Defendants' order is
2 impossible to comply with. First, the 90 day time period does not take into account interagency
3 permitting and coordination between other federal, state, and local agencies that may be required
4 before Plaintiffs even begin to comply with Defendants' order. Declaration of Laura Moran
5 (Moran Dec.) ¶¶ 2-13; Lunny Dec. ¶¶ 49-50. Second, the 90 day period does not account for any
6 additional environmental review that may be required pursuant to federal or state law, including
7 NEPA and the California Environmental Quality Act. Moran Dec. ¶ 13 Third, Plaintiffs estimate
8 that it would only be able to remove 9 million oysters by February 28, 2013, leaving 11 million
9 oysters and 2 million clams in Drakes Estero. Lunny Dec. ¶¶ 51-52. Fourth, due to winter tides,
10 inclement weather conditions, and the time necessary to remove each oyster rack, Plaintiffs
11 estimate that it would only be able to physically remove eight to twelve oyster racks before
12 February 28, 2012, nowhere near removing all 95 oyster racks. Lunny Dec. ¶¶ 61-62.

13 **C. The Balance of Equities Tips In Favor of Plaintiffs**

14 Defendants will not be harmed by maintaining the status quo—which has existed for
15 approximately eighty years in Drakes Estero—while the Court considers the merits of Plaintiffs'
16 suit. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (uncertain or minimal
17 environmental harm may be outweighed by economic harm).

18 Furthermore, NPS has demonstrated by its conduct that there is no exigency in removing
19 the oyster farm from the shores of Drakes Estero. In 2004, NPS had the right to eliminate the
20 oyster farm by exercising its right of first refusal to block the transfer of the RUO to Plaintiffs and
21 terminate the oyster arm eight years early, but it did not do so. Lunny Dec. ¶ 4. If NPS judged it
22 sufficient to wait at least until the end of RUO, it cannot claim imminent harm from waiting a
23 short while longer to allow Plaintiffs' claims to be heard by this Court.

24 In contrast, Plaintiffs would suffer the destruction of their business, including but not
25 limited to the complete dismantling of the physical structures necessary for the business both
26 onshore and offshore, the destruction of their oyster crop and inability to plant future crops, the
27 loss of highly skilled and experienced employees, the loss of customers, and the loss of valid
28 State water bottom leases. Lunny Dec. ¶¶ 34, 41-45, 69-79. Furthermore, Plaintiffs would be

required to expend over $700,000 and large amounts of time to implement the decision to remove the physical structures from the onshore and offshore areas. *Id*. ¶¶ 57-67.

It is also impossible for Plaintiffs to comply with the NPS Directive due to practical realities. It will take much longer than 90 days to accomplish everything the decision requires, including: (1) acquiring the necessary federal, state, and local permitting to allow DBOC to begin the process of implementing the NPS Directive, and complying with environmental review requirements—a period of undetermined duration; (2) removing all oysters and clams from Drakes Estero, which would require a minimum of 220 days; and (3) removing the oyster racks from Drakes Estero, which would require a minimum of 285 days over 665 calendar days, even if DBOC diverted the use of its oyster skiffs and staff completely to this task. Luchessa Dec. ¶ 11; Moran Dec. ¶¶ 1, 13; Lunny Dec. ¶¶ 61-62. Finally, as demonstrated below, the balance of equities tips even more heavily in favor of Plaintiffs when the public interest is weighed.

D. The Public Interest Supports Issuance of the Injunction

It is in the public interest to preserve the status quo during the pendency of Plaintiffs' suit. First, compliance with NEPA and other environmental law is in the public interest. *Cottrell*, 632 F.3d at 1138 (recognizing that ensuring that careful consideration of environmental impacts occurs prior to major federal projects and suspending such projects until such consideration occurs is in the public interest).

Second, the public interest will be served by avoiding the immediate loss of thirty-one full-time jobs, the loss of affordable housing for fifteen people—DBOC's employees and their families—and academic impacts to the twelve children of DBOC employees who will likely be forced to change schools mid-year, which are all appropriate considerations in accounting for the public interest. *Cottrell*, 632 F.3d at 1138-39; Declaration of James Patterson ¶¶ 6-8.

Third, declarations from environmental professionals at ENVIRON International document the immediate environmental harm that implementing the NPS Directive will entail, including increased nutrient loading and nitrogen pollution from upland sources due to the absence of the shellfish that filter, sequester and remove these pollutants from the ecosystem (Luchessa Dec. ¶¶ 4-7; Moran Dec. ¶ 10); reduced water clarity and quality stemming from the

shellfish removal that would also negatively impact eelgrass and the essential fish habitat it provides (Luchessa Dec. ¶¶ 8-9; Moran Dec. ¶ 11); potential noise impacts to fish and wildlife caused by removing the oyster racks (Luchessa Dec. ¶ 12); and potential to allow invasive species, like the invasive tunicate and mud snail, to spread and thrive Luchessa Dec. ¶¶ 13-14).

Fourth, it is in the public interest to preserve the interpretive and educational value provided by Plaintiffs to PRNS visitors, school groups, local non-profit organizations, private organizations, and government agencies. Lunny Dec. ¶¶ 81-83.

Fifth, it is in the public interest to avoid elimination of the State's reserved rights over Drakes Estero, approximately one-third of the State's oyster production, and the corresponding impacts to the people of California, including price increases, increased importation of shellfish from out of state, increased production of greenhouse gases related to transportation, and loss of jobs dependent on Plaintiffs' operations. Lunny Dec. ¶¶ 80, 84-86.

E. Scope of Relief

Secretary Salazar is the head of the Department of the Interior, and was vested with authority under Section 124 to direct NPS with respect to DBOC. 16 U.S.C. § 2. Director Jarvis is the head of the NPS, with the authority to direct the actions of NPS staff. 16 U.S.C. § 1 Thus, an injunction against Secretary Salazar and Director Jarvis will enjoin its implementation.

V. CONCLUSION

Plaintiffs seek a temporary restraining order to prevent the immediate and irreparable loss of 2.5 million oyster spat (approximately 20-25% of its 2014 crop) and the corresponding immediate layoff of one-third of its employees, as well as to prevent the utter destruction of their business, harm to the public, and irreparable environmental damage to Drakes Estero in the next 90 days. Plaintiffs also seek a temporary restraining order because it is impossible to comply with Defendants' orders. Plaintiffs must ask for this extraordinary remedy because they lack the means to withstand the destruction of their business and to attempt to comply with Defendants' unlawful and impossible orders, and still pursue adjudication of the merits of their case.

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DATED: December 12, 2012

CAUSE OF ACTION

By: /s/ Amber Abbasi
AMBER ABBASI
Attorneys for Plaintiff

DATED: December 12, 2012

STOEL RIVES LLP

By: /s/ S. Wayne Rosenbaum
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