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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND 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; and
JONATHAN JARVIS,
in his official capacity as Director, U.S. National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: January 25, 2013

Time: 2:00 p.m.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Regulations

Other Authorities

I. INTRODUCTION

A preliminary injunction should be granted because Defendants have not provided any substantive rebuttal to Plaintiffs' arguments. Defendants' chief contention—that they had absolute, unreviewable discretion to shutter Drakes Bay Oyster Company (DBOC) because the Secretary's decision somehow constituted "a failure to act" or "inaction"—is based on a legally flawed form-over-substance approach and the omission of a key part of the APA definition of "agency action." Defendants similarly misinterpret the plain language of Section 124, the 1976 and 1978 Acts, and NEPA. If the injunction is denied, Defendants' long-running campaign to shutter DBOC will culminate in irreparable harms to Plaintiffs, DBOC's employees, and the public. This Court should issue the injunction to prevent these harms until the merits of Plaintiffs' claims have been heard.

II. PLAINTIFFS' APA CLAIMS ARE JUSTICIABLE

A. Defendants' Decision Constitutes "Agency Action" Under the APA

Defendants concede that they made a "decision," but characterize it as "non-action" that is unreviewable under the APA. Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction D.64 (Opp.) at 11:17-20. Defendants are wrong for three reasons.

First, the effect of Defendants' decision was to deny Plaintiffs' Special Use Permit (SUP) application, and the denial of a permit application constitutes reviewable agency action. *See* 5 U.S.C. § 551(13) (defining "agency action" to include the "denial" of a "license"); 5 U.S.C. § 551(8) (defining "license" to include an "agency permit"). Courts look to the effect of a decision, rather than its form, in determining whether it is reviewable agency action. *See Env'l Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("When administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief."); *accord Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990); *Franco v. U. S. Dep't of Interior*, No. S-09-1072, 2012 U.S. Dist. LEXIS 105316, at *33-34 (E.D. Cal. July 26, 2012); *see also Socop-Gonzalez v. INS*, 208 F.3d 838, 845-46 (9th Cir. 2000) (decision not to reopen deportation proceedings is "inaction only in an extremely

formalistic sense" because "the decision not to act constitutes a decision to deport" and thus is subject to judicial review). Here, what Defendants call their decision to "allow the Company's existing authorizations to expire," Opp. at 12:8-9, had precisely the same effect as a denial of Plaintiffs' permit application. In fact, Defendants acknowledge in the first sentence of their Memorandum that their decision was in response to Plaintiffs' permit application. *See* Goodyear Dec. D. Ex. 65-1 at 1 ("[a]fter giving due consideration to the request of [DBOC] to conduct commercial operations . . . I have directed [NPS] to allow the permit to expire"). Defendants' decision thus constitutes agency action—a permit denial—for which judicial review is available.

Second, Defendants issued an affirmative order to Plaintiffs to wind down their business. This order came in the form of a letter from Defendants giving Plaintiffs a "license" to remove their personal property and cease operations. Goodyear Dec. D. 65-2 Ex. 2 at 1-2; *see also Her Majesty the Queen*, 912 F.2d at 1531 (agency cannot "avoid judicial review 'merely by choosing the form of a letter to express its definitive position'" citation omitted)). This order and license each constitute agency action under the APA. *See* 5 U.S.C. § 551(13) (defining "agency action" to include an "order" and a "license"); 5 U.S.C. § 551(6) (defining "order" to include "licensing"). Because Plaintiffs' suit challenges this agency action, this Court has jurisdiction to review the legal basis of that action as articulated in the Secretary's Memorandum. *See* 5 U.S.C. § 706 (in determining whether an agency abused its discretion or did not act in accordance with law, "the court shall review the whole record or those parts of it cited by a party").

Third, Defendants' argument rests on a misquotation of the key part of a statute and a misunderstanding of a Supreme Court case. Defendants misquote the APA's definition of "agency action" as follows:

> The APA defines an "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof."

Opp. at 12:1-2 (quoting 5 U.S.C. § 551(13)). This quote, however, omits the last four key words of the definition—which make clear that "agency action" also includes the "failure to act":

> "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*;

5 U.S.C. § 551(13) (emphasis added); *see also* 40 C.F.R. § 1508.18 (defining agency action for purposes of NEPA as including "the circumstance where the responsible officials fail to act"). Thus even if, as Defendants argue, this case is a challenge to agency "non-action," it is still reviewable as a "failure to act," under the part of the definition of agency action Defendants omit.

Defendants also quote a portion of the opinion in *SUWA* to suggest that the Supreme Court held that failures to act are unreviewable, except when an agency is challenged under Section 706(1) of the APA for failing to do something it was "legally required" to do. Opp. at 12:3-6 (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (*SUWA*)). But the passage quoted by Defendants simply describes the difference between a "failure to act" and a "denial"; *SUWA* held that a failure to act, like a denial, is reviewable if the "failure to act" is "discrete." *SUWA*, 542 U.S. at 63-64. Further, the scope of *SUWA*'s holding is limited to claims brought under Section 706(1), and the case imposes no limits on claims brought under Section 706(2). *See Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1118-19 (9th Cir. 2010) (contrasting review under § 706(2) with *SUWA*, which held that an agency's failure to perform some required, discrete statutory duty is reviewable under § 706(1)); *see also Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 9-10 (D.D.C. 2007) (*SUWA* limited to § 706(1) claims and "does not reach claims encompassed within § 706(2)").

Here, Defendants made a discrete decision to not allow the oyster farm to continue operations. That decision came in the form of the Secretary's seven-page Memorandum and the National Park Service's (NPS) ensuing order to Plaintiffs. Whether that decision is cast as a permit denial or a failure to act, it fits the definition of agency action under the statute and under *SUWA*. This Court thus has jurisdiction to review Plaintiffs' challenge to that action as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975) (agency decision "not to sue" is subject to "judicial review under the standard specified in [5 U.S.C.] § 706(2)(A)").

B. There Are Laws and Meaningful Standards to Apply to Plaintiffs' Claims

Defendants admit that judicial review of agency action is presumptively available, but argue that this case fits a "narrow" exception for decisions "committed to agency discretion by

law." Opp. at 14:11-14 (quoting 5 U.S.C. § 701(a)(2)). Defendants assert that decisions are committed to agency discretion by law when there is "no meaningful standard against which to judge the agency's exercise of discretion and there thus is no law to apply." Opp. at 14:15-17. But there are laws and meaningful standards to apply here.

There is law to apply because Plaintiffs challenge four legal interpretations Defendants made in their decision. Defendants admit that their decision was based on "matters of law." Opp. at 15:7; *see also id.* at 22:20-22 (ownership of Drakes Estero may be "a matter of law for a Court to decide"). This Court is quite capable of deciding whether Defendants correctly interpreted that law. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is."). Defendants do not dispute that their decision must be overturned if they misconceived that law. *See SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943) (quoted in Plaintiffs' Memorandum of Points and Authorities (Memo.) D. 32 at 12:22-24). The "narrow" exception to judicial review thus does not apply here.

There are also meaningful standards to apply. Defendants argue that there are no meaningful standards to apply because Congress used the phrase "notwithstanding any other provision of law" in Section 124. Opp. at 15:3-5. Defendants are wrong. Congress enacted Section 124 as a special dispensation for Plaintiffs' benefit, to override Defendants' position at the time that existing laws prohibited them from issuing the permit. Memo. at 5:1-18. Defendants concede that Plaintiffs are right about Congress's intent: ". . . Congress's use of the 'notwithstanding' clause is evidence of its intent to remove legal obstacles to *the issuance* of a new SUP . . . ." Opp. at 17:23-24 (emphasis added).

Defendants now suggest that Section 124 was enacted for *their* benefit and that Congress actually wanted to make it *easier* for them to deny the permit by precluding judicial review. There are two problems with this argument. First, Defendants lack any evidence that Congress intended the "notwithstanding" clause to apply to a denial. The task of statutory construction is to determine Congress's intent. *See Scheidler v. NOW, Inc.*, 547 U.S. 9, 23 (2006) ("canons of interpretation . . . are tools designed to help courts better determine what Congress intended"); *In re Glacier Bay*, 944 F.2d 577, 581-82 (9th Cir. 1991) (courts look carefully at Congressional

intent to see what Congress intended "notwithstanding" language to apply to). While the parties agree that Congress intended the "notwithstanding" clause to remove legal obstacles to issue a permit, there is no evidence of Congressional intent to remove legal obstacles to *deny* a permit. Defendants are wrong that Congress intended the "notwithstanding" clause to apply to a denial.

Second, Section 124 does not say that the Secretary has discretion to make every kind of decision "notwithstanding any other provision of law"—whether that be to issue, deny, or even take no action at all. Rather, Section 124 is specific and operates like a ratchet in only one direction: it only "authorized" the Secretary "to issue" the permit "notwithstanding any other provision of law," i.e., those very laws that Defendants keep saying prohibit issuance of the permit. Waterman Dec. D. 43 Ex. 5.

Defendants argue that Plaintiffs' interpretation of Section 124 "effectively reads Congress's use of the word 'authorized' out of the statute." Opp. at 17:12:13. Defendants misunderstand Plaintiffs' argument. Plaintiffs do not argue that Section 124 required the Secretary to issue the permit; it authorized him to do so notwithstanding any other provision of law. Plaintiffs' argument is that, if the Secretary wanted to issue the permit, Section 124's plain terms made it easy for him to do so by removing the obstacles that Defendants had claimed prohibited issuance of the permit. *See Confederated Salish & Kootenai Tribes v. United States*, 343 F.3d 1193, 1196 (9th Cir. 2003) ("When the words of a statute are unambiguous . . . judicial inquiry is complete." (internal citation and quotation marks omitted).) But if the Secretary wanted to deny the permit, however, Section 124 did not excuse Defendants from complying with laws they would otherwise be required to obey.

Even if Defendants had made no misinterpretations of law, this Court could still assess their decision against the meaningful standards that Defendants' regulations impose. Where an agency has adopted regulations providing standards governing permit decisions, courts have jurisdiction to determine whether the agency's decisions comply with those standards. *See Kola, Inc. v. United States*, 882 F.2d 361, 364 (9th Cir. 1989) (reversing dismissal under § 701(a)(2) because standards provided in agency's regulations "[]bound" its discretion and "provide a basis for judicial review"); *see also Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 719 (9th Cir. 2011)

(judicial review under § 701(a)(2) was appropriate where regulations "supply the standard against which we can judge the agency's decision-making"). Here, Defendants have adopted regulations providing standards governing applications for a permit to operate businesses in park areas. *See* 36 C.F.R. § 1.6(a) (NPS may issue permits for otherwise restricted activities in park areas); 36 C.F.R. § 5.3 (allowing business activities by permit); *see also* Goodyear Dec. D. 65-2 Ex. 2 (issuing "license" to Plaintiffs under 36 C.F.R. § 5.3). Such a permit application may be denied "only" if NPS makes certain findings specified in the regulations. *See* 36 C.F.R. § 1.6(d). NPS's denial of such a permit is judicially reviewable. *See Clipper Cruise Line v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994) (reviewing decision under 36 C.F.R. § 1.6(d) to deny a permit under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A)). Because there are meaningful standards to apply, this Court has jurisdiction.

III. DEFENDANTS MISINTERPRETED THE LAW IN THEIR DECISION

A. Defendants Misinterpret Section 124

Defendants argue that Plaintiffs "misconstrue" the Secretary's Memorandum as concluding that issuing a new permit would "violate" the law. Opp. at 15:14-15. Plaintiffs did not misconstrue the Memorandum; they quoted it correctly. On the very first page of the Memorandum, the Secretary cited two key reasons for his decision, including, "[t]he continuation of the [oyster farm] would *violate* . . . specific wilderness *legislation.*" Goodyear Dec. D. 65-1 Ex. 1 at 1 (emphasis added). But Section 124 provides that issuing the permit would *not* violate any other laws. Thus the Secretary misinterpreted the law and his decision should be set aside.

Defendants suggest that the Secretary did not really mean what he said on the first page of his Memorandum because on the sixth page he noted that Section 124 "'grants me the authority to issue a new SUP.'" Opp. at 15:14-16 (quoting Goodyear Dec. D. 65-1 Ex. 1 at 6). But Defendants again omit the latter part of the sentence, where he said that this authority "in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero." Goodyear Dec. D. 65-1 Ex. 1 at 6. To put it another way, the Secretary reasoned that Congress gave him the authority to issue the permit, and made it easy for him to do so notwithstanding any other provision of law, but still really did not want him to issue it because of the 1976 Act. This

sentence not only contradicts itself, it contradicts the first page. Agency decisions that are "internally inconsistent and inadequately explained" are "arbitrary and capricious." *General Chemical Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987); *accord Pac. Coast Fed'n of Fishermen's Ass'n v. Gutierrez*, 606 F. Supp.2d 1122, 1143 (E.D. Cal. 2008). The decision should thus be set aside.[1]

B. Defendants Misinterpret the 1978 Act

Defendants argue that the Secretary's Memorandum refers only to a 1962 Act, and thus that Plaintiffs are wrong to argue that the Secretary misinterpreted the 1978 Act. Opp. at 15:26-28. The Memorandum actually refers to the 1962 Act "as amended." Goodyear Dec. D. 65-1 Ex. 1 at 2. As the Memorandum later acknowledges, the 1978 Act amended the 1962 Act. *Id.* at 7 ("Congress amended the [1962 Act] in 1978"). Plaintiffs are right.

Defendants next argue that they need not have read the 1978 Act together with the National Aquaculture Act of 1980 because "nothing in Section 124 required the Secretary to consider the National Aquaculture Act in reviewing the Company's request for a new SUP." Opp. at 16:10-11. Defendants miss the point. Section 124 did not require the Secretary to consider the policies of the National Aquaculture Act—the National Aquaculture Act did. *See* 16 U.S.C. § 2805(d). The "notwithstanding" clause of Section 124 does not relieve Defendants of that requirement because that clause applied only had the Secretary decided "to issue" the permit. *See* Section II.B above.

Finally, Defendants argue that their broad authority under the 1978 Act to lease "land" for agriculture does not include the specific right to lease "submerged lands." Opp. at 16:14-15. Defendants cite nothing in support of this argument. There is "no reason in logic or practice" why a statute drawn in "broad" terms should not be interpreted to include the "specific." *Wong Kam Wo v. Dulles*, 236 F.2d 622, 626 (9th Cir. 1956). "Submerged lands" are thus a type of

[1] Defendants also misquote Section 124. Although they say they quote the statute "in full" (Opp. at 6:9), Defendants actually omit the last sentence, which provides: "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."

"land" that the 1978 Act empowers the Secretary to lease. Even assuming that the federal government, rather than California, has the fishing rights in Drakes Estero, the 1978 Act thus authorizes the Secretary to allow continued oyster farming in Drakes Estero—just as he has authorized continued farming in all of the uplands surrounding Drakes Estero. Goodyear Dec. D. 65-1 Ex. 1 at 7. Defendants were wrong when they concluded otherwise.

C. Defendants Misinterpret the 1976 Point Reyes National Seashore Acts

Defendants argue that Congress "*rejected*" the Department of Interior's argument that Drakes Estero should never be wilderness because Congress *downgraded* Drakes Estero's designation from actual to potential wilderness in the final bill. Opp. at 16:23-26 (emphasis in original). Defendants' argument makes no sense. The facts are: Congress's initial bill would have designated Drakes Estero as actual wilderness; Defendants urged Congress to change that designation because California's "retained rights" make the area "inconsistent" with wilderness; several members of Congress then voiced support for allowing oyster farming to continue in Drakes Estero indefinitely;[2] and Congress in the final bill changed the designation from actual wilderness to potential wilderness. Memo. at 3:24-4:23. In short, Congress's potential wilderness designation reflects its *agreement* with Defendants that Drakes Estero should not be wilderness so long as California retains its rights.

Contrary to what they told California in 1966 and Congress in 1976, Defendants now argue that California's retained rights "do[] not include [DBOC's] private commercial operations." Opp. at 22:18; *see also* Memo. at 3:3-4:2 (discussing Defendants' earlier interpretation). Defendants' newfound interpretation is wrong. *See Crestview Cemetery Ass'n v. Dieden*, 54 Cal. 2d 744, 753 (1960) (interpretation given to an instrument before a dispute arises is "one of the most reliable means" of interpreting it). Defendants ignore the fact that California

[2] Defendants suggest that this testimony is irrelevant because it was given on S. 2472, which was never enacted. Opp. at 3 n.2. This is nonsense. Rep. Burton and Sen. Tunney co-sponsored the PRNS legislation in their respective chambers—H.R. 8002 (Burton) and S. 2472 (Tunney). H.R. 8002 became Pub. L. 94-544. *Compare* Goodyear Dec. D. 71-9 Ex. 13 at 1-2, n.1, *with* Goodyear Dec. D. 75-4 Ex. 41 at 271 (Sen. Tunney testifying that Rep. Burton introduced the same legislation "on the House side"). Accordingly, testimony on S. 2472 qualifies as legislative history for its House companion bill H.R. 8002, which became Pub. L. 94-544.

has given Plaintiffs an "exclusive" lease to farm shellfish on the "water bottoms" of Drakes Estero until 2029. Lunny Dec. D. 38 Exs. 2, 3. Defendants also ignore the two most recent letters they have received on the subject from the Director of the California Department of Fish and Game (CDFG) and the Executive Director of the California Fish and Game Commission (CFGC), both of which assert that California retains its rights to lease the water bottoms in Drakes Estero for aquaculture indefinitely. Lunny Rebuttal Dec. Ex. 5 ("Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottom lands at Drakes Estero indefinitely for shellfish cultivation."); Bagley Dec. D. 33 Ex. 9 at 1 (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 [DBOC].").

Defendants next argue that Plaintiffs' position is that the 1978 Act repeals the 1976 Acts. Opp. at 17:2-6. Defendants are wrong. Congress in the 1976 Acts designated Drakes Estero as potential wilderness because of California's retained rights. The 1978 Act then authorized Defendants to lease "lands" in use for "agricultural" purposes indefinitely. 16 U.S.C. § 459c-5(b). The combined effect of the three Acts is that Congress gave Defendants the authority to allow the oyster farm to continue operating until such time as California conveyed its retained rights back to the federal government and Drakes Estero could be converted to full wilderness. But California still retains its rights, and Defendants were thus wrong to conclude in the Memorandum that Congress wanted Drakes Estero to be converted to wilderness now.

D. Defendants Were Required to Comply with NEPA

Defendants assert that they were not required to comply with NEPA because, "plainly," Section 124's "notwithstanding" clause applies "both" to a denial as well as to an issuance of the permit. Opp. at 17:11. As explained in Section II.B, above, Defendants are wrong because Congress intended to apply the "notwithstanding" clause to the issuance of a permit, not to a denial, and Defendants have no evidence to support their interpretation of the statute. Furthermore, the plain words of the statute apply only to an issuance: "notwithstanding any other provision of law, the Secretary of the Interior is authorized *to issue* a special use permit."

Waterman Dec. D. 43 Ex. 5 (emphasis added). Section 124 says nothing about a denial. Section 124 did not excuse Defendants from complying with NEPA.

IV. DEFENDANTS FAILED TO COMPLY WITH NEPA

Defendants argue that they are exempt from NEPA because it does not apply to "*inaction*, or a decision *not* to act." Opp. at 18:20-21 (emphasis in original). Defendants made this same argument about the APA, and it should be rejected for the same reasons here. *See* Section II.A, above. As they did for the APA, Defendants again omit the key language of the pertinent definition, which defines "[a]ctions" for purposes of NEPA to include "the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the [APA]." 40 C.F.R. § 1508.18; *see* Opp. at 19:3-12. Because Defendants' decision is reviewable agency action under the APA, it is similarly subject to NEPA.

Moreover, Defendants' own definition of "[p]roposed action" "includes the [Interior Department's] exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits…." 43 C.F.R. § 46.30. Defendants have authority to grant DBOC's request to issue a permit; the Secretary made a "decision" not to. This decision constituted action, and Defendants' interpretation that NEPA did not apply is thus "not in accordance with law" and warrants being set aside. *See* 5 U.S.C. § 706(2)(a).

To dodge their NEPA obligations, Defendants cite inapposite cases involving attempts to force action from uninvolved agencies. In *State of Alaska v. Andrus*, no permit was denied and no EIS was prepared; instead, the court held that NEPA did not apply to the Secretary's "nonuse of a power of supervision." 591 F.2d 537, 541 (9th Cir. 1979). In *Sierra Club v. Babbitt*, the court held that NEPA did not apply in the absence of a history of the agency exercising control and authority over permits for the use at issue. 65 F.3d 1502, 1512-1513 (9th Cir. 1995). But where an agency has "actual power to control" a proposed activity, as here, NEPA applies to the agency's decision. *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988).

Defendants do not dispute that, if NEPA applies, the abortive NEPA process Defendants engaged in was fatally defective. NEPA does not permit an agency to excuse substantial scientific flaws in an EIS on the ground that they "illuminate" "environmental complexities."

Opp. at 20:22. Rather, where misrepresentations and error in an EIS have "fatally infected its balance of economic and environmental considerations," the agency's ensuing decision is "arbitrary and capricious in violation of the APA." *NRDC v. U.S. Forest Service*, 421 F.3d 797, 816 (9th Cir. 2005). The fact that Defendants now distance themselves from the EIS that "informed" the Secretary's decision underscores the substantive critiques Plaintiffs make regarding Defendants' flawed science and misconduct.[3] For example, Defendants do not contest misrepresenting the findings of the NPS-contracted harbor seal expert, Dr. Brent Stewart, in the FEIS, or misrepresenting their ability to identify DBOC boat noise and exaggerating DBOC equipment noise in the FEIS. Goodman Rebuttal Dec. ¶¶ 10, 14; Steffel Rebuttal Dec. ¶¶ 7-10.

V. DEFENDANTS PUBLISHED A FALSE FEDERAL REGISTER NOTICE

Defendants assert that NPS rulemaking procedures under 36 C.F.R. § 1.5 apply only to "closures and public use limits." Opp. at 22:25. Defendants again misquote the regulation, which by its terms applies to any "designation" that significantly changes an area's "resource management objectives," or is "highly controversial." 36 C.F.R. § 1.5(b). Where, as here, NPS contemplates a highly controversial change in the objectives of an area's use, it is obligated by its own regulation to conduct a formal rulemaking.

Defendants are also wrong when they argue that they are excused from their own regulation because publishing the FR Notice was a "ministerial implementation of a congressionally directed change in status." Opp. at 23:2-3. No statute directs Defendants to convert Drakes Estero to wilderness. In fact, through the 1978 Act and Section 124, Congress has specifically authorized Defendants to allow oyster farming to continue there for at least 10 years.

[3] Defendants also dispute that they committed scientific misconduct. Opp. at 20:24-21:10. The Government's own investigations speak for themselves. The Interior Department's Inspector General found that Defendants had knowingly "misrepresented research" and were "privy to information contrary" to what they published, but that they "did nothing to correct the information before its release to the public." Lunny Dec. D. 39 Ex. 5 at 2. The National Academy of Sciences found that Defendants had "selectively presented, over-interpreted, or misrepresented" their own data. *Id.* Ex. 6 at 72-73. And the Interior Department Solicitor's office found that Defendants had violated their Interim Code of Scientific and Scholarly Conduct because they committed "misconduct" that arose from "incomplete and biased evaluation and from blurring the line between exploration and advocacy through research." *Id.* D. 40 Ex. 8 at 35.

Nor do any provisions of the 1976 Acts exempt NPS from compliance with its own regulations. NPS's failure to follow those regulations thus violates the APA. *Conservancy of Southwest Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1078 (11th Cir. 2012) ("An agency's failure to follow its own regulations is arbitrary and capricious.").

Defendants also argue that the FR Notice was not false because there are no "continuing commercial operations in the waters of Drakes Estero." Opp. at 22:12. But there are. Plaintiffs continue to harvest shellfish and to plant oyster spat in the waters of Drakes Estero, as authorized by Defendants. D. 31 ¶ 1 (DBOC oyster planting activities may continue); Lunny Rebuttal Dec. ¶ 65. Furthermore, Defendants ignore the fact that the oyster racks—commercial structures used for aquaculture—remain in Drakes Estero, are subject to Defendants' own removal order, and constitute prohibited "structures or installations" under the Wilderness Act. 16 U.S.C. § 1133(c). The FR Notice is thus premised on an inarguably false statement and is unlawful.[4]

VI. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Without injunctive relief, Plaintiffs will suffer irreparable harm, including permanent loss of business; loss of good will, customers, and reputation; stress and emotional harm caused by loss of employment and business; and loss of unique, irreplaceable property interests. Lunny Dec. D. 38 at ¶¶ 68-70, 79; Lunny Rebuttal Dec. ¶ 66. Any one of these harms warrants preliminary injunctive relief. *See Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (threatened loss of business); *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (stress and emotional damage from loss of business); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839, 841 (9th Cir. 2001) (threatened loss of customers and damage to business reputation and goodwill); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (damage to goodwill); *see also, e.g., Sundance Land Corp. v. Community First Federal Sav. & Loan Assoc.*, 840 F.2d 653, 661-62 (9th Cir. 1988) (allowing defendant to foreclose on apple

[4] Defendants are also wrong for the reasons explained in Section III.C, above, when they defend their claim in the FR Notice that "'Drakes Estero is entirely in federal ownership.'" Opp. at 22:16-17 (quoting Goodyear Dec. D. 73-3 Ex. 29).

orchard constitutes irreparable injury); *Kelly v. Public Util. Dist. No. 2*, No. CV-11-023, 2012 U.S. Dist. LEXIS 43889, 11-13 (E.D. Wash. Mar. 29, 2012) (loss of homes, property, and businesses due to eviction constitutes irreparable harm); *see Mahroom v. Best W. Int'l.*, No. C07-2351, 2009 U.S. Dist. LEXIS 11041, 9-10 (N.D. Cal. Feb. 2, 2009)(major business disruption, and loss of goodwill and reputation unquantifiable).

Defendants do not dispute that Plaintiffs will suffer these irreparable harms. Instead, Defendants argue that Plaintiffs' harms cannot be considered irreparable because they were aware that their existing authorizations would expire on November 30, 2012, and therefore, their harms were foreseeable and not the result of Defendants' actions.[5] Opp. at 23:7-20. In essence, Defendants argue Plaintiffs' harms are self-inflicted. Defendants are wrong.

Defendants pretend that Plaintiffs had no chance that they would be granted permission to continue operating for another ten years, and should have been ready to cease operations on December 1, 2012. But Plaintiffs had a pending SUP application for a new ten-year term until it was denied on November 29, 2012—one day before their existing authorizations would expire. It is patently unreasonable to expect Plaintiffs to have been simultaneously dismantling their business while also preparing for another ten years of operations; the consequences of Defendants' eleventh-hour permit denial are thus not "self-inflicted" harms.

Defendants also do not dispute that the removal activities they have ordered Plaintiffs to undertake may require permitting from federal, state, and local agencies, and that achieving agency coordination and permitting will take much longer than 90 days. Ketcham Dec. D. 64-2 ¶ 32 (acknowledging state and federal agencies "should be prepared to address any related permitting issues" and not disputing length of time for coordination and permitting); Moran Rebuttal Dec. ¶¶ 3, 5, 7-10.

Finally, Defendants misapprehend Plaintiffs' burden of proof under *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). It is not Plaintiffs' burden to show a likelihood of

[5] Defendants' argument that Plaintiffs knew the RUO would expire is irrelevant for the reasons stated above, but it is worth noting that the RUO included a renewal clause that allowed for the issuance of a SUP, and Mr. Lunny had no knowledge that NPS would take the position that it could not consider issuing a SUP prior to buying the oyster farm. Lunny Rebuttal Dec. ¶¶ 62-64.

irreparable harm to the *environment* (Opp. at 24:4-17); rather, it is Plaintiffs' burden to show they are likely to suffer irreparable harm in the absence of an injunction. *Winter*, 555 U.S. at 20; *see, e.g. Rovio Entm't, Ltd. v. Royal Plush Toys, Inc.*, 2012 U.S. Dist. LEXIS 169020, at *30 (N.D. Cal. Nov. 27, 2012) (granting preliminary injunction where plaintiff demonstrated irreparable harm to its goodwill and business reputation). Plaintiffs have carried their burden convincingly.

VII. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR PLAINTIFFS

Plaintiffs face the end of their business—an extreme sanction. For their part, Defendants cite marine debris, boat noise, and the risk of proliferation of non-native species, including Manila clams and *Didemnum vexillum*. Opp. at 24:28-25:5. Defendants do not enumerate any "harms" that differ from the status quo, and all are addressed by precautionary measures DBOC already employs.[6] Lunny Rebuttal Dec. ¶¶ 48-60 (marine debris removal); ¶¶ 67-75 (non-native species precautions). Accordingly, the balance of the equities tips heavily in favor of Plaintiffs.

Furthermore, it is in the public interest to avoid the immediate negative impacts to the environment, DBOC employees, their children and families, the State of California, and the local community that dismantling DBOC will cause. Defendants' desire for an "untrammeled, natural, and undeveloped character of the Estero" (Opp. at 25:20) will require extensive removal activities with admitted environmental impacts to hikers, kayakers, birds, eelgrass, marine mammals, and fish. Ketcham Dec. D. 64-2 ¶¶ 26, 33 (eelgrass; special status species); Fristrup Dec. D. 64-3 ¶ 4 (harbor seals and fish); Martello Rebuttal Dec. ¶¶ 5-11 (harbor seals and fish); Moran Rebuttal Dec. ¶¶ 4, 9, 11 (birds, special status species, eelgrass); Luchessa Rebuttal Dec. ¶¶ 5-6, 8, 12-20 (water quality; eelgrass and fish habitat); Steffel Rebuttal Dec. ¶¶ 4, 20 (hikers, kayakers, bird, mammals); Goodman Rebuttal Dec. ¶¶ 13, 15-23 (harbor seals). Furthermore, Defendants cannot show that the removal action they have ordered could be completed before February 28, 2013. Lunny Rebuttal Dec. ¶¶ 20, 32-45; Moran Rebuttal Dec. ¶¶ 9-11.

[6] Defendants also cite DBOC's lack of a coastal development permit (CDP) and "violations alleged by the [California] Coastal Commission" as evidence that Plaintiffs' operations harm the environment. Opp. at 24:20-27. Plaintiffs' CDP application has been pending with the Commission since August 20, 2008, and Plaintiffs dispute the Commission's allegations. Lunny Rebuttal Dec. ¶¶ 7-11. DBOC is working with the agency to resolve their differences. *Id.*

Defendants do not contest that without an injunction all of DBOC's employees will lose their jobs, the academic achievement of DBOC's employees' children and their classmates will be harmed, approximately one-third of California's oyster supply and last remaining oyster cannery will be lost, California's only source of oyster shell for threatened and endangered species habitat restoration will be terminated, and DBOC's free interpretative and educational services will be lost to approximately 50,000 visitors every year. Lunny Dec. D. 38 ¶¶ 70-74, 80-87; Patterson Dec. D. 36 ¶¶ 3-8; Mata Rebuttal Dec. ¶¶ 2-33 (personal harm; NPS claim of relocation assistance invalid). The public has a strong interest in preventing these harms.

While the public may also have an interest in the creation of wilderness where it can legally be established, this interest would not be lost through the issuance of a preliminary injunction to maintain the status quo during this case. If Plaintiffs' suit does not prevail on the merits, the wilderness designation will stand. The converse, however, is not true. If no injunction is issued, it will be irrelevant whether Defendants violated the law because the public interest in maintaining the oyster farm will have been irretrievably lost. Accordingly, the balance of equities tips in favor of Plaintiffs, and the issuance of an injunction is in the public interest.

VIII. CONCLUSION

Plaintiffs ask the Court to maintain the status quo so their claims can be adjudicated on the merits. Plaintiffs meet their burden to obtain this relief by demonstrating a likelihood of succeeding on the merits because Defendants misinterpreted Section 124 and a series of federal laws, and committed scientific misconduct in the preparation of the FEIS. Plaintiffs further show that they are likely to suffer irreparable harm because the fate of their small family business is at stake. Finally, the balance of the equities and the public interest tips heavily in Plaintiffs' favor, especially due to the immediate environmental harm Defendants admit will occur during the removal of the oyster farm and the loss this removal will cause to the public's interest in sustainable shellfish farming in Drakes Estero. Plaintiffs respectfully request that this Court issue preliminary injunctive relief to prevent Defendants from irreversibly destroying sustainable shellfish farming at Drakes Estero, and to give them opportunity to make their case.

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Respectfully submitted,

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