No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,

Plaintiff-Appellants,

v.

KENNETH L. SALAZAR, in his official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

PLAINTIFF-APPELLANTS' REPLY TO DEPARTMENT OF THE INTERIOR'S OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiff-Appellants Drakes Bay Oyster Company and Kevin Lunny (hereinafter "DBOC") ask that their decades-old farm be preserved until the courts can rule on whether Defendants broke the law in denying DBOC a permit to continue operations. In that decision, the Secretary of the Interior did the two things Congress told him *not* to do. First, Congress in Section 124 told the Secretary that he was "authorized to issue" the permit. But when he denied the permit for the very reason that Section 124 prohibited—that issuing the permit would "violate" the law—the Secretary contravened Section 124. Second, Congress sought to ensure a "solid scientific foundation" for any permit denial, in response to substantial public criticism of the "validity of the science" Defendants have proffered in attempts to show that DBOC causes environmental harm. But in denying the permit, Defendants ignored the science and relied instead on the laws that Section 124 overrode. The Secretary's refusal to base his decision on a solid scientific foundation disobeyed Congress and was an abuse of discretion.

DBOC is not asking this Court to order the issuance of a permit. All DBOC asks for is a fair shake from their government. If Defendants want to deny the permit, they should comply with the law and defend their science. So far, they have been unable to do either. Until they can, their decision should not stand—and neither should the district court's Order. In the meantime, this Court should issue an injunction pending appeal to preserve the status quo and prevent the irreparable harm that the district court found will result without an injunction.

ARGUMENT

A. The Court has jurisdiction.

Defendants argue that Section 124 fits within "a narrow exception to APA jurisdiction … providing 'clear and convincing' evidence that Congress intended to exempt the Secretary's decision from review."[1] The language of the statute and the legislative history provide no such evidence.

Section 124 authorizes the Secretary to issue the permit notwithstanding any other provision of law, but does not authorize the Secretary to deny the permit notwithstanding any other provision of law.[2] Defendants insist that Section 124 must be read as if it were symmetrical. E. Opp. at 7. But the intent of Congress was not symmetrical, and DBOC established—and Defendants conceded—that Section 124 expresses Congress's "intent to remove legal obstacles to the issuance of a new SUP." E. Mot. at 9 (quoting Opposition at 17:24); *see also* E. Opp. at 12 ("Perhaps Congress did intend, as DBOC argues, to 'encourage the Secretary to issue the permit, not to deny it.'"). This is apparent from the text of Section 124, which authorizes the Secretary to *issue* the permit notwithstanding any other provision of law, but does not apply the "notwithstanding" provision to a denial. Congress's intent was asymmetrical—to "encourage the Secretary to issue the permit, not to deny it,"—and the logical result of that intent is an asymmetric statute. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1114

[1] Department of the Interior's Opposition to Plaintiffs' Emergency Motion for Injunction Pending Appeal, Docket No. 17-1 (hereinafter "E. Opp.") at 9.
[2] Plaintiffs' Motion for Injunction Pending Appeal, Docket No. 12-1 (hereinafter "E. Mot.") at 8, 9, 15.

(2011) ("Congress wrote the statute it wrote. . . . [A] preference for symmetry cannot trump an asymmetrical statute.").

And even if Section 124 were symmetrical, Defendants would still be wrong when they assert that "Section 124 . . . does not provide any standard . . . ." E. Opp. at 10. As DBOC argued, Section 124 itself provides standards to apply, such as prohibiting the Secretary from relying on a violation of other law as a reason to justify the denial. E. Mot. at 11. Defendants do not dispute this point, and thereby concede it.

Defendants are also wrong when they argue that if the "notwithstanding" clause applies to a denial, they are necessarily exempted from having to comply with NEPA and their own regulations. E. Opp. at 14. Courts look closely at the scope of a "notwithstanding" clause, and exempt agencies from applicable requirements only when it is clear that Congress intended to do so. E. Mot. at 10, citing *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) (courts presume "that by passing a new statute Congress ordinarily does not intend to displace laws already in effect"). Defendants' own actions suggest that they did not believe that Section 124 exempted them from NEPA's requirements—until it became clear that they were not going to comply with NEPA.[3] Defendants do not dispute that NEPA

[3] In fact, a NEPA process was contemplated by Congress. *See* H.R. Rep. No. 112-331, at 1057 (Dec. 15, 2011) (directing the National Academy of Sciences to "assess the data, analysis, and conclusions" in the DEIS "in order to ensure there is a solid scientific foundation for the [FEIS] expected in mid-2012"). Defendants actively engaged in the NEPA process from September 2010 to November 20, 2012, ending in the publication of a "Final EIS"—which was the first time Defendants suggested that NEPA did not apply. Moreover, DOI's Inspector General's report, which Defendants selectively attached a single page of as an

provides meaningful standards for judicial review, and concede that NPS regulations would if they applied. E. Opp. at 10 n.5.

Moreover, NPS has previously taken the position that a statute with an analogous "notwithstanding" clause did not override NEPA's procedural requirements—and this Court has agreed. *Hale v. Norton*, 476 F.3d 694, 698–701 (9th Cir. 2007).[4] Even if the notwithstanding clause applies to a permit denial, as Defendants contend, they have not met their burden of showing that Congress intended Section 124 to displace all other law. Without this, Defendants cannot establish that there is no "law to apply" and that the Secretary's decision is unreviewable.[5]

DBOC does not dispute that the Secretary could deny the SUP. E. Opp. at 11, 12. But that is not the issue. The issue is whether Defendants have provided clear and convincing evidence that Congress intended, when it enacted Section 124, to exempt a permit denial from judicial review. Defendants have provided no

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exhibit (E. Opp. at 20 n.11), explains that "NPS [was] required to comply with the NEPA process" in connection with DBOC's SUP application. Abbasi Rebuttal Dec., Ex. 1 at 4.

[4] Defendants argue that letters from DBOC support Defendants' position. E. Opp. at 16. But those letters asserted that Defendants could *issue* the permit without complying with NEPA. *See* E. Opp. Ex. 8 at 2 ("Section 124 includes a 'general repealing clause' that allows you override conflicting provisions in other laws--including NEPA--to *issue* the SUP" (emphasis added). DBOC did not concede that Defendants could *deny* the permit without complying with NEPA. *Id*.

[5] Defendants argue that *Ness* requires dismissal, E. Opp. at 9, but that case actually supports DBOC's position. *Ness* did not address NEPA, and it held that an agency's failure to conform to pertinent regulations and agency manual provisions, *inter alia*, can "state issues which are proper for judicial review." *Ness Inv. Corp. v. U.S. Forest Service*, 512 F.2d 706, 716–17 (9th Cir. 1975).

evidence that Congress intended to exempt a denial from judicial review. The courts therefore have jurisdiction to review the denial.

B. DBOC is likely to prevail on the merits of its claims.

Defendants argue that, under a "broad APA standard of review to DBOC's claims, rather than particular details of the statutes that DBOC cites," it is enough that "the agency 'clearly explained its reasons' for denying the permit." E. Opp. at 14–15. But an agency must do more than merely explain its reasons. It must correctly conceive the law. When 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). Here, DBOC identified four instances in which Defendants have misconceived the law. E. Mot. at 13–15. Defendants did not respond to the first three and thus conceded these points. In response to the fourth—that Defendants violated NEPA—Defendants' only argument is that Section 124 "exempt[s] the Secretary's decision from the requirements of NEPA." E. Opp. at 16. Defendants are wrong about Section 124, and they therefore lose the fourth argument on the merits as well.

But the Secretary's Decision was not just based upon misinterpretations of law: it also failed to clearly explain its reasons. The Decision is internally inconsistent and the legal and policy explanations therein are contradictory. For example, it states that granting DBOC a permit "would violate . . . specific wilderness legislation." Decision at 1. But it later acknowledges that Section 124 did allow the Secretary to issue the SUP. *Id.* at 6. Because the Decision is "internally inconsistent and inadequately explained" it is "arbitrary and

capricious." *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987).[6] What Defendants call a clear explanation is actually a morass of inconsistencies.

DBOC is also likely to prevail on the merits of its claims regarding the false Federal Register Notice. DBOC identified two false statements in the Notice, either of which would invalidate it. E. Mot. at 18 n.7. Defendants defend the veracity of neither statement. Instead, Defendants assert that DBOC's injuries cannot be redressed, and therefore that DBOC lacks standing to challenge the notice. E. Opp. at 16. But contrary to Defendants' contention that "[t]he notice merely noted the end of any further legal obstacles to a wilderness designation," *id.*, publication of the Notice had the legal effect of designating the land as wilderness. Pub. L. No. 94-567, Sec. 3. This designation, as Defendants interpret it, would prevent DBOC from operating under its California leases, even if DBOC prevails on its other claims. For DBOC's injuries to be ultimately redressed, it will be necessary to vacate the false Notice.

C. DBOC has established that irreparable harm will ensue absent injunctive relief.

Defendants incorrectly claim that DBOC has waived the issue of irreparable harm. Opp. at 17–18. But as DBOC noted, the district court found in DBOC's favor on this issue. E. Mot. at ii, 5; *see* Order at 27:24–25. DBOC is not

[6] Similarly, the Secretary did not clarify or explain how he picked and chose among those parts of the FEIS that "informed" him and were "helpful," and those that were identified as "fatally flawed." Decision at 5. *See Beno v. Shalala*, 30 F.3d 1057, 1075 (9th Cir. 1994) ("Stating that a factor was considered . . . is not a substitute for considering it.") (citations omitted).

challenging that finding, and neither do Defendants.

D. The public interest and balance of equities favor an injunction.

The failure to weigh the public interest as expressed in statutes is an abuse of discretion. *See* E. Mot. at 19 (quoting *Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382, 1382 (9th Cir. 1977)); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (failure to adequately consider the public interest, which "may be declared in the form of a statute," is reversible error) (citations omitted)).[7]

Defendants do not dispute, and thus tacitly concede, that if DBOC prevails on the merits, the district court's failure to weigh the policies found in applicable federal law in its balancing of the equities was reversible error. E. Opp. at 18. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("the public interest favors applying federal law correctly").

Defendants instead belittle DBOC's showing that the balance of equities and public interest favor an injunction, asserting that "no act of Congress" weighs in DBOC's favor. E. Opp. at 18. They are wrong. No fewer than *four* acts of Congress weigh in favor of an injunction. First, the National Aquaculture Act of 1980 makes it "national policy" to "encourage the development of aquaculture" in

[7] *Beno*, 30 F.3d at 1063 n.9 ("[I]n APA cases, a district court decision [to grant or deny preliminary relief] is 'generally accorded no particular deference,' and is reviewed de novo 'because the district court is in no better position than this court to review the administrative record.'" (citations omitted)). DBOC can therefore prevail not "only if it can show that the district court abused its discretion in weighing the equities," E. Opp. at 17 n.9, but also if the district court's Order did not "balance all of the competing interests at stake" *id.*, which is reviewed *de novo*. *See AP v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (failure to adequately balance hardships is reversible error).

the United States. 16 U.S.C. § 2801(b)–(c) (2012). Second, the 1978 Act authorized the Secretary to continuously lease federally owned land for aquaculture. 16 U.S.C. § 459c-5(a)–(b). Third, Section 124 was intended to ease issuance of a permit, not a denial—as Defendants admit. E. Mot. at 9. Fourth, under NEPA, "the public interest requires careful consideration of environmental impacts" *before* a decision is made.[8] *S. Fork Band Council of W. Shoshone v. DOI*, 588 F.3d 718, 728 (9th Cir. 2009).

Moreover, Defendants' reliance on a single sentence from a House Report concerning the 1976 Acts, E. Opp. at 3, 18–19, is contravened by the Senate Report, which says that Drakes Estero will not convert to wilderness until the federal government gains "full title" to the area. E. Mot. at 3. Even the legislative history of the 1976 Acts, therefore, supports DBOC rather than Defendants.[9]

Furthermore, Defendants fail to defend—and thereby concede—that the district court's consideration of DBOC's expectations when it purchased the oyster farm in 2004 was reversible error because it conflicted with Section 124. *Compare* E. Mot. at 19–20 *with* E. Opp. at 19 n.10; *see, e.g., Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997) (improper consideration of a factor in

[8] Defendants do not contest that they never finished the NEPA process. E. Mot. at 16 n.6.

[9] Contrary to what they told Congress in 1976, E. Mot. at 2–3, Defendants now argue that California's retained rights "do not cover DBOC's operation." E. Opp. at 15 n.8. Defendants' ignore California's retained mineral rights entirely, and they also ignore the fact that California has given DBOC exclusive leases to farm shellfish on the water bottoms of Drakes Estero. E. Mot. at 2. Defendants also ignore the two most recent letters they have received on the subject from California supporting DBOC. Abbasi Rebuttal Dec. Exs. 2 & 3.

balancing of equities is reversible error). DBOC is likely to succeed on the merits because the district court abused its discretion in weighing the equities.

As evidence that the public interest does not favor an injunction, Defendants point to the supposed benefits of converting Drakes Estero to wilderness (as compared to the public interest in maintaining the source of one-third of California's oyster production),[10] and avoidance of alleged environmental harm associated with DBOC's operations (as compared to admitted environmental harm that will be cause by removing the farm). E. Opp. at 19–20. Neither showing helps Defendants because the district court weighed DBOC's and Defendants' evidence on these factors and concluded that it could not judge which "weigh[ed] more strongly" than the other. Order at 30:16–21.

It is particularly troubling that Defendants continue to rely on an unfinished, unlawful, and flawed FEIS, E. Opp. at 20, despite the fact that they claim no need to comply with NEPA and made no attempt to rebut the significant errors DBOC identified in the FEIS in briefing before the district court. E. Mot. at 16–17. For example, DBOC proved—and Defendants have never rebutted—that the FEIS altered the findings of the NPS-contracted harbor seal expert, increasing the number of DBOC-related seal disturbances from zero to two; claimed NPS could identify DBOC boat noise on days when DBOC boats were not operating; and

[10] Allegations of an adverse impact to "wilderness values" ignore the fact that DBOC is not the one blot preventing an otherwise pristine area from becoming wilderness: it is a farm surrounded by other farms. *See* FEIS (E. Opp. Ex. 1) at 6 (about 14 square miles of "the lands surrounding Drakes Estero [are leased] for cattle grazing"). In truth, Defendants are trying to impose an artificial wilderness in the middle of a historic farming community.

grossly exaggerated DBOC equipment noise. Mot. at 8, 18–19; Reply at 11:4–9 (citing Goodman Rebuttal Dec. ¶¶ 10, 14 (Abbasi Rebuttal Dec. Ex. 4) and Steffel Rebuttal Dec. ¶¶ 7–10 (Abbasi Rebuttal Dec. Ex. 5)). Defendants' inconsistent position on NEPA illustrates another substantial public interest that strongly weighs in favor of an injunction: protecting the public's confidence in government decisionmaking. It is emphatically in the public interest that its "government operates effectively and fairly" so that "public confidence in government is not undermined . . . ." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 n.27 (1977).

CONCLUSION

A fundamental function of the courts is to protect individuals from government excesses. Here, Defendants jettisoned a nearly three-year NEPA process at the last moment and now contend their decision need not have complied with any law. Defendants also have the audacity to argue that "DBOC does not offer any support for the claim . . . that, absent an injunction, its oyster farm will be 'permanently destroyed.'" E. Opp. at 17. Defendants have ordered DBOC to terminate their business and remove all their oysters and the district court specifically found Defendants' actions would "destroy" DBOC. Order at 27:13–14. DBOC's emergency motion for an injunction pending appeal should be granted because it is likely to prevail on the merits of its appeal, will suffer irreparable harm without an injunction, and the balance of the equities and public interest favor issuance of the injunction.

DATED: February 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 21, 2013

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