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

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

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(ii) Facts Showing the Existence and Nature of the Claimed Emergency:

On February 4, 2013, the district court issued an Order ("Order") denying Plaintiff-Appellants' request for a preliminary injunction that would have preserved their oyster farm during the pendency of their challenge to the Defendant-Appellees' permit denial. Absent this relief, the farm must close on February 28, 2013, destroying the business, thirty-one jobs, and 19 million shellfish.

The Order found that the farm would suffer irreparable harm absent injunctive relief. That harm is ongoing, as under the operative directives from the

National Park Service (NPS)and Secretary Salazar, Plaintiff-Appellants must now begin to dismantle the farm to meet the February 28 deadline. Unless an injunction pending appeal is issued in the next sixteen days, the farm will be destroyed and its employees thrown out of work before this Court can review whether denial of a preliminary injunction was proper.

(iii) Notification Regarding Service of Motion:

Counsel for Defendant-Appellees (hereinafter "Defendants") were notified of Plaintiff-Appellants' intention to file an emergency motion with this Court on February 5, 2013, as set forth in the accompanying Declaration of Amber Abbasi and of the filing of this emergency motion on February 12, 2013. Counsel were served with this motion by ECF and email on February 12.

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RELIEF REQUESTED

Pursuant to Fed. R. App. P. 8(a)(2) and Circuit Rule 27-3, Plaintiff-Appellants Drakes Bay Oyster Company and Kevin Lunny (hereinafter "DBOC") submit this emergency motion for an injunction pending appeal enjoining named Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from enforcing or otherwise implementing Secretary Salazar's November 29, 2012, Memorandum of Decision, the National Park Service's November 29, 2012 Directive, and the December 4, 2012, Federal Register Notice, 77 Fed. Reg. at 71,826 (Dec.4, 2012), and from interfering with the continuing operations of Plaintiffs' oyster farm, pending adjudication of DBOC's interlocutory appeal of the February 4, 2013, district court Order denying Plaintiffs' Motion for a Preliminary Injunction, pending appeal to this Court. DBOC respectfully requests a ruling on this motion by this Court no later than February 28, 2013.

INTRODUCTION

Unless this Court issues an injunction before February 28, 2013, DBOC's oyster farm will be permanently destroyed. This means the loss of a family-owned, environmentally-sustainable small business; thirty-one full-time jobs; and irreparable environmental harm. The district court refused to enjoin Defendants based on the erroneous legal conclusion that it did not have jurisdiction to adjudicate DBOC's claims. It misread federal law, wrongly endowing Defendants with absolute discretion and immunity from judicial review. As a result, the district court committed reversible legal error when it concluded that DBOC was not likely

to prevail on the merits of its claims and that a preliminary injunction was not in the public interest. DBOC respectfully urges this Court to enter an injunction pending appeal.

BACKGROUND

Oyster farming began in Drakes Estero, California, in the early 1930s. Declaration of Amber Abbasi ("Abbasi Decl."), Ex. 9 ("Order") at 5:5-9. DBOC is the current owner of the oyster farm in Drakes Estero at Point Reyes National Seashore. *Id*. at 6:4-6. That farm has two main components—one under water and the other on land. The oysters grow in underwater oyster beds in Drakes Estero. *See id.* at 5:7-9. Once harvested, they are processed for distribution and sale in onshore facilities. *See id.* at 5:11-13.

The water operations are principally operated under exclusive leases from the State of California issued under its retained fishing and mineral rights to Drakes Estero. *See id.* at 5:7-9; *see also* 1965 Cal. Stat. Ch. 983, 2604-05 (conveying Drakes Estero water bottoms to U.S. Government, but retaining fishing and mineral rights to California). Land operations are carried out under what is essentially a renewable 40-year lease from the federal government, which was set to expire unless renewed on November 30, 2012. Order at 5:16-28.

In 1976, Congress considered designating Drakes Estero as "wilderness" under the 1964 Wilderness Act, 16 U.S.C. § 1131 *et seq.*, but it decided not to do so at the Department of the Interior's request. Order at 3:14-20 (discussing Pub. L. Nos. 94-544 and 94-567 (together "1976 Acts")). Interior explained that California's "reserved rights" made Drakes Estero "inconsistent" with wilderness,

and thus that the area should *never* be designated as wilderness until California conveyed those rights back to the U.S. Government:

> Commercial oyster farming operations take place in [Drakes Estero] and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness.

H.R. Rep. No. 94-1680, at 6, *reprinted in* 1976 U.S.C.C.A.N. 5593, 5597.

Congress instead designated Drakes Estero "potential wilderness." Order at 3:6-8. Although the House Report said that "potential wilderness" areas generally should be managed "to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status," *id.* at 3:9-14, the Senate concluded that Drakes Estero could not be designated as a wilderness until "the Federal government gains full title to these lands…." S. Rep. No. 94-1357, at 7.

In 2005, however, NPS informed DBOC that the 1976 Acts prohibited it from issuing the oyster farm a new permit when its lease expired in 2012. Order at 6:14-7:13. In response, in 2009, Congress stepped in and passed a law—"Section 124"—authorizing the Secretary of the Interior "to issue" a special use permit (SUP) allowing DBOC to continue its existing operations "notwithstanding any other provision of law." Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) (quoted in full in Order at 4:12-22).

In July 2010, DBOC applied for this SUP. Order at 7:20-23. In October 2010, the Interior Department, through NPS, formally began the NEPA process to analyze the environmental impacts of DBOC's request. *Id.* at 8:4-9. In September 2011, NPS released a Draft EIS (hereinafter "DEIS") for public comment. *Id.* at

8:12-13. In December 2011, Congress expressed concern about "the validity of the science underlying the DEIS," and directed the National Academy of Sciences (NAS) to review it. H.R. Rep. No. 112-331, at 1057 (2011) (Conf. Rep.).

On November 20, 2012—ten days before the end of the farm's lease—NPS released what it called a "Final" EIS (hereinafter "FEIS"). Order at 9:9-14. As the *New York Times* reported, "flaws identified in the science may ... have cost the National Park Service, particularly the Point Reyes scientists and their defenders, a substantial loss of professional credibility."[1]

On November 29, 2012—the day before the expiration of DBOC's authorizations—Secretary Salazar issued a "decision" to not issue DBOC the SUP. Abbasi Decl., Ex. 1 (hereinafter "Decision") at 1. Even though Section 124 authorized issuance of the SUP notwithstanding any other laws, the Secretary stated that issuance "would violate ... specific wilderness legislation," i.e., the 1976 Acts. *Id.* at 1. And he concluded that "[t]he 'notwithstanding any other provision of law' language in [Section 124] expressly exempts my decision from any substantive or procedural requirements"—including NEPA. *Id.* at 4. Defendants then directed DBOC to shut down the farm by February 28, 2013. Order at 10:21-26.

On December 4, 2012, NPS published a Federal Register notice ("FR Notice") falsely stating that "all uses prohibited under the Wilderness Act within

[1] Felicity Barringer, *A Park, an Oyster Farm, and Science: Epilogue*, http://green.blogs.nytimes.com/2012/12/04/a-park-an-oyster-farm-and-science-epilogue/ (last visited Feb. 12, 2013).

Drakes Estero have ceased as of 11:59 p.m. on November 30, 2012. Drakes Estero is entirely in federal ownership," thereby changing Drakes Estero to "designated wilderness." 77 Fed. Reg. at 71,826, 71,827 (Dec. 4, 2012). Nevertheless, California still retains the fishing and mineral rights in Drakes Estero, 1965 Cal. Stat. Ch. 983, §§ 2-3, at 2605, the oyster racks remain in the estero, and Defendants are still permitting DBOC to plant oyster spat and harvest oysters for sale until the end of this month. Order at 10:21-26.

On December 3, DBOC filed suit in U.S. District Court, alleging that the denial of the permit had been made contrary to law, and on December 21, 2012, moved for a preliminary injunction to preserve the farm from destruction during the pendency of the litigation. Abbasi Decl., Ex. 3 ("Motion"). The district court's February 4, 2013 Order denied the motion, holding that judicial review was unavailable and that the criteria for preliminary injunctive relief were not met. The court did find, t, that DBOC was likely to suffer irreparable harm in the absence of a preliminary injunction. Order at 27:24-25.

DBOC promptly appealed the Order to this Court on February 6. In compliance with Fed. R. App. P. 8(a)(1) and Circuit Rule 27-3(a)(4), DBOC also filed a motion for injunction pending resolution of that appeal with the district court on February 7. Abbasi Decl., Ex. 10. Defendants did not oppose DBOC's request for an expedited ruling, but opposed DBOC's motion. *Id*. Ex. 11. The district court denied that motion "for the same reasons described in" the Order on February 11. *Id*., Ex. 12. All grounds advanced in support of the present motion were submitted in DBOC's motion to the district court per Circuit Rule 27-3(a)(4).

LEGAL STANDARD

The standard for granting an injunction pending appeal is the same as for a preliminary injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). For purposes of an injunction pending appeal, the relevant inquiry is likelihood of success on the merits of the appeal. *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011).

The district court's Order is reviewed for abuse of discretion. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). "Conclusions of law [are reviewed] de novo and findings of fact for clear error," *id.*, and "[a]n error of law is an abuse of discretion." *Strauss v. Comm'r of the SSA*, 635 F.3d 1135, 1137 (9th Cir. 2011). Thus, the district court's "order is reversible … if the court did not apply the correct preliminary injunction standard, or if the court misapprehended the law with respect to the underlying issues in the litigation." *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994). "[I]f the district court's application of fact to law requires reference to 'the values that animate legal principles,'" review is de novo, "as if it were a legal finding." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (citation omitted).

ARGUMENT

The district court committed three reversible errors: (1) it misinterpreted the applicable legal standard when it concluded that it did not have jurisdiction to hear the case, (2) it incorrectly concluded that DBOC would not prevail on the merits, and (3) it failed to give any weight to the congressional intent manifested by laws like NEPA and Section 124 when it determined that the balance of the equities and public interest did not favor granting DBOC a preliminary injunction.

A. The district court erred in finding that it lacked jurisdiction to review the Secretary's decision to deny the SUP.

There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). "Precluding [judicial] review requires clear and convincing evidence that Congress intended to dislodge this presumption." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) (citing *Kucana v. Holder*, 130 S.Ct. 827, 839 (2010)); *Bowen*, 476 U.S. at 671. Moreover, it is the agency's "heavy burden" to prove judicial review is unavailable. *Id.* at 672.

The Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., provides for judicial review of federal agency action, including decisions not to issue a permit. Order at 14-16. Here, the Secretary decided not to issue the requested permit and justified this decision in his seven-page Decision. DBOC argued that the Decision was contrary to Section 124, that Defendants had not complied with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., and that the FR Notice was false and published illegally. Motion at 12:10-22:5.

The district court found that there is no jurisdiction because "the statutory context affords complete discretion." Order at 19:5. This is wrong as a matter of law. Neither the statute's plain language nor its legislative history provide clear and convincing evidence that Congress intended to cut off judicial review of a decision denying the SUP. On the contrary, they leave no doubt that Congress intended to encourage the Secretary to issue the permit, not to deny it.

1. *The district court's ruling contradicts the plain language and legislative intent of the statute.*

To begin with, the plain language Section 124 does not immunize the Secretary from judicial review of a permit denial— it says nothing about a denial. The operative language in Section 124 provides that: "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…." Order at 4. The remaining three sentences impose conditions and limitations on the issuance of the permit. *See id.* Section 124 does not say that the Secretary may "issue *or deny*" the permit notwithstanding any other provision of law. Nor is there anything providing that a denial would be insulated from judicial review. The plain language of Section 124, therefore, establishes that Congress intended to give the Secretary unfettered authority to issue the permit, subject only to some specific requirements and limitations on that issuance. "When the statutory language is plain, the sole function of the courts … is to enforce it according to its terms." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). The district court's conclusion that Congress intended to

insulate a permit denial from judicial review is directly contrary to the plain language of Section 124, which encourages the Secretary to issue the permit, not to deny it.

The undisputed legislative history leaves no doubt about why Section 124's plain language is phrased as it is. Defendants had taken the position that they were prohibited by law from issuing a new SUP; Congress overrode that position and authorized them to issue the permit notwithstanding those laws. Defendants agree that Section 124 expresses Congress's "intent to remove legal obstacles to the *issuance* of a new SUP." Abbasi Decl., Ex. 4 (hereinafter "Opposition") at 17:24 (emphasis added). Moreover, by specifying the terms and conditions of "the extended authorization," Congress envisaged that the permit would be issued, not that it would be denied. In construing a statute, courts must "look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (citations omitted). Congressional intent to remove obstacles to the issuance of a permit is plainly not the same as an intent to preclude judicial review of a denial.

Additional evidence of Congressional intent comes from a related statute enacted after Section 124. In response to the substantial criticism of the "validity of the science underlying the DEIS" that had been prepared for the Secretary's decision on the SUP, in December 2011, Congress directed NAS "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." Conf. Rep. at 1057. This directive is strong evidence that Congress did not intend to give the Secretary

complete discretion to deny the SUP; instead, it wanted the Secretary to ensure a solid scientific foundation before any denial.

The district court noted that "Congress considered, and rejected, a mandate requiring the Secretary to extend the permit." Order at 18. But deciding to confer some discretion is not deciding to cut off judicial review. Federal courts routinely review discretionary decisions (as opposed to those that are completely committed to agency discretion). Virtually every NEPA case, for example, arises out of a discretionary decision, because NEPA does not apply to non-discretionary agency actions. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

Even if Congress had authorized the Secretary to issue *or deny* the permit notwithstanding any other provision of law, that would not be end of the analysis. When Congress does not specifically exempt an agency from compliance with a statute, but instead uses the "notwithstanding" formulation, the general rule is that existing law remains in place unless there is other convincing evidence that Congress intended the existing law to be displaced. *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) ("notwithstanding" clause will not displace existing law absent "other convincing indices of statutory intent"); *see also In re Glacier Bay*, 944 F.2d 577, 581-82 (9th Cir. 1991) (courts look carefully to see what Congress intended "notwithstanding" language to apply to). Here there are no other convincing indices of congressional intent that would support a denial of jurisdiction in the event that the permit was denied.

The plain language and legislative history of Section 124, therefore, do not provide clear and convincing evidence of an intent to cut off judicial review. By

concluding otherwise, the district court committed legal error.

2. Judicial review is available because there were meaningful standards to apply.

The district court also found that there is no jurisdiction because Section 124 provides "no meaningful standard" to apply. Order at 19:8-11 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The *Heckler* exception is "very narrow." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (citation omitted).[2] But the district court was simply wrong that there were no meaningful standards to apply here.

Section 124 itself provides a judicially cognizable standard for review. Congress authorized the Secretary to issue the permit notwithstanding any other provision of law. Therefore, the Secretary's denial on the grounds that granting the farm a permit would "would violate ... specific wilderness legislation" may be tested against Congress's plain language. *Compare* Decision at 1, *with SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (when agency "action is based upon a determination of law … an order may not stand if the agency has misconceived the law").[3] The district court thus had standards from Section 124 to apply.

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[2] The *Heckler* exception typically applies to enforcement-discretion cases—which this is not. *See Beaty v. FDA*, 853 F. Supp. 2d 30, 39-40 (D.D.C. 2012) (*Heckler* presumption of unreviewability limited to agency decisions not to enforce or investigate); *see also Port of Seattle v. FERC*, 499 F.3d 1016, 1026-27 (9th Cir. 2007) (same).

[3] *See Montana Air Chapter No. 29, Ass'n of Civilian Technicians v. Fair Labor Relations Auth.*, 898 F.2d 753, 756-57 (9th Cir. 1990) (an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986) ("Indeed, it seems almost ludicrous to

NEPA also supplied meaningful standards for review. Plaintiffs argued that the Secretary's seven-page Decision denying DBOC's SUP application, and issuance of the FEIS nine days before, did not comply with NEPA. Motion at 20:6-21:2. NEPA indisputably provides sufficient standards for judicial review. *See Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012) (judicial review of agency compliance with NEPA available under 5 U.S.C. § 706(2)(A)).

Defendants' regulations also provide sufficient standards for jurisdiction. *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").[4]

The district court misapplied this Court's decision in *Ness Inv. Corp. v. U.S. Dep't. of Agric.*, 512 F.2d 706 (9th Cir. 1975). Order at 17:1-15. In *Ness*, there was "no law to apply" because NEPA was not at issue and the agency had no regulations governing its permit decisions. *See id*. at 715-16. The *Ness* Court itself recognized that "a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency

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suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law." (emphasis in the original)).

[4] Defendants have enacted regulations requiring a formal rulemaking before changing an area's use designation. *See* 36 C.F.R. § 1.5(b); *see also Ft. Funston Dog Walkers et al. v. Babbitt*, 96 F. Supp. 2d 1021, 1039-40 (N.D. Cal. 2000) (granting motion for preliminary injunction to remedy NPS's failure to complete formal rulemaking under 36 C.F.R. § 1.5(b)). Defendants have also enacted regulations governing permit decisions. *See* 36 C.F.R. § 1.6; *see also Clipper Cruise Line v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994) (reviewing NPS decision to deny a permit under 36 C.F.R. § 1.6).

of constitutional, statutory, regulatory or other legal mandates or restrictions." *Id.* at 715. Here, NEPA applies and Defendants have regulations that apply. DBOC alleged that Defendants both violated Section 124 and abused their discretion by failing to conform to the procedures prescribed by NEPA and Defendants' regulations. Even under *Ness*, therefore, the district court had jurisdiction.

The district court's ruling that Section 124 provided the Secretary with absolute, unreviewable discretion to deny the permit should be reversed.

B. DBOC is likely to prevail on the merits.

The district court also erred by finding that, even if judicial review were available, injunctive relief was not. The Order stated that DBOC is unlikely to prevail on the merits of its claims that Defendants violated, *inter alia*, the APA, NEPA, and applicable regulations in denying their SUP application. This conclusion is based on erroneous interpretations of law and also warrants reversal.

1. Defendants violated the APA.

The district court erred in concluding that DBOC was unlikely to prevail on the merits of its APA claims. Defendants' decision violated the APA because it was based on four misinterpretations of law, any one of which is sufficient to require invalidation of the decision. Motion at 12:21-15:28; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (agency action "may not stand if the agency has misconceived the law"); 5 U.S.C. § 706(2)(A) (agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

First, Defendants erred in concluding that issuing DBOC a new SUP would violate the law, Decision at 1, because Section 124 provided that Defendants were authorized to issue the permit notwithstanding any other provision of law. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (agency action "would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

Second, Defendants erroneously concluded that converting Drakes Estero to wilderness now "effectuates ... Congressional intent" as expressed in the 1976 Acts. Decision at 6. But Congress agreed with Defendants' position at the time that Drakes Estero should not be converted to wilderness so long as California retains the fishing and mineral rights that make the area "inconsistent" with wilderness. *See* Background section, above. Defendants also ignored subsequent legislation—the National Aquaculture Act of 1980—which makes it "national policy" to "encourage the development of aquaculture." 16 U.S.C. § 2801(b), (c).

Third, Defendants misinterpreted a 1978 Act in concluding that it did "not authorize mariculture" in the estero. Decision at 2 (referring to a 1962 act "as amended"); *id.* at 7 (acknowledging that the 1978 Act amended the 1962 Act). But that legislation authorizes the Secretary "to lease federally owned land (or any interest therein) … which was agricultural land prior to its acquisition," and it defines "agricultural land" as "lands which were in regular use for … agricultural, ranching, or dairying purposes as of May 1, 1978." 16 U.S.C. § 459c-5(a), (b). Drakes Estero has been home to an oyster farm since the 1930s. And in California, "agriculture" includes aquaculture. Cal. Pub. Res. Code § 30100.2 ("Aquaculture

products are agricultural products ...."); *see also Ass'n to Protect Hammersley v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (Ninth Circuit refers to "shellfish farming" in Puget Sound). Thus Drakes Estero was agricultural land as of May 1, 1978, and so the 1978 Act allowed the Secretary to continue mariculture leases there. The Secretary made a legal error when he concluded otherwise.

Fourth, Defendants wrongly concluded that Section 124 exempted them from complying with NEPA and other laws for their decision to deny Plaintiffs a permit to continue operating. Decision at 4. But Congress intended to apply the "notwithstanding" clause to the issuance of a permit only. Section 124 says nothing about a denial. Section 124 did not excuse Defendants from complying with NEPA and other laws in their decision to deny the permit.

The district court did not respond to the first three of these arguments. Instead, it concluded that there was a "'rational connection' between the choices made." Order at 22. But that test is not the only test agency action must pass. As explained above, agency actions cannot be based on misconceptions of the law or factors that Congress did not intend the agency to consider. When these standards are applied, Plaintiffs are likely to prevail on the merits.[5]

2. *Defendants violated NEPA.*

Because it wrongly concluded that NEPA did not apply, the district court

[5] The district court noted that the Secretary's Decision asserted that he "gave great weight to matters of public policy." Order at 22. But the policies referred to are those expressed by Congress in the 1976 Acts. Pub. L. No. 94-567, § 3, 90 Stat. 2692, 2693 (1976). The Secretary did not properly interpret those acts or the effect of Section 124.

failed to analyze whether DBOC was likely to prevail on the merits of its NEPA claim. But Defendants' decision to deny the SUP did violate NEPA. NEPA requires agencies to take a "hard look" that "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). "'Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.'" *Id*. (quoting 40 C.F.R. § 1500.1(b)).

Defendants do not dispute that, if NEPA applies, they did not comply with its basic procedural requirements.[6] Defendants also do not defend the FEIS. In response to the evidence that Defendants violated NEPA by relying on scientifically invalid data and conclusions, the Secretary asserted that his decision "was not based on flawed data," and the district court found that the record "cannot be resolved at this stage." Order at 24. The district court concluded that "policy

[6] Although Defendants initiated the NEPA process upon receiving DBOC's SUP application, Order at 8:4-9, they did not complete it. Defendants did not file the FEIS with EPA, as required by 40 C.F.R. § 1506.9. Because of this failure, EPA never published a notice of availability for the FEIS. NEPA regulations also specify that "[n]o decision on the proposed action shall be made" until 30 days after the publication of the notice of availability. 40 C.F.R. § 1506.10(b)(2). Likewise, the Secretary did not issue a NEPA-compliant record of decision (ROD), as required by 40 C.F.R. § 1505.2. By failing to follow these procedural requirements, Defendants violated NEPA and the APA. *See, e.g.*, *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813, 816 (9th Cir. 2005) (holding that agency EIS "violated NEPA's procedural requirement to present complete and accurate information" and was thus arbitrary and capricious); *see generally Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1099-1100 (9th Cir. 2010) (discussing importance and function of NEPA's procedural requirements).

decisions, not science, controlled the ultimate decision." *Id*. But NEPA prohibits decisions—including discretionary policy decisions—from being made based on defective data and junk science and without proper evaluation of their environmental consequences. DBOC provided specific evidence of instances in which Defendants had relied on invalid data or reached invalid conclusions, Motion at 8, 18-19, and Defendants did not counter that evidence. *See NRDC v. U.S. Forest Service*, which held that 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." 421 F.3d 797, 816 (9th Cir. 2005). DBOC thereby established that it was likely to prevail on the merits of a NEPA claim. When the district court rejected those contentions on the ground that the ultimate decision was a policy decision, the district court effectively refused to enforce NEPA, and committed reversible error.

3. Defendants illegally published a false Federal Register Notice.

The district court further erred by failing to address whether DBOC would likely prevail on the merits of its claim that the FR Notice is also illegal under Defendants' regulations. Those regulations require that any "closure, designation, use or activity restriction or condition" that significantly changes a park's public uses, or that is "highly controversial," "shall be published as rulemaking in the Federal Register." 36 C.F.R. § 1.5(b) (2013). This regulation applies because the FR Notice was the result of Defendants' highly controversial decision to change the designation of Drakes Estero to wilderness and thereby restrict its uses. The failure to complete a formal rulemaking process before publishing the FR Notice

violates the law and is grounds to issue an injunction and vacate the notice. *See Ft. Funston Dog Walkers v. Babbitt*, 96 F. Supp. 2d 1021, 1022, 1039 (N.D. Cal. 2000) (granting motion for preliminary injunction to remedy NPS's failure to complete formal rulemaking before highly controversial decision to alter park usage).[7]

4. *The district court erred in finding that the balance of the equities and public interest did not favor granting an injunction.*

The district court also applied the law incorrectly in determining that the balance of equities and public interest do not support injunctive relief.[8]

First, the district court erred by failing to weigh the public's interest in Defendants' compliance with federal law. "[T]he public interest favors applying federal law correctly." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011). As shown above, Defendants' decision violated Section 124, the APA,

[7] The district court did address DBOC's claim that the FR Notice issued by Defendants was false and published illegally, but committed clear error by concluding that "Plaintiffs have not shown how the notice can be held patently false." Order at 22 n.17. The FR Notice explicitly stated that "all uses prohibited under the Wilderness Act within Drakes Estero have ceased as of 11:59 p.m. on November 30, 2012," 77 Fed. Reg. at 71827, but commercial activities continued after that date—as specifically authorized by Defendants—including planting spat in the waters of the estero, and processing and selling oysters. The FR Notice also falsely stated that "Drakes Estero is entirely in federal ownership," *id.*, even though California still retains the fishing rights in Drakes Estero. Issuance of a false FR Notice is an abuse of Defendants' discretion, *cf. Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 806 (9th Cir. 2005) (an "explanation that runs counter to the evidence" is an abuse of discretion); therefore, DBOC is likely to prevail on its claim that this violated the APA.

[8] The balance of the equities and the public interest factors "merge" where, as here, the Government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

NEPA, and their own regulations. In particular, the district court ignored "Congress's determination in enacting NEPA … that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). The district court's failure to weigh these interests was reversible error. *See Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382, 1382 (9th Cir. 1977) (district court's failure to consider "public interest, as reflected in [an Act of Congress]" is "an abuse of discretion").

The district court also erred by fundamentally misapprehending the legal relevance of Section 124. In finding that the public interest and balance of the equities did not favor injunctive relief, the district court invoked the 2005 communications from NPS to DBOC regarding the agency's position that the 1976 Acts prohibited Defendants from issuing a new SUP after the original authorization expired in 2012. Order at 30:1-13. The district court weighed against DBOC its alleged "failure to conduct due diligence ... [about] the Park Services' (*sic*) intention to allow the Reservation to lapse in November 2012, and the Company's failure to prepare for the same." *Id*. But the purchase of the farm and NPS's expressions of intent to allow the existing permit to expire occurred prior to the game-changing enactment of Section 124, which was intended to (and should have) completely superseded any legal conclusions or positions based on the previous statutory backdrop.[9] It is undisputed that Section 124 authorized the

[9] For the same reason, the court erred when it concluded that the reference in the House Report accompanying the 1976 Acts about "remov[ing] obstacles" to the

Secretary to issue a new SUP that would allow DBOC to continue operations until 2022 under the same terms as its original permit. Order at 18:3-4. For the district court to hold against DBOC a "refusal to hear the message" from Defendants that no SUP could issue, when that message had been explicitly overruled by Congress, is reversible error.

CONCLUSION

DBOC's emergency motion for an injunction pending appeal should be granted to avoid the irreparable harm associated with the termination of an eighty-year tradition of shellfish farming at Drakes Estero.

DATED: February 12, 2013

Respectfully submitted,

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conversion of potential wilderness areas to wilderness areas was an "important consideration" weighing against an injunction. Order at 30:6-10. This analysis ignored the more recent expression of congressional intent to make it easy to issue the permit, as expressed in Section 124. It also misreads the congressional intent of the 1976 Acts, since, as noted above, Congress in the 1976 Acts did not intend Drakes Estero to convert to wilderness until California conveyed its retained rights back to the U.S. Government.

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 12, 2012.

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 12, 2013

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