No. 13-_____

In the Supreme Court of the United States

DRAKES BAY OYSTER COMPANY AND KEVIN LUNNY,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In reviewing an agency's denial of a permit to continue operating an 80-year-old oyster farm, the United States Court of Appeals for the Ninth Circuit held that a federal court has jurisdiction to review a discretionary agency decision for compliance with specific requirements, but does not have jurisdiction to determine whether the same decision is arbitrary and capricious or an abuse of discretion. Because of this asserted lack of jurisdiction, the majority could not evaluate whether, as the dissent concluded, the agency had relied on factors Congress did not intend it to consider, and had misinterpreted the law it relied on. Nine circuits have split five ways on this jurisdiction issue. The circuits are also split on an environmental-review issue, and are split in principle on a prejudicial-error issue.

The questions presented are:

1. Whether federal courts lack jurisdiction under the Administrative Procedure Act to review an agency action that is arbitrary and capricious or an abuse of discretion when the statute authorizing the action does not impose specific requirements governing the exercise of discretion.

2. Whether federal agencies can evade review of their actions under the National Environmental Policy Act by designating their actions as "conservation efforts", when the record shows that the action will cause significant adverse environmental effects.

3. Whether an agency commits prejudicial error when it makes materially false statements in an environmental impact statement, and then asserts that it would have made the same decision even if the false statements had been corrected.

RULE 14.1(b) STATEMENT

Petitioners are Drakes Bay Oyster Company and Kevin Lunny.

Respondents are Sally Jewell, Secretary of the U.S. Department Of The Interior; U.S. Department of the Interior; Jonathan Jarvis, Director of the U.S. National Park Service; and the U.S. National Park Service.

RULE 29.6 STATEMENT

There are no parent corporations or publicly held corporations involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Drakes Bay Oyster Company and Kevin Lunny respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the Ninth Circuit Court of Appeals (APP. 52-101) is reported at 729 F.3d 967. The amended opinion of the court of appeals (APP. 1-51) is available at 2014 U.S.App.LEXIS 915. The opinion of the District Court for the Northern District of California (APP. 104-152) is reported at 921 F.Supp.2d 972.

JURISDICTION

The court of appeal's judgment was entered on September 3, 2013. APP. 52. A timely petition for rehearing en banc was denied on January 14, 2014. APP. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court has jurisdiction under 28 U.S.C. § 1331.

STATUTES INVOLVED

The statutes involved are set out in the appendix (APP. 167-177).

STATEMENT OF THE CASE

Although this case now raises issues of importance to people and businesses across the Nation, it started as a regional dispute between modern environmentalists and wilderness extremists.

Petitioner Drakes Bay Oyster Company is supported by modern environmentalists who believe that people can, through sustainable agriculture, develop a close and symbiotic relationship with the environment. The great majority of Marin County, just north of San Francisco, has rallied around the oyster farm and its workers and their families who live at the farm. They see no good reason why respondent National Park Service should eliminate the oyster farm or create an artificial wilderness in the middle of an important and historic farming area.

Oysters and other shellfish were once abundant in the area. Oysters provide environmental benefits, for example by filtering and clarifying the water. Because of these benefits, efforts are now being made to restore oysters in San Francisco Bay, Chesapeake Bay, and New York Harbor. As a food crop, oysters provide good protein without any addition of feed, fertilizers, or pesticides.

Respondent federal agencies are supported by wilderness extremists who want to rid the area of agricultural and commercial operations. But whatever one might think of the Park Service's extreme devotion to wilderness in Point Reyes, there is nothing to recommend the means it has used to achieve its ends. It has insisted on misinterpreting the relevant law even after Congress overrode its misinterpretation, and it has hid and misrepresented

scientific data even after it was criticized by the Department of the Interior's Solicitor's Office and by the National Academy of Sciences.

A. History Of Farming In Point Reyes

Point Reyes is a coastal farming peninsula just north of San Francisco. Since the 1850s, much of the peninsula has been in beef and dairy ranching, and now produces prized organic food for the Bay Area and beyond. These ranches surround an embayment known as Drakes Estero.[1] Drakes Estero is an ideal place for oyster farming. The State of California has leased its tide and submerged lands in Drakes Estero for oyster farming continuously since 1934.

Petitioner Drakes Bay Oyster Company is the current owner of the oyster farm in Drakes Estero. Petitioner Kevin Lunny is its President. Drakes Bay is widely respected for producing some of the world's finest oysters in harmony with the environment.

B. Point Reyes National Seashore

In the late 1950s, the Park Service proposed to create a "national seashore" at Point Reyes to protect the area from being overrun with residential subdivisions. *See generally Drakes Bay Land Co.* v. *United States*, 424 F.2d 574, 575-579 (Ct. Cl. 1970) (developer prevails on claim that Park Service's proposal caused inverse condemnation). The Park Service was particularly interested in preserving the "exceptional" public values offered by the oyster farm:

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[1] Historians believe that Drakes Estero is the site of the first English encampment in North America. In 1579, Sir Francis Drake landed his ship, the *Golden Hinde*, for 36 days of repairs on his way to circumnavigating the globe.

> Existing commercial oyster beds and an oyster cannery at Drakes Estero … should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.[2]

In 1962, Congress adopted the proposal and passed the Point Reyes National Seashore Act,[3] which authorized the Secretary of the Interior to purchase the farmland and lease it back to the farmers.[4]

C. Point Reyes Wilderness Act

In the mid-1970s, Congress considered proposals to designate areas within the Point Reyes National Seashore as "wilderness" under the 1964 Wilderness Act.[5] The initial proposals, authored by members of California's Congressional delegation,

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[2] S. 476, A Bill To Establish The Point Reyes National Seashore In The State Of California, And For Other Purposes: Hearings Before Subcomm. On Pub. Lands Of The Comm. On Interior And Insular Affairs, 87th Cong. (1961) at 20 (reprinting National Park Service, Report On the Economic Feasibility Of The Proposed Point Reyes National Seashore (1961)).

[3] Pub. L. No. 87-657, 76 Stat. 538 (1962), codified at 16 U.S.C. §§ 459c *et seq*.

[4] 16 U.S.C. § 459c-5(a) (amended in 1978 by Pub. L. No. 95-625, § 318, to allow for leases in perpetuity).

[5] Pub. L. No. 88-577, 78 Stat. 890 (1964), codified at 16 U.S.C. §§ 1131 *et seq*.

would have designated Drakes Estero as wilderness because "they did not view the [oyster] farm's operations as incompatible with the area's wilderness status." APP. 40 (Watford, J., dissenting from opinion below). The civic, environmental, and conservation groups that commented on the bill all agreed, stressing "a common theme: that the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness." APP. 41 (dissent).

The only party opposed to designating Drakes Estero as wilderness was the Department of the Interior. The Department opposed *any* wilderness designation for Drakes Estero because, it argued, California had retained fishing and mineral rights that made the area "inconsistent with wilderness". APP. 43 (dissent). At the time, the Park Service's position was that wilderness areas "should not be left with the possibility—no matter how remote—that we do not completely control the property."[6]

The legislation that came out of this debate, the 1976 Point Reyes Wilderness Act ("1976 Act"), designated Drakes Estero as "potential wilderness".[7] Although "potential wilderness" was not defined in the legislation, the author of the final bill, Congressman John Burton, explained that, "[a]s 'potential wilderness,' these areas would be designated as wilderness effective when the State

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[6] Wilderness Additions—National Park System: Hearings Before the Subcomm. on Parks and Recreation of the S. Comm. on Interior and Insular Affairs, 94th Cong. 271, 329 (1976).

[7] Pub. L. No. 94-544 § 1, 90 Stat. 2515 (1976); Pub. L. No. 94-567 § 1(k), 90 Stat. 2692.

ceeds [sic] these rights to the United States."[8] The House Report stated that, for potential wilderness areas, there should be "efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status."[9] Those "obstacles" were California's retained rights, not the oyster farm: "all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status." APP. 45 (dissent).

D. Congress Overrides The Park Service

Petitioner Kevin Lunny grew up on a cattle ranch adjacent to the oyster farm, and became the first certified organic rancher in Point Reyes. In 2004, he founded Drakes Bay Oyster Company and purchased the oyster farm from its previous owners. He was aware at the time of purchase that the oyster farm (like the surrounding cattle ranches) had a lease that would need to be renewed from time to time, but the Park Service gave him no notice of any intent not to renew the lease.

In 2005, however, he received a memo from the Park Service asserting that the Park Service could not issue a permit to the oyster farm when its lease came up for renewal in November 2012. According to the memo, the 1976 Act mandated the

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[8] H.R. 7198, H.R. 8002, et al., To Designate Certain Lands in the Point Reyes National Seashore, California as Wilderness: Hearing Before Subcomm. on Nat'l Parks and Recreation of the H. Comm. on Interior and Insular Affairs, 94th Cong. (1976) (prepared statement of Rep. John Burton, at 2).

[9] H.R. Rep. No. 94-1680, at 3 (1976).

elimination of the oyster farm. APP. 44 (dissent). The memo did not identify any statutory language supporting that mandate. Instead, the memo relied on the sentence in the House report, quoted in Section C above, that referred to the removal of "obstacles" preventing wilderness designation. *Id*.

In 2009, Congress enacted what is referred to as "Section 124".[10] This statute was intended to override the Park Service's 2005 legal analysis. APP. 38 (dissent). The purpose of Section 124, expressed in a single phrase, was "[t]o extend a special use permit for Drake's Estero at Point Reyes National Seashore."[11] 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" to Drakes Bay.

E. False Accusations Of Environmental Harm

In 2006, the Park Service began claiming that the oyster farm was causing environmental harm, especially to harbor seals in Drakes Estero. But the accusations did not stand up to scientific scrutiny. In 2009, the National Academy of Sciences found that the Park Service had "selectively presented, overinterpreted, or misinterpreted" the data.[12] The National Academy concluded that "there is a lack of

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[10] Pub. L. No. 111-88, § 124, 123 Stat. 2903, 2932 (2009), quoted in full at APP. 170-171.

[11] 155 CONG. REC. S. 9773 (December 24, 2009).

[12] Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California (May 5, 2009) at 72-73 (http://www.nap.edu/catalog.php?record_id=12667).

strong scientific evidence that shellfish farming has major adverse ecological effects" on Drakes Estero.[13]

The Park Service did not provide all relevant data to the National Academy of Sciences. After the Academy's report was prepared, the Park Service was found to have been hiding photographs that exonerated Drakes Bay from the Park Service's charges. These photographs had been taken, secretly, every minute of the day during the harbor-seal pupping season for the previous three years, undoubtedly with the intent of catching the oyster farm in a bad act. The photographs were taken of an area in which seals and their pups haul out of the water. Also visible at times were boats and workers who tended an oyster-farming area in the distance. The Park Service reviewed these photographs and found no evidence that the oyster boats or workers were disturbing the adult seals or their pups. The Park Service kept this information to itself.

The Park Service's behavior was investigated by the Department of the Interior's Solicitor's Office, which concluded that the Park Service's handling of these photographs demonstrated a "troubling mindset".[14] The Solicitor's Office also concluded that five employees had violated the Park Service's Code of Scientific and Scholarly Conduct.[15]

Despite these reprimands, the Park Service has continued to misrepresent facts and hide

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[13] *Id.* at 6.

[14] Dkt. 77 at 12 n.10. ("Dkt." refers to docket entries in the Ninth Circuit; the page numbers cited are those ECF-stamped at the top of the document.)

[15] *Id.*

information. When the Park Service could not find any evidence in the photographs that Drakes Bay disturbed the seals, the Park Service secretly hired a harbor-seal expert to re-analyze the photographs. The expert found "no evidence of disturbance" by the oyster boats or workers[16], just as the Park Service had found none. The expert report was not disclosed.

In November 2012, the Park Service released a final environmental impact statement ("EIS") that evaluated the environmental effects of the oyster farm. Despite the report from its own expert, the final EIS asserts that the oyster farm causes significant "adverse impacts" to harbor seals.[17]

Within 30 days after the release of the final EIS, Drakes Bay obtained a copy of the expert's report and learned that the Park Service had misrepresented the conclusion of its harbor-seal expert. Respondents have never contested the fact that the EIS "misrepresents the conclusion" of the Park Service's expert,[18] although in their briefs respondents continue to cite the misrepresentation as though it were true.

F. The Secretary's Decision

In 2010, Drakes Bay applied for the permit authorized by Section 124. On November 29, 2012, former Secretary of the Interior Kenneth Salazar issued a memorandum of decision denying Drakes Bay's permit application. APP. 153-166.

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[16] ER 286-294. ("ER" refers to Appellants' Excerpts Of Record filed with the Ninth Circuit.)

[17] SER 58. ("SER" refers to Appellees' Supplemental Excerpts Of Record filed with the Ninth Circuit.)

[18] ER 188.

The Secretary recognized that Section 124 gave him authority to issue the permit notwithstanding any other provision of law. Nevertheless, he began by asserting that he would not issue the permit because doing so would "violate" the 1976 Act. APP. 154. (The Ninth Circuit concluded that he could not have meant what he said. APP. 22-23.)

Ultimately, the Secretary declared that he based his decision to deny Drakes Bay a permit on the "public policy inherent in the 1976 act of Congress". According to the Secretary, "Sec. 124 … in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero." APP. 163. (The Secretary misinterpreted the intent of Congress as expressed in the 1976 Act, according to the dissent, and the majority did not disagree. APP. 48 (dissent).)

The Secretary also asserted that Section 124 "expressly exempts my decision from any substantive or procedural legal requirements", including the National Environmental Policy Act ("NEPA"). APP. 160. (The Ninth Circuit held that he was mistaken. APP. 15.)

The Secretary relied in part on the draft EIS and final EIS that had been prepared for the decision. Although they were "not material to the legal and policy factors that provide the central basis for [his] decision", they "informed [him] with respect to the complexities, subtleties, and uncertainties of the matter and have been helpful to [him] in making [his] decision." APP. 162. He believed that there was "scientific uncertainty" about the effects of the oyster farm. *Id*. He acknowledged that Drakes Bay had challenged some of the data and conclusions, and asserted that his decision was not based "on the data that was asserted to be flawed". *Id*. n.5.

He called out only one aspect of the environment—Drakes Estero "is home to one of the largest harbor seal populations in California"—and asserted that eliminating the oyster farm "would result in long-term beneficial impacts to the estero's natural environment." APP. 154, 162. He made no mention of the photographs the Park Service had taken, or that (in the opinion of the Park Service's harbor-seal expert) there was no evidence that Drakes Bay was disturbing the seals. At the time he made his decision, he could not have been aware of the controversy that erupted, several weeks later, when Drakes Bay discovered that the final EIS misrepresented the conclusions of the Park Service's harbor-seal expert.

The Secretary gave Drakes Bay 90 days to wind up its operations and remove its property. APP. 164. On December 4, 2012, the Park Service published a notice in the Federal Register that Drakes Estero is now "designated wilderness."[19]

G. The Litigation

On December 4, 2012, petitioners (referred to here jointly as "Drakes Bay") filed this suit in the district court. Drakes Bay alleged that the Secretary abused his discretion and violated the Administrative Procedure Act ("APA") by basing his decision on false statements and misinterpretations of law. Drakes Bay also alleged that the Secretary violated NEPA by relying on a defective EIS. On December 21, 2012, Drakes Bay moved for a preliminary injunction.

On February 4, 2013, the district court entered an order denying the motion. It held that it did not have jurisdiction to review the Secretary's decision.

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[19] 77 Fed.Reg. 71,826, 71,827 (Dec. 4, 2012).

APP. 136. It also found that although Drakes Bay would suffer irreparable harm without the injunction, the other requirements for injunctive relief were not met. APP. 136-151.

Drakes Bay appealed and moved for an emergency injunction pending appeal. On February 25, 2013, the Ninth Circuit's motions panel granted that motion. It found that "there are serious legal questions and the balance of hardships tips sharply in appellants' favor." APP. 103.

On September 3, 2013, a divided panel of the Ninth Circuit issued an opinion affirming the district court. APP. 52-101. The majority held that it lacked jurisdiction over the APA claim, but had jurisdiction over the NEPA claim. APP. 64-66; *see* Section I.C below. The majority rejected the NEPA claim on the grounds that the Secretary's decision "is essentially an environmental conservation effort, which has not triggered NEPA in the past", and that Drakes Bay had not demonstrated prejudicial error. APP. 81-82.

The dissent concluded that Drakes Bay was likely to prevail on the APA claim, and would have reversed. APP. 88-89. The dissent summarized its reasoning as follows:

> The Department had concluded, in 2005, that the [1976] Act barred issuance of a special use permit authorizing continued operation of Drakes Bay Oyster Company's oyster farm. The Department thought Congress had "mandated" that result by designating Drakes Estero, where the oyster farm is located, as a "potential wilderness addition" in the Point Reyes Wilderness Act. The Act's legislative history makes clear, however, that by divining such a

> mandate, the Department simply misinterpreted the Act's provisions and misconstrued Congress's intent. The Department's misinterpretation of the Point Reyes Wilderness Act prompted Congress to enact § 124 in 2009. In my view, by including a notwithstanding clause in § 124, Congress attempted to supersede the Department's erroneous interpretation of the Act.
>
> In the 2012 decision challenged here, the Secretary nonetheless denied Drakes Bay's permit request based primarily on the very same misinterpretation of the Point Reyes Wilderness Act that Congress thought it had overridden. As a result, I think Drakes Bay is likely to prevail on its claim that the Secretary's decision is arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

APP. 88.

On October 28, 2013, Drakes Bay petitioned for rehearing en banc. On January 14, 2014, the panel denied the petition and issued an amended opinion with minor changes. APP. 1-51.

On January 27, 2014, the panel issued an order staying the mandate for 90 days pending the filing of a petition for writ of certiorari. According to the Federal Rules of Appellate Procedure, stays pending certiorari continue in effect until this Court's final disposition of the case. Fed. R. App. Proc. R. 41(d)(2)(b).

REASONS WHY CERTIORARI IS WARRANTED

I. THERE ARE DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICTS ON THE JURISDICTIONAL ISSUE

A. Nine Circuits Have Split Five Ways

The Administrative Procedure Act ("APA") excludes from judicial review agency action that "is committed to agency discretion by law". 5 U.S.C. § 701(a)(2). In *Overton Park*, this Court stated that this exclusion "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). Nine circuits have split five ways on how to interpret the "no law to apply" test.

Confusion arises because the APA prohibits an agency from making decisions that are arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). If the arbitrary-and-capricious standard provides law to apply, then there will always be law to apply to ordinary agency decisions. The Fourth Circuit and a panel in the Ninth Circuit have followed this logic and found that § 706(2)(A) provides law to apply.[20] The Second Circuit and a panel in the Ninth Circuit have held exactly to the contrary.[21]

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[20] *Virginia* v. *Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) ("action committed to agency discretion is nevertheless reviewable under the APA for abuse of discretion"); *Pinnacle Armor* v. *United States*, 648 F.3d 708, 720 (9th Cir. 2011) ("abuse of discretion" standards of APA "are adequate to allow a court to determine whether the [agency] is doing what it is supposed to be doing").

[21] *Lunney* v. *United States*, 319 F.3d 550, 559 (2d Cir. 2003) ("the APA's 'arbitrary and capricious' standard, see

Confusion also arises because every statute has a purpose, and a statutory purpose can provide sufficient "law to apply". But how specific does the purpose have to be? If even a vague and general statutory purpose provides the necessary "law to apply", then there will always be law to apply to ordinary agency decisions. The Second, Seventh, Tenth, and District of Columbia Circuits have found law to apply from broad statutory purposes and general principles.[22] The Fifth, Ninth, and Eleventh Circuits have held, to the contrary, that for a court to

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5 U.S.C. § 706(2)(A), cannot be sufficient by itself to provide the requisite 'meaningful standard' for courts to apply in evaluating the legality of agency action"); *Oregon Nat. Res. Council* v. *Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) (rejecting argument that "there can be 'arbitrary and capricious' review under APA § 706(2)(A) independent of another statute").

[22] *Christianson* v. *Hauptman*, 991 F.2d 59, 62-63 (2d Cir. 1993) (finding law to apply in the goal of "conserving the natural resources", and because "§ 701(a)(2) did not preclude judicial review over the adequacy of an administrative investigation"); *Vahora* v. *Holder*, 626 F.3d 907, 917-919 (7th Cir. 2010) (finding jurisdiction to review agency's use of "procedural device"); *Sabin* v. *Butz*, 515 F.2d 1061, 1065, 1066-1070 (10th Cir. 1975) (finding jurisdiction to review action under statute that provides "broad authority to issue permits for the use of land in the National Forests" because authority "shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests"); *Dickson* v. *Secretary of Defense*, 68 F.3d 1396, 1400-1405 (D.C. Cir. 1995) (finding jurisdiction to review waivers under statute providing for waivers "in the interest of justice").

have jurisdiction the statute must provide specific requirements.[23]

Because the test is so indeterminate, circuits cannot consistently decide whether a statute provides "law to apply". Splits on several statutes are noted in Section I.B below.

The cases above considered whether courts have jurisdiction when there are no specific requirements (other than § 706(2)(A)) to apply. But even when there are specific requirements, several circuits have split on the "no law to apply" test. The Eighth Circuit has held that when a statute imposes specific requirements, a court has jurisdiction to review compliance with *both* the specific requirements and the arbitrary-and-capricious standard imposed by § 706(2)(A).[24]

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[23] *Ellison* v. *Connor*, 153 F.3d 247, 253 (5th Cir. 1998) (without "specific factors, the making of findings or the development of any additional evidentiary record", "the judiciary was in no position to gainsay the Secretary's determination as arbitrary, capricious or an abuse of discretion"); APP. 14 (in this case, Ninth Circuit holds 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 of constitutional, statutory, regulatory or other legal mandates or restrictions'", quoting *Ness Inv. Corp*. v. *United States Dep't of Agriculture, Forest Service*, 512 F.2d 706, 715 (9th Cir. 1975)); *Conservancy of Southwest Fla.* v. *United States Fish & Wildlife Serv*., 677 F.3d 1073, 1082-1085 (11th Cir. 2012) (no jurisdiction to review abuse-of-discretion claim because of "the absence of any applicable legal standard that limits the agency's discretion").

[24] *Friends of the Norbeck* v. *Forest Service*, 661 F.3d 969, 975 (8th Cir. 2011) (holding that it had jurisdiction to review abuse-of-discretion claim because Forest Service

But in this case the Ninth Circuit held, to the contrary, that when there are specific requirements, a court has jurisdiction *only* to review for compliance with those specific requirements, and *does not* have jurisdiction to assess whether an agency decision was arbitrary and capricious. APP. 14-16, discussed in Section I.C below. This version of the "no law to apply" test has also been used by panels in the Fourth and District of Columbia Circuits.[25]

The Third Circuit applies a different rule, one that evaluates concepts not explicitly considered by other circuits.[26]

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regulation provided "standards, albeit broad ones," and then applying § 706(2)(A)).

[25] *Angelex Ltd.* v. *United State*s, 723 F.3d 500, 508 (4th Cir. 2013) ("[e]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations, but they may not review agency action where the challenge is only to the decision itself"); *Milk Train, Inc.* v. *Veneman*, 310 F.3d 747, 750-752 (D.C. Cir. 2002) (court does not have jurisdiction to review for abuse of discretion an agency decision to cap the amount of production eligible for subsidy, but it does have jurisdiction to review same decision for claim that agency was providing subsidy to cover losses in years other than the prior year).

[26] *Raymond Proffitt Found.* v. *U.S. Army Corps of Engineers*, 343 F.3d 199, 205 (3d Cir. 2003) (when considering claim of unreviewability, Third Circuit considers "whether: 1) the action involves broad discretion, not just the limited discretion inherent in every agency action; 2) the action is the product of political, military, economic, or managerial choices that are not readily subject to judicial review; and 3) the action does not involve charges that the

Cases interpreting the "no law to apply" standard, therefore, can be sorted into five groups: those that find jurisdiction under the APA or from vague statutory purposes, those that refuse jurisdiction when there are no specific requirements, those that review for compliance both with specific requirements and with the arbitrary-and-capricious standard of the APA, those that review for compliance only with the specific requirements, and those in the Third Circuit.

The main issue in this petition—when a court has jurisdiction to review a discretionary agency decision for compliance with the arbitrary-and-capricious standard of APA § 706(2)(A)—is fundamental to administrative law. Courts, agencies, and litigants all deserve a clear and *uniform* national rule on jurisdiction. Perpetuating the existing situation, in which a rule that cannot be objectively applied gives some people their day in court and deprives others of that benefit, would not be consistent with fairness or due process.

Despite the complexity of these circuit splits, the jurisdiction problem can readily be resolved with a single solution, as explained in Section I.E below.

The petition for writ of certiorari should be granted.

B. The Issue Is Nationally Important

Many statutes provide an agency with a broad grant of authority to issue permits or enter into leases. The issue in this case affects how courts will

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agency lacked jurisdiction, that the decision was motivated by impermissible influences such as bribery or fraud, or that the decision violates a constitutional, statutory, or regulatory command").

determine whether they have jurisdiction to review agency action under all of these statutes.

Several of the statutes apply nationally, or to vast areas of the West. The National Park Service's organic act, for example, provides the Secretary of the Interior broad authority to enter into leases.[27]

The Taylor Grazing Act provides broad authority to the Secretary of the Interior to issue permits to graze livestock.[28] The Ninth and Tenth Circuits have split on whether a court has jurisdiction to review decisions made under this provision. *Compare Mollohan* v. *Gray*, 413 F.2d 349, 352 (9th Cir. 1969) (no jurisdiction) *with Diamond Ring Ranch, Inc.* v. *Morton*, 531 F.2d 1397, 1406 (10th Cir. 1976) (jurisdiction).

The Secretary of Agriculture is authorized to permit use of land within the national forests for hotels.[29] The Ninth and Tenth Circuits have also

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[27] "[T]he Secretary of the Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities", which includes "enter[ing] into a lease with any person or governmental entity for the use of buildings and associated property administered by the Secretary as part of the National Park System." 16 U.S.C. § 1a-2(k).

[28] "The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law." 43 U.S.C. § 315b.

[29] "The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and

split on whether a court has jurisdiction to review agency decisions made under this provision. *Compare Ness*, 512 F.2d at 706 (Ninth Circuit, no jurisdiction) *with Sabin*, 515 F.2d at 1065 (Tenth Circuit, jurisdiction); *see Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 813 (9th Cir. 1987) (noting that *Sabin* is "[c]ontra" to *Ness*), reversed on other grounds, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989).)

Many other statutes provide broad grants of authority, which have produced additional circuit splits on the question of jurisdiction. For example, the Seventh Circuit has split with the Eighth and Ninth Circuits on whether a court has jurisdiction to review the use of a "procedural device" in immigration cases.[30] The District of Columbia Circuit has split with the Eighth Circuit on whether a court has jurisdiction to review military waiver determinations.[31] The "no law to apply" test is unworkable, and needs to be replaced.

C. This Case Provides An Excellent Opportunity To Consider The Issue

This case raises all the issues that the circuits have split on, as identified in Section I.A above.

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conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests … for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety." 16 U.S.C. § 497.

[30] *Vahora*, 626 F.3d at 917 (Seven Circuit notes disagreement with Eighth and Ninth Circuits).

[31] *Dickson*, 68 F.3d at 1401 n.5 (District of Columbia Circuit notes implicit split with Eighth Circuit).

The court specifically invoked the "no law to apply" test. It asserted that § 701(a)(2) applies 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion'" and that the exception is "for circumstances where there is 'no law to apply'". APP. 14, quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) and *Webster* v. *Doe*, 486 U.S. 592, 599 (1988).

Drakes Bay argued in its briefs that the agency decision was an abuse of discretion in violation of APA § 706(2)(A). The dissent would have ruled in favor of Drakes Bay because the government's decision "relied on factors which Congress has not intended it to consider", and because the government made a "legally erroneous interpretation of the controlling statute". APP. 47, 49, quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Safe Air for Everyone* v. *EPA*, 488 F.3d 1088 (9th Cir. 2007); *see Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) (when making a discretionary decision, agency "must confront the … question free of [its] mistaken legal premise"); *see also* APP. 48 (noting that the majority did not argue that the government's interpretation of the 1976 Point Reyes Wilderness Act was correct).

The panel conceded that it had jurisdiction to determine, among other things, whether the government had complied with "applicable procedural restraints" such as NEPA. APP. 16. But even though there was law to apply, the panel held that it did not have jurisdiction to consider an APA claim of abuse of discretion:

> [E]ven where the substance or result of a decision is committed fully to an agency's discretion, "a federal court has

> jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." In such circumstances, a federal court lacks only jurisdiction to review an alleged abuse of discretion regarding "the making of an informed judgment by the agency."

APP. 14-15, quoting *Ness*, 512 F.2d at 715; *see* APP. 14 ("we agree … that we lack jurisdiction to review the Secretary's ultimate discretionary decision whether to issue a new permit").

Also, the panel reached an illogical and extreme result. How can a court lack jurisdiction because there is no law to apply, but retain jurisdiction to determine compliance with those laws that do apply? Or, in the words of the court, how can a decision be "committed fully to an agency's discretion" when there are "legal mandates or restrictions" limiting that discretion?

The holding implies that courts *never* have jurisdiction to consider whether an agency decision is arbitrary and capricious or an abuse of discretion under APA § 706(2)(A). If a court cannot conduct arbitrary-and-capricious review either when *there is* law to apply, or when *there is not* law to apply, then a court can *never* conduct arbitrary-and-capricious review. The Ninth Circuit's holding, therefore, would write § 706(2)(A) out of the APA.

The petition for writ of certiorari should be granted.

D. The Circuit Splits Can All Be Resolved By Setting Aside The "No Law To Apply" Standard

The "no law to apply" test is neither an accurate nor a helpful way to make the determination of whether a decision is committed to agency discretion. The circuit splits identified in Section I.A above can all be resolved by setting aside the test.

The usual rationale behind "no law to apply" is that a "governing statute confers such broad discretion as to essentially rule out the possibility of abuse". *Amador County* v. *Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011). This assertion rarely holds up on close inspection. For example, "[i]t is not really true that a court would have no meaningful standard against which to judge the agency's exercise of discretion" under the National Security Act of 1947. *Webster* v. *Doe*, 486 U.S. at 610 (Scalia, J., dissenting) (internal quotation marks omitted). The standard established by that act, although broad,

> at least excludes [job] dismissal out of personal vindictiveness, or because the Director wants to give the job to his cousin. Why … is respondent not entitled to assert the presence of such excesses, under the "abuse of discretion" standard of § 706?

Id.

Here, there are also meaningful standards to apply. As the dissent concluded, the government relied on factors that Congress did not intend it to consider, and misinterpreted the statute it relied on. *See* Section I.C above. Drakes Bay asserts that the government misrepresented the scientific facts. *See* Sections E and G in the Statement of the Case above.

A broad grant of authority should not generally be interpreted as a license to abuse that authority by misrepresenting facts, misinterpreting law, or acting irrationally. If an agency provided a wholly irrational reason for a decision—for example, that the moon was made of green cheese—a court should have no trouble finding jurisdiction to set aside that decision. *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action'", quoting *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43).[32]

Courts have confused the "no law to apply" test with the real question, which is whether (in the words of § 701(a)(2)) the action is "committed to agency discretion by law". The test should be set aside.

E. This Court's Analytical Framework Best Resolves The Split

The confusion caused by "no law to apply" can readily be eliminated by replacing that standard with an analytical framework developed by this Court. The framework begins with the presumption

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[32] *See also* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 707-708 (1990) (characterizing assertions that "the agency misunderstood the facts, that it departed from its precedents without a good reason, that it did not reason in a minimally plausible fashion, or that it made an unconscionable value judgment" as "'pure' abuse of discretion theories", and arguing that "[p]ure abuse of discretion inquiries do not depend on the contents of the statute under which an agency acts; therefore, it is illogical to suppose that the lack of 'law to apply' makes the inquiries unworkable").

that all final agency actions are subject to judicial review, then considers (1) whether there is evidence that Congress did not intend to have the agency's decision judicially reviewed, and (2) whether judicial review should be foreclosed because of common-law considerations.

Before considering the jurisdictional question, however, a court can consider whether the plaintiff has stated a claim. If the complaint alleges nothing more than "a faulty weighing of permissible policy factors", in the words of the dissent below (APP. 49), then a court can find that the action was not in violation of § 706(2)(A), and can dismiss the complaint for failure to state a claim.[33]

When a complaint alleges a truly arbitrary and capricious action, then the analysis should begin with the APA, which provides a right of review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see also* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). There is a "strong presumption that Congress intends review of admin-

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[33] *See Chehazeh* v. *AG of the United States*, 666 F.3d 118, 125 n.11(3d Cir. 2012) (noting that it is not the APA, but rather the "'federal question' statute, 28 U.S.C. § 1331, [that] 'confer[s] jurisdiction on federal courts to review agency action'" (quoting *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977)), and concluding that dismissal when a case is committed to agency discretion is best characterized as a failure to state a claim under the APA).

istrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

This presumption may be overcome by evidence of Congressional intent to the contrary. It "takes 'clear and convincing evidence' to dislodge the presumption". *Kucana* v. *Holder*, 558 U.S. 233, 251-252 (2010), quoting *Bowen* at 671. The presumption also "'may be overcome by inferences of intent drawn from the statutory scheme as a whole.'" *Sackett* v. *EPA*, 132 S. Ct. 1367, 1372-1373 (2012), quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

Even when Congressional intent is not clear, a court may refuse jurisdiction for reasons of tradition and policy. "Over the years, [this Court has] read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts *traditionally* have regarded as committed to agency discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993) (emphasis added, internal quotation marks omitted). In *Lincoln*, this Court emphasized the reasons of tradition and policy behind those cases holding that some categories of decisions are committed to agency discretion:

> In *Heckler* itself, we held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2). An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," and for this and other good reasons, we concluded, "such a decision has *traditionally* been 'committed to agency discretion[.]'" Similarly, in *ICC* v. *Locomotive Engineers*, we held that

> § 701(a)(2) precludes judicial review of another type of administrative decision *traditionally* left to agency discretion, an agency's refusal to grant reconsideration of an action because of material error. … Finally, in *Webster*, we held that § 701(a)(2) precludes judicial review of a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, an area of executive action "in which courts have long been hesitant to intrude."

Lincoln, 508 U.S. at 191-192, emphasis added, citations omitted, referring to *Heckler* v. *Chaney*, *supra*; *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987); and *Webster* v. *Doe*, *supra*. These cases are part of the common law of unreviewable agency action. *Webster*, 486 U.S. at 610-611 (Scalia, J., dissenting).

This analytical structure puts the focus where it belongs—on Congressional intent and on matters of tradition and policy—rather than on the unhelpful question of whether a court has "no law to apply" when an agency acts under a broad grant of authority.

The petition for writ of certiorari should be granted.

II. THE CIRCUITS ARE SPLIT ON WHETHER NEPA APPLIES TO "CONSERVATION EFFORTS"

The Ninth and Tenth Circuits have split on whether NEPA applies to "conservation efforts". The holding below effectively brings the Ninth Circuit into conflict with the Fifth, Eleventh, and District of

Columbia Circuits, which hold that NEPA applies even to actions that have solely beneficial effects.

NEPA requires a "detailed statement" (now referred to as an "environmental impact statement" or "EIS") to be prepared for "major Federal actions significantly affecting the quality of the human environment". 42 U.S.C. § 4332(2)(C). In *Douglas County*, the Ninth Circuit held that NEPA does not apply to the designation of critical habitat as required by the Endangered Species Act. *Douglas County* v. *Babbitt*, 48 F.3d 1495, 1507-1508 (9th Cir. 1995). The Ninth Circuit concluded that an EIS "is not necessary for federal actions that conserve the environment". *Id.* at 1505. These conservation actions, the court explained, are "federal actions that do nothing to alter the natural physical environment." *Id.*

The Tenth Circuit rejected *Douglas County*, and held, directly to the contrary, that NEPA applies to the designation of critical habitat. *Catron County Bd. of Comm'rs* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996). The Tenth Circuit disagreed with the Ninth Circuit's assumption that the agency's decision did nothing to alter the environment:

> We likewise disagree with [*Douglas County*] that no actual impact flows from the critical habitat designation. Merely because the Secretary says it does not make it so. The record in this case suggests that the impact will be immediate and the consequences could be disastrous.

Id.

In this case, the Ninth Circuit has greatly extended *Douglas County*. The panel concluded that destroying the oyster farm "is essentially an environmental conservation effort, which has not triggered NEPA in the past." APP. 30. This destruction qualifies as an environmental conservation effort, the panel concluded, because it "is a step toward restoring the 'natural, untouched physical environment'". *Id*., quoting *Douglas County* at 1505.

There are at least five flaws in this conclusion. First, it arises from a romantic notion rather than the facts. Oysters and other shellfish are native to Drakes Estero, and were abundant before they were fished out. Farming oysters "is a step towards restoring" the natural oyster populations; destroying the farmed oysters is not.

Second, the panel seems to think that "conservation efforts" are always benign. But one could take "a step toward restoring the natural, untouched physical environment" by blowing up Hoover Dam, which forms Lake Mead (the largest reservoir in the Nation) and stores water for use in California, Arizona, and Nevada. Blowing up Hoover Dam would destroy the reservoir-adapted biota upstream, inundate people and homes downstream, and leave cities and agricultural districts thirsting for a supply of water. Here, the government's decision will, if implemented, harm local water quality (Drakes Bay's oysters filter the water), the resident workers' families (who would be kicked out of their homes), and California's shellfish consumers (Drakes Bay provides 16-35% of the oysters har-

vested in California).[34] Because this "conservation effort" and many others will cause severe adverse effects, there should be no doubt that at least some "conservation efforts" are subject to NEPA.

Third, the Ninth Circuit's rationale exposes a deep misunderstanding of NEPA. According to the court, "[t]he Secretary's decision to allow the permit to expire … protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." APP. 31, internal quotation marks omitted. But NEPA is not intended to "foreclose" human impacts; it is intended to promote conditions in which people and nature co-exist *in productive harmony*:

> The Congress … declares that it is the continuing policy of the Federal Government … to use all practicable means and measures … to create and maintain conditions under which man and nature can exist in productive harmony …

42 U.S.C. § 4331(a). To the many local supporters who are devoted to this concept, the oyster farm is the apotheosis of "conditions under which man and nature can exist in productive harmony". *See* Sections A-C in the Statement of the Case above.

Fourth, the Ninth Circuit's holding undermines the goal of informed decision-making that

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[34] Although the Ninth Circuit asserted that destroying the oyster farm would produce only minor effects, the Park Service's final EIS reported that this destruction "could result in long-term major adverse impacts on California's shellfish market", and in adverse effects on water quality, eelgrass, fish, birds, harbor seals, and special status species. SER 53-55, 57-58, 62-63, 66, 74.

NEPA was intended to promote. If federal agencies can avoid NEPA review simply by labeling an action as an "environmental conservation effort", then they will have an incentive to apply the label to as many projects as they can. They will also have an incentive to support their labeling with factual findings and demand deferential review. Many interested parties, including industry and environmental groups, may find themselves unable to challenge agency actions.

Fifth, and finally, by holding that NEPA does not apply to "conservation efforts", and implying that these efforts produce only beneficial environmental effects, the Ninth Circuit brings itself into conflict with the Fifth, Eleventh, and District of Columbia Circuits, which have held that NEPA applies to actions that have solely beneficial environmental effects. The Ninth Circuit acknowledges these holdings and the inter-circuit conflict. APP. 31 n.11; *see also Friends of Fiery Gizzard* v. *Farmers Home Admin.*, 61 F.3d 501, 504-505 (6th Cir. 1995) (Sixth Circuit holds to the contrary).

The Ninth Circuit asserts that this authority from the Fifth, Eleventh, and District of Columbia Circuits "is not persuasive here" because those cases "dealt with major federal construction projects" and "none of those cases addressed environmental conservation efforts". APP. 31 n.11. But NEPA makes no distinction that would bring those *construction* projects, but not this *destruction* project, within its scope. If there is a principled reason for excluding conservation projects from NEPA, it must be that those projects are assumed to have solely beneficial effects—which brings this case squarely into conflict with the Fifth, Eleventh, and District of Columbia Circuits.

The petition for writ of certiorari should be granted.

III. THE NINTH CIRCUIT HAS SPLIT IN PRINCIPLE WITH THE DISTRICT OF COLUMBIA CIRCUIT OVER THE HARMLESS-ERROR RULE

Here, the Ninth Circuit held that the government's non-compliance with NEPA should be excused as harmless error because the government would have made the same decision if it had complied with NEPA. The District of Columbia Circuit, however, has rejected an agency's argument that its error was harmless because it would have made the same decision anyway.

In the words of the Ninth Circuit, the government "acknowledges that compliance with NEPA was less than perfect". APP. 32. Immediately after the final EIS was made public, Drakes Bay informed the Park Service that the EIS's conclusions about noise (referred to by the government as "soundscape") were defective. APP. 33. Drakes Bay also asserted that "the absence of the thirty-day comment period denied it an opportunity to fully air its critique". *Id*. During the thirty days after the final EIS was made public, Drakes Bay discovered and reported that the final EIS misrepresented the conclusions of the government's harbor-seal expert. *See* Sections E-F in the Statement of the Case above.

The Ninth Circuit held that "Drakes Bay has shown no prejudice from these claimed violations." APP. 32. It did not matter that the data are flawed, the court reasoned, because the government "specifically referenced [Drakes Bay's report that the noise data were defective] and stated that he did not rely

on the 'data that was asserted to be flawed.'" APP. 34.

The District of Columbia Circuit has rejected an agency's argument that its error was harmless because it would have made the same decision anyway. *Gerber* v. *Norton*, 294 F.3d 173, 183-184 (D.C. Cir. 2002). In *Gerber*, the government had not provided an environmental group with a map that was needed for the group's comments on the proposed action. *Id*. at 182. The government argued that this error was harmless because it (1) knew about the comments the group would have made before it made its decision, (2) reaffirmed its decision before the group filed suit, and (3) would not have changed its decision had the group submitted its comments before the decision. *Id*. at 182-184. The court rejected all three arguments. It reasoned that if "the agency may simply thank them … and announce that it has nonetheless reached the same conclusion", that would "eviscerate the [Endangered Species Act's] notice requirements". *Id*. at 184.

If an agency could protect itself against NEPA litigation simply by saying that it would make the same decision regardless of any defects in the EIS, then every agency would make this statement, and NEPA litigation would be at an end. But that cannot be the law. NEPA is designed to force agencies to disclose the environmental consequences of their decisions, even when the agencies have no intention of changing their pre-EIS decision. When an EIS falsely reports that significant environmental harm will result from the granting of a permit application, then the permit applicant has suffered prejudice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY; KEVIN LUNNY, *Plaintiffs-Appellants,* v. SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as Director, U.S. National Park Service, *Defendants-Appellees.*	No. 13-15227 D.C. No. 4:12-cv-06134-YGR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted
May 14, 2013—San Francisco, California

Filed September 3, 2013
Amended January 14, 2014

Before: M. Margaret McKeown and Paul J. Watford, Circuit Judges, and Algenon L. Marbley, District Judge.*

Opinion by Judge McKeown;

Dissent by Judge Watford

ORDER

The opinion filed on September 3, 2013, appearing at 729 F.3d 967, is hereby amended. An amended opinion is filed concurrently with this order.

With these amendments, Judge McKeown voted to deny the petition for rehearing en banc and Judge Marbley so recommends. Judge Watford voted to grant the petition.

Amicus Curiae Catherin Rucker's request for judicial notice in support of her brief opposing the petition for rehearing en banc is **DENIED**.

The full court has been advised of the petition for rehearing en band and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**. No further petitions for en banc or panel rehearing shall be permitted.

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* The Honorable Algenon L. Marbley, District Judge for the U.S. District Court for the Southern District of Ohio, sitting by designation.

OPINION

McKEOWN, Circuit Judge:

This appeal, which pits an oyster farm, oyster lovers and well-known "foodies" against environmentalists aligned with the federal government, has generated considerable attention in the San Francisco Bay area.[1] Drakes Bay Oyster Company ("Drakes Bay") challenges the Secretary of the Interior's discretionary decision to let Drakes Bay's permit for commercial oyster farming expire according to its terms. The permit, which allowed farming within Point Reyes National Seashore, was set to lapse in November 2012. Drakes Bay requested an extension pursuant to a Congressional enactment that provided, in relevant part, "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." Department of the Interior Appropriations Act, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124"). After the Secretary declined to extend the permit, Drakes Bay

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[1] The panel appreciates the amicus briefing filed by supporters of both sides. Alice Waters, Tomales Bay Oyster Company, Hayes Street Grill, the California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and the Alliance For Local Sustainable Agriculture filed an amici curiae brief in support of Drakes Bay. The Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, Save Our Seashore, and the Coalition of National Park Service Retirees filed an amici curiae brief in support of the federal parties.

sought a preliminary injunction, arguing that the Secretary's decision violated the authorization in Section 124, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and various federal regulations.

We have jurisdiction to consider whether the Secretary violated "constitutional, statutory, regulatory or other legal mandates or restrictions," *Ness Inv. Corp. v. U.S. Dep't of Agr., Forest Serv.*, 512 F.2d 706, 715 (9th Cir. 1975), and we agree with the district court that Drakes Bay is not likely to succeed in proving any such violations here. Through Section 124, Congress authorized, but did not require, the Secretary to extend the permit. Congress left the decision to grant or deny an extension to the Secretary's discretion, without imposing any mandatory considerations. The Secretary clearly understood he was authorized to issue the permit; he did not misinterpret the scope of his discretion under Section 124. In an effort to inform his decision, the Secretary undertook a NEPA review, although he believed he was not obligated to do so. Nonetheless, any asserted errors in the NEPA review were harmless.

Because Congress committed the substance of the Secretary's decision to his discretion, we cannot review "the making of an informed judgment by the agency." *Id.* In letting the permit lapse, the Secretary emphasized the importance of the long-term environmental impact of the decision on Drakes Estero, which is located in an area designated as potential wilderness. He also underscored that, when Drakes Bay purchased the property in 2005, it did so with eyes wide open to the fact that the permit acquired from its predecessor owner was set to expire just seven years later, in 2012. Drakes Bay's

disagreement with the value judgments made by the Secretary is not a legitimate basis on which to set aside the decision. Once we determine, as we have, that the Secretary did not violate any statutory mandate, it is not our province to intercede in his discretionary decision. We, therefore, affirm the district court's order denying a preliminary injunction.

BACKGROUND

I. THE POINT REYES NATIONAL SEASHORE

Congress established the Point Reyes National Seashore ("Point Reyes") in 1962 "in order to save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped." Act of Sept 13, 1962, Pub. L. No. 87-657, 76 Stat. 538, 538. The area is located in Marin County, California, and exhibits exceptional biodiversity. Point Reyes is home to Drakes Estero, a series of estuarial bays.

The enabling legislation for Point Reyes gave the Secretary of the Interior administrative authority over the area and directed him to acquire lands, waters, and other property and interests within the seashore. *Id.* at § 3(a), 76 Stat. at 539-40. In 1965, the State of California conveyed to the United States "all of the tide and submerged lands or other lands" within Point Reyes, reserving certain minerals rights to itself and reserving the right to fish to Californians. 1965 Cal. Stat. 2604-2605, § 1-3.

In the Point Reyes Wilderness Act of 1976, Congress designated certain areas within the seashore as "wilderness" under the Wilderness Act of 1964. Pub. L. No. 94-544, 90 Stat. 2515. The Wilderness Act "established a National Wilderness

Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas.'" 16 U.S.C. § 1131(a). Such areas are to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character." *Id*. Accordingly, subject to statutory exceptions and existing private rights, the Act provides that "there shall be no commercial enterprise . . . within any wilderness area." 16 U.S.C. § 1133(c).

The Point Reyes Wilderness Act designated other areas, including Drakes Estero, as "potential wilderness." Pub. L. No. 94-544,90 Stat. 2515. Congress considered designating Drakes Estero as "wilderness," but declined to do so. The legislative history reflects that Congress took into account the Department of the Interior's position that commercial oyster farming operations taking place in Drakes Estero, as well as California's reserved rights and special use permits relating to the pastoral zone, rendered the area "inconsistent with wilderness" at the time. H.R. Rep. No. 94-1680, at 5-6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5593, 5597. Congress specified in separate legislation that the "potential wilderness additions" in Point Reyes "shall. . . be designated wilderness" by "publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act . . . have ceased." Act of Oct. 20, 1976, Pub. L. No. 94-567, § 3, 90 Stat. 2692.

II. DRAKES BAY OYSTER COMPANY'S OPERATIONS

Oyster farming has a long history in Drakes Estero, dating to the 1930s. Charles Johnson started

the Johnson Oyster Company in Drakes Estero in the 1950s. His oyster farm was in operation on a five-acre parcel of land on the shore of the estero when Congress created the Point Reyes National Seashore. In 1972, Johnson sold his five acres to the United States, electing to retain a forty-year reservation of use and occupancy ("RUO"). The RUO provided that, "[u]pon expiration of the reserved term, a special use permit *may* be issued for the continued occupancy of the property for the herein described purposes." (Emphasis added.) It added that, "[a]ny permit for continued use will be issued in accordance with National Park Service ["NPS"] regulations in effect at the time the reservation expires." In late 2004, Drakes Bay agreed to purchase the assets of the Johnson Oyster Company. The RUO was transferred along with the purchase. The forty-year RUO ended on November 30, 2012.

When it purchased the farm, Drakes Bay was well aware that the reservation would expire in 2012, and received multiple confirmations of this limitation. The acquisition documents specifically referenced "that certain Reservation of Possession Lease dated 10/12/1972, entered into by Seller and the National Park Service." In January 2005, the National Park Service wrote to Kevin Lunny, an owner of Drakes Bay, highlighting "the issue of the potential wilderness designation." The Park Service told Lunny that it wanted to make sure he was aware of the Interior Department's legal position "[b]efore [he] closed escrow on the purchase" of Johnson's farm. The Park Service accordingly sent Lunny a memorandum from the Department's Solicitor. Notably, the Solicitor disagreed with the proposition previously expressed in the House Report accompanying the Point Reyes Wilderness Act that California's retained fishing and mineral rights were

inconsistent with wilderness designation. The Solicitor concluded, "the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e. the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non conforming use can be eliminated." In March 2005, the Park Service reiterated its guidance regarding the Drakes Bay's purchase of the Johnson property. It specifically informed Lunny, "Regarding the 2012 expiration date and the potential wilderness, based on our legal review, no new permits will be issued after that date."

III. SECTION 124 AND THE SECRETARY'S DECISION

Several years later, in 2009, Congress addressed the Department of the Interior's authority to issue Drakes Bay a new permit in appropriations legislation. The Senate appropriations committee proposed a provision requiring the Secretary to issue a special use permit for an additional ten years. H.R. 2996, 111th Cong. § 120(a) (as reported in Senate, July 7, 2009) (providing "the Secretary of the Interior *shall* extend the existing authorization . . ." (emphasis added). The Senate rejected this mandate, and amended the language to provide that the Secretary "is authorized to issue" the permit, rather than required to do so. 155 Cong. Rec. S9769-03, S9773 (daily ed. Sept. 24, 2009).

The law as enacted provides:

> Prior to the expiration on November 30, 2012 of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drakes Estero at Point Reyes National Seashore, notwithstanding any other

> provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012. *Provided*, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences ["NAS"] Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

123 Stat. at 2932. The House Conference Report reflected that the final language "provid[ed] the Secretary *discretion* to issue a special use permit. . . ." 155 Cong. Rec. H11871-06 (daily ed. October 28, 2009) (emphasis added).

The NAS report that Section 124 referenced, "Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California," was prepared in 2009, in light of "the approach of the 2012 expiration date" of the permit, in order "to help clarify the

scientific issues raised with regard to the shellfish mariculture activities in Drakes Estero." The report highlighted that there was "limited scientific literature" available and that there was evidence that oyster farming had both negative and positive effects on the environment. The report explained: "The ultimate decision to permit or prohibit shellfish farming in Drakes Estero necessarily requires value judgments and tradeoffs that can be informed, but not resolved, by science."

Drakes Bay sent letters to the Secretary in July 2010 requesting that he exercise his authority under Section 124 to issue a permit extension. Park Service staff met with Lunny soon after to discuss a draft schedule to complete a NEPA process. The Department, through the Park Service, then formally began to prepare an Environmental Impact Statement ("EIS") in an effort "to engage the public and evaluate the effects of continuing the commercial operation within the national seashore" and "to inform the decision of whether a new special use permit should be issued." Drakes Bay Oyster Company Special Use Permit, 75 Fed. Reg. 65,373 (Oct. 22, 2010).[2]

The Park Service issued a draft EIS ("DEIS") for public comment in September 2011. Drakes Bay submitted comments criticizing much of the draft,

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[2] In the final EIS, the Department stated that Section 124 did not require compliance with NEPA because that provision gave the Secretary authorization to make the permit decision "notwithstanding any other provision of law." Nevertheless, the Department "determined that it is helpful to generally follow the procedures of NEPA." The Secretary reiterated this position in his decision.

along with a data quality complaint.[3] Congress expressed "concerns relating to the validity of the science underlying the DEIS" and therefore "direct[ed] 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 Final Environmental Impact Statement expected in mid-2012." H.R. Conf. Rep. No. 112-331, at 1057 (Dec. 15, 2011), *reprinted in* 2011 U.S.C.C.A.N. 605, 788.

The NAS released its report in August 2012. The report noted several instances where the DEIS "lack[ed] assessment of the level of uncertainty associated with the scientific information on which conclusions were based." But the report concluded that the available research did not admit of certainty:

> The scientific literature on Drakes Estero is not extensive and research on the potential impacts of shellfish mariculture on the Estero is even sparser . . . . Consequently, for most of the resource categories the committee found that there is a moderate or high level of uncertainty associated with impact assessments in the DEIS.

The final EIS, issued on November 20, 2012, responded to the NAS review. The EIS revised the definitions of the intensity of impacts to wildlife and wildlife habitats, clarified the assumptions underlying those conclusions, and added discussion of the uncertainty of scientific data.

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[3] Drakes Bay's data quality complaint is not before us in this appeal.

The Secretary issued his decision on November 29, 2012, directing the Park Service to let the permit expire according to its terms. He explained that his decision was "based on matters of law and policy," including the "explicit terms of the 1972 conveyance from the Johnson Oyster Company to the United States" and "the policies of NPS concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore." He recognized that Section 124 "grant[ed] [him] the authority to issue a new SUP," but elected to effectuate Park Service policies and the principles he discerned in wilderness legislation.

In his decision, the Secretary recognized the "scientific uncertainty" and "lack of consensus in the record regarding the precise nature and scope of the impacts that [Drakes Bay's] operations have" on wilderness and other resources. Generally, he found that the impact statements supported the proposition that letting the permit expire "would result in long-term beneficial impacts to the estero's natural environment." But he explained that the draft and final EIS were "not material to the legal and policy factors that provide the central basis" for his decision, though they were "helpful" in that they informed him regarding the "complexities, subtleties, and uncertainties of this matter." He disclaimed reliance on "the data that was asserted to be flawed," and noted that his decision was "based on the incompatibility of commercial activities in wilderness."

In accordance with his decision, the Secretary directed the Park Service to publish a notice in the Federal Register announcing the conversion of

Drakes Estero from potential to designated wilderness. This litigation followed. Drakes Bay sued the Secretary, seeking a declaratory judgment that his decision violated the Administrative Procedure Act ("APA"), 5 U.S.C.§ 551 *et seq.*, an order that the Secretary direct the Park Service to issue a new ten-year permit, and, alternatively, an order vacating and remanding for a new decision. Drakes Bay moved for a preliminary injunction to avoid having to cease its operations pending suit, as it had been given ninety days to remove its property from the estero.

The district court determined that it did not have jurisdiction to review the Secretary's decision because "the statutory context affords complete discretion" and "Section 124 provides the Court with 'no meaningful standard' for the Court to apply in reviewing the Decision not to issue a New SUP." The court went on to provide an alternate rationale for denial: "the Court does not find that Plaintiffs can show a likelihood of success under a Section 706(2) standard [arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA]." Finally, the court held that "[o]n balance, and combining the requirement of both the equities and the public interest more broadly, the Court does not find these elements weigh in favor of granting a preliminary injunction."[4]

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[4] A motions panel granted Drakes Bay's emergency motion for an injunction pending appeal "because there are serious legal questions and the balance of hardships tips sharply in appellants' favor." With the benefit of full briefing and argument, we need not defer to the motion panel's necessarily expedited decision. *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986).

ANALYSIS

I. JURISDICTION AND THE SCOPE OF THE "NOTWITHSTANDING" CLAUSE

As a threshold matter, we address jurisdiction. On this point, we disagree in part with the district court. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n.1 (9th Cir. 2006) (reviewing de novo the question of subject matter jurisdiction under the APA). We do have jurisdiction to review whether the Secretary violated any legal mandate contained in Section 124 or elsewhere. However, we agree with the district court that we lack jurisdiction to review the Secretary's ultimate discretionary decision whether to issue a new permit.

The government argues that we lack jurisdiction to review any of Drakes Bay's claims because, under Section 124, the Secretary's decision was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This narrow exception to the presumption of judicial review of agency action under the APA applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *see also Webster v. Doe*, 486 U.S. 592, 599, (1988) (characterizing the exception as for circumstances where there is "no law to apply") (internal quotation marks and citation omitted). But even where the substance or result of a decision is committed fully to an agency's discretion, "a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Inv. Corp.*, 512 F.2d at 715. In such circumstances, a federal court lacks only

jurisdiction to review an alleged abuse of discretion regarding "the making of an informed judgment by the agency." *Id.*

Here, as in *Ness Inv. Corp.*, "[t]he secretary is 'authorized,' not required, to issue" a permit, and there are "no statutory restrictions or definitions prescribing precise qualifications" for issuance. *Id.* Consequently we may review only whether the Secretary followed whatever legal restrictions applied to his decision-making process. The parties agree that the *Ness* framework applies, but disagree on whether any "mandates or restrictions," *id.*, exist. Drakes Bay interprets Section 124, NEPA, and various federal regulations as imposing legal restrictions on the Secretary, but it contends that these requirements apply only to a decision to deny an extension, not to a decision granting an extension. The Secretary contends that the "notwithstanding" clause of Section 124 sweeps away any statutes and regulations that might otherwise apply to a permit application. Neither side has it quite right.

As a general matter, "notwithstanding" clauses nullify *conflicting* provisions of law. *See United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("The Supreme Court has indicated as a general proposition that statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."). Before Congress passed Section 124, the Department's Solicitor had issued a series of opinions holding that the Wilderness Act, the Point Reyes Wilderness Act, and Park Service management policies legally prohibited any extension of the permit. Section 124's "notwithstanding" clause trumps any law that purports to prohibit or preclude the Secretary from extending the permit, as such a law would "conflict"

with Section 124's authorization. Thus we may review whether the Secretary misunderstood his authority to issue a permit and the closely related question of whether he mistakenly interpreted other statutory provisions as placing a legal restriction on his authority. As the government itself acknowledges, if Section 124 provides restrictions on the Secretary's exercise of discretion, then we have jurisdiction to review compliance with those limits.

The Secretary's decision is also subject to applicable procedural constraints. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Thus, we have jurisdiction to consider the applicability of NEPA and other procedures that do not conflict with the authorization in Section 124.

Procedural constraints that do not conflict with the authorization would apply to the Secretary's decision regardless of whether he granted or denied the permit. We reject Drakes Bay's anomalous position that the Secretary had "unfettered authority to issue the permit," while his "discretion to deny [Drakes Bay] a [permit] [was] bounded by NEPA and other applicable law." Drakes Bay points to the fact that Section 124 says that "notwithstanding any other provision of law, the Secretary of the Interior is authorized *to issue* a special use permit," rather than that he is authorized to "*issue or deny*" one. From that language, Drakes Bay extrapolates that Section 124 "was enacted to make it easy to issue the permit." The statute does not dictate such a one-way ratchet. Indeed, if Congress had so wanted to make it easy or automatic for Drakes Bay, one wonders why it rejected the proposal that would have simply required the Secretary to issue a new permit. The

ultimate legislation was a move away from, not toward, Drakes Bay's favored result.

A natural reading of the authorization to issue a permit implies authorization not to issue one, and we see no reason to interpret the "notwithstanding" clause as applying to one outcome but not the other. *See Confederated Salish and Kootenai Tribes v. United States*, 343 F.3d 1193, 1196-97 (9th Cir. 2003) (interpreting the word "authorized" to mean both the power to grant or deny a request for the Secretary to take land in trust for a tribe). Section 124 was enacted as part of appropriations legislation, granting the Secretary authority to act, without providing any statement of Congress's view on that decision one way or the other.

Drakes Bay's effort to read into this short appropriations provision a preference for issuance of the permit is unavailing, as is the dissent's attempt to do so based on legislative history from decades earlier. The dissent misunderstands the significance of the legislative history of the Point Reyes Wilderness Act of 1976, which focuses on the notion that Congress at that time viewed oyster farming as desirable and consistent with wilderness designation.

The dissent stacks legislative history from one enactment to another, over decades, when Section 124 itself does not make the link. "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the *enacting Legislature's* understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (emphasis added). Regardless of the accuracy of the dissent's recitation of the legislative history of the 1976 Act, the dissent's citation to congressional statements in support of designating Drakes Estero as wilderness

in 1976 do not reliably reflect that the Congress that enacted Section 124 was of the dissent's view that Drakes Bay's operations were "not an 'obstacle' to converting Drakes Estero to wilderness status." Dissent at 46. The dissent's position would rewrite the clause to something like "notwithstanding the Department's policy view that oyster farming can be incompatible with wilderness designation." The dissent cites nothing from the text, or even the legislative history, of *Section 124* to support this interpretation. Even Drakes Bay did not argue this position or urge us to go this far afield.[5]

Here, where Section 124 merely grants *authority* to take an action, the "notwithstanding" clause targets laws that "potentially conflict[]" *with that authority*. *Novak*, 476 F.3d at 1046. Given the Department's opinions in 2005 that wilderness

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[5] The dissent's conclusion that "[c]ontinued operation of the oyster farm is fully consistent with the Wilderness Act," Dissent at 46, is particularly puzzling given that Drakes Bay *itself* argued that wilderness designation of Drakes Estero was not possible while the oyster farm's commercial activities continued. Moreover, there are a variety of Park Service management criteria that inform the question of what kinds of activities are "consistent" with wilderness designation under the Wilderness Act. The dissent's reliance on decades-old legislative pronouncements about the Johnson oyster farm for the proposition that Section 124 was intended to foreclose the Secretary from considering his department's own policies with regard to Drakes Bay stretches even the most liberal use of legislative history to the breaking point. "[U]nenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

legislation prevented any exercise of authority to extend the permit, the notwithstanding clause has a clear function—to convey that prior legislation should not be deemed a legal barrier.[6] The dissent confuses actual or potential legal impediments to the Secretary's authority with policy considerations that might lead the Department not to extend Drakes Bay's permit. Section 124 does not prescribe considerations on which the Secretary may or may not rely, it says nothing about the criteria for wilderness designation and says nothing about whether oyster farming is consistent with wilderness designation. As the Supreme Court has admonished, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation marks and alteration omitted). Had Congress wanted to express a view on whether the Secretary should consider the Department's policies on wilderness or other criteria, it would have said so.[7] It did not, but rather gave the Secretary the discretion to decide.

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[6] This function is meaningful regardless of whether conflicting laws actually prevented the Secretary from issuing a permit, a question the dissent would answer in the negative, Dissent at 46, but which we simply have no occasion to pass on here. The Department's legal position raised a "*potential*[] conflict[]," *Novak*, 476 F.3d at 1046 (emphasis added), regarding the Department's authority, and the "notwithstanding clause" made clear that "other provisions of law" were not an impediment.

[7] Indeed, the only consideration that Congress addressed in Section 124 was that "[t]he Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in

We now turn to consideration of the Secretary's decision.

II. PRELIMINARY INJUNCTION NOT WARRANTED

In seeking a preliminary injunction, Drakes Bay must establish "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We have held that a "likelihood" of success per se is not an absolute requirement. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Rather, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. We review for abuse of discretion the district court's determination that Drakes Bay did not meet its burden under this test. *FTC v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004).

Drakes Bay contends that the Secretary misinterpreted his authority under Section 124 in that he mistakenly believed that granting a permit extension would violate other laws, that he failed to comply with NEPA, and that he failed to comply with federal rulemaking procedures. According to Drakes Bay, these errors render the Secretary's decision "arbitrary, capricious, an abuse of discretion, or

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Point Reyes National Seashore before *modifying* any terms and conditions of the extended authorization." (Emphasis added.) As modification of the permit is not at issue here, this provision is not relevant.

otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, the likelihood of success on the merits of these claims is too remote to justify the extraordinary remedy of a preliminary injunction. In light of our conclusion about the merits, we address only in passing the remaining preliminary injunction factors.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

1. The Import of Section 124

The Secretary's decision did not violate any statutory mandate, particularly the provision that gave him discretion to grant the permit despite any prior conflicting law. The key portion of Section 124 provides as follows: "Prior to the expiration on November 30, 2012 of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drakes Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit. . . Section 124 put the Secretary on notice that he was not hamstrung by other law should he determine a permit extension was appropriate. The section left him free to consider wilderness values and the competing interests underlying a commercial operation in an area set aside as a natural seashore.

The narrow question that we have jurisdiction to review is whether the Secretary misinterpreted his authority under Section 124. The record leaves no doubt that the answer is no.

As the Secretary explained, "SEC. 124 grants me the authority and discretion to issue [Drakes Bay] a new special use permit, but it does not direct me to do so." The Secretary repeated this

understanding multiple times throughout the decision, noting, for example, that Section 124 "does not dictate a result or constrain my discretion in this matter," and that it "grants me the authority to issue a new SUP."

Drakes Bay's view that the Secretary violated Section 124 rests on a misinterpretation of that provision and a misapprehension of the Secretary's reasoning. Drakes Bay first argues that the statute was intended to "make it easy" to issue the permit. As we explained above, this approach is wishful thinking, since the statute says nothing of the kind. Indeed, Congress first considered whether to mandate issuance of the permit but backed off that approach and ultimately left the decision to the Secretary's discretion. In the end, Congress did nothing more than let the Secretary know his hands were not tied.

Drakes Bay next argues that the Secretary erroneously concluded that extending the permit would "violate" applicable wilderness legislation. According to Drakes Bay, because Section 124 authorized the Secretary to extend the permit "notwithstanding any other provision of law," the Secretary was "prohibit[ed]... from relying on a violation of other law as a reason to justify a permit denial."

Drakes Bay's reading of the decision is not tenable. Taken as a whole, the decision reflects that the Secretary explicitly recognized that extending the permit would be lawful and that he was not legally constrained by other laws.

The Secretary elected to let the permit expire not to avoid "violating" any law, as Drakes Bay posits, but because the Secretary weighed and balanced competing concerns about the environment

and the value of aquaculture. He chose to give weight to the *policies* underlying wilderness legislation, taking into account consideration of environmental impacts: "In addition to considering the [Drafted Environmental Impact Statement and Final Environmental Impact Statement], I gave *great weight to matters of public policy, particularly the public policy inherent in the 1976 act* of Congress that identified Drakes Estero as potential wilderness." (Emphasis added).

Drakes Bay seizes on a single sentence in a summary of reasons as evidence that the Secretary thought extending the permit would "violate... specific wilderness legislation." At the beginning of the decision, the summary includes one sentence that, read in isolation, raises an ambiguity: "The continuation of the [Drakes Bay] operation would *violate the policies of NPS* concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, *as well as specific wilderness legislation* for Point Reyes National Seashore." (Emphasis added). However, reading the sentence in context of the full decision, it is obvious the Secretary did not erroneously consider himself bound by any provision of wilderness legislation. In reviewing the agency's decision, we must uphold even "a decision of less than ideal clarity" so long as "the agency's path may reasonably be discerned." *FCC v. Fox Television Stations*, 556 U.S. 502, 513-14 (2009) (internal quotation marks omitted).

The Secretary's reliance on policy considerations and Congressional intent is evident throughout the decision. Recounting the factual and legal background, for example, the Secretary cited the House of Representatives committee report

accompanying the Point Reyes Wilderness Act, which stated:

> As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3. The Secretary returned to this committee report in his conclusion, explaining that:

> My decision honors Congress's direction to "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" and thus ensures that these precious resources are preserved for the enjoyment of future generations of the American public, for whom Point Reyes National Seashore was created.

As expressed in his decision, his choice was consistent with the draft and final environmental impact statements that "support the proposition that the removal of [Drakes Bay's] commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment."

Drakes Bay suggests that referencing even the Congressional "intent" or policies underlying the Point Reyes Wilderness Act runs afoul of Section 124. But as Drakes Bay itself acknowledges, the "most natural, common-sense reading" of the notwithstanding clause is "notwithstanding any law

that would *otherwise legally preclude issuance* of a [special use permit], the Secretary has the *authority* to issue a SUP." It is abundantly clear that the Secretary recognized his authority under Section 124 and did not believe he was legally bound by any statute to deny the permit. But the policy that underlies the 1976 Act and other wilderness legislation is just that--an expression of public policy. These expressions neither "legally preclude" nor legally mandate extension, and they are not "other provision[s] of law" that are swept aside by Section 124's "notwithstanding" clause. Statements in committee reports do not carry the force of law. *See Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993). "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980, (2011) (quoting *Exxon Mobil*, 545 U.S. at 568).

The Secretary's incorporation of the policies underlying wilderness legislation, and of Congressional intent as expressed in the House committee report, was a matter of his discretion. The Secretary noted correctly that "SEC. 124 . . . does not prescribe the factors on which I must base my decision." Section 124 "provides the court no way to second-guess the weight or priority to be assigned" to these factors. *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1535 (D.C. Cir. 1988) (concluding that agency decision to deny petition for enforcement was not reviewable where the governing regulations provided no standards to enable judicial review). The choice was the Secretary's to make.[8]

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[8] The dissent's position that the agency "relied on factors which Congress has not intended it to consider," Dissent at 49, is not supported by the record. Under the

2. Drakes Bay's Other Statutory Arguments

As Section 124 affords no basis for us to review the substance of the Secretary's decision, we have no measuring stick against which to judge Drakes Bay's various claims that the Secretary's policy determination was mistaken. To the extent the Secretary's decision can be evaluated against the statutory requirements cited by Drakes Bay, Drakes Bay is unlikely to prevail in showing the decision was arbitrary and capricious, an abuse of discretion, or in violation of any law.

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deferential arbitrary and capricious standard, we uphold agency action for which a rational explanation is given, particularly where the agency "acted within the sphere of its expertise." *McFarland v. Kempthorne*, 545 F.3d 1106, 1113 (9th Cir. 2008). The Secretary's decision relied in general on "Congress's direction" to remove "obstacles" to wilderness designation. While the Wilderness Act bans commercial enterprise within wilderness areas "subject to existing private rights," 16 U.S.C. § 1133(c), Park Service policies inform whether wilderness designation is appropriate in the first instance. Contrary to the dissent's characterization, the 1976 legislation did not invoke a crystal ball and pass judgment on the compatibility of oyster farming in Drakes Estero with wilderness some thirty plus years later when the reservation of use would expire. Indeed, things change. The Secretary, drawing on the agency expertise amassed in the decades since the 1970s, concluded that continued oyster farming was inconsistent with wilderness criteria and the Department's policies. The Secretary's decision that removing the farm would further Congress's earlier expressed goal of moving toward wilderness designation was rational and within his authority under Section 124.

Drakes Bay argues that the Secretary violated the law by directing that Drakes Estero be designated as wilderness, because such a designation was not possible under the Wilderness Act in light of California's retained mineral and fishing rights. Although the Department of the Interior adopted this view in the past, the Department has since deemed that position inaccurate. The Wilderness Act itself nowhere provides that retained mineral or fishing rights preclude wilderness designation.[9] Drakes Bay is not likely to succeed on its theory that the Secretary's current position--that the permit's expiration enables wilderness designation despite retained mineral and fishing rights--amounted to "legal error."

Drakes Bay also believes that wilderness designation was improper in light of the "historic farming community" that remains on Drakes Estero. However, a 1978 amendment to the legislation establishing Point Reyes specifically authorizes the Park Service to lease property used for "agricultural,

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[9] Notably, the State of California takes the position that its retained rights, including the state constitutional right to fish, do not cover aquaculture. The California Department of Fish and Game criticized and rejected "brief, general, and conclusory" communications it made decades earlier that suggested the oyster farm was covered by the "right to fish" reservation. At present, the state has issued water bottom leases to Drakes Bay for its commercial operations, but has made clear that the use of those leases past 2012 "is expressly contingent upon [Drakes Bay's] compliance with the 1972 grant reservation and, after its expiration, with any special use permit" that the federal government "may issue in its discretion."

ranching, or dairying purposes." Act of Nov. 10, 1978, Pub. L. No. 95-625, § 318, 92 Stat. 3467, 3487. The Secretary's decision considered these uses a "compatible activity" within a wilderness area. Drakes Bay has not demonstrated how such a determination violates any restriction on the Secretary's authority.

On a related note, Drakes Bay charges that, in recounting the statutory history, the Secretary erred in stating that the 1978 amendment did not permit him to issue leases for mariculture. Drakes Bay's effort to shoehorn itself into an "agricultural purpose" is unavailing. Congress limited the Secretary's leasing authority to "lands" in Section 318(b) of the 1978 Act, rather than to the "lands, waters, and submerged lands" described in Section 318(a) of the same statute. *Id*. It is reasonable to assume this distinction is meaningful and reasonable for the Secretary to state that the Act did not authorize mariculture leases. Even if the Secretary misinterpreted this earlier law, he plainly understood that Section 124 did authorize him to issue Drakes Bay a permit for mariculture. In sum, the Secretary neither violated any statutory mandate nor did he misapprehend his authority under the various statutes raised by Drakes Bay.

3. Compliance with NEPA

We next address the applicability of NEPA to the Secretary's decision. Under NEPA, an agency is required to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The government urges that its decision to let Drakes Bay's permit expire is not a "major Federal action []," but rather is inaction that does not implicate NEPA.

Drakes Bay responds that the term "major Federal actions" includes failures to act, 40 C.F.R. § 1508.18, and that NEPA applies to decisions concerning whether to issue a permit.[10]

Here, the Secretary's decision to let Drakes Bay's permit expire according to its terms effectively "denied" Drakes Bay a permit. We have held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, *issuance* of that permit does constitute major federal action." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). But we have never held failure to grant a permit to the same standard, and for good reason. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt. Our case law makes clear that not every denial of a request to act is a "major Federal action." We have held, for example, that no EIS was

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[10] Drakes Bay argues that we cannot consider the government's inaction argument because the Secretary did not rely on that position in his decision. We disagree. "The rationale behind the *Chenery I* Court's refusal to accept belated justifications for agency action not previously asserted during the agency's own proceedings does not apply in this case. *Chenery I* was premised on the policy that courts should not substitute their judgment for that of the agency when reviewing a 'determination of *policy or judgment which the agency alone is authorized to make* and which it has not made.'" *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)) (emphasis added). The "policy or judgment" call here was the Secretary's substantive decision whether to grant the permit. We are not constrained in considering arguments concerning the applicability of NEPA.

required when the federal government denied a request to exercise its regulatory authority to stop a state's program killing wildlife. *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979).

Drakes Bay suggested at oral argument that the Secretary's decision differs from typical inaction because it effected a change in the status quo, namely, the cessation of commercial operations that had previously been authorized. We are skeptical that the decision to allow the permit to expire after forty years, and thus to move toward designating Drakes Estero as wilderness, is a major action "significantly affecting the quality of the human environment" to which NEPA applies. 42 U.S.C. § 4332(2)(C). "The purpose of NEPA is to 'provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'" *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995) (quoting *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

The Secretary's decision is essentially an environmental conservation effort, which has not triggered NEPA in the past. For example, in *Douglas County*, we held NEPA did not apply to critical habitat designation under the Endangered Species Act ("ESA") because it was "an action that prevent[ed] human interference with the environment" and "because the ESA *furthers the goals of NEPA* without demanding an EIS." *Id.* at 1505, 1506 (emphasis added). Because removing the oyster farm is a step toward restoring the "natural, untouched physical environment" and would prevent subsequent human interference in Drakes Estero, *id.* at 1505, the reasoning of *Douglas County* is persuasive here. The Secretary's decision to allow the permit to expire, just like the designation under the

ESA, "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." *Id.* at 1507.[11]

Drakes Bay also argued that removal of the oyster farm implicates NEPA because it has "adverse environmental consequences." Although the final EIS did note that removal might cause certain short-term harms, such as noise associated with heavy machinery needed to remove Drakes Bay's structures, such relatively minor harms do not by themselves "significantly affect[]" the environment in

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[11] Drakes Bay noted at oral argument that we have recognized a circuit split on the question of "whether significant *beneficial* effects alone would trigger an EIS" and concluded in dicta that requiring an EIS in those circumstances was "consistent with the weight of circuit authority and has the virtue of reflecting the plain language of the statute." *Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010) (citing cases) (emphasis added). The authority cited is not persuasive here, however, because none of those cases addressed environmental conservation efforts. The cases instead dealt with major federal construction projects to which NEPA applied in order to evaluate the positive effects asserted. *See Sierra Club v. Froehlke*, 816 F.2d 205, 211 n.3 (5th Cir. 1987) (major federal water project of Army Corps of Engineers); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 783 (11th Cir. 1983) (construction of man-made lake); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) (major navigational project); *see also Natural Res. Def Council, Inc. v. Herrington*, 768 F.2d 1355, 1431 (D.C. Cir. 1985) (addressing energy-efficiency standards for household appliances and noting in dicta that "both beneficial and adverse effects on the environment can be significant within the meaning of NEPA").

such a way as to implicate NEPA. 42 U.S.C. § 4332(2)(C). We are "reluctant . . . to make NEPA more of an obstructionist tactic to prevent environmental protection than it may already have become." *Douglas County*, 48 F.3d at 1508 (internal quotation marks omitted).

Ultimately, we need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence. The government produced a lengthy EIS, which the Secretary considered and found "helpful." Although the Secretary acknowledges that compliance with NEPA was less than perfect, Drakes Bay is unlikely to succeed in showing that the errors were prejudicial. Relief is available under the APA only for "prejudicial error." 5 U.S.C. § 706; *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule.") (internal quotation marks and citation omitted).

Drakes Bay points to "technical" violations, specifically, the Secretary's failure to publish the EIS more than thirty days before he made his decision and the Secretary's framing the extension denial in the form of a Decision Memorandum rather than a Record of Decision. Drakes Bay has shown no prejudice from these claimed violations. *See Nat'l Forest Pres. Grp. v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973) (declining to reverse where NEPA timing and EIS requirements were not strictly followed but the agency "did consider environmental factors" and the "sterile exercise" of forcing agency to reconsider "would serve no useful purpose"); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir.

2004) (declining to reverse based on violation of deadline for ESA biological assessment where no harm was shown).

Drakes Bay puts considerable stock in its claims that the final EIS was based on flawed science and that the absence of the thirty-day comment period denied it an opportunity to fully air its critique, specifically with regard to conclusions regarding the "soundscape" of the estero.[12] Nothing in the record suggests that Drakes Bay was prejudiced by any shortcomings in the final soundscape data. Drakes Bay sent the Secretary its

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[12] Drakes Bay had submitted previous criticisms about the soundscape analysis, and related impacts on harbor seals, in its data quality complaint regarding the draft EIS. Although Drakes Bay did not raise the issue in its briefs, at oral argument it objected that the Secretary did not adequately respond to expert comments to the DEIS. In general, "on appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Regardless, we conclude the response to the DEIS was adequate. The Congressionally-mandated NAS report that criticized elements of the DEIS, including on these subjects, was brought to the Secretary's attention. The NAS report emphasized that the scientific literature on Drakes Estero was simply "not extensive" and that research on the impact of oyster farming was "even sparser." The take-away was that impact assessments for the soundscape and harbor seals were "considered to have a high level of uncertainty." The final EIS responded to the NAS critique and also addressed the scientific disputes. In particular, it added "a discussion on the strength of the underlying scientific data" to address the NAS's concerns about scientific uncertainty.

scientific critique before he issued his decision. The Secretary specifically referenced that communication and stated that he did not rely on the "data that was asserted to be flawed." The Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes and his statement was unambiguous that they did not carry weight in his decision. Drakes Bay's suggestion that the Secretary could not have made the informed decision that NEPA requires without resolving all controversies about the data is unsound. NEPA requires only that an EIS "contain[] a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (internal quotation marks and citation omitted). Drakes Bay is not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required.

4. Federal Register Notice

In light of the determination to let the permit expire, the Secretary directed the National Park Service to "publish in the Federal Register the notice announcing the conversion of Drakes Estero from potential to designated wilderness." Drakes Bay argues that the subsequently published notice was false because Drakes Bay's continued commercial activities (under the 90-day period the decision allowed to wrap up operations) and California's retained fishing and mineral rights precluded wilderness status. Drakes Bay also argues that the notice was issued in violation of formal rulemaking regulations.

Drakes Bay lacks standing to challenge the publication of the notice. Its claimed injury arises from the Secretary's decision to let its permit expire, not the designation in the notice. Drakes Bay cannot

continue its operations without a permit, regardless of how the estero is designated. We disagree with Drakes Bay's position that it has standing because "it will be necessary to vacate the unlawful notice in order for [Drakes Bay's] injuries to be ultimately redressed." Because Drakes Bay is not injured by the notice, it may not challenge the notice's purported falsity or the Secretary's compliance with rulemaking procedures.[13]

B. WEIGHING THE EQUITIES

Drakes Bay is not entitled to a preliminary injunction not only because it failed to raise a serious question about the Secretary's decision, but also because it has not shown that the balance of equities weighs in its favor. *Alliance for the Wild Rockies*, 632

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[13] To the extent that Drakes Bay argues that the Secretary's decision was somehow tainted by the instruction that the Park Service publish the notice, the challenge still fails because the instruction was in accordance with the law. The notice was not false because, as we explained above, Drakes Estero could be designated "wilderness" despite California's reserved rights. Nor is the presence of temporary non-wilderness conditions an obstacle because Park Service policy permits a wilderness designation when "wilderness character could be . . . restored through appropriate management actions." In addition, although general regulations require rulemaking for certain use terminations, 36 C.F.R. § 1.5(b), the more specific section of 1976 legislation provided that conversion to wilderness would be automatic "upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act . . . have ceased." 90 Stat. 2692.

F.3d at 1132. The district court found that, although Drakes Bay satisfied the irreparable harm prong of the preliminary injunction analysis, neither the public interest nor the equities were in its favor. When the government is a party, these last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Our review of the court's findings is for abuse of discretion, and we see none here.

The district court reasonably found that the public interest does not weigh in favor of injunctive relief. The public benefits both from the enjoyment of protected wilderness and of local oysters, and the court found no basis upon which to weigh these respective values. This factor does not tip to Drakes Bay.

Recognizing that Drakes Bay bears the burden in its quest for a preliminary injunction, the court's consideration of other equitable factors was also reasonable. Drakes Bay purchased the oyster farm with full disclosure, knowing that the reservation of use and occupancy was set to expire in 2012. The Department repeatedly warned the company that it did not plan to issue a new permit. Although the prospect of closing down a business is a serious hardship, the only reasonable expectation Drakes Bay could have had at the outset was that such a closure was very likely, if not certain. Closure remained a distinct possibility even after the passage of Section 124. Drakes Bay argued to the district court that it had "every reason to hope" for extension. But when parties "'anticipate[] a pro forma result' in permitting applications, they become 'largely responsible for their own harm.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002)). We see no reason to disturb the

court's finding that the company's "refusal to hear the message" was an equitable factor weighing against it.

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

The majority states that, by enacting § 124, "Congress did nothing more than let the Secretary know his hands were not tied." Maj. op. at 24. I think Congress, by including the "notwithstanding" clause in § 124, intended to do more than that. In particular, it sought to override the Department of the Interior's misinterpretation of the Point Reyes Wilderness Act, Pub. L. No. 94-544, 90 Stat. 2515 (1976).

The Department had concluded, in 2005, that the Act barred issuance of a special use permit authorizing continued operation of Drakes Bay Oyster Company's oyster farm. The Department thought Congress had "mandated" that result by designating Drakes Estero, where the oyster farm is located, as a "potential wilderness addition" in the Point Reyes Wilderness Act. The Act's legislative history makes clear, however, that by divining such a mandate, the Department simply misinterpreted the Act's provisions and misconstrued Congress's intent. The Department's misinterpretation of the Point Reyes Wilderness Act prompted Congress to enact § 124 in 2009. In my view, by including a notwithstanding clause in § 124, Congress attempted to supersede the Department's erroneous interpretation of the Act.

In the 2012 decision challenged here, the Secretary nonetheless denied Drakes Bay's permit request based primarily on the very same misinterpretation of the Point Reyes Wilderness Act that Congress thought it had overridden. As a result, I think Drakes Bay is likely to prevail on its claim that the Secretary's decision is arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Because the other preliminary injunction

factors also weigh in Drakes Bay's favor, injunctive relief preserving the status quo should have been granted here.

I

To explain why I think the Interior Department (and later the Secretary) misinterpreted the Point Reyes Wilderness Act, a fairly detailed discussion of the Act's legislative history is necessary.

The events leading up to passage of the Point Reyes Wilderness Act begin in 1962, when Congress authorized creation of the Point Reyes National Seashore and appropriated funds for land acquisition within the Seashore's designated boundaries. Act of Sept. 13, 1962, Pub. L. No. 87-657, 76 Stat. 538 (1962). As part of that process, in 1965, the State of California conveyed ownership of the submerged lands and coastal tidelands within the Seashore's boundaries to the federal government. *See* Act of July 9, 1965, ch. 983, § 1, 1965 Cal. Stat. 2604, 2604. Those lands included Drakes Estero. The conveyance reserved certain mineral and fishing rights, which allowed the State to "prospect for, mine, and remove [mineral] deposits from the lands," and "reserved to the people of the state the right to fish in the waters underlying the lands." *Id*. §§ 2-3, 1965 Cal. Stat. at 2605. At the time of the State's conveyance, oyster farming was already a well-established fixture in Drakes Estero, with roots dating back to the 1930s.

In 1973, the President recommended that Congress preserve 10,600 acres within the Point Reyes National Seashore as "wilderness," under the terms of the Wilderness Act of 1964, Pub. L. No. 88-577, § 3(c), 78 Stat. 890, 892 (1964). Members of California's congressional delegation found that recommendation woefully inadequate, and soon

thereafter introduced identical bills in the House and Senate designating far larger areas of the Seashore as wilderness. In the House, Congressman John Burton introduced H.R. 8002, 94th Cong. (1975); in the Senate, Senator John Tunney introduced S. 2472, 94th Cong. (1975). H.R. 8002 is the bill that eventually became the Point Reyes Wilderness Act.

As originally proposed, H.R. 8002 and S. 2472 would have designated more than thirty-eight thousand acres as wilderness. Included within that designation was Drakes Estero, as well as most of the other submerged lands and coastal tidelands conveyed by California in 1965. The sponsors of H.R. 8002 and S. 2472 were well aware of the oyster farm in Drakes Estero. They nonetheless included Drakes Estero within the wilderness designation because they did not view the farm's operations as incompatible with the area's wilderness status. Commenting on the Senate bill, Senator Tunney left no doubt on that score, declaring, "Established private rights of landowners and leaseholders will continue to be respected and protected. The existing agricultural and aquacultural uses can continue." *Wilderness Additions--National Park System: Hearings Before the Subcomm. on Parks and Recreation of the S. Comm, on Interior and Insular Affairs*, 94th Cong. 271 (1976) [hereinafter *Senate Hearing*].

During hearings on H.R. 8002 and S. 2472, various civic, environmental, and conservation groups supported Drakes Estero's designation as wilderness. They explained in detail why neither the State's reserved mineral and fishing rights nor the oyster farm precluded such a designation. No one advocating Drakes Estero's designation as wilderness suggested that the oyster farm needed to

be removed before the area could become wilderness. *See id*. at 324-33, 344-61; H.R. 7198, H.R. 8002, *et al, To Designate Certain Lands in the Point Reyes National Seashore, California as Wilderness: Hearing Before Subcomm. on Nat'l Parks and Recreation of the H. Comm, on Interior and Insular Affairs*, 94th Cong. (1976) [hereinafter *House Hearing*], prepared statements of Jim Eaton, William J. Duddleson, Ms. Raye-Page, and Frank C. Boerger.

The comments Congress received from those who were advocating Drakes Estero's designation as wilderness stressed a common theme: that the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness. For example, a representative from the Wilderness Society stated: "Within Drakes Estero the oyster culture activity, which is under lease, has a minimal environmental and visual intrusion. Its continuation is permissible as a pre-existing non-conforming use and is not a deterrent for inclusion of the federally owned submerged lands of the Estero in wilderness." *House Hearing*, prepared statement of Ms. Raye-Page, at 6. The Chairman of the Golden Gate National Recreation Area Citizens' Advisory Commission noted that the oyster-farming operations "presently carried on within the seashore existed prior to its establishment as a park and have since been considered desirable by both the public and park managers." *Senate Hearing*, at 361. He therefore recommended that specific provision be made to allow such operations "to continue unrestrained by wilderness designation." *Id*. Others observed, echoing the comments of Senator Tunney, that the proposed House and Senate bills already provided for that. *See House Hearing*, prepared statement of William J. Duddleson, at 3--4 ("H.R. 8002 would allow

continued use and operation of Johnson's Oyster Company at Drakes Estero, as a pre-existing non-conforming use."); *Senate Hearing*, at 357 ("S. 2472 would allow the continued use and operation of Johnson's Oyster Company in Drakes Estero."). A local state assemblyman succinctly summed it up this way: "Finally, I believe everyone concerned supports the continued operation of oyster farming in Drakes Estero as a non-conforming use." *Senate Hearing*, at 356.

The view expressed by these speakers--that continued operation of the oyster farm was fully compatible with Drakes Estero's designation as wilderness--was not some wild-eyed notion. It was firmly grounded in the text of the Wilderness Act itself. The Act generally bans commercial enterprise within wilderness areas, but does so "subject to existing private rights." 16 U.S.C. § 1133(c). Drakes Bay's predecessor, the Johnson Oyster Company, had existing private rights in the form of water-bottom leases issued by California that pre-dated both the passage of the Wilderness Act and creation of the Point Reyes National Seashore. The Act also generally prohibits the use of motorboats within wilderness areas, *see id.*, but the Secretary of Agriculture may permit continued use of motorboats when, as here, such use has "already become established." *Id.* § 1133(d)(1). To the extent there is any ambiguity in these provisions, the Act's legislative history makes clear that Congress believed the new wildemess-preservation system would not affect the economic arrangements of business enterprises "because existing private rights and established uses are permitted to continue." S. Rep. No. 88-109, at 2 (1963).

The only party opposed to designating Drakes Estero as wilderness was the Department of the Interior. At first, the Department took the position that none of the submerged lands and coastal tidelands conveyed by California in 1965 could be designated as wilderness, because the State's reserved mineral and fishing rights were "inconsistent with wilderness." *House Hearing*, letter from John Kyi, Assistant Secretary of the Interior, at 3. When the Department's view came under attack by those who argued that the State's reserved rights were not in any way inconsistent with wilderness, *see, e.g., Senate Hearing*, at 327-28, the Department backpedaled. It proposed placing most of the lands subject to the State's reserved rights into a new legislative classification--"potential wilderness addition"--which it had developed in connection with similar wilderness proposals. *See House Hearing*, at 11--12; id., letter from John Kyi, Assistant Secretary of the Interior, at 1. That designation was intended to encompass "lands which are essentially of wilderness character, but retain sufficient non-conforming structures, activities, uses or private rights so as to preclude immediate wilderness classification." S. Rep. No. 94-1357, at 3 (1976).

Four areas subject to the State's reserved rights were at issue; the coastal tidelands, Limantour Estero, Abbotts Lagoon, and Drakes Estero. The original version of H.R. 8002 designated all four areas as wilderness, not just potential wilderness additions. But in the spirit of compromise, Congressman Burton, the sponsor of H.R. 8002, agreed to amend the bill by designating those areas as potential wilderness additions, rather than as wilderness. *See House Hearing*, prepared statement of Rep. John Burton, at 2. In doing so, he made clear that all four areas were being designated as potential

wilderness additions due to California's reserved mineral and fishing rights. *See id*. He noted that, "[a]s 'potential wilderness,' these areas would be designated as wilderness *effective when the State ceeds [*sic*] these rights to the United States*." *Id*. (emphasis added). As so amended, H.R. 8002 was enacted as the Point Reyes Wilderness Act in 1976.

Fast forward now to 2005. Shortly before Drakes Bay's purchase of the oyster farm closed, the Park Service reiterated its view that, based on a legal analysis performed by the Interior Department, no new permits authorizing oyster fanning in Drakes Estero could be issued. The Department's legal analysis concluded--bizarrely, given the legislative history recounted above--that by designating Drakes Estero as a potential wilderness addition in the Point Reyes Wilderness Act, Congress had "mandated" elimination of the oyster farm. The Department never identified anything in the text of the Act to support that view; it cited only a passage from the House Report accompanying H.R. 8002. But that passage "is in no way anchored in the text of the statute," *Shannon v. United States*, 512 U.S. 573, 583-84 (1994), and thus provides no support for the Department's interpretation of the Act.

Even taken on its own terms, however, the passage from the House Report does not support the Department's interpretation. The passage states in full: "As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, *with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status*." H.R. Rep. No. 94-1680, at 3 (1976) (emphasis added). But the oyster farm was not an

"obstacle" to Drakes Estero's conversion to wilderness status, and no one in Congress ever expressed that view. To the contrary, as discussed above, all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status.

II

With that background in mind, we can now turn to the legal issue at the heart of this appeal, which is how to construe § 124.

Everyone appears to agree that the Park Service's conclusion in 2005 that it was legally prohibited from granting Drakes Bay a special use permit prompted Congress to enact § 124. If all Congress had wanted to do was "let the Secretary know his hands were not tied," as the majority asserts, § 124 could simply have stated, as it does, that "the Secretary of the Interior is authorized to issue a special use permit . . ." Act of Oct. 30, 2009, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932. But Congress went further and added a notwithstanding clause, so that the statute as enacted reads, "*notwithstanding any other provision of law*, the Secretary of the Interior is authorized to issue a special use permit. . ." *Id.* (emphasis added). Our task is to determine what effect Congress intended the notwithstanding clause to have.

Given the historical backdrop against which § 124 was enacted, I think Congress intended the clause to override the Interior Department's misinterpretation of the Point Reyes Wilderness Act. Reading the clause in that fashion is consistent with the way courts have typically construed notwithstanding clauses. The Supreme Court has held that the use of such a clause "clearly signals the

drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). And we have said that the basic function of such clauses is to "sweep aside" and "supersede" any potentially conflicting laws. *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc); *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1166 (9th Cir. 2001). A notwithstanding clause often targets those laws that were the "legal sticking point" for the action Congress intends to authorize. *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1301 n.19 (11th Cir. 2010).

In this case, no conflicting laws actually prevented the Secretary from issuing a permit to Drakes Bay. Continued operation of the oyster farm is fully consistent with the Wilderness Act, and the farm's existence is therefore not an "obstacle" to converting Drakes Estero to wilderness status as directed by the Point Reyes Wilderness Act. Instead, it was the Interior Department's *misinterpretation* of the Point Reyes Wilderness Act that proved to be the "legal sticking point" here. I think the best reading of the notwithstanding clause is that Congress meant to "override" ("sweep aside," "supersede") that misinterpretation of the law when it enacted § 124. *Alpine Ridge Grp.*, 508 U.S. at 18; *Novak*, 476 F.3d at 1046; *Student Loan Fund*, 272 F.3d at 1166.

If you accept what I have said so far, only two questions remain. The first is whether Congress, having overridden the Department's misinterpretation of the Point Reyes Wilderness Act, nonetheless authorized the Secretary to rely on that misinterpretation as a basis for denying Drakes Bay

a permit. I cannot see any reason why we would construe § 124 in that fashion. Under the Administrative Procedure Act (APA), if an agency bases its decision on a legally erroneous interpretation of the controlling statute, its decision will be deemed arbitrary, capricious, or otherwise not in accordance with law. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091, 1101 (9th Cir. 2007) (involving an erroneous interpretation of a state implementation plan that had the force and effect of federal law). Thus, even without the notwithstanding clause, it would make no sense to assume that Congress authorized the Secretary to base his decision on a misinterpretation of the Point Reyes Wilderness Act. With the clause, adopting any such construction of § 124 would be entirely indefensible.

The second (and admittedly closer) question is whether the Secretary in fact based his decision on the misinterpretation of the Act that Congress intended to override by enacting § 124. The majority suggests that the Secretary based his decision instead on the Interior Department's own policies, *see* Maj. op. at 20 & n.5, 27-28 n.8, but I do not think the Secretary's written decision denying the permit supports that view. The Secretary's decision states that he gave "great weight" to what he called "the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness." The Secretary read that Act as expressing Congress's intention that all "obstacles" to converting Drakes Estero to wilderness status should be removed. But he erroneously deemed the oyster farm to be such an obstacle ("DBOC's commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness"), because he erroneously assumed that the oyster farm's continued operation was "prohibited by the

Wilderness Act." That in turn led him to conclude--again erroneously--that his decision to eliminate the oyster farm "effectuate[d]" Congress's intent as expressed in the Point Reyes Wilderness Act.

These are precisely the same errors of statutory interpretation the Interior Department made back in 2005. They are precisely the same errors that prompted Congress to enact § 124 in the first place. And, in my view, they are precisely the same errors Congress attempted to supersede by inserting the notwithstanding clause. Contrary to the majority's assertion, the Secretary had no authority to rely on this misinterpretation of "Congress's earlier expressed goal" because the notwithstanding clause eliminated any such authority. *See* Maj. op. at 27-28 n.8.

What does the majority offer in response to this analysis? Some hand waving, to be sure, but nothing of any substance. Most tellingly, the majority never attempts to argue that the Interior Department's interpretation of the Point Reyes Wilderness Act was *correct*. Nor could it make that argument with a straight face given the Act's clear legislative history, which the majority never attempts to address, much less refute. The majority thus has no explanation for Congress's inclusion of the notwithstanding clause in § 124 other than the one I have offered: that it was included to override the Department's misinterpretation of the Point Reyes Wilderness Act. The majority claims that the clause "has a clear function—to convey that prior legislation should not be deemed a legal barrier" to permit issuance. *See* Maj. op. at 20. But that reading of the clause *supports* my position because the Secretary did treat "prior legislation"—namely, the Point Reyes Wilderness Act—as a "legal barrier" to

permit issuance. As I have argued, that is exactly what the notwithstanding clause was intended to prohibit.

The majority also claims that I have not accorded the Secretary's decision the deference it is owed under the arbitrary and capricious standard, which requires us to give due regard to an agency's exercise of discretion within its sphere of expertise. *See* Maj. op. at 27-28 n.8. But I am not arguing here that the Secretary's decision must be set aside because it reflects faulty weighing of permissible policy factors. We would have no authority to second guess a decision of that order. What I am saying, instead, is that § 124's notwithstanding clause precluded the Secretary from basing his decision on the very misinterpretation of the Point Reyes Wilderness Act that Congress intended to override. A decision will normally be deemed arbitrary and capricious if an agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That, unfortunately, is just what the Secretary did.

In short, I would hold that Drakes Bay is likely to prevail on the merits of its APA claim. The Secretary's misinterpretation of the Point Reyes Wilderness Act, and his mistaken view that denying the permit request effectuated *Congress's* intent, were "fundamental" to his decision, rendering the decision "arbitrary, capricious, or otherwise not in accordance with law." *Safe Air for Everyone*, 488 F.3d at 1101 (internal quotation marks omitted).

III

Like the majority, I will not spend much time addressing the remaining preliminary injunction factors--irreparable harm, balance of the equities,

and the public interest. *See Winter v. Natural Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008). Considered together, those factors tip in Drakes Bay's favor.

Drakes Bay will suffer irreparable injury to its business and real-property rights if a preliminary injunction is erroneously denied. *See*, *e.g.*, *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). The loss of "an ongoing business representing many years of effort and the livelihood of its [owners] constitutes irreparable harm." *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (per curiam).

The balance of equities favors Drakes Bay. The majority concludes otherwise by noting that Drakes Bay knew when it acquired the oyster farm that its permit would expire in 2012. Maj. op. at 37. But that is not the relevant consideration. Rather, the controlling consideration is that the harm Drakes Bay will suffer from the erroneous denial of a preliminary injunction far outweighs the harm the government will suffer from an erroneous grant of such relief. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137-38 (9th Cir. 2011); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002); *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986); *Roso-Lino*, 749 F.2d at 126. The government will suffer only modest harm if oyster farming's eighty-year history in the Estero continues a bit longer. But if a preliminary injunction is erroneously denied, Drakes Bay's business will be destroyed. That is all Drakes Bay must show to demonstrate that the balance of equities tips in its favor here.

Finally, the public interest favors neither side. As the district court observed, federal judges are ill equipped to weigh the adverse environmental consequences of denying a preliminary injunction against the consequences of granting such relief, or the relative interests in access to Drakes Bay's oysters as opposed to unencumbered wilderness. It is the equities that carry the day in this case, *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (when the United States is a party, equities and the public interest merge), and the equities strongly favor Drakes Bay.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY; KEVIN LUNNY, *Plaintiffs-Appellants,* v. SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as Director, U.S. National Park Service, *Defendants-Appellees.*	No. 13-15227 D.C. No. 4:12-cv-06134-YGR OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted
May 14, 2013—San Francisco, California

Filed September 3, 2013

Before: M. Margaret McKeown and Paul J. Watford, Circuit Judges, and Algenon L. Marbley, District Judge.*

Opinion by Judge McKeown;
Dissent by Judge Watford

OPINION

McKEOWN, Circuit Judge:

This appeal, which pits an oyster farm, oyster lovers and well-known "foodies" against environmentalists aligned with the federal government, has generated considerable attention in the San Francisco Bay area.[1] Drakes Bay Oyster Company ("Drakes Bay") challenges the Secretary of the Interior's discretionary decision to let Drakes Bay's permit for commercial oyster farming expire

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* The Honorable Algenon L. Marbley, District Judge for the U.S. District Court for the Southern District of Ohio, sitting by designation.

[1] The panel appreciates the amicus briefing filed by supporters of both sides. Alice Waters, Tomales Bay Oyster Company, Hayes Street Grill, the California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and the Alliance For Local Sustainable Agriculture filed an amici curiae brief in support of Drakes Bay. The Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, Save Our Seashore, and the Coalition of National Park Service Retirees filed an amici curiae brief in support of the federal parties.

according to its terms. The permit, which allowed farming within Point Reyes National Seashore, was set to lapse in November 2012. Drakes Bay requested an extension pursuant to a Congressional enactment that provided, in relevant part, "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." Department of the Interior Appropriations Act, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124"). After the Secretary declined to extend the permit, Drakes Bay sought a preliminary injunction, arguing that the Secretary's decision violated the authorization in Section 124, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and various federal regulations.

We have jurisdiction to consider whether the Secretary violated "constitutional, statutory, regulatory or other legal mandates or restrictions," *Ness Inv. Corp. v. U.S. Dep't of Agr., Forest Serv.*, 512 F.2d 706, 715 (9th Cir. 1975), and we agree with the district court that Drakes Bay is not likely to succeed in proving any such violations here. Through Section 124, Congress authorized, but did not require, the Secretary to extend the permit. Congress left the decision to grant or deny an extension to the Secretary's discretion, without imposing any mandatory considerations. The Secretary clearly understood he was authorized to issue the permit; he did not misinterpret the scope of his discretion under Section 124. In an effort to inform his decision, the Secretary undertook a NEPA review, although he believed he was not obligated to do so. Nonetheless, any asserted errors in the NEPA review were harmless.

Because Congress committed the substance of the Secretary's decision to his discretion, we cannot review "the making of an informed judgment by the agency." *Id*. In letting the permit lapse, the Secretary emphasized the importance of the long-term environmental impact of the decision on Drakes Estero, which is located in an area designated as potential wilderness. He also underscored that, when Drakes Bay purchased the property in 2005, it did so with eyes wide open to the fact that the permit acquired from its predecessor owner was set to expire just seven years later, in 2012. Drakes Bay's disagreement with the value judgments made by the Secretary is not a legitimate basis on which to set aside the decision. Once we determine, as we have, that the Secretary did not violate any statutory mandate, it is not our province to intercede in his discretionary decision. We, therefore, affirm the district court's order denying a preliminary injunction.

BACKGROUND

I. THE POINT REYES NATIONAL SEASHORE

Congress established the Point Reyes National Seashore ("Point Reyes") in 1962 "in order to save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped." Act of Sept. 13, 1962, Pub. L. No. 87-657, 76 Stat. 538, 538. The area is located in Marin County, California, and exhibits exceptional biodiversity. Point Reyes is home to Drakes Estero, a series of estuarial bays.

The enabling legislation for Point Reyes gave the Secretary of the Interior administrative authority over the area and directed him to acquire lands, waters, and other property and interests within the

seashore. *Id.* at § 3(a), 76 Stat. at 539-40. In 1965, the State of California conveyed to the United States "all of the tide and submerged lands or other lands" within Point Reyes, reserving certain minerals rights to itself and reserving the right to fish to Californians. 1965 Cal. Stat. 2604-2605, § 1-3.

In the Point Reyes Wilderness Act of 1976, Congress designated certain areas within the seashore as "wilderness" under the Wilderness Act of 1964. Pub. L. No. 94-544, 90 Stat. 2515. The Wilderness Act "established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas.'" 16 U.S.C. § 1131(a). Such areas are to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character." *Id.* Accordingly, subject to statutory exceptions and existing private rights, the Act provides that "there shall be no commercial enterprise . . . within any wilderness area." 16 U.S.C. § 1133(c).

The Point Reyes Wilderness Act designated other areas, including Drakes Estero, as "potential wilderness." Pub. L. No. 94-544, 90 Stat. 2515. Congress considered designating Drakes Estero as "wilderness," but declined to do so. The legislative history reflects that Congress took into account the Department of the Interior's position that commercial oyster farming operations taking place in Drakes Estero, as well as California's reserved rights and special use permits relating to the pastoral zone, rendered the area "inconsistent with wilderness" at the time. H.R. Rep. No. 94-1680, at 5-

6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5593, 5597. Congress specified in separate legislation that the "potential wilderness additions" in Point Reyes "shall . . . be designated wilderness" by "publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act . . . have ceased." Act of Oct. 20, 1976, Pub. L. No. 94-567, § 3, 90 Stat. 2692.

II. DRAKES BAY OYSTER COMPANY'S OPERATIONS

Oyster farming has a long history in Drakes Estero, dating to the 1930s. Charles Johnson started the Johnson Oyster Company in Drakes Estero in the 1950s. His oyster farm was in operation on a five-acre parcel of land on the shore of the estero when Congress created the Point Reyes National Seashore. In 1972, Johnson sold his five acres to the United States, electing to retain a forty-year reservation of use and occupancy ("RUO"). The RUO provided that, "[u]pon expiration of the reserved term, a special use permit *may* be issued for the continued occupancy of the property for the herein described purposes." (Emphasis added.) It added that, "[a]ny permit for continued use will be issued in accordance with National Park Service ["NPS"] regulations in effect at the time the reservation expires." In late 2004, Drakes Bay agreed to purchase the assets of the Johnson Oyster Company. The RUO was transferred along with the purchase. The forty-year RUO ended on November 30, 2012.

When it purchased the farm, Drakes Bay was well aware that the reservation would expire in 2012, and received multiple confirmations of this limitation. The acquisition documents specifically referenced "that certain Reservation of Possession Lease dated 10/12/1972, entered into by Seller and the National Park Service." In January 2005, the

National Park Service wrote to Kevin Lunny, an owner of Drakes Bay, highlighting "the issue of the potential wilderness designation." The Park Service told Lunny that it wanted to make sure he was aware of the Interior Department's legal position "[b]efore [he] closed escrow on the purchase" of Johnson's farm. The Park Service accordingly sent Lunny a memorandum from the Department's Solicitor. Notably, the Solicitor disagreed with the proposition previously expressed in the House Report accompanying the Point Reyes Wilderness Act that California's retained fishing and mineral rights were inconsistent with wilderness designation. The Solicitor concluded, "the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e. the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non conforming use can be eliminated." In March 2005, the Park Service reiterated its guidance regarding the Drakes Bay's purchase of the Johnson property. It specifically informed Lunny, "Regarding the 2012 expiration date and the potential wilderness, based on our legal review, no new permits will be issued after that date."

III. SECTION 124 AND THE SECRETARY'S DECISION

Several years later, in 2009, Congress addressed the Department of the Interior's authority to issue Drakes Bay a new permit in appropriations legislation. The Senate appropriations committee proposed a provision requiring the Secretary to issue a special use permit for an additional ten years. H.R. 2996, 111th Cong. § 120(a) (as reported in Senate, July 7, 2009) (providing "the Secretary of the Interior *shall* extend the existing authorization . . .") (emphasis added). The Senate rejected this mandate,

and amended the language to provide that the Secretary "is authorized to issue" the permit, rather than required to do so. 155 Cong. Rec. S9769-03, S9773 (daily ed. Sept. 24, 2009).

The law as enacted provides:

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

> potential wilderness outside the Seashore.

123 Stat. at 2932. The House Conference Report reflected that the final language "provid[ed] the Secretary *discretion* to issue a special use permit. . . ." 155 Cong. Rec. H11871-06 (daily ed. October 28, 2009) (emphasis added).

The NAS report that Section 124 referenced, "Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California," was prepared in 2009, in light of "the approach of the 2012 expiration date" of the permit, in order "to help clarify the scientific issues raised with regard to the shellfish mariculture activities in Drakes Estero." The report highlighted that there was "limited scientific literature" available and that there was evidence that oyster farming had both negative and positive effects on the environment. The report explained: "The ultimate decision to permit or prohibit shellfish farming in Drakes Estero necessarily requires value judgments and tradeoffs that can be informed, but not resolved, by science."

Drakes Bay sent letters to the Secretary in July 2010 requesting that he exercise his authority under Section 124 to issue a permit extension. Park Service staff met with Lunny soon after to discuss a draft schedule to complete a NEPA process. The Department, through the Park Service, then formally began to prepare an Environmental Impact Statement ("EIS") in an effort "to engage the public and evaluate the effects of continuing the commercial operation within the national seashore" and "to inform the decision of whether a new special use permit should be issued." Drakes Bay Oyster

Company Special Use Permit, 75 Fed. Reg. 65,373 (Oct. 22, 2010).[2]

The Park Service issued a draft EIS ("DEIS") for public comment in September 2011. Drakes Bay submitted comments criticizing much of the draft, along with a data quality complaint.[3] Congress expressed "concerns relating to the validity of the science underlying the DEIS" and therefore "direct[ed] 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 Final Environmental Impact Statement expected in mid-2012." H.R. Conf. Rep. No. 112-331, at 1057 (Dec. 15, 2011), *reprinted in* 2011 U.S.C.C.A.N. 605, 788.

The NAS released its report in August 2012. The report noted several instances where the DEIS "lack[ed] assessment of the level of uncertainty associated with the scientific information on which conclusions were based." But the report concluded that the available research did not admit of certainty:

> The scientific literature on Drakes Estero is not extensive and research on the potential impacts of shellfish

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[2] In the final EIS, the Department stated that Section 124 did not require compliance with NEPA because that provision gave the Secretary authorization to make the permit decision "notwithstanding any other provision of law." Nevertheless, the Department "determined that it is helpful to generally follow the procedures of NEPA." The Secretary reiterated this position in his decision.

[3] Drakes Bay's data quality complaint is not before us in this appeal.

> mariculture on the Estero is even sparser . . . . Consequently, for most of the resource categories the committee found that there is a moderate or high level of uncertainty associated with impact assessments in the DEIS.

The final EIS, issued on November 20, 2012, responded to the NAS review. The EIS revised the definitions of the intensity of impacts to wildlife and wildlife habitats, clarified the assumptions underlying those conclusions, and added discussion of the uncertainty of scientific data.

The Secretary issued his decision on November 29, 2012, directing the Park Service to let the permit expire according to its terms. He explained that his decision was "based on matters of law and policy," including the "explicit terms of the 1972 conveyance from the Johnson Oyster Company to the United States" and "the policies of NPS concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore." He recognized that Section 124 "grant[ed] [him] the authority to issue a new SUP," but elected to effectuate Park Service policies and the principles he discerned in wilderness legislation.

In his decision, the Secretary recognized the "scientific uncertainty" and "lack of consensus in the record regarding the precise nature and scope of the impacts that [Drakes Bay's] operations have" on wilderness and other resources. Generally, he found that the impact statements supported the proposition that letting the permit expire "would result in long-term beneficial impacts to the estero's natural environment." But he explained that the draft and

final EIS were "not material to the legal and policy factors that provide the central basis" for his decision, though they were "helpful" in that they informed him regarding the "complexities, subtleties, and uncertainties of this matter." He disclaimed reliance on "the data that was asserted to be flawed," and noted that his decision was "based on the incompatibility of commercial activities in wilderness."

In accordance with his decision, the Secretary directed the Park Service to publish a notice in the Federal Register announcing the conversion of Drakes Estero from potential to designated wilderness. This litigation followed. Drakes Bay sued the Secretary, seeking a declaratory judgment that his decision violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, an order that the Secretary direct the Park Service to issue a new ten-year permit, and, alternatively, an order vacating and remanding for a new decision. Drakes Bay moved for a preliminary injunction to avoid having to cease its operations pending suit, as it had been given ninety days to remove its property from the estero.

The district court determined that it did not have jurisdiction to review the Secretary's decision because "the statutory context affords complete discretion" and "Section 124 provides the Court with 'no meaningful standard' for the Court to apply in reviewing the Decision not to issue a New SUP." The court went on to provide an alternate rationale for denial: "the Court does not find that Plaintiffs can show a likelihood of success under a Section 706(2) standard [arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA]." Finally, the court held that "[o]n

balance, and combining the requirement of both the equities and the public interest more broadly, the Court does not find these elements weigh in favor of granting a preliminary injunction."[4]

ANALYSIS

I. JURISDICTION AND THE SCOPE OF THE "NOTWITHSTANDING" CLAUSE

As a threshold matter, we address jurisdiction. On this point, we disagree in part with the district court. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n.1 (9th Cir. 2006) (reviewing de novo the question of subject matter jurisdiction under the APA). We do have jurisdiction to review whether the Secretary violated any legal mandate contained in Section 124 or elsewhere. However, we agree with the district court that we lack jurisdiction to review the Secretary's ultimate discretionary decision whether to issue a new permit.

The government argues that we lack jurisdiction to review any of Drakes Bay's claims because, under Section 124, the Secretary's decision was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This narrow exception to the presumption of judicial review of agency action under the APA applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."

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[4] A motions panel granted Drakes Bay's emergency motion for an injunction pending appeal "because there are serious legal questions and the balance of hardships tips sharply in appellants' favor." With the benefit of full briefing and argument, we need not defer to the motion panel's necessarily expedited decision. *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986).

Heckler v. Chaney, 470 U.S. 821, 830 (1985); *see also Webster v. Doe*, 486 U.S. 592, 599 (1988) (characterizing the exception as for circumstances where there is "no law to apply") (internal quotation marks and citation omitted). But even where the substance or result of a decision is committed fully to an agency's discretion, "a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Inv. Corp.*, 512 F.2d at 715. In such circumstances, a federal court lacks only jurisdiction to review an alleged abuse of discretion regarding "the making of an informed judgment by the agency." *Id.*

Here, as in *Ness Inv. Corp.*, "[t]he secretary is 'authorized,' not required, to issue" a permit, and there are "no statutory restrictions or definitions prescribing precise qualifications" for issuance. *Id.* Consequently we may review only whether the Secretary followed whatever legal restrictions applied to his decision-making process. The parties agree that the Ness framework applies, but disagree on whether any "mandates or restrictions," *id.*, exist. Drakes Bay interprets Section 124, NEPA, and various federal regulations as imposing legal restrictions on the Secretary, but it contends that these requirements apply only to a decision to deny an extension, not to a decision granting an extension. The Secretary contends that the "notwithstanding" clause of Section 124 sweeps away any statutes and regulations that might otherwise apply to a permit application. Neither side has it quite right.

As a general matter, "notwithstanding" clauses nullify *conflicting* provisions of law. *See*

United States v. Novak, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("The Supreme Court has indicated as a general proposition that statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."). Before Congress passed Section 124, the Department's Solicitor had issued a series of opinions holding that the Wilderness Act, the Point Reyes Wilderness Act, and Park Service management policies legally prohibited any extension of the permit. Section 124's "notwithstanding" clause trumps any law that purports to prohibit or preclude the Secretary from extending the permit, as such a law would "conflict" with Section 124's authorization. Thus we may review whether the Secretary misunderstood his authority to issue a permit and the closely related question of whether he mistakenly interpreted other statutory provisions as placing a legal restriction on his authority. As the government itself acknowledges, if Section 124 provides restrictions on the Secretary's exercise of discretion, then we have jurisdiction to review compliance with those limits.

The Secretary's decision is also subject to applicable procedural constraints. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Thus, we have jurisdiction to consider the applicability of NEPA and other procedures that do not conflict with the authorization in Section 124.

Procedural constraints that do not conflict with the authorization would apply to the Secretary's decision regardless of whether he granted or denied the permit. We reject Drakes Bay's anomalous position that the Secretary had "unfettered authority to issue the permit," while his "discretion to deny

[Drakes Bay] a [permit] [was] bounded by NEPA and other applicable law." Drakes Bay points to the fact that Section 124 says that "notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit," rather than that he is authorized to "issue or *deny*" one. From that language, Drakes Bay extrapolates that Section 124 "was enacted to make it easy to issue the permit." The statute does not dictate such a one-way ratchet. Indeed, if Congress had so wanted to make it easy or automatic for Drakes Bay, one wonders why it rejected the proposal that would have simply required the Secretary to issue a new permit. The ultimate legislation was a move away from, not toward, Drakes Bay's favored result.

A natural reading of the authorization to issue a permit implies authorization not to issue one, and we see no reason to interpret the "notwithstanding" clause as applying to one outcome but not the other. *See Confederated Salish and Kootenai Tribes v. United States*, 343 F.3d 1193, 1196-97 (9th Cir. 2003) (interpreting the word "authorized" to mean both the power to grant or deny a request for the Secretary to take land in trust for a tribe). Section 124 was enacted as part of appropriations legislation, granting the Secretary authority to act, without providing any statement of Congress's view on that decision one way or the other.

Drakes Bay's effort to read into this short appropriations provision a preference for issuance of the permit is unavailing, as is the dissent's attempt to do so based on legislative history from decades earlier. The dissent misunderstands the significance of the legislative history of the Point Reyes Wilderness Act of 1976, which focuses on the notion

that Congress at that time viewed oyster farming as desirable and consistent with wilderness designation.

The dissent stacks legislative history from one enactment to another, over decades, when Section 124 itself does not make the link. "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the *enacting Legislature's* understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (emphasis added). Regardless of the accuracy of the dissent's recitation of the legislative history of the 1976 Act, the dissent's citation to congressional statements in support of designating Drakes Estero as wilderness in 1976 do not reliably reflect that the Congress that enacted Section 124 was of the dissent's view that Drakes Bay's operations were "not an 'obstacle' to converting Drakes Estero to wilderness status." Dissent at 45-46. The dissent's position would rewrite the clause to something like "notwithstanding the Department's policy view that oyster farming can be incompatible with wilderness designation." The dissent cites nothing from the text, or even the legislative history, of Section 124 to support this interpretation. Even Drakes Bay did not argue this position or urge us to go this far afield.[5]

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[5] The dissent's conclusion that "[c]ontinued operation of the oyster farm is fully consistent with the Wilderness Act", Dissent at 45, is particularly puzzling given that Drakes Bay *itself* argued that wilderness designation of Drakes Estero was not possible while the oyster farm's commercial activities continued. Moreover, there are a variety of Park Service management criteria that inform the question of what kinds of activities are "consistent" with wilderness designation under the Wilderness Act.

Here, where Section 124 merely grants *authority* to take an action, the "notwithstanding" clause targets laws that "potentially conflict[]" *with that authority*. *Novak*, 476 F.3d at 1046. Given the Department's opinions in 2005 that wilderness legislation prevented any exercise of authority to extend the permit, the notwithstanding clause has a clear function--to convey that prior legislation should not be deemed a legal barrier.[6] The dissent confuses actual or potential legal impediments to the Secretary's authority with policy considerations that might lead the Department not to extend Drakes Bay's permit. Section 124 does not prescribe considerations on which the Secretary may or may not rely, it says nothing about the criteria for wilderness designation and says nothing about

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The dissent's reliance on decades-old legislative pronouncements about the Johnson oyster farm for the proposition that Section 124 was intended to foreclose the Secretary from considering his department's own policies with regard to Drakes Bay stretches even the most liberal use of legislative history to the breaking point. "[U]nenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

[6] This function is meaningful regardless of whether conflicting laws actually prevented the Secretary from issuing a permit, a question the dissent would answer in the negative, Dissent at 45, but which we simply have no occasion to pass on here. The Department's legal position raised a "*potential*[] conflict[]," *Novak*, 476 F.3d at 1046 (emphasis added), regarding the Department's authority, and the "notwithstanding clause" made clear that "other provisions of law" were not an impediment.

whether oyster farming is consistent with wilderness designation. As the Supreme Court has admonished, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation marks and alteration omitted). Had Congress wanted to express a view on whether the Secretary should consider the Department's policies on wilderness or other criteria, it would have said so.[7] It did not, but rather gave the Secretary the discretion to decide.

We now turn to consideration of the Secretary's decision.

II. PRELIMINARY INJUNCTION NOT WARRANTED

In seeking a preliminary injunction, Drakes Bay must establish "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We have held that a "likelihood" of success per se is not an absolute requirement. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Rather, "'serious questions going to the merits' and a hardship balance that tips sharply toward the

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[7] Indeed, the only consideration that Congress addressed in Section 124 was that "[t]he Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before *modifying* any terms and conditions of the extended authorization." (Emphasis added.) As modification of the permit is not at issue here, this provision is not relevant.

plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. We review for abuse of discretion the district court's determination that Drakes Bay did not meet its burden under this test. *FTC v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004).

Drakes Bay contends that the Secretary misinterpreted his authority under Section 124 in that he mistakenly believed that granting a permit extension would violate other laws, that he failed to comply with NEPA, and that he failed to comply with federal rulemaking procedures. According to Drakes Bay, these errors render the Secretary's decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, the likelihood of success on the merits of these claims is too remote to justify the extraordinary remedy of a preliminary injunction. In light of our conclusion about the merits, we address only in passing the remaining preliminary injunction factors.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

1. The Import of Section 124

The Secretary's decision did not violate any statutory mandate, particularly the provision that gave him discretion to grant the permit despite any prior conflicting law. The key portion of Section 124 provides as follows: "Prior to the expiration on November 30, 2012 of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drakes Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit . . . ." Section

124 put the Secretary on notice that he was not hamstrung by other law should he determine a permit extension was appropriate. The section left him free to consider wilderness values and the competing interests underlying a commercial operation in an area set aside as a natural seashore.

The narrow question that we have jurisdiction to review is whether the Secretary misinterpreted his authority under Section 124. The record leaves no doubt that the answer is no.

As the Secretary explained, "SEC. 124 grants me the authority and discretion to issue [Drakes Bay] a new special use permit, but it does not direct me to do so." The Secretary repeated this understanding multiple times throughout the decision, noting, for example, that Section 124 "does not dictate a result or constrain my discretion in this matter," and that it "grants me the authority to issue a new SUP."

Drakes Bay's view that the Secretary violated Section 124 rests on a misinterpretation of that provision and a misapprehension of the Secretary's reasoning. Drakes Bay first argues that the statute was intended to "make it easy" to issue the permit. As we explained above, this approach is wishful thinking, since the statute says nothing of the kind. Indeed, Congress first considered whether to mandate issuance of the permit but backed off that approach and ultimately left the decision to the Secretary's discretion. In the end, Congress did nothing more than let the Secretary know his hands were not tied.

Drakes Bay next argues that the Secretary erroneously concluded that extending the permit would "violate" applicable wilderness legislation. According to Drakes Bay, because Section 124

authorized the Secretary to extend the permit "notwithstanding any other provision of law," the Secretary was "prohibit[ed] . . . from relying on a violation of other law as a reason to justify a permit denial."

Drakes Bay's reading of the decision is not tenable. Taken as a whole, the decision reflects that the Secretary explicitly recognized that extending the permit would be lawful and that he was not legally constrained by other laws.

The Secretary elected to let the permit expire not to avoid "violating" any law, as Drakes Bay posits, but because the Secretary weighed and balanced competing concerns about the environment and the value of aquaculture. He chose to give weight to the *policies* underlying wilderness legislation, taking into account consideration of environmental impacts: "In addition to considering the [Drafted Environmental Impact Statement and Final Environmental Impact Statement], I gave *great weight to matters of public policy, particularly the public policy inherent in the 1976 act* of Congress that identified Drakes Estero as potential wilderness." (Emphasis added).

Drakes Bay seizes on a single sentence in a summary of reasons as evidence that the Secretary thought extending the permit would "violate . . . specific wilderness legislation." At the beginning of the decision, the summary includes one sentence that, read in isolation, raises an ambiguity: "The continuation of the [Drakes Bay] operation would *violate the policies of NPS* concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, *as well as specific wilderness legislation* for Point Reyes National Seashore." (Emphasis

added). However, reading the sentence in context of the full decision, it is obvious the Secretary did not erroneously consider himself bound by any provision of wilderness legislation. In reviewing the agency's decision, we must uphold even "a decision of less than ideal clarity" so long as "the agency's path may reasonably be discerned." *FCC v. Fox Television Stations*, 556 U.S. 502, 513-14 (2009) (internal quotation marks omitted).

The Secretary's reliance on policy considerations and Congressional intent is evident throughout the decision. Recounting the factual and legal background, for example, the Secretary cited the House of Representatives committee report accompanying the Point Reyes Wilderness Act, which stated:

> As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3. The Secretary returned to this committee report in his conclusion, explaining that:

> My decision honors Congress's direction to "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" and thus ensures that these precious resources are preserved for the enjoyment of future generations of the American public, for whom Point Reyes National Seashore was created.

As expressed in his decision, his choice was consistent with the draft and final environmental impact statements that "support the proposition that the removal of [Drakes Bay's] commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment."

Drakes Bay suggests that referencing even the Congressional "intent" or policies underlying the Point Reyes Wilderness Act runs afoul of Section 124. But as Drakes Bay itself acknowledges, the "most natural, common-sense reading" of the notwithstanding clause is "notwithstanding any law that would *otherwise legally preclude issuance* of a [special use permit], the Secretary has the *authority* to issue a SUP." It is abundantly clear that the Secretary recognized his authority under Section 124 and did not believe he was legally bound by any statute to deny the permit. But the policy that underlies the 1976 Act and other wilderness legislation is just that--an expression of public policy. These expressions neither "legally preclude" nor legally mandate extension, and they are not "other provision[s] of law" that are swept aside by Section 124's "notwithstanding" clause. Statements in committee reports do not carry the force of law. *See Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993). "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil*, 545 U.S. at 568).

The Secretary's incorporation of the policies underlying wilderness legislation, and of Congressional intent as expressed in the House committee report, was a matter of his discretion. The Secretary noted correctly that "SEC. 124 . . . does not prescribe the factors on which I must base my

decision." Section 124 "provides the court no way to second-guess the weight or priority to be assigned" to these factors. *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1535 (D.C. Cir. 1988) (concluding that agency decision to deny petition for enforcement was not reviewable where the governing regulations provided no standards to enable judicial review). The choice was the Secretary's to make.[8]

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[8] The dissent's position that the agency "relied on factors which Congress has not intended it to consider," Dissent at 48, is not supported by the record. Under the deferential arbitrary and capricious standard, we uphold agency action for which a rational explanation is given, particularly where the agency "acted within the sphere of its expertise." *McFarland v. Kempthorne*, 545 F.3d 1106, 1113 (9th Cir. 2008). The Secretary's decision relied in general on "Congress's direction" to remove "obstacles" to wilderness designation. While the Wilderness Act bans commercial enterprise within wilderness areas "subject to existing private rights," 16 U.S.C. § 1133(c), Park Service policies inform whether wilderness designation is appropriate in the first instance. Contrary to the dissent's characterization, the 1976 legislation did not invoke a crystal ball and pass judgment on the compatibility of oyster farming in Drakes Estero with wilderness some thirty plus years later when the reservation of use would expire. Indeed, things change. The Secretary, drawing on the agency expertise amassed in the decades since the 1970s, concluded that continued oyster farming was inconsistent with wilderness criteria and the Department's policies. The Secretary's decision that removing the farm would further Congress's earlier expressed goal of moving toward wilderness designation was rational and within his authority under Section 124.

2. Drakes Bay's Other Statutory Arguments

As Section 124 affords no basis for us to review the substance of the Secretary's decision, we have no measuring stick against which to judge Drakes Bay's various claims that the Secretary's policy determination was mistaken. To the extent the Secretary's decision can be evaluated against the statutory requirements cited by Drakes Bay, Drakes Bay is unlikely to prevail in showing the decision was arbitrary and capricious, an abuse of discretion, or in violation of any law.

Drakes Bay argues that the Secretary violated the law by directing that Drakes Estero be designated as wilderness, because such a designation was not possible under the Wilderness Act in light of California's retained mineral and fishing rights. Although the Department of the Interior adopted this view in the past, the Department has since deemed that position inaccurate. The Wilderness Act itself nowhere provides that retained mineral or fishing rights preclude wilderness designation.[9] Drakes Bay

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[9] Notably, the State of California takes the position that its retained rights, including the state constitutional right to fish, do not cover aquaculture. The California Department of Fish and Game criticized and rejected "brief, general, and conclusory" communications it made decades earlier that suggested the oyster farm was covered by the "right to fish" reservation. At present, the state has issued water bottom leases to Drakes Bay for its commercial operations, but has made clear that the use of those leases past 2012 "is expressly contingent upon [Drakes Bay's] compliance with the 1972 grant reservation and, after its expiration, with any special use

is not likely to succeed on its theory that the Secretary's current position—that the permit's expiration enables wilderness designation despite retained mineral and fishing rights—amounted to "legal error."

Drakes Bay also believes that wilderness designation was improper in light of the "historic farming community" that remains on Drakes Estero. However, a 1978 amendment to the legislation establishing Point Reyes specifically authorizes the Park Service to lease property used for "agricultural, ranching, or dairying purposes." Act of Nov. 10, 1978, Pub. L. No. 95-625, § 318, 92 Stat. 3467, 3487. The Secretary's decision considered these uses a "compatible activity" within a wilderness area. Drakes Bay has not demonstrated how such a determination violates any restriction on the Secretary's authority.

On a related note, Drakes Bay charges that, in recounting the statutory history, the Secretary erred in stating that the 1978 amendment did not permit him to issue leases for mariculture. Drakes Bay's effort to shoehorn itself into an "agricultural purpose" is unavailing. Congress limited the Secretary's leasing authority to "lands" in Section 318(b) of the 1978 Act, rather than to the "lands, waters, and submerged lands" described in Section 318(a) of the same statute. *Id*. It is reasonable to assume this distinction is meaningful and reasonable for the Secretary to state that the Act did not authorize mariculture leases. Even if the Secretary misinterpreted this earlier law, he plainly understood that Section 124 did authorize him to

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permit" that the federal government "may issue in its discretion."

issue Drakes Bay a permit for mariculture. In sum, the Secretary neither violated any statutory mandate nor did he misapprehend his authority under the various statutes raised by Drakes Bay.

3. Compliance with NEPA

We next address the applicability of NEPA to the Secretary's decision. Under NEPA, an agency is required to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The government urges that its decision to let Drakes Bay's permit expire is not a "major Federal action[]," but rather is inaction that does not implicate NEPA. Drakes Bay responds that the term "major Federal actions" includes failures to act, 40 C.F.R. § 1508.18, and that NEPA applies to decisions concerning whether to issue a permit.[10]

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[10] Drakes Bay argues that we cannot consider the government's inaction argument because the Secretary did not rely on that position in his decision. We disagree. "The rationale behind the *Chenery I* Court's refusal to accept belated justifications for agency action not previously asserted during the agency's own proceedings does not apply in this case. *Chenery I* was premised on the policy that courts should not substitute their judgment for that of the agency when reviewing a 'determination of *policy or judgment which the agency alone is authorized to make* and which it has not made.'" *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 977-78 (9th Cir. 2005) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)) (emphasis added). The "policy or judgment" call here was the Secretary's substantive decision whether to grant the

Here, the Secretary's decision to let Drakes Bay's permit expire according to its terms effectively "denied" Drakes Bay a permit. We have held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, *issuance* of that permit does constitute major federal action." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). But we have never held failure to grant a permit to the same standard, and for good reason. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt. Our case law makes clear that not every denial of a request to act is a "major Federal action." We have held, for example, that no EIS was required when the federal government denied a request to exercise its regulatory authority to stop a state's program killing wildlife. *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979).

Drakes Bay suggested at oral argument that the Secretary's decision differs from typical inaction because it effected a change in the status quo, namely, the cessation of commercial operations that had previously been authorized. We are skeptical that the decision to allow the permit to expire after forty years, and thus to move toward designating Drakes Estero as wilderness, is a major action "significantly affecting the quality of the human environment" to which NEPA applies. 42 U.S.C. § 4332(2)(C). "The purpose of NEPA is to 'provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'" *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995)

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permit. We are not constrained in considering arguments concerning the applicability of NEPA.

(quoting *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

The Secretary's decision is essentially an environmental conservation effort, which has not triggered NEPA in the past. For example, in *Douglas County*, we held NEPA did not apply to critical habitat designation under the Endangered Species Act because it did "not alter the natural, untouched physical environment at all" and "because the ESA *furthers the goals of NEPA* without demanding an EIS." *Id.* at 1505-06 (emphasis added). Because removing the oyster farm is a step toward restoring the "natural, untouched physical environment," the reasoning of *Douglas County* is persuasive here. The Secretary's decision to allow the permit to expire, just like the designation under the ESA, "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." *Id.* at 1507.[11]

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[11] Drakes Bay noted at oral argument that we have recognized a circuit split on the question of "whether significant *beneficial* effects alone would trigger an EIS" and concluded in dicta that requiring an EIS in those circumstances was "consistent with the weight of circuit authority and has the virtue of reflecting the plain language of the statute." *Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010) (citing cases) (emphasis added). The authority cited is not persuasive here, however, because none of those cases addressed environmental conservation efforts. The cases instead dealt with major federal construction projects to which NEPA applied in order to evaluate the positive effects asserted. *See Sierra Club v. Froehlke*, 816 F.2d 205, 211 n.3 (5th Cir. 1987) (major federal water project of Army Corps of Engineers); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 783 (11th Cir. 1983) (construction of man-made

Drakes Bay also argued that removal of the oyster farm implicates NEPA because it has "adverse environmental consequences." Although the final EIS did note that removal might cause certain short-term harms, such as noise associated with heavy machinery needed to remove Drakes Bay's structures, such relatively minor harms do not by themselves "significantly affect[]" the environment in such a way as to implicate NEPA. 42 U.S.C. § 4332(2)(C). We are "reluctant . . . to make NEPA more of an obstructionist tactic to prevent environmental protection than it may already have become." *Douglas County*, 48 F.3d at 1508 (internal quotation marks omitted).

Ultimately, we need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence. The government produced a lengthy EIS, which the Secretary considered and found "helpful." Although the Secretary acknowledges that compliance with NEPA was less than perfect, Drakes Bay is unlikely to succeed in showing that the errors were prejudicial. Relief is available under the APA only for "prejudicial error." 5 U.S.C. § 706; *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) ("In administrative law, as in federal civil and criminal

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lake); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) (major navigational project); *see also Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1431 (D.C. Cir. 1985) (addressing energy-efficiency standards for household appliances and noting in dicta that "both beneficial and adverse effects on the environment can be significant within the meaning of NEPA").

litigation, there is a harmless error rule.") (internal quotation marks and citation omitted).

Drakes Bay points to "technical" violations, specifically, the Secretary's failure to publish the EIS more than thirty days before he made his decision and the Secretary's framing the extension denial in the form of a Decision Memorandum rather than a Record of Decision. Drakes Bay has shown no prejudice from these claimed violations. *See Nat'l Forest Pres. Grp. v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973) (declining to reverse where NEPA timing and EIS requirements were not strictly followed but the agency "did consider environmental factors" and the "sterile exercise" of forcing agency to reconsider "would serve no useful purpose"); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (declining to reverse based on violation of deadline for ESA biological assessment where no harm was shown).

Drakes Bay puts considerable stock in its claims that the final EIS was based on flawed science and that the absence of the thirty-day comment period denied it an opportunity to fully air its critique, specifically with regard to conclusions regarding the "soundscape" of the estero.[12] Nothing

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[12] Drakes Bay had submitted previous criticisms about the soundscape analysis, and related impacts on harbor seals, in its data quality complaint regarding the draft EIS. Although Drakes Bay did not raise the issue in its briefs, at oral argument it objected that the Secretary did not adequately respond to expert comments to the DEIS. In general, "on appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Regardless, we

in the record suggests that Drakes Bay was prejudiced by any shortcomings in the final soundscape data. Drakes Bay sent the Secretary its scientific critique before he issued his decision. The Secretary specifically referenced that communication and stated that he did not rely on the "data that was asserted to be flawed." The Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes and his statement was unambiguous that they did not carry weight in his decision. Drakes Bay's suggestion that the Secretary could not have made the informed decision that NEPA requires without resolving all controversies about the data is unsound. NEPA requires only that an EIS "contain[] a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (internal quotation marks and citation omitted). Drakes Bay is not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required.

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conclude the response to the DEIS was adequate. The Congressionally-mandated NAS report that criticized elements of the DEIS, including on these subjects, was brought to the Secretary's attention. The NAS report emphasized that the scientific literature on Drakes Estero was simply "not extensive" and that research on the impact of oyster farming was "even sparser." The take-away was that impact assessments for the soundscape and harbor seals were "considered to have a high level of uncertainty." The final EIS responded to the NAS critique and also addressed the scientific disputes. In particular, it added "a discussion on the strength of the underlying scientific data" to address the NAS's concerns about scientific uncertainty.

4. Federal Register Notice

In light of the determination to let the permit expire, the Secretary directed the National Park Service to "publish in the Federal Register the notice announcing the conversion of Drakes Estero from potential to designated wilderness." Drakes Bay argues that the subsequently published notice was false because Drakes Bay's continued commercial activities (under the 90-day period the decision allowed to wrap up operations) and California's retained fishing and mineral rights precluded wilderness status. Drakes Bay also argues that the notice was issued in violation of formal rulemaking regulations.

Drakes Bay lacks standing to challenge the publication of the notice. Its claimed injury arises from the Secretary's decision to let its permit expire, not the designation in the notice. Drakes Bay cannot continue its operations without a permit, regardless of how the estero is designated. We disagree with Drakes Bay's position that it has standing because "it will be necessary to vacate the unlawful notice in order for [Drakes Bay's] injuries to be ultimately redressed." Because Drakes Bay is not injured by the notice, it may not challenge the notice's purported falsity or the Secretary's compliance with rulemaking procedures.[13]

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[13] To the extent that Drakes Bay argues that the Secretary's decision was somehow tainted by the instruction that the Park Service publish the notice, the challenge still fails because the instruction was in accordance with the law. The notice was not false because, as we explained above, Drakes Estero could be designated "wilderness" despite California's reserved rights. Nor is

B. WEIGHING THE EQUITIES

Drakes Bay is not entitled to a preliminary injunction not only because it failed to raise a serious question about the Secretary's decision, but also because it has not shown that the balance of equities weighs in its favor. *Alliance for the Wild Rockies*, 632 F.3d at 1132. The district court found that, although Drakes Bay satisfied the irreparable harm prong of the preliminary injunction analysis, neither the public interest nor the equities were in its favor. When the government is a party, these last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Our review of the court's findings is for abuse of discretion, and we see none here.

The district court reasonably found that the public interest does not weigh in favor of injunctive relief. The public benefits both from the enjoyment of protected wilderness and of local oysters, and the court found no basis upon which to weigh these respective values. This factor does not tip to Drakes Bay.

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the presence of temporary non-wilderness conditions an obstacle because Park Service policy permits a wilderness designation when "wilderness character could be . . . restored through appropriate management actions." In addition, although general regulations require rulemaking for certain use terminations, 36 C.F.R. § 1.5(b), the more specific section of 1976 legislation provided that conversion to wilderness would be automatic "upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act . . . have ceased." 90 Stat. 2692.

Recognizing that Drakes Bay bears the burden in its quest for a preliminary injunction, the court's consideration of other equitable factors was also reasonable. Drakes Bay purchased the oyster farm with full disclosure, knowing that the reservation of use and occupancy was set to expire in 2012. The Department repeatedly warned the company that it did not plan to issue a new permit. Although the prospect of closing down a business is a serious hardship, the only reasonable expectation Drakes Bay could have had at the outset was that such a closure was very likely, if not certain. Closure remained a distinct possibility even after the passage of Section 124. Drakes Bay argued to the district court that it had "every reason to hope" for extension. But when parties "'anticipate[] a pro forma result' in permitting applications, they become 'largely responsible for their own harm.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002)). We see no reason to disturb the court's finding that the company's "refusal to hear the message" was an equitable factor weighing against it.

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

The majority states that, by enacting § 124, "Congress did nothing more than let the Secretary know his hands were not tied." Maj. op. at 23. I think Congress, by including the "notwithstanding" clause in § 124, intended to do more than that. In particular, it sought to override the Department of the Interior's misinterpretation of the Point Reyes Wilderness Act, Pub. L. No. 94-544, 90 Stat. 2515 (1976).

The Department had concluded, in 2005, that the Act barred issuance of a special use permit authorizing continued operation of Drakes Bay Oyster Company's oyster farm. The Department thought Congress had "mandated" that result by designating Drakes Estero, where the oyster farm is located, as a "potential wilderness addition" in the Point Reyes Wilderness Act. The Act's legislative history makes clear, however, that by divining such a mandate, the Department simply misinterpreted the Act's provisions and misconstrued Congress's intent. The Department's misinterpretation of the Point Reyes Wilderness Act prompted Congress to enact § 124 in 2009. In my view, by including a notwithstanding clause in § 124, Congress attempted to supersede the Department's erroneous interpretation of the Act.

In the 2012 decision challenged here, the Secretary nonetheless denied Drakes Bay's permit request based primarily on the very same misinterpretation of the Point Reyes Wilderness Act that Congress thought it had overridden. As a result, I think Drakes Bay is likely to prevail on its claim that the Secretary's decision is arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Because the other preliminary injunction

factors also weigh in Drakes Bay's favor, injunctive relief preserving the status quo should have been granted here.

I

To explain why I think the Interior Department (and later the Secretary) misinterpreted the Point Reyes Wilderness Act, a fairly detailed discussion of the Act's legislative history is necessary.

The events leading up to passage of the Point Reyes Wilderness Act begin in 1962, when Congress authorized creation of the Point Reyes National Seashore and appropriated funds for land acquisition within the Seashore's designated boundaries. Act of Sept. 13, 1962, Pub. L. No. 87-657, 76 Stat. 538 (1962). As part of that process, in 1965, the State of California conveyed ownership of the submerged lands and coastal tidelands within the Seashore's boundaries to the federal government. *See* Act of July 9, 1965, ch. 983, § 1, 1965 Cal. Stat. 2604, 2604. Those lands included Drakes Estero. The conveyance reserved certain mineral and fishing rights, which allowed the State to "prospect for, mine, and remove [mineral] deposits from the lands," and "reserved to the people of the state the right to fish in the waters underlying the lands." *Id*. §§ 2-3, 1965 Cal. Stat. at 2605. At the time of the State's conveyance, oyster farming was already a well-established fixture in Drakes Estero, with roots dating back to the 1930s.

In 1973, the President recommended that Congress preserve 10,600 acres within the Point Reyes National Seashore as "wilderness," under the terms of the Wilderness Act of 1964, Pub. L. No. 88-577, § 3(c), 78 Stat. 890, 892 (1964). Members of California's congressional delegation found that recommendation woefully inadequate, and soon

thereafter introduced identical bills in the House and Senate designating far larger areas of the Seashore as wilderness. In the House, Congressman John Burton introduced H.R. 8002, 94th Cong. (1975); in the Senate, Senator John Tunney introduced S. 2472, 94th Cong. (1975). H.R. 8002 is the bill that eventually became the Point Reyes Wilderness Act.

As originally proposed, H.R. 8002 and S. 2472 would have designated more than thirty-eight thousand acres as wilderness. Included within that designation was Drakes Estero, as well as most of the other submerged lands and coastal tidelands conveyed by California in 1965. The sponsors of H.R. 8002 and S. 2472 were well aware of the oyster farm in Drakes Estero. They nonetheless included Drakes Estero within the wilderness designation because they did not view the farm's operations as incompatible with the area's wilderness status. Commenting on the Senate bill, Senator Tunney left no doubt on that score, declaring, "Established private rights of landowners and leaseholders will continue to be respected and protected. The existing agricultural and aquacultural uses can continue." *Wilderness Additions--National Park System: Hearings Before the Subcomm. on Parks and Recreation of the S. Comm. on Interior and Insular Affairs*, 94th Cong. 271 (1976) [hereinafter *Senate Hearing*].

During hearings on H.R. 8002 and S. 2472, various civic, environmental, and conservation groups supported Drakes Estero's designation as wilderness. They explained in detail why neither the State's reserved mineral and fishing rights nor the oyster farm precluded such a designation. No one advocating Drakes Estero's designation as wilderness suggested that the oyster farm needed to

be removed before the area could become wilderness. *See id.* at 324-33, 344-61; *H.R. 7198, H.R. 8002, et al., To Designate Certain Lands in the Point Reyes National Seashore, California as Wilderness: Hearing Before Subcomm. on Nat'l Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 94th Cong. (1976) [hereinafter *House Hearing*], prepared statements of Jim Eaton, William J. Duddleson, Ms. Raye-Page, and Frank C. Boerger.

The comments Congress received from those who were advocating Drakes Estero's designation as wilderness stressed a common theme: that the oyster farm was a beneficial preexisting use that should be allowed to continue notwithstanding the area's designation as wilderness. For example, a representative from the Wilderness Society stated: "Within Drakes Estero the oyster culture activity, which is under lease, has a minimal environmental and visual intrusion. Its continuation is permissible as a pre-existing non-conforming use and is not a deterrent for inclusion of the federally owned submerged lands of the Estero in wilderness." *House Hearing*, prepared statement of Ms. Raye-Page, at 6. The Chairman of the Golden Gate National Recreation Area Citizens' Advisory Commission noted that the oyster-farming operations "presently carried on within the seashore existed prior to its establishment as a park and have since been considered desirable by both the public and park managers." *Senate Hearing*, at 361. He therefore recommended that specific provision be made to allow such operations "to continue unrestrained by wilderness designation." *Id.* Others observed, echoing the comments of Senator Tunney, that the proposed House and Senate bills already provided for that. *See House Hearing*, prepared statement of William J. Duddleson, at 3-4 ("H.R. 8002 would allow continued

use and operation of Johnson's Oyster Company at Drakes Estero, as a pre-existing non-conforming use."); *Senate Hearing*, at 357 ("S. 2472 would allow the continued use and operation of Johnson's Oyster Company in Drakes Estero."). A local state assemblyman succinctly summed it up this way: "Finally, I believe everyone concerned supports the continued operation of oyster farming in Drakes Estero as a non-conforming use." *Senate Hearing*, at 356.

The view expressed by these speakers--that continued operation of the oyster farm was fully compatible with Drakes Estero's designation as wilderness--was not some wild-eyed notion. It was firmly grounded in the text of the Wilderness Act itself. The Act generally bans commercial enterprise within wilderness areas, but does so "subject to existing private rights." 16 U.S.C. § 1133(c). Drakes Bay's predecessor, the Johnson Oyster Company, had existing private rights in the form of water-bottom leases issued by California that pre-dated both the passage of the Wilderness Act and creation of the Point Reyes National Seashore. The Act also generally prohibits the use of motorboats within wilderness areas, *see id.*, but the Secretary of Agriculture may permit continued use of motorboats when, as here, such use has "already become established." *Id.* § 1133(d)(1). To the extent there is any ambiguity in these provisions, the Act's legislative history makes clear that Congress believed the new wilderness-preservation system would not affect the economic arrangements of business enterprises "because existing private rights and established uses are permitted to continue." S. Rep. No. 88-109, at 2 (1963).

The only party opposed to designating Drakes Estero as wilderness was the Department of the Interior. At first, the Department took the position that none of the submerged lands and coastal tidelands conveyed by California in 1965 could be designated as wilderness, because the State's reserved mineral and fishing rights were "inconsistent with wilderness." *House Hearing*, letter from John Kyl, Assistant Secretary of the Interior, at 3. When the Department's view came under attack by those who argued that the State's reserved rights were not in any way inconsistent with wilderness, *see, e.g., Senate Hearing*, at 327-28, the Department backpedaled. It proposed placing most of the lands subject to the State's reserved rights into a new legislative classification--"potential wilderness addition"--which it had developed in connection with similar wilderness proposals. *See House Hearing*, at 11-12; *id*., letter from John Kyl, Assistant Secretary of the Interior, at 1. That designation was intended to encompass "lands which are essentially of wilderness character, but retain sufficient nonconforming structures, activities, uses or private rights so as to preclude immediate wilderness classification." S. Rep. No. 94-1357, at 3 (1976).

Four areas subject to the State's reserved rights were at issue: the coastal tidelands, Limantour Estero, Abbotts Lagoon, and Drakes Estero. The original version of H.R. 8002 designated all four areas as wilderness, not just potential wilderness additions. But in the spirit of compromise, Congressman Burton, the sponsor of H.R. 8002, agreed to amend the bill by designating those areas as potential wilderness additions, rather than as wilderness. *See House Hearing*, prepared statement of Rep. John Burton, at 2. In doing so, he made clear that all four areas were being designated as potential

wilderness additions due to California's reserved mineral and fishing rights. *See id.* He noted that, "[a]s 'potential wilderness,' these areas would be designated as wilderness *effective when the State ceeds [sic] these rights to the United States*." *Id.* (emphasis added). As so amended, H.R. 8002 was enacted as the Point Reyes Wilderness Act in 1976.

Fast forward now to 2005. Shortly before Drakes Bay's purchase of the oyster farm closed, the Park Service reiterated its view that, based on a legal analysis performed by the Interior Department, no new permits authorizing oyster farming in Drakes Estero could be issued. The Department's legal analysis concluded—bizarrely, given the legislative history recounted above—that by designating Drakes Estero as a potential wilderness addition in the Point Reyes Wilderness Act, Congress had "mandated" elimination of the oyster farm. The Department never identified anything in the text of the Act to support that view; it cited only a passage from the House Report accompanying H.R. 8002. But that passage "is in no way anchored in the text of the statute," *Shannon v. United States*, 512 U.S. 573, 583-84 (1994), and thus provides no support for the Department's interpretation of the Act.

Even taken on its own terms, however, the passage from the House Report does not support the Department's interpretation. The passage states in full: "As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, *with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status*." H.R. Rep. No. 94-1680, at 3 (1976) (emphasis added). But the oyster farm was not an

"obstacle" to Drakes Estero's conversion to wilderness status, and no one in Congress ever expressed that view. To the contrary, as discussed above, all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status.

II

With that background in mind, we can now turn to the legal issue at the heart of this appeal, which is how to construe § 124.

Everyone appears to agree that the Park Service's conclusion in 2005 that it was legally prohibited from granting Drakes Bay a special use permit prompted Congress to enact § 124. If all Congress had wanted to do was "let the Secretary know his hands were not tied," as the majority asserts, § 124 could simply have stated, as it does, that "the Secretary of the Interior is authorized to issue a special use permit . . . ." Act of Oct. 30, 2009, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932. But Congress went further and added a notwithstanding clause, so that the statute as enacted reads, "*notwithstanding any other provision of law*, the Secretary of the Interior is authorized to issue a special use permit . . . ." *Id.* (emphasis added). Our task is to determine what effect Congress intended the notwithstanding clause to have.

Given the historical backdrop against which § 124 was enacted, I think Congress intended the clause to override the Interior Department's misinterpretation of the Point Reyes Wilderness Act. Reading the clause in that fashion is consistent with the way courts have typically construed notwithstanding clauses. The Supreme Court has held that the use of such a clause "clearly signals the

drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). And we have said that the basic function of such clauses is to "sweep aside" and "supersede" any potentially conflicting laws. *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc); *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1166 (9th Cir. 2001). A notwithstanding clause often targets those laws that were the "legal sticking point" for the action Congress intends to authorize. *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1301 n.19 (11th Cir. 2010).

In this case, no conflicting laws actually prevented the Secretary from issuing a permit to Drakes Bay. Continued operation of the oyster farm is fully consistent with the Wilderness Act, and the farm's existence is therefore not an "obstacle" to converting Drakes Estero to wilderness status as directed by the Point Reyes Wilderness Act. Instead, it was the Interior Department's *misinterpretation* of the Point Reyes Wilderness Act that proved to be the "legal sticking point" here. I think the best reading of the notwithstanding clause is that Congress meant to "override" ("sweep aside," "supersede") that misinterpretation of the law when it enacted § 124. *Alpine Ridge Grp.*, 508 U.S. at 18; *Novak*, 476 F.3d at 1046; *Student Loan Fund*, 272 F.3d at 1166.

If you accept what I have said so far, only two questions remain. The first is whether Congress, having overridden the Department's misinterpretation of the Point Reyes Wilderness Act, nonetheless authorized the Secretary to rely on that misinterpretation as a basis for denying Drakes Bay

a permit. I cannot see any reason why we would construe § 124 in that fashion. Under the Administrative Procedure Act (APA), if an agency bases its decision on a legally erroneous interpretation of the controlling statute, its decision will be deemed arbitrary, capricious, or otherwise not in accordance with law. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091, 1101 (9th Cir. 2007) (involving an erroneous interpretation of a state implementation plan that had the force and effect of federal law). Thus, even without the notwithstanding clause, it would make no sense to assume that Congress authorized the Secretary to base his decision on a misinterpretation of the Point Reyes Wilderness Act. With the clause, adopting any such construction of § 124 would be entirely indefensible.

The second (and admittedly closer) question is whether the Secretary in fact based his decision on the misinterpretation of the Act that Congress intended to override by enacting § 124. The majority suggests that the Secretary based his decision instead on the Interior Department's own policies, *see* Maj. op. at 19 & n.5, 27 n.8, but I do not think the Secretary's written decision denying the permit supports that view. The Secretary's decision states that he gave "great weight" to what he called "the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness." The Secretary read that Act as expressing Congress's intention that all "obstacles" to converting Drakes Estero to wilderness status should be removed. But he erroneously deemed the oyster farm to be such an obstacle ("DBOC's commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness"), because he erroneously assumed that the oyster farm's continued operation was "prohibited by the

Wilderness Act." That in turn led him to conclude--again erroneously--that his decision to eliminate the oyster farm "effectuate[d]" Congress's intent as expressed in the Point Reyes Wilderness Act.

These are precisely the same errors of statutory interpretation the Interior Department made back in 2005. They are precisely the same errors that prompted Congress to enact § 124 in the first place. And, in my view, they are precisely the same errors Congress attempted to supersede by inserting the notwithstanding clause. Contrary to the majority's assertion, the Secretary had no authority to rely on this misinterpretation of "Congress's earlier expressed goal" because the notwithstanding clause eliminated any such authority. *See* Maj. op. at 27 n.8.

What does the majority offer in response to this analysis? Some hand waving, to be sure, but nothing of any substance. Most tellingly, the majority never attempts to argue that the Interior Department's interpretation of the Point Reyes Wilderness Act was *correct*. Nor could it make that argument with a straight face given the Act's clear legislative history, which the majority never attempts to address, much less refute. The majority thus has no explanation for Congress's inclusion of the notwithstanding clause in § 124 other than the one I have offered: that it was included to override the Department's misinterpretation of the Point Reyes Wilderness Act. The majority claims that the clause "has a clear function—to convey that prior legislation should not be deemed a legal barrier" to permit issuance. *See* Maj. op. at 20. But that reading of the clause *supports* my position because the Secretary did treat "prior legislation"—namely, the Point Reyes Wilderness Act—as a "legal barrier" to

permit issuance. As I have argued, that is exactly what the notwithstanding clause was intended to prohibit.

The majority also claims that I have not accorded the Secretary's decision the deference it is owed under the arbitrary and capricious standard, which requires us to give due regard to an agency's exercise of discretion within its sphere of expertise. *See* Maj. op. at 27 n.8. But I am not arguing here that the Secretary's decision must be set aside because it reflects faulty weighing of permissible policy factors. We would have no authority to second guess a decision of that order. What I am saying, instead, is that § 124's notwithstanding clause precluded the Secretary from basing his decision on the very misinterpretation of the Point Reyes Wilderness Act that Congress intended to override. A decision will normally be deemed arbitrary and capricious if an agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That, unfortunately, is just what the Secretary did.

In short, I would hold that Drakes Bay is likely to prevail on the merits of its APA claim. The Secretary's misinterpretation of the Point Reyes Wilderness Act, and his mistaken view that denying the permit request effectuated *Congress's* intent, were "fundamental" to his decision, rendering the decision "arbitrary, capricious, or otherwise not in accordance with law." *Safe Air for Everyone,* 488 F.3d at 1101 (internal quotation marks omitted).

III

Like the majority, I will not spend much time addressing the remaining preliminary injunction factors--irreparable harm, balance of the equities,

and the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Considered together, those factors tip in Drakes Bay's favor.

Drakes Bay will suffer irreparable injury to its business and real-property rights if a preliminary injunction is erroneously denied. *See*, *e.g.*, *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). The loss of "an ongoing business representing many years of effort and the livelihood of its [owners] constitutes irreparable harm." *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (per curiam).

The balance of equities favors Drakes Bay. The majority concludes otherwise by noting that Drakes Bay knew when it acquired the oyster farm that its permit would expire in 2012. Maj. op. at 36. But that is not the relevant consideration. Rather, the controlling consideration is that the harm Drakes Bay will suffer from the erroneous denial of a preliminary injunction far outweighs the harm the government will suffer from an erroneous grant of such relief. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137-38 (9th Cir. 2011); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002); *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986); *Roso-Lino*, 749 F.2d at 126. The government will suffer only modest harm if oyster farming's eighty-year history in the Estero continues a bit longer. But if a preliminary injunction is erroneously denied, Drakes Bay's business will be destroyed. That is all Drakes Bay must show to demonstrate that the balance of equities tips in its favor here.

Finally, the public interest favors neither side. As the district court observed, federal judges are ill equipped to weigh the adverse environmental consequences of denying a preliminary injunction against the consequences of granting such relief, or the relative interests in access to Drakes Bay's oysters as opposed to unencumbered wilderness. It is the equities that carry the day in this case, *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (when the United States is a party, equities and the public interest merge), and the equities strongly favor Drakes Bay.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY; KEVIN LUNNY, *Plaintiffs-Appellants,* v. KENNETH L. SALAZAR, in his official capacity as Secretary, U.S. Department of the Interior; et al., *Defendants-Appellees.*	No. 13-15227 D.C. No. 4:12-cv-06134-YGR ORDER Filed Feb. 25, 2013

Before: GOODWIN, WARDLAW, and MURGUIA, Circuit Judges

This is a preliminary injunction appeal.

The court grants the motion of Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore for leave to file an amici curiae response in opposition to the emergency motion for injunction pending appeal. The Clerk shall file the amici curiae opposition submitted on February 19, 2013. If these entities seek leave to file an amici curiae brief on the merits of this appeal, a separate motion is required.

The court grants appellants' request to file a response to the amici curiae opposition. The Clerk shall file the response submitted by appellants on February 21, 2013.

Appellants' emergency motion for an injunction pending appeal is granted, because there are serious legal questions and the balance of hardships tips sharply in appellants' favor. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

The court sua sponte expedites the calendaring of this preliminary injunction appeal. The Clerk shall calendar this case during the week of May 13-17, 2013 in San Francisco.

The briefing schedule established previously shall remain in effect.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DRAKES BAY OYSTER COMPANY, *et al.*; *Plaintiffs,* v. KENNETH L. SALAZAR, in his official capacity as Secretary, U.S. Department of the Interior; *et al.*, *Defendants.*	Case No.: 12-cv-06134-YGR **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

GONZALES ROGERS, United States District Court Judge:

Plaintiffs Drakes Bay Oyster Company (the "Company") and Kevin Lunny ("Lunny" and collectively, "Plaintiffs") initiated this action requesting that the Court declare void and unlawful the November 29, 2012 Memorandum of Decision of Defendant Kenneth L. Salazar, Secretary of the U.S. Department of the Interior ("Secretary"), in which he decided not to grant Plaintiffs a permit to allow for the continued operation of their oyster farm ("Decision"). Plaintiffs further ask the Court to order the Secretary to direct the National Park Service ("NPS" or "Park Service") to issue the Company a ten-year special use permit, and to enjoin the enforcement of the Decision thereby allowing the

Company to continue operating until the Court decides the merits of the lawsuit.

Plaintiffs filed their Motion for Preliminary Injunction on December 21, 2012. (Dkt. No. 32.) Defendants filed their Opposition to Plaintiffs' Motion for Preliminary Injunction on January 9, 2013. (Dkt. No. 64.) On January 16, 2013, Plaintiffs filed their Reply in Support of Motion for Preliminary Injunction ("Reply"). (Dkt. No. 79.)[1] Defendants thereafter filed an Errata and Corrected Opposition to Plaintiffs' Motion for Preliminary Injunction. (Dkt. No. 84.) The Court held oral argument on January 25, 2013. (Dkt. No. 85.)

Having carefully considered the papers, evidence, and oral arguments submitted, as well as the pleadings in this action, and for the reasons set forth below, the Court **DENIES** Plaintiffs' Motion for Preliminary Injunction. As a threshold issue, the Court must have subject matter jurisdiction over Plaintiffs' claims. The Court finds it does not have jurisdiction to review the Secretary's Decision. Moreover, even if Plaintiffs' claims could be

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[1] Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore (collectively, "Proposed Intervenors") filed a Motion to Intervene in this action. (Dkt. No. 11-1.) Proposed Intervenors filed a proposed opposition to Plaintiffs' Motion. The Court has issued herewith its Order Denying Motion to Intervene (Dkt. No. 11); and Denying Plaintiffs' Administrative Motion to Strike (Dkt. No. 83). For the reasons set forth therein, the Court has treated Proposed Intervenors' opposition brief as an amicus brief and permitted Plaintiffs to file their proposed reply.

construed to give this Court jurisdiction, based upon the record presented, Plaintiffs have not demonstrated a likelihood of success on the merits of the claims nor that the balancing of the equities favors injunctive relief.

I. BACKGROUND

A. STATUTORY BACKGROUND

In 1962, Congress created the Point Reyes National Seashore ("Seashore"), and placed it under the administrative authority of the Secretary of the Interior. Pub. L. No. 87-657, 76 Stat. 538,, (codified at 16 U.S.C. §§ 459c *et. seq.*)(1962). The Seashore's 1962 enabling legislation recognized a pastoral zone in the Seashore where existing ranches and dairy farms could continue to operate. Pub. L. No. 87-657 § 4, 76 Stat. 538, 540.

Two years later, Congress passed the Wilderness Act, which directed the Secretary of the Interior to identify the suitability of certain national park acreage for wilderness designation. 16 U.S.C. § 1132(c). Under the Wilderness Act of 1964, Congress "established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas,'" to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness." 16 U.S.C. § 1131(a). The Wilderness Act proscribes commercial enterprises in the wilderness. 16 U.S.C. § 1133(c) ("Except as specifically provided for in this chapter, and *subject to existing private rights*, there shall be no commercial enterprise and

no permanent road within any wilderness area designated by this chapter . . .") (emphasis supplied.)

In 1976, Congress enacted the Point Reyes Wilderness Act, designating 25,370 acres of the Seashore as "wilderness" under the Wilderness Act of 1964 and 8,003 acres, including Drakes Estero, as "potential wilderness." Pub. L. No. 94-544, 90 Stat. 2515 (1976); *see also* Pub. L. No. 94-567, 90 Stat. 2692 (1976). The House Committee Report accompanying Pub. L. No. 94-544 states the following regarding the potential wilderness additions:

> As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3, reprinted in 1976 U.S.C.C.A.N. 5593, 5595. The legislative history of Public Law No. 94-544 indicates that Congress considered designating Drakes Estero and surrounding areas as "wilderness," but did not do so. The Department of the Interior, in a report to the House accompanying Public Law No. 94-544, noted that Drakes Estero could not be designated as "wilderness" so long as the existing commercial oyster farming operations, as well as California's reserved fishing rights on the State tidelands in the area, remained in place. H.R. Rep. No. 94-1680, 6 (1976) reprinted in 1976 U.S.C.C.A.N. 5593, 5597. Further Congressional guidance in Public Law No. 94-567 provided that lands and waters designated as "potential wilderness" would become designated wilderness "upon publication in the Federal Register

of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased. . . ." Pub. L. No. 94-567, 90 Stat 2692 (1976).

Two years later, Congress passed a further enabling act ("1978 Act") that gave the Secretary of the Interior the authority to lease federally-owned "agricultural land" within the Seashore in perpetuity, defining "agricultural land" as "lands which were in regular use for . . . agricultural, ranching, or dairying purposes as of May 1, 1978." Pub. L. No. 95-625 § 318, codified at 16 U.S.C. § 459c-5(b). At that time, Congress recognized certain "non-conforming" uses, including oyster farming. *See* S. Rep. No. 94-1357, at 3 (1976) ("National Park Service wilderness proposals have embodied the concept of 'potential wilderness addition' as a category of lands which are essentially of wilderness character, but retain sufficient non-conforming structures, activities, uses or private rights so as to preclude immediate wilderness classification. It is intended that such lands will automatically be designated as wilderness by the Secretary by publication of notice to that effect in the Federal Register when the non-conforming structures, activities, uses or private rights are terminated."); *see also* H.R. Rep. No. 94-1680 (1976) at 6, reprinted in 1976 U.S.C.C.A.N. 5593, 5597.

Relevant here, in 2009, Congress enacted appropriations legislation entitled the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010. Pub. L. No. 111-88 § 124, 123 Stat. 2904, 2932 (2009). As part of this Appropriations Act, Section 124 provided in full:

> **Prior to the expiration on November 30, 2012** of the Drake's Bay Oyster Company's Reservation of Use

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

Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124") (emphasis supplied).[2] As referenced therein, in 2009, the National Academy of Sciences ("NAS") had published a 179-page report in 2009 entitled *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. (Declaration of Ryan Waterman in Support of Motion for Preliminary Injunction ("Waterman Decl.") (Dkt. No. 42), Attachment 4a to Ex. 1 (Dkt. No. 42-2 ["2009 NAS Report"]).)

B. FACTUAL BACKGROUND

Oyster farming in Drakes Estero began in the 1930s. (Declaration of Kevin Lunny in Support of Motion for Preliminary Injunction ("Lunny Decl.") ¶ 88 (Dkt. No. 38); *see also* Lunny Decl., Ex. 1 (Grant Deed) at ECF pp. 35-39 (Dkt. No. 38-1).) As early as 1934, the California Fish and Game Department began leasing the right to cultivate oysters in the waters of Drakes Estero and Estero de Limantour in Marin County. The Johnson Oyster Company, owned

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[2] The House version of the bill would have made issuance of the special use permit for an additional ten years mandatory--*i.e.*, the House's version read that "the Secretary of the Interior shall extend the existing authorization . . . ." H.R. 2996, 111th Cong. § 120(a) (as reported in Senate, July 7, 2009). The Senate rejected that language and the appropriations bill ultimately included the language "is authorized to issue," rather than the House's mandatory language. The House Conference Report acknowledged that the change to the language "provid[ed] the Secretary discretion to issue a special use permit to Drake's Bay Oyster Company. . . ." 155 Cong. Rec. H11871, H11900 (daily ed. October 28, 2009).

by Charles Johnson ("Johnson"), operated an oyster farm on the shores of Drakes Estero beginning in 1954. (Grant Deed at ECF p. 35.) The current-day Drakes Bay Oyster Company operates on a parcel of land which Johnson sold to the United States in 1972 for $79,200.00. (*Id.* at ECF p. 4.) The Grant Deed describes the parcel as "contain[ing] 5 acres, more or less," of beach and onshore property adjacent to Drakes Estero. (*Id.*; Declaration of Barbara Goodyear in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Goodyear Decl.") (Dkt. No. 65), Ex. 8 at ECF p. 3 (Dkt. No. 71-4).)

The Grant Deed contained a reservation of use and occupancy ("Reservation") pertinent here, which reads in full:

> THE GRANTOR RESERVES only the following rights and interests in the hereinabove described property: a reservation of the use and occupancy for a period of forty (40) years in accordance with the terms of the Offer to Sell Real Property, assigned Contract No. CX800032073, signed by the GRANTOR on October 13, 1972, accepted on October 16, 1972, and on file with the National Park Service.

(Lunny Decl., Ex. 1 at ECF p. 4; Goodyear Decl., Ex. 8 at ECF p. 3.) The Reservation allowed Johnson to continue his oyster operations until November 30, 2012. (Lunny Decl., Ex. 1 at ECF p. 8 (Grant Deed filed on November 30, 1972); Goodyear Decl., Ex. 8 at ECF p. 7.) The United States and Johnson agreed that "[u]pon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property for the herein described

purposes . . . [and a]ny permit for continued use will be issued in accordance with the National Park Service regulations in effect at the time the reservation expires." (Lunny Decl., Ex. 1 at ECF p. 19; Goodyear Decl., Ex. 8 at ECF p.18.) The agreement also provided that upon expiration of the Reservation term, or any extension by permit, the Johnson Oyster Company was responsible to remove all structures and improvements on the property within 90 days. (Lunny Decl., Ex. 1 at ECF p. 19; Goodyear Decl., Ex. 8 at ECF p.18.)

Thirty-two years later, on December 17, 2004, Lunny entered into an Asset Purchase Agreement with the Johnson Oyster Company wherein Lunny agreed to pay a purchase price of $260,000 "at the Closing" which was to occur at a later "mutually convenient" date. (Goodyear Decl., Ex. 23 (Dkt. 72-8) ["Asset Purchase Agreement"]; *see* Lunny Decl. ¶¶ 2 & 5.) The parties agreed that during the "period between the execution of this Agreement and the Closing," Lunny would have "full access to all premises, properties, personnel, books, records . . . , contracts, and documents of or pertaining to the Acquired Assets" which were defined as "rights under any Lease or Permit required to conduct the Seller's business" and specifically included "that certain Reservation of Possession Lease dated 10/12/1972, entered into by Seller and the National Park Service." (Asset Purchase Agreement ¶¶ 1, 5, 5(e) & Ex. B.)

On January 25, 2005, the Park Service provided Lunny a letter ("January 2005 Letter") attaching a copy of a memorandum (dated February 26, 2004 ["2004 Memorandum"]) from the Department of the Interior's San Francisco Field Solicitor to the Superintendent of the Seashore so

that "[b]efore [Lunny] closed escrow on the purchase," the Park Service could "make sure [he] had a copy for [his] review." (Goodyear Decl., Exs. 14 & 24 (Dkt. Nos. 71-10 & 72-9).) The January 2005 Letter indicates that the Park Service had met with Lunny during the prior week.[3]

The attached 2004 Memorandum detailed the legal history of the Seashore area and specified the Park Service's own view of its policy mandates:

> The Park Service's Management Policies clearly state that the Park Service must make decisions regarding the management of potential wilderness even though some activities may temporarily detract from its wilderness character. The Park Service is to manage potential wilderness as wilderness to the extent that existing non-confirming conditions allow. The Park Service is also required to actively

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[3] The record includes evidence that in January 2005, Lunny stated he "had been informed by [the Park Service] of its decision not to extend operating rights past 2012, and that he had a 'business plan' to recoup his investment within the remaining seven years of operating rights." (Declaration of Gordon Bennett ("Bennett") (Dkt. No. 11-2) ¶ 6, submitted in support of Motion to Intervene.) While, in an apparent attempt to undermine Bennett's credibility, Lunny submitted a supplemental declaration but does not deny making that January 2005 statement. (Declaration of Kevin Lunny in Support of Plaintiffs' Opposition to Environmental Action Committee of West Marin, *et al.*'s Motion to Intervene (Dkt. No. 41-7) ¶¶ 7-11 & Ex. 1.)

> seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation. 6.3.1 Wilderness Resource Management, General Policy.

(*Id.* at Exs. 14 & 24.) The 2004 Memorandum concluded that "the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e., the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non[-]conforming use can be eliminated." (Goodyear Decl., Ex. 14 at 3; *id.*, Ex. 24 at 4.)[4]

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[4] With Plaintiffs' Reply, Lunny claims in his rebuttal declaration that when the Company purchased the farm in December 2004, he had no knowledge that the Park Service would not allow the farm to continue after 2012, or that the Solicitor's Opinion stated that it would not issue a new special use permit at the end of the Reservation term. (Rebuttal Declaration of Kevin Lunny in Support of Motion for Preliminary Injunction ("Lunny Rebuttal Decl.") (Dkt. No. 80) ¶ 64.) However, Lunny's first declaration suggests otherwise: "In 2005, Superintendant Don Neubacher informed me that he did not intend to issue a Special Use Permit (SUP) to [the Company] at the end of the [Reservation] on November 30, 2012, due to the 1976 wilderness laws that designated Drakes Estero as potential wilderness." (Lunny Decl. ¶ 10.) Lunny does not dispute receipt of the letters from 2005 referenced herein, and the record is silent as to the closing date of the purchase.

Two months later, on March 28, 2005, the Superintendent again wrote "to reiterate our guidance to you regarding the transfer of the Johnson Oyster Company site to your family [and] . . . to ensure clarity and to avoid any misunderstanding." (Goodyear Decl., Ex. 25 (Dkt. No. 72-10).) Among other things, the letter stated that "[r]egarding the 2012 expiration date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date." (*Id.* at 2.)

In April 2008, the Company and the Park Service executed a Special Use Permit ("2008 SUP") that authorized the Company to conduct its operations on additional area adjacent to the Reservation area for purposes of: processing shellfish, providing an interpretive area for visitors, operating of well and pump areas for water supply, and maintaining of a sewage pipeline and sewage leachfield to service the Company's facilities. (Goodyear Decl., Ex. 26.) The 2008 SUP had an expiration date of November 30, 2012, which coincided with the expiration date of the Reservation. (*Id.*)

According to Lunny, in early July 2010 and pursuant to Section 124, the Company sent letters to the Secretary to apply for a ten-year special use permit to continue farm operations at the site after the expiration of the Reservation ("New SUP"). (Lunny Decl. ¶ 14; *see also* Waterman Decl., Attachment 1 to Ex. 1 at ECF pp. 11-19 (Dkt. No. 42-1).) In September of 2010, Park Service staff met with Lunny to discuss the National Environmental Policy Act ("NEPA") process and the "process and path forward until [the] existing [2008] SUP expires." (Lunny Decl. ¶ 15, Ex. 7 (Dkt. No. 39-2).) In

October 2010, the Interior Department, through the Park Service, formally began the NEPA process to analyze the environmental impacts of Plaintiffs' request. *See* 75 Fed. Reg. 65,373 (Oct. 22, 2010) ("Pursuant to [NEPA], the National Park Service is preparing an Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company Special Use Permit[.] . . . Pursuant to [Section 124], the Secretary of the Interior has the discretionary authority to issue a special use permit for a period of 10 years to Drakes Bay Oyster Company . . . ."). The Federal Register notice does not reference any statutory guidelines against which the Secretary's review of the permit under Section 124 should be evaluated.

In September 2011, the Park Service released a Draft Environmental Impact Statement ("Draft EIS" or "DEIS") for public comment. (Lunny Decl., Ex. 9; *see also* cross-reference in the Final Environmental Impact Statement ["Final EIS" or "FEIS"], Goodyear Decl., Ex. 3 (Dkt. No. 66-2 at ECF p. 16).) The Company submitted comments critical of the DEIS, and a Data Quality Complaint. (Lunny Decl. ¶¶ 17, 27 & Ex. 14.)

In December 2011, Congress directed NAS to assess the Draft EIS. H.R. Rep. No. 112-331, at 1057 (2011) (Conf. Rep.). In August 2012, NAS released its report entitled *Scientific Review of the Draft Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit*, which Lunny alleges "was highly critical of the DEIS" and determined many of its conclusions were "uncertain, exaggerated, or based on insufficient information." (First Amended Complaint for Declaratory and Injunctive Relief ("FAC") ¶¶ 89-90 (Dkt. No. 44); Lunny Decl., Ex. 11.)

By letter dated September 17, 2012, Plaintiffs' counsel sent the Secretary a letter encouraging him to make his "decision without the benefit of a Final Environmental Impact Statement" arguing that "Section 124 repeal[ed] conflicting statutes, such as NEPA." (Waterman Decl., Ex. 1 (Dkt. No. 42-1 ["Plaintiffs' 9/17/12 Letter"]).) Plaintiffs reiterated their position on November 1, 2012:

> [W]hat effect does the NPS's failure to provide you with a legally adequate FEIS have on your discretion under Public Law 111-88, § 124 (Section 124)? In fact, none, because Section 124 includes a "general repealing clause" that allows you to override conflicting provisions in other laws--including NEPA--to issue the [New] SUP.

(Proposed Intervenors' Request for Judicial Notice in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 63); Declaration of George M. Torgun in Support of Proposed Intervenors' Opposition to Plaintiffs' Motion for Preliminary Injunction, Ex. 2 (Dkt. No. 63-1) ["Plaintiffs' 11/1/12 Letter"].) [5]

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[5] The Court has been asked to take judicial notice of this document as part of the administrative record in this Administrative Procedure Act litigation. Plaintiffs did not object to the request for judicial notice, but instead argued in their reply to Proposed Intervenors' opposition that the letter is entirely consistent with their position in litigation. (*See* Dkt. No. 83-1 at 3.) Plaintiffs do not object to the authenticity of the letter, nor did they raise this at oral argument. As such, the Court **GRANTS** the request for judicial notice of Plaintiffs' 11/1/12 Letter.

On November 20, 2012, the Park Service released the Final EIS. (Goodyear Decl., Ex. 3 (Dkt. Nos. 66-70); Lunny Decl., Ex. 12.) The FEIS stated the Secretary's position that the "notwithstanding" clause in Section 124 rendered NEPA analysis unnecessary to his Decision, but that "the Department has determined that it is helpful to generally follow the procedures of NEPA." (Goodyear Decl., Ex. 3 at ECF p. 34 (Dkt. No. 66-2).) [6]

On November 29, 2012, Secretary Salazar issued the Memorandum of Decision at issue here to the Director of the National Park Service and "directed the National Park Service (NPS) to allow the [Company's] permit to expire at the end of its current term." (Goodyear Decl., Ex. 1 (Dkt. No. 65-1).) At the outset, the Decision identified two law and policy rationales: (i) the United States purchased the property with a reservation of use which expired on November 30, 2012 and explicitly advised the Company in 2004 when it purchased the business that an additional permit would not be issued; and (ii) the Company's continued operation "would violate the policies of NPS concerning commercial use . . . within potential or designated wilderness." [7]

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[6] The Draft EIS had also reinforced this point: "Although the Secretary's authority under Section 124 is "notwithstanding any other provision of law," the Department has determined that it is appropriate to prepare an EIS and otherwise follow the procedures of NEPA." (Lunny Decl., Ex. 9 at ECF p. 9.)

[7] As a result, the Secretary further directed the Park Service to: (1) "[n]otify [the Company] that both the Reservation . . . and [2008 SUP] held by [it] expire according to their terms on November 30, 2012"; (2)

(Decision at 1.) In reaching his Decision, the Secretary "personally traveled to Point Reyes National Seashore, visited [the Company], met with a wide variety of interested parties on all sides of this issue, and considered many letters, scientific reports, and other documents." (*Id.* at 2.) The Secretary next referenced the enactment of Section 124 and the Parks Service's initiation of an environmental impact statement "to analyze the environmental impacts associated with various alternatives related to a decision to permit or not to permit [the Company's] continued operations." (*Id.* at 4.) In his Decision, the Secretary stated that "SEC. 124 does not require me (or the NPS) to prepare a DEIS or an [*sic*] FEIS or otherwise to comply with [NEPA] or any other law." (*Id.*) Rather, he used the NEPA process to "inform the decision" even though NEPA, like Section 124 itself, did "not dictate a result or constrain [his] discretion in this matter." (*Id.* at 4-5.)

Additionally, the Secretary readily admitted that the "scientific methodology employed by the NPS . . . generated much controversy and ha[s] been the subject of several reports." (Decision at 5.) Further, while there was "scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope of the impacts [of] [the Company's] operations," the Secretary's position was that the draft and final impact study did support the premise that "removal of [the Company's]

"[a]llow [the Company] a period of 90 days . . . to remove its personal property . . . and to meet its obligations to vacate and restore all areas covered by the [Reservation] and [2008 SUP]"; and (3) "[e]ffectuate the conversion of Drakes Estero from potential to designated wilderness." (Decision at 1-2.)

commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment." (*Id.*) The Secretary further revealed that he had given "great weight" to the "public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness" and to "Congress's direction to 'steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.'" (*Id*. at 5, 7.)

On the same day, November 29, 2012, the Park Service notified the Company and Lunny of the Secretary's Decision. (Goodyear Decl., Ex. 2 (Dkt. No. 65-2).) Among other things, the Park Service directed the closure of the Company's operations but authorized limited commercial activities, as specified by the letter, until February 28, 2013. Plaintiffs were also informed that they had 90 days to vacate and surrender the property, remove all personal property, and repair any damage resulting from removal. (*Id.*)

On December 4, 2012, the Park Service published a notice in the Federal Register announcing the change in status of Drakes Estero from potential wilderness to designated wilderness. 77 Fed. Reg. 71826 (Dec. 4, 2012).

C. CLAIMS IN THIS LITIGATION

Plaintiffs filed suit to have the Secretary's Decision not only declared "null and void" and "set aside," but, among other relief, to "Order [the] Secretary . . . to issue [the Company] a [New] SUP," or alternatively, "to vacate the decision . . . with instructions to make a new decision." (FAC ¶¶ 25-26 & Requested Relief ¶¶ 1-4.) The legal basis for the requested relief includes Count 1 for Violations of NEPA and the Administrative Procedure Act ("APA"), alleging that "Plaintiffs' interests, including their environmental concerns, fall within

the zone of interested protected by NEPA" and the FEIS did not comply with the requirements set forth in the Code of Federal Regulations. (FAC ¶¶ 143-155.) Plaintiffs further allege that the Secretary's interpretation of Section 124 "as relieving him of his NEPA . . . obligations" was "arbitrary and capricious." (*Id.* ¶ 158.) Count 2 alleges Violation of the Data Quality Act and the APA by failing "to correct the FEIS to reflect the proposed corrections outlined" in their Data Quality Act complaint. (*Id.* ¶¶ 164-169.) Count 3 alleges Violation of the APA and Section 124 by authorizing the Park Service to publish a notice in the Federal Register converting Drakes Estero from "potential wilderness" to "wilderness," failing to consider the NAS reports, and denying the New SUP in contravention to the "plain language" of Section 124." (*Id.* ¶¶ 170-175.)[8] However, the FAC concedes that the Secretary's Decision was based on his "application of some federal laws, such as the 1965 Wilderness Act and the 1976 Point Reyes Wilderness Act." (*Id.* ¶ 173; *see also* ¶ 181 ("the Secretary's decision was made in reliance upon an arbitrary and capricious interpretation of the 1976 Point Reyes Wilderness Act, the 1972 Grant Deed and [Reservation] held by [the Company] . . . ").)

Based upon the allegations in the First Amended Complaint, Plaintiffs filed the instant motion for a preliminary injunction.

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[8] Counts Four and Five allege Fifth Amendment violations in light of the issues referenced above (FAC ¶¶ 176-185) and Count Six alleges Unlawful Interference with Agency Functions (*id.* ¶¶ 186-190).

II. STANDARDS APPLICABLE TO THIS MOTION

Federal courts exercise limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Courts are presumptively without jurisdiction until it is established by the party asserting it. *Id.* Thus, the Court must always look first to questions of jurisdiction before proceeding to the merits of a dispute.

Assuming jurisdiction is established, a party seeking a preliminary injunction bears the burden of establishing four separate factors: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in its favor; and (4) the injunction is in the public interest. *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008).

III. JUSTICIABILITY

The Court first addresses the threshold issue of whether jurisdiction exists. Defendants advance two alternative theories for the proposition that the Court lacks jurisdiction, each of which the Court addresses in turn. *First*, does "agency action" include a failure to act to issue a special use permit? *Second*, if so, does the action here fall within the exception set forth in 5 U.S.C section 701(a)(2) of the APA exempting from judicial review any agency action which is "committed to agency discretion by law"? The Court finds that, generally, courts do have jurisdiction to review an agency's *in*action, or failure to act, on a permit. However, where, as here, Congress has authorized the Secretary to act (or not act) on a specific, discrete circumstance with discretion, that particular act falls within the

exception established under Section 701(a)(2) and judicial review is precluded. On this basis, the Court declines to exercise jurisdiction. The Court explains its analysis on each theory below, but first discusses the statutory framework of the APA.

A. THE APA FRAMEWORK

Chapter 7 of Title 5 of the United States Code, popularly known as the Administrative Procedure Act or APA (5 U.S.C. §§ 701-706 ("Sections 701-706")), confers jurisdiction upon courts to review the claim of "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Section 702 (entitled "Right of review"). Unless a statute provides a private right of action, courts may only review "**final agency action** for which there is no other adequate remedy." *Section 704* (entitled "Actions reviewable") (emphasis supplied); *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004). In this context, to the extent agency action is reviewable, "[t]he reviewing court" is charged with deciding "all relevant questions of law [and] interpret[ing] constitutional and statutory provisions." Section 706 (entitled "Scope of review"). Section 706 mandates the court to "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency actions, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Sections 706(1), 706(2)(A). The section does not permit the reviewing court to make the policy decisions nor to instruct an agency to make a particular discretionary choice. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) ("The APA does not allow the court to overturn

an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts.").

Notwithstanding the foregoing, a carve-out exists in Section 701(a) which specifies that the "chapter applies . . . *except* to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[9] Section 701 (entitled "Application; definitions") (emphasis supplied). The facial inconsistency between this section which, on the one hand, prohibits judicial review of actions "committed to agency discretion" under Section 701(a)(2), and on the other hand, a court's authority to review agency actions under an "abuse of discretion" standard--as set forth in Section 706(2)(A)--has caused much confusion, and is explained in Section III.C. *infra*. Here, because Plaintiffs do not have a private right of action, the APA is the only basis upon which jurisdiction can exist.

B. FIRST GROUND: AN AGENCY'S FAILURE TO ACT MAY CONFER JURISDICTION

The Secretary urges that his Decision to allow the Reservation to expire by its own terms and not to issue a New SUP is not "agency action" and is therefore outside of the APA's scope of review. Plaintiffs urge the Court to consider the effect of the Decision, rather than its form, in determining whether the Decision is reviewable. Plaintiffs also note the Decision included an affirmative order to wind down the Company's operations and on that basis could be considered "action." (Reply at 2.) The Court finds that, in general, a decision not to issue a

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[9] Neither party suggests Section 701(a)(1) applies here.

special use permit constitutes "agency action" under the APA.

First, the plain language of the APA supports this construction. "Agency action" is defined in the APA as including "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) ("Section 551(13)"), cross-referenced by Section 701(b)(2). As noted therein, an agency action is defined both in affirmative terms (a rule, order, license, sanction, relief, or the equivalent thereof) and in negative terms (the denial of the same or the failure to act on the same). Although a "special use permit" is not specifically listed, the included term "license" is further defined in Section 551(8) as including "the whole or a part of an agency permit . . . or other form of permission." Thus, action relating to the failure to issue a permit falls within the explicit terms of the APA generally.

Second, caselaw is in accord. In *Her Majesty the Queen in Right of Ontario v. U.S. Environmental Protection Agency*, the court addressed the justiciability of whether the EPA had "any present obligation to take action under section 115 of the Clean Air Act" and affirmatively to "set in motion section 115's international pollution abatement procedures." 912 F.2d 1525, 1527 (D.C. Cir. 1990). There, the controversy centered on whether *letters declining* to take action based upon the EPA's interpretation of section 115 could be deemed "final agency action" subject to review. *Id.* at 1530-31. The court held that the issue was reviewable because the letters were "'sufficiently final to demand compliance with its announced position.'" *Id.* at 1531 (internal citations omitted). Jurisdiction would not have existed if the letters had communicated a tentative

position. Where decisions are not final, "judicial intervention may 'den[y] the agency an opportunity to correct its own mistakes and to apply its expertise . . . lead[ing] to piecemeal review which at the least is inefficient and . . . might prove to have been unnecessary." *Id.* (citing *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980)) (first alteration in original). Here, the Decision communicates a final position--no doubt remains as to the Secretary's Decision to allow the Reservation to expire and not issue the New SUP.

Defendants' reliance on *Norton v. Southern Utah Wilderness Alliance* ("*Norton*") on this specific proposition is misplaced and does not compel a different result. 542 U.S. 55 (2004). While the Supreme Court did not find jurisdiction in *Norton*, it did not hold that an agency's failure to act on a request for a permit was not reviewable. Rather, the Court held the allegations of the agency's failures to act did not relate to specific, discrete actions and therefore, on that basis, were not reviewable.[10] The Court began with the basic premise that judicial review under the APA "insist[s] upon an 'agency action.'" *Id.* at 62. Congress defined "agency action" to include an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Section 551(13). With respect to a "failure to

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[10] Respondents in that case alleged the Bureau: (i) violated its non-impairment obligation under the Wilderness Act by allowing degradation in certain wilderness study areas; (ii) failed to implement provisions of its own land use plans relating to off-road vehicles, and (iii) failed to determine whether a supplemental NEPA study should be undertaken in that regard. *Norton*, 542 U.S. at 60-61.

act," the Court held that it was "properly understood as a failure to take an *agency action*-that is, a failure to take one of the agency actions (including their equivalents) earlier defined in [Section] 551(13)" or, put differently, the failure to take limited, discrete action. *Norton*, 542 U.S. at 62-63.[11] Thus, the Supreme Court found that the action at issue must concern "discrete" conduct and not "broad programmatic attack[s]." *Id.* at 64 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U. S. 871 (1990)).[12] On that

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[11] *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d. 1093 (D.C. Cir. 1970), on which Plaintiffs relied, is in accord. That case arose after the Department of Agriculture failed to take any action on petitioners' request that it issue certain notices of cancellations related to pesticides. *Id.* at 1095.

[12] The *Norton* Court also addressed the impact of the "failure to act" analysis under a claim based upon Section 706(1) specifically. *Norton*, 542 U.S. at 63-65. For purposes of this Motion, the parties argue that Section 706(1) does not apply. (Opp. at 13; Reply at 3.) However, the affirmative relief requested in the FAC and other portions of Plaintiffs' Reply suggest Plaintiffs believe otherwise. (FAC ¶ 25 (referencing Section 706(1) and "compel[ling] agency action unlawfully withheld") & Requested Relief ¶ 3 ("[o]rder Secretary Salazar . . . to direct NPS to issue to DBOC a 10-year SUP); *see also* Reply at 3 (arguing the definition of "agency action" is satisfied under *Norton*).) The Court notes that a Section 706(1) claim to compel action only allows a court to compel that which an agency is "legally *required*" to do, such as would be achieved historically through writs of mandamus. *Norton*, 542 U.S. at 63. Given Plaintiffs' wholesale failure to make any showing for a mandatory order compelling action under Section 706(1), the Court

particular basis, the Court held that the alleged failures to act were not subject to review under the APA. *Id.* at 68-71. [13]

Thus, based upon this analysis, the Court concludes a failure to issue a special use permit may confer jurisdiction.

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finds that Plaintiffs concede that they would not be successful on the merits in this regard.

[13] Defendants also rely on *Hells Canyon Preservation Council v. U.S. Forest Servc.*, 593 F.3d 923 (9th Cir. 2010). There, the Ninth Circuit addressed, and rejected, plaintiffs' request that the court review the Forest's Service's "ongoing failure to act" by refusing to close a trail in the Hells Canyon Wilderness area to motorized use under Section 706(1) of the APA. *Id.* at 932, 934. The court affirmed the *Norton* analysis limiting review to discrete actions only, but focused and combined its analysis on the second element required under *Norton* that the action being "compelled" also be one the agency is "required to take." *Id.* at 932-33. In that case, while plaintiffs' request could be considered "discrete" in a vacuum, the practical effect of plaintiffs' request would have required the court to compel the Forest Service to disregard boundaries for the wilderness area established over 30 years prior and substitute it with those which plaintiffs themselves were advocating. *Id.* at 932-33. The court held that the action was framed as an "end run around" Section 706(2) requiring the court to review the Forest Service's boundary determination under an "arbitrary and capricious" standard, which itself was a time-barred claim. *Id.* at 933.

C. SECOND GROUND: EXEMPTION FROM JUDICIAL REVIEW UNDER SECTION 701(a)(2)

Defendants contend that *even if* the Secretary's Decision could be construed as "action," Section 701(a)(2) of the APA exempts from judicial review any agency action "committed to agency discretion by law." For the reasons set forth below, the Court agrees that the exclusion applies here.

As a starting point, courts have interpreted Subsection 701(a)(2) to exclude from review "agency actions" that fall within one of two categories, either those actions where: (i) a court has no meaningful standard against which to judge the exercise of discretion and therefore no law to apply; or (ii) the agency's action requires a complicated balancing of factors peculiarly within the agency's expertise. *Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of U.S. Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008); *see Heckler v. Chaney,* 470 U.S. 821, 830 (1985) ("Congress has not affirmatively precluded review" but review cannot be had "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"--*i.e.*, law commits "decisionmaking to the agency's judgment absolutely"). The Supreme Court has held that construction of Section 701(a)(2) is consistent with Section 706 to the extent that "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830.

Ninth Circuit authority controls the analysis. In *Ness Inv. Corp. v. U.S. Dept. of Agriculture, Forest Service*, plaintiffs sued the Forest Service for denying an application for a special use permit. 512 F.2d 706,

711-12 (9th Cir. 1975). Noting confusion between the provision of the APA *precluding* review of agency action "committed to agency discretion by law" (Section 701(a)(2)) and the provision *permitting* review of agency action found to be "an abuse of discretion" (Section 706(2)(A)), the Ninth Circuit held: "(1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency." *Id.* at 712, 715. The court further held that the statute at issue there authorized the Forest Service to grant or deny the issuance of the special use permit and provided "no statutory restrictions or definitions *prescribing precise qualifications* for permittees." *Id.* at 715 (emphasis supplied). As such, the decision was "patently . . . left to the secretary or his delegate to answer . . . [as] [t]he statute is, with respect to the proper recipient of a special use permit, drawn in such broad terms that there is no law to apply." *Id.*

Plaintiffs contend that *Ness* has been superceded by *KOLA, Inc. v. United States*, 882 F.2d 361 (9th Cir. 1989) wherein the Ninth Circuit did exercise jurisdiction regarding a special use permit. The Court disagrees with Plaintiffs' reliance on *KOLA*. Unlike the court in *Ness*, the *KOLA* court had available meaningful standards upon which to evaluate the permit at issue. In that case, the Forest Service had promulgated "precise qualifications" not existing at the time *Ness* was decided. *KOLA*, 882 F.3d at 363. With these guidelines, the Ninth Circuit held that courts, moving forward, could inquire as to

whether the Forest Service properly considered the promulgated factors. *Id.* at 364 (citing *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 813-14 (9th Cir. 1987)). For our purposes here, *KOLA* does not change the circumstances that existed in *Ness*, namely the lack of formal guidelines, nor did it change that fundamental holding.[14]

Here, the record demonstrates that Congress afforded the Secretary discretion to make his Decision without sufficient meaningful standards for the Court to review the Decision within the confines of the APA. First, the Court finds that the Secretary's authority to issue the New SUP stemmed from Section 124. The express language and legislative history of Section 124 evidence Congress' intent to grant the Secretary complete discretion on the issue of whether to grant the Company the New SUP. The legislative history reveals that Congress

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[14] The statute evaluated in *Ness,* 16 U.S.C. section 497*,* provided broadly that "[t]he Secretary of Agriculture is authorized, under such regulation as he may make and upon such terms and conditions as he may deem proper," to permit specific uses and occupancy of land and prohibited the Secretary from excluding the general public from full enjoyment of the natural forests. By contrast, the regulations enacted after *Ness,* 36 C.F.R. sections 251.54-251.56, included a detailed proposal process for special use permits requiring specific information about the applicant and proposed uses and a response. It also stated that an authorized officer (i) "will" perform certain assessments and make specific determinations, and (ii) may deny such applications if certain determinations were made. Plaintiffs have failed to establish that any similar applicable regulations exist here.

considered, and rejected, a mandate requiring the Secretary to extend the permit. *See supra* n.2 (rejecting language that the Secretary "shall extend the existing authorization" and instead providing him "discretion to issue a special use permit to Drakes Bay Oyster Company"). Congress did not include any significant restriction: it acknowledged action could occur prior to the expiration of the then-existing Reservation--that is, before November 30, 2012. Otherwise, it granted authority "notwithstanding any other provision of law." The authority did not extend to any other permit, company, or "to any location other than Point Reyes National Seashore," nor did it comprise part of any comprehensive statutory scheme with specific requirements. *See* Section 124. To the contrary, it was created as part of an appropriations measure for a single permit to a single company at single location under terms previously defined. The only guidance included was for the Secretary to "take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in the Point Reyes National Seashore *before modifying* any terms and conditions of the extended authorization." *See* Section 124 (emphasis supplied).

Plaintiffs argue that Section 124's "notwithstanding any other provision of law" language does not confer complete discretion, but rather, operates unilaterally. More precisely, Plaintiffs argue that the Secretary was only authorized *to issue* the permit "notwithstanding any other provision of law," but the same did not apply for a denial. (Reply at 5; Mot. at 15.) Plaintiffs' reliance on *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991) for this proposition is meritless. That case simply holds that a court must look carefully at

Congressional intent--nothing more. The Court agrees that when evaluating the limits of a "notwithstanding any other provision of law" phrase, courts must look to the entire statutory context. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1168 (9th Cir. 2007) (notwithstanding clause must "tak[e] into account the whole of the statutory context in which it appears") (internal citation omitted).

Here, the statutory context affords complete discretion. Discretion, by its very nature, affords the Secretary myriad outcomes. Plaintiffs have failed to provide any evidence of Congressional intent to the contrary.

Second, Section 124 provides the Court with "no meaningful standard" for the Court to apply in reviewing the Decision not to issue a New SUP, and thus, the Court has no basis upon which to review adequately the Decision. *Ctr. for Policy Analysis on Trade & Health (CPATH)*, 540 F.3d at 944-45; *Heckler*, 470 U.S. at 830. Even Plaintiffs, who contend Defendants were not excused "from complying with laws they would otherwise be required to obey," cannot identify the precise requirements against which the Court should review the matter. In their Reply, Plaintiffs refer to 36 C.F.R. sections 1.6 ("Section 1.6") and 5.3 ("Section 5.3")[15] as "regulations providing standards governing

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[15] Section 5.3 merely states that a permit must be obtained before engaging in a business in a park area: "[e]ngaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized

permit decisions." But, unlike the regulations promulgated *post-Ness*, the referenced provisions govern permit decisions generally and are not enacted as part of a statutory scheme under Section 124. Plaintiffs vaguely state in their Motion that Section 1.6(d) required the Secretary to provide a "written finding" of the basis for denial, including any adverse impact to the generic factors specified in subsection 1.6(a) noted below.[16] (Mot. at 16.) However, Plaintiffs never identify how the Secretary's Decision was deficient, nor does their Requested Relief in the FAC seek written clarification of his Decision. See Section 1.6(d).

Third, Plaintiffs' own conduct confirms that the plain meaning of Section 124 provided the Secretary with discretion. *Twice* Plaintiffs urged the Secretary to act without reference to a Final EIS because it no longer had any bearing on the issue:

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under special regulations applicable to a park area, is prohibited." Plaintiffs do not establish how this regulation provides any standard by which to review the Secretary's decision.

[16] Section 1.6(a) provides generally that: "[w]hen authorized by regulations set forth in this chapter, the superintendent may issue a permit to authorize an otherwise prohibited or restricted activity or impose a public use limit. The activity authorized by a permit shall be consistent with applicable legislation, Federal regulations and administrative policies, and based upon a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted."

"Section 124 includes a 'general repealing clause' that allows you to override conflicting provisions in other laws--including NEPA--to issue the [New] SUP." (Plaintiffs' 11/1/12 Letter at 2.) Moreover, Plaintiffs declared that "Section 124 permits you [the Secretary] to grant [the Company] a 10 year SUP even though NPS cannot provide a legally adequate Final EIS by November 30, 2012." (Plaintiffs' 9/17/12 Letter at 3.)

Fourth, the mere existence of NEPA does not change the analysis. At least three circuits have found that "NEPA cannot be used to make indirectly reviewable a discretionary decision not to take an enforcement action where the decision itself is not reviewable under the APA or the substantive statute. 'No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.'" *Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 102-03 (1st Cir. 2012) (quoting *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980); *accord Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1123 (10th Cir. 2009).).

Finally, while never addressing adequately the issue of "meaningful standards," Plaintiffs argue that the Court should address four alleged misinterpretations of law. Namely, that Defendants misinterpreted: (1) the 1976 Point Reyes Wilderness Act by concluding that granting the New SUP under Section 124 would violate the act; (2) the 1978 Act by not construing it broadly enough to cover oyster farming; (3) the 1976 Act as evidencing an intent to convert Point Reyes National Seashore to wilderness; and (4) the applicability of NEPA. (Mot. at 12-15.) None of these are specific to the standards for *issuing*

the New SUP itself under Section 124, and consequently, are not appropriate for judicial review.

As Congress envisioned, unless a court can *meaningfully review* the specific manner in which an agency must act, not dictating therein the conclusion the agency must reach, review under the APA is unavailable. Here, because Section 124 sought to address one specific special use permit for one specific business on a specific timeframe, the Secretary was afforded the discretion to decide whether to issue the permit and judicial review is not authorized.

IV. AVAILABILITY OF INJUNCTIVE RELIEF

While the Court has found that jurisdiction does not exist, for the reasons set forth *supra*, the Court further finds that, based on this record, injunctive relief would not be available in any event. The Court begins with the premise that a preliminary injunction is an "extraordinary and drastic remedy," and never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). Thus, a plaintiff seeking a preliminary injunction bears the burden of establishing four separate factors: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in its favor; and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20. "'[S]erious questions going to the merits' [combined with] a balance of hardships that tips *sharply* towards the plaintiff can support issuance of a preliminary injunction, *so long* as the plaintiff also shows that there is a likelihood of irreparable injury *and* that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis supplied). A "serious

question" is one on which the plaintiff "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software. Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). As a result, an injunction serves as "a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. The Court reviews each of the elements required to obtain a preliminary injunction.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

If the Court had jurisdiction, Plaintiffs would have to demonstrate the likelihood of success under a *Section 706(2)* analysis requiring a finding that Secretary's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See S.E.C. v. Small Bus. Capital Corp.*, No. 12-CV-03237 EJD, 2012 U.S. Dist. LEXIS 178392, 2012 WL 6584953, at *1 (N.D. Cal. Dec. 17, 2012) ("Procedurally speaking, 'a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint.'" (quoting *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir.1994)). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "In conducting an APA review, the court must determine whether the agency's decision is 'founded on a

rational connection between the facts found and the choices made . . . and whether [the agency] has committed a clear error of judgment.' 'The [agency's] action . . . need only be a reasonable, not the best or most reasonable, decision.'" *River Runners for Wilderness*, 593 F.3d at 1070 (internal citations omitted). As detailed above, Plaintiffs assert multiple causes of action requesting that the Court order the Secretary to issue the special use permit and overturn the Secretary's Decision to deny the issuance of a New SUP to replace the lapsed Reservation. Based upon this record, the Court does not find that Plaintiffs can show a likelihood of success under a Section 706(2) standard.[17]

First, the Secretary's rationale, though controversial, had a basis in law and policy, showed a "rational connection" between the choices made, and was not "so implausible" that differences in opinion could not account for the result. The Secretary's

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[17] Plaintiffs also claim that Defendants failed to comply with 36 C.F.R. section 1.5 by filing a false notice announcing the closure of the Company. Plaintiffs have not shown how the notice can be held patently false, where the Defendants merely announced the legal termination of the Company's right to operate, and Public Law No. 94-567 provided that a notice in the Federal Register would be sufficient to change a designation from potential wilderness to wilderness. *See id.* §§ 1(k) & 3 ("All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness."). The notice is not "false" simply because the Company had not vacated the property.

Memorandum of Decision identified, in pertinent part, policy considerations upon which he based his decision:

> I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.
>
> In enacting that provision, Congress clearly expressed its view that, but for the nonconforming uses, the estero possessed wilderness characteristics and was worthy of wilderness designation. Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when "all uses thereon prohibited by the Wilderness Act have ceased." The [Company's] commercial operations currently are the only use of the estero prohibited by the Wilderness Act. Therefore, [the Company's] commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness.

(Decision at 5-6.)

Second, the Secretary did not violate the private right of use which had existed for 40 years but considered the explicit terms of the conveyance from the Johnson Oyster Company to the United States and the subsequent purchase by the Company:

> Since the [Reservation] and [2008] SUP allowing [the Company's] commercial operations in the estero will expire by

> their own terms, after November 30, 2012, [the Company] no longer will have legal authorization to conduct those operations, and approximately 1,363 acres can become designated wilderness.

(*Id.* at 6.) The Secretary further articulated that the Superintendent of the Point Reyes National Seashore informed the Company in early 2005 that the Park Service did not intend to issue any new permit beyond the expiration in 2012. (*Id.* at 3-4.)

Third, the Secretary explicitly recognized the "debate" and "scientific uncertainty" regarding the impact of the Company's operations on "wilderness resources, visitor experience and recreation, socioeconomic resources and NPS operations." (*Id.* at 5.) While noting that both the Draft EIS and the Final EIS suggested that the removal of the Company's business operations would have a beneficial impact on the environment, the Secretary emphasized his Decision was "based on the incompatibility of commercial activities in the wilderness and not on the data that was asserted to be flawed." (Decision at 5 n.5.) He determined that the uncertainties regarding the impact were "not material to the legal and policy factors that provide the central basis for [his] decision." (*Id.* at 5.) [18]

Third, Plaintiffs strain credulity to argue that the Secretary's interpretation of Section 124 to afford

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[18] The Court notes the 2009 NAS Report not only affirmed the same uncertainty, but cautioned that the associated costs to resolve the debate could be significant. (2009 NAS Report (Dkt. No. 42-2) at ECF p. 101 ("there is no scientific answer to the question of whether to extend the [Reservation] for shellfish farming").)

discretion and not require compliance with NEPA is "arbitrary and capricious" when they themselves made the urged the same interpretation--not once, but twice.

Plaintiffs have argued that the rationale in the Secretary's Memorandum is faulty, but none of their arguments demonstrate why the Court should ignore the Secretary's explicit declaration of the policy considerations for his Decision. As discussed above, Section 124 contains no factors or considerations upon which the Secretary was to base his Decision, other than to consider the 2009 NAS Report in the event of a modification. Given the content in the Secretary's Decision, the Court would have to find that his consideration of the goals of the Wilderness Act was not legally proper or was in contravention to the law. Further, the Court would be forced to ignore Congress' statement that "those lands and waters designated as potential wilderness additions [were to] be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." H.R. Rep. No. 1680, H.R. REP. 94-1680, 3, 1976 U.S.C.C.A.N. 5593, 5595. Even a plain meaning interpretation of the phrase "potential wilderness" suggests on its face the appropriateness of full wilderness as the ultimate goal.

Finally, the Court notes that Plaintiffs have emphasized throughout their briefs Defendants' alleged commission and admission of "scientific misconduct." At best, the record before the Court is mixed with competing expert declarations, does not warrant injunctive relief, and cannot be resolved at this stage. Despite the Secretary's express statement that his Decision was not based on flawed data in the

Final EIS, Plaintiffs assume that he did rely on false statements and did not ensure that all previously identified misconduct had been corrected. (Mot. at 18.) However, even the NAS itself recognized that policy considerations, not science, controlled the ultimate Decision:

> After evaluating the limited scientific literature on Drakes Estero . . . , there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current . . . [levels of production and operational practices.] . . . Importantly from a management perspective, lack of evidence of major adverse effects is not the same as proof of no adverse effects nor is it a guarantee that such effects will not manifest in the future. A more definitive understanding of the adverse or beneficial effects cannot be readily or inexpensively obtained[.] . . .
>
> *The ultimate decision* to permit or prohibit a particular activity, such as shellfish farming, in a particular location, such as Drakes Estero, necessarily requires *value judgments* and tradeoffs that *can be informed, but not resolved, by science*. . . . Because stakeholders may reasonably assign different levels of priority or importance to these effects and outcomes, there is no scientific answer to the question of whether to extend the [Reservation] for shellfish farming. Like other zoning and land use questions, *this issue will be resolved by policymakers charged with*

> *weighing the conflicting views and priorities of society as part of the decision-making process.*

(2009 NAS Report at ECF pp. 100-101 (emphasis supplied).)

For all these reasons, the Court finds that even if jurisdiction existed, Plaintiffs cannot establish that the Secretary's refusal to issue the New SUP was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law such that they would ultimately be successful on the merits of their claim.

B. IRREPARABLE HARM

The Court next considers whether the party seeking such interim relief is likely to suffer irreparable harm if an injunction does not issue prior to trial on the merits. *Winter*, 555 U.S. at 20. Generally, the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (internal citation and quotations omitted). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Id.* "[A]lthough some injuries may usually be irreparable and thus a likelihood of irreparable injury easily shown, the plaintiff must still make that showing on the facts of his case and cannot rely on a presumption to do it for him." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (citing *Winter* and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)).

Plaintiffs argue that they will suffer irreparable harm in the absence of a preliminary injunction because their oyster crop will be destroyed by premature removal of oysters from Drakes Estero, future crops will be destroyed due to inability to undertake regular planting activities and sustain the normal oyster growth cycle, and the business itself will be destroyed by requiring the Company to remove its equipment and lay off its workers. Plaintiffs further argue that injury to their business, including loss of business good will, customers, and reputation, constitute irreparable harm. Finally, Plaintiffs contend that, in the absence of interim relief, they will lose a unique, irreplaceable interest in real property.

Ordinarily, lost revenue does not establish irreparable harm. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). Similarly, courts have denied injunctive relief where the facts disclose that loss of business goodwill can be remedied by money damages. *See id.* at 1202 (evidence of loss of revenue, property value, and goodwill did not establish irreparable harm); *see also OG Int'l, Ltd. v. Ubisoft Entm't*, C 11-04980 CRB, 2011 U.S. Dist. LEXIS 124020, 2011 WL 5079552, at *10 (N.D. Cal. Oct. 26, 2012) (finding in trademark action that customers and business goodwill "at least in theory may be compensated by damages" and therefore weigh against a claim of irreparable harm).

More often, however, courts find that intangible business-related injury, such as loss of customers and business goodwill can be difficult to valuate and *may*, in some instances, constitute irreparable harm. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (injury to goodwill and ongoing

marketing efforts established irreparable harm); *Stuhlbarg Int'l Sales Co., Inc. v John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) (loss of goodwill resulting from failure to fill customer orders would result in irreparable harm). Indeed, the Ninth Circuit has stated that "[t]he threat of being driven out of business is sufficient to establish irreparable harm." *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). Evidence of such a threat must be adequate and must be causally connected to the alleged wrongdoing. For example, in *American Passage Media,* the court held that evidence of past losses and forecasts of future losses, standing alone, were insufficient to show that the company was "threatened with extinction." *Id.* at 1474; *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984)(evidence of loss of goodwill and customers was speculative and did not support injunctive relief).

Loss of an interest in real property may also be considered irreparable harm since the unique nature of real property makes a damages remedy inadequate. *See, e.g., Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 756 (2011) (in action under federal housing law, affirming grant of preliminary injunction to stop eviction from apartment complex); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988) (affirming injunction to prevent foreclosure on orchard property). Nevertheless, expenses arising out of the loss of real property rights do not automatically establish irreparable harm. *See Goldie's Bookstore*, 739 F.2d at 471 (in action challenging statute denying stay of eviction from premises upon expiration of lease,

damages sustained as a result of having to remove business from premises was mere financial injury and would not constitute irreparable harm).

In the present case, Plaintiffs' claimed loss of current and future oyster crops would generally be compensable by money damages. Indeed, Plaintiffs' evidence on these points consists mainly of detailing the monetary value of the lost crops. (Lunny Decl. ¶¶ 32-44.) Plaintiffs have not offered evidence or argument indicating that they could not, "at a later date, in the ordinary course of litigation" recover money damages for such losses.[19] Plaintiffs also detail the cost, effort and difficulty of removing the oyster racks and other personal property from the site, ultimately arguing that it is economically and logistically infeasible to do so in the time required. (Lunny Decl. ¶¶ 46-68.) However, the expense and difficulty of removing the trappings of the business here, while inconvenient, are generally a matter of money lost rather than irreparable harm. Moreover, Plaintiffs fail to address why expense and difficulty, in and of themselves, are reasons that support an injunction pending an entire litigation.

More difficult to valuate, however, is the damage to the business itself. Plaintiffs offer evidence that they will face a gap in production down the line if they are unable to plant oyster and clam

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[19] The Court notes, however, that Plaintiffs have not sought an award of money damages in their First Amended Complaint, nor is it clear that money damages could eventually be awarded here. *See generally* 5 U.S.C. § 702 (APA waives sovereign immunity for relief other than money damages); 28 U.S.C. § 2680(a) (Federal Tort Claim Act exempts claims based upon discretionary functions).

"seed" now. (Lunny Decl. ¶43.) They indicate that the immediate shutdown, along with the later gap in production, would prevent them from effectively resuming operations, destroying their business. (*See* Lunny Decl. ¶¶ 42-44, 69.) Likewise, the loss of Plaintiffs' rights with respect to the real property itself is not otherwise remediable. These injuries support a finding that irreparable harm is likely.

The Secretary argues that whatever irreparable harm is shown here should be weighed against the fact that the Company has known since it acquired the Reservation that the right to continue operations expired on November 30, 2012, with no guarantee of an additional special use permit. They argue the irreparable harm of which the Company complains was a foreseeable consequence of its acquisition of Johnson's assets in 2004 and not the result of some new action by the Secretary or the Park Service. The Secretary's arguments are more a reflection of his view of the merits or balancing of the equities than evidence affecting the existence of irreparable harm.

In sum, the Court finds that Plaintiffs have made a sufficient showing of irreparably harm in the absence of injunctive relief.

C. BALANCE OF EQUITIES AND CONSIDERATION OF THE PUBLIC INTEREST

In deciding whether to grant an injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief . . . pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal citations and quotations omitted). "The assignment of weight to particular harms is a matter for district

courts to decide." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).

Plaintiffs argue that the balance of equities favors them because Defendants will not be harmed by maintaining the status quo and allowing an oyster farm that has been operating for nearly eighty years to continue, while Plaintiffs will suffer the total destruction of their business. Plaintiffs further contend that, because Defendants did not act to prevent the transfer of the Reservation to the Company in 2004, no evidence of any exigency in removing the oyster farm exists now. Although Plaintiffs never explain how the Secretary could have so acted given the express Reservation in the Grant Deed and Defendants' determination that they were not required to approve the sale from Johnson to the Company.

Looking more broadly, Plaintiffs argue that the public interest favors an injunction in three ways: (1) it maintains the status quo and would avoid loss of jobs and housing for the Company's employees and their families; (2) an injunction would avoid the adverse impacts to water quality and the ecosystem associated with removing the oysters and equipment of the oyster farm[20]; and (3) the public benefits from maintaining a local landmark, a major

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[20] (*See* Declaration of Scott Luchessa in Support of Motion for Preliminary Injunction ¶¶ 7-19 (Dkt. No. 34); Declaration of Richard Steffel in Support of Motion for Preliminary Injunction ¶¶ 6-12 (Dkt. No. 37); Declaration of Robert Abbott in Support of Motion for Preliminary Injunction ¶¶ 5-13 (Dkt. No. 48); Rebuttal Declaration of Scott Luchessa in Support of Motion for Preliminary Injunction ¶ 20 (Dkt. No. 79-2).)

oyster supplier, and the last oyster cannery in California.

Defendants counter that the equities do not favor injunctive relief. Defendants maintain that achievement of full wilderness status for Drakes Estero has been an express goal Congress defined for more than 36 years, and should not be delayed further, especially where the purchase of the property expressly envisioned a *terminable* reservation of use. They argue Plaintiffs have been permitted to carry on a non-conforming use for many years and were on notice of the impending expiration prior to their purchase in 2005. The Proposed Interveners also offered declarations regarding their own constituents' public interest in eliminating the non-conforming use. Congress' long-standing legislation and goals for the area indicate a strong public interest in bringing the land to wilderness status and thus the highest protection afforded to federal lands. *Cf. Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382, 1382-83 (9th Cir. 1977) (balancing of harms was an abuse of discretion where court weighed severe economic hardship to the tuna fishing industry imposed by the operation of the Marine Mammal Protection Act but failed to consider the public interests reflected in passage of the Act).

The Secretary further argues that the public interest favors closing down the Company without further delay because the oyster farm has negative environmental consequences such as providing a habitat for invasive and non-native species, with adverse effects on native ecosystems. (Declaration of Brannon Ketcham in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Ketcham Decl.") ¶¶ 15, 18 (Dkt. No. 64-2).) The Secretary acknowledges that the noise

associated with the removal of the oyster racks will create short-term impacts. (Declaration of Dr. Kurt M. Fristrup in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ¶¶ 3-7 (Dkt. No. 64-3); Ketcham Decl. ¶ 38.) However, he argues that those short-term negative impacts will be minor and offset by the benefits of full wilderness protection.

Finally, given that the decision is one in equity, Defendants urge the Court to consider that the California Coastal Commission has issued cease and desist orders to the Company for alleged violations including the cultivation of Manila clams in harbor seal protected areas, boat transit in restricted areas, and unpermitted discharge of marine debris. (Declaration of Cicely Muldoon in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 28 (Dkt. No. 64-1); Goodyear Decl., ¶ 35 & Ex. 34.)

In balancing the equities, the Court, on the one hand, recognizes that Plaintiffs will suffer significant costs including the unfortunate impacts on the Company's employees and their families from loss of their jobs and their living quarters on the oyster farm. The close of any business frequently brings hardship. The Court weighs this consideration against Plaintiffs' ability and/or own failure to conduct due diligence prior to its purchase from Johnson, their knowledge of the Park Services' intention to allow the Reservation to lapse in November 2012, and the Company's failure to prepare for the same. Plaintiffs claimed at oral argument that they had "every reason to hope" for a New SUP but the record does not reflect that their hope was based upon any assurances by the decisionmakers themselves.

On the other hand, the Court weighs Congress' long-standing intention to manage lands in the public trust in a manner that will "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" as an important consideration, as is the obligation to protect express property rights. H.R. Rep. No. 1680, H.R. REP. 94-1680, 3, 1976 U.S.C.C.A.N. 5593, 5595. Further, the record lacks evidence that Defendants misled Plaintiffs to believe that a New SUP would be issued. To the contrary, Defendants acted affirmatively to warn the Lunnys at the outset of their intention to allow the Reservation to lapse without a New SUP and reiterated this position over time. The Lunnys' refusal to hear the message weighs against them.

Ideally, the Secretary's final decision would have been made more promptly, and the political debate aired in a way not to increase acrimony among the interested parties. However, the Court is not in a position, on this record, to evaluate the reasons driving timing. Nor can the Court determine, on the record before it, that the adverse environmental consequences of denying an injunction and allowing the removal of the Company's personal property from the site weigh more strongly than the environmental consequences of enjoining that removal. Finally, the Court has no basis upon which to weigh the relative public interest in access to local oysters with the public's interest in unencumbered wilderness.

On balance, and combining the requirement of both the equities and the public interest more broadly, the Court does not find these elements weigh in favor of granting a preliminary injunction.

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Preliminary Injunction is **DENIED** on the grounds that: (i) the Court lacks jurisdiction under Section 701(a)(2) of the APA to provide any meaningful review of Section 124, given its discretionary character; and (ii) even if it did, Plaintiffs cannot satisfy all four elements necessary to obtain preliminary injunctive relief.

This Order terminates Dkt. No. 32.

IT IS SO ORDERED.

Dated: February 4, 2013

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

THE SECRETARY OF THE INTERIOR

WASHINGTON

NOV 29 2012

To:	Director, National Park Service
Through:	Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
From:	Secretary */s/ Ken Salazar*
Subject:	Point Reyes National Seashore – Drakes Bay Oyster Company

After giving due consideration to the request of the Drakes Bay Oyster Company ("DBOC") to conduct commercial operations within Point Reyes National Seashore in the State of California ("Point Reyes"), I have directed the National Park Service (NPS) to allow the permit to expire at the end of its current term. This decision is based on matters of law and policy including:

1) The explicit terms of the 1972 conveyance from the Johnson Oyster Company to the United States of America. The Johnson Oyster Company received $79,200 for the property. The Johnson Oyster Company also reserved a 40 year right of use and occupancy expiring November 30, 2012. Under these terms and consideration paid, the United States purchased all the fee interest that housed the oyster operation. In 2004, DBOC acquired the business from Johnson Oyster Company, including the remaining term of the reservation of use and occupancy and was

explicitly informed "no new permit will be issued" after the 2012 expiration date.

2) The continuation of the DBOC operation would violate the policies of NPS concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore.

This area within Point Reyes that Congress identified as potential wilderness includes a biologically rich estuary known as Drakes Estero, consisting of several tidal inlets tributary to Drakes Bay, on the southern side of the Point Reyes peninsula. Drakes Estero encompasses approximately 2,500 acres of tidelands and submerged lands and is home to one of the largest harbor seal populations in California. In 1999 the eastern portion of Drakes Estero, known as the Estero de Limantour, was converted from potential to designated wilderness, becoming the first (and still the only) marine wilderness on the Pacific coast of the United States outside of Alaska. DBOC's commercial mariculture operation is the only use in the remaining portion of Drakes Estero preventing its conversion from potential to designated wilderness.

Therefore, I direct you to:

1) Notify DBOC that both the Reservation of Use and Occupancy ("RUO") and the Special Use Permit ("SUP") held by DBOC expire according to their terms on November 30, 2012.

2) Allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.

3) Effectuate the conversion of Drakes Estero from potential to designated wilderness.

Because of the importance of sustainable agriculture on the pastoral lands within Point Reyes, I direct that you pursue extending permits for the ranchers within those pastoral lands to 20-year terms.

Finally, I direct you to use all existing legal authorizations at your disposal to help DBOC workers who might be affected by this decision, including assisting with relocation, employment opportunities, and training.

I have taken this matter very seriously. I have personally traveled to Point Reyes National Seashore, visited DBOC, met with a wide variety of interested parties on all sides of this issue, and considered many letters, scientific reports, and other documents. The purpose of this memorandum is to document the reasons for my decision and to direct you to take all necessary and appropriate steps to implement it.

I. FACTUAL AND LEGAL BACKGROUND

A. Point Reyes National Seashore

Congress authorized the establishment of Point Reyes National Seashore in the Act of September 13, 1962, Pub. L. No. 87-657, 76 Stat. 538, codified as amended at 16 U.S.C. §§ 459c through 459c-7 (2012). The NPS subsequently began to acquire privately owned lands within Point Reyes's legislated boundaries. In 1965 the State of California granted the United States all of the State's right, title, and interest to the tide and submerged lands within the national seashore except for certain mineral rights. On October 20, 1972, the national seashore was formally established by publication of the required notice in the Federal Register. 37 Fed. Reg. 23,366 (1972). The legislation does authorize the Secretary of the Interior to lease agricultural ranch and dairy lands within Point Reyes' pastoral zone in keeping with the historic use of that land. The enabling legislation does not authorize mariculture.

Point Reyes comprises approximately 71,067 acres, of which approximately 65,090 are federally owned. The National Seashore, located about an hour's drive north of San Francisco, currently attracts more than two million visitors per year. In 1976, Congress designated 25,370 acres if land within Point Reyes as wilderness and identified an additional 8,003 acres of land and water as potential wilderness. As of October 18, 1976, Pub. L. No. 95-544, 90 Stat. 2515, and § 1(k) of the Act of October

20, 1976, Pub. L. No. 94-567, 90 Stat. 2692, 2693.[1] With respect to the area identified as potential wilderness, Congress provided, "All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness." *Id.* § 3.[2] The House of Representatives committee report accompanying the October 18, 1976, act states, "As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." H.R. REP. NO. 94-1680 at 3 (1976).[3] Sections 4(c) and 4(d)(5) of the Wilderness Act prohibit commercial activities such as mariculture in designated wilderness. 16 U.S.C. §§ 1133(c) and 1133(d)(5).

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[1] The official map referenced in both pieces of legislation indicated that Congress actually designated approximately 24,200 acres of land as wilderness and identified approximately 8,530 of additional land as potential wilderness.

[2] It is worth noting that under the statute's clear terms the conversion from potential to designated wilderness occurs automatically by operation of law when the required Federal Register notice is published.

[3] In 1999 approximately 1,752 acres of uplands, tidelands, and submerged lands within Point Reyes were converted from potential to designated wilderness. 64 Fed. Reg. 63,057 (1999).

B. Commercial Mariculture Operations within Point Reyes National Seashore

Since the 1930s commercial oyster operations have been conducted on lands and waters now included within Point Reyes. In 1958 Charles W. Johnson assumed control over state-issued water-bottom leases in Drakes Estero, and in 1961 he purchased five acres of uplands near the estero and expanded an existing oyster processing facility on it. In 1972 Mr. Johnson, dba Johnson Oyster Company (JOC), conveyed fee title to his property to the United States, reserving in the deed a 40-year right to use and occupy 1.5 acres of land, including the processing facility, "for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary [*sic*; probably should read "complementary"] food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incident thereto." The reservation indicated that possibility of a new permit after the RUO's expiration but in no way suggested that one would definitely be issued. The United States paid JOC fair market value for the interest the United States acquired, taking into consideration the value of the 40-year reserved use and occupancy. The deed of conveyance refers to the reservation as "a terminable right to use and occupy."

In 2004 DBOC purchased the assets of Johnson's Oyster Company, including the remaining term of the RUO, with full knowledge that the reserved use and occupancy would expire in 2012.

On March 28, 2005, then Superintendent of Point Reyes, Don Neubacher, sent a letter to DBOC "to ensure clarity and avoid any misunderstanding…[r]egarding the 2012 expiration

date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date."

The DBOC subsequently applied for, and was issued, an NPS special use permit authorizing it to use approximately 1,050 acres offshore and 3.1 additional acres onshore for its operations. Both authorizations – the RUO and the SUP – expire by their own terms on November 30, 2012.

C. SEC. 124

In 2009 Congress enacted SEC. 124 of the Act of October 30, 2009, Pub. L. No. 111-88, 123 Stat. 2932, which provides in its entirety as follows:

> SEC. 124. Prior to the expiration on November 30, 2012, of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use Permit ("existing authorization") within Drake's (sic) Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes

> National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section to be cited as precedent for management of any potential wilderness outside the Seashore.

D. Preparation of Draft and Final Environmental Impact Statements

After SEC. 124 was enacted in 2009, the NPS initiated the process of preparing a draft environmental impact statement (DEIS) to analyze the environment impacts associated with various alternatives related to a decision to permit or not to permit DBOC's continued commercial operations in Drakes Estero and to obtain robust public input into this matter. The NPS issued a scoping notice, hosted public scoping meetings, produced and released to the public a thousand-page-long DEIS, and invited and accepted public comments on the DEIS. As a result of that public process, the NPS prepared a final environmental impact statement (FEIS), which includes responses to public comments on the DEIS. The NPS released the FEIS to the public earlier this month.

SEC. 124 does not require me (or the NPS) to prepare a DEIS or an FEIS or otherwise to comply with the National Environmental Policy Act of 1969 (NEPA) or any other law. The "notwithstanding any other provision of law" language in SEC. 124 expressly exempts my decision from any substantive or procedural legal requirements. Nothing in the

DEIS or FEIS that the NPS released to the public suggests otherwise. As the FEIS explained:

> Although the Secretary's authority under Section 124 is 'notwithstanding any other provision of law,' the Department has determined that it is helpful to generally follow the procedures of NEPA. The EIS provides decision-makers with sufficient information on potential environmental impacts, within the context of law and policy, to make an informed decision on whether or not to issue a new SUP. In addition, the EIS process provides the public with an opportunity to provide input to the decision-makers on the topics covered by this document.

FEIS at 2. The FEIS also stated, "The NEPA process will be used to inform the decision of whether a new [special use permit] should be issued to DBOC for a period of 10 years." *Id.* at 5. The NEPA process, like SEC. 124 itself, does not dictate a result or constrain my discretion in this matter.

II. Discussion

I understand and appreciate that the scientific methodology employed by the NPS in preparing the DEIS and FEIS and the scientific conclusions contained in those documents have generated much controversy and have been the subject of several reports. Collectively, those reports indicate that there is a level of debate with respect to the scientific analyses of the impacts of DBOC's commercial mariculture operations on the natural environment within Drakes Estero.

Although there is scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope of the impacts that DBOC's operations have on wilderness resources, visitor experience and recreation, socioeconomic resources and NPS operations, the DEIS and FEIS support the proposition that the removal of DBOC's commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment.[4] Thus while the DEIS and FEIS do not resolve all the uncertainty surrounding the impacts of the mariculture operations on Drakes Estero, and while they are not material to the legal and policy factors that provide the central basis for my decision, they have informed me with respect to the complexities, subtleties, and uncertainties of this matter and have been helpful to me in making my decision.[5]

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[4] While NEPA review was not legally required, NEPA as a general matter does not require absolute scientific certainty or the full resolution of any uncertainty regarding the impacts of the federal action. *See League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060 (9th Cir.2012) and *Lands Council v. McNair, 537 F.3d 981,988 (9th Cir 2008) (en banc)* (overruled in part on other grounds by *Winter v. Natural Res. Def. Council*,, 555 U.S. 7 (2008).

[5] In a letter to me dated November 27, 2012, counsel for DBOC has asserted that the FEIS is "fatally flawed" and I should avoid any consideration "of the FEIS in its entirety." My decision today is based on the incompatibility of commercial activities in wilderness and not on the data that was asserted to be flawed.

SEC. 124 grants me the authority and discretion to issue DBOC a new special use permit, but it does not direct me to do so. SEC. 124 also does not prescribe the factors on which I must base my decision. In addition to considering the documents described above, I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.

In enacting that provision, Congress clearly expressed its view that, but for the nonconforming uses, the estero possessed wilderness characteristics and was worthy of wilderness designation. Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when "all uses thereon prohibited by the Wilderness Act have ceased." The DBOC's commercial operations currently are the only use of the estero prohibited by the Wilderness Act. Therefore, DBOC's commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness. Since the RUO and SUP allowing DBOC's commercial operations in the estero will expire by their own terms, after November 30, 2012, DBOC no longer will have legal authorization to conduct those operations, and approximately 1,363 acres can become designated wilderness.

Although SEC. 124 grants me the authority to issue a new SUP and provides that such a decision would not be considered to establish any national precedent with respect to wilderness, it in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero. With that in mind, my decision effectuates that Congressional intent.

III. IMPLEMENTATION

Based on the foregoing, I hereby direct that you expeditiously take all necessary and appropriate steps to implement my decision. My decision means that, after November 30, 2012, DBOC no longer will be legally authorized to conduct commercial operations within Point Reyes. Accordingly, I direct that the NPS publish in the Federal Register the notice announcing the conversion of Drakes Estero from potential to designated wilderness. I direct that the NPS allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.

I am aware that allowing DBOC's existing authorizations to expire by their terms will result in dislocation of DBOC's business and may result in the loss of jobs for the approximately 30 people currently employed by DBOC. I therefore direct that you use existing legal authorities to ameliorate to the extent possible the economic and other impacts on DBOC's employees, including providing information and other assistance to those employees to the full extent authorized under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, codified as amended at 42 U.S.C. §§ 4601-4655. Additionally, I direct you to develop a plan for

training and to work with the local community to identify job opportunities for DBOC employees..

Finally, the Department of the Interior and the NPS support the continued presence of dairy and beef ranching operations in the Point Reyes' pastoral zone. I recognize that ranching has a long and important history on the Point Reyes peninsula, which began after centuries old Coast Miwok traditions were replaced by Spanish mission culture at the beginning of the 19th century. Long-term preservation of ranching was a central concern of local interests and members of Congress as they considered legislation to establish the Point Reyes National Seashore in the late 1950s and early 1960s. In establishing the pastoral zone (Pont Reyes enabling legislation PL 87-657, Section 4) Congress limited the Government's power of eminent domain and recognized "the value to the Government and the public of continuation of ranching activities, as presently practiced, in preserving the beauty of the area." (House Report No. 1628 at pages 2503-04). Congress amended the Point Reyes enabling legislation in 1978 to authorize the NPS to lease agricultural property that had been used for ranching or dairying purposes. (Section 318, Public Law 95-625, 92 Stat. 3487, 1978). The House Report explained that the "use of agricultural lease-backs is encouraged to maintain this compatible activity, and the Secretary is encouraged to utilize this authority to the fullest extent possible." (House Report 95-1165, page 344).

Accordingly, I direct that the Superintendent work with the operators of the cattle and dairy ranches within the pastoral zone to reaffirm my intention that, consistent with applicable laws and planning processes, recognition of the role of

ranching be maintained and to pursue extending permits to 20-year terms for the dairy and cattle ranches within that pastoral zone. In addition, the values of multi-generational ranching and farming at Point Reyes should be fully considered in future planning efforts. These working ranches are a vibrant and compatible part of Point Reyes National Seashore, and both now and in the future represent an important contribution to the Point Reyes' superlative natural and cultural resources.

IV. CONCLUSION

My decision honors Congress's direction to "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" and thus ensures that these precious resources are preserved for the enjoyment of future generations of the American public, for whom Point Reyes National Seashore was created. As President Lyndon Johnson said on signing the Wilderness Act in 1964, "If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it."

cc: Regional Director, Pacific West Region, NPS
Superintendent, Point Reyes National Seashore

APPENDIX F

Relevant Statutes

Administrative Procedure Act (5 U.S.C §§ 551 *et seq.*) excerpts

5 U.S.C. § 701:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> (b) For the purpose of this chapter—
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia;
>
> (E) agencies composed of representatives of the parties or of representatives of

> organizations of the parties to the disputes determined by them;
>
> (F) courts martial and military commissions;
>
> (G) military authority exercised in the field in time of war or in occupied territory; or
>
> (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix; and
>
> (2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. […]

5 U.S.C. § 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. […]

5 U.S.C. § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Interior Appropriations Act of 2009 (Pub. L. No. 111-88, 123 Stat. 2903, 2932 (2009)) excerpt

§ 124:

> Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drake's Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: *Provided*, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences

> Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

National Environmental Policy Act (43 U.S.C. 4321 *et seq.*) excerpts

43 U.S.C. § 4331:

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use

all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain,

wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

43 U.S.C. § 4332:

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the

environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the

maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State

agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.