No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

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

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

AMICI CURIAE BRIEF OF ENVIRONMENTAL ACTION COMMITTEE OF WEST MARIN, NATIONAL PARKS CONSERVATION ASSOCIATION, NATURAL RESOURCES DEFENSE COUNCIL, SAVE OUR SEASHORE, AND COALITION OF NATIONAL PARK SERVICE RETIREES IN SUPPORT OF DEFENDANT-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

STATE STATUTES

RULES

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

CORPORATE DISCLOSURE STATEMENT AND RULE 29(c)(5) STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amici Applicants Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, Save Our Seashore, and Coalition of National Park Service Retirees ("Amici Applicants") state that: 1) they do not issue stock or shares to the public; 2) they do not have any parent corporation(s); and 3) there is no publicly held corporation that has a 10% or greater ownership in any of them.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici Applicants further state that their counsel were the sole authors of this brief and that Amici Applicants bore all costs of this brief, with no financial contributions from any party, party's counsel, or any other person not affiliated with Amici Applicants and their counsel.

STATEMENT OF AMICI'S INTEREST

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae applicants Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, Save Our Seashore, and Coalition of National Park Service Retirees (collectively, "Amici Applicants") submit this proposed amicus brief in support of Appellees' Response Brief, Dkt. 36-1. As described in the accompanying Motion for Leave to File Amici Curiae Brief ("Motion for Leave"), Amici Applicants (except for Coalition of National Park Service Retirees) are nonprofit environmental organizations with offices and staff in California that have worked for years to protect Drakes Estero and moved to intervene to support Appellees in the proceedings below. Motion for Leave at 2-4. While the district court denied their motion,[1] it recognized that these applicants' "interests…are sufficiently related to the claims at issue in this action" to support intervention under Federal Rule of Civil Procedure 24(a) and treated their proposed opposition brief "as an amicus brief." ER 7, 16. This Court also granted these applicants' motion for leave to file an amici curiae response to DBOC's emergency motion for injunction pending appeal. Dkt. 22 at 1.

The Coalition of National Park Service Retirees is a nonprofit organization headquartered in Tucson, Arizona and consisting of members who are former

[1] These applicants have appealed the denial of their intervention to this Court. Case No. 13-15390 (notice of appeal filed Feb. 27, 2013).

salaried employees of Appellee National Park Service ("NPS"). Motion for Leave at 4. It is dedicated to advancing NPS's central mission, to conserve the resources of the national parks unimpaired for the enjoyment of future generations. *Id.* It strongly supports the protection of Drakes Estero as wilderness as provided in the Point Reyes Wilderness Act of 1976. *Id.* at 5.

INTRODUCTION

In this appeal, Appellants Drakes Bay Oyster Company, *et al.* (collectively, "DBOC") seek to enjoin the determination by Appellees Kenneth L. Salazar, *et al.* (collectively, "Appellees") to allow DBOC's authorization to operate a commercial oyster facility at Drakes Estero, within Point Reyes National Seashore ("PRNS"), to expire on its own terms and to designate the Estero as wilderness. Dkt. 23-1 ("DBOC Br."). However, DBOC has made no showing that the district court abused its discretion in ruling that the balance of equities favored denial of an injunction, and its assertions regarding the public interest were not raised in the proceedings below and otherwise provide no basis for overturning the district court's carefully considered decision. Moreover, the unsubstantiated allegations regarding private economic interests presented by Amici Applicants Alice Waters, *et al.* ("DBOC Amici") do not "speak for the public interest," were not before the district court, and should not be considered here. *See* Dkt. 30-2 ("Amici Br."). Consequently, the district court's denial of the injunction should be affirmed.

STATEMENT OF FACTS

I. Point Reyes National Seashore and the Drakes Estero Wilderness.

In 1962, Congress created Point Reyes National Seashore "to save and preserve, for the purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped." 16 U.S.C. § 459c. As the legislative history to this act recognized, the Point Reyes peninsula, "from its seashore to forest-covered Inverness Ridge, provides a combination of scenic, recreation, and biologic interests which can be found nowhere else in the country near a large center of population." H.R. Rep. No. 87-1628 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2500, 2502. Congress directed the Secretary of the Interior ("Secretary") "to take appropriate action in the public interest toward the establishment of the national seashore" and to "acquire as rapidly as appropriated funds become available" the lands, waters, and other property located within the boundaries of PRNS. 16 U.S.C. §§ 459c, 459c-2.

Two years later, in 1964, Congress enacted the Wilderness Act to establish a system of protected "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." 16 U.S.C. §§ 1131-36. A "wilderness" is defined as an "area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human

habitation," where "commercial enterprise" and motorized equipment are prohibited. *Id*. §§ 1131(c), 1133(c). The Wilderness Act required the Secretary, within ten years of its enactment, to survey all roadless areas of 5,000 acres or more within the National Park System and to "report to the President his recommendation as to the suitability or nonsuitability of each such area…for preservation as wilderness." *Id*. § 1132(c). The President was then to relay to Congress a recommendation regarding which of the areas surveyed should be designated as wilderness. *Id*.

This procedure was followed for PRNS, and, in 1976, Congress enacted the Point Reyes Wilderness Act. Pub. L. No. 94-544, 90 Stat. 2515 (1976) (codified as 16 U.S.C. § 1132 note). The Act designated 25,370 acres of PRNS as wilderness, providing full Wilderness Act protection, and designated an additional 8,003 acres as "potential wilderness" (depicted on a map accompanying the Act). *Id*. § 1. The potential wilderness area included Drakes Estero, at issue here, a large estuary in the heart of PRNS. *Id*.[2]

[2] Section 4 of the Point Reyes Wilderness Act also amended Section 6a of the authorizing legislation for PRNS to require the Secretary to administer the area "without impairment of its natural values, in a manner which provides for such recreational, educational, historic preservation, interpretation, and scientific research opportunities as are consistent with, based upon, and supportive of *the maximum protection, restoration, and preservation of the natural environment within the area*." 16 U.S.C. § 459c-6a (emphasis added).

"Potential wilderness" is defined in the legislative history for the Point Reyes Wilderness Act and companion wilderness legislation for PRNS and other areas 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." S. Rep. No. 94-1357 at 3 (1976). This legislative history provides an explicit statement of Congressional intent regarding the removal of all nonconforming uses from areas designated as potential wilderness so that they can receive wilderness status:

> 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); *see also* S. Rep. No. 94-1357 at 7 (potential wilderness "will automatically gain wilderness status" when "non-conforming uses and/or structures are eliminated"). The companion legislation specifically provided that "[a]ll 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." Pub. L. No. 94-567, § 3, 90 Stat. 2692, 2693 (1976) (codified as 16 U.S.C. § 1132 note); *see id.* § 1(k) (PRNS wilderness designation).

Congress designated Drakes Estero as "potential wilderness" in 1976 because of a nonconforming use, a commercial oyster operation then called the

Johnson Oyster Company ("JOC"). *See* H.R. Rep. No. 94-1680 at 5-6. As part of the land acquisition for PRNS, Appellees had purchased the JOC property along the shores of Drakes Estero in 1972. ER 304.[3] As a term of the purchase, JOC reserved a "terminable right to use and occupy" the property ("RUO") to continue its operations "for a period of 40 years," expiring on November 30, 2012. ER 304, 596. 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 same purposes. ER 599. In December 2004, DBOC purchased JOC's operation and was informed by Appellees before the close of escrow in January 2005 that no further permit for commercial oyster operations would be issued after the RUO's expiration. ER 227-30, 297-98. In 2008, Appellees issued a separate Special Use Permit ("SUP") governing DBOC's operations with the same November 30, 2012 expiration date. ER 200, 320.[4]

[3] The State of California had previously granted to the United States "all of the tide and submerged lands or other lands beneath navigable waters situated within the boundaries of the Point Reyes National Seashore," while reserving the public's "right to fish" in such waters, consistent with article 1, section 25 of the California Constitution. *See* 1965 Cal. Stat. ch. 983.

[4] In its brief, DBOC asserts that this SUP "for the first time, purported to extend [NPS's] authority into Drakes Estero, essentially overlapping the State's lease areas." DBOC Br. at 9 n.3. Although this is an apparent attempt to support DBOC's claim that the State of California retains the right to continue leasing the Estero for aquaculture (discussed below), DBOC signed the SUP and has not challenged NPS's authority in this regard. *See* ER 200.

In November 2009, Congress passed an appropriations bill rider that gave the Secretary discretionary authority to extend DBOC's lease for ten years. Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124"). Specifically, Section 124 provided that "[p]rior to the expiration [of the RUO and SUP] on November 30, 2012" and "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…for a period of 10 years…." *Id*. The legislative history stated that this section gave the Secretary "discretion to issue a special use permit to [DBOC]." H.R. Conf. Rep. No. 111-316 at 107 (2009). DBOC then requested that the Secretary issue it a new ten-year SUP pursuant to Section 124. ER 305, 368-76.

On November 29, 2012, the Secretary issued a memorandum directing NPS to "[n]otify DBOC that both the [RUO and SUP] held by DBOC expire according to their terms on November 30, 2012." ER 118. The Secretary also directed NPS to provide DBOC 90 days after November 30, 2012 to remove its equipment and inventory from the area, and to use all legal authorities to assist the DBOC workers affected by the expiration of the permits. ER 119. Drakes Estero was designated as wilderness on December 4, 2012. 77 Fed. Reg. 71,826 (Dec. 4, 2012).

II. Regulation of Aquaculture in Drakes Estero by the State of California.

Although Drakes Estero has long been in federal ownership, the State of California retains limited rights and responsibilities in the Estero, including the enforcement of the Coastal Act by the California Coastal Commission ("CCC") and the Department of Fish and Wildlife's ("DFW")[5] oversight of certain aspects of DBOC's commercial aquaculture operations. *See, e.g.*, SER 95. However, these rights and duties do not affect Drakes Estero's designation as wilderness in the manner asserted by DBOC and DBOC Amici. First, there is no merit to DBOC's contention that California's 1965 reservation of a "right to fish" includes "the right to lease Drakes Estero for aquaculture." DBOC Br. at 6-7; *see also* Amici Br. at 4, 6-7. In fact, the CCC, State Lands Commission, ("SLC"), and DFW have all repeatedly rejected this interpretation. *See, e.g.*, Appendix, Exh. 1[6] (CCC letter stating that "[e]quating 'fishing' with 'aquaculture' would contradict the definition of 'aquaculture'" in state law)]; SER 231 (SLC finding that constitutional "right to fish" reservation "addresses fishing in the sense of taking or capturing fish and that it does not deal with aquaculture which comes under the jurisdiction of [DFW]"); SER 233 (DFW letter finding that aquaculture is distinct from fishing and "not subject to this tidelands grant reservation"); SER 229 (DFW

[5] Prior to January 1, 2013, DFW operated as the Department of Fish and Game.

[6] All of the documents included in the Appendix to this brief are part of the record for this action.

letter concluding that "[a]lthough the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations.").

Second, the state reservation of the public's "right to fish" in Drakes Estero does not make the area "inconsistent" with wilderness. *See* DBOC Br. at 13, 36-37 n.15. Such reservations are specifically recognized by, and consistent with, the Wilderness Act. *See* 16 U.S.C. § 1133(d)(7) ("Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."); *see also* 16 U.S.C. § 459c-6a(b) (PNRS enabling legislation recognizing the potential for state jurisdiction over and regulation of fishing activities within the park). When Congress designated Drakes Estero as potential wilderness in 1976 because of the nonconforming commercial oyster operations, it did so notwithstanding the State's reserved fishing rights. *See* H.R. Rep. No. 94-1680 at 6.

Furthermore, there is no merit to DBOC Amici's claims regarding the intent of the California Fish and Game Commission ("Commission") in renewing state water bottom leases for aquaculture in Drakes Estero. *See* Amici Br. at 5-7. First, DBOC Amici are wrong that "the Commission can continue to lease the water bottoms whether or not the Secretary grants the Oyster Farm a permit to continue to utilize the onshore facilities." *Id*. at 5-6. In fact, the Commission's 2004 renewal was explicitly made "contingent on a concurrent Federal Reservation of

Use and Occupancy for fee land in the Point Reyes National Seashore." Appendix, Exh. 2 at 3-4, Exh. 3 at 3; *see also* SER 230 ("The 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with the 1972 grant reservation and, after its expiration, with any special use permit that PRNS may issue in its discretion."). Finally, DFW has acknowledged that, although it retains limited oversight and enforcement duties over aquaculture operations in Drakes Estero, the "primary management authority" for the Estero lies with NPS. SER 229, 233.

STANDARD OF REVIEW

To prevail on a motion for preliminary injunctive relief, the moving party has the burden to establish four separate factors: (1) likelihood of success on the merits; (2) likelihood that the moving party will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008); *see Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lesser standard [than the *Winter* standard], they are no longer controlling, or even viable."). Denial of a preliminary injunction is reviewed for abuse of discretion. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). "This review is 'limited and deferential,' and it does not extend to the

underlying merits of the case." *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (quoting *Am. Trucking*, 559 F.3d at 1052).

The district court found that DBOC had failed to demonstrate a likelihood of success on the merits and that the balance of equities and public interest favored denial of an injunction. *See* ER 44. However, a motions panel of this Court subsequently granted DBOC's emergency motion for an injunction pending appeal stating, without explanation, that "there are serious legal questions and the balance of hardships tips sharply in [DBOC's] favor." Dkt. 22 at 2. DBOC now contends that this Court should "defer to the motions panel's" decision. DBOC Br. at 16, 34 (citing *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1032 n.3 (9th Cir. 1990)). Such deference would be inappropriate here for several reasons.

First, the *Sanchez* case did not involve a prior motions panel ruling on an emergency motion for injunction pending appeal pursuant to Circuit Rule 27-3, but rather a jurisdictional question for which the merits panel determined it had "an independent duty to decide." *Sanchez*, 936 F.2d at 1032 n.3. More importantly, a motions panel ruling made on an emergency motion schedule, without the benefit of full briefing and oral argument, and decided without legal reasoning, should not be entitled to deference. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (vacating Ninth Circuit motions panel decision to grant emergency injunction where panel had not provided any reasoning and Supreme Court could not determine whether

appropriate deference had been given to district court's denial of requested relief); *In re Castro*, 919 F.2d 107, 108 (9th Cir. 1990) (finding that motion panel's "denial of a dispositive motion without opinion is equivocal. It may be a denial on the merits, or it may also be a determination that plenary consideration is required. Thus, the disposition of a prior motion is not binding on a merits panel."); *U.S. v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) ("A summary disposition [by motions panel], without a reasoned analysis reflecting the authorities or argument which led us to rule as we did, requires us to scrutinize the merits of the question we were asked to reconsider with greater care."); *see also Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) ("Motions panel decisions are tentative and subject to reexamination by the merits panel."); *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th Cir. 1996) ("a motions panel's decision ... is tentative because it is based on an abbreviated record and made without the benefit of full briefing and oral argument."). Thus, this Court should not defer to the motions panel's ruling but should fully reexamine the issues presented by the parties.

ARGUMENT

I. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF DENYING THE INJUNCTION.

In considering a preliminary injunction motion, 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.'" *Winter*, 555 U.S. at 24 (quoting

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)). The Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco*, 480 U.S. at 545. Therefore, when environmental injury is "sufficiently likely," the "balance of harms will usually favor" environmental protection. *Id*. Further, as this Court has found, potential monetary damage to a private litigant weighs lightly, if at all, on the scales of equity in environmental cases. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (loss of tour operator's anticipated revenues "does not outweigh the potential irreparable damage to the environment"); *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (finding that although preliminary injunction could present financial hardship to "communities in and around [national forest], this possible financial hardship is outweighed by the fact that '[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce'") (quoting *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989)).

DBOC argued below that the balance of harms supported an injunction because its operations are "a model for sustainable agriculture working in harmony with the environment," while removing its operations "will cause environmental harm" and the destruction of its business. Dkt. 12-4. But through several expert

declarations, Amici Applicants showed that the environmental harms from DBOC's operations greatly outweighed monetary damages or alleged short-term harm from removing such operations. Dkt. 18-2, Exhs. 7-13; Dkt. No. 12-10 at 14-19. Further, Amici Applicants demonstrated that DBOC, far from being environmentally benign, has been in continuous violation of the California Coastal Act, various permit conditions, and other environmental laws. Dkt. 12-10 at 19-20. The district court considered these factors and concluded that the balance of equities supported denial of the injunction. ER 42-44.

In its brief, DBOC offers no arguments to show that the district court erred regarding these issues.[7] Consequently, DBOC has failed to establish any basis for the extraordinary remedy of a preliminary injunction. *See Winter*, 555 U.S. at 22-24. Given the exceptional natural resource qualities of Drakes Estero, Dkt. 18-2, Exh. 13, ¶ 5, Amici Applicant's unrebutted showing of the environmental harm

[7] Instead, while acknowledging that "[b]oth sides presented evidence on the environmental and public health impact of keeping versus removing the oyster farm," DBOC claims that "the district court did not base its analysis on that evidence." DBOC Br. at 34 n.13. This is flatly contradicted by the district court's discussion of these materials. *See* ER 42-44. Regardless, the fact that the district court found that DBOC failed to meet its burden on this factor provides no justification for DBOC to ignore it here. In addition, while DBOC Amici repeatedly refer to DBOC's operations as "sustainable," *see, e.g.*, Amici Br. at 1, 5-7, they provide no evidence to support this characterization. As discussed in detail below, DBOC's commercial oyster operations, which have caused environmental harm to Drakes Estero and repeated violations of state and federal environmental laws, are anything but "sustainable."

that would result from continuing DBOC's oyster operations warrants discussion here.

Noise disturbance of harbor seals: Drakes Estero hosts 20% of California's mainland breeding population of harbor seals. Dkt. 18-2, Exh. 7, ¶ 4. Noise from DBOC's daily motorboat use negatively affects this seal colony. *Id.*, Exh. 8, ¶ 14. While DBOC has claimed that removal of oyster racks would result in higher sound levels than oyster farm operations, Dr. Dominique Richard, an engineering acoustics expert, found these assertions to be erroneous. *Id.*, ¶¶ 5-15. "[R]emoval of the racks would not cause disturbance to harbor seals, but…the continued normal DBOC operations do make enough noise from motorized boats to have negative impacts to harbor seals." *Id.*, ¶ 16.

Disturbance of birds: Biologist Dr. John Kelly has worked in the Point Reyes area for over 25 years. Dkt. 18-2, Exh. 9, ¶ 3. His declaration addressed the effects of DBOC's motorboats on birds at Drakes Estero: "[M]otorized boat activity introduces a level of disturbance that is incompatible with migratory and resident waterbirds that use the Estero's natural resources for sustenance, rest, and protection." *Id.*, ¶ 4. As Dr. Kelly explained:

> Drakes Estero…is an important foraging and resting place for migrating and seasonally resident seabirds, shorebirds, and waterbirds [generically, waterbirds herein]. Large numbers of waterbirds winter in the Estero, and many waterbirds that migrate along the Pacific Flyway between wintering grounds to the south and summer breeding areas in the Arctic depend on Drakes Estero for migratory support.

Id., ¶ 5. He concluded that continued DBOC operations would have long-term adverse impacts on birds through noise disturbance and habitat loss. *Id.*, ¶ 14.

Invasive species: Julia Stalker is an expert on invasive species. Dkt. 18-2, Exh. 10, ¶ 3. Ms. Stalker observed the presence of a highly invasive colonial organism, Didemnum vexillum ("Dvex"), in Drakes Estero. *Id.*, ¶¶ 5-7; *see id.*, Exh. 2 (photos). This organism gained its foothold via DBOC's oyster infrastructure and the oysters themselves. *Id.* "Fragments of Dvex broken off from an existing colony can spread and form new colonies within the Estero." *Id.*, ¶ 8. DBOC has employed the practice of scraping Dvex from oyster shells and disposing of it in Estero waters, increasing the risk of further Dvex spread. *Id.* Ms. Stalker observed Dvex colonies in eelgrass beds at least 20 meters from the nearest oyster racks. *Id.*, ¶ 10. If DBOC's operations continue, these eelgrass beds and the species that rely upon them are at risk of harm from Dvex. *Id.*, ¶ 11.

Plastic debris: Thomas Baty lives on Point Reyes and spends substantial time in PRNS. Dkt. 18-2, Exh. 11, ¶ 3-4. Mr. Baty has "picked up thousands of pieces of black plastic spacer tubes…unique to [DBOC's] mariculture operations" on PRNS beaches. *Id.*, ¶ 4. In July 2011 and February 2012, Mr. Baty walked nearly all major PRNS beaches, using a GPS device to plot where he found DBOC debris. *Id.*, ¶¶ 7, 8. The resulting maps show that DBOC plastic litters beaches for miles from Drakes Estero. *Id.*, Exhs. 2, 4. While DBOC plastic already released

will not instantly disappear, cessation of DBOC operations would end the release of more plastic debris to PRNS waters and beaches.

Water quality: DBOC argued below that its non-native oysters are essential to preserving water quality by removing nutrients from Estero waters. Dkt. 18-2, Exh. 12, ¶ 6; *see* Amici Br. at 15. Dr. Peter Baye, an ecologist expert in northern California coastal lagoons and estuaries, found that DBOC was wrong in asserting that its oysters were the primary – or even a significant – vehicle for nutrient removal. Dkt. 18-2, Exh. 12, ¶¶ 3, 7-9. Drakes Estero is a marine lagoon with a large tidal inlet allowing for daily tidal flushing with clear ocean water. *Id*., ¶ 4. As a result, "water quality in Drakes Estero will not suffer or decline with the removal of DBOC's non-native oysters and oyster infrastructure." *Id*., ¶ 10.

DBOC's ongoing violations of environmental laws: Since its assumption of the RUO in 2004, DBOC has been subject to several cease and desist orders from the California Coastal Commission, the state agency charged with protecting the coastal environment, that sought to remedy violations of various environmental laws, regulations, and permit conditions. Appendix, Exhs. 4, 5.[8] Among the

[8] In balancing the equities, the district court also considered DBOC's "failure to conduct due diligence prior to its purchase from [JOC], 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." ER 43-44. As the 2003 CCC Order demonstrates, NPS made its intentions clear well before DBOC took over the operation. *See* Appendix, Exhibit 4 at 2 ("NPS has informed staff that it cannot…extend or renew JOC's lease when it expires in 2012 because…the

ongoing violations identified in these cease and desist orders are illegal operation of DBOC motorboats in wildlife protection zones, in violation of NPS permit conditions; unpermitted discharge of marine debris, such as the plastic debris discussed above; and unpermitted development both onshore and offshore, including the unauthorized placement of clam bags within the harbor seal protection area and operations that have promoted the spread of Dvex, in violation of the California Coastal Act. Appendix, Exh. 5 at 2. The CCC found that such violations threaten to degrade Drakes Estero's ecologically significant resources, and stated that DBOC's failure to comply with its orders "have perpetuated *the overall state of noncompliance of DBOC's operations with the Coastal Act*." *Id*. at 2-3 (emphasis added).

In sum, the unsubstantiated assertions about DBOC's "sustainable" business do not comport with the facts about its operations in Drakes Estero. The environmental harm resulting from continuing these operations far outweighs any short-term impacts or monetary harms from closure and supports denial of the injunction. The district court did not err in its consideration of this factor.

II. DENYING THE INJUNCTION IS IN THE PUBLIC INTEREST.

The final factor that DBOC must demonstrate in order to obtain a preliminary injunction is that such relief "is in the public interest." *Winter*, 555

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continued operation of a commercial aquaculture facility is inconsistent with the wilderness designation").

U.S. at 22. As this Court has often found, the "public interest in preserving nature and avoiding irreparable environmental injury" outweighs harm to the local economy. *See, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). The public interest in environmental protection is even greater where wilderness is at issue. *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 643 (9th Cir. 2004) (holding re alleged impacts to wilderness that "the public interest weighs in favor of equitable relief" because "Congress has recognized through passage of the Wilderness Act…that there is a strong public interest in maintaining pristine wild areas").

After carefully considering the evidence presented, the district court concluded that DBOC had failed to meet its burden to show that an injunction was in the public interest. ER 44. DBOC now contends that the district court erred by failing to consider the public interest as expressed in four federal statutes: (1) the National Aquaculture Act of 1980; (2) a 1978 Act that amended 16 U.S.C. § 459c-5 to provide for the reservation of certain agricultural rights on land acquired for inclusion in PRNS; (3) Section 124; and (4) the National Environmental Policy Act ("NEPA"). DBOC Br. at 15, 35-37. These arguments lack merit.

DBOC argued below only that "compliance with NEPA and other environmental law is in the public interest." SER 254-55. DBOC cannot now claim that the district court abused its discretion by failing to consider the

purported public interest implications of other statutes, especially statutes that have little or no relevance to the issues here.[9] *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) ("We apply a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court."); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc) (finding NEPA argument not sufficiently presented in district court waived).

Moreover, given the district court's finding that DBOC failed to demonstrate any likelihood of success on the merits of its NEPA and Section 124 claims, it is no surprise that Appellees' compliance with these laws was not a factor in determining the public interest. The district court also recognized that DBOC had previously argued that the Secretary was not required to comply with NEPA in exercising his discretion under Section 124. ER 22-23, 34; SER 245 (DBOC letter asserting that "Section 124 includes a 'general repealing clause' that allows you [to] override conflicting provisions in other laws – including NEPA – to issue the SUP"); SER 239-40 (DBOC letter encouraging Secretary to make his "decision

[9] DBOC is simply wrong that the 1978 Act "amended the 1964 Wilderness Act," DBOC Br. at 27-28, or has any relevance to Drakes Estero's designation as wilderness or the expiration of its RUO. *See* Pub. L. No. 95-625, Title III, § 318(b)-(d), 92 Stat. 3487 (1978). With regard to the National Aquaculture Act, DBOC has failed to demonstrate how the public interest is served by promoting commercial aquaculture in a Congressionally-designated wilderness area.

without the benefit of a Final Environmental Impact Statement" because "Section 124 repeal[ed] conflicting statutes, such as NEPA."); *see Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) ("Judicial estoppel…precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.").

Furthermore, there is no merit to DBOC's contentions that the district court "fundamentally misapprehended the legal relevance of Section 124" and improperly considered other laws such as the 1976 Point Reyes Wilderness Act. DBOC Br. at 36-37. Section 124, an appropriations rider passed without debate, was value neutral, simply giving the Secretary discretion to extend, or not, DBOC's lease for ten years.[10] There is no indication that Section 124 was intended to "supersede" the existing statutory scheme (DBOC Br. at 36), which shows Congress's clear intent to preserve Drakes Estero's natural values. *See, e.g.*, Pub. L. No. 94-544, 90 Stat. 2515 (Point Reyes Wilderness Act designating Drakes

[10] It is questionable whether a rider passed without debate concerning a private business reflects the public interest. *See Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 1125 (D. Mont. 2011) ("Defendants argue—unpersuasively—that Congress balanced the conflicting public interests and policies to resolve a difficult issue. … Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy. Policy changes of questionable political viability, such as occurred here, can be forced using insider tactics without debate by attaching riders to legislation that must be passed.").

Estero as "potential wilderness"); *see also* 16 U.S.C. § 459c (1962 enabling legislation creating PRNS "to save and preserve, for the purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped"); H.R. Rep. No. 87-1628, *reprinted in* 1962 U.S.C.C.A.N. at 2502 (noting PRNS's combination of "scenic, recreation, and biologic interests which can be found nowhere else in the country near a large center of population").

DBOC's argument also contradicts its own assertions regarding Section 124's impact on existing law. As DBOC notes, "the general rule is that existing law remains in place unless there is other convincing evidence that Congress intended the existing law to be displaced." DBOC Br. at 23. "The intention of the legislature to repeal must be clear and manifest," and "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Firebaugh Canal Co. v. U.S. Dep't of Interior*, 203 F.3d 568, 575 (9th Cir. 2000) (internal quotations, citations omitted). This doctrine "applies with full vigor" where, as here, "the subsequent legislation is an appropriations measure." *Id.*

Consequently, the public interest in this case favors removal of the commercial oyster operations from Drakes Estero so that the estuary can achieve the wilderness protection that Congress intended and the public can enjoy this

historic conservation achievement. As discussed in the Declaration of Dr. Sylvia Earle,[11] the continued existence of the oyster operation in Drakes Estero, an area "well known as having exceptional natural resource qualities," is "in direct conflict with the Seashore's mandate of natural systems management as well as wilderness laws and national park management policies." Dkt. 18-2, Exh. 13, ¶¶ 4-9. On the other hand, the removal of mariculture activities and protection of Drakes Estero as wilderness "will facilitate varied and numerous environmental benefits" and "will beneficially impact the greater marine environment and the wildlife species that depend on it." *Id*., ¶¶ 9-10.

DBOC Amici claim to identify "a wide variety of public interests that will be seriously and negatively impacted if the Secretary's Order to close down the Oyster Farm is not enjoined pending a decision on the merits of the case." Amici Br. at 1-2.[12] However, their brief primarily contains unsubstantiated allegations

[11] Contrary to DBOC Amici's citations to a blog post suggesting an "anti-science mania" on this issue, the prominent, independent scientists who actually commented on the Draft EIS supported Drakes Estero's designation as wilderness. *See, e,g.*, Appendix, Exh. 6 (comment letter from Sylvia A. Earle, Edward O. Wilson, Jean-Michel Cousteau, Thomas E. Lovejoy, and Tundi Agardy).

[12] In support of their brief, DBOC Amici request that the Court take judicial notice of 24 exhibits included in an Appendix pursuant to Fed. R. Evid. 201(c). Amici Br. at 3 n.3. With regard to documents in the record or otherwise properly before the district court, this Court may consider such materials. However, DBOC Amici have also introduced "copies of commentary in the press" which do not contain facts that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b). As such, the Court

regarding private economic interests, rather than public interests, that were not presented to the district court. *See, e.g.*, *id.* at 1 (alleging unspecified impacts to "local economy" and "on food security and the U.S. balance of trade"); 5 (closure of oyster operation will "wreak havoc" on food industry); 5-6 (alleging impacts on restaurants "ability to serve fresh shellfish" and meet demand for oysters); 6 ("supply of shellfish that local retail establishments depend on having available for their customers will be interrupted"); 9 ("Bay Area restaurants that feature locally grown oysters from DBOC will have either to cease serving oysters or stop featuring local sustainably raised shellfish on their menus"). Yet as this Court has frequently held, "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns." *See, e.g., Alliance for the Wild Rockies*, 632 F.3d at 1138.[13]

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should not take judicial notice of Exhibits 1, 8, 9, 11, and the articles referenced on page 11, n.15 and page 12, n.16. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'") (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006)); *U.S. v. Ortiz*, 742 F.2d 712, 713 (2d Cir. 1984) (refusing to take judicial notice of "facts" in newspaper articles).

[13] Besides being irrelevant to the public interest, DBOC Amici's allegations regarding the impact of DBOC's closure on California oyster production are inconsistent and contrary to the record. For example, there are no precise estimates regarding the portion of California oysters that DBOC produces, but available data put that figure somewhere between 16 and 36%, or 3.4% in the Pacific coast region. *Cf.* FEIS at 280 *with* Amici Br. 5 (40%). DBOC Amici are also incorrect

DBOC Amici also contend that closing DBOC's operations in Drakes Estero "would be inconsistent with the best thinking of the modern environmental movement." Amici Br. at 1, 11-14. Yet virtually every environmental and conservation organization that commented on the Draft EIS supported wilderness in Drakes Estero. *See, e.g.*, Appendix, Exh. 7 (comment letter from over 50 environmental organizations and other groups, including Pacific Coast Federation of Fishermen's Associations, supporting wilderness). DBOC Amici cite two online articles[14] that make no mention of Drakes Estero and stand for the

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that Drakes Estero accounts for "55% of the water bottoms in the State of California that are leased for shellfish cultivation," Amici Br. at 5, as that figure fails to account for the substantial water bottom acreage leased by agencies other than DFW. *See* FEIS at 277 ("CDFG manages 18 leases for 9 mariculture operations in California (out of a total of approximately 30 mariculture operations in the state)"). Moreover, the record does not support the assertion that "there are no options for relocating these oyster beds in California" or that DBOC's closure will affect the "U.S. balance of trade." Amici Br. at 6. Rather, Humboldt Bay operations continue to expand, and Tomales Bay growers have complained only of an "onerous and expensive permit process" to increase production, not that expansion is not an option. *See* FEIS at 279; Amici Br., Appendix, Exh. 6 at 3. Finally, there is no merit to the assertions regarding the existence of oyster shell mounds "on the shores of Drakes Estero," Amici Br. at 3-4, as these mounds contain little evidence of oyster shells. Appendix, Exh. 8, 9. In fact, local tribes have supported the designation of Drakes Estero as wilderness because of the adverse impacts from DBOC's operations on sacred sites and the "traditional cultural landscape" in the Estero. Appendix, Exhs. 10, 11.

[14] Although the first article is by a scientist, Peter Kareiva, who works for The Nature Conservancy, there is no evidence that his organization has taken any position on the issues in this case. DBOC Amici also cite a newspaper column by Laura Watt that is most notable for inaccurate factual assertions regarding DBOC's operations. *See* Amici Br. at 12-13. For example, Watt's assertion that "the

unremarkable proposition that parks and wilderness must exist "amid a wide variety of modern, human landscapes," Amici Br. at 11-12, which is exactly the situation with PNRS and the Drakes Estero wilderness. *See* H.R. Rep. No. 87-1628, *reprinted in* 1962 U.S.C.C.A.N. at 2502 (noting PRNS's combination of "scenic, recreation, and biologic interests which can be found nowhere else in the country near a large center of population").

In fact, as described in the Declaration of Amy Meyer, the wilderness areas in PRNS are unique in their ability to provide public access to wilderness near a major metropolitan area. Dkt. 18-2, Ex. 7, ¶¶ 2-4. As vice-chair of the federal advisory commission for the Golden Gate National Recreation Area and PRNS, Ms. Meyer was involved in the wilderness designation in these parks and recalls the public support for "the largest possible wilderness" area, which the commission endorsed and recommended to Congress. *Id.*, ¶ 5. At the time, there was no suggestion by the commission or Congress that the only existing non-conforming use in Drakes Estero, the commercial oyster operation, would continue after its operating rights expired and prevent the area from receiving full wilderness protection. *Id.*, ¶¶ 6-7. Since the owners of Drakes Estero "are the people of the

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'commercial operation' itself is on the shore" is contradicted by DBOC's own arguments that continued commercial operations in the Estero, "including planting oyster seed in the waters of the estero and harvesting oysters," preclude its designation as wilderness. *See* DBOC Br. at 32. Watt is also wrong that DBOC's onshore operations are "part of the pastoral zone." *See* SER 101 (Drakes Estero and oyster operation "were not identified as part of the pastoral zone").

United States, not the Drakes Bay Oyster Company," allowing continued commercial oyster operations would overturn the historic achievement of protecting the "ecological heart" of PRNS as wilderness and set a dangerous policy precedent for our national park and wilderness systems. *Id*., ¶¶ 4, 9-10.

Finally, DBOC Amici *are* correct that "[t]here is no single voice that can speak for the 'public interest.'" Amici Br. at 1. In fact, as evidenced by the number of comments on the Draft EIS (over 52,000), many voices have stated their opinion on the issue, and over 92% of the comments supported the protection of Drakes Estero as wilderness. Appendix, Exh. 12. That DBOC Amici may be required to obtain oysters from other sources does not outweigh the historic conservation achievement of protecting the exceptional natural resources of Drakes Estero through full wilderness protection as Congress intended. Consequently, the district court did not err in determining that the public interest supports the denial of an injunction.

CONCLUSION

For the foregoing reasons, Amici Applicants respectfully request that this Court affirm the decision of the district court.

DATED: April 10, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7) and 29(d) because this brief contains 6,985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Times New Roman.

Dated: April 10, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 10, 2013.

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I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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