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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

13 **TOMALES BAY OYSTER COMPANY;**
14 **SALTWATER OYSTER DEPOT;**
15 **OSTERIA STELLINA; HAYES STREET**
16 **GRILL; CAFÉ REYES; ALLIANCE**
17 **FOR LOCAL SUSTAINABLE**
AGRICULTURE; MARGARET
GRADE; LORETTA MURPHY;
JEFFREY CREQUE; and PATRICIA
UNTERMAN,

18 Plaintiffs,

19 v.

20 **UNITED STATES DEPARTMENT OF**
THE INTERIOR; SALLY JEWELL, in
21 her official capacity as Secretary of the
Interior; **UNITED STATES NATIONAL**
22 **PARK SERVICE; JONATHAN JARVIS,**
in his official capacity as Director of the
23 National Park Service; **NATIONAL**
24 **OCEANIC AND ATMOSPHERIC**
ADMINISTRATION OFFICE OF
25 **OCEAN AND COASTAL RESOURCE**
MANAGEMENT, and **MARGARET**
26 **DAVIDSON,** in her official capacity as
Acting Director of the Office of Ocean and
Coastal Resource Management,

27 Defendants.
28

Case No.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' APPLICATION AND
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

Date: TBD
Time: TBD
Crtrm: TBD
Judge: TBD

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INTRODUCTION

1
2 Absent intervention by this Court, on July 31, 2014, by order of Defendants the
3 Department of the Interior (“DOI”) and the National Park Service (“NPS,” collectively with the
4 DOI and the respective head of each, “Interior Defendants”) Drakes Bay Oyster Company
5 (“DBOC”) will close. *See* Declaration of Stuart G. Gross (“Gross Dec.”), Ex. 3.

6 With its closure, almost 80 years of continuous oyster cultivation in the Drakes Estero
7 would cease. California’s production of oysters would drop by at least on third, restaurants and
8 other businesses in West Marin and the greater Bay Area would lose a critical supply of locally
9 grown oysters that are fundamental to their business success and reputation, and numerous
10 people whose livelihoods, and even housing, directly and indirectly depend on the DBOC will
11 suffer irreparable harm.

12 In making his decision, on November 29, 2012, to close the DBOC oyster farm, the
13 Secretary of the Interior (the “Secretary”) declared himself “exempt[] . . . from any substantive
14 or procedural legal requirements,” by virtue of language contained in Department of the Interior
15 Appropriations Act, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) (“Section 124”).
16 Gross Dec., Ex. B at 4. Understanding themselves to be so liberated from the law, the Interior
17 Defendants ignored it. The Interior Defendants ignored their substantive legal obligations under
18 the National Aquaculture Act, 16 U.S.C. § 2805(d), to ensure that their decision to close the
19 DBOC oyster farm was consistent “to maximum extent practicable” with the act’s purpose and
20 policy of promoting and supporting development of aquaculture and domestic aquatic food
21 supplies, and they ignored their procedural legal obligation to consult with a statutorily created
22 coordinating group to ensure this substantive result was achieved. The Interior Defendants
23 similarly ignored their substantive legal obligations under the Coastal Zone Management Act
24 (“CZMA”), 16 U.S.C. § 1456(c)(1), to ensure that the decision to close the DBOC oyster farm
25 was consistent “to the maximum extent practicable” with the enforceable policies of the
26 California Coastal Management Program, and they ignored their procedural legal obligations to
27 obtain a determination from the California Coastal Commission (“CCC”) that it was so.
28

1 The Ninth Circuit expressly rejected the Secretary's claimed exemption from the law.
2 *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014). However, Plaintiffs
3 were not represented in that case, and, accordingly, claims arising from the Interior Defendants'
4 violations of the National Aquaculture Act and the CZMA, as well as the violations of the
5 CZMA by the other Defendants named herein, were not raised or adjudicated therein.

6 Plaintiffs are likely to prevail on these claims. The Interior Defendants' violations of the
7 substantive and procedural requirements of these laws are clear and require that their decision to
8 close the DBOC oyster farm be set aside under the Administrative Procedures Act ("APA"), 5
9 U.S.C. §§ 706(2)(A), 706(2)(C), and 706(2)(D). However, if the Court does not enjoin the
10 enforcement of the Interior Defendants' decision to close of the DBOC oyster farm while
11 Plaintiffs' claims are pending, Plaintiffs would irreparably suffer the harms that these laws were
12 enacted to prevent. Plaintiffs, which include Tomales Bay Oyster Company ("TBOC"),
13 California's oldest continuously run shellfish farm whose retail operation depends heavily on
14 DBOC oysters and almost every significant restaurant in the Point Reyes area, would lose
15 access to a critical and irreplaceable supply of locally and sustainably grown oysters on which
16 their business reputations and success depend. Plaintiffs would have no remedy for this harm.
17 And furthermore, without the injunction, an order invalidating the Interior Defendants' decision
18 at the end of the litigation and requiring them to re-examine the issue in accordance with the
19 legal requirements they ignored would likely do Plaintiffs little good. The Interior Defendants
20 have ordered the DBOC shut, its facilities dismantled, its employees fired, their onsite housing
21 destroyed.

22 The interests of the Plaintiffs and the public are too strong here to allow this to occur
23 while Plaintiffs seek the Court's assistance in ensuring their executive agencies obey the law.
24 The law matters. The Plaintiffs' and public's interests harmed by Defendants' disregard for the
25 law matter. Plaintiffs respectfully request that this Court protect those interests, enforce the law,
26 and issue a temporary restraining order, followed by a preliminary injunction after a hearing,
27 that enjoins the Interior Defendants from enforcing their decision to close the DBOC oyster
28 farm until Plaintiffs' claims can be heard.

BACKGROUND

I. History of Oyster Farming In Drakes Estero

Since at least 1938, commercial oyster farms have continuously operated in Drakes Estero. Gross Dec., Ex. 5 (Final Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit (“FEIS”) at v.¹ The original Drakes Bay Oyster Company, operated from 1938 through 1945. *Id.* Between 1946 and 1958, it was operated by Larry Jensen and the Coast Oyster company, before being sold to the Johnson Oyster Company (“JOC”), which operated it for the next 45 years. *Id.* The Johnson Oyster Company (“JOC”) held valid State water bottom leases in Drakes Estero from the 1950s until December 2004 to cultivate oysters. In 2004, the California Fish and Game Commission (“CFGC”) granted JOC an extension of its two State water bottom leases in Drakes Estero for twenty-five (25) years, until 2029. *Id.*, Ex. 6 (FEIS at 9). That same year, the DBOC purchased the farm from JOC. *Id.*, Ex. 5 (FEIS at vi).

In 1965, the State of California conveyed the water bottoms of Drakes Estero to the United States but reserved the right to fish, including the right to lease the State water bottoms for aquaculture. AB 1024 (Bagley) Ch. 983, Stats. of 1965. Indeed, when the State of California grants property rights to bottomlands under navigable waters the grant is always subject to the public trust rights of others to fish in those waters. *See* California Const. Art. X, §3; *People v. Cal. Fish Co.*, 166 Cal. 576 (1913); Cal. Public Resource Code §6009.1. The California State Legislature and State executive agencies thus lack the legal authority to include within a grant of property rights to bottom lands below navigable waters a right to exclude others that would interfere with their public trust rights to fish such waters, subject to certain very narrow exceptions not applicable here. An April 1974 Environmental Impact Statement for the then proposed Point Reyes Wilderness Area confirms the contemporaneous interpretation of the rights retained by the State in 1965. It provides that “[c]ontrol of the lease from the California

¹ Plaintiffs’ citation to the FEIS should not be interpreted as an adoption or concurrence of the accuracy or correctness of the analysis or conclusions therein. Rather, Plaintiffs have done so for the purpose of efficiency and to indicate the undisputed nature of certain facts. Because of the size of the FEIS, Plaintiffs have only included those portions of the FEIS to which they cite in this brief. The entire FEIS can be found at Docket Nos. 66-70 in the case titled *Drakes Bay Oyster Co. v. Salazar*, 12-06134-YGR (N.D. Cal.).

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1 Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved
2 by the State on these submerged lands.”

3 Effective November 30, 1972, JOC granted fee title to 1.5 acres on the shores of Drakes
4 Estero where the oyster farm was located to the United States in exchange for a forty (40) year
5 renewable Reservation of Use and Occupancy (“RUO”), ending November 30, 2012. Gross
6 Dec., Ex. 6 (FEIS at 16). The RUO contained a renewal clause, which provided that a special
7 use permit (“SUP”) could issue at the end of the RUO period. *Id.* (FEIS at 19). This RUO was
8 transferred to DBOC and its owner Kevin Lunny in December 2004. *Id.* (FEIS at 21).

9 **II. Interior Departments’ Decision to Close the Drakes Bay Oyster Farm**

10 In 2009 Congress enacted Sec. 124, which provided: “Prior to the expiration on
11 November 30, 2012, of the Drakes Bay Oyster Company's Reservation of Use and Occupancy
12 and associated special use permit (“existing authorization”) within Drake's [*sic*] Estero at Point
13 Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the
14 Interior is authorized to issue a special use permit with the same terms and conditions as the
15 existing authorization, except as provided herein, for a period of 10 years from November 30,
16 2012.” *Id.*, Ex. 5 (FEIS at iii).

17 In July 2010, DBOC applied for a SUP from NPS consistent with the terms found in
18 Article 11 of the RUO, and Section 124. *Id.* (FEIS at v).

19 On November 20, 2012, the NPS release the FEIS. The NPS stated that it prepared the
20 FEIS “as the culmination of the NEPA [National Environmental Policy Act] process” to
21 consider alternatives presented by the DBOC’s request to continue its operations. *Id.* (FEIS).
22 However, in the FEIS the NPS disclaimed any obligation or to follow any law in making its
23 decision whether to close the DBOC oyster farm. *Id.* Accordingly, and relevant here, the FEIS
24 contains no discussion of the Interior Defendants’ substantive or procedural legal obligations
25 under the CZMA triggered by its decision whether to close the DBOC oyster farm, and
26 dismissed the possibility of it having obligations in this context under National Aquaculture Act
27 based on the fact that “[t]he National Aquaculture Act of 1980 (Act) does not identify the
28

1 National Park Service as having responsibility for programs related to aquaculture.” *Id.* Ex. 8
2 (FEIS at F-26).

3 On November 29, 2012, the Secretary issued the decision to close the DBOC oyster
4 farm, directing NPS to allow DBOC’s existing RUO and SUP to expire; to publish a notice in
5 the Federal Register to convert Drakes Estero from “potential wilderness” to “wilderness”; and
6 to allow DBOC ninety days to terminate its operations. *Id.*, Ex. 4. The November 29, 2012
7 memorandum reiterated the Interior Defendants’ interpretation that Section 124 exempted the
8 Secretary’s decision from all substantive and procedural legal requirements: “Sec. 124 does not
9 require me (or the NPS) . . . to comply with the National Environmental Policy Act of 1969
10 (NEPA) or any other law. . . . Sec. 124 expressly exempts my decision from any substantive or
11 procedural legal requirements.” *Id.* at 4.

12 On December 3, 2012, DBOC and Mr. Lunny filed suit challenging the Interior
13 Defendants’ decision to close the DBOC’s oyster farm. *See Drakes Bay Oyster Co. v. Salazar*
14 (“*DBOC Suit*”), No. 12-6134 (YGR), Doc. 1. Plaintiffs were not parties to the *DBOC Suit*, and
15 the plaintiffs therein did not state claims based on violations of the National Aquaculture Act or
16 the CZMA. On February 4, 2013, a motion for a preliminary injunction by DBOC and Mr.
17 Lunny was denied. *See DBOC Suit*, Doc. 89. On January 14, 2014, affirmed the lower court’s
18 denial of the motion for preliminary injunction, but expressly reject the Interior Defendants’
19 interpretation of Section 124 as having given the Secretary the discretion to make the decision
20 whether to close the DBOC oyster farm unbridled by any substantive legal or procedural
21 requirements. *Drakes Bay Oyster*, 747 F.3d at 1083. On June 30, 2014, the Supreme Court
22 denied the petition for certification filed by DBOC and Mr. Lunny.

23 **III. Importance of the Drakes Bay Oyster Farm to the Local Community, Including**
24 **Plaintiffs, and the Likely Impacts of its Closure on Them**

25 The Drakes Estero water bottoms are 55% of the total acreage leased for shellfish
26 cultivation by the State of California; and 85% of the oysters sold in the San Francisco Bay
27 Area are produced by DBOC. Declaration of Donna Yamagata (“Yamagata Dec.”), ¶ 7;
28 Declaration of Sam Dolcini (“Dolcini Dec.”), ¶ 3. DBOC is responsible for 58% to 70% of the

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1 oysters grown in Marin. *See* Gross Dec., Ex. 5 (FEIS at xx); Friend Dec., ¶ 10. Approximately
2 40% of the shellfish cultivated by the DBOC are sold onsite to retail customers, another 40%
3 are sold directly to local markets and restaurants, and 18% are sold to Tomales Bay shellfish
4 growers. *Id.* Approximately one third of all shellfish and approximately 50% of all Pacific
5 oysters produced in California are grown by DBOC. *See* Gross Dec., Ex. 7 (FEIS at 279);
6 Friend Dec., ¶ 10. Even with this supply, according to the NPS’s analysis, “[i]n recent years,
7 shellfish producers across the country, including those in California, have struggled to meet
8 shellfish demands.” Gross Dec., Ex. 7 (FEIS at 274). There is no know source of California, let
9 alone local, shellfish that could be used to replace the supply if DBOC’s oyster farm is closed.
10 Yamagata Dec., ¶ 10. Thus, “[t]he loss of shellfish grown in Drakes Estero would mean a
11 significant reduction in the State and the Nation's capacity to meet the rapidly growing demand
12 for safe, sustainably produced, high quality seafood.” Declaration of Jeffrey Creque (“Creque
13 Dec.”). For West Marin and greater San Francisco Bay Area restaurants and other businesses
14 that depend on the availability of local oysters the effect of this loss would be dramatic.

15 For example, the Charles “Tod” Friend, the owner of Plaintiff Tomales Bay Oyster Co.
16 (“TBOC”), estimates that “[a]t a minimum, . . . closing DBOC as a source of oysters will cost
17 TBOC between \$250,000 to \$400,000 a year.” Friend Dec., ¶ 17. The sources of these losses
18 flowing from the closure of the DBOC would be several-fold. While TBOC grows shellfish on
19 bottomlands in Tomales Bay, it must purchase oysters grown by others to meet demand at its
20 retail operation on Route 1 in Marshall, California. *See id.*, ¶¶ 4-7. The lack of DBOC grown
21 oysters to meet that demand mean several things. First, between 30% to 40% of TBOC’s retail
22 customers will not buy anything but local oysters, and travel specifically to TBOC to buy local
23 oysters. *Id.*, ¶ 7. Aside from DBOC, the only other Tomales Bay oyster grower, Hog Island,
24 cannot produced enough oysters to meet its own retail demand, let alone TBOC’s demand, and
25 the only other significant source for oysters north of the Golden Gate is in Humboldt County,
26 almost 300 miles and a five-hour drive away. *Id.*, ¶ 8. Thus, without DBOC as a source for local
27 oysters, TBOC would suffer a chronically inadequate source of locally grown oysters, *id.*, ¶ 14,
28 the specific product that 30-40% travel to TBOC exclusively to buy. *Id.*, ¶ 7.

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1 The situation would be even more acute for TBOC in times of rain. When local rainfall
2 is half an inch or more, TBOC and other Tomales Bay growers are barred from harvesting
3 oysters for a week, while only a portion of Drakes Estero is affected during such times and for a
4 fewer days. *Id.*, ¶ 9. “Thus, following rains, there are significant periods when DBOC is the
5 only source for fresh local oysters.” *Id.*

6 However, the damage threatened to TBOC’s business by the closure of DBOC is in
7 some ways even direr in the traditionally dry months of August and September. During this
8 period, TBOC runs the significant risk of not being able to provide *any* oysters to its customers
9 when its limited supply of its self-grown oysters runs out. In August and September, oysters are
10 often not available from Washington, due to closures instituted by State officials there. *Id.*, ¶ 10.
11 Washington is the other location in addition to Drakes Estero and Tomales Bay, from which
12 TBOC sources oysters. *Id.* Given the lack of any alternative source of oysters, the closure of
13 DBOC would “have a devastating impact on [TBOC’s] business during those months.” *Id.*

14 As a result, the closure of DBOC is likely to not only directly cause TBOC, thousands of
15 dollars in unrecoverable lost sales, *see id.*, ¶¶6-8, it is also likely to cause TBOC to suffer very
16 significant damage to its business reputation and goodwill. If TBOC is consistently unable to
17 satisfy the demand for local oysters of customers who specifically travel to TBOC to purchase
18 local oysters, those customers will cease to do so and its reputation as a source for local oysters
19 will be irreparably harmed. *See id.*, ¶¶ 14-15. If, during August and September months when
20 Washington growers are not allowed to harvest, TBOC is consistently unable to meet customer
21 demand for any oysters, its “business and reputation as a reliable destination where family and
22 friends can go for oysters and enjoy a few hours with friends and family on the shore of
23 Tomales Bay will be lost.” *Id.*, ¶ 16.

24 The business success and reputation of local restaurants, while not to the same degree as
25 TBOC, is also tied to the continued operation of DBOC. Luc Chamberland, owner of the
26 Plaintiff Saltwater Oyster Depot in Inverness, California states:

27 As the owner and operator of a small farm to table restaurant, we rely on locally
28 sourced shellfish to offer our guests a taste of our area and support a tightly knit
food production network.

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1 Locally sourced oysters are a key element of our menu and losing Drakes Bay
2 oysters would greatly diminish the value of what we have to offer. Furthermore,
3 the cost of replacing Drakes Bay oysters with out of state oysters is both more
costly and logistically difficult due to the lengthy travel times between the area
of production and the final location of consumption.

4 Declaration of Luc Chamberland (“Chamberland”), ¶¶ 2-3. Plaintiff Margaret Grade, partner in
5 the Sir and Star in Olema, California, similarly testifies:

6 Sir and Star is a destination restaurant. It is small and our menu, which changes
7 with the season and what is available, is grounded in the products that are
farmed, foraged or fished locally. . . .

8 [F]resh oysters on the half shell and fresh-shucked canned oysters are virtually
9 staples on our menu, which otherwise changes with the seasons. The Drakes Bay
Oyster Company [DBOC] is the only source consistently available to us for fresh
10 locally grown oysters.

11 The DBOC is the only oyster cannery remaining in California, and the only
12 oyster grower who grows oysters in the clusters that are ideal for use as shucked
oysters. If the National Park Service succeeds in closing down DBOC, our menu
will be changed forever, not just change with the seasons.

13 Despite all of the efforts to "save the salmon" and other fish that were available
14 from local sources in the past, oysters from Drakes Estero have become the only
truly fresh and locally sourced fish available to restaurants like ours on a
15 consistent basis.

16 Declaration of Margaret Grade (“Grade Dec.”), ¶¶ 2, 4-6. The high reputation of Plaintiff
17 Osteria Stellina, an Italian restaurant in Point Reyes, similarly rests on its “unwavering
18 commitment to local organic products.” Declaration of Christian Caiazzo (“Caiazzo Dec.”), ¶ 2.

19 As its owner, Christian Caiazzo testifies, Osteria Stellina “has become a destination restaurant
20 and we have regular customers who come from what we call ‘over the hill’ because they
21 appreciate our commitment to fresh locally produced food, including DBOC oysters.” *Id.*, ¶ 4.

22 Mr. Caiazzo continues:

23 Without DBOC oysters, we will no longer be able to consistently serve fresh
24 locally sourced seafood. While I cannot estimate the loss in our customer base, it
will be significant.

25 *Id.*, ¶ 5. Robert Harvell owner of Plaintiff Reyes Café in Point Reyes Station, California,
26 similarly testifies, “many of my customers come to Point Reyes because of the reputation
27 restaurants here have for serving fresh organic and locally sourced cuisine, such as oysters from
28 nearby Drakes Estero. The closure of Drakes Bay Oyster Company would hurt the reputation

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1 local restaurants have earned through the years as their customers have grown to expect locally
2 sourced foods.” See Declaration of Robert Harvell (“Harvell Dec.”), ¶¶ 2-5. Even for restaurants
3 in San Francisco, like the Hayes Street Grill, the closure of Drakes Bay oysters presents
4 devastating loss, given the important role it plays as a source of “fresh, nutritious and affordable
5 protein, especially compared in price to wild local king salmon, local halibut or black cod.” See
6 Declaration of Patricia Unterman (“Unterman Dec.”), ¶ 6.

7 The importance of the DBOC to the small rural community of West Marin is, however,
8 not at all limited to the irreplaceable role it plays as source of locally grown shellfish. The
9 DBOC is a source of both employment and housing for a large portion of the local community,
10 most of whom will likely be forced to move out of the area given the limited supply of both
11 housing and jobs there. As Plaintiff Loretta Murphy, a manager at DBOC and 28-year West
12 Marin community member testifies:

13 DBOC and the oyster farm workers are an *integral part of the community*
14 *fabric, and the destruction of the oyster farm, would further add to the*
15 *unraveling of the core fabric of our area.* If the oyster farm is forced to close
16 and the oyster workers lose their housing and move to other areas it will be a
17 large negative impact on the local school, the local church, and countless
businesses, shops and restaurants. The loss of these jobs will mean upheaval for
over 40 family members and there will be much collateral damage from such a
large change in such a small town.

18 Declaration of Loretta Murphy (“Murphy Dec.”), ¶ 5 (emphasis added). Ramon Cadiz,
19 President of the West Marin Chamber of Commerce, similarly testifies:

20 The impact on our local economy of losing so many jobs in an already tight
21 economy, and the impact on the families who will lose their homes when there
22 simply is no affordable housing available for people who work in West Marin, is
23 tragic. The impact on the social fabric of our community could take decades to
repair and the relationship of the community to its NPS neighbors may never
heal if the NPS succeeds in closing down the Drakes Bay Oyster Farm.

24 Declaration of Ramon Cadiz (“Cadiz Dec.”), ¶ 4.

25 The loss of such an important part of the local agricultural community also puts at risk
26 the viability of that community. Sam Dolcini, a fourth generation Marin County dairy farm and
27 President of the Board of the Marin County Farm Bureau, testifies:
28

1 Agriculture is an important part of Marin's economy and the oyster farm in
2 Drakes Estero is a significant and important part of agriculture in Marin. It
3 produces 85% of the San Francisco Bay Area's shellfish, all of which are sold
4 locally, mostly at farmers' markets, to local restaurants or through booths at local
5 events. The loss of this product would seriously impact the local food
6 distribution system and economy.

7 Dolcini Dec., ¶ 3. The DBOC’s closure also creates the risk of creating a domino effect that
8 could lead to closing of ranches in Marin national parks, which together account for 17% of
9 Marin’s direct gross agricultural income, the loss of which could significantly undermine the
10 viability of Marin’s agricultural sector. *See id.*, ¶ 6.

11 **LEGAL STANDARDS**

12 The Federal Rule of Civil Procedure 65 provides courts the authority to temporarily
13 restrain and preliminarily enjoin conduct by defendants prior to a full adjudication of the merits
14 of a case. The purpose of a preliminary injunction is “to preserve the status quo with provisional
15 relief until the merits can be sorted out.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
16 1127, 1134 (9th Cir. 2011) (internal quotation omitted). In the Ninth Circuit, there exist two
17 standards for determining whether issuance of a preliminary injunction is appropriate. The
18 standards that govern the issuance of a temporary restraining order are “substantially identical”
19 to those governing issuance of a preliminary injunction. *Stuhlberg Int’l Sales Co. v. John D.*
20 *Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001); *see also* Fed. R. Civ. P. 65(b).

21 The two standards for issuance of a preliminary injunction are often referred to as the
22 “likelihood of success on the merits” standard and the “serious questions going to the merits”
23 standard. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d at 1132 (internal quotation
24 omitted). Under both standards, the party seeking the preliminary injunction must establish
25 “there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at
26 1135. However, under the “likelihood of success on the merits” formulation, if the plaintiff
27 satisfies the above two prongs, and shows that she is likely to succeed on the merits of a claim,
28 she need only show that the balance of the hardships tips in her favor to be entitled to a
preliminary injunction. *See Am. Trucking Assns. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.
2009). On the other hand, under the “serious questions going to the merits” formulation, a

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1 plaintiff is entitled to a preliminary injunction if, in addition to satisfying the above two prongs,
2 she shows that there are serious questions going to the merits of a claim and the balance of the
3 hardships tips “sharply towards the plaintiff.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
4 at 1135. In this context, “‘serious questions’ refers to questions which cannot be resolved one
5 way or the other at the hearing on the injunction and as to which the court perceives a need to
6 preserve the status quo lest one side prevent resolution of the questions or execution of any
7 judgment by altering the status quo.” *Philippines v. Marcos*, 862 F.2d 1355, 1362 (9thCir. 1988)
8 (internal quotations omitted).

9 **ARGUMENT**

10 **I. Plaintiffs Would Likely Suffer Irreparable Harm Absent Preliminary Relief**

11 **A. Plaintiffs Would Lose a Critically Important Supply of Local Oysters Likely**
12 **Causing them to Suffer an Irreparable Loss of Business Goodwill**

13 As discussed *supra* the business reputations, goodwill, and ability to draw customers of
14 Plaintiffs TBOC, Saltwater Oyster Depot, Osteria Stellina, Café Reyes, and Plaintiff Grade’s Sir
15 and Star restaurant, all depend on their ability to deliver locally source products, including local
16 oysters, to a customer base that specifically travels to their locations in West Marin to consume
17 those products. *See* Friend Dec., ¶¶ 7, 14; Chamberland Dec., ¶¶ 2-3, Grade Dec., ¶¶2, 4-6;
18 Ciazzo Dec., ¶¶ 2, 4-5; Harvell Dec., ¶¶ 2-5. This is especially so for TBOC, which estimates
19 that between 30% to 40% of TBOC’s retail customers will not buy anything but local oysters,
20 and travel specifically to TBOC to buy local oysters. Friend Dec., ¶ 7. According the NPS, the
21 DBOC is responsible for 58% of the oysters grown in Marin, Gross Dec., Ex. 5 (FEIS at xx),
22 while TBOC’s owner, Mr. Friend of, who has worked in the Marin’s aquaculture industry since
23 1989 puts DBOC’s contribution at 70% of the total. Friend Dec., ¶ 10. There is no alternative
24 supply for TBOC and other plaintiffs who depend on DBOC for local oysters. *See id.*, ¶ 8.
25 Furthermore, if DBOC closes, TBOC, the business of which substantially depends on providing
26 customers local oysters, every time it rains a half an inch or more, will have no local oysters at
27 all to provide to such customers. *See id.*, ¶ 9. Furthermore, if DBOC closes, in August and
28 September when the State of Washington prohibits harvesting of oysters, TBOC is likely to be

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1 left with only the small amount of oysters it grows itself to sell, meaning that it will likely have
2 no oysters—local or otherwise—to sell many of its customers. The inability of these Plaintiffs
3 to provide the product that their customers are specifically traveling to their businesses to
4 provide will inevitably cause them significant reputational harm and a loss of goodwill. *See id.*,
5 ¶¶ 9, 14-17; Chamberland Dec., ¶¶ 2-3, Grade Dec., ¶¶2, 4-6; Ciazzo Dec., ¶¶ 2, 4-5; Harvell
6 Dec., ¶¶ 2-5.

7 It is well established that a likely “loss of business goodwill and reputation” constitutes
8 irreparable harm sufficient to support issuance of a preliminary injunction. *Am. Trucking Assns.*
9 *v. Los Angeles*, 559 F.3d at 1057. Furthermore, courts have consistently recognized that the
10 termination of a supply of a unique product that a business’s customers expect the business to
11 have and to the business specifically to purchase creates irreparable damage to that businesses
12 goodwill. *See, e.g. Reuters, Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 907-908 (2d Cir.
13 1990) (“terminating the delivery of a unique product to a distributor whose customers expect
14 and rely on the distributor for a continuous supply of that product almost inevitably creates
15 irreparable damage to the good will of the distributor.” (collecting cases); *Ross-Simons of*
16 *Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996).

17 Thus, the likely loss of goodwill and reputation that Plaintiffs TBOC, Saltwater Oyster
18 Depot, Osteria Stellina, Café Reyes, Grade will suffer if the DBOC closes and they lose access
19 to the locally harvested oysters it now supplies constitutes a likelihood of irreparable harm
20 squarely satisfying that requirement.

21 **B. Plaintiffs Would also Likely Suffer Significant Uncompressible, and thus**
22 **Irreparable, Direct Financial Losses from the Loss of DBOC Oysters**

23 In addition to the irreparable reputational harm that would occur Plaintiff TBOC and the
24 other Marin business Plaintiffs if the DBOC closed and they no longer had access to the local
25 oysters it supplies, these Plaintiffs, especially Plaintiff TBOC, would also likely suffer
26 significant direct financial losses from the loss of supply. As Mr. Friend states, he commonly
27 purchased between 6,000 and 15,000 oysters a week from DBOC. Friend Dec., ¶ 5.
28 Furthermore, as he testified, DBOC oysters are very significant, and after rains, the only source

1 of local oysters, which between 30-40% of his customers exclusively come to him to purchase,
2 during the periods when Washington’s oyster fishery is closed, DBOC is the only source of
3 oysters he has to sell beyond the small number he raises. *See id.*, ¶¶ 7-10, 14-16. These are very
4 likely losses for which TBOC has no cause of action to recover from Defendants. These loses
5 therefore also constitute a likelihood of irreparable harm that supports issuance of a preliminary
6 injunction here. *See Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009)

7 **II. Plaintiffs are Likely to Succeed on the Merits of Their Claims and Have, at least,**
8 **Raised Serious Question Concerning These Claims**

9 **A. Plaintiffs Are Likely to Prevail on, and Have, at least, Raised Serious**
10 **Questions concerning, their National Aquaculture Act Claim Against the**
11 **Interior Defendants**

12 The National Aquaculture Act states: “Each Federal department and agency that has
13 functions or responsibilities with respect to aquaculture or has jurisdiction over any activity that
14 affects, or that may affect, the achievement of the purpose and policy of this Act, . . . in
15 consultation with the coordinating group and to the maximum extent practicable, perform such
16 function, responsibility, or activity in a manner that is consistent with the purpose and policy of
17 this Act.” 16 U.S.C. § 2805(d). The referenced purpose and policy of the National Aquaculture
18 Act is to promote and support the development of private aquaculture and domestic aquatic food
19 supplies and to ensure coordination among the various federal agencies that have aquaculture
20 programs and policies and those that have jurisdiction over activities that affects aquaculture.
21 *See* 16 U.S.C. §2801.

22 The record shows that (1) the Interior Defendants were required to comply with the
23 substantive and procedural legal requirements of the National Aquaculture Act in deciding
24 whether to close the DBOC oyster farm; (2) the Interior Defendants erroneously decided they
25 were not required to comply with those substantive and procedural legal requirements; and (3)
26 as a result, the Interior Defendants did not comply with those substantive and procedural legal
27 requirements. Thus, Plaintiffs are likely to prevail on their National Aquaculture Act Claim
28 against the Interior Defendants.

1. The Interior Defendants Were Required to Follow the Substantive
and Procedural Legal Requirements of the National Aquaculture Act

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in Deciding Whether to Close the DBOC Oyster Farm

The National Aquaculture Act’s substantive and procedural legal requirements apply *inter alia* to “[e]ach Federal department and agency that . . . has jurisdiction over any activity that affects, or that may affect, the achievement of the purpose and policy of this Act.” 16 U.S.C. § 2805(d). The policy and purpose of the National Aquaculture Act is to promote the development of aquaculture and domestic aquatic food supplies. *See* 16 U.S.C. §2801. Section 124 gave the Secretary the authority to decide whether to close an oyster farm that is responsible for 50% of the total amount of oysters grown in the State of California. Thus, the National Aquaculture Act’s substantive and procedural legal requirements applied to that decision.

2. The Interior Defendants Erroneously Determined that the National Aquaculture Act’s Substantive and Procedural Legal Requirements Did Not Apply to their Decision whether to Close the DBOC Oyster Farm

In addition to the Secretary’s erroneously claimed broad exemption from *all* substantive and procedural legal requirements in making his decision whether to close the DBOC oyster farm, the Interior Defendants also erroneously claimed a categorical exemption from the legal requirements of the National Aquaculture Act based on the fact that “[t]he National Aquaculture Act of 1980 (Act) does not identify the National Park Service as having responsibility for programs related to aquaculture.” Gross Dec., Ex. 8 (FEIS at F-26). This interpretation, however, ignores the second part 16 U.S.C. § 2805(d)’s jurisdictional clause, which defines the entities subject to the Act’s legal requirements as “[e]ach Federal department and agency that has functions or responsibilities with respect to aquaculture *or has jurisdiction over any activity that affects, or that may affect, the achievement of the purpose and policy of this Act.*” Having determined that the NPS did not meet the first criterion, to wit having “functions or responsibility with respect to aquaculture,” the Interior Defendants wholly ignored the other criterion, having “jurisdiction over any activity that affects, or that may affect, the achievement of the purpose and policy of the act.”

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1 As discussed *supra* having the jurisdiction to decide whether to close an oyster farm that
 2 is responsible for half of California’s domestic oyster production qualifies as an activity that has
 3 affects, or that may affect, the achievement of the National Aquaculture Act’s purpose and
 4 policy of promoting and supporting the development of aquaculture and domestic aquatic food
 5 supplies. Moreover, in the FEIS, the NPS expressly claimed the jurisdiction to determine
 6 whether or not the DBOC could continue operating its oyster farm in Drakes Estero. Under the
 7 heading “NPS JURISDICTION,” the FEIS states *inter alia*: “The NPS’s jurisdiction over
 8 DBOC’s aquaculture operation is not limited by the rights of the state retained when it
 9 conveyed the tide and submerged lands in Drakes Estero to the United States.” Gross Dec., Ex.
 10 6 (FEIS at 7).² The FEIS further states “NPS laws, regulations, and policies apply to DBOC’s
 11 operations on tide and submerged lands within Drakes Estero.” *Id* (FEIS at 8). The Interior
 12 Defendants are not free to, on the one hand, claim the jurisdictional authority over DBOC’s
 13 aquaculture operations sufficient to shut those operations down, while, on the other hand,
 14 disclaim that jurisdiction so as to avoid the obligation to exercise that authority in accordance
 15 with the National Aquaculture Act. Their opportunistic attempt to do so is classically arbitrary,
 16 capricious, and unlawful.

17 Thus, whether the Interior Defendants’ determination that they were not bound by the
 18 National Aquaculture Act’s substantive and procedural legal requirements in deciding whether
 19 to close the DBOC oyster farm was based the Secretary’s erroneously claim immunity from all
 20 legal constraints or their erroneous reading of the National Aquaculture Act jurisdictional
 21 mandates, it was arbitrary, capricious and unlawful and should be set aside. *See* 5 U.S.C. §
 22 702(2)(A).

23
 24
 25
 26 ² As discussed in the Complaint, ¶¶ 64-67, the Interior Defendants’ analysis and consideration
 27 of the public trust right to fish and the manner in which their decision whether to close the
 28 DBOC oyster farm could affect it was arbitrary and capricious. As result of time constraints and
 interests of judicial efficiency, Plaintiffs have chosen not to base the instant motion on that
 claim. This does not reflect a belief by Plaintiffs that they are unlikely to prevail on that claim.

3. **The Interior Defendants Failed to Comply with the National Aquaculture Act’s Substantive and Procedural Legal Requirements**

The National Aquaculture Act has both substantive and procedural legal requirements, both of which the Interior Defendants ignored in their decision whether to close the DBOC oyster farm. Substantively, the act requires that a federal agency preform any act that affects, or may have an affect on, the act’s policies and purposes of promoting the development of aquaculture and domestic aquatic food supplies “in a manner that is consistent with the purpose and policy of [the National Aquaculture Act] . . . to the maximum extent practicable.” 16 U.S.C. § 2805(d). And procedurally, the act requires that such a federal agency consult “with the coordinating group” in order to ensure achievement of that result. *Id.*³

In response to statements of concern regarding the Interior Defendants’ failure to comply with the National Aquaculture Act in deciding whether to close the DBOC oyster farm, the Interior Defendants, based on their erroneous determination that the act’s provisions were not applicable to their decision, admitted that they did not seek to comply with it. *See* Gross Dec., Ex. 8 (FEIS F-26). And, indeed, there is nothing in the FEIS to indicate that the Interior Defendants either (a) sought to craft their decision whether to close the DBOC in a manner that was consistent with the act’s policies and purposes to the maximum extent practicable, or (b) that the Interior Defendants ever consulted with the coordinating group in this regard. This is despite the fact that by the Interior Defendants’ own admission, that “[i]n recent years, shellfish producers across the country, including those in California, have struggled to meet shellfish demands.” Gross Dec., Ex. 7 (FEIS at 274)

Accordingly, the Interior Defendants’ decision to close the DBOC was: (1) arbitrary, capricious, and unlawful in violation of 5 U.S.C. § 706(2)(A); (2) was made without observance of legally required procedures in violation of 5 U.S.C. § 706(2)(D); and (3) was in excess of statutory limitations in violation of 5 U.S.C. § 706(2)(C).

³ The “coordinating group” is a Joint Subcommittee on Aquaculture of the Federal Coordinating Council on Science, Engineering, and Technology made up of designees from various Federal agencies. 16 U.S.C. § 2805(a).

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1 For the foregoing reasons, Plaintiffs are likely to prevail on Count 1 of the Complaint,
2 that the Interior Defendants violated the National Aquaculture Act and the APA, and, at least,
3 have raised serious questions in this regard.

4 **B. Plaintiffs Are Likely to Prevail on, and Have, at least, Raised Serious**
5 **Questions concerning, their Coastal Zone Management Act Claim against**
6 **the Interior Defendants**

7 The Coastal Zone Management Act (“CZMA”) also contains substantive and procedural
8 legal requirements that the Interior Defendants ignored in making their decision whether to
9 close the DBOC oyster farm. Substantively, the CZMA requires that activities by federal
10 agencies that have coastal effects be “consistent to the maximum extent practicable” with
11 federally approved enforceable policies of a state’s coastal management plan. 16 U.S.C. §
12 1456(c)(1)(A). Among the enforceable policies of the California coastal zone management plan
13 is that “lands suitable for agricultural use shall not be converted to nonagricultural uses unless
14 continued or renewed agricultural use is not feasible.” Cal. Public Resources Code § 30242. The
15 plan further defines “agriculture” to include aquaculture. Cal. Public Resources Code § 30100.2.
16 Furthermore, qualify as “consistent to the maximum extent practicable,” as required, the activity
17 must be “fully consistent with the enforceable policies of management programs unless full
18 consistency is prohibited by existing law applicable to the Federal agency.” 15 C.F.R. § 930.32.
19 Furthermore, the law makes clear coastal effects “are not just environmental effects, but include
20 effects on coastal uses.” 15 CFR § 930.11(G).

21 Procedurally, federal agencies are required to provide the applicable State agency, here,
22 the CCC “with consistency determinations for all Federal agency activities affecting any coastal
23 use or resource,” and to “coordinate with the State agency prior to providing the determination.”
24 15 C.F.R. § 930.34.

25 The record shows that (1) the Interior Defendants were required to comply with the
26 substantive and procedural legal requirements of the CZMA in deciding whether to close the
27 DBOC oyster farm; (2) the Interior Defendants erroneously decided they were not required to
28 comply with those substantive and procedural legal requirements; and (3) as a result, the

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1 Interior Defendants did not comply with those substantive and procedural legal requirements.
2 Thus, Plaintiffs are likely to prevail on their CZMA claim against the Interior Defendants.

3 **1. The Interior Defendants Were Required to Follow the Substantive**
4 **and Procedural Legal Requirements of the CZMA in Deciding**
5 **Whether to Close the DBOC Oyster Farm**

6 The Interior Defendants’ closure of the DBOC oyster farm, ending 80 years of
7 continuous oyster cultivation in Drakes Estero as a “Federal agency activity within or outside
8 the coastal zone that affects any land or water use or natural resource of the coastal zone,” 16
9 U.S.C. § 1456(c)(1), and thus was subject to the CZMA’s substantive and procedural legal
10 requirements. This activity undeniably affected both land and water uses in the coastal zone.

11 The fact that a permit was involved and the NOAA Defendants erroneously determined
12 that the DBOC had to submit a consistency certification in connection with the latter’s effort to
13 fight the closure does not change this conclusion. Section 307(c)(1) of the CZMA provides that
14 if an activity is subject to Section 307(c)(3) it is not subject to the requirements of Section
15 307(c)(1). *See* 16 U.S.C. § 1456(c)(1). As an initial matter, as discussed below the NOAA
16 Defendants decision in this regard was erroneous. Allowing the DBOC to continue operating an
17 oyster farm cannot, as a matter of logic and plain language be said to “affect land or water use”
18 in Drakes Estero and its shores. In order for something to be said to “affect” something else it
19 must cause some kind of change to it. *Accord, e.g.,* Black’s Law Dictionary 57 (6th ed. 1990)
20 (“To act upon; influence; change; . . . often used in the sense of acting injuriously upon persons
21 or things.”); Webster’s Third New International Dictionary 35 (1986) (“to act upon”; “to
22 produce a material influence upon or alteration in”). If the Interior Defendants had granted the
23 DBOC the special use permit, there would have been no “change” or “alteration in” the use of
24 lands and waters in Drakes Estero; rather, just the opposite, such use would have remained
25 consistent with that of the last 80 years. In contrast, the Interior Defendants’ closure of the
26 DBOC oyster farm would dramatically affect the use of water and land in Drakes Estero. The
27 Interior Defendants cannot avoid their substantive and procedural legal obligations to ensure
28 that their decision whether to do so was consistent to the maximum extent practicable with
California’s enforceable coastal policies on the ground that a permit was involved and the

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1 NOAA Defendants erroneously determined that the DBOC was required to submit a consistency
2 certification in connection with it.

3 Furthermore, even if the NOAA Defendants' decision in that regard were not erroneous,
4 it would not operate to excuse the Interior Defendants of their obligations under the CZMA. In
5 *California v. Norton*, 311 F.3d 1162, 1172 (9th Cir. 2002), the federal government argued that
6 its decision to suspend offshore oil leases did not constitute a federal activity subject to a
7 consistency determination under § 307(c)(1) on the ground that when the holders of the leases
8 began exploration activities they would have to submit consistency certifications under §
9 307(c)(3). The Ninth Circuit rejected this argument, finding that when a federal agency makes a
10 significant decision that affects land or water uses or resources in the coastal zone it cannot
11 avoid the obligations under § 307(c)(1), on the ground that a private party might also have
12 obligations under § 307(c)(3) for a related activity. *Id.* at 1173. Similarly here, the Interior
13 Department cannot evade the substantive and procedural legal requirements under the CZMA
14 triggered by their decision to suspend 80 years of historical land and water use patterns in Drakes
15 Estero, based on the fact that the DBOC might also have obligations under the act. This is
16 especially so here, where the challenged action at issue is squarely *inconsistent* with
17 California's enforceable coastal policies.

18 **2. The Interior Defendants Erroneously Determined that the CZMA's**
19 **Substantive and Procedural Legal Requirements Did Not Apply to**
20 **their Decision whether to Close the DBOC Oyster Farm**

21 The FEIS contains no discussion of any obligation by the Interior Defendants to comply
22 with the CZMA. The Interior Defendants' apparent failure to even consider the possibility
23 makes their decision to close the DBOC's oyster farm arbitrary and capricious. *See Motor*
24 *Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency
25 must . . . articulate a satisfactory explanation for its action including a rational connection
26 between the facts found and the choice made.”). In addition, if, as is likely, their decision to
27 ignore these obligations was based on the Secretary's erroneous determination that he was not
28 constrained in making his decision by “any substantive or procedural legal requirements,” it was
also arbitrary and capricious on this ground as well. Finally, if the Interior Defendants' decision

1 to ignore the CZMA’s legal requirements was based on a determination that only the DBOC
2 had obligations under the CZMA, as discussed above, such a determination was wrong as a
3 matter as law and thus arbitrary and capricious.

4 **3. The Interior Defendants Failed to Comply with the CZMA**
5 **Substantive and Procedural Legal Requirements**

6 Flowing from the Interior Defendants’ apparent failure to even consider whether they
7 had legal obligations under the CZMA in connection with their decision to close the DBOC
8 oyster farm, the Interior Defendants wholly failed to satisfy any of their substantive or
9 procedural obligations under the act. Nowhere is there any indication that their decision to close
10 the DBOC oyster farm is consistent at all, let alone to the maximum extent practicable, with
11 California’s enforceable coastal policies. Those policies include: “lands suitable for agricultural
12 use shall not be converted to nonagricultural uses unless continued or renewed agricultural use
13 is not feasible.” Cal. Public Resources Code § 30242. There is nothing to indicate that the
14 Interior Defendants even considered this policy. Furthermore, there is nothing to indicate that
15 the Interior Defendants ever provide the CCC a consistency determination concerning their
16 decision to close the DBOC oyster farm in direct contravention with their explicit affirmative
17 obligation to do so. *Cf* 15 C.F.R. § 930.34(a)(1).

18 Accordingly, the Interior Defendants’ decision to close the DBOC was: (1) arbitrary,
19 capricious, and unlawful in violation of 5 U.S.C. § 706(2)(A); (2) was made without observance
20 of legally required procedures in violation of 5 U.S.C. § 706(2)(D); and (3) was in excess of
21 statutory limitations in violation of 5 U.S.C. § 706(2)(C).

22 _____
23 For the foregoing reasons, Plaintiffs are likely to prevail on Count 2 of the Complaint,
24 that the Interior Defendants violated the CZMA and the APA, and, at least, have raised serious
25 questions in this regard.
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C. **Plaintiffs Are Likely to Prevail on, and Have, at least, Raised Serious Questions concerning, their Coastal Zone Management Act Claim against the NOAA Defendants**

As discussed above the NOAA Defendants’ decision to require the DBOC to submit a consistency certification was erroneous. “The sole basis” on which the NOAA Defendants may base their decision whether to require an applicant for a permit to submit a consistency certification is “whether the proposed activity’s coastal effects are reasonably foreseeable.” 15 C.F.R. § 930.54(c). As a matter of basic logic, the proposed activity here, continuation of oyster farming that has occurred in the estero uninterrupted for approximately 80 years cannot be deemed to have coastal effects that are reasonably foreseeable, but rather only the cessation of such farming could have such effects. The definition in 15 CFR § 930.11(G) of “effect on any coastal use or resource” conforms with the natural reading of the phrase, to wit to “affect coastal resources” an activity must effect some kind of change from the status quo. The definition defines the term as “any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity.” 15 CFR § 930.11(G) (emphasis added). Maintenance of the status quo cannot, absent tortured interpretation, be deemed to “result from” anything. Furthermore the latter definition states explicitly, “Effects are not just environmental effects, but include effects on coastal uses.” Again, the only context in which coastal uses could be affected here was not as a result the continued operation of the oyster farm, but rather its cessation. Furthermore still the latter definition states that “[e]ffects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.” Again, the key is a change from the status quo. The continued operation of the oyster farm could not have any such indirect effects, while, in contrast, its cessation would. For example, Plaintiffs that depend on locally harvested oysters from the DBOC for the continued operation of their respective businesses cannot sensibly be

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1 described as being foreseeably affected, indirectly, by the continued operation of the DBOC’s
2 oyster farm; however, the cessation of its operations would indubitably have foreseeable
3 indirect effects on them. They would lose their critical supply of local oysters.

4 Accordingly, the NOAA Defendants’ decision to require that the DBOC submit a
5 consistency determination to CCC in connection with it continued operation of the oyster farm
6 was arbitrary, capricious, and lawful in violation of 5 U.S.C. § 706(2)(A) and was made without
7 observance of the procedures required by law in violation of 5 U.S.C. § 706(2)(D).

8
9 For the foregoing reasons, Plaintiffs are likely to prevail on Count 4 of the Complaint,
10 that the NOAA Defendants violated the CZMA and the APA, and, at least, have raised serious
11 questions in this regard.

12 **III. The Balance of the Equities Tip Sharply in Favor of Issuing a TRO and**
13 **Preliminary Injunction and Would Serve the Public Interest**

14 Because the instant action is against government agencies, the balance of the equities
15 and public interest analyses merge, *Drakes Bay Oyster*, 747 F.3d at 1092, and point towards
16 issuance of an injunction.

17 First, issuing the injunction would serve “a public interest of the highest order: the
18 interest in having government officials act in accordance with law.” *Seattle Audubon Soc. v.*
19 *Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) *aff’d* 952 F.2d 297 (9th Cir. 1991) The
20 Secretary explicitly, and erroneously, claimed that he was exempt from all substantive and legal
21 requirements in making the decision whether to close the DBOC’s oyster farm. *See* Gross Dec.,
22 Ex. B at 4. Accordingly, the Interior Defendants completely disregarded their legal obligations
23 under the National Aquaculture Act and CZMA. There is an extremely strong public interest in
24 ensuring that the Interior Defendants comply with those legal obligations. However, if
25 preliminary relief is not granted and the DBOC is dismantled while this litigation is pending,
26 any order by the Court requiring that the Interior Defendants complying with those obligations
27 would be effectively illusory. Thus, these laws and the obligations they impose on the Interior
28 Defendants will have been nullified here.

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1 Second, closure of the DBOC would mean not only a huge loss of jobs, but also the loss
2 of housing by 40 working class people in a county that has some of the most expensive housing
3 in the country. Murphy Dec., ¶ 5. This result in not only overwhelming hardship for these
4 people but also significant injury, and disruption to, the local community. *Id.*, ¶ 5; Cadiz Dec., ¶
5 4.

6 Third, closure of the DBOC would put at risk not only the continued business success of
7 the Plaintiffs, as discussed above, it would also decrease the long-term viability of Marin’s
8 agricultural sector. *See id.*; Dolcini Dec. ¶¶ 3-6. The weakening of Marin’s agricultural
9 character is significant public interest impact, given the increasing urbanization of the areas
10 around it.

11 Fourth and related to the first reason above, allowing closure of the DBOC oyster farm
12 before the Interior Defendants had met their legal obligations under the National Aquaculture
13 Act and CZMA, threatens the public interest served by the policies of encouraging the
14 preservation of aquaculture use of California coastal areas and aquaculture generally. These are
15 policies are not only reflected in California’s enforceable policies as discussed above, but also
16 the 2011 Shellfish Initiative. *See* Declaration of Thomas Moore (“Moore Dec.”), ¶ 3.

17 Fifth, the closure of the DBOC oyster farm before the Interior Defendants had met their
18 legal obligations under the National Aquaculture Act and CZMA is contrary to the public’s
19 interest in protection of their public trust right to fish and the proper and lawful regulation
20 thereby the California State authorities. *See id.*, ¶ 2; Yamagata Dec., ¶¶ 13-14.

21 Sixth, the public interest is served by ensuring that a uniquely affordable, healthy, local
22 and environmentally beneficial food source remains available while it is adjudicated whether
23 the Interior Defendants violated their legal obligations in deciding to shut this farm down. *See*
24 Creque Dec., ¶¶ 4-15; Yamagata Dec., ¶ 6-12; Unterman Dec., ¶ 6.

25 Finally, it should be noted, Plaintiffs have in no way brought this harm on themselves or
26 otherwise sat on their hands.

27 On the other hand, the public interest will not suffer in having an oyster farm continue to
28 operate in a location where oysters have been continuously raised since the 1930s.

1 **IV. No Bond Should Be Required**

2 There is no ground to require Plaintiffs, who are here acting as private attorneys general
3 to ensure that Defendants meet their duties under the nation’s laws, to post any more than a
4 nominal bond as a condition of granting the requested relief. *See California v. Tahoe Regional*
5 *Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985).

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiffs respectfully request that their Application and
8 Motion for a Temporary Restraining Order and Preliminary Injunctive Relief be granted.

9
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