

2-12-2016

## The Procedural Impact of an Environmental Impact Statement on Judicial Review

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### Recommended Citation

Ashley Poon, *The Procedural Impact of an Environmental Impact Statement on Judicial Review*, 43 B.C. Envtl. Aff. L. Rev. 221 (2016), <http://lawdigitalcommons.bc.edu/ealr/vol43/iss1/9>

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# THE PROCEDURAL IMPACT OF AN ENVIRONMENTAL IMPACT STATEMENT ON JUDICIAL REVIEW

ASHLEY POON\*

**Abstract:** On a sunny summer day in 2014, Drakes Bay Oyster Company closed its doors to the public, admitting defeat in a years-long fight with the Department of the Interior over the renewal of its operating permit. The Secretary of the Interior believed that the region's designation as "potential wilderness" under the Point Reyes Wilderness Act, along with public policy considerations, obligated him to decline renewal of the permit. In producing an Environmental Impact Statement regarding the impact of closing the farm, the Secretary procedurally insulated his agency decision from later judicial review in *Drakes Bay Oyster Company v. Jewell*.

## INTRODUCTION

Drakes Estero is a coastal estuary in the geographic and ecological center of Point Reyes National Seashore in Marin County, north of San Francisco.<sup>1</sup> The meeting of freshwater runoff with the Pacific Ocean's saltwater in the estuary creates a biologically diverse environment.<sup>2</sup> This mixing of freshwater and saltwater is also ideal for oyster farming, which began in the area in the 1930s.<sup>3</sup>

Charles Johnson opened the Johnson Oyster Company in Drakes Estero in 1954.<sup>4</sup> In 1972, Johnson sold his company and a forty-year reservation of use and occupancy (the "RUO") to the United States.<sup>5</sup> The RUO ended on November 30, 2012, and stated that upon its expiration "a special use permit may be issued for the continued occupancy of the property" and that such a permit "for continued use will be issued in accordance with the National Park Service (the "NPS") regulations in effect at the time the reservation expires."<sup>6</sup> Upon expira-

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

<sup>1</sup> *Drakes Estero Restoration*, NAT'L PARK SERV., [http://www.nps.gov/pore/learn/management/planning\\_drakesestero\\_restoration.htm](http://www.nps.gov/pore/learn/management/planning_drakesestero_restoration.htm) [<http://perma.cc/TE58-FMLE>].

<sup>2</sup> *Id.*

<sup>3</sup> *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1079 (9th Cir. 2013).

<sup>4</sup> *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 978 (N.D. Cal. 2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Jewell*, 747 F.3d at 1079 (emphasis omitted).

tion of the RUO or its extension, the company was “to remove all structures and improvements on the property within 90 days.”<sup>7</sup>

On December 17, 2004, Kevin Lunny purchased Johnson’s oyster company, including his farm.<sup>8</sup> Kevin Lunny and his wife Nancy renamed the farm Drakes Bay Oyster Company (the “Company”), which eventually produced approximately one third of California’s oysters.<sup>9</sup> In 2010, Lunny applied for a ten-year special use permit to continue operating the state’s largest oyster farm by writing to the Secretary of the U.S. Department of the Interior (the “Secretary” or “Secretary of the Interior”), Kenneth L. Salazar.<sup>10</sup> The controversy over the effects of the oyster farm’s operations pits food heavyweights and culinary industry activists against environmental conservationists.<sup>11</sup>

Lunny viewed himself as more than a mere farmer, and Drakes Bay Oyster Company as more than a seafood vendor.<sup>12</sup> Lunny believed that he was a steward of Drakes Estero because he practiced sustainable farming and ranching, donated oyster shells to habitat restoration efforts in the San Francisco Bay, and opened his farm to thousands of visitors for educational tours to increase awareness of the local ecosystem.<sup>13</sup> Drakes Bay Oyster Company employed thirty-one members of the Marin County community, half of which lived in affordable housing on-site at the farm.<sup>14</sup> The Lunnys asserted that the oyster farm provided beneficial ecological services to Drakes Estero by filter-

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<sup>7</sup> *Salazar*, 921 F. Supp. 2d at 979.

<sup>8</sup> *Id.*

<sup>9</sup> First Amended Complaint for Declaratory and Injunctive Relief at 1, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227), 2012 WL 6967944, at \*1 [hereinafter First Amended Complaint].

<sup>10</sup> *Salazar*, 921 F. Supp. 2d at 980.

<sup>11</sup> See Michael Ames, *The Oyster Shell Game*, NEWSWEEK (Jan. 18, 2015, 11:49 AM), <http://www.newsweek.com/2015/01/30/oyster-shell-game-300225.html>. Alice Waters, along with Tomales Bay Oyster Company, a Point Reyes oyster farm, Hayes Street Grill, a restaurant in San Francisco, and the following agriculture groups: California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and the Alliance for Local Sustainable Agriculture, filed an amici curiae brief to support Drakes Bay Oyster Company, arguing that closing Drakes Bay Oyster Company would have “broad, negative and immediate impact” on the food industry as a matter of public interest. Motion for Leave to File Amici Curiae Brief in Support of Appellant DBOC Preliminary Injunction Appeal at 1, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227), 2013 WL 1212907, at \*1. The Environmental Action Committee of West Marin, the National Parks Conservation Association, the National Resources Defense Council, Save our Seashore, and the Coalition of the National Park Service Retirees filed an amici curiae brief to support the Secretary of the Interior, arguing that the environmental benefits of removing the oyster operations outweighed the harm of removal, and that Drakes Bay Oyster Company’s request for injunction should be denied because it did not meet its burden of showing how extending the permit was in the public interest. See Motion for Leave to File Amici Curiae Brief in Support of Department of the Interior Response Brief at 3, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227), 2013 WL 1741902, at \*3.

<sup>12</sup> See *Stewardship*, SAVE OUR DRAKES BAY OYSTER FARM, <http://savedrakesbay.com/core/stewardship/> [<http://perma.cc/65K2-QU23>].

<sup>13</sup> *Id.*

<sup>14</sup> First Amended Complaint, *supra* note 9, at 1.

ing the bay's water.<sup>15</sup> Supporters of the farm's closure argued that the operations created a noise disturbance that negatively affected Drakes Estero's harbor seals and birds, left behind plastic debris on the Point Reyes National Seashore's beaches, and did not contribute to an improvement in water quality.<sup>16</sup>

In *Drakes Bay Oyster Co. v. Jewell*, Drakes Bay Oyster Company appealed the decision handed down by the United States District Court for the Northern District of California.<sup>17</sup> The Ninth Circuit Court of Appeals affirmed the district court's verdict upholding the Secretary's decision to allow the forty-year permit to expire and his order that the Company cease operations by denying Drakes Bay Oyster Company's requested preliminary injunction.<sup>18</sup> The farm's retail operations and cannery shut down on July 31, 2014, and farming ceased on December 31, 2014.<sup>19</sup> This Comment argues that the Secretary's enabling legislation allowed him to decline a permit extension without considering the content of the Environmental Impact Statement ("EIS") because production of the EIS alone satisfied the "hard look" baseline required by an Administrative Procedure Act (the "APA") analysis on judicial review, thereby precluding the decision from being overturned as arbitrary and capricious.<sup>20</sup>

## I. FACTS AND PROCEDURAL HISTORY

Congress established the Point Reyes National Seashore (the "Seashore") in 1962; the enabling legislation placed the Seashore under the administrative authority of the Secretary of the Interior.<sup>21</sup> Three years later, California conveyed all the land within the Point Reyes National Seashore to the United States, and reserved certain minerals rights to itself and the right to fish to Cal-

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<sup>15</sup> See *Environment and Awareness*, DRAKES BAY OYSTER CO., <http://www.drakesbayoyster.com/environment/> [<http://perma.cc/35XB-HU74>].

<sup>16</sup> Motion for Leave to File Amici Curiae Brief in Support of Department of the Interior Response Brief, *supra* note 11, at 15–17.

<sup>17</sup> *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1077 (9th Cir. 2013). Sally Jewell was sworn in as Secretary of the Interior during the course of litigation in April 2013, replacing Salazar. *About Secretary Jewell*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/whoware/secretaryjewell> [<https://perma.cc/LNJ9-F36N>]. Accordingly, the defendant's name changed from Salazar to Jewell on review in the Ninth Circuit. See FED. R. CIV. P. 25.

<sup>18</sup> *Jewell*, 747 F.3d at 1078.

<sup>19</sup> See *About Us*, SAVE OUR DRAKES BAY OYSTER FARM, <http://savedrakesbay.com/core/about/> [<http://perma.cc/PL24-FVWM>].

<sup>20</sup> See *infra* notes 21–102 and accompanying text.

<sup>21</sup> *Jewell*, 747 F.3d at 1078.

ifornians.<sup>22</sup> In 1976, Congress's Point Reyes Wilderness Act (the "Act") designated certain areas of the Point Reyes National Seashore as wilderness.<sup>23</sup>

The Point Reyes Wilderness Act also designated Drakes Estero as potential wilderness, and granted the Secretary of the Interior discretion to later designate the area as wilderness.<sup>24</sup> The House Committee's Report regarding the Act stated that potential wilderness areas were to be "essentially managed as wilderness, to the extent possible," and required continuous efforts to eliminate barriers to converting these lands and waters into full wilderness.<sup>25</sup>

In passing the Act, Congress took into account the Department of the Interior's recommendation that the acreage, including the Drakes Estero oyster farm, not be designated as wilderness because the "farming operations taking place in this estuary and the fishing rights over the submerged lands" made the area "inconsistent with wilderness."<sup>26</sup> At the same time that the Point Reyes Wilderness Act was passed, Congress indicated that "publication in the Federal Register of a notice by the Secretary of the Interior" would convert potential wilderness areas into wilderness.<sup>27</sup>

Kevin Lunny purchased the Johnson Oyster Company and its reservation of use and occupancy permit in 2004.<sup>28</sup> Before he closed in escrow on the pur-

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Wilderness is defined in the Wilderness Act of 1964 as "an area where the earth and its community of life are untrammelled by man." 16 U.S.C. § 1131 (2012). Such land is designated as wilderness for preservation of its physical characteristics which:

(1) [G]enerally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

*Id.*

<sup>24</sup> *Jewell*, 747 F.3d at 1079.

<sup>25</sup> H.R. REP. NO. 94-1680, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5593, 5595. Congress first used the term "potential wilderness" in Public Law 94-567 (the "Public Law") designating the Point Reyes National Seashore lands as wilderness and potential wilderness. Act of Oct. 20, 1976, Pub. L. No. 94-567, § 3, 90 Stat. 2692, 2693 (1976); Julia Graeser, *The Role of (Junk) Science in Wilderness Management: Lessons Learned in the Wake of Drakes Bay Oyster Company*, 19 HASTINGS W. NW.J. ENVTL. L. & POL'Y 307, 312 (2013). The Public Law did not define the term at the time. Graeser, *supra*.

<sup>26</sup> H.R. REP. NO. 94-1680, at 3.

<sup>27</sup> Act of Oct. 20, 1976, 90 Stat. at 2693. The National Park Service has continued to use the potential wilderness designation: its internal, unofficial management policies state that the label is intended to be a temporary label. *See* NAT'L PARK SERV., MANAGEMENT POLICIES 2006, at § 6.2.2.1 (2006), <http://www.nps.gov/policy/mp2006.pdf> [<http://perma.cc/B9AM-4J6N>]. Congress may authorize the potential wilderness to become designated wilderness upon the NPS Secretary's determination; this change in status is to be published in the Federal Register after the nonconforming uses in the potential wilderness area have ceased. *See id.*

<sup>28</sup> *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 979 (N.D. Cal. 2013).

chase of the farm, the National Park Service met with him and communicated the legal history of the area, including its view that it was required by its enabling legislation and management policies to actively seek to convert potential wilderness areas, specifically Drakes Estero and the oyster farm, to wilderness status by removing “non-conforming conditions.”<sup>29</sup> The NPS also communicated that it did not intend to extend the farm’s RUO when it expired.<sup>30</sup>

In 2009, Congress reviewed the authority it granted to the Secretary to extend the RUO.<sup>31</sup> Congress stated in Section 124 of the Department of the Interior Appropriations Act that before the farm’s permit expired on November 30, 2012, “[N]otwithstanding 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 . . . .”<sup>32</sup>

In 2010, Lunny applied to the Secretary for a ten-year special use permit extension.<sup>33</sup> In response, the NPS began the National Environmental Policy Act (“NEPA”) process for analyzing the environmental impacts of the farm’s operations, and released a Draft Environmental Impact Statement (“DEIS”) in September 2011.<sup>34</sup> Drakes Bay Oyster Company responded with a Data Quality Complaint, claiming the DEIS’s conclusions were inaccurate.<sup>35</sup> Congress directed the National Academy of Sciences (“NAS”) to assess the DEIS.<sup>36</sup> In August 2012, NAS stated that the DEIS had “a moderate or high level of uncertainty associated with impact assessments . . . .”<sup>37</sup> The NPS published its Final EIS in November 2012, which asserted that according to Section 124 of the Appropriations Act, the Secretary could make his decision to deny or extend the permit “notwithstanding” the NEPA analysis and the EIS.<sup>38</sup>

One day before the permit’s expiration, the Secretary announced in a Memorandum of Decision that he would allow the permit to expire.<sup>39</sup> The Secretary did not consider the EIS’s findings essential to his decision; instead, he incorporated a balancing test that relied on policy considerations of the NPS’s wilderness approach and the congressional intent underlying the Point Reyes

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 980.

<sup>31</sup> *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1080 (9th Cir. 2013).

<sup>32</sup> Act of Oct. 30, 2009, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009).

<sup>33</sup> *Salazar*, 921 F. Supp. 2d at 980.

<sup>34</sup> *Id.*

<sup>35</sup> First Amended Complaint, *supra* note 9, at 13.

<sup>36</sup> *Jewell*, 747 F.3d at 1081.

<sup>37</sup> *Id.*

<sup>38</sup> *Salazar*, 921 F. Supp. 2d at 981.

<sup>39</sup> *Id.*

Wilderness Act.<sup>40</sup> The following week, the NPS published a notice in the Federal Register announcing that Drakes Estero was designated as wilderness.<sup>41</sup>

Lunny filed a motion for preliminary injunction requesting that the United States District Court for the Northern District of California declare the Secretary's Memorandum of Decision void and unlawful, issue the special use permit he originally requested, and enjoin enforcement of the decision so that the Company could continue its operations throughout litigation.<sup>42</sup> He argued that the Secretary's decision violated Section 124 of the Department of the Interior Appropriations Act, NEPA, and the APA.<sup>43</sup>

To obtain injunctive relief, the moving party must establish: "(1) [L]ikelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in its favor; and (4) the injunction is in the public interest."<sup>44</sup> The district court denied Lunny's motion finding that Section 124 granted the Secretary full discretion to decide whether to renew a permit, which the court could not review under the APA.<sup>45</sup> The court also held that even if it had jurisdiction to review the decision, the Company was unlikely to meet the requisite elements to succeed on the merits of its motion, nor could it show that the balance of equities tipped in its favor such that the court could grant injunctive relief.<sup>46</sup>

Lunny appealed the decision to the United States Court of Appeals for the Ninth Circuit, arguing that the decision violated NEPA, the Data Quality Act, the APA, and the Constitution.<sup>47</sup> In *Jewell*, the Ninth Circuit affirmed the district court's order denying Drakes Bay's preliminary injunction.<sup>48</sup> The Ninth Circuit agreed with the district court that Drakes Bay was unlikely to succeed in proving that the Secretary violated Section 124, and thus, affirmed the lower court's denial of a preliminary injunction.<sup>49</sup>

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<sup>40</sup> See *id.* at 981–82.

<sup>41</sup> Designation of Potential Wilderness as Wilderness, Point Reyes National Seashore, 77 Fed. Reg. 71,826, 71826–27 (Dec. 4, 2012).

<sup>42</sup> *Salazar*, 921 F. Supp. 2d at 975–76.

<sup>43</sup> *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1077–78 (9th Cir. 2013).

<sup>44</sup> *Salazar*, 921 F. Supp. 2d at 983.

<sup>45</sup> See *id.* at 976.

<sup>46</sup> *Id.*

<sup>47</sup> First Amended Complaint, *supra* note 9.

<sup>48</sup> 747 F.3d at 1078.

<sup>49</sup> *Id.* Drakes Bay Oyster Company appealed the district court's decision to the United States Supreme Court, but the writ of certiorari was denied. *Drakes Bay Oyster Co. v. Jewell*, 134 S. Ct. 2877 (2014). The Company reached a settlement agreement with the NPS in the Northern District of California, and closed on December 31, 2014. Mark Prado, Marin Indep. Journal, *Drakes Bay Oyster Co. Dismantled to Return Farm Site to Nature*, SAN JOSE MERCURY NEWS, (Jan. 19, 2015, 8:28 AM), [http://www.mercurynews.com/eat-drink-play/ci\\_27349076/drakes-bay-oyster-co-dismantled-return-farm-site](http://www.mercurynews.com/eat-drink-play/ci_27349076/drakes-bay-oyster-co-dismantled-return-farm-site) [<http://perma.cc/E6TR-YBDA>]. The NPS is currently creating a restoration plan for Drakes Bay Oyster Company's remaining oyster racks and marine debris. See *Drakes Estero Restoration*, *supra* note 1.

## II. LEGAL BACKGROUND

The National Environmental Policy Act (“NEPA”) was enacted in 1969 under the Congressional Declaration of National Environmental Policy to “create and maintain conditions under which man and nature can exist in productive harmony.”<sup>50</sup> As the United States Court of Appeals for the Ninth Circuit emphasized in 1995, “[T]he purpose of NEPA is to ‘provide a mechanism to enhance or improve the environment and prevent further irreparable damage.’”<sup>51</sup>

NEPA requires agencies to produce an Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment . . . .”<sup>52</sup> Certain environmental actions do not require the production of an EIS.<sup>53</sup> In 1995, a county in Oregon sought declaratory and injunctive relief before the Ninth Circuit in *Douglas County v. Babbitt*, asserting that the U.S. Secretary of the Interior (the “Secretary”) failed to comply with NEPA when designating habitat for threatened species under the Endangered Species Act.<sup>54</sup> The Ninth Circuit found that a proposed environmental conservation effort did not trigger NEPA and therefore did not require an EIS because the action “protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose.”<sup>55</sup> When required, the dual purposes of an EIS are to ensure that agencies properly consider the environmental consequences of a proposed action and to keep the public informed of environmental impacts of a proposed action.<sup>56</sup>

The President’s Council on Environmental Quality (the “CEQ”) oversees implementation of NEPA.<sup>57</sup> The CEQ issued regulations in 1978 that govern agencies’ authority to carry out their obligations under NEPA.<sup>58</sup> Specifically, the CEQ recognized agencies’ authority to interpret NEPA “as a supplement to its existing authority” and to carry out the requirements of NEPA in “full compliance with the purposes and provisions of [NEPA].”<sup>59</sup>

The National Park Service (the “NPS”) produces its own agency-specific NEPA regulations as updates to its “Directors Order #12: Conservation Planning, Environmental Impact Analysis, and Decision-making” (the “Order”)

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<sup>50</sup> 42 U.S.C. § 4331 (2012).

<sup>51</sup> *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995) (quoting *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

<sup>52</sup> 42 U.S.C. § 4332.

<sup>53</sup> *See id.*

<sup>54</sup> *See Babbitt*, 48 F.3d at 1499.

<sup>55</sup> *Id.* at 1507.

<sup>56</sup> *See id.* at 1498.

<sup>57</sup> *See* 42 U.S.C. § 4344.

<sup>58</sup> *See* 40 C.F.R. § 1500.6 (2015).

<sup>59</sup> *Id.*

and accompanying handbook.<sup>60</sup> These documents outline the agency's approach to its decision-making process.<sup>61</sup> The Order states that the "NPS will articulate a reasoned connection between the technical and scientific information considered and the final agency action."<sup>62</sup> If this information cannot be obtained because it would be too expensive or technically impossible to ascertain, the NPS will identify a proposed alternative.<sup>63</sup> If a proposed alternative is unavailable, the NPS will follow the CEQ's regulations and state in the EIS that:

(1) . . . [S]uch information is incomplete or unavailable; (2) . . . the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) an evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.<sup>64</sup>

NEPA functions jointly with the Administrative Procedure Act (the "APA") to ensure that agencies take a "hard look" at any environmental consequences of a proposed action.<sup>65</sup>

The APA authorizes judicial review of agency actions, which may be set aside if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>66</sup> An agency's decision must be upheld in court as long as "the agency's path may reasonably be discerned."<sup>67</sup> Given agencies' expertise and experience in regulating their specific areas of industry and commerce, a court's standard of judicial review of an agency action is fairly narrow.<sup>68</sup> A court may not substitute its judgment for that of the agency; rather,

<sup>60</sup> *Environmental Planning & Compliance Branch, NAT'L PARK SERV.*, <http://www.nps.gov/orgs/1812/epc.htm> [<http://perma.cc/5YRL-PSZ3>].

<sup>61</sup> *See id.*

<sup>62</sup> Nat'l Park Serv., U.S. Dep't of the Interior, Director's Order #12: Conservation Planning, Environmental Impact Analysis, and Decision-Making § 4.5 (Oct. 5, 2011), [http://www.nps.gov/policy/DOOrders/DO\\_12.pdf](http://www.nps.gov/policy/DOOrders/DO_12.pdf) [<http://perma.cc/9BZH-M35X>].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 4.6.

<sup>65</sup> *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* stated that NEPA's "mandate to the agencies is essentially procedural." 435 U.S. 519, 558 (1978). Because NEPA is primarily a procedural statute, a court's role is merely "to insure that the agency has taken a *hard look* at environmental consequences." *See Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983) (emphasis added).

<sup>66</sup> Administrative Procedure Act, 5 U.S.C. § 706 (2012).

<sup>67</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (internal citation and quotation marks omitted).

<sup>68</sup> *Judulang v. Holder*, 132 S. Ct. 476, 483 (2011).

in reviewing a decision, a court must assess “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment” from the agency.<sup>69</sup>

The limits of a court’s deference to agency decisions are evident in *Bluewater Network v. Salazar*, decided in 2010 by the United States District Court for the District of Columbia, in which environmental organizations challenged the NPS’s decision to allow jet skis back into the Gulf Islands National Seashore and the Pictured Rocks National Lakeshore.<sup>70</sup> The NPS had conducted an Environmental Assessment (the “EA”) analyzing the impacts of jet skis and laying out three options for action: allowing jet ski use at the same level, limiting jet ski use, or prohibiting jet ski use entirely.<sup>71</sup> The court in *Bluewater Network* found that the EA was improperly conclusory, and the NPS’s decision to allow jet skis in the national parks made pursuant to the analysis of the EA was therefore arbitrary and capricious.<sup>72</sup>

The United States Supreme Court clarified the scope of judicial review of administrative decisions in *Citizens to Preserve Overton Park, Inc. v. Volpe* in 1971 by affirming that a court’s inquiry must be “searching and careful,” and stating that the “ultimate standard of review is a narrow one.”<sup>73</sup> Private citizens and conservation organizations claimed that the Secretary of the U.S. Department of Transportation (the “Secretary of Transportation”) violated federal statutes that prohibited him from using federal funds to build a highway through a public park if a “feasible and prudent alternate route exist[ed].”<sup>74</sup> If there was no such alternate route, the Secretary of Transportation was permitted to approve the construction of the highway if all possible harm was minimized.<sup>75</sup> The Supreme Court found that the Secretary of Transportation’s failure to make formal findings and state his reasons for allowing the highway’s construction, though making judicial review more difficult, did not “necessarily require that the case be remanded to the Secretary.”<sup>76</sup> Nevertheless, the Su-

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<sup>69</sup> *Id.* at 477 (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>70</sup> 721 F. Supp. 2d 7, 9 (D.D.C. 2010).

<sup>71</sup> *See id.* at 12. The United States Court of Appeals for the Ninth Circuit has clarified that “[a]n environmental assessment (EA) is a document used to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS.” *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1498 (9th Cir. 1995). An Environmental Assessment determines if there will be significant effects from a federal action, whereas an EIS analyzes and discloses the significant effects known to result from a federal action. *Frequently Asked Questions*, BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, [http://www.blm.gov/wo/st/en/prog/planning/planning\\_overview/frequently\\_asked\\_questions.html#12](http://www.blm.gov/wo/st/en/prog/planning/planning_overview/frequently_asked_questions.html#12) [<http://perma.cc/MP7Q-2E98>]. An EA is generally shorter than an EIS, its production is less procedurally intensive, and it provides the public with less chance for involvement. *Id.*

<sup>72</sup> *Bluewater Network*, 721 F. Supp. 2d at 38.

<sup>73</sup> 401 U.S. 402, 416 (1971).

<sup>74</sup> *Id.* at 404–05.

<sup>75</sup> *Id.* at 405.

<sup>76</sup> *Id.* at 417.

preme Court ultimately remanded the case because the Secretary of Transportation was obliged to provide some explanation sufficient to allow the court “to determine if the Secretary acted within the scope of his authority and if the Secretary’s action was justifiable under the applicable standard” of review.<sup>77</sup>

In *Baltimore Gas and Electric Co. v. Natural Resources Defense Council* in 1983, the National Resource Defense Counsel challenged the Nuclear Regulatory Commission’s (the “NRC”) new rule, which assumed that no environmental impact would result from long-term storage of certain radioactive wastes.<sup>78</sup> The United States Supreme Court held that the NRC complied with both NEPA and the APA.<sup>79</sup> The Court’s NEPA and APA analyses were separate but related, and did not “impose *hybrid* procedures greater than those contemplated by the governing statutes.”<sup>80</sup> The Court held that the Nuclear Regulatory Commission’s decision was made with a “self-evident judgment in error,” which violated NEPA and failed the APA’s arbitrary and capricious standard.<sup>81</sup> Specifically, the Court found that if an agency’s decision ignores factors relevant under NEPA with regard to the environmental effects of a proposed action, the decision is arbitrary and capricious.<sup>82</sup> The Court emphasized that its role was not to substitute its own decision-making process for that of the agency, but rather, to confirm that the agency “considered the relevant factors and articulated a rational connection” between the facts and the agency’s ultimate decision.<sup>83</sup>

### III. ANALYSIS

In *Drakes Bay Oyster Co. v. Jewell*, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Northern District of California’s decision that Drakes Bay Oyster Company would likely not be able to show that the Secretary of the U.S. Department of the Interior (the “Secretary” or “Secretary of the Interior”) violated the National Environmental Policy Act (“NEPA”) in his decision to decline to extend the reservation of use and occupancy (the “RUO”) permit.<sup>84</sup> The Interior Appropriations Act’s “notwithstanding” clause applied to conflicting provisions of law: the Secretary, in making his decision, was required to take into account statutes and regulations that did not conflict with the Section 124 grant of authority to extend the permit, but could disregard potentially conflicting statutes or regula-

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<sup>77</sup> *Id.* at 420.

<sup>78</sup> *See* 462 U.S. 87, 89–90 (1983).

<sup>79</sup> *Id.* at 90.

<sup>80</sup> *Id.* at 92 (emphasis added).

<sup>81</sup> *Id.* at 95–96.

<sup>82</sup> *Id.* at 96.

<sup>83</sup> *Id.* at 105.

<sup>84</sup> 747 F.3d 1073, 1078 (9th Cir. 2014).

tions.<sup>85</sup> Similarly, the Ninth Circuit in its review of the Secretary's decision should consider Section 124 and any other applicable statutes that did not conflict with Section 124.<sup>86</sup> Ultimately, the Ninth Circuit found that the Secretary's decision was not arbitrary and capricious, and that Drakes Bay Oyster Company's "likelihood of success on the merits of [its] claims [was] too remote" to warrant the remedy of a preliminary injunction.<sup>87</sup> Following the Ninth Circuit's prior reasoning in *Douglas County v. Babbitt* that an act that was essentially a conservation act did not trigger NEPA, the court in *Jewell* held that the Secretary's failure to extend the RUO did not trigger NEPA compliance because the removal of the oyster farming operations restored the physical environment to its natural state.<sup>88</sup>

In contrast to the United States District Court for the District of Columbia's decision in *Bluewater Network v. Salazar*, where the court found the National Park Service's (the "NPS") Environmental Assessment and the agency's later reliance on it both conclusory, the Ninth Circuit held that the Secretary of the Interior's decision with regards to NEPA compliance was acceptable.<sup>89</sup> The court recognized the Secretary's acknowledgement that NEPA compliance was procedurally "less than perfect," but this did not amount to prejudicial error that would grant Drakes Bay Oyster Company relief under the Administrative Procedure Act (the "APA").<sup>90</sup> The court was satisfied that the Secretary considered the Environmental Impact Statement (the "EIS") because NEPA does not require resolution of all potential environmental consequences.<sup>91</sup> In doing so, the Ninth Circuit reaffirmed that the NEPA and APA analyses are separate, as established in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, because the court found that the APA arbitrary and capricious standard does not require flawless NEPA compliance.<sup>92</sup> Though the Secretary did not consider the EIS's content crucial to his decision, the Ninth Circuit nevertheless deferred to his expertise.<sup>93</sup>

By merely producing an EIS, the NPS ensured that a court would be unlikely to find the agency's decision arbitrary and capricious under the APA's standard: the results and recommendations within the EIS are less consequen-

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<sup>85</sup> Act of Oct. 30, 2009, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009); *Jewell*, 747 F.3d at 1083 (internal citation omitted).

<sup>86</sup> *Jewell*, 747 F.3d at 1083.

<sup>87</sup> *Id.* at 1085.

<sup>88</sup> *See id.* at 1090.

<sup>89</sup> Compare *Jewell*, 747 F.3d at 1090–91 (upholding the Secretary's decision, finding that it met the NEPA standard of review and was not conclusory), with *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 38 (D.D.C. 2010) (holding that the NPS decision was conclusory).

<sup>90</sup> *Jewell*, 747 F.3d at 1090–91.

<sup>91</sup> *Id.* at 1091.

<sup>92</sup> *See* *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 92 (1983); *Jewell*, 747 F.3d at 1090–91.

<sup>93</sup> *See Jewell*, 747 F.3d at 1091.

tial than the process of producing the EIS.<sup>94</sup> NEPA compliance and the findings of the EIS were, therefore, not essential to the Secretary's decision because the Secretary reasonably relied on the policy and congressional intent underlying the 1976 Point Reyes Wilderness Act.<sup>95</sup>

The time-consuming, resource-intensive process of producing an EIS is nevertheless important because it preemptively ensures that the agency has taken a "hard look" at the issue, which effectively insulates the decision from being overturned on judicial review.<sup>96</sup> Producing an EIS that will not be considered in the agency's final decision threatens the dual purpose of the EIS, which requires the agency to properly consider the environmental consequences of a proposed action and keeps the public informed of environmental impacts.<sup>97</sup> Although affected parties may remain involved in agency decision-making by participating in the production of the EIS, they may be excluded from administrative decision-making if the EIS is later considered inconsequential.<sup>98</sup>

In declining to extend the RUO for Drakes Bay Oyster Company, the NPS closed a locally beloved institution and expressed its interpretation of legislation regarding permissible commercial activities within a wilderness area.<sup>99</sup> Further, the Ninth Circuit, in upholding the Secretary's decision and validating the decision-making process on the basis of law and policy rather than on the findings of the EIS, strengthened the related analyses of APA and NEPA compliance by allowing the procedural production of an EIS alone, rather than its substantive scientific findings, to meet the APA's standard, which requires the agency to take a "hard look" at environmental effects of a proposed action.<sup>100</sup>

Given the Ninth Circuit's acceptance of the Secretary's cursory NEPA compliance and his statement that he disregarded the controversial portions of the EIS, future cases may follow precedent and defer to agencies' understand-

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<sup>94</sup> See Administrative Procedure Act, 5 U.S.C. § 706 (2012); *Jewell*, 747 F.3d at 1091; see also *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (stating that NEPA is a procedural, rather than substantive, mandate to agencies).

<sup>95</sup> See *Jewell*, 747 F.3d at 1084, 1087.

<sup>96</sup> See *id.* at 1086–87; see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (1983) (explaining that a court may not interject its own discretion when ruling on agency decisions).

<sup>97</sup> See *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1498 (9th Cir. 1995).

<sup>98</sup> See *id.* (explaining that one of the purposes of producing an EIS is to keep the public, including the parties potentially affected by the proposed agency action "informed about the environmental impact of proposed agency actions").

<sup>99</sup> See Press Release, U.S. Dep't of the Interior, Secretary Salazar Issues Decision on Point Reyes National Seashore Permit (Nov. 29, 2012), <https://www.doi.gov/news/pressreleases/secretary-salazar-issues-decision-on-point-reyes-national-seashore-permit> [<https://perma.cc/KP3L-WGB7>]. In the press release announcing Salazar's decision, he explained that allowing the permit to lapse was aligned with Congress's intent in the Point Reyes Wilderness Act. *Id.* Wilderness areas are "devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C. § 1133(b) (2012).

<sup>100</sup> See *Jewell*, 747 F.3d at 1086.

ing of NEPA.<sup>101</sup> This could allow agencies to take advantage of the procedural significance of producing an EIS without concern for the scientific findings or recommendations contained within the studies and final report.<sup>102</sup>

### CONCLUSION

In *Drakes Bay Oyster Company v. Jewell*, the Ninth Circuit Court of Appeals' affirmation of the decision of the Secretary of the Interior (the "Secretary"), allowing the reservation of use and occupancy to expire without materially considering the Environmental Impact State (the "EIS") affirms the National Park Service's authority and expertise in its decision-making because the court's interpretation of Section 124's "notwithstanding" clause enabled the Secretary to reach his decision without considering conflicting provisions of law. Therefore, regardless of the results and recommendations contained in the EIS, the Secretary could have made his decision with the assumption that his decision would not fail an Administrative Procedure Act analysis on judicial review. Despite the competing and even compelling claims as to the environmental effects of the oyster farm's operations, the Secretary acted within his authority throughout the decision-making process, and the production of an EIS effectively insulated his decision from review by meeting the "hard look" requirement.

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<sup>101</sup> See *id.* at 1091 (demonstrating procedurally faulty NEPA compliance and reliance on a scientifically inconclusive EIS).

<sup>102</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989) (establishing that an agency adhering to NEPA procedure may nevertheless make a decision based on "other values [that] outweigh the environmental costs," rather than on the findings of the EIS).

