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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RESOURCE RENEWAL INSTITUTE, CENTER FOR BIOLOGICAL DIVERSITY, and WESTERN WATERSHEDS PROJECT,

Plaintiffs,

v.

NATIONAL PARK SERVICE, a federal agency, and CICELY MULDOON, in her official capacity as Superintendent of Point Reyes National Seashore,

Defendants.

Case No. 4:16-cv-00688-SBA

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: July 13, 2016
Time: 1:00 p.m.
Dept: TBA
Judge: Hon. Saundra Brown Armstrong

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Trial Date: None set

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I. SUMMARY OF ARGUMENT

The Motion to Dismiss is meritless and should be denied. It is apparently designed to delay these proceedings, and further forestall the completion of an updated General Management Plan ("GMP") and National Environmental Policy Act ("NEPA") compliant Environmental Impact Statement ("EIS") for the Point Reyes National Seashore ("PRNS" or "Seashore"). These delays advance the National Park Service's ("NPS") efforts to issue new, long-term commercial ranching leases without ever evaluating whether and/or to what extent ranching at the Seashore should continue through the legally mandated GMP/EIS planning process. It is for this very reason that Plaintiffs seek relief.

Plaintiffs' First Claim invokes this Court's authority to order Defendants to honor their obligatory duty to complete an updated GMP. Under the plain language of the National Park Service Act ("NPS Act"), Defendants must update the Seashore's GMP in a "timely manner." *See* 54 U.S.C. § 100502. The APA requires also Defendants to act "within a reasonable time," in the absence of a firm calendar deadline prescribed by statute. *See* 5 U.S.C. § 555(b). Federal courts possess jurisdiction to enforce these requirements pursuant to 5 U.S.C. § 706(1), and in the Ninth Circuit they do so by applying the so-called *TRAC* factors, which provide a rule-of-reason framework for analysis that takes into consideration, for example, the applicable statutory scheme and "other [Congressional] indications of the speed with which it expects the agency to proceed in the enabling statute." *Telecomm. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n. 11 (9th Cir. 2002). Defendants hope to short-circuit this analysis and convert an ultimate merits question—whether or not NPS violated its mandatory duty by unreasonably delaying the GMP planning process—into a jurisdictional hurdle by claiming unbounded (and therefore unreviewable) discretion to update the GMP whenever, if ever, they see fit. Neither the case law nor the plain language of the NPS Act supports their position.[1]

It has long been settled that a mandatory duty to act within a reasonable time arises even in the absence of any specific statutory deadline, and regardless of whether the statute specifies a fixed period or date (*e.g.*, "every 15 years" or "by 1995"), or requires "timel[iness]," as in this case. *See, e.g., Houseton*

[1] Nor do NPS's own policies and conduct support their litigation position, although the Court need not consider those matters to adjudicate Defendants' Motion to Dismiss. *See infra* at 9-10 & n.8.

v. Nimmo, 670 F.2d 1375, 1377 (9th Cir. 1982) ("even though agency action may be subject to no explicit time limit, a court may compel an agency to act within a reasonable time"). The Court therefore plainly has jurisdiction under the APA and NPS Act to consider whether Defendants have abided by their statutory duty to update the GMP "in a timely manner." And while Plaintiffs look forward to addressing the merits expeditiously, Defendants' attempt to raise them in their Motion to Dismiss is premature.[2] Defendants' Motion to Dismiss Plaintiffs' First Claim should therefore be denied.

Plaintiffs' Second and Third Claims challenge Defendants' failure to ensure that specific permits and leases they issued to authorize ranching comply with the Point Reyes National Seashore Enabling Act ("Point Reyes Act"), 16 U.S.C. § 459c, the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4332, *et seq*, the NPS Act, 54 U.S.C. § 100101, *et seq*, and the NPS's own regulations, 36 C.F.R. § 1.6. Defendants' suggestion that Plaintiffs have not identified any "final agency actions" borders on frivolous. Each of the authorizations granted over the past six years—leases, permits, and short-term extensions—are "final agency actions" under settled Ninth Circuit law. *See, e.g., Or. Natural Desert Ass'n (ONDA) v. U.S. Forest Serv.*, 465 F.3d 977, 990 (9th Cir. 2006) (authorization of livestock grazing on federal land constitutes a "final agency action" challengeable under the APA).

Defendants' alternative request for a more definite statement is litigation-driven posturing. The Complaint challenges each ranching authorization currently in effect that the NPS issued within the last six years. *See* Compl. ¶¶ 92-92, 99, 121-125, 127-134. During a pre-filing meet and confer, Plaintiffs specifically identified exemplary ranching leases and permits, and referred Defendants to the NPS's own website where many are posted, as well as the relevant case law; Defendants never responded substantively to explain their purported uncertainty or confusion about the scope of Plaintiffs' Second and Third Claims, and instead filed the instant Motion. *See* Declaration of Jeffery R. Chanin in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Chanin Decl."), Ex. ¶ 15. As a legal and practical matter, there can be no serious question that Defendants have been provided with adequate

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[2] Similarly, Defendants' lengthy discourses on the history of the Seashore and the purported meaning and legislative history of Point Reyes Act, appear to be directed at ultimate merits questions, rather than the jurisdictional issues raised in their Motion to Dismiss. Plaintiffs disagree that the history of the Point Reyes Act supports the view that Congress intended to protect private, commercial ranching interests at the Seashore in perpetuity—quite the opposite is true. But those arguments are irrelevant to adjudication of the Motion to Dismiss, and therefore will not be rebutted in this Opposition brief.

notice of the final agency actions challenged by Plaintiffs' Second and Third Claims. Defendants' Motion to Dismiss, or in the Alternative, for a More Definite Statement, should be denied as to the Second and Third Claims, as well.

II. LEGAL BACKGROUND

A. The NPS Act Requires Timely Revisions to the GMP for the Seashore.

In 1962, Congress established the Point Reyes National Seashore as a unit of the National Park System "to save and preserve, for purposes of *public* recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped…." 16 U.S.C. § 459c (emphasis added). NPS must manage it:

> ***without impairment of its natural values***, in a manner which provides for such recreational, educational, historic preservation, interpretation, and scientific research opportunities as are consistent with, based upon, and supportive of the ***maximum protection, restoration, and preservation of the natural environment within the area*** ….

16 U.S.C. § 459c-6(a) (emphases added). By law, all National Park System units shall be managed according to the NPS Act's "non-impairment mandate":

> by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, ***which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein*** and to provide for the enjoyment of the same in such manner and by such means ***as will leave them unimpaired for the enjoyment of future generations***.

54 U.S.C. § 100101(a) (emphasis added). Towards that end, Congress enacted legislation in 1978 requiring the NPS to prepare and ***"revise[ ]in a timely manner***" a GMP to govern the use of each unit within the National Park System. 54 U.S.C. § 100502 (emphasis added). Under the NPS Act, such GMPs "shall include":

> (1) measures for the preservation of the area's resources;
> (2) indications of types and general intensities of development (including visitor circulation and transportation patterns, systems, and modes) associated with public enjoyment and use of the area; including general locations, timing of implementation, and anticipated costs;
> (3) identification of and implementation commitments for visitor carrying capacities for all areas of the System unit; and
> (4) indications of potential modifications to the external boundaries of the System unit, and the reasons for the modifications.

See 54 U.S.C. § 100502. The NPS's own polices describe GMPs as the "basic foundation for decision-making" regarding the future uses for each Park unit. They interpret the requirement to update each Park's GMP in a "timely manner" to mean that NPS must "keep them current," with revisions to occur

1 "every 10 to 15 years," though sooner "if conditions change significantly," or longer if they do not. *See*
2 Chanin Decl., Ex. A at 8, 11 (2006 Management Policies at §§ 2.3.1, 2.3.12).

3 **B. The Laws Requires an EIS Prior to Issuing Commercial Ranching Leases and as Part of a GMP Revision.**

4 The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an EIS for
5 all "major Federal actions significantly affecting the quality of the human environment." An EIS must
6 consider, *inter alia*, the environmental impact of the proposed action, a range of reasonable alternative
7 actions, and cumulative impacts. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.7, 1508.25. These
8 procedural requirements ensure "that environmental information is available to public officials and
9 citizens *before* decisions are made and before actions are taken." *See* 40 C.F.R. § 1500.1(b) (emphasis
10 added). A federal agency's issuance or renewal of a permit authorizing livestock grazing on federal
11 public lands triggers NEPA review. *See, e.g., Natural Res. Def. Council, Inc. v. Morton*, 388 F. Supp.
12 829, 834 (D.D.C. 1974) ("Grazing clearly may have a severe impact on local environments."), *aff'd*
13 *without opinion*, 527 F.2d 1386 (D.C. Cir. 1976).

14 A GMP revision also typically requires preparation of an EIS. *Ctr. for Biological Diversity v.*
15 *U.S. Dep't of Interior*, 623 F.3d 633, 647 (9th Cir. 2010) (citing *Klamath Siskiyou Wildlands Ctr. v.*
16 *Boody*, 468 F.3d 549, 560-62 (9th Cir. 2006)) ("Amending a resource management plan ordinarily
17 constitutes 'major federal action' requiring NEPA analysis."). Recognizing as much, in its 2006
18 Management Policies pertaining to GMPs and NEPA, the NPS concluded that amendments or revisions
19 to a GMP will be accompanied by a supplemental EIS or other suitable NEPA analysis, together with
20 public input. *See* Chanin Decl., Ex. A, at 8, 11 (setting forth policies for "Environmental Analysis," §
21 2.3.1.7 and "Periodic Review of General Management Plans," § 2.3.1.12).

22 **C. The Administrative Procedure Act**

23 The APA, 5 U.S.C. § 706, provides federal jurisdiction for judicial review of agency inaction, as
24 well as "final" agency actions. *See Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1124
25 (N.D. Cal. 2007) (Armstrong, J.). The APA requires that, "within a reasonable time, each agency shall
26 proceed to conclude a matter presented to it," 5 U.S.C. § 555(b), and if it does not, "[t]he reviewing court
27 shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[T]he
28 two sections provide that even though agency action may be subject to no explicit time limit, a court may

compel an agency to act within a reasonable time," *Houseton*, 670 F.2d at 1377, provided the "plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004) (emphases in original). In addition, with respect to "final" agency actions, courts may "hold unlawful and set aside [such] agency action," if deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015).

D. Federal Rule of Civil Procedure 12

To adjudicate a facial jurisdictional challenge under Fed. R. Civ. P. 12(b)(1), the Court must accept all material allegations in the Complaint as true and, construing them in plaintiffs' favor, assess whether the allegations sufficiently invoke subject matter federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

III. FACTUAL BACKGROUND

A. The NPS Began Revising the Seashore's Outdated 1980 GMP/EA in 1997 Then Side-lined the Process in 2008 Without Explanation.

In 1980, the Park Service issued a GMP for the National Seashore, but with only an Environmental Assessment ("EA") rather than an EIS. Compl. ¶ 56. Thereafter, conditions at the Seashore changed significantly, including substantially increased visitor use, expansion of reintroduced native tule elk populations, climate change threats, and the listing of numerous additional species under the Endangered Species Act, and the expiration of ranchers' original leases/permits (or other property interests) issued prior to the 1980 GMP/EA. *See* Compl. ¶¶ 60, 61, 68-75, 86-89, 91, 95. The NPS and other agencies have also found that ranching is adversely impacting soils, air and water quality, wildlife and its habitat, recreational uses, and other values of the National Seashore. *Id.* at ¶¶ 67-83, 90-91.

From 1997-2000, the Park Service gave public notice that it was time to revise the 1980 GMP, and that the agency was preparing a new GMP/EIS for the public. *See* Chanin Decl., Ex. B (62 Fed. Reg. 53336 (Oct. 14, 1997); 64 Fed. Reg. 28008 (May 24, 1999); 65 Fed. Reg. 5365-66 (Feb. 3, 2000)); Compl. ¶¶ 62-66. The explicit purpose of the GMP/EIS was "to state the management philosophy for Point Reyes National Seashore and *provide strategies for addressing major issues*," in order to "manage and preserve cultural and natural resources" and "provide for safe, accessible, and appropriate use of those resources by visitors." Chanin Decl., Ex. B at 5 (65 Fed. Reg. 5366-02). The agency explained the

1 revised GMP/EIS would "guide management of park lands over the subsequent 10-15 years." *Id.*
2 From 2000 to 2008, the NPS expended substantial time and resources to prepare a draft GMP/EIS
3 for public release; it crafted five alternative management concepts for public review, it solicited public
4 comments in writing and at numerous meetings, and it commissioned fourteen studies, plans and
5 assessments. *See* Compl. ¶¶ 62-66; Chanin Decl., Exs. C (2003 General Management Plan Update) & D
6 (2008 General Management Plan Update). Three of the five concepts released for comment would have
7 reduced or eliminated further commercial dairy and beef cattle operations at the Park. *Id.*, Ex. C, at 4-6.
8 In 2008, the agency announced it had prepared a draft GMP/EIS for release in the Fall/Winter of 2008, to
9 be recorded in 2009. *Id.*, Ex. D, at 1.
10 But then the NPS went silent, mysteriously side-lining the GMP/EIS after 8 years of work.
11 Compl. ¶ 66. Without the administrative record or discovery that the NPS has declined to produce until
12 two months after its Motion is decided, one can only speculate that pressure from various quarters during
13 the heavily politicized war over renewal of the Drakes Bay Oyster Farm's lease caused the NPS to retreat
14 from its statutory obligation to revise the GMP/EIS. *See* Chanin Decl., Ex. E ("The Oyster War," *Marin*
15 *Magazine* (Nov. 2008)). Then in 2012, in a memorandum of decision not to renew the commercial oyster
16 farming lease, former Interior Secretary Salazar—a cattle rancher himself—unilaterally added a directive
17 that the operators of cattle and dairy ranches within the Seashore should be given special dispensation and
18 granted extended ranching permits for up to 20-year terms. *See* Chanin Decl., Ex. F, at 3, 6-7.
19 During the past six years, the period of limitations for Plaintiffs' challenge to final agency actions,
20 the NPS has authorized continued commercial dairy and cattle ranching at the PRNS through three formal
21 types of permits—agricultural lease/permits, special use permits, and letters of authorization. Compl. ¶
22 94; Chanin Decl., Exs. G-I. NPS failed to prepare an EIS or determine that ranching does not impair the
23 resources of the Seashore *before* issuing these authorizations. Compl. ¶¶ 97-99, 122, 124, 127, 132-33.
24 The Complaint challenges the "current" authorizations in effect for each ranch unit that the Defendants
25 issued during the past six years. *See* Compl. ¶¶ 92-94, 121, 122, 125, 127, 134; Chanin Decl., Exs. G-I.
26 In April 2014, the NPS gave notice that it was initiating a process to prepare a Ranch
27 Comprehensive Management Plan ("RMP") and EA "[t]o implement the Secretary of the Interior's
28 direction to pursue issuance of leases/permits with terms up to 20-years." *See* Compl. ¶ 104; Chanin

Decl., Exs. J & K. In an accompanying press statement, Defendant Supervisor Muldoon candidly stated that the RMP process "will set a strong foundation for ranching now and into the future." *See* Chanin Decl., Ex. K. And after this lawsuit was filed, an NPS spokeswoman reiterated that the NPS had already decided that "[r]anching is here to stay at Point Reyes National Seashore"—which is what the updated GMP/EIS sidelined in 2008 was supposed to address. *Id.*, Ex. L, at 2.

IV. ARGUMENT

A. The Court has Subject Matter Jurisdiction to Enforce the NPS's Mandatory Duty to Revise the Seashore GMP in a Timely Manner.

Under the APA, 5 U.S.C. § 706(1), agency action that is "discrete" and "legally required," but wrongfully withheld or unreasonably delayed, may be judicially compelled, even absent a firm deadline or date certain set by statute. *SUWA*, 542 U.S. at 63; *see also* 5 U.S.C. § 555(b) (agency must "conclude a matter presented to it ... within a reasonable time"). The command of the NPS Act is discrete and unmistakable: "General management plans for the preservation and use of each [s]ystem unit . . . *shall* be prepared and revised *in a timely manner* by the Director."[3] 54 U.S.C. § 100502 (emphases added). "Shall," of course, connotes a mandatory duty, and numerous courts including the Ninth Circuit and the Northern District have found that statutory directives requiring that an agency "shall" perform some action (such as preparing a resource plan), are subject to review under § 706(1). *Ctr. For Biological Diversity v. Norton*, 254 F.3d 833, 847 (9th Cir. 2001); *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001); *Ctr. For Biological Diversity v. Bureau of Land Mgmt.*, 35 F. Supp. 3d 1137, 1149-51 (N.D. Cal. 2014) (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997)); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("'Shall' means 'shall.'"); *Friends of the Wild Swan v. Ashe*, 18 F. Supp. 3d 1077, 1081 (D. Mont. 2014).

Long-settled case law establishes that even in the absence of *any* specific statutory deadline, agencies cannot unreasonably delay action. *See, e.g., Houseton*, 670 F.2d at 1377; *In re Pesticide Action Network*, 798 F.3d 809, 813 (9th Cir. 2015); *Ctr. For Biological Diversity*, 35 F. Supp. 3d at 1149-51.

[3] Defendants misstate Plaintiffs' position as being that the NPS Act's "timeliness" requirement "mandates that NPS must revise its GMP before it issues a Ranch Management Plan." *See* ECF No. 26 at 8. Not so: Plaintiffs will ask for an Order that the GMP process must be completed first to provide an effective remedy for the harms created by Defendants' improper delays—but do not propose this as a statutory interpretation of the NPS's "timely manner" requirement.

The NPS Act's express "timely manner" requirement merely reinforces that the agency's revision of the GMP must not be unreasonably delayed. It certainly does not support Defendants' claim that the obligation to "timely" revise the GMP is unenforceable because the Park Service possesses unreviewable and unfettered discretion to act *whenever, if ever*, it sees fit. That suggestion cannot be squared with the plain language of the NPS Act, settled case law, or even the NPS's own policies and past conduct, and appears instead to be a litigation-driven effort to recast ultimate merits issues into a jurisdictional question that would preclude judicial review. But, whether Defendants delayed action unreasonably and in violation of their statutory duties, even in the absence of a firm statutory deadline, is a merits question. Indeed, the so-called *TRAC* factors are employed by the Ninth Circuit, as in other jurisdictions, precisely for the purpose of assessing whether delays are unreasonable "in the absence of a firm deadline."[4] *Biodiversity Legal Found.*, 309 F.3d at 1177 n. 11 (citing *TRAC*, 750 F.2d 70). When it reaches the merits, this Court can and should apply the *TRAC* factors to decide whether Defendants have unreasonable delayed revising the GMP.

Defendants proffer an absurd and perverse interpretation, misconstruing the very language Congress chose to ensure "timely" action in an effort to absolve the Director of any enforceable obligation to act, ever. The plain meaning of "timely" is, "quickly, rapidly; *without delay*, promptly." *See, e.g.,* Chanin Decl., Ex. M (Oxford English Dictionary (3d ed. March 2012) (timely) (emphasis added)). The duty to act "in a timely manner" cannot be fairly compared, as Defendants suggest, to actions to be undertaken "when appropriate," or "[a]s soon as practical." *See* ECF No. 26 at 9 (citing *ONRC* and *Luciano Farms*). The latter phrasings necessarily implicate the exercise of discretion, and

[4] Under the *TRAC* standard:

(1) "the time agencies take to make decisions must be governed by a 'rule of reason,'"
(2) "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason,"
(3) "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,"
(4) "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority"
(5) "the court should also take into account the nature and extent of the interests prejudiced by delay," and
(6) "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

See TRAC, 750 F.2d at 80 (citation and internal quotation marks omitted).

arguably contemplate indefinite delay if the "appropriate" or "practical" occasion never arises, whereas "timely" action calls for quite the opposite.

Defendants' proposed interpretation also fundamentally conflicts with the many cases applying § 706(1) to compel agency action *even where the relevant statute sets forth no deadline or timeliness requirement whatsoever*. *See, e.g., Houseton*, 670 F.2d at 1377. For example, the Ninth Circuit recently held that the EPA's eight-year delay in responding to an administrative petition was not only "unreasonable" under the APA, but "egregious," and granted mandamus relief—even though no statute provided a specific deadline for response. *In re Pesticide Action Network*, 798 F.3d 809, 813 (9th Cir. 2015). Likewise, this Court (Judge Illston) recently held that the Endangered Species Act's ("ESA") directive that "the Secretary 'shall' develop a recovery plan" created an obligatory and enforceable duty—again, even in the absence of a firm statutory deadline.[5] *Ctr. for Biological Diversity*, 35 F. Supp. at 1151 (citing *Bennett*, 520 U.S. at 172) ("[The Act] states that the Secretary 'shall' develop a recovery plan, and the Court finds that the terms of this section are 'those of obligation rather than discretion.'"); *see also Friends of the Wild Swan*, 18 F. Supp. 3d at 1081 (same, even though the Act concededly "does not include a timetable or indication of the speed with which the recovery plan should be developed").

Although it is not strictly necessary for the Court to consider such matters to adjudicate the Motion to Dismiss, notably, the NPS's own policies and conduct do not support their litigation position.[6] NPS's Management Policies interpret the agency's statutory duty to "timely revise" the GMP to mean typically every 10-15 years, but sooner if conditions have "changed significantly," and possibly longer if they have not. *See* Chanin Decl., Ex. A, at 12. *Thirty-six years* does not even meet the smell test when 10 to 15 years is the targeted range. And as Plaintiffs allege in the Complaint, even under this rubric,

[5] Although the case arose under the ESA's citizen enforcement provision rather than the APA, § 706(1)'s standard for delay still applies. *See Ctr. for Biological Diversity*, 35 F. Supp. 3d at 1151-52.

[6] Defendants mischaracterize Plaintiffs' position concerning the NPS Management Policies. Plaintiffs do not argue that the 2006 Management Policies are binding or independently enforceable. Rather, these policies are persuasive because they reveal the agency's interpretation of its statutory duty to revise "in a timely manner," and NPS's decision to depart from them further demonstrates that the agency's delay in revising the GMP is unreasonable. *See Or. Natural Desert Ass'n*, 625 F.3d 1092, 1116 (9th Cir. 2010) (considering agency guidance where it was "well-reasoned and persuasive" and compatible with the "underlying statutes"). To the extent the NPS Management Policies comport with the NPS Act's non-impairment mandate, 54 U.S.C. § 100101(a), and the resource preservation purposes of the Point Reyes Act, 16 U.S.C. § 459c-6(a), the Court may consider such matters in connection with the *TRAC* factors, when it addresses the merits concerning the reasonableness of Defendants' delays.

conditions at the Seashore have in fact "changed significantly." *See* Compl., ¶¶ 3, 60-61, 115. The NPS itself has repeatedly documented numerous changes that are significant, many of which represent serious threats to the agency's duties to not impair natural resources under the Point Reyes Act and other statutes. *Id.* Nineteen years ago, NPS noted that a revised "GMP/EIS" was needed to address "major issues," and since that time it has repeatedly identified conditions that have "changed significantly" in the intervening thirty-six years since the 1980 GMP/EA issued. *Id.* ¶¶ 25-27, 30, 60-82, 87-91; *see also* Chanin Decl., Ex. A (62 Fed. Reg. 53336). Tellingly, Defendants do not urge the Court to adopt or apply the NPS's own interpretation of "timely," but seek to wish it away. *See* ECF No. 26 at 11. However, the NPS's interpretation set forth in its Management Policies "'claim[s] the merit of ... [a] thoroughness, logic, ... [and] fit with prior interpretations' of the relevant statutes…as its brief does not." *See Or. Natural Desert Ass'n*, 625 F.3d at 1116 (quoting *United States* v. *Mead Corp.,* 533 U.S. 218, 235 (2001)). Indeed, the agency's departure in this litigation from its own interpretation is merely a self-serving litigation position that warrants no deference.[7] *Price v. Stevedoring Serv. of Am., Inc.*, 697 F.3d 820, 830-33 (9th Cir. 2012).

The cases Defendants cite do not counsel a contrary conclusion concerning this Court's jurisdiction. In *Gardner v. Bureau of Land Management*, the court declined to compel the agency to "reach [the] particular result" of prohibiting off-road vehicles, because the agency's regulations (not statutory language) that plaintiffs sought to enforce did not create a mandatory duty to act unless the agency first found that off-roading would have "considerable adverse effects"—a conclusion the agency, in its discretion, *rejected*. *See* 638 F.3d 1217, 1223 (9th Cir. 2011). *Gardner* does not silently override the APA's "reasonable time" requirements, nor broadly hold that there is no duty to act where a statute actually requires "timely" action. *In re Pesticide Action Network*, 798 F.3d at 813, decided four years later, confirms as much.

[7] In the merits phase of this case, the NPS would need to provide a rational explanation for departure from its policies, and demonstrate that the delay was not unreasonable under the APA. *See, e.g.*, *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2011 WL 4526746, at *17 (D. Idaho Sept. 28, 2011) ("It does not matter whether the Policy and Strategy contain requirements or only guidelines—either way, the BLM violates FLPMA by completely disregarding its own policies … without discussion or analysis …."); *see also Atchison v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973) (where agency modifies or overrides its longstanding precedents or policies, it has the "duty to explain its departure from prior norms")). But, plainly the Court has jurisdiction to decide this issue were the NPS to contest on the merits.

Defendants also draw a false analogy when arguing that the Secretary's discretion in *SUWA* to manage the southern Utah wilderness is like the Park Service's purported discretion to delay "timely" updating the Seashore's 36-year-old GMP/EA for as long as the Secretary so chooses. The two obligations are not even remotely comparable. In *SUWA*, the Supreme Court held that a general non-impairment provision requiring that "the Secretary shall continue to manage such lands ... in a manner so as not to impair the suitability of such areas for preservation as wilderness," was not sufficiently "discrete" to permit enforcement under § 706(1), in view of the discretion afforded the Secretary to achieve the goal of preservation. *SUWA*, 542 U.S. at 66 ("Section 1782(c) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it."). Here, in contrast, Plaintiffs' First Claim invokes NPS's discrete ministerial duty to prepare an updated GMP in a "timely manner;" it does not ask this ask this Court to dictate, comparable to *SUWA*, the *content* of the revised GMP. *See Brennan*, 571 F. Supp. 2d at 1130-35 (holding that defendants unlawfully withheld a revised plan required under statute and that they "are not at liberty to circumvent a Congressional mandate through indefinite delay"). Indeed, the Ninth Circuit recently explained that "discretion in the *manner* in which the duty may be carried out does not mean that [an agency] does not have a duty to perform a 'discrete action' within the meaning of … *SUWA*." *Vietnam Veterans of Am. v. Cent. Intelligence Agency*, 811 F.3d 1068, 1079 (9th Cir. 2016) (emphasis added). Furthermore, *SUWA* does not require Plaintiffs to identify an action that the agency is required to take "at a particular time" as Defendants urge. *See* ECF No. 26 at 8. The Court in *SUWA* did not purport to alter the consistent body of case law across circuits holding that, even in absent a firm calendar deadline, performance may be compelled under § 706(1) in consideration of the *TRAC* factors.

In sum, the plain language of the NPS Act, the APA's requirements, the case law, and even Defendants' own policies and conduct, all confirm that this Court has jurisdiction to consider Plaintiff's First Claim. The Court should reject Defendants' position that "in a timely manner" means, in effect, "whenever, or possibly never," and should exercise review pursuant to § 706(1).

B. The Court Has Jurisdiction to Determine Whether Ranching Authorizations Issued Without Environmental Analyses Violate NEPA and the NPS Act.

Claims Two and Three challenge discrete ranching authorizations issued during the past six years without any analysis of their environmental impacts, or a determination that they would not impair or

1 adversely affect the environment and natural resources of Point Reyes, in violation of NEPA, and the
2 Point Reyes, and NPS Acts. *See* Compl. ¶¶ 92-99, 120-134 (alleging that Plaintiffs challenge the current
3 ranching authorizations that Defendants have issued over the past six years for each of the approximately
4 twenty-five ranch units at the Seashore).[8] Defendants feign ignorance as to the specific authorizations *in*
5 *their possession* that fall within Plaintiffs' description of the "final agency actions" challenged in the
6 Complaint. ECF No. 26 at 12. Indeed, during the pre-filing meet and confer, Plaintiffs' counsel directed
7 Defendants' counsel to *NPS's own website* that lists the ranch units for which the agency has issued
8 authorizations, and Plaintiffs also provided exemplary authorizations that Plaintiffs obtained from
9 *Defendants* through a Freedom of Information Act request, clearly providing notice of the discrete actions
10 that Plaintiffs challenge. Chanin Decl. ¶ 15 & Exs. N-O.

11 Nevertheless, Defendants argue that Plaintiffs allege a broad, programmatic attack on ranching
12 divorced from any final actions. Given Defendants' awareness that Plaintiffs challenge *specific*
13 authorizations, not a broad program, and the Ninth Circuit's ruling in *ONDA,* 465 F.3d at 990, that
14 authorizing livestock grazing on federal land constitutes a "final agency action" under the APA, this
15 argument is frivolous. Defendants cannot seriously argue that the challenged authorizations, which
16 permit private, commercial ranching operations on nearly half of the publicly owned, non-wilderness
17 areas at PRNS and harm Plaintiffs' members and supporters (and the public's) enjoyment of the
18 Seashore, do not constitute final agency actions under the APA. *See* Compl. ¶¶ 12-15, 19, 37, 77-78, 80,
19 89-99; *see ONDA*, 465 F.3d at 982 (when determining whether an agency action is final the "core
20 question is whether the agency has completed its decisionmaking process, and *whether the result of that*
21 *process is one that will directly affect the parties*" (emphasis added)).

22 In *ONDA*, the Ninth Circuit held that a federal agency's annual authorization of livestock grazing
23 is a "final agency action" under the APA because it "is a discrete, site-specific action representing the

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[8] Plaintiffs described the number of ranch units with the term "approximately" in the Complaint due to minor uncertainties about the status of authorizations for a limited number of the ranch units. For example, a single authorization is issued for two ranch units, and there appears to be no current authorization for Ranch Unit 8. Use of the term "approximately" as to the number of authorizations does not deprive the Court of jurisdiction, as Plaintiffs have alleged that a current ranching authorization exists for each ranch unit because ranching continues at each unit, but rather leaves the issue to prove after production and review of the administrative record. Further, Defendants may continue to issue authorizations during the pendency of the litigation, so Plaintiffs' pleading is designed to encompass such changes.

1 [agency's] last word from which binding obligations flow." 465 F.3d at 990. The court explained that
2 the authorizations concluded the agency's "determination regarding the extent, limitation, and other
3 restrictions on a permit holder's right to graze his livestock under the terms of the permit" for at least a
4 year, and carried legal consequences. *Id.* 983-989. Here, the Park Service's authorizations are virtually
5 indistinguishable from those in *ONDA*, as they allow grazing on public lands under terms and conditions
6 that prescribe legal consequences and represent the agency's decision—*without which ranching may not*
7 *continue*. *See* Compl. ¶¶ 92-99; Chanin Decl., Ex. G-I. Other courts have repeatedly found such
8 authorizations are subject to challenge under the APA. *Or. Natural Desert Ass'n v. U.S. Forest Serv.*,
9 312 F. Supp. 2d 1337, 1343 (D. Or. 2004) (rejecting an agency's argument that a challenge to annual
10 grazing authorizations was a broad and impermissible challenge to the "administration of several grazing
11 allotments" and holding such authorizations were final agency actions); *see also Or. Natural Desert Ass'n*
12 *v. Sabo*, 854 F. Supp. 2d 889, 901, 925 (D. Or. 2012) (holding annual grazing authorization issued
13 without NEPA compliance was arbitrary and capricious under the APA); *W. Watersheds v. U.S. Forest*
14 *Serv.*, No. C 08-1460 PJH, 2012 WL 1094356, at *1, 20 (N.D. Cal. Mar. 30, 2012).

15 Defendants' heavy reliance on *Lujan* also is misplaced. ECF No. 26, at 12-14 (citing *Lujan v.*
16 *Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). *Lujan* involved a claim about broad management
17 concerns that were untethered from authorizations of particular activities. *Lujan*, 497 U.S. at 890-93. But
18 in that case, the Supreme Court recognized that, if a permit for a specific activity had been granted, "there
19 is no doubt that agency action ripe for review will have occurred." *Id.* at 893, n. 3. Here, Plaintiffs'
20 Complaint may describe overarching management failures at the Seashore as the reason why relief is
21 needed, but it only challenges discrete and final agency actions. Thus, the other cases Defendants cite
22 involving challenges to broad programs, not discrete authorizations, are fundamentally distinguishable
23 from this one. *See* ECF No. 26 at 13.

24 Plaintiffs also do not mount an impermissible "programmatic challenge," because the Complaint
25 identifies a discrete set of authorizations in a definable area at a single location, the Seashore. *See High*
26 *Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (rejecting argument that challenge to
27 the issuance of special use permits was an impermissible programmatic attack); *W. Watersheds Project v.*
28 *Jewell,* 56 F. Supp. 3d 1182, 1184 (D. Idaho 2014) (reviewing challenge to four grazing permit renewals

under APA); *W. Watersheds Project*, 2012 WL 1094356, at *4 (ruling on claim that challenged several livestock grazing decisions across three national forests).

Plaintiffs did not need to plead more specific facts regarding each authorization to establish the Court's jurisdiction at this stage. *Maya v. Centex Corp.,* 658 F.3d 1060, 1068 (9th Cir. 2011) ("At the pleading stage, general factual allegations … may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting *Lujan*, 504 U.S. at 561). Plaintiffs have identified the approximate number of ranch units, provided a map with the location of those units, explained the types of legal documents the agency uses to authorize ranching and the types of activities authorized, and described the terms and conditions included within the authorizations. *See* Compl., ¶¶ 92-96, 99. These facts are more than sufficient to place Defendants on notice of the specific authorizations *in their possession* that constitute the agency's "last word" on whether ranchers may conduct dairy and cattle ranching operations and reside at the Seashore. *See* *ONDA*, 465 F.3d at 990. Plaintiffs could not plead more particular information about all the authorizations currently in effect because of a lack of public information as to such particulars, but the NPS knows which authorizations it issued within the last six years, and which of them are currently in effect, as well as their terms. *See* Chanin Decl., Exs. G-I.

C. A More Definite Statement Would Unnecessarily Delay This Litigation.

Rule 12(e) allows for a more definite statement if a complaint "is so vague or ambiguous that the [defendant] cannot reasonably prepare a response." *See* Fed. R. Civ. P. 12(e). A motion for a more definite statement "fails where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted." *Nat'l Fed'n of the Blind of California v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073, 1082 (N.D. Cal. 2015). Such motions "are disfavored and granted only sparingly because pleadings are to be construed liberally to do substantial justice." *Crooker v. Nat'l Enter. Sys.*, No. EDCV 08-01322-SGL, 2008 WL 5243641, at *1 (C.D. Cal. Dec. 9, 2008) (quotations omitted).

Here, Defendants are undeniably on notice of the challenged actions—the authorizations that *they issued* within the last six years at Point Reyes. *See* Compl. ¶¶ 125, 134; Chanin Decl., ¶ 15, Exs. G-I Such notice is all that is required to satisfy the federal pleading requirements. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining the rules require only "a short and plain statement of the

claim showing [entitlement] to relief in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests….") (quotations omitted). Any purported shortcomings in specifics about the authorizations may be remedied through discovery (or for Claims Two and Three, administrative record disputes), not this motion. *See Sony Corp. v. LG Elecs. U.S.A., Inc.*, 768 F. Supp. 2d 1058, 1064 (C.D. Cal. 2011). Indeed, after rejecting an agency's argument that annual grazing authorizations were not final agency actions under the APA, a court explained that: "[t]o the extent that the [agency] is still unclear about *which* [annual grazing authorizations] plaintiffs mean to challenge as it relates to producing the administrative record for this case, I direct the parties to confer on this issue." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 312 F. Supp. 2d at 1343 (emphasis in original).

As Defendants are clearly aware of the challenged ranching authorizations, their demand for a more definite statement is simply to cause delay. *See Crooker*, 2008 WL 5243641, at *1 ("granting a motion for a more definite statement often adds little more than could be accomplished more directly through discovery without the delay created by requiring further amendment"). However, time is of the essence in this case, as the NPS continues to delay completion of an updated GMP, while at the same time it continues to grant annual ranching authorizations without an EIS, and is implementing a plan to issue longer-term extensions up to 20 years. *See* ECF No. 27 at 4, 8-9. Defendants have an incentive to prolong this case so they can end-run the GMP process and issue long-term ranching authorizations *before* the Court determines whether the current ranching authorizations are lawful, or a new GMP must come first. The Court should deny the motion and require an answer to Plaintiffs' complaint expeditiously.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss, or for a more definite statement.

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