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LAW

FIRM

LLP

375 MARKET STREET, SUITE 2700
SAN FRANCISCO, CA 94102
TELEPHONE: 415.813.6100
FACSIMILE: 415.813.6400
business@ssl-law.com

February 4, 2013

VIA FEDERAL EXPRESS

Heather Johnston
Enforcement Analyst
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105

Re: Drakes Bay Oyster Company

Dear Heather:

Please include the attached declarations in the administrative record concerning Cease and Desist Order No. CCC-13-CD-01 and Restoration Order No. CCC-13-RO-01. The declarations were prepared in support of the Motion for Preliminary Injunction to enjoin the Department of Interior and National Park Service from preventing ongoing aquaculture in Drakes Estero. The declarations provide evidence demonstrating (1) that Drakes Bay Oyster Company's operations do not harm the estero; (2) the level of effort necessary to remove oyster racks from the estero; (3) environmental impacts that will result from removing oysters and clams from the estero; and (4) environmental impacts to eelgrass that will result from removing the racks. This evidence is relevant to the Commission's consideration of the proposed orders, including, but not limited to, the feasibility of implementing Restoration Order No. CCC-13-RO-01 and the obligation pursuant to the California Environmental Quality Act to evaluate the environmental impacts that the orders will cause.

Regards,

Zachary Walton

cc: Lisa Haage, Chief of Enforcement
Alex Helperin, Senior Staff Counsel

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel List Continues On Next Page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF SCOTT LUCHESSA
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

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Counsel List Continued

John Briscoe [CSBN 53223]
Lawrence S. Bazel [CSBN 114641]
Peter S. Prows [CSBN 257819]
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Suite 700
San Francisco, CA 94104
Phone: 415.402.2700
Fax: 415-398.5630
E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
pprows@briscoelaw.net

Zackary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Scott Luchessa, declare as follows:

2 1. I am Scott Luchessa, a certified ecologist and Senior Science Advisor at
3 ENVIRON (my CV is attached as Exhibit 1 to this document; a list of references cited in this
4 Declaration is attached as Exhibit 2). The following facts are based on my own personal
5 knowledge and, if called as a witness, I could and would testify competently thereto.

6 2. I have over 25 years of experience in natural resource consulting. My experience
7 includes evaluation of potential water quality impacts, such as nutrient loading, for proposed
8 development projects. For the past several years, I have been the lead or contributing author of
9 more than a dozen biological assessments (BA) examining potential water quality and
10 environmental impacts from shellfish aquaculture in the Puget Sound estuary. I am also a technical
11 reviewer or contributing author for restoration projects in the lower Columbia River for the Port of
12 Portland. Finally, I have written or co-authored over 10 sections in National Environmental Policy
13 Act environmental impact statements on water resources and wetlands.

14 3. Biological assessments quantitatively and qualitatively evaluate impacts to critical
15 habitat and primary constituent elements of federally-listed threatened and endangered species
16 (Endangered Species Act [ESA]-listed species) of fish and wildlife. BAs must receive concurrence
17 from the National Marine Fisheries Service and U.S. Fish and Wildlife Service that proposed
18 projects do not adversely affect ESA-listed species. The BA also serves to inform the U.S. Army
19 Corps of Engineers in order to obtain permit approval for operating shellfish farms or other water-
20 dependent projects. These BAs also include evaluation of potential impacts of projects on Essential
21 Fish Habitat, including eelgrass.

22 4. Proposed Onshore Personal Property Removal: DBOC's personal property in the
23 onshore RUO and SUP area includes a 24' x 8' office trailer, five fiberglass shellfish setting tanks,
24 a 40' x 8' cannery container, 40' x 8' equipment storage shed, shellfish culture equipment, a 20' x
25 20' open sided shed, 12 picnic tables, two septic systems, and a water well. After removing all
26 personal property inside, the office trailer, the cannery container, and the equipment storage
27 containers would be loaded on flatbed semi-trailers with a crane and hauled away. This process
28 would take approximately three business days. Removal of the shellfish setting tanks would

1 require the use of a track-mounted hydraulic excavator to remove the tanks and load onto dump
2 trucks for disposal in the landfill. This process would take approximately two business days;
3 however, it would take more time to remove all underground piping connected to the setting tanks.
4 The setting tank removal will result in ground disturbance near a known archaeological site. Septic
5 systems will need to be properly abandoned by pumping tanks, removing pumps, filling with sand,
6 covering with topsoil, and installing erosion control. The water well will be filled with pea gravel
7 and capped with concrete. Concrete slab and well enclosure will be demolished and removed from
8 the site. After all required permits are obtained, removal of onshore personal property would take
9 approximately two weeks. Removal of personal property likely will require federal, state, and local
10 agency permitting that will prevent DBOC from taking action until such permits are acquired.

11 5. Proposed Oyster Rack Removal Using DBOC Equipment: According to Drakes
12 Bay Oyster Company (DBOC) President Kevin Lunny, there are 95 oyster racks in Drakes Estero,
13 which comprise a total of approximately 250,000 board feet (ft) of treated wood. There are an
14 estimated 4,700 posts, according to the FEIS. Posts are connected to each other by 10-foot-long, 2
15 x 4 rails at top and bottom, with the bottom rails buried in the sediment. The oyster racks would be
16 removed using a chainsaw to cut the legs and rails into manageable units and lifted out of the
17 substrate using a hoist (powered by an electric motor and supplied by a generator) mounted on a
18 barge towed by one of DBOC's two oyster skiffs. The skiffs would be anchored to the bottom
19 substrate by two anchors during this effort. Using the proposed methods, it is anticipated that each
20 rack (a total of 95) will take a minimum of 3 days to remove, or a total of 285 days within
21 approximately 665 calendar days, assuming good tides and weather conditions. It is important to
22 note that this does not account for periods when removal work may be restricted due to the
23 presence of sensitive life stages for protected species period between March 1 and October 15 due
24 to harbor seal pupping (March 1 to June 30), anadromous fish migration (June 15 to October 15),
25 and the Migratory Bird Treaty Act (February 1 to August 31). See Table 1 provided as Exhibit 3.

26 6. Water Quality Impacts from Removal – Turbidity: Removal of buried support
27 posts and buried or partially buried and connected 2 x 4s will result in increased turbidity because
28 of the sediment clinging to the post that will slough off into the water column as it is removed. An

1 estimated 4,700 posts exist in the 95 oyster racks. It is estimated by Kevin Lunny that 2,350 posts
2 are connected together by 10-ft-long, 2 x 4 cross ties. Assuming that cross ties are buried a
3 minimum of 4 inches below the surface of the sediment, an estimate of the amount of sediment
4 disturbed can be calculated as: $2,350 \times 10 \text{ ft} \times 2 \text{ in} \times 4 \text{ in}$ or $2350 \times 10 \text{ ft} \times 0.166666667 \text{ ft} \times 0.25 \text{ ft}$
5 $= \sim 979$ cubic ft (cu. ft.). There are 27 cu ft per cubic yard (CY). Thus at least approximately 36
6 CY of sediment would be disturbed by removing posts and buried cross ties. If the cross ties are
7 buried deeper, the potential disturbance of sediment above the 2 x 4 cross tie would be greater and
8 the amount of disturbance may increase incrementally. Where eelgrass rhizomes are present above
9 the 2 x 4 cross tie, incrementally greater disturbance of sediment is likely to result from pulling and
10 breaking apart roots embedded in a larger sediment matrix extending well beyond the width of the 2
11 x 4 cross ties. Continuous removal activities that extend over a period of 22 months (665 calendar
12 days) or more would result in cumulative impacts to water quality from increased turbidity. It is
13 not possible to accurately estimate increased turbidity levels that will likely result from elevated
14 levels of total suspended solids resulting from removal activities without doing detailed modeling
15 or *in situ* monitoring that take into consideration circulation patterns and tidal flushing. It is
16 certain, however, that oyster rack removal will contribute to an unnaturally long period of elevated
17 turbidities from increases in total suspended solid concentrations in the water column (i.e., water
18 quality degradation) within the Estero.

19 7. Water Quality Impacts from Removal – Nutrient Loading: One of the primary
20 impacts from removal of shellfish aquaculture will be on nutrient loading and availability,
21 particularly nitrogen and phosphorus from existing non-point sources of pollution (e.g., cattle
22 ranches and stormwater runoff) within the Estero's watershed. One of the main ecosystem services
23 provided by cultured shellfish is nitrogen removal. Cultured shellfish mitigate for non-point
24 pollution sources through filtration, nitrogen sequestration, and total removal of nutrients from the
25 system during harvest of cultivated oyster and clams. Robert Rheault, who has a Ph.D. in
26 Biological Oceanography and is an adjunct faculty member in the University of Rhode Island's
27 Department of Fisheries & Aquaculture, estimated that the harvest of approximately 4.3 million
28 oysters and 1 million clams annually by DBOC results in the direct removal of approximately 2.5

1 tons nitrogen and 0.75 tons phosphorus (R. Rheault, pers. comm., 2010). Newell (2004)
 2 commented that bioextraction (e.g., shellfish harvest) represents the only method of nitrogen
 3 removal once it has entered the system, which can then make that system more resilient to nutrient
 4 loading. Loss of the nutrient removal function performed by cultivated shellfish, especially in
 5 relation to the mitigation of upland sources of nutrients, could lead to cultural eutrophication of
 6 Drakes Estero.

7 8. Native Shellfish: Although there are native species of bivalves in the system, they
 8 are not as efficient at filtration, and would not occur at the densities, as the clams and oysters
 9 provided by DBOC. For example, oyster racks (7 acres) are 3-dimensional structures that enable
 10 animals to be grown in the water column where natural production does not typically occur. Native
 11 shellfish filter at about 1/3 the capacity of Pacific oysters (Ruesink et al. 2006 and references cited
 12 within this document). Thus, even at the same density of cultured shellfish (which would not be the
 13 case given the loss of the three dimensional structures), the filtration capacity of native shellfish
 14 represents a 30% loss in water quality mitigation. Loss of filtration capacity from cultivated
 15 shellfish, and potential to increase eutrophication in the Estero, could result in significant impacts to
 16 the water quality of the Estero.

17 9. Cultural Eutrophication: Excessive contributions of inorganic nitrogen (ammonia
 18 and nitrate) are recognized as the primary cause for degraded water quality, hypoxia, habitat loss
 19 and reduction of biodiversity in our nation's coastal ecosystems (NAS 2012). If the DBOC
 20 shellfish are removed, and the loss in filtration capacity is not supplied by native shellfish, a
 21 significant portion of nitrogen and phosphorus that is currently removed will remain in the Estero
 22 and likely contribute to cultural eutrophication. Eutrophication of a system stimulates plankton
 23 blooms, which result in increased turbidity and reduced water clarity. In some cases, harmful algal
 24 blooms (HABs) that produce biotoxins can cause death of mammals and other animals and
 25 paralytic shellfish poisoning to humans that ingest the algae. Such HABs or red tides are
 26 occasionally now a problem in the Estero as indicated in the FEIS. Though these red tides are
 27 reportedly attributed to coastal upwelling that can occur anywhere along the California coast in the
 28 FEIS, it stands to reason that increased availability of nutrients once shellfish are removed could

1 exacerbate the duration and extent of red tides in the Estero or offshore areas receiving tidally
2 flushed nutrient-enriched waters from the Estero.

3 10. Biochemical Oxygen Demand (BOD): As plankton die and decompose, oxygen is
4 consumed from the water column, which is expressed as biochemical oxygen demand (BOD). The
5 excess algal productivity associated with cultural eutrophication will lead to increased BOD that
6 can depress dissolved oxygen concentrations to levels that stress or adversely affect other aquatic
7 biota (Borsuk et al. 2001; Volkmar and Dahlgren 2006). As phytoplankton blooms are a natural
8 phenomenon, whether or not there are excessive nutrients available to stimulate growth, they will
9 naturally decompose and end up in the sediment layer. Without the filtration capacity of DBOC
10 oysters, there will be an excess of phytoplankton in Drakes Estero, which will further exacerbate
11 BOD. Even if tidal flushing removes some of the phytoplankton from the system, it is unlikely to
12 flush settlement of organisms in the sediment layer, which will force the system toward anoxic
13 sediment conditions if uncontrolled.

14 11. Tidal Flushing: Potential cultural eutrophication of the Estero is, in part, dependent
15 on hydraulic residence time (HRT). HRT is directly proportional to tidal flushing, which is related
16 to freshwater inflow, tides, currents, wind, and waves. It is unlikely that the nutrient loading from
17 upland sources will be tidally flushed from the system, particularly in the upper arms of Drakes
18 Estero, which are more poorly flushed than other portions of the Estero. In addition, the DBOC
19 oysters are predominantly located within the upper arms of the Estero. By taking out the DBOC
20 oysters, you are removing efficient filter feeders from areas that require the most mitigation from
21 nutrient loading.

22 12. Eelgrass Habitat in Drakes Estero: Aquaculture in the Estero has created water
23 quality conditions (clarity and nutrient availability) suitable to eelgrass growth. According to data
24 provided by Kirsten Ramey (pers. comm., 2012) at the California Department of Fish and Game
25 (CDFG), eelgrass in Drakes Estero doubled from 1991 to 2007. A comparison of the aerial
26 photography is provided as Exhibit 4. CDFG personnel attributed (at least in part) the expansion of
27 eelgrass to the presence of DBOC shellfish (Bartley et al. 2009). Notably, eelgrass increased the
28 most dramatically in the upper arms of the Estero where oyster racks predominate. This pattern of

1 recruitment was also observed by Mr. Lunny (pers. comm., 2012) who commented that eelgrass is
2 currently recruited around 85% of the oyster racks, which were originally sited in areas devoid of
3 eelgrass habitat. This can be observed in the aerial photographs, showing that less than 20 racks
4 had eelgrass around them in 1991, but nearly all racks were surrounded by eelgrass in 2007.

5 13. Impacts to Eelgrass from Cultural Eutrophication: Many researchers have
6 identified water clarity as the most important factor limiting eelgrass distribution and abundance
7 (Fonseca and Bell 1998; Cho and Poirrier 2005; Fonseca and Malhotra 2006). It is acknowledged in
8 the FEIS at page 213 that light availability in the water column, which is adversely affected by
9 turbidity, likely controls productivity of eelgrass. Similarly, many authors, such as Burkholder et
10 al. (2007), have documented nutrient enrichment (eutrophication) as a major cause of degradation
11 of water clarity and loss of seagrass (including eelgrass) habitat in estuaries. By consuming
12 phytoplankton and particulate organic matter, shellfish increase the amount of light reaching the
13 sediment surface that is available for photosynthesis (Koch and Beer 1996). The loss of the DBOC
14 shellfish will likely contribute to the cultural eutrophication of the Estero and adversely affect the
15 productivity of eelgrass, spatial distribution and extent of eelgrass habitat.

16 14. Impacts to Eelgrass from Turbidity: Relatively long-term increases in suspended
17 sediments and increased turbidity from oyster rack removal operations also would reduce water
18 clarity, light transmittance through the water column and reduce primary production by eelgrass,
19 especially within the upper arms that do not receive the same amount of tidal flushing as the main
20 portion of the Estero. Depending on the tidal cycle, turbidity may not be flushed out of the Estero in
21 a short time period. Reductions in eelgrass primary production during the active growth period
22 (April through October) also could have cascading effects on organisms associated with or
23 dependent on eelgrass.

24 15. Direct Impacts to Eelgrass from Oyster Rack Removal: Because eelgrass has
25 colonized areas occupied by oyster racks, removal operations would result in direct impact to
26 eelgrass habitat. Eelgrass rhizomes and shoots growing in and around sediment adjacent to posts
27 and above buried 2x4-connectors would be removed as the racks are pulled out. Removal of the
28

1 shoots may take up to two years to reestablish lost biomass (Ruesink and Rowell 2012; Ruesink et
2 al. 2012), which assumes no other changes to water quality conditions during eelgrass growth.

3 16. Essential Fish Habitat: Eelgrass is acknowledged as essential fish habitat (EFH) in
4 the FEIS. The FEIS postulated that removal of oyster racks (7 acres) will open areas for eelgrass
5 colonization. However, this hypothesis is not supported if water quality conditions deteriorate due
6 to cultural eutrophication and relatively long-term increases in turbidity from rack removal
7 extending over a period of up to almost two years. The loss of eelgrass habitat from removal and
8 cultural eutrophication would negatively impact EFH.

9 17. Shellfish Nutrient Mitigation: The National Oceanic and Atmospheric
10 Administration (NOAA), Environmental Protection Agency (EPA), and other partner organizations
11 are actively investigating shellfish aquaculture as a method for mitigating excessive nutrient
12 loading that contributes to cultural eutrophication in Long Island Sound and other estuaries.
13 Shellfish sequester and incorporate nutrients in their shells and biomass. When shellfish are
14 harvested, the nutrients contributing to eutrophication are removed from the system. This means of
15 bioextraction (or bioharvesting) removes nitrogen and other nutrients from eutrophied waters (LISS
16 2012). In fact, Newell and Koch (2004) provided an ecosystem modeling and mesocosm study that
17 indicated the presence of even a modest fraction (25 g dry tissue weight m⁻²) of oysters in
18 Chesapeake Bay could improve water quality and aid in the recovery of seagrasses. The System
19 Wide Eutrophication Model (SWEM), and other models, are being used throughout the United
20 States to explore the use of shellfish as a mitigation strategy for controlling anthropogenic sources
21 of nutrients, such as nitrogen, that are causing the eutrophication and degradation of estuaries.

22 18. Invasive Snail: Another invasive species in the Estero is the mud snail, *Batillaria*
23 *atramentaria*. In the event that cultural eutrophication progressed following the removal of
24 cultured oysters and clams, the mud snail would likely colonize new areas of the Estero. The
25 scientific literature clearly documents that eutrophication tends to favor non-native and invasive
26 species that are more tolerant of degraded water quality conditions. Studies of the invasive mud
27 snail confirmed that it is more tolerant of hypoxia/anoxia (Byers 2000), which would allow it to
28 colonize areas that are more eutrophic. Byers (1999) reported that this snail was relatively

1 restricted within the Estero (data collected in 1997). If water quality conditions become more
2 eutrophic as expected once shellfish aquaculture is removed, favorable conditions for the expansion
3 of this species may be created to the detriment of native invertebrates.

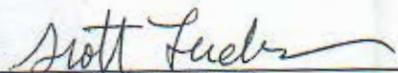
4 19. Conclusions: If the order is upheld and the DBOC onshore and offshore facilities
5 must be removed, there will be relatively long-term and potential irreversible impacts to the trophic
6 status of the Estero. Loss of nutrient removal and filtration functions of cultured shellfish is likely
7 to lead to the cultural eutrophication of the system. Attendant impacts of cultural eutrophication are
8 well established in the scientific literature and will likely include degraded water quality (reduced
9 clarity and light transmission), loss of eelgrass (EFH), and shift in the dominant source of primary
10 production from eelgrass to phytoplankton and macroalgae. Periodic plankton blooms will likely
11 increase BOD contributing to periodic hypoxia events in surface sediments as plankton die and
12 decompose. All of these impacts could lead to trophic cascades and changes in the invertebrate and
13 fish community structures and changes in forage quality and use of the Estero's habitats by fish,
14 birds, and mammals, including protected species,

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this ___ day of December, 2012, Seattle, Washington.



Scott Luchessa

EXHIBIT 1

Scott Luchessa, MS

EDUCATION

- 1990 MS, Environmental Studies, University of Montana
- 1985 BS, Biology, San Diego State University

REGISTRATIONS & CERTIFICATIONS

Certified Ecologist, Ecological Society of America

Certified SCUBA diver, PADI

EXPERIENCE

Scott Luchessa is a certified ecologist with more than 25 years of experience in aquatic, wetlands, and terrestrial ecology. For the past 21 years, Scott has been an environmental consultant and much of his practice has focused on evaluating potential impacts to wetlands and aquatic environments from proposed development projects for a broad array of public and private sector clients, including the National Park Service, U.S. Forest Service, U.S. Coast Guard, U.S. Navy, state departments of transportation, state natural resource management agencies, and others. Mr. Luchessa is an expert on federal Clean Water Act regulation of wetlands and other Waters of the U.S. Scott has evaluated potential impacts to wetlands and water quality for a number of NEPA environmental impact statements and environmental assessments of proposed development activities involving estuaries in Oregon, Washington, and elsewhere in the Pacific Northwest, California, and Alaska. In addition, Mr. Luchessa has been a lead or contributing author or technical reviewer on the preparation of many biological evaluations and biological assessments (BAs) examining potential impacts of proposed aquaculture operations on federally-listed threatened and endangered species and essential fish habitat needed to comply with the consultation requirements of the Endangered Species Act and Magnuson-Stevens. Scott was a contributor on programmatic BAs of Nationwide Permit 48 (Shellfish Aquaculture) prepared on behalf of the U.S. Army Corps of Engineers in California, Oregon, and Washington in consultation with the National Marine Fisheries Service. He is a recognized leader in wetland ecology in the Pacific Northwest and has co-authored publications analyzing the use of wetland mitigation banks and identification of the characteristics of peatlands in western Washington. He has designed and implemented compensatory wetland mitigation plans for projects that have unavoidable adverse impacts to estuarine and freshwater wetlands. More detailed descriptions of selected examples of his experience within these areas can be found below.

Wetland Delineation

Mr. Luchessa has identified and delineated hundreds of wetlands using numerous delineation methods, including the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual and various regional supplements that have been adopted between 2007 and 2010; the 1989 Unified Federal Wetland Delineation Manual; the U.S. Fish and Wildlife Services' definition of wetlands; and the 1997 Washington Wetlands Identification and Delineation Manual. He has applied these delineation methods all across the western United States, including in California, Washington, Alaska, Oregon, and Montana.

Hydrologic Monitoring Plans

Scott Luchessa, MS

Scott has designed hydrologic monitoring plans using networks of shallow groundwater monitoring wells and direct observations of indicators of wetland hydrology to both demonstrate presence or absence of wetlands, document successful creation or restoration of wetland hydrology as part of compensatory wetland mitigation (creation or restoration) projects, and assess impacts to wetland hydrology from development projects.

Wetland Mitigation Plans, Specifications, and Cost Estimates

Scott has successfully managed a number of compensatory wetland mitigation design projects, including enhancement, restoration, and creation for clients whose development projects had unavoidable adverse impacts to wetlands. He has designed and implemented compensatory mitigation plans, specifications, and cost estimates in collaboration with project teams and successfully advocated and negotiated with agency personnel to develop plans that comply with regulatory requirements and meet client needs.

Permitting

Mr. Luchessa has successfully led numerous clients through the increasingly complex and constantly changing regulatory processes required to comply with federal, state, and local government laws, rules, and regulations. In addition to obtaining various permits and approvals needed to implement proposed projects, he has also acted to ensure client complied with applicable permitting obligations.

- Directed and prepared biological assessment (BA) and Section 404(b)(1) Alternatives Analyses for numerous water-dependent projects.
- Prepared restoration and mitigation plans, specifications and cost estimates.
- Prepared restoration and mitigation monitoring plans, conducted quantitative monitoring, and prepared monitoring reports to document compliance and ecological success of restoration and compensatory mitigation projects with specified performance standards.

Construction Oversight

Construction oversight by the mitigation specialist is a critical element to successful project completion. Scott has provided this important function to ensure projects are properly implemented as designed so that they are both compliant with permit requirements and ecologically successful.

NEPA

Mr. Luchessa has been a technical lead and project manager on numerous environmental assessments and environmental impact review/statement projects completed in compliance with the National Environmental Policy Act (NEPA). Some selected examples of his NEPA experience are identified as follows.

- National Park Service, Denali National Park, Gravel Acquisition Plan, Wetland Delineation, Denali, Alaska—Delineated wetlands throughout Denali park corridor at 11 sites. Prepared a jurisdictional wetland delineation report that assessed potential impacts from gravel mining operations on wetlands, identified wetland functional values, and evaluated potential wetland mitigation opportunities and constraints. Work was completed in support of a 10-year gravel acquisition plan NEPA Environmental Assessment.

Scott Luchessa, MS

- USDA, Forest Service, Dog Creek Bridge to Coffman Cove EA, Prince of Wales Island, Alaska—Managed and provided senior technical oversight of natural resource investigations conducted to support and completed an environmental assessment to comply with NEPA, ESA, and other state and federal laws and regulations. Prepared a biological assessment of the potential effects of the proposed project to listed threatened and endangered species, including Steller sea lion, Humpback whale, as well as Forest Service sensitive plants and animals to fulfill the consultation requirements of ESA.
- Imperial County and Imperial County Air Pollution Control District, Imperial County, CA—Co-authored a declaration submitted to the Sacramento Superior Court extending a stay of the Imperial Irrigation District's Quantification Settlement Agreement for transfer conserved water from the Salton Sea to the San Diego Water Authority and others on the grounds that actual impacts stipulated in the CEQA EIR/EIS documents to biological resources are greater than those projected. The declaration provided a comparison of the current observed elevation and salinity levels with the EIR/EIS projected baseline levels and project impact analysis to determine if the water transfers have led to a reduction in the Salton Sea elevation and salinity increases beyond that projected, which may be in violation of the mitigation measures and State Water Resources Control Board orders.
- Port of Seattle, Sea-Tac International Airport Master Plan Update EIS, SeaTac, Washington— Prepared multiple sections for the NEPA/SEPA EIS for the controversial Port of Seattle, Sea-Tac International Airport Third Runway project. Lead author on the fisheries and biotic communities, water quality section, the water quality subsection of the human health section, and the flood plains section responsible for identifying existing conditions, potential impacts, and appropriate mitigating measures. Calculated sediment loading for existing and proposed conditions using the Revised Universal Soil Loss Equation. The EIS successfully withstood substantial scrutiny and protracted legal challenges and the project has now been completed.

PROFESSIONAL AFFILIATIONS & ACTIVITIES

Member, Society of Wetland Scientists

Member, Ecological Society of America

SELECTED PUBLICATIONS

Luchessa, S. 2010. Using wetland creation, restoration, and preservation for developing carbon offsets in wetlands. *National Wetlands Newsletter* 32(4):12-17,23

Kulzer, L., S. Luchessa, S. Cooke, R. Errington, and F. Weinmann, 2001. Characteristics of the Low-Elevation Sphagnum-Dominated Peatlands of Western Washington: A Community Profile. Part 1: Physical, Chemical and Vegetation Characteristics. Funded in part by a grant from the U.S. Environmental Protection Agency, Region X, Seattle, WA.

Castelle, A.J., S.A. Luchessa, C. Conolly, M. Emers, E.D. Metz, S. Meyer, and M. Witter, 1992. Wetlands Mitigation Banking. Washington State Department of Ecology, Publication No. 92-12, Olympia.

Scott Luchessa, MS

Luchessa, S.A., 1990. Soluble Reactive Phosphorus Concentrations in the Upper Clark Fork River, Montana: A Study of the Contributions from Two Nonpoint Sources of Sediment. Masters thesis, University of Montana, Missoula, MT.

Luchessa, S.A., and R.P. Kramer, 1989. Natural Large Woody Debris Loading for Selected 3rd and 4th Order Streams in the Lolo and Bitterroot National Forests. Pages 4-35 in Y. Vadeboncoeur, S.A. Luchessa, and R.P. Kramer, editors. Fisheries Habitat and Aquatic Environment Monitoring Report: Bitterroot, Deerlodge and Lolo National Forests 1987 and 1988. U.S. Department of Agriculture, Forest Service, Missoula, Montana.

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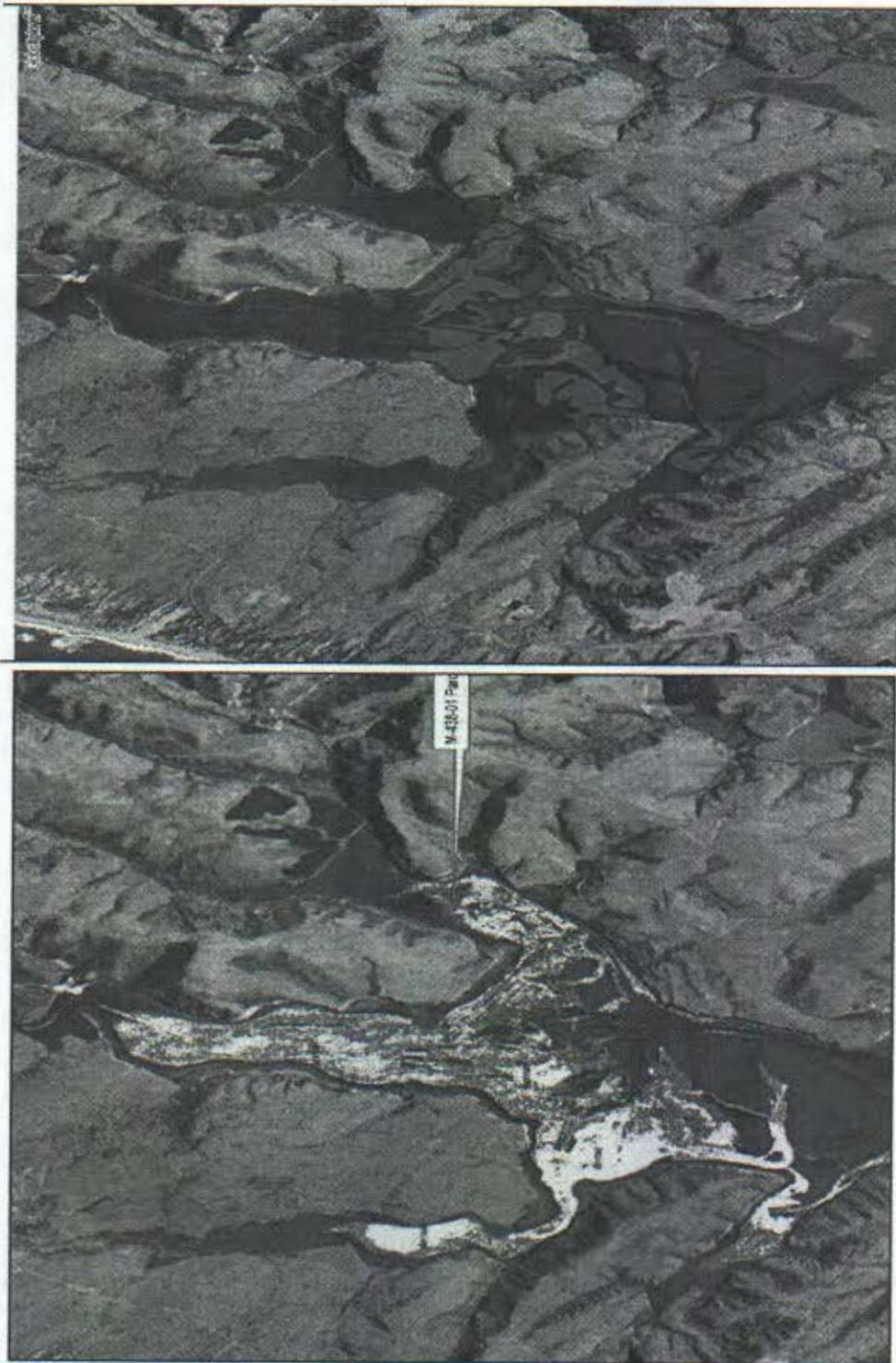
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EXHIBIT 3

Table 1. ESA-listed and sensitive species in Drakes Estero.

Species Name		Status		Work Restrictions
Common Name	Scientific Name	Fed	State	
Coho salmon - Central California Coast ESU	<i>Oncorhynchus kisutch</i>	E	E	June 15 to October 15 (anadromous fish migration)
Steelhead - Central California Coast ESU	<i>O. mykiss</i>	T	None	June 15 to October 15 (anadromous fish migration)
Western snowy plover	<i>Charadrius alexandrinus nivosus</i>	T	None	only existing habitat available, no documented nests present
Harbor Seal	<i>Phoca vitulina</i>	MMPA	None	March 1 to June 30 (pupping season)
Elephant Seal	<i>Mirounga angustirostris</i>	MMPA	None	none
Migratory Birds	multiple	None	None	February 1 to August 31 (Migratory Bird Treaty Act)

EXHIBIT 4



Eelgrass habitat in Drakes Estero from 1991 (A) to 2007 (B). Aerial photography shows a doubling of eelgrass habitat in sixteen years. Red = the location of oyster racks (7 acres).

1 Amber D. Abbasi [CSBN 240956]
2 **CAUSE OF ACTION**
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel List Continues On Next Page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF LAURA MORAN IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415-398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
11 pprows@briscoelaw.net

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8 Zackary Walton [CSBN 181041]
9 **SSL LAW FIRM LLP**
10 575 Market Street, Suite 2700
11 San Francisco, CA 94105
12 Phone: 415.243.2685
13 Email: zack@sslfirm.com

1 I, Laura Moran, declare as follows:

2 1. I have over 26 years of experience dealing with coastal development projects in
3 the United States; 18 years in California with an emphasis on the San Francisco Bay Area. I am a
4 wetlands and permitting specialist and Senior Biologist with Environ International Corporation. I
5 routinely direct, manage, and conduct a broad range of multi-agency permitting activities
6 including, wetland delineation and resource studies, biological resource inventories, special-status
7 species surveys, environmental impact assessments, and create environmental monitoring plans for
8 mitigation and construction projects for a variety of public and private sector clients throughout
9 California. Further details of my experience can be found in my CV provided in Exhibit 1. The
10 following facts are based on my own personal knowledge and, if called as a witness, I could and
11 would testify competently thereto.

12 2. Proposed Onshore Personal Property Removal: DBOC's personal property in the
13 onshore RUO and SUP area includes a 24' x 8' office trailer, five fiberglass shellfish setting tanks,
14 a 40' x 8' cannery container, 40' x 8' equipment storage shed, shellfish culture equipment, a 20' x
15 20' open sided shed, 12 picnic tables, two septic systems, and a water well. After removing all
16 personal property inside, the office trailer, the cannery container, and the equipment storage
17 containers would be loaded on flatbed semi-trailers with a crane and hauled away. This process
18 would take approximately three business days. Removal of the shellfish setting tanks would
19 require the use of a track-mounted hydraulic excavator to remove the tanks and load onto dump
20 trucks for disposal in the landfill. This process would take approximately two business days;
21 however, it would take more time to remove all underground piping connected to the setting tanks.
22 The setting tank removal will result in ground disturbance near a known archaeological site.
23 Septic systems will need to be properly abandoned by pumping tanks, removing pumps, filling
24 with sand, covering with topsoil, and installing erosion control. The water well will be filled with
25 pea gravel and capped with concrete. Concrete slab and well enclosure will be demolished and
26 removed from the site. After all required permits are obtained, removal of onshore personal
27 property would take approximately two weeks. Removal of personal property likely will require
28

1 federal, state, and local agency permitting that will prevent DBOC from taking action until such
2 permits are acquired.

3 3. Proposed Oyster Rack Removal Using DBOC Equipment: According to Drakes
4 Bay Oyster Company (DBOC) President Kevin Lunny, there are 95 oyster racks in Drakes Estero,
5 which comprise a total of approximately 250,000 board feet (ft) of treated wood. There are an
6 estimated 4,700 posts, according to the FEIS. Posts are connected to each other by 10-foot-long, 2
7 x 4 rails at top and bottom, with the bottom rails buried in the sediment. The oyster racks would
8 be removed using a chainsaw to cut the legs and rails into manageable units and lifted out of the
9 substrate using a hoist (powered by an electric motor and supplied by a generator) mounted on a
10 barge towed by one of DBOC's two oyster skiffs. The skiffs would be anchored to the bottom
11 substrate by two anchors during this effort. Using the proposed methods, it is anticipated that each
12 rack (a total of 95) will take a minimum of 3 days to remove, or a total of 285 days within
13 approximately 665 calendar days, assuming good tides and weather conditions. It is important to
14 note that this does not account for periods when removal work may be restricted due to the
15 presence of sensitive life stages for protected species period between March 1 and October 15 due
16 to harbor seal pupping (March 1 to June 30), anadromous fish migration (June 15 to October 15),
17 and the Migratory Bird Treaty Act (February 1 to August 31). See Table 1 provided as Exhibit 2.

18 4. Permitting and Agency Coordination: Based on my professional experience, the
19 dismantling and removal of the existing Drakes Bay Oyster Company (DBOC) production facility,
20 including remnants of former shellfish production activities, would likely require interagency
21 regulatory permitting and coordination. The dismantling of the shellfish facility may require an
22 extended period of time based on tidal, weather, and potential migratory/resident species
23 disturbance implications which have not been considered in environmental impact analyses to
24 date. In addition, the use of heavy machinery (e.g. crane, boom, and/or hoist) may be required to
25 remove existing in-water, over-water and near shore structures. Permits currently held by DBOC
26 only cover operation and maintenance activities and do not cover decommissioning/deconstruction
27 of the shellfish facility. Potential regulatory agency permitting and coordination are further
28 described below.

1 5. U.S. Army Corps of Engineers: Clean Water Act (CWA) Section 404 Individual
2 or Nationwide Permit compliance may be required for deconstruction activities occurring in
3 navigable waters and/or adjacent to wetlands.

4 6. Regional Water Quality Control Board (RWQCB): The Porter-Cologne Water
5 Quality Act (Cal. Water Code, Sections 13000 et seq.) was enacted in 1969 to preserve, enhance
6 and restore the quality of California's water resources, and ensure their proper allocation and
7 efficient use of the benefit of present and future generations. The Act established the State Water
8 Resources Control Board (the California Water Board) and nine Regional Water Quality Control
9 Boards as the principal State agencies with the responsibility for protecting water quality in
10 California. Under the Act, the Water Board has the ultimate authority over State water rights and
11 water quality policy, and the regional boards oversee water quality on a day-to-day basis at the
12 regional level by determining the beneficial uses for all water-bodies within their jurisdiction,
13 establishing and enforcing water quality standards for surface and groundwater, and taking actions
14 needed to maintain the standards by controlling point and non-point sources of pollution. The
15 Shellfish Act of 1993 established the requirement that the Regional Board form a Technical
16 Advisory Committee to investigate sources of pollution in threatened shellfish areas.

17 7. CWA Section 401 Water Quality Certification may be required for deconstruction
18 activities having temporary and/or permanent impacts to water quality within Drakes Estero.
19 Other coordination with RWQCB may be required for deconstruction activities impacting isolated
20 wetlands and/or other waters of the State in addition to regulatory coordination with CDFG for
21 water pollution considerations.

22 8. California Department of Fish and Game (CDFG): In addition to required
23 coordination with CDFG which oversees shellfish cultivation, a 2081 Incidental Take Permit
24 (California Endangered Species Act (CESA)) may be needed for the effort to dismantle the DBOC
25 operation. The Department also oversees water pollution pursuant to Section 5650. Fish and
26 Game wardens are authorized to issue citations for spills or discharges of any substance(s)
27 considered deleterious to fish and wildlife. Violations are punishable as provided in Sections
28

1 12000-12002. Fish and Game staff report chronic (sub-lethal, long-term) water pollution
2 conditions to RWQCBs and cooperate in obtaining corrections or abatements to the condition.

3 9. United States Fish and Wildlife Service (USFWS): There are multiple federal and
4 state listed special status plant and animal species documented to occur in the immediate vicinity
5 of the DBOC including but not limited to: San Bruno elfin butterfly, western snowy plover,
6 tidewater goby, coho salmon, steelhead, California clapper rail, California red-legged frog,
7 Myrtle's silverspot, California freshwater shrimp, Sonoma alopcurus, robust spineflower,
8 Sonoma spineflower, Baker's larkspur, golden larkspur, beach layia, Tidestrom's lupine, and
9 showy rancheria clover. Both land and water based dismantling activities have the potential to
10 impact these species. Breeding and nesting habitat of these species is protected and requires
11 significant setbacks and restrictions on noise and vibration that could disrupt breeding and nesting
12 activities. For example, a typical protection buffer from known clapper rail habitat is 700 feet.
13 Other work window restrictions include: June 15 through October 15 for Coho salmon and
14 steelhead during anadromous fish migration and March 1 through June 30 for harbor seal pupping
15 season. In addition to special status species, all migratory and resident bird species are protected
16 during nesting and breeding season, under the Migratory Bird Treaty Act, which extends from
17 February 1 to August 31. Section 7 Consultation under the Federal Endangered Species Act
18 (FESA) may be needed in order to safeguard special status species during the DBOC dismantling.
19 Protection and mitigation measures for proceeding with the DBOC dismantling project would need
20 to be determined through consultation with USFWS. Depending on the level of consultation
21 required and any subsequent focused survey requirements, consultation may take anywhere from 6
22 months to 2 years or more.

23 10. California Coastal Commission (CCC): Per the Coastal Zone Management Act of
24 1972 (16 U.S.C. §1451, e.t seq.), a Coastal Development Permit will likely be required for the
25 DBOC operation dismantling process. The CCC retains permanent coastal permit jurisdiction
26 over development proposed on tidelands, submerged lands, and public trust lands, and the CCC
27 also acts on appeals from certain local government coastal permit decisions. The CCC reviews and
28 approves any amendments to previously certified LCPs.

1 11. National Oceanic and Atmospheric Administration (NOAA)/Gulf of the Farallones
2 National Marine Sanctuary (GNMS): GNMS has been vested with the authority, in accordance
3 with the National Marine Sanctuaries Act (NMSA) of 1972 (16 U.S.C. § 1431, et seq.), to provide
4 comprehensive and coordinated conservation and management of 948 square nautical miles of
5 near-shore and offshore waters of the eastern Pacific. A complete spectrum of marine habitats
6 ranging from unique inland estuarine, to intertidal, pelagic, and deep oceanic environments is
7 found within the Sanctuary. These productive marine environments support an abundance of living
8 resources including: at least 36 species of marine mammals; 54 species of breeding birds; and 25
9 threatened or endangered species.

10 12. In 1981, NOAA determined that these offshore areas contain exceptional natural
11 resources, and that these waters around the Farallon Islands and along the mainland coast of the
12 Point Reyes Peninsula between Bodega Head and Rocky Point deserved special recognition,
13 protection, and designation as a national marine sanctuary.

14 13. National Marine Sanctuary (GNMS): Tidal Flushing: Potential cultural
15 eutrophication of the Estero is in part dependent on hydraulic residence time (HRT). HRT is
16 directly proportional to tidal flushing, which is related to freshwater inflow, tides, currents, as well
17 as wind and waves. Additional and existing nutrient loading into the system is unlikely to be
18 tidally flushed out of the system, particularly in the upper arms of Drakes Estero, which are more
19 poorly flushed than other portions. The total removal and disruption of sediment underneath
20 growing areas will add nutrients to the Estero. In addition to the nutrient load from the shellfish
21 removal, upland sources of nutrients that flow to the Estero will no longer be controlled after the
22 oysters are removed. Removal of the DBOC shellfish represents an approximately 30% loss of
23 filtration capacity, which is likely to push the system toward cultural eutrophication.

24 14. National Marine Fisheries Service (NMFS): NMFS has jurisdiction over eelgrass
25 beds and has recently drafted a new mitigation policy which would extend NMFS jurisdiction to
26 include all vegetated eelgrass area plus a buffer of 10 meters (30 feet). The dismantling of the
27 DBOC operation would involve potentially extensive disturbance and/or destruction of eelgrass
28 beds during the dismantling of the oyster racks.

1 15. Bay Area Air Quality Management District (BAAQMD): It is anticipated that
2 there will be increased emissions from DBOC dismantling activities. Sources would include but
3 not be limited to: hoist and generator, chain saws, boat trips, and truck trips. The current EIS did
4 no evaluate the use of diesel fuel equipment during DBOC dismantling activities. In the State of
5 California, diesel exhaust is considered a Toxic Air Contaminant (TOC) due to its carcinogenic
6 properties. Under BAAQMD guidelines, CEQA analysis is required for any potential TOC release
7 to nearby sensitive receptors. DBOC may need to obtain both an Authority to Construct Permit
8 and a Permit to Operate in order to comply with BAAQMD air quality standards. Emissions
9 analysis and coordination with BAAQMD is anticipated to take a minimum of 180 days once a
10 complete application is filed.

11 16. In addition to those regulatory agencies listed above, additional permitting and
12 coordination may be required for dismantling of the DBOC operation by other agencies involved
13 with vessel management, habitat, and water quality issues including but not limited to: , California
14 Department of Boating and Waterways, California Department of Public Health, United States
15 Coast Guard, and the United States Environmental Protection Agency.

16 17. In my experience it is common for initial inter-agency coordination, to determine
17 potential regulatory issues and establish agency roles, to take approximately 120 days. Additional
18 time for permit coordination and compliance is then required once agency roles and permit
19 requirements (including NEPA/CEQA considerations) have been determined.
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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.
Executed this 20th day of December, 2012 in Novato, California.



Laura Moran

EXHIBIT 1

Laura Moran

Sr. Manager/Sr. Biologist

EXPERTISE

Regulatory Permitting
 NEPA/CEQA Technical Reporting and Impact Analysis
 Wetland Delineation
 Habitat Management, Restoration, Mitigation and Monitoring Plans
 Environmental Permitting
 Biological Assessments and Baseline Studies

CREDENTIALS

BSLA/MUP Degree Program, City University of New York
 BS Biology, St. Lawrence University
 Habitat Evaluation Procedure (HEP) Certification, US Fish and Wildlife Service, Anchorage Alaska
 Wetland Delineation Certification, Rutgers University
 Wetland Restoration, Enhancement and Construction, Environmental Concern, St. Michaels, MD
 Society of Wetland Scientists
 Association of Environmental Professionals
 California Native Plant Society, Marin Chapter
 Hazardous Material Handling Training
 CERT, American Red Cross First Aid and CPR
 NAUI Open Water Scuba Certification

Laura Moran is a Senior Biologist and Manager at ENVIRON, with over 26 years of environmental consulting experience in both biology and project management. Ms. Moran has directed, managed, and conducted a broad range of multi-agency permitting activities including wetland delineation and resource studies, biological resource inventories, special-status species surveys, environmental impact analyses, and environmental monitoring plans for mitigation and construction projects for a variety of public and private sector clients on both the east and west coasts. Ms. Moran has a thorough understanding of CEQA and NEPA, both state and federal endangered species acts, and state and federal regulations and permits involving biological and water resources. She has worked on a wide variety of complex, multi-jurisdictional and environmental compliance projects, involving EIR and EIS compliance documentation as well as multi-agency consultation, reporting and permit application preparation for projects in the eastern and western United States. Ms. Moran maintains an excellent rapport with state and federal resource agencies. Her professional specialty includes multiple aspects of environmental studies and analyses, wetland delineation, restoration and mitigation design in support of environmental compliance and permitting.

EXPERIENCE HIGHLIGHTS

- Currently providing technical and strategic guidance for biological and hydrological resources components of joint CEQA/NEPA environmental review and regulatory permitting for a green waste to energy biofuels project in southern California. Project to be located on inert landfill and active sand and gravel quarry regulated under SMARA. Permitting lead for confidential private client currently seeking qualification for a federal U.S. Department of Energy (USDOE) loan guarantee that requires NEPA compliance.
- Currently managing adaptation portion of the Climate Mitigation and Adaptation Plan (CMAP) for the Port of San Diego. Project involves extensive analysis of land uses within Port jurisdiction relative to sea level rise and other potential impacts associated with climate change. An initial vulnerability assessment is underway to identify high risk areas. The CMAP will be appended to the Port's Master Plan and will be used to guide the CEQA and NEPA process for future Port projects.
- Currently managing preparation of regulatory agency permit applications to US Army Corps of Engineers (USACE), California Department of Fish and Game (CDFG), US Fish and Wildlife Service, Regional Water Quality Control Board (RWQCB), California Coastal Commission (CCC), and San Francisco Bay Conservation and Development Commission (SFBCDC). Multiple projects.
- Recently managed preparation of biological portions of PES in support of a federal Tiger II Grant Application submittal by the San Francisco Redevelopment Agency for the infrastructure portions of the Mission Bay Development area. Project implementation will likely require a Minimal Impact NES in support of a Caltrans Categorical Exemption determination. Managing NEPA compliance, BDCD and CCC coordination. The Mission Bay Development project is the largest project currently underway in the City of San Francisco.
- Recently completed biological assessment for Section 7, wetland delineation and regulatory agency permitting for several segments of the flood control channel desiltation and improvement projects in Hayward, Union City, and Fremont, CA. The flood control projects involve levee reconstruction/construction, channel desiltation and bank stabilization, dredging, and desiltation basin maintenance. Future tasks include a system-wide marsh enhancement plan. The flood control projects are part of the South Bay Salt Pond Restoration Project. Key biological issues include freshwater and tidal wetlands, multiple special status species, western pond turtle, pallid bat, steelhead and Chinook salmon.



EXHIBIT 2

Table 1. ESA-listed and sensitive species in Drakes Estero.

Species Name		Status		Work Restrictions
Common Name	Scientific Name	Fed	State	
Coho salmon - Central California Coast ESU	<i>Oncorhynchus kisutch</i>	E	E	June 15 to October 15 (anadromous fish migration)
Steelhead - Central California Coast ESU	<i>O. mykiss</i>	T	None	June 15 to October 15 (anadromous fish migration)
Western snowy plover	<i>Charadrius alexandrinus nivosus</i>	T	None	only existing habitat available, no documented nests present
Harbor Seal	<i>Phoca vitulina</i>	MMPA	None	March 1 to June 30 (pupping season)
Elephant Seal	<i>Mirounga angustirostris</i>	MMPA	None	none
Migratory Birds	multiple	None	None	February 1 to August 31 (Migratory Bird Treaty Act)

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel list continues on next page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and
23
24 **KEVIN LUNNY,**
25 17171 Sir Francis Drake Blvd
26 Inverness, CA 94937

27 Plaintiffs,

28 v.

29 **KENNETH L. SALAZAR,**
30 in his official capacity as Secretary, U.S.
31 Department of the Interior,
32 1849 C Street, NW, Washington, D.C., 20240;
33 **U.S. DEPARTMENT OF THE INTERIOR**
34 1849 C Street, NW, Washington, D.C., 20240;
35 **U.S. NATIONAL PARK SERVICE**
36 1849 C Street, NW, Washington, D.C. 20240;
37 and **JONATHAN JARVIS,**
38 in his official capacity as Director, U.S.
39 National Park Service,
40 1849 C Street, NW, Washington, D.C. 20240.

41 Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF RICHARD
STEFFEL IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net; pprows@briscoelaw.net

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Zackary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Richard Steffel, declare as follows:

2 1. I am a Principal at ENVIRON International Corporation, specializing in
3 environmental impact assessments related to air quality and environmental noise. The following
4 facts are based on my own personal knowledge and, if called as a witness, I could and would testify
5 competently thereto.

6 2. I have a BA in Anthropology from Georgia State University (1975) and an MS in
7 Environmental Studies from the University of Montana (1981). I have more than 30 years of
8 experience conducting air quality and/or environmental noise impact and mitigation assessments.
9 (my CV is attached as Exhibit 1 to this document; a list of references cited in this Declaration is
10 attached as Exhibit 2).

11 3. Proposed Onshore Personal Property Removal: DBOC's personal property in the
12 onshore RUO and SUP area includes a 24' x 8' office trailer, five fiberglass shellfish setting tanks,
13 a 40' x 8' cannery container, 40' x 8' equipment storage shed, shellfish culture equipment, a 20' x
14 20' open sided shed, 12 picnic tables, two septic systems, and a water well. After removing all
15 personal property inside, the office trailer, the cannery container, and the equipment storage
16 containers would be loaded on flatbed semi-trailers with a crane and hauled away. This process
17 would take approximately three business days. Removal of the shellfish setting tanks would require
18 the use of a track-mounted hydraulic excavator to remove the tanks and load onto dump trucks for
19 disposal in the landfill. This process would take approximately two business days; however, it
20 would take more time to remove all underground piping connected to the setting tanks. The setting
21 tank removal will result in ground disturbance near a known archaeological site. Septic systems
22 will need to be properly abandoned by pumping tanks, removing pumps, filling with sand, covering
23 with topsoil, and installing erosion control. The water well will be filled with pea gravel and
24 capped with concrete. Concrete slab and well enclosure will be demolished and removed from the
25 site. After all required permits are obtained, removal of onshore personal property would take
26 approximately two weeks. Removal of personal property likely will require federal, state, and local
27 agency permitting that will prevent DBOC from taking action until such permits are acquired.

28

1 4. Proposed Oyster Rack Removal Using DBOC Equipment: According to Drakes
2 Bay Oyster Company (DBOC) President Kevin Lunny, there are 95 oyster racks in Drakes Estero,
3 which comprise a total of approximately 250,000 board feet (ft) of treated wood. There are an
4 estimated 4,700 posts, according to the FEIS. Posts are connected to each other by 10-foot-long, 2
5 x 4 rails at top and bottom, with the bottom rails buried in the sediment. The oyster racks would be
6 removed using a chainsaw to cut the legs and rails into manageable units and lifted out of the
7 substrate using a hoist (powered by an electric motor and supplied by a generator) mounted on a
8 barge towed by one of DBOC's two oyster skiffs. The skiffs would be anchored to the bottom
9 substrate by two anchors during this effort. Using the proposed methods, it is anticipated that each
10 rack (a total of 95) will take a minimum of 3 days to remove, or a total of 285 days within
11 approximately 665 calendar days, assuming good tides and weather conditions. It is important to
12 note that this does not account for periods when removal work may be restricted due to the presence
13 of sensitive life stages for protected species period between March 1 and October 15 due to harbor
14 seal pupping (March 1 to June 30), anadromous fish migration (June 15 to October 15), and the
15 Migratory Bird Treaty Act (February 1 to August 31). See Table 1 provided as Exhibit 3.

16 5. Heavy Equipment for Oyster Rack Removal: Alternatively, if the removal process
17 is to be completed within a shorter timeframe (and not including the time required for acquiring
18 necessary permits for such operations), the oyster rack demolition and removal would require the
19 use of additional heavy equipment. Information provided to Dr. Robert Abbott by Mr. Mark
20 Sutton of Dixon Marine Services regarding the methods and equipment that would be required for
21 removal to occur within a shorter time period indicates that the methods would be similar to those
22 Kevin Lunny has proposed, but the shorter time period would necessitate the use of more and
23 heavier equipment. The additional equipment would need to be secured, which would involve
24 linking steel barges together and loading a 100-200 ton crawler crane onto the barges.
25 Additionally, in order to secure the barge-crane system to the bottom, spuds would be pushed deep
26 into the sediment. A diesel pusher boat with a large prop would be employed to push the barge-
27 crane system out to the racks.

28

1 6. Airborne Noise Sources associated with Oyster Rack Removal: Removal
2 operations using such equipment would result in airborne noise that would vary with the
3 combination(s) of equipment in use at any one time and with distance from the source(s) to the
4 noise receiving location(s). Noise from individual equipment and from combinations of equipment
5 would result in fairly high sound levels, audible at great distances compared with existing
6 background levels and with noise from normal oyster farm operations.

7 7. Typical gasoline chainsaws can generate noise a level of about 85 dBA (L_{eq}) at a
8 distance of about 50 feet (size not specified, FHWA 2008). A crane also can generate a level of
9 85 dBA (L_{eq}) at a distance of about 50 feet (capacity not specified, FHWA 2008). And an electrical
10 generator, as could be used to power an electric hoist (instead of a large crane), can generate noise a
11 level of about 73 dBA (L_{eq}) at a distance of about 50 feet (size not specified, FHWA 2008). Use of
12 either of the two existing DBOC skiffs (with 20-hp and 40-hp outboard engines) would generate
13 levels of noise of about 60 dBA (L_{eq}) at 50 feet (ENVIRON 2011). A diesel-powered pusher boat
14 would also generate noise, but such noise might be reduced by the engine enclosure; in the absence
15 of readily available data, this specific source was not considered further.

16 8. Airborne Noise Levels associated with Oyster Rack Removal: The use of engine-
17 powered equipment associated with removal of the rack structures would generate noise.
18 Movement of barges using either the existing small skiffs or a larger pusher boat would represent
19 mobile sources that would not be present for very long in any one place and unlikely to result in
20 elevated sound levels. The highest sound levels would result during use of one or more chainsaws,
21 a generator to power an electric hoist, or a crane (instead of a hoist, so without a generator),
22 especially a diesel-powered crane. The loudest sound levels would occur during periods when the
23 chainsaw(s) and (whichever) lift equipment were in use simultaneously.

24 9. I used the FHWA Road Construction Noise Model (RCNM) to estimate the
25 cumulative sound levels from several scenarios of operations (FHWA 2008). These are reported
26 below. Use of more than one chainsaw at a time would result in higher sound levels than discussed
27 below.

28

1 10. Removal Noise Using DBOC Equipment (as proposed by Kevin Lunny): Use of
2 an electric hoist, a generator to power the hoist, and one chainsaw would result in sound levels
3 dominated by chainsaw noise. Assuming an 85% use factor for the chainsaw and 90% use factor
4 for the generator, this combination of equipment would result in hourly noise levels (L_{eq}) of about
5 85 dBA at 50 feet, about 65 dBA at 500 feet, and about 59 dBA at 1,000 feet. As a result, any
6 kayakers, hikers, or birds and mammals within about 7,500 feet of the rack removal operation
7 would be subjected to airborne noise levels higher than the 40-42 dBA (L_{eq}) average existing
8 daytime background sound levels (Volpe, 2011).

9 11. Removal Noise Using Heavy Equipment: Use of a large barge-mounted crane and
10 one chainsaw would result in sound levels dominated about equally by chainsaw and crane noise.
11 Assuming an 85% use factor for the chainsaw and 75% use factor for the crane, this combination of
12 equipment would result in hourly noise levels (L_{eq}) of about 87 dBA at 50 feet, about 67 dBA at
13 500 feet, and about 61 dBA at 1,000 feet. As a result, any kayakers, hikers, or birds and mammals
14 within about 10,000 feet of the rack removal operation would be subjected to airborne noise levels
15 higher than the 40-42 dBA (L_{eq}) average existing daytime background sound levels (Volpe, 2011).
16 If the accelerated removal schedule required the use of one or more additional chainsaws, the
17 resulting cumulative noise levels would be higher, and the potential area of impact larger than
18 estimated above.

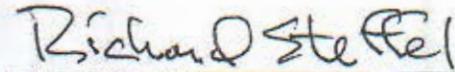
19 12. Conclusions: Removal of the oyster racks would result in higher sound levels than
20 any associated with normal operation of the oyster farm. Use of the equipment associated with
21 Kevin Lunny's proposed system for removal (i.e., small boats, an electric hoist, and one or more
22 chainsaws) would result in lower levels of noise, and thus a smaller overall noise "footprint," than
23 would the use of additional larger equipment (i.e., a push boat and a large barge-mounted crane)
24 associated with an accelerated removal schedule. However, the longer extraction schedule would
25 result in a longer period of time during which there would be a potential for noise impacts, i.e.,
26 about 285 days over 22 months (665 calendar days), assuming no delays in removal operations.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 20th day of December, 2012, in Lynnwood, Washington.



Richard Steffel

EXHIBIT 1



Richard Steffel | Principal

Lynnwood, Washington
+ 1 425 412 1808 | rsteffel@environcorp.com

Richard Steffel has over 30 years of experience evaluating environmental impacts and possible mitigation measures related to mobile and area sources of air pollution. His experience includes 19 years conducting transportation and general conformity assessments under state and federal air quality rules for a variety of transportation projects, transit and transit-oriented development projects and new and redevelopment projects that required project-level air quality conformity assessments. Additionally, he has over 20 years of experience conducting and managing a wide variety of environmental noise compliance, impact and mitigation assessments. These have included numerous evaluations of roadway, transit and development projects which have had to comply with state and local noise rules and/or federal and state noise impact and mitigation criteria established by the Federal Transit Administration, the Federal Highway Administration, the Department of Housing and Urban Development and various western state transportation agencies. Additionally, he has conducted numerous air and noise studies for new and modified marine shipping and repair facilities, including cruise ship homeports, container terminals, commodity export terminals and intermodal shipping facilities. Many of these air quality and environmental noise studies included reviews and documentation required by the Washington State Environmental Policy Act and NEPA.

EDUCATION

1981 MS, Environmental Studies, University of Montana (Air Quality/Energy Conservation)

1975 BA, Anthropology, Georgia State University (Ecological Anthropology)

EXPERIENCE

Noise Impact/Compliance/Mitigation Assessments

- Terminal 5 (T-5) Container Equipment-Handling Noise Mitigation Assessment, Port of Seattle, WA. Principal in charge, project manager, and primary investigator in equipment noise reduction study. Efforts focused on backup alarm noise from container-handling equipment at T-5, and included sound level measurements to assess the audibility of these safety devices, and recommendations for using quieter devices to reduce noise levels received at off-site residential locations.
- Train Yard Noise Impact and Mitigation Assessment, Equistar Chemicals, Morris, Illinois. Principal in charge and project manager for a noise compliance, impact, and mitigation assessment of a new rail storage yard at an existing chemical manufacturing plant. The review included multi-day sound level measurements both on site and near noise-sensitive residential receivers in the vicinity, and CadnaA noise modeling to consider the changes in the acoustic environment due to the new rail yard. In addition to projecting off-site rail yard noise levels, the modeling also considered the effectiveness of using noise barriers near portions of the facility property boundary to obstruct noise transmission to off-site receivers. The mitigation analysis additionally used CadnaA to assist in defining the placement, length, and height of two noise barriers, including use of a berm/wall combination to achieve a greater overall height. These noise analyses were documented in a technical report provided to the client.
- Seattle Steam Fuel Change Project, Seattle Steam, Inc., Seattle, WA. Project manager and principal investigator for the air quality and noise impact review of proposed fuel change at existing facility. Noise analysis focused on the design and noise sources associated with the new wood fuel-handling building to assess compliance with applicable noise rules.

Richard Steffel

- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance and mitigation assessment of operational transfer station to recommend means to reduce noise received on nearby properties. Included source and ambient measurements in the area and noise modeling to assess potential noise reduction treatments.
- Tacoma Narrows Bridge 24th Street Electronic Toll On-Ramp Project, WSDOT, Gig Harbor, WA. Project manager and principal investigator for the analysis to consider the need for supplemental noise mitigation assessment for potential traffic noise impacts at residential receivers affected by the larger Tacoma Narrows Bridge Project. Analysis refuted previous determination of the lack of feasible and reasonable mitigation to shield affected from high levels of traffic noise by proving mitigation could work at a reasonable cost.
- Oso Gravel Pit Noise Studies, Green Crow, Inc., Snohomish County, WA. Principal in charge for ongoing support related to noise issues from operation and expansion of the facility. Project has included numerous sound level measurements to document existing ambient conditions near the gravel pit's initial and relocated access road, and continuing consulting and expert testimony before hearings examiner and monitoring related to the conditional use permit conditions for the facility.
- Float Glass Manufacturing Plant, Cardinal Glass Industries, Napavine, WA. Project manager and principal investigator of environmental noise implications of the development of a float glass manufacturing facility in Lewis County, WA. Analysis included measurements of existing sound levels at representative sensitive receiving locations in areas. Potential impacts from operational noise included on-site truck traffic and idling, on-site train movements, facility noise, on-site material handling, and an on-site electrical substation. Evaluated noise from these sources using the FHWA Traffic Noise Model, the Environmental Noise Model, and specialized calculations. Considered projected future sound levels both in relation to the county noise limits and with regard to the potential for noise impacts due to changes in the existing acoustic environment. Analysis also evaluated potential noise reducing mitigation in the forms of operational changes and noise barriers for several potentially problematic noise sources. Findings summarized in the Final EIS for the project. Also testified in the successful defense of the EIS during an administrative appeal.
- Gravel Truck Noise Assessment, Canyon Resources, Puyallup, WA. Contributor. Developed noise monitoring protocol and participated in initial sound level measurements of compliance of gravel pit haul truck traffic noise levels with applicable county nighttime noise limits. Conducted noise mitigation analysis and oversaw subsequent sound level measurements to verify compliance.
- 145th Place Noise Impact/Mitigation Study, City of Bellevue, Bellevue, WA. Project manager and senior reviewer of noise impact and mitigation study for the widening of 145th Place.
- Manufacturing Facility Noise Compliance Assessment, Confidential Client, Tumwater, WA. Project manager and principal investigator for noise compliance measurements for a microchip manufacturer. Evaluation included frequency-specific source sound measurements during experimental operation of the facility to identify potentially problematic sources and to assess the effectiveness of noise mitigation barriers along the property line.
- 140th Avenue Noise Mitigation Studies, City of Bellevue, Bellevue, WA. Project manager and principal investigator for the noise impact and mitigation study for the widening of 140th Avenue. Assessment included extensive modeling to assess potential traffic noise impacts under Bellevue's noise rule followed by site-specific modeling to evaluate the potential noise reduction benefits of noise barriers along much of the project alignment. Included several meetings with citizen advisory group to explain and discuss findings. Studies led to construction of cost-effective noise barriers along much of this project area.
- Madrona Woods Noise Mitigation Study, Homeowners Association, Gig Harbor, WA. Project manager and principal investigator for review of noise impact and mitigation assessment related to SR-16/36th Street

Richard Steffel

interchange. Analysis led to construction of two noise barriers determined in previous analyses to be unnecessary and ineffective.

- Noise Compliance Assessment, City of Kent, Kent, WA. Project manager and principal investigator for noise compliance assessment of a food distribution facility where large trucks idle across the street from numerous residential receivers. Assessment led to further studies (by others) to assess and then construct noise barriers for this facility.
- Terminal 90/91 Noise Compliance Assessment, Port of Seattle, Seattle, WA. Project manager and principal investigator for compliance assessment of noise from refrigerated shipping trucks at the loading dock of a fish-processing facility. Study led to operational changes at the facility to relocate idling reefer containers.

Marine/Freight Facility Projects (Including General Air Quality Conformity where Applicable)

- Gateway Pacific Terminal, SSA Marine, Cherry Point, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation assessments for a proposed 54 million ton/year commodity export/import terminal on the Strait of Georgia, northwest of Bellingham, WA. The environmental noise assessment included measurements of existing conditions in the project vicinity and noise modeling using CadnaA to consider off-site sound levels related to facility operations. The noise assessment also considered train operations noise along the route between the railroad mainline and the facility, and included a mitigation assessment for projected train-horn noise impacts. The air quality review included extensive emission inventory development to characterize future operations of transiting and on-site trains, coal and other commodity-handling systems, vessels in transit and hoteling, and vessel-loading systems. These emissions were considered in an AERMOD dispersion modeling analysis that evaluated compliance with ambient air quality standards. Results of these analyses were documented in technical reports review by permitting agencies and the EIS contractors for this project. This project is ongoing.
- Puyallup Tribal Terminal, SSA Marine, Port of Tacoma, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation assessments for the modification and expansion to develop a 4-berth container terminal in the Port of Tacoma, WA. The environmental noise assessment included measurements of existing conditions in the project vicinity, source noise measurements of expected terminal operations equipment, and noise modeling using CadnaA to consider off-site sound levels related to facility operations. The air quality review included extensive emission inventory development to characterize future terminal operations and AERMOD dispersion modeling to evaluate compliance with ambient air quality standards. Due to the designation of the Tacoma area as nonattainment for fine particulate matter (PM_{2.5}), the review also included extensive review by and interactions with the Puget Sound Clean Air Agency regarding emission reduction components included in the project.
- Weyerhaeuser Port of Olympia Log-Export Facility, Weyerhaeuser Company, Olympia, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation studies for a proposed log export facility. The air quality analysis included compilation of worst-case peak-day and annual vessel and log-handling equipment emission inventories, and AERMOD dispersion modeling. The analysis assessed potential off-site concentrations of fine particulate matter (PM_{2.5}), which were also used as a surrogate for diesel particulate matter. The noise study included measurements of ambient levels in the project vicinity, equipment source noise measurements in and around an operational log-handling facility, and calculations to assess both compliance with local noise limits and the potential for impacts due to changes in noise levels.
- Terminal 30 (T-30) Container Terminal Reactivation and T-91 Cruise Terminal Relocation, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality impact and mitigation assessment and environmental noise impact review for this two-part project. Air quality analysis included compilation of detailed peak-day and annual emission inventories for hotelling vessels and container-handling equipment and haul

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vehicles. Emissions data considered in AERMOD dispersion modeling to assess potential off-site concentrations of both criteria air pollutants and selected toxic air pollutants. Analysis considered uncontrolled emissions and then more realistic and controlled emissions based on implementation of particulate control technologies and cleaner diesel fuels.

- Rail/Barge Satellite Transfer Facility, Port of Everett, Everett/Mukilteo, WA. Project manager and principal investigator for the air and noise studies for the EIS considering establishment of a barge-to-rail transfer facility for oversized containers. Studies considered three candidate sites. Air quality analysis included an assessment in relation to general conformity during construction of the facility and review of the implications of related traffic. Noise analysis included ambient measurements in the vicinity, special consideration of rail travel and horn noise, impact and mitigation modeling, and subsequent testimony during the shoreline permitting process for the facility. Subsequent work included development of air quality and noise management plans for implementation during construction of the facility, and sound level measurements to assess pile-driving noise levels at nearby eagle nest and perch locations.
- Homeport Cruise Ship Terminal, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and noise impact and mitigation analyses for the proposed development of a temporary cruise ship homeport terminal at the Port's Terminal 90/91 and Terminal 30 on Elliott Bay. Assessments included dispersion modeling of the cruise ship sources and consideration of off-site traffic-related air quality. Provided support in later supplemental air quality analyses for the now operational T-30 cruise ship port facility.
- Pier 1 Redevelopment Project, Port of Anacortes, Anacortes, WA. Project manager and principal investigator for the air quality and noise impact and mitigation evaluations for the EIS for the proposed redevelopment and expansion of an existing shipyard on the industrial waterfront. Air quality analysis included consideration of compiled monitoring data and review of projected future traffic related to the facility. Noise analysis included ambient and compliance measurements in neighborhoods near the facility, source measurements of shipyard noise sources (e.g., cranes, welding, etc.), and impact and mitigation modeling to assess the noise implications of the proposed facility expansion.
- Terminal 90/91 Neighborhood Noise Compliance Studies, Port of Seattle, Seattle, WA. Project manager and senior reviewer for the nighttime noise monitoring compliance evaluation for the Terminal 90/91 facility under terms of the short-fill agreement between the Port and nearby neighborhoods. Project included periodic measurements of nighttime (10 p.m. to 7 a.m.) noise levels at locations overlooking the facility, and analysis of the collected second-by-second data to ascertain contributions from terminal sources to neighborhood sound levels. Also conducted measurements and calculations to assess compliance with Seattle noise regulation and consulted with the Port and with terminal tenants in efforts to reduce off site noise levels. Work began in 1990 and extends to the present day, and has involved numerous meetings with the advisory group representing affected citizens, including revamping the protocols used in these evaluations.
- Southwest Harbor Cleanup and Redevelopment, Port of Seattle, Seattle, WA. Project manager for later phases of project and primary air quality analyst. Performed transportation and general conformity air quality analyses for a major port redevelopment of Terminal 5 (T-5) in the south Seattle PM10 nonattainment area. Effort included compiling emission inventories for both the federally controlled phases of construction and the operational phase of the entire facility. Compared emission tabulations with allowed *de minimis* levels and/or used in modeling to assess compliance with ambient air quality standards. Results reported in a NEPA EIS and related documentation.
- Southwest Harbor Redevelopment Supplemental Noise Study, Port of Seattle, Seattle, WA. Project manager and principal investigator for extended baseline noise measurements near Southwest Harbor (T-5) site as it was being redeveloped an intermodal container shipping terminal. Measurements used in later assessments of compliance with noise conditions. Project also included an equipment noise reduction study and construction noise and vibration monitoring.

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- Shilshole Bay Marina Redevelopment, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and noise impact assessments for the redevelopment and expansion of the Shilshole Bay Marina.
- California Street Overpass Project, Port of Everett, Everett, WA. Project manager and principal investigator for the air quality and noise impact and mitigation analyses of the proposed new access route to the Port. Air quality analysis included hot-spot modeling and consideration of transportation conformity. Noise analysis included measurements and impact and mitigation modeling, including special studies related to a daycare center near the proposed facility.
- Intermodal Facility Study, Burlington Northern Santa Fe Railway, Auburn, WA. Project manager and principal investigator for the air quality and noise analyses for a potential intermodal rail facility. Air quality concerns focused on off-site traffic sources, while noise study examined a wide range of on-site sources and mitigation opportunities.

Noise Policy Studies

- Off-Road Vehicle (ORV) Noise Mitigation Policy Study, Washington Interagency Committee (IAC) for Outdoor Recreation, WA. Managed and provided senior review of research for and development of a proposed model ordinance to reduce impacts from ORV noise received in residential properties around the state. Research effort included literature reviews, interviews of potentially affected stakeholders, and public meetings to seek input on preliminary proposals. Model ordinance development included proposed amendments to the existing state noise rules (WAC 173-60 and others) to provide a tool with which local jurisdictions can control ORV noise. Study and proposed model ordinance reported in a document submitted to the IAC.
- Petrovitsky Road Noise Mitigation Studies, King County Roads Dept. King County, WA. Project manager and principal investigator for three phases of the Petrovitsky Road noise barrier effectiveness study. First phase determined existing sound levels near a road scheduled for widening based on expanded baseline sound level measurements. Second phase included more sound level measurements to assess traffic noise levels after the road had been widened but before the noise barrier was fully constructed. Final phase used additional measurements to document the noise reduction provided by the noise barrier. Reports of all three assessments provided to King County.
- Road Noise Impact and Mitigation Policy Study, King County Roads Dept., King County, WA. Project manager and principal investigator for study examining alternative traffic noise impact definitions and mitigation policies in King County, WA. Included extensive literature review of noise effects on people, consideration of regulations and policies in a wide range of jurisdictions, a measurement study of possible mitigation using alternative paving materials, and development of a noise impact matrix for county roads to assist decision makers in their considerations of alternative policy goals. Study also involved presentations of findings and sound level demonstrations to county staff and members of the County Council.

Transportation Projects (with Air Quality Transportation Conformity)

- NE 8th Street Widening Project, City of Bellevue, Bellevue, WA. Senior reviewer for the air quality and noise impact and mitigation assessments for the NE 8th Street widening project in Bellevue. The air quality review was based on qualitative comparisons of project-related traffic effects at intersections with traffic conditions encountered in previous air quality modeling analyses. The noise study included ambient sound level measurements in the project vicinity and traffic noise modeling (using TNM) to assess potential impacts and possible mitigation measures. Both analyses were documented in WSDOT format discipline reports.
- Granite Falls Alternative Route, Snohomish County Public Works, Granite Falls, WA. Principal in charge, project manager, and senior reviewer for air quality and environmental noise reviews of a proposed new roadway to reroute heavy-duty gravel truck traffic away from the central business district. Air quality analysis included a

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conformity review based on consideration of the traffic impact assessment, with a focus on roundabout intersections along the proposed new roadway. Environmental noise study included sound level measurements throughout the project area and impact and mitigation modeling using the FHWA Traffic Noise Model (TNM). Analyses conducted in accordance with WSDOT policies, and documented in technical reports approved by WSDOT. Subsequently assisted with refined noise barrier analysis to provide decision makers and public with additional, specific information regarding barrier locations and heights.

- Federal Way Transit Center, Sound Transit (regional transit authority), Federal Way, WA. Project manager and senior reviewer to reexamine the need for mitigation for air quality impacts projected in a previous analysis (by others). Analysis included consideration of latest available Mobile6.2 emission factors and revised CAL3QHC modeling to examine the need for structural mitigation. Analysis determined mitigation would not be necessary.
- Tacoma Narrows Bridge 24th Street Electronic Toll On-Ramp Project, WSDOT, Gig Harbor, WA. Project manager and principal investigator for air quality analysis of potential impacts related to modification of the larger Tacoma Narrows Bridge Project. Analysis included hot-spot air quality modeling and a conformity determination related to the ramp project and the toll plaza of the facility based on specialized project-level air quality dispersion modeling of these facilities.
- West Lake Sammamish Parkway, City of Redmond, Redmond, WA. Project manager and primary investigator for air and noise reviews for a proposed widening of West Lake Sammamish Parkway, near SR 520 in Redmond. Air quality review included hot-spot modeling, and the noise analysis included sound level measurements and a thorough examination of potential noise impacts using TNM. Noise mitigation was proposed and examined at several locations along the project corridor.
- Russell Street Expansion Project, City of Missoula, Missoula, MT. Project manager and senior reviewer for the air quality and environmental noise reviews for the proposed widening of Russell Street and 3rd Street in the Missoula, MT. The air quality review included hot-spot modeling of project-created roundabouts. The noise analysis included numerous noise measurements and TNM modeling to examine potential noise impacts at numerous receiving locations along both roadways. The Montana DOT noise rules were used to determine the degree of impact and the potential effectiveness of noise mitigation.
- I-5/196th Street Interchange Project, City of Lynnwood, Lynnwood, WA. Project manager and primary investigator for the air quality and environmental noise impact and mitigation studies related to the proposed creation of a new freeway interchange. The air quality analysis included project-level hot-spot modeling. The environmental noise analysis included ambient noise measurements at potentially affected sensitive receivers, and extensive modeling and calculations to assess the likelihood of noise impacts and evaluate potential mitigation measures in accord with WSDOT policies. The methods and findings of these analyses were documented in technical reports that were summarized in the project EIS.
- Transportation Projects, Various Clients, WA. Completed a wide range of transportation projects for a variety of clients, including the Peace Arch International Border Crossing redevelopment project in Blaine, WA; the S. 228th Street Extension Project in Kent, WA, to establish a new east-west corridor between I-5 and north Kent; the Lundeen Parkway Extension project and the 196th Street Extension project in Snohomish County, WA; the Issaquah-Fall City Road and Woodinville-Duvall Road projects in King County, WA; the 142nd Street improvement project in Sumner, WA; the SR-18/C Street ramp relocation project in Auburn, WA; the Allen Street Bridge Replacement Project in Kelso, WA; the Bremerton to Gorst, WA, highway project; the South 196th/200th Street corridor project in Kent, WA; and the S. 312th widening project in Federal Way.

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Transportation Planning Projects (Some with Air Quality Conformity)

- Redmond Overlake Plan Update, City of Redmond, WA. Project manager and principal investigator for the air quality impact assessment of alternative transportation system plans using hot-spot modeling. Results of analysis reported in the environmental impact statement (EIS) for the project.
- Bellevue 2006-2017 Transportation Facilities Plan Noise Analysis, City of Bellevue, Bellevue, WA. Project manager and senior reviewer for the air quality and noise analyses for the 2006-2017 Transportation Facilities Plan (TFP), a city-wide programmatic plan to improve transportation. Examined the potential for traffic noise impacts due to proposed improvements at nearly 30 intersections. Analysis included sound level measurements and using the FHWA NOISE model, completed an assessment of the potential for noise impacts at each project area. The air quality analysis included the use of EPA-approved models to estimate CO concentrations near congested intersections. Findings of both noise and air quality analyses were documented as separate technical reports included in the project's SEPA review.
- Bellevue Downtown Implementation Plan, City of Bellevue Transportation Department, Bellevue, WA. Project manager and senior reviewer for the air quality and environmental noise review of alternative redevelopment options for downtown Bellevue. Alternatives ranged from transportation-system to transit options. The air review included hot-spot modeling and the noise assessment included measurements and use of the FHWA NOISE model to consider potential impacts.
- Transportation Planning Projects, Various Clients, WA. Completed a variety of transportation planning projects including the Bel-Red Overlake Transportation Plan and several City of Bellevue Transportation Facilities Plans and alternative downtown development plans. Efforts included technical support in the development of computerized procedures to calculate peak-hour pollutant emissions from traffic on all major roads in the city, based on output from the EMME/2 transportation system model. Some projects also included CAL3QHC modeling of affected intersections throughout the city. Conducted subarea air quality conformity reviews for proposed subarea plans in Everett and Shoreline, WA. Results typically included in the SEPA EIS examining the transportation plan alternatives.

Transit/Transit-Oriented Projects

- First Hill Streetcar, Seattle DOT, Seattle, WA. Principal in charge, project manager, and senior reviewer for the environmental noise impact and mitigation analyses for the establishment of a new 2.5 mile streetcar system from Pioneer Square onto First Hill. The noise review included measurements of existing sound levels in several locations within the study area, a detailed review of noise-sensitive receivers within the FTA-defined screening distance for such facilities, and screening-level impact assessment based on equipment noise specifications and comparisons of projected construction and operational noise. A subsequent detailed analysis included additional source-specific measurements of an active Seattle streetcar system and CadnaA noise modeling to consider the potential for impacts. The methods and findings of these analyses were reported in several technical memos submitted to project stakeholders.
- Sounder Commuter Rail Expansion and Realignment, Sound Transit, Tacoma, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation analyses for the supplemental SEPA and NEPA studies considering the extension and realignment of the Sound Commuter Rail. The air quality study included a project-level conformity review based on dispersion modeling. The environmental noise analysis included locomotive source noise measurements, ambient noise measurements, and extensive modeling and calculations to assess the likelihood of noise impacts and evaluate potential mitigation measures in accord with FTA policies. The methods and findings of these analyses of the multiple alternative routes and options considered were reported in a number of technical memos that were summarized in the supplemental EIS for the project.

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- Portland Streetcar Loop Project, City of Portland/TriMet, Portland, OR. Project manager and principal investigator for environmental noise assessment for proposed Portland Streetcar Loop project, to extend streetcar tracks, stations and service. The noise analysis identified and focused on potential sensitive uses along the project routes and assessed the potential for the new streetcar and other considered alternatives to cause noise impacts during either construction or operation of the new system. Project related operational noise was calculated using the Federal Transit Administration (FTA) spreadsheet model, and impact assessment was based on noise impact policies and guidance of the FTA. In addition, construction-related mitigation measures were identified and evaluated.
- South Kirkland Park & Ride Facility, King County Metro, Kirkland, WA. Project manager and principal reviewer for the air quality transportation conformity review for the proposed expansion of an existing Park & Ride facility. The analysis included screening of project-affected intersections based on the traffic review and detailed hot-spot modeling of the two intersections that would be most affected by project-related traffic. The results of this analysis were documented in a memo report that was submitted to the Federal Transit Administration for review as part of the grant-funding process for this project.
- Woodinville Park & Ride, Sound Transit, Woodinville, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation studies for a proposed Park & Ride expansion and transit-oriented development. Air quality analysis included hot-spot modeling. Noise assessment included on-site and source noise measurements, modeling, and a mitigation analysis. Results reported in a SEPA EIS.
- Redmond Transit Center Expansion, King County Metro, Redmond, WA. Project manager and senior reviewer for the noise impact assessment for proposed changes and expansion to an existing transit center. Analysis included ambient and source sound measurements, as well as calculations to evaluate potential impacts related to expanded use of the facility and relocation of the transit center circulation roadways through the facility. Results reported in the SEPA review for the project.
- Redmond Park & Ride Garage, King County Metro, Redmond, WA. Project manager and senior reviewer for the air quality and noise impact assessment for the construction and operation of a multilevel garage to replace an existing surface parking lot. Analysis included ambient sound measurements and noise modeling to assess potential impacts. Results reported in the SEPA documentation for the project. Developed a construction noise minimization plan to reduce impacts to nearby homes.
- South Sounder Train Storage Yard, Sound Transit, Lakewood, WA. Project manager and senior reviewer for the air quality conformity-level analysis examining the implications of relocating the south Sounder train storage yard to a site in Lakewood, WA. Conducted the environment noise impact and mitigation assessment including sound level measurements and noise modeling to consider compliance, potential impacts, and mitigation for the relocation of this facility. Included wayside horn analysis as potential mitigation.
- Everett to Seattle Sounder, Sound Transit, WA. Project manager and principal investigator for the air quality impact assessment for the north Sounder commuter rail extending from Everett to Seattle. Analysis included hot-spot modeling and regional emissions comparisons for the EIS for the project.
- Seattle Monorail Project (SMP) Programmatic Review, Seattle Monorail Authority, Seattle, WA. Project manager and senior reviewer for the air quality and noise impact studies for the programmatic EIS that evaluated potential impacts associated with alternative routes for the Seattle Monorail Project.
- Seattle Monorail Project Project-Level Review, Seattle Monorail Authority, Seattle, WA. Project manager and principal investigator for the analysis of potential noise impacts and mitigation measures for the SMP project-level EIS. Analyses included source noise measurements of an operational monorail, noise impact and mitigation modeling, and indoor/outdoor measurements to assess potential impacts on performance venues at Seattle

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Center. Provided expert testimony regarding noise issues in the successful defense of an appeal of the adequacy of the EIS.

- Transit Projects, Various Clients, WA. Managed and participated in the air quality and/or noise analyses for environmental impact studies for the Sound Transit (ST) Lynnwood Park & Ride Expansion and direct high-occupancy vehicle (HOV) ramp project, the ST Auburn Park & Ride, the King County Metro (KC Metro) Eastgate Park & Ride expansion, the KC Metro Northgate Park and Pool lot expansion, the KC Metro Kenmore Park & Ride expansion, the Pierce Transit Lakewood Park & Ride and transit base expansion and relocation, and the Whatcom Transit Authority's Lynden, WA, Transfer Center project. Provided senior review of the qualitative air quality and noise assessments of several King County transit-oriented design projects. Provided expert testimony regarding noise issues related to an appeal of a proposed Sound Transit parking garage in Federal Way.

Mixed Use/Institutional Development Projects/Public Housing

- Virginia Mason Medical Campus Master Plan, Virginia Mason, Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for a major phased expansion of this existing medical campus. The air quality review was based on qualitative comparisons with previous analyses. The noise assessment included baseline sound level measurements and qualitative consideration of both the construction and the operational phases of this facility. Subsequently took second round of baseline noise measurements to assess the influence of emergency vehicle siren noise in the project vicinity.
- Yesler Terrace Redevelopment, Seattle Housing Authority, Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for the complete phased redevelopment of an existing low income housing facility adjacent to Interstate 5 in Seattle. The air quality review included AERMOD dispersion modeling to evaluate potential traffic-related air pollutant emission levels across the project site. The noise assessment considered the suitability of the project site under HUD criteria based on extensive CadnaA noise modeling of freeway and other major roadway traffic noise across the site. The noise evaluation included consideration of potential noise mitigation measures including noise wall and sit layout changes to shield noise-sensitive areas of the facility.
- North and East Cities Justice Center, NEC Coalition, Metro Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for studies that considered numerous candidate sites for a new jail and justice center to serve northern King County. The air quality review was based primarily on qualitative comparisons derived from assessment of the traffic impact studies of the proposed facility. The noise assessment included baseline sound level measurements at numerous locations and noise modeling to consider both construction and operational noise from the facility.
- Thurston Highlands Development, Thurston Highlands LLC, Yelm, WA. Project manager and senior reviewer for air quality analysis for a proposed 1,251-acre master planned mixed-use development that would include approximately 5,000 homes in a mix of housing types and densities. The analysis included air quality dispersion modeling of several signalized intersections that would be affected by project traffic. The analysis also included a greenhouse gas emissions estimate for construction and operation of the first phase of the development.
- Accountability and Restitution Center, Shockey/Brent, Inc., Tumwater, WA. Senior technical reviewer for air quality and environmental noise evaluations for the environmental impact analysis for the proposed Thurston County Accountability and Restitution Center (ARC) and Courts Facility.
- King County Regional Justice Center Site-Selection Analyses, King County, Kent, WA. Project manager and senior reviewer for the air quality and traffic noise impact assessments for the SEPA EIS for the proposed King County Regional Justice Center. Assessments used the CAL3QHC dispersion model and EPA NOISE model to evaluate

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potential effects of locating the facility at four different candidate sites in three separate municipal jurisdictions in the county. Noise analyses considered county noise rules in conjunction with the rules in Kent, Auburn, and SeaTac, and included measurements and modeling of future impacts.

- Kent Events Arena, City of Kent, WA. Project manager and senior reviewer for air quality and environmental noise impact assessments for development of a proposed major events arena. The air quality evaluation consisted of a primarily qualitative review based on consideration of the traffic impact assessment for the facility. Environmental noise review included multi-day sound level measurements in the vicinity of the preferred project site, traffic noise modeling, and facility noise calculations to consider both compliance with local noise limits and the potential for noise impacts at nearby sensitive receivers.
- Yakima Valley Memorial Hospital Plan Update, Yakima Regional Hospital, Yakima, WA. Project manager and principal investigator for air quality and environmental noise impact assessment for 30-year plan update for this major regional hospital. Air quality analysis included consideration of traffic-related air quality issues, including tabulation of fine particulate matter emissions. Noise analysis included measurements in the vicinity of the facility and calculations to consider future changes in the facility layout and on-site sources. Results reported in the EIS for the project.
- North Bay Master Plan, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation analyses for proposed redevelopment of an industrial portion of the Port's Terminal 90/91 into a mixed use research and development/office/residential facility. The air quality analysis included hot-spot modeling near project-affected intersections. The noise assessment included long-term on- and near-site sound level measurements along with traffic noise modeling and calculations to evaluate the potential for impacts as well as compliance with applicable noise limits. Analyses published in the draft EIS for the project.
- Port Gardner Wharf/North Marina Redevelopment, Port of Everett, Everett, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation analyses for the proposed redevelopment of an existing industrial and recreational boating maintenance and repair facility into a mixed use office/residential facility. Analyses were published in the draft and final EIS for the project.
- Westpark Redevelopment Project, Bremerton Housing Authority, Bremerton, WA. Project manager and senior reviewer for the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility in Bremerton as required by the U.S. Department of Housing and Urban Development (HUD). Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Noise analysis included measurements on the existing development site and traffic noise modeling (using TNM) of roadways affecting the proposed development. Analyses reported in the SEPA review documentation for the project. Subsequent analyses based on refined noise barrier modeling provided information that will be used in noise barrier design and construction.
- Greenbridge Redevelopment Project, King County Housing Authority, King County, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility south of West Seattle, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized inter-sections. Noise analysis included measurements on the existing development site and TNM of roadways affecting the proposed development, including re-graded terrain and new residential buildings. Analyses were reported in the SEPA review documentation for the project, and a final report included a determination of suitability of the site for residential use, as well as recommendations of effective noise mitigation options.

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- High Point Redevelopment Project, Seattle County Housing Authority, Seattle, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility in West Seattle, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Noise analysis included measurements on the existing development site and traffic noise modeling of roadways affecting the proposed development, including re-graded terrain and new residential buildings. Analyses reported in the SEPA review documentation for the project.
- Salishan Redevelopment Project, Tacoma Housing Authority, Tacoma, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Analysis included noise measurements of traffic and other ambient noise sources affecting the existing development site, and TNM of the roadways affecting the proposed development. Analyses reported in the SEPA review documentation for the project, and findings included a determination of site suitability for residential use and potential noise mitigation options.
- Woodland Park Zoo Master Plan, Woodland Park Zoo, Seattle, WA. Project manager and senior reviewer for the air quality impact study for master plan alternatives EIS that considered expanded parking facilities at the zoo. Analysis included carbon monoxide (CO) hot-spot modeling of affected off-site intersections in the project vicinity.
- Children's Hospital Parking Garage, Children's Hospital, Seattle, WA. Project manager for the air quality analysis of potential CO impacts of a proposed parking garage at the Children's Hospital and Regional Medical Center, including the development of emission factors.
- Good Samaritan Hospital, Good Samaritan Hospital, Puyallup, WA. Project manager and principal investigator for the qualitative air quality impact review for the master plan update for this facility.
- Arrowleaf Development, Arrowleaf Development Co., Methow Valley, WA. Air/noise analyst for the impact and mitigation assessments for a proposed resort development in Okanogan County, WA. Project included research and development of a program designed to restrict residential wood burning during periods of impaired air quality based on real-time PM10 monitoring and meteorological measurements.
- Miscellaneous Mixed Use Developments, Various Cities, WA. Managed and participated in the air quality and noise analyses for environmental impact studies for the Issaquah East Village mixed use development; the Kenmore Lake Pointe mixed use development; the Cascadia mixed use development in Pierce County, WA; and the Grand Ridge urban planned development in King County, WA.

School Siting Projects

- Site-Selection Analyses for Public Schools, Various Clients, WA. Managed and participated in the air quality and/or environmental noise impact and mitigation studies for new high schools in Auburn, Bonney Lake, and Tacoma, WA. Noise investigations for these projects included documenting source sound levels from several high school bands and developing noise mitigation measures for band and on-site traffic noise using noise barriers and relocation of sound sources. Conducted several school feasibility ambient sound measurements and reports required under Washington Administrative Code school site requirements.

Solid Waste Facilities

- Central Recycling and Transfer Station, Snohomish County Solid Waste, Everett, WA. Project manager and principal investigator for the air quality and noise impact evaluations for the siting of a new transfer station, now in operation. Air quality review included considerations of off-site traffic and facility-related odors. Noise assessment included baseline sound level measurements and noise impact modeling and calculations to evaluate compliance

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with applicable noise regulations. Review process included detailed analyses for two candidate sites, including one within the flight path of a small regional airport. Findings of the air and noise studies documented in the SEPA EIS for the project. This facility considered in this project is now operational as the Airport Road Recycling & Transfer Station.

- Solid Waste Transfer Station Siting Study, King County Solid Waste, Eastern King County, WA. Project manager and principal investigator for noise measurements, traffic noise modeling, and noise calculations for a site-selection study for a proposed solid waste transfer station in eastern King County. Evaluated potential noise impacts due to traffic and operational noise associated with the proposed transfer station at three candidate sites. Measured sound levels near each candidate site, as well as a similarly designed facility in Vancouver, BC. Measurements used in the calculations of off-site noise levels. Also qualitatively assessed both air quality and odor impacts from the facility and related traffic. Results of these analyses included in a SEPA EIS.
- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance and mitigation assessment of operational transfer station to recommend means to reduce noise received on nearby properties. Included source and ambient measurements in the area and noise modeling to assess potential noise reduction treatments for the facility. Recommended treatments were implemented and included extending the primary transfer station wall downward to enclose more of the transfer building and installing masonry noise barriers in several locations on the site to obstruct noise transmission to off-site receivers. Subsequent sound level measurements documented substantial noise decreases.
- Solid Waste Transfer and Disposal Facilities, Various Clients, WA. Project manager and principal investigator for the air quality and noise impact and mitigation evaluations during the siting studies for the Everett Central Transfer Station; the Lynnwood Disposal recycling center; the Pacific Disposal Tumwater transfer station and recycling center; the King County Cedar Hills landfill expansion; the Hobart Transfer Station siting studies; and the Enumclaw Transfer Station.
- Snohomish County Regional Landfill Noise Studies, Snohomish County Public Works, Solid Waste, et al., Snohomish County, WA. Project manager and principal investigator for several evaluations of compliance with Conditional Use Permit conditions related to temporary interim uses of lands in the vicinity of the Snohomish County Regional Landfill. Studies included background and active source sound measurements both on-site near active transfer station activities and at property line locations near off-site sensitive uses.
- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance assessment of proposed transfer station operational and equipment changes based on source-specific sound measurements and ambient measurements at potentially affected locations.

Prior to joining ENVIRON, Mr. Steffel's experience includes:

- 2004-2008 Geomatrix Consultants, Inc., Principal Environmental Scientist
- 1993-2004 MFG, Inc., Senior Environmental Scientist
- 1989-1993 TRC Environmental Corp, Senior Environmental Scientist
- 1981-1988 Eco-Resource Systems, Owner

CREDENTIALS

Professional Affiliations and Activities

Air & Waste Management Association
Institute for Noise Control Engineering, Member

EXHIBIT 2

1 References Cited in Declaration of Richard Steffel

2 ENVIRON International Corporation (ENVIRON). 2011. *Comments on Drakes Bay Oyster*
3 *Company Special Use Permit Environmental Impact Statement: Point Reyes National*
4 *Seashore*. Prepared for Draft EIS DBOC SUP c/o Superintendent, Point Reyes Station, CA
5 on behalf of Drakes Bay Oyster Company. December 9, 2011

6 Volpe. 2011. *Baseline Ambient Sound Levels in Point Reyes National Seashore; Final Report*.
7 U.S. Department of Transportation Research and Innovative Technology Administration
8 John A. Volpe National Transportation Systems Center Environmental Measurement and
9 Modeling Division, RVT-41 Acoustics Facility Cambridge, MA 02142-1093

10 Federal Highway Administration (FHWA). 2008. *Road Construction Noise Model (RCNM)*;
11 *Version 1.1*. U.S. Department of Transportation Research and Innovative Technology
12 Administration, John A. Volpe National Transportation Systems Center, Environmental
13 Measurement and Modeling Division. 12/8/2008

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EXHIBIT 3

Table 1. ESA-listed and sensitive species in Drakes Estero.

Species Name		Status		Work Restrictions
Common Name	Scientific Name	Fed	State	
Coho salmon - Central California Coast ESU	<i>Oncorhynchus kisutch</i>	E	E	June 15 to October 15 (anadromous fish migration)
Steelhead - Central California Coast ESU	<i>O. mykiss</i>	T	None	June 15 to October 15 (anadromous fish migration)
Western snowy plover	<i>Charadrius alexandrinus nivosus</i>	T	None	only existing habitat available, no documented nests present
Harbor Seal	<i>Phoca vitulina</i>	MMPA	None	March 1 to June 30 (pupping season)
Elephant Seal	<i>Mirounga angustirostris</i>	MMPA	None	none
Migratory Birds	multiple	None	None	February 1 to August 31 (Migratory Bird Treaty Act)

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rrwaterman@stoel.com

16 *Counsel list continues on next page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 OAKLAND DIVISION

21 **DRAKES BAY OYSTER COMPANY,**
22 17171 Sir Francis Drake Blvd
23 Inverness, CA 94937, and

24 **KEVIN LUNNY,**
25 17171 Sir Francis Drake Blvd
26 Inverness, CA 94937

27 Plaintiffs,

28 v.

KENNETH L. SALAZAR,
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF KEVIN LUNNY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
11 pprows@briscoelaw.net

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8 Zackary Walton [CSBN 181041]
9 **SSL LAW FIRM LLP**
10 575 Market Street, Suite 2700
11 San Francisco, CA 94105
12 Phone: 415.243.2685
13 Email: zack@sslfirm.com

1 I, Kevin Lunny, declare as follows:

2 1. I am an owner and the President of the Drakes Bay Oyster Company (DBOC).

3 The following facts are based on my own personal knowledge and, if called as a witness, I could
4 and would testify competently thereto.

5 2. In December 2004, DBOC purchased the oyster farm from the Johnson Oyster
6 Company (JOC). The Reservation of Use and Occupancy (RUO) for the onshore area, and the two
7 State water bottom leases for offshore cultivation of oysters, were transferred to me and DBOC.
8 DBOC's oyster processing facilities are located within the RUO area.

9 3. Attached as Exhibit 1 is a true and correct copy of the RUO for the onshore area.

10 4. The National Park Service (NPS) had the right to prevent the transfer of the RUO
11 from JOC to me and DBOC.

12 5. DBOC and I currently hold State water bottom leases M-438-01 and M-438-02, as
13 amended, with the California Fish and Game Commission (CFGC). These leases give DBOC
14 permission to cultivate oysters and clams in 1,060 acres in Drakes Estero. Of that total lease area,
15 DBOC actually cultivates oysters and clams in approximately 147 acres of the lease area.

16 6. Attached as Exhibit 2 is a true and correct copy of State water bottom lease M-
17 438-01, as amended.

18 7. Attached as Exhibit 3 is a true and correct copy of State water bottom lease M-
19 438-02, as amended.

20 8. The CFGC renewed JOC's State water bottom leases in Drakes Estero for twenty-
21 five year terms in 1979 and again in 2004.

22 9. Within the first eighteen months, DBOC invested over \$300,000.00 to address
23 health and safety issues that had been identified while JOC was operating the oyster farm, clean up
24 preexisting marine debris attributed to JOC's operations, and bring the oyster farm into
25 administrative compliance.

26 10. In 2005, Superintendent Don Neubacher informed me that he did not intend to
27 issue a Special Use Permit (SUP) to DBOC at the end of the RUO on November 30, 2012, due to
28 the 1976 wilderness laws that designated Drakes Estero as potential wilderness.

1 11. In 2008, DBOC and I received a new SUP from the National Park Service (NPS)
2 that covered 3.1 acres of onshore area, and purported for the first time to cover the offshore
3 shellfish cultivation areas leased by the State of California. Attached as Exhibit 4 is a true and
4 correct copy of the 2008 SUP.

5 12. On July 21, 2008, the Office of Inspector General, Department of the Interior,
6 issued its investigative report into allegations of scientific misconduct by Point Reyes National
7 Seashore (PRNS) employees. Attached as Exhibit 5 is a true and correct copy of the redacted
8 report made publicly available.

9 13. In May 2009, the National Academy of Sciences issued its report, "Shellfish
10 Mariculture in Drakes Estero, Point Reyes National Seashore, California." Attached as Exhibit 6 is
11 true and correct copy of the report made publicly available.

12 14. On July 10, 2010, DBOC requested that Secretary Salazar issue it a SUP for ten
13 years pursuant to Pub. L. No. 111-88, § 124 (2009) (hereinafter "Section 124").

14 15. On September 22, 2010, NPS staff met with me and shared a "Draft Schedule of
15 Major Milestones" for the National Environmental Policy Act (NEPA) process to analyze the
16 environmental impacts of my request for a SUP pursuant to Section 124. Attached as Exhibit 7 is a
17 true and correct copy of the NPS "Draft Schedule of Major Milestones."

18 16. On March 22, 2011, the Office of the Solicitor, Department of the Interior, issued
19 its investigative report into allegations of scientific misconduct by NPS Pacific West Region
20 employees. Attached as Exhibit 8 is a true and correct copy of the report made publicly available.

21 17. In September 2011, NPS issued a Draft Environmental Impact Statement (DEIS)
22 for the DBOC SUP. DBOC submitted timely comments on the DEIS that were highly critical of
23 nearly every aspect of the DEIS. Attached as Exhibit 9 are true and correct copies of select
24 portions of the DEIS.

25 18. Instead of collaborating with the National Academy of Sciences, NPS
26 commissioned its own secret peer review of the DEIS by Atkins North America, Inc., which was
27 published in March 2012.

28

1 19. NPS began collaborating with NAS on the congressionally-mandated review of the
2 DEIS in May 2012.

3 20. On May 22, 2012, Senator Dianne Feinstein wrote a letter to CFGC President
4 Daniel Richards, describing her involvement with DBOC and the NPS. Attached as Exhibit 10 is a
5 true and correct copy of the letter.

6 21. On August 30, 2012, the National Academy of Sciences issued its report entitled,
7 "Scientific Review of the Draft Environmental Impact Statement: Drakes Bay Oyster Company
8 Special Use Permit." Attached as Exhibit 11 is a true and correct copy of the report made publicly
9 available.

10 22. On November 20, 2012, NPS issued a Final Environmental Impact Statement
11 (FEIS) for the DBOC SUP. Attached as Exhibit 12 are true and correct copies of select portions of
12 the FEIS.

13 23. NPS issued the FEIS on the evening before Secretary Salazar visited DBOC and
14 PRNS, and one day prior to the Thanksgiving holiday weekend.

15 24. On November 29, 2012, I was notified by Secretary of the Interior Kenneth L.
16 Salazar that DBOC had been denied a SUP for the continued use of the land and facilities on the
17 shores of Drakes Estero. This decision has caused and will continue to cause irreparable harm to
18 myself, to DBOC, DBOC's thirty-one full time employees, DBOC's customers, the environment of
19 Drakes Estero, and the community at large, as more fully described below.

20 25. Prior to Secretary Salazar's decision on November 29, 2012, NPS did not publish a
21 Notice of Availability (NOA) in the Federal Register, did not issue a Record of Decision (ROD),
22 and did not submit the FEIS to the U.S. Environmental Protection Agency (EPA) for review. EPA
23 did not publish a NOA announcing the availability of FEIS.

24 26. Attached as Exhibit 13 is a true and correct copy of the Memorandum of Decision
25 from Secretary Salazar to the Director of the NPS, denying DBOC a SUP, which I received from
26 Ms. Laura Davis, Chief of Staff to Secretary Salazar, on November 29, 2012.

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1 27. On August 7, 2012, DBOC and Dr. Corey Goodman filed a Data Quality Act
2 (DQA) Complaint with the NPS . Attached as Exhibit 14 is a true and correct copy of the DQA
3 Complaint.

4 28. On October 3, 2012, NPS refused to respond to the DQA Complaint. Attached as
5 Exhibit 15 is a true and correct copy of the NPS refusal to respond.

6 29. On October 16, 2012, DBOC and Dr. Corey Goodman appealed NPS's refusal to
7 respond to the DQA complaint. Attached as Exhibit 16 is a true and correct copy of the DQA
8 appeal.

9 30. On November 29, 2012, I received a letter from Christine Lehnertz, Regional
10 Director, Pacific West Region, National Park Service, outlining the NPS's terms and conditions for
11 what activities DBOC would be permitted to take during the ninety-day period, from December 1,
12 2012 to February 28, 2013 (hereinafter the "NPS Directive"). Attached as Exhibit 17 is a true and
13 correct copy of NPS Directive.

14 **Irreparable Harm Related to Shellfish in Drakes Estero**

15 31. The NPS Directive requires DBOC to remove all shellfish from Drakes Estero by
16 February 28, 2013, whether they are mature or not.

17 32. DBOC currently has approximately 20 million oysters and approximately
18 2 million clams growing in the waters of Drakes Estero in various stages of development.

19 33. Before February 28, 2013, approximately 1,000,000 oysters (approximately 5% of
20 the total oysters) and 10,000 clams (less than 1% of the total clams) will be commercially viable
21 such that they are ready for harvest.

22 34. If oysters and clams are removed from Drakes Estero before they are
23 commercially viable, they must be destroyed pursuant to CDFG regulations. Accordingly,
24 approximately 19 million oyster and 1.99 million clams must be destroyed to comply with the NPS
25 Directive.

26 35. Mature oysters have a current market value of approximately \$0.50 each, and
27 mature clams have a current market value of approximately \$0.30 each.

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1 36. Removal and disposal of 19 million immature oysters and 1.99 million immature
2 clams will create approximately 260 tons of biological waste that must be disposed of in a landfill.

3 37. The NPS Directive prohibits DBOC from planting or placing additional larvae or
4 shellfish within Drakes Estero effective December 1, 2012.

5 38. DBOC has approximately 2.5 million oyster spat maturing in Drakes Estero that
6 must be taken from mesh bags, strung on wires, and hung on oyster racks to allow them to continue
7 to mature normally, which takes approximately twelve to eighteen months after the oyster spat are
8 hung on racks.

9 39. DBOC is currently engaged in performing this work to prevent the oyster spat
10 from smothering as they grow too large to live in the mesh bags.

11 40. If the NPS had not stipulated that DBOC is allowed to transfer the approximately
12 2.5 million oyster spat from mesh bags to the oyster racks, those spat would have died or become
13 stunted and commercially unusable.

14 41. The 2.5 million oyster spat represent approximately 20 to 25% of DBOC's 2014
15 oyster crop, which would have been lost if NPS had not stipulated to allow DBOC to take
16 immediate action to transfer those spat from mesh bags to oyster racks.

17 42. To maintain continuity of production of oysters and clams, DBOC must plant
18 approximately 25 million oyster seed and 2 million clam seed in Drakes Estero between April 1 and
19 September 30 every year. This is in addition to the 2.5 million oyster spat being placed on racks in
20 Drakes Estero. It takes approximately two years for those oysters and clams to mature to the point
21 where they are commercially viable.

22 43. If DBOC is not permitted to plant new oyster seed and clam seed in Drakes Estero,
23 it will face a significant gap in production in approximately eighteen months to two years.

24 44. Even if DBOC were to prevail in this litigation, this gap in production could cause
25 a *de facto* termination of DBOC's business because DBOC would not be able to provide product to
26 its customers, and would lose its income stream for at least as long as it takes to resolve this
27 litigation. Accordingly, DBOC would suffer the same business harms by not being able to provide
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1 product to its customers and to pay its workers and vendors as outlined below in the “Irreparable
2 Harm to DBOC’s Business and Business Relationships” section.

3 45. If DBOC is required to remove its personal property from the onshore areas, it will
4 be forced to sell or destroy that property because it does not have any place to store it.

5 **Compliance With the Memorandum of Decision Is Infeasible**

6 46. By stipulation, NPS has ordered DBOC to remove its personal property from the
7 onshore RUO and SUP areas, remove shellfish and oyster racks from the tidal and submerged lands
8 within Drakes Estero, repair any damage resulting from such removal, and vacate and surrender the
9 premises by February 28, 2013, although NPS has stipulated to allow DBOC until March 15, 2013,
10 to remove its personal property within the onshore area.

11 47. DBOC’s personal property in the onshore RUO and SUP area includes including a
12 24’ x 8’ office trailer, five fiberglass shellfish setting tanks, a 40’ x 8’ cannery container, 40’ x 8’
13 equipment storage shed, shellfish culture equipment, a 20’ x 20’ open sided shed, two septic
14 systems, a water well, three mobile residences, and 12 picnic tables. NPS has stipulated that DBOC
15 does not need to remove the three mobile residences.

16 48. After removing all personal property inside, the office trailer, the cannery
17 container, and the equipment storage containers would be loaded on flatbed semi-trailers with a
18 crane and hauled away. This process would take approximately three business days. Removal of
19 the shellfish setting tanks would require the use of a track-mounted hydraulic excavator to remove
20 the tanks and load onto dump trucks for disposal in the landfill. This process would take
21 approximately two business days, however, it would take more time to remove all underground
22 piping connected to the setting tanks if required. The setting tank removal will result in ground
23 disturbance near a known archaeological site. Septic systems will need to be properly abandoned
24 by pumping tanks, removing pumps, filling with sand, covering with topsoil, and installing erosion
25 control. The water well will be filled with pea gravel and capped with concrete. After all required
26 permits are obtained, removal of onshore personal property would take approximately two weeks.
27 To remove DBOC’s onshore personal property will cost approximately \$55,000. Very little, if any,
28 of this cost will be recoverable through re-sale of equipment.

1 49. Removal of onshore personal property will likely require federal, state, and local
2 agency permitting that will prevent DBOC from taking action until such permits are obtained.

3 50. Removal of the oyster racks and shellfish in Drakes Estero will likely require
4 federal, state, and local agency permitting that will prevent DBOC from taking action until such
5 permits are obtained.

6 51. We can remove approximately 100,000 oysters or 100,000 clams per day on
7 average. Accordingly, it would take approximately 220 work days to remove all oysters and clams
8 because there are currently 20 million oysters and 2 million clams in Drakes Estero.

9 52. Taking these practical realities into account, it is impossible to comply with the
10 NPS Directive to remove all shellfish from Drakes Estero before February 28, 2013. Assuming that
11 we focus only on removing oysters and clams, we could only remove approximately 9 million
12 oysters and no immature clams by February 28, 2013, leaving approximately 11 million oysters and
13 1.99 million clams in Drakes Estero.

14 53. Tipping fees at the Redwood Sanitary Landfill are approximately \$35 per ton, so
15 the disposal cost of 19 million oysters and 1.99 million clams—260 tons of biological waste—will
16 cost approximately \$9,100.00.

17 54. Trucking fees are approximately \$100 per hour, and it will take approximately
18 three hours round trip from DBOC to the Redwood Sanitary Landfill and back, for a cost of \$300
19 per trip. Accordingly, trucking fees to dispose of 260 tons of oysters and clams will be
20 approximately \$62,400.00, based on approximately one trip per day at a little more than one ton per
21 trip.

22 55. Employee costs to remove immature oysters and clams for 210 days is
23 approximately \$168,000.00.

24 56. In sum, the total cost for removing immature oysters and clams that must be
25 destroyed would be approximately \$239,500.00.

26 57. Work on dismantling oyster racks could not begin until the oysters occupying the
27 racks are removed because they would interfere with the dismantling process and because the same
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1 DBOC staff and boats would be used to perform both tasks, and would not be able to accomplish
2 both tasks at the same time.

3 58. There are 95 oyster racks in Drakes Estero. Each oyster rack is 300 feet long and
4 12 feet wide on average, and is composed of 2" x 8", 2" x 6", and 2" x 4" pressure treated lumber,
5 held together by galvanized and stainless steel fasteners. There are an estimated 4,700 posts sunk
6 into the substrate of Drakes Estero, according to the FEIS. Posts are connected to each other by 10-
7 foot-long, 2" x 4" rails at top and bottom, with the bottom rails buried in the sediment. In sum, the
8 oyster racks in Drakes Estero account for approximately 250,000 board feet of lumber, which
9 weighs approximately 375 tons, and may weigh more due to water absorbed into the wood.

10 59. Because it is only possible to dismantle oyster racks at low tide and under good
11 weather conditions, I estimate DBOC could average three days of work per week. Taking into
12 account the winter tides and inclement weather Drakes Estero experiences between December 1
13 and February 28, I estimate DBOC may only average two days of work per week.

14 60. At low tide, oyster racks would be dismantled using the following process: the
15 oyster racks would be removed using a chainsaw to cut the posts and rails into manageable units.
16 Posts and bottom rails would be lifted out of the substrate using a hoist (powered by an electric
17 motor and supplied by a generator) mounted on a barge towed by one of DBOC's two oyster skiffs.
18 The skiff would be anchored to the bottom substrate by two anchors during this effort. All debris
19 would be placed on the barge, towed to shore, unloaded by forklift and loaded onto trucks, and
20 hauled to the landfill.

21 61. I estimate it will take approximately three days to dismantle each rack in good
22 weather conditions, and five to seven days to dismantle each oyster rack in bad weather conditions,
23 for a total of 285 work days within approximately 665 calendar days to dismantle and remove all 95
24 oyster racks.

25 62. Taking these practical realities into account, it is impossible to comply with the
26 NPS Directive to remove all oyster culture racks before February 28, 2013. Assuming that we
27 focused only on removing the oyster racks alone, and did not remove any shellfish, DBOC could
28 only remove eight to twelve oyster racks by February 28, 2013.

1 63. The oyster racks are composed of pressure-treated lumber that cannot be disposed
2 of in a landfill, and must instead be disposed of at the Marin Resource Recovery Center.

3 64. Tipping fees at the Marin Resource Recovery Center are approximately \$150 per
4 ton, so the disposal cost of 375 tons of pressure treated lumber will cost approximately \$56,250.

5 65. Trucking fees are approximately \$100 per hour, and it will take approximately
6 three hours round trip from DBOC to the Marin Resource Recovery Center and back, for a cost of
7 \$300 per trip. Accordingly, trucking fees to dispose of 375 tons of pressure treated lumber will be
8 approximately \$9,375, based on thirty-one trips at twelve tons per trip.

9 66. Employee and equipment costs to dismantle and remove oyster racks for 285 days
10 is approximately \$342,000.00.

11 67. In sum, the total cost for dismantling, removing, and disposing of the oyster racks
12 would be approximately \$407,625.00.

13 68. Having to take the actions listed above will cause immediate irreparable monetary
14 and nonmonetary harm to DBOC, myself and my wife Nancy, and DBOC's employees, including
15 permanent damage to DBOC's property, loss of business reputation, loss of customers, and loss of
16 standing in the community in which I live.

17 **Irreparable Harm to DBOC's Business and Business Relationships**

18 69. We have long-lasting commercial and personal relationships, and intangible good
19 will that DBOC has earned, that will be irreparably harmed if DBOC is forced to cease operations
20 on February 28, 2013 because DBOC's customers will be forced to seek alternate suppliers and to
21 sign contracts with those suppliers. There is no guarantee that DBOC would be able to reestablish
22 those business relationships at some point in the future even if DBOC were to prevail in this suit.

23 70. We will be forced to lay off our thirty-one highly skilled and experienced
24 employees who have skills that are irreplaceable.

25 71. It is unlikely that our employees will be able to find employment in Marin County
26 in aquaculture, and therefore, they may be forced to change professions or move out of Marin
27 County to find work in the aquaculture field.

28

1 **Irreparable Harm to DBOC's Employees and their Families Who Live at the Farm**

2 72. Fifteen people—DBOC employees and their families—live on site and will be
3 forced to move if the NPS Directive is enforced.

4 73. In addition to losing their jobs, our employees who live onsite are likely to have to
5 pay more for housing due to the scarcity of affordable housing in Marin County.

6 74. Seven children under the age of sixteen live onsite and being forced to move will
7 break their social and academic networks. It is unlikely that their next home will be as safe and
8 sheltered as the community where they live at DBOC.

9 **Irreparable Harm to the Environment**

10 75. The shellfish and oyster racks have been in place for more than fifty years. I
11 believe that removing the shellfish and oyster racks will cause environmental harm to Drakes
12 Estero that has not been adequately studied or accounted for.

13 76. DBOC has worked diligently to preserve the unique environmental characteristics
14 of Drakes Estero by operating in a sustainable, environmentally conscious manner, balancing the
15 commercial aspects of the business with the surrounding environment.

16 **Irreparable Harm to DBOC's Valid State Water Bottom Leases**

17 77. California conveyed fee title to the water bottoms in Drakes Bay to the federal
18 government in 1965, but expressly retained the rights to lease the water bottoms in Drakes Estero
19 for aquaculture.

20 78. As noted above, DBOC holds valid State water bottom leases from the CFGC to
21 cultivate shellfish in Drakes Estero.

22 79. Converting Drakes Estero from "potential wilderness" to "wilderness" will deprive
23 DBOC of its right to conduct oyster cultivation operations pursuant to its valid State water bottom
24 leases.

25 **Irreparable Harm to the Public**

26 80. DBOC is a local landmark, and is one of the most visited places in the PRNS. The
27 loss of DBOC will deprive the public of the opportunity to enjoy DBOC and to learn about the long
28 history of aquaculture in Drakes Estero.

1 81. DBOC conducts tours free of charge for school groups, local non-profit
2 organizations, private organizations, and government agencies. In 2012, DBOC staff gave over
3 forty (40) organized tours to groups ranging in age from elementary school children (St. Rita's
4 Elementary School) to senior citizens (Concord Senior Center). Bus loads of students visiting the
5 farm ranging from sixth grade up to graduate level marine biology classes are common.

6 82. DBOC provides interpretive services free of charge to the approximately 50,000
7 people who visit DBOC every year. DBOC is the only farm of any kind that is open to the visiting
8 public located within the PRNS. Accordingly, it is the only actual functioning part of the "working
9 landscape" idea that PRNS was founded on that visitors can experience.

10 83. DBOC is an important resource for students to learn about marine biology and
11 oyster cultivation as the only shellfish hatchery operation in the San Francisco Bay Area, the only
12 oyster cannery in the State of California, and due to the comprehensive nature of DBOC's
13 cultivation techniques, which employ a range of culturing techniques, including cluster oyster
14 culture, single oyster culture, clam culture, and a purple hinged rock scallop culture.

15 84. As a consequence of being the last remaining oyster cannery in California, DBOC
16 is also the only remaining source of oyster shell used for habitat restoration in California. DBOC
17 provides large truck loads of oyster shell for habitat restoration every year, including habitat
18 restoration for the Western Snowy Plover and the Least Tern, both birds are listed as threatened or
19 endangered species under the federal Endangered Species Act, and for habitat restoration for the
20 native Olympia oyster in San Francisco Bay.

21 85. DBOC currently produces approximately one-third of the oysters produced in
22 California.

23 86. The termination of DBOC's business would remove overnight a significant portion
24 of the State's shellfish production, which will cause a number of permanent harms to the people of
25 the State of California, including: price increases for shellfish; increased importation of shellfish
26 from out of state; increased production of greenhouse gas emissions and fuel use; decreased
27 freshness; increased risk of food-borne illness; increased risk of food shortages; and increased
28 harvest pressure on wild fisheries as a substitute.

1 87. The termination of DBOC's business would also remove a destination that draws
2 approximately 50,000 people to the coastal communities of West Marin every year, which will
3 harm the local economy (restaurants, shops, hotels/motels, etc.) by depriving them of income that
4 otherwise would be generated by those visits to DBOC.

5 88. Oyster farming in Drakes Estero began in the 1930s, and we believe that it allows
6 us to produce some of the world's best oysters due to the unique attributes found in Drakes Estero.

7 89. The farms in PRNS, including DBOC, have been pioneers in sustainable
8 agriculture and have a well-deserved reputation of being a model for sustainable agriculture
9 working in harmony with the environment.

10 90. Drakes Estero is surrounded on all sides by ranching operations that extend to the
11 waters' edge.

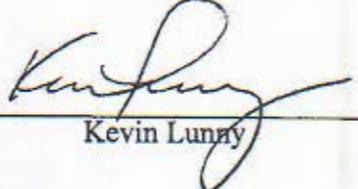
12 91. Based on my observations, I estimate that eelgrass has recruited around
13 approximately 85% of the oyster racks.

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1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct.

3 Executed this 20th day of December, 2012, in Inverness, California.

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Kevin Lunny

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rrwaterman@stoel.com

16 *Counsel List Continues On Next Page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
JONATHAN JARVIS,
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240;
and

DOES 1-100.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF KEVIN LUNNY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

EXHIBIT 1



United States Department of the Interior

NATIONAL PARK SERVICE
WESTERN REGION
450 GOLDEN GATE AVENUE, BOX 36063
SAN FRANCISCO, CALIFORNIA 94102

IN REPLY REFER TO:

L1425(WR)ML
PORE
Tr. 02-106
Johnson Oyster Co.

December 19, 1973

RECEIVED
Point Reyes
National Seashore

Copy

DEC 21 1973

<input checked="" type="checkbox"/>	SUPT.
<input checked="" type="checkbox"/>	ADM. OFF.
<input type="checkbox"/>	MAINTENANCE
<input type="checkbox"/>	INTERPRETATION
<input type="checkbox"/>	RES. BIOLOGIST
<input type="checkbox"/>	PROTECTION
<input type="checkbox"/>	HORSE FARM
<input type="checkbox"/>	SAFETY
<input checked="" type="checkbox"/>	FILES

Memorandum

To: Associate Director, Park System Management
From: Regional Director, Western Region
Subject: Transmittal of Deed Assembly

Vendor: Johnson Oyster Company
Tract No.: 02-106
Area: Point Reyes National Seashore
Deed No.:

The original documents for the subject acquisition are transmitted herewith as follows:

- (x) 1. Recorded Instrument of Conveyance
 - (x) 2. Attorney General's Final Title Opinion
 - (x) 3. Title Evidence
 - () 4. Administrative Waiver Certificate
 - (x) 5. Certificate of Inspection and Possession
 - () 6. Articles of Incorporation
 - () 7. Resolution
 - (x) 8. Other Documents
- Vendor's (Seller's) Certificate of Possession (1)
Tenant's Certificate of Possession (6)
Disclaimers (6)
Terms of reservation contained in contract no. CX800032073

(Sgd) Howard H. Chapman

Enclosures

cc: Superintendent, Point Reyes, NS
w/cy Deed and Final Title Opinion

97555 U

RECORDED AT REQUEST OF
MARIN TITLE GUARANTY CO.

16827

After recording, return to:
NATIONAL PARK SERVICE
WESTERN REGION, DIVISION OF LANDS
450 Golden Gate Avenue, Box 36063
San Francisco, California 94102 Official Records of Marin County, Calif.

AT 30 MIN. PAST 12 M.

NOV 3 0 1972

POINT REYES NATIONAL SEASHORE
Tract 02-106

109-130-03

40627

N. J. Liacomini;
FEE \$ 5.00 RECORDER

BOOK 2634 PAGE 641

GRANT DEED

JOHNSON OYSTER COMPANY, a California corporation, GRANTOR, pursuant to a Resolution of the Grantor's Board of Directors September 2, 1972, in consideration of SEVENTY NINE THOUSAND TWO HUNDRED (\$79,200.00) DOLLARS, to it in hand paid, receipt of which is hereby acknowledged, does hereby grant and convey to the UNITED STATES OF AMERICA, and its assigns, GRANTEE, the following described property located in the County of Marin, State of California:

EXHIBIT "A" attached hereto and made a part hereof

TOGETHER WITH all buildings and improvements thereon and all water rights appurtenant thereto and all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

The land is conveyed subject to existing easements of record for public roads and highways, public utilities, railroads, ditches and canals.

The land hereinabove conveyed contains 5 acres, more or less, and is being acquired by the Department of the Interior, National Park Service.

THE GRANTOR RESERVES only the following rights and interests in the hereinabove described property: a reservation of use and occupancy for a period of forty (40) years in accordance with the terms of the Offer to Sell Real Property, assigned Contract No. CR800032073, signed by the GRANTOR on October 13, 1972, accepted on October 16, 1972, and on file with the National Park Service.

TO HAVE AND TO HOLD the same unto said UNITED STATES OF AMERICA and its assigns, forever.

THE GRANTOR further remises, releases, and forever quitclaims to the UNITED STATES OF AMERICA and its assigns, all right, title, and interest which the GRANTOR may have in the banks, beds, and waters of any streams bordering the land conveyed and also all interest in and to any alleys, roads, streets, ways, strips, gores or railroad rights-of-way abutting or adjoining the land conveyed and in any means of ingress or egress appurtenant thereto.

IN WITNESS WHEREOF, Johnson Oyster Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officer, this 9th day of November, 1972.

JOHNSON OYSTER COMPANY

DOCUMENTARY TRANSFER TAX \$ <u>None</u>
<input type="checkbox"/> Computed on full value of property conveyed.
<input type="checkbox"/> OR Computed on full value less liens and encumbrances existing at time of sale.
Signature of Decedant or Agent Determining Tax: <u>Albert Jensen</u>
Firm Name: <u>Marin Title Guaranty Co.</u>

By Charles M. Johnson
Charles M. Johnson, President.

By Milton Simmons
Milton Simmons, Secretary-Treasurer

ACKNOWLEDGMENT

STATE OF California
County of San Francisco



On this 9 day of November in the year 1972 before me, John M. Pohlmann, a Notary Public of said State, duly commissioned and sworn, personally appeared Charles M. Johnson & Milton T. Simmons and acknowledged to me that such corporation executed the same.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

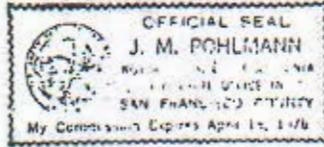
My commission expires: April 18, 1976

John M. Pohlmann
Notary Public in and for said State
BOOK 2634 PAGE

STATE OF CALIFORNIA, County of MOCK
On November 9, 1972
before me, the undersigned, a Notary Public, in and for said County
and State, personally appeared Charles W. Johnson
and Walter Johnson

known to me to be the VICE President and Secretary
Treasurer of the corporation that
executed the within instrument, and also known to me to be the
persons who executed it on behalf of such corporation and acknowl-
edged to me that such corporation executed the same.

J. M. Pohlmann Notary Public



BOOK 2034 PAGE 642

PARCEL ONE:

BEGINNING at a point which bears South 43° 25' 25" West 4667.148 feet from the most Easterly corner of that certain parcel of land conveyed by James and Margaret McClure to R.C.S. Communications, Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at page 93, Marin County Records; and running thence South 60° 09' East 938.6 feet, South 2° 09' East 238.01 feet, North 60° 09' West 938.6 feet and North 2° 09' West 238.01 feet to the point of beginning

PARCEL TWO:

A RIGHT OF WAY for roadway purposes over a strip of land 14 feet in width, the center line of which is described as follows: BEING that certain property in the County of Marin, State of California, more particularly described as follows: BEGINNING at a point on the Northeasterly boundary line of that certain tract of land conveyed from Edward H. Heims et ux to Larry Jensen et ux, by Deed dated February 2, 1951, distant on said line South 60° 09' East 198.25 feet from the most Northerly corner of said tract; and running thence North 42° 47' West 171.66 feet, North 21° 12' West 107.84 feet, North 4° 48' West 105.70 feet, North 25° 45' East 168.34 feet, North 11° 06' East 96.79 feet, North 6° 29' West 224.11 feet, North 13° 57' West 110.34 feet, North 01° 18' West 91.41 feet, North 22° 51' East 349.15 feet, North 44° 19' East 145.39 feet, North 17° 40' East 137.40 feet, North 04° 58' East 225.42 feet, North 12° 20' East 151.12 feet, North 26° 04' East 173.97 feet, North 11° 55' East 285.05 feet, North 22° 56' East 166.80 feet, North 32° 14' East 170.88 feet, North 53° 27' East 161.26 feet, North 47° 12' East 126.93 feet, North 65° 02' East 76.43 feet, North 45° 17' East 78.38 feet, North 31° 38' East 91.54 feet, North 55° 55' East 99.86 feet and North 35° 11' East 177.94 feet to the Inverness-Pt. Reyes County Road.

EXHIBIT "A"

BOOK 2634 PAGE 643



Office of the Attorney General
Washington, D. C. 20530

December 12, 1973

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D. C.

My dear Mr. Secretary:

Re: File No. 33-5-2295-227
Tract No. 02-106
County Marin State California

An examination has been made of the title evidence and related papers pertaining to certain land in which interests have been acquired under authority of existing legislation. The land and estate acquired by the United States are more particularly described in the deed.

The title evidence and accompanying data disclose valid title to be vested in the United States of America subject to the rights and easements noted in Schedule A attached hereto which your Department has advised will not interfere with the proposed use of the land.

The title evidence and related papers have been retained in the files of this Department.

Sincerely yours,

Robert H. Bark

Acting Attorney General

Schedule A

File No.: 33-5-2295-227

Tract No.: 02-106

Project: Point Reyes National Seashore located in Marin
County, California

Estate Acquired: Fee simple and easement

Acreage: 5.00

Consideration: \$79,200.00

The deed to the United States of America was executed by Johnson Oyster Company, a corporation, on November 9, 1972, filed for record on November 30, 1972, and recorded in Book 2634, at page 641.

The title insurance policy was last satisfactorily certified as of November 30, 1972, by Transamerica Title Insurance Company.

The title is subject to the following:

1. Existing easements of record for public roads and highways, rights of way for railroads, pipelines, public utilities, ditches and canals.
2. Reservation by the grantors of the right to occupy the premises as set forth in the deed to the United States.

(WSC)LW 1
(May 1971)

UNITED STATES
DEPARTMENT OF THE INTERIOR
National Park Service

Johnson Oyster Company
Vendor

02-106
Tract

CX800032073
Contract No.

Point Reyes
National Seashore
Area

OFFER TO SELL REAL PROPERTY

The undersigned, hereinafter called the Vendor, in consideration of the mutual covenants and agreements herein set forth, offers to sell and convey to the United States of America and its assigns, the fee simple title to the following described land, with the buildings and improvements thereon, and all rights, hereditaments, easements, and appurtenances thereunto belonging, located in the

County of Marin, State of California,

containing 5.00 acres, more or less, more particularly described as follows:

See Exhibit "A" attached hereto and made a part hereof.

(WSC)LW 1
(May 1971)

subject to existing easements for public roads and highways, public utilities, railroads and pipelines, and encumbrances listed on Exhibit "B" attached hereto and made a part hereof.

Excepting and reserving only the following rights and interests in the above described property: as shown on Exhibit "C" attached hereto and made a part hereof.

The terms and conditions of this offer are as follows:

(1) The Vendor agrees that this offer may be accepted by the United States through any duly authorized representative, by delivering, mailing, or telegraphing a notice of acceptance to the Vendor at the address stated below, at any time within three (3) month(s) from the date hereof, whereupon this offer and the acceptance thereof become a binding contract.

(2) The United States of America agrees to pay the Vendor for said land the sum of Seventy Nine Thousand Two Hundred dollars (\$ 79,200.00) payable on acceptance of this offer and approval of

(WSC)LW 1
(May 1971)

the Vendor's title; provided the Vendor can execute and deliver a good and sufficient deed conveying said land with the hereditaments and appurtenances thereunto belonging to the United States of America and its assigns, in fee simple, free and clear of all liens and encumbrances, except those specifically excepted or reserved above, together with all right, title, and interest of the Vendor in and to any streams, alleys, roads, streets, ways, strips, gores, or railroad rights-of-way abutting or adjoining said land.

(3) It is agreed that the United States will defray the expenses incident to the preparation and recordation of the deed to the United States and the procurement of the necessary title evidence.

(4) The Vendor agrees that all taxes, assessments, and encumbrances which are a lien against the land at the time of conveyance to the United States shall be satisfied of record by the Vendor at or before the transfer of title and, if the Vendor fails to do so, the United States may pay any taxes, assessments, and encumbrances which are a lien against the land; that the amount of any such payments by the United States shall be deducted from the purchase price of the land; that the Vendor will, at the request of the United States and without prior payment or tender of the purchase price, execute and deliver the deed to the United States, pay any applicable documentary revenue stamp tax or excise tax, and obtain and record such other curative evidence of title as may be required by the United States.

As soon as possible after the date of payment of the purchase price of this offer or the date of deposit in court of the funds to satisfy the award of compensations in a condemnation proceeding to acquire the real property herein described, whichever is the earliest, the United States hereby agrees to reimburse the Vendor in an amount deemed by the United States to be fair and reasonable for the following expenses incurred by the Vendor in completing this transaction:

- (a) Recording fees, transfer taxes and similar expenses incidental to conveying the real property described herein to the United States.
- (b) Penalty cost for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering said real property; and
- (c) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is earlier. The

(WSC)LW 1
(April 71)

Vendor agrees to furnish the United States evidence that these items of expenses have been billed to and paid by him, and further agrees that the United States alone shall determine the fairness and reasonableness of the expenses to be paid.

(5) The Vendor agrees that loss or damage to the property by fire or acts of God shall be at the risk of the Vendor until the title to the land and deed to the United States have been accepted by the United States through its duly authorized representative; and, in the event that such loss or damage occurs, the United States may, without liability, refuse to accept the conveyance of the title or it may elect to accept conveyance of title to such property, in which case there shall be an equitable adjustment of the purchase price.

(6) The Vendor agrees that the United States may acquire title to said land by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States in the prosecution of such proceedings; agrees that the consideration hereinabove stated shall be the full amount of the award of just compensation, inclusive of interest, for the taking of said land; agrees that any and all awards of just compensation that may be made in the proceeding to any defendant shall be payable and deductible from said amount.

(7) The Vendor further agrees that from the date hereof, officers and accredited agents of the United States shall have, at all proper times, rights and privileges to survey and enter upon said property for all lawful purposes in connection with the acquisition thereof.

(8) It is agreed that the spouse, if any, of the Vendor, by signing below, agrees to join in any deed to the United States and to execute any instrument deemed necessary to convey to the United States any separate or community estate or interest in the subject property and to relinquish and release any dower, curtesy, homestead, or other rights or interests of such spouse therein.

(9) The Vendor represents and it is a condition of acceptance of this offer that no member of or delegate to Congress, or resident commissioner, shall be admitted to or share any part of this agreement, or to any benefits that may arise therefrom; but this provision shall not be construed to extend to any agreement if made with a corporation for its general benefit.

(10) The terms and conditions aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the Vendor.

(WSC)LW 1
(April 71)

(11) All terms and conditions with respect to this offer are expressly contained herein and the Vendor agrees that no representative or agent of the United States has made any representation or promise with respect to this offer not expressly contained herein.

(12) The Vendor hereby authorizes and directs the United States to accomplish payment of the amount specified in paragraph 2 above by depositing a check in said amount payable to the Marin Title Guaranty Company, escrow agent for the Vendor, 1300 Fourth Street San Rafael, California.

Signed and Delivered this 12th day of October, 1972.

WITNESSES:

VENDORS: Johnson Oyster Company

Witness

Charles W. Johnson
Vendor
Charles W. Johnson, President

Witness

Milton Simmons
Vendor
Milton Simmons, Secretary-Treasurer

Witness

Vendor

Witness

Vendor

Notice of acceptance of this offer is to be sent to:

Mr. Charles W. Johnson, P. O. Box 68, Inverness, California 94937
Name Address City, State, ZIP

ACCEPTANCE OF OFFER TO SELL REAL PROPERTY

The offer of the Vendor contained herein is hereby accepted for and on behalf of the UNITED STATES OF AMERICA.

Date: 10/16/72

By: [Signature]

Title: CHIEF, DIVISION OF LANDS
WESTERN REGION

Exhibit "A"

That certain real property situate in the County of Marin, State of California, described as follows:

PARCEL ONE:

BEGINNING at a point which bears South 43° 25' 25" West 4667.148 feet from the most Easterly corner of that certain parcel of land conveyed by James and Margaret McClure to R.C.S. Communications, Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at page 93, Marin County Records; and running thence South 60° 09' East 938.6 feet, South 2° 09' East 238.01 feet, North 60° 09' West 938.6 feet and North 2° 09' West 238.01 feet to the point of beginning

PARCEL TWO:

A RIGHT OF WAY for roadway purposes over a strip of land 14 feet in width, the center line of which is described as follows: BEING that certain property in the County of Marin, State of California, more particularly described as follows: BEGINNING at a point on the Northeasterly boundary line of that certain tract of land conveyed from Edward H. Mcins et ux to Larry Jensen et ux, by Deed dated February 2, 1951, distant on said line South 60° 09' East 198.25 feet from the most Northerly corner of said tract; and running thence North 42° 47' West 171.66 feet, North 21° 12' West 107.84 feet, North 4° 48' West 105.70 feet, North 25° 45' East 168.34 feet, North 11° 06' East 96.79 feet, North 6° 29' West 224.11 feet, North 13° 57' West 110.34 feet, North 01° 18' West 91.41 feet, North 22° 51' East 349.15 feet, North 44° 19' East 145.39 feet, North 17° 40' East 137.40 feet, North 04° 58' East 225.42 feet, North 12° 20' East 151.12 feet, North 26° 04' East 173.97 feet, North 11° 55' East 285.05 feet, North 22° 56' East 166.00 feet, North 32° 14' East 170.88 feet, North 53° 27' East 161.26 feet, North 47° 12' East 126.93 feet, North 65° 02' East 76.43 feet, North 45° 17' East 78.38 feet, North 31° 38' East 91.54 feet, North 55° 55' East 99.86 feet and North 35° 11' East 177.94 feet to the Inverness-Pt. Reyes County Road.

Exhibit "B"

1. Any adverse claim based upon the assertion that some portion of said land is tide or submerged lands, or has been created by artificial means or has accreted to such portions so created.
2. No insurance will be undertaken as to any portion of the herein described property that lies below the line of ordinary high tide as it came to rest from natural means.
3. Conditions regarding the use of Parcel Two herein as contained in an Agreement between Edward H. Heims, et ux and A. L. Jensen, et ux, recorded February 5, 1951, in Book 676 of Official Records at page 382.

The interest of the Heims now vests in the United States of America.

EXHIBIT "C"

Reserving to Vendor, its successors and assigns, a terminable right to use and occupy the above-described property, as delineated on Exhibit "D", attached, together with the improvements situated thereon, for a period of 40 years for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto, subject to the following:

Definitions

The term "Director" as used herein means the Director of the National Park Service; and includes all his duly authorized, delegated representatives.

The term "Vendor" as used herein means the Johnson Oyster Company, a California Corporation, and its successors and assigns.

1. The premises reserved by Vendor hereunder shall at all times be maintained in a safe, sanitary, and sightly condition, open to reasonable inspection by the Director, and meeting all Federal, State, and County health, sanitation, and safety standards applicable to operation of and residence within areas engaged in the processing and retail sale of oysters.

2. Utility services related to the reserved premises, including but not limited to water, electricity, sanitation, and garbage disposal are the sole responsibility of Vendor. Garbage and debris shall be disposed of by Vendor outside the boundary of the Point Reyes National Seashore. Use of the existing trash and garbage dumps on the reserved premises shall be discontinued and the dumps shall be restored to a natural condition by Vendor.

3. Oyster shells may be disposed of within the boundaries of the Point Reyes National Seashore and may be stockpiled for a reasonable period of time on the premises for use as follows:

- a) Upon approval and under an agreement with the Fish and Game Department and other State of California regulatory authorities, some shells may be ground up and deposited uniformly on the water bottom allotments.
- b) Some shells may be used for surfacing the road southerly from Sir Francis Drake Highway to the premises including the parking area on the reserved premises and the parking area on the adjacent land under special use by the Vendor. Approval of the Superintendent will be required prior to deposition of shells anywhere else within the Seashore for road surfacing purposes.
- c) Some shells may be used for seed purpose in oyster propagation.

d) Some shells will be maintained to offer as gifts to the visiting public.

4. Vendor shall not commit waste upon the reserved premises and shall at all times maintain them in a neat and sightly condition.

5. A permanent residence shall be maintained upon the reserved property, occupied by a responsible employee of Vendor.

6. Vendor shall abide by all rules and regulations pertaining to National Park System areas.

7. No permanent or temporary structure, sign or other improvement of any type whatsoever shall be erected by Vendor in or upon the reserved premises or improvements without the prior written approval of the Director.

8. Vendor and its employees shall take all reasonable precautions to prevent fires in and about the reserved premises, and shall cooperate with the Director in fire extinguishment in the reserved premises and areas immediately adjacent to the reserved premises.

9. During the term of Vendor's reservation, Vendor shall be solely responsible for all claims arising from use of the reserved premises by visitors, and shall carry extended coverage liability insurance protecting against such claims in an amount and of a type agreed by the Director, to be sufficient for this purpose.

10. During the term of occupancy, the Vendor shall carry fire and extended coverage insurance to the full insurable value of the improvements. The insured under said fire and extended coverage insurance shall be the Vendor and the United States of America as their interests may appear. In case of loss, the Vendor may replace the improvements with equivalent structures. Should the Vendor elect not to rebuild, all insurance proceeds shall be divided between the United States and the Vendor as their interests may appear.

11. Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property for the herein described purposes, provided however, that such permit will run concurrently with and will terminate upon the expiration of State water bottom allotments assigned to the Vendor. Any permit for continued use will be issued in accordance with National Park Service regulations in effect at the time the reservation expires.

12. Upon expiration of Vendor's reservation, or the extended use period by permit, it shall remove all structures and improvements placed upon the premises during the period of its reservation. Any such property not removed from the reserved premises within 90 days after expiration of Vendor's reservation shall be presumed to have been abandoned and shall be

presumed to have been abandoned and shall become the property of the United States of America, but this shall in no way relieve Vendor of liability for the cost of removal of such property from the reserved premises.

13. Disputes concerning performance under the terms of this reservation shall be determined by the Secretary of the Interior or his duly authorized representative in a manner consistent with due process of law.

14. Should Vendor elect to dispose of any unused portion of the remainder of its reserved occupancy, the United States of America shall be afforded a right of first refusal to acquire the same.

15. A special use permit will be issued by the Director to Vendor for public interpretation of oyster cultivation by Vendor or adjacent premises, effective concurrently with Vendor's reservation.

16. Vendor shall keep the reserved premises open to the public for the interpretation of oyster cultivation and processing.

17. Vendor, its successors and assigns, shall pay the possessory interest tax during the term of use and occupancy.

18. Vendor cannot conduct a restaurant operation on the premises without prior written approval of the Director.

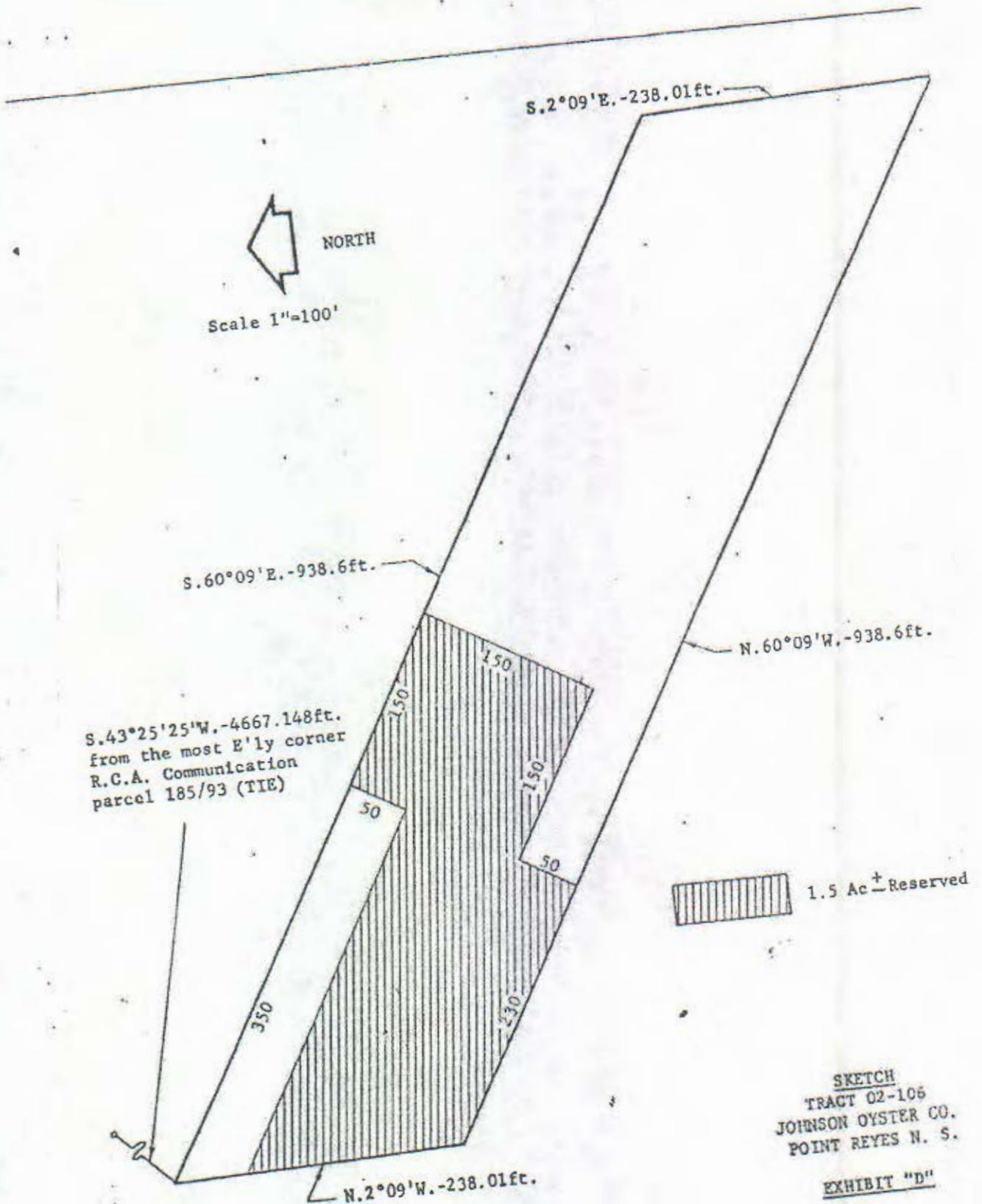


EXHIBIT 2



DEPARTMENT OF FISH AND GAME

<http://www.dfg.ca.gov>

1416 Ninth Street

Sacramento, CA 95814



December 21, 2004

Mr. Tom Johnson
Johnson Oyster Company
P.O. Box 69
Inverness, CA 94937

Subject: Renewal of Leases, M-438-01 and M-438-02

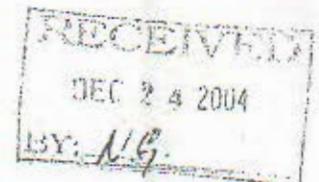
Dear Mr. Johnson:

Enclosed are the executed copies for lease agreements, M-438-01 and M-438-02, for your files. I appreciate your patience in the execution of these documents. Should you have questions regarding the activities associated with these leases, please contact Tom Moore at (707) 875-4261.

Sincerely,

Eric R. Dockter
Analyst
Business Services

cc: Tom Moore
Region 7
Eric Larson (w/o attachments)
Region 7



RENEWAL OF LEASE

Made this 25th day of June, 2004 at Crescent City, California by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor" and Johnson Oyster Company, hereinafter referred to as "Lessee."

WITNESSETH:

WHEREAS, Lessee indicated an interest in renewing a prior lease agreement in correspondence dated May 28th, 2003 and exercised that option by requesting Fish and Game Commission consideration of the request in correspondence dated April 8, 2004, and

WHEREAS, The Fish and Game Commission at the May 4, 2004, meeting in San Diego, California granted the Lessee's request to extend the lease for 90 days to negotiate specific terms and conditions for the new lease.

WHEREAS, Lessee is presently a registered aquaculturist authorized to grow marine life for profit in the waters of the State of California as provided in Section 15101 of the Fish and Game Code, and

WHEREAS, Lessee expressed support for the Lessor's recommended approval of the requested lease renewal for a 25-year period, contingent on a concurrent Federal Reservation of Use and Occupancy for fee land in the Point Reyes National Seashore, at an initial lease rate of three dollars (\$3.00) per acre at signing, ten dollars (\$10.00) at 4 years, fifteen dollars (\$15.00) at 10 years, and twenty dollars (\$20.00) at 15 years, subject to adjustment considering changes in the Consumer Price Index and current lease rates no more often than every five years, at the Fish and Game Commission's discretion, and.

WHEREAS, the Fish and Game Commission determined that a lease renewal was in the best interest of the State of California at the June 25, 2004, meeting in Crescent City, California and approved the renewal based on the renegotiated lease terms recommended by the Department of Fish and Game.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That, in consideration of payment of the monies hereinafter stated in accordance with the renegotiated terms recommended by the Lessor and accepted at a duly called and noticed hearing of the Fish and Game Commission of the State of California, pursuant to law and in consideration of the covenants contained herein on the part of the Lessee, Lessor does hereby grant to Lessee the exclusive privilege to cultivate approved shellfish hereon and in those certain waters of the State of California

described as follows, to wit:

All that certain real property situated in the County of Marin, State of California, described as follows:

Two parcels of water bottoms in Drakes Estero, county of Marin, State of California, and being particularly described as follows:

Parcel 1.

Beginning at a point near the oyster plant site of Johnson Oyster Company which bears South 43° 25' 25" West 3667.148 feet from the most easterly corner of that certain parcel of land conveyed by James and Magaret McClure of R.C.S. Communications Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at Page 93, Marin County Records; and running thence North 59° West 420 feet to a point on the high water line of Drakes Estero, Marin County, State of California, which is the true point of beginning for this allotment; thence South 17° West 90 feet to the Northeasterly edge of a 100-foot boat passageway along the deepest water of Schooner Bay; thence following along the Easterly edge of said boat passageway South 58° 30' East 420 feet; South 10° West 600 feet; South 39° 30' West 1820 feet; South 8° West 650 feet to the Southeasterly edge of the 100-foot passageway; thence North 86° 30' East 390 feet; South 3600 feet; South 20° East 3410 feet to the Northwesterly point of the sheer cliff separating Home Bay from Drakes Estero, said point having U.S.G.S. grid coordinates 38° 3' 18" N. 122° 55' 54" W.; thence following along the high water line of Home Bay Northeasterly to the extremity of Home Bay; thence Northerly and Southwesterly along the high water line of Home Bay to Schooner Bay; thence Northerly along the high water line of Schooner Bay to the point of beginning; said Parcel containing 350 acres, more or less.

Parcel 2.

Beginning at a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning of Parcel 1; thence North 17° East 160 feet to the Northwesterly corner of the 100-foot Schooner Bay Boat passageway; thence following along the Westerly edge of said passageway along the deepest water in Schooner Bay South 58° 30' East 175 feet; 10° West, 500 feet; South 29° 30' West 1916 feet; South 8° West 690 feet to the Southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 47° East 1,340 feet; North 80° East 1,300 feet; North 53° East 2,100 feet; South 1,410 feet; South 59° West 1,510 feet; South 17° East 1,300 feet; South 65° West 1,080 feet; South 79° West 1,480 feet to a point on the high water line on the Westerly shore of the main body of Drakes Estero having a U.S.G.S. grid coordinates 38° 2' 41" N., 122° 56' 51" W.; thence following

Northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the Westerly shore of Drakes Estero; thence Northwesterly along the high water line of the Western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence Southerly along the high water line of the Eastern and Southern shores of Creamery Bay and following Northeasterly along the Westerly shore of Schooner Bay along the high water line to the point of beginning at the Northwesterly edge of the 100-foot boat passageway.

Excepting therefrom, a one-acre parcel designated as Mariculture Lease No. M-438-02, said Parcel 2 containing 709 acres, more or less.

These parcels 1 and 2, containing 1,059 acres, more or less, together comprise Oyster Allotment Number M-438-01.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating Pacific oyster (*Crassostrea gigas*), and European flat oyster (*Ostrea edulis*), in the previously designated area. The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

All oyster cultivation on the lease shall be confined to the bottom, stakes, and racks within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, P.O. Box 1560, Bodega Bay, California 94923, telephone (707) 875-4261, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

In accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby renew said lease for such consideration, specific purposes and subject to covenants, terms, conditions, reservation, restrictions and limitation as are set forth herein.

This lease renewal is authorized for a term of twenty-five (25) years commencing on the 25th day of June, 2004, and ending on the 24th day of June, 2029, contingent on

a concurrent federal Reservation of Use and Occupancy for fee land in the Point Reyes National Seashore, at an initial lease rate of three dollars (\$3.00) per acre at signing, ten dollars (\$10.00) at 4 years, fifteen dollars (\$15.00) at 10 years, and twenty dollars (\$20.00) at 15 years, subject to adjustment considering changes in the Consumer Price Index and current lease rates no more often than every five years, at the Fish and Game Commission's discretion, and a privilege tax on all products harvested as provided by Fish and Game Code Sections 8051, 18406.5, and 15406.7. Beginning January 1, 2005, said annual rental fee will be payable to Lessor on a calendar year basis, January 1 – December 31. If said annual rental fee is not paid within sixty (60) days after the close of the month in which it is due, an additional 10 percent penalty shall be paid. Lessor, at its option, may declare the lease abandoned for failure to pay such rental fees within 90 days from the beginning of the rental period; although such abandonment shall not relieve Lessee of its obligation to pay such rental and penalty which are due and owing. Lessee agrees to pay Lessor reasonable attorney fees and costs incurred in collecting any amounts and/or penalties due and owing from Lessee under the provisions of this lease. Lessee agrees to pay said fee(s) to Lessor at its office in the City of Sacramento, State of California, or at such other place as Lessor may, from time to time, designate.

Lessee expressly recognizes and acknowledges that any payments by Lessee as provided for herein are subject to the provisions of Section 15410 of the Fish and Game Code which states "All leases shall be subject to the power of the Legislature to increase or decrease the rents, fees, taxes, and other charges relating to the lease, but no increase in rent shall be applicable to an existing lease until it is renewed."

This lease is made upon the following additional terms, conditions, and covenants, to wit:

- A. This lease may, at the option of Lessee, be renewed for additional periods not to exceed 25 years each. If the Lessee desires to enter into a new lease for a period commencing after expiration of the initial 25-year term, Lessee shall give notice to Lessor one (1) year prior to termination of the lease. The lease may be renewed if, during the notification period, terms for a new lease are agreed upon by Lessee and the Commission. Lessor retains the right to renegotiate terms of the lease, including annual rental rates, subject to adjustment considering changes in the Consumer Price Index and current lease rates, at the Fish and Game Commission's discretion, no more often than every ten (10) years during the current renewal period.
- B. Lessee shall keep records as required in accordance with Fish and Game Code Section 15414 on forms to be supplied by Lessor, and shall maintain adequate accounting records sufficient to determine monies due to Lessor by the 10th day of each month for all shellfish harvested during the preceding calendar month. Lessor reserves the right to inspect Lessee's premises, equipment and all books at any time, and Lessee's records pertaining to its cultivation on the leased

premises.

- C. The lease shall be improved at no less than the minimum rate established by Commission regulations (Section 237(i)(A) - (C), Title 14, CCR). A minimum rate of planting shall be negotiated for option periods. Lessor may declare this lease terminated if Lessee fails to meet these requirements, and if Lessee, at any time, is proven to be failing in good faith, to pursue the purpose of this lease.
- D. If, at any time subsequent to the beginning date of this lease the use of stakes or racks authorized herein shall fall into a state of disrepair or otherwise become an environmental or aesthetic degradation, as determined by Lessor, then upon written notice by Lessor, Lessee shall have sixty (60) days to repair and correct conditions cited by Lessor. Failure to comply with the written notice shall be grounds for termination of this lease and Lessee shall, at the option of Lessor, remove all improvements located on lands covered by this lease.

As a financial guarantee of growing structure removal and/or clean-up expense in the event the lease is abandoned or otherwise terminated, Lessee shall place on deposit, pursuant to the "Escrow Agreement for Clean-up of Aquaculture Leases, Drakes Estero, California", the sum of ten thousand dollars (\$10,000). Such money shall be deposited over a two-year period payable, three-quarters upon entering upon the lease, and one-quarter upon the first anniversary of such inception date. The escrow account shall be increased if the Fish and Game Commission determines that, if abandoned, the culture operation is likely to be more expensive to remove. The escrow account may be reduced by the Commission upon demonstration that the probable cost of removal of all improvements would be less than the deposit previously required. In its annual Proof-of Use Report, the Lessor shall advise the Commission of its best estimate of the probable cost of removal the lease operation. The escrow agreement, escrow holder, and escrow depository shall be agreed upon by the Executive Director of the Fish and Game Commission and the Lessor.

If Lessee abandons this lease without removing growing structures therefrom, the escrow deposit shall be expended to remove growing structures or otherwise clean up the lease.

In order to assure compliance with the escrow provisions of this lease, Lessee shall dedicate to the agreed upon escrow account specified in the "Escrow Agreement for Clean-up of Aquaculture Leases in Drakes Estero, California (Addendum 1)", hereby attached to and made part of this agreement, a total of seven thousand five hundred dollars (\$7,500). This amount equals three-quarters of the amount, ten thousand dollars (\$10,000), to be deposited in the "Drakes Estero Escrow Account".

- E. Lessee shall make monthly surveys of Drakes Estero for the purpose of clean-up

- of lost growing equipment or materials. Lessee shall keep a record of date of surveys and materials recovered and shall provide this information in the annual Proof-of-Use Report.
- F. Lessee shall observe and comply with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law, including but not limited to State Water Resources Control Board, State Coastal Commission, State Lands Commission, and U.S. Army Corps of Engineers. Any other permits or licenses required by such agencies will be obtained by Lessee at his own sole cost and expense.
- G. Lessee recognizes and understands in accepting this lease that his interest therein may be subject to a possible possessory interest tax that the county may impose on such interest, and that such tax payment shall not reduce any rent or royalty due the Lessor hereunder and any such tax shall be the liability of and be paid by Lessee.
- H. Any modification of natural or existing features of the real property described in this lease, which are not consistent with the authorized uses under this lease are expressly prohibited without prior written consent of the Lessor.
- I. As evidence of progress in aquaculture, Lessee shall submit each year to the State at the Marine Region office, P.O. Box 1560, Bodega Bay, California 94923, a written declaration under penalty of perjury, showing the date and amount of each type of aquaculture development and date and amount of designated species comprising each planting, including a diagram (map) showing area, amounts, and dates planted. Such annual proof-of-use shall be submitted on or before February 1 of each year for the previous year, January 1 -- December 31, inclusive.
- J. This lease shall be canceled at any time Lessee fails to possess a valid aquaculture registration issued pursuant to Section 15101 of the Fish and Game Code. Lessee agrees not to commit, suffer, or permit any waste on said premises or any act to be done thereon in violation of any laws or ordinances. This lease shall be subject to termination by Lessee at any time during the term hereof, by giving Lessor notice in writing at least ninety (90) days prior to the date when such termination shall become effective. In the event of such termination by Lessee, any unearned rental shall be forfeited to the Lessor.
- K. This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown or harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section

28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

- L. In addition to the conditions and restrictions herein provided for in this lease, and any right or privilege granted, conveyed or leased hereunder, shall be subject to, and Lessee agrees to comply with all applicable provisions of the California Fish and Game Code, and regulation of the Fish and Game Commission, in particular Sections 15400 - 15415, inclusive, of the Fish and Game Code, and expressly recognizes the right of the Legislature and the Fish and Game Commission to enact new laws and regulations. In the event of any conflict between the provisions of this lease and any law or regulation, the latter will control. This lease shall be deemed amended automatically upon the effective date of such conflicting law or regulation.
- M. This lease is personal to the Lessee and shall not be transferred, assigned, hypothecated or subleased, either voluntarily or by operation of law, without prior approval of the Fish and Game Commission.
- N. The waiver by the Lessor of any default or breach of any term, covenant or condition shall not constitute a waiver of any other default or breach, whether of the same or any other term, covenant or condition, regardless of the Lessor's knowledge of such other defaults or breaches. The subsequent acceptance of monies hereunder by the Lessor shall not constitute a waiver of any preceding default or breach of any term, covenant or condition, other than the failure of the Lessee to pay the particular monies so accepted, regardless of the Lessor's knowledge of such preceding default or breach at the time of acceptance of such monies, nor shall acceptance of monies after termination constitute a reinstatement, extension or renewal of the agreement or revocation of any notice or other act by the Lessor. In the event of any breach by Lessee of any of the provisions hereof, other than the payment of any sum due from Lessee to Lessor hereunder, which breach is not remedied, abated and cured by Lessee within sixty (60) days after notice in writing, shall cause this lease to thereupon cease and terminate.
- O. Lessee shall not assign or transfer this agreement without prior written approval. Such written approval of the assignment or transfer of lease shall be subject to any and all conditions required by the Fish and Game Commission including, without limitation by reason of the specifications herein, the altering, changing or amending of this agreement as deemed by the Commission to be in the best interest of the State.
- P. All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and

Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

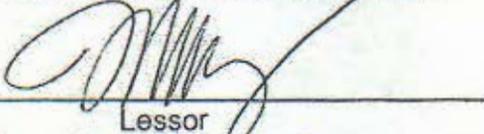
IN WITNESS THEREOF, the parties hereto have caused this lease to be duly executed as of the day and year first above written.

APPROVED:

FISH AND GAME COMMISSION

By: Robert Treman

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME**

By: 
Lessor

Renee Renwick Deputy Director, Administration

**TOM JOHNSON
JOHNSON OYSTER COMPANY**

By: 
Lessee

STATE OF CALIFORNIA }
COUNTY OF Sonoma }SS

On 12/08/04 before me, Sara L. Huddleston, Notary Public
personally appeared Tom Johnson

personally known to me

NAME(S) OF SIGNER(S)
- OR - proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.
Sara L. Huddleston
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER
INDIVIDUAL
CORPORATE OFFICER

TITLE(S)
PARTNER(S)
LIMITED or GENERAL
ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER:

DESCRIPTION OF ATTACHED DOCUMENT
Renewal of Lease
TITLE OR TYPE OF DOCUMENT

10 pages total
NUMBER OF PAGES

12/08/04
DATE OF DOCUMENT

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

N/A
SIGNER(S) OTHER THAN NAMED ABOVE

ADDENDUM TO
AQUACULTURE LEASE
BETWEEN
DEPARTMENT OF FISH AND GAME, LESSOR
AND
JOHNSON OYSTER COMPANY
NONDISCRIMINATION CLAUSE

(OCP - 1)

1. During the performance of this contract, contractor* and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Administrative Code, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Administrative Code are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.
2. This contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

* All references to "contractor" shall be deemed to be Lessee.

**AMENDMENT NO. 2
TO
INDENTURE OF LEASE**

This amendment of Aquaculture Lease is made and entered into as of the 18th day of March 2005, by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor", and Drakes Bay Oyster Company, hereinafter referred to as "Lessee.

WITNESSETH:

WHEREAS, on January 18, 1934, the State did allocate approximately 6,000 acres of State water bottoms, lying in Drakes Estero and Estero de Limantour, Marin County, to David C. Dreir as Oyster Allotment No. 2, under provisions of then Section 820 of the Fish and Game Code, and

WHEREAS, on April 3, 1935, the State did approve the transfer of Allotment No. 2 from David C. Dreir to the Drakes Bay Oyster Company, Inc., and

WHEREAS, on September 4, 1946, the State did approve the transfer of Allotment No. 2 from Drakes Bay Oyster Company to Larry Jenson, and

WHEREAS, on July 6, 1954, the State did approve the transfer of Allotment No.2 from Larry Jenson to Van Camp Seafood, Inc., and

WHEREAS, on February 11, 1955, the State did approve the transfer of Allotment No. 2 from Van Camp Seafood, Inc., to Coast Oyster Company of California and redescribed said allotment, reducing the acreage of said allotment from an estimated 6,000 acres to 2,130 acres, and

WHEREAS, on September 6, 1955, the State did set aside (under authority of Section 6497 of the Fish and Game Code), 965 acres of water bottoms in Drakes Estero and Estero de Limantour, for Public Clam Reserve No. 3, thereby reducing Oyster Allotment No. 2 to 1,165 acres, more or less, and

WHEREAS, on November 18, 1960, Coast Oyster Company did assign their interest in Oyster Allotment No. 2, lying in Drakes Estero and Estero de Limantour, to Charles W. Johnson, and

WHEREAS, on March 7, 1961, the State did approve the transfer of Oyster Allotment No. 2 to Mr. Johnson and, subsequently, on that date did approve the assignment of the Allotment to the Allottee, and

WHEREAS, on February 19, 1965, Allottee agreed to the abandonment of that entire portion of Oyster Allotment No. 2, lying in Estero de Limantour, provided the State

Number M-438-01

approve the allotment of 170 additional acres of water bottoms in Drakes Estero to Allottee, and

WHEREAS, on February 19, 1965, the State did approve a redescription of Oyster Allotment No. 2 to exclude the original allotment acreage lying within Estero de Limantour, thereby reducing said allotment to 843 acres and allocating a new oyster allotment designated No. 72 in Drakes Estero, comprised of 170 acres, to Allottee, and

WHEREAS, on June 1, 1979, it was considered to be in the best interest of the State to consolidate Oyster Allotments Nos. 2 and 72 to comprise one Allotment (M-438-01) in conformation with the standard allotment numbering system adopted by the State on March 24, 1971, and

WHEREAS, on June 1, 1979, the State did consolidate said allotments Nos. 2 and 72 and did re-allot unto the Allottee the State water bottoms designated as Aquaculture Lease M-438-01, and

WHEREAS, the Fish and Game Commission at its meeting on October 7, 1994, adopted new administrative procedures to standardize annual proof-of-use reporting and the rental period for aquaculture leaseholds, and Lessor amended said lease on April 1, 1997 to reflect these changes, and

WHEREAS, Johnson Oyster Company requested that title to Lease Agreement (No. M-438-01) be transferred to Drakes Bay Oyster Company and the Fish and Game Commission at its meeting on March 18, 2005, authorized the transfer of title of State Water Bottoms Lease M-438-01, from Johnson Oyster Company to Drakes Bay Oyster Company;

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

That, in accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby amend said lease for such consideration, specific purposes, and subject to covenants, terms, conditions, reservations, restrictions and limitations as are set forth herein, and does hereby grant to Lessee the exclusive privilege to cultivate shellfish thereon, and in all that certain real property situated in the County of Marin, State of California, described as follows:

Two parcels of water bottoms in Drakes Estero, county of Marin, State of California, and being particularly described as follows:

Parcel 1.

Beginning at a point near the oyster plant site of Johnson Oyster Company which bears South 43° 25' 25" West 3667.148 feet from the most easterly corner of that

Number M-438-01

certain parcel of land conveyed by James and Margaret McClure of R.C.S. Communications Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at Page 93, Marin County Records; and running thence North 59° West 420 feet to a point on the high water line of Drakes Estero, Marin County, State of California, which is the true point of beginning for this allotment; thence South 17° West 90 feet to the Northeasterly edge of a 100-foot boat passageway along the deepest water of Schooner Bay; thence following along the Easterly edge of said boat passageway South 58° 30" East 420 feet; South 10° West 600 feet; South 39° 30' West 1820 feet; South 8° West 650 feet to the Southeasterly edge of the 100-foot passageway; thence North 86° 30' East 390 feet; South 3600 feet; South 20° East 3410 feet to the Northwesterly point of the sheer cliff separating Home Bay from Drakes Estero, said point having U.S.G.S. grid coordinates 38° 3' 18" N. 122° 55' 54" W.; thence following along the high water line of Home Bay Northeasterly to the extremity of Home Bay; thence Northerly and Southwesterly along the high water line of Home Bay to Schooner Bay; thence Northerly along the high water line of Schooner Bay to the point of beginning; said Parcel containing 350 acres, more or less.

Parcel 2.

Beginning at a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning of Parcel 1; thence North 17° East 160 feet to the Northwesterly corner of the 100-foot Schooner Bay Boat passageway; thence following along the Westerly edge of said passageway along the deepest water in Schooner Bay South 58° 30" East 175 feet; 10° West, 500 feet; South 29°30' West 1916 feet; South 8° West 690 feet to the Southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 47° East 1,340 feet; North 80° East 1,300 feet; North 53° East 2,100 feet; South 1,410 feet; South 59° West 1,510 feet; South 17° East 1,300 feet; South 65° West 1,080 feet; South 79° West 1,480 feet to a point on the high water line on the Westerly shore of the main body of Drakes Estero having a U.S.G.S. grid coordinates 38° 2' 41" N., 122° 56' 51" W.; thence following Northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the Westerly shore of Drakes Estero; thence Northwesterly along the high water line of the Western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence Southerly along the high water line of the Eastern and Southern shores of Creamery Bay and following Northeasterly along the Westerly shore of Schooner Bay along the high water line to the point of beginning at the Northwesterly edge of the 100-foot boat passageway.

Excepting therefrom, a one-acre parcel designated as Aquaculture Lease No. M-438-02, said Parcel 2 containing 709 acres, more or less.

Number M-438-01

These parcels 1 and 2, containing 1,059 acres, more or less, together comprise Aquaculture Lease Number M-438-01.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating Pacific oyster (*Crassostrea gigas*), and European flat oyster (*Ostrea edulis*), in the previously designated area.

The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

Shellfish cultivation methods approved for the lease shall be stakes, racks, and bottom culture within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, P.O. Box 1560, Bodega Bay, California 94923, telephone (707) 875-4261, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States Mail, certified and postage prepaid and addressed as follows:

To the Lessor	DEPARTMENT OF FISH AND GAME 1416 Ninth Street Sacramento, CA 95814
To the Lessee	MR. KEVIN LUNNY DRAKES BAY OYSTER COMPANY 17171 Sir Francis Drake Boulevard Inverness, CA 94937

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed as aforesaid to either party may be changed by written notice given by such party to the other, as hereinbefore provided.

Number M-438-01

This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown and harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

Lessee must recognize that compliance by certified shellfish harvesters with the conditions and procedures set forth in the Department of Health Service's current "Management Plan for Commercial Shellfishing in Drakes Estero, California" and in the current "Contingency Plan for Marine Biotoxins in California Shellfish" is mandatory. These conditions and procedures establish classifications for certification to harvest shellfish (oysters, mussels and clams) and establish rainfall closures which may delay or prevent harvesting of cultured organisms from this lease and are a condition of the Shellfish Growing Area Certificate.

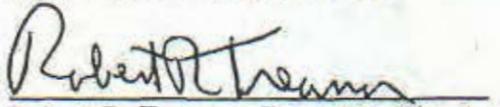
Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have caused this amendment to said aquaculture lease to be executed as of the day and year first above written.

APPROVED:

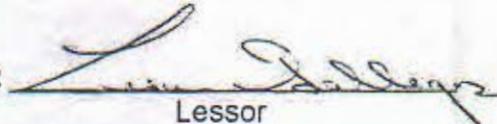
FISH AND GAME COMMISSION

By:


Robert R. Treanor, Executive Director

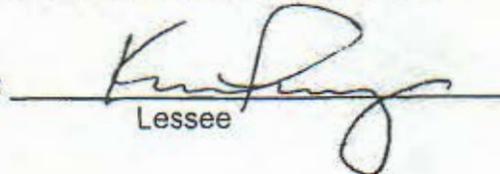
STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By:


Lessor

KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

By:


Lessee

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA } SS
COUNTY OF Sonoma

On 12/02/05 before me, Chris Mark Krupansky

personally appeared Kevin Lunny NAME(S) OF SIGNER(S)

personally known to me

- OR - proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Chris Mark Krupansky
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

PARTNER(S)
LIMITED or GENERAL
ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER:

DESCRIPTION OF ATTACHED DOCUMENT

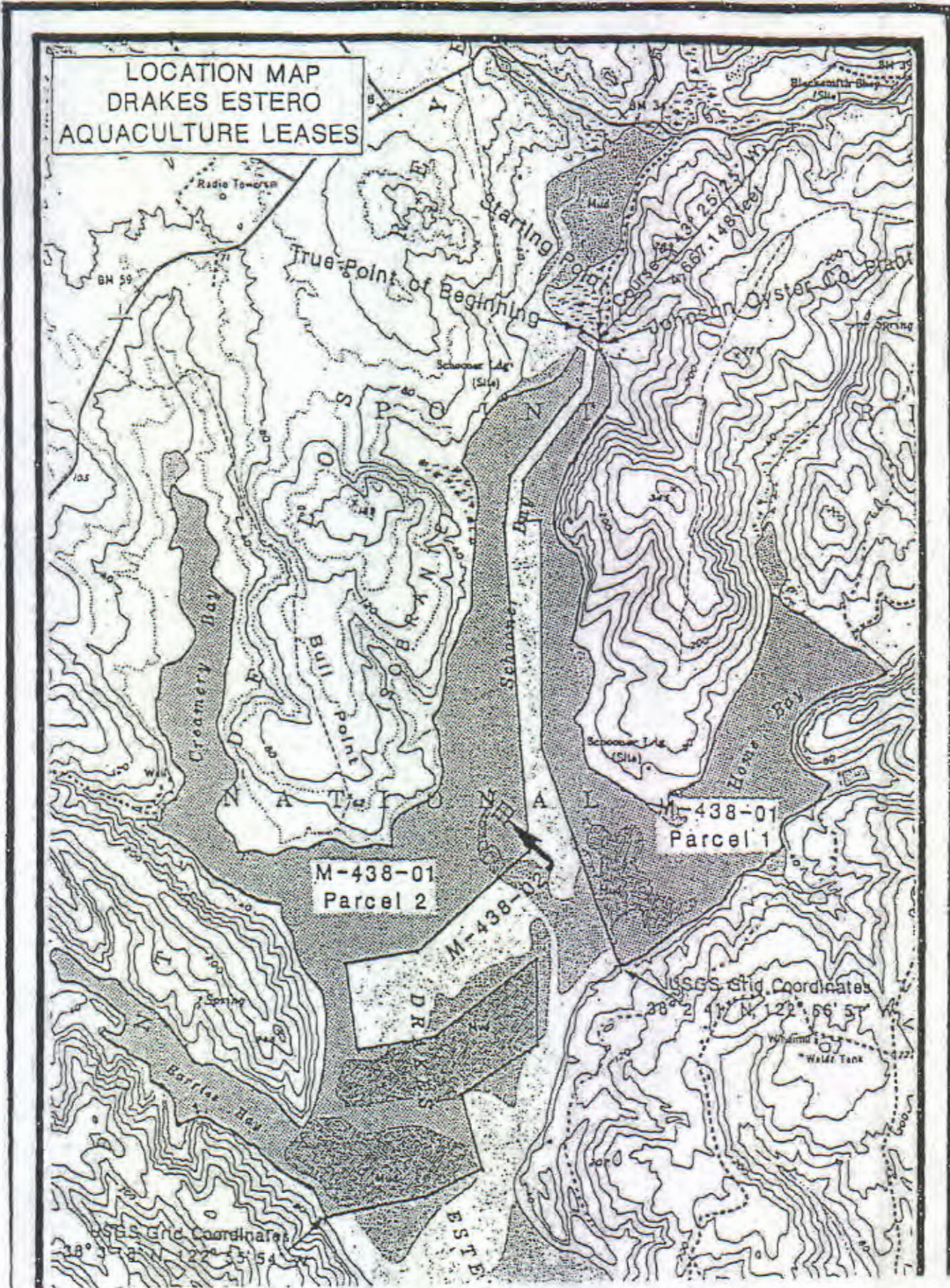
Amendment #2 to indemnity to lease
TITLE OR TYPE OF DOCUMENT

5 pages
NUMBER OF PAGES

12/2/05
DATE OF DOCUMENT

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

Robert R. Treanor
SIGNER(S) OTHER THAN NAMED ABOVE



**AMENDMENT NO. 3
TO
INDENTURE OF LEASE**

This amendment of Aquaculture Lease is made and entered into as of the 10th day of December 2009, by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor", and Drakes Bay Oyster Company, hereinafter referred to as "Lessee.

WITNESSETH:

WHEREAS, on January 18, 1934, the State did allocate approximately 6,000 acres of State water bottoms, lying in Drakes Estero and Estero de Limantour, Marin County, to David C. Dreir as Oyster Allotment No. 2, under provisions of then Section 820 of the Fish and Game Code, and

WHEREAS, on April 3, 1935, the State did approve the transfer of Allotment No. 2 from David C. Dreir to the Drakes Bay Oyster Company, Inc., and

WHEREAS, on September 4, 1946, the State did approve the transfer of Allotment No. 2 from Drakes Bay Oyster Company to Larry Jenson, and

WHEREAS, on July 6, 1954, the State did approve the transfer of Allotment No.2 from Larry Jenson to Van Camp Seafood, Inc., and

WHEREAS, on February 11, 1955, the State did approve the transfer of Allotment No. 2 from Van Camp Seafood, Inc., to Coast Oyster Company of California and redescribed said allotment, reducing the acreage of said allotment from an estimated 6,000 acres to 2,130 acres, and

WHEREAS, on September 6, 1955, the State did set aside (under authority of Section 6497 of the Fish and Game Code), 965 acres of water bottoms in Drakes Estero and Estero de Limantour, for Public Clam Reserve No. 3, thereby reducing Oyster Allotment No. 2 to 1,165 acres, more or less, and

WHEREAS, on November 18, 1960, Coast Oyster Company did assign their interest in Oyster Allotment No. 2, lying in Drakes Estero and Estero de Limantour, to Charles W. Johnson, and

WHEREAS, on March 7, 1961, the State did approve the transfer of Oyster Allotment No. 2 to Mr. Johnson and, subsequently, on that date did approve the assignment of the Allotment to the Allottee, and

WHEREAS, on February 19, 1965, Allottee agreed to the abandonment of that entire portion of Oyster Allotment No. 2, lying in Estero de Limantour, provided the State

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approve the allotment of 170 additional acres of water bottoms in Drakes Estero to Allottee, and

WHEREAS, on February 19, 1965, the State did approve a redescription of Oyster Allotment No. 2 to exclude the original allotment acreage lying within Estero de Limantour, thereby reducing said allotment to 843 acres and allocating a new oyster allotment designated No. 72 in Drakes Estero, comprised of 170 acres, to Allottee, and

WHEREAS, on June 1, 1979, it was considered to be in the best interest of the State to consolidate Oyster Allotments Nos. 2 and 72 to comprise one Allotment (M-438-01) in conformation with the standard allotment numbering system adopted by the State on March 24, 1971, and

WHEREAS, on June 1, 1979, the State did consolidate said allotments Nos. 2 and 72 and did re-allot unto the Allottee the State water bottoms designated as Aquaculture Lease M-438-01, and

WHEREAS, the Fish and Game Commission at its meeting on October 7, 1994, adopted new administrative procedures to standardize annual proof-of-use reporting and the rental period for aquaculture leaseholds, and Lessor amended said lease on April 1, 1997 to reflect these changes, and

WHEREAS, Johnson Oyster Company requested that title to Lease Agreement (No. M-438-01) be transferred to Drakes Bay Oyster Company and the Fish and Game Commission at its meeting on March 18, 2005, authorized the transfer of title of State Water Bottoms Lease M-438-01, from Johnson Oyster Company to Drakes Bay Oyster Company, and

WHEREAS, the Fish and Game Commission at its meeting on December 10, 2009, corrected a clerical error from the Fish and Game Commission meeting of October 8, 1993 and clarified that the cultivation of Manila clams (*Venerupis philippinarum*) on Lease M-438-01 is authorized as was originally requested by the former lessee, Johnson Oyster Company;

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

That, in accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby amend said lease for such consideration, specific purposes, and subject to covenants, terms, conditions, reservations, restrictions and limitations as are set forth herein, and does hereby grant to Lessee the exclusive privilege to cultivate shellfish thereon, and in all that certain real property situated in the County of Marin, State of California, described as follows:

Number M-438-01

Two parcels of water bottoms in Drakes Estero, county of Marin, State of California, and being particularly described as follows:

Parcel 1.

Beginning at a point near the oyster plant site of Johnson Oyster Company which bears South 43° 25' 25" West 3667.148 feet from the most easterly corner of that certain parcel of land conveyed by James and Margaret McClure of R.C.S. Communications Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at Page 93, Marin County Records; and running thence North 59° West 420 feet to a point on the high water line of Drakes Estero, Marin County, State of California, which is the true point of beginning for this allotment; thence South 17° West 90 feet to the Northeasterly edge of a 100-foot boat passageway along the deepest water of Schooner Bay; thence following along the Easterly edge of said boat passageway South 58° 30' East 420 feet; South 10° West 600 feet; South 39° 30' West 1820 feet; South 8° West 650 feet to the Southeasterly edge of the 100-foot passageway; thence North 86° 30' East 390 feet; South 3600 feet; South 20° East 3410 feet to the Northwesterly point of the sheer cliff separating Home Bay from Drakes Estero, said point having U.S.G.S. grid coordinates 38° 3' 18" N. 122° 55' 54" W.; thence following along the high water line of Home Bay Northeasterly to the extremity of Home Bay; thence Northerly and Southwesterly along the high water line of Home Bay to Schooner Bay; thence Northerly along the high water line of Schooner Bay to the point of beginning; said Parcel containing 350 acres, more or less.

Parcel 2.

Beginning at a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning of Parcel 1; thence North 17° East 160 feet to the Northwesterly corner of the 100-foot Schooner Bay Boat passageway; thence following along the Westerly edge of said passageway along the deepest water in Schooner Bay South 58° 30' East 175 feet; 10° West, 500 feet; South 29°30' West 1916 feet; South 8° West 690 feet to the Southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 47° East 1,340 feet; North 80° East 1,300 feet; North 53° East 2,100 feet; South 1,410 feet; South 59° West 1,510 feet; South 17° East 1,300 feet; South 65° West 1,080 feet; South 79° West 1,480 feet to a point on the high water line on the Westerly shore of the main body of Drakes Estero having a U.S.G.S. grid coordinates 38° 2' 41" N., 122° 56' 51" W.; thence following Northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the Westerly shore of Drakes Estero; thence Northwesterly along the high water line of the Western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence Southerly along the high water line of the Eastern and Southern shores of

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Creamery Bay and following Northeasterly along the Westerly shore of Schooner Bay along the high water line to the point of beginning at the Northwesterly edge of the 100-foot boat passageway.

Excepting therefrom, a one-acre parcel designated as Aquaculture Lease No. M-438-02, said Parcel 2 containing 709 acres, more or less.

These parcels 1 and 2, containing 1,059 acres, more or less, together comprise Aquaculture Lease Number M-438-01.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating Pacific oyster (*Crassostrea gigas*), Manila clams (*Tapes japonica*), and European flat oyster (*Ostrea edulis*), in the previously designated area.

The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

Shellfish cultivation methods approved for the lease shall be stakes, racks, and bottom culture within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, 619 Second Street, Eureka, California 95501, telephone (707) 445-5365, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States Mail, certified and postage prepaid and addressed as follows:

To the Lessor

DEPARTMENT OF FISH AND GAME
1416 Ninth Street
Sacramento, CA 95814

To the Lessee

MR. KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

Number M-438-01

17171 Sir Francis Drake Boulevard
Inverness, CA 94937

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed as aforesaid to either party may be changed by written notice given by such party to the other, as hereinbefore provided.

This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown and harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

Lessee must recognize that compliance by certified shellfish harvesters with the conditions and procedures set forth in the Department of Health Service's current "Management Plan for Commercial Shellfishing in Drakes Estero, California" and in the current "Contingency Plan for Marine Biotoxins in California Shellfish" is mandatory. These conditions and procedures establish classifications for certification to harvest shellfish (oysters, mussels and clams) and establish rainfall closures which may delay or prevent harvesting of cultured organisms from this lease and are a condition of the Shellfish Growing Area Certificate.

Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have caused this amendment to said aquaculture lease to be executed as of the day and year first above written.

APPROVED:

FISH AND GAME COMMISSION

By: _____
John Carlson, Jr., Executive Director

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME**

Number M-438-01

By: _____
Lessor

KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

By: _____
Lessee

EXHIBIT 3

RENEWAL OF LEASE

Made this 25th day of June, 2004 at Crescent City, California, by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor" and Johnson Oyster Company, hereinafter referred to as "Lessee."

WITNESSETH:

WHEREAS, Lessee indicated an interest in renewing a prior lease agreement in correspondence dated May 28th, 2003 and exercised that option by requesting Fish and Game Commission consideration of the request in correspondence dated April 8, 2004, and

WHEREAS, The Fish and Game Commission at the May 4, 2004, meeting in San Diego, California granted the Lessee's request to extend the lease for 90 days to negotiate specific terms and conditions for the new lease.

WHEREAS, Lessee is presently a registered aquaculturist authorized to grow marine life for profit in the waters of the State of California as provided in Section 15101 of the Fish and Game Code, and

WHEREAS, Lessee expressed support for the Lessor's recommended approval of the requested lease renewal for a 25-year period, contingent on a concurrent Federal Reservation of Use and Occupancy for fee land in the Point Reyes National Seashore, at an initial lease rate of twenty dollars (\$20.00) per acre at signing, subject to adjustment considering changes in the Consumer Price Index and current lease rates no more often than every five years, at the Fish and Game Commission's discretion, and.

WHEREAS, the Fish and Game Commission determined that a lease renewal was in the best interest of the State of California at the June 25, 2004, meeting in Crescent City, California and approved the renewal based on the renegotiated lease terms recommended by the Department of Fish and Game.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That, in consideration of payment of the monies hereinafter stated in accordance with the renegotiated terms recommended by the Lessor and accepted at a duly called and noticed hearing of the Fish and Game Commission of the State of California, pursuant to law and in consideration of the covenants contained herein on the part of the Lessee, Lessor does hereby grant to Lessee the exclusive privilege to cultivate approved shellfish hereon and in those certain waters of the State of California described as follows, to wit:

All that certain real property situated in the County of Marin, State of California, described as follows:

An area of one (1) acre lying within the following described area:

Beginning at a point on the high water line of Drakes Estero, Marin County, State of California which is the true point of beginning for Oyster Allotment No. M-438-01, then southwesterly to a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning and true point of beginning for Parcel No. 2 of said allotment; thence North 17° East 160 feet to the Northwesterly corner of the 100-foot Schooner Bay boat passageway along the deepest water in Schooner Bay South 58° 30' East 175 feet; South 10° West 500 feet; South 29° 30' West 1950 feet; South 8° West, 690 feet to the southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 50° West, 2400 feet; South 80° West 1250 feet; South 10° East 1375 feet; North 10° East 1250 feet; North 37° East 2100 feet; South 4° East 1410 feet; South 58° West 1700 feet; South 20° East 1300 feet; South 85° West 1100 feet; thence due West 1300 feet to a point on the high water line on the westerly shore of the main body of Drakes Estero having U.S.G.S. grid coordinates 38° 2' 41", 122° 56' 51" W.; thence following northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the westerly shore of Drakes Estero; thence northwesterly along the high water line of the western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence southerly along the high water line of the eastern and southern shores of Creamery Bay and following northeasterly along the westerly shore of Schooner Bay along the high water line to the point of beginning at the northwesterly edge of the 100-foot boat passageway.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating purple-hinged rock scallops and Manila clams, in the previously designated area. The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

All shellfish cultivation on the lease shall be confined to racks and in trays within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, P.O. Box 1560, Bodega Bay, California 94923, telephone (707) 875-4261, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

In accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby renew said lease for such consideration, specific purposes and subject to covenants, terms, conditions, reservation, restrictions and limitation as are set forth herein.

This lease renewal is authorized for a term of twenty-five (25) years commencing on the 25TH day of June, 2004, and ending on the 24th day of June, 2029, contingent on a concurrent federal Reservation of Use and Occupancy for fee land in the Point Reyes National Seashore, at an initial lease rate of twenty dollars (\$20.00) per acre at signing, subject to adjustment considering changes in the Consumer Price Index and current lease rates no more often than every five years, at the Fish and Game Commission's discretion, and a privilege tax on all products harvested as provided by Fish and Game Code Sections 8051, 18406.5, and 15406.7. Beginning January 1, 2005, said annual rental fee will be payable to Lessor on a calendar year basis, January 1 – December 31. If said annual rental fee is not paid within sixty (60) days after the close of the month in which it is due, an additional 10 percent penalty shall be paid. Lessor, at its option, may declare the lease abandoned for failure to pay such rental fees within 90 days from the beginning of the rental period; although such abandonment shall not relieve Lessee of its obligation to pay such rental and penalty which are due and owing. Lessee agrees to pay Lessor reasonable attorney fees and costs incurred in collecting any amounts and/or penalties due and owing from Lessee under the provisions of this lease. Lessee agrees to pay said fee(s) to Lessor at its office in the City of Sacramento, State of California, or at such other place as Lessor may, from time to time, designate.

Lessee expressly recognizes and acknowledges that any payments by Lessee as provided for herein are subject to the provisions of Section 15410 of the Fish and Game Code which states "All leases shall be subject to the power of the Legislature to increase or decrease the rents, fees, taxes, and other charges relating to the lease, but no increase in rent shall be applicable to an existing lease until it is renewed."

This lease is made upon the following additional terms, conditions, and covenants, to wit:

- A. This lease may, at the option of Lessee, be renewed for additional periods not to exceed 25 years each. If the Lessee desires to enter into a new lease for a period commencing after expiration of the initial 25-year term, Lessee shall give

notice to Lessor one (1) year prior to termination of the lease. The lease may be renewed if, during the notification period, terms for a new lease are agreed upon by Lessee and the Commission. Lessor retains the right to renegotiate terms of the lease, including annual rental rates, subject to adjustment considering changes in the Consumer Price Index and current lease rates, at the Fish and Game Commission's discretion, no more often than every five (5) years during the current renewal period.

- B. The lease shall be improved at no less than the minimum rate established by Commission regulations (Section 237(i)(2)(A), Title 14, CCR). A minimum rate of planting shall be negotiated for option periods. Lessor may declare this lease terminated if Lessee fails to meet these requirements, and if Lessee, at any time, is proven to be failing in good faith, to pursue the purpose of this lease.
- D. Lessee shall keep records as required in accordance with Fish and Game Code Section 15414 on forms to be supplied by Lessor, and shall maintain adequate accounting records sufficient to determine monies due to Lessor by the 10th day of each month for all shellfish harvested during the preceding calendar month. Lessor reserves the right to inspect Lessee's premises, equipment and all books at any time, and Lessee's records pertaining to its cultivation on the leased premises.
- E. As evidence of progress in aquaculture, Lessee shall submit each year to the State at the Marine Region office, P.O. Box 1560, Bodega Bay, California 94923, a written declaration under penalty of perjury, showing the date and amount of each type of aquaculture development and date and amount of designated species comprising each planting, including a diagram (map) showing area, amounts, and dates planted. Such annual proof-of-use shall be submitted on or before February 1 of each year for the previous year, January 1 -- December 31, inclusive.
- F. This lease shall be canceled at any time Lessee fails to possess a valid aquaculture registration issued pursuant to Section 15101 of the Fish and Game Code. Lessee agrees not to commit, suffer, or permit any waste on said premises or any act to be done thereon in violation of any laws or ordinances. This lease shall be subject to termination by Lessee at any time during the term hereof, by giving Lessor notice in writing at least ninety (90) days prior to the date when such termination shall become effective. In the event of such termination by Lessee, any unearned rental shall be forfeited to the Lessor.
- G. This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown or harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California

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Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

- H. In addition to the conditions and restrictions herein provided for in this lease, and any right or privilege granted, conveyed or leased hereunder, shall be subject to, and Lessee agrees to comply with all applicable provisions of the California Fish and Game Code, and regulation of the Fish and Game Commission, in particular Sections 15400 - 15415, inclusive, of the Fish and Game Code, and expressly recognizes the right of the Legislature and the Fish and Game Commission to enact new laws and regulations. In the event of any conflict between the provisions of this lease and any law or regulation, the latter will control. This lease shall be deemed amended automatically upon the effective date of such conflicting law or regulation.
- I. This lease is personal to the Lessee and shall not be transferred, assigned, hypothecated or subleased, either voluntarily or by operation of law, without prior approval of the Fish and Game Commission.
- J. The waiver by the Lessor of any default or breach of any term, covenant or condition shall not constitute a waiver of any other default or breach, whether of the same or any other term, covenant or condition, regardless of the Lessor's knowledge of such other defaults or breaches. The subsequent acceptance of monies hereunder by the Lessor shall not constitute a waiver of any preceding default or breach of any term, covenant or condition, other than the failure of the Lessee to pay the particular monies so accepted, regardless of the Lessor's knowledge of such preceding default or breach at the time of acceptance of such monies, nor shall acceptance of monies after termination constitute a reinstatement, extension or renewal of the agreement or revocation of any notice or other act by the Lessor. In the event of any breach by Lessee of any of the provisions hereof, other than the payment of any sum due from Lessee to Lessor hereunder, which breach is not remedied, abated and cured by Lessee within sixty (60) days after notice in writing, shall cause this lease to thereupon cease and terminate.
- K. All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States Mail, certified and postage prepaid and addressed as follows:

To the Lessor

DEPARTMENT OF FISH AND GAME
1416 Ninth Street
Sacramento, CA 95814

To the Lessee

MR. TOM JOHNSON
JOHNSON OYSTER COMPANY
P.O. Box 69
Inverness, CA 94937

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed as aforesaid to either party may be changed by written notice given by such party to the other, as hereinbefore provided.

- L. Lessee shall observe and comply with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law, including but not limited to State Water Resources Control Board, State Coastal Commission, State Lands Commission, and U.S. Army Corps of Engineers. Any other permits or licenses required by such agencies will be obtained by Lessee at his own sole cost and expense.
- M. Lessee recognizes and understands in accepting this lease that his interest therein may be subject to a possible possessory interest tax that the county may impose on such interest, and that such tax payment shall not reduce any rent or royalty due the Lessor hereunder and any such tax shall be the liability of and be paid by Lessee.
- N. Any modification of natural or existing features of the real property described in this lease, which are not consistent with the authorized uses under this lease are expressly prohibited without prior written consent of the Lessor.
- O. Lessee shall not assign or transfer this agreement without prior written approval. Such written approval of the assignment or transfer of lease shall be subject to any and all conditions required by the Fish and Game Commission including, without limitation by reason of the specifications herein, the altering, changing or amending of this agreement as deemed by the Commission to be in the best interest of the State.
- P. The lease does not imply that any guarantee is given that shellfish may be grown and harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

Lessee must recognize that compliance by certified shellfish harvesters with the conditions and procedures set forth in the Department of Health Service's current

"Management Plan for Commercial Shellfishing in Drakes Estero, California" and in the current "Contingency Plan for Marine Biotoxins in California Shellfish" is mandatory. These conditions and procedures establish classifications for certification to harvest shellfish (oysters, mussels and clams) and establish rainfall closures which may delay or prevent harvesting of cultured organisms from this lease and are a condition of the Shellfish Growing Area Certificate.

- Q. The terms, provisions, and conditions hereof shall be binding upon and inure to the benefit of the parties and the successors, and assigns of the parties hereto
- R. The attached Nondiscrimination Clause (OCP-1) is hereby made a part of this agreement.

Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

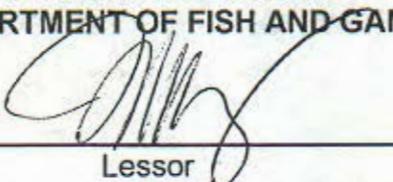
IN WITNESS THEREOF, the parties hereto have caused this lease to be duly executed as of the day and year first above written.

APPROVED:

FISH AND GAME COMMISSION

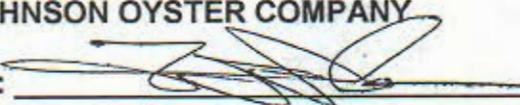
By: Robert R. Treanor

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME**

By: 
Lessor

Renee Renwick Deputy Director, Administration

**TOM JOHNSON
JOHNSON OYSTER COMPANY**

By: 
Lessee

STATE OF CALIFORNIA }
COUNTY OF Sonoma } SS

On 12/08/04 before me, Sara L. Huddleston, Notary Public,
personally appeared Tom Johnson

personally known to me

NAME(S) OF SIGNER(S)
- OR - proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Sara L. Huddleston
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

PARTNER(S)
LIMITED or GENERAL
ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER:

DESCRIPTION OF ATTACHED DOCUMENT

Renewal of Lease
TITLE OR TYPE OF DOCUMENT

8 Pages total
NUMBER OF PAGES

12/08/04
DATE OF DOCUMENT

SIGNER IS REPRESENTING:

NAME OF PERSON(S) OR ENTITY(IES)

N/A
SIGNER(S) OTHER THAN NAMED ABOVE

Number M-438-02

**AMENDMENT NO. 3
TO
INDENTURE OF LEASE**

This amendment of Aquaculture Lease is made and entered into as of the 18th day of March 2005, by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor" and Drakes Bay Oyster Company, hereinafter referred to as "Lessee."

WITNESSETH:

WHEREAS, the parties hereto did on June 1, 1979, enter into Lease Agreement No. M-438-02 for the purpose of cultivating purple-hinged rock scallops, and

WHEREAS, Lessee in accordance with the terms of said lease agreement applied to the Fish and Game Commission for authority to cultivate Manila clams (*Tapes japonica*) on the lease, and on October 8, 1993 an amendment to said lease was approved, and

WHEREAS, the Fish and Game Commission at its meeting on October 7, 1994, adopted new administrative procedures to standardize annual proof-of-use reporting and the rental period for aquaculture leaseholds, and Lessor amended said lease on April 1, 1996 to reflect these changes, and

WHEREAS, the Fish and Game Commission determined that a lease renewal was in the best interest of the State of California at the June 25, 2004, meeting in Crescent City, California and approved the renewal based on the renegotiated lease terms recommended by the Department of Fish and Game, and

WHEREAS, Johnson Oyster Company requested that title to Lease Agreement (No. M-438-02) be transferred to Drakes Bay Oyster Company and the Fish and Game Commission at its meeting on March 18, 2005, authorized the transfer of title of State Water Bottoms Lease M-438-02, from Johnson Oyster Company to Drakes Bay Oyster Company;

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

That, in accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby amend said lease for such consideration, specific purposes, and subject to covenants, terms, conditions, reservations, restrictions and limitations as are set forth herein, and does hereby grant to Lessee the exclusive privilege to cultivate shellfish thereon, and in all that certain real property situated in the County of Marin, State of California, described as follows:

Number M-438-02

An area of one (1) acre lying within the following described area:

Beginning at a point on the high water line of Drakes Estero, Marin County, State of California which is the true point of beginning for Oyster Allotment No. M-438-01, then southwesterly to a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning and true point of beginning for Parcel No. 2 of said allotment; thence North 17° East 160 feet to the Northwesterly corner of the 100-foot Schooner Bay boat passageway along the deepest water in Schooner Bay South 58° 30' East 175 feet; South 10° West 500 feet; South 29° 30' West 1950 feet; South 8° West, 690 feet to the southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 50° West, 2400 feet; South 80° West 1250 feet; South 10° East 1375 feet; North 10° East 1250 feet; North 37° East 2100 feet; South 4° East 1410 feet; South 58° West 1700 feet; South 20° East 1300 feet; South 85° West 1100 feet; thence due West 1300 feet to a point on the high water line on the westerly shore of the main body of Drakes Estero having U.S.G.S. grid coordinates 38° 2' 41", 122° 56' 51" W.; thence following northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the westerly shore of Drakes Estero; thence northwesterly along the high water line of the western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence southerly along the high water line of the eastern and southern shores of Creamery Bay and following northeasterly along the westerly shore of Schooner Bay along the high water line to the point of beginning at the northwesterly edge of the 100-foot boat passageway.

This parcel containing 1 acre, more or less, comprises Aquaculture Lease No. M-438-02.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating purple-hinged rock scallops (*Crassodoma gigantea* formerly *H. multirugosus*) and Manila clams (*Venerupis philippinarum* formerly *T. japonica*), in the previously designated area.

The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

Number M-438-02

All shellfish cultivation on the lease shall be confined to racks and in trays within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, P.O. Box 1560, Bodega Bay, California 94923, telephone (707) 875-4261, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

This lease is made upon the following additional terms, conditions, and covenants, to wit:

All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States Mail, certified and postage prepaid and addressed as follows:

To the Lessor	DEPARTMENT OF FISH AND GAME 1416 Ninth Street Sacramento, CA 95814
---------------	--

To the Lessee	MR. KEVIN LUNNY DRAKES BAY OYSTER COMPANY P.O. Box 69 Inverness, CA 94937
---------------	--

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed as aforesaid to either party may be changed by written notice given by such party to the other, as hereinbefore provided.

This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown and harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

Lessee must recognize that compliance by certified shellfish harvesters with the conditions and procedures set forth in the Department of Health Service's current "Management Plan for Commercial Shellfishing in Drakes Estero, California" and in the

12/19/2005 10:22 9164455151

PAGE 04/06

Number M-438-02

current "Contingency Plan for Marine Biotoxins in California Shellfish" is mandatory. These conditions and procedures establish classifications for certification to harvest shellfish (oysters, mussels and clams) and establish rainfall closures which may delay or prevent harvesting of cultured organisms from this lease and are a condition of the Shellfish Growing Area Certificate.

Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have caused this amendment to said aquaculture lease to be executed as of the day and year first above written.

APPROVED:

FISH AND GAME COMMISSION

By: Robert R. Treanor
Robert R. Treanor, Executive Director

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By: Kevin Lunny
Lessor

KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

By: Kevin Lunny
Lessee

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA } SS
COUNTY OF Sonoma

On 12/02/05 before me, Chris Mark Krupansky

personally appeared Kevin Lemay
personally known to me

NAME(S) OF SIGNER(S)
- OR - proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/henrtheir authorized capacity(ies), and that by his/henrtheir signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.
Chris Mark Krupansky
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

PARTNER(S)
LIMITED or GENERAL
ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER:

DESCRIPTION OF ATTACHED DOCUMENT

Amendment #3 to Indenture of Lease
TITLE OR TYPE OF DOCUMENT

5 pages
NUMBER OF PAGES

12/2/05
DATE OF DOCUMENT

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

Robert R. Trauer
SIGNER(S) OTHER THAN NAMED ABOVE



**AMENDMENT NO. 4
TO
INDENTURE OF LEASE**

This amendment of Aquaculture Lease is made and entered into as of the 10th day of December 2009, by and between the State of California, acting by and through its Department of Fish and Game, hereinafter referred to as "Lessor" and Drakes Bay Oyster Company, hereinafter referred to as "Lessee."

WITNESSETH:

WHEREAS, the parties hereto did on June 1, 1979, enter into Lease Agreement No. M-438-02 for the purpose of cultivating purple-hinged rock scallops, and

WHEREAS, Lessee in accordance with the terms of said lease agreement applied to the Fish and Game Commission for authority to cultivate Manila clams (*Tapes japonica*) on the lease, and on October 8, 1993 an amendment to said lease was approved, and

WHEREAS, the Fish and Game Commission at its meeting on October 7, 1994, adopted new administrative procedures to standardize annual proof-of-use reporting and the rental period for aquaculture leaseholds, and Lessor amended said lease on April 1, 1996 to reflect these changes, and

WHEREAS, the Fish and Game Commission determined that a lease renewal was in the best interest of the State of California at the June 25, 2004, meeting in Crescent City, California and approved the renewal based on the renegotiated lease terms recommended by the Department of Fish and Game, and

WHEREAS, Johnson Oyster Company requested that title to Lease Agreement (No. M-438-02) be transferred to Drakes Bay Oyster Company and the Fish and Game Commission at its meeting on March 18, 2005, authorized the transfer of title of State Water Bottoms Lease M-438-02, from Johnson Oyster Company to Drakes Bay Oyster Company, and

WHEREAS, the Fish and Game Commission at its meeting on December 10, 2009, corrected a clerical error from the Fish and Game Commission meeting of October 8, 1993 and removed Manila clams (*Tapes japonica*) from Lease M-438-02;

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

That, in accordance with actions taken by the Fish and Game Commission of the State of California, pursuant to Fish and Game Code Section 15400, Lessor does hereby amend said lease for such consideration, specific purposes, and subject to

covenants, terms, conditions, reservations, restrictions and limitations as are set forth herein, and does hereby grant to Lessee the exclusive privilege to cultivate shellfish thereon, and in all that certain real property situated in the County of Marin, State of California, described as follows:

An area of one (1) acre lying within the following described area:

Beginning at a point on the high water line of Drakes Estero, Marin County, State of California which is the true point of beginning for Oyster Allotment No. M-438-01, then southwesterly to a point on the high water line on the West Shore of Schooner Bay, said point bearing South 17° West 420 feet from the point of beginning and true point of beginning for Parcel No. 2 of said allotment; thence North 17° East 160 feet to the Northwestern corner of the 100-foot Schooner Bay boat passageway along the deepest water in Schooner Bay South 58° 30' East 175 feet; South 10° West 500 feet; South 29° 30' West 1950 feet; South 8° West, 690 feet to the southerly end of the 100-foot passageway; thence South 4° East 5100 feet; South 50° West, 2400 feet; South 80° West 1250 feet; South 10° East 1375 feet; North 10° East 1250 feet; North 37° East 2100 feet; South 4° East 1410 feet; South 58° West 1700 feet; South 20° East 1300 feet; South 85° West 1100 feet; thence due West 1300 feet to a point on the high water line on the westerly shore of the main body of Drakes Estero having U.S.G.S. grid coordinates 38° 2' 41", 122° 56' 51" W.; thence following northwesterly along the high water line of Barries Bay to its extremity; thence Southeasterly along the high water line of Barries Bay to the westerly shore of Drakes Estero; thence northwesterly along the high water line of the western shore of Drakes Estero and Creamery Bay to the extremity of Creamery Bay; thence southerly along the high water line of the eastern and southern shores of Creamery Bay and following northeasterly along the westerly shore of Schooner Bay along the high water line to the point of beginning at the northwesterly edge of the 100-foot boat passageway.

This parcel containing 1 acre, more or less, comprises Aquaculture Lease No. M-438-02.

This lease, in accordance with provisions of Section 15400 of the Fish and Game Code, as may from time to time be amended or changed by the State Legislature, is for the sole purpose of cultivating purple-hinged rock scallops (*Crassodoma gigantea* formerly *H. multirugosus*), in the previously designated area.

The cultivation of additional species of aquatic plants or animals must have approval of the Fish and Game Commission. Seed stock must be certified before planting in compliance with Section 15201 of the Fish and Game Code, and must be planted by Lessee in a manner and at a size approved by the Lessor to assure that harvested animals are a product of the lease. A request for certification of planting

stock will be submitted by Lessee to the Lessor at least ten (10) days prior to the proposed date of inspection.

All shellfish cultivation on the lease shall be confined to racks and in trays within the area approved by the Commission. No other mode of operation or culture method is authorized unless Lessee shall first obtain approval thereof from the Fish and Game Commission.

The notice of intent to plant shellfish on the lease shall be given to the Department of Fish and Game's, Marine Region Aquaculture Coordinator, 619 Second Street, Eureka, California 95501, telephone (707) 445-5365, or at such other place as Lessor may from time to time designate. In addition to the required ten (10) day notice, at least a 24-hour notice shall be given to the aquaculture coordinator or their designee, giving the details on where the shellfish seed can be inspected.

All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States Mail, certified and postage prepaid and addressed as follows:

To the Lessor	DEPARTMENT OF FISH AND GAME 1416 Ninth Street Sacramento, CA 95814
To the Lessee	MR. KEVIN LUNNY DRAKES BAY OYSTER COMPANY P.O. Box 69 Inverness, CA 94937

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed as aforesaid to either party may be changed by written notice given by such party to the other, as hereinbefore provided.

This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown and harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Health Services has the authority (Health and Safety Code Section 28500 et. seq.) to certify and regulate sanitary procedures followed in the harvesting, handling, processing, storage, and distribution of bivalve mollusk shellfish intended for human consumption.

Lessee must recognize that compliance by certified shellfish harvesters with the conditions and procedures set forth in the Department of Health Service's current "Management Plan for Commercial Shellfishing in Drakes Estero, California" and in the

Number M-438-02

current "Contingency Plan for Marine Biotoxins in California Shellfish" is mandatory. These conditions and procedures establish classifications for certification to harvest shellfish (oysters, mussels and clams) and establish rainfall closures which may delay or prevent harvesting of cultured organisms from this lease and are a condition of the Shellfish Growing Area Certificate.

Except as herein amended, all other terms of said lease agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have caused this amendment to said aquaculture lease to be executed as of the day and year first above written.

APPROVED:

FISH AND GAME COMMISSION

By: _____
John Carlson, Jr., Executive Director

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME**

By: _____
Lessor

**KEVIN LUNNY
DRAKES BAY OYSTER COMPANY**

By: _____
Lessee

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rrwaterman@stoel.com

16 *Counsel List Continues On Next Page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
JONATHAN JARVIS,
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240;
and

DOES 1-100.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF KEVIN LUNNY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

EXHIBIT 4

Form 10-114
Rev. Jan. 00

Page 1 of 17

UNITED STATES DEPARTMENT OF THE INTERIOR
National Park Service
Special Use Permit

Name of Use: Aquaculture

Date Permit Reviewed 2008
Reviewed 20
Reviewed 20
Expires November 30, 2012

Long Term X
Short Term

Permit # MISC-8530-6000-8002
Type Park Code No. #
Point Reyes National Seashore

Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937
(415) 669-1149

is hereby authorized for a period ("Term") commencing on April, 2008 ("Commencement Date") and terminating on November 30, 2012 ("Expiration Date") to use the following described land, improvements, and waters in the following area:

the lands and improvements at Drakes Bay Estero at the former Johnson's Oyster Site consisting of approximately 1.1 acres of land and improvements designated as the "SUP Area" on the map attached hereto as Exhibit B ("Drake's Estero Oysters - SUP & ROP"); the waters designated as the "SUP Area" on the map attached hereto as Exhibit A ("Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area"); the land designated as the "Well Area" on the map attached hereto as Exhibit D ("Drakes Bay Oyster Company Well Area"); and the land designated as the "Sewage Area" on the map attached hereto as Exhibit E ("Drakes Bay Oyster Company Sewage Area"). Collectively, the areas so designated shall be referred to as the "Premises." The Premises governed by this Permit do not include the area designated as the ROP Area on the map attached hereto as Exhibit B.

For the purpose(s) of:

Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit B for the purpose of processing shellfish, the interpretation of shellfish cultivation to the visiting public, and residential purposes reasonably incidental thereto. Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit A for the purpose of shellfish cultivation. Use of the area designated as the "Well Area" on the map attached hereto as Exhibit D for the purpose of supplying water for the Drakes Bay Oyster Company facilities using Permittee well, pump, and pipelines. Use of the area designated as the "Sewage Area" on the map attached hereto as Exhibit E for the purpose of use and maintenance of existing sewage pipeline and sewage leachfield to service the Drakes Bay Oyster Company facilities. Collectively, the uses set forth in this paragraph shall be referred to as the "Permitted Uses."

Authorizing legislation or other authority (RE - DO-53): 16 U.S.C. 1, 1a-1, 3 & 459c; the Reservation of Use and Occupancy.

NEPA & NHPA Compliance: NEPA compliance pending

PERFORMANCE BOND: Required Not Required X Amount:
LIABILITY INSURANCE: Required X Not Required Amount: As set forth in Article 15 of this Permit.

ISSUANCE of this Permit is subject to the terms, covenants, obligations, and reservations, expressed or implied herein and to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of \$2,800.00 per year, plus an amount to be determined by appraisal for the use of the Sewage Area and the Well Area including water use.

PERMITTEE: [Signature] Drakes Bay Oyster Company 4/22/08
Signature Organization Date
Authorizing Official: George J. Turnbull George Turnbull 4/22/08
Signature Deputy Regional Director Date

LIST OF EXHIBITS

- EXHIBIT A: Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area
- EXHIBIT B: Map – Drake's Estero Oysters – SUP & ROP
- EXHIBIT C: Drakes Estero Aquaculture and Harbor Seal Protection Protocol
- EXHIBIT D: Map – Drakes Bay Oyster Company Well Area
- EXHIBIT E: Map – Drakes Bay Oyster Company Sewage Area



CONDITIONS OF THIS PERMIT

1) DEFINITIONS

As used in this Permit, the following terms shall have the following meanings:

- a) "Agency" means any agency, department, commission, board, bureau, office or other governmental authority having jurisdiction.
- b) "Applicable Laws" includes, without limitation all present and future statutes, regulations, requirements, Environmental Requirements, guidelines, judgments, or orders of any Agency or judicial body, whether now existing or hereafter established, relating to or affecting the Premises or the use or occupancy of the Premises.
- c) "Commencement Date" is as defined on the Cover Page of this Permit.
- d) "Cyclic Maintenance" means (i) the performance by Permittee of all repairs, maintenance, or replacement-in-kind necessary to maintain the Premises and the existing improvements thereon in good order, condition, and repair; (ii) housekeeping and routine and periodic work scheduled to mitigate wear and deterioration without materially altering the appearance of the Premises; (iii) the repair or replacement-in-kind of broken or worn-out elements, parts or surfaces so as to maintain the existing appearance of the Premises; and (iv) scheduled inspections of all building systems on the Premises.
- e) "Default" means Permittee's failure to keep and perform any of the Provisions of this Permit.
- f) "Environmental Requirements" means, without limitation, all standards or requirements relating to the protection of human health or the environment such as:
 - a. standards or requirements pertaining to the reporting, permitting, management, monitoring, investigation or remediation of emissions, discharges, releases, or threatened emissions, releases or discharges of Hazardous Materials into the air, surface water, groundwater, or land;
 - b. standards or requirements relating to the manufacture, handling, treatment, storage, disposal, or transport of Hazardous Materials; and
 - c. standards or requirements pertaining to the health and safety of employees or the public.
- g) "Expiration Date" is as defined on the Cover Page of this Permit.
- h) "Hazardous Materials" means, without limitation, any material or substance, whether solid, liquid, or gaseous in nature,
 - a. the presence of which requires reporting, permitting, management, monitoring, investigation or remediation under any Environmental Requirement;
 - b. that is or becomes defined as a "hazardous waste," "extremely hazardous waste," "restricted hazardous waste," "hazardous substance," "pollutant," "discharge," "waste," "contaminant," or "toxic contaminant" under any Environmental Requirement, or any above-ground or underground storage containers for the foregoing;
 - c. that is toxic, explosive, corrosive, flammable, infectious, radioactive, reactive, carcinogenic, mutagenic, or otherwise hazardous to human health or the environment and is or becomes regulated under any Environmental Requirement;
 - d. that contains gasoline, diesel fuel or other petroleum hydrocarbons or derivatives or volatile organic compounds, or is an above-ground or underground storage container for same;

- e. that contains polychlorinated biphenyls (PCBs), asbestos, asbestos-containing materials or urea formaldehyde foam insulation; or
- f. that contains radon gas.
- i) "Hazardous Materials Occurrence" means any use, generation, treatment, keeping, storage, transport, release, disposal, migration, or discharge of any Hazardous Materials from, on, under or into the Premises or Point Reyes National Seashore ("Point Reyes") that causes any environmental contamination.
- j) "Improvements or Alterations" means any construction that does not fall within the definition of Cyclic Maintenance.
- k) "NPS" means the management officials in charge of the administration and operation of Point Reyes, including the Superintendent or his/her designee(s).
- l) "Park" means, without limitation, all lands, waters and structures within the legislative boundaries of the Point Reyes National Seashore, all natural and cultural resources within such boundaries, and any other property within such boundaries belonging to Point Reyes. As appropriate given the context, this term also includes the visiting public and/or Point Reyes employees.
- m) "Permit" means this instrument which contains those certain termination and revocation provisions as provided for herein.
- n) "Permitted Uses" is as defined on the Cover Page of this Permit.
- o) "Personal Property" means all furniture, fixtures, equipment, appliances and apparatus placed on the Premises that neither are attached to nor form a part of the Premises. Personal Property also includes any trailers, modular units, and/or temporary structures owned by Permittee.
- p) "Point Reyes" means Point Reyes National Seashore.
- q) "Premises" is as defined on the Cover Page of this Permit.
- r) "Provision" shall mean any term, agreement, covenant, condition or provision of this Permit or any combination of the foregoing.
- s) "ROP" or "Reservation of Use and Occupancy" means the Reservation of Use and Occupancy purchased by the Permittee in 2005. In 1972 the United States of America purchased Johnson Oyster Company's property, subject to a Reservation of Use and Occupancy on approximately 1.5 of those acres for a period of forty (40) years. This Reservation of Use and Occupancy expires on November 30, 2012.
- t) "SUP" means this Permit.
- u) "Term" is as defined on the Cover Page of this Permit.
- v) "Termination Date" means the Expiration Date or such earlier date as this Permit is terminated or revoked pursuant to any Provision of this Permit.

2) GENERAL CONDITIONS

- a) The Permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with all Applicable Laws.
- b) Permit and Approvals – Except as otherwise provided in this Permit, Permittee shall be responsible for obtaining, at its sole cost and expense, all necessary permits, approvals or other authorizations relating to Permittee's use and occupancy of the Premises.

- c) Damages - The Permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the Permittee is authorized to make of the land and areas described in this Permit.
- d) Benefit - Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this Permit or derive, either directly or indirectly any pecuniary benefits to arise therefrom: Provided, however, that nothing herein contained shall be construed to extend to any incorporated company if the Permit be for the benefit of such corporation.
- e) Assignment and Subletting - This Permit may not be transferred or assigned without the consent of the Permitter, in writing. Permittee shall not sublet the Premises or any part thereof or any property thereon, nor grant any interest, privilege or license whatsoever in connection with this Permit without the prior written approval of the Permitter.
- f) Revocation - This Permit may be terminated upon Default or at the discretion of the Permitter.
- g) The Permittee is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(4)]

3) USE OF PREMISES

- a) Permittee is authorized to use the Premises only for the Permitted Uses.
- b) Permittee shall not engage in any activity that may be dangerous or harmful to persons, property, or the Park; that constitutes or results in waste or unreasonable annoyance (including, without limitation, signage and the use of loudspeakers or sound or light apparatus that could disturb park visitors and wildlife outside the Premises); that in any manner causes or results in a nuisance; or that is of a nature that it involves a substantial hazard, such as the manufacture or use of explosives, chemicals or products that may explode.
- c) The Parties hereby acknowledge and agree that Permittee's covenant that the Premises shall be used as set forth in this Article 3 is material consideration for Permitter's agreement to enter into this Permit. The Parties further acknowledge and agree that any violation of said covenant shall constitute a Default under this Permit and that Permitter may inspect the premises at any time.
- d) This Permit is subject to the right of the NPS to establish trails and other improvements and betterments over, upon, or through the Premises and further to the use by travelers and others of such established or existing roads and trails. The Permittee understands that occasional park visitors are authorized to walk, use non-motorized watercraft, or hike in the various areas included in this Permit even though no trails are formally established.
- e) Permitter reserves the right for Permitter, its employees, contractors and agents to enter and to permit any Agency to enter upon the Premises for the purposes of inspection, inventory or when otherwise deemed appropriate by the Permitter for the protection of the interests of Permitter, including Permitter's interests in any natural or cultural resources located on, in or under the Premises.
- f) Permitter reserves the right at any time to close to travel any of its lands, to erect and maintain gates at any point thereon, to regulate or prevent traffic of any kind thereon, to prescribe the methods of use thereof, and to maintain complete dominion over the same; provided, however, that at all times during the Term, Permitter shall provide Permittee and Permittee's invitees with reasonable access to the Premises subject only to interruptions caused by necessary maintenance or administrative operations or by matters beyond Permitter's control.
- g) Permittee hereby waives any claim for damages for any injury, inconvenience to or interference with Permittee's use and occupancy of the Premises, any loss of occupancy or quiet enjoyment of the Premises, or any other loss occasioned by Permitter's exercise of its rights under this Article 3 except to the extent that the damages, expenses, claims or suits result from the willful misconduct or gross negligence of Permitter, its employees, contractors or agents; provided, further, that Permitter shall be liable only to the extent such claims are allowed

under the Federal Tort Claims Act.

- h) Members of the general public visiting the Drakes Bay Oyster Company operation may park in the adjacent NPS parking area and walk over to the SUP or ROP areas.
- i) While Permittee is permitted to use and operate motorized watercraft in Drakes Estero for the purpose of conducting daily business operations, which can include occasional inspections required by Agencies, no other use of Permittee's motorized watercraft is authorized. No motorized watercraft may enter the designated wilderness boundary (See "Existing Wilderness" on map attached hereto as Exhibit A). To protect water quality in the Estero, any additional or replacement boat motors obtained by Permittee must be four stroke motors.
- j) Due to a lack of adequate parking space and restroom facilities for the public, barbecuing is not permitted in the Special Use Permit Area. To comply with this paragraph, Permittee will not encourage barbecuing in the SUP Area. Picnic tables will be provided by the NPS at the adjacent parking area.
- k) Unauthorized discharge into the estuary is prohibited. This prohibition includes any discharge from processing facilities. Notwithstanding the foregoing, discharge of oyster wash water from dock and from hatchery operations is allowed if authorized by relevant Agencies.
- l) In order to ensure public health and safety, Permittee will ensure that Permittee and Permittee's officers, agents, employees, and contractors comply with Applicable Laws regarding pets, including the NPS regulation at 36 C.F.R. § 2.15.
- m) In order to ensure public health and safety, Permittee shall allow all appropriate Federal, State and/ or County agencies; including the United States Department of Health and Human Services, the State of California Department of Health Services and Marin County Community Development Agency Environmental Health Services, to conduct inspections on a routine basis.

4) SPECIAL PERMIT CONDITIONS

- a) If Permittee and Permitter disagree about an issue related to this Permit, they will first make a good faith effort to resolve such issue at the Park level. If they are unable to resolve the issue at the Park level, Permittee may request a review of the issue by the Regional Director.
- b) Based upon the findings of an independent science review and/or NEPA compliance, Permitter reserves its right to modify the provisions of this Article 4. Permitter further reserves its right to incorporate new mitigation provisions based upon the findings of an independent science review.
 - i) Production of all shellfish species shall be capped at the "current production level" as determined under the California Coastal Commission Consent Order No. CCC-07-CD-04.
 - ii) No additional aquaculture racks and/or cultivation infrastructure will be constructed without the prior approval of the Permitter. Operation, repair, and maintenance of infrastructure currently being used for oyster cultivation is permitted.
 - iii) Permittee and Permitter acknowledge the importance of eelgrass within the ecology of the estuary. Permittee will not place bags for shellfish production onto eelgrass.
 - iv) Within sixty (60) days following the signing of this Interim Permit, Permittee will submit for National Park Service approval a boating operations plan, which will indicate dedicated navigation routes, chosen to minimize impacts to eelgrass beds when accessing aquaculture racks and/or cultivation equipment.
 - v) To minimize the chances of introducing invasive species or pathological microorganisms to Drake's Estero, Permittee will only import shellfish in the form of larvae and seed. Within 30 days of the Commencement Date, Permittee shall produce sufficient evidence, for the review and approval of the Permitter, that larvae and seed from outside sources have been certified by the California Department of Fish and Game ("CDFG")

to be free of pathogens. If the Permittee determines that the documentation is insufficient, Permittee shall cease from importing larvae within 30 days of receiving notification of the determination from the Permitter.

- vi) Permittee will not introduce species of shellfish beyond those described in the existing leases from the CDFG. Permittee may seek to conform and/or modify these leases with the CDFG. Any modifications approved by CDFG will be considered by Permitter on a case-by-case basis, and Permittee may not implement any such modifications without the prior written approval of the Permitter.
- vii) Permittee must avoid disturbance to marine mammals and marine mammal haul-out sites. The Marine Mammal Protection Act, 16 U.S.C. 1361 et seq., includes a prohibition against any act of pursuit, torment or annoyance that has the potential to injure or disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. The National Oceanic and Atmospheric Administration (NOAA) recommends maintaining a distance of at least 100 yards to avoid disturbance to seals. Permittee will maintain a distance of at least 100 yards from hauled out seals throughout the year. Permitter will monitor marine mammal populations in Drakes Estero. In addition, during the pupping harbor seal closure period, March 1-June 30, the designated wilderness area (outside of Permit area) is closed to all boats. Permittee will follow "Drakes Estero Aquaculture and Harbor Seal Protection Protocol" attached hereto as Exhibit C. If required by CDHS, watercraft may use the Main Channel identified in Exhibit C during the pupping harbor seal closure period only to access CDHS's sentinel monitoring station for marine biotoxins. Boats shall be operated at low speed, near the eastern shore, to minimize chance of disturbance to harbor seals. No other use of the Main Channel is authorized during the pupping harbor seal closure period.
- c) Permittee's agreement to the provisions of this Permit does not waive Permittee's ability to take contrary positions with regard to similar provisions with other Agencies.

5) ACCEPTANCE OF PREMISES

- a) Prior to entering into this Permit, Permittee has made a thorough, independent examination of the Premises and all matters relevant to Permittee's decision to enter into this Permit, and Permittee is thoroughly familiar with all aspects of the Premises and is satisfied that they are in an acceptable condition and meet Permittee's needs, provided that Permittee and Permitter acknowledge that certain repairs are necessary to comply with Applicable Laws. Permittee will make such repairs at its sole cost and expense in compliance with Applicable Laws.
- b) Permittee expressly agrees to use and occupy the Premises and all improvements thereon in their existing "AS IS" condition "WITH ALL FAULTS" and acknowledges that in entering into this Permit, Permittee does not rely on, and Permitter does not make, any express or implied representations or warranties as to any matters including, without limitation, the suitability of the soil or subsoil; any characteristics of the Premises or improvements thereon; the suitability of the Premises for the approved use; the economic feasibility of Permittee's use and occupancy of the Premises; title to the Premises; the presence of Hazardous Materials in, on, under or in the vicinity of the Premises; or any other matter. Permittee has satisfied itself as to such suitability and other pertinent matters by Permittee's own inquiries and tests into all matters relevant to determining whether to enter into this Permit and Permittee hereby accepts the Premises.

6) CONSTRUCTION OF IMPROVEMENTS OR ALTERATIONS

- a) Permittee may only make those Improvements or Alterations to the Premises that relate to Permittee's use of the Premises as specified in Article 3, "Use of the Premises."
- b) Permittee shall not undertake any Improvements or Alterations to the Premises (including installation of temporary equipment or facilities) without the prior written approval of Permitter.
- c) As a prerequisite to obtaining approval for Improvements or Alterations, Permittee, at Permittee's sole cost and expense, shall submit design plans and any other relevant data for Permitter's approval.
- d) Construction of Improvements or Alterations by Permittee shall be performed in accordance with all Applicable

Laws, including but not limited to general planning, building, and environmental laws and approved design plans and shall be undertaken and completed at Permittee's sole cost and expense.

- e) Permittee shall, upon request, furnish Permitter with a true and correct copy of any contract, and any modification or amendment thereof, with Permittee's contractors, architects, or any other consultants, engaged in connection with this Permit.
- f) Any Improvements or Alterations undertaken by Permittee shall be performed in a good and workmanlike manner and with materials of a quality and standard acceptable to Permitter. Permittee shall also construct, install and maintain equipment and any construction facilities on the Premises in a safe and orderly manner.
- g) Permittee shall not construct any Improvements or Alterations outside the boundaries of the Premises.
- h) Permitter in its discretion is entitled to have on the Premises at any time during the construction of Improvements or Alterations an inspector or representative who shall be entitled to observe all aspects of the construction on the Premises.
- i) All lumber utilized at the site will be processed in compliance with current laws and regulations regarding wood treatments. This includes lumber utilized in assembly and repair of aquaculture racks.
- j) As set forth in Article 17, title to any Improvements or Alterations to the Premises shall be and remain solely in the Permitter.

7) TREATMENT OF REFUSE

- a) Refuse shall be promptly removed from within the boundaries of Point Reyes National Seashore and shall be disposed of in accordance with Applicable Laws.
- b) Permittee will make best efforts to remove debris associated with aquaculture production operations including wood from racks, plastic spacers, unused shellfish bags, shellfish shells, and any other associated items.

8) PESTICIDE AND HERBICIDE USE

- a) The National Park Service utilizes Integrated Pest Management ("IPM") to treat pest and vegetation problems. The goal of IPM is to use the least-toxic, effective methods of controlling pests and vegetation. Except for normal household purposes, Permittee shall not use any pesticides that do not comply with the IPM program. To this end, Permittee shall submit in writing to Permitter, a request for the use of pesticide(s) or herbicide(s) and shall not use any pesticide(s) or herbicide(s) until Permittee has received an express written authorization therefor from Permitter.
- b) Permittee shall manage, treat, generate, handle, store and dispose of all pesticides and herbicides in accordance with Applicable Laws, including reporting requirements.

9) FIRE PREVENTION AND SUPPRESSION

- a) Permittee and its employees, agents, and contractors shall, in Permittee's use and occupancy of the Premises, take all reasonable precautions to prevent forest, brush, grass, and structural fires and shall, if safety permits, assist the Permitter in extinguishing such fires on the Premises.

10) EXCAVATION, SITE AND GROUND DISTURBANCE

- a) Permittee shall not cut, remove or alter any timber or any other landscape feature; conduct any mining or drilling operations; remove any sand, gravel or similar substances from the ground or watercourse; commit waste of any kind; or in any manner change the contour or condition of the Premises without the prior written approval of the Permitter. Except in emergencies, Permittee shall submit requests to conduct such activities in writing to the Permitter not less than sixty (60) days in advance of the proposed commencement date of any such activities.

- b) If approval of activities referenced above in Section 10(a) is granted, Permittee shall abide by all the terms and conditions of the approval, including provisions pertaining to archaeological resources.
- c) No soil disturbance of any kind may occur in the vicinity of a known archeological site, without the presence of an NPS archeological monitor.

11) NONPOINT SOURCE POLLUTION

- a) The Permittee shall comply with all Applicable Laws regarding non-point source pollution (including the protection of beneficial uses of waters as designated by the State of California). Further, Permittee's use and occupancy of the Premises shall be designed to minimize, to the greatest extent feasible, non-point source pollution within National Park Service boundaries or on adjacent lands.
- b) Except as set forth in Section 3(k) of this Permit, no discharge into the estuary is permitted. This prohibition includes any discharge from processing facilities.

12) TREE AND VEGETATION REMOVAL

- a) The Permittee may not remove tree(s) or vegetation unless expressly approved in writing by the Permitter. The Permittee shall provide specific plans to the Permitter for desired tree(s) and vegetation removal during the annual meeting or in writing during the Term of this Permit.
- b) Removal of non-native invasive vegetation such as non-native thistles, trimming and vegetation removal around structures is permissible.

13) WILDLIFE PROTECTION

- a) Wildlife is an integral part of Point Reyes National Seashore and must be managed in accordance with all Applicable Laws, including but not limited to NPS laws, regulations, and policies.
- b) Permittee shall not engage in any activity that purposely causes harm or destroys any wildlife. Conversely, Permittee shall not engage in any activity that purposely supports or increases populations of non-native or invasive animal species, except for the cultivation of the shellfish species authorized by this Permit.
- c) On a case by case basis, the Permitter will evaluate incidences of depredation caused by Permittee and choose a course of action. The nature of the course of action will be determined by the extent and frequency of the damage, the wildlife species, and park-wide management objectives.

14) HAZARDOUS MATERIALS; ENVIRONMENTAL HEALTH AND SAFETY

- a) In connection with this Permit, Permittee, its officers, agents, employees and contractors, shall not use, generate, sell, treat, keep, or store any Hazardous Materials on, about, under or into the Premises or elsewhere in Point Reyes except in compliance with all Applicable Laws and as approved in writing by Permitter. However, Permittee shall not be obligated to obtain Permitter's approval to use, keep, or generate Hazardous Materials as necessary for the normal operation or maintenance of vehicles or for standard household cleaners. Permittee agrees to be responsible for timely acquisition of any permit(s) required for its Hazardous Materials-related activities, and shall provide to the Permitter, upon request, inventories of all such Hazardous Materials and any supporting documentation, including but not limited to material safety data sheets, uniform waste manifest forms, and/or any other pertinent permits.
- b) Permittee, its officers, agents, employees and contractors, shall not release, discharge or dispose of any Hazardous Materials from, on, about, under or into the Premises or elsewhere in Point Reyes, except as authorized by Applicable Laws.
- c) If Permittee knows of or reasonably suspects or receives notice or other communication concerning any past,

ongoing, or potential violation of Environmental Requirements in connection with the Premises or Permittee's activities, Permittee shall immediately inform Permitter and shall provide copies of any relevant documents to Permitter. Receipt of such information and documentation shall not be deemed to create any obligation on the part of the Permitter to defend or otherwise respond to any such notification.

- d) If any Hazardous Materials Occurrence is caused by, arises from, or is exacerbated by the activities authorized under this Permit or by the use of the Premises by Permittee, its officers, agents, employees or contractors, Permittee shall promptly take all actions at its sole cost and expense as are required to comply with Applicable Laws and to allow the Premises and any other affected property to be used free of any use restriction that could be imposed under Applicable Laws; provided that, except in cases of emergency, Permitter's approval of such actions shall first be obtained.
- e) The Permitter shall have the right, but not the duty, at all reasonable times and, except in the case of emergency, following at least twenty-four (24) hours advance notice to Permittee, to enter and to permit any Agency, public or private utilities and other entities and persons to enter upon the Premises, as may be necessary as determined by the Permitter in its sole discretion, to conduct inspections of the Premises, including invasive tests, to determine whether Permittee is complying with all Applicable Laws and to investigate the existence of any Hazardous Materials in, on or under the Premises. The Permitter shall have the right, but not the duty, to retain independent professional consultants to enter the Premises to conduct such inspections and to review any final report prepared by or for Permittee concerning such compliance. Upon Permittee's request, the Permitter will make available to Permittee copies of all final reports and written data obtained by the Permitter from such tests and investigations. Permittee shall have no claim for any injury or inconvenience to or interference with Permittee's use of the Premises or any other loss occasioned by inspections under this Section 14(e). Notwithstanding the foregoing, neither Permittee nor Permitter shall be required to provide a report under this Section 14(e) if such report is protected by attorney-client privilege.
- f) Should Permittee, its officers, agents, employees or contractors, fail to perform or observe any of the obligations or agreements pertaining to Hazardous Materials or Environmental Requirements for a period of thirty (30) days (or such longer period of time as is reasonably required) after notice, then Permitter shall have the right, but not the duty, without limitation of any other rights of Permitter under this Permit, personally or through its agents, consultants or contractors to enter the Premises and perform the same. Permittee agrees to reimburse Permitter for the costs thereof and to indemnify Permitter as provided for in this Permit.
- g) Permittee understands and acknowledges that the Premises may contain asbestos and lead-based paint. If Permittee performs any Improvements or Alterations, Permittee shall comply with all Environmental Requirements related to asbestos and lead-based paint and shall solely bear all costs associated therewith. Nothing in this Permit shall be construed to require Permittee to remove asbestos or lead-based paint unless Environmental Requirements require such removal.
- h) Permittee shall indemnify, defend, save and hold Permitter, its employees, successors, agents and assigns, harmless from and against, and reimburse Permitter for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments, and expenses, including without limitation, consultant fees and expert fees, that arise during or after the Term as a result of any violation of any Environmental Requirement in connection with this Permit or any Hazardous Materials Occurrence in connection with this Permit.
- i) The provisions of this Article 14 shall survive any termination or revocation of this Permit. Article 15 (Insurance) of this Permit shall not limit in any way Permittee's or Permitter's obligations under this Article 14.

15) INSURANCE

- a) Permittee shall purchase the types and amounts of insurance described herein before the Commencement Date of this Permit unless otherwise specified. At the time such insurance coverage is purchased, Permittee shall provide Permitter with a statement of Permittee insurance describing the insurance coverage in effect and a Certificate of Insurance covering each policy in effect as evidence of compliance with this Permit. Permittee shall also provide the Permitter thirty (30) days advance written notice of any material change in the Permittee's

insurance program hereunder. Permitter shall not be responsible for any omissions or inadequacies in insurance coverage or amounts in the event such coverage or amounts prove to be inadequate or otherwise insufficient for any reason whatsoever.

- b) From time to time, as conditions in the insurance industry warrant, the Permitter reserves the right to revise the minimum insurance limits required in this Permit.
- c) All insurance policies required by this Permit shall specify that the insurance company shall have no right of subrogation against the United States, except for claims arising solely from the negligence of the United States or its employees, or shall provide that the United States is named as an additional insured.
- d) All insurance policies required herein shall contain a loss payable clause approved by the Permitter which requires insurance proceeds to be paid directly to the Permittee without requiring endorsement by the United States. Insurance proceeds covering any loss of the Premises but not used to replace such losses shall be promptly paid by Permittee to Permitter. The use of insurance proceeds for the repair, restoration or replacement of the Premises shall not give any ownership interest therein to Permittee.
- e) **Property Insurance:** At a minimum, the Permittee shall be required to purchase Basic Form Actual Cash Value (replacement cost less depreciation) insurance coverage for all residence on the Premises. Within thirty days of issuance of the Permit, the Permittee shall submit a report from a reputable insurance company which provides a full range of options for insurance coverage on all nonresidential structures on the Premises. Within thirty days of receipt of this report, the Permitter, in its sole discretion, will review and specify the type and level of insurance coverage which shall be required. The Permitter will provide the Permittee written notification of insurance requirements and the Permittee shall be required to have the specified level(s) of insurance in place within thirty days of such notification. The cost of the insurance will be deducted from the appraised fair market value for the Premises; this adjustment and the insurance requirements will be addressed in an amendment to the Permit. Permittee shall, in the event of damage or destruction in whole or in part to the Premises, use all proceeds from the above described insurance policies to repair, restore, replace or remove those buildings, structures, equipment, furnishings, betterments or improvements determined by the Permitter, in Permitter's sole discretion, to be necessary to satisfactorily discharge the Permittee's obligations under this Permit.
- f) **Public Liability:** The Permittee shall provide Comprehensive General Liability insurance against claims arising from or associated with Permittee's use and occupancy of the Premises. Such insurance shall be in the amount commensurate with the degree of risk and the scope and size of such use and occupancy, but in any event, the limits of such insurance shall not be less than \$1,000,000.00 per occurrence covering both bodily injury and property damage. If claims reduce available insurance below the required per occurrence limits, the Permittee shall obtain additional insurance to restore the required limits. An umbrella or excess liability policy, in addition to a Comprehensive General Liability Policy, may be used to achieve the required limits.
- g) Permittee shall also obtain the following additional coverage:
 - i) **Automobile Liability** – To cover all owned, non-owned, and hired vehicles in the amount of \$300,000.00.
 - ii) **Workers' Compensation** – The amount shall be in accordance with that which is required by the State of California.

16) INDEMNITY

- a) In addition to the indemnification contained in Article 14, Permittee shall indemnify, defend, save and hold Permitter, its employees, successors, agents and assigns, harmless from and against, and reimburse Permitter for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments and expenses and the like incurred in connection with or arising in any way out of this Permit; the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors; the design, construction, maintenance, or condition of any Improvements or Alterations; or any accident or occurrence on the Premises or elsewhere arising out of the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors. Permittee's obligations hereunder shall include, but not be limited to, the burden and

expense of defending all claims, suits and administrative proceedings (with counsel reasonably approved by Permittee), even if such claims, suits or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against the United States.

- b) Permittee agrees to cooperate, to the extent allowed by law, in the submission of claims pursuant to the Federal Tort Claims Act against the United States by third parties for personal injuries or property damage resulting from the negligent act or omission of any employee of the United States in the course of his or her employment.
- c) This Article 16 shall survive any termination or revocation of this Permit. The provisions of Article 15 (Insurance) of this Permit shall not limit in any way Permittee's obligations under this Article 16.

17) PROPERTY INTEREST

- a) This Permit shall vest in Permittee no property interest in the Premises or in the Improvements thereon. Title to real property and improvements thereon, including any Improvements or Alterations constructed by Permittee, shall be and remain solely in Permittee. Except as provided in Paragraph 3(g), Permittee shall have no claim for any compensation or damages for the Premises, the improvements thereon, or any Improvements or Alterations constructed by the Permittee.
- b) Nothing in this Permit shall give or be deemed to give Permittee an independent right to grant easements or other rights-of-way over, under, on, or through the Premises.
- c) Permittee hereby retains the sole and exclusive right to oil, gas, hydrocarbons, and other minerals (of whatsoever character) in, on, or under the Premises.

18) RENTS, TAXES AND ASSESSMENTS

- a) The annual rental rate for this Permit shall be established by Permittee and is set forth on the Cover Page of this Permit.
- b) The annual rent under this Permit is payable in advance on a semi-annual basis. Therefore, Permittee hereby agrees to pay fifty percent of the annual rate on or before November with the remaining fifty percent payable on or before May of each year during the Term.
- c) Permittee shall pay the proper Agency, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the Term of this Permit, are levied or assessed against the Premises.
- d) Rents due hereunder shall be paid without assertion of any counterclaim, setoff, deduction or defense and without abatement, suspension, deferment or reduction.

19) CYCLIC MAINTENANCE

- a) Permittee shall perform all Cyclic Maintenance in accordance with the Provisions of this Permit and at Permittee's sole cost and expense. Permittee is responsible for the maintenance of all fences, buildings, and other improvements upon the Premises. All improvements and facilities used and occupied by Permittee shall at all times be protected and maintained in a safe, sanitary and sightly condition.
- b) Specific maintenance requirements may be negotiated with Permittee each year as outlined in Article 21 (Annual Meeting).
- c) Docks and Fences shall be maintained in good condition and shall be timely repaired in conformance with Applicable Laws. Abandoned fences and other decrepit improvements shall be removed from the Premises and shall be disposed of outside the Park or as directed by Permittee after review and approval by the NPS Historian.

- d) New lighting under Permittee's control of the Premises shall be redesigned to protect and preserve the night sky/darkness and minimize light pollution in Drakes Estero.
- e) Parking areas shall be maintained in a safe condition and no new roads or truck trails shall be established without prior written permission of the Permitter. The main entrance road from Sir Francis Drake Boulevard to the SUP Area will be maintained by the NPS. The Park will respond in a timely manner to Permittee and/or visitor complaints regarding the condition of the main entrance road. Notwithstanding the foregoing, Permitter may enter into a road maintenance contract with Permittee.
- f) Existing water reservoirs shall be maintained in a safe and secure condition to prevent washouts and erosion and no new reservoirs shall be constructed or established without prior written approval of the Permitter.
- g) Permittee shall maintain the water, well, pump and all pipelines within the Premises. Permittee shall replace or repair any damage or loss of the water system within the Premises.
- h) Permittee shall maintain the sewage pipeline and sewage leachfield in the "Sewage Area."
- i) Permittee shall be responsible for removing slash buildup around fences or other facilities within the Premises so as to prevent fire and egress hazards. Permittee shall also be responsible for removing litter and trash from the Premises.

20) COMPLIANCE WITH APPLICABLE LAWS: NEPA, NHPA

- a) General Compliance: As provided for in this Permit, Permittee at its sole cost and expense shall promptly comply with all Applicable Laws as required by law. Permittee shall immediately notify Permitter of any notices received by or on behalf of Permittee regarding any alleged or actual violation(s) of or non-compliance with Applicable Laws. Permittee shall, at its sole cost and expense, promptly remediate or correct any violation(s) of Applicable Laws.
- b) National Environmental Policy Act and National Historic Preservation Act: Where activities undertaken by Permittee relate to the preparation of compliance documents pursuant to the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"), Permittee shall supply all necessary information to Permitter and any Agency in a timely manner. Permitter will pay for the preparation of NEPA or NHPA documents. If there is litigation regarding NEPA or NHPA compliance, it will not trigger the indemnification requirements of Article 16.

21) ANNUAL MEETING

- a) The Parties shall meet annually each year during the Term of this Permit for the purposes of discussing and resolving issues of mutual concern and ensuring that Permittee is complying with the Provisions of this Permit.

22) PENALTY

- a) At the option of the Permitter, Permitter may, in lieu of voiding and terminating this Permit, assess a penalty of \$50.00 per day for any failure by Permittee to keep and perform any of the Provisions of this Permit. In such case, Permittee shall be given notice in writing of a grace period (of from one to thirty days) to remedy the situation before a penalty will be assessed. Payment of any penalty under this provision shall not excuse Permittee from curing the Default. This provision shall not be construed as preventing Permitter from issuing citations or initiating enforcement proceedings under Applicable Laws.

23) SURRENDER AND VACATE THE PREMISES, RESTORATION

- a) At the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall surrender and vacate the Premises, remove Permittee's Personal Property therefrom, and repair any damage

resulting from such removal. Subject to the approval of the Permittee, Permittee shall also return the Premises to as good order and condition (subject to ordinary wear and tear and damage that is not caused directly or indirectly by Permittee) as that existing upon the Effective Date.

- b) All Permittee's Personal Property shall remain the property of Permittee. However, if after the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall fail satisfactorily to remove Permittee's Personal Property and so repair the Premises, then, at the Permittee's sole option, after notice to Permittee, Permittee's Personal Property, shall either become the property of the Permittee without compensation therefore, or the Permittee may cause it to be removed and the Premises to be repaired at the expense of Permittee, and no claim for damages against Permittee, its employees, agents or contractors shall be created or made on account of such removal or repair work.

24) LIMITATION ON EFFECT OF APPROVALS

- a) All rights of Permittee to review, comment upon, approve, inspect or take any other action with respect to the use and occupancy of the Premises by Permittee, or any other matter, are expressly for the benefit of Permittee and no other party. No review, comment, approval or inspection, right or exercise of any right to perform Permittee's obligations, or similar action required or permitted by, of, or to Permittee under this Permit, or actions or omissions of Permittee's employees, contractors, or other agents, or other circumstances shall give or be deemed to give Permittee any liability, responsibility or obligation for, in connection with, or with respect to the operation of the Premises, nor shall any such approval, actions, information or circumstances relieve or be deemed to relieve Permittee of its obligations and responsibilities for the use and occupancy of the Premises as set forth in this Permit.

25) WAIVER NOT CONTINUING

- a) The waiver of any Default, whether such waiver be expressed or implied, shall not be construed as a continuing waiver, or a waiver of or consent to any subsequent or prior breach of the same or any other provision of this Permit. No waiver of any Default shall affect or alter this Permit, but each and every Provision of this Permit shall continue in full force and effect with respect to any other then existing or subsequent Default.

26) LIENS

- a) Permittee shall have no power to do any act or to make any contract that may create or be the foundation for any lien, mortgage or other encumbrance upon the reversion, fee interest or other estate of the Permittee or of any interest of the Permittee in the Premises. If any such lien shall at anytime be filed against the Premises or any portion thereof, Permittee shall cause the Permittee to be discharged from the lien.

27) HOLDING OVER

- a) This Permit shall terminate upon the Termination Date and any holding over by Permittee after the Termination Date shall not constitute a renewal of this Permit or give Permittee any rights under this Permit or in or to the Premises.

28) NOTICES

- a) Any notice or other communication required or permitted under this Permit shall be in writing and shall be delivered by hand or certified mail with return receipt requested. Notices and other communications shall be addressed as follows:

If to Permitter:

Superintendent
Point Reyes National Seashore
Point Reyes Station, CA 94956

If to Permittee:

Mr. Kevin Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake
Inverness, CA 94937

29) NO PARTNERSHIP OR JOINT VENTURE

- a) Permitter is not for any purpose a partner or joint venturer of Permittee in the development or operation of the Premises or in any business conducted on the Premises. Permitter shall not under any circumstances be responsible or obligated for any losses or liabilities of Permittee.

30) ANTI-DEFICIENCY ACT

- a) Permittee and Permitter agree that nothing contained in this Permit shall be construed as binding Permitter to expend, in any fiscal year, any sum in excess of the appropriation made by Congress for that fiscal year in furtherance of the subject matter of this Permit, or to involve Permitter in any contract or other obligation for the future expenditure of money in excess of such appropriations.

31) COMPLIANCE WITH EQUAL OPPORTUNITY LAWS

- a) Permittee agrees that in undertaking all activities pursuant to this Permit, Permittee will comply with all Applicable Laws relating to non-discrimination.

32) ENTIRE AGREEMENT AND AMENDMENT

- a) This instrument, together with the exhibits hereto, all of which are incorporated in this Permit by reference, constitutes the entire agreement between Permitter and Permittee with respect to the subject matter of this Permit and supersedes all prior offers, negotiations, oral and written. This Permit may not be amended or modified in any respect whatsoever except by an instrument in writing signed by Permitter and Permittee.

33) NO PAYMENTS BY PERMITTER

- a) Under no circumstances or conditions, whether now existing or hereafter arising, and whether or not beyond the present contemplation of the Parties, shall Permitter be expected or required to make any payment of any kind whatsoever with respect to the Premises or be under any obligation or liability except as expressly set forth in this Permit.

34) NO THIRD PARTY BENEFICIARIES

- a) Except as expressly set forth in this Permit, this Permit shall not be deemed to confer upon any person or entity, other than the parties to this Permit as expressly set forth in this Permit, any third party beneficiary status, any right to enforce any Provision of this Permit, or any other right or interest.

35) NO PREFERENTIAL RENEWAL AND RELOCATION ASSISTANCE

- a) Permittee hereby agrees that Permittee is not a concessioner and that the provisions of law regarding National Park Service concessionaires do not apply to Permittee. No rights shall be acquired by virtue of this Permit entitling Permittee to claim benefits under the Uniform Relocation Assistance and Real Property Acquisition

Policies Act of 1970, Public Law 91-646.

36) SEVERABILITY

- a) In case any one or more of the provisions of this Permit shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Permit, and this Permit shall be construed as if such invalid, illegal or unenforceable provisions had not been contained in this Permit.

37) EXHIBITS

- a) Each of the exhibits referenced in this Permit is attached hereto and incorporated herein.

38) TIME OF THE ESSENCE

- a) Time is hereby expressly declared to be of the essence of this Permit and of each and every Provision of this Permit.

39) HEADINGS

- a) Article, Section and Subsection headings in this Permit are for convenience only and are not to be construed as a part of this Permit or in any way limiting or amplifying the Provisions of this Permit.

40) PERMIT CONSTRUED AS A WHOLE

- a) The language in all parts of this Permit shall in all cases be construed as a whole according to its fair meaning and not strictly for or against either Permitter or Permittee. The Parties acknowledge that each party and its counsel have reviewed this Permit and participated in its drafting and therefore that the rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed or applied in the interpretation of this Permit.

41) MEANING OF TERMS

- a) Whenever the context so requires, the neuter gender shall include the masculine and the feminine, and the singular shall include the plural and vice versa.

42) FEDERAL LAW

- a) The laws of the United States shall govern the validity, construction and effect of this Permit.

EXHIBIT A

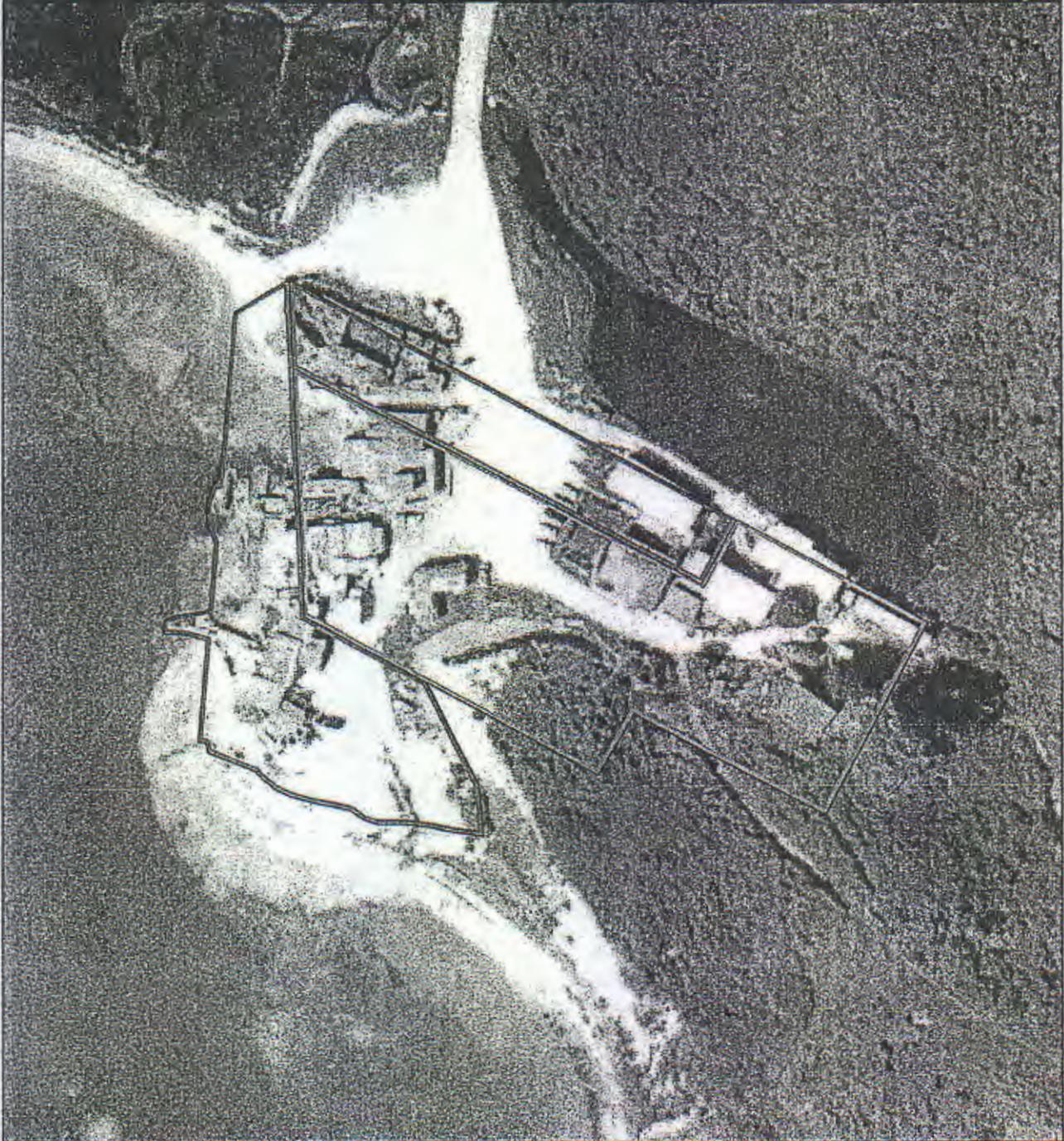
Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area



EXHIBIT B

Map – Drake's Estero Oysters – SUP & ROP

Drake's Estero Oysters - SUP & ROP



National Park Service
Point Reyes National Seashore
Marin County, CA



0 50 100 150 200 Feet

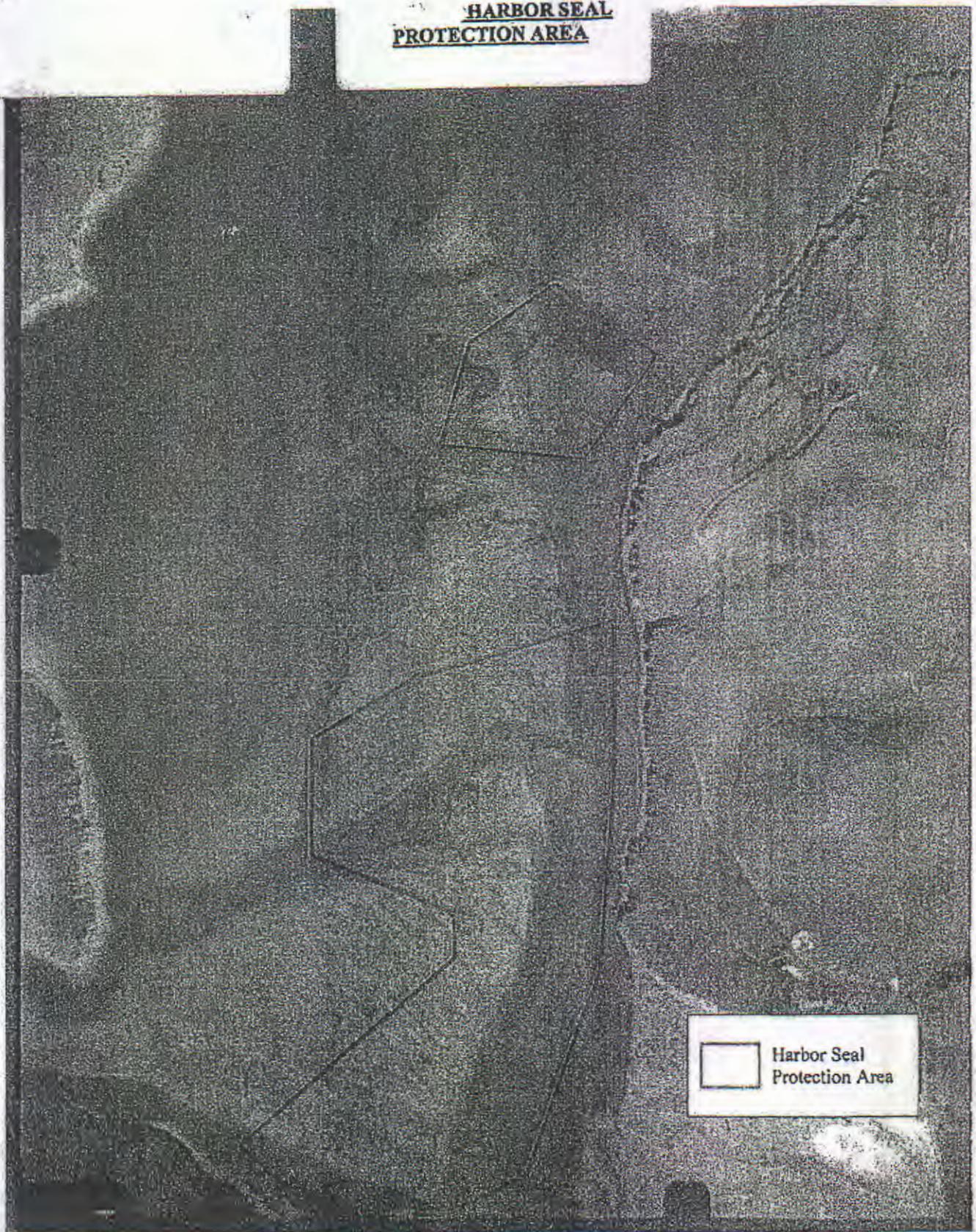
Permit Type

-  ROP - 1.5 acres
-  SUP - 1.1 acres

EXHIBIT C

Drakes Estero Aquaculture and Harbor Seal Protection Protocol

HARBOR SEAL
PROTECTION AREA



 Harbor Seal
Protection Area

**Drakes Estero Aquaculture and
Harbor Seal Protection Protocol**

The following items are mutually agreed to for protection of harbor seals in and adjacent to the Harbor Seal Protection Areas identified in the Map, attached hereto and incorporated herein by reference ("Protocol Map"):

1. During the breeding season, March 1 through June 30, the "Main Channel" and "Lateral Channel" of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone.
2. During the breeding season, Permittee boats may use the "West Channel" at low speed while maintaining a distance of at least 100 yards from hauled out seals.
3. Throughout the year, all of Permittee's boats, personnel, and any structures and materials owned or used by Permittee shall be prohibited from the harbor seal protection areas identified on the Protocol Map. In addition, all of the Permittee's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

EXHIBIT D

Map - Drakes Bay Oyster Company Well Area

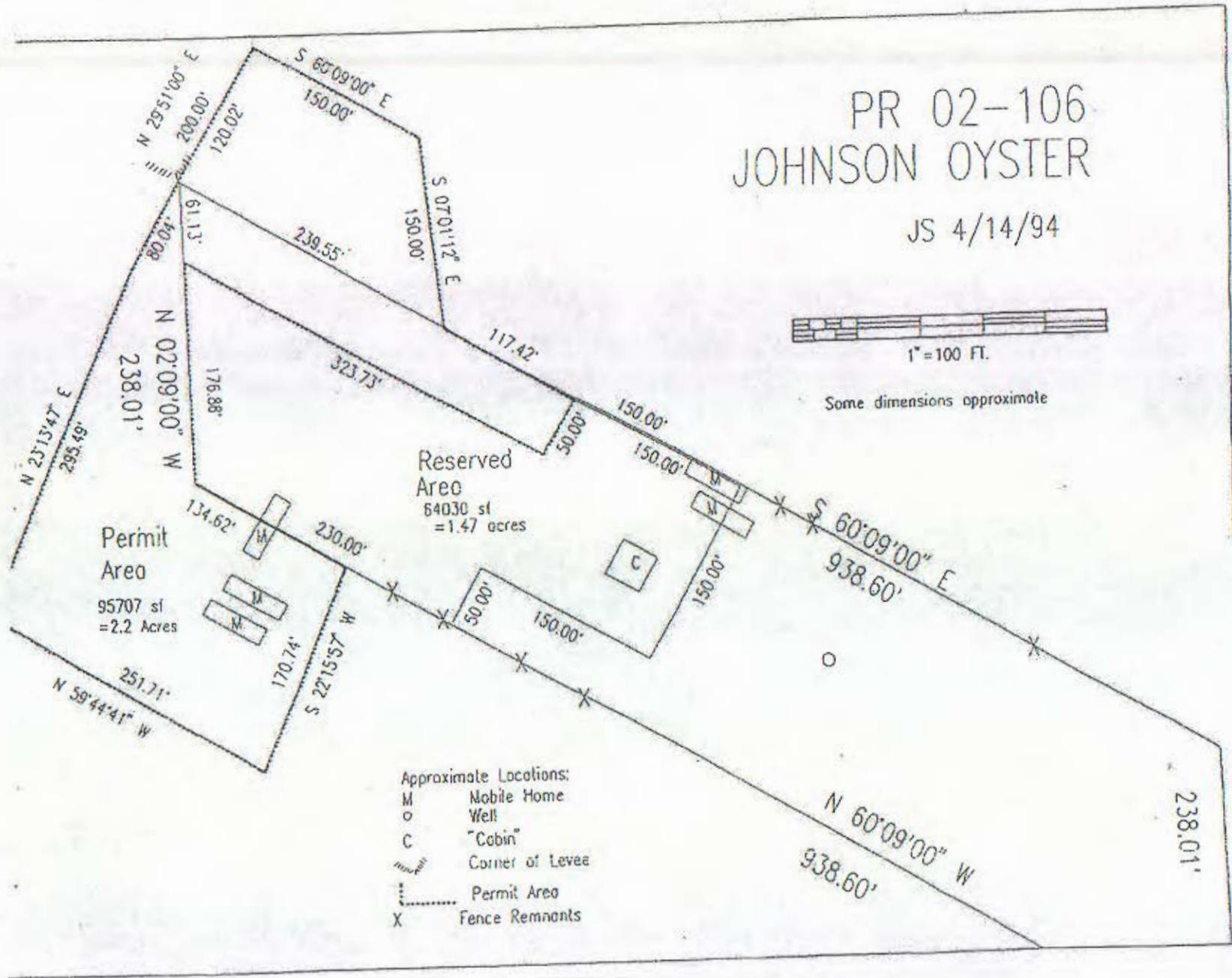
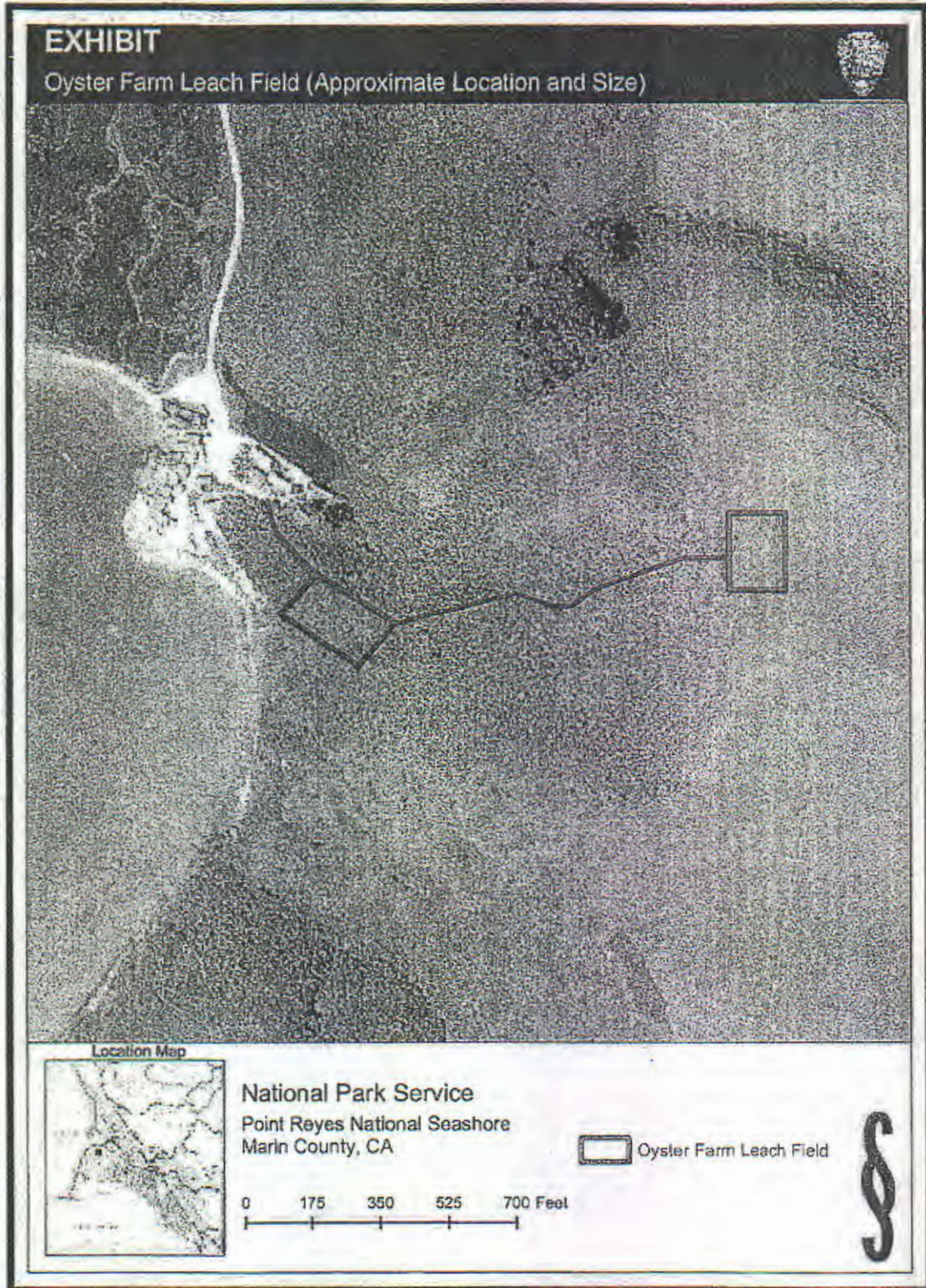


EXHIBIT E

Map – Drakes Bay Oyster Company Sewage Area



1 Amber D. Abbasi [CSBN 240956]
2 **CAUSE OF ACTION**
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel list continues on next page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and
JONATHAN JARVIS,
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF ROBERT ABBOTT
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net; pprows@briscoelaw.net

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Zackary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Robert Abbott, declare as follows:

2 1. I am a Principal Consultant at ENVIRON International Corporation, specializing
3 in fisheries and shellfish fisheries projects in northern California (my CV is attached as Exhibit 1 to
4 this document; a list of references cited in this Declaration is attached as Exhibit 2). The following
5 facts are based on my own personal knowledge and, if called as a witness, I could and would testify
6 competently thereto.

7 2. I earned my doctorate at the University of Washington in 1973, working on the
8 hydroacoustics of salmonids. Starting in 1995, I began working on the mitigation of underwater
9 noise from pile driving, and assisted in the application of bubble curtains to reduce the amplitude
10 and intensity of low frequency underwater noise to protect marine mammals and fish.

11 3. Proposed Onshore Personal Property Removal: DBOC's personal property in the
12 onshore RUO and SUP area includes a 24' x 8' office trailer, five fiberglass shellfish setting tanks,
13 a 40' x 8' cannery container, 40' x 8' equipment storage shed, shellfish culture equipment, a 20' x
14 20' open sided shed, 12 picnic tables, two septic systems, and a water well. After removing all
15 personal property inside, the office trailer, the cannery container, and the equipment storage
16 containers would be loaded on flatbed semi-trailers with a crane and hauled away. This process
17 would take approximately three business days. Removal of the shellfish setting tanks would require
18 the use of a track-mounted hydraulic excavator to remove the tanks and load onto dump trucks for
19 disposal in the landfill. This process would take approximately two business days; however, it
20 would take more time to remove all underground piping connected to the setting tanks. The setting
21 tank removal will result in ground disturbance near a known archaeological site. Septic systems
22 will need to be properly abandoned by pumping tanks, removing pumps, filling with sand, covering
23 with topsoil, and installing erosion control. The water well will be filled with pea gravel and
24 capped with concrete. Concrete slab and well enclosure will be demolished and removed from the
25 site. After all required permits are obtained, removal of onshore personal property would take
26 approximately two weeks. Removal of personal property likely will require federal, state, and local
27 agency permitting that will prevent DBOC from taking action until such permits are acquired.

28

1 4. Proposed Oyster Rack Removal Using DBOC Equipment: According to Drakes
 2 Bay Oyster Company (DBOC) President Kevin Lunny, there are 95 oyster racks in Drakes Estero,
 3 which comprise a total of approximately 250,000 board feet (ft) of treated wood. There are an
 4 estimated 4,700 posts, according to the FEIS. Posts are connected to each other by 10-foot-long, 2
 5 x 4 rails at top and bottom, with the bottom rails buried in the sediment. The oyster racks would be
 6 removed using a chainsaw to cut the legs and rails into manageable units and lifted out of the
 7 substrate using a hoist (powered by an electric motor and supplied by a generator) mounted on a
 8 barge towed by one of DBOC's two oyster skiffs. The skiffs would be anchored to the bottom
 9 substrate by two anchors during this effort. Using the proposed methods, it is anticipated that each
 10 rack (a total of 95) will take a minimum of 3 days to remove, or a total of 285 days within
 11 approximately 665 calendar days, assuming good tides and weather conditions. It is important to
 12 note that this does not account for periods when removal work may be restricted due to the presence
 13 of sensitive life stages for protected species period between March 1 and October 15 due to harbor
 14 seal pupping (March 1 to June 30), anadromous fish migration (June 15 to October 15), and the
 15 Migratory Bird Treaty Act (February 1 to August 31). See Table 1 provided as Exhibit 3.

16 5. Extended Period of Disruption: There are three marine Endangered Species Act
 17 (ESA)-listed species, two Marine Mammal Protection Act (MMPA) species, and 490 resident and
 18 migratory birds that utilize Drakes Estero (see Table 1 provided as Exhibit 3). Prolonged exposure
 19 to increased ambient noise may lead to physiological and behavioral stress in fish and wildlife.
 20 Impacts associated with chronic noise can cause feeding disruption, lower growth rates, mating
 21 interference, population declines, and abandonment of haulout areas (Richardson et al. 1995,
 22 Nightingale and Simenstad 2001, Weilgart 2007, Barber et al. 2010, Blickley and Patricelli 2010).

23 6. Underwater Noise from Extended Disruption: Oyster rack removal operations will
 24 likely result in exceedance of the marine mammal behavior threshold (NMFS 2012). The
 25 underwater noise associated with the use of a skiff with a 40 HP engine moving at low speed is
 26 estimated to be 157 dB re 1 μ Pa at a distance of 1 m (Wyatt 2008), noise associated with a
 27 pneumatic chainsaw that can cut portions of the racks that are underwater is estimated to be 88 dB
 28 re 1 μ Pa at a distance of 1 m (UNITEC 2012), and the electric motor for the hoist is a nominal

1 addition to underwater noise. By making the assumption that underwater noise sources are
 2 additive, and applying the rapid spreading loss model [$R1 = R2 * 10^{((V-120)/15)}$] to determine how far
 3 underwater noise will be generated at levels exceeding the marine mammal behavioral disturbance
 4 threshold (120 dB re 1 μ Pa), results in a distance of 292 m. This distance places at least the closest
 5 harbor seal haulout location within the range of disturbance from the oyster rack removal.
 6 Although it is the best model available, some caution should be used when interpreting the rapid
 7 spreading loss model, which was created for open water conditions. Land will attenuate sound, so
 8 although the distance will not be as great as indicated by this calculation, underwater noise within
 9 the behavioral disturbance threshold from the rack removal process will still reach seal haulout
 10 locations.

11 7. Airborne Noise associated with Extended Disruption: In addition to underwater
 12 noise, removal operations are likely to result in airborne noise that nearly exceeds harbor seal
 13 disturbance thresholds, and is certainly higher than background conditions for an extended period
 14 of time. The airborne noise disturbance threshold for harbor seals is 90 dB re 20 μ Pa (NMFS
 15 2012). According to noise modeling by Richard Steffel, noise from a chainsaw and electric hoist
 16 would be 85 dBA (L_{eq}) at 50 ft. A noise level of 40-42 dBA (L_{eq}) would extend for 7,500 ft.
 17 Because seals likely forage near the racks, due to increased biodiversity of fish, demolition noise
 18 will disturb and prevent them from having access to what has been a customary food source.

19 8. Seal Use of Oyster Racks: Although studies directly related to marine mammal
 20 attraction to oyster aquaculture have not been done, the addition of structured habitat has long been
 21 recognized to increase the biodiversity and abundance of fish, invertebrates, and aquatic plants in a
 22 given area (Iversen and Bannerot 1984, Buckley and Hueckel 1985, Hueckel and Buckley 1987,
 23 Gregg 1995, Sargent et al. 2006). This indicates that harbor seals are likely to use the oyster rack
 24 areas for foraging. Removal of the racks would alter a food source that has been available at least
 25 since the existence of the oyster operation in Drakes Estero.

26 9. Heavy Equipment for Oyster Rack Removal: Alternatively, if the removal process
 27 is to be completed within a shorter timeframe (and setting aside the time required for acquiring the
 28 necessary permits for such an operation), then the demolition will require the use of heavy

1 equipment to remove the oyster racks. The following information was provided to me by Mr. Mark
2 Sutton of Dixon Marine Services in terms of what would be required for this removal to occur
3 within a shorter time period. The methods would be similar to what Kevin Lunny has proposed,
4 although the shorter time period would necessitate the use of much more equipment. The
5 additional equipment would need to be secured, which would involve linking steel barges together
6 and loading a 100-200 ton crawler crane onto the barges. Additionally, in order to secure the barge-
7 crane system to the bottom, spuds would be pushed deep into the sediment. A diesel pusher boat
8 with a large prop would be employed to push the barge-crane system out to the racks.

9 10. Underwater Noise with Shorter Disruption: This type of heavy equipment would
10 generate high amplitude underwater noise at levels exceeding the injury threshold of harbor seals
11 (190 dB re 1 μ Pa; NMFS 2012) and fish (187 dB re 1 μ Pa (\geq 2 grams) and 183 dB re 1 μ Pa ($<$ 2
12 grams); WSDOT 2010). For example, a tug with a single barge can generate underwater noise of
13 184 dB re 1 μ Pa, but increasing the length of the load by linking barges can potentially increase the
14 underwater noise generation to 192 dB re 1 μ Pa at 1 m (Wyatt 2008). Harbor seals are very
15 sensitive to underwater sound (Richardson et al. 1995). This is especially important because they
16 use underwater sound to find prey and avoid predation. Repeated, high amplitude underwater
17 sound is also known to result in damage to the inner ear of fish, resulting in disorientation and
18 hearing loss (Nightingale and Simenstad 2001). Therefore, underwater noise from the operation of
19 heavy equipment would adversely impact the distribution and abundance of fish that are the base of
20 the harbor seal food web.

21 11. Airborne Noise associated with Shorter Disruption: The use of heavy equipment
22 includes the use of a diesel pusher boat and 100-200 ton crane, along with the chainsaw (mentioned
23 for use in the long-term removal). According to Richard Steffel's noise modeling, this combination
24 of equipment would result in hourly noise levels (L_{eq}) of about 87 dBA at 50 feet, and between 40-
25 42 dBA (L_{eq}) for 10,000 feet of the rack removal operation. Although this would be a shorter
26 disruption period, the extent of noise above background levels would expand much farther than the
27 longer disruption period.

28

1 12. Turbidity: The operation of the barge and pusher boat is likely to create a large
2 turbidity plume and uproot eelgrass since Drakes Estero is very shallow. The placement and
3 retrieval of anchors for the DBOC equipment or spuds needed to secure the heavy equipment
4 during work will create turbidity and uproot eelgrass growing in and around the racks. The lifting
5 of the rack legs from the sediment will also create significant turbidity and uproot eelgrass. This
6 demolition-related turbidity will result in reduced solar penetration, which will adversely affect
7 growing conditions for eelgrass. Even the proposed demolition (i.e., without the use of heavy
8 equipment) will result in direct impacts to eelgrass and reduce eelgrass habitat within the Estero.
9 Adverse impacts on the eelgrass food web will impact the distribution and abundance of fish and
10 harbor seals in Drakes Estero.

11 13. Potential Take: The repeated disturbance of habitat has resulted in the abandonment of
12 rookeries by marine mammals (Colegrove et al. 2005). The combination of intermittent, high
13 amplitude, broad frequency spectrum underwater noise, disruption from airborne noise, and visual
14 disturbance and disruption of the food web over as little as one or two months is likely to result in
15 the permanent abandonment of the Drakes Estero harbor seal rookery. These conditions apply to
16 both methods of oyster rack removal. The only differences are the length of time required for each
17 and the level of noise generated. Adverse impacts to marine mammals is termed a "take." A "take"
18 is prohibited under terms of the ESA and the MMPA.

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1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct.

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4 Executed this 20th day of December, 2012, in Emeryville, California.

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7 Robert Abbott
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1 Amber D. Abbasi [CSBN 240956]
2 **CAUSE OF ACTION**
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel list continues on next page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and
23
24 **KEVIN LUNNY,**
25 17171 Sir Francis Drake Blvd
26 Inverness, CA 94937

27 Plaintiffs,

28 v.

29 **KENNETH L. SALAZAR,**
30 in his official capacity as Secretary, U.S.
31 Department of the Interior,
32 1849 C Street, NW, Washington, D.C., 20240;
33 **U.S. DEPARTMENT OF THE INTERIOR**
34 1849 C Street, NW, Washington, D.C., 20240;
35 **U.S. NATIONAL PARK SERVICE**
36 1849 C Street, NW, Washington, D.C. 20240;
37 and
38 **JONATHAN JARVIS,**
39 in his official capacity as Director, U.S.
40 National Park Service,
41 1849 C Street, NW, Washington, D.C. 20240.

42 Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF ROBERT ABBOTT
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

EXHIBIT 1



Robert R. Abbott, PhD | Principal Consultant

Emeryville, California

+ 1 510 420 2593 | rabbott@environcorp.com

Dr. Abbott, a Senior Principal Environmental Biologist, is a fisheries expert who has been performing assessments of fisheries and aquatic resource information for government agencies and the private sector since 1974. He specializes in fisheries ecology, marine bioacoustics, underwater explosive impacts, and natural resource modeling. He has managed large teams of scientists and field technicians in designing monitoring programs, collecting field data, computer data entry, modeling based on field data, and the analysis of model outputs and databases. He is an expert in threatened and endangered species of fish, dam removal permits, underwater explosive and pile driving impacts on fish, and aquatic pest control. He has worked in the Sultanate of Oman, Egypt, Burma, Chile, Tuvalu, and Kiribati on various fisheries, aquaculture, and environmental development projects.

He earned his Doctorate at the University of Washington College of Fisheries and prepared his dissertation on the bioacoustics of salmon and trout. Most of his fisheries experience since 1995 has been directed towards managing fisheries resources through the application of natural resource simulation models and the assessment of impacts on fisheries resources for NEPA/CEQA compliance. He prepared an environmental impact assessment for California Department of Transportation (Caltrans) on the impact of a large underwater blasting project on salmon, herring, and fish eggs. Responsibilities involved review of agency databases for relevant data, assessment of blast modeling results, and the design of a comprehensive mitigation plan. Additional work has been done on assessing the potential impact of land based blasting on fish in San Francisco Bay and the use of detonation cord to control exotic fish. Dr. Abbott conducted a series of studies on the effects of the underwater noise created by very large pile drivers on fish since 2000. Studies include placing fish in cages at various distances, necropsies, and the predation by gulls on stunned fish. Research has focused on determining the extent of the radius of delayed mortalities for surfperch, Sacramento blackfish, Sacramento splittail, and steelhead.

EDUCATION

1973 PhD, Fisheries, University of Washington

1970 MS, Fisheries, University of Washington

1964 BS, Biology, California Western University

EXPERIENCE

- City of Oakland Public Works Agency Seismic Retrofit of Eight Bridges, Oakland, California. Environmental and engineering services including asbestos and lead management, cultural resources, permitting, and environmental documentation to resume support of Caltrans seismic retrofit projects of eight bridges. These have included three bridges at Park Boulevard Viaduct, overhead passes at 23rd Avenue and Hegenberger Road, and bridges over Lion Creek, Sausal Creek (Leimert Bridge) and Damon Slough. Responsible for overseeing and performing activities related to cultural resources, permitting and environmental documentation.
- URS Corp./California Department of Transportation, Essential Fish Habitat (EFH), San Francisco-Oakland Bay Bridge East Span, California. Evaluated California Department of Fish and Game databases for records of federally managed fish caught in south central San Francisco Bay by the Interagency Ecological Program fisheries monitoring vessels. Conducted an appraisal of the habitat types and life history stages of federally managed species using the project area for some part of their life history. Advised on methods to minimize impacts and mitigate for unavoidable adverse impacts.

Robert R. Abbott, PhD

- Parson Brinckerhoff Quade and Douglas/Caltrans, Fisheries and Hydroacoustic Monitoring Program Compliance Report, San Francisco, California. Project manager and team leader for a project to use fish held in cages to assess the impacts of pile driving. After exposure, the fish were held 48 hours to assess delayed mortality. Managed team monitoring the sound pressure level and birds eating fish killed by pile driving.
- Manson Construction Company/Port of Oakland, Monitoring the Effects of Conventional Pile Driving on Three Species of Fish, Oakland, California. Tested the impact of pile driving 24" concrete piles with a diesel hammer on three species of fish. Managed a team of biologists and hydroacoustic monitoring engineers. After exposure to pile driving the fish were evaluated for vestibular injury and then prepared for a histopathology examination of four internal organs.
- Caltrans, District 4, Benicia-Martinez Bridge Pile Driving Impact Assessment, California. Collected fish injured by pile driving and conducted necropsies and an impact assessment and evaluation of mitigation methods. Conducted caged fish studies with Sacramento splittail and Sacramento blackfish at different distances assessing the radius of impact and the effects of different durations of exposure.
- Foundation Constructors, Project Modification Permit Assistance, Napa, California. Client desired to modify the project to use a few large piles instead of numerous small piles on a bridge crossing the Napa River. Assisted in consultation with the National Marine Fisheries Service, California Department of Fish and Game, and the U.S. Army Corps of Engineers.
- Parson Brinckerhoff Quade and Douglas/Caltrans, Fisheries and Hydroacoustic Monitoring Program Work Plan for the San Francisco-Oakland Bay Bridge Retrofit, California. Lead author for the work plan to monitor pile driving impacts in San Francisco Bay. The core of the work plan was the experimental design for a fish in cage experiment. Collaborators included two statisticians and an underwater acoustics monitoring team. Made the presentation to the National Marine Fisheries Service and California Department of Fish and Game.
- Blankinship and Associates/California Department of Fish and Game, Lake Davis CEQA Initial Study/Negative Declaration for the Use of Detonation Cord to Control Northern Pike, Lake Davis, California. Prepared the fisheries and recreational impact assessment for the use of detonation cord to kill northern pike. Responsibilities included supervision of subcontractors and the estimation of the kill radius. Provided guidance in the development of the experimental design and the blasting plan.
- Parson Brinckerhoff Quade and Douglas/Caltrans, Fisheries Impact Assessment for the Caltrans Pile Driving Installation Demonstration Project (PIDP), San Francisco, California. Conducted field studies on the impact of the shock wave from 500 kilo joules and 1700 kilo joules hammers on fish populations in San Francisco Bay. Collected injured fish, conducted necropsy, and assessed acoustic monitoring data. Prepared a report for Caltrans on the mitigation alternatives. Technical analysis included characterization of pile driving acoustic energy and risk assessment for fish and fish eggs in San Francisco Bay.
- Woodward Clyde/Parsons Brinckerhoff/Caltrans, Marine Life Mitigation Plan for Sensitive Operations, Dismantlement, and Replacement of the East Span of San Francisco-Oakland Bay Bridge, California. Prepared a technical report on the potential impact of underwater explosives on fish and marine life in San Francisco Bay. The report included a discussion of how underwater explosives affect fish, a kill radius.
- Parson Brinckerhoff Quade and Douglas/Caltrans, Fisheries and Hydroacoustic Monitoring Program Compliance Report, San Francisco, California. Project manager and team leader for a project to use fish held in cages to assess the impacts of pile driving. After exposure, the fish were held 48 hours to assess delayed mortality. Managed team monitoring the sound pressure level and birds eating fish killed by pile driving.
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Robert R. Abbott, PhD

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- Parson Brinckerhoff Quade and Douglas/Caltrans, Fisheries and Hydroacoustic Monitoring Program Work Plan for the San Francisco-Oakland Bay Bridge Retrofit, California. Lead author for the work plan to monitor pile driving impacts in San Francisco Bay. The core of the work plan was the experimental design for a fish in cage experiment. Collaborators included two statisticians and an underwater acoustics monitoring team. Made the presentation to the National Marine Fisheries Service and California Department of Fish and Game.
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- Woodward Clyde/Parsons Brinckerhoff/Caltrans, Marine Life Mitigation Plan for Sensitive Operations, Dismantlement, and Replacement of the East Span of San Francisco-Oakland Bay Bridge, California. Prepared a technical report on the potential impact of underwater explosives on fish and marine life in San Francisco Bay. The report included a discussion of how underwater explosives affect fish, a kill radius for different size charges associated with construction of a main pier supportive bench, and the dismantling of old bridge piers. The report included a discussion of impacts on herring, salmon, and steelhead along with a set of recommendations to minimize adverse impacts.
- Sea Grant College Program, Bioacoustics of Salmonids, Seattle, Washington. Directed a project to determine the underwater acoustic sensitivity of salmon and trout. Trout were trained using near-field and far-field low frequency sound waves to skip a heart beat upon sound detection and to come to feeding stations when underwater sound was transmitted. Salmon were trained to come to feeding stations in large ponds and floating pens to improve feeding efficiency.

CREDENTIALS

Member, American Fisheries Society, Threatened and Endangered Species Subcommittee

Member, Pile Driving Contractors Association, Environmental Committee

Robert R. Abbott, PhD

Member, Fisheries and Hydroacoustics Working Group: Caltrans, District 4

Member, Bay Area Modeling Forum: Steering Committee

PUBLICATIONS & PRESENTATIONS

Public Speaking and Public Participation Programs

- An Overview of Pile Driving Effects on Fish. Oregon Department of Transportation. March 19, 2009
- An Overview of Pile Driving Effects on Fish. Oregon Department of Transportation. May 14, 2009
- American Institute of Fisheries Research Biologists. Caged Fish Monitoring to Assess Pile Driving Bubble Curtain Effectiveness: Methods and Materials. Oakland, California, May 2004.
- CalNeva. Bay Bridge Pile Driving Monitoring Program Using Caged Fish. Redding, California, April 24, 2004.
- Pile Driving Contractors Association. Underwater Noise and Pile Driving Impacts on Fish. Orlando, Florida, February 20, 2004.
- ECOS. Pile Driving Hydroacoustic Noise Effects on Fish. Office of Naval Research. San Antonio, Texas, May 15, 2003.
- Bay Planning Coalition. Observation on the Pile Driving Effects on Fish. Oakland, California, October 2, 2003.
- Western Division American Fisheries Society. Pile Driving Impacts on Swim Bladder, San Diego, California, April 17, 2003.
- American Fisheries Society. Impact Assessment for Pile Driving. Baltimore, Maryland, August 2002.
- Lake Davis Community Meeting. Made a presentation and addressed questions from the Portola community on northern pike management measures, including the use of detonation cord. Portola, California, September 2001.
- Guest Lecturer San Francisco State University. Bioacoustics and explosives in the Marine Environment. San Francisco, California, June 1999.

Selected Publications and Reports

- Burgess, W.C., S. B. Blackwell, and R. Abbott. 2005. Underwater acoustic measurements of vibratory pile driving at the Pipeline 5 crossing in the Snohomish River, Everett, Washington, Greeneridge Rep. 322-2, Rep. from Greeneridge Sciences Inc., Santa Barbara, CA, for URS Corporation, Seattle, WA, and the City of Everett, Everett, WA, 35 pp
- Abbott, Robert R., James Reyff, and Gary Marty. 2004. Monitoring the effects of conventional pile driving on three species of fish. Manson Construction Company, Richmond CA.
- Fisheries and Hydroacoustic Monitoring Program Compliance Report. June 2004. San Francisco-Oakland Bay Bridge East Span Seismic Safety Project. Contract EA 012023, 4-SF-80 KP 12.2 KP 14.3.
- Sedimentation Rate, Bathymetry and Sediment Quality Analysis, Peacock Gap Lagoon. July 26, 2004. Peacock Gap Golf and Country Club, San Rafael, California.
- PIDP PILE RE-STRIKE: Summary of Bird Predation Activity. Caltrans Contract 04A1524. District 4. Oakland, California. March 2003.

Robert R. Abbott, PhD

- Assessment of Pile Driving Induced Hydroacoustic Impacts at Various Distances on the Sacramento Splittail (*Pogonichthys mactolepidotus*). 2002. Prepared for Caltrans, District 4, Oakland, California.
- Assessment of Pile Driving Induced Hydroacoustic Impacts at Various Distances on a Model Species, the Sacramento Blackfish (*Orthodon microlepidotus*). 2002. Prepared for Caltrans, District 4, Oakland, California.
- Fisheries and Hydroacoustic Monitoring Program - Work Plan April 2002. Caltrans EA 12000 Contract 04A0148. April 2002.
- Guidelines for Dam Removal in press. *Abbott, Robert and McGowan, Michael* . 2001.
- Pile Installation Demonstration Project Fish Impacts Assessments. Parsons Brinckerhoff/Caltrans. *Abbott, Robert*. 2000.
- Marine Life Mitigation Plan for Sensitive Operations Dismantlement and Replacement of East Span of San Francisco-Oakland Bay Bridge. *Howorth, Peter and Abbott, R.* 1999.
- Essential Fish Habitat Assessment San Francisco-Oakland Bay Bridge Retrofit Project. *Abbott, Robert and Davis, Michael W.* June 1999.
- Induced Aggregation of Pond-Reared Rainbow Trout (*Salmo gairdneri*) through acoustic conditioning. *Trans. Amer. Fish. Soc.* 101(1): (35-43). *Abbott, R. R.* 1971.

AWARDS

Excellence in Transportation Award; The Environment. Caltrans 2005. Bubble Curtain Technology

EXHIBIT 2

1 References Cited in Declaration of Robert Abbott

- 2 Barber, J.R., K.R. Crooks, and K.M. Fristrup. 2010. The costs of chronic noise exposure for
3 terrestrial organisms. *Trends in Ecology and Evolution*. 25(3): 180-189.
- 4 Blickley, J.L. and G.L. Patricelli 2010. *Journal of International Wildlife Law & Policy*. 13: 274-
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- 6 Buckley, R.M. and G.J. Hueckel. 1985. Biological processes and ecological development on an
7 artificial reef in Puget Sound, Washington. *Bull. Mar. Sci.* 37(1): 50-69.
- 8 Colegrove, K.M., D.J. Greig, and F.M.D. Gulland. 2005. Causes of live strandings of northern
9 elephant seals (*Mirounga angustirostris*) and Pacific harbor seals (*Phoca vitulina*) along the
10 central California coast, 1992-2001. *Aquatic Mammals* 31:1-10.
- 11 Gregg, K.L. 1995. Comparisons of three manufactured artificial reef units in Onslow, Bay,
12 North Carolina. *N. Amer. J. Fish. Mgmt.* 15: 316-324.
- 13 Hueckel, G.J. and R.M. Buckley. 1987. The influence of prey communities on fish species
14 assemblages on artificial reefs in Puget Sound, Washington. *Env. Biol. Fishes.* 19(3): 195-
15 214.
- 16 Iversen, E.S. and S.P. Bannerot. 1984. Artificial reefs under marina docks in southern Florida.
17 *N. Amer. J. Fish. Mgmt.* 4: 294-299.
- 18 National Marine Fisheries Service (NMFS). 2012. Interim sound threshold guidance. National
19 Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northwest
20 Regional Office. Accessed December 10, 2012. Website: [http://www.nwr.noaa.gov/Marine-](http://www.nwr.noaa.gov/Marine-Mammals/MM-sound-thrshld.cfm)
21 [Mammals/MM-sound-thrshld.cfm](http://www.nwr.noaa.gov/Marine-Mammals/MM-sound-thrshld.cfm)
- 22 Nightingale B.J., C.A. Simenstad, Jr. 2001. Overwater structures: marine issues. Washington
23 Department of Fish and Wildlife. Olympia, Washington. White Paper. Website:
24 <http://wdfw.wa.gov/hab/ahg/finalmar.pdf>
- 25 Richardson, J., C. Greene, C. Malme and D. Thompson. 1995. *Marine mammals and noise*.
26 Academic Press. New York.
- 27 Sargent, P.S., R.S. Gregory, and D.C. Schneider. 2006. Density responses of subarctic coastal
28 marine fish and crabs to artificial reefs. *Trans. Amer. Fish. Soc.* 135: 348-360.

1 UNITEC. 2012. Pneumatic chain saws. Assessed on December 19, 2012. Website:

2 www.csunitec.com

3 Washington State Department of Transportation (WSDOT). 2010. Marine mammal, fish, and
4 marbled murrelet injury and disturbance thresholds for marine construction activity.

5 Accessed on February 22, 2010. Website:

6 <http://www.wsdot.wa.gov/Environment/Biology/BA/BAGuidance.htm#noise>

7 Weilgart, L.S. 2007. A brief review of known effects of noise on marine mammals. International
8 Journal of Comparative Psychology. 20: 159-168.

9 Wyatt, R. 2008. Review of existing data on underwater sounds produced by the oil and gas
10 industry. Oil and Gas Producers (OGP) Joint Industry Programme report on Sound and
11 Marine Life.

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1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan R. Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rrwaterman@stoel.com

16 *Counsel list continues on next page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF DR. COREY
GOODMAN IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 pm

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net; pprows@briscoelaw.net

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Zackary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Dr. Corey Goodman, Ph.D., declare as follows:

2 1. I am an elected member of the U.S. National Academy of Sciences (1995), the
3 American Academy of Arts and Sciences (1993), and the American Philosophical Society (1999). I
4 was a biology professor at Stanford University (Department of Biological Sciences) and the
5 University of California, Berkeley (the Evan Rauch Chair, Department of Molecular and Cell
6 Biology) for twenty-five years until I moved into the private sector. I am currently an adjunct
7 professor at the University of California San Francisco (Departments of Anatomy, and
8 Biochemistry and Biophysics). The following facts are based on my own personal knowledge and,
9 if called as a witness, I could and would testify competently thereto.

10 2. At the University of California, Berkeley, I was Head of the Division of
11 Neurobiology, Co-founder and Director of the Helen Wills Neuroscience Institute, and an
12 Investigator with the Howard Hughes Medical Institute. I spent two summer studying marine
13 biology, the first at Stanford's Hopkins Marine Station in Pacific Grove, CA, and the second at U.
14 of Washington's Friday Harbor Laboratory on San Juan Island, WA. I have taught at Woods Hole
15 Oceanographic Institution in Falmouth, MA.

16 3. My scientific awards and honors include the Alan T. Waterman Award from the
17 National Science Board, the Fondation IPSEN Neuronal Plasticity Prize, the Ameritec Prize, the
18 Wakeman Award, the J. Allyn Taylor International Prize in Medicine, the Canada Gairdner
19 Biomedical Award, the March-of-Dimes Prize in Developmental Biology, the Reeve-Irvine
20 Research Medal, and the Dawson Prize in Genetics from Trinity College Dublin.

21 4. I have served on the following committees and boards in public service to the role
22 of science in public policy. I served for the National Research Council, the National Academy of
23 Sciences' public policy arm, advising the federal government, as a elected member of the Board on
24 Biology (1996-2000), a member of the Commission on Life Sciences (1998-2000), and Chair of the
25 Board on Life Sciences (2001-2006). I am an elected member of the California Council on
26 Science and Technology, advising the California state government (2007-present). I am a member
27 of the President's Strategic Advisory Council for the California Institute for Regenerative Medicine
28

1 (CIRM) (2011-present). I am a member of the Board of the Directors of the Pacific Institute, a non-
2 profit institute dedicated to advancing environmental protection with science-based solutions.

3 5. I have also served as an advisor to numerous biomedical foundations and
4 universities, and served as editor or member of the editorial board of numerous scientific journals.
5 I have published over 200 peer-reviewed scientific papers and reviews. Further details of my
6 experience can be found in my CV provided in Exhibit 1.

7 6. Attached as Exhibit 2 is a true and correct copy of select portions of the Drakes
8 Bay Oyster Company Special Use Permit Final Environmental Impact Statement (FEIS).

9 7. Attached as Exhibit 3 is a true and correct copy of the report, "Assessment of
10 Photographs from Wildlife Monitoring Cameras in Drakes Estero, Point Reyes National Seashore,
11 California," by William A. Lellis, Carrie J. Blakeslee, Laurie K. Allen, Bruce F. Molnia, Susan D.
12 Price, Sky Bristol, and Brent Stewart, United States Geologic Survey (USGS) Open-File Report:
13 2012-1249, issued November 26, 2012, and available at
14 <http://pubs.er.usgs.gov/publication/ofr20121249> (USGS Report).

15 8. Five of the six authors of the USGS Report are employees of USGS, however, the
16 USGS Report does not describe their respective areas of expertise.

17 9. Attached as Exhibit 4 is a true and correct copy of the report, "Evaluation of Time-
18 Lapse Photographic Series of Harbor Seals Hauled Out In Drakes Estero, California, For Detecting
19 and Assessing Disturbance Events," Technical Report 2012-378, as well as a true and correct copy
20 of an Excel Spreadsheet named "Drakes Estero Harbor Seals HSWRI Revised.xlsx," which
21 contains Dr. Stewart's research notes supporting the conclusions made in the main report, both of
22 which were submitted by Dr. Brent Stewart, Ph.D., J.D., Senior Research Scientist at the Hubbs-
23 SeaWorld Research Institute, to the United States Department of the Interior, National Park
24 Service, on May 12, 2012 (jointly, the Stewart Report), in support of the USGS Report, which I
25 received by electronic mail on December 13, 2012, upon request from the Hubbs-SeaWorld
26 Research Institute.

27 10. On December 4, 2012, Dr. William Lellis (senior author on the USGS Report)
28 confirmed by electronic mail that Dr. Stewart was the "harbor seal behaviorist on this project" and

1 thus the expert who analyzed the videos of the time-lapse photographic series used in the
2 production of the USGS Report. Attached as Exhibit 5 is a true and correct copy of the electronic
3 mail from Dr. Lellis to me. Dr. Lellis subsequently confirmed to me in a telephone conversation on
4 December 7, 2012, that Dr. Stewart was the only harbor seal behavior expert on the team that put
5 together the USGS Report.

6 11. On December 5, 2012, Dr. Lellis confirmed by electronic mail that the Stewart
7 Seal Report was used to prepare Appendix 1, "Summary analysis of 3,140 photographs from 75
8 potential disturbance events to hauled out harbor seals in Drakes Estero," of the USGS Report.
9 Attached as Exhibit 6 is a true and correct copy of the electronic mail from Dr. Lellis to me.

10 12. I have prepared a report analyzing the conclusions reached in the Stewart Report,
11 the USGS Report, and the FEIS's conclusions based upon the USGS Report. Attached as Exhibit 7
12 is a true and correct copy of my report, dated December 20, 2012 (Goodman Report).

13 13. Based on my analysis presented in the Goodman Report, it is my opinion that Dr.
14 Stewart's finding of no harbor seal disturbances by DBOC oyster boats was transformed by two
15 sequential misrepresentations — the first by USGS and the second by NPS — from a finding of no
16 evidence of DBOC boat disturbances of harbor seals to the cause-and-effect conclusion made in the
17 FEIS..

18 14. The USGS Report concludes that "boat traffic at nearby sandbars" "could be
19 directly connected, or at least associated with a flushing level of disturbance in the OB seals" in
20 pictures on May 15, 2008 and June 11, 2008. Ex. 3, USGS Report at 5.

21 15. The FEIS concludes that the USGS Report showed "[t]wo flushing disturbance
22 events were attributed to boat traffic at nearby sand bars" Ex. 2, FEIS at 376.

23 16. On May 15, 2008, Dr. Stewart's research notes concluded: "very poor camera
24 focus; skiff visits; no evidendence [sic] of disturbance to seals." Ex. 4.

25 17. On June 11, 2008, Dr. Stewart's research notes concluded: "very poor camera
26 focus; rafting birds scattered; skiff visits; brief movement of seals towards waters [sic] edge several
27 minutes before skiff arrives but none seem to enter water; no obvious disturbance." Ex. 4.

28

1 18. Neither the USGS Report nor the FEIS indicate that Dr. Stewart found no evidence
2 of disturbance to harbor seals caused by oyster boats.

3 19. In summary, concerning the NPS photographs, the Stewart Report found no
4 evidence of oyster boats and disturbance to seals, the USGS Report found a weak correlation (an
5 association) of the oyster boats and disturbance to seals, and the NPS FEIS found a causation (an
6 attribution) of the oyster boats and disturbance to seals.

7 20. The NPS formally contracted Dr. Stewart's service and received a copy of the
8 Stewart Report on May 12, 2012 (Exhibit 4) and were aware of his role and expertise in the USGS
9 Report. In the FEIS, the NPS wrote: "... the NPS initiated a third-party review of the photographs
10 with the U.S. Geological Survey (USGS), in consultation with a harbor seal specialist with the
11 Hubbs-SeaWorld Research Institute. The USGS issued a report entitled, *Assessment of*
12 *Photographs from Drakes Estero Wildlife Monitoring Cameras* (Lellis et al. 2012)." Ex. 2, FEIS at
13 33.

14 21. Based in large part upon the USGS Report, the NPS FEIS concluded that
15 continuation of the DBOC oyster farm "would result in long-term moderate adverse impacts on
16 harbor seals for another 10 years due to the seal displacement effects of human activities in Drakes
17 Estero associated with DBOC's operation, and the potential for disturbances known to disrupt
18 harbor seal behavior." Ex. 2, FEIS at 377.

19 22. In summary, the FEIS lacked the scientific evidence to conclude that continuation
20 of the oyster farm would result in a long-term "moderate adverse impact" on harbor seals due to the
21 "potential for disturbances" and "continued disturbances" caused by DBOC oyster boats (FEIS, pg.
22 377).

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1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct.

3 Executed this 20th day of December, 2012, in Dublin, Ireland.

4 
5 _____
6 Corey Goodman

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1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan R. Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rrwaterman@stoel.com

16 *Counsel list continues on next page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**REBUTTAL DECLARATION OF DR.
COREY GOODMAN IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: January 25, 2013

Time: 2:00 pm

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net; pprows@briscoelaw.net

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Zachary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Dr. Corey Goodman, Ph.D., declare as follows:

2 1. I am an elected member of the U.S. National Academy of Sciences (1995), the
3 American Academy of Arts and Sciences (1993), and the American Philosophical Society (1999). I
4 was a biology professor at Stanford University (Department of Biological Sciences) and the
5 University of California, Berkeley (the Evan Rauch Chair, Department of Molecular and Cell
6 Biology) for twenty-five years until I moved into the private sector. I am currently an adjunct
7 professor at the University of California San Francisco (Departments of Anatomy, and
8 Biochemistry and Biophysics). The following facts are based on my own personal knowledge and,
9 if called as a witness, I could and would testify competently thereto.

10 2. At the University of California, Berkeley, I was Head of the Division of
11 Neurobiology, Co-founder and Director of the Helen Wills Neuroscience Institute, and an
12 Investigator with the Howard Hughes Medical Institute. I spent two summer studying marine
13 biology, the first at Stanford's Hopkins Marine Station in Pacific Grove, CA, and the second at U.
14 of Washington's Friday Harbor Laboratory on San Juan Island, WA. I have taught at Woods Hole
15 Oceanographic Institution in Falmouth, MA.

16 3. My scientific awards and honors include the Alan T. Waterman Award from the
17 National Science Board, the Foundation IPSEN Neuronal Plasticity Prize, the Ameritec Prize, the
18 Wakeman Award, the J. Allyn Taylor International Prize in Medicine, the Canada Gairdner
19 Biomedical Award, the March-of-Dimes Prize in Developmental Biology, the Reeve-Irvine
20 Research Medal, and the Dawson Prize in Genetics from Trinity College Dublin.

21 4. I have served on the following committees and boards in public service to the role
22 of science in public policy. I served for the National Research Council, the National Academy of
23 Sciences' public policy arm, advising the federal government, as a elected member of the Board on
24 Biology (1996-2000), a member of the Commission on Life Sciences (1998-2000), and Chair of the
25 Board on Life Sciences (2001-2006). I am an elected member of the California Council on
26 Science and Technology, advising the California state government (2007-present). I am a member
27 of the President's Strategic Advisory Council for the California Institute for Regenerative Medicine
28

1 (CIRM) (2011-present). I am a member of the Board of the Directors of the Pacific Institute, a non-
2 profit institute dedicated to advancing environmental protection with science-based solutions.

3 5. I have also served as an advisor to numerous biomedical foundations and
4 universities, and served as editor or member of the editorial board of numerous scientific journals.
5 I have published over 200 peer-reviewed scientific papers and reviews. Further details of my
6 experience can be found in my CV provided in Exhibit 1.

7 6. I have reviewed the declaration of Dr. Kurt Fristrup, and make the following
8 responses to his statements and representations of the issues.

9 7. Dr. Fristrup asserts that I criticized NPS “for overestimating the noise generated by
10 DBOC equipment” Fristrup Dec. D. 64-3 ¶ 5. This is not an accurate statement. Rather, I
11 criticized NPS for not taking *any* noise measurements of DBOC equipment, and for instead
12 employing proxies for DBOC equipment that grossly overstated the noise profile of DBOC’s
13 equipment. I note that none of the proxies for DBOC equipment that NPS had relied on in the
14 DEIS—including New Jersey State Police measurements of a 70 horsepower (HP) Jet Ski and
15 other loud, fast boats to represent DBOC’s 20 HP and 40 HP outboard skiffs, and a 400 HP cement
16 truck to represent a plastic oyster tumbler powered by a 1/4 HP electric motor—were included in
17 the Final Environmental Impact Statement (FEIS) issued on November 20, 2012.

18 8. Dr. Fristrup asserts that “the levels ENVIRON reported were substantially lower
19 than levels reported by other authoritative reports.” Fristrup Dec. D. 64-3 ¶ 5. I am unaware of
20 *any* other “authoritative reports” on DBOC’s operational noise profile besides the 2011 ENVIRON
21 report. For example, the FEIS admits that the “NPS did not obtain noise measurements of
22 operational DBOC equipment in Drakes Estero.” Declaration of Barbara Goodyear (Goodyear
23 Dec.) Ex. 3 at 256.

24 9. Dr. Fristrup does not acknowledge that the NPS still has not taken any onsite
25 measurements of DBOC’s operational noise profile, in violation of NPS policies and NEPA
26 regulations. See NPS Management Policies 2006, § 8.2.2 (“Park managers will . . . monitor, in and
27 adjacent to parks, noise-generating human activities – including noise caused by mechanism or
28 electronic devises – that adversely affect visitor opportunities to enjoy park soundscapes.”); NPS

1 Director's Order No. 47, Soundscape Preservation and Noise Management (directing "park
2 managers to measure acoustic conditions, differentiate existing or proposed human-made sounds
3 that are consistent with park purposes, set acoustic goals based on the sounds deemed consistent
4 with the park purpose, and determine which noise sources are impacting the parks"); 40 C.F.R. §
5 1502.22(a) ("If the incomplete information relevant to reasonably foreseeable significant adverse
6 impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it
7 are not exorbitant, the agency shall include the information in the environmental impact
8 statement.").

9 10. Dr. Fristrup wrongly asserts that "NPS was able to extract estimates of the noise
10 generated by DBOC motorboats. Goodyear Dec. Ex. 3 at 258-59." Fristrup Dec. D. 64-3 ¶ 5. Dr.
11 Fristrup's comment refers to NPS's claim in the FEIS to have positively identified the noise
12 characteristics of DBOC's skiffs from noise data recorded by the Federal Aviation Administration
13 (FAA) PORE004 microphone. Goodyear Dec. Ex. 3 at 258-259. On November 27, 2012, I
14 submitted a report, in combination with Richard Steffel of ENVIRON, to Secretary Salazar that
15 definitively showed that NPS had falsely identified seven instances of DBOC boat noise on
16 Sundays and Mondays when no DBOC boats were operating, and failed to detect boat noise on
17 several occasions when DBOC boats operated in proximity to the microphone. Waterman Dec. D.
18 43 at ENVIRON Report at 7, and Attachment 1 thereto at 15-19. Dr. Fristrup does not rebut my
19 conclusions regarding the inadequacy of the NPS analysis in the FEIS.

20 11. Dr. Fristrup also does not contest the findings made by ENVIRON that the proxies
21 that NPS used in the FEIS for DBOC also grossly overstated the sound profile of DBOC
22 equipment. *Compare* Fristrup Dec. D. 64-3 ¶¶ 5-7 with Waterman Dec. D. 43, ENVIRON Report
23 at 2-4.

24 12. Dr. Fristrup asserts that, "Although the noise analysis in the FEIS contains
25 considerable detail, its findings are fairly simple to express. DBOC airborne noise sources range
26 from 60-80 dBA, loud enough to interfere with conversation more than 50 feet from the noise
27 source. . . . Industrial noise sources – like DBOC equipment – have huge spatial footprints in quiet
28 natural environments." Fristrup Dec. D. 64-3 ¶ 7. In his statement, Dr. Fristrup continues to

1 perpetuate the misrepresentation that NPS has data of direct measurements of DBOC noise
2 generators, and that those measurements range from 60-80 dBA in noise level. NPS has no such
3 measurements, and Dr. Frstrup can make no such assertions. Dr. Frstrup has no basis for
4 comparing DBOC equipment to industrial noise sources with huge spatial footprints, since neither
5 he nor anyone else from NPS has ever measured the noise generated by the DBOC equipment.
6 Furthermore, it is inappropriate to compare the DBOC equipment to industrial noise sources with
7 huge spatial footprints. The ENVIRON measurements show that DBOC equipment noise sources
8 make much less noise that NPS misrepresented in either the DEIS or FEIS. Thus, I see no factual
9 basis for either of Dr. Frstrup's statements. Frstrup Dec. D. 64-3 ¶ 7.

10 13. Dr. Frstrup admits that he agrees that "the accelerated removal scenario involving
11 heavy equipment (linked steel barges, crawler crane, etc.) will generate higher noise levels, levels
12 that will plausibly, but temporarily, change the distribution and behavior of animals in Drakes
13 Estero." Frstrup Dec. D. 64-3 ¶ 4. Thus, Dr. Frstrup agrees with Steffel and Abbott that the
14 removal of the DBOC oyster racks will cause disturbance and displacement of harbor seals.

15 14. I note that none of the declarations submitted by Defendants contradict my
16 conclusion that the FEIS misrepresents the conclusion reached by the NPS-contracted harbor seal
17 expert, Hubbs SeaWorld Research Institute senior research scientist Dr. Brent Stewart, which was
18 that there was no evidence of any harbor seal disturbances caused by DBOC's operations.
19 Declaration of Corey Goodman D. 49 ¶¶ 18-22.

20 15. Dr. Frstrup asserts that, "I find it improbable that marine mammals or fishes
21 would abandon Drakes Estero while the DBOC structures are removed." Frstrup Dec. D. 64-3 ¶
22 4. Dr. Frstrup does not attest to any expertise in marine mammal behavior, and none of his
23 publications involve harbor seal behavior. *Id.* at ¶ 1.

24 16. Dr. Frstrup also asserts that "adverse behavioral effects" of oyster rack removal
25 activities will be "temporary. Declaration of Barbara Goodyear ("Goodyear Decl.") Ex. 3, at
26 446." Frstrup Dec. D. 64-3 ¶ 4. Yet the page he cites in the FEIS does not even discuss the
27 potential impacts on harbor seals from noise associated with oyster rack removal activities, much
28 less whether those impacts would be "temporary." Goodyear Dec. Ex. 3 at 446. Furthermore, Dr.

1 Fristrup's assertion is inconsistent with PRNS rules, which state that, "No management action
2 other than closure [during the harbor seal pupping season from March 1 to June 30] is sufficient
3 because a *single* disturbance could significantly reduce the productivity of the colonies, resulting
4 in a reduced population size or loss of habitat if they leave the area." PRNS Superintendent's
5 Compendium, dated June 22, 2012, at 6 (emphasis added). Attached hereto as Exhibit 2 is a true
6 and correct copy of the PRNS Superintendent's Compendium, dated June 22, 2012.

7 17. Dr. Fristrup states: "For a barge radiating 184 dB ... the fish would have to be
8 within 1.1 meters to risk injury." Fristrup Dec. D. 64-3 ¶ 3. He continues: "Fish and seals are
9 likely to move away from the equipment when it is operating and utilize other areas in Drakes
10 Estero." This was precisely the point Steffel and Abbott made in their previous declarations. The
11 standard for an impact is not whether a harbor seal is exposed to such intense noise that it
12 permanently damages the seal's inner ear. The definition of impacts in the FEIS is not based on
13 physiological injury, but rather on disturbance and displacement.

14 18. The FEIS defines a major impact of noise as: "Human-caused noise would be at a
15 level (greater than 41 dBA) that requires elevated vocal effort for communication between people
16 separated by 16 feet, and the natural soundscape is interfered with more than 10 percent of the
17 time." Goodyear Dec. Ex. 3 at 445. Dr. Fristrup appears to agree that during the several years
18 required to remove the DBOC oyster racks, the noise from the equipment will cause a major
19 impact.

20 19. The FEIS defines a major impact to the harbor seals as: "Impacts on harbor seals
21 would result in readily apparent and substantial effects on the population, natural processes, or
22 habitat in the project area. Loss of habitat or consistent disruptions may affect the viability of the
23 species or cause the population to relocate outside the project area." Goodyear Dec. Ex. 3 at 372.
24 A moderate impact is defined as: "Impacts on harbor seals would result in readily apparent effects
25 on the population, natural processes, or habitat in the project area." *Id.* I infer from Dr. Fristrup's
26 declaration that he agrees that during the several years required to remove the DBOC oyster racks,
27 the noise from the equipment will cause at least a moderate, if not a major, impact on the harbor
28 seals.

1 20. For both impacts on soundscape and harbor seals, even if NPS increases the
2 number of crews and barges and decreases the time period from several years to one year, the
3 increased oyster rack removal activity will only increase the severity of negative impacts during
4 that period.

5 21. The DBOC oyster boats normally stay around 700 yards or more away from the
6 harbor seals during pupping season. No bona fide disturbances of harbor seals by the DBOC
7 oyster boats have been recorded. On the other hand, Dr. Fristrup agrees with us that the noise
8 generated by the equipment required to remove the DBOC oyster racks will be substantial, and
9 will cause a short-term major impact on the harbor seals in terms of disturbance and displacement.
10 Dr. Fristrup argues that the population of harbor seals will recover from such a major impact, but
11 his statements are contradicted by management policies and statements from NPS, including in the
12 FEIS, that disturbances can lead to long-term shifts in harbor seal populations.

13 22. In summary, continuation of DBOC operations during the court proceedings will
14 not cause a negative impact on Drakes Estero. NPS did not measure the noise generated by DBOC
15 equipment. Dr. Fristrup is incorrect in making assertions about the noise levels from DBOC
16 equipment based upon surrogate measurements of unrelated equipment. Dr. Fristrup is incorrect
17 in comparing DBOC equipment to heavy industrial equipment. Dr. Fristrup does not dispute the
18 fact that the FEIS relied upon measurements from unrelated equipment (e.g., the U.S. Army
19 portable, metal cement mixer) to represent DBOC equipment (e.g., the plastic oyster tumbler).
20 Only ENVIRON measured the noise generated by DBOC equipment, and measured much lower
21 sound levels than NPS lists in the FEIS. The FEIS exaggerated the noise generated by DBOC
22 equipment, and thus, derived an incorrect assessment of the soundscape impact. Continuing of
23 oyster farm operations will not have a major impact on the soundscape. Similarly, continuing the
24 oyster farm operations will not have a major impact on the harbor seals (or other wildlife). The
25 FEIS incorrectly claimed evidence of two DBOC disturbances of harbor seals based upon a
26 misrepresentation of the USGS Report, which itself misrepresented the Stewart Report, which
27 found no evidence for disturbances by DBOC.

28

1 23. In contrast, removal of DBOC oyster racks and other facilities would have a major
2 adverse impact on the soundscape, harbor seals, and other wildlife in Drakes Estero. Dr. Frstrup
3 agrees that there would be an impact, but calls it a short-term temporary impact. Dr. Frstrup
4 assumes that the harbor seals and other wildlife will return to their normal habitats in Drakes
5 Estero, but this assertion is contradicted by statements from NPS claiming that single disturbances
6 can have profound negative impacts on harbor seals and other wildlife. Thus, there is evidence that
7 removing the DBOC oyster racks would have a major impact on the environment of Drakes Estero,
8 whereas allowing the oyster farm to continue to operate, as it has for 80 years, the last seven under
9 the ownership of Kevin Lunny, will not have a major negative impact on the environment of
10 Drakes Estero.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 14th day of January, 2013, in Marshall, California.



Corey Goodman

EXHIBIT 1

Corey S. Goodman, Ph.D.

Adjunct Professor of Anatomy, and Biochemistry & Biophysics
University of California, San Francisco

Managing Director and co-founder, venBio, LLC

Co-founder: Exelixis, Renovis, Second Genome, Ossianix

Born: June 29, 1951 in Chicago, Illinois; Married: December 8, 1984 to Marcia Barinaga

Dr. Goodman is a renowned scientist, educator, entrepreneur, CEO, and corporate executive. With a B.S. from Stanford University and Ph.D. from U.C. Berkeley, he spent 25 years as professor of biology at Stanford and Evan Rauch Chair of Neurobiology at Berkeley, where he was Howard Hughes Medical Institute Investigator and co-founder and director of the Wills Neuroscience Institute. He is currently an adjunct professor at U.C. San Francisco.

Dr. Goodman is an elected member of the National Academy of Sciences, American Academy of Arts and Sciences, and American Philosophical Society, and the recipient of many honors including the Alan T. Waterman Award, the Canada Gairdner Biomedical Award, the March-of-Dimes Prize in Developmental Biology, the Reeve-Irvine Research Medal, and the Dawson Prize in Genetics from Trinity College Dublin.

Dr. Goodman moved into biotechnology to help apply biomedical discoveries to human health. He co-founded Exelixis, Renovis, Second Genome, and Ossianix, and led Renovis as President and CEO (2001) from a private to public company (2004) until its acquisition by Evotec (2007). In 2007, he was recruited as President and founder of Pfizer's Biotherapeutics and Bioinnovation Center and a member of Pfizer's executive leadership team, based on a new entrepreneurial R&D model of small units at major biotech hubs fostering innovative drug discovery and game-changing technology.

Today Dr. Goodman is Managing Director and co-founder of venBio, a venture capital firm investing in biotech companies with innovative therapeutics for major unmet medical needs, based on a new model of strategic collaboration in partnership with Amgen, Baxter, and PPD. He is Chair of the Board of three biotech companies, Board member of two others, and advises others.

Amongst his many public policy roles, Dr. Goodman is on the Board of the California Council on Science and Technology, Pacific Institute, Bay Area Science and Innovation Consortium, and is former Chair of the National Research Council's (NAS) Board on Life Sciences and past President of the McKnight Endowment Fund for Neuroscience. He is an advisor to numerous biomedical foundations, and a member of the editorial board of Science Translational Medicine and Neuron.

Dr. Goodman was born in Chicago. He and his wife Marcia Barinaga have lived in West Marin, California since 1993. Marcia oversees Barinaga Ranch, their farmstead sheep dairy, and produces artisanal sheep cheese in her family's Basque tradition.

Education

Postdoctoral studies, U.C. San Diego, developmental neurobiology, Helen Hay Whitney Fellow (adv.: Nicholas Spitzer)	1977-1979
Ph.D., U.C. Berkeley, neurobiology, NSF Fellow (adv.: Hugh Rowell)	1972-1977
B.S., Stanford University, biology, Searle Scholar (adv.: Donald Kennedy) graduated Phi Beta Kappa, Distinction, Department Honors	1968-1972

Academia Appointments

University of California, San Francisco Adjunct Professor of Anatomy and Biochemistry & Biophysics	2007-
University of California, Berkeley Adjunct Professor of Neurobiology, Dept. of MCB	2005-2007
Professor on leave, Div. of Neurobiology, Dept. of MCB	2001-2005
Director, Helen Wills Neuroscience Institute	1999-2001
Member, Wills Neuroscience Institute	1997-2007
Co-founder (w/ Carla Shatz), Helen Wills Neuroscience Institute	1997
Head, Division of Neurobiology, Dept. of MCB	1992-1999
Professor, Div. of Neurobiology, Dept. of MCB	1992-2005
Professor, Div. of Genetics, Dept. of Mol. and Cell Biology	1989-1992
Professor, Depts. of Biochemistry and Physiology-Anatomy	1987-1989
Howard Hughes Medical Institute, Investigator	1988-2001
Cold Spring Harbor, Instructor, Developmental Neurobiology course	1986, '88, '90
Stanford University Associate Professor (tenured 1982), Dept. of Biological Sciences	1982-1987
Assistant Professor, Dept. of Biological Sciences	1979-1982

Industry Appointments

venBio, LLC, Managing Director and co-founder	2009-
Pfizer, President, Biotherapeutics & Bioinnovation Center, and Member, Pfizer Executive Leadership Team	2007-2009
Renovis, President and Chief Executive Officer, and Director	2001-2007

Academia, Foundation, and Public Policy Boards

Member, California Institute for Regenerative Medicine (CIRM) President's Strategic Industry Advisory Council	2011-
Member, Stanley Center for Psychiatric Research, MIT/Harvard, Scientific Advisory Board	2009-
Member, Pacific Institute Board of Directors	2009-
Member, Stanford's BioX Interdisciplinary Biosciences Advisory Council	2008-2011
Member, QB3 (UCSF-UCB-UCSC) Industry Advisory Board	2007-
Member, California Council on Science and Technology	2007-
Chair, Innovation Task Force, California Council on Science & Technology	2006
Spinal Muscular Atrophy Foundation, Member, Scientific Advisory Board	2005-
Christopher Reeve Paralysis Found., Member, Research Planning Comm.	2002-2005
Hong Kong University of Science and Technology, member, International Advisor Board of the Molecular Neurosci. Center	2000-2010
Institute of Neuroscience, Shanghai, Advisory Board member	2000-2006
Reeve-Irvine Research Center, U.C. Irvine, Advisory Board member	2000-2005

Exploratorium, Scientific Advisor, NSF Traits of Life project	1999-2002
Jane Coffin Childs Fund for Medical Research, Scientific Advisory Board	1998-2001
National Academy of Sciences	
Chair, Neurobiology Section (#24)	1998-2001
Member, Class Membership Committee	1998-2000,2005
National Research Council	
Chair, Board on Life Sciences	2001-2006
Member, Commission on Life Sciences	1998-2000
Member, Board on Biology	1996-2000
Member, Research Opportunities in Biology, Subcommittee on Growth and Development	1987
Society for Neuroscience	
Councilor	1996-2000
Public Information Committee	1995-1999
Nominating Committee	1992
PEW Scholars Program, Scientific Advisory Committee	1993
Searle Scholars Program, Scientific Advisory Committee	1988-1992
McKnight Foundation Endowment Fund for Neuroscience	
President	2000-2005
Vice President	1998-2000, 2005-2008
Board of Directors	1986-
Chair, Scholars Award Committee	1989-1997
Member, Scholars Award Committee	1984-1997
Cold Spring Harbor Laboratory, Neurobiology Advisory Board	1984-1990
American Cancer Society, California Division, Fellowship Committee	1984-1987
NIH Neurobiology Study Section Member	1981-1982

Industry Boards

Biotechnology Industry Organization (BIO), member, Health Section Governing Body	2008 -2009
member, Emerging Company Section (ECS) Governing Body	2005-2007
Bay Area Science and Innovation Consortium (BASIC), member, BOD	2006-
BayBio, member, Board of Directors	2005-
Compugen, scientific and business advisor	2009-
NuMedii, Chair, Board of Directors	2010-2012
Ossianix, Chair, Board of Directors	2010-
Co-Founder (w / Frank Walsh)	
Mirna Therapeutics, Member, Board of Directors	2009-
Neurotherapeutics Pharma, Member, Board of Directors	2009-
Oligasis, Chair, Board of Directors	2009-
Second Genome, Chair, Board of Directors	2009-
Co-Founder (w / Gary Anderson, John Hulls, Thane Kreiner)	2009-
iPierian, Chair, Board of Directors	2009-2011
Limerick, Board of Directors	2007-2012
Chair, Board of Directors	2009-2012
Evotec, Board of Directors	2008-2010
Vice Chair, Board of Directors	2009-2010
Chiron, member, Science Board	2005-2006

Renovis	
Member, Board of Directors	2001-2008
Co-Chair, Scientific Advisory Board	2000-2001
Co-Founder (w/ Marc Tessier-Lavigne, Tito Serafini, Ed Penhoet)	2000
Exelixis	
Member, Scientific Advisory Board	1995-2001
Co-Founder (w/ Spyros Artavanis-Tsakonas, Gerry Rubin, Stelios Papadopoulos)	1995
Teijin Limited, consultant for neuroscience	1990-1995
Athena Neurosciences, member, Scientific Advisory Board	1988-1992

Awards, Honors

Dawson Prize in Genetics, Trinity College Dublin	2011
Reeve-Irvine Research Medal (w/ Marc Tessier-Lavigne)	2006
Ernst & Young Entrepreneur of the Year Finalist	2005
March-of-Dimes Prize in Developmental Biology (w/ Tom Jessell)	2001
Evan Rauch Chair of Neuroscience, U.C. Berkeley	1999-2001
Elected Member, American Philosophical Society	1999
Wakeman Award (w/ Tessier-Lavigne) for Research in Neurosciences	1998
Ameritec Prize for basic research toward a cure for paralysis	1997
Canada Gairdner International Award in Medical Sciences	1997
J. Allyn Taylor International Prize in Medicine (w/ Tom Jessell)	1996
Fondation IPSEN Neuronal Plasticity Prize (w/ Marc Tessier-Lavigne and Friedrich Bonhoeffer)	1996
Elected Member, National Academy of Sciences	1995
Elected Fellow, American Academy of Arts and Sciences	1993
W. Alden Spencer Award, Columbia University College of P&S	1992
NIH Javits Neuroscience Investigator Award	1992-1999
Fellow, American Association for the Advancement of Science	1991
Weizmann Scholarship Foundation Award, 3rd Annual	1990
Endowed Chair (5 yr award), Class of 1933, U.C. Berkeley	1987-1992
NIH MERIT Award, NICHD	1985-1995
NIH Javits Neuroscience Investigator Award	1985-1992
McKnight Neuroscience Development Award	1985-1987
Alan T. Waterman Award, National Science Board	1983
Demuth Swiss Medical Res Found., 2nd Inter. Award in Neuroscience	1983
Charles Judson Herrick Award	1982
McKnight Scholars Award	1980-1983
Alfred P. Sloan Research Fellow	1980-1982
Helen Hay Whitney Postdoctoral Fellowship	1977-1979
NSF Predoctoral Fellowship	1972-1975
Phi Beta Kappa, Distinction, Department Honors	1972
G.D. Searle Foundation Scholarship	1968-1972
Ford Foundation Scholarship	1968
President, Illinois Junior Academy of Sciences	1967-1968

Endowed and Special Lectures (partial list)

Bodenstein Lecture, University of Virginia	2001
Lecture at the Nobel Forum, Karolinska Institute, Stockholm	1999

Keynote Lecture, Cell Contact and Adhesion Gordon Conference	1999
Pomerat Lecture, University of Texas Medical Branch, Galveston, Texas	1999
Keynote Lecture, American Soc. for Neurochemistry annual meeting	1999
Nachmansohn Lecture, sponsored by Weizmann Inst.	1998
1998 Grass Lecture, Society for Neuroscience	1998
Runnström Lecture, Stockholm University	1998
Keynote Lecture, Basement Membranes Gordon Conference	1998
Vernon B. Mountcastle Lecture, Johns Hopkins University	1998
Ameritec Foundation Award Lecture, New Orleans	1997
Gairdner Foundation Award Lecture, University of Toronto	1997
Congressional Biomedical Research Caucus, House of Representatives	1997
Grass Lecture, University of Illinois	1997
Jack Sadler Memorial Lecture, University of Colorado	1997
Presidential Symposium, Society for Neuroscience	1995
Burton L. Baker Memorial Lecture, University of Michigan	1995
McClintock Lecture, University of British Columbia	1995
W. Alden Spencer Lecture, Columbia University	1992
Laura J. Kalfayan Memorial Lecture, Univ. North Carolina	1992
Anders Retzius Lecture, Karolinska Institute, Sweden	1991
Albert L. Tester Memorial Lecture, U. Hawaii	1990
Victor Hamburger Lecture, Washington University	1989
NSF Commemorative Lecture, Cell Biology Meeting	1989
Jenkinson Memorial Lecture, Oxford University	1988

Editorial Boards

Science Translational Medicine, Board of Reviewing Editors	2009-
Proceedings of the National Academy of Science, Editorial Board	1999-2000
Molecular and Cellular Neuroscience	1995-2005
Development, Associate Editor	1993-2001
Journal of Cell Biology	1993-1994
Current Biology, Current Opinion in Neurobiology	1992-2002
Mechanisms of Development	1990-2000
Cell Regulation/Molecular Biology of the Cell	1989-1992
J. of Neuroscience, Developmental Neurobiology Co-Section Editor	1989-1993
Neuron	1987-
Science, Board of Reviewing Editors	1986-1996
Cell	1986-1992, 1999-2001
Developmental Biology	1985-1988
Journal of Comparative Neurology	1983-1984
Trends in Neuroscience	1981-1996

Patents Approved and Pending (available upon request)

numerous patents sponsored by U.C. Berkeley approved and pending involving therapeutic applications of Semaphorins, Robos, Slits, and Comms

Publications: Journal Articles

1. Scommegna, A., Burd, L., Goodman, C.S., Bieniarz, J., and Seals, C. (1970). The effects of pregnenolone sulfate on uterine contractility. *Amer. J. Obstet. Gynec.* 108, 1023-1029.
2. Goodman, C.S. (1974). Anatomy of locust ocellar interneurons: constancy and variability. *J. comp. Physiol.* 95, 185-201.
3. Goodman, C.S. (1976). Constancy and uniqueness in a large population of small interneurons. *Science* 193, 502-504.
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EXHIBIT 2



National Park Service
U.S. Department of the Interior

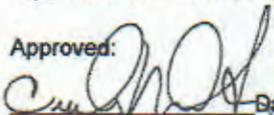
POINT REYES
NATIONAL SEASHORE

1 Bear Valley Road
Point Reyes Station
CA 94956

Superintendent's Compendium
Of Designations, Closures, Permit
Requirements and Other Restrictions
Imposed Under Discretionary Authority.

415-464-5100 phone
415-663-8132 fax

Approved:


Date: 22 JUNE 2012
Superintendent

In accordance with regulations and the delegated authority provided in Title 36, Code of Federal Regulations ("36 CFR"), Chapter 1, Parts 1-7, authorized by Title 16 United States Code, Section 3, the following provisions apply to all lands and waters administered by the National Park Service, within the boundaries of Point Reyes National Seashore and the Northern District of Golden Gate National Recreation Area north off the Bolinas/Fairfax Road administered by Point Reyes National Seashore. Unless otherwise stated, these regulatory provisions apply in addition to the requirements contained in 36 CFR, Chapter 1, parts 1-7. Some of the sub-sections in are under review.

Written determinations, which explain the reasoning behind the Superintendent's use of discretionary authority, as required by Section 1.5(c), appear in this document identified by italicized print.

I. **36 CFR §1.5 – VISITING HOURS, PUBLIC USE LIMITS, CLOSURES, AND AREA DESIGNATIONS FOR SPECIFIC USE OR ACTIVITIES**

(a)(1) The following visiting hours and public use limits are established for all or for the listed portions of the park, and the following closures are established for all or a portion of the park to all public use or to a certain use or activity:

Visiting Hours:

- The Park is open to visitors every day of the year. Visitor center hours are as follows:
 - Bear Valley Visitor Center: open year-round (except December 25), weekdays from 9-5; weekends and holidays from 8-5
 - Kenneth C. Patrick Visitor Center: Open Saturday, Sunday, and Holidays from 10-5 year round. Closed December 25.
 - Lighthouse Visitor Center: Open year round (except December 25), Thursday through Monday 10-4:30; closed on Tuesdays and Wednesdays year round.
- All areas in the park are closed to visitor vehicle parking between the hours of 12:00 a.m. and 6:00 a.m. with the exception that visitors holding backcountry camping permits may park at established trailheads and authorized visitors staying overnight at the Clem Miller Environmental Education Center, the Point Reyes Hostel, and the Lifeboat Station may park at those locations or at established trailhead parking lots. Any other overnight parking and use must be approved by the Chief Ranger's office

Since non-permitted overnight use and camping is prohibited in the park, there is no valid reason for a vehicle to remain in the park overnight unless the Chief Ranger's Office has given previous approval.

PUBLIC USE LIMITS:

Sir Francis Drake Boulevard:

- During high visitation seasons due to wildflower, and whale, sea lion, and elephant seal activity visitors entering the westernmost section of the park on Sir Francis Drake Boulevard may be denied access beyond the road to South Beach. During such closures, shuttle bus transportation will be provided from this point to the various viewing and public use areas.

As a result of dramatically increasing visitation and traffic during the wildflower seasons, whale migrations, elephant seal and sea lion colony expansions in this area of the park, capacity limits have been established. It was determined that the visitor would be better served, and necessary resource protection would be better facilitated, by a docent program combined with shuttle bus service. Shuttle bus transportation will be provided from the point of closure to the various viewing and public use areas.

Wilderness Trail Use:

- Day users traveling on established trails within designated wilderness areas may not travel in groups of more than 40 persons.

Large groups create noise and a presence that disturbs wildlife and interferes with other people in the area who are looking for a wilderness experience away from crowds and noise.

Bicycle Groups:

- The maximum number of bicyclists in any one group is 10. Larger groups of cyclists will have to divide into groups no larger than 10.

This size restriction is necessary for the safety of cyclists using public roadways and authorized trails within the Park. These roadways and trails are narrow and winding and will not accommodate large numbers of bicyclists.

Picnic Group Size/Permits:

- Visitor groups of more than 100 people who wish to picnic in the park must obtain a permit.

Because there are limited places in the park which can accommodate a picnic group of this size, and to minimize the impact of such a group on other visitors, a permit system is necessary for these groups.

Weddings/Permits:

- All visitors wishing to hold a wedding ceremony in the park must obtain a permit.

In order to provide for resource protection, avoid conflicts between groups wishing to use the same site, and to minimize the impact of such events on other visitors, a permit system is necessary for these events.

Beach Fires:

- Individuals or groups visiting beach areas, who light or maintain a wood fire, including ceramic pit fires, must obtain a permit.

In order to protect beach resources, educate visitors on proper fire use and allowed materials, and control fires during High and Extreme Fire Danger, a permit system is necessary within the park.

Boat Stay Limit:

- Within the waters of Point Reyes National Seashore, all boats (occupied or unoccupied) are limited to a stay of four (4) consecutive nights in any one stay, and thirty (30) total nights within a calendar year.

In order to protect water quality, provide for standardized rules with other camping experiences and to allow all visitors access to the few protected anchorages, it is necessary to limit overnight stays.

Boat Moorings:

- Individuals who wish to install permanent boat moorings on Tomales Bay south of Walker Creek (in both Point Reyes NS and Golden Gate NRA waters) and within the ¼ mile Point Reyes offshore park boundary north of Walker Creek must obtain a permit.

In order to protect water quality, control numbers of boat moorings, and provide for standardized management of all of Tomales Bay, a permit system has been determined to be necessary.

CLOSURES:

Park Facilities:

The following areas and facilities are closed to public use:

- Park administrative, maintenance, operations, storage, and employee housing facilities, including but not limited to access roads, outbuildings, grounds, and docks. This closure shall not apply to residents, guests of residents, or persons engaged in legitimate Government activities or permitted business activities.
- Except for facilities designated for visitor use, all buildings are closed to unauthorized entry. This shall not apply to persons in non-public areas who have been granted specific permission by the National Park Service (NPS) or another authorized Federal agency, licensed concessionaires or their representatives, or those who are under escort of park employees acting within the scope of employment.

Parking:

- All parking areas in the park are closed to camping and overnight parking, with the exception that visitors holding (hike-in) backcountry camping permits may park at established trailheads and visitors staying overnight at the Clem Miller Environmental Education Center, the Point Reyes Hostel, and the Lifeboat Station may park at those locations. Overnight parking is defined as a vehicle parking from 12:00 a.m. to 6:00 a.m.

Since overnight use and camping is prohibited in the park except in established backcountry campsites there is no valid reason for a vehicle to remain in the park overnight unless the Visitor and Resource Protection Division has been previously advised.

Chimney Rock Boat Launch:

- The pier and marine railway boat launching facility adjacent to the historic lifeboat station at Chimney Rock are closed.

These facilities are closed due to safety considerations. There are no less restrictive means that would ensure the continued safety of visitors.

Kehoe and Tomales Cliffs:

- Ocean facing cliff areas from Kehoe Beach to Tomales Point are closed except at the following sites: Elk Fence, Elephant Rock, Driftwood Beach and the Lower Pierce Point Beach.

These areas are closed due to safety considerations. Less restrictive closures are not as safe as a full closure and could lead to visitor confusion as to when or whether the areas are open.

Chimney Rock Cliffs:

- Cliff areas between mean low tide and the bluffs between Chimney Rock and the Lighthouse are closed.

This area is closed due to safety considerations and to protect marine mammal and bird colonies. Less restrictive closures are not as safe as a full closure and could lead to visitor confusion as to when or whether the areas are open.

Chimney Rock Fish Dock:

- The Fish Dock area beyond the closed sign at the end of Chimney Rock Road is closed to unauthorized vehicles. The Fish Dock is closed to public use/entry.

For visitor safety, the Chimney Rock Fish Dock and is for NPS administrative use only.

Point Reyes Lighthouse:

- The Lighthouse area is closed from the upper observation area to the lower Lighthouse on Tuesdays, Wednesdays and all other days from 4:30 pm to 10:00 a.m. and during periods when the wind speed exceeds 40 mph. The entire Lighthouse area (from the gate at the parking lot to the lower Lighthouse) is closed from 10:00pm to 6:00am. The Lighthouse area (from the gate at the parking lot to the lower Lighthouse) is also closed to wedding ceremonies and other non-park sponsored events.

This area is closed for public safety reasons and to protect the historic Lighthouse, Visitor Center and other structures when no park staff is in the area. Weddings impact visitors not participating in the ceremonies. The Lighthouse is closed to weddings because the Lighthouse is a high visitation area, and weddings substantially increase the visitation and traffic in the area. The area is too small to safely accommodate wedding parties and visitors at the same time. Parking is also very limited.

Seal Pupping Areas:

- Double Point, Drake's Estero, and South Blue Gums Beach harbor seal pupping areas are closed to the public from March 1 to June 30 of each year. Hog Island is closed to overnight use. Day use is permitted at Hog Island with access and use restricted to the west side only. (See Exhibit A).
- Drakes Beach elephant seal pupping area as delineated by the signing at the western most end of Drakes Beach is closed to all entry by visitors due to seal activity at all times of the year.

These closures are necessary to protect harbor and elephant seals from disturbance during the pupping or season when they are exceptionally vulnerable and for other wildlife concerns. No management action other than closure is sufficient because a single disturbance could significantly reduce the productivity of the colonies, resulting in a reduced population size or loss of habitat if they leave the area.

Snowy Plover Closures:

- Specific areas on Point Reyes Beach which are signed and fenced to protect snowy plover nests from March 1 through September 30 every year are closed to all entry by visitors (including on horseback) in order to protect the Snowy Plover.

The seasonal closure is necessary to ensure that no damage occurs to ground nests of snowy plovers, a federally listed threatened species. Because there are bird nests there throughout the breeding season, nothing other than a full closure of the specific fenced areas would be sufficient to protect the birds.

Seabird Colony Sites:

Seabird Nesting Areas:

- Point Reyes Headlands, Miller Rocks, Stormy Stack, and Hog Island seabird nesting areas are closed to the public from March 1 to July 30 of each year (See Exhibit A)
- Bird Rock is closed year round to visitor use.

The year round closure is necessary to insure that no damage occurs to nesting burrows of storm petrels and rhinoceros auklets, both of which are species of concern under California state law. Brown pelicans, a federally listed threatened species, roost on Bird Rock in the summer time. Because there are bird colonies there throughout the year, nothing other than a full closure would be sufficient to protect the birds.

Kite-boarding:

Kite-boarding is not allowed off Limantour Beach, Drakes Beach, and the Great Beach due to snowy plover habitat.

This closure is necessary as kite-boarding interferes with wildlife behavior.

Disturbing Wildlife with Sound:

- The use of any audio or mechanical device to attract or disturb wildlife is prohibited.

The use of audio devices to attract wildlife has the potential to cause bodily injury, energy loss, a decrease in food intake, habitat avoidance and abandonment, and reproductive losses (Busnel, R.G. and J. Fletcher (eds.) 1978. Effects of noise on wildlife New York: Academic Press.) In addition, audio attractants can increase mortality by causing animals to move into high risk areas (ie. roadways) or areas where they would be more vulnerable to predators (ie. open fields).

Remote Controlled, Motorized Aircraft

- Remote controlled aircraft (both motorized propeller driven and gliders) are not allowed in the park.

Because the use of remote controlled aircraft has the potential to harass wildlife, especially marine mammals and threatened shore bird species, and bother other visitors, their use has been determined to be incompatible with the parks mission.

Boating:

- Boating or the use of any vessel (as defined by 36 CFR 1.4) is prohibited in the following areas:

Within 100 yards of the Point Reyes headlands shoreline between the Point Reyes Lighthouse and Chimney Rock

This closure is necessary to protect marine mammals and seabirds in this area consistent with the State of California Point Reyes Special Closure Marine Protected Area.

Limantour & Drakes Estero:

The waters including tidal areas of Limantour and Drakes Estero are closed to boating from March 1 to June 30. This closure excludes operations associated with Drakes Bay Oyster Company

The Esteros are protected seabird, shorebird, and marine mammal pupping sites. No management action other than closure is sufficient because a single disturbance could significantly reduce the productivity of the colonies, resulting in a reduced population size or loss of habitat if they leave the area.

Non-Motorized Craft Allowed:

- Where the use of vessels on inland waters, such as freshwater lakes and including Abbotts Lagoon, Drakes and Limantour Esteros, and the Giacomini Wetlands area (this area is bordered by the Tomales Bay State Park to the north and the "Green Bridge" to the south) is permitted in the Park, only non-motorized craft may be used.

Under the Wilderness Act, motorized vehicles are prohibited in congressionally designated wilderness areas. Additionally, the NPS manages designated potential wilderness in a manner consistent with wilderness designation.

NOTE: All areas within the park are subject to emergency closure to the public when the Superintendent or designated representative determines an emergency situation exists which, coupled with continued visitation or unrestricted activities, would pose a threat to public safety or adversely affect the park's natural, aesthetic, scenic or cultural values. Such closures will be lifted immediately upon termination of the emergency situation.

(a)(2) The following areas have been designated for a specific use or activity, under the conditions and/or restrictions as noted:

- **Bicycle Riding:** The following roads, though closed to public motor vehicle use, are open to bicycling:
 - Sky Trail (from Limantour Road to Sky Camp)
 - Bear Valley Trail (Bear Valley Trailhead to Glen Junction)
 - Coast Trail (Laguna Road to Coast Camp)
 - Inverness Ridge Trail (Limantour Road to the Mt. Vision Road)
 - Marshall Beach Trail
 - Stewart Trail (including Glen Camp Spur Trail from Stewart Trail to Glen Camp)
 - Lighthouse Road from the parking lot to the Lighthouse Visitor Center

- Camping: Please refer to § 2.10 of this compendium for specific camping area designations.

At-large camping has been determined to be inconsistent with the resource protection and visitor management mission of the park. Campsite locations have been selected for maximum visitor experience while avoiding sensitive resource areas.

- As per section § 7.81, Drakes Beach Overlook is the only location approved for powerless flight. A permit is required in that location.

For safety reasons, Drakes Beach Overlook is best suited for this use. A large part of the park is congressionally designated wilderness where powerless flight is not a compatible use. There are very few places where powerless flight would be safe.

II. 36 CFR §1.6 – ACTIVITIES THAT REQUIRE A PERMIT

(f) The following is a compilation of those activities for which a permit from the Superintendent is required:

For all permits, contact Point Reyes National Seashore, Point Reyes Station, California 94956, phone number, 415 464-5170.

- §1.5(d) The following activities related to Public Use Limits:
 - Picnic groups of over 100 people
 - Weddings
 - Visitors lighting or maintaining beach fires and ceramic pit fires
 - Installation of permanent boat moorings
- §2.4(d) Carry or possess a weapon, trap, or net
- §2.5(a) Specimen collection (Take plant, fish, wildlife, rocks or minerals)
- §2.10(a) The following camping activities:
 - Overnight camping, including backcountry and boat camping.
- §2.12 Audio Disturbances:
 - (a)(2) Operating a chain saw in developed areas
 - (a)(3) Operation of any type of portable motor or engine, or device powered by a portable motor or engine in non-developed areas
 - (a)(4) Operation of a public address system in connection with a public gathering or special event for which a permit has been issued pursuant to §2.50 or §2.51
- §2.13(a) Fires: Beach fires and ceramic pit fires
- §2.16 Horses and Pack Animals: Groups with over 25 head of horses or pack animals.
- §2.17 Aircraft & Air Delivery:
 - (a)(3) Delivery or retrieval of a person or object by parachute, helicopter or other airborne means
 - (c)(1) Removal of a downed aircraft
- §2.38 Explosives:
 - (a) Use, possess, store, transport explosives, blasting agents
 - (b) Use or possess fireworks

- §2.50(a) Conduct a sports event, pageant, regatta, public spectator attraction, entertainment, ceremony, and similar events
- §2.51(a) Public assemblies, meetings, gatherings, demonstrations, parades and other public expressions of views involving more than 25 people
- §2.52(c) Sale or distribution of printed matter that is not solely commercial advertising
- §2.60(b) Livestock use
- §2.61(a) Residing on federal lands
- §2.62 Memorialization:
 - (a) Erection of monuments (Requires approval from Regional Director)
 - (b) Scattering ashes from human cremation
- §4.11(a) Exceeding of established vehicle load, weight and size limits
- §5.1 Advertisements - (Display, posting or distribution.)
- §5.3 Engaging in or soliciting any business (Requires a permit, contract or other written agreement with the United States, or must be pursuant to special regulations).
- §5.5 Commercial Photography/Filming:
 - (a) Commercial filming of motion pictures or television involving the use of professional casts, settings or crews, other than bona fide newsreel or news television
 - (b) Still photography of vehicles, or other articles of commerce or models for the purpose of commercial advertising.
- §5.6(c) Use of commercial vehicles on park area roads (The Superintendent may issue a permit to access private lands within or adjacent to the park when access is otherwise not available)
- §5.7 Construction of buildings, facilities, trails, roads, boat docks, path, structure, etc.
- §6.9(a) Operation of a solid waste disposal site
- Part 7 Special Regulations
- §7.81 Powerless Flight

III. GENERAL REGULATIONS

36 CFR §2.1 – PRESERVATION OF NATURAL, CULTURAL AND ARCHEOLOGICAL RESOURCES

(a)(4) Dead wood on the ground may be collected for use as fuel for campfires within the park in the following areas:

- Individuals or groups who have been issued a fire permit under 1.5(a)(1) may collect naturally occurring dead wood (driftwood) that does not contain creosote from beach areas for use as firewood on those beaches in the park, except for beaches on Tomales Bay.

(c)(1), (c)(2) The following fruits, nuts, berries or unoccupied seashells may be gathered by hand for personal use or consumption, in accordance with the noted size, quantity, collection sites and/or use or consumption restrictions:

- Blackberries, Raspberries, Thimbleberries, Gooseberries, Salmonberries, Huckleberries, or apples, 2 quarts per person per day.
- Mushrooms, 2 gallons and 1 mushroom per adult per day.

The minor collection of any of these items will not result in an adverse effect to park wildlife, the reproduction of any plant species or other park resources or otherwise adversely affect park wildlife. If future monitoring indicates that such collection is causing any of the above problems, the authorization of this consumptive use will be terminated.

36 CFR §2.2 - WILDLIFE PROTECTION

(d) The transporting of lawfully taken wildlife through the park is permitted under the following conditions and procedures:

- The carcass must be tagged in accordance with state law.
- Said carcass must be kept out of sight.

(e) The following areas are closed to the viewing of wildlife with the use of an artificial light:

- The entire park is closed to viewing wildlife with artificial light.

36 CFR §2.3 – FISHING

Note: By California State Law no fishing is allowed in:

- Lagunitas Creek and all its tributaries including Olema and Bear Valley Creeks
- All coastal streams within the park
- Limantour Estero
- Point Reyes Headlands State Marine Reserve

Note: Per 36CFR 2.3(d)(1) Fishing in freshwaters by any manner other than hook and line is prohibited

36 CFR §2.10 – CAMPING and FOOD STORAGE

(a) The sites and areas listed below have been designated for camping activities as noted. A permit system has been established for certain campgrounds or camping activities, and conditions for camping and camping activities are in effect as noted:

- Stay Limit: Camping in Point Reyes National Seashore is limited to not more than a total of 4 nights in any one visit and not more than 30 nights in any given calendar year unless authorized by a special use permit.
- Site Limit: Each campsite at Point Reyes National Seashore has a maximum density (persons per site) which is given at the time the permit is issued and to exceed this number is considered a violation of permit.
- Group Site Limit: Group sites are limited to a maximum of 25 people per night at Coast Camp, Wildcat Camp, and Sky Camp.

- Checkout Time: Checkout time in all campgrounds is 12:00 noon on the day of departure.
- Waste Water Disposal: Camping waste-water (dishwater and cooking water) must be discharged at least 100 feet from streams or bodies of water.
- Age Limit: The minimum age of any camper is 18 unless accompanied by an adult.
- Backcountry Camping Permits: Backcountry camping in Point Reyes National Seashore is by permit only at designated backcountry campsites. The sites are located at the following designated campgrounds: Coast Camp, Sky Camp, Wildcat Camp and Glen Camp. Camping permits must be in the possession of the camper while he/she is enroute to their site. Thereafter the permit is to be attached to the tent or some other object where it can be checked should the permittee be away from the site.
- Tomales Bay Boat Camping: All camping in Tomales Bay is boat-in camping and requires a permit. Camping on the west shore of Tomales Bay in Point Reyes National Seashore, with the exception of Tomales Bay State Park, is authorized for dispersed minimum impact camping within 75 feet of the mean high tide level. Camping permits must be in the possession of the group while in the park.
- Camping on Hog Island and on Duck Island is prohibited.

(b)(3) Camping within 25 feet of a fire hydrant or main road, or within 100 feet of a flowing stream, river or body of water is authorized only in the following areas, under the conditions noted:

- In established campsites in designated campgrounds

(d) Conditions for the storage of food are in effect, as noted, for the following areas:

- All food items(including canned, bottled or otherwise packaged, equipment used to cook or store food, garbage and toiletries such as soap, toothpaste and cosmetics) must be stored in food lockers where provided.
- Canned or bottled items that have never been opened may be stored in vessels, or in the trunk of the vehicle parked at the trailhead parking area or if there is no trunk, as low in the vehicle as possible, provided that the cans and bottles are stored out of sight in odor-tight containers and all vehicle doors, windows and vents are closed.

36 CFR §2.11 – PICNICKING

Conditions for Picnicking:

- Leaving food unattended is prohibited.
- Picnicking is permitted within all designated campgrounds; however, picnickers must yield campsites to persons with camping permits.
- Groups of over 100 people who wish to picnic in the park must first obtain a permit.
- A designated portion of Bear Valley picnic area is available by reservation. This portion is limited to a maximum of 75 people.

36 CFR 2.13 – FIRES

(a)(1) The lighting or maintaining of fires is generally prohibited, except as provided for in the following designated areas and/or receptacles, and under the conditions noted:

Designated Areas:

- Beaches: Wood fires are allowed, by permit, pursuant to 1.5(a)(1) Public Use Limits, on beaches below the high tide line within Point Reyes National Seashore.
- Campgrounds and Picnic Areas: Charcoal fires only for cooking.
- Stewart Horse Camp: Wood and charcoal fires in park provided grills

Established Conditions:

In all cases, fires are only allowed in such fire danger conditions as directed by the park's Fire Step-Up Plan

Beach Fires:

- The person attending the beach fire must have in his/her possession a valid permit.
- Fires must be a minimum of 30 feet in all directions from flammable material, including vegetation.
- No fire shall exceed 36 inches in diameter at its base.
- Wooden pallets, tires or flammable liquid such as gasoline may not be burned. All metal such as nails or screws, must be removed from wood before it is brought to the beach.

Campgrounds and Picnic Areas:

- Only charcoal, gas stove or canned heat may be used for cooking.
- Charcoal fires only may be made in the provided grills or in visitor owned grills brought into a campground.

Stewart Horse Camp:

- Wood fires may only be made in the provided grills
- Charcoal fires may only be made in the provided grills or in visitor owned grills brought into a campground.

(b) Fires must be extinguished according to the following conditions:

- Fires shall be attended at all times by a responsible person until the fire is completely out and the coals are cold.
- Fires must be extinguished by 12 midnight.
- Fires must be completely extinguished with water, using the "drown, stir and feel" method.
- Extinguishing fires with sand is prohibited.

(c) High fire danger closures will be in effect as noted:

- Mount Vision Road will be closed to vehicles during extreme and red flag fire danger

36 CFR §2.14 – SANITATION and REFUSE

(b) Conditions for the disposal, containerization, or carryout of human body waste have been established as follows:

- Human waste must be disposed of at least 100 feet from any water source (including seasonal creek beds, etc, that may be dry), campsite or trail and be buried 6" deep in the soil.
- Portable toilets are required for all overnight trips in Tomales Bay.

36 CFR §2.15 – PETS

(a)(1) The following structures and/or areas are closed to the possession of pets:

- All Point Reyes National Seashore trails and in wilderness areas, except:
 1. Trails within the Northern District of Golden Gate NRA, north of Bolinas Fairfax Road including the Tomales Bay Trail and the trails in the Giacomini Wetlands Preserve.
 2. Trails and roads within the Niman Ranch/Commonweal area south of the Commonweal entrance road and west of Mesa road.
 3. Kehoe Beach access trail.
 4. The Point Reyes Beach (Great Beach) except below listed seasonal closures
- Bull Point Trail
- Drakes Beach
- McClures Beach
- Palomarin Beach
- Limantour Preserve and that portion of the beach peninsula parallel to the preserve and designated by signs.
- Abbotts Lagoon including that area within 150 yards of the trail and the Lagoon itself.
- Chimney Rock Headlands area, and all areas adjacent to the Chimney Rock trailhead parking area.
- During snowy plover nesting season, the portion of the Great Beach from the intersection of Kehoe Beach trail and Kehoe Beach to the north of North Beach parking lot (as signed), to protect snowy plovers.
- The southern end of South Point Reyes Beach from the Ben Davis Reservation of Use and Occupancy property (as signed) to the Lighthouse during January, February and March, to protect elephant seals during pupping season.
- Lighthouse area, parking lot, Sea Lion Overlook and all adjacent trails.
- All campgrounds except Tomales Bay boat-in camping sites south of the Tomales Point Tule Elk Preserve.
- Specific areas as posted by signs.

(a)(5) Pet excrement must be disposed of in accordance with the following conditions:

- Pet excrement must be bagged and deposited in proper waste receptacles.

(e) Pets may be kept by park residents under the following conditions:

- Park employees in government housing may keep pets only in accordance with the Point Reyes National Seashore Pet Policy SOP approved by the Superintendent. That document shall, by reference, be made a part of this compendium. Permit/lease and Reservation of Use and Occupancy holders must comply with Marin County pet regulations.

36 CFR §2.16 – HORSES and PACK ANIMALS

(a) The following animals are designated as pack animals for purposes of transporting equipment:

- horses
- mules
- burros
- llamas

(b) The use of horses or pack animals is allowed on the following trails, routes or areas:

- Park wide except that:
- Drakes Beach, Earthquake Trail, and Woodpecker Trail are closed to horses and other pack animals at all times (See Exhibit B).
- Llamas are prohibited on the Tomales Point Tule Elk Preserve and the Limantour Area from Home Bay to Coast Trail/Woodward Valley Trail Junction and the beach to Inverness Ridge (See Exhibit C).
- The following areas are closed to horses and pack animals on weekends and holidays because such use will conflict with high visitor use: Bear Valley Trail (between Mt. Wittenberg Trail and Glen Trail junction), Meadow Trail, and Old Pine Trail.
- Overnight camping with horses and pack animals (except llamas) is permitted only in the designated areas of the Coast, Wildcat or Sky Camps. Llamas are allowed to overnight camp in the designated areas at Wildcat and Sky Camps.
- Horses and pack animals are not permitted overnight at Glen Camp.

(g) Other conditions concerning the use of horses or pack animals:

- Horse drawn wagons, carts and/or buggies are prohibited on all trails unless specifically authorized by the Superintendent or designated representative.
- Off-trail or cross-country travel is prohibited, except within 100 feet of the trail for purposes of watering and rest stops, or by permittees conducting normal ranching operations in enclosed pastures, corrals and fields under Special Use Permit, Lease or Reservation of Possession .
- Stock users are specifically prohibited from establishing new trails and from short cutting trails and switchbacks.
- All persons who wish to camp in the backcountry campgrounds must obtain and carry with them a camping permit. The permit is valid only for the dates and camping locations indicated.
- The maximum string size for parties not spending nights in the park is 25 head of stock on designated routes. Groups in excess of 25 head of stock must obtain a permit from the Superintendent.

- Tying stock to trees overnight or for extended periods of time is prohibited. When picketed on a line, stock must be tied so they cannot chew on tree bark or eat the leaves of shrubs or plants.
- It is prohibited to tie or picket stock within 100 feet of any stream, lake or spring. Stock may not be tied within a campsite except for loading and unloading or in designated areas.
- Grazing is prohibited.
- Groups with horses or pack animals must bring in their own feed for their animals. Certified weed free hay, pellet feed or hay cubes are required to minimize noxious weed introduction.
- Horse users are prohibited from unloading manure and hay from their trailers into parking lots within the Seashore.
- Campers are required to thoroughly clean the campsite on a daily basis. Manure and uneaten fodder must be raked and spread out.
- Watering facilities must be used when they are provided.
- The maximum number of horses permitted overnight at Sky, Coast and Wildcat campgrounds is 8.

36 CFR §2.17 – AIRCRAFT and AIR DELIVERY

(a)(1) Areas designated for operating or using aircraft are provided for in section 7.81

(a)(2) The operation or use of aircraft under power on water within 500 feet of designated swimming beaches, boat docks, piers, or ramps is permitted in the following areas, under the conditions noted:

- There are no park designated areas where seaplanes may land.

(c)(1) The removal of a downed aircraft, components, or parts thereof is subject to procedures established by the Superintendent through written authorization.

36 CFR §2.21 – SMOKING

(a) The following portions of the park, or all or portions of buildings, structures or facilities are closed to smoking as noted:

- All public buildings including park offices and restrooms, and public areas of concession buildings.
- Within 25 feet of building entrances normally used by the public, or 25 feet of entrances not normally used by the public if smoke gets in the building.
- Where posted.
- Smoking while traveling on trails. Persons who wish to smoke while hiking or riding on trails must stop and remain in one location until they have extinguished their smoking material.
- Morgan Horse Ranch barn and exhibit areas.

- All government vehicles.
- The Superintendent may ban smoking on trails and in backcountry areas during periods of very high and extreme fire danger.

These restrictions are enacted to protect public health and structures from fire danger or smoke. This prohibition is consistent with state law and past practice. Smoking while travelling on trails is prohibited because of fire danger. Ashes inadvertently dropped while walking or riding an animal have the potential to start a fire that may go unnoticed in its initial stages. Requiring persons to remain in one location minimizes this risk. Smoking while on trails or backcountry areas during very high or extreme fire danger conditions is prohibited because of heightened fire danger.

36 CFR §2.22 – PROPERTY

(a)(2) Property may be left unattended for periods longer than 24 hours in the following areas and under the following conditions:

- Visitors on backcountry trips may leave their vehicles unattended for the period specified by the backcountry permit.

36 CFR §2.23 – RECREATION FEES

(b) Recreation fees, and/or a permit, in accordance with 36 CFR part 71, are established for the following entrance fee areas, and/or for the use of the following specialized sites, facilities, equipment or services, or for participation in the following group activity, recreation events or specialized recreation uses:

Entrance Fee Areas:

- None

Daily Site Use Fee Areas:

- None

Special Recreation Permit Fee (Such as but not limited to, group activities, recreation events, and the use of motorized recreation vehicles):

- None

36 CFR §2.35 –ALCOHOLIC BEVERAGES and CONTROLLED SUBSTANCES

(a)(3)(i) The following public use areas, portions of public use areas, and/or public facilities within the park are closed to consumption of alcoholic beverages, and/or to the possession of a bottle, can or other receptacle containing an alcoholic beverage that is open, or has been opened, or whose seal has been broken or the contents of which have been partially removed:

- All public use areas within the park are closed to the possession of a receptacle(s) with a capacity of five fluid gallons or more which contain(s) an alcoholic beverage.

The behavior induced by the consumption of excessive amounts of alcoholic beverages may adversely affect the park experience of other visitors. Parties with alcohol in large containers (i.e. kegs) have consistently caused problems in the past including rowdy behavior and vandalism.

36 CFR §2.51 – PUBLIC ASSEMBLIES , MEETINGS

(e) The following areas are designated for the purpose of 1st Amendment speech, demonstrations and/or the distribution and/or sale of printed matter. Groups of more than 25 demonstrators must obtain a permit from the park Superintendent.

- Areas adjacent to the Bear Valley and Ken Patrick Visitor Centers (see Exhibit D).

36 CFR §2.62 – MEMORIALIZATION

(b) A permit is required for the scattering of ashes from cremated human remains, or in the following designated areas without a permit, in accordance with the following terms and conditions:

- A permit is required for all areas.
- Remains to be scattered must have been cremated and pulverized.
- Scattering by persons on the ground is to be performed at least 100 yards from any trail, road, developed facility or body of water, and 440 yards seaward from the shoreline on the Pacific Ocean.
- Scattering from the air will not be performed over developed areas, facilities or bodies of water and will be performed at a minimum altitude of 2000 feet above the ground.

36 CFR §3.3 – VESSEL PERMITS

Permits are required for the use of a vessel in the following areas:

- None

36 CFR §3.21 – SWIMMING and BATHING

(a)(1) The following areas are closed to swimming and bathing:

- None.

(a)(2) Swimming and bathing is allowed under the following conditions:

No soap may be used in any freshwater lake, pond, or stream.

36 CFR §3.23 – SCUBA and SNORKELING

(a) SCUBA diving and snorkeling is permitted in the following swimming, docking, and mooring areas under the terms and conditions noted:

- All areas except Drakes Estero and Limantour Estero.

36 CFR §4.10 – TRAVEL ON PARK ROADS and ROUTES

(a) Park roads open for travel by motor vehicle are those indicated below, and/or as indicated in the following publication or document (attached hereto):

- Most current version of the official NPS Map & Guide to Point Reyes National Seashore

36 CFR §4.11 – VEHICLE LOAD, WEIGHT and SIZE LIMITS

(a) The following load, weight and size limits, which are more restrictive than State law, apply to the roads indicated under the terms and conditions, and/or under permit as noted:

- Vehicles over 24 feet in length are prohibited on Mount Vision Road and Chimney Rock Road. Groups arriving by bus who have reservations at the Lifeboat Station will be escorted by NPS staff to that location.
- Travel trailers are prohibited on Limantour Road, Mount Vision Road and Chimney Rock Road.

36 CFR §4.21 – SPEED LIMITS

(b) The following speed limits are established for the routes/roads indicated:

15 MPH:

- The unpaved section of Mesa Road
- Drakes Bay Oyster Company Access Road
- Mt. Vision Road
- Estero Trail Access Road
- Marshall Beach Road
- Sacramento Landing Road
- Chimney Rock Road
- The following sections of trails open for administrative vehicle use:
 - Sky Trail (from Limantour Road to Sky Camp)
 - Bear Valley Trail (Bear Valley Trailhead to Glen Junction)
 - Coast Trail (Limantour Road to Coast Camp)
 - Drivable sections of the Inverness Ridge Trail (Limantour Road to the Mt. Vision Road)
 - Marshall Beach Trail
 - Stewart Trail (including Glen Camp Spur Trail from Stewart Trail to Glen Camp)
 - Lighthouse Road from the parking lot to the Lighthouse Visitor Center
 - Bolinas Ridge Trail
 - Randall Trail

25 MPH:

- Limantour Road (Sky Trail to Limantour Parking Lot, including the road to the southern parking lot)
- L Ranch Road to L Ranch
- North Beach Access Road
- South Beach Access Road
- Drakes Beach Road from D Ranch to the Ken Patrick Visitor Center
- Sir Francis Drake Blvd from Chimney Rock Junction to the Lighthouse Parking lot

35 MPH:

- Pierce Point Road
- Limantour Road (Sky Trail to Bear Valley Road)

Posted speed limits shall apply on all County and State controlled roads within Point Reyes National Seashore and the Northern District of Golden Gate NRA

36 CFR §4.30 – BICYCLES

The following additional routes, in developed areas or special use zones, have been designated for bicycle use:

- Sky Trail (from Limantour Road to Sky Camp)
 - Bear Valley Trail (Bear Valley to Glen Junction)
 - Coast Trail (Laguna Road to Coast Camp)
 - Inverness Ridge Trail (Limantour Road to Mt. Vision Road)
 - Marshall Beach Trail
 - Stewart Trail (including Glen Camp Spur Trail from Stewart Trail to Glen Camp)
 - Bull Point Trail
 - Chimney Rock Trail
 - Drakes Head Trail
 - Estero Trail (Trailhead to 1.4 mi past Drakes Head Trail)
 - Morgan Trail (Bear Valley Trailhead north to Bear Valley Road)
 - Olema Valley Trail
 - Sunset Beach Trail
 - White Gate Trail
 - Mount Vision Road from the locked gate to the FAA Station
- The speed limit for bicycles on designated routes within the Park shall be 15 mph on trails with long sight distances and 5 mph when passing others or approaching blind turns.
 - No bicycle shall be operated in a manner which may endanger the safety of others or environmental resources.

(b) Bicycle use is allowed in undeveloped areas as provided for in section 7.97 [Golden Gate NRA]

- Bolinas Ridge Trail
- McCurdy Trail
- Randall Trail
- Jewell Trail
- Cross Marin Trail
- Tomales Bay Trail

36 CFR §4.31 – HITCHHIKING

Hitchhiking is permitted in the following areas under the conditions noted:

- Hitchhiking is allowed anywhere in the park as long as the person does not stand in a roadway and the hitchhiking/solicitation does not adversely affect visitor safety or the normal flow of traffic.

36 CFR §7.81 - POWERLESS FLIGHT:

(a) The use of devices designed to carry persons through the air in powerless flight is allowed at the following locations pursuant to terms and conditions of a permit.

- Drakes Beach Overlook

1 Amber D. Abbasi [CSBN 240956]
2 **CAUSE OF ACTION**
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel List Continues On Next Page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and
23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**REBUTTAL DECLARATION OF SCOTT
LUCHESSA IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

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Counsel List Continued

John Briscoe [CSBN 53223]
Lawrence S. Bazel [CSBN 114641]
Peter S. Prows [CSBN 257819]
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Suite 700
San Francisco, CA 94104
Phone: 415.402.2700
Fax: 415-398.5630
E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
pprows@briscoelaw.net

Zachary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Scott Luchessa, declare as follows:

2 1. I am Scott Luchessa, a certified ecologist and Senior Science Advisor at
3 ENVIRON (my CV is attached as Exhibit 1 to this document; a list of references cited in this
4 Declaration is attached as Exhibit 2). The following facts are based on my own personal
5 knowledge and, if called as a witness, I could and would testify competently thereto.

6 2. I have over 25 years of experience in natural resource consulting. My experience
7 includes evaluation of potential water quality impacts, such as nutrient loading, for proposed
8 development projects. For the past several years, I have been the lead or contributing author of
9 more than a dozen biological assessments (BA) examining potential water quality and
10 environmental impacts from shellfish aquaculture in the Puget Sound estuary. I am also a technical
11 reviewer or contributing author for restoration projects in the lower Columbia River for the Port of
12 Portland. Finally, I have written or co-authored over 10 sections in National Environmental Policy
13 Act environmental impact statements on water resources and wetlands.

14 3. I have reviewed the declaration of Mr. Brannon Ketcham. I am providing the
15 following response to that declaration based on my personal knowledge and professional expertise.

16 4. Proposed Oyster Rack Removal: Mr. Ketcham's response does not address the
17 fact that the removal of oyster racks will require significantly longer than 90 days, regardless of
18 whether approvals for additional equipment and multiple work crews are used. See Rebuttal
19 Declaration of Kevin Lunny (Lunny Rebuttal Dec.) ¶¶ 36-45.

20 5. Water Quality Impacts from Removal – Nutrient Loading: Mr. Ketcham does not
21 address the nutrient removal service provided by cultured shellfish, and the fact that nutrient
22 availability in the Estero will be substantially higher once the cultured shellfish have been removed.
23 Declaration of Brannon Ketcham (Ketcham Dec.) D. 64-2 ¶¶ 4-8. The nutrient inputs for the Estero
24 include those from freshwater inputs and those associated with daily tidal exchange. The combined
25 filtering activity of the millions of cultivated shellfish being grown in the Estero is as much as
26 350,000 m³ each day (R. Rhealt, pers. comm. 2010). This represents 4% of the water in Drakes
27 Estero based on an estimated total volume of 7,680,000 m³ (NOAA 2011), which is small but still
28 significant. This is especially true in the upper arms of Drakes Estero (including Creamery Bay,

1 Schooner Bay, and Home Bay) where streamflow during the wetter months has a greater influence
2 on water quality. Nutrients that are no longer removed by cultured shellfish will be available to
3 phytoplankton and macroalgae.

4 6. Mr. Ketcham's suggestion that Dumbauld et al. (2009) reported that primary
5 production in West Coast estuaries is controlled by tides and upwelling is taken out of context.
6 Ketcham Dec. D. 64-2 ¶ 7. These authors stated that water column and sediment nutrient
7 concentrations are generally relatively high and greatly influenced by the proximity to deeper
8 nearshore ocean waters, where upwelling controls production during the *summer* months. It is
9 agreed that when streamflow is low during the summer months, nutrient concentrations are strongly
10 influenced by daily tidal exchange. However, that does not change the fact that cultivated shellfish
11 sequester and remove significant quantities of nutrients during all seasons, contributing to water
12 quality benefits.

13 7. Native Shellfish: Mr. Ketcham does not acknowledge the fact that native shellfish
14 occur at much lower densities than cultured shellfish, and do not provide the same water quality
15 benefits. Ketcham Dec. D. 64-2 ¶¶ 9-14. As noted in my previous declaration (Declaration of
16 Scott Luchessa (Luchessa Dec.) D. 34 at ¶ 8), native shellfish filter at about 1/3 the capacity of
17 Pacific oysters (Ruesink et al. 2006). Thus, there would be a significant loss of filtration capacity
18 provided by the combined rack, floating, and bag cultured shellfish, even when accounting for an
19 increase in the populations of native shellfish, which will never attain comparable densities and do
20 not provide the same benefits to the ecosystem as cultured shellfish in terms of total removal of
21 nutrients from the system during harvest.

22 8. Cultural Eutrophication: As noted in my previous declaration, cultural
23 eutrophication is caused by excessive or increased nutrient availability, particularly inorganic
24 nitrogen in estuaries. Luchessa Dec. D. 34 at ¶ 9. Mr. Ketcham suggests that nutrient loading from
25 non-point sources of pollution is insignificant in the Estero, but the FEIS clearly acknowledges that
26 ranches, which surround it, are a source of water quality degradation. *Compare* Ketcham Dec. D.
27 64-2 ¶ 5 *with* Declaration of Barbara Goodyear (Goodyear Dec.) Ex. 3 at 249, 303, 424, 427.
28 Though the number of cattle within the watershed may have declined in the recent past, the limited

1 water quality data collected on tributary streams to the Estero clearly suggests that nutrient loading
2 may be appreciable (see Table 1 provided as Exhibit 3). Furthermore, stormwater runoff from
3 roads that contain atmospheric deposits (wet and dry) of nutrients within the watershed are another
4 non-point source deposition that has not been accounted for in terms of degradation to water
5 quality. In a study of nutrients from non-urban highway runoff in California, Kayhanian et al.
6 (2003) reported average ammonia, nitrate, and total Kjeldahl nitrogen concentrations of 2.3, 0.6,
7 and 2.0 mg/L, respectively. These values were similar to those reported in the U.S. Environmental
8 Protection Agency's nationwide urban runoff program (1983).

9 9. Mr. Ketcham suggests that the Estero de Limantour has comparable non-point
10 source nutrient loading as Drakes Estero without the presence of shellfish cultivation, and can be
11 used as an example that Drakes Estero would not be at risk of becoming increasingly eutrophic.
12 Ketcham Dec. D. 64-2 ¶ 6. This does not appear to be a valid comparison. Much less than half of
13 the lands surrounding Estero de Limantour are subject to ranching and the remainder is designated
14 wilderness, whereas the entire Drakes Estero upper watershed is ranch land (see figures provided as
15 Exhibit 4).

16 10. Phytoplankton blooms are not necessarily restricted to warm water as suggested by
17 Mr. Ketcham (Ketcham Dec. D. 64-2 ¶ 6). While cell division rates may be influenced by
18 temperature (Harris 1986), light and available nutrients are other important factors that influence
19 phytoplankton blooms (Horner et al. 1997, Paerl 1997, Anderson et al. 2002). Harmful algal
20 blooms that now periodically occur in the Estero, as acknowledged in the FEIS (Goodyear Dec. Ex.
21 3 at 212-213), are evidence that favorable nutrient conditions for phytoplankton blooms exist even
22 now with existing shellfish aquaculture. Thus, Mr. Ketcham has not provided convincing evidence
23 that there is not an increased risk of eutrophication given existing non-point sources of nutrients
24 within the watershed (ranches and road runoff) that will persist in the future and increasing nutrient
25 availability that will occur with the subsequent loss of the significant nutrient removal function
26 provided by cultured shellfish.

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1 11. Biochemical Oxygen Demand (BOD): Mr. Ketcham did not address the potential
2 relationship between increased primary production from algae and phytoplankton, increased BOD
3 associated with such changes, and potential for water quality degradation.

4 12. Impacts to Eelgrass from Turbidity: Mr. Ketcham does not address the potential
5 impacts of increased turbidity caused by oyster rack removal. Though silt curtains may help
6 confine higher turbidities to smaller areas during rack removal, effectiveness is highly variable and
7 depends on many factors. Silt curtains have been evaluated since the early 1970's in dredging
8 operations, but there are relatively few detailed studies on their effectiveness (Francingues and
9 Palermo 2005). According to the Army Corps of Engineer Research and Development Center
10 (Francingues and Palermo 2005), the JBF Corporation in 1978 completed one of the best, early
11 studies of the effectiveness of silt curtains. They reported that factors influencing effectiveness
12 include: (1) the quantity and type of material in suspension; (2) characteristics, construction, and
13 condition of the curtain, as well as the area and configuration; (3) method of deployment; and (4)
14 hydrodynamic conditions (e.g., currents, winds, tidal fluctuations, and waves).

15 13. Properly anchored, deployed, and maintained silt curtains can be effective in
16 retaining suspended sediments within the enclosure. However, elevated turbidities within the
17 enclosure during rack removal, and deposition of suspended sediments on top of eelgrass, may
18 adversely affect photosynthesis and eelgrass productivity. Many researchers have identified water
19 clarity as the most important limiting factor to eelgrass habitat (Fonseca and Bell 1998; Cho and
20 Poirrier 2005; Fonseca and Malhotra 2006). Work completed on the West Coast reported
21 significant long-term changes or reductions in survival of eelgrass as a result of sediment loading,
22 turbidity, or light availability (Zimmerman et al. 1999, Kraemer and Alberte 1995, Ward et al.
23 2003).

24 14. Tidal conditions in the Estero will require use of a Type III silt curtain, according
25 to Mark Sutton of Dixon Marine (pers. comm. 2012). A figure showing a typical Type III silt
26 curtain is provided as Exhibit 5. An average 300-foot-long and 12-foot-wide oyster rack would
27 require approximately 1,200 feet of silt curtain to enclose it.

28

1 15. Mr. Dixon indicated that a crew could deploy up to 1,000 feet of curtain a day, and
2 remove it a bit more quickly. He also indicated that a pulse of sediment would be released when
3 moving the curtain from one rack removal location to another. Finer silt-and clay-sized particles
4 would take days to settle out of the water column within the enclosure.

5 16. Even if additional work crews and multiple silt curtains are used, eelgrass beds
6 within and outside work areas will likely be exposed to elevated turbidities over an extended
7 period, especially taking into account curtain deployment and removal times, suspended solid
8 settling times, and weather conditions. Unnaturally elevated turbidities may adversely affect
9 eelgrass throughout the Estero, depending on the effectiveness of the silt curtains. This likely will
10 contribute to significant reductions in eelgrass primary productivity during removal activities, and
11 possibly a reduction in the areal extent of eelgrass in the event that elevated turbidities persist for
12 several months during the active growing season.

13 17. Direct Impacts to Eelgrass from Oyster Rack Removal: Previously described
14 direct impacts to eelgrass associated with oyster rack removal were not addressed by Mr. Ketcham.
15 Even if the duration of rack removal is reduced by employing multiple work crews, the direct
16 impacts would remain the same as previously described.

17 18. In addition to what was provided in my original declaration, incrementally greater
18 direct impacts would also occur from anchor deployment and removal associated with silt curtain
19 use. Mr. Sutton indicated that 25-lb Danforth anchors are placed every 50 feet on either side of the
20 silt curtain. Thus, a typical 1,200-foot enclosure would require a total of 48 anchors to be
21 deployed. Each anchor has a 35-inch height, 26.75-inch stock length, and 19-inch fluke length (see
22 Exhibit 5 for a photograph of a typical Danforth anchor). Eelgrass surrounds the majority of racks
23 in the Estero. Photographs of eelgrass habitat surrounding an oyster rack is provided as Exhibit 6.
24 Therefore, each anchor placement within eelgrass could pull out a substantial amount of eelgrass
25 upon retrieval. Assuming similar silt curtain deployments and enclosures for removal of all of the
26 racks, the total number of anchor points would be 4,560 ($48 * 95 = 4,560$). Not all of the
27 anchorages would be in eelgrass, but the potential impacts are clear.

28

1 19. Essential Fish Habitat: The direct loss of eelgrass habitat (essential fish habitat)
2 caused by removal of oyster racks was not addressed in Mr. Ketcham's declaration.

3 20. Conclusions: Removal of shellfish aquaculture will result in a significant net loss
4 of filtration capacity and greater nutrient concentrations that would be available for increased
5 phytoplankton and macroalgae production. Native shellfish have a much lower filtration capacity
6 and, because they are not harvested, do not completely remove nutrients from the estuary. Total
7 nutrient removal only occurs when shellfish are harvested. An increased supply of nutrients may
8 exacerbate periodic HABs, which already occur in the Estero, and increase the risk of cultural
9 eutrophication. Reduced water clarity and increased nutrient availability may adversely affect
10 eelgrass, an essential fish habitat. Even if BMPs, such as silt curtains, are used to mitigate water
11 quality impacts, the duration of those impacts at the lower estimated timeframe (using more crews
12 to complete removal operations) would be well beyond a couple of months when taking into
13 consideration tide, weather, and permitting constraints. Such impacts are much more significant
14 than the short-term minor adverse impacts suggested by the FEIS.

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1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct.
3 Executed this 15th day of January, 2013, Seattle, Washington.

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6 Scott Luchessa

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EXHIBIT 1

Scott Luchessa, MS

EDUCATION

- 1990 MS, Environmental Studies, University of Montana
- 1985 BS, Biology, San Diego State University

REGISTRATIONS & CERTIFICATIONS

- Certified Ecologist, Ecological Society of America
- Certified SCUBA diver, PADI

EXPERIENCE

Scott Luchessa is a certified ecologist with more than 25 years of experience in aquatic, wetlands, and terrestrial ecology. For the past 21 years, Scott has been an environmental consultant and much of his practice has focused on evaluating potential impacts to wetlands and aquatic environments from proposed development projects for a broad array of public and private sector clients, including the National Park Service, U.S. Forest Service, U.S. Coast Guard, U.S. Navy, state departments of transportation, state natural resource management agencies, and others. Mr. Luchessa is an expert on federal Clean Water Act regulation of wetlands and other Waters of the U.S. Scott has evaluated potential impacts to wetlands and water quality for a number of NEPA environmental impact statements and environmental assessments of proposed development activities involving estuaries in Oregon, Washington, and elsewhere in the Pacific Northwest, California, and Alaska. In addition, Mr. Luchessa has been a lead or contributing author or technical reviewer on the preparation of many biological evaluations and biological assessments (BAs) examining potential impacts of proposed aquaculture operations on federally-listed threatened and endangered species and essential fish habitat needed to comply with the consultation requirements of the Endangered Species Act and Magnuson-Stevens. Scott was a contributor on programmatic BAs of Nationwide Permit 48 (Shellfish Aquaculture) prepared on behalf of the U.S. Army Corps of Engineers in California, Oregon, and Washington in consultation with the National Marine Fisheries Service. He is a recognized leader in wetland ecology in the Pacific Northwest and has co-authored publications analyzing the use of wetland mitigation banks and identification of the characteristics of peatlands in western Washington. He has designed and implemented compensatory wetland mitigation plans for projects that have unavoidable adverse impacts to estuarine and freshwater wetlands. More detailed descriptions of selected examples of his experience within these areas can be found below.

Wetland Delineation

Mr. Luchessa has identified and delineated hundreds of wetlands using numerous delineation methods, including the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual and various regional supplements that have been adopted between 2007 and 2010; the 1989 Unified Federal Wetland Delineation Manual; the U.S. Fish and Wildlife Services' definition of wetlands; and the 1997 Washington Wetlands Identification and Delineation Manual. He has applied these delineation methods all across the western United States, including in California, Washington, Alaska, Oregon, and Montana.

Hydrologic Monitoring Plans

Scott Luchessa, MS

Scott has designed hydrologic monitoring plans using networks of shallow groundwater monitoring wells and direct observations of indicators of wetland hydrology to both demonstrate presence or absence of wetlands, document successful creation or restoration of wetland hydrology as part of compensatory wetland mitigation (creation or restoration) projects, and assess impacts to wetland hydrology from development projects.

Wetland Mitigation Plans, Specifications, and Cost Estimates

Scott has successfully managed a number of compensatory wetland mitigation design projects, including enhancement, restoration, and creation for clients whose development projects had unavoidable adverse impacts to wetlands. He has designed and implemented compensatory mitigation plans, specifications, and cost estimates in collaboration with project teams and successfully advocated and negotiated with agency personnel to develop plans that comply with regulatory requirements and meet client needs.

Permitting

Mr. Luchessa has successfully led numerous clients through the increasingly complex and constantly changing regulatory processes required to comply with federal, state, and local government laws, rules, and regulations. In addition to obtaining various permits and approvals needed to implement proposed projects, he has also acted to ensure client complied with applicable permitting obligations.

- Directed and prepared biological assessment (BA) and Section 404(b)(1) Alternatives Analyses for numerous water-dependent projects.
- Prepared restoration and mitigation plans, specifications and cost estimates.
- Prepared restoration and mitigation monitoring plans, conducted quantitative monitoring, and prepared monitoring reports to document compliance and ecological success of restoration and compensatory mitigation projects with specified performance standards.

Construction Oversight

Construction oversight by the mitigation specialist is a critical element to successful project completion. Scott has provided this important function to ensure projects are properly implemented as designed so that they are both compliant with permit requirements and ecologically successful.

NEPA

Mr. Luchessa has been a technical lead and project manager on numerous environmental assessments and environmental impact review/statement projects completed in compliance with the National Environmental Policy Act (NEPA). Some selected examples of his NEPA experience are identified as follows.

- National Park Service, Denali National Park, Gravel Acquisition Plan, Wetland Delineation, Denali, Alaska—Delineated wetlands throughout Denali park corridor at 11 sites. Prepared a jurisdictional wetland delineation report that assessed potential impacts from gravel mining operations on wetlands, identified wetland functional values, and evaluated potential wetland mitigation opportunities and constraints. Work was completed in support of a 10-year gravel acquisition plan NEPA Environmental Assessment.

Scott Luchessa, MS

- USDA, Forest Service, Dog Creek Bridge to Coffman Cove EA, Prince of Wales Island, Alaska—Managed and provided senior technical oversight of natural resource investigations conducted to support and completed an environmental assessment to comply with NEPA, ESA, and other state and federal laws and regulations. Prepared a biological assessment of the potential effects of the proposed project to listed threatened and endangered species, including Steller sea lion, Humpback whale, as well as Forest Service sensitive plants and animals to fulfill the consultation requirements of ESA.
- Imperial County and Imperial County Air Pollution Control District, Imperial County, CA—Co-authored a declaration submitted to the Sacramento Superior Court extending a stay of the Imperial Irrigation District's Quantification Settlement Agreement for transfer conserved water from the Salton Sea to the San Diego Water Authority and others on the grounds that actual impacts stipulated in the CEQA EIR/EIS documents to biological resources are greater than those projected. The declaration provided a comparison of the current observed elevation and salinity levels with the EIR/EIS projected baseline levels and project impact analysis to determine if the water transfers have led to a reduction in the Salton Sea elevation and salinity increases beyond that projected, which may be in violation of the mitigation measures and State Water Resources Control Board orders.
- Port of Seattle, Sea-Tac International Airport Master Plan Update EIS, SeaTac, Washington— Prepared multiple sections for the NEPA/SEPA EIS for the controversial Port of Seattle, Sea-Tac International Airport Third Runway project. Lead author on the fisheries and biotic communities, water quality section, the water quality subsection of the human health section, and the flood plains section responsible for identifying existing conditions, potential impacts, and appropriate mitigating measures. Calculated sediment loading for existing and proposed conditions using the Revised Universal Soil Loss Equation. The EIS successfully withstood substantial scrutiny and protracted legal challenges and the project has now been completed.

PROFESSIONAL AFFILIATIONS & ACTIVITIES

Member, Society of Wetland Scientists

Member, Ecological Society of America

SELECTED PUBLICATIONS

Luchessa, S. 2010. Using wetland creation, restoration, and preservation for developing carbon offsets in wetlands. *National Wetlands Newsletter* 32(4):12-17,23

Kulzer, L., S. Luchessa, S. Cooke, R. Errington, and F. Weinmann, 2001. Characteristics of the Low-Elevation Sphagnum-Dominated Peatlands of Western Washington: A Community Profile. Part 1: Physical, Chemical and Vegetation Characteristics. Funded in part by a grant from the U.S. Environmental Protection Agency, Region X, Seattle, WA.

Castelle, A.J., S.A. Luchessa, C. Conolly, M. Emers, E.D. Metz, S. Meyer, and M. Witter, 1992. Wetlands Mitigation Banking. Washington State Department of Ecology, Publication No. 92-12, Olympia.

Scott Luchessa, MS

4

Luchessa, S.A., 1990. Soluble Reactive Phosphorus Concentrations in the Upper Clark Fork River, Montana: A Study of the Contributions from Two Nonpoint Sources of Sediment. Masters thesis, University of Montana, Missoula, MT.

Luchessa, S.A., and R.P. Kramer, 1989. Natural Large Woody Debris Loading for Selected 3rd and 4th Order Streams in the Lolo and Bitterroot National Forests. Pages 4-35 in Y. Vadeboncoeur, S.A. Luchessa, and R.P. Kramer, editors. Fisheries Habitat and Aquatic Environment Monitoring Report: Bitterroot, Deerlodge and Lolo National Forests 1987 and 1988. U.S. Department of Agriculture, Forest Service, Missoula, Montana.

Hastings, S.J., S.A. Luchessa, W.C. Oechel, and J.D. Tenhunen, 1989. Standing Biomass and Production in Water Drainages of the Foothills of the Phillip Mountains, Alaska. *Holarctic Ecology*. 12:304-311.

EXHIBIT 2

1 References Cited in Declaration of Scott Luchessa

- 2 Anderson, D.M., P.M. Gilbert, and J.M. Burkholder. 2002. Harmful algal blooms and
3 eutrophication: nutrient sources, composition, and consequences. *Estuaries*. 25: 704-726.
- 4 Cho, H.J. and M.A. Poirrier. 2005. A model to estimate potential submersed aquatic vegetation
5 habitat based on studies in Lake Pontchartrain, Louisiana. *Restoration Ecology*. 13: 623-629.
- 6 Dumbauld, B.R., J.L. Ruesink, and S.S. Rumrill. 2009. The ecological role of bivalve shellfish
7 aquaculture in the estuarine environment: A review with application to oyster and clam culture
8 in West Coast (USA) estuaries. *Aquaculture* 290(3-4): 196-223.
- 9 Fonseca, M.S. and A. Malhotra. 2006. WEMO (Wave Exposure Model) for use in Ecological
10 Forecasting version 3.0. AGENCY. Beaufort, NC.
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12 Beaufort, North Carolina, USA. *Marine Ecology-Progress Series* 171:109-121.
- 13 Francingues, N. R., and Palermo, M. R. 2005. Silt curtains as a dredging project management
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15 Research and Development Center, Vicksburg, MS.
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20 survival. *Aquatic Botany*. 51(1-2):67-86.

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EXHIBIT 3

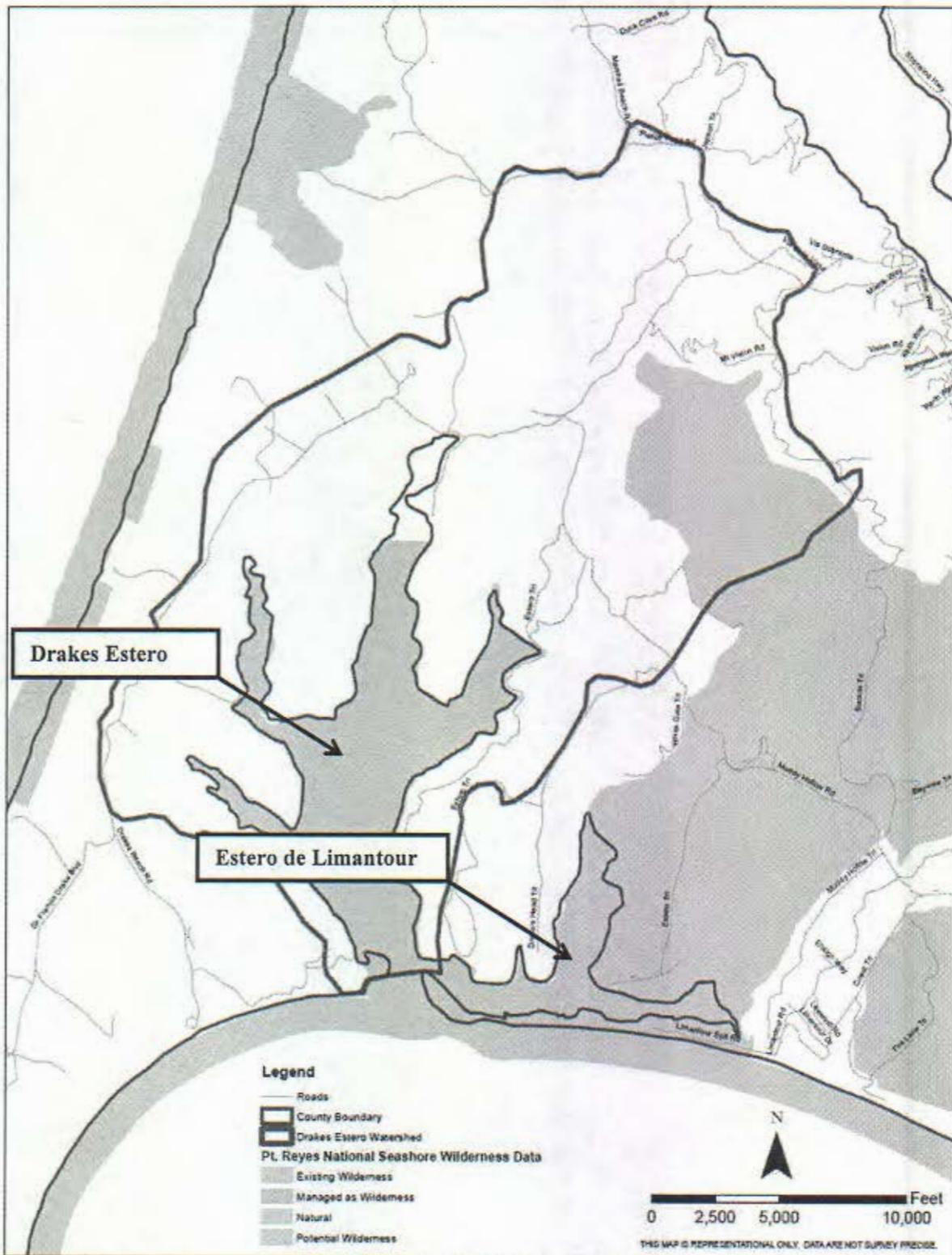
Table 1. Water Quality Measurements for Point Reyes National Seashore Tributaries 1999-2001

Watershed	Station	Location	Sample Years	# of Samples	Temperature (°C)			Specific Conductance ¹ (µS/cm)			Salinity (ppt)			pH			Dissolved Oxygen (mg/L)		
					Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.
Lagunitas Creek	OLM10	Olema Creek - below Stewart's Pasture	1999-2001	9	12.2	16.2	8.3	216	336	42	0.1	0.2	0	7.9	8.4	7.7	9.5	10.8	6
Lagunitas Creek	OLM11	Olema Creek - Bear Valley Bridge	1999-2001	11	11.7	16	8.3	238	372	95	0.1	0.2	0	7.9	8.6	7.6	10.3	12.1	8.5
Lagunitas Creek	OLM5	Olema Creek - Vedanta Creek	1999-2001	10	12.6	16.6	8.6	280	371	173	0.1	0.2	0.1	7.8	8.5	7.2	8.3	10.5	4.8
Lagunitas Creek	OLM12	Olema Creek - above Vedanta Bridge	1999-2001	8	11.7	16	8.2	225	341	103	0.1	0.2	0.1	7.9	8.1	7.6	10.2	11.5	9
Lagunitas Creek	OLM4	Olema Creek - Quarry Gulch	1999-2001	11	11.5	15.6	7.6	163	217	97	0.1	0.1	0	8.1	9.1	7.6	9.2	11.3	3.5
Lagunitas Creek	OLM13	Olema Creek - Truttman Gulch	1999-2001	8	11.1	13.7	8.3	225	350	101	0.1	0.2	0	7.9	8.1	7.6	10.5	12.7	9.3
Lagunitas Creek	OLM16	Olema Creek - Building 168	2000-2001	7	10.8	12.6	8.5	209	333	108	0.1	0.2	0.1	7.8	8.1	7	10.5	11.2	10.3
Lagunitas Creek	OLM14	Olema Creek - Five Brooks	1999-2001	8	10.9	14.7	8.6	198	320	91	0.1	0.2	0	7.9	8.1	7.4	9.2	11	6.8
Lagunitas Creek	OLM2	Olema Creek - Giacomini Gulch	1999-2001	10	10.7	14.4	8.2	150	277	78	0.1	0.1	0	8	8.6	7.6	10	11.5	6.5
Lagunitas Creek	OLM1	Olema Creek - John West Fork	1999-2001	12	11.2	15.1	8.9	148	214	81	0.1	0.1	0	8.2	9	7.6	8.8	10.7	5.2
Lagunitas Creek	OLM15	Olema Creek - above John West Fork	1999-2001	8	11	15.3	8.3	202	316	94	0.1	0.2	0	8	8.3	7.6	9.8	11.4	7.6
Lagunitas Creek	OLM3	Olema Creek - Randall Gulch	2000-2001	7	11.7	15.8	9.4	97	113	82	0	0.1	0	7.6	8.3	6.9	10.1	10.5	9.6
Lagunitas Creek	OLM18	Olema Creek - Randall	2000-2001	5	9	9.9	8.1	148	167	129	0.1	0.1	0.1	8.2	8.4	8	9	9.8	8.2
Lagunitas Creek	LAG1	Bear Valley	1999-2001	9	12	16.5	9.5	299	340	235	0.2	0.2	0.1	8.2	9.3	7.7	9.5	10.4	8.1
Lagunitas Creek	LAG2	Cheda Creek	1999-2001	13	12.6	18.6	8.7	295	394	131	0.2	0.2	0.1	8.3	8.9	7.6	9	11	7
Lagunitas Creek	LAG3	Devil's Gulch	1999-2001	9	11.1	15.6	8.8	262	365	154	0.1	0.2	0.1	8.3	8.9	7.7	10.6	11.5	9.5
Drakes Estero	DES2	East Scooner (Drakes)	1999-2001	9	11	14.1	8.9	246	318	157	0.1	0.2	0.1	8	9.5	7.3	9.9	11.1	6.5
Drakes Estero	DES3	Home Ranch (Drakes)	1999-2001	9	12.8	16.3	8.9	248	337	144	0.1	0.2	0.1	7.9	9.1	7	9.2	12.1	6.1
Drakes Estero	DES4	Muddy Hollow (Limantour)	1999-2001	9	12.1	15.1	9.1	281	349	181	0.1	0.2	0.1	7.8	8.1	7.3	10.2	10.8	8.6
Drakes Estero	DES5	Laguna Creek (Limantour)	1999-2001	9	10.7	13.4	8.5	381	482	208	0.2	0.2	0.1	8.1	8.6	7.6	10.1	11.1	5.8
Drakes Bay	DBY1	C-Ranch	2001	2	11	12.8	9.2	1048	1089	1006	0.5	0.5	0.5	7.7	8	7.4	9.5	9.6	9.5
Drakes Bay	DBY2	B-Ranch	2001	2	11.8	15.3	8.3	2134	2941	1327	1.1	1.5	0.7	7.9	8.2	7.7	4.7	6.1	3.2
Drakes Bay	DBY3	A-Ranch	1999-2001	11	11.9	15.2	7.7	1220	1912	672	0.7	1	0.3	8.3	9.7	7.8	9.6	12.2	6.3
Kehoe Creek	PAC1	South Kehoe	1999-2001	12	11.5	14.5	7.3	453	623	298	0.2	0.3	0.1	7.6	8.1	6.9	4.7	7.7	2
Kehoe Creek	PAC2	North Kehoe	1999-2001	12	11.5	13.8	8	582	816	339	0.3	0.4	0.2	7.8	8.2	7.4	8.5	10.1	4.5
Kehoe Creek	PAC2A	North Kehoe Ranch (farm)	2001	3	11.3	14.3	8.3	1126	1910	538	0.5	1	0.1	7.9	8.3	7.5	9.5	10.8	7.4
Abbotts Lagoon	ABB1	Abbotts Perennial	2000-2001	9	10.6	13.2	7.7	252	360	162	0.1	0.2	0.1	7.6	8.1	6.9	9.4	11.1	5.6
Abbotts Lagoon	ABB2	McClures Ranch	2001	2	11.9	12.5	11.3	342	384	299	0.2	0.2	0.1	7.3	7.3	7.2	7.4	7.6	7.2

¹ Specific Conductance at 25°C
Source: Ketchum 2001

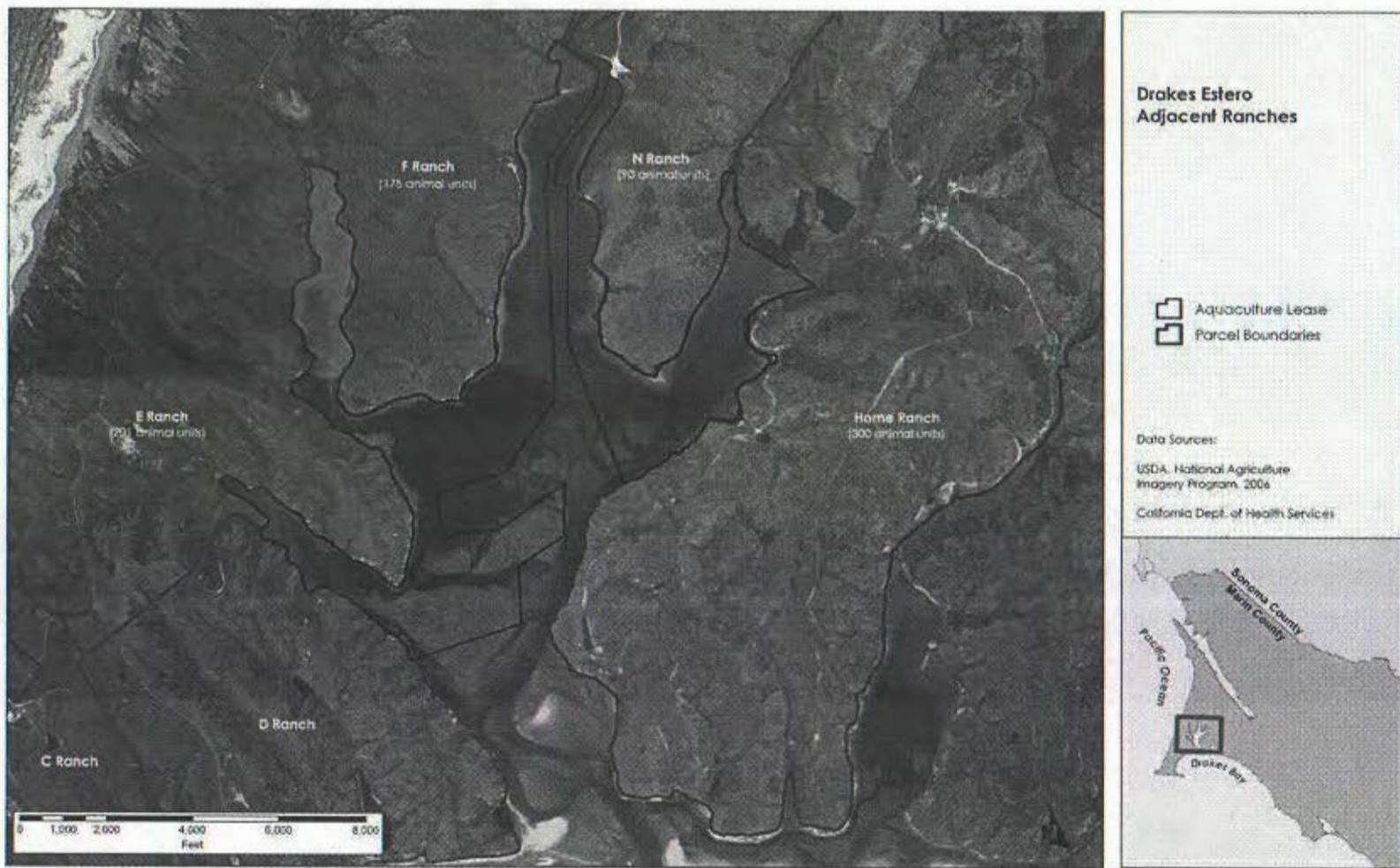
Watershed	Station	Nitrate (mg/L)			Orthophosphorous (mg/L)			Ammonia (mg/L)			Total Suspended Solids (mg/L)			Total Coliform (MPN/100mL)			Fecal Coliform (MPN/100mL)					
		Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	90th Perct.	Min.	Avg.	Max.	90th Perct.	Min.				
Lagunitas Creek	OLM10	0.47	1.2	0.2	0.3	0.5	0.2	0.1	0.2	0.1	0	77.6	247	188	1	3736	16000	300	3194	16000	6000	2
Lagunitas Creek	OLM11	0.5	1.3	0.2	0.2	0.4	0.1	0.1	0.2	0.1	0	82.9	256	204	0	6534	35000	500	5340	28000	17200	2
Lagunitas Creek	OLM5	0.74	2.2	0.2	0.4	0.8	0.2	0.1	0.2	0.1	0	31.9	79	78	2	7142	17000	300	4290	16000	9880	17
Lagunitas Creek	OLM12	0.52	1.2	0.2	0.2	0.3	0.1	0.1	0.2	0.1	0	74.9	176	168	1	3669	16000	350	1699	5400	4070	2
Lagunitas Creek	OLM4	0.56	1.9	0.2	0.2	0.3	0.1	0.1	0.2	0.1	0	81.4	294	216	0	34376	300000	44	33147	300000	44400	8
Lagunitas Creek	OLM13	0.5	1.1	0.2	0.3	0.4	0.1	0.1	0.2	0	0	67.7	250	175	0	4266	16000	79	3159	16000	8580	22
Lagunitas Creek	OLM16	0.55	1.4	0.2	0.3	0.6	0.1	0.1	0.2	0.1	0	61.8	129	120	0	16591	92000	240	6539	24000	19200	200
Lagunitas Creek	OLM14	0.5	1.1	0.2	0.2	0.4	0.1	0.1	0.2	0.1	0	70.2	155	127	2	9653	54000	60	7970	54000	19980	2
Lagunitas Creek	OLM2	0.81	1.8	0.26	0.7	2.2	0.1	0.2	0.4	0.1	0	160.9	660	517	1	80856	540000	110	46612	240000	176000	2
Lagunitas Creek	OLM1	0.56	1.5	0.2	0.1	0.1	0.1	0.1	0.2	0.1	0	6.3	32	14	0	4394	17000	17	1493	13000	2252	2
Lagunitas Creek	OLM15	0.36	0.73	0.2	0.3	0.5	0.1	0.1	0.2	0.1	0	87.3	337	231	0	3873	16000	7	2874	16000	7250	2
Lagunitas Creek	OLM3	0.51	1.1	0.2	0.2	0.7	0.1	0.1	0.1	0.1	0	14.2	46	32	3	8340	22000	500	3052	11000	7240	460
Lagunitas Creek	OLM18	0.38	0.55	0.2	0.1	0.1	0.1	0.2	0.2	0.2	0	9.8	23	19	2	3250	5400	1100	820	1100	1044	540
Lagunitas Creek	LAG1	0.79	1.4	0.43	0.4	0.5	0.3	0.2	0.3	0.1	0	25.7	95	61	2	1408	2400	50	888	2400	1700	22
Lagunitas Creek	LAG2	0.53	1.8	0.2	0.2	0.5	0.1	0.1	0.2	0.1	0	29.5	180	68	0	1847	16000	22	1776	16000	16000	11
Lagunitas Creek	LAG3	0.52	1.3	0.08	0.2	0.3	0.1	0.1	0.2	0.1	0	13.7	36	29	0	3108	16000	30	1145	3500	3500	7
Drakes Estero	DES2	0.77	1.6	0.2	0.1	0.2	0.1	0.1	0.2	0.1	0	27.1	138	63	3	2772	16000	80	430	1600	1080	11
Drakes Estero	DES3	0.33	0.6	0.2	0.1	0.2	0.1	0.2	0.3	0.1	0	15.4	61	32	2	7322	16000	1600	3047	9200	9040	460
Drakes Estero	DES4	0.25	0.7	0.02	0.1	0.1	0.1	0.1	0.2	0.1	0	16.9	104	38	0	1316	5400	110	161	350	285	17
Drakes Estero	DES5	0.61	1.4	0.2	0.3	0.4	0.3	0.2	0.2	0.1	0	58.4	388	143	0	1778	9200	50	204	540	388	17
Drakes Bay	DBY1	1.88	2.9	0.86	1.6	2.7	0.5	2	2	2	0	18	23	22	13	16600	24000	9200	7700	13000	11940	2400
Drakes Bay	DBY2	3.4	6.6	0.2	2.2	2.8	1.6	7	8.5	5.6	2	88	95	94	81	530000	900000	160000	495000	900000	819000	90000
Drakes Bay	DBY3	5.27	11	0.2	5	12	0.5	0.9	4.3	0.1	2	28.4	113	66	1	166064	1600000	500	46974	300000	160000	110
Kahoe Creek	PAC1	1.81	4.1	0.2	1	2.1	0.5	0.5	1.2	0.1	0	113.1	716	271	3	160083	1600000	1600	158079	1600000	151000	220
Kahoe Creek	PAC2	1.78	3.7	0.2	1.5	6.4	0.2	0.6	2	0.1	0	137.9	471	317	9	158577	1600000	500	154058	1600000	147000	170
Kahoe Creek	PAC2A	4.63	9	1.5	2	3	1	0.8	0.9	0.6	0	171	292	266	69	863333	1600000	90000	710000	1600000	1380000	30000
Abbotts Lagoon	ABB1	0.38	1.4	0.2	0.1	0.2	0.1	0.2	0.3	0.1	0	25.6	56	43	7	19956	92000	700	10878	35000	26200	700
Abbotts Lagoon	ABB2	3.45	3.9	3	1.8	1.8	1.8	0.2	0.2	0.2	0	19	20	20	18	37090	50000	24000	20000	24000	23200	16000

EXHIBIT 4



Approximate wetland boundaries for Drakes Estero and Estero de Limantour in relation to existing wilderness.

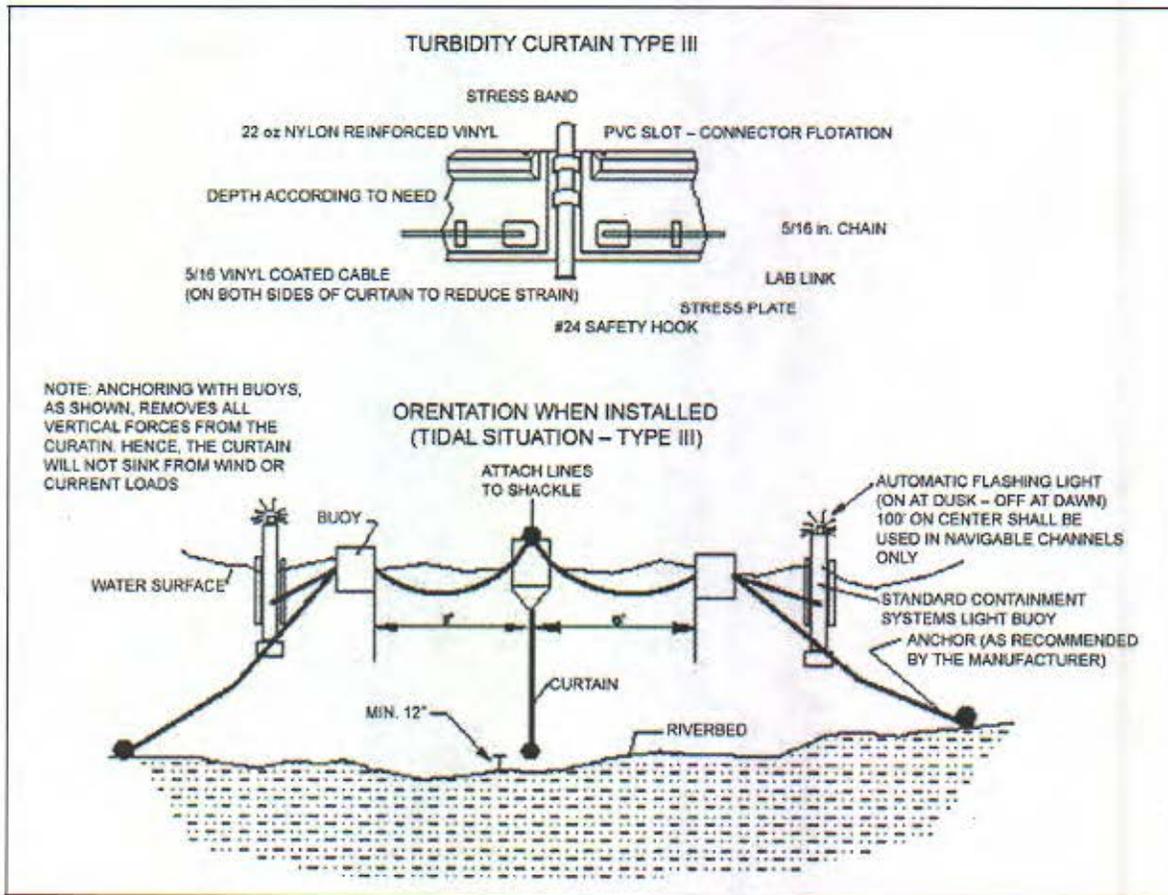
Source: K. Lunny, pers. comm., 2013



Cattle ranches surrounding the Drakes Estero watershed

Source: FSA 2013

EXHIBIT 5

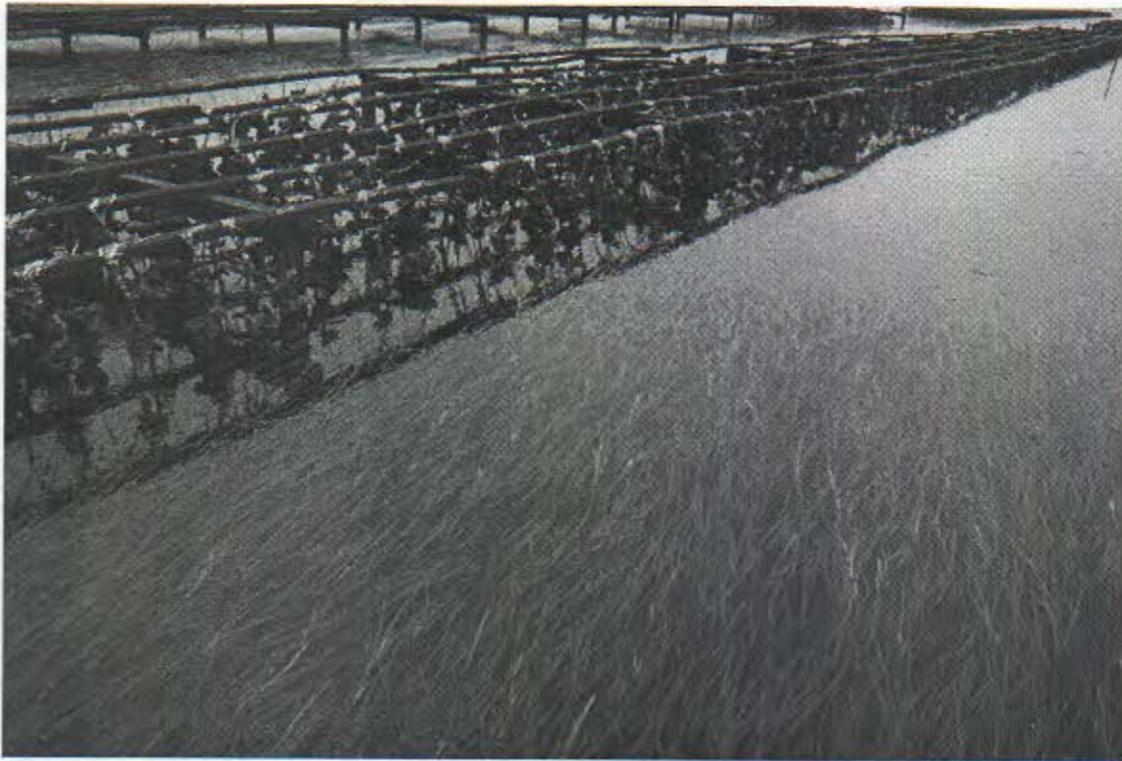
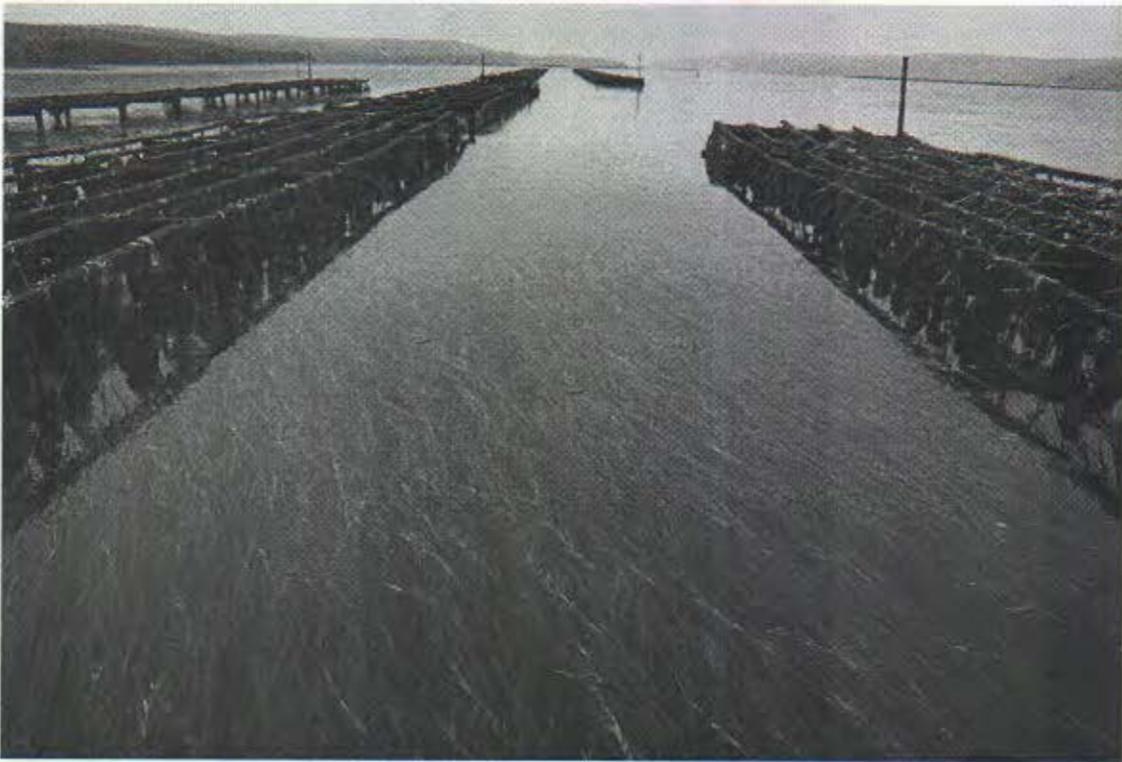


Type III silt curtain (Source: Francingues and Palermo 2005)



Typical Danforth anchor. 25-lb anchor dimensions are: 35-inch height, 26.75-inch stock length, and 19-inch fluke length

EXHIBIT 6



Typical eelgrass densities at Drakes Bay Oyster Company Surrounding Bed 4 in Drakes Estero
(Source: K. Lunny, pers. comm. 2013)

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum [CSBN 182456]
9 Ryan Waterman [CSBN 229485]
10 **STOEL RIVES LLP**
11 12255 El Camino Real, Suite 100
12 San Diego, CA 92130
13 Phone: 858.794.4100
14 Fax: 858.794.4101
15 Email: swrosenbaum@stoel.com; rwaterman@stoel.com

16 *Counsel list continues on next page*

17 Attorneys for Plaintiffs DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 OAKLAND DIVISION

21 **DRAKES BAY OYSTER COMPANY,**
22 17171 Sir Francis Drake Blvd
23 Inverness, CA 94937, and

24 **KEVIN LUNNY,**
25 17171 Sir Francis Drake Blvd
26 Inverness, CA 94937

27 Plaintiffs,

28 v.

KENNETH L. SALAZAR,
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**REBUTTAL DECLARATION OF KEVIN
LUNNY IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

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Counsel List Continued

John Briscoe [CSBN 53223]
Lawrence S. Bazel [CSBN 114641]
Peter S. Prows [CSBN 257819]
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Suite 700
San Francisco, CA 94104
Phone: 415.402.2700
Fax: 415.398.5630
E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
pprows@briscoelaw.net

Zachary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Kevin Lunny, declare as follows:

2 1. I am an owner and the President of the Drakes Bay Oyster Company (DBOC). I
3 have reviewed Defendants' Opposition to the Motion for Preliminary Injunction, and the
4 declarations of Cicely Muldoon, Brannon Ketcham, and Thomas Baty. The following facts are
5 based on my own personal knowledge and, if called as a witness, I could and would testify
6 competently thereto.

7 **I. REBUTTAL TO DECLARATION OF CICELY MULDOON**

8 2. Ms. Muldoon asserts that that the public interest will be harmed through granting
9 of the motion for preliminary injunction in part because “[n]ow that Drakes Estero has attained full
10 wilderness status, the American public can enjoy the only marine wilderness on the West Coast
11 outside of Alaska,” and the “wilderness in Drakes Estero is unique because it is easily accessible
12 to the millions of visitors who come to the Bay Area every year.” Muldoon Dec. D. 64-1 ¶¶ 4-5.
13 Ms. Muldoon’s statements are inaccurate because two waters in Point Reyes National Seashore
14 (PRNS)—Limantour Estero and Abbotts Lagoon—were accorded full wilderness status in 1999.
15 Attached as Exhibit 1 is a true and correct copy of National Park Service Federal Register Notice,
16 dated November 18, 1999, 64 FR 63057 (Nov. 18, 1999); *see also* Muldoon Dec. D. 64-1 ¶ 13
17 (referencing these wilderness designations). Furthermore, Ms. Muldoon admits that Limantour
18 and Abbotts Lagoon receive documented visitation that exceeds 50,000 people annually. Muldoon
19 Dec. D. 64-1 ¶ 23. Accordingly, the visiting public is not being deprived of experiencing
20 “wilderness” in PRNS, with or without Drakes Estero.

21 3. Ms. Muldoon also fails to note that as “potential wilderness,” Drakes Estero has
22 been managed as “wilderness” since 1976 in every way except for the pre-existing use evinced by
23 the oyster farm. Notably, Ms. Muldoon does not attest to any public uses that are presently not
24 allowed due to DBOC’s operations that would be allowed under a “wilderness” designation.
25 Muldoon Dec. D. 64-1 ¶¶ 4-5.

26 4. It is important to note that the DBOC onshore facilities are within the pastoral
27 zone in Point Reyes National Seashore. Accordingly, DBOC is part of “the ranches within the
28 pastoral zone” that “tells part of the Point Reyes story” Muldoon Dec. D. 64-1 ¶ 8.

1 5. In her description of the interpretative services offered by the National Park
2 Service (NPS) and its partners at Point Reyes National Seashore, Ms. Muldoon does not contest
3 that DBOC "is the only farm of any kind that is open to the visiting public within the PRNS."
4 *Compare* Muldoon Dec. D. 64-1 ¶¶ 9-14 *with* Lunny Dec. D. 38 ¶ 82. Furthermore, while Ms.
5 Muldoon asserts that NPS staff provide "walks and talks" on a wide range of subjects including
6 "the history of ranching at Point Reyes," she does not attest that the NPS provides any of the
7 following interpretative services that DBOC provides, including the ongoing role of PRNS ranches
8 in the "working landscape" idea that PRNS was founded upon, marine biology and oyster
9 cultivation at the only shellfish hatchery in the Bay Area, the only oyster cannery in California,
10 and the long history and practice of aquaculture in Drakes Estero generally. *Compare* Muldoon
11 Dec. D. 64-1 ¶ 11 *with* Lunny Dec. D. 38 ¶¶ 80-85.

12 6. DBOC interpretative staff are professionally trained. DBOC manager, Ginny
13 Cummings, is in charge of interpretation at DBOC. Ms. Cummings has a B.A. in Education from
14 St. Mary's College and worked as an interpretative ranger at PRNS for a period of time.

15 7. In 2007, DBOC and the California Coastal Commission (CCC) entered into a
16 consensual Consent Cease and Desist Order, No. CCC-07-CD-11 (Consent Order). Attached
17 hereto as Exhibit 2 is a true and correct copy of the Consent Order and accompanying staff report,
18 dated December 12, 2007.

19 8. The Consent Order was designed to address matters from a previous CCC Cease
20 and Desist Order that had been entered against the Johnson Oyster Company (JOC) in 2003, as
21 well as to address development activities and cover DBOC's operations with the first Coastal
22 Development Permit (CDP) ever issued by the CCC for aquaculture operations in Drakes Estero.
23 The fact of the matter is that for nearly the entire history of aquaculture in Drakes Estero the CCC
24 has not been involved as a permitting agency.

25 9. In the Consent Order, CCC staff acknowledged that "due to the scientific,
26 procedural, and legal complexities of this matter, Commission staff does not expect that [CDP]
27 permit application to be filed for many months." Exhibit 2 at 4.

28

1 10. DBOC has had a pending CDP application before the CCC since August 20, 2008.
2 At one point, CCC staff were planning to bring DBOC's CDP application to the full Commission
3 for its consideration at the Commission's December 2009 hearing. I believe that there are two
4 reasons why DBOC's CDP application has still not been heard by the Commission: first, on
5 January 19, 2010, DBOC requested that the CCC conform DBOC's CDP application to the
6 requirements of Public Resources Code § 30411(a), which prohibits the CCC from establishing or
7 imposing any controls with respect to the establishment or control of wildlife and fishery
8 management programs that duplicate or exceed regulatory controls established by the California
9 Department of Fish and Game (CDFG) and California Fish and Game Commission (CFGC); and
10 second, the CCC's discretionary decision to stay action on DBOC's CDP application during NPS's
11 preparation of an Environmental Impact Statement, which began in mid-2010.

12 11. DBOC has contested the basis for the CCC's Notice of Intent to Commence Cease
13 and Desist and Restoration Order Proceedings, dated October 24, 2012. Attached as Exhibit 3 is a
14 true and correct copy of a letter from Ryan Waterman of Stoel Rives LLP to Nancy Cave, CCC,
15 dated October 24, 2012, explaining why the CCC lacks a sufficient basis to pursue such
16 proceedings. DBOC is currently working with CCC staff to resolve their disagreements in a
17 consensual fashion.

18 12. After I received the November 16, 2010, letter from the U.S. Army Corps of
19 Engineers (ACOE) described in Ms. Muldoon's declaration (Muldoon Dec. D. 64-1 ¶ 29), I called
20 the permitting staff at the ACOE to begin the application process for DBOC's aquaculture
21 operations. I was told at that time by permitting staff to wait to make my application until after the
22 Final Environmental Impact Statement (FEIS) was complete.

23 13. A search of the Environmental Protection Agency's (EPA) online database at
24 <http://yosemite.epa.gov/oeca/webeis.nsf/AdvSearch?OpenForm>, on January 14, 2013, revealed
25 that the NPS has never submitted a copy of the FEIS to EPA. Accordingly, EPA has not published
26 a notice of availability in the Federal Register and the required thirty day public notice and
27 comment period has not transpired. 40 C.F.R. § 1506.10(a), (b)(2). Accordingly, I am under the
28

1 impression that the FEIS is not yet complete and that it would be inappropriate for me to seek to
2 apply for an Army Corps of Engineers permit at this time.

3 14. Ms. Muldoon is wrong to assert that “DBOC’s operation is not part of the
4 Seashore’s pastoral zone” Muldoon Dec. D. 64-1 ¶ 30. Attached as Exhibit 4 is a true and
5 correct copy of select portions of the General Management Plan in effect for Point Reyes National
6 Seashore, dated September 1980. DBOC’s onshore operations covered by the 1972 Reservation of
7 Use and Occupancy (RUO) and 2008 Special Use Permit are within the pastoral zone, and are
8 covered with an overlying “Oyster Farm” special use designation. Exhibit 4 at 10-11. Even if
9 DBOC’s onshore operations are not classified as being in the “pastoral zone,” that area continues
10 to be in the “Oyster Farm” special use zone under the 1980 General Management Plan, which
11 remains in effect. The area encompassed by DBOC’s onshore operations was not part of the
12 “wilderness” designation made by the NPS Federal Register notice on December 4, 2012 (77 FR
13 71826).

14 15. The June 18, 2004, letter from PRNS Superintendant Don Neubacher to Robert
15 Treanor, Executive Director of the CFGC, explicitly recognizes the State’s right to lease the State
16 water bottoms in Drakes Estero. Declaration of Barbara Goodyear (Goodyear Dec.) D. 75-8 Ex.
17 45 at 2. In fact, Mr. Neubacher argued that the State should only extend a temporary lease for the
18 State water bottoms to DBOC’s predecessor, JOC, to allow JOC to show progress in complying
19 with orders from the CCC, County of Marin, and NPS. *Id.* Mr. Neubacher’s letter did not claim
20 that the State lacked jurisdiction to lease the State water bottoms in the first instance.

21 16. In her discussion of CDFG correspondence, Ms. Muldoon pointedly ignores the
22 most recent communication from CDFG to the Department of the Interior. Muldoon Dec. D. 64-1
23 ¶¶ 51, 53. Attached as Exhibit 5 is a true and correct copy of a letter from CDFG Director
24 Charlton Bonham to Ms. Muldoon, dated October 10, 2012. In his letter, Director Bonham writes,
25 “Correspondence between our agencies shortly after the conveyance strongly suggests that our
26 agencies then believed that the State’s reservation of fishing rights included the right to lease the
27 bottom lands at Drakes Estero indefinitely for shellfish cultivation.”
28

1 17. Ms. Muldoon mischaracterizes the outcome of the April 12, 2012 and December
2 12, 2012, CFGC hearings. Muldoon Dec. D. 64-1 ¶¶ 56, 58.

3 18. At the April 12, 2012, hearing, the CFGC determined that it need not adopt a
4 resolution because its issuance of State water bottom leases for a twenty-five year period in 1979
5 and 2004 demonstrated that it had such jurisdiction to do so. Instead, the CFGC directed its
6 Executive Director Sonke Mastrup to write a letter to Secretary Salazar confirming its jurisdiction
7 over the State water bottom leases. In CFGC Executive Director Sonke Mastrup's letter to
8 Secretary of the Interior Salazar, Mr. Mastrup writes, "[t]he Commission, in the proper exercise of
9 its jurisdiction, . . . has clearly authorized the shellfish cultivation in Drakes Estero through at least
10 2029 through the lease granted to the Drakes Bay Oyster Company." Goodyear Dec. D. 75-9 Ex.
11 46 at 1. Ms. Muldoon was a carbon copy recipient of the letter.

12 19. At the December 12, 2012, hearing, DBOC provided a report to the CFGC
13 regarding the Secretary's decision and this litigation. DBOC made two requests to the CFGC.
14 First, to consider amending its state water bottom leases, and second, to confirm DBOC's
15 interpretation that its state water bottom leases continue in effect. In response, the Commission's
16 counsel stated that the Commission would take "no action" because it had been threatened by
17 litigation. DBOC has not threatened the CFGC with litigation. Neither the CFGC nor the CDFG
18 have communicated that DBOC's state water bottom leases are no longer in effect.

19 II. REBUTTAL TO DECLARATION OF BRANNON KETCHAM

20 20. Mr. Ketcham purports to be "very familiar with DBOC's operations," however, he
21 has never asked any questions of DBOC staff about our operations, and never toured DBOC's
22 onshore or off-shore operations with DBOC staff. Ketcham Dec. D. 64-2 ¶ 2. In my opinion, it is
23 impossible for Mr. Ketcham to be "very familiar with DBOC's operations" without first-hand
24 knowledge of how those operations are conducted.

25 21. It is inappropriate to describe Estero de Limantour as being part of Drakes Estero
26 for purposes of analyzing DBOC. Four bays in Drakes Estero are directly related to DBOC's
27 aquaculture activities, including Home Bay, Schooner Bay, Creamery Bay, and Barries Bay. See
28 Exhibit 1, Final Environmental Impact Statement (FEIS) Fig. ES-2. The mouth of Estero de

1 Limantour is approximately one mile from DBOC's nearest oyster beds, and is also separated from
2 Home Bay, Schooner Bay, Creamery Bay, and Barries Bay by an outlet to the Pacific Ocean. See
3 Exhibit 1, FEIS Fig. ES-1. Accordingly, I will refer to Drakes Estero (which includes Home Bay,
4 Schooner Bay, Creamery Bay, and Barries Bay) and Estero de Limantour separately.

5 22. Mr. Ketcham's statement that "upland pollutant sources are not perceived as a
6 problem within the [Drakes Estero] watershed" contradicts the FEIS, which notes that "inputs
7 from upstream sources originating from the cattle ranches intermittently affect the pathogen levels
8 in the upper bays of Drakes Estero." *Compare* Ketcham Dec. D. 64-2 ¶ 5 with Goodyear Dec. Ex.
9 3 at 427.

10 23. Drakes Estero differs from Estero de Limantour in that Drakes Estero is entirely
11 surrounded by cattle operations that occur in the pastoral zone.

12 24. Cattle have direct access to approximately 50 percent of the Drakes Estero
13 shoreline. Stormwater runoff affected by livestock from the entire Drakes Estero watershed within
14 the pastoral zone has access to Drakes Estero regardless of whether or not livestock have direct
15 access to the Drakes Estero shoreline.

16 25. Mr. Ketcham claims that "high flushing rates have even allowed the California
17 Department of Public Health ("CDPH") to characterize some growing areas in Drakes Estero as
18 fully approved (not subject to regular rainfall closure) (CDPH 2012)." In fact, *only one* growing
19 area out of the nearly forty growing areas in Drakes Estero—Bed 17, which is the growing bed
20 located closest to the mouth of Drakes Estero—is not subject to regular rainfall closure due to
21 contamination from stormwater runoff from the pastoral zone surrounding Drakes Estero.

22 26. Mr. Ketcham's statement that "[a]ny water quality benefit from shellfish depends
23 on shellfish growing practices within the Estero" is wrong. Ketcham Dec. D. 64-2 ¶ 9. Oysters
24 filter water and improve water quality regardless of growing practices, although their overall
25 efficiency can be improved through various growing practices. Total water filtration is mainly a
26 function of the number of oysters, not the oyster cultivation method used. Accordingly, it is
27 irrelevant what percentage of oyster racks in Drakes Estero are in use—it is the total number of
28 oysters that counts.

1 27. Mr. Ketcham criticizes DBOC for shellfish growing practices that he posits “are
2 not conducted in a manner that appears to consider or maximize water quality conditions” in part
3 based on use of only 47% of the oyster racks in Drakes Estero. Ketcham Dec. D. 64-2 ¶ 11. Mr.
4 Ketcham fails to note that the California Coastal Commission has denied DBOC permission to
5 repair oyster racks so that they could remain in use, or be put back into use.

6 28. Mr. Ketcham’s unfamiliarity with DBOC’s operations is demonstrated by his
7 claim that “DBOC primarily uses the racks for younger, smaller oysters” Ketcham Dec. D.
8 64-2 ¶ 12. DBOC’s oysters reach harvest size on the oyster racks before being removed from the
9 racks for the “beach hardening” process.

10 29. Mr. Ketcham’s unfamiliarity with DBOC’s operations is demonstrated by his
11 implication that the bottom bags in the southern-most growing areas of Drakes Estero are
12 composed entirely of mature oysters. Ketcham Dec. D. 64-2 ¶ 14. In fact, approximately 75
13 percent of the bottom bags in the southern-most growing areas at any given time will be immature
14 oysters.

15 30. Mr. Ketcham’s unfamiliarity with DBOC’s operations and the practice of
16 aquaculture in Drakes Estero is demonstrated by his claim that “[t]he Manila clam is a recent
17 introduction into DBOC’s shellfish cultivation stock at Drakes Estero.” Ketcham Dec. D. 64-2 ¶
18 16. In fact, the Manila clam has been an approved cultured species by the State of California, and
19 has been grown in Drakes Estero since 1993. Attached as Exhibit 6 is a true and correct copy of a
20 letter from the California Fish and Game Commission to Mr. Kevin Lunny, dated April 14, 2010,
21 correcting a clerical error made at the October 8, 1993, Commission hearing when the
22 Commission approved the cultivation of Manila clams in Drakes Estero; pers. comms. with Tom
23 and Mark Johnson, JOC’s prior owners; pers. comm. with Jorge Mata, JOC employee.

24 31. Mr. Ketcham’s unfamiliarity with DBOC’s operations and the practice of
25 aquaculture in Drakes Estero is demonstrated by his claim that “bags used in their 2009 Manila
26 clam planting were heavily damaged by crabs.” Ketcham Dec. D. 64-2 ¶ 17. In 2009, clams
27 growing inside the bags were heavily damaged by crabs, not the bags themselves. Crab larvae set
28 inside the clam bags and began to grow. The crabs grew larger than the holes in the mesh bags

1 and could not escape. The crabs' only food source was the clams, which heavily damaged the
2 clams. This is a common problem in clam cultivation. Crabs cannot and do not damage the bags
3 as suggested by Mr. Ketcham. Accordingly, there is no risk of Manila clams being introduced to
4 the environment in the manner in which Mr. Ketcham suggests.

5 32. Mr. Ketcham's unfamiliarity with the Marin County Environmental Health
6 Services and the California Department of Public Health, Drinking Water Branch, which are the
7 two agencies responsible for DBOC's septic system and public water system, respectively, is
8 demonstrated by his claim that "NPS will only require that DBOC pump out of [sic] the septic
9 tanks and conduct an inspection of the septic system and well with the NPS prior to closeout."
10 Ketcham Dec. D. 64-2 ¶ 19. The NPS is neither the owner nor the regulatory authority in charge
11 of the septic and drinking water system. Accordingly, my estimate of the costs and time necessary
12 to address DBOC's responsibilities to the appropriate regulatory authorities are valid.

13 33. Mr. Ketcham does not dispute my statement that, "[r]emoval of onshore personal
14 property will likely require federal, state, and local agency permitting that will prevent DBOC
15 from taking action until such permits are obtained." *Compare* Ketcham Dec. D. 64-2 ¶ 20 *with*
16 Lunny Dec. D. 38 ¶ 49.

17 34. Mr. Ketcham's unfamiliarity with DBOC's operations and the practice of
18 aquaculture in Drakes Estero is demonstrated by his claim that I overestimated the time necessary
19 to remove existing oysters and clams, and the oyster racks in Drakes Estero. Ketcham Dec. D. 64-
20 2 ¶¶ 22-25. In fact, Mr. Ketcham does not attest that he has personal experience with the practical
21 realities of working on Drakes Estero, including tides, winds, daylight, and weather. As noted
22 above, Mr. Ketcham has no personal experience with DBOC's operations. See para. 20, above.

23 35. In my estimate of board feet of lumber in the oyster racks in Drakes Estero (Lunny
24 Dec. D. 38 ¶ 58), I took into account the condition of the racks in Drakes Estero. Accordingly, my
25 estimate of total board feet of lumber to be removed from Drakes Estero is accurate, as is the time
26 necessary to remove the oyster racks.

27 36. Mr. Ketcham claims that my time estimate is wrong because it "is based on the
28 faulty assumption that [DBOC] can only use a single work team. Use of multiple (three or four)

1 teams, and additional boats and barges is an option available to Mr. Lunny.” *Id.* ¶ 24. My time
2 estimate accurately describes DBOC’s capability to remove existing oysters and clams, and the
3 oyster racks in Drakes Estero, with the equipment and personnel available to it and permitted by
4 the NPS order I received on November 29, 2012 (Goodyear Dec. D. 65-2 Ex. 2). As Mr. Ketcham
5 notes, NPS has not given express written consent to DBOC to use any equipment beyond that
6 already in its possession.

7 37. My estimate assumed that DBOC’s two crews would be working at one time, one
8 crew removing oysters and clams, and another crew removing the oyster racks.

9 38. A crew using comparable equipment to what DBOC uses could remove
10 approximately 100,000 oysters or clams per day. Accordingly, my declaration serves as an
11 accurate measuring tool for how quickly oysters and clams could be removed from Drakes Estero.
12 There are approximately 20 million oysters and 2 million clams in Drakes Estero, which will take
13 220 work days to remove. DBOC staff could supervise a maximum of two additional crews
14 working in Drakes Estero. Accordingly, if NPS authorized the use of two additional crews, boats,
15 and barges, and DBOC dedicated both its existing crews on oyster and clam removal alone, DBOC
16 could remove the remaining oysters and clams from Drakes Estero in approximately 55 days.

17 39. Mr. Ketcham does not dispute that dismantling the oyster racks could not proceed
18 until oyster are removed from the racks that they are located upon.

19 40. In my declaration, I estimated that DBOC could dismantle oyster racks in Drakes
20 Estero an average three days of work per week, and only two days of work per week during winter
21 months between December 1 and February 28. Lunny Dec. D. 38 ¶ 59. Mr. Ketcham’s contention
22 that DBOC removal activities could proceed “more than 2-3 days per week” focuses solely on
23 tidal levels, and does not take into account wind, daylight, and weather conditions in Drakes
24 Estero. Ketcham Dec. D. 64-2 ¶ 23. Furthermore, Mr. Ketcham does not attest to having any
25 personal experience upon which to base his conjecture. See paras. 20, 34, above.

26 41. Mr. Ketcham does not dispute my estimate that it will take a crew approximately
27 three work days to remove an oyster rack.

28

1 42. If NPS authorized the use of two additional crews, boats, and barges, and DBOC
2 dedicated both its existing crews on removing oyster racks, DBOC could remove the 95 oyster
3 racks in approximately 72 work days over 167 calendar days, the ultimate duration of which would
4 depend on how much of the work would occur during winter conditions.

5 43. Using the assumptions employed by Mr. Ketcham that DBOC would be allowed to
6 use up to two additional crews and associated equipment (Ketcham Dec. D. 64-2 ¶ 24), there is
7 still no way that DBOC could complete the removal of its oysters and clams, and the oyster racks,
8 within 90 days. Furthermore, my estimates do not include the time necessary to complete
9 permitting and agency coordination with relevant federal, state, and local regulatory agencies; time
10 delays imposed by restrictions put into place by regulatory agencies to avoid potential impacts to
11 sensitive life stages of protected species, such as anadromous fish migration; or delays associated
12 with the implementation of best management practices to reduce water quality impacts during
13 removal.

14 44. Mr. Ketcham claims that “the use of hydraulic cutters rather than an underwater
15 chainsaw” could be used in the oyster rack removal process. Ketcham Dec. D. 64-2 ¶ 25. I did
16 not propose using an underwater chainsaw; I proposed using a chainsaw. Lunny Dec. D. 38 ¶ 60.
17 I am not aware of a hand-held hydraulic wood cutter that could be used to cut the posts and rails of
18 the oyster racks into manageable units, which is the purpose for which a chainsaw would be
19 employed.

20 45. Assuming the use of best management practices as Mr. Ketcham suggests
21 (Ketcham Dec. D. 64-2 ¶ 25), such as use of silt curtains to minimize turbidity during oyster rack
22 removal, will increase, not decrease, the time necessary to remove the oyster racks. For example,
23 setting, maintaining, monitoring, and re-setting silt curtains is an additional work process that
24 would need to be performed and was not included in my original time estimates.

25 46. Mr. Ketcham mistakenly asserts that “[u]nder the terms of the RUO, if DBOC is
26 unable to remove its racks and other personal property within the 90-day wind down period
27 because it has failed to obtain the necessary permits, NPS may remove the structures after that
28 period and seek to recover the costs of removal. Goodyear Decl. Ex. 8 at 19, Ex. 2 at 2.”

1 Ketcham Dec. D. 64-2 ¶ 32. The RUO does not cover the state water bottoms in Drakes Estero
2 where the oyster racks are located because it only covers the 1.5 acres of onshore area where
3 DBOC's onshore operations are located. Goodyear Dec. D. 71-4 Ex. 8 at "Exhibit D."

4 47. Mr. Ketcham misconstrues the requirements of DBOC's state water bottom leases.
5 Ketcham Dec. D. 64-2 ¶ 37. In the leases, DBOC is the "Lessee," and the State of California
6 acting by and through its Department of Fish and Game is the "Lessor." Goodyear Dec. D. 72-4
7 Ex. 19 at 1. Accordingly, it is the Department's obligation as the "Lessor" to annually advise the
8 California Fish and Game Commission of its best estimate of the probable cost of removal of the
9 lease operation, not DBOC's obligation as the "Lessee." The Department has never asked DBOC
10 to supply an estimate of the costs of removal.

11 **III. REBUTTAL TO DECLARATION OF THOMAS BATY**

12 48. In his declaration, Mr. Baty does not attest to ever asking any questions of DBOC
13 staff about DBOC's operations, or touring DBOC's onshore or off-shore operations with DBOC
14 staff. I am unaware of any such interactions between Mr. Baty and DBOC staff.

15 49. JOC, DBOC's predecessor, used aquaculture techniques that allowed for the
16 deposition of substantial quantities of debris into the marine environment. When DBOC assumed
17 operations from JOC in 2005, the problem associated with JOC's legacy marine debris was well-
18 known.

19 50. Mr. Baty asserts that he has picked up "scores of DBOC's mesh bags, Styrofoam
20 floats, and plastic milk crates." Baty Dec. D. 62-1 ¶ 4. Both DBOC, and its predecessor JOC,
21 used mesh bags and Styrofoam floats like those displayed in Exhibit 1 to the Baty Dec. Contrary
22 to Mr. Baty's assertion, DBOC does not use plastic milk crates in its offshore operations; I do not
23 know if or how JOC used milk crates in its operations.

24 51. JOC lost a significant amount of aquaculture-related debris into the marine
25 environment, including black plastic spacer tubes and mesh bags, prior to onset of DBOC's
26 operations. JOC lost this equipment through two aquaculture practices that DBOC has never
27 employed, including "stake" culture and cutting oyster wires (on which the spacers are placed)
28 over Drakes Estero.

1 52. When DBOC began operations, it designed its operations to prevent the release of
2 black plastic spacer tubes and floating mesh bags into the marine environment. For example,
3 spacers are not removed from the wire oyster “strings” until they are above the high tide level and
4 stored in containers for future use. This eliminates the risk of spacers accidentally entering the
5 marine environment while oyster boats are still on the water in Drakes Estero. Also, DBOC does
6 not utilize the “stake” oyster culture method previously employed by JOC, which is the method by
7 which many thousands of black plastic spacers and plastic coffee can lids were lost into the marine
8 environment. Finally, over time DBOC is phasing out the use of black plastic spacer tubes in
9 favor of using french tube culture, which does not require the use of plastic spacer tubes.
10 Furthermore, DBOC attaches all floating mesh bags with two ropes attached to the bags on
11 opposite ends of the bags, and the ropes are anchored with two separate anchors. This redundancy
12 prevents accidental loss.

13 53. DBOC’s experience since 2005 has been very little to no loss of black plastic
14 spacers, or mesh bags, through the course of its operations.

15 54. DBOC operates under a “zero loss” policy to prohibit the release of any
16 aquaculture-related debris into the marine environment. This policy means that DBOC staff is
17 required to inspect ropes anchoring floating systems regularly, inspect connections to bags, inspect
18 racks, and remove any loose lumber before it is released. Furthermore, DBOC investigates claims
19 of accidental release of DBOC aquaculture material promptly.

20 55. In 2005, DBOC agreed to regularly cleanup marine debris in Drakes Estero to
21 account for JOC’s legacy marine debris. Since that time, DBOC staff have performed regular
22 beach cleanups of all marine debris—not just legacy aquaculture debris—on a monthly basis.
23 DBOC cleans the entire shoreline adjacent to the State water bottom leases. In the course of these
24 cleanup activities, since 2005 DBOC has removed approximately 2.5 tons of marine debris from
25 PRNS beaches (based on an estimate of an average of 50 pounds of marine debris per month over
26 an eight year period).

27 56. During DBOC beach cleanups, I often find black plastic spacers and coffee can
28 lids that were last used in JOC’s “stake” culture method in the mid-1990s (and has never been

1 used by DBOC). It is suspicious that Mr. Baty does not report finding plastic coffee lids in any of
2 his beach walks, which were also lost in large numbers by JOC's aquaculture operation and are
3 routinely found even now.

4 57. Mr. Baty asserts that he has picked up DBOC debris on PRNS beaches over a
5 multi-year period. Baty Dec. D. 62-1 ¶¶ 4-8. Without any knowledge of DBOC's current
6 operational practices, however, he has no basis upon which to assert that the debris he has found—
7 all of which was also used by JOC—originated from DBOC's operations, or instead originated
8 from JOC's operations.

9 58. Attached as Exhibit 7 is a true and correct copy of a letter from Thomas Moore,
10 former Marine Region Aquaculture Coordinator for the California Department of Fish and Game
11 to Nancy Cave, Northern California Enforcement Program Supervisor for the California Coastal
12 Commission, dated October 3, 2012. Mr. Moore is the person most familiar with both JOC's and
13 DBOC's operations because he supervised both aquaculture operations on behalf of CDFG prior to
14 his retirement in 2009. *Id.* at 1. In his letter, Mr. Moore explains that legacy debris from JOC's
15 operations continue to be found because “[w]aves from storms, winds, and strong tidal currents all
16 work to unearth buried materials and wash them ashore where they are continually found even
17 today.” *Id.*

18 59. Since 2005, DBOC beach cleanup crews have noticed a decline in the amount of
19 legacy aquaculture debris that they are recovering. It is my experience that the combination of
20 DBOC's operational practices that prevent the release of aquaculture-related materials into the
21 marine environment, combined with monthly beach cleanups by DBOC employees, is making a
22 significant difference in reducing the amount of overall marine debris in Drakes Estero.

23 60. If DBOC no longer performs monthly beach cleanups, there will be a significant
24 amount of marine debris, including legacy aquaculture debris, that will not be removed from the
25 marine environment in Drakes Estero.

26 61. Attached hereto as Exhibit 8 is a true and correct copy of a letter from Tom St
27 Clair, Atkins Program Manager, to Dr. Ralph Morgenweck, dated May 7, 2012.

28

1 **IV. IRREPARABLE HARM TO PLAINTIFFS**

2 62. In December 2004, DBOC purchased the oyster farm from JOC without
3 knowledge that the NPS would claim it could not allow the farm to continue past 2012. At that
4 time, the RUO for the onshore area and the two State water bottom leases for offshore cultivation
5 of oysters were transferred to DBOC and I. DBOC's oyster process facilities are located within the
6 RUO area.

7 63. The RUO states that, "[u]pon expiration of the reserved term, a special use permit
8 may be issued for the continued occupancy of the property for the herein described purposes,
9 provided however, that such permit will run concurrently with and will terminate upon the
10 expiration of State water bottom allotments assigned to the Vendor. Any permit for continued use
11 will be issued in accordance with National Park Service regulations in effect at the time the
12 reservation expires." Lunny Dec. D. 38-1 "Exhibit C" ¶ 11.

13 64. When DBOC purchased the oyster farm in December 2004, it was my
14 understanding that the RUO provided that DBOC could apply for a Special Use Permit (SUP) at
15 the end of the RUO, and NPS had the authority to issue DBOC a SUP with an expiration date later
16 than November 30, 2012. I was unaware that NPS had taken the position in a 2004 Field
17 Solicitor's Opinion that NPS believed that it lacked the authority to issue DBOC a new SUP at the
18 end of the RUO term.

19 65. Pursuant to authorization contained in NPS's November 29, 2012, letter to myself
20 and the terms of a stipulation dated Dec. 14, 2012, DBOC personnel have continued to harvest
21 shellfish from the waters of Drakes Estero and transfer oyster spat from bags in the estero to oyster
22 racks on the water bottom since November 30, 2012, the date on which DBOC's existing SUP and
23 RUO terminated. At no time before or after Dec. 4, 2012, when a "Notice of Designation of
24 Potential Wilderness as Wilderness, Point Reyes National Seashore," was published in the Federal
25 Register, has DBOC stopped farming oysters in Drakes Estero.

26 66. Drakes Estero is a unique place. It is not possible for DBOC to relocate to another
27 part of California with conditions that are as well suited for oyster farming. The loss of the ability
28 to continue operating in Drakes Estero cannot be remedied by monetary damages.

1 **V. PRECAUTIONARY MEASURES TO ADDRESS INVASIVE SPECIES**

2 67. *Didemnum vexillum* (D. Vex.) is an invasive species that attaches to hard
3 substrates, like rock, and in some instances, oyster shell.

4 68. D. Vex. occurs commonly along the West Coast, and is known to exist in San
5 Francisco Bay, Tomales Bay, and Bodega Bay. D. Vex. was present in Drakes Estero prior to
6 DBOC beginning operations.

7 69. The water bottoms in Drakes Estero are composed of fine sediments, which is not
8 the preferred habitat of D. Vex. Furthermore, in my experience working in aquaculture in Drakes
9 Estero, I have not seen D. Vex. colonizing the fine sediments of Drakes Estero's water bottoms.

10 70. D. Vex. has never been found colonizing eelgrass in Drakes Estero.

11 71. The extent and distribution of D. Vex. in Drakes Estero has not changed since
12 2005.

13 72. Accordingly, based on my experience working on Drakes Estero, I believe that
14 there is a very low risk of proliferation of D. Vex. to eelgrass or the water bottoms of Drakes
15 Estero.

16 73. In DBOC's Manila clam culture, we mitigate against the potential risk of
17 unintentional proliferation of Manila clams in Drakes Estero by ensuring that we only use mesh
18 bags that are in good repair, and by only transferring Manila clams to mesh bags for placement in
19 Drakes Estero when the clams themselves are larger in diameter than the holes in the mesh bags.

20 74. When Manila clams are harvested, they are never handled or removed from their
21 mesh bags over water. All processing of Manila clams, including removing them from their mesh
22 bags, occurs above the high tide line in Drakes Estero.

23 75. DBOC complies with CDFG (now CDFW) requirements to use only oyster seed
24 and clam seed that is certified to be free of invasive species, provided by certified hatcheries.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 16 day of January, 2013, in Inverness, California.

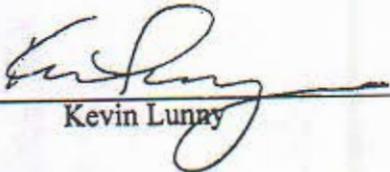

Kevin Lunny

EXHIBIT 1

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Dated: November 9, 1999.

John J. Reynolds,

Regional Director, Pacific West Region.

[FR Doc. 99-30112 Filed 11-17-99; 8:45 am]

BILLING CODE 4310-70-M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Designation of Potential Wilderness as Wilderness, Point Reyes National Seashore

AGENCY: National Park Service, Interior
ACTION: Notice.

Public Law 94-567, approved October 20, 1976, designated 25,370 acres in Point Reyes National Seashore as Wilderness, and further identified 8,003 acres as potential wilderness additions in maps entitled "Wilderness Plan, Point Reyes National Seashore", numbered 612-90,000-B and dated September 1976. These maps showing the wilderness area and potential wilderness additions are on file at the headquarters of Point Reyes National Seashore, Point Reyes Station, California, 94956.

Section 3 of Public Law 94-567 provided a process whereby potential wilderness additions within the Point Reyes National Seashore would convert to designated wilderness upon publication in the *Federal Register* of a notice that all uses of the land, prohibited by the Wilderness Act (Pub. L. 88-577), have ceased.

The National Park Service has determined that all Wilderness Act prohibited activities on the following described designated potential wilderness additions have ceased. The lands are located in the Muddy Hollow, Abbotts Lagoon, and Limantour Area and are described on map 612-60, 189. Such lands are entirely in Federal ownership. Because such lands now fully comply with congressional direction in Section 3 of Public Law 94-567, this notice hereby effects the change in status of the lands in these areas to designated wilderness, totaling 1,752 acres, more or less. The map showing this change is on file at the headquarters of Point Reyes National Seashore, Point Reyes Station, California, 94956.

This notice hereby changes the total wilderness acreage within Point Reyes National Seashore to 27,122 acres. The potential wilderness additions remaining consist of 6,251 more or less. The remaining potential wilderness areas will remain as such until all uses conflicting with the provisions of the Wilderness Act have ceased.

Note that Congress in Public Law 99-68, approved on July, 1985, designated that the wilderness area of Point Reyes National Seashore, to be known as the "Phillip Burton Wilderness."

Dated: October 29, 1999.

Robert Stanton,

Director, National Park Service.

[FR Doc. 99-29779 Filed 11-17-99; 8:45 am]

BILLING CODE 4310-70-P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

November 9, 1999.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation for BLS, ETA, PWBA, and OASAM contact Karin Kurz ({202} 219-5096 ext. 159 or by E-mail to Kurz-Karin@dol.gov). To obtain documentation for ESA, MSHA, OSHA, and VETS contact Darrin King ({202} 219-5096 ext. 151 or by E-Mail to King-Darrin@dol.gov).

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ({202} 395-7316), within 30 days from the date of this publication in the *Federal Register*.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration (OSHA).

Title: Shipyard Certification Records (29 CFR 1915.113(b)(1) and 1915.172(d)).

OMB Number: 1281-0220.

Frequency: On occasion; Quarterly; Annually.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal Government; State, Local or Tribal Government.

Number of Respondents: 900.

Estimated Time Per Respondent: 3 to 20 minutes.

Total Burden Hours: 4461.

Total Annualized capital/startup costs: \$0.

Total annual costs (operating/maintaining systems or purchasing services): \$0.

Description: The Standard for shackles and hooks (29 CFR 1915.113(b)(1)) requires that all hooks for which no applicable manufacturer's recommendations are available shall be tested to twice their intended safe work load before they are initially put into use, and that the employer shall maintain a certification record. The standard for portable air receivers (29 CFR 1915.172(d)) requires that portable, unfired pressure vessels, not built to the code requirements of 1915.172(a), shall be examined quarterly by a competent person and that they be subjected yearly to a hydrostatic pressure test of one and one-half times the working pressure of the vessels. A certification record of these examinations and tests shall be maintained.

The information collection requirements contained in 29 CFR 1915.113(b)(1) and 29 CFR 1915.172(d) (shipyard certification records) ensures that employees properly inform employees about the condition of shackles and hooks, and portable air receivers and other unfired pressure vessels, in shipyards. The information collection requirements also verify that employers are in compliance with the standard. OSHA compliance officers may require employers to disclose the required certification records at the time of an inspection.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 99-30120 Filed 11-17-99; 8:45 am]

BILLING CODE 4510-26-M

EXHIBIT 2

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



Item W6

Staff: Christine Chestnut-SF
Staff Report: November 29, 2007
Hearing Date: December 12, 2007

STAFF REPORT AND FINDINGS FOR CONSENT CEASE AND DESIST ORDER

ORDER NUMBER: CCC-07-CD-11

RELATED VIOLATION FILE: V-7-07-001

PROPERTY LOCATION: The property, referred to as the Drake's Bay Oyster Company facility, is located within the Point Reyes National Seashore and consists of an onshore area located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and an offshore area in Drake's Estero (APN 109-13-017). (**Exhibit 1**)

DESCRIPTION OF PROPERTY: Approximately 3.7 acres onshore and approximately 1060 acres offshore, containing shellfish cultivation and processing equipment, commercial aquaculture facilities, and related business and residential buildings and associated development including septic systems.

PROPERTY OWNER: National Park Service, United States Department of the Interior

LESSEE/ENTITY SUBJECT TO THIS ORDER: Drake's Bay Oyster Company

REPRESENTATIVE: Kevin Lunny, owner/operator of Drake's Bay Oyster Company

VIOLATION DESCRIPTION: Unpermitted development consisting of offshore aquaculture operations, onshore processing and retail facilities, and related residential use. The unpermitted development activities at issue include

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both the construction/installation of structures and the performance of ongoing activities.

SUBSTANTIVE FILE DOCUMENTS: 1. Cease and Desist Order File for CCC-07-CD-11
2. Exhibits 1 through 10

CEQA STATUS: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2)), and Categorically Exempt (CG §§ 15061(b)(2), 15037, 15038, and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

Staff recommends that the California Coastal Commission ("Commission") approve Consent Cease and Desist Order No. CCC-07-CD-11 ("Consent Order") to address unpermitted development at the Drake's Bay Oyster Company ("DBOC") facility located at 17171 Sir Francis Drake Blvd. in Inverness in Marin County, including the adjacent offshore area in Drake's Estero ("property"). The property consists of approximately 1060 acres of offshore area in Drake's Estero and approximately 3.7 acres of onshore area immediately adjacent to Drake's Estero and is identified by the Marin County Assessor's Office as Assessor's Parcel Number 109-13-017.

Property Description

The property is federally owned and located entirely within the Point Reyes National Seashore ("PRNS"), which is part of the National Park system and managed by the National Park Service (NPS), a bureau of the United States Department of the Interior. PRNS, a popular visitor destination, was established in 1962 to "save and preserve [the area], for purposes of public recreation, benefit, and inspiration."¹ The property was designated as potential wilderness under the Point Reyes Wilderness Act of 1976.² The variety of habitats and the unique geology of the park provide a home for at least forty-five percent of North American avian species, almost eighteen percent of California's plant species, and thirty-eight threatened and endangered species.³

The offshore portion of the property is located in Drake's Estero, a shallow tidal estuary located along the southern coast of the PRNS immediately north of Drake's Bay. Drake's Estero supports large areas of eelgrass (*Zostera marina*),⁴ which is habitat for many species of invertebrates and fish and important foraging habitat for many birds, such as black brant (*Branta bernicla nigricans*). Drake's Estero has been designated a site of regional importance by the

¹ Pub. L. 87-657, Sept. 13, 1962, 76 Stat. 538 (16 U.S.C. 459c et seq.).

² Pub. L. 94-544, Oct. 18, 1976 and Pub. L. 94-567, Oct. 20, 1976 (16 U.S.C. 459c et seq.).

³ National Park Service website at <http://www.nps.gov/pore/naturescience/index.htm> (last accessed on November 15, 2007).

⁴ Memorandum from Dr. John Dixon, Commission biologist, dated September 11, 2007, at page 1 attached as Exhibit 3b.

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Western Hemisphere Shorebird Reserve Network.⁵ The eelgrass beds and other estuarine habitats of Drake's Estero have also been designated as Essential Fish Habitat/ Habitat Area of Particular Concern by the Pacific Fisheries Management Council.⁶ In addition to avian, fish, and invertebrate species, Drake's Estero is also home to one of the largest harbor seal populations in California. Collectively, the harbor seal colonies on the Point Reyes Coast represent approximately 20% of the California population, and of those colonies, Drake's Estero is one of the primary pupping sites.⁷

Throughout the world, eelgrass and other seagrass habitats are declining due to a number of factors, including physical disturbance.⁸ In an effort to protect the eelgrass beds in Drake's Estero, the proposed Consent Order will establish protocols for vehicle traffic in Drake's Estero (using established channels) to reduce the potential for resource impacts, and will preclude unpermitted development activities such as cultivation outside of current cultivation areas and the placement of additional structures in the Estero, which could displace eelgrass habitat. Additional onshore and offshore protective measures include: 1) the establishment of harbor seal protected areas, 2) a production limit, 2) the requirement that all shellfish larvae and seed from outside sources be certified as free of pathogens, and 3) the requirements for the submittal of water quality information.

Issuance of this Order under Coastal Act Section 30810, does not require that the Commission take a position, through this enforcement action, on whether resource impacts have occurred on the property or are occurring as a result of the development activities at issue. Rather, it is the intent of the proposed Consent Order to proactively address resource concerns, given the sensitivity of the area and the importance of the resources⁹. Accordingly, DBOC has agreed to the protective measures set forth in the Consent Order, which are designed to protect and reduce any potential impacts to sensitive resources and other coastal resources under the Coastal Act while DBOC seeks authorization from NPS and the Commission for the development currently located on the property and for any proposed new development.

History of Use of the Property and Commission Action

In 1972, NPS purchased approximately five acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from the owner at that time, Johnson Oyster Company ("Johnson"), subject to the reservation of a right allowing Johnson to use approximately 1.5 acres of the land for "processing and selling... oysters, seafood, and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto". NPS then issued a Special Use Permit to Johnson for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the

⁵ *Id.*, at page 2. See also http://www.nps.gov/pore/parknews/newsreleases_20071111_oilspill_coscobusan.htm (last accessed on November 29, 2007).

⁶ *Id.* at 3 (citing <http://www.pccouncil.org/facts/habitat.pdf>, last accessed November 29, 2007)..

⁷ *Id.*

⁸ Orth et al., *A Global Crisis for Seagrass Ecosystems*, *BioScience*, Volume 56, Issue 12 (December 2006), at 987.

⁹ Dr. John Dixon Memorandum, September 11, 2007.

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operation and the utilization of tidelands for purposes related to the operation of the oyster farm.” DBOC, as successor in interest to Johnson, uses onshore areas for shellfish harvesting, processing, packaging, and retail facilities, and for employee housing. Oysters and clams are cultivated in offshore areas located in Drake's Estero. Currently, DBOC is in the process of obtaining updated special use permits from NPS for onshore operations outside of the reservation of use area and including, for the first time, the offshore operations.

In 2003, after Marin County requested that the Commission assume primary enforcement authority with regards to Coastal Act violations on the property, the Commission issued Cease and Desist Order No. CCC-03-CD-12 (“Johnson Order”) to Johnson to address unpermitted development on the property. DBOC purchased the operation from Johnson in January of 2005. At that time, DBOC agreed to accept responsibility for compliance with the Johnson Order, which includes a requirement for the submittal of a CDP application for after-the-fact authorization of the unpermitted development on the onshore and offshore areas of the property at that time.¹⁰ That application has been submitted, but, as of the date of this report, it is not complete.

DBOC has not yet removed all of the unpermitted development that was the subject of the Johnson Order and has constructed additional development on the property without a CDP since it took over the operation, subsequent to the Commission's issuance of the Johnson Order. Therefore, under the Consent Order, DBOC has agreed to submit a CDP application to the Commission for all onshore and offshore development on the property that requires a permit.¹¹ The proposed Consent Order will set a reasonable timeframe for submittal of the CDP application. However, due to the scientific, procedural, and legal complexities of this matter, Commission staff does not expect that permit application to be filed for many months. In the interim, since the Commission does not have the information necessary to determine the exact parameters of approvable operations, the Consent Order establishes some agreed-upon conditions on operations, and lists specific activities that can reasonably be expected to result in negative impacts, and which DBOC will therefore, under the terms of the Consent Order, avoid while it seeks Commission approval for the development. The terms and conditions of the proposed Consent Order are designed to ensure that current operations are not expanded, and to provide significant protections for the valuable resources on the property until the Commission can consider DBOC's CDP application and take appropriate action.

Proposed Enforcement Action

¹⁰ Neither Johnson nor DBOC has obtained a CDP for the onshore or offshore development at issue in this matter. As part of the proposed Consent Order, DBOC has agreed to apply for a CDP for all of the development currently on the property and for any proposed expansion of their operations, which would include the placement of additional development on the property.

¹¹ The Consent Order requires DBOC to apply for a CDP for all development requiring a CDP that is currently located on the property. However, nothing in the Consent Order precludes DBOC from applying for authority to conduct additional, proposed development, including expansion of the operations and replacement of structures with larger structures. The Consent Order does, however, clearly state that DBOC must obtain a CDP prior to undertaking of any proposed development.

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The activities at issue in this matter consist of offshore aquaculture operations, onshore processing and retail facilities, and related residential use. The development includes both the construction/installation of structures and the performance of ongoing activities. These activities constitute development under Coastal Act Section 30106¹² and, therefore, require a coastal development permit ("CDP") under Coastal Act Section 30600 unless exempt under Coastal Act Section 30610. No such exemptions apply to the development, and no CDP was obtained for the development. Therefore, the development is unpermitted, in violation of the Coastal Act, and the Commission has the authority under Coastal Act Section 30810 to undertake enforcement action to resolve the violations.

Although Marin County has a certified Local Coastal Program ("LCP"), and some of the property is within its jurisdiction, Marin County requested that the Commission take enforcement action in 2003 for the portion located in their jurisdiction. Additionally, much of the property addressed by this Consent Order is in the Commission's retained jurisdiction.¹³ Consequently, the property was the subject of a previous Commission enforcement action that resulted in the issuance of the Johnson Order. Provision 1.0 (d) of the Johnson Order requires the submittal of a CDP application "to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act." The permit application is not yet complete. In the meantime, DBOC has undertaken new development. Therefore, under Coastal Act Section 30810(a), the Commission has the authority to take a new enforcement action with respect to both the portion of the property located within Marin County's certified LCP jurisdiction and the portion in the Commission's retained jurisdiction. The provisions of the Johnson Order that have not yet been fulfilled, such as the requirement to submit a CDP application for development on the property, will be supplanted by the proposed Consent Order, which requires, among other things, the submittal of a comprehensive CDP application including all current onshore and offshore operations.

In addition, Provision 1.0(b) of the Johnson Order specifically requires that the following be addressed:

...the unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.

Similarly, this Commission has the authority under Section 30810(b) to include protective measures in the Consent Order at issue here, to ensure that these potential resource concerns are addressed.

¹² The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further Coastal Act section references are to that code.

¹³ For a more detailed discussion of the jurisdiction issue, see Section IV.E.2, *infra*.

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Staff worked closely with DBOC to reach an amicable resolution in this matter and commends DBOC for its cooperation. On November 29, 2007, Kevin Lunny signed the proposed Consent Order, as the representative for DBOC, and a copy of the signed Consent Order is attached to this staff report on page 17. The proposed Consent Order reflects DBOC's agreement to work cooperatively with the Commission to resolve the violations on the property and to protect the unique and valuable resources of the Estero.

Staff recommends that the Commission approve the proposed Consent Order, directing DBOC to take actions including the following: 1) cease from performing any additional development activity on the onshore and offshore portions of the property without first obtaining a CDP or other Coastal Act approval; 2) cease from expanding operations, including the placement of structures, without first obtaining a CDP or other Coastal Act approval; 3) comply with the protective measures set forth in the Consent Order; 4) cooperate in good faith with the National Park Service to obtain a special use permit within a reasonable time period, and implement any steps authorized or required by any special use permit obtained; 5) revise the project description in CDP Application No. 2-06-003 to include all onshore and offshore development; 6) complete the CDP application by the deadline set forth in the Consent Order and allow the application to proceed through the Commission permitting process according to applicable laws; and 7) implement and comply with all the terms of any permit issued, including the removal of any development that is denied under a Commission permit action in this matter if such removal is necessary.

As stated above, staff greatly appreciates DBOC's cooperation and efforts in reaching this settlement. The proposed Consent Order represents the best current course of action in this matter and staff looks forward to working collaboratively with DBOC to address the violations on the property in a timely fashion.

II. CEASE AND DESIST ORDER HEARING PROCEDURES

The procedures for a hearing on a proposed Cease and Desist Order are set forth in Section 13185 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8. For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all alleged violators or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, in his or her discretion, to ask of any other party. Commission staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR section 13185 and

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13186, incorporating by reference section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions of any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the motion, per staff recommendation or as amended by the Commission, will result in issuance of the order.

III. STAFF RECOMMENDATION

A. Motion Re: Consent Cease and Desist Order:

I move that the Commission issue Consent Cease and Desist Order No. CCC-07-CD-11 pursuant to the staff recommendation.

B. Recommendation of Approval:

Staff recommends a YES vote. Passage of this motion will result in the issuance of the Consent Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

C. Resolution to Issue Consent Cease and Desist Order:

The Commission hereby issues Consent Cease and Desist Order No. CCC-07-CD-11, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and in violation of the Coastal Act, and that the requirements of the Consent Order are necessary to ensure compliance with the Coastal Act.

IV. FINDINGS FOR CONSENT CEASE AND DESIST ORDER NO. CCC-07-CD-11¹⁴

A. Property Description

The property at issue in this matter, identified by the Marin County Assessor's Office as Assessor's Parcel No. 109-13-017 (**Exhibit 2**), is located at 17171 Sir Francis Drake Blvd. in the town of Inverness in Marin County and includes the adjacent offshore area in Drake's Estero. The property consists of approximately 3.7 acres of onshore area¹⁵ and approximately 1060 acres

¹⁴ These findings also hereby incorporate by reference Section I of the November 29, 2007 staff report in which these findings appear, entitled "Summary of Staff Recommendation and Findings."

¹⁵ Although the federal government has owned this land since 1972, the seller reserved the right to use 1.5 acres for 40 more years after the sale, and NPS issued the seller a Special Use Permit for use of an additional 2.2 acres of land. The seller thereby remained in occupation until DBOC succeeded to those interests, though NPS has indicated that the Special Use Permit has actually expired.

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of offshore area¹⁶, all located within the PRNS. The federally-owned PRNS is part of the National Park system and is managed by the National Park Service, a bureau of the United States Department of the Interior. PRNS, a popular visitor destination, was established in 1962 to "save and preserve [the area], for purposes of public recreation, benefit, and inspiration."¹⁷ Drake's Estero and the property at issue was designated potential wilderness under the Point Reyes Wilderness Act of 1976.¹⁸ The variety of habitats and the unique geology of the PRNS provide a home for at least forty-five percent of North American avian species, almost eighteen percent of California's plant species, and thirty-eight threatened and endangered species.¹⁹ DBOC uses the property as a commercial aquaculture facility through a Reservation of Use and Occupancy Agreement with the National Park Service.

Drake's Estero is a shallow tidal estuary located along the southern coast of PRNS, immediately north of Drake's Bay. (**Exhibit 3**) The Estero supports a vibrant population of eelgrass (*Zostera marina*), which in turn provides habitat for a large abundance and diversity of fish and invertebrates and foraging habitat for waterfowl such as the black brant (*Branta bernicla nigricans*), a goose species found in coastal areas. Worldwide, eelgrass and other seagrass species are in decline due to multiple stressors, including physical disturbance.²⁰ DBOC has agreed, as part of the proposed Consent Order, to limit vessel traffic in the Estero to the channels designated on an approved Vessel Transit Plan, to submit water quality information, and to restrict the importation of outside larvae and seed to those certified by the California Department of Fish and Game as being free of pathogens and, therefore, posing no threat of introducing invasive species into the Estero. In addition to the fish, invertebrate, and avian species found in therein, Drake's Estero, is also home to one of the largest concentrations of harbor seals in the state and to one of the primary pupping sites within the Point Reyes harbor seal colonies, which together comprise approximately 20% of the California population. (**Exhibit 4**) As part of the proposed Consent Order, DBOC has agreed not to enter into Harbor Seal Protected Areas, which were established as part of the proposed Consent Order and are shown on Figures 1 and 2 of the Order (attached to this report at page 17) nor operate within 100 yards of any hauled-out seal outside of the protected areas.

B. Violation History

In 1972, NPS purchased approximately five acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from Johnson Oyster Company ("Johnson"), the owner at that time, subject to the reservation of a right allowing Johnson to use approximately 1.5 acres of the land for "processing and selling... oysters, seafood, and complimentary food items, the

¹⁶ Although the State of California ceded the bottom of the Estero to the National Park Service in 1965, the boundaries of the property at issue in this matter still correspond to California Department of Fish and Game leases M-438-01 (1059 acres) and M-438-02 (1 acre).

¹⁷ Pub. L. 87-657, Sept. 13, 1962, 76 Stat. 538 (16 U.S.C. 459c et seq.).

¹⁸ Pub. L. 94-544, Oct. 18, 1976, 90 Stat. 2515 et seq., and Pub. L. 94-567, Oct. 20, 1976, 90 Stat. 2692 et seq., (16 U.S.C. § 459c et seq.).

¹⁹ National Park Service website at <http://www.nps.gov/pore/naturescience/index.htm> (last accessed on November 15, 2007).

²⁰ Orth et al., at 987.

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interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012.²¹ (Exhibit 5) NPS then issued Special Use Permit No. 8530-121 to Johnson for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the operation and the utilization of tidelands for purposes related to the operation of the oyster farm." (Exhibit 6)

In 2003, after attempting to resolve numerous Coastal Act/LCP, building code, and health and safety code violations, which had been occurring on the property since 1989, Marin County requested that the Commission assume enforcement authority over the property with respect to Coastal Act violations. Accordingly, the Commission issued Cease and Desist Order No. CCC-03-CD-12 ("Johnson Order") in December 2003, which required the removal of some of the unpermitted development from the property and submittal of a CDP application for after-the-fact authorization of other items of unpermitted development.²²

In January of 2005, DBOC purchased the business from Johnson and currently operates a commercial aquaculture business on the property. (Exhibit 7) At that time, DBOC assumed the compliance obligations of the Johnson Order. Commission staff has worked with DBOC for two years to bring the property into compliance with the Johnson Order and with the Coastal Act. During that time, DBOC has removed the following items of unpermitted development:²³

1. Two storage containers
2. The western portion and the second story of the oyster processing building and retail facility
3. A refrigerated trailer
4. The seed setting area
5. The western portion of the storage facility
6. A mobile home

Unfortunately, DBOC has not removed all of the unpermitted development that was the subject of the Johnson Order and has undertaken new development activities on the property, including, but not limited to, the installation of two large containers being used to house production facilities (including shucking and packing), construction of a processing facility, placement of a temporary construction trailer, grading, paving, and placement of oyster cultivation apparatus in

²¹ The quotation in this sentence can be found in Schedule C of the *Offer to Sell Real Property*, entered into by Johnson and NPS, dated October 21, 2003.

²² The Johnson staff report and order can be accessed online at <http://www.coastal.ca.gov/legal/Th16a-12-2003.pdf>. Provision 1.0 (c) of the Johnson Consent Order states in part:

The development that must be addressed in the removal and restoration plan consists of several commercial buildings, modifications to buildings that pre-date the Coastal Act, three storage/refrigeration containers, an above-ground diesel tank with a concrete containment structure, and a mobile home and submerged oyster cultivation equipment and materials in the estuary.

²³ Prior to selling the business to DBOC, Johnson contained the waste water from the shucking building, removed equipment and refuse materials from the shoreline and from the estuary, and contained and removed used motor oil from the property pursuant to the Johnson Order. (See letter from Commission staff to Carol Whitmire, dated March 3, 2004.)

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the Estero without any CDPs. Commission staff sent multiple violation letters to DBOC regarding this new unpermitted development. (For examples, *see Exhibit 8*) In the letters, Commission staff requested that DBOC submit a CDP application with a site plan and project description including the structures remaining on the property, new structures placed on the property, and any proposed development.

In January of 2006, DBOC submitted a CDP application seeking after-the-fact authorization for the placement of an 8x40' trailer containing a shucking plant, 20'x8' trailers, 40'x8' containers, construction of a porch at the managers residence/office, installation of fencing, a parking lot, a display aquarium and shellfish tanks, and for authorization to remodel four existing buildings including replacing roofs, paint, and trim, and adding ADA-compliant bathrooms. The application is not yet complete. One of the outstanding items, which DBOC must submit to complete the application, is a special use permit from the National Park Service. The special use permit will provide evidence for the standard CDP application requirement that an applicant has the necessary authorization from the property owner, in this case, to operate a commercial aquaculture business on the property. In June, 2007, the Executive Director sent a letter to DOC regarding the lack of a CDP for offshore operations. (*Exhibit 11*) Commission staff began discussions with DBOC regarding resolution of this issue, and on October 3, 2007, the Executive Director sent a "Notice of Intent to Commence Cease and Desist Order Proceedings." (*Exhibit 12*). As part of the proposed Consent Order, DBOC has agreed to participate in good faith in the process of obtaining a special use permit from NPS and has agreed to make a good faith effort to obtain the permit within a reasonable time period.

The proposed Consent Order establishes a reasonable timeline to proceed through the NPS permit process and, subsequently, the Commission permitting process. The Consent Order will also include protective measures to be undertaken immediately to address potential impacts to the valuable resources that are protected under Chapter 3 of the Coastal Act.

C. Resource Concerns Addressed Through the Consent Order

A showing of inconsistency with the resource protection policies of Chapter 3 of the Coastal Act is not required for the issuance of a Cease and Desist Order under Coastal Act Section 30810. Moreover, it is important to note that issuance of the proposed Consent Order does not require a finding that resource impacts addressed through the proposed Consent Order are occurring. Rather, the proposed Consent Order requires DBOC to establish protocols and to take other proactive measures to ensure that these potential resource impacts do not occur. However, a brief discussion of some of the relevant Chapter 3 policies may assist in illuminating the Coastal Act issues, and underscore the importance of the proposed Consent Order and, specifically, the protective measures.

Coastal Act Section 30230 states:

Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will

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sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Coastal Act Section 30231 states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The relatively pristine waters of Drake's Estero support a unique ecosystem including eelgrass and a diverse array of bird, invertebrate, fish, and mammal species. Impacts to this marine environment that affect the biological productivity therein or that cause the decline of certain populations of species would be inconsistent with Coastal Act Sections 30230 and 30231.²⁴ Potential resource impacts to these sensitive resources from both onshore and offshore oyster cultivation activities on the property include water quality impacts, impacts to harbor seals such as decreased reproductive success, direct and indirect loss of eelgrass habitat from boat propellers and oyster bags and racks, impacts to federally listed and protected bird species such as the black brant and brown pelican from boating in roosting areas and loss of foraging habitat, and the potential introduction of invasive species. One of the main goals of the Consent Order is to take steps to protect the waters and eelgrass beds of the Estero and the many invertebrate, fish, mammal, and bird species that rely on this sensitive habitat from identified potential resource impacts. The proposed Consent Order is intended to proactively address these potential impacts by setting forth protective measures.²⁵ In addition, the proposed Consent Order will also establish a reasonable timeline for completion of the CDP application for all DBOC operations on the property. Through the permitting process, the Commission will be able to assess all existing and proposed development and impose conditions on any approved development to protect the natural resources of the Estero.

D. Description of Development Undertaken Without a CDP

Development activities were undertaken on the property without a CDP, and no exemptions to Coastal Act permitting requirements apply. This unpermitted development located on the property includes offshore aquaculture operations, and onshore processing and retail facilities. (Exhibit 9) In addition, three trailers and two single-family homes that provide onsite employee

²⁴ In addition, development located on onshore areas of the property may be inconsistent with other Coastal Act sections, including Section 30251, which protects scenic and visual resources and requires that development in scenic areas, such as PRNS, be visually compatible with the character of surrounding areas. These issues will be analyzed and addressed through the permitting process.

²⁵ The protective measures are listed in Provision 3.0 of the proposed Consent Order.

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housing have been placed along the northern boundary of the property immediately adjacent to a fresh water pond. (Exhibit 10) A separate septic system serves this residential development. A construction/maintenance trailer has been placed among the residential development. The unpermitted development activities at issue include both the construction/installation of structures and the performance of ongoing and new activities. No CDP has been obtained for this development and the development is not exempt, under Coastal Act Section 30610, from the permitting process.

E. Basis for Issuance of Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states:

(a) If the commission, after public hearing, determines that any person... has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person ... to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

...

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

Development activities were undertaken on the property without a CDP and no exemptions, under Coastal Act Section 30610, to the Coastal Act permitting requirements apply. The Commission has primary enforcement authority and permit jurisdiction with regards to this development. The following two subsections of this report set forth the basis for the issuance of the proposed Consent Order in this matter.

1. Development Requiring a CDP Occurred on the Property

Development is defined in Coastal Act Section 30106 as:

"... on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials;

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change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; ... (emphasis added).

The activities at issue in this matter clearly constitute development under Section 30106. Once development has been identified, Section 30600(a) provides:

(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone... shall obtain a coastal development permit.

Thus, the development on the property requires authorization in the form of a Commission CDP pursuant to Coastal Act Section 30600(a). No CDP has been obtained to authorize the development and the development is not exempt from permitting requirements. Therefore, all of the cited development on the property constitutes unpermitted development and the Commission has the authority to issue the proposed Order to address this unpermitted development under Coastal Act Section 30810.

2. The Commission Has Jurisdiction in This Matter

The Commission has primary permitting jurisdiction over areas of the property located below the mean high tide line,²⁶ and therefore has primary authority under Coastal Act Section 30810 to take enforcement action in this matter with respect to that portion of the property. In 2003, the County requested that the Commission assume primary enforcement authority with regards to Coastal Act violations resulting from aquaculture activities on the portion of the property above the mean high tide line as well. Moreover, in accordance with the County's request, the property is now the subject of a Commission Order that is still in effect and has not yet been fully complied with. For these reasons, the Commission has enforcement authority under Coastal Act Section 30810(a)(1) with respect to the portion of the property within Marin County's certified LCP jurisdiction.

Provision 1.0 (d) of the Johnson Order, issued by the Commission in 2003, requires the submittal of a CDP application "to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act."

²⁶ Coastal Act Section 30519(b) states that the Commission retains permitting jurisdiction in Coastal Act matters involving tidelands, submerged lands, and public trust lands, even after the local government with municipal jurisdiction over such areas establishes a Local Coastal Program covering those areas. The areas of the property that are located below the mean high tide line are either tidelands or submerged lands depending on the tidal height. Moreover, for purposes of enforcement, Chapter 9 of the Coastal Act provides that the Commission can undertake enforcement action, under certain circumstances, within the entire Coastal Zone.

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Therefore, the Commission has permit jurisdiction with respect to the development at issue in this matter, and any CDP application addressing that development shall be submitted to the Commission for consideration of the onshore and offshore operations as a whole. Furthermore, Provision 1.0(b) of the Johnson Order requires that the following be addressed:

[T]he unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.

Therefore, under Coastal Act Section 30810(b), the proposed Consent Order includes protective measures and requires a CDP for all unpermitted development related to DBOC's onshore and offshore operations to address these concerns.

F. California Environmental Quality Act (CEQA)

The Commission finds that the issuance of CCC-07-CD-11 to compel compliance with the Coastal Act is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA) and will not have any significant adverse effects on the environment, within the meaning of CEQA. The Order is exempt from the requirements of CEQA based on Sections 15060(c)(2), 15061(b)(2), 15307, 15308, and 15321 of the CEQA Guidelines.

G. Summary of Findings

1. The property, commonly referred to as the Drake's Bay Oyster Company site, is located within the Point Reyes National Seashore and consists of onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County, and offshore facilities in Drake's Estero. The property is located within the Coastal Zone.
2. The property is federally-owned and managed by the National Park Service, a bureau of the United States Department of the Interior.
3. The facilities on the property are operated by Drake's Bay Oyster Company, of which Kevin Lunny is the representative and agent for service of documents.
4. In 1972, the National Park Service purchased the onshore property and granted a reservation of use to 1.5 acres to the owner at that time. The National Park Service then issued a Special Use Permit for an additional 2.2 acres to the former owner. DBOC is in the process of obtaining a special use permit for the onshore and offshore operations on the property that are located outside of the reservation of use area.
5. In 2003, the Commission issued Cease and Desist Order No. CCC-03-CD-12 to Johnson Oyster Company to address unpermitted development on the property that resulted from Johnson's commercial aquaculture business.

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6. Drake's Bay Oyster Company purchased the business from Johnson in January 2005.
7. Drake's Bay Oyster Company removed some unpermitted development from the property, including two storage containers, the western portion and the second story of the oyster processing building and retail facility, a refrigerated trailer, a seed setting area, the western portion of a storage facility, and a mobile home, as required under Cease and Desist Order No. CCC-03-CD-12. However, some of the unpermitted development at issue in that order remains on the property, and Drake's Bay Oyster Company has undertaken new development including but not limited to the placement of two large containers being used to house the production facilities (including shucking and packing), construction of a processing facility, placement of a temporary construction trailer, grading, and paving on the property without a coastal development permit.
8. Unpermitted development activities at issue include offshore aquaculture operations, onshore processing and retail facilities, and related residential use (including associated placement of structures).
9. The activities that were undertaken on the property constitute "development" as that term is defined in Coastal Act Section 30106.
10. No coastal development permit was obtained to authorize the development at issue in this matter. No permit exemptions, under Coastal Act Section 30610, apply to these activities.
11. The Estero and intertidal areas of the property contain significant areas of sensitive and valuable eelgrass habitat that provides habitat for invertebrates and fish and provides important foraging habitat for birds. The area is also of regional importance for harbor seals. The unpermitted development at issue is located in or immediately adjacent to these habitat areas.
12. No formal determination regarding the consistency of the cited development with Coastal Act Chapter 3 resource protection policies has been made because DBOC has not yet submitted a complete CDP application.
13. On October 3, 2007, the Executive Director of the Coastal Commission issued a Notice of Intent to Commence Cease and Desist Order Proceedings, addressing the unpermitted development on the property.
14. On November 29, 2007, Drake's Bay Oyster Company agreed to the proposed Consent Order that is attached to this report, beginning on page 17.
15. The Commission has the authority under Coastal Act Section 30810 to take enforcement action in this matter with respect to the portion of the property below the mean high tide line and under Coastal Act Section 30810(a)(1) with respect to the portion of the property within Marin County's certified LCP jurisdiction.

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H. Violator's Defenses and Commission Response

Commission staff and DBOC have reached an agreement and have signed the proposed Consent Order to resolve the violations at issue. Accordingly, DBOC did not submit a Statement of Defense, and, under Provision 21.0 of the Consent Order, has waived its right to challenge the issuance of the Consent Order. DBOC has not, however, waived its legal rights, positions, or defenses with respect to any other proceeding in front of the Commission or other governmental agency.

Staff recommends that the Commission issue the following Consent Cease and Desist Order:

CA Drake's Bay Oyster Co. COMMISSION
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CONSENT ORDER NO. CCC-07-CD-04
(DRAKE'S BAY OYSTER COMPANY)

1.0 General

Pursuant to its authority under Public Resource Code §30810,¹ the California Coastal Commission ("Commission") hereby orders and authorizes Drake's Bay Oyster Farm, run by Drake's Bay Oyster Company (hereinafter referred to as "Respondent"), its employees, agents, contractors, and anyone acting in concert with any of the foregoing, and successors in interest and future owners/operators of the business or lessees to comply with the terms and conditions of this Consent Cease and Desist Order (hereinafter referred to as "Consent Order"). Respondent agrees to undertake the following, pursuant to this Consent Order and in the interest of resolving and settling this matter:

2.0 Further Unpermitted Development

Respondent agrees to cease and desist from performing any new development, as the term "development" is defined in Coastal Act §30106, on the property, which is defined in Provision 10.0 of this Consent Order, and from expanding or altering the current development that exists on the property. Nothing in this Consent Order prohibits the Respondent from continuing current operational activities, provided that all protective measures set forth in Provision 3.0 of this Consent Order are implemented as required and that the current activities are not expanded.

3.0 Resource Protection Measures

Respondent agrees to implement the following measures to minimize potential resource impacts to onshore and offshore areas caused by the operation of the facility. Nothing in this Consent Order shall be construed to authorize the corresponding development or the operations.

3.1 Onshore Conditions

- 3.1.1 Additional Structures.** Construction and/or placement of any additional onshore structures are prohibited until Respondent obtains a coastal development permit. Nothing in this Consent Order precludes Respondent from seeking a waiver for de minimis development, as set forth in Coastal Act §30624.7, or from seeking a CDP for development on the property.

¹ The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

3.1.2 Water Quality/Hazardous Waste. Within 60 days of the issuance of this Consent Order, Respondent shall submit a hazardous materials/discharge management plan which: 1) identifies and outlines procedures for the removal or replacement of any receptacle for oil, paint, or other hazardous materials that is leaking or could leak in the near future; 2) identifies current and potential polluted discharges and outlines protocols for addressing the discharges; 3) provides a contingency plan for potential leaks; 4) states that Respondent shall take all necessary measures to prevent leaks or spills; and 5) states that all adequate or new receptacles shall be moved at least 100 feet from sensitive areas, or to paved areas or inside structures, securely stored, and properly labeled. If the information required under this provision has been provided to a county or state agency in order to comply with that agency's regulations or requirements, the information supplied to that agency may be submitted in lieu of the hazardous materials/discharge management plan.

3.1.3 Thermal Discharges and Seawater Use. Elevated temperature waste discharges shall comply with limitations necessary to ensure protection of marine resources and biological productivity. The maximum temperature of waste discharges, as measured from the point of discharge of the "incubation area", shall not exceed the maximum temperature of the receiving waters by more than 20 degrees F. In addition, all seawater intake structures shall be designed to ensure that maximum through-screen intake velocity does not exceed 0.5 feet per second. Measures shall be adopted to minimize the facility's intake and use of seawater, including the use of a seawater collection and re-circulation system in the grow-out room.

3.2 Offshore Conditions

3.2.1 Additional Structures. Construction and/or placement of any additional offshore aquaculture racks/cultivation infrastructure is prohibited until Respondent obtains a coastal development permit.

3.2.2 Future Abandonment and Removal of Equipment. To prevent the degradation of oyster cultivation apparatus and the release of debris into Drake's Estero, within 30 days of the cessation of harvesting on any plot that is being temporarily taken out of production, Respondent shall remove oyster culture apparatus from that plot except for permanent structures including oyster racks located within certified harvest areas. Notwithstanding the foregoing, Respondent may resume harvesting on any plot temporarily taken out of production. Within 30 days of the cessation of harvesting on any plot that is being permanently taken out of production, Respondents shall remove all oyster cultivation apparatus from that plot, including permanent structures such as oyster racks, stakes, and pallets.

- 3.2.3 Removal of Abandoned Equipment.** All currently abandoned materials including cultivation equipment/apparatus, including those stakes and racks not currently and actively being used to produce shellfish, except those plots that are identified for repair, shall be removed. Within 90 days of the issuance of this order, Respondent shall submit a Debris Removal Plan to the National Park Service and Executive Director of the Coastal Commission for approval. The plan shall include location of debris identified for removal, proposed techniques and equipment to be used for debris removal, and identification of the debris disposal facility. Within 60 days of approval by the Executive Director and National Park Service of the Debris Removal Plan, Respondents shall remove all debris as approved in the Debris Removal Plan. Within 30 days of completing debris removal, Respondent shall submit to the Executive Director and National Park Service a final report detailing the material that was removed, the locations from which this material was removed, the techniques and equipment used, and the location of the disposal facility.
- 3.2.4 Invasive Species.** To minimize the chances of introducing invasive species or pathological microorganisms to Drake's Estero, Respondent will only import shellfish in the form of larvae and seed. Within 30 days of the issuance of this Consent Order, Respondent shall produce sufficient evidence, for the review and approval of the Executive Director, that larvae and seed from outside sources have been certified by California Department of Fish and Game to be free of pathogens. If the Executive Director determines that the evidence is insufficient, Respondent shall cease from importing larvae within 30 days of receiving notification of the determination from the Executive Director.
- 3.2.5 Boat Transit.** Boat traffic shall be limited to established channels that do not violate the protective measures set forth in this Consent Order. In situations where visibility is poor, Respondent will make every effort to use only the established channels. Within 60 days of the issuance of this order, Respondent shall submit to the National Park Service and the Executive Director a Vessel Transit Plan for review and approval. This plan shall include proposed access lanes (distinguishing between commonly-used channels and channels only used when certain racks/bags are active) and mooring areas for maintenance and harvesting of oysters, clams, and scallops. Once approved, only the vessel lanes and mooring areas described and mapped in the Vessel Transit Plan shall be used by Respondent and Respondent's employees.
- 3.2.6 Harbor Seal Protection Areas.** All of Respondent's boats, personnel, and any structures and materials owned or used by Respondent shall be prohibited from the harbor seal protection areas defined on the map, which is attached to this Consent Order as Figure 1. Within 60 days of issuance of this Consent Order, Respondents shall submit a plan outlining the removal of all equipment and materials located in these areas. Within 60

days of the approval of this plan by the Executive Director, Respondents shall implement the plan as approved. In addition all of Respondent's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

- 3.2.7 Pacific Oyster and European Flat Oyster.** Cultivation of Pacific oyster (*Crassostrea gigas*) and European flat oyster (*Ostrea edulis*) shall only occur in the "cultivation area" defined in Provision 3.2.11 of this Consent Order. Cultivation of additional oyster species within this area shall not be allowed and cultivation of these oyster species outside of this lease area shall also not be allowed. Within 60 days of the issuance of this Consent Order, Respondent shall submit a plan outlining the removal of all shellfish and equipment from prohibited areas, as defined in this provision, and setting forth protocols for cultivation of allowable species and prevention of intrusion by prohibited species in the areas defined in this provision. Within 30 days of the approval of this plan by the Executive Director, Respondent shall implement the plan as approved.
- 3.2.8 Non-Oyster Species Areas.** Cultivation of manila clams (*Venerupis philippinarum* formerly *Tapes japonica*) and purple-hinged rock scallops (*Crassodoma gigantean* formerly *Hinnities multirugosus*) shall only occur where currently cultivated in the "cultivation area" defined in Provision 3.2.11 of this Consent Order. Cultivation of additional non-oyster species shall not be allowed. Within 60 days of the issuance of this Consent Order, Respondent shall submit a plan outlining the removal of all clams, scallops or any unpermitted species and any associated cultivation equipment located outside of the cultivation area. Within 30 days of the approval of this plan by the Executive Director, Respondent shall implement the plan as approved.
- 3.2.9 Use of Bottom Bags.** Bottom bags shall only be placed in intertidal areas devoid of eelgrass. No eelgrass shall be removed to create additional areas for bottom bags. Within 60 days of the issuance of this Consent Order, Respondent shall submit protocols for the location and practices regarding the use of bottom bags according to this provision and the terms and conditions of this Consent Order.
- 3.2.10 Maximum Annual Production Limit.** Within 60 days of the issuance of this Consent Order, Respondents shall provide documentation showing the "current production level," including the amount harvested in the last year and any projected increases in yield for the coming year. Production of all shellfish species shall be capped at this "current production level."
- 3.2.11 Cultivation Area.** All cultivation shall be confined to areas which are: 1) currently included in the California Department of Fish and Game lease numbers M438-01 and M438-02; 2) consistent with the California Department of Health, the Food and Drug Administration, and the

National Shellfish Sanitation Program approved shellfish harvest areas within Drakes Estero; and 3) specified as oyster beds or primary water quality sites on the map attached to this Consent Order as Figure 1.

4.0 Plan Revisions

If the Executive Director determines that any immaterial modifications or additions to the plans submitted under Provision 3.0 of this Consent Order are necessary, he shall notify Respondent. Respondent shall complete the requested modifications and resubmit the plan(s) for approval within 10 days of the notification.

5.0 Completion of Coastal Development Permit (CDP) Application

- 5.1** Within 60 days from the issuance date of this Consent Order or within such additional time as the Executive Director may grant for good cause, pursuant to Section 18.0 of this Consent Order, Respondent shall revise the project description in Coastal Development Permit (CDP) application No. 2-06-003 to include all unpermitted onshore and offshore development, as that term is defined and addressed in the Coastal Act and Commission's regulations (California Code of Regulations (CCR), Title 14, Division 5.5), subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0.
- 5.2** Within 120 days from the date of issuance of a National Park Service Special Use Permit for the operations on the property, or within such additional time as the Executive Director may grant for good cause, Respondent shall submit all materials which are required to complete CDP application No. 2-06-003, to:

California Coastal Commission
Energy, Ocean Resources, and Federal Consistency Division
Attn: Cassidy Teufel
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

The application shall address all existing development, as that term is defined and addressed in the Coastal Act and Commission's regulations (Title 14 of the California Code of Regulations), that is unpermitted, including but not limited to the development identified in Provision 11.0, on the property identified in Provision 10.0, subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0. If Respondent believes that one or more items of development listed in Provision 11.0 do not exist on the property, Respondent shall submit evidence supporting the claim(s) to the Executive Director. If the Executive Director determines that the claim is valid, this Consent Order shall not apply to that portion of cited development.

- 5.3** Respondent shall not withdraw the application submitted under Provision 5.1 and shall allow the application to proceed through the Commission permitting process

according to applicable laws, subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0.

- 5.4 If the Executive Director determines that additional information is required to complete CDP application No. 2-06-003, the Executive Director shall send a written request for the information to the Respondent, which will set forth the additional materials required and provide a reasonable deadline for submittal. Respondent shall submit the required materials by the deadline specified in the request letter.
- 5.5 Respondent shall fully participate and cooperate in good faith in the Commission permitting process, provide timely responses, and work to move the process along as quickly as possible, including responding to requests for information.
- 5.6 Based on the understanding that the Respondent will fully cooperate in good faith with the National Park Service permitting process and that process will be completed within a reasonable amount of time, it is the intent of the Commission to process the Commission CDP after the National Park Service has taken action on the permit currently before it, conditioned upon the Respondent taking any procedural steps necessary to accommodate this sequence of events.

6.0 National Park Service Special Use Permit

Respondent shall fully participate and cooperate in good faith in the National Park Service permitting process, provide timely responses, and work to advance the process as efficiently as possible, including responding to requests for information.

7.0 Compliance with Permits and All Applicable Laws

Respondent shall comply fully with the terms and conditions of any permit that the Commission or the National Park Service issues in response to the applications referenced in Provisions 5.0 and 6.0 above. Respondent shall also comply with all applicable laws and regulations.

8.0 Status Updates

Respondent shall attend status conferences in person or by telephone with Commission staff at least once every 2 months to discuss the status of compliance with this Consent Order. Commission permit staff may report on progress in this matter to the Commission as appropriate.

9.0 Persons Subject to the Order

Persons subject to this Consent Order are Respondent, their agents, contractors, and employees, and any persons acting in concert with any of the foregoing. Kevin Lunny, as an owner and operator of Drake's Bay Oyster Company, is the representative and agent for service of documents for Respondent.

10.0 Identification of the Property

The property that is subject to this Consent Order is described as follows:

Approximately 1.5 acres of dry land along the banks of Drake's Estero and approximately 1600 acres, including approximately 1060 acres of submerged areas within Drake's Estero, all of which is located within the Point Reyes National Seashore and is referred to as Drake's Bay Oyster Company. The street address for the operation is 17171 Sir Francis Drake Blvd., Inverness, California, 94937. The property is owned by the National Park Service and leased to Respondent under a reservation of use agreement and related documents.

11.0 Description of Unpermitted Development

Notwithstanding any permits from other state and local agencies that the Respondent may have, development activities were undertaken on the property without a CDP. These development activities were not exempt from Coastal Act permitting requirements under Coastal Act §30610. The development at issue includes but is not limited to the following: grading (cut and fill); change in intensity of use of the land and water; removal of major vegetation; and placement of solid materials and structures including two large storage containers, a construction trailer, tanks, fencing, paving, residences, abandoned vehicles, generators, two septic systems, refrigeration units, processing, storage, and retail buildings, rack and bag aquaculture equipment including stringing, growing, harvesting, shucking, and bottling equipment.

12.0 Commission Jurisdiction and Authority to Act

The Commission has enforcement authority under §30810 due to the fact that the Commission has original jurisdiction over development in submerged areas of the property under Coastal Act §30519(b) and that the property was the subject of previous enforcement action undertaken by the Commission at the request of the County under Coastal Act §30810(a)(2). In addition, because proposed activities involve the private use of federally owned submerged lands within the coastal zone, the Commission has the authority to review proposed activities on the property to determine consistency with the resource protection policies of Chapter 3 of the Coastal Act. Furthermore, because the existing and continued operation of shellfish aquaculture in Drakes Estero appears to require the issuance of federal permits that can reasonably be expected to affect the coastal zone, the Commission has the authority, under the federal Coastal Zone Management Act of 1972 (CZMA) §306(d)(6) and 15 CFR 930.11(o), to review proposed activities on the property to determine consistency with the resource protection policies of Chapter 3 of the Coastal Act and with the CZMA.

13.0 Consent to Issuance

In light of the intent of the parties to resolve these matters in settlement, Respondent has agreed not to contest the legal and factual basis for this Consent Order and the terms and issuance of this Consent Order. Specifically, Respondent agrees not to present defenses or evidence to contest the issuance of the Consent Order. Respondent agrees to comply with the specific terms of this Consent Order, and the Commission shall enforce any noncompliance with this Consent Order. Respondent agrees not to contest the Commission's jurisdiction to issue and enforce this Consent

Order. The parties agree that all of the necessary elements for issuance of an order under Coastal Act Section 30810 have been met. Except as provided herein, Respondent is not waiving any legal rights, positions, or defenses, by entering into this Consent Order, and Respondent retains the right to assert its legal rights, positions, and defenses in any other proceeding before the Commission, any other governmental agency, any administrative tribunal, or a court of law.

14.0 Effective Date and Terms of the Consent Order

The effective date of the Consent Order is the date of approval by the Commission. The Consent Order shall remain in effect in perpetuity unless and until modified or rescinded by the Commission pursuant to §13188 of the Commission's administrative regulations (CCR, Title 14, Division 5.5).

15.0 Submittal of Documents

According to the terms and conditions of this Consent Order, and in addition to the recipient(s) designated herein, copies of all documents pertaining to this property and the matter at issue that are submitted to the Commission or the National Park Service pursuant to this Consent Order must be sent to:

California Coastal Commission
Statewide Enforcement Unit
Attn: Christine Chestnut
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

California Coastal Commission
Energy, Ocean Resource, and Federal Consistency
Attn: Cassidy Teufel
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

16.0 Findings

The Consent Order is issued on the basis of the findings adopted by the Commission at the December 2007 hearing, as set forth in the document entitled: Staff Report and Findings for Consent Cease and Desist Order as well as the testimony and any additional evidence presented at the hearing. The activities authorized and required in this Consent Order are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act and the resource protection policies of the certified Marin County Local Coastal Program.

17.0 Compliance Obligation

Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director grants an extension under 18.0, will constitute a violation of this Consent Order and shall result in Respondent being liable for stipulated penalties in the amount of \$250 per day per violation. Respondent shall pay stipulated penalties within fifteen days of receipt of written demand by the Commission for such penalties regardless of whether Respondent have subsequently complied. If Respondent violates this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil

penalties and other remedies pursuant to Coastal Act §§30821.6, 30822, and 30820 as a result of the lack of compliance with the Consent Order and for the underlying Coastal Act violations as described herein.

18.0 Extension of Deadlines

The Executive Director may extend deadlines for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least ten days prior to expiration of the subject deadline. The Executive Director shall grant an extension of deadlines upon a showing of good cause, if the Executive Director determines that Respondent has diligently worked to comply with their obligations under this Consent Order but cannot meet deadlines due to unforeseen circumstances beyond their control.

19.0 Site Access

Respondent agrees to provide access to the subject property at all reasonable times to Commission staff and any agency having jurisdiction over the work being performed under this Consent Order. Nothing in this Consent Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission staff may enter and move freely about the portions of the subject property on which the violations are located, and on adjacent areas of the property for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting and reviewing the progress of Respondents in carrying out the terms of this Consent Order.

20.0 Modifications and Amendments to this Consent Order

Except as provided in Section 18.0 of this order, this Consent Order may be amended or modified only in accordance with the standards and procedures set forth in §13188(b) of the Commission's administrative regulations (CCR, Title 14, Division 5.5).

21.0 Waiver of the Right to Appeal and Seek Stay

Persons against whom the Commission issues a Cease and Desist Order have the right pursuant to §30803(b) of the Coastal Act to seek a stay of the order. However, pursuant to the agreement of the parties as set forth in this Consent Order, Respondent agrees to waive whatever right it may have to seek a stay or to challenge the issuance and enforceability of this Consent Order in a court of law.

22.0 Government Liability

The State of California, the Commission, and its employees shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Respondent in carrying out activities pursuant to this Consent Order, nor shall the State of California, the Commission, or its employees be held as a party to any contract entered into by Respondent or its agents in carrying out activities pursuant to this Consent Order.

23.0 Settlement of Claims

The Commission and Respondent agree that this Consent Order settles their monetary claims for relief for those violations of the Coastal Act specifically resolved through the commitments contained in this Consent Order, and occurring prior to the date of this Consent Order (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including §§30805, 30820, and 30822), with the exception that, if Respondents fail to comply with any term or condition of this Consent Order, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of this Consent Order. This Consent Order does not limit the Commission from taking enforcement action to enforce this Consent Order, or due to Coastal Act violations at the subject property not resolved herein, provided however, future commission actions regarding matters beyond this Consent Order would constitute new actions, for which notice and the opportunity for submittal of a Statement of Defense under Chapter 9 of the Coastal Act would be provided. This Consent Order does not preclude Respondent from applying for a Coastal Development Permit to authorize development on the property including expansion of the property.

24.0 Cease and Desist Order Obligations

Nothing in this Consent Order is intended to interfere with or preclude Respondent's compliance with Cease and Desist Order No. CCC-03-CD-12, which is attached as Attachment A to this Consent Order and thereby incorporated by reference.

25.0 Successors and Assigns

This Consent Order applies to Drake's Bay Oyster Company and all successors in interest, heirs, assigns, and future lessees including future owners/operators of Drake's Bay Oyster Company or any other facility on the property. Respondent shall provide notice to all successors, assigns, and potential purchasers of the property of any remaining obligations under this Consent Order.

26.0 Governmental Jurisdiction

This Consent Order shall be interpreted, construed, governed, and enforced under and pursuant to the laws of the State of California.

27.0 Scope of Order

This agreement is designed to assist in establishing a process for resolving the situation as it currently exists in a timely fashion. It does not provide a final resolution as to the disposition of the development at the site. Except as expressly provided herein, nothing herein shall limit or

Drake's Bay Oyster Co.
CCC-07-CD-11
Page 27 of 34

restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Consent Order.

28.0 Representative Authority

The signatory below attests that he has the authority to represent and bind in this agreement the Respondents.

29.0 Integration

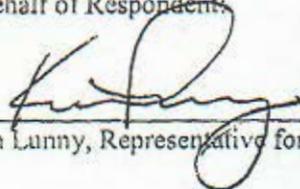
This Consent Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in this Consent Order.

30.0 Stipulation

Respondent and its representatives attest that they have reviewed the terms of this Consent Order and understand that their consent is final and stipulate to its issuance by the Commission.

IT IS SO STIPULATED AND AGREED:

On behalf of Respondents:



Kevin Lunny, Representative for Respondent

11/29/07
Date

Executed in San Francisco on behalf of the California Coastal Commission:

Peter Douglas, Executive Director

Date

FIGURE 1: HARBOR SEAL PROTECTION AREA

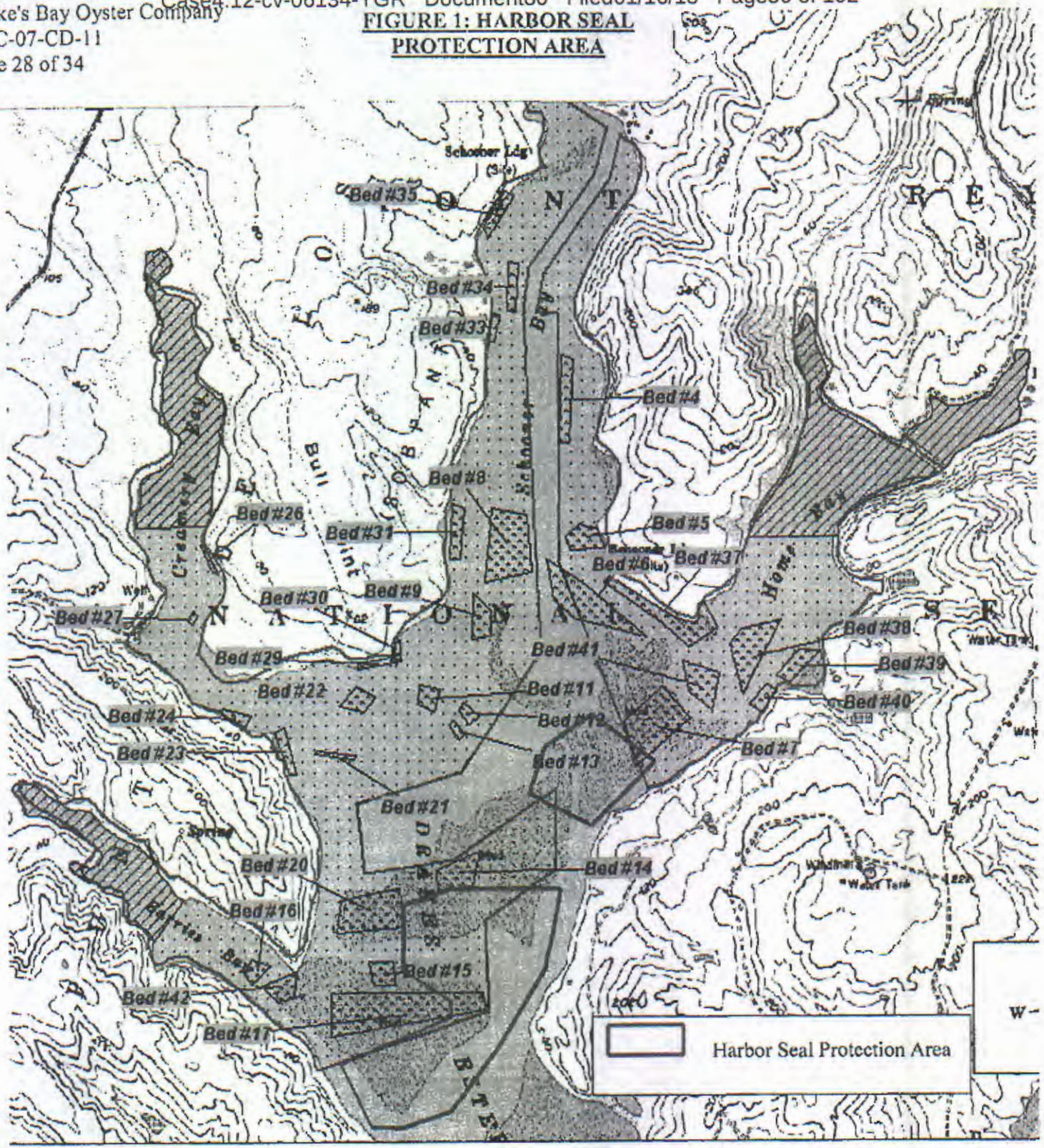
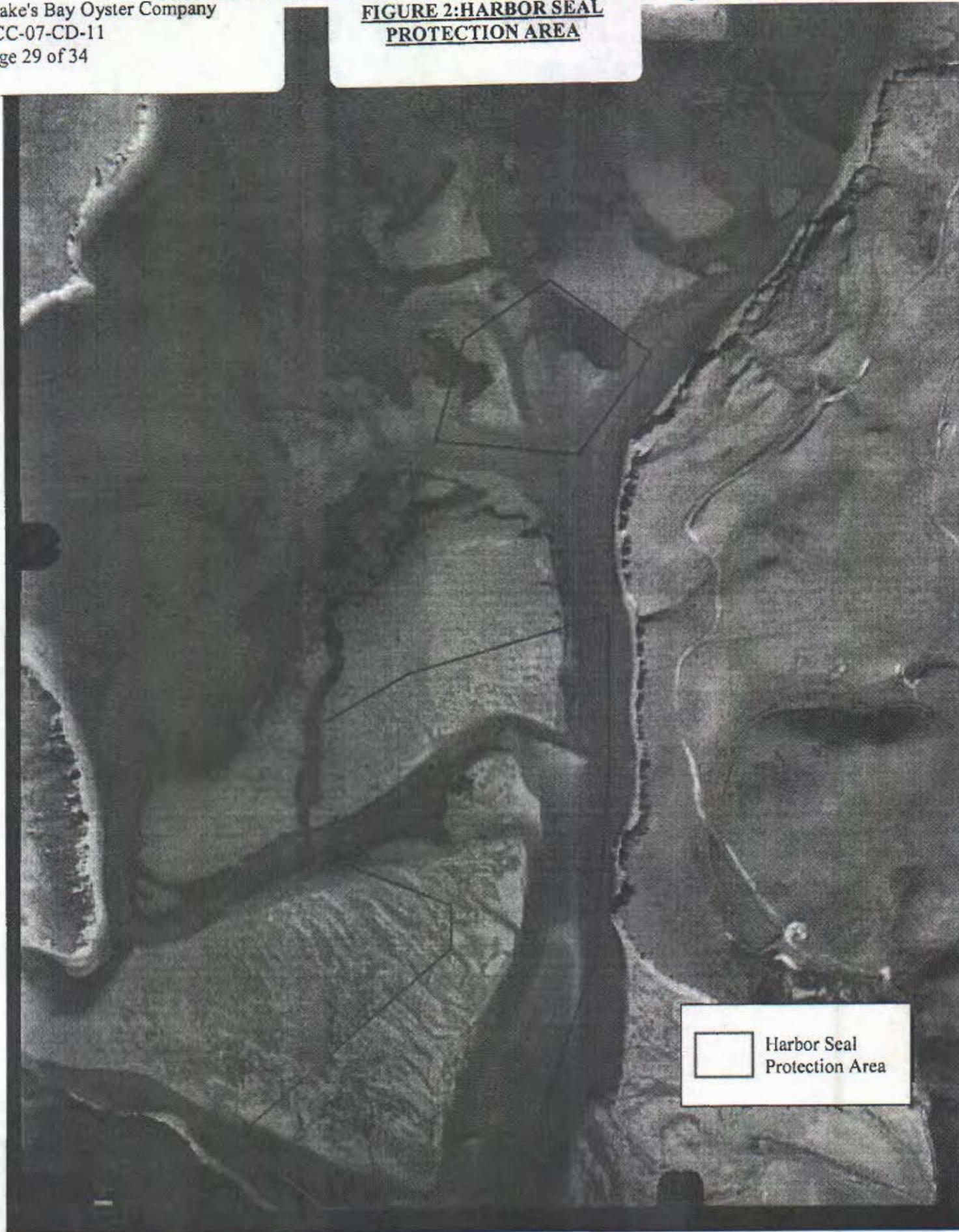


FIGURE 2:HARBOR SEAL
PROTECTION AREA



 Harbor Seal
Protection Area

**ATTACHMENT A****COMMISSION CEASE AND DESIST ORDER NO. CCC-03-CD-12****1.0 REQUIRED-AUTHORIZED ACTIONS**

Pursuant to authority provided in Public Resources Code Section 30810, the California Coastal Commission hereby orders and authorizes Johnson Oyster Company, Inc. (hereinafter "Johnson"), doing business in Point Reyes National Seashore under a lease agreement with the National Park Service (NPS) to:

- (a) Cease and desist from maintaining unpermitted development at the site, and refrain from performing future development at the site not specifically authorized by a coastal development permit or a Consistency Certification.
- (b) Within 60 days of the issuance of this Cease and Desist Order (hereinafter "Order"), address the unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.
- (c) Within 90 days of the issuance of this Order, submit for the approval of the Executive Director, a plan prepared by a qualified land use planner and a certified engineer for the complete removal of all of the unpermitted development constructed or brought to the site after the Coastal Act of 1976¹ that the Commission would be unlikely to find consistent with Coastal Act policies, remediation of coastal resource impacts, and restoration of the site. The development that must be addressed in the removal and restoration plan consists of several commercial buildings, modifications to buildings that pre-date the Coastal Act, three storage/refrigeration containers, an above-ground diesel tank with a concrete containment structure, and a mobile home and submerged oyster cultivation equipment and materials in the estuary.² The plan must also characterize any impacts to coastal resources from the unpermitted development onshore and in the estuary and provide for remediation of

¹ The buildings that pre-date the Coastal Act include the building that houses the shucking room and the retail counter, the two houses, and two of the four mobile homes. In 1984, the Commission authorized a third mobile home at the site through Consistency Certification No. CC-34-84.

² Johnson may apply to the Commission for a coastal development permit to retain the unpermitted mobile home and oyster cultivation equipment in the estuary pursuant to Section 1.0(d).

those impacts, including but not limited to restorative grading and soil remediation and the use of best management practices to protect the water quality of the estuary.³ Should the plan call for the removal of oyster cultivation equipment and materials in the estuary, the plan must provide measures to minimize negative impacts to coastal resources from the removal.

- (d) Within 60 days of the issuance of this Order, submit a complete application for a coastal development permit to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act, and the recently constructed horse paddock.
- (e) Complete implementation of the removal and restoration plan within 90 days of its approval by the Executive Director.

2.0 IDENTIFICATION OF THE PROPERTY

The property that is the subject of this Order is located at the northern terminus of Schooner Bay in Drakes Estero, Point Reyes National Seashore, Marin County, Assessor's Parcel No. 109-130-17 (hereinafter "Subject Property").

3.0 PERSONS SUBJECT TO THIS ORDER

The entity subject to this Order is the Johnson Oyster Company, Inc., its officers, employees, agents, and anyone acting in concert with the foregoing.

4.0 DESCRIPTION OF COASTAL ACT VIOLATION

Johnson's Coastal Act violation is its failure to obtain a coastal development permit or a consistency certification to authorize: (1) construction of several commercial buildings, additions to buildings that pre-date Proposition 20, and a horse paddock; (2) placement of a mobile home, three metal refrigeration containers and an above-ground diesel fuel tank with a concrete containment structure; (3) drainage of waste water from the shucking room and retail building onto the ground and into the estuary; and (4) storage of oyster cultivation equipment and disposal of debris in the estuary and along the shore. The precise dates that the development was performed are unknown but all of the development subject to this order occurred after the date of the Coastal Act.

³ Nothing in this Order shall be interpreted or construed to represent Commission approval of any new or existing development that may be proposed in the removal and restoration plan Johnson is required to submit pursuant to this Order.

5.0 COMMISSION AUTHORITY TO ACT

The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

This Order is being issued on the basis of the findings adopted by the Commission on December 11, 2003, as set forth in the attached document entitled Staff Report for Cease and Desist Order No. CCC-03-CD-12

7.0 EFFECTIVE DATE

This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

Strict compliance with the terms and conditions of this Order is required. If Johnson fails to comply with the requirements of Section 1.0 of this Order, including any deadline contained therein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists.

9.0 EXTENSIONS OF DEADLINES

Notwithstanding Section 10.0, if Johnson is unable to comply with the deadlines contained in Section 1.0 of this Order, Johnson may request from the Executive Director in writing an extension of said deadlines. If the Executive Director determines that Johnson has made a showing of good cause, he/she shall grant extensions of the deadlines. Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline.

10.0 SITE ACCESS

Johnson agrees to provide full access to the Subject Property at all reasonable times to Commission staff, and employees of the County of Marin and National Park Service for the purpose of inspecting the progress of work being carried in compliance with the terms of this Order.

12.0 GOVERNMENT LIABILITY

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by JOC in carrying out activities authorized under this Order, nor shall the State of California be held as a party to any contract entered into by JOC or their agents in carrying out activities pursuant to this Order.

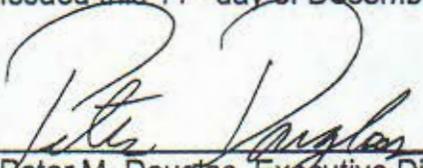
13.0 GOVERNING LAW

This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 11th day of December, 2003



Peter M. Douglas, Executive Director
California Coastal Commission

12/12/03
Date

Drake's Bay Oyster Company
CCC-07-CD-11
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Exhibit List

Exhibit Number	Description
1.	Site Map and Location.
2.	Assessor's Parcel Map.
3.	Photographs of Drake's Estero.
3b.	Memorandum from Dr. John Dixon, Commission biologist, dated September 11, 2007.
4.	Photographs of harbor seals in Drake's Estero.
5.	Grant deed, transferring onshore property from Johnson to NPS, dated November 30, 1072.
6.	Special Use Permit No. WRO-PORE-6000-306 (renewed permit), dated April 5, 1993.
7.	Photographs of DBOC operations.
8.	Two of the letters from Commission staff to DBOC, dated May 11, 2005 and March 21, 2006.
9.	Photographs of non-residential buildings on the property.
10.	Photographs of residential structures on the property.
11.	Letter to DBOC from Executive Director, dated June 5, 2007
12.	Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 3, 2007.

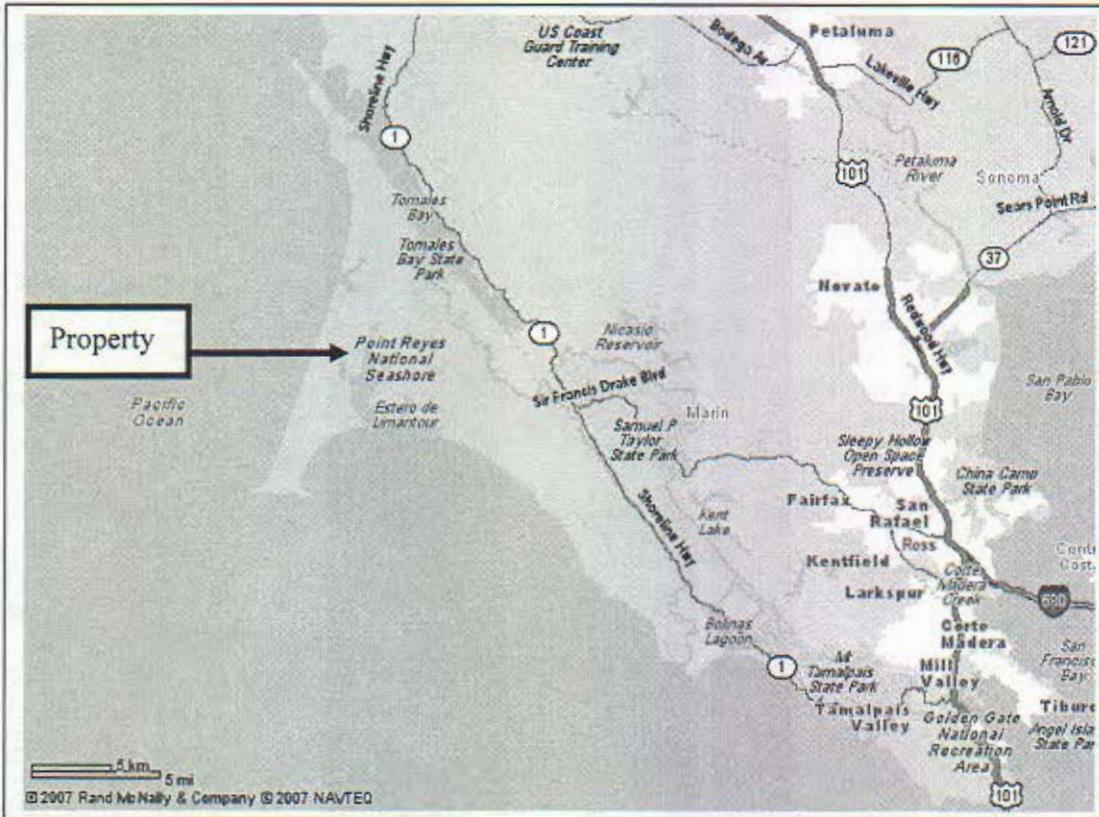
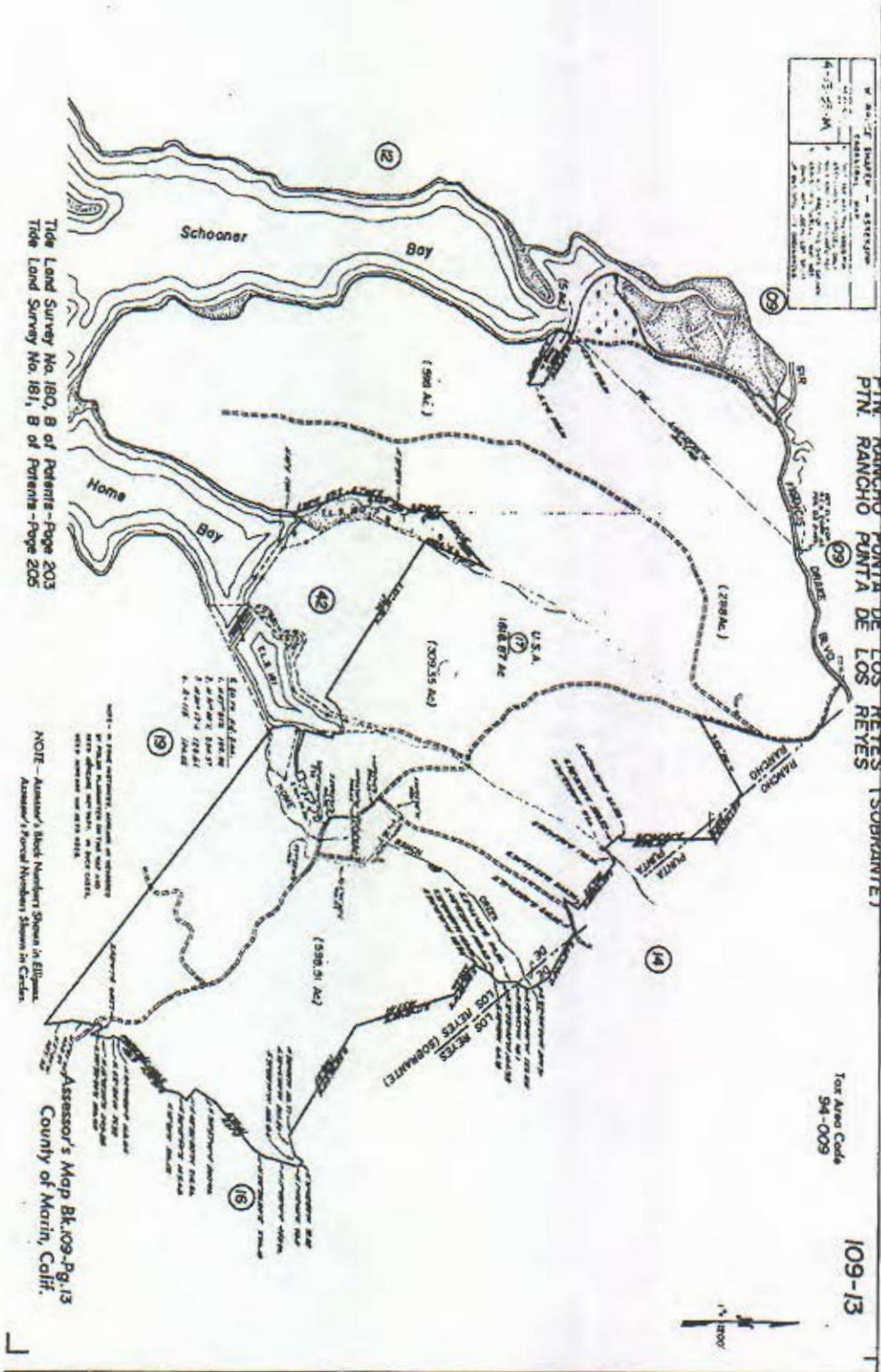


Exhibit 1: Map showing location of the property.



Tide Land Survey No. 180, B of Patents - Page 203
 Tide Land Survey No. 181, B of Patents - Page 205

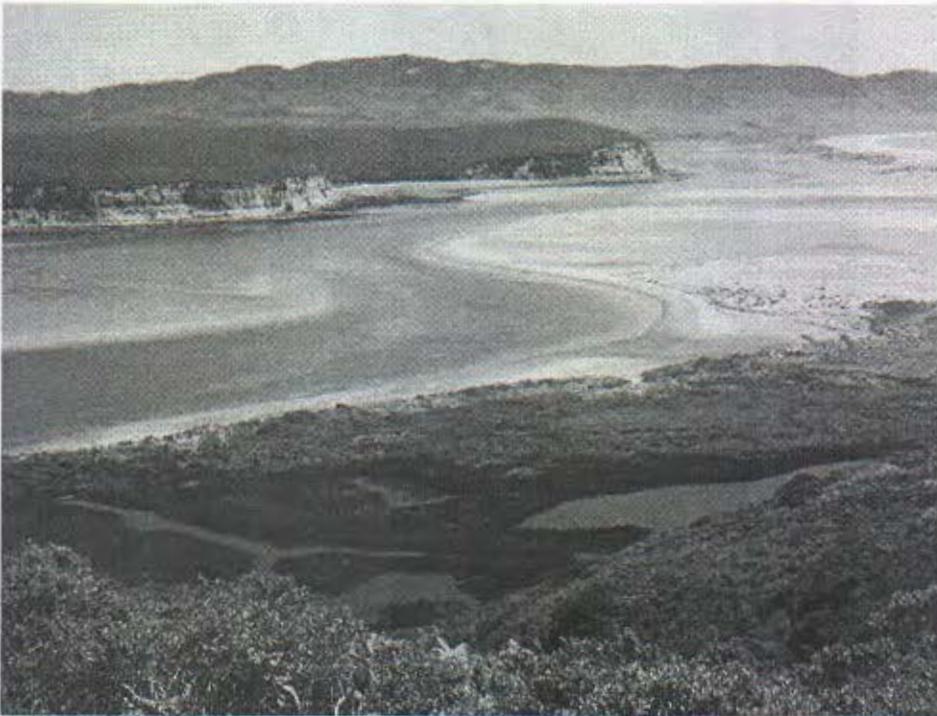
NOTE - Assessor's Block Numbered Sheets in Ellipse
 Assessor's Map Bk. 109-Pg. 13
 County of Morrh, Calif.

PT. RANCHO PUNTA DE LOS REYES (SOBERANTE)

For Area Code
 94-009

109-13

Exhibit 2
 Drake's Bay Oyster Co.
 CCC-07-CD-11



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Exhibit 3: Photographs of Drake's Estero (top photograph was taken during a May 8, 2007 site visit).

Exhibit 3
Drake's Bay Oyster Co.
CCC-07-CD-11

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
 SAN FRANCISCO, CA 94105-2219
 VOICE AND TDD (415) 904-5200
 FAX (415) 904-5400



MEMORANDUM

FROM: John Dixon, Ph.D.
 Ecologist

TO: Alison Dettmer

SUBJECT: Effects of Oyster Mariculture on the Natural Resources in Drake's Estero

DATE: September 11, 2007

Habitat Characteristics of Drake's Estero

Drake's Estero is a shallow tidal estuary with four inland branching bays (Figures 1 & 2). A fifth bay to the west, Estero de Limantour, is somewhat isolated but its mouth is also inside the sand spit that shelters these areas from the open ocean and, to some degree, it is functionally a part of Drake's Estero. Anima (1990) categorizes Drake's Estero as a "coastal lagoon" because there is relatively little freshwater influence. Salinity throughout the estuary is generally similar to that on the open coast. At higher high tide, the lagoon system (including Estero de Limantour) covers about 2323 ac (9.4 km²) of which some 1186 ac (4.8 km²) are intertidal. The subtidal portions of the Estero are shallow, generally less than 6.5 ft (2 m). The deepest areas (23-26 ft; 7-8 m) are at the entrance and within a portion of the main channel. There is very little natural hard substrate present. The dominant substrates are silty sands and muds.

Large areas of subtidal sand and mud currently support eelgrass. Eelgrass (*Zostera marina*) is one of about 50 species of seagrasses, a polyphyletic group of specialized flowering plants that have evolved adaptations to live and reproduce in the marine environment. They are distinct from the algae that are the most common photosynthetic organisms in the oceans. Like other seagrasses, eelgrass provides important habitat for large numbers of species of invertebrates and fish (Phillips 1984). Thirty-five species of fish have been observed within eelgrass beds in either Drake's Estero or Estero de Limantour (Wechsler 1996). Eelgrass is often described as "nursery habitat" because of its importance to the juvenile life stages of many species. It also provides foraging habitat for many species of birds, including black brant (*Branta bernicla nigricans*) for which eelgrass itself is a preferred food (Ganter 2000). Eelgrass also has important indirect effects on community organization by stabilizing the substrate and affecting nutrient cycling (Phillips 1984). A demonstration of the importance of eelgrass habitats occurred in the 1930s when disease destroyed 90% to 100% of beds of eelgrass in various locations in the north Atlantic. This was followed by a precipitous decline in many fish and invertebrate species, including commercial species, which

caused significant economic hardship (Stauffer 1937; Cottam & Munroe 1954; Phillips 1984). Coincident with the loss of eelgrass, the overwintering population of brant in the Netherlands dropped two orders of magnitude to about 100 individuals. This natural catastrophe has been largely forgotten by all but eelgrass specialists. However, a widespread appreciation of the critical ecological functions of eelgrass is re-emerging as seagrass habitats are again in decline, now being imperiled by the intensive development of the world's coastlines (Orth et al. 2006).

Like most species, eelgrass waxes and wanes in local abundance and spatial distribution over time (e.g., Griffin 1997). Where appropriate data are available, the best estimate of suitable habitat is generally the cumulative distribution of eelgrass over some long period. In 1990 when Anima mapped eelgrass in Drake's Estero, it was mostly confined to the central portion of the estero. Today, there are also significant eelgrass beds in Schooner Bay and Home Bay (personal observations on July 17, 2007 and aerial photograph in NPS 2007) and probably in other areas. Brown and Becker (2007) estimate that there are currently 740 acres¹ of eelgrass in Drake's Estero, of which 355 acres have dense cover and 385 acres have patchy cover. Obviously the appropriate habitat is more extensive than would have been estimated by the distribution of eelgrass in 1990. Since there apparently are few estimates of eelgrass distribution in Drake's Estero, all areas of appropriate substrate and depth should be considered potential eelgrass habitat.

Drake's Estero is relatively pristine. Water quality is high with little evidence of herbicides or pesticides and human activities within the watershed (mostly grazing) do not appear to have resulted in high levels of sediment inputs (Anima 1990). There are few roads or buildings in the area. Within the estero itself, the only development is related to oyster mariculture. Drake's Estero is part of Point Reyes National Seashore and has received special congressional designation as "wilderness"² (NPS 2007). Drake's Estero is particularly important for shorebirds and waterfowl. Thousands of birds are regularly present and during the winter the number of individuals occurring in Drake's Estero and Estero de Limantour are thought to be around 20,000 (Hickey et al. 2003). Drake's Estero (including Estero de Limantour) has been designated a site of regional importance by the Western Hemisphere Shorebird Reserve Network. Drake's Estero is also of regional significance for harbor seals. Twenty percent of the mainland breeding population in California utilizes the Point Reyes coast (Allen et al. 2004). Within this important area, Drake's Estero is one of the primary pupping sites. In 2006, Drake's Estero supported the largest number of harbor seals and contributed the largest number of pups within Point Reyes (Manna et al. 2006). The significance to fish of eelgrass and other estuarine habitats within Drake's Estero was recognized by the Pacific Fisheries Management Council when it designated those habitats as "Essential

¹ No methods were described in this Trip Report (Brown & Becker 2007), so this should be considered a preliminary estimate until a formal report is available.

² Estero de Limantour is currently designated "wilderness" (and a California State Ecological Reserve) and Drake's Estero is "potential wilderness" due to the nonconforming mariculture operation. The 1972 agreement that "grandfathered" the mariculture operation for 40 years expires in 2012, at which time Drake's Estero will be eligible for full "wilderness" status.

Fish Habitat" and a "Habitat Area of Particular Concern"³ under the Magnuson-Stevens Fishery Conservation and Management Act (<http://www.pcouncil.org/facts/habitat.pdf>).

Oyster mariculture in Drake's Estero

Oysters have been grown in Drake's Estero since about 1930 (Anima 1990). The processing facility is located close to the shore in the upper northeast section of Schooner Bay. Currently, there are at least four methods of cultivation employed. Oysters are grown suspended from wooden racks, on the bottom in plastic mesh bags individually scattered in a haphazard fashion on intertidal flats, on the bottom in plastic mesh bags tethered in lines on intertidal flats, and in buoyed plastic mesh bags that are tethered in lines on intertidal flats but that float when the area is inundated by the tide. Each of these culture techniques has the potential for negative environmental impacts.

Bottom bag culture is generally restricted to intertidal areas and so avoids the eelgrass beds which grow from rhizomes in the subtidal sediments. However, some of the individual bags have found their way into the adjacent eelgrass. I suspect that this is an accidental result of placing the bags by dropping them from a boat at high tide. It is also possible that some bags have been moved by waves or currents. Regardless of how they arrived, these bags should be removed from the eelgrass beds because they preempt habitat. The bags that are left on the intertidal flats probably add nutrients to the sediments and isolate the sediment from the water column. Taken together, these factors probably result in anaerobic conditions developing closer to the surface⁴, which would likely result in changes to the composition of the infaunal community. To my knowledge, this hypothesis remains untested. I have found no studies of the effects of bottom bags on infauna. A potentially more serious environmental impact of bottom bags is the preemption of shorebird foraging habitat. In Tomales Bay, oyster mariculture is avoided by western sandpipers and dunlins but preferentially utilized by willets (Kelley et al. 1996). Overall, the abundance of foraging shorebirds is reduced in Tomales Bay by the mariculture operation. However, Kelley et al (1996) did not distinguish the effects of bottom bag culture and culture in bags on raised racks. Although a reduction in shorebird foraging opportunities is a potentially serious environmental impact of oyster bottom culture, the significance of such an impact will be directly related to the proportion of foraging habitat that is preempted. An estimation of that proportion would help in the assessment of the significance of the environmental impact. If the proportion of the suitable intertidal foraging habitat that is covered by bottom bags is relatively small, then the impact is probably not very significant. The effects of bottom bag culture on harbor seals is potentially much more serious. Some of the bags are being placed on intertidal flats which have been documented to be haul-out sites for harbor seals (Allen 2007). The bags preempt space and create barriers to

³ "Habitat Area of Particular Concern" refers to the subset of Essential Fish Habitat which is rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area.

⁴ When I disturbed the substrate by tugging on bottom bags that were scattered on the intertidal flat at Bull Point, there was a strong hydrogen sulfide odor released, which indicates shallow reducing conditions.

movement and are a locus of disturbance when they are placed, maintained, and retrieved.

Oyster culture within eelgrass beds generally has deleterious effects (Everett, et al. 1995; De Casabianca, et al. 1997; Griffin 1997; Rumrill and Poulton 2004; Bertin & Chamillon 2006). These are related to preemption of space, changes in currents that result in either scour or sedimentation, shading, biodeposition that may result in increased sedimentation and eutrophication, and physical disturbance of the substrate (e.g., trampling & propeller scarring) related to routine mariculture activities. The type and severity of mariculture impacts are related to the type of culture technique (e.g., ground culture⁵, bottom bag culture or rack culture), the depth distribution of eelgrass relative to optimal mariculture habitat, the spatial extent of the mariculture manipulations, the biomass of cultured oysters, and the hydrological characteristics of the site.

At Drake's Estero, only rack culture using suspended lines is intentionally located in eelgrass beds. The most obvious effect of the oyster culture is that eelgrass tends to be excluded from the footprint of the racks (Wechsler 2004, Brown & Becker 2007, NPS 2007⁶, pers. obs. July 17, 2007). National Park Service personnel counted 89 culture racks in eelgrass beds and found no eelgrass under the 62 useable racks and no eelgrass under 20 of the 27 dilapidated racks (Brown & Becker 2007). The total area under active and abandoned oyster racks where eelgrass is excluded is estimated to be about 8 acres (Brown & Becker 2007). Eelgrass is very sensitive to light levels (Backman & Barilotti 1976; Burdick & Short 1999) and the lack of eelgrass within the footprint of culture racks is probably a result of shading. Depending on their orientation relative to currents oyster racks can also cause scouring or increases in sedimentation (Forrest & Creese 2006), either of which could also reduce eelgrass abundance. However, regardless of mechanism, there is less eelgrass present today than there would be in the absence of the oyster racks.

Eelgrass is also impacted by the boat traffic associated with the oyster operation. The deep channel in Schooner Bay is thought to be caused by scour from regular boat use associated with the oyster operation (Anima 1990). In the absence of frequent motor boat activity this channel would probably be shallow and winding, as is the case elsewhere in the estero, and portions of what is now channel would be shallow flats that could support eelgrass. Propeller scarring in seagrass beds is a well-known phenomenon that is of increasing concern in heavily populated areas (Sargent et al.

⁵ Ground culture differs from bottom bag culture in that shells with oyster spawn (cultch) are scattered directly on the substrate and are not confined.

⁶ NPS (2007) incorrectly cites Elliott-Fisk et al. (2005) as also noting a lack of eelgrass under mariculture racks. In fact, the latter state that, "We found the oyster racks to have no pronounced impacts on the eelgrass beds, which existed both under and away from the racks as an incredibly rich habitat type." Elliott-Fisk et al. is largely a summary of the research that was conducted by several U.C. Davis graduate students, including Wechsler. Since the quoted passage directly contradicts the findings of Wechsler (2004) and recent observations, it was probably simply a mistake by the author of that section. In any event, the current presence or absence of eelgrass under culture racks is a simple matter of fact that can be easily verified.

1995; Madley et al. 2004). In shallow water, propellers and propeller wash tear up the sea grass canopy but also displace rhizomes and leave bare areas (Zieman 1976). Even in Drake's Estero where boating activity is relatively low, the cumulative effects of propeller scarring may be significant because it may take years for scars to recover (Dawes et al. 1997). The direct impacts on eelgrass are obvious and the area affected could be determined from aerial imagery. There may also be indirect impacts to organisms that depend upon the eelgrass for habitat. The patchy disturbance to the seagrass bed affects different species in different ways, with motile swimming species being less affected than more sedentary species (Bell et al. 2002; Uhrin & Holmquist 2003). Although the community effects of propeller scarring in Drake's Estero are difficult to quantify, it is clear that they constitute a negative impact.

Biodeposition is a phenomenon that can have deleterious effects by increasing sedimentation and nutrients. Oysters feed by filtering materials that are suspended in the water column. This includes plankton, particulate organic matter, and inorganic particles. Oysters do not ingest filtered inorganic particles. Both organic residue from the digestive tract and rejected inorganic particles are bound in a mucus matrix and ejected (Newell et al. 2005). The former are termed feces and the latter are called pseudofeces since they have not passed through the digestive system. If the concentration of suspended particles is so high that the filtering rate exceeds the processing rate, oysters will reject plankton and particulate organic matter in addition to the indigestible inorganic particles and the pseudofeces will then have a relatively high organic content. The strings of feces and pseudofeces are much larger than the constituent materials and settle around seven times as fast as unbound suspended particles (Haven & Morales-Alamo 1966). Where oyster culture is intense and tidal flushing is low, biodeposition has been shown to have very serious deleterious effects (Ito & Imai 1955; De Casabianca 1997; Bertin & Chaumillon 2006). However, in Drake's Estero there is good tidal flushing and individual rack areas are fairly small. Therefore, at current levels of oyster production it seems unlikely that biodeposition would result in significant environmental impacts to eelgrass or to the local infauna. According to Elliott-Fisk et al. (2005), Harbin-Ireland (2004) found little difference in the number of infaunal taxa or individuals under the racks and at various distances up to 50 m away. Nor was there a significant difference in the concentration of organic materials in the sediments. Qualitatively, however, the effect of oyster culture is to remove plankton, particulate organic matter, and inorganic particles from the water column, process them, and deposit them on the bottom. Whether this is a positive or negative ecological effect depends on the context. In Drake's Estero where water quality is good and where millions of bivalves may not have been present historically (although the history of native oysters is probably unknown), the effects of oyster culture on natural ecological processes is probably negative but not easily measured.

A salient effect of oyster mariculture is to introduce hard substrates to areas where they are naturally rare. The oyster racks, the oyster cultch, and the cultured oysters all provide surfaces that can be colonized by sedentary "fouling" organisms. The novel surfaces associated with pilings and floats are particularly attractive to non-indigenous species (Glasby et al. 2007). Where both natural reefs and pilings are present, the

latter are disproportionately colonized by the exotics. In Drake's Estero, one such species is the tunicate identified as *Didemnum* species A (Bullard et al. 2007; NPS 2007). This invasive species is common on oysters and has also colonized patches of intertidal mudstone. Although *Didemnum* is unlikely to become a pest in Drake's Estero due to the lack of appropriate substrate, the oyster racks and oysters provide a continuing source of larvae that can colonize other areas.

The oyster racks themselves are constructed of lumber that was pressure treated with a wood preservative. Prior to 2003, the preservative used was almost always chromated copper arsenate. This chemical compound is highly toxic to marine organisms (Weis & Weis 1996). It is designed to be very persistent in wood and retention studies show little change in concentration over time at the parts-per-hundred level. However, aquatic organisms are affected at a parts-per-million level and the chemicals do leach at this level, although the rate of leaching decreases with time (Weis et al. 1992). The leached toxic compounds are taken up and concentrated by marine organisms and accumulate in sediments (Weis & Weis 1992; Weis & Weis 1996). The most toxic element for aquatic organisms is the copper, which has even been found at elevated levels in oysters growing on structures constructed of treated wood (Weis et al. 1993).

Oyster racks and the suspended strings of oysters with their attached fouling organisms also create a physical habitat that is not naturally present and that might alter the species composition and abundance of the local fish community. Such structures provide habitat and may also simply act as fish aggregating devices. Wechsler (2004) attempted to assess the effects of the oyster racks on the fish community. However, his fishing methods prevented him from sampling within the footprint of the oyster rack itself. Trawls were conducted within eelgrass 1 to 2 m from the racks. Gill nets were attached to the racks and may provide a better indication of the community actually associated with the racks, but the data were not separated by fishing method. The results indicated no differences in the number of species or number of individuals next to the racks, 75 m distant, and in Estero de Limantour.⁷

A potentially very significant environmental impact associated with oyster culture is disturbance of foraging birds and disturbance of harbor seals. Disturbance may exclude birds from feeding or roosting areas, increase energy demands both by increasing metabolic rate before flight and causing them to take flight, and reduce feeding efficiency and feeding time (Stillman et al. 2007). Similarly, both pedestrian and boat activity can result in physiological and behavioral changes in harbor seals. Disturbance that causes seals to leave the shore and enter the water is particularly serious, especially when pups are present (Suryan & Harvey 1999). Such disturbance increases energy requirements by decreasing the haul-out period, creates a trampling risk for pups, and increases the chances of pup abandonment. The significance of disturbance varies with tidal height, frequency, distance, and season. At higher tides most habitat will be inundated and the effects of human activities will be less consequential. Obviously, more frequent disturbance will have more serious consequences. The

⁷ The analysis of variance resulted in tiny F-values which were incorrectly associated with a P-value of 0.01. However, Wechsler appropriately described his results as statistically not significant.

closer the source of disturbance, the more likely it will have a negative effect on behavior. For example, in Washington, it was found that of all cases of harbor seal harassment from boat operation, none took place at distances >260 m, 25% occurred at a distance of 200-260 m, 50% at a distance of 100-200m, and 25% at a distance of <100 m (Suryan & Harvey 1999). The seasons of greatest concern are probably the spring and fall migratory periods and winter for birds and the breeding and pupping season (March – June) for harbor seals. In Drake's Estero, both human presence and boat operation are potential sources of disturbance to birds and harbor seals. For example, an oyster operation boat was observed to disturb 90 hauled out harbor seals, of which 7 adults and 7 pups flushed into the water, and around 300 black brant, which were flushed from an eelgrass bed where they were feeding (Allen 2007).

Summary and Recommendations

Oyster mariculture in Drake's Estero causes a number of environmental impacts. Those that are most significant are the preemption of space by culture racks that results in the loss of about 8 acres of eelgrass, the damage to eelgrass beds by boating (propeller scars and channel scour), the provision of suitable habitat for exotic fouling species by placing mariculture infrastructure in the estero, the placement of bottom culture bags on harbor seal haul-out areas, and disturbance to harbor seals and birds from pedestrians and boats. Some impacts are not mitigable, but the negative effects of others can be significantly reduced. I suggest that the following mitigation measures be implemented:

1. Oyster mariculture should not occur on tidal flats that are harbor seal haul-out and pupping sites.
2. Boat operation and other human activities should stay a safe distance away from haul-out areas. Data suggest that an adequate buffer would be between 100 and 200 meters, depending on the type of disturbance (Allen et al. 1984; Suryan & Harvey 1999; Johnson & Acevedo-Gutierrez 2007).
3. Boat routes to culture areas should be marked and traffic confined to those defined lanes. This would reduce both impacts to eelgrass and disturbance to wildlife.
4. No bottom culture should take place in eelgrass habitat and bottom bags that are currently in eelgrass habitat should be removed.
5. No new structures should be added and discarded materials and culture racks that are no longer used should be removed. These materials provide habitat for non-indigenous species and the racks are constructed of lumber that contains toxic compounds.
6. No aquaculture organisms from other areas or aquaculture materials, including shell, that have been used in the marine environment elsewhere should be placed in Drake's Estero.
7. To the extent feasible, mariculture operations should be spatially consolidated.

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Figure 1. Drake's Estero and Estero de Limantour. Google Earth photograph.

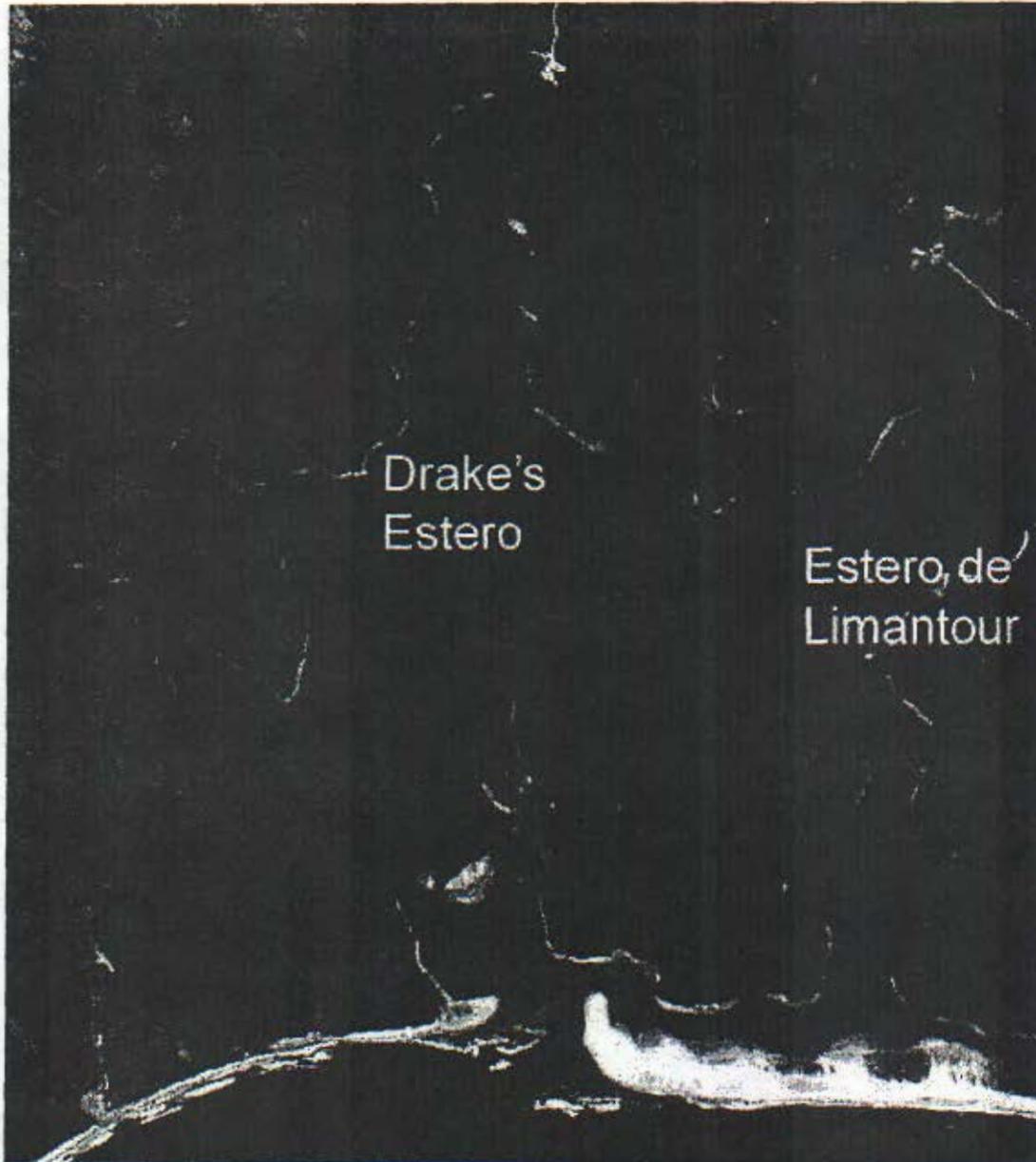


Figure 2. Schematic showing significant features of Drake's Estero (From Anima 1990). The Johnson's Oyster Company is now Drakes Bay Oyster Farm.

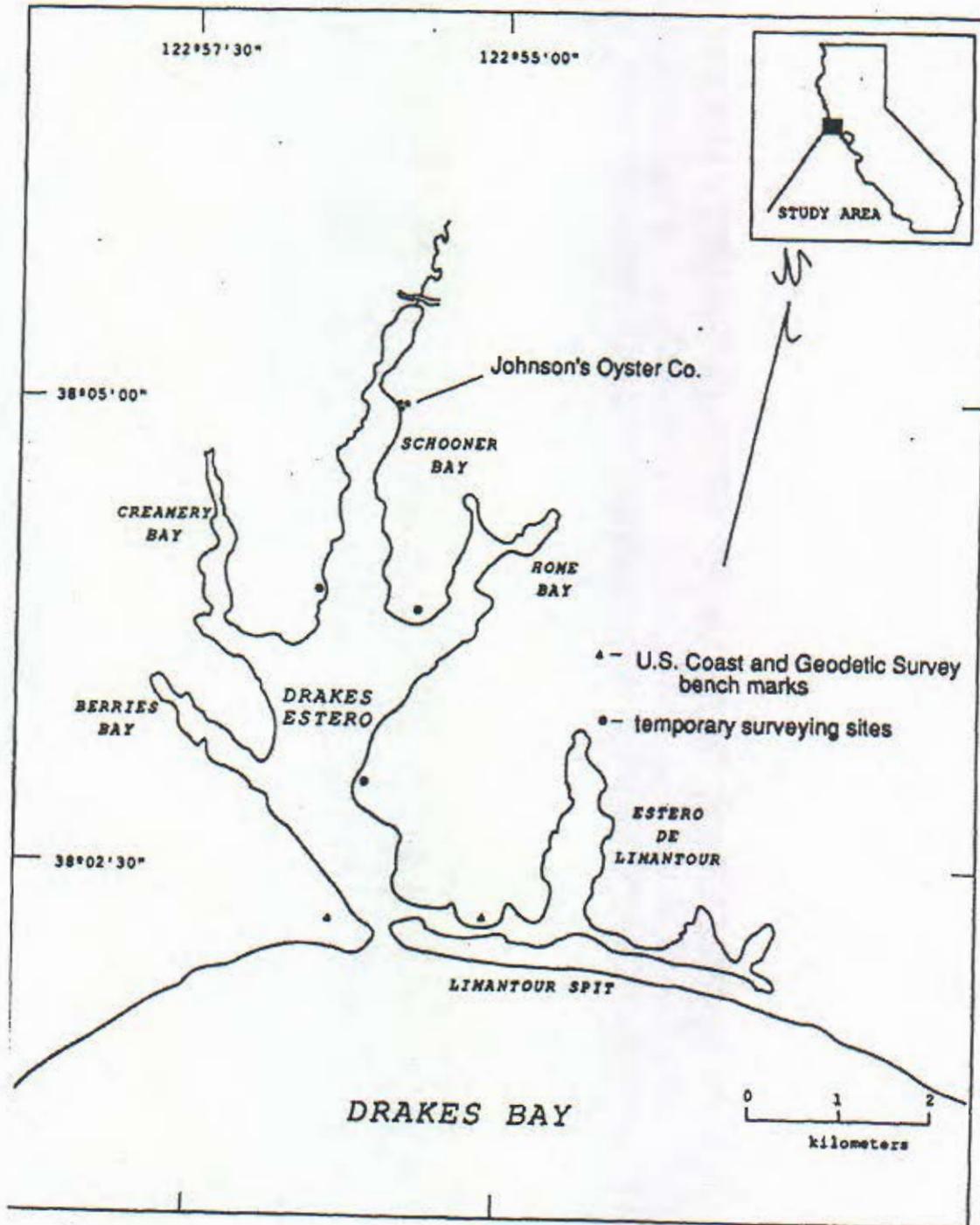




Exhibit 4: Photographs taken during May 8, 2007 site visit.

Exhibit 4
Drake's Bay Oyster Co.
CCC-07-CD-11

97555 13

RECORDED AT REQUEST OF
MARIN TITLE GUARANTY CO.

16827

After recording, return to:
NATIONAL PARK SERVICE
WESTERN REGION, DIVISION OF LANDS
450 Golden Gate Avenue, Box 35063
San Francisco, California 94103
AT 20 MIN. PAST 12 P.M.
NOV 3 01972
Official Records of Marin County, Calif.

POINT REYES NATIONAL SEASHORE
Tract 02-106

109-130-03

46827

N. J. Giacomini
FEE \$ 5.00 RECORDER
GRANT DEED

BOOK 2634 PAGE 641

JOHNSON OYSTER COMPANY, a California corporation, GRANTOR, pursuant to a Resolution of the Grantor's Board of Directors September 2, 1972, in consideration of SEVENTY NINE THOUSAND TWO HUNDRED (\$79,200.00) DOLLARS, to it in hand paid, receipt of which is hereby acknowledged, does hereby grant and convey to the UNITED STATES OF AMERICA, and its assigns, GRANTEE, the following described property located in the County of Marin, State of California:

EXHIBIT "A" attached hereto and made a part hereof

TOGETHER WITH all buildings and improvements thereon and all water rights appurtenant thereto and all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

The land is conveyed subject to existing easements of record for public roads and highways, public utilities, railroads, ditches and canals.

The land hereinabove conveyed contains 5 acres, more or less, and is being acquired by the Department of the Interior, National Park Service.

THE GRANTOR RESERVES only the following rights and interests in the hereinabove described property: a reservation of use and occupancy for a period of forty (40) years in accordance with the terms of the Offer to Sell Real Property, assigned Contract No. C0800032073, signed by the GRANTOR on October 13, 1972, accepted on October 16, 1972, and on file with the National Park Service.

TO HAVE AND TO HOLD the same unto said UNITED STATES OF AMERICA and its assigns, forever.

THE GRANTOR further releases, releases, and forever quitclaims to the UNITED STATES OF AMERICA and its assigns, all right, title, and interest which the GRANTOR may have in the banks, beds, and waters of any streams bordering the land conveyed and also all interest in and to any alleys, roads, streets, ways, strips, gores or railroad rights-of-way abutting or adjoining the land conveyed and in any means of ingress or egress appurtenant thereto.

IN WITNESS WHEREOF, Johnson Oyster Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officer, this 9th day of November, 1972.

JOHNSON OYSTER COMPANY

DOCUMENTARY TRANSFER TAX 3 <u>fore</u>
— Computed on full value of property conveyed,
— OR Computed on full value less liens and encumbrances existing at time of sale.
<u>Albert Lissner</u>
Signature of Declarant of Actual Determining Tax.
Print Name <u>Marin Title Guaranty Co.</u>

BY Charles W. Johnson
Charles W. Johnson, President

BY Milton T. Simmons
Milton T. Simmons, Secretary-Treasurer



ACKNOWLEDGMENT

STATE OF California
County of San Francisco



On this 9 day of November in the year 1972, before me, J. M. Pohlmann, a Notary Public of said State, duly commissioned and sworn, personally appeared Charles W. Johnson & Milton T. Simmons

and acknowledged to me that such corporation executed the same.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

My commission expires: April 18, 1976

J. M. Pohlmann
Notary Public in and for said State
BOOK 2634 PAGE 641

STATE OF CALIFORNIA, County of ALameda

On November 9, 1972

before me, the undersigned, a Notary Public, in and for said County and State, personally appeared Charles W. Johnson and Milton Simon

known to me to be the President and Secretary/Treasurer of the corporation that executed the within instrument, and also known to me to be the persons who executed it on behalf of such corporation and acknowledged to me that such corporation executed the same.

[Handwritten Signature]

Notary Public



BOOK 2034 PAGE 642

PARCEL ONE:

BEGINNING at a point which bears South 43° 25' 25" West 4667.148 feet from the most Easterly corner of that certain parcel of land conveyed by James and Margaret McClure to R.C.S. Communications, Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at page 93, Marin County Records; and running thence South 60° 09' East 938.6 feet, South 2° 09' East 238.01 feet, North 60° 09' West 938.6 feet and North 2° 09' West 238.01 feet to the point of beginning

PARCEL TWO:

A RIGHT OF WAY for roadway purposes over a strip of land 14 feet in width, the center line of which is described as follows: BEING that certain property in the County of Marin, State of California, more particularly described as follows: BEGINNING at a point on the Northeasterly boundary line of that certain tract of land conveyed from Edward H. Heims et ux to Larry Jensen et ux, by Deed dated February 2, 1951, distant on said line South 60° 09' East 198.25 feet from the most Northerly corner of said tract; and running thence North 42° 47' West 171.66 feet, North 21° 12' West 107.84 feet, North 4° 48' West 105.70 feet, North 25° 45' East 168.34 feet, North 11° 06' East 96.79 feet, North 6° 29' West 224.11 feet, North 13° 57' West 110.34 feet, North 01° 18' West 91.41 feet, North 22° 51' East 349.15 feet, North 44° 19' East 145.39 feet, North 17° 40' East 137.40 feet, North 04° 58' East 225.42 feet, North 12° 20' East 151.12 feet, North 26° 04' East 173.97 feet, North 11° 55' East 285.05 feet, North 22° 56' East 166.80 feet, North 32° 14' East 170.88 feet, North 53° 27' East 161.26 feet, North 47° 12' East 126.93 feet, North 65° 02' East 76.43 feet, North 45° 17' East 78.38 feet, North 31° 38' East 91.54 feet, North 55° 55' East 99.86 feet and North 35° 11' East 177.94 feet to the Inverness-Pt. Reyes County Road.

EXHIBIT "A"

BOOK 2634 PAGE 643

Form 10-11.4
Rev. Aug. 86
OMB No. 1024-0026

UNITED STATES DEPARTMENT OF THE INTERIOR
National Park Service

Special Use Permit

Name of Use Parking and Launching Space

Date Permit Reviewed 19 _____
Reviewed 19 _____
Reviewed 19 _____
Expires 19 97 Nov. 15

Long Term X
Short Term _____

Permit # WRO PORE 6000 306
Region Park Type No #
Point Reyes National Seashore
Name of Area

Johnson Oyster Co. of P.O. Box 68, Inverness, CA 94937 (415) 669-1149
Name or Permittee Address Phone

is hereby authorized during the period from (Time 12:01a.m day 15 Month 11 19 93), through (Time 11:59 p.m. day 14 Month 11 19 97), to use the following described land or facilities in the above named area:

Two and two tenths (2.2) acres of tract 02-106 as shown on the attached sketch as agreed in discussions during meetings relative to acquisition and the reservation of a portion of Tract 02-106.

For the purpose(s) of: To continue providing parking space for Seashore and Johnson Oyster Co. visitors, including an area for launching canoes, kayaks or other non-motorized boats.

Authorizing legislation or other authority (RE- NPS-53 Appendix 1):

NEPA Compliance: CATEGORICALLY EXCLUDED X EA/FONSI _____ EIS _____ OTHER APPROVED PLANS _____

PERFORMANCE BOND: Required _____ Not Required X Amount \$ _____

LIABILITY INSURANCE: Required X Not Required _____ Amount \$ 100,000.00

ISSUANCE of this permit is subject to the conditions on the reverse hereof and appended pages and when appropriate to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of \$ 250.00 semi-annually.

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied herein.

PERMITTEE [Signature] 03-02-93
Signature Date

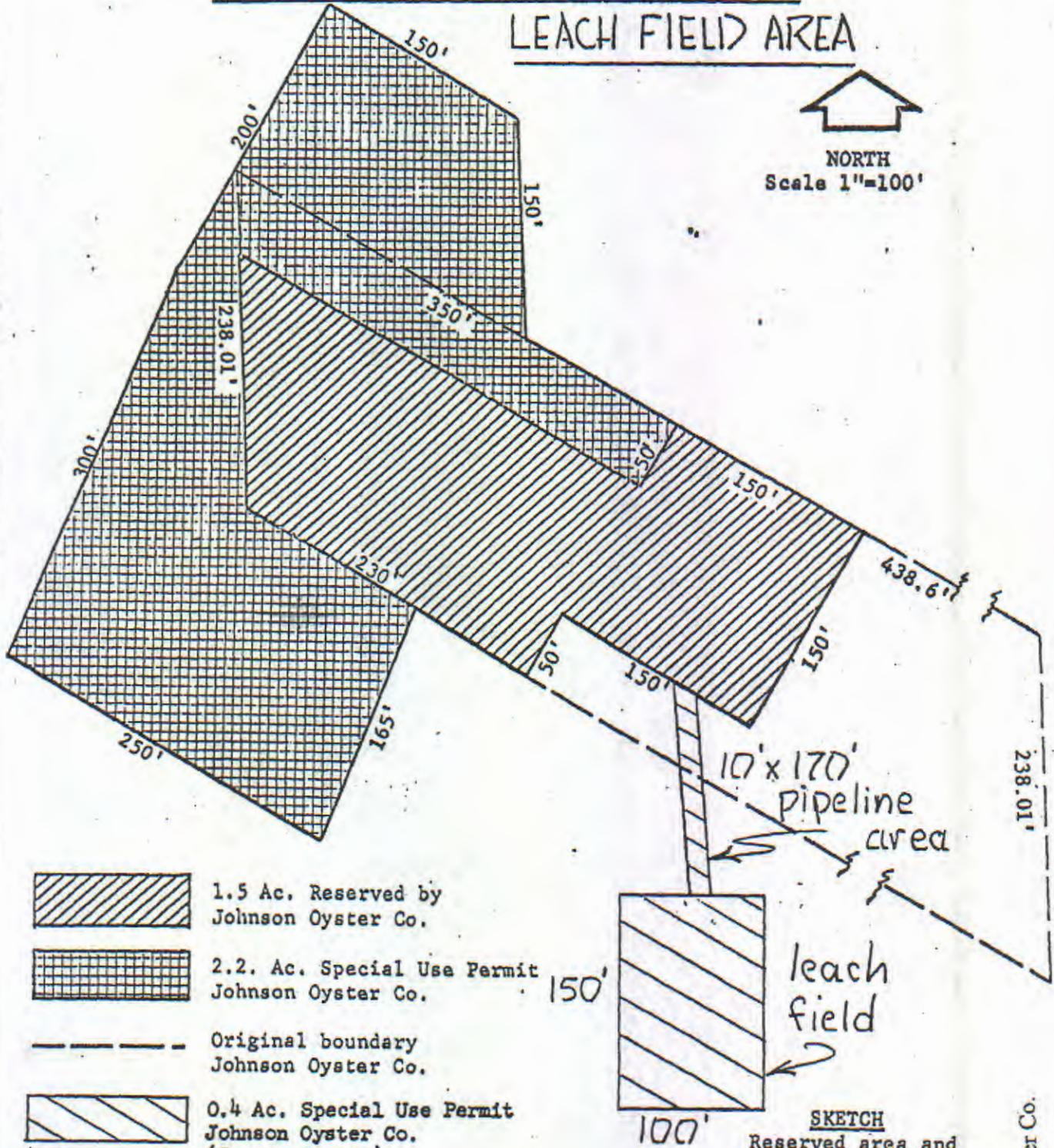
Authorizing Official [Signature] JOHN L. SANSON 4/5/93
Signature Superintendent Date

Additional Authorizing Official _____
(If Required) Signature Tit Exhibit 6
Drake's Bay Oyster Co.
CCC-07-CD-11

Special Use Permit Continuation Sheet
Permit No. WRO-PORE-6000-306
Page 3

9. The issuance of this permit does not convey any right, title, interest or estate in or to the land covered by the permit.
10. This permit may be reissued for additional periods providing the land is not needed for Park purposes and the permit has not been terminated for a breach of conditions.
11. Permittee agrees to pay the Marin County Possessory Use Tax, if applicable, or other taxes if properly assessed by the County or the State.
12. Permittee agrees to meet State or County environmental requirements and requirements imposed by the California Coastal Zone Conservation Commission.

SEPTIC SYSTEM PIPELINE AND LEACH FIELD AREA



-  1.5 Ac. Reserved by Johnson Oyster Co.
-  2.2. Ac. Special Use Permit Johnson Oyster Co.
-  Original boundary Johnson Oyster Co.
-  0.4 Ac. Special Use Permit Johnson Oyster Co. (Sewage System)

SKETCH
Reserved area and special use permit Johnson Oyster Co. Point Reyes N. S.



Exhibit 7: Photographs of DBOC operations (these photographs were taken during an August 9, 2007 site visit).

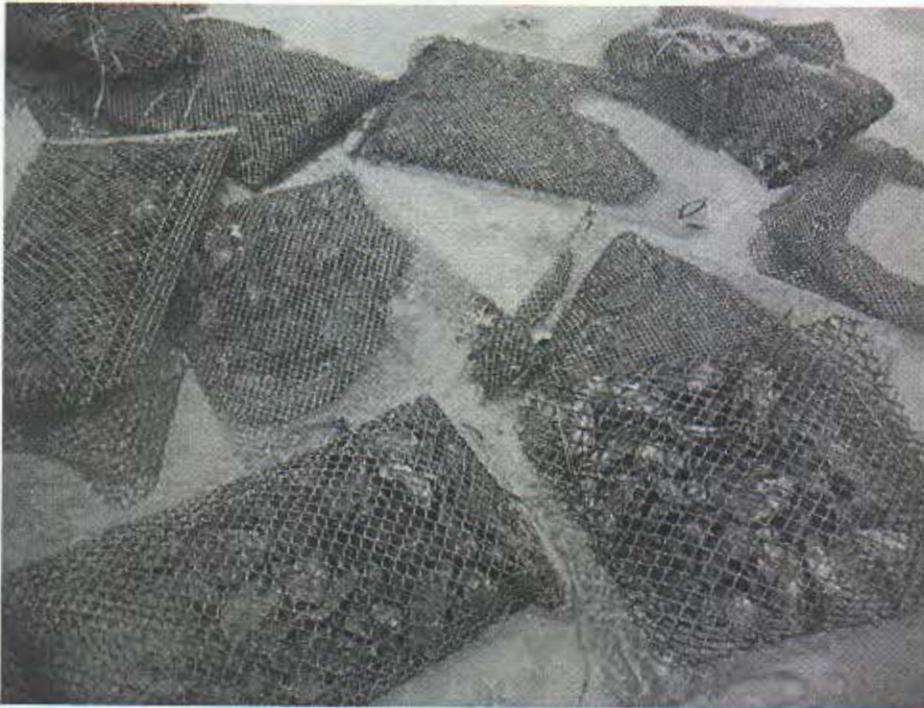


Exhibit 7: Photographs of DBOC operations (these photographs were taken during a July 17, 2007 site visit).

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200



VIA CERTIFIED AND REGULAR MAIL

May 11, 2005

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

SUBJECT: Status of Compliance with Cease and Desist Order No. CCC-03-CD-12

Dear Mr. Lunny:

I am writing to provide an update regarding compliance with Cease and Desist Order CCC-03-CD-12, regarding the removal of unpermitted development at Drakes Bay Oyster Company (formerly Johnson Oyster Company). Thank you for meeting with Commission and County staff at the property on March 15, 2005. Enforcement staff greatly appreciates your efforts to date in complying with the Cease and Desist Order.

Regarding the removal of the addition to the processing building (labeled Building J on the 2004 building location exhibit) the cement foundation must also be removed. Staff has examined a 1972 photograph of this building, and it is clear that the addition and its foundation were not part of the structure in 1972, just prior to when the permit requirements of the Coastal Act came into effect. I have attached a copy of this photograph for your review. The foundation is part of the unpermitted addition that was subject to removal under the enforcement order, and must be removed in order to fully comply with the Cease and Desist Order.

During the March 2005 site visit, Commission and County staff noted the presence of a large storage container that has recently been placed on the property. While we understand that compliance with the Cease and Desist Order has eliminated some storage areas, the storage container constitutes new development as defined in the Coastal Act, and would require a coastal development permit. Please indicate in your site plans and project description whether you are proposing to retain this structure and if you are proposing new storage structures elsewhere on the property.

The remaining structures that must still be removed under the terms of the Cease and Desist Order are Building C (small storage shed), the additions to the three trailers (Buildings D) and Building E (garage building with existing power connection to inhabited trailer). Staff understands that you may be proposing to completely remove and replace these trailers with three new trailers that have a smaller

Lunny CDO compliance status
Page 2 of 2

overall footprint, which would improve upon the original intent of the Cease and Desist Order. Please indicate your proposal for these structures in your site plan and project description. If you have decided to leave the original trailers in place, please proceed with removal of the trailer additions as required by the Cease and Desist Order.

Finally, as mentioned in Don Neubacher's March 28, 2005 letter to you, the National Park Service, Marin County, and the Coastal Commission must all review your proposed site plan and project description in order to issue any permits for future operations at the site. Please submit your site plan and project description to all reviewing agencies (including a complete coastal development permit application to the Coastal Commission) no later than **June 1, 2005**.

Thank you for your ongoing cooperation and we look forward to working further with you in resolving this matter. Please feel free to call me at 415-597-5894 if you have any questions. I will be out of the office from May 12-23 of this month. If you have any enforcement-related questions during that time, please contact Lisa Haage at 415-904-5220.

Sincerely,

Sheila Ryan
Headquarters Enforcement Officer

Enclosure: 1972 photograph of processing building ("Building J")

cc without enclosure: Lisa Haage, Chief of Enforcement, CCC
Chris Kern, North Central District Office Supervisor, CCC
Don Neubacher, Superintendent, Point Reyes National Seashore
Debbie Poiani, Code Enforcement Specialist, Marin County Community Development

Agency Curtis Havel, Planner, Marin County Community Development Agency

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CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200



VIA CERTIFIED AND REGULAR MAIL

March 21, 2006

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

SUBJECT: Ongoing violation of Cease and Desist Order No. CCC-03-CD-12 and violation of the Coastal Act; deadline for completion of CDP Application No. 2-06-003

Dear Mr. Lunny:

I am writing to formally reiterate to you that Drakes Bay Oyster Company (formerly Johnson Oyster Company) is in continuing violation of Cease and Desist Order CCC-03-CD-12 ("Order") and is in violation of the Coastal Act. Unpermitted development on the property has occurred without the required Coastal Development Permit ("CDP"), which violates both the Order and the Coastal Act. On January 3, 2006 Commission staff became aware of new unpermitted development on the property, including a large storage container (next to another large storage container that we previously notified you was unpermitted in a letter dated May 11, 2005), a construction trailer, and five plumbed oyster culture tanks. Staff notified you in a letter dated January 20, 2006 that Drakes Bay Oyster Company was in violation of both the Order and the Coastal Act. Staff visited the property on February 17, 2006, at which time staff observed this unpermitted development as well as other new unpermitted development including fencing and a wedge of fill topped with freshly paved asphalt located between the two unpermitted storage containers and the retail building. Staff also observed several instances of non-compliance with the removal requirements of the Order, which are discussed in more detail below.

During last month's site visit, staff observed that the concrete foundation of the retail building addition (Building "J") is still present on site. This foundation is part of the building addition that was required to be removed under the Order, and as staff informed you

Exhibit 8
Drake's Bay Oyster Co.
CCC-07-CD-11
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Lunny CDO violation
Page 2 of 3

to you, the foundation must be completely removed. Although you have asserted that photographs show that this foundation is pre-Coastal, you have not provided any evidence to Commission staff, photographic or otherwise, that supports this assertion. In fact, a January 1972 photograph (staff has already provided you with a copy), clearly shows that neither the addition nor its concrete foundation were present on the property just prior to the enactment of Coastal Act permit requirements, and this is why the addition (and its foundation) were subject to removal under the Order. As previously noted in staff's May 11, 2005 letter to you:

"Regarding the removal of the addition to the processing building (labeled Building J on the 2004 building location exhibit) the cement foundation must also be removed. Staff has examined a 1972 photograph of this building, and it is clear that the addition and its foundation were not part of the structure in 1972, just prior to when the permit requirements of the Coastal Act came into effect. I have attached a copy of this photograph for your review. The foundation is part of the unpermitted addition that was subject to removal under the enforcement order, and must be removed in order to fully comply with the Cease and Desist Order."

Drakes Bay Oyster Company will not be in compliance with this portion of the Order's removal requirements until this foundation is completely removed up to the existing building edge.

Staff also observed five partially buried and plumbed oyster culture tanks located in the area labeled "M: Seed setting area" on the 2004 building location exhibit. These tanks were not present in this location during staff's March 15, 2005 site visit (see attached photo), and were presumably removed as required under the Order when all of the Area M buildings and their contents were removed. During last month's site visit, you stated that you simply put the tanks back near where they used to be inside the buildings that were removed. The removal requirements of the Order, however, include not just the buildings that were slated for removal, but their contents as well. The relocation, partial burial, and plumbing of these tanks in this location therefore constitute new unpermitted development and are in violation of the Order's removal requirements.

When staff arrived for the February 17, 2005 site visit, we observed new asphalt paving on a new wedge of fill between the two unpermitted storage containers and the retail building. We also observed new unpermitted fencing near the unpermitted construction trailer. You must add detailed descriptions and site plan locations of all of the cited unpermitted development to your CDP application, and clearly indicate whether you are seeking to retain this development. You mentioned during the site visit that you intend to extend the asphalt paving in the direction of the retail building, but this is not included in your current proposed site description or proposed site plans. **Please note that as of the date of this notification letter, any additional unpermitted development that occurs on the property without the required CDP will be considered a knowing and intentional violation of both the Order and the Coastal Act.**

Although staff appreciates that you submitted a CDP application by the January 27, 2006 deadline, we note that the application is incomplete and is lacking numerous essential information that we previously instructed you to submit as part of your application, including a detailed project description and site plan describing **all** proposed development on the property.

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Drake's Bay Oyster Co.
CCC-07-CD-11
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Lunny CDO violation
Page 3 of 3

proof of legal interest in the property, and verification of all other permits, permissions or approvals granted by other public agencies. Staff's February 22, 2006 letter to you details additional materials and information that you must provide in order for the application to be filed and scheduled for hearing. Please submit the required materials and information to the attention of Al Wanger in the Commission's North Central District office in San Francisco **no later than April 28, 2006.**

Staff reminds you that Section 8 of the Order details the compliance obligation for the Order. Violation of the Order may result in the imposition of civil penalties of up to \$6,000 per day for each day in which compliance failure persists (Public Resources Code Section 30821.6). In the event we have to take formal action to enforce the Order, the Commission would also seek attorney's fees under Code of Civil Procedures Section 1021.8. The Commission may also seek other remedies pursuant to Public Resources Code Sections 30810 and 30811 regarding any new Coastal Act violations on the site and Sections 30820 and 30822 regarding knowing and intentional violations of the Coastal Act. In addition, Section 30812 of the Coastal Act allows the Executive Director, after providing notice and opportunity for a hearing, to record a Notice of Violation of the Coastal Act against the property. Commission staff will send you a subsequent notice prior to proceeding with recordation of a Notice of Violation in this matter. We look forward to resolving this matter and hope to do so without needing to take any such formal actions.

Please call me at 415-597-5894 if you have any questions about this letter.

Sincerely,

Sheila Ryan
Headquarters Enforcement Officer

Enclosure: March 15, 2005 site visit photo

cc: Lisa Haage, Chief of Enforcement, CCC
Al Wanger, North Central District Office, CCC
Don Neubacher, Superintendent, Point Reyes National Seashore
Todd Carr, Senior Planner, Marin County Community Development Agency
Judy Davidoff, attorney for Mr. Lunny

Exhibit 8
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Exhibit 9: Photographs of commercial facilities (photographs on this page were taken during an August 9, 2007 site visit).



Exhibit 9: Photographs of commercial facilities (photograph on this page was taken during a July 17, 2007 site visit).

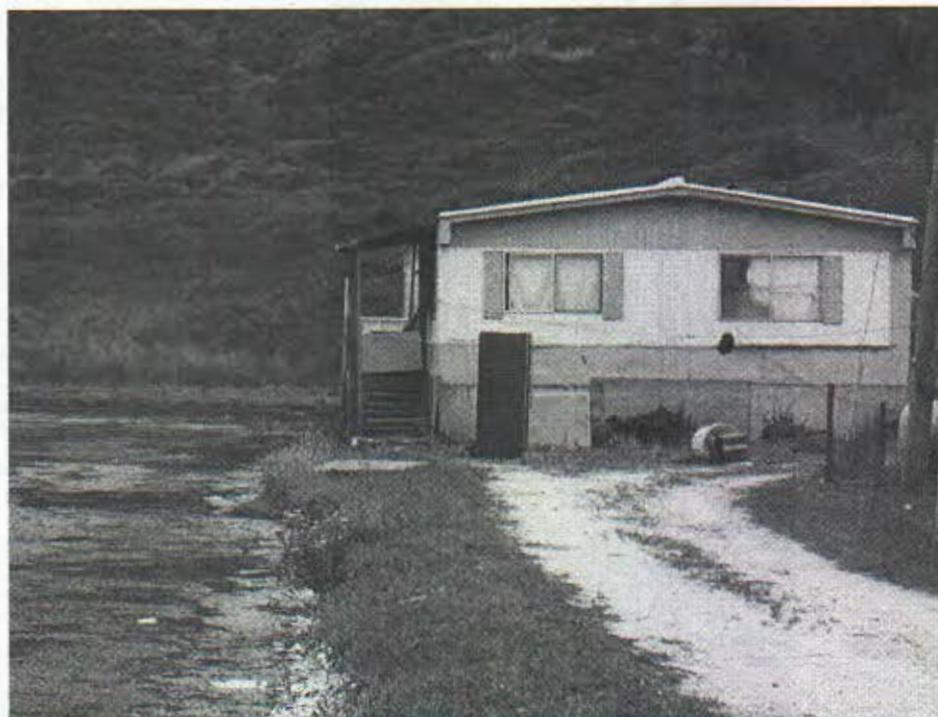


Exhibit 10: Photographs of residential development on the property, taken during an August 9, 2007 site visit.

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
 SAN FRANCISCO, CA 94105-2219
 VOICE AND TDD (415) 904-5200
 FAX (415) 904-5400



June 5, 2007

Kevin Lunny
 Drakes Bay Oyster Company
 17300 Sir Francis Drake Blvd.
 Inverness, CA 94937

RE: Drakes Bay Oyster Company Aquaculture Operations in Drakes Estero

Dear Mr. Lunny:

I am writing concerning the Drakes Bay Oyster Company's aquaculture operations in Drakes Estero. As you know, the Coastal Commission issued a Cease and Desist Order to the previous owner, Johnson's Oyster Company ("JOC") for various Coastal Act violations concerning the onshore oyster operations along Drakes Estero. Commission staff has been in communication with you concerning compliance with this Order, including information required to complete your application for a Coastal Development Permit as required under the Order.

Recent information has come to our attention regarding your offshore aquaculture operations that raises concerns about potential impacts to sensitive resources in Drakes Estero. In particular, we are concerned about adverse impacts your operations may be having on coastal resources such as eelgrass, harbor seals, and black brant and other shorebirds, as well as the potential introduction of exotic and invasive species in this sensitive area. In addition, it appears your expanded operations have not received necessary permits, including a coastal development permit from the California Coastal Commission. These concerns are discussed in more detail below.

Background. Drakes Estero is within Point Reyes National Seashore ("Point Reyes"), which was established in 1962¹. Drakes Bay Oyster Company is the only aquaculture operation located within the Drakes Estero portion of Point Reyes, an area designated as potential wilderness under the Point Reyes Wilderness Act of 1976². In the early 1960s, prior to the designation of Point Reyes, JOC was operating aquaculture activities in Drakes Estero pursuant to a lease/allotment from the State of California ("State")³. In 1965, after the designation, the State conveyed the submerged lands within Drakes Estero to the federal government, subject to certain limitations, including the reserved right of "the people of the state . . . to fish in the waters."⁴ In 1972, the National Park Service ("NPS"), which administers Point Reyes, purchased approximately five acres of dry land along the banks of Drakes Estero from JOC, subject to a reservation of a terminable right allowing JOC to use and occupy approximately 1.5 acres of the land for

¹ Public Law 87-657 (Sept. 13, 1962)

² Public Laws 94-544 (Oct. 18, 1976) and 94-567 (Oct. 20, 1976)

³ State Department of Fish and Game Oyster Allotment No. 2 and, later, Allotment No. 72.

⁴ Stats. 1965, Chap. 983

Kevin Lunny
Drakes Bay Oyster Company
June 5, 2007
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"processing and selling . . . oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012, at which time it is expected that aquaculture operations will cease and the NPS will obtain a full wilderness designation for Drakes Estero. The federal government thus came to own both the onshore and offshore property upon which the aquaculture operation is located. At about the same time, the NPS issued a term-limited Special Use Permit to JOC, NPS Special Use Permit No. 8530-121, for the use of both the dry land and the tidelands for purposes similar to those listed in the reservation of right. In 2005, you purchased JOC, and you began operations under the business name Drakes Bay Oyster Company ("DBOC").

According to a recent California Department of Fish and Game ("DFG") Report from March 2007, DBOC has increased the number of oysters being cultivated in the Estero from a pre-purchase level of roughly one million oysters in 2004 to a current production level of approximately nine million oysters and one million clams. We believe that this increase in operations within the Estero may be adversely affecting coastal resources.

Impacts to Coastal Resources.

Harbor Seals. Drakes Estero is one of only five major seal colonies at Point Reyes. The Point Reyes harbor seal population represents the largest concentration of harbor seals in the State of California outside of the Channel Islands and accounts for as much as 20% of the total mainland breeding population. Drakes Estero and the nearby Double Point area of Point Reyes provide habitat for as much as half of this population during both the breeding and molting seasons, and the beaches and intertidal sand bars within the Estero function as essential seal haul-out and pupping areas through the spring and summer seasons. Harbor seals are year-round residents of the Estero, with as many as 2,000 breeding/molting individuals and 300-500 pups annually.

The regional significance of Drakes Estero as a harbor seal mating, molting, and pupping area, combined with the sensitivity to disturbance of this population during these critical life stages, was instrumental to Drakes Estero's designation as potential wilderness and in 1995 prompted the NPS to prohibit the use of the Estero for recreational kayaking and canoeing each year from March to July.

Harbor seals have been directly affected by oyster operations in the past, but disturbances to resting and breeding seals appear to have increased in 2007. Since March of this year, park biologists documented oyster boats disturbing mothers with pups, and the placement of oyster bags on and near sandbars where seals would normally give birth and nurse their pups. The science advisor to the National Park Service, who has amassed 25 years of continuous data about the harbor seal nursery at the Estero, has documented evidence of recent adverse impacts to harbor seals in intertidal areas affected by oyster and/or clam culture operations. Disturbance to seals by oyster boats and aquaculture activities in these areas has reportedly caused seals and

Kevin Lunny
Drakes Bay Oyster Company
June 5, 2007
Page 3

pups to be "flushed"⁵ into the water on at least several occasions and may have interfered with the use of these important haul-out areas by breeding and pupping seals. Accordingly, we are concerned that your operations near these intertidal sandbars are having an adverse affect on harbor seals in the Estero.

Eelgrass. Drakes Estero is one of only a few sites with significant eelgrass beds in California. These beds represent approximately 7% of all eelgrass in California, and at 750 acres, comprise one of the most expansive contiguous eelgrass sites in the state. These eelgrass beds provide important habitat and food resources for many species, including spawning and larval fish, overwintering black brant, and invertebrates. Within Drakes Estero, many species such as Pacific herring, bay pipefish, gammarid and caprellid amphipods, the sea slug (*Phyllaplysia taylori*), and several shrimp species are directly dependent on eelgrass beds. Eelgrass is very sensitive to light, nutrients, pollution and sedimentation, and is thus an excellent indicator of estuarine health. Oyster farming has a number of impacts on eelgrass: it reduces the amount of light available to eelgrass beds because of shading by racks; it increases the amount of sedimentation and turbidity due to deposition of oyster pseudo-feces and trapping sediment; and it can contribute biocides and chemical pollutants to the marine environment from treated construction materials and from general operations.

As much as 96% of DBOC's oyster racks are located in the Estero's eelgrass beds and the eelgrass beds in these areas appear to have been significantly affected by the oyster racks, with approximately eight acres of eelgrass directly lost due to shading from the oyster racks, and an additional 50 acres potentially suffering secondary impacts from propeller cuts, anchoring, etc.

Black Brant and Other Birds Species. Recent reports from the NPS science advisor and NPS volunteer monitors have shown that oyster cultivation operations have resulted in the periodic flushing and abandonment of roosting sites by up to several hundred black brant – a species of marine goose that has been included on both the Audubon WatchList and the IUCN Red List of threatened species and is protected under the Migratory Bird Treaty Act. Large numbers of these birds migrate from the Arctic to Point Reyes each year, and Drakes Estero provides vital wintering habitat due to its large eelgrass beds. Also, hundreds to thousands of brown pelicans, a federally protected species, congregate at the Esteros (Drakes and Limantour) from the summer through December, feeding on large schooling fish such as anchovies, herring, and smelt, and resting on tidal mudflats. Other species that occur in large numbers are Caspian terns, gadwall, ruddy duck, American widgeon, bufflehead, green-winged teal, Western and least sandpiper, dunlin, and black-bellied plover. Based on the observed effects on black brants and your operation's use of tidal mudflats that may serve as roosting and foraging habitat for shorebirds, we are concerned that your aquaculture operations in the Estero may be adversely affecting these bird species as well.

⁵ In this context "flushing" refers to the behavioral response of harbor seals that causes them to leave their haul-out sites and enter the water when confronted with a disturbance.

Kevin Lunny
Drakes Bay Oyster Company
June 5, 2007
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Other Environmental Impacts. The Drakes Bay Oyster Company operation also has the potential to cause negative impacts throughout both Drakes Estero and the larger coastal region through inadvertent or intentional introduction of exotic invasive species that may result from aquaculture activities. The marine ecologist with the Point Reyes National Seashore has noted that many of the apparently older and larger oysters growing on racks had extensive non-native, highly invasive tunicates (*Didemnum* species) growing on them. This species is an aggressive invader that has had substantial ecosystem and financial impacts in New Zealand, several west coast estuaries and the Grand Banks off Newfoundland. Other fouling organisms (native and non-native sponges, tunicates, bryozoans, and mussels) have been observed by Park Service staff, as well as researchers from UC Davis, on both oysters and racks throughout the estuary. Introduced species released within Drakes Estero have the potential to become established and spread to other adjoining water bodies resulting in potentially significant and widespread economic, commercial, and ecological effects.

In addition, the placement of large amounts of hard substrate (oyster racks and bags) and the cultivation of large numbers of filter-feeding non-native oysters within Drakes Estero, an area traditionally characterized by eelgrass, intertidal sand flats, and other areas of soft benthic habitat, has the potential to alter the overall ecology of the Estero. Increases in the availability and abundance of hard substrate within the Estero, due to the placement of human-made structures and materials, would not only enable the cultivation of exotic commercial species of clams and oysters but may also result in the establishment and spread of suites of additional species that specialize on these habitat types and would not typically be found within the Estero during more natural conditions when the amount of available hard substrate would be very limited. This would increase competition for resources within the Estero and could substantially alter the types and numbers of species making use of the Estero and its corresponding ecological vitality. The cultivation of large numbers and quantities of filter-feeding exotic species within the Estero would result in the removal of substantial quantities of planktonic organisms and organic matter from the Estero's waters. Based on an individual oyster's estimated potential to filter and remove planktonic organisms from up to 50 gallons of water per day, the current cultivation of as many as nine million oysters within the Estero can be estimated to result in the filtration of approximately 450 million gallons of water per day. On a continual basis, this level of filtration could potentially result in competition for food resources and negative impacts to native clams and benthic filter-feeders that naturally occur within the Estero and rely on the same types of planktonic food sources that are being removed by cultivated exotic oysters and clams.

Authorizations. It appears that you may not have all the required permits and authorizations for your expanded aquaculture operation, including but not limited to coastal permits from the Coastal Commission, federal permits from the U.S. Army Corps of Engineers ("Army Corps"), and use permits from the NPS. A coastal development permit ("CDP") may be necessary to authorize your current operations in, and use of, the Estero. Pursuant to the definition of development in the Coastal Act⁶, a CDP from the Coastal Commission is required for, among other things, any "change in the intensity of use of water" that occurred anytime after February 1,

⁶ Cal. Pub. Res. Code § 30106

Kevin Lunny
Drakes Bay Oyster Company
June 5, 2007
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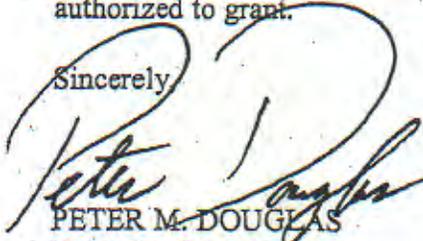
1973, the effective date of the Coastal Zone Conservation Act of 1972.⁷ If, after the above-referenced date, the racks have been moved to different locations, or new racks have been installed for the increase in oyster production, a CDP may have also been required for the following additional form of "development": "on land, in or under water, the placement or erection of any solid material or structure." Therefore, a CDP may be required for such actions as: 1) increase in the intensity of the aquaculture operations from the 2004 pre-purchase level of one million oysters to the current level of nine million oysters and one million clams, and the geographic expansion into seal pupping areas; 2) addition of new species (addition of new oyster, mussel, or clam species not previously authorized under DFG or NPS permits); 3) the addition of new materials or structures to the environment (installation of new racks and/or changing locations of existing racks); and 4) change in the type of aquaculture (new and/or expanded use of bottom culture bags).

Finally, if either Section 404⁸ or Section 10⁹ Permits are required by the Army Corps of Engineers, the Coastal Commission would have the authority under the Coastal Zone Management Act ("CZMA")¹⁰ to review these permits for consistency with the Coastal Act. The Coastal Commission may also have the authority under the CZMA to review the National Park Service's special use permits for consistency with the Coastal Act.

In summary, Commission staff has identified several types of potentially significant adverse impacts to coastal habitat and wildlife resulting from aquaculture operations in Drakes Estero, including concerns about adverse impacts on harbor seals and the potential for reduced reproductive success; direct and indirect loss of eelgrass habitat; impacts to a number of bird species including federally listed and protected species; and the potential introduction of invasive species. We would like to work with you and the NPS to find ways to minimize adverse impacts from your operation, and to work with you to process your application for the necessary authorizations under the Coastal Act.

Please contact Alison Dettmer, Deputy Director, of my staff to discuss the matter of obtaining coastal permits for offshore operations. She can be reached at 415-904-5205. We recommend that you also contact the Army Corps to pursue any appropriate federal permits that they are authorized to grant.

Sincerely,



PETER M. DOUGLAS
Executive Director

⁷ Cal. Pub. Res. Code § 27000 *et seq.* (repealed).

⁸ 33 U.S.C. § 1344

⁹ 33 U.S.C. § 403

¹⁰ 16 U.S.C. §§ 1451 *et seq.*

Kevin Lunny
Drakes Bay Oyster Company
June 5, 2007
Page 6

cc: Senator Dianne Feinstein
Steve Kinsey, Marin County Supervisor, District 4
Don Neubacher, Superintendent, Point Reyes National Park
Jane Hicks, Army Corps of Engineers
Al Wanger, Deputy Director
Alison Dettmer, Deputy Director
Lisa Haage, Chief of Enforcement
Michael Endicott, North Central Coast District Manager
Jo Ginsberg, Enforcement Analyst
Cassidy Teufel, Coastal Program Analyst

Exhibit 11
Drake's Bay Oyster Co.
CCC-07-CD-11
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CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



VIA CERTIFIED AND REGULAR MAIL

October 3, 2007

Kevin Lunny
Drake's Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937

Subject: Notification of Intent to Commence Cease and Desist Order Proceedings

Violation No.: V-7-07-001

Property Location: Property is located within the Point Reyes National Seashore and is referred to as Drake's Bay Family Farms, with onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and offshore facilities in Drake's Estero.

Violation Description: Unpermitted development consisting of offshore aquaculture facilities and operations and onshore harvesting and processing facilities and operations.

Dear Mr. Lunny:

Thank you very much for meeting with my staff at the Commission's San Francisco office on August 30, 2007, to discuss resolution of this situation and to clarify the current extent of your operations and the protocols that you have implemented to protect the valuable and sensitive resources in Drake's Estero. Staff has informed me that the meeting was very informative and productive and that they look forward to continuing to work collaboratively with you. As we have previously stated, the necessary and appropriate first step in the resolution of this matter is the issuance of a Commission cease and desist order, to address the fact that operations are ongoing in the absence of any Commission authorization, and, as you know, we would prefer to address this matter through a consent cease and desist order. During the August 30, 2007

Drake's Bay Oyster Co. (V-7-07-001)
October 3, 2007
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meeting, my staff reviewed a draft consent order with you and intends to continue to work with you to reach a resolution through the consent order process. This letter is a formal requirement, under Section 13181(a) of the Commission's regulations (Cal. Code Regs., Title 14, § 13181) for the issuance of a cease and desist order, and is intended to facilitate that process. Thus, I am hereby, in accordance with the Commission's regulations, notifying you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to commence proceedings for the issuance of a cease and desist order addressing unpermitted development on property located within the Point Reyes National Seashore that is referred to as Drake's Bay Oyster Company, including onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and offshore facilities in Drake's Estero (the onshore and offshore areas will hereinafter collectively be referred to as "the property").

As you know, the property is owned by the National Park Service (NPS) but you currently occupy the onshore portion pursuant to a reservation of "right to use and occupy," which accompanied the 1972 deed through which NPS obtained title to the property, and you use both the onshore and offshore portions for an oyster cultivation venture. The property consists of approximately 1600 acres offshore and approximately 1.5 acres onshore. The proposed order will direct you to: 1) cease from performing any further development activity on the onshore and offshore portions of the property without first obtaining a Coastal Development Permit (CDP) or other Coastal Act approval¹; 2) cease from expanding or increasing the intensity of use of any existing unpermitted development on the property without first obtaining a CDP; 3) comply with the protective measures set forth in the Order; 4) complete the National Park Service's special use permit process by the schedule set forth in the Order, and implement any steps authorized or required by any special use permit obtained, unless inconsistent with another term of this Order; 5) revise the project description in CDP Application No. 2-06-003 to include all onshore and offshore development; 6) complete the CDP application by the deadline set forth in the Order and allow the application to proceed through the Commission permitting process according to applicable laws; and 7) implement and comply with all the terms of any permit issued, including the removal of any development that is denied under a Commission permit action in this matter if such removal is necessary.

As discussed with staff, please include in your application all items of the unpermitted development that you would like to retain, and any new development which you would like to apply for under the Coastal Act. The Order may include a provision that required removal of any development, as that term is defined in Section 30106 of the Coastal Act, that is not included in your application, as it will continue to constitute unpermitted development even if a permit is granted, or any development denied by the Commission as part of the Commission action on the permit application. Staff is happy to work with you once an order is issued to help you to comply with these conditions and with all terms and conditions of the order to reach a comprehensive resolution in this matter.

¹ The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

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The unpermitted development activities at issue were undertaken on the property, and include both the construction/installation of structures and the performance of ongoing activities. The activities constitute "development" as defined by Section 30106 of the Coastal Act and Policy 22.56.0301C of the Marin Local Coastal Program (LCP) Implementation Plan and require a CDP pursuant to Coastal Act Section 30600 and LCP Policy 22.56.040I.² No CDP has been obtained to authorize the development. Consequently, the unpermitted development violates the Coastal Act and the LCP. We appreciate your willingness to resolve these violations.

Commission staff most recently conducted site visits on July 17, 2007 and August 9, 2007, to observe current site conditions and to preliminarily evaluate the potential adverse impacts from your operations, which should be addressed through the NPS permitting and Commission enforcement and permitting processes. These potential impacts include water quality impacts, impacts to harbor seals such as decreased reproductive success, direct and indirect loss of eelgrass habitat from boat propellers and oyster bags and racks, impacts to federally listed and protected bird species such as the black brant and brown pelican from boating in roosting areas and loss of foraging habitat, and the potential introduction of invasive species. These impacts require immediate attention. The proposed order will set forth protective measures meant to preliminarily address the impacts and will as establish a reasonable timeline for completion of the NPS and Commission permitting processes.

Violation History

In 1972, NPS purchased approximately 5 acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from Johnson's Oyster Company ("Johnson's"), the owner at that time, subject to the reservation of a right allowing Johnson's to use approximately 1.5 acres of the land for "processing and selling... oysters, seafood, and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012. NPS then issued Special Use Permit No. 8530-121 to Johnson's for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the operation and the utilization of tidelands for purposes related to the operation of the oyster farm."

In 2003, after attempting to resolve numerous Coastal Act/LCP, building code, and health and safety code violations on the property since 1989, Marin County requested that the Commission assume enforcement authority over the property with respect to Coastal Act violations. Accordingly, the Commission issued Cease and Desist Order No. CCC-03-CD-12 in December 2003, which required the removal of some of the unpermitted development from the property and submittal of a CDP application for after-the-fact authorization of some of the unpermitted development.

After you purchased the business from Johnson's at the beginning of 2005 and began operations as Drake's Bay Oyster Company, you generally undertook compliance with the Cease and

² The Commission certified the Marin County LCP on April 1, 1981.

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Desist Order. Commission staff has worked with you for two years to bring the property into compliance with the Cease and Desist Order and with the Coastal Act. Unfortunately, during this time, new development, including the installation of two large containers being used to house the production facilities including shucking and packing, construction of a processing facility, placement of a temporary construction trailer, grading, and paving has occurred on the property without any CDPs, and there are concerns that your current, unpermitted operations may have adverse impacts on the flora and fauna of the Estero and the water quality of the Estero and surrounding areas. For example, Commission staff has received reports that boats owned and operated by Drake's Bay Oyster Company have veered too close to harbor seal pupping/haul out areas while en route to work on oyster racks and bags in the Estero. A consent order in this matter may help resolve such issues and avoid misunderstandings in the future.

You submitted a CDP application in January of 2006, seeking after-the-fact authorization for the placement of an 8x40' trailer containing a shucking plant, 20'x8' trailers, 40'x8' containers, construction of a porch at the managers residence/office, installation of fencing, a parking lot, a display aquarium and shellfish tanks, and for authorization to remodel four existing buildings including replacing roofs, paint, and trim, and adding ADA-compliant bathrooms. The application is not yet complete. Commission staff is aware that a conditional use permit from NPS is required to complete your application and that you are in the process of obtaining such a permit from NPS. The proposed order establishes a reasonable timeline to proceed through the NPS permit process and, subsequently, the Commission permitting process. The order will also include provisions to be undertaken immediately in an attempt to ensure protection, in the interim, of the valuable resources that are protected under Chapter 3 of the Coastal Act and upon which you rely for your aquaculture operation. We believe such measures are in the best interests of you and the Commission, and we look forward to working with you on a consent order that will allow us to work cooperatively toward resolving the violations and getting all necessary permit requirements addressed at the site, while protecting the sensitive natural resources on which those operations rely.

Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states the following:

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

Exhibit 12
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(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

The unpermitted development at issue in this matter clearly constitutes "development", and therefore, requires a CDP. No CDP authorizing any item of the cited development has been issued. You have expressed your willingness to complete your CDP application in an effort to obtain the necessary authorization for the development at issue. The mechanism to facilitate this process and to ensure that it proceeds in a timely manner, which is in the Commission's and your best interests, is a cease and desist order. As I have previously stated, we would prefer that the order be a consent order, which will provide you with the opportunity to collaborate with staff and to have input into the process and timing of any removal of unpermitted development should such removal be required. Therefore, I am issuing this notice of intent to formally begin the order process, with the intent to accomplish our goals through a consent order.

In accordance with Sections 13181(a) of the Commission's regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent for the proposed cease and desist order by completing the enclosed Statement of Defense form. **The Statement of Defense form must be returned to Christine Chestnut in the Commission's San Francisco office, using the address provided on the letterhead, no later than October 22, 2007.** Submittal of a Statement of Defense will not be necessary if you reach agreement with Commission staff on a consent order, although you are not precluded from submitting a Statement of Defense form in that instance.

Please be advised that Coastal Act Sections 30803 and 30805 authorize the Coastal Commission to initiate litigation to seek injunctive relief and an award of civil penalties in response to any violation of the Coastal Act. Coastal Act Section 30820(a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty not to exceed \$30,000 per violation. Further, Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs any development in violation of the Coastal Act can be subject to a civil penalty of up to \$15,000 for each day in which each violation persists. Additional penalties of up to \$6,000 per day per violation can be imposed if a cease and desist or restoration order is violated. Section 30822 further provides that exemplary damages may also be imposed for knowing and intentional violations of the Coastal Act or of any orders issued pursuant to the Coastal Act.

Commission staff has tentatively scheduled the hearing for the proposed cease and desist order during either the October or November 2007 Commission meeting, depending on the progress made during further consent order discussions and the time necessary for additional discussions in order to reach an effective and comprehensive resolution. Thank you again for all of the time and effort that you have put into this process. We appreciate your cooperation and commitment to ensuring that your operations are conducted in a way that complies with the Coastal Act and

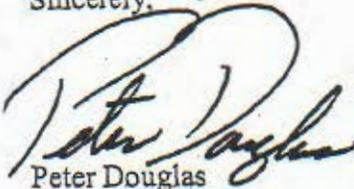
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other applicable laws. If you have any questions or concerns regarding this letter or any aspect of this matter, please contact Christine Chestnut at 415-904-5294.

Sincerely,



Peter Douglas
Executive Director

Enc. Statement of Defense Form for Cease and Desist Order

cc w/o Enc.: Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Nancy Cave, Northern California Enforcement Program Supervisor
Alison Dettmer, Energy and Ocean Resources Program Manager
Cassidy Teufel, Energy and Ocean Resources Analyst
Charles Lester, Deputy Director
Michael Endicott, North Central District Manager
Jo Ginsberg, North Central District Enforcement Analyst
Christine Chestnut, Statewide Enforcement Analyst

EXHIBIT 3



12255 El Camino Real, Suite 100
San Diego, California 92130
main 858.794.4100
fax 858.794.4101
www.stoel.com

RYAN R. WATERMAN
Direct (858) 794-4114
rrwaterman@stoel.com

October 24, 2012

VIA ELECTRONIC MAIL AND U.S. MAIL
(ncavc@coastal.ca.gov)

Nancy Cave
Northern California Enforcement Program Supervisor
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11

Dear Ms. Cave:

This letter responds to your July 30, 2012, letter asserting that the Drakes Bay Oyster Company may be in violation of California Coastal Commission Consent Cease and Desist Order No. CCC-07-CD-11 ("Consent Order").

Drakes Bay Oyster Company is in full compliance with the Consent Order. Its actions and positions are transparent. Perhaps no coastal activity in California is as carefully managed and heavily scrutinized as the Drakes Bay Oyster Company.

This letter responds to the three compliance issues raised in the July 30 letter by providing relevant evidence, analyzing and answering the CCC's allegations, and proposing a path forward to resolve each issue.

There is no basis for CCC to consider, much less engage in, a new enforcement action against Drakes Bay Oyster Company.

I. DRAKES BAY OYSTER COMPANY COMPLIES WITH THE HARBOR SEAL PROTOCOL FOR ACCESSING THE "LATERAL CHANNEL" OF DRAKES ESTERO DURING HARBOR SEAL PUPPING SEASON

Two errors have misled the CCC into alleging that Drakes Bay Oyster Company ("DBOC") has been in violation of the protocol for accessing the "Lateral Channel" in Drakes Estero during harbor seal pupping season.



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First, the CCC fails to understand how the "Lateral Channel" has been defined over nearly twenty years of operational history under both the 1992 Record of Agreement Regarding Drake's Estero Oyster Farming and Harbor Seal Protection ("1992 Multi-Agency Seal Protocol"), and the 2008 Special Use Permit ("2008 SUP") between DBOC and the National Park Service ("NPS"). As documented in this letter, operational practice makes clear that DBOC's activities during the harbor seal pupping season have been long acknowledged and accepted by the NPS, the National Marine Fisheries Service ("NMFS"), the California Department of Fish and Game ("CDFG"), and California Department of Health Services (now known as the California Department of Public Health, or "CDPH") (collectively, the "Resource Agencies").

Second, although the CCC asserts that the terms and conditions found in the 2008 SUP between DBOC and the NPS establish that DBOC is in violation of the harbor seal pupping protocol, the 2008 SUP does not define the key terms or provide any metrics that are inconsistent with operational practice under the 1992 Multi-Agency Seal Protocol. Accordingly, the 2008 SUP does not provide any basis for a finding that DBOC has failed to comply with the harbor seal pupping season protocol.

A. Operational Practice Defines the Westernmost Extent of the "Lateral Channel" During the Harbor Seal Pupping Season

As the CCC understands, restrictions on oyster boat travel in Drakes Estero during harbor seal pupping season have been in place since May 1992, when the operator at that time, the Johnson Oyster Company ("JOC"), entered into the 1992 Multi-Agency Seal Protocol with the Resource Agencies. Accordingly, by the time DBOC took over from JOC in 2005, over a decade of operations under the 1992 Multi-Agency Seal Protocol had already occurred.

CDFG official Tom Moore, a biologist with responsibility for managing aquaculture operations in Drakes Estero and the agency official with the longest continuous involvement with aquaculture operations in Drakes Estero, is the most knowledgeable person regarding the protective actions taken to ensure harbor seals are not disturbed by aquaculture operations. He was an original participant in developing the 1992 Multi-Agency Seal Protocol and was responsible for implementing it over nearly two decades—first with JOC, and later with DBOC. At the time of Mr. Moore's retirement in 2009, he was CDFG's Marine Region Aquaculture Coordinator, and was responsible for managing all the state's marine aquaculture.



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Mr. Moore notes that when the 1992 Multi-Agency Seal Protocol took effect, there was “no exact beginning of the western edge of the ‘lateral channel,’ whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map.” Attachment 1, Moore letter to Cave, at 2 (October 3, 2012). Without either GPS or GIS ability “to mark, using latitude and longitude, this undefined point in 1992 . . . JOC employees landed at the western ‘edge’ of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.” *Id.* This operational practice persisted throughout the remainder of JOC’s operations, without complaint by NPS (or any other agency) about harbor seal disturbances. *Id.*

In fact, Mr. Moore always understood that the 1992 Multi-Agency Seal Protocol was “meant to be an adaptive management tool with new input from operational experience revising the protocols.” Attachment 1, Moore letter to Cave, at 3.

When DBOC began operations, Mr. Moore provided Mr. Lunny with the 1992 Multi-Agency Seal Protocol and took him and DBOC employees to “the lateral channel area . . . to indicate the permissible extent of access during the harbor seal pupping season.” Attachment 1, Moore letter to Cave, at 2. According to Mr. Moore, “DBOC’s use of this area is essentially in the same manner (stocking, working and harvesting) as JOC’s *except with less use* of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations.” *Id.* at 2 (emphasis added). In Mr. Moore’s opinion, “DBOC has shown good faith and adherence to the protocols in both the [1992 Multi-Agency Seal Protocols] and the 2008 Special Use Permit (SUP) . . .” *Id.* at 2-3.

Throughout its operations, DBOC has respected both the 1992 Multi-Agency Seal Protocol and the 2008 SUP, and has not entered the “Lateral Channel” as defined by decades of operational practice during the harbor seal pupping season. GIS records demonstrate the consistency of DBOC’s operations in the western side of Drakes Estero and confirm that DBOC boats are not accessing the “Lateral Channel” during harbor seal pupping season. Attachment 2, DBOC GIS map of June 2010 boat transit (“June 2010 Boat Map”).

Notably, since 2005, the NPS has closely monitored DBOC’s activities, especially during the harbor seal pupping season. Despite this scrutiny, NPS has never alleged that DBOC is out of compliance with the 1992 Multi-Agency Seal Protocol, or the 2008 SUP.



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More importantly, NMFS—the agency with jurisdiction under the Marine Mammal Protection Act to protect harbor seals—has never alleged that DBOC is out of compliance with the 1992 Multi-Agency Seal Protocol, and does not consider DBOC's long-standing boat transit patterns to cause any impacts to harbor seals during the pupping seal closure.

It is unsurprising that the Resource Agencies have long allowed oyster boats to access Beds 15, 17, and 20 during the March 1 to June 30 period. This is so because the Drakes Estero harbor seal haul out areas are approximately 600 yards from the point where DBOC's boats stop, a distance six times greater than the 100 yard buffer generally required by the 1992 Multi-Agency Protocol, and the 2008 SUP.

Furthermore, Mr. Moore notes that since 1992, the aquaculture sites have become even further removed from harbor seals using the "Lateral Channel" because "shallower water [in the western end of the "Lateral Channel"] has caused [the seals] to abandon the haul-out sites nearer to the aquaculture operations."¹ Attachment 1, Moore letter to Cave, at 2.

B. The 2008 Special Use Permit Does Not Contradict Operational Practice

The CCC's July 30 letter asserts that DBOC frequently has been in violation of the 2008 SUP's boat transit restrictions by accessing the "Lateral Channel" in Drakes Estero during the March 1 to June 30 harbor seal pupping season. The CCC bases this claim on its interpretation of Exhibit C of the 2008 SUP, which provides a "Drakes Estero Aquaculture and Harbor Seal Protection Protocol."

The CCC's contention that DBOC is out of compliance with the 2008 SUP turns on how the term "Lateral Channel" is defined in the 2008 SUP, and in practice.

¹ As the CCC is likely aware, harbor seals choose haul-out sites proximate to deep water, not shallow water. In a recent online journal, NMFS researchers noted that "[l]ower tides often expose rocky reefs, sandy beaches and mudflats that are favorable haul-out sites for seals because of isolation from land predators and *quick access to deep water.*" LONDON, J. M., J. M. Ver HOEF, S. J. JEFFRIES, M. M. LANCE, and P. L. BOVENG, "Haul-Out Behavior of Harbor Seals (*Phoca vitulina*) in Hood Canal, Washington, PLoS One, 7(6):e38180 (June 18, 2012) (emphasis added), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0038180>.



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At the time it was issued, the 2008 SUP did not disturb in any way the sixteen years of operational practice under the 1992 Multi-Agency Seal Protocol already in place with respect to where oyster boats travel on the western side of Drakes Estero during the harbor seal pupping season. For example, it did not define the key terms “Lateral Channel,” “Main Channel,” or “West Channel,” used in Exhibit C (the “Drakes Estero Aquaculture and Harbor Seal Protection Protocol”), despite the fact that an understanding of the geographic extent of these areas is critical to compliance. *See* Attachment 3, 2008 SUP, Exhibit C. Nor did the map included in Exhibit C to the 2008 SUP designate the geographic extent of the “Lateral Channel,” “Main Channel,” or “West Channel”—in fact, those areas were not even labeled on the map.

The four corners of the 2008 SUP provide no metrics for determining the geographic extent of the “Lateral Channel” in Drakes Estero, or for determining what constitutes a violation of the “Lateral Channel” under the Exhibit C “Drakes Estero Aquaculture and Harbor Seal Protection Protocol.” Had the NPS and DBOC intended to change sixteen years of operational practice, it was incumbent on the NPS to make that clear to DBOC in the 2008 SUP.

In fact, the record demonstrates no intent to change DBOC’s operational practice on the western side of Drakes Estero during harbor seal pupping season through the 2008 SUP.

Since 2008, NPS has never cited DBOC for failure to comply with the 2008 SUP or the 1992 Multi-Agency Seal Protocol, despite full and continuous knowledge of DBOC’s boat transit patterns from at least three different sources.

First, in 2008 as part of the SUP process, DBOC submitted a Boat Transit Map to NPS that demonstrated the year-round extent of its boat transit operations.² Attachment 4, DBOC

² The CCC received this map as part of the Consent Order process. The July 30 letter takes the position that the Boat Transit Map “did not address the necessary seasonal closures,” but that is not the case. *Id.* at 2. In fact, the Boat Transit Map shows DBOC’s operations year-round, and never purported to do anything else. CCC’s misunderstanding is a direct result of its divorce from operational practice in Drakes Estero. The annual harbor seal protection zones implemented with the Consent Order, and subsequently incorporated into the 2008 SUP, effectively closed the “Lateral Channel” to DBOC boats year-round because an harbor seal protection zone covers the intersection of the Main Channel and the “Lateral Channel,” and much of the “Lateral Channel” itself. When DBOC agreed to the annual harbor seal protection zones, it effectively agreed to operate with respect to the “Lateral Channel” as if it was harbor seal pupping season all year long.



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Boat Transit Map (2007). Second, NPS's secret camera program took over 281,000 photos during harbor seal pupping season from May 2007 through 2010, which documented DBOC's boat operations near the harbor seal protection zones. Finally, as part of the NPS Environmental Impact Statement ("EIS") preparation process, DBOC submitted GPS data detailing its boat transit operations in June 2010. This data also demonstrated the extent of DBOC boat transit, and was replicated into Figure ES-2 in the Draft EIS. *See* NPS Draft EIS, Fig. ES-2, Existing Conditions (Offshore Operations); Attachment 2, June 2010 Boat Map.

In response to this full and continuous knowledge of DBOC's boat transit patterns the NPS did . . . nothing. Why? Two decades of boat transit patterns under the 1992 Multi-Agency Seal Protocol, combined with the 2008 SUP's failure to effect any change to that operational practice, explains perfectly why NPS reacted as it did—DBOC has been and continues to be in full compliance with the harbor seal protocols.

The July 30 letter cites to a January 23, 2012, letter from NPS to DBOC, which states in relevant part that NPS interprets the term "Lateral Channel" in the 2008 SUP as "the entire channel between the Main Channel and West Channel." Attachment 5, Muldoon letter to DBOC at 1 (January 23, 2012). This letter is unhelpful, in that it uses undefined terms in an attempt to define an undefined term, and never relates to a map. Furthermore, it does nothing to explain how long-standing operational practice was changed by the 2008 SUP, if at all.

C. The Resource Agencies Could Easily Resolve Any Controversy With Readily Available Technology

Mr. Moore, the CDFG biologist responsible for managing aquaculture operations in Drakes Estero from 1988 until 2009 and a participant in the 1992 Multi-Agency Seal Protocol, explains that the westernmost extent of the "Lateral Channel" has always been undefined. Attachment 1, Moore letter at 2 ("In reality, there is no exact beginning of the western edge of the 'lateral channel,' whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map.").

In fact, Drakes Estero is a dynamic tidal environment where physical features like sand bar location, tidal height, current, wind speed, visibility, and water conditions are constantly in flux. Mr. Moore explains that some of the navigational difficulties associated with determining the location of the westernmost extent of the "Lateral Channel" boundary in Drakes Estero include tidal levels obscuring mudflat areas and algal bloom conditions. *Id.* at 2-3. Mr. Moore notes, "I am frankly quite amazed that the 'lateral channel' remains undefined and that no buoy or channel marker has been placed to provide a reference point." *Id.* at 3.



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Today, technology exists to enable DBOC to navigate its oyster boats with precision by using GPS navigational tools. In fact, DBOC uses GPS navigational tools routinely in its operations in Drakes Estero. Furthermore, physical markers designate the geographic extent of the annual harbor seal protection zones. The Resource Agencies—particularly NPS—could easily resolve any controversy with readily available technology.

D. DBOC Is In Compliance With the 2008 SUP and the Consent Order

The July 30 letter contends that DBOC has been in violation of the 2008 SUP's March 1 to June 30 harbor seal pupping protocol since approximately April 22, 2008, when the 2008 SUP came into effect, through March 5, 2012, when DBOC voluntarily agreed to suspend boat transit in the disputed area until this issue could be resolved. *Id.* at 2.

The CCC has no basis to contend that DBOC has been in violation of the 2008 SUP during the 2008, 2009, 2010, 2011, or 2012 harbor seal pupping seasons because the 2008 SUP does not disturb in any way operational practice for boat transit on the western side of Drakes Estero during the harbor seal pupping season. Furthermore, taken in context with the record, DBOC's interpretation of the harbor seal pupping season closure protocol is confirmed by Mr. Moore, the person most knowledgeable, as well as by NPS's failure to cite DBOC for non-compliance at any point.

More to the point, Mr. Moore's explanation that the 1992 Multi-Agency Seal Protocol was "meant to be an adaptive management tool with new input from operational experience revising the protocols," demonstrates why CCC's attempt to interpret the Protocol in absence of operational practice was doomed to fail from the outset. Attachment 1, Moore letter at 3. It also indicates why it was imperative that NPS clearly define key terms in the 2008 SUP if it intended to change long-standing operational practice under the 1992 Multi-Agency Seal Protocol.

E. The California Coastal Commission Lacks Jurisdiction to Duplicate or Exceed the California Department of Fish and Game's Long-Standing Program for Protecting Harbor Seals In Drakes Estero

Section 30411(a) of the Coastal Act recognizes that the Fish and Game Commission and CDFG are "the principal state agencies responsible for the establishment and control of wildlife and fishery management programs", and prohibits the CCC from establishing or imposing "any controls with respect thereto that duplicate or exceed regulatory controls established by [CDFG or the Fish and Game Commission] pursuant to specific statutory requirements or authorization." Cal. Pub. Res. Code § 30411(a).



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The July 30 letter continues to assert that the CCC—despite the CDFG's long-standing establishment and implementation of a program to prevent aquaculture operations in Drakes Estero from impacting harbor seals—has jurisdiction to duplicate and exceed the controls in the CDFG program. There are three key problems with this position.

First, the July 30 letter asserts that Section 30411(a) does not apply because “aquaculture operations are not wildlife or fisheries management programs” within the meaning of Section 30411(a). *Id.* at 4. This frames the issue exactly in reverse—it is not DBOC's aquaculture operations that are the focus when applying Section 30411(a), but rather, CDFG's actions as the principle state agency responsible for wildlife management programs. Here, the relevant CDFG action is the 1992 Multi-Agency Seal Protocol and over twenty years of CDFG implementation of the same, which was designed to “minimize the disturbance to harbor seals resulting from [] oystering operations.” Attachment 6, 1992 Multi-Agency Seal Protocol.

The CCC cannot escape Section 30411(a)'s exclusionary effect because the 1992 Multi-Agency Seal Protocol is a wildlife management program, and CDFG acted within its statutory authority when it entered into the Protocol.

It is axiomatic that CDFG's wildlife management programs include those programs that are designed to control human activities to protect wildlife. This is so because CDFG's mission is extremely broad. *See* Fish & Game Code § 1802 (giving CDFG jurisdiction over the “conservation, protection, and management of fish, wildlife, native plants, and habitat” and designating CDFG as the “trustee for fish and wildlife resources”). When it entered into the 1992 Multi-Agency Seal Protocol, CDFG was clearly acting within its capacity as the State trustee to protect wildlife in Drakes Estero.

Furthermore, the Fish and Game Code includes explicit statutory provisions directing the CDFG and the Fish and Game Commission to regulate aquaculture for the benefit of wildlife. *See* Cal. Fish & Game Code §§ 15005(a) (“[w]hen necessary for the protection of native wildlife, the [Fish and Game Commission] may regulate the transportation, purchase, possession, and sale of specific aquaculture products”); 15101(b) (authorizing CDFG to establish procedures to “ensure the [aquaculture] operation will not be detrimental to native wildlife”); 15102 (authorizing CDFG to “prohibit an aquaculture operation or the culturing of any species at any location where it is determined it would be detrimental to adjacent native wildlife”); 15500-15516 (scheme for regulating aquaculture to prevent diseases and parasites).



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By entering into the 1992 Multi-Agency Seal Protocol and implementing the same for more than twenty years to protect harbor seals in Drakes Estero, the CDFG established controls that fall squarely within the scope of Section 30411(a) because the CDFG was acting: (1) within its role as the trustee for wildlife, and (2) pursuant to explicit statutory authority in the Fish and Game Code. The CCC has no discretion to exceed or duplicate those controls. Notably, the fact that the CCC was not included in the 1992 Multi-Agency Seal Protocol serves as a pointed demonstration of CCC's lack of jurisdiction in this regard.

Second, the July 30 letter's assertion that Section 30411(a) does not apply because the Consent Order "is not directly regulating or managing the seals in any way, but rather is regulating DBOC's aquaculture operations," makes little sense. *Id.* at 4. Neither the CCC nor the CDFG have any authority to manage or regulate harbor seals—only the NMFS has that authority under the Marine Mammal Protection Act.

Third, the July 30 letter's claim without citation to authority to regulate DBOC's operations fails to read Section 30411 as a whole by ignoring the one portion of Section 30411 that does refer to the CCC's role with respect to aquaculture. When it comes to aquaculture, Section 30411(c) further isolates the CCC's authority to coastal planning responsibilities. Section 30411(c) explains that aquaculture is a "coastal-dependent use which should be encouraged" and that the "[CCC], and where appropriate, local governments shall, *consistent with the coastal planning requirements of this division*, provide for as many coastal sites identified by the Department of Fish and Game for any uses that are consistent with the policies of Chapter 3 (commencing with Section 30200) of this division." *Id.* (emphasis added). This planning authority cannot be read as a blanket grant of authority over aquaculture operations.

In fact, the July 30 letter's assertion of jurisdiction over DBOC's aquaculture operations flies in the face of CDFG's long-standing control over aquaculture operations in Drakes Estero. CDFG has consistently regulated aquaculture in Drakes Estero since well before the enactment of the California Coastal Act and the creation of Point Reyes National Seashore. The CDFG has continually expressed its intent to continue to regulate aquaculture into the future. Not only did the CDFG issue new state water bottom leases that run to 2029, but also the CDFG recently wrote that "[c]orrespondence between [CDFG and NPS] shortly after the conveyance [of bottom lands in Drakes Estero to the U.S. in 1965] strongly suggests that [CDFG and NPS] then believed that the State's reservation of fishing rights included the right to lease bottom lands at Drakes Estero indefinitely for shellfish cultivation." Attachment 7, CDFG Director Bonham to Superintendent Muldoon at 1 (October 10, 2012). The letter further urged continued cooperation between NPS and CDFG to continue to manage the resource into the future. *Id.*



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The July 30 letter attempts to bootstrap jurisdiction by turning the analysis under Section 30411(a) on its head. The CDFG's twenty year history of protecting harbor seals in Drakes Estero pursuant to the 1992 Multi-Agency Seal Protocol, along with its express statutory authority to do so, excludes any attempt by the CCC to duplicate or exceed those controls.

F. No Path Forward for the CCC at This Time

DBOC recognizes the difficulties the CCC has encountered when attempting to analyze the 2008 SUP and the 1992 Multi-Agency Seal Protocol due to the fact that the CCC is not a party to either agreement, never consulted with CDFG, NMFS, or CDPH, and as a third party observer, failed to gain the benefit of operational practice surrounding either agreement.

In the course of the communications with the NPS, however, it has become clear that the NPS does not consider the 1992 Multi-Agency Seal Protocol to be in effect, and that the 2008 SUP lacks clarity with respect to permitted boat transit during the harbor seal pupping season.

That has been a surprise to the other parties to the 1992 Multi-Agency Seal Protocol, including NMFS, CDFG, and CDPH. NPS's failure to coordinate with these other agencies has also caused inadvertent conflict. For example, as noted in the July 30 letter, NPS and CDPH are currently attempting to resolve a NPS-created conflict over DBOC's monthly access to water sampling stations to take public health water samples in the "Lateral Channel" during the harbor seal pupping season. This is so because NPS unilaterally prohibited DBOC access to CDPH sampling stations that DBOC is required to monitor year-round to protect public health.

Ultimately, the geographic extent of the harbor seal pupping closure in Drakes Estero is an issue for the Resource Agencies—NPS, NMFS, CDFG, and CDPH—to resolve together with DBOC. While DBOC stands ready to participate with the agencies on the issue, it sees no formal role for CCC in those discussions beyond that of an interested observer.

II. DBOC REQUESTS THAT THE CCC SHARE THE AQUACULTURE DEBRIS FROM DRAKES ESTERO IN ITS POSSESSION WITH DBOC

The July 30 letter asserts that DBOC's 2008 Debris Removal Plan "has proven to be insufficient, and that both *new and old debris* from the aquaculture operations need to be addressed", and suggests possible violations of Sections 3.2.2 and 3.2.3 of the Consent Order. *Id.* at 3 (emphasis added). Respectfully, DBOC cannot respond until the CCC shares what marine debris it has obtained, and where and when the debris was found. It is especially important for the CCC to share the marine debris it has recovered in order for DBOC to



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determine whether any “new” debris (i.e., originating from DBOC’s current aquaculture operations) has been found.

DBOC cannot agree with the July 30 letter’s assertion that the “distinction [DBOC has] made between *new and legacy debris is irrelevant . . .*” *Id.* at 3 (emphasis added). This is so because DBOC operates under a self-imposed “zero loss” policy with respect to the aquaculture materials DBOC uses in Drakes Estero. DBOC takes this commitment seriously, and has designed its operations to prevent loss of aquaculture material into the marine environment. If CCC has evidence (in the form of “new” aquaculture debris) that DBOC is not succeeding in achieving its goal, DBOC can only evaluate and correct its operational practices to prevent future loss if CCC shares the marine debris it has recovered with DBOC.

As extensively documented in DBOC’s February 27, 2012, letter to the CCC, DBOC does not dispute that JOC’s operations permitted the loss of a substantial amount of aquaculture materials into the marine environment. For example, it is not uncommon after a storm event for DBOC employees to find aquaculture materials that were last used in the 1990s—nearly twenty years ago—on the shores of Drakes Estero. *See also* Attachment 1, Moore letter at 1 (describing JOC operational losses of aquaculture materials and process by which such materials are deposited on the shores of Drakes Estero years after they were lost).

Setting aside for the moment CCC’s assertion that all historic aquaculture debris is DBOC’s legal obligation, DBOC’s revised Debris Removal Plan (currently under CCC review) evidences DBOC’s commitment to clean up marine debris—regardless of origin—in Drakes Estero. DBOC has spent hundreds of thousands of dollars to remove historic aquaculture operations and to clean up debris put into the marine environment by others. In fact, much of the marine debris that DBOC collects on a regular basis does not come from historic aquaculture activities, but rather, has been deposited into the marine environment through other processes.

To move this issue forward, DBOC looks forward to working with the CCC to make sure that DBOC’s extensive marine debris recovery activities provide the information necessary for CCC to appreciate the time and attention DBOC invests on a regular basis to keeping the Estero clean. In particular, Kevin and Nancy Lunny will be in touch to arrange a mutually convenient time to meet to evaluate the debris in the CCC’s possession.



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III. DBOC HAS NOT PERFORMED ANY "AFTER THE FACT" DEVELOPMENT THAT HAS NOT BEEN LONG ACKNOWLEDGED BY THE CCC

The July 30 letter asserts that a May 7, 2012, DBOC letter to Superintendent Muldoon admits that DBOC has performed unpermitted development activities after the 2007 Consent Order came into being. *Id.* at 5. It also implies that the May 7 letter contained new information that the CCC has never received before. *Id.*

DBOC regrets that its May 7 letter inadvertently caused some concern for CCC permit staff. DBOC's May 7 letter responded to Superintendent Muldoon's request for more information about DBOC's ongoing activities, and also informed her that DBOC has agreed to limit its Coastal Development Permit ("CDP") application with the CCC to its existing activities. Attachment 8, DBOC letter to Muldoon at 1 (May 7, 2012).

DBOC regrets that it failed to make clear in its May 7 letter that the CCC has long had knowledge of the activities described in Items 39 – 47, which the CCC describes as "after the fact" development. Items 39 – 45 in the May 7 letter recount activities completed at the direction of the NPS, the County of Marin, and/or the CCC in the period immediately after DBOC took over the oyster farm. These activities preceded the Consent Order, and were actually what spurred the process that the CCC and DBOC have been engaged in since 2006, which resulted in the Consent Order and DBOC's long-pending CDP application. Item 47—installation of several new picnic tables—also preceded the Consent Order.

Only one activity described in the May 7 letter occurred after the Consent Order, and the CCC has long had knowledge of the event. With respect to Item 46, on March 5, 2008, DBOC experienced an electrical emergency involving an underground conduit. In the process of attempting to perform an emergency replacement of the conduit, DBOC dug a 12" x 18" x 80' trench. As stated in the May 7 letter, DBOC did not believe that the emergency repair constituted "new development" under the Coastal Act. CCC enforcement staff immediately informed DBOC that it could not perform the work without a permit. DBOC stopped the work before it was completed and backfilled the trench as directed by the CCC. DBOC complied fully with CCC enforcement at the time, and paid the one-day violation fee assessed under the Consent Order.

To be clear: DBOC's May 7 letter did not propose any new activities, or describe any past activities of which the CCC has not long been aware. DBOC is in compliance with the Consent Order. Nothing in the May 7 letter changes that fact.



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The July 30 letter notes that CCC permit staff will be responding with a separate letter, however, DBOC believes that this response should resolve the issue.

IV. NO NEW ENFORCEMENT ACTION IS WARRANTED

The July 30 letter raises the specter of additional enforcement action by the CCC for alleged violations of the Consent Order. As demonstrated in this response, no such action is warranted because DBOC is not in violation of the Consent Order.

Furthermore, the July 30 letter closes by asking for "a proposal for the resolution of the outstanding stipulated penalties . . ." *Id.* at 6. DBOC submitted its detailed explanation of the issues surrounding its inadvertent placement of clams by letter on December 21, 2009, and DBOC's counsel, Zachary Walton, submitted further response by letter on January 19, 2010. DBOC continues to await the CCC's response to those letters.

Please do not hesitate to contact me if you have any questions about the foregoing. Kevin and Nancy Lunny will be in touch soon to arrange a mutually convenient opportunity for them to view the Drakes Estero marine debris in your possession.

~~Very truly yours,~~

Ryan R. Waterman

Attachments

cc: Kevin and Nancy Lunny, Drakes Bay Oyster Company
Zachary Walton, SSL Law Firm
Charles Lester, CCC, Executive Director
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Lisa Haage, CCC, Chief of Enforcement
Alex Helperin, CCC, Senior Staff Counsel
Jo Ginsberg, CCC, Enforcement Analyst
Cassidy Teufel, CCC, Coastal Program Analyst
Senator Diane Feinstein
Cicely Muldoon, Superintendent, Point Reyes National Seashore



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Kirsten Ramey, CDFG, Marine Aquaculture Coordinator
Diane Windham, NOAA NMFS, Southwest Region Aquaculture Coordinator
Gregg Langlois, CDPH, Senior Environmental Scientist

Attachment 1

Nancy Cave
Northern California Enforcement Program Supervisor
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

October 3, 2012

Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11

Dear Ms. Cave:

I would like to take this opportunity to provide some historical background on both marine debris in Drakes Estero and that pertaining to the 1992 Interagency Meeting that led to the development of protocols contained in the Record of Agreement regarding the timing and use of various areas in Drakes Estero with regard to oyster operations as practiced by the Johnson Oyster Company (JOC) and Drakes Bay Oyster Company (DBOC).

From 1988 until 2009, I was the Department of Fish and Game (CDFG) biologist managing aquaculture operations in Drakes Estero and the Agency person with the longest continuous involvement with aquaculture operations in Drakes Estero. At the time of my retirement, I was the CDFG Marine Region Aquaculture Coordinator managing all the state's marine aquaculture.

Marine Debris in Drakes Estero

By 1991, CDFG had received numerous letters about marine debris in Drakes Estero from concerned citizens forwarded to CDFG by then PRNS Superintendent John Sansing. I was actively working with JOC on containment, clean-up and removal of oyster cultivation materials. Many years of oyster culture by JOC using methods that utilized long-lasting plastics and polyvinyl products (PVC pipe and coffee can lids) had created a persistent problem (legacy debris). Neither of these products floats, so escaped materials sink to the bottom and get moved by currents or get buried. Waves from storms, winds, and strong tidal currents all work to unearth buried materials and wash them ashore where they are continually found even today.

JOC regularly conducted clean-up of debris on the shores of Drakes Estero and took steps to contain and minimize loss of oyster culture growing structure materials. Additionally, they were also looking for new ways to grow and harvest their oysters that would not release these products into the environment.

DBOC has moved to new culture methods and containment at harvest and regularly picks-up marine debris from beaches in the Estero, when they are not prohibited by seasonal and other closures. Materials used for culture are not cheap, so there is also a financial incentive to contain and re-use these materials. Documented collection efforts and a categorization of collected materials would provide evidence of compliance with mandated clean-up efforts. It would also provide a baseline to look at the decline of legacy materials over time. Also, it may surprisingly show, as JOC found, that there is a fair amount of plastics, foam from buoys, etc. that enters Drakes Estero from the ocean and also from PRNS visitors.

Harbor Seal Pupping Season Closure

In late 1991, allegations of take under terms of the Marine Mammal Protection Act (MMPA) of harbor seals by JOC and their oyster operations led to the involvement of NOAA National Marine Fisheries Service (NMFS). Two meetings were held, one inter-agency meeting with NMFS, NPS, CDFG and CDHS (now California Department of Public Health) on December 9, 1991, and a follow-up meeting with the Agency personnel and JOC on January 15, 1992. NMFS Enforcement did not pursue action under the MMPA and felt that JOC's normal operations did not constitute a take. NMFS Enforcement did direct the parties (NPS, CDFG and JOC) to work together to develop a mutual plan for minimizing the disturbance to harbor seals from aquaculture operations by JOC in Drakes Estero.

This Record of Agreement (see attached) resulted in the closure of the "lateral channel" during harbor seal pupping season (March 15- June 1). The "lateral channel" was generally defined as the channel running between the main channel and the western channel and illustrated as such on a map included in correspondence from NPS to CDFG on April 28, 1992. This map shows the maximum mudflat area exposed on very low tides (less than -1.0 ft.) in Drakes Estero. However, the vast majority of the time these areas are under water and not visible on the surface.

Since the Record of Agreement was finalized, JOC oyster farm employees have accessed the oyster beds adjacent to the lateral channel from the western channel during closures and year around. In reality, there is no exact beginning of the western edge of the "lateral channel," whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map. There was not the GPS or GIS capability available to mark, using latitude and longitude, this undefined point in 1992. Accordingly, JOC employees landed at the western "edge" of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.

This worked for 15 years since complaints from NPS about harbor seal disturbance ceased. As a party to the Record of Agreement, CDFG tried to ensure that JOC operated within the agreed upon protocols.

When DBOC took over the lease from JOC, I provided Mr. Lunny with a copy of the Record of Agreement and made onsite visits to the lateral channel area with Mr. Lunny and DBOC employees to indicate the permissible extent of access during the harbor seal pupping season. DBOC's use of this area is essentially in the same manner (stocking, working and harvesting) as JOC's except with less use of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations. If there had been complaints or evidence of adverse impacts, CDFG would have, with input from parties to the Record of Agreement, defined the exact location and placed a buoy or channel marker to define the westernmost permissible extent of access to the "lateral channel" area.

The shallowing of the western end of the lateral channel since 1992 has provided additional protection to harbor seals using the lateral channel since the shallower water has caused them to abandon the haul-out sites nearer to the aquaculture operations. The Marine Mammal Commission found no scientific evidence or basis to suggest the current usage of the western edge of the lateral channel, as practiced by DBOC and formerly JOC, to work Barries Bar is causing any adverse impacts to the harbor seals. Additionally, DBOC has shown good faith and adherence to the protocols in both the Record of Agreement and the

2008 Special Use Permit (SUP), and did not violate the terms of either with regard to not using the main channel during closure as shown in the 250,000 photographs taken by NPS over three years.

The Record of Agreement was meant to be an adaptive management tool with new input from operational experience revising the protocols. The technology now exists (aerial photography, Google Earth) and has been used to view accustomed usage patterns of DBOC's oyster workers in the lateral channel area and place them within the currently undefined "lateral channel" boundary. It is very easy to determine the position of an object from an altitude of several thousand feet but much more difficult in a large embayment from a boat at high tide with an algal bloom limiting water visibility. The reason there are channel markers and buoys in the marine environment is because it is very difficult to define your position on open water. It is also the reason that the CDPH has buoys for their water quality sampling stations so the samples are taken from the same place over time.

I am frankly quite amazed that the "lateral channel" remains undefined and that no buoy or channel marker has been placed to provide a reference point. I cannot imagine that in a terrestrial setting that a sign or fence would not have been posted to define the closure point or area.

DBOC has not violated the "lateral channel" boundary since they have been going about their accustomed normal operating procedures as per the Record of Agreement and in the same manner as JOC did in the past.

Proposing a Solution

A sensible solution would be to convene all the parties (CDFG, NPS, NMFS, DBOC) to the original Record of Agreement, and addressing this apparent need to define the exact boundaries for the "lateral channel." An additional item at this meeting might be for the NPS to provide the exact coordinates for the corners of the harbor seal protection polygons.

It seems that there is currently an adversarial component to the agency interactions that is not in the spirit of fostering working relationships that produce products such as the Record of Agreement. While I worked for CDFG, I tried to keep aquaculturists operating within the laws and regulations pertaining to aquaculture and their lease provisions. I also provided help in compliance if I had the resources or tools to assist them. If my experience and long history with aquaculture can be of any assistance, please feel free to contact me.

Thank You.

Sincerely,



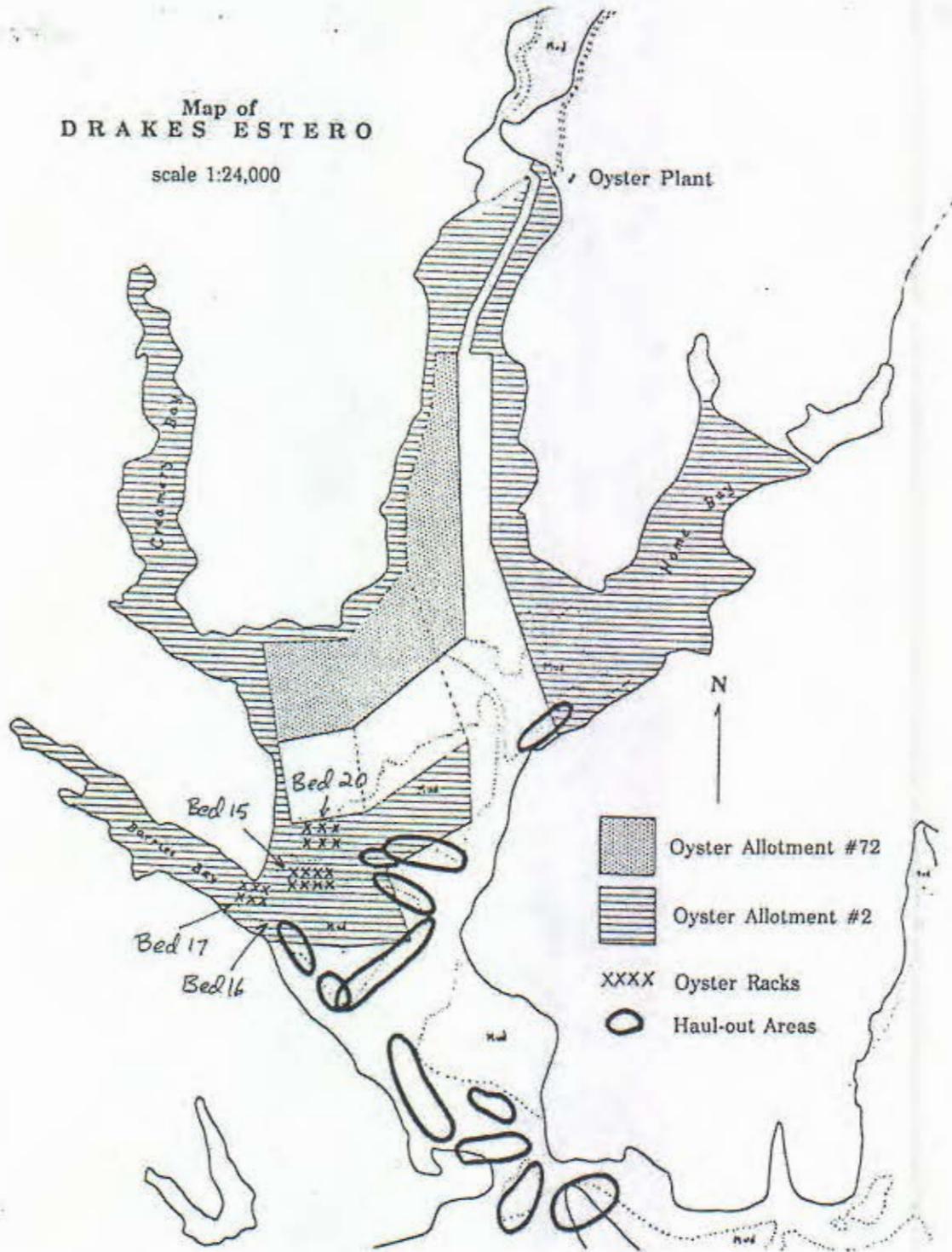
Thomas Moore
Retired CDFG Marine Aquaculture Coordinator
1136 Duer Rd.
Sebastopol, CA 95472
707-480-4939
tmoore2003@sbcglobal.net

May 15, 1992

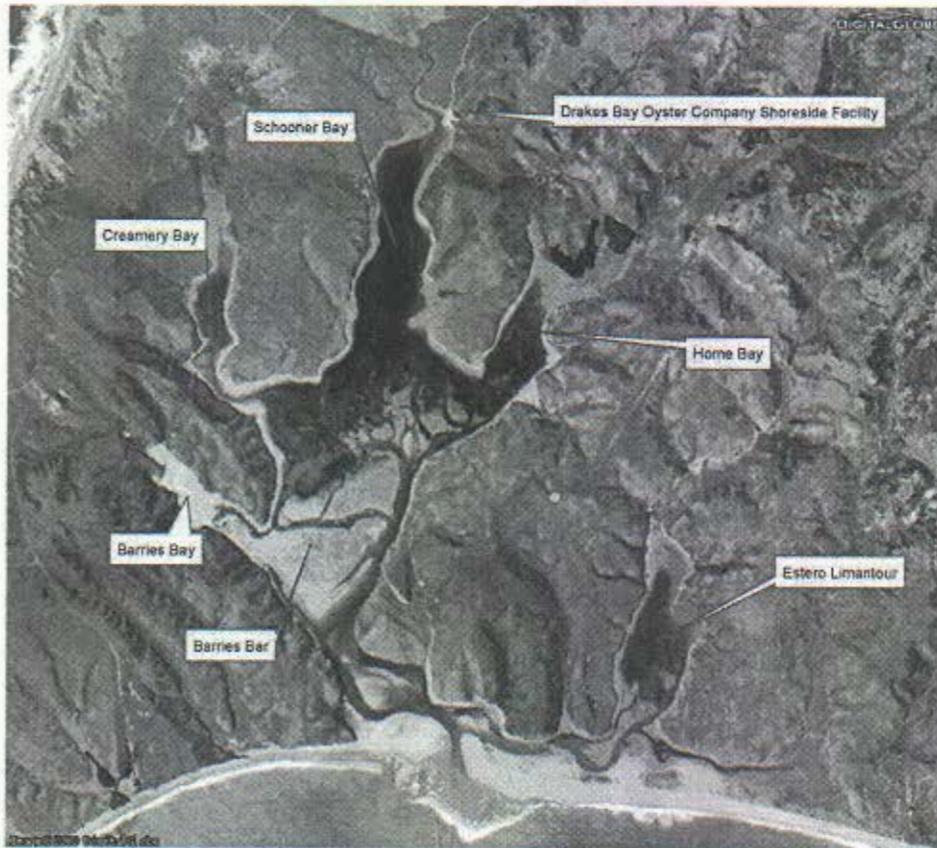
Record of Agreement
Regarding
Drake's Estero Oyster Farming
and
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

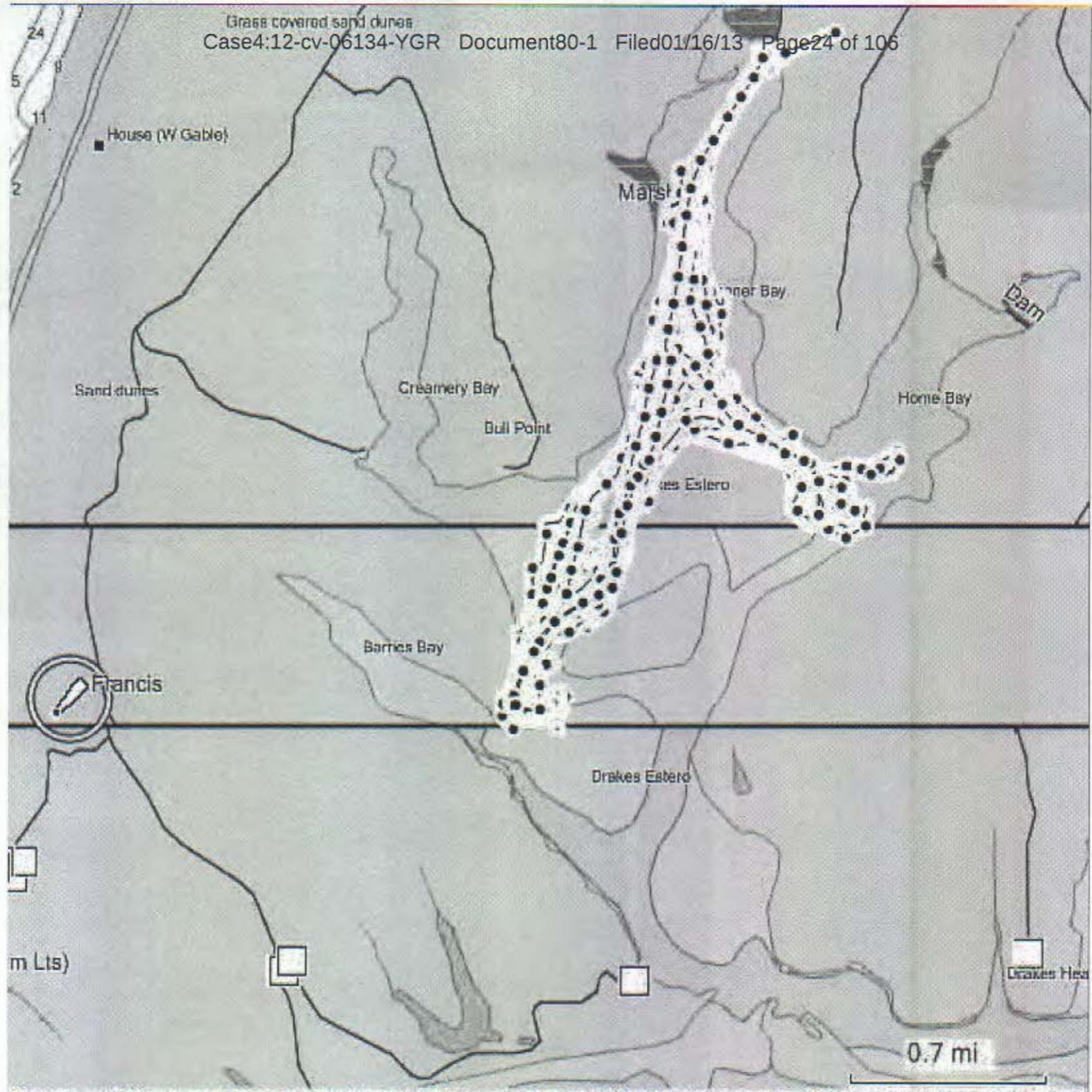
- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.



Drakes Estero and Estero Limantour



Attachment 2



Attachment 3

Form 10-114
Rev. Jan. 00

Page 1 of 17

UNITED STATES DEPARTMENT OF THE INTERIOR
National Park Service
Special Use Permit

Name of Use: Aquaculture

Date Permit Reviewed 2008
Reviewed 20
Reviewed 20
Expires November 30, 2012

Long Term X
Short Term

Permit # MISC-8530-6000-8002

Type Park Code No. #

Point Reyes National Seashore

Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937
(415) 669-1149

is hereby authorized for a period ("Term") commencing on April, 2008 ("Commencement Date") and terminating on November 30, 2012 ("Expiration Date") to use the following described land, improvements, and waters in the following area:

the lands and improvements at Drakes Bay Estero at the former Johnson's Oyster Site consisting of approximately 1.1 acres of land and improvements designated as the "SUP Area" on the map attached hereto as Exhibit B ("Drake's Estero Oysters - SUP & ROP"); the waters designated as the "SUP Area" on the map attached hereto as Exhibit A ("Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area"); the land designated as the "Well Area" on the map attached hereto as Exhibit D ("Drakes Bay Oyster Company Well Area"); and the land designated as the "Sewage Area" on the map attached hereto as Exhibit E ("Drakes Bay Oyster Company Sewage Area"). Collectively, the areas so designated shall be referred to as the "Premises." The Premises governed by this Permit do not include the area designated as the ROP Area on the map attached hereto as Exhibit B.

For the purpose(s) of:

Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit B for the purpose of processing shellfish, the interpretation of shellfish cultivation to the visiting public, and residential purposes reasonably incidental thereto. Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit A for the purpose of shellfish cultivation. Use of the area designated as the "Well Area" on the map attached hereto as Exhibit D for the purpose of supplying water for the Drakes Bay Oyster Company facilities using Permittee well, pump, and pipelines. Use of the area designated as the "Sewage Area" on the map attached hereto as Exhibit E for the purpose of use and maintenance of existing sewage pipeline and sewage leachfield to service the Drakes Bay Oyster Company facilities. Collectively, the uses set forth in this paragraph shall be referred to as the "Permitted Uses."

Authorizing legislation or other authority (RE-DO-53): 16 U.S.C. 1, 1a-1, 3 & 459c; the Reservation of Use and Occupancy.

NEPA & NHPA Compliance: NEPA compliance pending

PERFORMANCE BOND: Required Not Required X Amount:

LIABILITY INSURANCE: Required X Not Required Amount: As set forth in Article 15 of this Permit.

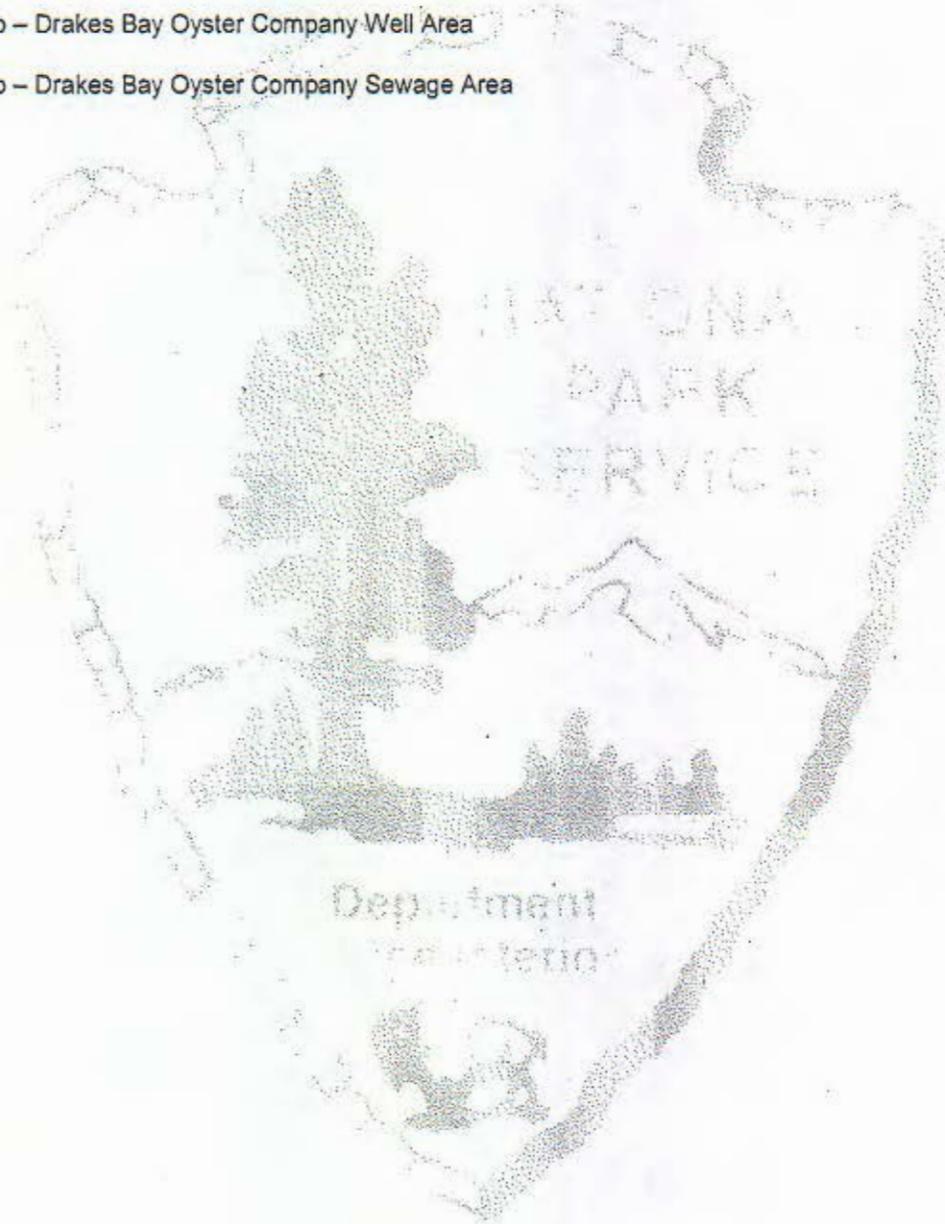
ISSUANCE of this Permit is subject to the terms, covenants, obligations, and reservations, expressed or implied herein and to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of **\$2,800.00** per year, plus an amount to be determined by appraisal for the use of the Sewage Area and the Well Area including water use.

PERMITTEE: [Signature] Drakes Bay Oyster Company 4/22/08
Signature Organization Date

Authorizing Official: [Signature] George Turnbull 4/22/08
Signature Deputy Regional Director Date

LIST OF EXHIBITS

- EXHIBIT A: Map – Drake’s Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area
- EXHIBIT B: Map – Drake’s Estero Oysters – SUP & ROP
- EXHIBIT C: Drakes Estero Aquaculture and Harbor Seal Protection Protocol
- EXHIBIT D: Map – Drakes Bay Oyster Company Well Area
- EXHIBIT E: Map – Drakes Bay Oyster Company Sewage Area



CONDITIONS OF THIS PERMIT

1) DEFINITIONS

As used in this Permit, the following terms shall have the following meanings:

- a) "Agency" means any agency, department, commission, board, bureau, office or other governmental authority having jurisdiction.
- b) "Applicable Laws" includes, without limitation all present and future statutes, regulations, requirements, Environmental Requirements, guidelines, judgments, or orders of any Agency or judicial body, whether now existing or hereafter established, relating to or affecting the Premises or the use or occupancy of the Premises.
- c) "Commencement Date" is as defined on the Cover Page of this Permit.
- d) "Cyclic Maintenance" means (i) the performance by Permittee of all repairs, maintenance, or replacement-in-kind necessary to maintain the Premises and the existing improvements thereon in good order, condition, and repair; (ii) housekeeping and routine and periodic work scheduled to mitigate wear and deterioration without materially altering the appearance of the Premises; (iii) the repair or replacement-in-kind of broken or worn-out elements, parts or surfaces so as to maintain the existing appearance of the Premises; and (iv) scheduled inspections of all building systems on the Premises.
- e) "Default" means Permittee's failure to keep and perform any of the Provisions of this Permit.
- f) "Environmental Requirements" means, without limitation, all standards or requirements relating to the protection of human health or the environment such as:
 - a. standards or requirements pertaining to the reporting, permitting, management, monitoring, investigation or remediation of emissions, discharges, releases, or threatened emissions, releases or discharges of Hazardous Materials into the air, surface water, groundwater, or land;
 - b. standards or requirements relating to the manufacture, handling, treatment, storage, disposal, or transport of Hazardous Materials; and
 - c. standards or requirements pertaining to the health and safety of employees or the public.
- g) "Expiration Date" is as defined on the Cover Page of this Permit.
- h) "Hazardous Materials" means, without limitation, any material or substance, whether solid, liquid, or gaseous in nature,
 - a. the presence of which requires reporting, permitting, management, monitoring, investigation or remediation under any Environmental Requirement;
 - b. that is or becomes defined as a "hazardous waste," "extremely hazardous waste," "restricted hazardous waste," "hazardous substance," "pollutant," "discharge," "waste," "contaminant," or "toxic contaminant" under any Environmental Requirement, or any above-ground or underground storage containers for the foregoing;
 - c. that is toxic, explosive, corrosive, flammable, infectious, radioactive, reactive, carcinogenic, mutagenic, or otherwise hazardous to human health or the environment and is or becomes regulated under any Environmental Requirement;
 - d. that contains gasoline, diesel fuel or other petroleum hydrocarbons or derivatives or volatile organic compounds, or is an above-ground or underground storage container for same;

- e. that contains polychlorinated biphenyls (PCBs), asbestos, asbestos-containing materials or urea formaldehyde foam insulation; or
- f. that contains radon gas.
- i) "Hazardous Materials Occurrence" means any use, generation, treatment, keeping, storage, transport, release, disposal, migration, or discharge of any Hazardous Materials from, on, under or into the Premises or Point Reyes National Seashore ("Point Reyes") that causes any environmental contamination.
- j) "Improvements or Alterations" means any construction that does not fall within the definition of Cyclic Maintenance.
- k) "NPS" means the management officials in charge of the administration and operation of Point Reyes, including the Superintendent or his/her designee(s).
- l) "Park" means, without limitation, all lands, waters and structures within the legislative boundaries of the Point Reyes National Seashore, all natural and cultural resources within such boundaries, and any other property within such boundaries belonging to Point Reyes. As appropriate given the context, this term also includes the visiting public and/or Point Reyes employees.
- m) "Permit" means this instrument which contains those certain termination and revocation provisions as provided for herein.
- n) "Permitted Uses" is as defined on the Cover Page of this Permit.
- o) "Personal Property" means all furniture, fixtures, equipment, appliances and apparatus placed on the Premises that neither are attached to nor form a part of the Premises. Personal Property also includes any trailers, modular units, and/or temporary structures owned by Permittee.
- p) "Point Reyes" means Point Reyes National Seashore.
- q) "Premises" is as defined on the Cover Page of this Permit.
- r) "Provision" shall mean any term, agreement, covenant, condition or provision of this Permit or any combination of the foregoing.
- s) "ROP" or "Reservation of Use and Occupancy" means the Reservation of Use and Occupancy purchased by the Permittee in 2005. In 1972 the United States of America purchased Johnson Oyster Company's property, subject to a Reservation of Use and Occupancy on approximately 1.5 of those acres for a period of forty (40) years. This Reservation of Use and Occupancy expires on November 30, 2012.
- t) "SUP" means this Permit.
- u) "Term" is as defined on the Cover Page of this Permit.
- v) "Termination Date" means the Expiration Date or such earlier date as this Permit is terminated or revoked pursuant to any Provision of this Permit.

2) GENERAL CONDITIONS

- a) The Permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with all Applicable Laws.
- b) Permit and Approvals – Except as otherwise provided in this Permit, Permittee shall be responsible for obtaining, at its sole cost and expense, all necessary permits, approvals or other authorizations relating to Permittee's use and occupancy of the Premises.

- c) Damages - The Permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the Permittee is authorized to make of the land and areas described in this Permit.
- d) Benefit - Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this Permit or derive, either directly or indirectly any pecuniary benefits to arise therefrom; Provided, however, that nothing herein contained shall be construed to extend to any incorporated company if the Permit be for the benefit of such corporation.
- e) Assignment and Subletting - This Permit may not be transferred or assigned without the consent of the Permittee, in writing. Permittee shall not sublet the Premises or any part thereof or any property thereon, nor grant any interest, privilege or license whatsoever in connection with this Permit without the prior written approval of the Permittee.
- f) Revocation - This Permit may be terminated upon Default or at the discretion of the Permittee.
- g) The Permittee is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(4)]

3) USE OF PREMISES

- a) Permittee is authorized to use the Premises only for the Permitted Uses.
- b) Permittee shall not engage in any activity that may be dangerous or harmful to persons, property, or the Park; that constitutes or results in waste or unreasonable annoyance (including, without limitation, signage and the use of loudspeakers or sound or light apparatus that could disturb park visitors and wildlife outside the Premises); that in any manner causes or results in a nuisance; or that is of a nature that it involves a substantial hazard, such as the manufacture or use of explosives, chemicals or products that may explode.
- c) The Parties hereby acknowledge and agree that Permittee's covenant that the Premises shall be used as set forth in this Article 3 is material consideration for Permittee's agreement to enter into this Permit. The Parties further acknowledge and agree that any violation of said covenant shall constitute a Default under this Permit and that Permittee may inspect the premises at any time.
- d) This Permit is subject to the right of the NPS to establish trails and other improvements and betterments over, upon, or through the Premises and further to the use by travelers and others of such established or existing roads and trails. The Permittee understands that occasional park visitors are authorized to walk, use non-motorized watercraft, or hike in the various areas included in this Permit even though no trails are formally established.
- e) Permittee reserves the right for Permittee, its employees, contractors and agents to enter and to permit any Agency to enter upon the Premises for the purposes of inspection, inventory or when otherwise deemed appropriate by the Permittee for the protection of the interests of Permittee, including Permittee's interests in any natural or cultural resources located on, in or under the Premises.
- f) Permittee reserves the right at any time to close to travel any of its lands, to erect and maintain gates at any point thereon, to regulate or prevent traffic of any kind thereon, to prescribe the methods of use thereof, and to maintain complete dominion over the same; provided, however, that at all times during the Term, Permittee shall provide Permittee and Permittee's invitees with reasonable access to the Premises subject only to interruptions caused by necessary maintenance or administrative operations or by matters beyond Permittee's control.
- g) Permittee hereby waives any claim for damages for any injury, inconvenience to or interference with Permittee's use and occupancy of the Premises, any loss of occupancy or quiet enjoyment of the Premises, or any other loss occasioned by Permittee's exercise of its rights under this Article 3 except to the extent that the damages, expenses, claims or suits result from the willful misconduct or gross negligence of Permittee, its employees, contractors or agents; provided, further, that Permittee shall be liable only to the extent such claims are allowed

under the Federal Tort Claims Act.

- h) Members of the general public visiting the Drakes Bay Oyster Company operation may park in the adjacent NPS parking area and walk over to the SUP or ROP areas.
- i) While Permittee is permitted to use and operate motorized watercraft in Drakes Estero for the purpose of conducting daily business operations, which can include occasional inspections required by Agencies, no other use of Permittee's motorized watercraft is authorized. No motorized watercraft may enter the designated wilderness boundary (See "Existing Wilderness" on map attached hereto as Exhibit A). To protect water quality in the Estero, any additional or replacement boat motors obtained by Permittee must be four stroke motors.
- j) Due to a lack of adequate parking space and restroom facilities for the public, barbecuing is not permitted in the Special Use Permit Area. To comply with this paragraph, Permittee will not encourage barbecuing in the SUP Area. Picnic tables will be provided by the NPS at the adjacent parking area.
- k) Unauthorized discharge into the estuary is prohibited. This prohibition includes any discharge from processing facilities. Notwithstanding the foregoing, discharge of oyster wash water from dock and from hatchery operations is allowed if authorized by relevant Agencies.
- l) In order to ensure public health and safety, Permittee will ensure that Permittee and Permittee's officers, agents, employees, and contractors comply with Applicable Laws regarding pets, including the NPS regulation at 36 C.F.R. § 2.15.
- m) In order to ensure public health and safety, Permittee shall allow all appropriate Federal, State and/ or County agencies; including the United States Department of Health and Human Services, the State of California Department of Health Services and Marin County Community Development Agency Environmental Health Services, to conduct inspections on a routine basis.

4) SPECIAL PERMIT CONDITIONS

- a) If Permittee and Permitter disagree about an issue related to this Permit, they will first make a good faith effort to resolve such issue at the Park level. If they are unable to resolve the issue at the Park level, Permittee may request a review of the issue by the Regional Director.
- b) Based upon the findings of an independent science review and/or NEPA compliance, Permitter reserves its right to modify the provisions of this Article 4. Permitter further reserves its right to incorporate new mitigation provisions based upon the findings of an independent science review.
 - i) Production of all shellfish species shall be capped at the "current production level" as determined under the California Coastal Commission Consent Order No. CCC-07-CD-04.
 - ii) No additional aquaculture racks and/or cultivation infrastructure will be constructed without the prior approval of the Permitter. Operation, repair, and maintenance of infrastructure currently being used for oyster cultivation is permitted.
 - iii) Permittee and Permitter acknowledge the importance of eelgrass within the ecology of the estuary. Permittee will not place bags for shellfish production onto eelgrass.
 - iv) Within sixty (60) days following the signing of this Interim Permit, Permittee will submit for National Park Service approval a boating operations plan, which will indicate dedicated navigation routes, chosen to minimize impacts to eelgrass beds when accessing aquaculture racks and/or cultivation equipment.
 - v) To minimize the chances of introducing invasive species or pathological microorganisms to Drake's Estero, Permittee will only import shellfish in the form of larvae and seed. Within 30 days of the Commencement Date, Permittee shall produce sufficient evidence, for the review and approval of the Permitter, that larvae and seed from outside sources have been certified by the California Department of Fish and Game ("CDFG")

to be free of pathogens. If the Permittee determines that the documentation is insufficient, Permittee shall cease from importing larvae within 30 days of receiving notification of the determination from the Permitter.

- vi) Permittee will not introduce species of shellfish beyond those described in the existing leases from the CDFG. Permittee may seek to conform and/or modify these leases with the CDFG. Any modifications approved by CDFG will be considered by Permitter on a case-by-case basis, and Permittee may not implement any such modifications without the prior written approval of the Permitter.
 - vii) Permittee must avoid disturbance to marine mammals and marine mammal haul-out sites. The Marine Mammal Protection Act, 16 U.S.C. 1361 et seq., includes a prohibition against any act of pursuit, torment or annoyance that has the potential to injure or disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. The National Oceanic and Atmospheric Administration (NOAA) recommends maintaining a distance of at least 100 yards to avoid disturbance to seals. Permittee will maintain a distance of at least 100 yards from hauled out seals throughout the year. Permitter will monitor marine mammal populations in Drakes Estero. In addition, during the pupping harbor seal closure period, March 1-June 30, the designated wilderness area (outside of Permit area) is closed to all boats. Permittee will follow "Drakes Estero Aquaculture and Harbor Seal Protection Protocol" attached hereto as Exhibit C. If required by CDHS, watercraft may use the Main Channel identified in Exhibit C during the pupping harbor seal closure period only to access CDHS's sentinel monitoring station for marine biotoxins. Boats shall be operated at low speed, near the eastern shore, to minimize chance of disturbance to harbor seals. No other use of the Main Channel is authorized during the pupping harbor seal closure period.
- c) Permittee's agreement to the provisions of this Permit does not waive Permittee's ability to take contrary positions with regard to similar provisions with other Agencies.

5) ACCEPTANCE OF PREMISES

- a) Prior to entering into this Permit, Permittee has made a thorough, independent examination of the Premises and all matters relevant to Permittee's decision to enter into this Permit, and Permittee is thoroughly familiar with all aspects of the Premises and is satisfied that they are in an acceptable condition and meet Permittee's needs, provided that Permittee and Permitter acknowledge that certain repairs are necessary to comply with Applicable Laws. Permittee will make such repairs at its sole cost and expense in compliance with Applicable Laws.
- b) Permittee expressly agrees to use and occupy the Premises and all improvements thereon in their existing "AS IS" condition "WITH ALL FAULTS" and acknowledges that in entering into this Permit, Permittee does not rely on, and Permitter does not make, any express or implied representations or warranties as to any matters including, without limitation, the suitability of the soil or subsoil; any characteristics of the Premises or improvements thereon; the suitability of the Premises for the approved use; the economic feasibility of Permittee's use and occupancy of the Premises; title to the Premises; the presence of Hazardous Materials in, on, under or in the vicinity of the Premises; or any other matter. Permittee has satisfied itself as to such suitability and other pertinent matters by Permittee's own inquiries and tests into all matters relevant to determining whether to enter into this Permit and Permittee hereby accepts the Premises.

6) CONSTRUCTION OF IMPROVEMENTS OR ALTERATIONS

- a) Permittee may only make those Improvements or Alterations to the Premises that relate to Permittee's use of the Premises as specified in Article 3, "Use of the Premises."
- b) Permittee shall not undertake any Improvements or Alterations to the Premises (including installation of temporary equipment or facilities) without the prior written approval of Permitter.
- c) As a prerequisite to obtaining approval for Improvements or Alterations, Permittee, at Permittee's sole cost and expense, shall submit design plans and any other relevant data for Permitter's approval.
- d) Construction of Improvements or Alterations by Permittee shall be performed in accordance with all Applicable

Laws, including but not limited to general planning, building, and environmental laws and approved design plans and shall be undertaken and completed at Permittee's sole cost and expense.

- e) Permittee shall, upon request, furnish Permitter with a true and correct copy of any contract, and any modification or amendment thereof, with Permittee's contractors, architects, or any other consultants, engaged in connection with this Permit.
- f) Any Improvements or Alterations undertaken by Permittee shall be performed in a good and workmanlike manner and with materials of a quality and standard acceptable to Permitter. Permittee shall also construct, install and maintain equipment and any construction facilities on the Premises in a safe and orderly manner.
- g) Permittee shall not construct any Improvements or Alterations outside the boundaries of the Premises.
- h) Permitter in its discretion is entitled to have on the Premises at any time during the construction of Improvements or Alterations an inspector or representative who shall be entitled to observe all aspects of the construction on the Premises.
- i) All lumber utilized at the site will be processed in compliance with current laws and regulations regarding wood treatments. This includes lumber utilized in assembly and repair of aquaculture racks.
- j) As set forth in Article 17, title to any Improvements or Alterations to the Premises shall be and remain solely in the Permitter.

7) TREATMENT OF REFUSE

- a) Refuse shall be promptly removed from within the boundaries of Point Reyes National Seashore and shall be disposed of in accordance with Applicable Laws.
- b) Permittee will make best efforts to remove debris associated with aquaculture production operations including wood from racks, plastic spacers, unused shellfish bags, shellfish shells, and any other associated items.

8) PESTICIDE AND HERBICIDE USE

- a) The National Park Service utilizes Integrated Pest Management ("IPM") to treat pest and vegetation problems. The goal of IPM is to use the least-toxic, effective methods of controlling pests and vegetation. Except for normal household purposes, Permittee shall not use any pesticides that do not comply with the IPM program. To this end, Permittee shall submit in writing to Permitter, a request for the use of pesticide(s) or herbicide(s) and shall not use any pesticide(s) or herbicide(s) until Permittee has received an express written authorization therefor from Permitter.
- b) Permittee shall manage, treat, generate, handle, store and dispose of all pesticides and herbicides in accordance with Applicable Laws, including reporting requirements.

9) FIRE PREVENTION AND SUPPRESSION

- a) Permittee and its employees, agents, and contractors shall, in Permittee's use and occupancy of the Premises, take all reasonable precautions to prevent forest, brush, grass, and structural fires and shall, if safety permits, assist the Permitter in extinguishing such fires on the Premises.

10) EXCAVATION, SITE AND GROUND DISTURBANCE

- a) Permittee shall not cut, remove or alter any timber or any other landscape feature; conduct any mining or drilling operations; remove any sand, gravel or similar substances from the ground or watercourse; commit waste of any kind; or in any manner change the contour or condition of the Premises without the prior written approval of the Permitter. Except in emergencies, Permittee shall submit requests to conduct such activities in writing to the Permitter not less than sixty (60) days in advance of the proposed commencement date of any such activities.

- b) If approval of activities referenced above in Section 10(a) is granted, Permittee shall abide by all the terms and conditions of the approval, including provisions pertaining to archaeological resources.
- c) No soil disturbance of any kind may occur in the vicinity of a known archeological site, without the presence of an NPS archeological monitor.

11) NONPOINT SOURCE POLLUTION

- a) The Permittee shall comply with all Applicable Laws regarding non-point source pollution (including the protection of beneficial uses of waters as designated by the State of California). Further, Permittee's use and occupancy of the Premises shall be designed to minimize, to the greatest extent feasible, non-point source pollution within National Park Service boundaries or on adjacent lands.
- b) Except as set forth in Section 3(k) of this Permit, no discharge into the estuary is permitted. This prohibition includes any discharge from processing facilities.

12) TREE AND VEGETATION REMOVAL

- a) The Permittee may not remove tree(s) or vegetation unless expressly approved in writing by the Permitter. The Permittee shall provide specific plans to the Permitter for desired tree(s) and vegetation removal during the annual meeting or in writing during the Term of this Permit.
- b) Removal of non-native invasive vegetation such as non-native thistles, trimming and vegetation removal around structures is permissible.

13) WILDLIFE PROTECTION

- a) Wildlife is an integral part of Point Reyes National Seashore and must be managed in accordance with all Applicable Laws, including but not limited to NPS laws, regulations, and policies.
- b) Permittee shall not engage in any activity that purposely causes harm or destroys any wildlife. Conversely, Permittee shall not engage in any activity that purposely supports or increases populations of non-native or invasive animal species, except for the cultivation of the shellfish species authorized by this Permit.
- c) On a case by case basis, the Permitter will evaluate incidences of depredation caused by Permittee and choose a course of action. The nature of the course of action will be determined by the extent and frequency of the damage, the wildlife species, and park-wide management objectives.

14) HAZARDOUS MATERIALS: ENVIRONMENTAL HEALTH AND SAFETY

- a) In connection with this Permit, Permittee, its officers, agents, employees and contractors, shall not use, generate, sell, treat, keep, or store any Hazardous Materials on, about, under or into the Premises or elsewhere in Point Reyes except in compliance with all Applicable Laws and as approved in writing by Permitter. However, Permittee shall not be obligated to obtain Permitter's approval to use, keep, or generate Hazardous Materials as necessary for the normal operation or maintenance of vehicles or for standard household cleaners. Permittee agrees to be responsible for timely acquisition of any permit(s) required for its Hazardous Materials-related activities, and shall provide to the Permitter, upon request, inventories of all such Hazardous Materials and any supporting documentation, including but not limited to material safety data sheets, uniform waste manifest forms, and/or any other pertinent permits.
- b) Permittee, its officers, agents, employees and contractors, shall not release, discharge or dispose of any Hazardous Materials from, on, about, under or into the Premises or elsewhere in Point Reyes, except as authorized by Applicable Laws.
- c) If Permittee knows of or reasonably suspects or receives notice or other communication concerning any past,

ongoing, or potential violation of Environmental Requirements in connection with the Premises or Permittee's activities, Permittee shall immediately inform Permitter and shall provide copies of any relevant documents to Permitter. Receipt of such information and documentation shall not be deemed to create any obligation on the part of the Permitter to defend or otherwise respond to any such notification.

- d) If any Hazardous Materials Occurrence is caused by, arises from, or is exacerbated by the activities authorized under this Permit or by the use of the Premises by Permittee, its officers, agents, employees or contractors, Permittee shall promptly take all actions at its sole cost and expense as are required to comply with Applicable Laws and to allow the Premises and any other affected property to be used free of any use restriction that could be imposed under Applicable Laws; provided that, except in cases of emergency, Permitter's approval of such actions shall first be obtained.
- e) The Permitter shall have the right, but not the duty, at all reasonable times and, except in the case of emergency, following at least twenty-four (24) hours advance notice to Permittee, to enter and to permit any Agency, public or private utilities and other entities and persons to enter upon the Premises, as may be necessary as determined by the Permitter in its sole discretion, to conduct inspections of the Premises, including invasive tests, to determine whether Permittee is complying with all Applicable Laws and to investigate the existence of any Hazardous Materials in, on or under the Premises. The Permitter shall have the right, but not the duty, to retain independent professional consultants to enter the Premises to conduct such inspections and to review any final report prepared by or for Permittee concerning such compliance. Upon Permittee's request, the Permitter will make available to Permittee copies of all final reports and written data obtained by the Permitter from such tests and investigations. Permittee shall have no claim for any injury or inconvenience to or interference with Permittee's use of the Premises or any other loss occasioned by inspections under this Section 14(e). Notwithstanding the foregoing, neither Permittee nor Permitter shall be required to provide a report under this Section 14(e) if such report is protected by attorney-client privilege.
- f) Should Permittee, its officers, agents, employees or contractors, fail to perform or observe any of the obligations or agreements pertaining to Hazardous Materials or Environmental Requirements for a period of thirty (30) days (or such longer period of time as is reasonably required) after notice, then Permitter shall have the right, but not the duty, without limitation of any other rights of Permitter under this Permit, personally or through its agents, consultants or contractors to enter the Premises and perform the same. Permittee agrees to reimburse Permitter for the costs thereof and to indemnify Permitter as provided for in this Permit.
- g) Permittee understands and acknowledges that the Premises may contain asbestos and lead-based paint. If Permittee performs any Improvements or Alterations, Permittee shall comply with all Environmental Requirements related to asbestos and lead-based paint and shall solely bear all costs associated therewith. Nothing in this Permit shall be construed to require Permittee to remove asbestos or lead-based paint unless Environmental Requirements require such removal.
- h) Permittee shall indemnify, defend, save and hold Permitter, its employees, successors, agents and assigns, harmless from and against, and reimburse Permitter for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments, and expenses, including without limitation, consultant fees and expert fees, that arise during or after the Term as a result of any violation of any Environmental Requirement in connection with this Permit or any Hazardous Materials Occurrence in connection with this Permit.
- i) The provisions of this Article 14 shall survive any termination or revocation of this Permit. Article 15 (Insurance) of this Permit shall not limit in any way Permittee's or Permitter's obligations under this Article 14.

15) INSURANCE

- a) Permittee shall purchase the types and amounts of insurance described herein before the Commencement Date of this Permit unless otherwise specified. At the time such insurance coverage is purchased, Permittee shall provide Permitter with a statement of Permittee insurance describing the insurance coverage in effect and a Certificate of Insurance covering each policy in effect as evidence of compliance with this Permit. Permittee shall also provide the Permitter thirty (30) days advance written notice of any material change in the Permittee's

insurance program hereunder. Permitter shall not be responsible for any omissions or inadequacies in insurance coverage or amounts in the event such coverage or amounts prove to be inadequate or otherwise insufficient for any reason whatsoever.

- b) From time to time, as conditions in the insurance industry warrant, the Permitter reserves the right to revise the minimum insurance limits required in this Permit.
- c) All insurance policies required by this Permit shall specify that the insurance company shall have no right of subrogation against the United States, except for claims arising solely from the negligence of the United States or its employees, or shall provide that the United States is named as an additional insured.
- d) All insurance policies required herein shall contain a loss payable clause approved by the Permitter which requires insurance proceeds to be paid directly to the Permittee without requiring endorsement by the United States. Insurance proceeds covering any loss of the Premises but not used to replace such losses shall be promptly paid by Permitter to Permittee. The use of insurance proceeds for the repair, restoration or replacement of the Premises shall not give any ownership interest therein to Permittee.
- e) Property Insurance: At a minimum, the Permittee shall be required to purchase Basic Form Actual Cash Value (replacement cost less depreciation) insurance coverage for all residence on the Premises. Within thirty days of issuance of the Permit, the Permittee shall submit a report from a reputable insurance company which provides a full range of options for insurance coverage on all nonresidential structures on the Premises. Within thirty days of receipt of this report, the Permitter, in its sole discretion, will review and specify the type and level of insurance coverage which shall be required. The Permitter will provide the Permittee written notification of insurance requirements and the Permittee shall be required to have the specified level(s) of insurance in place within thirty days of such notification. The cost of the insurance will be deducted from the appraised fair market value for the Premises; this adjustment and the insurance requirements will be addressed in an amendment to the Permit. Permittee shall, in the event of damage or destruction in whole or in part to the Premises, use all proceeds from the above described insurance policies to repair, restore, replace or remove those buildings, structures, equipment, furnishings, betterments or improvements determined by the Permitter, in Permitter's sole discretion, to be necessary to satisfactorily discharge the Permittee's obligations under this Permit.
- f) Public Liability: The Permittee shall provide Comprehensive General Liability insurance against claims arising from or associated with Permittee's use and occupancy of the Premises. Such insurance shall be in the amount commensurate with the degree of risk and the scope and size of such use and occupancy, but in any event, the limits of such insurance shall not be less than \$1,000,000.00 per occurrence covering both bodily injury and property damage. If claims reduce available insurance below the required per occurrence limits, the Permittee shall obtain additional insurance to restore the required limits. An umbrella or excess liability policy, in addition to a Comprehensive General Liability Policy, may be used to achieve the required limits.
- g) Permittee shall also obtain the following additional coverage:
 - i) Automobile Liability – To cover all owned, non-owned, and hired vehicles in the amount of \$300,000.00.
 - ii) Workers' Compensation – The amount shall be in accordance with that which is required by the State of California.

16) INDEMNITY

- a) In addition to the indemnification contained in Article 14, Permittee shall indemnify, defend, save and hold Permitter, its employees, successors, agents and assigns, harmless from and against, and reimburse Permitter for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments and expenses and the like incurred in connection with or arising in any way out of this Permit; the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors; the design, construction, maintenance, or condition of any Improvements or Alterations; or any accident or occurrence on the Premises or elsewhere arising out of the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors. Permittee's obligations hereunder shall include, but not be limited to, the burden and

expense of defending all claims, suits and administrative proceedings (with counsel reasonably approved by Permittee), even if such claims, suits or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against the United States.

- b) Permittee agrees to cooperate, to the extent allowed by law, in the submission of claims pursuant to the Federal Tort Claims Act against the United States by third parties for personal injuries or property damage resulting from the negligent act or omission of any employee of the United States in the course of his or her employment.
- c) This Article 16 shall survive any termination or revocation of this Permit. The provisions of Article 15 (Insurance) of this Permit shall not limit in any way Permittee's obligations under this Article 16.

17) PROPERTY INTEREST

- a) This Permit shall vest in Permittee no property interest in the Premises or in the improvements thereon. Title to real property and improvements thereon, including any Improvements or Alterations constructed by Permittee, shall be and remain solely in Permittee. Except as provided in Paragraph 3(g), Permittee shall have no claim for any compensation or damages for the Premises, the improvements thereon, or any Improvements or Alterations constructed by the Permittee.
- b) Nothing in this Permit shall give or be deemed to give Permittee an independent right to grant easements or other rights-of-way over, under, on, or through the Premises.
- c) Permittee hereby retains the sole and exclusive right to oil, gas, hydrocarbons, and other minerals (of whatsoever character) in, on, or under the Premises.

18) RENTS, TAXES AND ASSESSMENTS

- a) The annual rental rate for this Permit shall be established by Permittee and is set forth on the Cover Page of this Permit.
- b) The annual rent under this Permit is payable in advance on a semi-annual basis. Therefore, Permittee hereby agrees to pay fifty percent of the annual rate on or before November with the remaining fifty percent payable on or before May of each year during the Term.
- c) Permittee shall pay the proper Agency, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the Term of this Permit, are levied or assessed against the Premises.
- d) Rents due hereunder shall be paid without assertion of any counterclaim, setoff, deduction or defense and without abatement, suspension, deferment or reduction.

19) CYCLIC MAINTENANCE

- a) Permittee shall perform all Cyclic Maintenance in accordance with the Provisions of this Permit and at Permittee's sole cost and expense. Permittee is responsible for the maintenance of all fences, buildings, and other improvements upon the Premises. All improvements and facilities used and occupied by Permittee shall at all times be protected and maintained in a safe, sanitary and sightly condition.
- b) Specific maintenance requirements may be negotiated with Permittee each year as outlined in Article 21 (Annual Meeting).
- c) Docks and Fences shall be maintained in good condition and shall be timely repaired in conformance with Applicable Laws. Abandoned fences and other decrepit improvements shall be removed from the Premises and shall be disposed of outside the Park or as directed by Permittee after review and approval by the NPS Historian.

- d) New lighting under Permittee's control of the Premises shall be redesigned to protect and preserve the night sky/darkness and minimize light pollution in Drakes Estero.
- e) Parking areas shall be maintained in a safe condition and no new roads or truck trails shall be established without prior written permission of the Permitter. The main entrance road from Sir Francis Drake Boulevard to the SUP Area will be maintained by the NPS. The Park will respond in a timely manner to Permittee and/or visitor complaints regarding the condition of the main entrance road. Notwithstanding the foregoing, Permitter may enter into a road maintenance contract with Permittee.
- f) Existing water reservoirs shall be maintained in a safe and secure condition to prevent washouts and erosion and no new reservoirs shall be constructed or established without prior written approval of the Permitter.
- g) Permittee shall maintain the water, well, pump and all pipelines within the Premises. Permittee shall replace or repair any damage or loss of the water system within the Premises.
- h) Permittee shall maintain the sewage pipeline and sewage leachfield in the "Sewage Area."
- i) Permittee shall be responsible for removing slash buildup around fences or other facilities within the Premises so as to prevent fire and egress hazards. Permittee shall also be responsible for removing litter and trash from the Premises.

20) COMPLIANCE WITH APPLICABLE LAWS: NEPA, NHPA

- a) **General Compliance:** As provided for in this Permit, Permittee at its sole cost and expense shall promptly comply with all Applicable Laws as required by law. Permittee shall immediately notify Permitter of any notices received by or on behalf of Permittee regarding any alleged or actual violation(s) of or non-compliance with Applicable Laws. Permittee shall, at its sole cost and expense, promptly remediate or correct any violation(s) of Applicable Laws.
- b) **National Environmental Policy Act and National Historic Preservation Act:** Where activities undertaken by Permittee relate to the preparation of compliance documents pursuant to the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"), Permittee shall supply all necessary information to Permitter and any Agency in a timely manner. Permitter will pay for the preparation of NEPA or NHPA documents. If there is litigation regarding NEPA or NHPA compliance, it will not trigger the indemnification requirements of Article 16.

21) ANNUAL MEETING

- a) The Parties shall meet annually each year during the Term of this Permit for the purposes of discussing and resolving issues of mutual concern and ensuring that Permittee is complying with the Provisions of this Permit.

22) PENALTY

- a) At the option of the Permitter, Permitter may, in lieu of voiding and terminating this Permit, assess a penalty of \$50.00 per day for any failure by Permittee to keep and perform any of the Provisions of this Permit. In such case, Permittee shall be given notice in writing of a grace period (of from one to thirty days) to remedy the situation before a penalty will be assessed. Payment of any penalty under this provision shall not excuse Permittee from curing the Default. This provision shall not be construed as preventing Permitter from issuing citations or initiating enforcement proceedings under Applicable Laws.

23) SURRENDER AND VACATE THE PREMISES, RESTORATION

- a) At the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall surrender and vacate the Premises, remove Permittee's Personal Property therefrom, and repair any damage

resulting from such removal. Subject to the approval of the Permittee, Permittee shall also return the Premises to as good order and condition (subject to ordinary wear and tear and damage that is not caused directly or indirectly by Permittee) as that existing upon the Effective Date.

- b) All Permittee's Personal Property shall remain the property of Permittee. However, if after the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall fail satisfactorily to remove Permittee's Personal Property and so repair the Premises, then, at the Permitter's sole option, after notice to Permittee, Permittee's Personal Property, shall either become the property of the Permitter without compensation therefore, or the Permitter may cause it to be removed and the Premises to be repaired at the expense of Permittee, and no claim for damages against Permitter, its employees, agents or contractors shall be created or made on account of such removal or repair work.

24) LIMITATION ON EFFECT OF APPROVALS

- a) All rights of Permitter to review, comment upon, approve, inspect or take any other action with respect to the use and occupancy of the Premises by Permittee, or any other matter, are expressly for the benefit of Permitter and no other party. No review, comment, approval or inspection, right or exercise of any right to perform Permitter's obligations, or similar action required or permitted by, of, or to Permitter under this Permit, or actions or omissions of Permitter's employees, contractors, or other agents, or other circumstances shall give or be deemed to give Permitter any liability, responsibility or obligation for, in connection with, or with respect to the operation of the Premises, nor shall any such approval, actions, information or circumstances relieve or be deemed to relieve Permittee of its obligations and responsibilities for the use and occupancy of the Premises as set forth in this Permit.

25) WAIVER NOT CONTINUING

- a) The waiver of any Default, whether such waiver be expressed or implied, shall not be construed as a continuing waiver, or a waiver of or consent to any subsequent or prior breach of the same or any other provision of this Permit. No waiver of any Default shall affect or alter this Permit, but each and every Provision of this Permit shall continue in full force and effect with respect to any other then existing or subsequent Default.

26) LIENS

- a) Permittee shall have no power to do any act or to make any contract that may create or be the foundation for any lien, mortgage or other encumbrance upon the reversion, fee interest or other estate of the Permitter or of any interest of the Permitter in the Premises. If any such lien shall at anytime be filed against the Premises or any portion thereof, Permittee shall cause the Permitter to be discharged from the lien.

27) HOLDING OVER

- a) This Permit shall terminate upon the Termination Date and any holding over by Permittee after the Termination Date shall not constitute a renewal of this Permit or give Permittee any rights under this Permit or in or to the Premises.

28) NOTICES

- a) Any notice or other communication required or permitted under this Permit shall be in writing and shall be delivered by hand or certified mail with return receipt requested. Notices and other communications shall be addressed as follows:

If to Permitter:

Superintendent
Point Reyes National Seashore
Point Reyes Station, CA 94956

If to Permittee:

Mr. Kevin Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake
Inverness, CA 94937

29) NO PARTNERSHIP OR JOINT VENTURE

- a) Permitter is not for any purpose a partner or joint venturer of Permittee in the development or operation of the Premises or in any business conducted on the Premises. Permitter shall not under any circumstances be responsible or obligated for any losses or liabilities of Permittee.

30) ANTI-DEFICIENCY ACT

- a) Permittee and Permitter agree that nothing contained in this Permit shall be construed as binding Permitter to expend, in any fiscal year, any sum in excess of the appropriation made by Congress for that fiscal year in furtherance of the subject matter of this Permit, or to involve Permitter in any contract or other obligation for the future expenditure of money in excess of such appropriations.

31) COMPLIANCE WITH EQUAL OPPORTUNITY LAWS

- a) Permittee agrees that in undertaking all activities pursuant to this Permit, Permittee will comply with all Applicable Laws relating to non-discrimination.

32) ENTIRE AGREEMENT AND AMENDMENT

- a) This instrument, together with the exhibits hereto, all of which are incorporated in this Permit by reference, constitutes the entire agreement between Permitter and Permittee with respect to the subject matter of this Permit and supersedes all prior offers, negotiations, oral and written. This Permit may not be amended or modified in any respect whatsoever except by an instrument in writing signed by Permitter and Permittee.

33) NO PAYMENTS BY PERMITTER

- a) Under no circumstances or conditions, whether now existing or hereafter arising, and whether or not beyond the present contemplation of the Parties, shall Permitter be expected or required to make any payment of any kind whatsoever with respect to the Premises or be under any obligation or liability except as expressly set forth in this Permit.

34) NO THIRD PARTY BENEFICIARIES

- a) Except as expressly set forth in this Permit, this Permit shall not be deemed to confer upon any person or entity, other than the parties to this Permit as expressly set forth in this Permit, any third party beneficiary status, any right to enforce any Provision of this Permit, or any other right or interest.

35) NO PREFERENTIAL RENEWAL AND RELOCATION ASSISTANCE

- a) Permittee hereby agrees that Permittee is not a concessioner and that the provisions of law regarding National Park Service concessionaires do not apply to Permittee. No rights shall be acquired by virtue of this Permit entitling Permittee to claim benefits under the Uniform Relocation Assistance and Real Property Acquisition

Policies Act of 1970, Public Law 91-646.

36) SEVERABILITY

- a) In case any one or more of the provisions of this Permit shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Permit, and this Permit shall be construed as if such invalid, illegal or unenforceable provisions had not been contained in this Permit.

37) EXHIBITS

- a) Each of the exhibits referenced in this Permit is attached hereto and incorporated herein.

38) TIME OF THE ESSENCE

- a) Time is hereby expressly declared to be of the essence of this Permit and of each and every Provision of this Permit.

39) HEADINGS

- a) Article, Section and Subsection headings in this Permit are for convenience only and are not to be construed as a part of this Permit or in any way limiting or amplifying the Provisions of this Permit.

40) PERMIT CONSTRUED AS A WHOLE

- a) The language in all parts of this Permit shall in all cases be construed as a whole according to its fair meaning and not strictly for or against either Permitter or Permittee. The Parties acknowledge that each party and its counsel have reviewed this Permit and participated in its drafting and therefore that the rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed or applied in the interpretation of this Permit.

41) MEANING OF TERMS

- a) Whenever the context so requires, the neuter gender shall include the masculine and the feminine, and the singular shall include the plural and vice versa.

42) FEDERAL LAW

- a) The laws of the United States shall govern the validity, construction and effect of this Permit.

EXHIBIT A

Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area

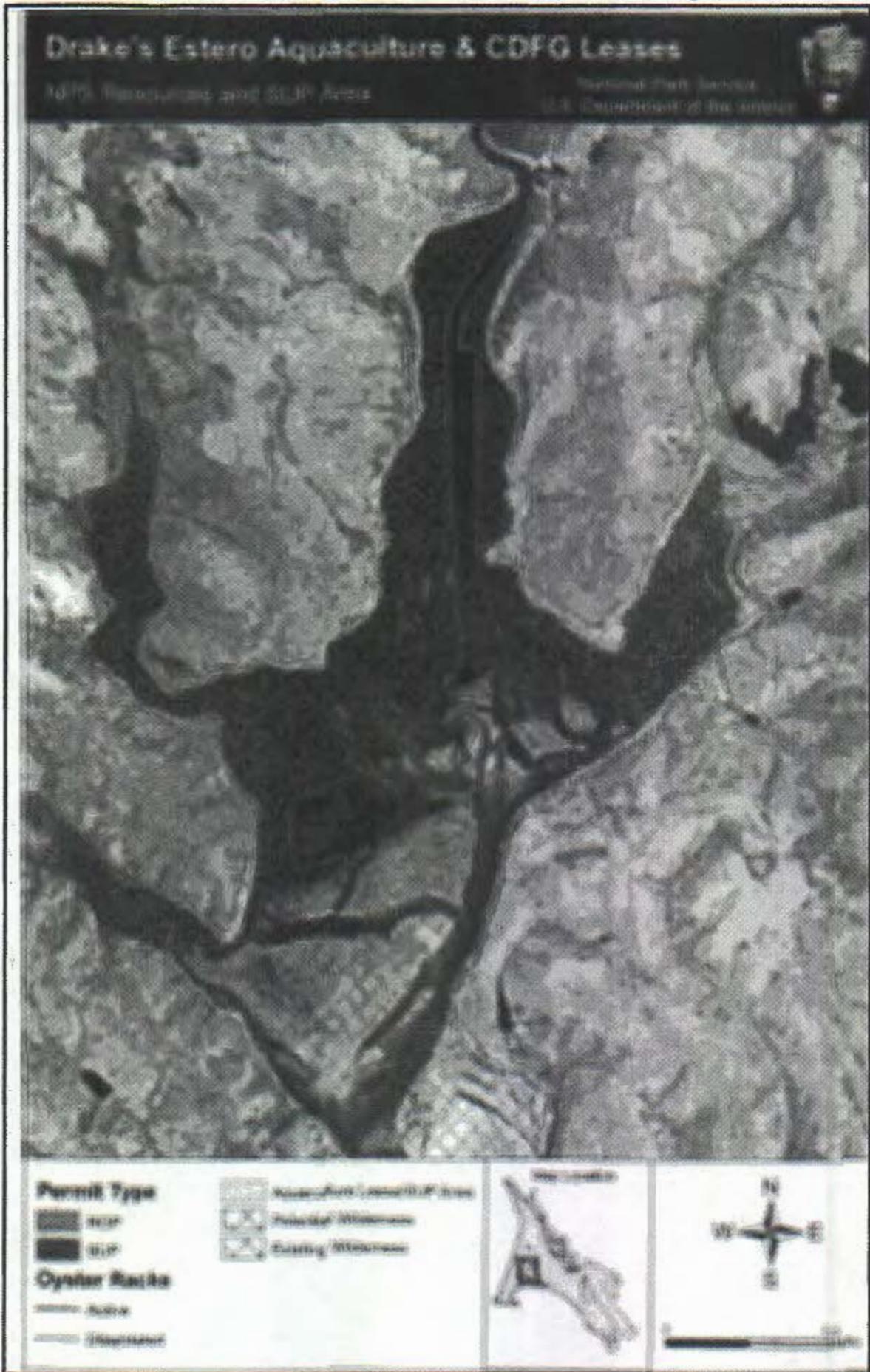


EXHIBIT B

Map – Drake's Estero Oysters – SUP & ROP

Drake's Estero Oysters - SUP & ROP



National Park Service
Point Reyes National Seashore
Marin County, CA



0 50 100 150 200 Feet

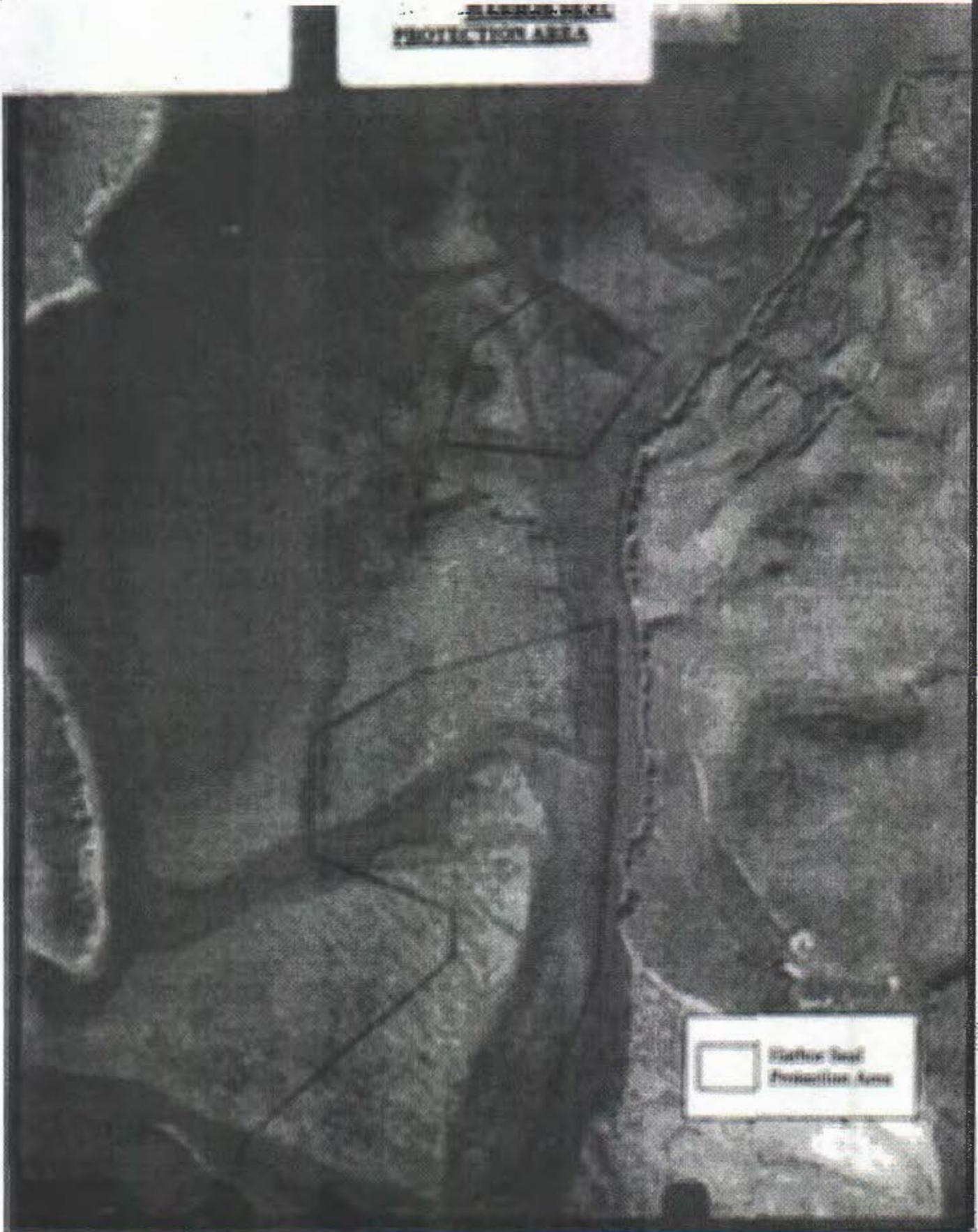
Permit Type

-  ROP - 1.5 acres
-  SUP - 1.1 acres

EXHIBIT C

Drakes Estero Aquaculture and Harbor Seal Protection Protocol

~~SECRET~~
PROTECTION AREA



 Protection Area

**Drakes Estero Aquaculture and
Harbor Seal Protection Protocol**

The following items are mutually agreed to for protection of harbor seals in and adjacent to the Harbor Seal Protection Areas identified in the Map, attached hereto and incorporated herein by reference ("Protocol Map"):

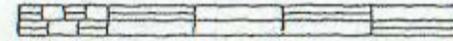
1. During the breeding season, March 1 through June 30, the "Main Channel" and "Lateral Channel" of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone.
2. During the breeding season, Permittee boats may use the "West Channel" at low speed while maintaining a distance of at least 100 yards from hauled out seals.
3. Throughout the year, all of Permittee's boats, personnel, and any structures and materials owned or used by Permittee shall be prohibited from the harbor seal protection areas identified on the Protocol Map. In addition, all of the Permittee's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

EXHIBIT D

Map – Drakes Bay Oyster Company Well Area

PR 02-106 JOHNSON OYSTER

JS 4/14/94



1" = 100 FT.

Some dimensions approximate

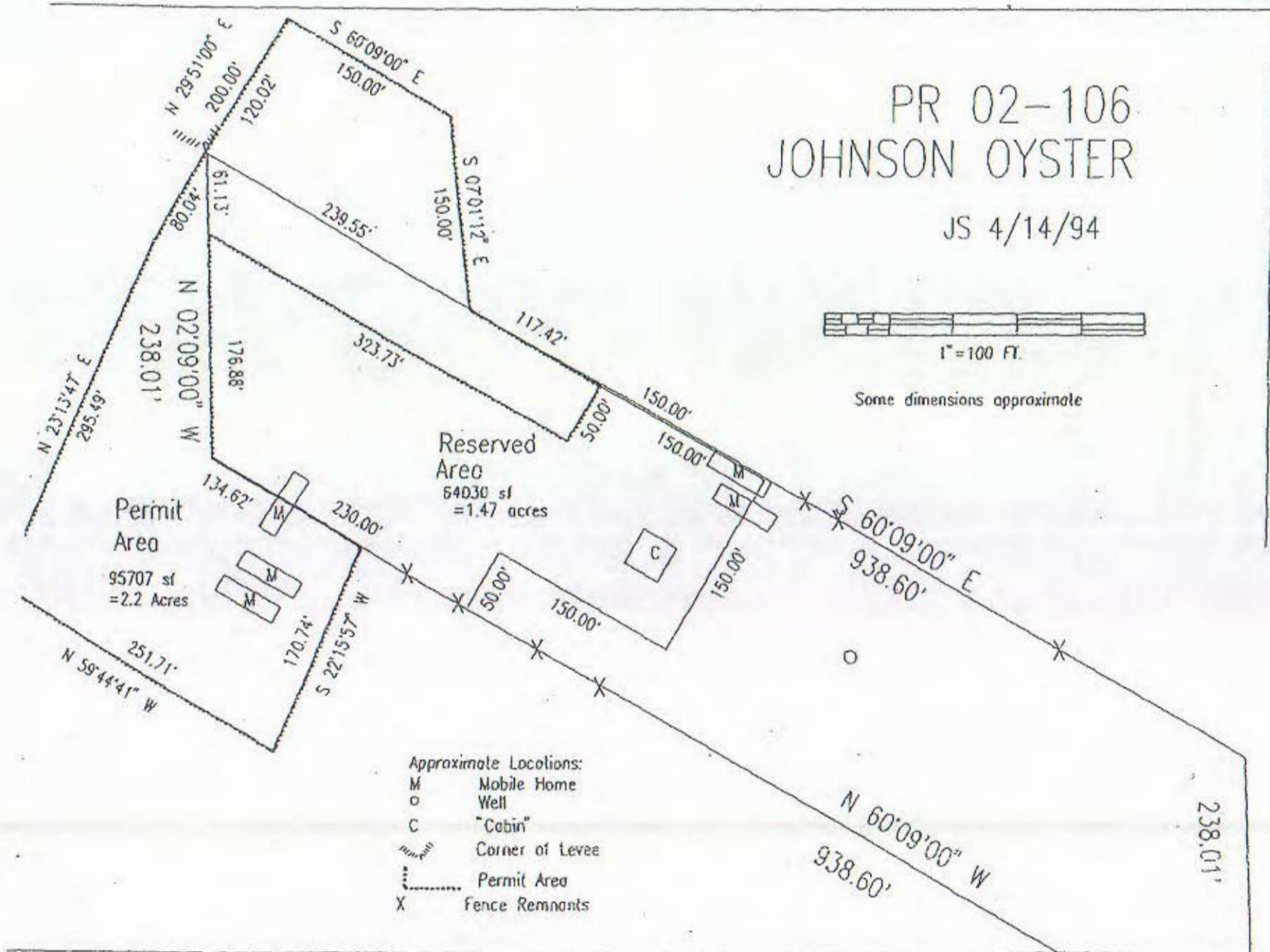
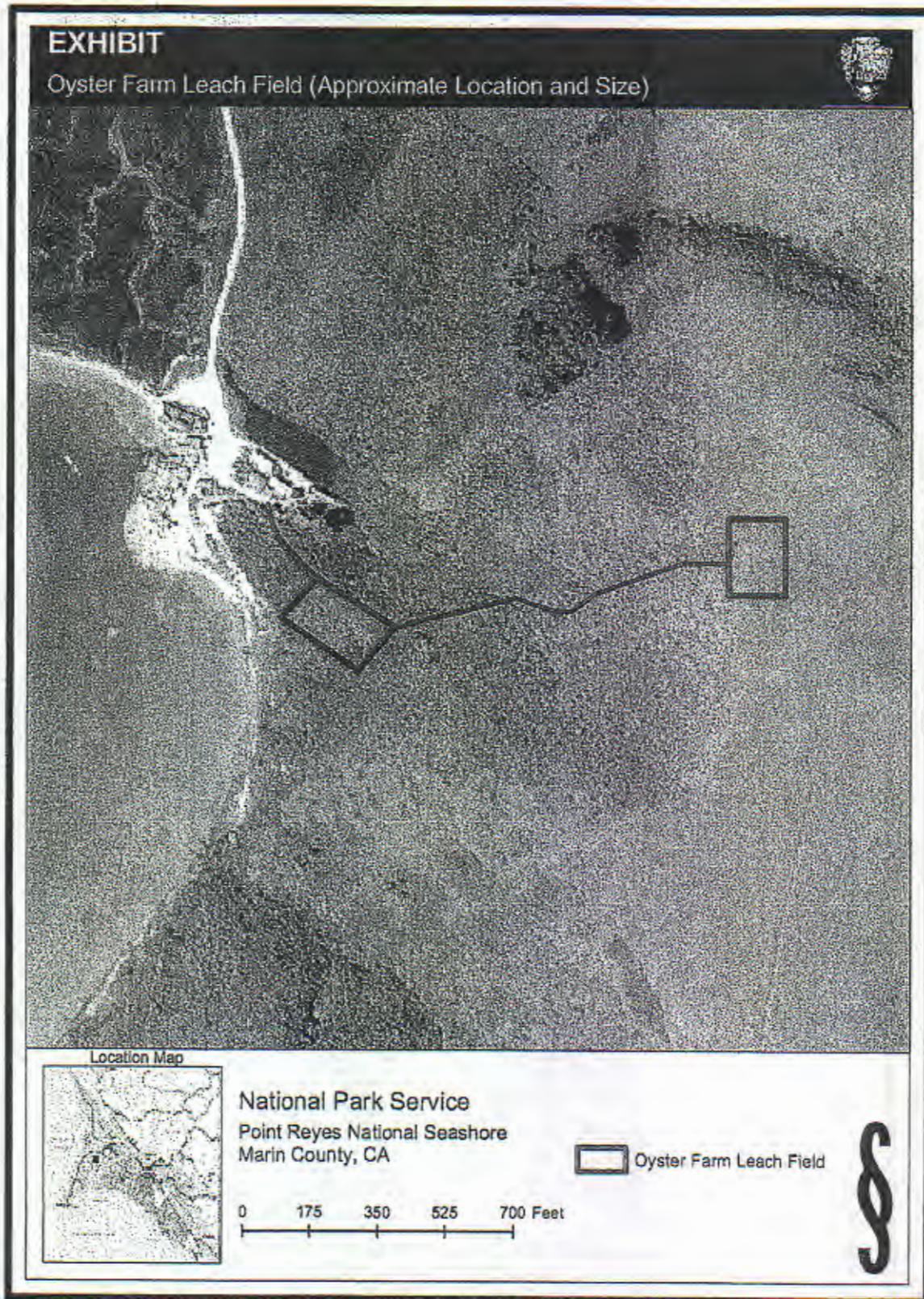


EXHIBIT E

Map - Drakes Bay Oyster Company Sewage Area



Attachment 4

Attachment 5



United States Department of the Interior

NATIONAL PARK SERVICE
Point Reyes National Seashore
Point Reyes, California 94956

IN REPLY REFER TO:

L7617
(Special Use Permit – MISC-8530-6000-8002)

JAN 23 2012

Mr. Kevin Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake
Inverness, CA 94937

KEVIN
Dear Mr. Lunny:

On January 12, 2012, you requested a meeting with the NPS regarding implementation of the current Special Use Permit (SUP) with respect to your communications with the California Coastal Commission (CCC). It is our understanding that the CCC is reviewing this information under your current Cease and Desist Order (CDO) because the CDO requires compliance with the terms and conditions of the SUP.

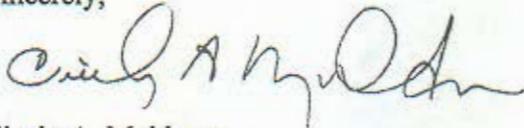
In your request you state that the CCC claims that Drakes Bay Oyster Company (DBOC) boats going to and from sandbars OB and UEN are a violation of the SUP. Subsequently the CCC responded to clarify that the issue is not the destination of the boats but the use of the Lateral Channel during the March 1 – June 30 seasonal closure.

Section 4(b)(vii) of the SUP includes provisions specific to harbor seals and directs the Permittee to follow "Drakes Estero Aquaculture and Harbor Seal Protection Protocol" (Exhibit C). Clause 1 of the Harbor Seal Protection Protocol states: "During the breeding season, March 1 through June 30, the 'Main Channel' and 'Lateral Channel' of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone."

The plain meaning of this provision is that the entirety of the Lateral Channel is closed during the harbor seal breeding season (March 1-June 30). The SUP references the Lateral Channel, Main Channel and West Channel. The Lateral Channel is the entire channel between the Main Channel and West Channel. The eastern portion of the Lateral Channel is within the permanent harbor seal protection area and is thus closed to boat use all year. The west portion of the Lateral Channel (outside of the harbor seal protection area) is subject to the seasonal closure (March 1-June 30).

During the negotiations for the current SUP, DBOC introduced a 1992 protocol for consideration, but it was not incorporated into the final signed SUP. As explained above, Section 4(b)(vii) and Exhibit C are the operative provisions of the SUP specific to harbor seals. Boat use of any portion of the Lateral Channel during the seasonal closure period is not allowed under the SUP.

Sincerely,

A handwritten signature in black ink, appearing to read "Cicely A. Muldoon". The signature is fluid and cursive, with the first name being the most prominent.

Cicely A. Muldoon
Superintendent

cc: Alison Dettmer, California Coastal Commission
Cassidy Teufel, California Coastal Commission
Jo Ginsberg, California Coastal Commission

Attachment 6

STATE OF CALIFORNIA—THE RESOURCES AGENCY

PETE WILSON, Governor

DEPARTMENT OF FISH AND GAME



P.O. BOX 944209
SACRAMENTO, CA 95844-2090
(916) 653-6194

May 15, 1992

Mr. John L. Sansing, Superintendent
Point Reyes National Seashore
Point Reyes, California 94956

Dear Mr. Sansing:

Thank you for following up on the meeting we had with you, Johnson Oyster Company (JOC), and National Marine Fisheries Service (NMFS). I am pleased to hear that operations appear to be occurring without incident. I am optimistic that the agreement reached at our meeting will provide the protection necessary for continued well-being of the harbor seals in Drakes Estero and, at the same time, provide guidelines for JOC that will allow them to continue their operations without undue hardship.

I have reviewed your synopsis of the issues and discussed it with Frank Henry and Tom Moore of our Department. During discussion at the meeting, Frank Henry took notes on the boating practices and mariculture procedures to be included in the agreement. As you may recall, at meeting's end, Frank read the proposed guidelines from his notes to those present and, after some discussion, all agreed to the language and content. His notes and the recollections of the three Department staff agree, in general, with your synopsis.

One significant difference we noted, was regarding operations in the western channel. Our notes do not reflect any agreement by JOC to not use that channel, even during the pupping season. The three of us all recollect that operation in this western channel was required for the minimal servicing of oyster beds 1, 2, and 3. We remember agreement from JOC not to use the lateral channel but to use the western channel, and then to travel by foot, if necessary to reach the beds. Our recollection is that this was acceptable to you, since operation in the western channel is a good distance from potential haul out areas at the east ends of the islands.

Another difference in our notes and recollections regards the timing of planting on these beds. You are correct that those present at the meeting, including JOC, agreed that, if possible, planting should be put off until after June 1. However, your language that seeding "may begin on June 1. Earlier commencement dates may be permitted ..." , we think, overstates the authority of the agreement.

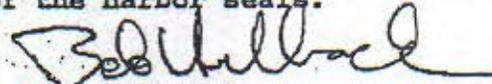
Our recollections are that JOC agreed to plan on, and make every effort to, beginning seeding after June 1. JOC noted, however, that they do not have absolute control over seed

Mr. John L. Sansing
May 15, 1992
Page Two

availability, and no control over weather and tides. The spirit of the agreement, we recall, was that JOC would plan on seeding after June 1, and would work with Gary Fellers to minimize the impacts of any earlier seeding. We do not believe there is existing authority to "permit" or to deny a "permit" for earlier seeding.

Also, in the spirit of positive agreement, and without changing any substance, we would strike "and restrictions" from the first sentence of the introductory paragraph. I have attached a copy of the complete Record of Agreement, with the three amendments. If these amendments are not acceptable to you, please let me know so that we may come to full agreement.

Thank you again John, for the cooperation and efforts of you and your staff on this issue. I believe they have made possible this resolution in the interest of the harbor seals.



Bob Hulbrock
Aquaculture Coordinator

cc: Johnson Oyster Co.

Tom Johnson
Bob Studdert
Manuel Solorzano

Point Reyes National Seashore

Russ Case
Gary Fellers
LeeRoy Brock

Department of Fish and Game

Frank Henry
Tom Moore

National Marine Fisheries Service

Diane Windham
Charles Clark

Department of Health Services

Gregg Langlois

May 15, 1992

Record of Agreement
Regarding
Drake's Estero Oyster Farming
and
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS), the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.

Drakes Estero Harbor Seal Pupping Season Closures

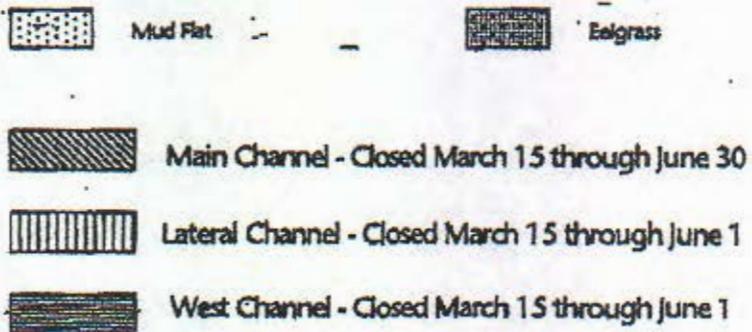
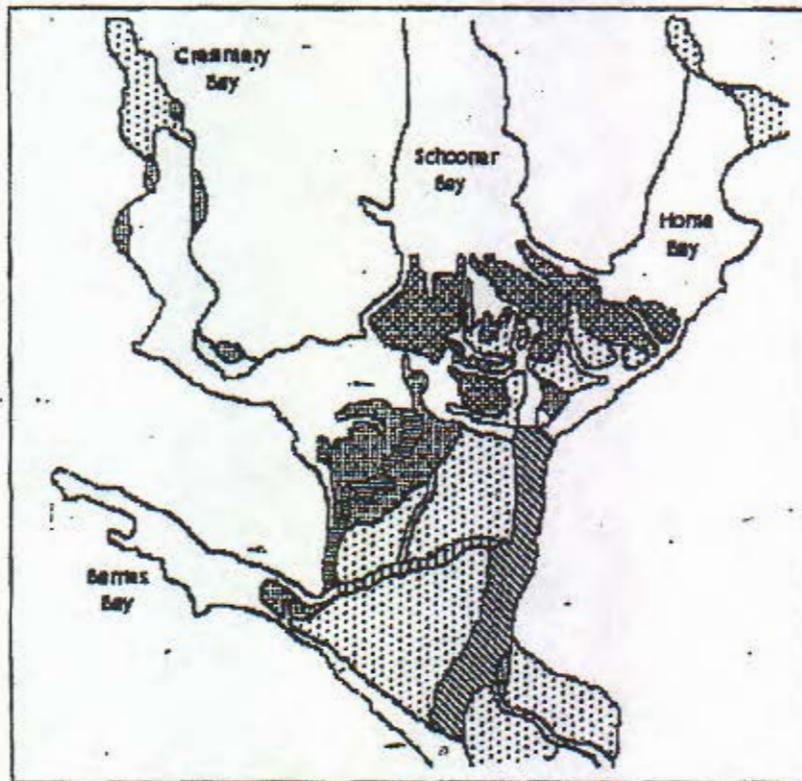
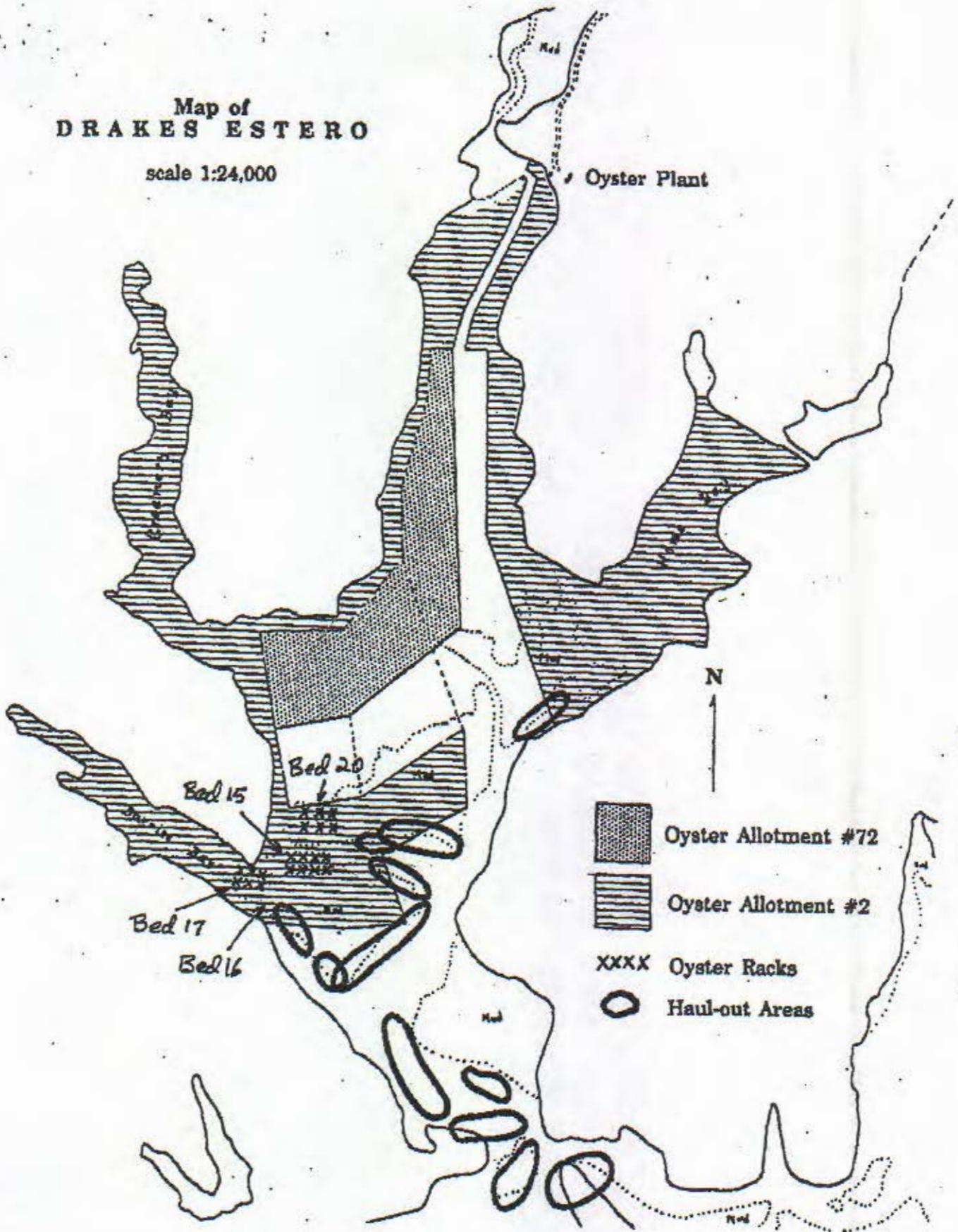


Figure 1

Map of DRAKES ESTERO

scale 1:24,000



Attachment 7



October 10, 2012

Superintendent Cicely Muldoon
National Park Service
Point Reyes National Seashore
1 Bear Valley Road
Point Reyes Station, CA 94956

Dear Ms. Muldoon:

I am writing to encourage continued cooperation between the National Park Service, the California Department of Fish and Game ("Department"), and Drakes Bay Oyster Company, as renewal of the Special Use Permit for the Drakes Bay Oyster Company is considered.

The state and federal government have worked together for 47 years—since the State originally conveyed the bottom lands in Drakes Estero to the United States in 1965—to allow continued aquaculture operations in Drakes Estero. Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottom lands at Drakes Estero indefinitely for shellfish cultivation.

For almost five decades, the State has supported aquaculture in Drakes Estero. It has done so by regulating the Drakes Bay Oyster Company on an ongoing basis, by renewing the water bottom leases in 1979 and 2004, and by authorizing aquaculture in 2010 when establishing the Drakes Estero State Marine Conservation Area. Regulations implementing the California Marine Life Protection Act prohibit the cultivation of oysters in Drakes Estero without a valid state water bottom lease. The current state issued water bottom lease with Drakes Bay Oyster Company extends to 2029.

It is also important to recognize that California now is second only to Washington in shellfish production on the west coast and that Drakes Bay Oyster Company represents 55% of the water bottoms leased and 40% of the oysters cultivated in the state.

The continued cooperation between Drakes Bay Oyster Company, the National Park Service and the California Department of Fish and Game will benefit the environment, the community, and the local economy, consistent with our agencies' unique history of managing this property. Please contact me at 916.653.7667 if you have any questions or would like to discuss this matter.

Sincerely,

Charlton H. Bonham
Director

cc: Senator Dianne Feinstein

Attachment 8

Drakes Bay Oyster Company

17171 Sir Francis Drake Boulevard
Inverness, CA 94937

(415) 669-1149

kevin@drakesbayoyster.com

nancy@drakesbayoyster.com

May 7, 2012

Cicely Muldoon
Superintendent
Point Reyes National Seashore
One Bear Valley Road
Point Reyes Station, CA 94937

Re: Coastal Development Permit Application No: 2-06-003

Dear Cicely,

In a meeting at the California Coastal Commission office in San Francisco on March 5, 2012, CCC and DBOC reached an agreement that DBOC would limit its current CDP application to the existing activities. In keeping with that process, DBOC has removed all new development from its application to the CCC. DBOC will apply to CCC for a CDP amendment in the future, as necessary, prior to future development.

In your letter dated November 10, 2010, you identified a number of ongoing activities for which NPS would like more information. This letter provides the necessary information, and will address the items in the order requested. NPS has requested this letter to improve the consistency with the NPS SUP.

9. *Continue to carry out oyster and clam culture using 24" x 24" x 3" plastic or plastic coated wire containers or trays.*

This tray culture has been used in Drakes Estero for many years. DBOC purchased the trays from Johnson Oyster Company. Oysters, clams and scallops are grown using these materials. The trays are primarily used for small seed rearing. The trays are stackable and can be placed directly on the bottom, can be floated by placing floatation material in the top tray and attaching the unit to an anchored long line, or hanging the unit from the racks.

10. *Continue to use established boat traffic lanes through Drakes Estero eelgrass beds for use during low tide.*

DBOC makes every effort to keep the boats within the channels during low tide to reduce potential impacts to eelgrass by boat propellers. This item simply states that DBOC will continue to do so.

11. *Continue to operate the picnic area.*

DBOC will continue to allow seashore visitor access to the picnic areas within the RUO and SUP areas. DBOC will continue to provide and maintain tables and keep the areas clean and safe. Picnicking at the oyster farm has been enjoyed by thousands of visitors for many decades. DBOC believes that this type of coastal access is a vital component of the visitor experience.

16. *Continue Manila clam culture using bottom bags within areas throughout DFG lease area number M-438-01 within Drakes Estero.*

All clam culture will be confined to the approved CDFG and CDPH growing areas. Clams will be cultured using similar methods as are used for oysters.

18. *Resume purple hinged rock scallop production using a floating system within DFG lease number M-438-02.*

Purple hinged rock scallops have traditionally been raised in Drakes Estero using floating racks, floating trays and lantern nets. DBOC plans to continue to culture these native scallops using similar techniques.

21. *Continue to operate non-motorized barges within estero to facilitate shellfish planting and harvesting.*

DBOC uses barges ("scows") in Drakes Estero. DBOC uses motorboats to move the barges throughout the estero. The barges are used to transport seed for planting and for harvested shellfish.

30. *Continue to implement the Hazardous Materials Business Plan.*

DBOC conducts its daily operations consistent with its Hazardous Materials Business Plan.

[NOTE: To fully understand the following items referred to as "after the fact development" (also referred to as "ongoing violations" by CCC staff, and later characterized as such by others), one must look at these items in context.

The owners of DBOC (the Lunnys) have lived in the coastal zone since before the PRNS was established in the 1960's and before the coastal act was passed in the 1970's. The Lunny Ranch buildings, as well as much of the Lunny Ranch rangeland, are within the coastal zone. Throughout the 1970s, 1980s, 1990s and 2000s, the Lunnys have replaced fences, done excavation for underground utilities, installed water troughs with associated

pipng, replaced porches and decks, placed storage containers, and paved portions of the ranch driveway and livestock feeding areas. Throughout the years, the NPS has been aware of these and other similar activities. We are also cognizant of the fact that other ranchers and farmers within PRNS and within the coastal zone have continuously made similar repairs and improvements to their infrastructures without CDPs. We do not believe that any of the seashore ranchers have been led to believe that they are in "violation of the coastal act" when they make necessary repairs on their ranches without a CDP.

It is with this history and experience that the Lunnys assumed the responsibility to cleanup, operate and maintain the neighboring oyster farm. Our family has tried to do the right thing to protect public health, public safety, public enjoyment and the environment. We have never intended to avoid obtaining appropriate permissions and authorizations. We simply assumed that these activities would not require a CDP, similar to surrounding ranches within the seashore.]

39. Installation of one 8-foot by 40-foot storage container.

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

40. Removal and replacement of a porch at worker residence.

DBOC was directed by CCC and NPS to remove a large covered wooden porch and steps that were connected to one of the worker residences because the porch was originally constructed without a CDP. This large porch had been in place for many years and was old and dilapidated. The finished floor elevation of the residence is approximately 3 feet above the ground level and the door was inaccessible after the covered porch was removed. DBOC did not replace the

porch or the roof over the porch. DBOC simply installed steps leading to the door so that the residence could be safely accessed. DBOC was unaware that a CDP was required for the steps.

41. *Installation of split rail fence along the edge of parking area.*

DBOC removed the remains of a dilapidated fence in this location. The previous barrier was beyond repair and missing some sections. DBOC recognized the need to replace the barrier to keep automobile traffic off the vegetated area near the pond and off the grassy area where the septic tanks are located. DBOC was unaware that a CDP would be required to replace this fence.

42. *Installation of asphalt pavement surrounding the processing facility.*

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

43. *Installation of a temporary construction trailer.*

DBOC placed an 8' x 20' trailer on site for use as an office during the extensive demolition and cleanup activities performed by DBOC. The trailer is rented from Modular Space, a company that specializes in temporary construction facilities. Because the oyster farm office was demolished and removed from the site as directed by the CCC, DBOC is currently using the trailer for its office and administrative activities. DBOC was unaware that placement of this trailer would require a CDP.

44. Installation of a temporary 8-foot by 40-foot container for oyster shucking and packing.

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

45. Use of five outdoor seed setting tanks and associated water intake, discharge and circulation infrastructure.

These setting tanks have been used continuously in this location for approximately 30 years. The same is true with the associated intake and piping to provide water and electricity to this location. The previous oyster farmers, Johnson Oyster Company, built a shed around the tanks. The CCC determined that the shed was constructed by JOC without a CDP and required DBOC to remove the structure. DBOC complied with the order to remove the shed, but kept the tanks in place so that the oyster farm could continue to operate. DBOC simply re-set the tanks in the identical location and made minor repairs to the associated plumbing that had been damaged or removed during the demolition activities. DBOC was unaware that a CDP would be required to continue using these same setting tanks.

46. Construction and backfilling of a 12-inch by 18-inch by 80-foot long trench.

During setting season, the electrical panel that serves the setting tanks shorted out, requiring an emergency replacement. DBOC hired a licensed electrician who immediately (same day) obtained a permit from the County of Marin to authorize the work. The electrician met with the representative of the utility company (PG&E). The PG&E expert required that the existing underground conductors

and conduit be replaced (the conduit and wire were visibly damaged). DBOC re-dug the existing trench and removed the failed conduit and wire. This trench is located in a level, shell-covered, un-vegetated work area. There was no rainfall during the period that the work took place, leaving no risk of sediment travel in storm water runoff. DBOC was unaware that the County permit was insufficient and that an additional permit would be required from CCC for this simple emergency repair of existing infrastructure.

47. *Replacement of six picnic tables and six additional picnic tables.*

The oyster farm has always provided important coastal access as well as other visitor services. One of the beloved visitor services offered by DBOC is the picnic area. DBOC, at its own expense, continues to offer picnic tables for the use of the visiting public, free of charge. This visitor service requires significant staff time to maintain the area in a safe and sanitary condition. It also requires that the picnic tables be replaced when necessary. In addition to replacing old tables, DBOC recognized that many visitors were using unsanitary and unsafe areas around the farm to have their picnics because there were not enough tables to use. In an effort to improve visitor safety and enjoyment, DBOC, at its own expense, purchased six additional tables. DBOC accepted the responsibility to add the necessary staff time to maintain these additional tables. DBOC was unaware that the CCC would require a CDP to replace existing picnic tables or to add picnic tables for an activity that has existed and has been enjoyed at the farm by thousands of coastal visitors for many decades. Furthermore, the NPS has pledged to add more picnic tables at the farm. It is unknown if the NPS has applied for a CDP to add these tables.

DBOC originally applied for a CDP in January of 2006 and will continue to work with NPS and CCC to complete the CDP process. DBOC expects that the process will be completed easily and quickly now that the CDP will cover existing activities – activities that pre-exist the creation of PRNS and pre-exist the establishment of the coastal act. DBOC will apply for a CDP amendment prior to any new development.

DBOC has been told that NPS is required to obtain a CDP prior to construction of new development or making any repairs within the coastal zone. For our records, would you please provide DBOC with a copy of the CDP application as well as the CDP issued for 1) the pit toilet NPS installed within the flood zone at the oyster farm (which was new development and required more excavation than the DBOC electrical trench repair) and 2) the split rail fence that the NPS installed around the kayak parking area (which was new development directly adjacent to the estero and is very similar to the split rail fence installed by DBOC).

Thank you,

Kevin Lunny

Attachments: 1

Cc: Cassidy Teufel, CCC

DRAKES BAY OYSTER COMPANY

17171 Sir Francis Drake Blvd., Inverness, CA 94937

Project Description

05/07/12

Proposed New Site Development

- ~~1. Construct and install required ADA compliant restroom facility.~~
- ~~2. Construct and install split rail and solid board fencing around proposed storage area and retail facility.~~
- ~~3. Construct and install paved walkway to the restrooms to meet ADA requirements.~~
- ~~4. Construct cover over existing wooden oyster washing pier per CDPH and FDA requirements to keep oysters out of direct sunlight after harvest.~~
- ~~5. Demolish and remove existing wooden pier (south pier).~~
- ~~6. Implement Vessel Transit Plan with mooring areas and access lanes clearly marked.~~

Ongoing Maintenance for Existing Operation

7. Continue to carry out regular repairs and maintenance to existing oyster racks using only CDFG, CCC and NPS approved materials.
8. Continue compliance with 1992 Harbor Seal Management Plan as well as final CCC and NPS harbor seal protection conditions.
9. Continue to carry out oyster and clam culture using 24" x 24" x 3" plastic or plastic coated wire containers or trays.
10. Continue to use established boat traffic lanes through Drakes Estero eelgrass beds for use during low tide.
11. Continue to operate the picnic area.
12. Continue Pacific and European oyster culture using hanging cluster method, both on "strings" and on "French Tubes" on racks located throughout DFG lease area number M-438-01 within Drakes Estero.
13. Continue Pacific and European oyster culture using anchored bottom bags within intertidal areas throughout DFG lease area number M-438-01 within Drakes Estero
14. Continue Pacific and European oyster culture using un-anchored bottom bags within intertidal areas throughout DFG lease area number M-438-01 within Drakes Estero
15. Continue Pacific and European oyster culture using anchored floating bags within intertidal areas throughout Department of Fish and Game lease area number M-438-01 within Drakes Estero
16. Continue Manila clam culture using bottom bags within areas throughout DFG lease area number M-438-01 within Drakes Estero
17. Continue to carry out marine biotoxin monitoring and water quality sampling within the estero.
18. Resume purple hinged rock scallop production using a floating system within DFG lease number M-438-02
19. Continue to import Pacific oyster larvae and seed; Manila clam larvae and seed, European oyster larvae and seed and purple hinged rock scallop larvae and seed only from CDFG approved sources with current CDFG permits.
20. Continue to operate motor driven vessels within Drakes Estero to plant and harvest approved shellfish species, for water quality monitoring, marine biotoxin monitoring, or any other farm related purpose.
21. Continue to operate non-motorized barges within estero to facilitate shellfish planting and harvesting.
22. Continue to operate retail sales facility.

23. Continue to operate the only state certified and FDA approved shellfish shucking and packing facility, pursuant to the requirements of the California Department of Public Health, Food and Drug Branch; the US Food and Drug Administration and the National Shellfish Sanitation Program.
24. Continue to operate onsite wastewater and septic systems.
25. Continue to store limited quantities of hazardous substances such as paints, gasoline, chlorine, detergents, solvents and cleaning products.
26. Continue to discharge wastewater from hatchery operations, wet storage, setting systems and oyster washing into estero (heated water to remain below 20 degrees above ambient water temperature)
27. Continue to carry out interpretive services to visiting public, conduct tours of onshore facilities for school groups, local non-profit organizations, private organizations, government agencies, etc.
28. Continue to provide onsite housing for employees and their families.
29. Continue to operate indoor hatchery/seed production facility and carry out remote setting activities both indoor and outdoor.
30. Continue to implement the Hazardous Materials Business Plan.
31. Continue to operate the state certified Drakes Bay Oyster Company non-transient, non-community, public water system, pursuant to the requirements of the California Department of Public Health, Drinking Water Unit and the National Shellfish Sanitation Program.

Repairs

- ~~32. Repair existing wooden oyster washing pier with similar materials.~~
- ~~33. Replace existing 12' X 60' floating dock at the end of the oyster washing dock.~~
- ~~34. Replace oyster washing / conveyor / sediment retention system.~~
- ~~35. Repairs to stringing shed.~~
- ~~36. Repairs to hatchery building.~~
- ~~37. Repairs to processing building.~~
- ~~38. Repairs to retail sales building.~~

After the Fact Development

39. Installation of one 8-foot by 40-foot storage container.
40. Removal and replacement of a porch at worker residence.
41. Installation of split rail fence along the edge of parking area.
42. Installation of asphalt pavement surrounding the processing facility.
43. Installation of a temporary construction trailer.
44. Installation of a temporary 8-foot by 40-foot container for oyster shucking and packing.
45. Use of five outdoor seed setting tanks and associated water intake, discharge and circulation infrastructure.
46. Construction and backfilling of a 12-inch by 18-inch by 80-foot long trench.
47. Replacement of six picnic tables and six additional picnic tables

EXHIBIT 4

general management plan

september 1980

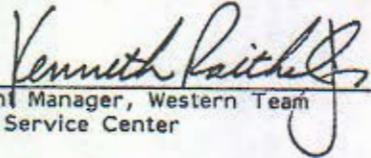
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POINT REYES NATIONAL SEASHORE
POINT REYES, CA 94956-9799**

POINT REYES

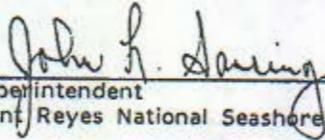


NATIONAL SEASHORE / CALIFORNIA

RECOMMENDED:

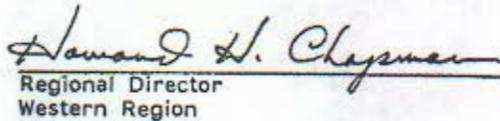


Assistant Manager, Western Team
Denver Service Center



Superintendent
Point Reyes National Seashore

APPROVED:

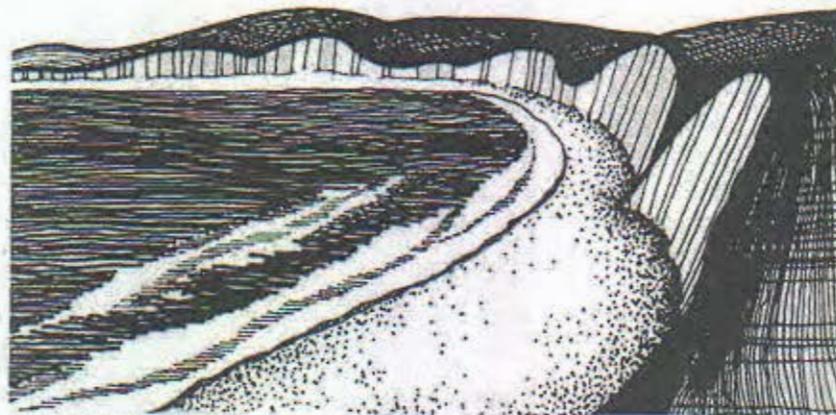


Regional Director
Western Region

Point Reyes



POINT REYES NATIONAL SEASHORE / CALIFORNIA
GENERAL MANAGEMENT PLAN



Drake's Beach



Salt Marsh - Drake's Estero

PREFACE

Confronted by the accelerating deterioration of life on earth, perceptive people reach out for benchmarks of natural integrity--places in which to recharge the mind and body, and learn of the things that are vital to the quality of our existence. To such people, the Point Reyes peninsula speaks eloquently of the past, and offers priceless hope for the future. There is no better place for man to contemplate his origins, the factors that sustain him, and the threats that may destroy him, than at the edge of the sea. Its magnetism is expressed in the words of Rachel Carson: "Like the sea itself, the shore fascinates us who return to it, the place of our dim ancestral beginnings. In the recurrent rhythms of tides and surf and in the varied life of the tide lines there is obvious attraction of movement and change and beauty. There is also, I am convinced, a deeper fascination born of inner meaning and significance."

This sense of attraction--whether consciously felt or not--modifies the objectives and responses of all who come to the shore seeking recreation. The resulting activities, though often dissimilar, derive their meaning from the inherent qualities of the land. As early as 1970, annual visitation at Point Reyes exceeded a million, with less than half of its acreage available for public use. Since this is one of the windiest and foggiest spots on the coast, such a visitation figure suggests that this is apparently something more than simply a place to play.

Even without its unusual variety of resources, Point Reyes would loom large in importance when viewed in proper context. In the 1959 survey of the recreation potential of the Pacific Coast, the National Park Service made this recommendation concerning the entire western shoreline: "As much of the seashore as possible should be preserved in its present undeveloped state and there should be no further invasion of coastal wilderness by highways except for incidental access and appropriate minimum development." The coast of California offers spectacular impressions to the automobile-borne traveler. However, nearly 90 percent of the state's shoreline is rimmed with a ribbon of asphalt--California Highway 1. This thoroughfare for many constitutes a permanent dilution of the seashore experience, constantly interrupting the continuity between the mountains and the sea.

Unfortunately, most state parks that include coastal frontage are either hemmed in as tiny enclaves between the highway and the ocean, or are bisected by the pavement. Less than half of the California coastline lies in public ownership, and even this is primarily preserved in isolated patches and strips of land which are

frequently vulnerable, both aesthetically and ecologically, to surrounding development. In only a few places is there a piece of coastal land large enough and undisturbed enough to convey the full impact and range of seashore experiences that this stimulating environment deserves. Point Reyes is one of a tiny number of such places that are permanently dedicated to the American public.

These attributes are basic to what this coastal remnant means to the people, and are expressed in the opening statement of the enabling legislation, in which Congress proclaimed that the national seashore was being established "in order to save and preserve . . . a portion of the diminishing seashore of the United States that remains undeveloped."

Point Reyes can perhaps be described best as a relict of the aboriginal California coast, serving as a vital and convenient outlet for a people becoming more and more pressured by technology. To many, it represents a last frontier--so near to the urban core, yet remaining unviolated by the symbols of contemporary life. Pristine it is not, for it bears the scars of miles of unsurfaced ranch roads. But these in themselves are anachronistic. The entire peninsula contains few reminders of the urgency of today, and in this condition it serves the present as usefully as any piece of land could. As a sharply contrasting complement to other public places in the San Francisco Bay Area, Point Reyes provides a major contribution to an effectively balanced system of recreational opportunities.

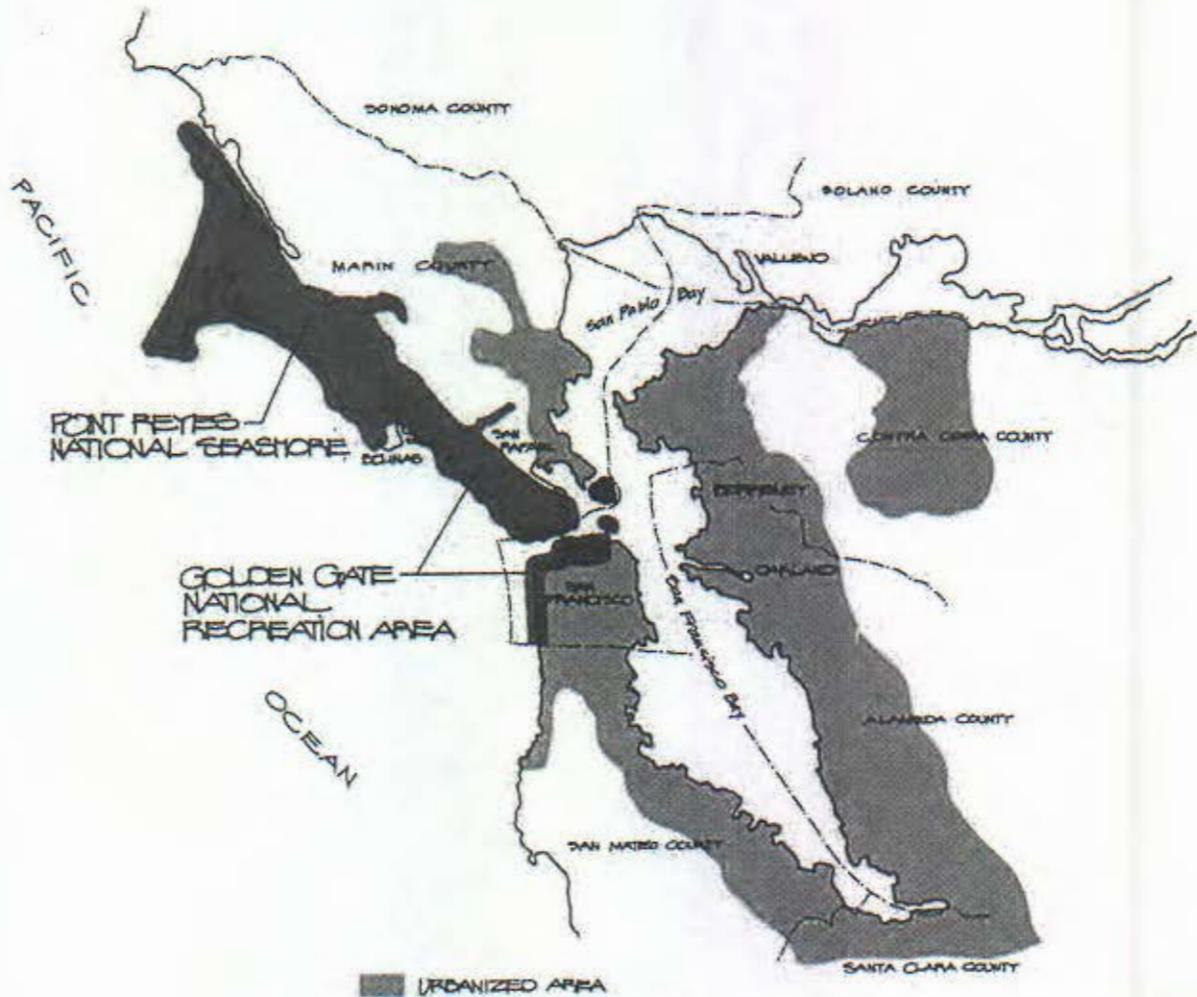
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DEC | MAR 79

NOT TO SCALE 

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

REGION

POINT REYES NATIONAL SEASHORE

THE PLAN

LAND MANAGEMENT ZONING

The following zone designations represent a composite picture of how the park will be managed and developed in the future based on its resource values, management objectives, and public expectations.

Natural Zone--41,867.95 Acres

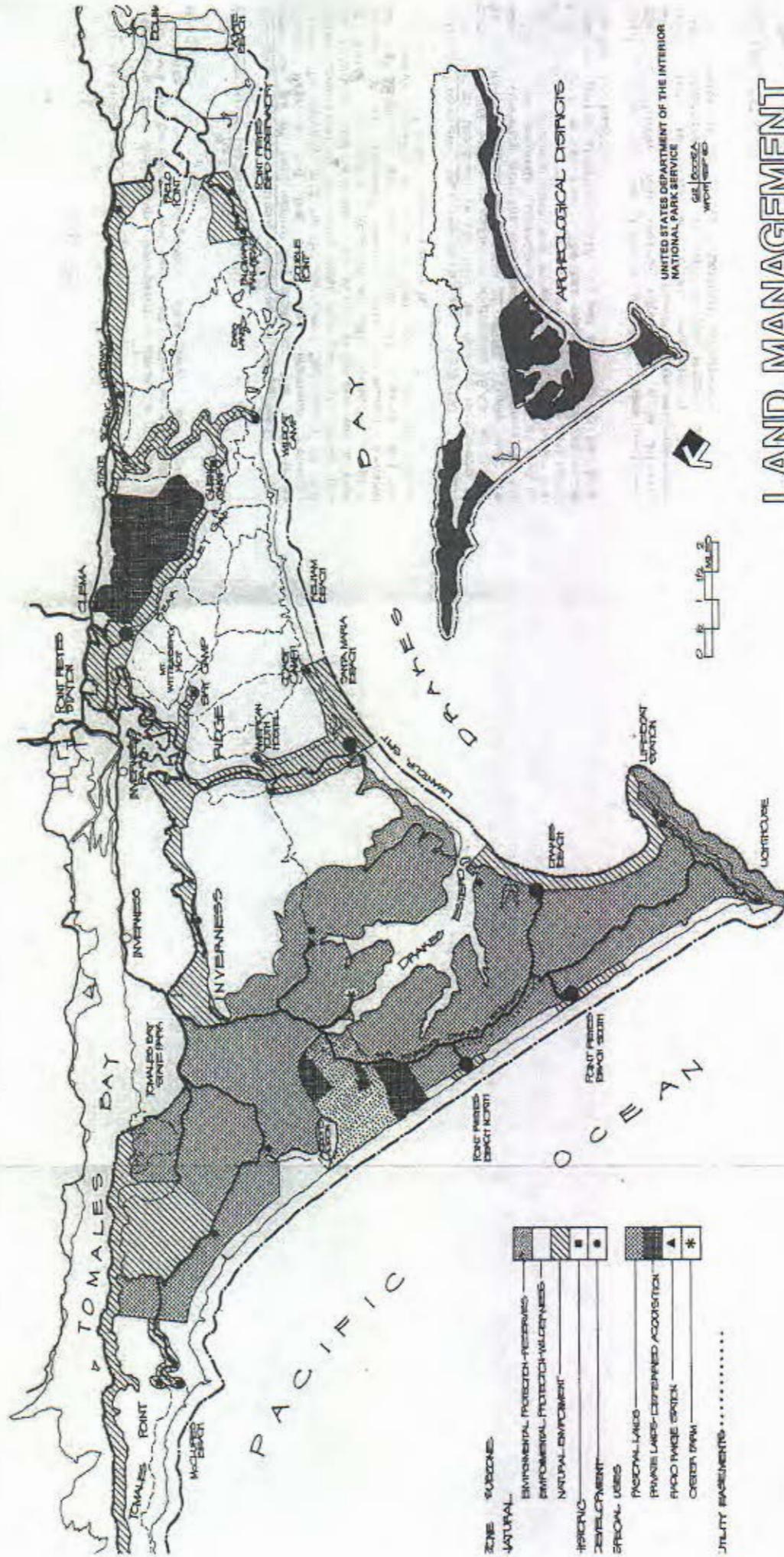
Environmental Protection Subzone--Reserves (1,300 acres). This subzone consists of two marine life reserves, the Point Reyes Headlands Reserve and the Estero de Limantour Reserve, established in January 1972 by the California Department of Fish and Game Commission to "preserve these land and water areas in a natural condition, and to protect the aquatic organisms and wildlife found thereon for public observation and scientific study." Management of the headlands reserve allows no human intrusion except that associated with approved research projects, and the estero reserve protects all lifeforms from removal or disturbance without state and federal collecting permits.

Environmental Protection Subzone--Wilderness (32,730 acres). Over one-half of the seashore has been legislatively designated as wilderness (24,200 acres) or potential wilderness (8,530 acres) by Public Law 94-567, signed on October 20, 1976. These lands are managed in accordance with the mandates of the Wilderness Act (78 Stat. 890). The designated potential wilderness consists of most of the quarter-mile offshore strip and other wetlands over which the state of California has retained some rights, and a strip still being used as a ranch access road. The two reserves described above are also designated wilderness, but are not included in the total acreage for this subzone.

Natural Environment Subzone (7,837.95 acres). These lands are managed to maintain their natural appearance while allowing compatible visitor use and providing a transition between man-made intrusions, such as roads and other developments, and the designated wilderness. Also included in this subzone are 3,413 acres of wetlands not designated as potential wilderness.

Historic Zone--157 acres

The following buildings or groups of buildings appear on the list of classified structures: Point Reyes lighthouse complex, Olema lime kilns, Point Reyes lifeboat station, Texeira Ranch complex, Home



ENVIRONMENTAL PROTECTION-RESERVES	■
ENVIRONMENTAL PROTECTION-WILDERNESSES	▨
NATURAL ENVIRONMENT	▩
HERITAGE	●
DEVELOPMENT	□
SPECIAL USES	○
NATIONAL LAKE	▧
PRIVATE LANDS-DETERMINED ACQUISITION	▲
ROAD WIDE OPEN	△
CRATER PAVAN	*

UTILITY FACILITIES.....

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
GSA B00824
MAY 1982

LAND MANAGEMENT AND USE ZONES

POINT REYES NATIONAL SEASHORE

Ranch complex, Pierce Point Ranch complex, and the Drake Monument. These resources are managed to preserve the historic remains and to allow visitor access where such access is not adversely affecting those remains.

A total of 95 archeological sites have been recorded within the national seashore. Five archeological districts have been designated. These districts encompass 74 individual sites of which 15 possess more than local significance. The 2,950 acres contained within these districts are all included within the totals shown for other zones, as management of the districts is generally in accord with the zone in which they are found unless proximity to visitor use areas requires specific preservation measures.

The historic properties shown have been included on the list of classified structures and have been or are in process of being nominated for inclusion on the National Register of Historic Places. The archeological districts are already nominated to the National Register and are currently undergoing review. These areas will be managed as National Register properties until final determination has been made.

Development Zone--85 acres

This classification includes all areas of development ranging in size and complexity from that at Bear Valley headquarters to trailhead parking for 10 cars. This zone is managed to provide essential visitor service and administrative facilities. Areas of heavy visitor concentration are shown with a larger circle on the map. In addition to Bear Valley these include the four areas where parking is available adjacent to beaches at North Beach, South Beach, Drakes Beach, and Limantour. Relatively minor developments include ten trailhead parking areas of from 10 to 100 cars, the American Youth Hostel, the Clem Miller Environmental Education Center, the Point Reyes Bird Observatory, backcountry campgrounds, the lighthouse, and the lifeboat station.

Special Use Zone--23,271.2 acres

These lands include those over which the National Park Service does not have complete jurisdiction, or upon which activities are permitted other than preservation and visitor use. Four subzones have been shown in this category.

Pastoral Lands (19,854.23 acres). This subzone was established to permit the continued use of existing ranchlands for ranching and dairying purposes, although owned by the United States. The permits, which run until 1990, and in two cases until 2000, restrict

the use of the lands to traditional ranching only. Trails for public use may be established over these lands provided they do not materially interfere with ranching activities. The concept of these pastoral lands has the support of the public and many organizations and groups, and it is probable that this use will continue indefinitely.

Radio Range Station (4 acres). This small area on Point Reyes Hill is leased to the Federal Aviation Administration and houses a directional signal station which guides planes to the San Francisco Airport. It was in existence at the time the national seashore was established.

Oyster Farm (5 acres). This property on the upper end of Drakes Estero is under a reservation of possession. The company has a lease which runs until the year 2015 from the California Department of Fish and Game for oyster culture in the estero.

Lands Not to Be Acquired (3,407.97 acres). This classification includes four ownerships excluded from acquisition although they are within the boundary. These are the American Telephone and Telegraph, the Radio Corporation of America, and the United States Coast Guard communication facilities located near North Beach, totaling 804.22 acres, and the Vedanta Society property near Bear Valley, totaling 2,144.98 acres. The exclusions are subject to removal if other than the present use is made of the properties. Other minor exclusions are as follows: U.S. Coast Guard automated lighthouse and U.S. Coast Guard communications stations, totaling 334.87 acres; Pacific Telephone, 2.83 acres; North Marin Water District, 1.06 acres; Inverness Water Company, 6.71 acres; County of Marin, 17.22 acres; and the Bolinas Community Public Utilities District, 96.08 acres.

Lands to Be Acquired--2,303.06 acres.

These lands were added by the National Parks and Recreation Act of 1978. When acquired, the lands will be added to the special use zone and the natural zone. The total acreage for the national seashore is now 67,684.21 acres.

NATURAL RESOURCES MANAGEMENT

Management strategies for perpetuating the biotic diversity and scenic quality of the park are contained in a separate natural resource management plan, which was approved in 1976.

As reflected in the land management zones, most of the national seashore is either legally designated as wilderness or is under lease

or permit for grazing purposes in accordance with its enabling legislation. Within the legal and administrative constraints imposed by these two designations, the unusual variety of scenic qualities and biotic communities that make the seashore attractive to scientists as well as recreationists will be aggressively maintained. Although the majority of the seashore is generally viewed as a wild area where natural processes are allowed to predominate, manipulation of those processes through methods such as selective thinning, burning, and mowing will be cautiously pursued when necessary to protect its scenic, ecological, and recreational values. Restoration of historic natural conditions (such as reestablishment of Tule elk) will continue to be implemented when such actions will not seriously diminish scenic and recreational values.

CULTURAL RESOURCES MANAGEMENT

Description of Resources

At Point Reyes, the complete story of northern California Indians is represented--from prehistory through European contact to recent times. For many centuries, the Coast Miwok Indians occupied this land; archeological evidence indicates that by A.D. 1500 the peninsula supported a greater population of people than today. Locked in the archeological sites of the Point Reyes peninsula lies the story of 350 years of European contact with native Californians--a contact that eventually displaced the Indian way of life. Five archeological districts containing a total of approximately 65 significant sites have been nominated to the National Register of Historic Places. These districts are Tomales Point, Headlands, Double Point Coast, Drakes Estero, and Bear Valley.

The attraction of Point Reyes to European explorers is also an important part of the area's history. Francis Drake, the English seaman, may have repaired his vessel the Golden Hinde here in 1579 at what is now known as Drakes Estero. Although Drake claimed the peninsula for England, the Spanish made the same proclamation 17 years later and gave it the name Punta de los Reyes. Pacific coast explorers continued to visit Point Reyes, and during the 19th century the area was familiar to traders, whalers, and fur hunters of the United States, Great Britain, and Russia.

The shipping trade along the coast resulted in frequent shipwrecks--56 of them from 1841 to 1934, perhaps fewer in number due to the Point Reyes lighthouse and the Point Reyes lifeboat station. The Point Reyes lighthouse (1870-1975, 9 structures), which includes the site of a weather bureau station, and the lifeboat station (1927-1969, 6 structures) have been nominated to the National Register as facilities that represent the rugged navigational history of this coastline, particularly treacherous due to harsh climate and currents.

EXHIBIT 5



Case 4:12-cv-06134-YGR Document 80-1 Filed 01/16/13 Page 91 of 106
State of California - Natural Resources Agency
DEPARTMENT OF FISH AND GAME
1416 9th Street
Sacramento, CA 95814
<http://www.dfg.ca.gov>

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



October 10, 2012

Superintendent Cicely Muldoon
National Park Service
Point Reyes National Seashore
1 Bear Valley Road
Point Reyes Station, CA 94956

Dear Ms. Muldoon:

I am writing to encourage continued cooperation between the National Park Service, the California Department of Fish and Game ("Department"), and Drakes Bay Oyster Company, as renewal of the Special Use Permit for the Drakes Bay Oyster Company is considered.

The state and federal government have worked together for 47 years—since the State originally conveyed the bottom lands in Drakes Estero to the United States in 1965—to allow continued aquaculture operations in Drakes Estero. Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottom lands at Drakes Estero indefinitely for shellfish cultivation.

For almost five decades, the State has supported aquaculture in Drakes Estero. It has done so by regulating the Drakes Bay Oyster Company on an ongoing basis, by renewing the water bottom leases in 1979 and 2004, and by authorizing aquaculture in 2010 when establishing the Drakes Estero State Marine Conservation Area. Regulations implementing the California Marine Life Protection Act prohibit the cultivation of oysters in Drakes Estero without a valid state water bottom lease. The current state issued water bottom lease with Drakes Bay Oyster Company extends to 2029.

It is also important to recognize that California now is second only to Washington in shellfish production on the west coast and that Drakes Bay Oyster Company represents 55% of the water bottoms leased and 40% of the oysters cultivated in the state.

The continued cooperation between Drakes Bay Oyster Company, the National Park Service and the California Department of Fish and Game will benefit the environment, the community, and the local economy, consistent with our agencies' unique history of managing this property. Please contact me at 916.653.7667 if you have any questions or would like to discuss this matter.

Sincerely,

Charlton H. Bonham
Director

cc: Senator Dianne Feinstein

EXHIBIT 6

COMMISSIONERS

Jim Kellogg, President
Discovery Bay
Richard Rogers, Vice President
Carpinteria
Michael Sutton, Member
Monterey
Daniel W. Richards, Member
Upland
Don Benninghoven, Member
Santa Barbara

ARNOLD SCHWARZENEGGER



JOHN CARLSON, JR.
EXECUTIVE DIRECTOR
1416 North Street
Box 944209
Sacramento, CA 94244-2090
(916) 653-4899
(916) 653-5040 Fax
fgc@fgc.ca.gov

STATE OF CALIFORNIA

Fish and Game Commission

April 14, 2010

Mr. Kevin Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake Boulevard
Inverness, CA 94937

Dear Mr. Lunny:

The Commission, at its December 10, 2009, meeting in Los Angeles, approved the correction of a clerical error from the Fish and Game Commission meeting of October 8, 1993, regarding addition of manila clams to Drakes Estero Aquaculture lease M-438-01. Manila clams were added to lease M-438-01, as originally requested, and Manila clams were removed from lease M-438-02.

Sincerely,

John Carlson, Jr.
Executive Director

cc: Deputy Director Mastrup
Marija Vojkovich, Manager, Marine Region
Kirsten Ramey, Marine Aquaculture Coordinator
Eric Dockter, Fiscal and Administrative Services Branch

EXHIBIT 7

Nancy Cave
Northern California Enforcement Program Supervisor
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

October 3, 2012

Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11

Dear Ms. Cave:

I would like to take this opportunity to provide some historical background on both marine debris in Drakes Estero and that pertaining to the 1992 Interagency Meeting that led to the development of protocols contained in the Record of Agreement regarding the timing and use of various areas in Drakes Estero with regard to oyster operations as practiced by the Johnson Oyster Company (JOC) and Drakes Bay Oyster Company (DBOC).

From 1988 until 2009, I was the Department of Fish and Game (CDFG) biologist managing aquaculture operations in Drakes Estero and the Agency person with the longest continuous involvement with aquaculture operations in Drakes Estero. At the time of my retirement, I was the CDFG Marine Region Aquaculture Coordinator managing all the state's marine aquaculture.

Marine Debris in Drakes Estero

By 1991, CDFG had received numerous letters about marine debris in Drakes Estero from concerned citizens forwarded to CDFG by then PRNS Superintendent John Sansing. I was actively working with JOC on containment, clean-up and removal of oyster cultivation materials. Many years of oyster culture by JOC using methods that utilized long-lasting plastics and polyvinyl products (PVC pipe and coffee can lids) had created a persistent problem (legacy debris). Neither of these products floats, so escaped materials sink to the bottom and get moved by currents or get buried. Waves from storms, winds, and strong tidal currents all work to unearth buried materials and wash them ashore where they are continually found even today.

JOC regularly conducted clean-up of debris on the shores of Drakes Estero and took steps to contain and minimize loss of oyster culture growing structure materials. Additionally, they were also looking for new ways to grow and harvest their oysters that would not release these products into the environment.

DBOC has moved to new culture methods and containment at harvest and regularly picks-up marine debris from beaches in the Estero, when they are not prohibited by seasonal and other closures. Materials used for culture are not cheap, so there is also a financial incentive to contain and re-use these materials. Documented collection efforts and a categorization of collected materials would provide evidence of compliance with mandated clean-up efforts. It would also provide a baseline to look at the decline of legacy materials over time. Also, it may surprisingly show, as JOC found, that there is a fair amount of plastics, foam from buoys, etc. that enters Drakes Estero from the ocean and also from PRNS visitors.

Harbor Seal Pupping Season Closure

In late 1991, allegations of take under terms of the Marine Mammal Protection Act (MMPA) of harbor seals by JOC and their oyster operations led to the involvement of NOAA National Marine Fisheries Service (NMFS). Two meetings were held, one inter-agency meeting with NMFS, NPS, CDFG and CDHS (now California Department of Public Health) on December 9, 1991, and a follow-up meeting with the Agency personnel and JOC on January 15, 1992. NMFS Enforcement did not pursue action under the MMPA and felt that JOC's normal operations did not constitute a take. NMFS Enforcement did direct the parties (NPS, CDFG and JOC) to work together to develop a mutual plan for minimizing the disturbance to harbor seals from aquaculture operations by JOC in Drakes Estero.

This Record of Agreement (see attached) resulted in the closure of the "lateral channel" during harbor seal pupping season (March 15- June 1). The "lateral channel" was generally defined as the channel running between the main channel and the western channel and illustrated as such on a map included in correspondence from NPS to CDFG on April 28, 1992. This map shows the maximum mudflat area exposed on very low tides (less than -1.0 ft.) in Drakes Estero. However, the vast majority of the time these areas are under water and not visible on the surface.

Since the Record of Agreement was finalized, JOC oyster farm employees have accessed the oyster beds adjacent to the lateral channel from the western channel during closures and year around. In reality, there is no exact beginning of the western edge of the "lateral channel," whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map. There was not the GPS or GIS capability available to mark, using latitude and longitude, this undefined point in 1992. Accordingly, JOC employees landed at the western "edge" of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.

This worked for 15 years since complaints from NPS about harbor seal disturbance ceased. As a party to the Record of Agreement, CDFG tried to ensure that JOC operated within the agreed upon protocols.

When DBOC took over the lease from JOC, I provided Mr. Lunny with a copy of the Record of Agreement and made onsite visits to the lateral channel area with Mr. Lunny and DBOC employees to indicate the permissible extent of access during the harbor seal pupping season. DBOC's use of this area is essentially in the same manner (stocking, working and harvesting) as JOC's except with less use of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations. If there had been complaints or evidence of adverse impacts, CDFG would have, with input from parties to the Record of Agreement, defined the exact location and placed a buoy or channel marker to define the westernmost permissible extent of access to the "lateral channel" area.

The shallowing of the western end of the lateral channel since 1992 has provided additional protection to harbor seals using the lateral channel since the shallower water has caused them to abandon the haul-out sites nearer to the aquaculture operations. The Marine Mammal Commission found no scientific evidence or basis to suggest the current usage of the western edge of the lateral channel, as practiced by DBOC and formerly JOC, to work Barries Bar is causing any adverse impacts to the harbor seals. Additionally, DBOC has shown good faith and adherence to the protocols in both the Record of Agreement and the

2008 Special Use Permit (SUP), and did not violate the terms of either with regard to not using the main channel during closure as shown in the 250,000 photographs taken by NPS over three years.

The Record of Agreement was meant to be an adaptive management tool with new input from operational experience revising the protocols. The technology now exists (aerial photography, Google Earth) and has been used to view accustomed usage patterns of DBOC's oyster workers in the lateral channel area and place them within the currently undefined "lateral channel" boundary. It is very easy to determine the position of an object from an altitude of several thousand feet but much more difficult in a large embayment from a boat at high tide with an algal bloom limiting water visibility. The reason there are channel markers and buoys in the marine environment is because it is very difficult to define your position on open water. It is also the reason that the CDPH has buoys for their water quality sampling stations so the samples are taken from the same place over time.

I am frankly quite amazed that the "lateral channel" remains undefined and that no buoy or channel marker has been placed to provide a reference point. I cannot imagine that in a terrestrial setting that a sign or fence would not have been posted to define the closure point or area.

DBOC has not violated the "lateral channel" boundary since they have been going about their accustomed normal operating procedures as per the Record of Agreement and in the same manner as JOC did in the past.

Proposing a Solution

A sensible solution would be to convene all the parties (CDFG, NPS, NMFS, DBOC) to the original Record of Agreement, and addressing this apparent need to define the exact boundaries for the "lateral channel." An additional item at this meeting might be for the NPS to provide the exact coordinates for the corners of the harbor seal protection polygons.

It seems that there is currently an adversarial component to the agency interactions that is not in the spirit of fostering working relationships that produce products such as the Record of Agreement. While I worked for CDFG, I tried to keep aquaculturists operating within the laws and regulations pertaining to aquaculture and their lease provisions. I also provided help in compliance if I had the resources or tools to assist them. If my experience and long history with aquaculture can be of any assistance, please feel free to contact me.

Thank You.

Sincerely,



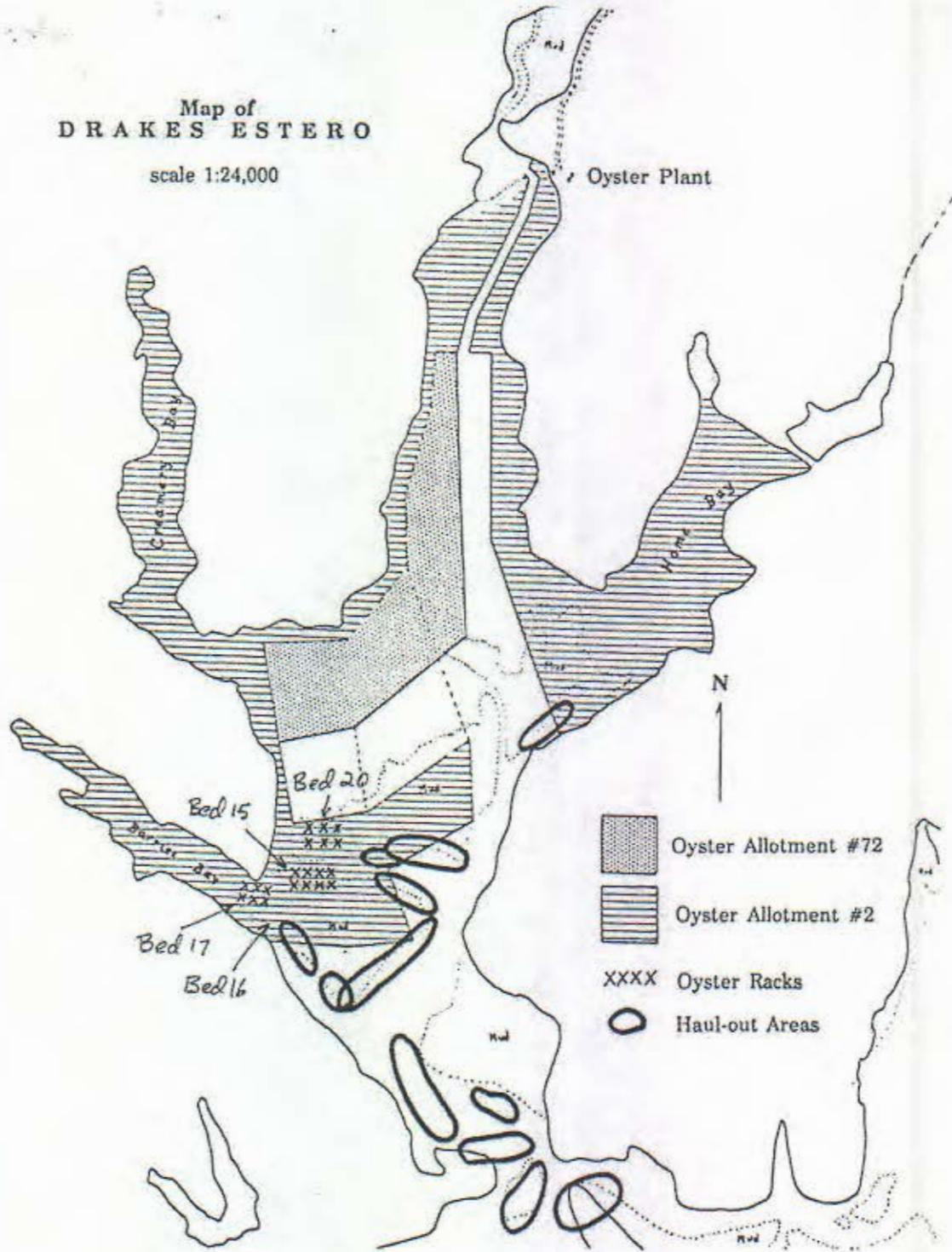
Thomas Moore
Retired CDFG Marine Aquaculture Coordinator
1136 Duer Rd.
Sebastopol, CA 95472
707-480-4939
tmoore2003@sbcglobal.net

May 15, 1992

Record of Agreement
Regarding
Drake's Estero Oyster Farming
and
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.



Drakes Estero and Estero Limantour

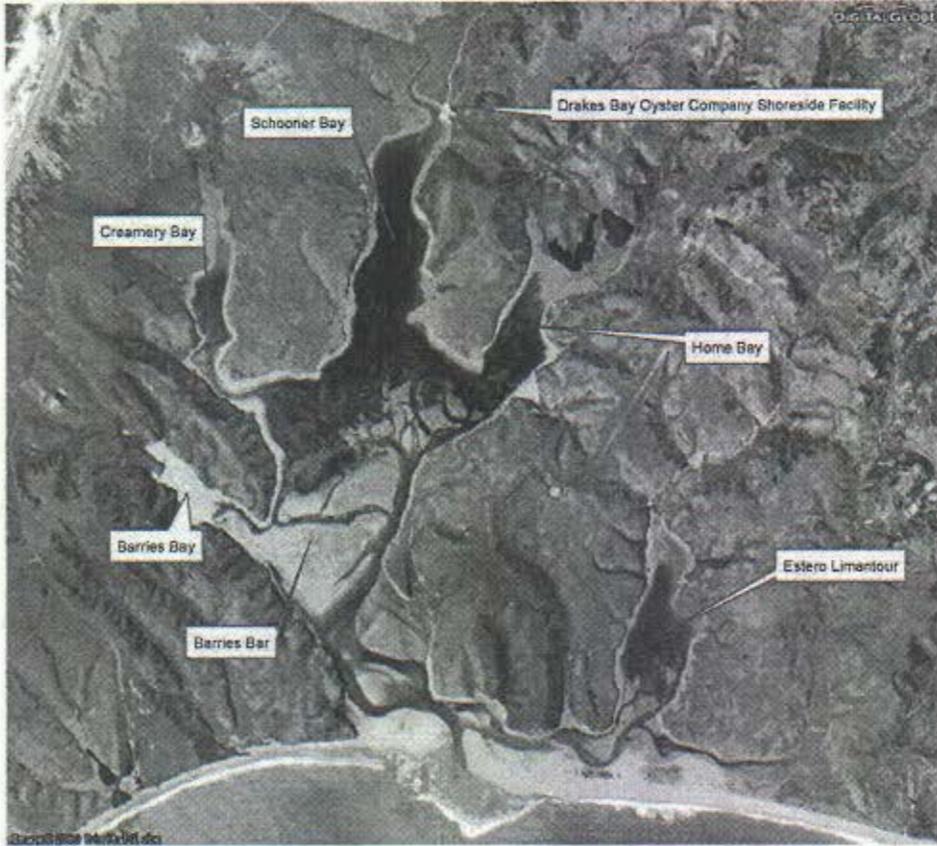


EXHIBIT 8

ATKINS

Atkins North America, Inc.
7406 Fullerton Street, Suite 350
Jacksonville, Florida 32256

Telephone: +1.904.363.6100
Fax: +1.904.363.8811

www.atkinsglobal.com/northamerica

May 7, 2012

Dr. Ralph Morgenweck
Department of the Interior
Scientific Integrity Officer
134 Union Blvd.
Lakewood, CO 80228

Subject: Response to letter from R. Morgenweck to T. St Clair dated April 19, 2012

Dear Ralph:

Attached is a letter of clarification from Dr. Chris Clark of Cornell University, documenting his current opinions regarding the Draft Environmental Impact Statement (DEIS) at Point Reyes National Seashore and the Drakes Bay Oyster Company (DBOC) operation. The gist of his response is that the new data made available by DBOC and ENVIRON during the DEIS comment period provide additional value to the impact assessment process and could usefully be included in the National Park Service's Final EIS. However Dr. Clark does mention that a full evaluation of these new data (and indeed the situation at Drakes Bay in general) would require new measurements and analysis over an extended period of time. As it stands, Dr. Clark's original opinion regarding the conclusions he drew of the current DEIS is unchanged.

In Atkins' opinion, the 'currently best available scientific information' has now been fully aired, and Dr. Clark's opinion is unchanged. If there were to be a much longer decision period, then a more detailed and comprehensive analysis could be designed and carried out. However, absent such a prolonged and potentially open-ended process, the currently available information is clear. It is also by no means certain that new research and analysis would lead to new conclusions. Hence we feel that the currently available scientific information provides a framework for decision-making.

Sincerely,

Tom St Clair
Program Manager

Letter from Ralph Morgenweck (DOI, Scientific Integrity Officer) to Dr. St. Clair on 19 April 2012: This letter listed three questions addressed to me in order to "clarify his (*my*) views on the DEIS acoustic chapter so that the National Parks Service (NPS) clearly understands his (*my*) suggestions for improving it. The three questions were:

1. Please review the data provided by ENVIRON and provide your opinion as to whether the ENVIRON measurements provide sound and reasonable information regarding the acoustic environment at Drakes Bay including whether the information was collected using appropriate techniques and whether any additional information would benefit NPS in addressing the ENVIRON data in the Final EIS (e.g. measurement protocols, weather conditions, operating condition of equipment).
2. Based solely on your interpretation of the scientific information related to acoustics are there different values and/or references for acoustic measurements (other than those in the DEIS) that appear credible and should be addressed in the final EIS?
3. Does new attention on the sources of the data in Table 3.3, the ENVIRONS data, or any additional or different values of references for measurements identified in response to question 2 alter your view of the DEIS chapter on acoustics? If so, what is your current assessment of the discussion of soundscapes in the DEIS?

I therefore carefully reviewed the DEIS, my comments on the DEIS, and the materials I received on 19 April, 2012. After this review I answered the three questions from Ralph Morgenweck's 19 April 2012 letter. I have tried to make my answers strictly based on science and not include anything but my professional scientific opinions. The following are my answers to the three questions.

Question 1.

Please review the data provided by ENVIRON and provide your opinion as to whether the ENVIRON measurements provide sound and reasonable information regarding the acoustic environment at Drakes Bay including whether the information was collected using appropriate techniques and whether any additional information would benefit NPS in addressing the ENVIRON data in the Final EIS (e.g. measurement protocols, weather conditions, operating condition of equipment).

The Environ document (ED) provides some additional synthesis of measurements. Section H provided critical review of the DEIS but did not provide any data, while Appendix B provided additional noise data in the form of charts based on sound level measurements collected on 22 November 2011 using a certified B&K 2250 Type 1 SL meter.

My simple answer to this question is that the ED information does provide some "reasonable information regarding the acoustic environment at Drakes Bay," that the data seem to have been collected "using appropriate techniques," and that both the DEIS and this ED could benefit from additional acoustic data as well as data interpretation. These additional ED noise level (in dBA) charts provide calibrated measurements of specific DBOC events relative to a distance of 50 feet. The ED data charts represent measurements of very short snapshots of specific DBOC acoustic activity events. One could go through a litany of issues related to the physical conditions under which those measurements were taken (e.g., humidity, ground reflection) and the need for a wider variety of data analyses to better address acoustic issues of spatial and temporal and spectral variability, but relative to the tolerances under discussion here, these are important and useful charts.

Neither the DEIS or ED document provides a full evaluation of the acoustic dynamics in Drakes Bay relative to the noise generating activities of DBOC. The DEIS (Chapter 3, page 202) refers to measurements collected in the Seashore in 2009 on a bluff on the eastern shore of Drakes Estero over the course of 30 days in July/August of 2009, "at a site "located approximately 2 miles from the onshore DBOC operations." These measurements were used to calculate L_{50} values for that site and time period. The context of these NPS measurements and those in the ED are very different, and cannot be effectively compared.

The photographs in the appendix provided very useful visualizations of the DBOC operational contexts.

Question 2

Based solely on your interpretation of the scientific information related to acoustics are there different values and/or references for acoustic measurements (other than those in the DEIS) that appear credible and should be addressed in the final EIS?

There are some additional DBOC noise level data that have become available since submission of the DEIS. These data were collected by ENVIRON International Corp and made available to me in their 9 December 2011 "Comments on the Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement" document. These are credible data relative to the received noise levels of specific DBOC noise-generating activities at relatively close ranges. As such, they revise the noise level values as presented in the DEIS Chapter 3, Table 3.3. These are the only additional data that I am aware of, which could inform the DEIS relative to the potential influence of DBOC generated noises on the Drakes Estero soundscape.

If there were additional time and resources, the NPS and/or others could carry out additional analyses on existing data and/or conduct additional acoustic studies. Although such efforts to collect more data and conduct more analyses would likely take several more years to complete, they would provide a quantitative mechanism by which to more fully assess the acoustic influences of DBOC operations on the Drakes Estero soundscape.

Question 3

Does new attention on the sources of the data in Table 3.3, the ENVIRONS data, or any additional or different values of references for measurements identified in response to question 2 alter your view of the DEIS chapter on acoustics? If so, what is your current assessment of the discussion of soundscapes in the DEIS?

The additional ENVIRONS' data is appropriate and helpful in that it provides some actual noise level measurement data for specific DBOC noise-generating activities at close range. Some of those activity level values in the DEIS Table 3.3 were not representative of actual DBOC noise-generating activities.

As mentioned in my responses to question-2, above, the DEIS would benefit from a richer set of data and acoustic metrics by which to evaluate the contributions of DBOC acoustic activities on the Park's physical soundscape. This will involve the application of a sound transmission model as a function of environmental conditions, terrain, and distance between the source and a potential visitor or wildlife. The dynamics of sound transmission are complex and site specific, and significantly influence the level and quality of sound received by a listener. As discussed in the DEIS, the subjective perception of sound by humans and wildlife is highly contextual and cannot be predicted simply by an estimate or measure of receive sound level, and there are numerous scientific publications attesting to the this subject. Therefore, relying on a richer set of empirically derived measurement data and sound transmission model is not by itself going to address the issue of a person's subjective experience in the Park.

In conclusion, I still find the DEIS discussion regarding potential future impacts from human-caused noise-generating activities (Chapter 4) reasonable and appropriate.

1 Amber D. Abbasi [CSBN 240956]
2 **CAUSE OF ACTION**
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel List Continues On Next Page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**REBUTTAL DECLARATION OF
DR. LINDA MARTELLO, PH.D. IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

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Counsel List Continued

John Briscoe [CSBN 53223]
Lawrence S. Bazel [CSBN 114641]
Peter S. Prows [CSBN 257819]
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Suite 700
San Francisco, CA 94104
Phone: 415.402.2700
Fax: 415-398.5630
E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
pprows@briscoelaw.net

Zachary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Linda Martello, declare as follows:

2 1. I am a Senior Scientist at ENVIRON International Corporation, specializing in
3 ecological risk assessment and marine mammal sciences (my CV is attached as Exhibit 1 to this
4 document; a list of references cited in this Declaration is attached as Exhibit 2). The following
5 facts are based on my own personal knowledge and, if called as a witness, I could and would testify
6 competently thereto.

7 2. I earned my doctorate at University of California, Santa Cruz in 1999 in the field
8 of environmental toxicology. My focus areas included marine mammal physiology and toxicology
9 and biochemical toxicology.

10 3. I have reviewed the rebuttal declaration by Dr. Kurt Fristrup. I am providing the
11 following response to that declaration based on my personal knowledge and professional expertise.

12 4. There are two noise thresholds that were discussed in Dr. Abbott's original
13 declaration—fish and harbor seal physical injury threshold, and marine mammal behavioral
14 disturbance threshold—for two oyster rack removal scenarios, a longer term removal scenario using
15 DBOC equipment, and a shorter-term removal scenario using heavy equipment. Declaration of
16 Robert Abbott (Abbott Dec.) D. 48 ¶¶ 6, 10. The shorter-term removal scenario would potentially
17 generate underwater noise of at least 184 dB μ Pa at 1m, and up to 192 dB. *Id.* at ¶ 10. The point
18 that noise would be generated above an injury threshold was to illustrate the fact that noise
19 associated with oyster rack removal operations will be significantly higher than typical noise
20 generated by DBOC operations, and are above the maximum thresholds established by NMFS for
21 protection of fish and wildlife.

22 5. Dr. Fristrup asserts that the “extended removal scenario will generate noise levels
23 similar to normal DBOC operations, but the noise will be present more often.” Declaration of Dr.
24 Kurt Fristrup (Fristrup Dec.) D. 64-3 ¶ 4. This assertion is flawed as normal DBOC operations do
25 not involve the use of chainsaws (or hydraulic cutters) and an electric hoist, and Dr. Fristrup does
26 not provide information to back up his claim that the noise levels during removal operations will be
27 similar to normal operations.

28

1 6. Dr. Fristrup does not acknowledge that prolonged exposure to increased ambient
2 noise may lead to physiological and behavioral stress in fish and wildlife. Fristrup Dec. D. 64-3 ¶
3 4.

4 7. Sound levels generated during removal operations would be in excess of
5 underwater noise generated from normal DBOC operations, and would occur for extended periods
6 of time (at least 4 hours in a work day). Dr. Fristrup underestimates how harbor seals would react
7 to these noise levels. He cites Southall et al. (2007), who reported that harbor seals behavioral
8 responses below 140 dB include: (1) moderate changes in locomotion speed, direction and/or dive
9 profile, (2) no avoidance behavior, and (3) brief, minor shift in group distribution, and moderate
10 cessation or modification of vocal behavior. Fristrup Dec. D. 64-3 ¶ 4. However, the potential
11 noise generated from removal would consistently exceed this level, and would extend beyond a
12 behavioral threshold from the source for a minimum of 292 m (Abbott Dec. D. 48 ¶ 6) and would
13 be expected to extend much further than 292 m for the higher levels of underwater noise estimated
14 (Abbott Dec. D. 48 ¶ 10). It should be noted that this is only the estimate for underwater noise, and
15 does not include the potential disturbance from airborne noise.

16 8. Dr. Fristrup acknowledges that exposure to continuous disturbance can result in
17 abandonment by marine mammals and fish, but suggests that this would be “improbable” and
18 indicates that even if abandonment occurred, marine mammals and fish would recolonize suitable
19 habitat when prior anthropogenic activity has ended. Fristrup Dec. D. 64-3 ¶ 4. The fact remains
20 that total abandonment of Drakes Estero by marine mammals and fish for any length of time
21 would represent immediate, irreparable harm with unknown consequences. It is exactly this
22 immediate harm that should be avoided, unless absolutely necessary.

23 9. Mr. Lunny estimates that removal activities using DBOC’s resources would occur
24 over a minimum of approximately 665 calendar days, which does not account for needing to stop
25 or reduce work during sensitive life stages (e.g., harbor seal pupping, anadromous fish migration,
26 bird migration/breeding). Declaration of Kevin Lunny D. 38 ¶ 61. Assuming that NPS were to
27 permit DBOC to employ additional crews, Mr. Lunny has estimated that this work period could be
28 shortened to occur over a minimum of approximately 167 calendar days, also not accounting for

1 needing to stop or reduce work during sensitive life stages, or time associated with employing best
2 management practices. Rebuttal Declaration of Kevin Lunny ¶¶ 42-43.

3 10. The Final Environmental Impact Statement did not contemplate disturbance for the
4 length of time estimated by Mr. Lunny. Declaration of Barbara Goodyear Ex. 3 at 111 (estimating
5 oyster rack removal to require “2 to 3 months”). Even if harbor seals recolonize following a short
6 cessation of activity, they are likely to abandon again once work has resumed. It is unknown what
7 impacts would be associated with constant disturbance and recolonization of habitat, and whether
8 there would be a point at which harbor seals would totally abandon the habitat.

9 11. Large-scale projects can distress seals into abandoning a haul out site completely.
10 Long-term, high levels of disturbance have led to permanent abandonment of haul-out sites at
11 numerous sites including sites near the San Francisco Bay Bridge, as well as other San Francisco
12 Bay sites (Fox 2008). In situations where disturbance may be frequent, but less threatening, seals
13 have become habituated to humans and tolerate their presence to some degree. Hauled out seals at
14 the Elkhorn Slough, near Moss Landing, California, swim close to kayakers and remain in place
15 as pontoon tour boats pass their haul-outs (Fox 2008). The harbor seals in Drakes Estero are
16 habituated to the daily activities of DBOC after many generations of exposure to the operation as
17 evidenced by the robust population of harbor seals within the Estero (MMC 2011). However, the
18 dramatic increase in activity required for removal of the DBOC structures would constitute a long
19 term, high level disturbance. This kind of heightened disturbance can lead to increased
20 physiological stress, altered haul-out behavior, and potentially, the complete abandonment of a
21 haul-out site.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 16th day of January, 2013 in Emeryville, California.



Linda Martello

EXHIBIT 1

Linda B. Martello, PhD

EDUCATION

- | | |
|------|---|
| 1999 | PhD, Environmental Toxicology, University of California, Santa Cruz |
| 1993 | BS, Biology, University of California, Santa Cruz |

EXPERIENCE

Dr. Martello is a manager in the Ecological Sciences Practice at ENVIRON. As an environmental toxicologist, Dr. Martello is responsible for project management and technical research involving the assessment of ecological impacts associated with chemical contamination of aquatic and terrestrial environments, and the toxicity of chemicals to marine mammals, fish and other aquatic organisms. Dr. Martello's expertise includes chemical acute and chronic toxicity thresholds to marine and freshwater organisms, establishing species-specific ecotoxicity benchmarks for chemicals and chemical mixtures, ecological risk assessment of persistent, bioaccumulative organic pollutants (e.g., dioxins and PCBs) and metals (e.g., chromium and mercury), chemical fingerprinting, chemical environmental fate, speciation of metals in aquatic systems, and food web modeling. Representative projects include the following:

- Technical lead regarding exposure of dolphins to PCBs and multiple stressors off the Georgia coast. Key tasks include developing sophisticated pharmacokinetic models to understand dolphin uptake and elimination of PCBs, dolphin physiology/immunology, dolphin foraging behavior and stress response, and PCB toxicology in marine mammals. This project included an in depth analysis of PCB toxicity and tissue residues among fish that are consumed by dolphins.
- Confidential Site, US. Marine mammal team leader in the development of a web-based information management system that compiles, evaluates, and facilitates access to publicly available data, reports, articles, and geospatial information related to baseline information on marine mammals. This project required the interpretation of large amounts of data to ascertain patterns in distribution, abundance, behavior and life history information of key marine mammals within a large waterbody.
- Elephant Seal PCB Transfer Study, Ano Nuevo, California. Biochemical toxicological study of the transfer of PCBs from mother to pup in northern elephant seals and the impact of PCB-laden milk on the immune systems of nursing pups.
- Primary ecological risk assessor quantifying aquatic impacts of mercury and selenium from the Salt River Project's (SRP) Navajo Generating Station (NGS) located in Page, Arizona. The atmospheric mercury and selenium emissions of the Navajo generating station and their fate and transport in the local environment, particularly in regard to their impact on nearby aquatic life, were evaluated. Mercury, methylmercury and selenium concentrations in soil, surface water, and sediment were compared to a variety of conservative ecological benchmarks that represent conservative thresholds for adverse ecological effects. Concentrations of these constituents in the diets of piscivorous wildlife and fish tissue were modeled in order to assess potential risks to the ecological community in the vicinity of the generating station.
- Project leader in the execution of an ecological and human health risk assessment for the lower Hackensack River, N.J. The risk assessment included consideration of sediment dwelling invertebrates, forage and predatory fish, omnivorous and carnivorous birds, and recreational and subsistence anglers, in a manner consistent with technical approaches widely recognized by USEPA, United States Navy (US Navy), United States Army Corps of Engineers (USACE), and state environmental agencies. Chemicals evaluated in the risk assessment focused on metals, but also included pesticides, polycyclic aromatic

Linda B. Martello, PhD

hydrocarbons (PAHs), polychlorinated biphenyls (PCBs), and polychlorinated dibenzo-p-dioxins and furans (PCDD/F).

- Key technical advisor regarding the behavior of metals in sediments at a contaminated site in the Newark Bay/Hackensack River estuary (New Jersey, USA). Responsibilities include preparing technical briefing documents outlining the behavior of metals in anoxic sediments and the implications regarding risk to human and ecological receptors, comparative ecological risk assessment for fish and avian receptors, and evaluation of potential sources of sediment contamination.
- Participated with a multi-firm team on an ecological risk assessment for a large marine terminal in the Patapsco River, Baltimore, Maryland. The ERA was designed to evaluate the potential ecological risks associated with exposure to chromium in the sediments and surface water in the Patapsco River. This ERA focuses on hexavalent chromium [Cr(VI)], trivalent chromium [Cr(III)], and chrome ore processing residue (COPR) constituents (aluminum, calcium, iron, magnesium, manganese, and vanadium).
- Primary ecological risk assessor at a Hudson River Superfund Site contaminated with metals and organics. A complete baseline ecological risk assessment was conducted for the site to determine potential impacts to aquatic and terrestrial receptors. The BERA required the development of a sophisticated tissue uptake and food web model using equilibrium partitioning to estimate risks to wildlife.
- Compiled and published two detailed reviews of the state-of-the-science concerning the ecotoxicological behavior of dioxins, PCBs, and PBDEs on aquatic organisms, with a particular focus on advancements during the past ten years in our understanding of exposure and effects in marine and freshwater fish, as well as residue levels in different species and food chain niches.
- Primary ecological risk assessor for a 5 year ecological review conducted at Lawrence Livermore National Laboratories (LLNL), Livermore, CA. The screening-level ecological risk evaluation, including food web modeling, was conducted to assess potential ecological effects of chemicals detected in surface soil, subsurface soil, and surface water within LLNL Site 300.
- Key ENVIRON team member for a Sediment Quality Triad (SQT) study consisting of chemical characterization in sediment, sediment toxicity and bioaccumulation testing, and benthic community assessments for the Lower Hackensack River, New Jersey. Chemistry data in sediment and porewater were evaluated based on the equilibrium partitioning approach and other published information to investigate the potential for chemical effects on benthic organisms and communities. Relationships were supported by laboratory toxicity and bioaccumulation experiments to characterize chemical effects and bioavailability. Benthic community results were evaluated using a regional, multimetric benthic index of biotic integrity and four heterogeneity indices.
- Conducted a Sediment Quality Triad (SQT) study for the San Diego Bay Shipyard Site. The project consisted of implementing novel approaches to quantifying the relationship between sediment-associated chemicals and biological community quality through sediment chemical characterization, toxicity and benthic community assessments.
- Development and implementation of a unique approach for performing a California DTSC Part B ecological scoping assessment at a 75-square mile petroleum reserve located in southern California USA. The ecological assessment is based on landscape ecology and the use of population indices to discern potential effects of active and historical petroleum exploration and production activities on endangered species and other sensitive receptors.
- Preparation of a California DTSC Part B ecological scoping assessment at an approximately 1,000 acre former industrial site contaminated primarily with VOCs and perchlorate in soil and groundwater. The goals of the assessment involve identifying

Linda B. Martello, PhD

species of potential concern, developing a conceptual site model, pathway and exposure assessments, and characterizing risk to the appropriate receptors.

- Compiled and evaluated data for the Lake Onondaga (New York USA) feasibility study pertaining to the impact of remediation on bioaccumulation and current and projected future mercury levels in fish tissue.
- Performed a human health risk assessment to evaluate human exposure to lead associated with installation of engine bearings and to determine whether levels requiring warning under the provisions of California's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). The project included developing the exposure protocol for evaluating incidental ingestion and dermal exposure, conducting a trial exposure study, performing the quantitative exposure and risk assessment, and preparation of the complete project.
- Preparation of a screening-level ecological risk assessment at a municipal landfill located in Ohio USA. Assessment tasks included identifying areas of ecological relevance, identifying threatened and endangered species, identifying chemicals of potential concern by comparison with ecological screening benchmarks, and characterizing ecological risk at the site. Results were used to evaluate the need for interim corrective measures.
- Participated in a baseline environmental and ecological assessment of the impact of dioxins and other chemicals on sediments and biota in Humboldt (Arcata) Bay (California USA). The assessment included preparation and implementation of a sediment and biota sampling and chemical testing work plan to understand current conditions, and evaluation of the potential impacts to the shellfish fishery in the bay. Results were used by the California Department of Health Services to determine that shellfish from the bay were safe for human consumption.

Prior to joining ENVIRON, Dr. Martello held the following positions:

Project Scientist/Toxicologist – EA Engineering, Science & Technology

- Project consultant on CEQA/NEPA issues for the City of San Francisco on the redevelopment and upgrade of the primary wastewater treatment plant in the city. Reviewed issues of water quality, hazardous materials and biology and prepared CEQA documentation.
- Developed a work plan for the rehabilitation of a stream receiving significant amounts of sedimentary materials. Examined alternative mechanisms for controlling sedimentation rates and restoring stream habitats, proposed mitigation alternatives and options.
- Assisted the CALFED Bay Delta Program (California USA) with their ecosystem restoration proposals and projects. This included organizing and participating in the peer review process of project deliverables, making recommendations to CALFED regarding monitoring needs for specific projects, reviewing draft and final monitoring plans and quality assurance project plans as well as reviewing proposals submitted during the proposal solicitation process.
- Assisted in the completion of elements for the sanitary plan for the Contra Costa Water District (California USA) regarding a new reservoir in the Sacramento-San Joaquin Delta water system. Reviewed data on contamination levels and potential sources at the reservoir.
- Prepared and implemented a limited physical and chemical testing program intended to support a Tier I waiver request to the San Francisco District Army Corps of Engineers on behalf of the TOSCO refinery (Benicia, California USA). The purpose was to provide corroborative evidence that the sediments at oil terminal piers were comprised of uncontaminated sands suitable for dredging and open water disposal. Results were used by the Army Corps to approve the Tier 1 exemption waiver.

Linda B. Martello, PhD

Sea Grant Fellow/Research Analyst - California State Coastal Commission

- Evaluated historical water, sediment and tissue data for pollutant concentrations in watersheds that feed the Monterey Bay National Marine Sanctuary (MBNMS). Analyze data for trends in levels of nutrients, bacteria, heavy metals, pesticides and other organic chemical contaminants that could significantly affect the environmental quality of the MBNMS and its resources. Created a database illustrating this information that was used as a reference by regional and state regulatory agencies and presented information regarding the Sanctuary's water quality to agencies statewide.

PROFESSIONAL AFFILIATIONS & ACTIVITIES

Society of Environmental Toxicology and Chemistry (SETAC), 1992 – present

PROFESSIONAL APPOINTMENTS

Battelle Third International Conference on Remediation of Contaminated Sediments Session Chair for the Session on "Bioavailability Assessments"

PUBLICATIONS & PRESENTATIONS

- Martello, L. B., Richard J. Wenning, Mary Sorensen. Important Considerations when Evaluating the Ecotoxicity of Speciated Metals in Sediments. (September 2004; Submitted to Battelle June 2005 Conference, Baltimore, Maryland).
- Martello, L.B., Wenning R.J., Von Burg, A., Pekala, J., Leitman, P., Sorensen, M. Trace Metal Contamination in Hackensack River, Passaic River, and upper Newark Bay Sediments (August 2004; Submitted to SETAC November 2004 Conference, Portland, Oregon).
- Martello, L.B., Wenning R.J., Von Burg, A., Pekala, J., Leitman, P., Sorensen, M. Pesticide Contamination in Hackensack River, Passaic River, and upper Newark Bay Sediments (August 2004; Submitted to SETAC November 2004 Conference, Portland, Oregon).
- Martello, L.B., R.S. Tjeerdema, W.S. Smith, .J. Kauten, D.G. Crosby. Influence of salinity on the actions of pentachlorophenol in *Haliotis* as measured by 31P NMR spectroscopy. *Aquat. Toxicol.* 41,229-250.
- Martello, L.B., C.S. Friedman, R.S. Tjeerdema. 1999. The combined effects of pentachlorophenol and salinity stress on phagocytic and chemotactic ability in two species of abalone. *Aquat. Toxicol.* 49,213-225.
- Martello, L.B. 1999. Ph.D. Dissertation, University of California, Santa Cruz, Department of Biology. The Combined Effects of Chemical and Natural Stressors on Phosphagen Concentrations and Nonspecific Immunity in Two Species of Abalone.
- Martello, L.B., R.S. Tjeerdema, 1999. The combined effects of chemical and natural stressors on Chemiluminescence activity in two species of abalone. *Aquatic Toxicol.* (in press)
- Moore, D.W., Diener, D., Anghera, M., Sorensen, M., Martello, L., Wenning, R.J. Weighing the Evidence: Delineation of Potential Sources of Toxicity Using Multiple Lines of Evidence (August 2004; Submitted to SETAC November 2004 Conference, Portland, Oregon).
- Sorensen, M., Wenning R.J., Martello, L.B., Von Burg, A., Pekala, J., Leitman, P. Polycyclic aromatic Hydrocarbons Contamination in Hackensack River, Passaic River, and upper Newark Bay Sediments (August 2004; Submitted to SETAC November 2004 Conference, Portland, Oregon).
- Tjeerdema, R.S., W.S. Smith, L.B. Martello, R.J. Kauten and D.G. Crosby, 1996. Interactions of chemical and natural stresses in the abalone (*Haliotis rufescens*) as measured by surface-probe localized 31P NMR. *Mar. Environ. Res.* 42, 369-374.

Linda B. Martello, PhD

Wenning RJ, LB Martello, A Prusak. 2010. Dioxins, PCBs, and PBDEs in aquatic organisms. In: J Meador (ed). Contaminants in Wildlife. Second edition. Taylor & Francis, Philadelphia PA. (in press).

Wenning RJ, LB Martello. 2008. Dioxin ecotoxicology. In: SE Jørgensen, BD Fath (ed). Ecotoxicology. Vol. [2] of Encyclopedia of Ecology. Elsevier, Oxford UK. p. 921-930.

Wenning R.J., Martello, L.B., Von Burg, A., Pekala, J., Leitman, P., Sorensen, M. Polychlorinated dibenzo-p-dioxin, furan and biphenyl Contamination in Hackensack River, Passaic River, and upper Newark Bay Sediments (August 2004; Submitted to SETAC November 2004 Conference, Portland, Oregon).

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EXHIBIT 2

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Hoover-Miller, A. A. 1994. Harbor seals (*Phoca vitulina*): Biology and Management in Alaska. Marine Mammal Commission. Washington, D.C. 45 pp.

Marine Mammal Commission (MMC). Mariculture and Harbor Seals in Drakes Estero, California. A Report by the Marine Mammal Commission. 22 November 2011.

1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES LLP**
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel List Continues On Next Page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and
23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

REBUTTAL DECLARATION OF LAURA MORAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415-398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net;
11 pprows@briscoelaw.net

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8 Zachary Walton [CSBN 181041]
9 **SSL LAW FIRM LLP**
10 575 Market Street, Suite 2700
11 San Francisco, CA 94105
12 Phone: 415.243.2685
13 Email: zack@sslfirm.com

1 I, Laura Moran, declare as follows:

2 1. I have over 26 years of experience dealing with coastal development projects in
3 the United States; 18 years in California with an emphasis on the San Francisco Bay Area. I am a
4 wetlands and permitting specialist and Senior Biologist with Environ International Corporation. I
5 routinely direct, manage, and conduct a broad range of multi-agency permitting activities
6 including, wetland delineation and resource studies, biological resource inventories, special-status
7 species surveys, environmental impact assessments, and create environmental monitoring plans for
8 mitigation and construction projects for a variety of public and private sector clients throughout
9 California. Further details of my experience can be found in my CV provided in Exhibit 1. The
10 following facts are based on my own personal knowledge and, if called as a witness, I could and
11 would testify competently thereto.

12 2. I have reviewed the declaration Mr. Brannon Ketcham. I am providing the
13 following response to those declarations based on my personal knowledge and professional
14 expertise.

15 3. Mr. Ketcham does not dispute that there are work window restrictions that need to
16 be adhered to in order to avoid impacts to special status species that are known to occur and/or
17 have the potential to occur based on suitable habitat in the immediate vicinity of DBOC.
18 Declaration of Brannon Ketcham (Ketcham Dec.) D. 64-2 ¶ 29.

19 4. Mr. Ketcham asserts that “activities associated with rack removal activities would
20 not affect any bird nests as all racks are flooded completely on a daily basis.” Ketcham Dec. D.
21 64-2 ¶ 30. Mr. Ketcham’s statement demonstrates his unfamiliarity with the Migratory Bird
22 Treaty Act (MBTA) and the habits of nesting birds in Drakes Estero. Any activity (e.g. increased
23 noise and vibration) that could cause nest abandonment by birds nesting in nearby saltmarsh and
24 shoreline habitats is considered a “take” under the MBTA and is unlawful. Identification of
25 nesting birds, nest locations and coordination of appropriate buffer zones with the California
26 Department of Fish and Wildlife (CDFW – formerly CDFG) and/or the United States Fish and
27 Wildlife Service (USFWS) is required for any work that would take place during the nesting
28 period of February 1 through August 31. It appears that Mr. Ketcham misinterpreted the intent of

1 the MBTA and also the nature of land based disturbance that dismantling of the DBOC operation
2 will cause and/or its impacts on nearby nesting habitat.

3 5. Mr. Ketcham does not dispute that significant the time, effort, or requirements for
4 obtaining permits necessary to perform activities associated with the aquaculture facility removal.
5 *Compare* Declaration of Laura Moran (Moran Dec.) D. 35 ¶¶ 4-17 with Ketcham Dec. D. 64-2 ¶
6 32.

7 6. Mr. Ketcham implies that DBOC should have applied for permits to remove
8 onshore and offshore aquaculture infrastructure *prior to* November 30, 2012. Ketcham Dec. D.
9 64-2 ¶ 32. Considering the fact that the Secretary of the Interior did not issue his decision to deny
10 DBOC's request for a Special Use Permit (SUP) until November 29, 2012, I do not consider
11 DBOC's failure to submit permit applications the *very next day* to be a delay for at least four
12 reasons. First, determining permitting requirements and preparing permit applications is a time-
13 intensive process, which will take much longer than a single day for DBOC's operations, which
14 may trigger permitting requirements with a multitude of federal, state, and local agencies. Moran
15 Dec. D. 35 ¶¶ 5-15. Second, inter-agency coordination between federal, state, and local regulatory
16 agencies—even prior to submission of formal permit applications—is very time intensive. Moran
17 Dec. D. 35 ¶ 17. Third, in my experience, regulatory agencies do not engage in processing permit
18 applications for hypothetical scenarios (i.e., prior to Secretary Salazar's decision of November 29,
19 2012) due to their limited resources. Finally, in my opinion, it is unreasonable for Mr. Ketcham to
20 expect DBOC to seek regulatory permits required for a removal action while they were waiting to
21 see if they would be granted a 10 year SUP extension.

22 7. Mr. Ketcham does not dispute that DBOC may need to acquire permits to avoid
23 impacts to special status species, that work window restrictions may apply, or the time and effort
24 required to obtain permits. Ketcham Dec. D. 64-2 ¶ 32. Accordingly, Mr. Ketcham's declaration
25 must be considered an admission that it would be impossible for DOBC to perform the removal
26 activities required by the National Park Service by February 28, 2013.

27 8. Mr. Ketcham states that CDFG (now CDFW), NMFS, USACE, and USEPA were
28 cooperating agencies listed in the FEIS and that these agencies are aware of and prepared to

1 address related permitting required for the dismantling of the DBOC operation. Ketcham Dec. D.
2 64-2 ¶ 32. Mr. Ketcham admits that regulatory permitting and agency coordination is required for
3 the DBOC operation removal, and that since DBOC could not have initiated permitting
4 coordination prior to the Government's decision on November 29, 2013, it is impossible for
5 DBOC to obtain the necessary permits within the timeframe mandated by the Government.

6 9. Mr. Ketcham admits that there are potential immediate impacts to special status
7 species due to the DBOC removal activities. Ketcham Dec. D. 64-2 ¶ 33 (central California coast
8 Coho salmon; central California coast steelhead). Therefore, any removal activities that may
9 affect these special status species will require regulatory agency permitting and coordination, in
10 addition to development of mitigation measures to be implemented during the removal process,
11 including the CDFW, USFWS, and NMFS. Moran Dec. D. 35 ¶¶ 5-15.

12 10. The oyster rack removal process also will likely be limited by work window
13 restrictions associated with these special status species, which occurs between June 15 and
14 October 15 for central California coast steelhead and central California Coast Coho salmon.
15 Accordingly, when combined with the harbor seal pupping season closure between March 1 to
16 June 30 (*see* Ketcham Dec. D. 64-2 ¶ 29, stating that rack removal should be done outside the
17 harbor seal pupping season), the apparent work window for offshore oyster rack removal activities
18 is a 136 day period between October 15 and February 28. This does not include potential nesting
19 bird issues that may be encountered during the month of February. Finally, in my opinion,
20 potential take of one or more of these listed species cannot be considered a "short term minor
21 adverse" impact, as suggested by Mr. Ketcham, nor would it be viewed so by the regulatory
22 agencies who protect these species.

23 11. Mr. Ketcham identifies that there will be immediate adverse impacts to eel grass
24 beds growing in and around the DBOC oyster racks during the dismantling process, regardless of
25 the removal process employed for the rack removal. Ketcham Dec. D. 64-2 ¶ 34. These impacts
26 are regulated and, therefore, agency coordination and permitting will be necessary with [CDFW,
27 USFWS, NMFS, USACE and potentially others. Moran Dec. D. 35 ¶¶ 5-15. Furthermore, as
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1 described in the Rebuttal Declaration of Scott Luchessa ¶¶ 12-17, the implementation of best
2 management practices like silt curtains may have an adverse impact on eelgrass.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 15 day of January, 2013 in Novato, California.



Laura Moran

EXHIBIT 1

Laura Moran

Sr. Manager/Sr. Biologist

Laura Moran is a Senior Biologist and Manager at ENVIRON, with over 26 years of environmental consulting experience in both biology and project management. Ms. Moran has directed, managed, and conducted a broad range of multi-agency permitting activities including wetland delineation and resource studies, biological resource inventories, special-status species surveys, environmental impact analyses, and environmental monitoring plans for mitigation and construction projects for a variety of public and private sector clients on both the east and west coasts. Ms. Moran has a thorough understanding of CEQA and NEPA, both state and federal endangered species acts, and state and federal regulations and permits involving biological and water resources. She has worked on a wide variety of complex, multi-jurisdictional and environmental compliance projects, involving EIR and EIS compliance documentation as well as multi-agency consultation, reporting and permit application preparation for projects in the eastern and western United States. Ms. Moran maintains an excellent rapport with state and federal resource agencies. Her professional specialty includes multiple aspects of environmental studies and analyses, wetland delineation, restoration and mitigation design in support of environmental compliance and permitting.

EXPERTISE

Regulatory Permitting
 NEPA/CEQA Technical Reporting and Impact Analysis
 Wetland Delineation
 Habitat Management, Restoration, Mitigation and Monitoring Plans
 Environmental Permitting
 Biological Assessments and Baseline Studies

CREDENTIALS

BSLA/MUP Degree Program, City University of New York
 BS Biology, St. Lawrence University
 Habitat Evaluation Procedure (HEP) Certification, US Fish and Wildlife Service, Anchorage Alaska
 Wetland Delineation Certification, Rutgers University
 Wetland Restoration, Enhancement and Construction, Environmental Concern, St. Michaels, MD
 Society of Wetland Scientists
 Association of Environmental Professionals
 California Native Plant Society, Marin Chapter
 Hazardous Material Handling Training
 CERT, American Red Cross First Aid and CPR
 NAUI Open Water Scuba Certification

EXPERIENCE HIGHLIGHTS

- Currently providing technical and strategic guidance for biological and hydrological resources components of joint CEQA/NEPA environmental review and regulatory permitting for a green waste to energy biofuels project in southern California. Project to be located on inert landfill and active sand and gravel quarry regulated under SMARA. Permitting lead for confidential private client currently seeking qualification for a federal U.S. Department of Energy (USDOE) loan guarantee that requires NEPA compliance.
- Currently managing adaptation portion of the Climate Mitigation and Adaptation Plan (CMAP) for the Port of San Diego. Project involves extensive analysis of land uses within Port jurisdiction relative to sea level rise and other potential impacts associated with climate change. An initial vulnerability assessment is underway to identify high risk areas. The CMAP will be appended to the Port's Master Plan and will be used to guide the CEQA and NEPA process for future Port projects.
- Currently managing preparation of regulatory agency permit applications to US Army Corps of Engineers (USACE), California Department of Fish and Game (CDFG), US Fish and Wildlife Service, Regional Water Quality Control Board (RWQCB), California Coastal Commission (CCC), and San Francisco Bay Conservation and Development Commission (SFBCDC). Multiple projects.
- Recently managed preparation of biological portions of PES in support of a federal Tiger II Grant Application submitted by the San Francisco Redevelopment Agency for the infrastructure portions of the Mission Bay Development area. Project implementation will likely require a Minimal Impact NES in support of a Caltrans Categorical Exemption determination. Managing NEPA compliance, BDCD and CCC coordination. The Mission Bay Development project is the largest project currently underway in the City of San Francisco.
- Recently completed biological assessment for Section 7, wetland delineation and regulatory agency permitting for several segments of the flood control channel desiltation and improvement projects in Hayward, Union City, and Fremont, CA. The flood control projects involve levee reconstruction/construction, channel desiltation and bank stabilization, dredging, and desiltation basin maintenance. Future tasks include a system-wide marsh enhancement plan. The flood control projects are part of the South Bay Salt Pond Restoration Project. Key biological issues include freshwater and tidal wetlands, multiple special status species, western pond turtle, pallid bat, steelhead and Chinook salmon.



1 Amber D. Abbasi [CSBN 240956]
2 CAUSE OF ACTION
3 1919 Pennsylvania Ave. NW, Suite 650
4 Washington, D.C. 20006
5 Phone: 202.499.4232
6 Fax: 202.300.5842
7 E-mail: amber.abbasi@causeofaction.org

8 S. Wayne Rosenbaum (CSBN 182456)
9 **STOEL RIVES** LLP
10 12255 El Camino Real, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 794-4100
13 Facsimile: (858) 794-4101
14 swrosenbaum@stoel.com

15 *Counsel list continues on next page*

16 Attorneys for Plaintiffs
17 **DRAKES BAY OYSTER COMPANY** and **KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**
21 17171 Sir Francis Drake Blvd
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**
24 17171 Sir Francis Drake Blvd
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**
in his official capacity as Secretary, U.S.
Department of the Interior,
1849 C Street, NW, Washington, D.C., 20240;
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW, Washington, D.C., 20240;
U.S. NATIONAL PARK SERVICE
1849 C Street, NW, Washington, D.C. 20240;
and **JONATHAN JARVIS,**
in his official capacity as Director, U.S.
National Park Service,
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF RICHARD
STEFFEL IN SUPPORT OF REPLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

1 **Counsel List Continued**

2 John Briscoe [CSBN 53223]
3 Lawrence S. Bazel [CSBN 114641]
4 Peter S. Prows [CSBN 257819]
5 **BRISCOE IVESTER & BAZEL LLP**
6 155 Sansome Street, Suite 700
7 San Francisco, CA 94104
8 Phone: 415.402.2700
9 Fax: 415.398.5630
10 E-mail: jbriscoe@briscoelaw.net; lbazel@briscoelaw.net; pprows@briscoelaw.net

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25
26
27
28
Zachary Walton [CSBN 181041]
SSL LAW FIRM LLP
575 Market Street, Suite 2700
San Francisco, CA 94105
Phone: 415.243.2685
Email: zack@sslfirm.com

1 I, Richard Steffel, declare as follows:

2 1. I am a Principal at ENVIRON International Corporation, specializing in
3 environmental impact assessments related to air quality and environmental noise. The following
4 facts are based on my own personal knowledge and, if called as a witness, I could and would testify
5 competently thereto.

6 2. I have a BA in Anthropology from Georgia State University (1975) and an MS in
7 Environmental Studies from the University of Montana (1981). I have more than 30 years of
8 experience conducting air quality and/or environmental noise impact and mitigation assessments.
9 (my CV is attached as Exhibit 1 to this document; a list of references cited in this Declaration is
10 attached as Exhibit 2).

11 3. I have reviewed the declarations of Dr. Kurt Fristrup and Mr. Brannon Ketcham
12 submitted by the Defendants, which purport to respond to issues regarding air-borne noise levels
13 associated with removal of the oyster racks. I offer the following responses to their statements and
14 representations of the issues.

15 4. Dr. Fristrup acknowledges that "the accelerated removal scenario involving heavy
16 equipment . . . will generate higher noise levels [than the Lunny-proposed removal process]."
17 Declaration of Dr. Kurt M. Fristrup (Fristrup Dec.) D. 64-3 ¶ 4. But he does not address or respond
18 to the issue of the greater extent of the noise impact "footprint" that these higher levels of noise
19 would cause, nor does he even comment on the noise impacts or to the fact that "any kayakers,
20 hikers, or birds and mammals within about 10,000 feet of the rack removal operation would be
21 subjected to airborne noise levels higher than the 40-42 dBA (Leq) average existing daytime
22 background sound levels." Declaration of Richard Steffel (Steffel Dec.) D. 37 ¶ 10. Dr. Fristrup
23 does, however, acknowledge that these levels "will plausibly, but temporarily, change the
24 distribution and behavior of animals in Drakes Estero." Fristrup Dec. D. 64-3 ¶ 4. Thus, Dr.
25 Fristrup agrees noise generated by the equipment required to remove the DBOC oyster racks will
26 be substantial, and that this noise will cause major impacts on the harbor seals in terms of
27 disturbance and displacement.

28

1 5. Dr. Fristrup asserts that ENVIRON “did not adequately describe the measurement
2 conditions or the operating status of the DBOC equipment to comply with common engineering
3 practice and the requirements of relevant national and international standards” when it provided
4 comments on the Draft Environmental Impact Statement (DEIS) in 2011. Fristrup Dec. D. 64-3 ¶

5 5. Dr. Fristrup fails to acknowledge the following: (1) the ENVIRON sound level measurements
6 were not intended to comprise absolutely definitive representations of DBOC sound sources, but
7 were instead used in ENVIRON comments to prove that DEIS noise levels for DBOC equipment
8 were grossly overstated; (2) NPS rules and policies make it the NPS’s responsibility to take
9 representative measurements for consideration in the noise impact assessment; (3) that after
10 providing direct measurement data disproving overstated source sound level used in the DEIS,
11 ENVIRON comments on the DEIS suggested that NPS use the period between the DEIS and the
12 FEIS to take their own measurements of said equipment, and (4) that the outside peer reviewer for
13 the DEIS concluded that the ENVIRON measurements represented new, actual, informative sound
14 level data regarding the equipment used by DBOC. Rebuttal Declaration of Kevin Lunny Ex. 8.

15 6. Dr. Fristrup also fails to explain why, when he must have known the DBOC
16 equipment noise data were critical to the assessment of potential impacts from DBOC operations,
17 NPS never took the simple step of taking direct measurements instead of relying on truly
18 unrepresentative industrial noise sources to represent these few, discrete, and easily measureable
19 DBOC sources. In fact, there has never been any explanation of this failure of the NPS to carry out
20 its clear responsibility to use the best data available, and Dr. Fristrup carries on with this approach
21 in his declaration.

22 7. Dr. Fristrup indicates ENVIRON direct measurement data of DBOC noise sources
23 “were substantially lower than levels reported by other authoritative reports.” Fristrup Dec. D. 64-
24 3 ¶ 5. I am unaware of any “authoritative reports” regarding the noise generation profile of DBOC
25 equipment beyond the ENVIRON report, which I previously described above. Dr. Fristrup’s
26 statement ignores the fact that the reports he cites were considering unrepresentative, much larger,
27 much louder industrially-sized equipment (e.g., a metal cement mixer filled with rock and gravel
28 to represent a plastic cylinder being turned by a low-power electric motor, and a 70-hp jet ski to

1 represent a 20-hp skiff). Although NPS had plenty of time and clearly more than adequate
 2 resources to take their own definitive sound level measurements of the equipment in question, they
 3 did not. Instead they chose to criticize the only direct measurements of the subject equipment
 4 without asking for additional clarifying information or ever explaining what they perceive the
 5 problem to be with these measurements. This is, I believe, a smokescreen to conjure up uncertainty
 6 where none exists, and in the absence of any alternative explanation, I am forced to conclude that
 7 NPS and Dr. Fristrup's decision not to take direct source noise measurements may have been
 8 based on the knowledge that using actual representations of DBOC noise sources would *not* have
 9 supported their preconceived (but still unproven) determination that these sources are causing a
 10 major noise impact on the soundscape of Drakes Estero.

11 8. Dr. Fristrup writes, "NPS was able to extract estimates of the noise generated by
 12 DBOC motorboats" and that "[these] estimates were inconsistent with the ENVIRON
 13 measurements, and consistent with the measurements reported elsewhere." Fristrup Dec. D. 64-3 ¶
 14 5. These statements have been completely discredited by an ENVIRON report submitted to
 15 Secretary Salazar on November 27, 2012, which proved NPS was absolutely *not* able to develop
 16 credible estimates of boat noise levels or that their estimates were in any way representative of
 17 actual DBOC boat noise levels. Waterman Dec. D. 43 Ex. 3, ENVIRON Report at 7, Attachment 1
 18 thereto at 15-19. Contrary to the claim repeated here by Dr. Fristrup that NPS was able to
 19 "unambiguously" detect and characterize the noise generated by DBOC motorboats from
 20 recordings from a remote microphone along the banks of Drakes Estero taken in summer 2009 and
 21 winter 2010, Dr. Goodman's analysis of the collected data showed that the NPS analysis contained
 22 "so many false positives . . . and false negatives . . . that all of the boat noise data presented in
 23 FEIS Appendix I lack scientific validity." *Id.*, ENVIRON Report at 7. No one at NPS, including
 24 Dr. Fristrup, has responded to this detailed critique of the soundscape section of the FEIS, and
 25 without some explanation of how these fatally flawed data are actually of any use, repeating the
 26 false claim to suggest that NPS has used this information to prove its case is, at best, disingenuous.

27 9. Dr. Fristrup states that in spite of the NPS uncertainty regarding the validity of the
 28 ENVIRON sound level measurements of DBOC equipment they nonetheless "retained the

1 ENVIRON values for the FEIS analysis to reveal the range of spatial impacts that would occur
2 under different assumptions for equipment noise levels.” Fristrup Dec. D. 64-3 ¶ 5. This suggested
3 largesse by NPS obscures the false dichotomy represented by this approach that insinuated both
4 greater uncertainty and an unrealistically large range of possible equipment noise levels than
5 actually exist. This artificial complexity could have been completely avoided by direct
6 measurements of DBOC equipment noise, but NPS never took this simple step. I have come to
7 believe this approach was intentionally selected to serve the NPS agenda of suggesting a much
8 larger potential for noise impacts than actually exists.

9 10. Dr. Fristrup notes that ENVIRON has commented several times regarding NPS
10 use of selected noise metrics to provide an indicator of noise impacts and the application of
11 incomplete and misrepresentative data to characterize existing conditions in the study area.
12 Fristrup Dec. D. 64-3 ¶ 6. In the original analysis reported in the DEIS the NPS applied a
13 heretofore unknown noise metric they called “lowest daily ambient level” along with the median
14 (L50) metric from a single measurement location to represent existing ambient noise levels
15 throughout the study area. The L90 was not mentioned, defined, or applied in the DEIS.

16 11. In the FEIS, NPS switched to using the L90 metric (and the L50) as indicators of
17 existing conditions, and used the L90 as the reference point for assessing impacts. Dr. Fristrup
18 claims use of the L90 “conforms to a practice suggested by American Standards Institute S 12.9
19 Part 1.” Fristrup Dec. D. 64-3 ¶ 6.

20 12. While the L90 is tangentially defined by the cited ANSI standard (i.e., as a “time-
21 above” metric and as a potential metric for describing “residual sound”), this ANSI standard does
22 not suggest applying the L90 to assess *impacts* of transient sources such as those represented by
23 DBOC equipment and, especially, the DBOC boats. And even if this standard could be construed
24 to suggest such comparisons, the overly simplistic noise calculations performed by NPS to
25 estimate sound levels at distance from DBOC sources would not be sufficient to make credible
26 determinations regarding the actual potential for impacts. (See further discussion of modeling
27 under paragraph 17, below.)

28

1 13. ENVIRON comments on the DEIS and FEIS suggested using the equivalent sound
 2 level (L_{eq}) as the best metric for comparing levels and for discerning the potential for adverse
 3 effects on people. This approach was confirmed by the National Research Council of the National
 4 Academy of Sciences (NAS) in their review of the NPS DEIS in which they stated, “[an] L_{eq}
 5 measurement gives a more representative value because it accounts for duration, although it tends
 6 to overestimate noise in quiet environments because it is sensitive to high amplitude transients.
 7 Alternatively, characterizing the variability of sound could also be accomplished using several
 8 percentiles (e.g., L_{90} , L_{50} , L_5). Volpe (2011) reports both L_{50} and L_{eq} values, which differ by up to
 9 6 dBA, a difference large enough to affect the estimated levels of impact of the alternatives which
 10 compare ambient sound levels for equipment similar to those used by DBOC. Assessment of the
 11 natural variability of the Drakes Estero soundscapes is essential for providing the proper context in
 12 which to analyze the influence of DBOC activities on the soundscapes.” Lunny Dec. D. 40 Ex. 11
 13 at 37.

14 14. In support of using the L_{90} metric, Dr. Fristrup claims that, “NPS policy focuses
 15 on the sustained capacity of the environment to mask sounds.” Fristrup Dec. D. 64-3 ¶ 6. Be that
 16 as it may, this approach was not part of the impact criteria defined in the Draft and Final EIS, and
 17 such comparisons did not comprise the “major” noise impact determination reported in the FEIS.
 18 These “impact” criteria were based on the levels and durations of DBOC noise compared with an
 19 estimated existing background level *and* an amount of time DBOC sources exceeded the
 20 background in the DEIS. Findings of “major” impacts based on these criteria were questioned in
 21 the NAS review of the DEIS, *and/or* for “minor” and “moderate” impacts in the FEIS, which
 22 found a high degree of uncertainty associated with stated soundscape impact findings of the DEIS
 23 and stated that alternatively, the noise impacts of the continued DBOC operations could be
 24 “moderate to minor.” Lunny Dec. D. 40 Ex. 11 at 50. This review may have contributed to the
 25 NPS decision to change noise impact metrics – so as to make their goal of finding major impacts
 26 achievable.

27 15. Dr. Fristrup claims that, “Although the noise analysis in the FEIS contains
 28 considerable detail, its findings are fairly simple to express. DBOC airborne noise sources range

1 from 60-80 dBA, loud enough to interfere with conversation more than 50 feet from the noise
2 source.” Fristrup Dec. D. 64-3 ¶ 6. Neither of these statements is accurate, and both are
3 misleading. The statement regarding DBOC noise levels is an unsubstantiated assertion not
4 supported by any direct measurement data collected by NPS. Direct measurements by ENVIRON
5 of the specific DBOC equipment in question suggest this characterization is a gross overstatement
6 of actual equipment noise levels. No *measured* DBOC equipment noise levels even approached the
7 80-dBA upper end of this supposed range (i.e., the very loudest source reached 70 dBA Leq), and
8 several were less than the low-end of this stated range. In addition, the loudest DBOC sources are
9 more than 50 feet from the water (where curious kayakers might possibly be exposed) and/or,
10 DBOC *could* easily employ mitigation measures that would substantially reduce noise
11 transmission from their equipment. But such mitigation measures were never even mentioned,
12 much less considered by the FEIS. Waterman Dec. D. 43 Ex. 3, ENVIRON Report at 7.
13 Consequently, DBOC equipment noise level already are, or could be reduced to levels where they
14 would not interfere with the conversation of park visitors, or there would be no people near
15 enough this equipment for conversation to be disrupted. Consequently, noise from this equipment
16 would *not* represent an impact as defined in the FEIS. I therefore believe Dr. Fristrup’s statements
17 here are nothing more than another smokescreen to obscure both the immediate issue at hand and
18 the even larger question of the accuracy and utility of the entire noise impact assessment prepared
19 by NPS.

20 16. Dr. Fristrup writes, “Background sound levels in Drakes Estero are about 26 dBA,
21 nearly an order of magnitude lower than the quiet background recommended for primary school
22 classrooms or bedrooms (35 dBA).” Fristrup Dec. D. 64-3 ¶ 7. This comparison is spurious. The
23 measured L90 sound level (which was exceeded by other sound levels 90% of the time) *during one*
24 *month at one location* was 26 dBA, but this level is neither representative of true existing levels,
25 nor is there any evidence that it is representative of levels at other locations throughout Drakes
26 Estero. This point was raised in ENVIRON comments on the DEIS, and clearly substantiated in
27 the NAS review of the DEIS which said, “An essential feature of a soundscape is the variation
28 over space and time. However, the environmental sound levels presented within the DEIS were

1 based on measurements taken from a single location (on a bluff above Drakes Estero) over 30 days
2 in late summer. This does not accurately represent the temporal or spatial variability of the project
3 area. Using data from a single month misses variability due to seasonal weather and wind patterns.
4 At the same time, limiting measurements to a single location cannot capture gradients in sound
5 levels with distance from the source. Propagation characteristics are complex in coastal regions
6 and extrapolating a single set of measurements to an area as large as Drakes Estero does not
7 capture this complexity or variability.” Lunny Dec. D. 40 Ex. 11 at 37. In addition, Dr. Fristrup’s
8 comparison to a recommended classroom or bedroom background level of 35 dBA is, at best,
9 misleading, because the recommended levels for such receiving locations are typically based on
10 the Leq metric and *not* the L90 NPS is attempting to use to represent existing background
11 conditions in the Drakes Estero. So again, Dr. Fristrup is only serving to confuse and not clarify
12 the issues at hand.

13 17. Dr. Fristrup writes, “Industrial noise sources – like DBOC equipment – have huge
14 spatial footprints in quiet natural environments.” Fristrup Dec. D. 64-3 ¶ 7. This is an
15 unsubstantiated, grossly exaggerated, misleading statement. The NPS has no evidence supporting
16 the contention that DBOC noise sources are similar to what would typically be regarded as
17 “industrial” sources, and simply saying it does not make it so. NPS has taken no direct
18 measurements of this equipment and has instead relied on unrepresentative estimates of much
19 larger and louder noise sources to overstate noise from these sources. The only direct
20 measurements of these noise sources by ENVIRON indicate they are relatively minor sources that
21 do not rise to the level of what would typically be considered an “industrial” source. But using
22 inflated source values, NPS performed very simplistic calculations that they then construe to
23 grossly overstate both the levels and durations of noise events. ENVIRON strongly suggested
24 replacing this simplistic approach by performing actual noise modeling using correct
25 representations of the noise sources in its comments on the DEIS. Waterman Dec. D. 43 Ex. 3 at 3.
26 NAS suggested a similar approach based on their review of the DEIS, saying, “There are many
27 propagation models available to model sound from a source to a receiver. The DEIS provides
28 sound levels from motorboats and associated consequences. The committee assumes simple

1 spherical spreading was used for these calculations, as this method was used elsewhere in the
2 DEIS. Simple spherical spreading is often not the most accurate model to use. In addition,
3 consequences for communication disruption within 50 feet of a source would only realistically
4 impact DBOC staff near the source. Kayakers or park visitors would be unlikely to spend time in
5 such close proximity to DBOC activities and sources. It would be more accurate to show
6 propagation model results from sources in different places around the area of DBOC operations to
7 more accurately illustrate propagation between sources and potential receivers.” Lunny Dec. D. 40
8 Ex. 11 at 38. But NPS ignored these suggestions and maintained their simplistic and grossly
9 exaggerated estimates of DBOC noise. I disagree with this approach and with the conclusions they
10 reached using it.

11 18. Mr. Ketcham does not respond to the issue of potential noise impacts from the
12 oyster rack removal process in the discussion of soundscape in his declaration. Ketcham Dec. D.
13 64-2 ¶ 38. Instead, he attempts to refute the discussion in my and Dr. Corey Goodman’s comments
14 on the FEIS regarding the NPS’s misuse of their own noise impact criteria, which are based on
15 defined amounts of time that sources of interest exceed background levels. Mr. Ketcham asserts
16 that we misunderstood the impact criteria in saying that noise impacts must be assessed based on
17 noise received at a single location instead of being considered based on noise emitted into the
18 project study area as a whole. I disagree with his assertion because it makes no sense for NPS to
19 argue that noise causes impacts due to potential interference with normal conversation, while at
20 the same time saying the impact determination can be based on noise emitted anywhere within the
21 Drakes Estero. For noise to have the potential to cause an impact at all, it must first be perceived
22 by a receiver. If either the noise emitting source or the noise receiver is moving during the noise
23 event, or if the source and receiver are separated by great distance, the amount of noise received
24 and the potential impact of that noise will be very different than if the source and receiver are close
25 enough for the noise to interfere with conversation during the entirety of the noise event.

26 19. The noise impact criteria to be applied in this assessment were redefined in the
27 FEIS as follows:
28

1 Intensity definitions for noise levels are rendered in terms of speech interference in order to
 2 interpret decibel values in relation to familiar, everyday experiences for park visitors and
 3 public stakeholders. . . . Intensity definitions based on function consequences to human
 4 communication also serve as reasonable proxies for the magnitude of human-caused noise
 5 inference with animal behavior.

6 For short-term impacts, percentages are based on the percentage of time during a year
 7 (taking into consideration 24 hours a day) that human-made noise impacts the ambient
 8 soundscape. For long-term impacts, percentages are based on the percentage of time during
 9 the 10-year SUP term (taking into consideration 24 hours a day) that human-made noise
 10 impacts the ambient soundscape

11 [Soundscape impacts are defined as follows]

12 **Negligible:** The impact is not detectable or measurable.

13 **Minor:** Human-caused noise would be at a level (less than 35 dBA) that enables normal
 14 voice conversation at distances exceeding 32 feet, *and/or* the natural soundscape is
 15 interfered with less than 5 percent of the time.

16 **Moderate:** Human-caused noise would be at a level that enables normal voice
 17 conversation at distances greater than 16 feet (less than 41 dBA) and less than 32 feet
 18 (greater than 35 dBA), *and/or* the natural soundscape is interfered with 5 to 10 percent of
 19 the time.

20 **Major:** Human-caused noise would be at a level (greater than 41 dBA) that requires
 21 elevated vocal effort for communication between people separated by 16 feet, *and* the
 22 natural soundscape is interfered with more than 10 percent of the time.

23 Goodyear Dec. Ex. 3 at 444-45 (emphasis added). Note that the first two “and/or” were simply
 24 “and” in the DEIS. Because these impact criteria are at least partially based on interference with
 25 normal conversation, it is clear that for such impacts to occur there must be a receiver present,
 26 which means the accumulated time used to assess impact *must be* for a single location. And
 27 contrary to Ketcham, I would argue a similar requirement for any portion of the soundscape,
 28 because without a receiver there is no impact, so again the cumulative exposure must be based on

1 sound levels over time at a single location. And as shown in a previous submittal, DBOC sources
2 *do not* rise to the level of impact based on cumulative noise duration. Waterman Dec. D. 43 Ex. 3,
3 ENVIRON Report at 4-7. This same conclusion is echoed by the findings of the DEIS review by
4 the NAS, which found a high degree of uncertainty associated with stated findings of impact and
5 that alternatively, the noise impacts of the continued DBOC operations could be “moderate to
6 minor.” Lunny Dec. D. 40 Ex. 11 at 50.

7 20. In contrast with the typical noise levels from DBOC equipment sources that do not
8 actually result in anything more than occasional, short-term, temporary, and minor noise impacts to
9 the soundscape within Drakes Estero, the noise associated with removing the oyster racks, would
10 cause major noise impacts, as acknowledged by Dr. Fristrup. In my opinion, the oyster rack
11 demolition process would cause greater noise impacts within the Estero than anything the oyster
12 farm’s operational noises have probably ever caused, and certainly while the facility has been
13 operated by DBOC. For these reasons, I urge granting of the injunction to prevent such demolition
14 until such time as the larger legal issues in this case have been resolved.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 14th day of January, 2013, in Lynnwood, Washington.



Richard Steffel

EXHIBIT 1



Richard Steffel | Principal

Lynnwood, Washington

+ 1 425 412 1808 | rsteffel@environcorp.com

Richard Steffel has over 30 years of experience evaluating environmental impacts and possible mitigation measures related to mobile and area sources of air pollution. His experience includes 19 years conducting transportation and general conformity assessments under state and federal air quality rules for a variety of transportation projects, transit and transit-oriented development projects and new and redevelopment projects that required project-level air quality conformity assessments. Additionally, he has over 20 years of experience conducting and managing a wide variety of environmental noise compliance, impact and mitigation assessments. These have included numerous evaluations of roadway, transit and development projects which have had to comply with state and local noise rules and/or federal and state noise impact and mitigation criteria established by the Federal Transit Administration, the Federal Highway Administration, the Department of Housing and Urban Development and various western state transportation agencies. Additionally, he has conducted numerous air and noise studies for new and modified marine shipping and repair facilities, including cruise ship homeports, container terminals, commodity export terminals and intermodal shipping facilities. Many of these air quality and environmental noise studies included reviews and documentation required by the Washington State Environmental Policy Act and NEPA.

EDUCATION

1981 MS, Environmental Studies, University of Montana (Air Quality/Energy Conservation)

1975 BA, Anthropology, Georgia State University (Ecological Anthropology)

EXPERIENCE

Noise Impact/Compliance/Mitigation Assessments

- Terminal 5 (T-5) Container Equipment-Handling Noise Mitigation Assessment, Port of Seattle, WA. Principal in charge, project manager, and primary investigator in equipment noise reduction study. Efforts focused on backup alarm noise from container-handling equipment at T-5, and included sound level measurements to assess the audibility of these safety devices, and recommendations for using quieter devices to reduce noise levels received at off-site residential locations.
- Train Yard Noise Impact and Mitigation Assessment, Equistar Chemicals, Morris, Illinois. Principal in charge and project manager for a noise compliance, impact, and mitigation assessment of a new rail storage yard at an existing chemical manufacturing plant. The review included multi-day sound level measurements both on site and near noise-sensitive residential receivers in the vicinity, and CadnaA noise modeling to consider the changes in the acoustic environment due to the new rail yard. In addition to projecting off-site rail yard noise levels, the modeling also considered the effectiveness of using noise barriers near portions of the facility property boundary to obstruct noise transmission to off-site receivers. The mitigation analysis additionally used CadnaA to assist in defining the placement, length, and height of two noise barriers, including use of a berm/wall combination to achieve a greater overall height. These noise analyses were documented in a technical report provided to the client.
- Seattle Steam Fuel Change Project, Seattle Steam, Inc., Seattle, WA. Project manager and principal investigator for the air quality and noise impact review of proposed fuel change at existing facility. Noise analysis focused on the design and noise sources associated with the new wood fuel-handling building to assess compliance with applicable noise rules.

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- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance and mitigation assessment of operational transfer station to recommend means to reduce noise received on nearby properties. Included source and ambient measurements in the area and noise modeling to assess potential noise reduction treatments.
- Tacoma Narrows Bridge 24th Street Electronic Toll On-Ramp Project, WSDOT, Gig Harbor, WA. Project manager and principal investigator for the analysis to consider the need for supplemental noise mitigation assessment for potential traffic noise impacts at residential receivers affected by the larger Tacoma Narrows Bridge Project. Analysis refuted previous determination of the lack of feasible and reasonable mitigation to shield affected from high levels of traffic noise by proving mitigation could work at a reasonable cost.
- Oso Gravel Pit Noise Studies, Green Crow, Inc., Snohomish County, WA. Principal in charge for ongoing support related to noise issues from operation and expansion of the facility. Project has included numerous sound level measurements to document existing ambient conditions near the gravel pit's initial and relocated access road, and continuing consulting and expert testimony before hearings examiner and monitoring related to the conditional use permit conditions for the facility.
- Float Glass Manufacturing Plant, Cardinal Glass Industries, Napavine, WA. Project manager and principal investigator of environmental noise implications of the development of a float glass manufacturing facility in Lewis County, WA. Analysis included measurements of existing sound levels at representative sensitive receiving locations in areas. Potential impacts from operational noise included on-site truck traffic and idling, on-site train movements, facility noise, on-site material handling, and an on-site electrical substation. Evaluated noise from these sources using the FHWA Traffic Noise Model, the Environmental Noise Model, and specialized calculations. Considered projected future sound levels both in relation to the county noise limits and with regard to the potential for noise impacts due to changes in the existing acoustic environment. Analysis also evaluated potential noise reducing mitigation in the forms of operational changes and noise barriers for several potentially problematic noise sources. Findings summarized in the Final EIS for the project. Also testified in the successful defense of the EIS during an administrative appeal.
- Gravel Truck Noise Assessment, Canyon Resources, Puyallup, WA. Contributor. Developed noise monitoring protocol and participated in initial sound level measurements of compliance of gravel pit haul truck traffic noise levels with applicable county nighttime noise limits. Conducted noise mitigation analysis and oversaw subsequent sound level measurements to verify compliance.
- 145th Place Noise Impact/Mitigation Study, City of Bellevue, Bellevue, WA. Project manager and senior reviewer of noise impact and mitigation study for the widening of 145th Place.
- Manufacturing Facility Noise Compliance Assessment, Confidential Client, Tumwater, WA. Project manager and principal investigator for noise compliance measurements for a microchip manufacturer. Evaluation included frequency-specific source sound measurements during experimental operation of the facility to identify potentially problematic sources and to assess the effectiveness of noise mitigation barriers along the property line.
- 140th Avenue Noise Mitigation Studies, City of Bellevue, Bellevue, WA. Project manager and principal investigator for the noise impact and mitigation study for the widening of 140th Avenue. Assessment included extensive modeling to assess potential traffic noise impacts under Bellevue's noise rule followed by site-specific modeling to evaluate the potential noise reduction benefits of noise barriers along much of the project alignment. Included several meetings with citizen advisory group to explain and discuss findings. Studies led to construction of cost-effective noise barriers along much of this project area.
- Madrona Woods Noise Mitigation Study, Homeowners Association, Gig Harbor, WA. Project manager and principal investigator for review of noise impact and mitigation assessment related to SR-16/36th Street

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interchange. Analysis led to construction of two noise barriers determined in previous analyses to be unnecessary and ineffective.

- Noise Compliance Assessment, City of Kent, Kent, WA. Project manager and principal investigator for noise compliance assessment of a food distribution facility where large trucks idle across the street from numerous residential receivers. Assessment led to further studies (by others) to assess and then construct noise barriers for this facility.
- Terminal 90/91 Noise Compliance Assessment, Port of Seattle, Seattle, WA. Project manager and principal investigator for compliance assessment of noise from refrigerated shipping trucks at the loading dock of a fish-processing facility. Study led to operational changes at the facility to relocate idling reefer containers.

Marine/Freight Facility Projects (Including General Air Quality Conformity where Applicable)

- Gateway Pacific Terminal, SSA Marine, Cherry Point, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation assessments for a proposed 54 million ton/year commodity export/import terminal on the Strait of Georgia, northwest of Bellingham, WA. The environmental noise assessment included measurements of existing conditions in the project vicinity and noise modeling using CadnaA to consider off-site sound levels related to facility operations. The noise assessment also considered train operations noise along the route between the railroad mainline and the facility, and included a mitigation assessment for projected train-horn noise impacts. The air quality review included extensive emission inventory development to characterize future operations of transiting and on-site trains, coal and other commodity-handling systems, vessels in transit and hoteling, and vessel-loading systems. These emissions were considered in an AERMOD dispersion modeling analysis that evaluated compliance with ambient air quality standards. Results of these analyses were documented in technical reports review by permitting agencies and the EIS contractors for this project. This project is ongoing.
- Puyallup Tribal Terminal, SSA Marine, Port of Tacoma, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation assessments for the modification and expansion to develop a 4-berth container terminal in the Port of Tacoma, WA. The environmental noise assessment included measurements of existing conditions in the project vicinity, source noise measurements of expected terminal operations equipment, and noise modeling using CadnaA to consider off-site sound levels related to facility operations. The air quality review included extensive emission inventory development to characterize future terminal operations and AERMOD dispersion modeling to evaluate compliance with ambient air quality standards. Due to the designation of the Tacoma area as nonattainment for fine particulate matter (PM_{2.5}), the review also included extensive review by and interactions with the Puget Sound Clean Air Agency regarding emission reduction components included in the project.
- Weyerhaeuser Port of Olympia Log-Export Facility, Weyerhaeuser Company, Olympia, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation studies for a proposed log export facility. The air quality analysis included compilation of worst-case peak-day and annual vessel and log-handling equipment emission inventories, and AERMOD dispersion modeling. The analysis assessed potential off-site concentrations of fine particulate matter (PM_{2.5}), which were also used as a surrogate for diesel particulate matter. The noise study included measurements of ambient levels in the project vicinity, equipment source noise measurements in and around an operational log-handling facility, and calculations to assess both compliance with local noise limits and the potential for impacts due to changes in noise levels.
- Terminal 30 (T-30) Container Terminal Reactivation and T-91 Cruise Terminal Relocation, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality impact and mitigation assessment and environmental noise impact review for this two-part project. Air quality analysis included compilation of detailed peak-day and annual emission inventories for hotelling vessels and container-handling equipment and haul

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vehicles. Emissions data considered in AERMOD dispersion modeling to assess potential off-site concentrations of both criteria air pollutants and selected toxic air pollutants. Analysis considered uncontrolled emissions and then more realistic and controlled emissions based on implementation of particulate control technologies and cleaner diesel fuels.

- Rail/Barge Satellite Transfer Facility, Port of Everett, Everett/Mukilteo, WA. Project manager and principal investigator for the air and noise studies for the EIS considering establishment of a barge-to-rail transfer facility for oversized containers. Studies considered three candidate sites. Air quality analysis included an assessment in relation to general conformity during construction of the facility and review of the implications of related traffic. Noise analysis included ambient measurements in the vicinity, special consideration of rail travel and horn noise, impact and mitigation modeling, and subsequent testimony during the shoreline permitting process for the facility. Subsequent work included development of air quality and noise management plans for implementation during construction of the facility, and sound level measurements to assess pile-driving noise levels at nearby eagle nest and perch locations.
- Homeport Cruise Ship Terminal, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and noise impact and mitigation analyses for the proposed development of a temporary cruise ship homeport terminal at the Port's Terminal 90/91 and Terminal 30 on Elliott Bay. Assessments included dispersion modeling of the cruise ship sources and consideration of off-site traffic-related air quality. Provided support in later supplemental air quality analyses for the now operational T-30 cruise ship port facility.
- Pier 1 Redevelopment Project, Port of Anacortes, Anacortes, WA. Project manager and principal investigator for the air quality and noise impact and mitigation evaluations for the EIS for the proposed redevelopment and expansion of an existing shipyard on the industrial waterfront. Air quality analysis included consideration of compiled monitoring data and review of projected future traffic related to the facility. Noise analysis included ambient and compliance measurements in neighborhoods near the facility, source measurements of shipyard noise sources (e.g., cranes, welding, etc.), and impact and mitigation modeling to assess the noise implications of the proposed facility expansion.
- Terminal 90/91 Neighborhood Noise Compliance Studies, Port of Seattle, Seattle, WA. Project manager and senior reviewer for the nighttime noise monitoring compliance evaluation for the Terminal 90/91 facility under terms of the short-fill agreement between the Port and nearby neighborhoods. Project included periodic measurements of nighttime (10 p.m. to 7 a.m.) noise levels at locations overlooking the facility, and analysis of the collected second-by-second data to ascertain contributions from terminal sources to neighborhood sound levels. Also conducted measurements and calculations to assess compliance with Seattle noise regulation and consulted with the Port and with terminal tenants in efforts to reduce off site noise levels. Work began in 1990 and extends to the present day, and has involved numerous meetings with the advisory group representing affected citizens, including revamping the protocols used in these evaluations.
- Southwest Harbor Cleanup and Redevelopment, Port of Seattle, Seattle, WA. Project manager for later phases of project and primary air quality analyst. Performed transportation and general conformity air quality analyses for a major port redevelopment of Terminal 5 (T-5) in the south Seattle PM10 nonattainment area. Effort included compiling emission inventories for both the federally controlled phases of construction and the operational phase of the entire facility. Compared emission tabulations with allowed *de minimis* levels and/or used in modeling to assess compliance with ambient air quality standards. Results reported in a NEPA EIS and related documentation.
- Southwest Harbor Redevelopment Supplemental Noise Study, Port of Seattle, Seattle, WA. Project manager and principal investigator for extended baseline noise measurements near Southwest Harbor (T-5) site as it was being redeveloped an intermodal container shipping terminal. Measurements used in later assessments of compliance with noise conditions. Project also included an equipment noise reduction study and construction noise and vibration monitoring.

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- Shilshole Bay Marina Redevelopment, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and noise impact assessments for the redevelopment and expansion of the Shilshole Bay Marina.
- California Street Overpass Project, Port of Everett, Everett, WA. Project manager and principal investigator for the air quality and noise impact and mitigation analyses of the proposed new access route to the Port. Air quality analysis included hot-spot modeling and consideration of transportation conformity. Noise analysis included measurements and impact and mitigation modeling, including special studies related to a daycare center near the proposed facility.
- Intermodal Facility Study, Burlington Northern Santa Fe Railway, Auburn, WA. Project manager and principal investigator for the air quality and noise analyses for a potential intermodal rail facility. Air quality concerns focused on off-site traffic sources, while noise study examined a wide range of on-site sources and mitigation opportunities.

Noise Policy Studies

- Off-Road Vehicle (ORV) Noise Mitigation Policy Study, Washington Interagency Committee (IAC) for Outdoor Recreation, WA. Managed and provided senior review of research for and development of a proposed model ordinance to reduce impacts from ORV noise received in residential properties around the state. Research effort included literature reviews, interviews of potentially affected stakeholders, and public meetings to seek input on preliminary proposals. Model ordinance development included proposed amendments to the existing state noise rules (WAC 173-60 and others) to provide a tool with which local jurisdictions can control ORV noise. Study and proposed model ordinance reported in a document submitted to the IAC.
- Petrovitsky Road Noise Mitigation Studies, King County Roads Dept. King County, WA. Project manager and principal investigator for three phases of the Petrovitsky Road noise barrier effectiveness study. First phase determined existing sound levels near a road scheduled for widening based on expanded baseline sound level measurements. Second phase included more sound level measurements to assess traffic noise levels after the road had been widened but before the noise barrier was fully constructed. Final phase used additional measurements to document the noise reduction provided by the noise barrier. Reports of all three assessments provided to King County.
- Road Noise Impact and Mitigation Policy Study, King County Roads Dept., King County, WA. Project manager and principal investigator for study examining alternative traffic noise impact definitions and mitigation policies in King County, WA. Included extensive literature review of noise effects on people, consideration of regulations and policies in a wide range of jurisdictions, a measurement study of possible mitigation using alternative paving materials, and development of a noise impact matrix for county roads to assist decision makers in their considerations of alternative policy goals. Study also involved presentations of findings and sound level demonstrations to county staff and members of the County Council.

Transportation Projects (with Air Quality Transportation Conformity)

- NE 8th Street Widening Project, City of Bellevue, Bellevue, WA. Senior reviewer for the air quality and noise impact and mitigation assessments for the NE 8th Street widening project in Bellevue. The air quality review was based on qualitative comparisons of project-related traffic effects at intersections with traffic conditions encountered in previous air quality modeling analyses. The noise study included ambient sound level measurements in the project vicinity and traffic noise modeling (using TNM) to assess potential impacts and possible mitigation measures. Both analyses were documented in WSDOT format discipline reports.
- Granite Falls Alternative Route, Snohomish County Public Works, Granite Falls, WA. Principal in charge, project manager, and senior reviewer for air quality and environmental noise reviews of a proposed new roadway to reroute heavy-duty gravel truck traffic away from the central business district. Air quality analysis included a

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conformity review based on consideration of the traffic impact assessment, with a focus on roundabout intersections along the proposed new roadway. Environmental noise study included sound level measurements throughout the project area and impact and mitigation modeling using the FHWA Traffic Noise Model (TNM). Analyses conducted in accordance with WSDOT policies, and documented in technical reports approved by WSDOT. Subsequently assisted with refined noise barrier analysis to provide decision makers and public with additional, specific information regarding barrier locations and heights.

- Federal Way Transit Center, Sound Transit (regional transit authority), Federal Way, WA. Project manager and senior reviewer to reexamine the need for mitigation for air quality impacts projected in a previous analysis (by others). Analysis included consideration of latest available Mobile6.2 emission factors and revised CAL3QHC modeling to examine the need for structural mitigation. Analysis determined mitigation would not be necessary.
- Tacoma Narrows Bridge 24th Street Electronic Toll On-Ramp Project, WSDOT, Gig Harbor, WA. Project manager and principal investigator for air quality analysis of potential impacts related to modification of the larger Tacoma Narrows Bridge Project. Analysis included hot-spot air quality modeling and a conformity determination related to the ramp project and the toll plaza of the facility based on specialized project-level air quality dispersion modeling of these facilities.
- West Lake Sammamish Parkway, City of Redmond, Redmond, WA. Project manager and primary investigator for air and noise reviews for a proposed widening of West Lake Sammamish Parkway, near SR 520 in Redmond. Air quality review included hot-spot modeling, and the noise analysis included sound level measurements and a thorough examination of potential noise impacts using TNM. Noise mitigation was proposed and examined at several locations along the project corridor.
- Russell Street Expansion Project, City of Missoula, Missoula, MT. Project manager and senior reviewer for the air quality and environmental noise reviews for the proposed widening of Russell Street and 3rd Street in the Missoula, MT. The air quality review included hot-spot modeling of project-created roundabouts. The noise analysis included numerous noise measurements and TNM modeling to examine potential noise impacts at numerous receiving locations along both roadways. The Montana DOT noise rules were used to determine the degree of impact and the potential effectiveness of noise mitigation.
- I-5/196th Street Interchange Project, City of Lynnwood, Lynnwood, WA. Project manager and primary investigator for the air quality and environmental noise impact and mitigation studies related to the proposed creation of a new freeway interchange. The air quality analysis included project-level hot-spot modeling. The environmental noise analysis included ambient noise measurements at potentially affected sensitive receivers, and extensive modeling and calculations to assess the likelihood of noise impacts and evaluate potential mitigation measures in accord with WSDOT policies. The methods and findings of these analyses were documented in technical reports that were summarized in the project EIS.
- Transportation Projects, Various Clients, WA. Completed a wide range of transportation projects for a variety of clients, including the Peace Arch International Border Crossing redevelopment project in Blaine, WA; the S. 228th Street Extension Project in Kent, WA, to establish a new east-west corridor between I-5 and north Kent; the Lundeen Parkway Extension project and the 196th Street Extension project in Snohomish County, WA; the Issaquah-Fall City Road and Woodinville-Duvall Road projects in King County, WA; the 142nd Street improvement project in Sumner, WA; the SR-18/C Street ramp relocation project in Auburn, WA; the Allen Street Bridge Replacement Project in Kelso, WA; the Bremerton to Gorst, WA, highway project; the South 196th/200th Street corridor project in Kent, WA; and the S. 312th widening project in Federal Way.

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Transportation Planning Projects (Some with Air Quality Conformity)

- Redmond Overlake Plan Update, City of Redmond, WA. Project manager and principal investigator for the air quality impact assessment of alternative transportation system plans using hot-spot modeling. Results of analysis reported in the environmental impact statement (EIS) for the project.
- Bellevue 2006-2017 Transportation Facilities Plan Noise Analysis, City of Bellevue, Bellevue, WA. Project manager and senior reviewer for the air quality and noise analyses for the 2006-2017 Transportation Facilities Plan (TFP), a city-wide programmatic plan to improve transportation. Examined the potential for traffic noise impacts due to proposed improvements at nearly 30 intersections. Analysis included sound level measurements and using the FHWA NOISE model, completed an assessment of the potential for noise impacts at each project area. The air quality analysis included the use of EPA-approved models to estimate CO concentrations near congested intersections. Findings of both noise and air quality analyses were documented as separate technical reports included in the project's SEPA review.
- Bellevue Downtown Implementation Plan, City of Bellevue Transportation Department, Bellevue, WA. Project manager and senior reviewer for the air quality and environmental noise review of alternative redevelopment options for downtown Bellevue. Alternatives ranged from transportation-system to transit options. The air review included hot-spot modeling and the noise assessment included measurements and use of the FHWA NOISE model to consider potential impacts.
- Transportation Planning Projects, Various Clients, WA. Completed a variety of transportation planning projects including the Bel-Red Overlake Transportation Plan and several City of Bellevue Transportation Facilities Plans and alternative downtown development plans. Efforts included technical support in the development of computerized procedures to calculate peak-hour pollutant emissions from traffic on all major roads in the city, based on output from the EMME/2 transportation system model. Some projects also included CAL3QHC modeling of affected intersections throughout the city. Conducted subarea air quality conformity reviews for proposed subarea plans in Everett and Shoreline, WA. Results typically included in the SEPA EIS examining the transportation plan alternatives.

Transit/Transit-Oriented Projects

- First Hill Streetcar, Seattle DOT, Seattle, WA. Principal in charge, project manager, and senior reviewer for the environmental noise impact and mitigation analyses for the establishment of a new 2.5 mile streetcar system from Pioneer Square onto First Hill. The noise review included measurements of existing sound levels in several locations within the study area, a detailed review of noise-sensitive receivers within the FTA-defined screening distance for such facilities, and screening-level impact assessment based on equipment noise specifications and comparisons of projected construction and operational noise. A subsequent detailed analysis included additional source-specific measurements of an active Seattle streetcar system and CadnaA noise modeling to consider the potential for impacts. The methods and findings of these analyses were reported in several technical memos submitted to project stakeholders.
- Sounder Commuter Rail Expansion and Realignment, Sound Transit, Tacoma, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise impact and mitigation analyses for the supplemental SEPA and NEPA studies considering the extension and realignment of the Sound Commuter Rail. The air quality study included a project-level conformity review based on dispersion modeling. The environmental noise analysis included locomotive source noise measurements, ambient noise measurements, and extensive modeling and calculations to assess the likelihood of noise impacts and evaluate potential mitigation measures in accord with FTA policies. The methods and findings of these analyses of the multiple alternative routes and options considered were reported in a number of technical memos that were summarized in the supplemental EIS for the project.

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- Portland Streetcar Loop Project, City of Portland/TriMet, Portland, OR. Project manager and principal investigator for environmental noise assessment for proposed Portland Streetcar Loop project, to extend streetcar tracks, stations and service. The noise analysis identified and focused on potential sensitive uses along the project routes and assessed the potential for the new streetcar and other considered alternatives to cause noise impacts during either construction or operation of the new system. Project related operational noise was calculated using the Federal Transit Administration (FTA) spreadsheet model, and impact assessment was based on noise impact policies and guidance of the FTA. In addition, construction-related mitigation measures were identified and evaluated.
- South Kirkland Park & Ride Facility, King County Metro, Kirkland, WA. Project manager and principal reviewer for the air quality transportation conformity review for the proposed expansion of an existing Park & Ride facility. The analysis included screening of project-affected intersections based on the traffic review and detailed hot-spot modeling of the two intersections that would be most affected by project-related traffic. The results of this analysis were documented in a memo report that was submitted to the Federal Transit Administration for review as part of the grant-funding process for this project.
- Woodinville Park & Ride, Sound Transit, Woodinville, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation studies for a proposed Park & Ride expansion and transit-oriented development. Air quality analysis included hot-spot modeling. Noise assessment included on-site and source noise measurements, modeling, and a mitigation analysis. Results reported in a SEPA EIS.
- Redmond Transit Center Expansion, King County Metro, Redmond, WA. Project manager and senior reviewer for the noise impact assessment for proposed changes and expansion to an existing transit center. Analysis included ambient and source sound measurements, as well as calculations to evaluate potential impacts related to expanded use of the facility and relocation of the transit center circulation roadways through the facility. Results reported in the SEPA review for the project.
- Redmond Park & Ride Garage, King County Metro, Redmond, WA. Project manager and senior reviewer for the air quality and noise impact assessment for the construction and operation of a multilevel garage to replace an existing surface parking lot. Analysis included ambient sound measurements and noise modeling to assess potential impacts. Results reported in the SEPA documentation for the project. Developed a construction noise minimization plan to reduce impacts to nearby homes.
- South Sounder Train Storage Yard, Sound Transit, Lakewood, WA. Project manager and senior reviewer for the air quality conformity-level analysis examining the implications of relocating the south Sounder train storage yard to a site in Lakewood, WA. Conducted the environment noise impact and mitigation assessment including sound level measurements and noise modeling to consider compliance, potential impacts, and mitigation for the relocation of this facility. Included wayside horn analysis as potential mitigation.
- Everett to Seattle Sounder, Sound Transit, WA. Project manager and principal investigator for the air quality impact assessment for the north Sounder commuter rail extending from Everett to Seattle. Analysis included hot-spot modeling and regional emissions comparisons for the EIS for the project.
- Seattle Monorail Project (SMP) Programmatic Review, Seattle Monorail Authority, Seattle, WA. Project manager and senior reviewer for the air quality and noise impact studies for the programmatic EIS that evaluated potential impacts associated with alternative routes for the Seattle Monorail Project.
- Seattle Monorail Project Project-Level Review, Seattle Monorail Authority, Seattle, WA. Project manager and principal investigator for the analysis of potential noise impacts and mitigation measures for the SMP project-level EIS. Analyses included source noise measurements of an operational monorail, noise impact and mitigation modeling, and indoor/outdoor measurements to assess potential impacts on performance venues at Seattle

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Center. Provided expert testimony regarding noise issues in the successful defense of an appeal of the adequacy of the EIS.

- Transit Projects, Various Clients, WA. Managed and participated in the air quality and/or noise analyses for environmental impact studies for the Sound Transit (ST) Lynnwood Park & Ride Expansion and direct high-occupancy vehicle (HOV) ramp project, the ST Auburn Park & Ride, the King County Metro (KC Metro) Eastgate Park & Ride expansion, the KC Metro Northgate Park and Pool lot expansion, the KC Metro Kenmore Park & Ride expansion, the Pierce Transit Lakewood Park & Ride and transit base expansion and relocation, and the Whatcom Transit Authority's Lynden, WA, Transfer Center project. Provided senior review of the qualitative air quality and noise assessments of several King County transit-oriented design projects. Provided expert testimony regarding noise issues related to an appeal of a proposed Sound Transit parking garage in Federal Way.

Mixed Use/Institutional Development Projects/Public Housing

- Virginia Mason Medical Campus Master Plan, Virginia Mason, Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for a major phased expansion of this existing medical campus. The air quality review was based on qualitative comparisons with previous analyses. The noise assessment included baseline sound level measurements and qualitative consideration of both the construction and the operational phases of this facility. Subsequently took second round of baseline noise measurements to assess the influence of emergency vehicle siren noise in the project vicinity.
- Yesler Terrace Redevelopment, Seattle Housing Authority, Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for the complete phased redevelopment of an existing low income housing facility adjacent to Interstate 5 in Seattle. The air quality review included AERMOD dispersion modeling to evaluate potential traffic-related air pollutant emission levels across the project site. The noise assessment considered the suitability of the project site under HUD criteria based on extensive CadnaA noise modeling of freeway and other major roadway traffic noise across the site. The noise evaluation included consideration of potential noise mitigation measures including noise wall and sit layout changes to shield noise-sensitive areas of the facility.
- North and East Cities Justice Center, NEC Coalition, Metro Seattle, WA. Principal in charge, project manager, and senior reviewer for the air quality and environmental noise assessments of potential impacts and possible mitigation measures for studies that considered numerous candidate sites for a new jail and justice center to serve northern King County. The air quality review was based primarily on qualitative comparisons derived from assessment of the traffic impact studies of the proposed facility. The noise assessment included baseline sound level measurements at numerous locations and noise modeling to consider both construction and operational noise from the facility.
- Thurston Highlands Development, Thurston Highlands LLC, Yelm, WA. Project manager and senior reviewer for air quality analysis for a proposed 1,251-acre master planned mixed-use development that would include approximately 5,000 homes in a mix of housing types and densities. The analysis included air quality dispersion modeling of several signalized intersections that would be affected by project traffic. The analysis also included a greenhouse gas emissions estimate for construction and operation of the first phase of the development.
- Accountability and Restitution Center, Shockey/Brent, Inc., Tumwater, WA. Senior technical reviewer for air quality and environmental noise evaluations for the environmental impact analysis for the proposed Thurston County Accountability and Restitution Center (ARC) and Courts Facility.
- King County Regional Justice Center Site-Selection Analyses, King County, Kent, WA. Project manager and senior reviewer for the air quality and traffic noise impact assessments for the SEPA EIS for the proposed King County Regional Justice Center. Assessments used the CAL3QHC dispersion model and EPA NOISE model to evaluate

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potential effects of locating the facility at four different candidate sites in three separate municipal jurisdictions in the county. Noise analyses considered county noise rules in conjunction with the rules in Kent, Auburn, and SeaTac, and included measurements and modeling of future impacts.

- Kent Events Arena, City of Kent, WA. Project manager and senior reviewer for air quality and environmental noise impact assessments for development of a proposed major events arena. The air quality evaluation consisted of a primarily qualitative review based on consideration of the traffic impact assessment for the facility. Environmental noise review included multi-day sound level measurements in the vicinity of the preferred project site, traffic noise modeling, and facility noise calculations to consider both compliance with local noise limits and the potential for noise impacts at nearby sensitive receivers.
- Yakima Valley Memorial Hospital Plan Update, Yakima Regional Hospital, Yakima, WA. Project manager and principal investigator for air quality and environmental noise impact assessment for 30-year plan update for this major regional hospital. Air quality analysis included consideration of traffic-related air quality issues, including tabulation of fine particulate matter emissions. Noise analysis included measurements in the vicinity of the facility and calculations to consider future changes in the facility layout and on-site sources. Results reported in the EIS for the project.
- North Bay Master Plan, Port of Seattle, Seattle, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation analyses for proposed redevelopment of an industrial portion of the Port's Terminal 90/91 into a mixed use research and development/office/residential facility. The air quality analysis included hot-spot modeling near project-affected intersections. The noise assessment included long-term on- and near-site sound level measurements along with traffic noise modeling and calculations to evaluate the potential for impacts as well as compliance with applicable noise limits. Analyses published in the draft EIS for the project.
- Port Gardner Wharf/North Marina Redevelopment, Port of Everett, Everett, WA. Project manager and principal investigator for the air quality and environmental noise impact and mitigation analyses for the proposed redevelopment of an existing industrial and recreational boating maintenance and repair facility into a mixed use office/residential facility. Analyses were published in the draft and final EIS for the project.
- Westpark Redevelopment Project, Bremerton Housing Authority, Bremerton, WA. Project manager and senior reviewer for the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility in Bremerton as required by the U.S. Department of Housing and Urban Development (HUD). Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Noise analysis included measurements on the existing development site and traffic noise modeling (using TNM) of roadways affecting the proposed development. Analyses reported in the SEPA review documentation for the project. Subsequent analyses based on refined noise barrier modeling provided information that will be used in noise barrier design and construction.
- Greenbridge Redevelopment Project, King County Housing Authority, King County, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility south of West Seattle, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized inter-sections. Noise analysis included measurements on the existing development site and TNM of roadways affecting the proposed development, including re-graded terrain and new residential buildings. Analyses were reported in the SEPA review documentation for the project, and a final report included a determination of suitability of the site for residential use, as well as recommendations of effective noise mitigation options.

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- High Point Redevelopment Project, Seattle County Housing Authority, Seattle, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility in West Seattle, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Noise analysis included measurements on the existing development site and traffic noise modeling of roadways affecting the proposed development, including re-graded terrain and new residential buildings. Analyses reported in the SEPA review documentation for the project.
- Salishan Redevelopment Project, Tacoma Housing Authority, Tacoma, WA. Manager and senior reviewer of the air quality and environmental noise impact and mitigation analyses to assess the potential impacts from and the site suitability of a new low and market rate housing development to replace an existing facility, as required by HUD. Air quality review included dispersion modeling to assess potential impacts near signalized intersections. Analysis included noise measurements of traffic and other ambient noise sources affecting the existing development site, and TNM of the roadways affecting the proposed development. Analyses reported in the SEPA review documentation for the project, and findings included a determination of site suitability for residential use and potential noise mitigation options.
- Woodland Park Zoo Master Plan, Woodland Park Zoo, Seattle, WA. Project manager and senior reviewer for the air quality impact study for master plan alternatives EIS that considered expanded parking facilities at the zoo. Analysis included carbon monoxide (CO) hot-spot modeling of affected off-site intersections in the project vicinity.
- Children's Hospital Parking Garage, Children's Hospital, Seattle, WA. Project manager for the air quality analysis of potential CO impacts of a proposed parking garage at the Children's Hospital and Regional Medical Center, including the development of emission factors.
- Good Samaritan Hospital, Good Samaritan Hospital, Puyallup, WA. Project manager and principal investigator for the qualitative air quality impact review for the master plan update for this facility.
- Arrowleaf Development, Arrowleaf Development Co., Methow Valley, WA. Air/noise analyst for the impact and mitigation assessments for a proposed resort development in Okanogan County, WA. Project included research and development of a program designed to restrict residential wood burning during periods of impaired air quality based on real-time PM10 monitoring and meteorological measurements.
- Miscellaneous Mixed Use Developments, Various Cities, WA. Managed and participated in the air quality and noise analyses for environmental impact studies for the Issaquah East Village mixed use development; the Kenmore Lake Pointe mixed use development; the Cascadia mixed use development in Pierce County, WA; and the Grand Ridge urban planned development in King County, WA.

School Siting Projects

- Site-Selection Analyses for Public Schools, Various Clients, WA. Managed and participated in the air quality and/or environmental noise impact and mitigation studies for new high schools in Auburn, Bonney Lake, and Tacoma, WA. Noise investigations for these projects included documenting source sound levels from several high school bands and developing noise mitigation measures for band and on-site traffic noise using noise barriers and relocation of sound sources. Conducted several school feasibility ambient sound measurements and reports required under Washington Administrative Code school site requirements.

Solid Waste Facilities

- Central Recycling and Transfer Station, Snohomish County Solid Waste, Everett, WA. Project manager and principal investigator for the air quality and noise impact evaluations for the siting of a new transfer station, now in operation. Air quality review included considerations of off-site traffic and facility-related odors. Noise assessment included baseline sound level measurements and noise impact modeling and calculations to evaluate compliance

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with applicable noise regulations. Review process included detailed analyses for two candidate sites, including one within the flight path of a small regional airport. Findings of the air and noise studies documented in the SEPA EIS for the project. This facility considered in this project is now operational as the Airport Road Recycling & Transfer Station.

- Solid Waste Transfer Station Siting Study, King County Solid Waste, Eastern King County, WA. Project manager and principal investigator for noise measurements, traffic noise modeling, and noise calculations for a site-selection study for a proposed solid waste transfer station in eastern King County. Evaluated potential noise impacts due to traffic and operational noise associated with the proposed transfer station at three candidate sites. Measured sound levels near each candidate site, as well as a similarly designed facility in Vancouver, BC. Measurements used in the calculations of off-site noise levels. Also qualitatively assessed both air quality and odor impacts from the facility and related traffic. Results of these analyses included in a SEPA EIS.
- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance and mitigation assessment of operational transfer station to recommend means to reduce noise received on nearby properties. Included source and ambient measurements in the area and noise modeling to assess potential noise reduction treatments for the facility. Recommended treatments were implemented and included extending the primary transfer station wall downward to enclose more of the transfer building and installing masonry noise barriers in several locations on the site to obstruct noise transmission to off-site receivers. Subsequent sound level measurements documented substantial noise decreases.
- Solid Waste Transfer and Disposal Facilities, Various Clients, WA. Project manager and principal investigator for the air quality and noise impact and mitigation evaluations during the siting studies for the Everett Central Transfer Station; the Lynnwood Disposal recycling center; the Pacific Disposal Tumwater transfer station and recycling center; the King County Cedar Hills landfill expansion; the Hobart Transfer Station siting studies; and the Enumclaw Transfer Station.
- Snohomish County Regional Landfill Noise Studies, Snohomish County Public Works, Solid Waste, et al., Snohomish County, WA. Project manager and principal investigator for several evaluations of compliance with Conditional Use Permit conditions related to temporary interim uses of lands in the vicinity of the Snohomish County Regional Landfill. Studies included background and active source sound measurements both on-site near active transfer station activities and at property line locations near off-site sensitive uses.
- Southwest Recycling and Transfer Station, Snohomish County Solid Waste, Mountlake Terrace, WA. Project manager and principal investigator for noise compliance assessment of proposed transfer station operational and equipment changes based on source-specific sound measurements and ambient measurements at potentially affected locations.

Prior to joining ENVIRON, Mr. Steffel's experience includes:

- 2004-2008 Geomatrix Consultants, Inc., Principal Environmental Scientist
- 1993-2004 MFG, Inc., Senior Environmental Scientist
- 1989-1993 TRC Environmental Corp, Senior Environmental Scientist
- 1981-1988 Eco-Resource Systems, Owner

CREDENTIALS

Professional Affiliations and Activities

Air & Waste Management Association
Institute for Noise Control Engineering, Member

EXHIBIT 2

1 References Cited in Declaration of Richard Steffel

2 ENVIRON International Corporation (ENVIRON). 2011. *Comments on Drakes Bay Oyster*
3 *Company Special Use Permit Environmental Impact Statement: Point Reyes National*
4 *Seashore*. Prepared for Draft EIS DBOC SUP c/o Superintendent, Point Reyes Station, CA
5 on behalf of Drakes Bay Oyster Company. December 9, 2011

6 National Academy of Sciences (NAS). 2012. *Scientific Review of the Draft Environmental Impact*
7 *Statement Drakes Bay Oyster Company Special Use Permit*. Committee on the Evaluation of
8 the Drakes Bay Oyster Company Special Use Permit DEIS and Peer Review, Ocean Studies
9 Board. National Research Council of the National Academy of Sciences. Pre-publication
10 version, August 2012

11 Volpe. 2011. *Baseline Ambient Sound Levels in Point Reyes National Seashore; Final Report*.
12 U.S. Department of Transportation Research and Innovative Technology Administration
13 John A. Volpe National Transportation Systems Center Environmental Measurement and
14 Modeling Division, RVT-41 Acoustics Facility Cambridge, MA 02142-1093

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CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

**STATEMENT OF DEFENSE FORM**

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by a notice of intent to initiate cease and desist order and restoration order proceedings before the commission. This document indicates that you are or may be responsible for or in some way involved in either a violation of the commission's laws or a commission permit. The document summarizes what the (possible) violation involves, who is or may be responsible for it, where and when it (may have) occurred, and other pertinent information concerning the (possible) violation.

This form requires you to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You should complete the form (please use additional pages if necessary) and return it **no later than November 13, 2012** to the Commission's enforcement staff at the following address:

**Heather Johnston, Legal Division,
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105**

If you have any questions, please contact **Heather Johnston** at (415) 904-5220.

1. Facts or allegations contained in the notice of intent that you admit (with specific reference to the paragraph number in such document):

DBOC admits that it is conducting its operations in compliance with the Coastal Act generally and the 2007 Consent Order specifically.

2. Facts or allegations contained in the notice of intent that you deny (with specific reference to paragraph number in such document):

DBOC denies that it has operated any boats in the lateral channel in violation of the 2007 Consent Order.

DBOC denies that it has discharged any marine debris about which staff complains.

DBOC denies that any star-the-fact development remains w/o the consent of staff.

Please see correspondence dated 10/24/12^{11/19/2010} for more detail.

3. Facts or allegations contained in the notice of intent of which you have no personal knowledge (with specific reference to paragraph number in such document):

DBOC has no personal knowledge of operating boats in the lateral channel in violation of the 2007 Consent Order.

DBOC has no personal knowledge of marine debris that it has discharged but did not promptly remove.

DBOC has no personal knowledge of any after-the-fact development about which staff has not consented.

Please see correspondence dated 10/29/12 & 1/19/10 for more detail.

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Please see correspondence referenced above.

5. Any other information, statement, etc. that you want to offer or make:

All after-the-fact development alleged by staff that occurred prior to the 2007 Consent Order was addressed by the 2007 Consent Order.

Staff has not responded to substantive correspondence explaining why staff's enforcement positions are not supported by law, particularly correspondence dated 10/24/12 and 1/19/10.

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, and title, and enclose a copy with this completed form):

Please see correspondence referenced above.



575 MARKET STREET, SUITE 2700
SAN FRANCISCO, CA 94105
TELEPHONE: 415.814.6400
FACSIMILE: 415.814.6401
zack@sslfirm.com

February 6, 2013

VIA FIRST CLASS and ELECTRONIC MAIL

Chair Shallenberger and Commissioners
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Cease and Desist Order No. CCC-13-CD-01, Restoration Order No. CCC-13-RO-01, Agenda Item No. Th. 11.1 & 11.2

Dear Chair Shallenberger and Commissioners:

Over the past month, Drakes Bay Oyster Company (DBOC) and staff have resolved many of the issues addressed in the Cease and Desist Order and Restoration Order, and it is DBOC's belief that with a reasonable extension of time a negotiated resolution could be reached. Therefore, DBOC requests that the Cease and Desist Order and Restoration Order docketed for your consideration on Thursday, February 7, 2013, be postponed, with direction to staff to consider the issues discussed below and to negotiate with DBOC in good faith on the many areas where the parties are close to agreement.

Additional time is needed because, as currently framed, the Cease and Desist Order and Restoration Order leave a number of important issues unresolved and we believe exceed the Coastal Commission's authority in a number of ways, as detailed in the attached memorandum.

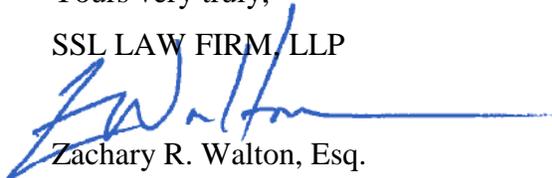
Accordingly, DBOC requests that the Coastal Commission entertain the following Motion to allow a reasonable extension of time to reach a negotiated resolution:

I move that the Commission postpone consideration of Cease and Desist Order No. CCC-13-CD-01 and Restoration Order No. CCC-13-RO-01 to the May 8-10, 2013, hearing docket, and direct Coastal Commission staff to address claims that such Orders exceed the Coastal Commission's authority, and to continue to negotiate in good faith with Drakes Bay Oyster Company to see if a consensual agreement can be reached.

In the interim, DBOC agrees to voluntarily comply with Sections 5.2 (Harbor Seal Protection Measures), 5.3 (Operational Debris Management), and 5.7 (Vessel Transit) of the Cease and Desist Order and Restoration Order during the pendency of any such postponement.

Yours very truly,

SSL LAW FIRM, LLP



Zachary R. Walton, Esq.

Attachments

cc: Kevin and Nancy Lunny, Drakes Bay Oyster Company
Ryan Waterman, Stoel Rives LLP
Dr. Charles Lester, Executive Director
Lisa Haage, Chief of Enforcement
Alex Helperin, Senior Staff Counsel
Alison Dettmer, Deputy Director, Energy, Ocean Resources & Federal Consistency Div.
Nancy Cave, Northern California Enforcement Supervisor
Cassidy Teufel, Environmental Scientist
Jamee Paterson, California Office of the Attorney General

MEMORANDUM

TO:	California Coastal Commission
FROM:	Drakes Bay Oyster Company
DATE:	February 6, 2013

I. INTRODUCTION

The Cease and Desist Order and Restoration Order before the Coastal Commission goes beyond the Commission’s authority, reaches clearly erroneous findings of fact, and unnecessarily truncates what had previously been fruitful negotiations between DBOC and Commission staff.

II. THE CEASE AND DESIST ORDER AND RESTORATION ORDER GO BEYOND COMMISSION AUTHORITY

The Cease and Desist Order and Restoration Order go beyond the Coastal Commission’s authority in four key ways.

A. DBOC Does Not Own the Oyster Racks and Cannot Be Ordered to Remove Them

Section 5.6 of the CDO and Section 7.3 of the Restoration Order presume that DBOC owns the oyster racks in Drakes Estero and therefore, that DBOC can be ordered to remove the racks. This is incorrect. Accordingly, the Cease and Desist Order and Restoration Order would impose legal obligations upon DBOC that go beyond the Coastal Commission’s authority to impose.

Under federal and state law, improvements that are affixed to land—like the oyster racks—become part of the real property unless there is an agreement to the contrary. When the State of California conveyed the water bottoms to the federal government by statute in 1965, it conveyed both the fee interest and the right to “everything permanently situated beneath or above it,” including ownership of the oyster racks. Cal. Civ. Code § 829. To the extent that there were oyster racks already installed in Drakes Estero, those racks were conveyed to the federal government at that time. *S. Pac. Co. v. County of Riverside*, 35 Cal. App. 2d 380, 386 (1939) (“[i]t is thoroughly settled that fixtures become a part of the land and pass to a purchaser with the fee of that land.”). Furthermore, to the extent that oyster racks were installed in Drakes Estero by the Johnson Oyster Company (JOC) after 1965, those racks also became the property of the federal government when JOC went out of business and the federal government did not require JOC to remove the racks. Cal. Civ. Code § 1013 (fixtures applied to land of another become the property of the owner of the land). By the same token, the Asset Purchase Agreement by which the DBOC acquired JOC’s assets did not include the oyster racks among JOC’s assets.

DBOC has not installed any oyster racks in Drakes Estero. Furthermore, the 2008 Special Use Permit (SUP) between the National Park Service (NPS) and DBOC, which incorporates Drakes Estero, does not make DBOC responsible for the oyster racks. The SUP limits DBOC's responsibility to remove its "Personal Property," which does not include the oyster racks in Drakes Estero because the racks cannot be construed as "fixtures, equipment, appliances and apparatus placed on the Premises that *neither are attached to nor form a part of* the Premises." Attachment A, 2008 SUP ¶ 1(o) (emphasis added). The Cease and Desist Order and Restoration Order must be revised to account for the fact that DBOC does not own the oyster racks and cannot be ordered to remove them.

B. Fish and Game Commission Water Bottom Leases M-438-01 and M-438-02 Remain Valid

The Cease and Desist Order and Restoration Order are premised on the assertion that the Fish and Game Commission (FGC) and Department of Fish and Wildlife (DFW) have no regulatory controls in place in Drakes Estero, and that the FGC water bottom leases M-438-01 and M-438-02 have expired. This is incorrect. The leases remain in effect. Neither the FGC nor the DFW has informed DBOC that its water bottom leases have expired. In fact, if the water bottom leases have expired, then Cease and Desist Order and Restoration Order Section 5.1 is unlawful because aquaculture in California can only be performed with a valid state lease issued by the FGC. Cal. Fish & Game Code § 15400(a) (FGC right to issue state leases). The Cease and Desist Order and Restoration Order must be revised to account for the fact that the FGC water bottom leases remain in effect.

C. The Cease and Desist Order and Restoration Order Intrudes on the Fish and Game Commission's Constitutionally-Delegated Authority

The Cease and Desist Order and Restoration Order intrude on the Constitutionally-delegated authority vested in the FGC and the DFW. The California Constitution gave the Legislature the right to delegate power to the FGC "relating to the protection and propagation of fish and game as the Legislature sees fit." Cal. Const., Art. IV, § 20. The California Attorney General has opined that the FGC is the *only* agency to which the Legislature is permitted to delegate "the power to administer the Division of Fish and Game" 17 Ops. Cal. Atty. Gen. 72 (1951). The Legislature has so delegated, as evidenced by the statutory scheme set forth in the Fish and Game Code, which illustrates the FGC's role in protecting and propagating aquaculture in California.¹ *See, e.g.*, Cal. Fish & Game Code §§ 17 (defining aquaculture); 15000(a) (reserving business of aquaculture to DFW and FGC); 15200 and 15202 (FGC may regulate aquaculture); 15400 (right to lease state water bottoms reserved to FGC).

¹ Oysters and other shellfish are included in the definition of "fish" under Fish and Game Code § 45. 46 Ops. Cal. Atty. Gen. 68 (1965) ("Oysters and shellfish are 'fish' ([Fish and Game Code] § 45), and as such are subject to the prerogative of the sovereign to protect and preserve them in such manner and upon such terms as the Legislature deems best for the common good.").

The Staff Report asserts that the Cease and Desist Order and Restoration Order would not “involve the [Coastal] Commission administering the Division of Fish and Game and thus would not be in conflict with this ruling.” Staff Report at 44. This is incorrect.

- Section 5.1(A) sets production limits for oysters and clams planted within Drakes Estero, which intrudes into the FGC’s Constitutionally-delegated right to regulate aquaculture. Cal. Fish & Game Code §§ 15200 (FGC authority to regulate aquatic animals placed in waters of the state), 15202 (FGC right to prohibit placement of aquatic animals in waters of the state).
- Section 5.4 requires an Invasive Species Management Plan that requires removal of *Didemnum* from aquaculture cultivation equipment and shellfish, and modifications to shellfish planting and harvesting practices, which intrudes on the FGC’s Constitutionally-delegated right to regulate aquaculture. Cal. Fish & Game Code §§ 15000(a) (FGC authority to regulate business of aquaculture), 15200 (FGC authority to regulate aquatic animals placed in waters of the state), 15202 (FGC right to prohibit placement of aquatic animals in waters of the state); § 2018 (restricted species); § 2020 (regulations regarding restricted species).
- Section 5.5 prohibits the use of any non-triploidy Manila clam seed, and requires the removal of any non-triploidy Manila clams being grown in Drakes Estero, which intrudes on the FGC’s Constitutionally-delegated right to control the placement of live aquatic animals in waters of the State, and the types of aquatic animals that can be imported into the State. Cal. Fish & Game Code §§ 15102 (right to prohibit culturing of any species where detrimental to adjacent native wildlife), 15200 (FGC to regulate placing animals in waters of the state), 15202 (FGC may prohibit placement of species in waters of the state), 15300 (describing legal sources of brood stock), 15600(a) (DFW approval required before importing life aquatic animal).
- Section 6.2 requires the removal of all Unpermitted Development offshore, which intrudes on the FGC’s Constitutionally-delegated authority to issue state leases and right to regulate aquaculture. Cal. Fish & Game Code §§ 15200 (FGC authority to regulate aquatic animals placed in waters of the state), 15202 (FGC right to prohibit placement of aquatic animals in waters of the state), 15400(a) (FGC right to issue state leases).

The Coastal Commission should consult with the FGC to determine the coordinate scope of their respective jurisdiction over these matters.

D. California Environmental Quality Act (CEQA) Review Is Required Prior to Approval of the Cease and Desist Order and Restoration Order

The Cease and Desist Order and Restoration Order require the Coastal Commission to perform CEQA review prior to approval because the Orders constitute a “project” under CEQA, and none of the cited CEQA categorical exemptions apply.

As an initial matter, the Staff Report is incorrect that the Cease and Desist Order and Restoration Order do not constitute a “project” under the CEQA. Staff Report at 31-32, 46. This is so because the Cease and Desist Order and Restoration Order would independently require the removal of oyster racks that have fallen into disuse (Section 5.6), and ultimately, effectuate the removal action contemplated by the NPS Order issued to DBOC on November 29, 2012. Cease and Desist Order and Restoration Order Sections 6.2 and 7.0; Staff Report at 29 (“Through the proposed Orders, DBOC will remove the specified portions of Unpermitted Development, including the oyster racks that have fallen into disuse . . .”).

The initial removal of oyster racks that have fallen into disuse, and ultimate implementation of the NPS removal action, would constitute a substantial construction project onshore and offshore in Drakes Estero because it would require removing DBOC’s personal property onshore, and the shellfish and oyster racks offshore. Declaration of Kevin Lunny, ¶¶ 46-61; Declaration of Scott Luchessa, ¶¶ 4-5.

The Cease and Desist and Restoration Orders, fits the CEQA definition of a “project” because it “has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . .” and it is “(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” 14 Cal. Code Regs. § 15378.

Furthermore, none of the CEQA categorical exemptions cited in the Staff Report—14 Cal. Code Regs. §§ 15307, 15308, or 15321—apply for two reasons. Staff Report at 31-23, 46. First, none of three exemptions apply to construction activities, and the Orders specifically order a construction project—namely, removal of onshore and offshore “Unpermitted Development,” including the abandoned oyster racks in the near-term. 14 Cal. Code Regs. §§ 15307 (“Construction activities are not included in this exemption.”); 15308 (“Construction activities . . . are not included in this exemption.”); 15321 (“(c) Construction activities undertaken by the public agency taking the enforcement or revocation action are not included in this exemption.”).

Second, none of the categorical exemptions apply because “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” 14 Cal. Code Regs. § 153002.(c).

DBOC has submitted a number of declarations prepared by Mr. Kevin Lunny, ENVIRON Corporation scientists, and Dr. Corey Goodman, all documenting the harmful effects of removing the oyster racks in Drakes Estero, including but not limited to impacts to sensitive and protected species, eelgrass, and other environmental values. *See* Declaration of Kevin Lunny; Declaration of Scott Luchessa; Declaration of Laura Moran; Declaration of Richard Steffel; Declaration of Dr. Corey Goodman; Declaration of Dr. Robert Abbott; Rebuttal Declaration of Kevin Lunny; Rebuttal Declaration of Scott Luchessa; Rebuttal Declaration of Dr. Corey Goodman; Rebuttal Declaration of Laura Moran; Rebuttal Declaration of Richard Steffel; Rebuttal Declaration of Dr. Linda Martello.

These declarants point to the environmental impacts that removing the oyster racks in the sensitive environment of Drakes Estero will have, which provide substantial evidence that

unusual circumstances exist here that preclude the Coastal Commission from relying on any of the proffered categorical exemptions and that CEQA review is required. *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles*, 161 Cal. App. 4th 1168, 1187 (2008) (approval set aside where agency failed to consider evidence of unusual circumstances).

The record before the Coastal Commission is devoid of substantial evidence that the Cease and Desist Order and Restoration Order would not trigger the unusual circumstances exception to the categorical exemptions cited in the Staff Report.

III. THE CEASE AND DESIST ORDER AND RESTORATION ORDER MAKE CLEARLY ERRONEOUS FINDINGS OF FACT

Section 4.3 of the Cease and Desist Order and Restoration Order makes a number of clearly erroneous findings of fact, including but not limited to findings that: (1) DBOC has operated its boats in the Lateral Channel in contravention of the December 2007 Cease and Desist Order; and (2) DBOC has discharged “abandoned, discarded, or fugitive mariculture materials” from its existing operations.

A. Section 4.3(D): DBOC Did Not Operate Its Boats In the Lateral Channel in Violation of the December 2007 Cease and Desist Order

The 2007 Cease and Desist Order incorporates the 2008 SUP, and relies on the 2008 SUP to define what constitutes a boat transit violation during the harbor seal pupping season period. As described in DBOC’s October 24, 2012, letter, the 2008 SUP does not define the “lateral channel,” or determine its geographic extent. Attachment A, 2008 SUP, Exhibit C.

The Staff Report asserts that the “references in the 2008 SUP are sufficiently clear on their face so as to obviate the need for further definition or metrics.” Staff Report at 34. Pointedly, this response does not point to any part of the 2008 SUP that defines the “lateral channel.”

Furthermore, the first time any agency has provided any GIS coordinates to define the extent of the “lateral channel” is in this Cease and Desist Order and Restoration Order. Section 4.6 (defining the “Lateral Channel”). If, as Commission staff assert, the geographic extent of the “Lateral Channel” was clear in the 2008 SUP, it would be unnecessary to provide another definition and the Cease and Desist Order and Restoration Order would just incorporate the definition provided in the 2008 SUP instead.

Finally, the Commission asserts that “DBOC’s operation of in the Lateral Channel is a change in intensity of use from the pre-1973 levels of use in that area, and is therefore unpermitted development.” Staff Report at 33.

There are two problems with this statement. First, the Staff Report does not provide any evidence of what pre-1973 levels of boat use were in that area—i.e., the baseline against which the Cease and Desist Order and Restoration Order are being measured—has not yet been defined. Second, it is likely that DBOC’s boat operations are *less intense* than any pre-1973 boat use because there is no evidence that boat travel before 1973 respected the harbor seal protection zones, including the year-round protection zone and the seasonal closure area.

Accordingly, the Cease and Desist Order and Restoration Order is based upon at least two erroneous findings of fact. First, that DBOC has been in violation of the 2007 Consent Order with respect to boat travel in the “Lateral Channel,” and second, that DBOC boat travel is more intense than pre-1973 boat use in Drakes Estero generally, and the “Lateral Channel” area in particular.

B. Section 4.3(E): DBOC Does Not Discharge Marine Debris From Ongoing Operations

Mr. Kevin Lunny has attested as to how DBOC prevents the release of mariculture equipment into the marine environment from ongoing operations. Rebuttal Declaration of Kevin Lunny, ¶¶ 48-60. Mr. Lunny has further documented how legacy mariculture debris released into the environment prior to DBOC’s existence continues to wash ashore in Drakes Estero and be picked up in monthly marine debris sweeps conducted by DBOC.

In contrast, the Cease and Desist Order and Restoration Order simply alleges that the mariculture debris that continues to wash ashore in Drakes Estero originates from DBOC’s ongoing operations. Staff Report at 27-28. This is a factual assertion that is unsupported by any fact. For example, Commission staff have not documented that mariculture debris discovered since the 2007 Consent Order is related to DBOC’s ongoing operations.

Finally, to the extent that Commission staff rely on the letters submitted by Mr. Thomas Baty, those letters cannot be relied upon because Mr. Baty has no personal knowledge of DBOC’s operations and as such, is not in a position to determine whether the marine debris he has found originated from DBOC’s predecessor, JOC, or originated from DBOC. Rebuttal Declaration of Kevin Lunny, ¶¶ 48-60.

IV. GOOD FAITH NEGOTIATIONS WERE TRUNCATED PREMATURELY

Over the holidays and throughout the month of January, DBOC and Coastal Commission staff worked together to identify ways that they could agree to resolve a variety of the issues raised in the Cease and Desist Order and Restoration Order. On the majority of those issues, DBOC and Coastal Commission staff had reached agreement, or were close to reaching agreement, before negotiations broke down on Wednesday, January 23, 2013, just two days prior to a major hearing in DBOC’s parallel federal action.

Where the negotiations broke down were on Coastal Commission staff’s requirement that DBOC agree to the Restoration Order before DBOC had been able to fully understand what it entailed. Simply put, DBOC’s available resources were severely constrained by the parallel federal court action at the time when staff demanded that DBOC agree to the Order as it currently was framed. Despite DBOC’s indication that it was willing to continue to negotiate but needed more time to consider the Restoration Order, Coastal Commission staff determined that they had to proceed to pursue a unilateral Cease and Desist Order and Restoration Order.

It is DBOC’s belief that the parties could reach a negotiated resolution with more time.

* * * * *

UNITED STATES DEPARTMENT OF THE INTERIOR
National Park Service
Special Use Permit

Name of Use: Aquaculture

Date Permit Reviewed 2008
Reviewed 20
Reviewed 20
Expires November 30, 2012

Long Term X
Short Term

Permit # MISC-8530-6000-8002
Type Park Code No. #
Point Reyes National Seashore

Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937
(415) 669-1149

is hereby authorized for a period ("Term") commencing on April, 2008 ("Commencement Date") and terminating on November 30, 2012 ("Expiration Date") to use the following described land, improvements, and waters in the following area:

the lands and improvements at Drakes Bay Estero at the former Johnson's Oyster Site consisting of approximately 1.1 acres of land and improvements designated as the "SUP Area" on the map attached hereto as Exhibit B ("Drake's Estero Oysters - SUP & ROP"); the waters designated as the "SUP Area" on the map attached hereto as Exhibit A ("Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area"); the land designated as the "Well Area" on the map attached hereto as Exhibit D ("Drakes Bay Oyster Company Well Area"); and the land designated as the "Sewage Area" on the map attached hereto as Exhibit E ("Drakes Bay Oyster Company Sewage Area"). Collectively, the areas so designated shall be referred to as the "Premises." The Premises governed by this Permit do not include the area designated as the ROP Area on the map attached hereto as Exhibit B.

For the purpose(s) of:

Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit B for the purpose of processing shellfish, the interpretation of shellfish cultivation to the visiting public, and residential purposes reasonably incidental thereto. Use of the area designated as the "SUP Area" on the map attached hereto as Exhibit A for the purpose of shellfish cultivation. Use of the area designated as the "Well Area" on the map attached hereto as Exhibit D for the purpose of supplying water for the Drakes Bay Oyster Company facilities using Permittee well, pump, and pipelines. Use of the area designated as the "Sewage Area" on the map attached hereto as Exhibit E for the purpose of use and maintenance of existing sewage pipeline and sewage leachfield to service the Drakes Bay Oyster Company facilities. Collectively, the uses set forth in this paragraph shall be referred to as the "Permitted Uses."

Authorizing legislation or other authority (RE - DO-53): 16 U.S.C. 1, 1a-1, 3 & 459c; the Reservation of Use and Occupancy.

NEPA & NHPA Compliance: NEPA compliance pending

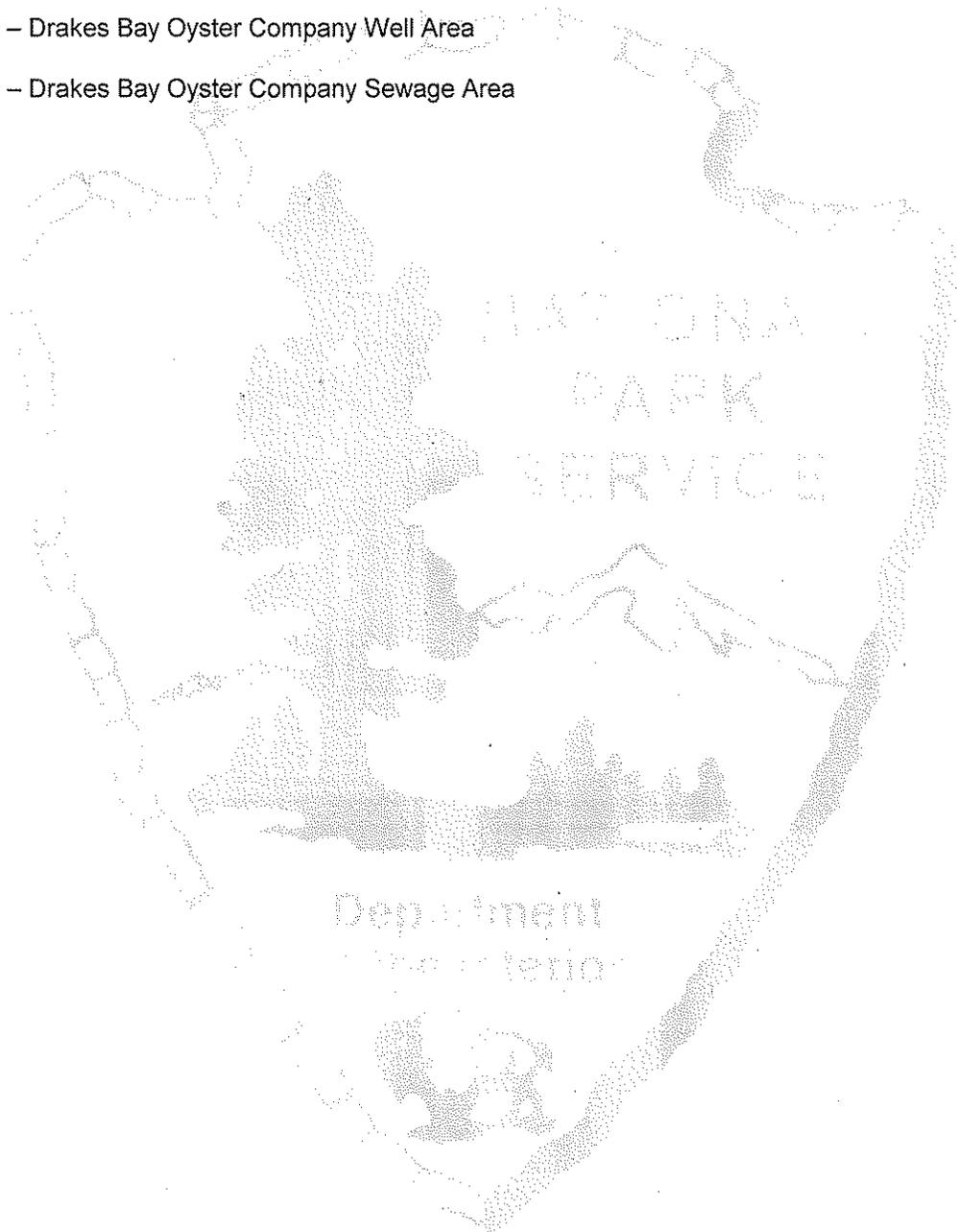
PERFORMANCE BOND: Required Not Required X Amount:
LIABILITY INSURANCE: Required X Not Required Amount: As set forth in Article 15 of this Permit.

ISSUANCE of this Permit is subject to the terms, covenants, obligations, and reservations, expressed or implied herein and to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of **\$2,800.00** per year, plus an amount to be determined by appraisal for the use of the Sewage Area and the Well Area including water use.

PERMITTEE: [Signature] Drakes Bay Oyster Company 4/22/08
Signature Organization Date
Authorizing Official: [Signature] George Turnbull 4/22/08
Signature Deputy Regional Director Date

LIST OF EXHIBITS

- EXHIBIT A: Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area
- EXHIBIT B: Map – Drake's Estero Oysters – SUP & ROP
- EXHIBIT C: Drakes Estero Aquaculture and Harbor Seal Protection Protocol
- EXHIBIT D: Map – Drakes Bay Oyster Company Well Area
- EXHIBIT E: Map – Drakes Bay Oyster Company Sewage Area



CONDITIONS OF THIS PERMIT

1) DEFINITIONS

As used in this Permit, the following terms shall have the following meanings:

- a) "Agency" means any agency, department, commission, board, bureau, office or other governmental authority having jurisdiction.
- b) "Applicable Laws" includes, without limitation all present and future statutes, regulations, requirements, Environmental Requirements, guidelines, judgments, or orders of any Agency or judicial body, whether now existing or hereafter established, relating to or affecting the Premises or the use or occupancy of the Premises.
- c) "Commencement Date" is as defined on the Cover Page of this Permit.
- d) "Cyclic Maintenance" means (i) the performance by Permittee of all repairs, maintenance, or replacement-in-kind necessary to maintain the Premises and the existing improvements thereon in good order, condition, and repair; (ii) housekeeping and routine and periodic work scheduled to mitigate wear and deterioration without materially altering the appearance of the Premises; (iii) the repair or replacement-in-kind of broken or worn-out elements, parts or surfaces so as to maintain the existing appearance of the Premises; and (iv) scheduled inspections of all building systems on the Premises.
- e) "Default" means Permittee's failure to keep and perform any of the Provisions of this Permit.
- f) "Environmental Requirements" means, without limitation, all standards or requirements relating to the protection of human health or the environment such as:
 - a. standards or requirements pertaining to the reporting, permitting, management, monitoring, investigation or remediation of emissions, discharges, releases, or threatened emissions, releases or discharges of Hazardous Materials into the air, surface water, groundwater, or land;
 - b. standards or requirements relating to the manufacture, handling, treatment, storage, disposal, or transport of Hazardous Materials; and
 - c. standards or requirements pertaining to the health and safety of employees or the public.
- g) "Expiration Date" is as defined on the Cover Page of this Permit.
- h) "Hazardous Materials" means, without limitation, any material or substance, whether solid, liquid, or gaseous in nature,
 - a. the presence of which requires reporting, permitting, management, monitoring, investigation or remediation under any Environmental Requirement;
 - b. that is or becomes defined as a "hazardous waste," "extremely hazardous waste," "restricted hazardous waste," "hazardous substance," "pollutant," "discharge," "waste," "contaminant," or "toxic contaminant" under any Environmental Requirement, or any above-ground or underground storage containers for the foregoing;
 - c. that is toxic, explosive, corrosive, flammable, infectious, radioactive, reactive, carcinogenic, mutagenic, or otherwise hazardous to human health or the environment and is or becomes regulated under any Environmental Requirement;
 - d. that contains gasoline, diesel fuel or other petroleum hydrocarbons or derivatives or volatile organic compounds, or is an above-ground or underground storage container for same;

- e. that contains polychlorinated biphenyls (PCBs), asbestos, asbestos-containing materials or urea formaldehyde foam insulation; or
- f. that contains radon gas.
- i) "Hazardous Materials Occurrence" means any use, generation, treatment, keeping, storage, transport, release, disposal, migration, or discharge of any Hazardous Materials from, on, under or into the Premises or Point Reyes National Seashore ("Point Reyes") that causes any environmental contamination.
- j) "Improvements or Alterations" means any construction that does not fall within the definition of Cyclic Maintenance.
- k) "NPS" means the management officials in charge of the administration and operation of Point Reyes, including the Superintendent or his/her designee(s).
- l) "Park" means, without limitation, all lands, waters and structures within the legislative boundaries of the Point Reyes National Seashore, all natural and cultural resources within such boundaries, and any other property within such boundaries belonging to Point Reyes. As appropriate given the context, this term also includes the visiting public and/or Point Reyes employees.
- m) "Permit" means this instrument which contains those certain termination and revocation provisions as provided for herein.
- n) "Permitted Uses" is as defined on the Cover Page of this Permit.
- o) "Personal Property" means all furniture, fixtures, equipment, appliances and apparatus placed on the Premises that neither are attached to nor form a part of the Premises. Personal Property also includes any trailers, modular units, and/or temporary structures owned by Permittee.
- p) "Point Reyes" means Point Reyes National Seashore.
- q) "Premises" is as defined on the Cover Page of this Permit.
- r) "Provision" shall mean any term, agreement, covenant, condition or provision of this Permit or any combination of the foregoing.
- s) "ROP" or "Reservation of Use and Occupancy" means the Reservation of Use and Occupancy purchased by the Permittee in 2005. In 1972 the United States of America purchased Johnson Oyster Company's property, subject to a Reservation of Use and Occupancy on approximately 1.5 of those acres for a period of forty (40) years. This Reservation of Use and Occupancy expires on November 30, 2012.
- t) "SUP" means this Permit.
- u) "Term" is as defined on the Cover Page of this Permit.
- v) "Termination Date" means the Expiration Date or such earlier date as this Permit is terminated or revoked pursuant to any Provision of this Permit.

2) GENERAL CONDITIONS

- a) The Permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with all Applicable Laws.
- b) Permit and Approvals – Except as otherwise provided in this Permit, Permittee shall be responsible for obtaining, at its sole cost and expense, all necessary permits, approvals or other authorizations relating to Permittee's use and occupancy of the Premises.

- c) Damages - The Permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the Permittee is authorized to make of the land and areas described in this Permit.
- d) Benefit - Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this Permit or derive, either directly or indirectly any pecuniary benefits to arise therefrom: Provided, however, that nothing herein contained shall be construed to extend to any incorporated company if the Permit be for the benefit of such corporation.
- e) Assignment and Subletting - This Permit may not be transferred or assigned without the consent of the Permitter, in writing. Permittee shall not sublet the Premises or any part thereof or any property thereon, nor grant any interest, privilege or license whatsoever in connection with this Permit without the prior written approval of the Permitter.
- f) Revocation - This Permit may be terminated upon Default or at the discretion of the Permitter.
- g) The Permittee is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(4)]

3) USE OF PREMISES

- a) Permittee is authorized to use the Premises only for the Permitted Uses.
- b) Permittee shall not engage in any activity that may be dangerous or harmful to persons, property, or the Park; that constitutes or results in waste or unreasonable annoyance (including, without limitation, signage and the use of loudspeakers or sound or light apparatus that could disturb park visitors and wildlife outside the Premises); that in any manner causes or results in a nuisance; or that is of a nature that it involves a substantial hazard, such as the manufacture or use of explosives, chemicals or products that may explode.
- c) The Parties hereby acknowledge and agree that Permittee's covenant that the Premises shall be used as set forth in this Article 3 is material consideration for Permitter's agreement to enter into this Permit. The Parties further acknowledge and agree that any violation of said covenant shall constitute a Default under this Permit and that Permitter may inspect the premises at any time.
- d) This Permit is subject to the right of the NPS to establish trails and other improvements and betterments over, upon, or through the Premises and further to the use by travelers and others of such established or existing roads and trails. The Permittee understands that occasional park visitors are authorized to walk, use non-motorized watercraft, or hike in the various areas included in this Permit even though no trails are formally established.
- e) Permitter reserves the right for Permitter, its employees, contractors and agents to enter and to permit any Agency to enter upon the Premises for the purposes of inspection, inventory or when otherwise deemed appropriate by the Permitter for the protection of the interests of Permitter, including Permitter's interests in any natural or cultural resources located on, in or under the Premises.
- f) Permitter reserves the right at any time to close to travel any of its lands, to erect and maintain gates at any point thereon, to regulate or prevent traffic of any kind thereon, to prescribe the methods of use thereof, and to maintain complete dominion over the same; provided, however, that at all times during the Term, Permitter shall provide Permittee and Permittee's invitees with reasonable access to the Premises subject only to interruptions caused by necessary maintenance or administrative operations or by matters beyond Permitter's control.
- g) Permittee hereby waives any claim for damages for any injury, inconvenience to or interference with Permittee's use and occupancy of the Premises, any loss of occupancy or quiet enjoyment of the Premises, or any other loss occasioned by Permitter's exercise of its rights under this Article 3 except to the extent that the damages, expenses, claims or suits result from the willful misconduct or gross negligence of Permitter, its employees, contractors or agents; provided, further, that Permitter shall be liable only to the extent such claims are allowed

under the Federal Tort Claims Act.

- h) Members of the general public visiting the Drakes Bay Oyster Company operation may park in the adjacent NPS parking area and walk over to the SUP or ROP areas.
- i) While Permittee is permitted to use and operate motorized watercraft in Drakes Estero for the purpose of conducting daily business operations, which can include occasional inspections required by Agencies, no other use of Permittee's motorized watercraft is authorized. No motorized watercraft may enter the designated wilderness boundary (See "Existing Wilderness" on map attached hereto as Exhibit A). To protect water quality in the Estero, any additional or replacement boat motors obtained by Permittee must be four stroke motors.
- j) Due to a lack of adequate parking space and restroom facilities for the public, barbecuing is not permitted in the Special Use Permit Area. To comply with this paragraph, Permittee will not encourage barbecuing in the SUP Area. Picnic tables will be provided by the NPS at the adjacent parking area.
- k) Unauthorized discharge into the estuary is prohibited. This prohibition includes any discharge from processing facilities. Notwithstanding the foregoing, discharge of oyster wash water from dock and from hatchery operations is allowed if authorized by relevant Agencies.
- l) In order to ensure public health and safety, Permittee will ensure that Permittee and Permittee's officers, agents, employees, and contractors comply with Applicable Laws regarding pets, including the NPS regulation at 36 C.F.R. § 2.15.
- m) In order to ensure public health and safety, Permittee shall allow all appropriate Federal, State and/ or County agencies; including the United States Department of Health and Human Services, the State of California Department of Health Services and Marin County Community Development Agency Environmental Health Services, to conduct inspections on a routine basis.

4) SPECIAL PERMIT CONDITIONS

- a) If Permittee and Permitter disagree about an issue related to this Permit, they will first make a good faith effort to resolve such issue at the Park level. If they are unable to resolve the issue at the Park level, Permittee may request a review of the issue by the Regional Director.
- b) Based upon the findings of an independent science review and/or NEPA compliance, Permitter reserves its right to modify the provisions of this Article 4. Permitter further reserves its right to incorporate new mitigation provisions based upon the findings of an independent science review.
 - i) Production of all shellfish species shall be capped at the "current production level" as determined under the California Coastal Commission Consent Order No. CCC-07-CD-04.
 - ii) No additional aquaculture racks and/or cultivation infrastructure will be constructed without the prior approval of the Permitter. Operation, repair, and maintenance of infrastructure currently being used for oyster cultivation is permitted.
 - iii) Permittee and Permitter acknowledge the importance of eelgrass within the ecology of the estuary. Permittee will not place bags for shellfish production onto eelgrass.
 - iv) Within sixty (60) days following the signing of this interim Permit, Permittee will submit for National Park Service approval a boating operations plan, which will indicate dedicated navigation routes, chosen to minimize impacts to eelgrass beds when accessing aquaculture racks and/or cultivation equipment.
 - v) To minimize the chances of introducing invasive species or pathological microorganisms to Drake's Estero, Permittee will only import shellfish in the form of larvae and seed. Within 30 days of the Commencement Date, Permittee shall produce sufficient evidence, for the review and approval of the Permitter, that larvae and seed from outside sources have been certified by the California Department of Fish and Game ("CDFG")

to be free of pathogens. If the Permitter determines that the documentation is insufficient, Permittee shall cease from importing larvae within 30 days of receiving notification of the determination from the Permitter.

- vi) Permittee will not introduce species of shellfish beyond those described in the existing leases from the CDFG. Permittee may seek to conform and/or modify these leases with the CDFG. Any modifications approved by CDFG will be considered by Permitter on a case-by-case basis, and Permittee may not implement any such modifications without the prior written approval of the Permitter.
- vii) Permittee must avoid disturbance to marine mammals and marine mammal haul-out sites. The Marine Mammal Protection Act, 16 U.S.C. 1361 et seq., includes a prohibition against any act of pursuit, torment or annoyance that has the potential to injure or disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. The National Oceanic and Atmospheric Administration (NOAA) recommends maintaining a distance of at least 100 yards to avoid disturbance to seals. Permittee will maintain a distance of at least 100 yards from hauled out seals throughout the year. Permitter will monitor marine mammal populations in Drakes Estero. In addition, during the pupping harbor seal closure period, March 1-June 30, the designated wilderness area (outside of Permit area) is closed to all boats. Permittee will follow "Drakes Estero Aquaculture and Harbor Seal Protection Protocol" attached hereto as Exhibit C. If required by CDHS, watercraft may use the Main Channel identified in Exhibit C during the pupping harbor seal closure period only to access CDHS's sentinel monitoring station for marine biotoxins. Boats shall be operated at low speed, near the eastern shore, to minimize chance of disturbance to harbor seals. No other use of the Main Channel is authorized during the pupping harbor seal closure period.
- c) Permittee's agreement to the provisions of this Permit does not waive Permittee's ability to take contrary positions with regard to similar provisions with other Agencies.

5) ACCEPTANCE OF PREMISES

- a) Prior to entering into this Permit, Permittee has made a thorough, independent examination of the Premises and all matters relevant to Permittee's decision to enter into this Permit, and Permittee is thoroughly familiar with all aspects of the Premises and is satisfied that they are in an acceptable condition and meet Permittee's needs, provided that Permittee and Permitter acknowledge that certain repairs are necessary to comply with Applicable Laws. Permittee will make such repairs at its sole cost and expense in compliance with Applicable Laws.
- b) Permittee expressly agrees to use and occupy the Premises and all improvements thereon in their existing "AS IS" condition "WITH ALL FAULTS" and acknowledges that in entering into this Permit, Permittee does not rely on, and Permitter does not make, any express or implied representations or warranties as to any matters including, without limitation, the suitability of the soil or subsoil; any characteristics of the Premises or improvements thereon; the suitability of the Premises for the approved use; the economic feasibility of Permittee's use and occupancy of the Premises; title to the Premises; the presence of Hazardous Materials in, on, under or in the vicinity of the Premises; or any other matter. Permittee has satisfied itself as to such suitability and other pertinent matters by Permittee's own inquiries and tests into all matters relevant to determining whether to enter into this Permit and Permittee hereby accepts the Premises.

6) CONSTRUCTION OF IMPROVEMENTS OR ALTERATIONS

- a) Permittee may only make those Improvements or Alterations to the Premises that relate to Permittee's use of the Premises as specified in Article 3, "Use of the Premises."
- b) Permittee shall not undertake any Improvements or Alterations to the Premises (including installation of temporary equipment or facilities) without the prior written approval of Permitter.
- c) As a prerequisite to obtaining approval for Improvements or Alterations, Permittee, at Permittee's sole cost and expense, shall submit design plans and any other relevant data for Permitter's approval.
- d) Construction of Improvements or Alterations by Permittee shall be performed in accordance with all Applicable

Laws, including but not limited to general planning, building, and environmental laws and approved design plans and shall be undertaken and completed at Permittee's sole cost and expense.

- e) Permittee shall, upon request, furnish Permitter with a true and correct copy of any contract, and any modification or amendment thereof, with Permittee's contractors, architects, or any other consultants, engaged in connection with this Permit.
- f) Any Improvements or Alterations undertaken by Permittee shall be performed in a good and workmanlike manner and with materials of a quality and standard acceptable to Permitter. Permittee shall also construct, install and maintain equipment and any construction facilities on the Premises in a safe and orderly manner.
- g) Permittee shall not construct any Improvements or Alterations outside the boundaries of the Premises.
- h) Permitter in its discretion is entitled to have on the Premises at any time during the construction of Improvements or Alterations an inspector or representative who shall be entitled to observe all aspects of the construction on the Premises.
- i) All lumber utilized at the site will be processed in compliance with current laws and regulations regarding wood treatments. This includes lumber utilized in assembly and repair of aquaculture racks.
- j) As set forth in Article 17, title to any Improvements or Alterations to the Premises shall be and remain solely in the Permitter.

7) TREATMENT OF REFUSE

- a) Refuse shall be promptly removed from within the boundaries of Point Reyes National Seashore and shall be disposed of in accordance with Applicable Laws.
- b) Permittee will make best efforts to remove debris associated with aquaculture production operations including wood from racks, plastic spacers, unused shellfish bags, shellfish shells, and any other associated items.

8) PESTICIDE AND HERBICIDE USE

- a) The National Park Service utilizes Integrated Pest Management ("IPM") to treat pest and vegetation problems. The goal of IPM is to use the least-toxic, effective methods of controlling pests and vegetation. Except for normal household purposes, Permittee shall not use any pesticides that do not comply with the IPM program. To this end, Permittee shall submit in writing to Permitter, a request for the use of pesticide(s) or herbicide(s) and shall not use any pesticide(s) or herbicide(s) until Permittee has received an express written authorization therefor from Permitter.
- b) Permittee shall manage, treat, generate, handle, store and dispose of all pesticides and herbicides in accordance with Applicable Laws, including reporting requirements.

9) FIRE PREVENTION AND SUPPRESSION

- a) Permittee and its employees, agents, and contractors shall, in Permittee's use and occupancy of the Premises, take all reasonable precautions to prevent forest, brush, grass, and structural fires and shall, if safety permits, assist the Permitter in extinguishing such fires on the Premises.

10) EXCAVATION, SITE AND GROUND DISTURBANCE

- a) Permittee shall not cut, remove or alter any timber or any other landscape feature; conduct any mining or drilling operations; remove any sand, gravel or similar substances from the ground or watercourse; commit waste of any kind; or in any manner change the contour or condition of the Premises without the prior written approval of the Permitter. Except in emergencies, Permittee shall submit requests to conduct such activities in writing to the Permitter not less than sixty (60) days in advance of the proposed commencement date of any such activities.

- b) If approval of activities referenced above in Section 10(a) is granted, Permittee shall abide by all the terms and conditions of the approval, including provisions pertaining to archaeological resources.
- c) No soil disturbance of any kind may occur in the vicinity of a known archeological site, without the presence of an NPS archeological monitor.

11) NONPOINT SOURCE POLLUTION

- a) The Permittee shall comply with all Applicable Laws regarding non-point source pollution (including the protection of beneficial uses of waters as designated by the State of California). Further, Permittee's use and occupancy of the Premises shall be designed to minimize, to the greatest extent feasible, non-point source pollution within National Park Service boundaries or on adjacent lands.
- b) Except as set forth in Section 3(k) of this Permit, no discharge into the estuary is permitted. This prohibition includes any discharge from processing facilities.

12) TREE AND VEGETATION REMOVAL

- a) The Permittee may not remove tree(s) or vegetation unless expressly approved in writing by the Permitter. The Permittee shall provide specific plans to the Permitter for desired tree(s) and vegetation removal during the annual meeting or in writing during the Term of this Permit.
- b) Removal of non-native invasive vegetation such as non-native thistles, trimming and vegetation removal around structures is permissible.

13) WILDLIFE PROTECTION

- a) Wildlife is an integral part of Point Reyes National Seashore and must be managed in accordance with all Applicable Laws, including but not limited to NPS laws, regulations, and policies.
- b) Permittee shall not engage in any activity that purposely causes harm or destroys any wildlife. Conversely, Permittee shall not engage in any activity that purposely supports or increases populations of non-native or invasive animal species, except for the cultivation of the shellfish species authorized by this Permit.
- c) On a case by case basis, the Permitter will evaluate incidences of depredation caused by Permittee and choose a course of action. The nature of the course of action will be determined by the extent and frequency of the damage, the wildlife species, and park-wide management objectives.

14) HAZARDOUS MATERIALS; ENVIRONMENTAL HEALTH AND SAFETY

- a) In connection with this Permit, Permittee, its officers, agents, employees and contractors, shall not use, generate, sell, treat, keep, or store any Hazardous Materials on, about, under or into the Premises or elsewhere in Point Reyes except in compliance with all Applicable Laws and as approved in writing by Permitter. However, Permittee shall not be obligated to obtain Permitter's approval to use, keep, or generate Hazardous Materials as necessary for the normal operation or maintenance of vehicles or for standard household cleaners. Permittee agrees to be responsible for timely acquisition of any permit(s) required for its Hazardous Materials-related activities, and shall provide to the Permitter, upon request, inventories of all such Hazardous Materials and any supporting documentation, including but not limited to material safety data sheets, uniform waste manifest forms, and/or any other pertinent permits.
- b) Permittee, its officers, agents, employees and contractors, shall not release, discharge or dispose of any Hazardous Materials from, on, about, under or into the Premises or elsewhere in Point Reyes, except as authorized by Applicable Laws.
- c) If Permittee knows of or reasonably suspects or receives notice or other communication concerning any past,

ongoing, or potential violation of Environmental Requirements in connection with the Premises or Permittee's activities, Permittee shall immediately inform Permitter and shall provide copies of any relevant documents to Permitter. Receipt of such information and documentation shall not be deemed to create any obligation on the part of the Permitter to defend or otherwise respond to any such notification.

- d) If any Hazardous Materials Occurrence is caused by, arises from, or is exacerbated by the activities authorized under this Permit or by the use of the Premises by Permittee, its officers, agents, employees or contractors, Permittee shall promptly take all actions at its sole cost and expense as are required to comply with Applicable Laws and to allow the Premises and any other affected property to be used free of any use restriction that could be imposed under Applicable Laws; provided that, except in cases of emergency, Permitter's approval of such actions shall first be obtained.
- e) The Permitter shall have the right, but not the duty, at all reasonable times and, except in the case of emergency, following at least twenty-four (24) hours advance notice to Permittee, to enter and to permit any Agency, public or private utilities and other entities and persons to enter upon the Premises, as may be necessary as determined by the Permitter in its sole discretion, to conduct inspections of the Premises, including invasive tests, to determine whether Permittee is complying with all Applicable Laws and to investigate the existence of any Hazardous Materials in, on or under the Premises. The Permitter shall have the right, but not the duty, to retain independent professional consultants to enter the Premises to conduct such inspections and to review any final report prepared by or for Permittee concerning such compliance. Upon Permittee's request, the Permitter will make available to Permittee copies of all final reports and written data obtained by the Permitter from such tests and investigations. Permittee shall have no claim for any injury or inconvenience to or interference with Permittee's use of the Premises or any other loss occasioned by inspections under this Section 14(e). Notwithstanding the foregoing, neither Permittee nor Permitter shall be required to provide a report under this Section 14(e) if such report is protected by attorney-client privilege.
- f) Should Permittee, its officers, agents, employees or contractors, fail to perform or observe any of the obligations or agreements pertaining to Hazardous Materials or Environmental Requirements for a period of thirty (30) days (or such longer period of time as is reasonably required) after notice, then Permitter shall have the right, but not the duty, without limitation of any other rights of Permitter under this Permit, personally or through its agents, consultants or contractors to enter the Premises and perform the same. Permittee agrees to reimburse Permitter for the costs thereof and to indemnify Permitter as provided for in this Permit.
- g) Permittee understands and acknowledges that the Premises may contain asbestos and lead-based paint. If Permittee performs any Improvements or Alterations, Permittee shall comply with all Environmental Requirements related to asbestos and lead-based paint and shall solely bear all costs associated therewith. Nothing in this Permit shall be construed to require Permittee to remove asbestos or lead-based paint unless Environmental Requirements require such removal.
- h) Permittee shall indemnify, defend, save and hold Permitter, its employees, successors, agents and assigns, harmless from and against, and reimburse Permitter for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments, and expenses, including without limitation, consultant fees and expert fees, that arise during or after the Term as a result of any violation of any Environmental Requirement in connection with this Permit or any Hazardous Materials Occurrence in connection with this Permit.
- i) The provisions of this Article 14 shall survive any termination or revocation of this Permit. Article 15 (Insurance) of this Permit shall not limit in any way Permittee's or Permitter's obligations under this Article 14.

15) INSURANCE

- a) Permittee shall purchase the types and amounts of insurance described herein before the Commencement Date of this Permit unless otherwise specified. At the time such insurance coverage is purchased, Permittee shall provide Permitter with a statement of Permittee insurance describing the insurance coverage in effect and a Certificate of Insurance covering each policy in effect as evidence of compliance with this Permit. Permittee shall also provide the Permitter thirty (30) days advance written notice of any material change in the Permittee's

insurance program hereunder. Permittee shall not be responsible for any omissions or inadequacies in insurance coverage or amounts in the event such coverage or amounts prove to be inadequate or otherwise insufficient for any reason whatsoever.

- b) From time to time, as conditions in the insurance industry warrant, the Permittee reserves the right to revise the minimum insurance limits required in this Permit.
- c) All insurance policies required by this Permit shall specify that the insurance company shall have no right of subrogation against the United States, except for claims arising solely from the negligence of the United States or its employees, or shall provide that the United States is named as an additional insured.
- d) All insurance policies required herein shall contain a loss payable clause approved by the Permittee which requires insurance proceeds to be paid directly to the Permittee without requiring endorsement by the United States. Insurance proceeds covering any loss of the Premises but not used to replace such losses shall be promptly paid by Permittee to Permittee. The use of insurance proceeds for the repair, restoration or replacement of the Premises shall not give any ownership interest therein to Permittee.
- e) Property Insurance: At a minimum, the Permittee shall be required to purchase Basic Form Actual Cash Value (replacement cost less depreciation) insurance coverage for all residence on the Premises. Within thirty days of issuance of the Permit, the Permittee shall submit a report from a reputable insurance company which provides a full range of options for insurance coverage on all nonresidential structures on the Premises. Within thirty days of receipt of this report, the Permittee, in its sole discretion, will review and specify the type and level of insurance coverage which shall be required. The Permittee will provide the Permittee written notification of insurance requirements and the Permittee shall be required to have the specified level(s) of insurance in place within thirty days of such notification. The cost of the insurance will be deducted from the appraised fair market value for the Premises; this adjustment and the insurance requirements will be addressed in an amendment to the Permit. Permittee shall, in the event of damage or destruction in whole or in part to the Premises, use all proceeds from the above described insurance policies to repair, restore, replace or remove those buildings, structures, equipment, furnishings, betterments or improvements determined by the Permittee, in Permittee's sole discretion, to be necessary to satisfactorily discharge the Permittee's obligations under this Permit.
- f) Public Liability: The Permittee shall provide Comprehensive General Liability insurance against claims arising from or associated with Permittee's use and occupancy of the Premises. Such insurance shall be in the amount commensurate with the degree of risk and the scope and size of such use and occupancy, but in any event, the limits of such insurance shall not be less than \$1,000,000.00 per occurrence covering both bodily injury and property damage. If claims reduce available insurance below the required per occurrence limits, the Permittee shall obtain additional insurance to restore the required limits. An umbrella or excess liability policy, in addition to a Comprehensive General Liability Policy, may be used to achieve the required limits.
- g) Permittee shall also obtain the following additional coverage:
 - i) Automobile Liability – To cover all owned, non-owned, and hired vehicles in the amount of \$300,000.00.
 - ii) Workers' Compensation – The amount shall be in accordance with that which is required by the State of California.

16) INDEMNITY

- a) In addition to the indemnification contained in Article 14, Permittee shall indemnify, defend, save and hold Permittee, its employees, successors, agents and assigns, harmless from and against, and reimburse Permittee for, any and all claims, demands, damages, injuries, losses, penalties, fines, costs, liabilities, causes of action, judgments and expenses and the like incurred in connection with or arising in any way out of this Permit; the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors; the design, construction, maintenance, or condition of any Improvements or Alterations; or any accident or occurrence on the Premises or elsewhere arising out of the use or occupancy of the Premises by Permittee or its officers, agents, employees, or contractors. Permittee's obligations hereunder shall include, but not be limited to, the burden and

expense of defending all claims, suits and administrative proceedings (with counsel reasonably approved by Permittee), even if such claims, suits or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against the United States.

- b) Permittee agrees to cooperate, to the extent allowed by law, in the submission of claims pursuant to the Federal Tort Claims Act against the United States by third parties for personal injuries or property damage resulting from the negligent act or omission of any employee of the United States in the course of his or her employment.
- c) This Article 16 shall survive any termination or revocation of this Permit. The provisions of Article 15 (Insurance) of this Permit shall not limit in any way Permittee's obligations under this Article 16.

17) PROPERTY INTEREST

- a) This Permit shall vest in Permittee no property interest in the Premises or in the improvements thereon. Title to real property and improvements thereon, including any Improvements or Alterations constructed by Permittee, shall be and remain solely in Permittee. Except as provided in Paragraph 3(g), Permittee shall have no claim for any compensation or damages for the Premises, the improvements thereon, or any Improvements or Alterations constructed by the Permittee.
- b) Nothing in this Permit shall give or be deemed to give Permittee an independent right to grant easements or other rights-of-way over, under, on, or through the Premises.
- c) Permittee hereby retains the sole and exclusive right to oil, gas, hydrocarbons, and other minerals (of whatsoever character) in, on, or under the Premises.

18) RENTS, TAXES AND ASSESSMENTS

- a) The annual rental rate for this Permit shall be established by Permittee and is set forth on the Cover Page of this Permit.
- b) The annual rent under this Permit is payable in advance on a semi-annual basis. Therefore, Permittee hereby agrees to pay fifty percent of the annual rate on or before November with the remaining fifty percent payable on or before May of each year during the Term.
- c) Permittee shall pay the proper Agency, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the Term of this Permit, are levied or assessed against the Premises.
- d) Rents due hereunder shall be paid without assertion of any counterclaim, setoff, deduction or defense and without abatement, suspension, deferment or reduction.

19) CYCLIC MAINTENANCE

- a) Permittee shall perform all Cyclic Maintenance in accordance with the Provisions of this Permit and at Permittee's sole cost and expense. Permittee is responsible for the maintenance of all fences, buildings, and other improvements upon the Premises. All improvements and facilities used and occupied by Permittee shall at all times be protected and maintained in a safe, sanitary and sightly condition.
- b) Specific maintenance requirements may be negotiated with Permittee each year as outlined in Article 21 (Annual Meeting).
- c) Docks and Fences shall be maintained in good condition and shall be timely repaired in conformance with Applicable Laws. Abandoned fences and other decrepit improvements shall be removed from the Premises and shall be disposed of outside the Park or as directed by Permittee after review and approval by the NPS Historian.

- d) New lighting under Permittee's control of the Premises shall be redesigned to protect and preserve the night sky/darkness and minimize light pollution in Drakes Estero.
- e) Parking areas shall be maintained in a safe condition and no new roads or truck trails shall be established without prior written permission of the Permitter. The main entrance road from Sir Francis Drake Boulevard to the SUP Area will be maintained by the NPS. The Park will respond in a timely manner to Permittee and/or visitor complaints regarding the condition of the main entrance road. Notwithstanding the foregoing, Permitter may enter into a road maintenance contract with Permittee.
- f) Existing water reservoirs shall be maintained in a safe and secure condition to prevent washouts and erosion and no new reservoirs shall be constructed or established without prior written approval of the Permitter.
- g) Permittee shall maintain the water, well, pump and all pipelines within the Premises. Permittee shall replace or repair any damage or loss of the water system within the Premises.
- h) Permittee shall maintain the sewage pipeline and sewage leachfield in the "Sewage Area."
- i) Permittee shall be responsible for removing slash buildup around fences or other facilities within the Premises so as to prevent fire and egress hazards. Permittee shall also be responsible for removing litter and trash from the Premises.

20) COMPLIANCE WITH APPLICABLE LAWS: NEPA, NHPA

- a) General Compliance: As provided for in this Permit, Permittee at its sole cost and expense shall promptly comply with all Applicable Laws as required by law. Permittee shall immediately notify Permitter of any notices received by or on behalf of Permittee regarding any alleged or actual violation(s) of or non-compliance with Applicable Laws. Permittee shall, at its sole cost and expense, promptly remediate or correct any violation(s) of Applicable Laws.
- b) National Environmental Policy Act and National Historic Preservation Act: Where activities undertaken by Permittee relate to the preparation of compliance documents pursuant to the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"), Permittee shall supply all necessary information to Permitter and any Agency in a timely manner. Permitter will pay for the preparation of NEPA or NHPA documents. If there is litigation regarding NEPA or NHPA compliance, it will not trigger the indemnification requirements of Article 16.

21) ANNUAL MEETING

- a) The Parties shall meet annually each year during the Term of this Permit for the purposes of discussing and resolving issues of mutual concern and ensuring that Permittee is complying with the Provisions of this Permit.

22) PENALTY

- a) At the option of the Permitter, Permitter may, in lieu of voiding and terminating this Permit, assess a penalty of \$50.00 per day for any failure by Permittee to keep and perform any of the Provisions of this Permit. In such case, Permittee shall be given notice in writing of a grace period (of from one to thirty days) to remedy the situation before a penalty will be assessed. Payment of any penalty under this provision shall not excuse Permittee from curing the Default. This provision shall not be construed as preventing Permitter from issuing citations or initiating enforcement proceedings under Applicable Laws.

23) SURRENDER AND VACATE THE PREMISES, RESTORATION

- a) At the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall surrender and vacate the Premises, remove Permittee's Personal Property therefrom, and repair any damage

resulting from such removal. Subject to the approval of the Permitter, Permittee shall also return the Premises to as good order and condition (subject to ordinary wear and tear and damage that is not caused directly or indirectly by Permittee) as that existing upon the Effective Date.

- b) All Permittee's Personal Property shall remain the property of Permittee. However, if after the conclusion of Permittee's authorization to use the Premises for the Permitted Uses, Permittee shall fail satisfactorily to remove Permittee's Personal Property and so repair the Premises, then, at the Permitter's sole option, after notice to Permittee, Permittee's Personal Property, shall either become the property of the Permitter without compensation therefore, or the Permitter may cause it to be removed and the Premises to be repaired at the expense of Permittee, and no claim for damages against Permitter, its employees, agents or contractors shall be created or made on account of such removal or repair work.

24) LIMITATION ON EFFECT OF APPROVALS

- a) All rights of Permitter to review, comment upon, approve, inspect or take any other action with respect to the use and occupancy of the Premises by Permittee, or any other matter, are expressly for the benefit of Permitter and no other party. No review, comment, approval or inspection, right or exercise of any right to perform Permitter's obligations, or similar action required or permitted by, of, or to Permitter under this Permit, or actions or omissions of Permitter's employees, contractors, or other agents, or other circumstances shall give or be deemed to give Permitter any liability, responsibility or obligation for, in connection with, or with respect to the operation of the Premises, nor shall any such approval, actions, information or circumstances relieve or be deemed to relieve Permittee of its obligations and responsibilities for the use and occupancy of the Premises as set forth in this Permit.

25) WAIVER NOT CONTINUING

- a) The waiver of any Default, whether such waiver be expressed or implied, shall not be construed as a continuing waiver, or a waiver of or consent to any subsequent or prior breach of the same or any other provision of this Permit. No waiver of any Default shall affect or alter this Permit, but each and every Provision of this Permit shall continue in full force and effect with respect to any other then existing or subsequent Default.

26) LIENS

- a) Permittee shall have no power to do any act or to make any contract that may create or be the foundation for any lien, mortgage or other encumbrance upon the reversion, fee interest or other estate of the Permitter or of any interest of the Permitter in the Premises. If any such lien shall at anytime be filed against the Premises or any portion thereof, Permittee shall cause the Permitter to be discharged from the lien.

27) HOLDING OVER

- a) This Permit shall terminate upon the Termination Date and any holding over by Permittee after the Termination Date shall not constitute a renewal of this Permit or give Permittee any rights under this Permit or in or to the Premises.

28) NOTICES

- a) Any notice or other communication required or permitted under this Permit shall be in writing and shall be delivered by hand or certified mail with return receipt requested. Notices and other communications shall be addressed as follows:

If to Permitter:

Superintendent
Point Reyes National Seashore
Point Reyes Station, CA 94956

If to Permittee:

Mr. Kevin Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake
Inverness, CA 94937

29) NO PARTNERSHIP OR JOINT VENTURE

- a) Permitter is not for any purpose a partner or joint venturer of Permittee in the development or operation of the Premises or in any business conducted on the Premises. Permitter shall not under any circumstances be responsible or obligated for any losses or liabilities of Permittee.

30) ANTI-DEFICIENCY ACT

- a) Permittee and Permitter agree that nothing contained in this Permit shall be construed as binding Permitter to expend, in any fiscal year, any sum in excess of the appropriation made by Congress for that fiscal year in furtherance of the subject matter of this Permit, or to involve Permitter in any contract or other obligation for the future expenditure of money in excess of such appropriations.

31) COMPLIANCE WITH EQUAL OPPORTUNITY LAWS

- a) Permittee agrees that in undertaking all activities pursuant to this Permit, Permittee will comply with all Applicable Laws relating to non-discrimination.

32) ENTIRE AGREEMENT AND AMENDMENT

- a) This instrument, together with the exhibits hereto, all of which are incorporated in this Permit by reference, constitutes the entire agreement between Permitter and Permittee with respect to the subject matter of this Permit and supersedes all prior offers, negotiations, oral and written. This Permit may not be amended or modified in any respect whatsoever except by an instrument in writing signed by Permitter and Permittee.

33) NO PAYMENTS BY PERMITTER

- a) Under no circumstances or conditions, whether now existing or hereafter arising, and whether or not beyond the present contemplation of the Parties, shall Permitter be expected or required to make any payment of any kind whatsoever with respect to the Premises or be under any obligation or liability except as expressly set forth in this Permit.

34) NO THIRD PARTY BENEFICIARIES

- a) Except as expressly set forth in this Permit, this Permit shall not be deemed to confer upon any person or entity, other than the parties to this Permit as expressly set forth in this Permit, any third party beneficiary status, any right to enforce any Provision of this Permit, or any other right or interest.

35) NO PREFERENTIAL RENEWAL AND RELOCATION ASSISTANCE

- a) Permittee hereby agrees that Permittee is not a concessioner and that the provisions of law regarding National Park Service concessionaires do not apply to Permittee. No rights shall be acquired by virtue of this Permit entitling Permittee to claim benefits under the Uniform Relocation Assistance and Real Property Acquisition

Policies Act of 1970, Public Law 91-646.

36) SEVERABILITY

- a) In case any one or more of the provisions of this Permit shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Permit, and this Permit shall be construed as if such invalid, illegal or unenforceable provisions had not been contained in this Permit.

37) EXHIBITS

- a) Each of the exhibits referenced in this Permit is attached hereto and incorporated herein.

38) TIME OF THE ESSENCE

- a) Time is hereby expressly declared to be of the essence of this Permit and of each and every Provision of this Permit.

39) HEADINGS

- a) Article, Section and Subsection headings in this Permit are for convenience only and are not to be construed as a part of this Permit or in any way limiting or amplifying the Provisions of this Permit.

40) PERMIT CONSTRUED AS A WHOLE

- a) The language in all parts of this Permit shall in all cases be construed as a whole according to its fair meaning and not strictly for or against either Permitter or Permittee. The Parties acknowledge that each party and its counsel have reviewed this Permit and participated in its drafting and therefore that the rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed or applied in the interpretation of this Permit.

41) MEANING OF TERMS

- a) Whenever the context so requires, the neuter gender shall include the masculine and the feminine, and the singular shall include the plural and vice versa.

42) FEDERAL LAW

- a) The laws of the United States shall govern the validity, construction and effect of this Permit.

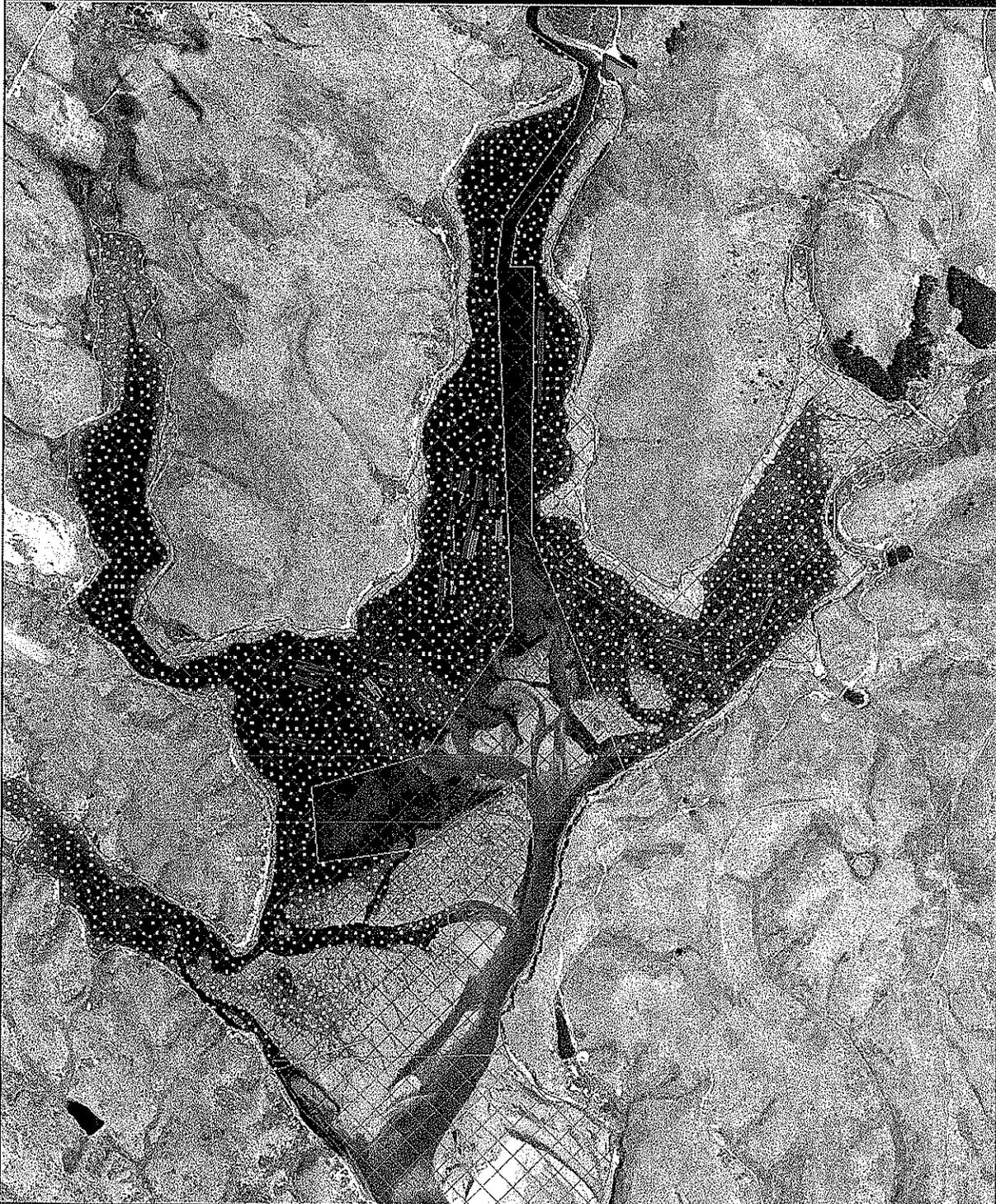
EXHIBIT A

Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area

Drake's Estero Aquaculture & CDFG Leases

NPS Resources and SUP Area

National Park Service
U.S. Department of the Interior



Permit Type

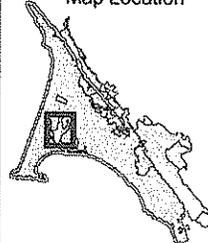
- ROP
- SUP

Oyster Racks

- Active
- Dilapidated

- Aquaculture Lease/SUP Area
- Potential Wilderness
- Existing Wilderness

Map Location

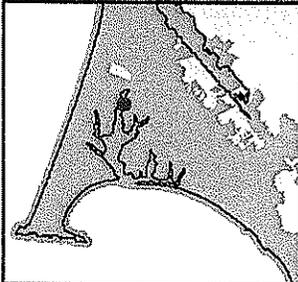


0 0.5 Miles

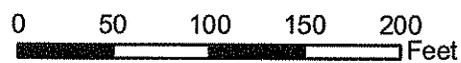
EXHIBIT B

Map – Drake's Estero Oysters – SUP & ROP

Drake's Estero Oysters - SUP & ROP



National Park Service
Point Reyes National Seashore
Marin County, CA



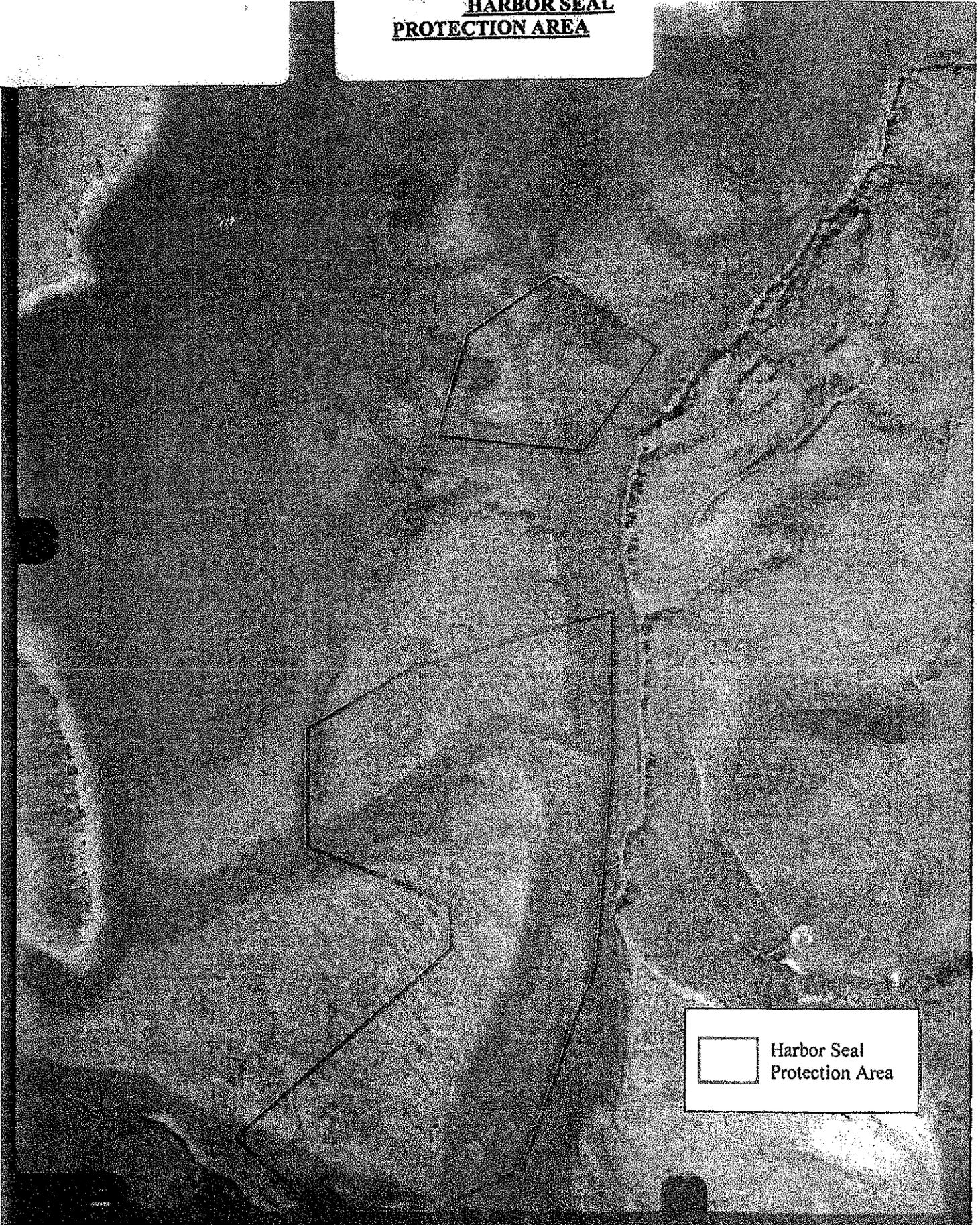
Permit Type

-  ROP - 1.5 acres
-  SUP - 1.1 acres

EXHIBIT C

Drakes Estero Aquaculture and Harbor Seal Protection Protocol

HARBOR SEAL
PROTECTION AREA



 Harbor Seal
Protection Area

Drakes Estero Aquaculture and Harbor Seal Protection Protocol

The following items are mutually agreed to for protection of harbor seals in and adjacent to the Harbor Seal Protection Areas identified in the Map, attached hereto and incorporated herein by reference ("Protocol Map"):

1. During the breeding season, March 1 through June 30, the "Main Channel" and "Lateral Channel" of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone.
2. During the breeding season, Permittee boats may use the "West Channel" at low speed while maintaining a distance of at least 100 yards from hauled out seals.
3. Throughout the year, all of Permittee's boats, personnel, and any structures and materials owned or used by Permittee shall be prohibited from the harbor seal protection areas identified on the Protocol Map. In addition, all of the Permittee's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

EXHIBIT D

Map – Drakes Bay Oyster Company Well Area

PR 02-106 JOHNSON OYSTER

JS 4/14/94



Some dimensions approximate

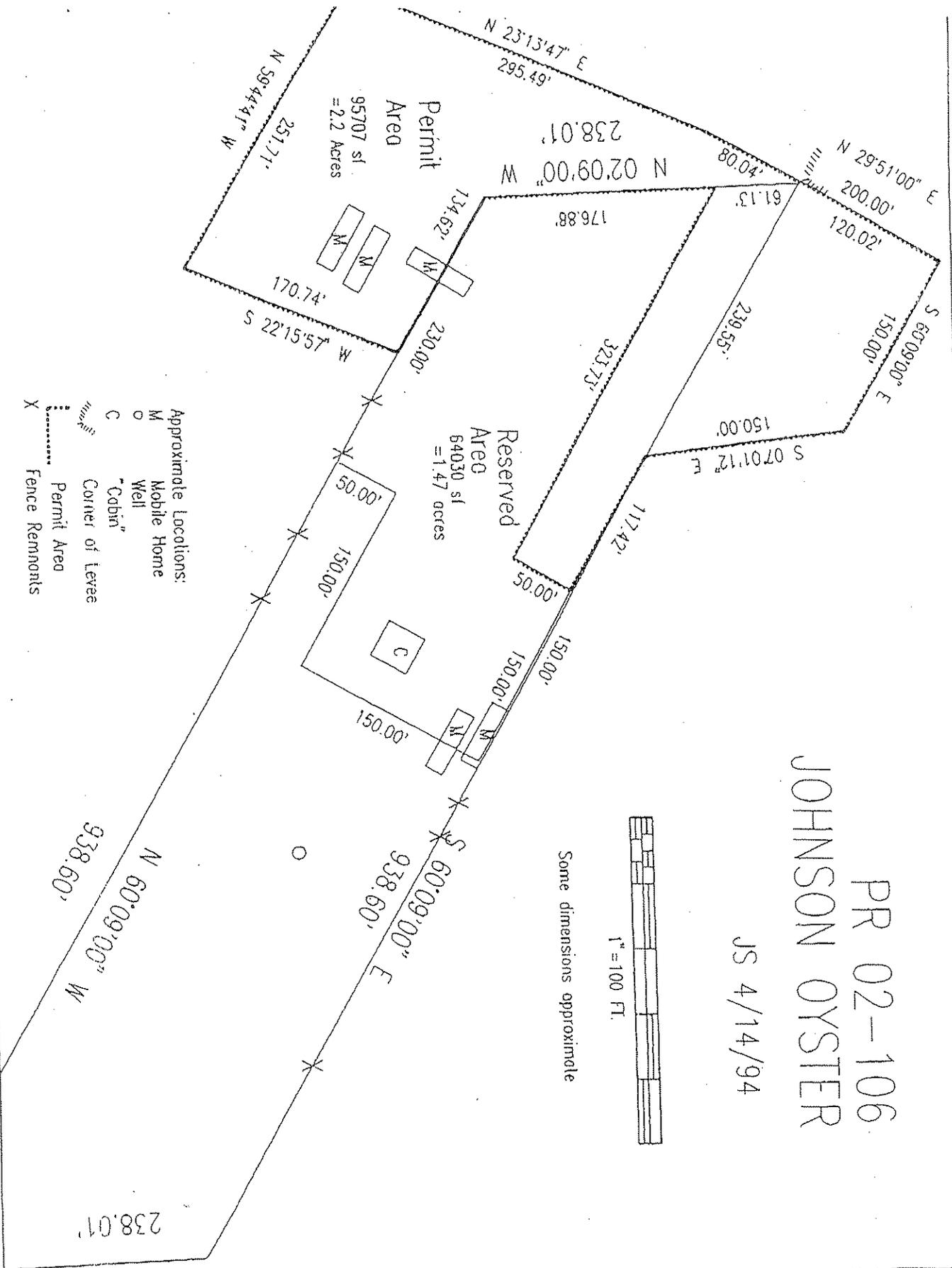
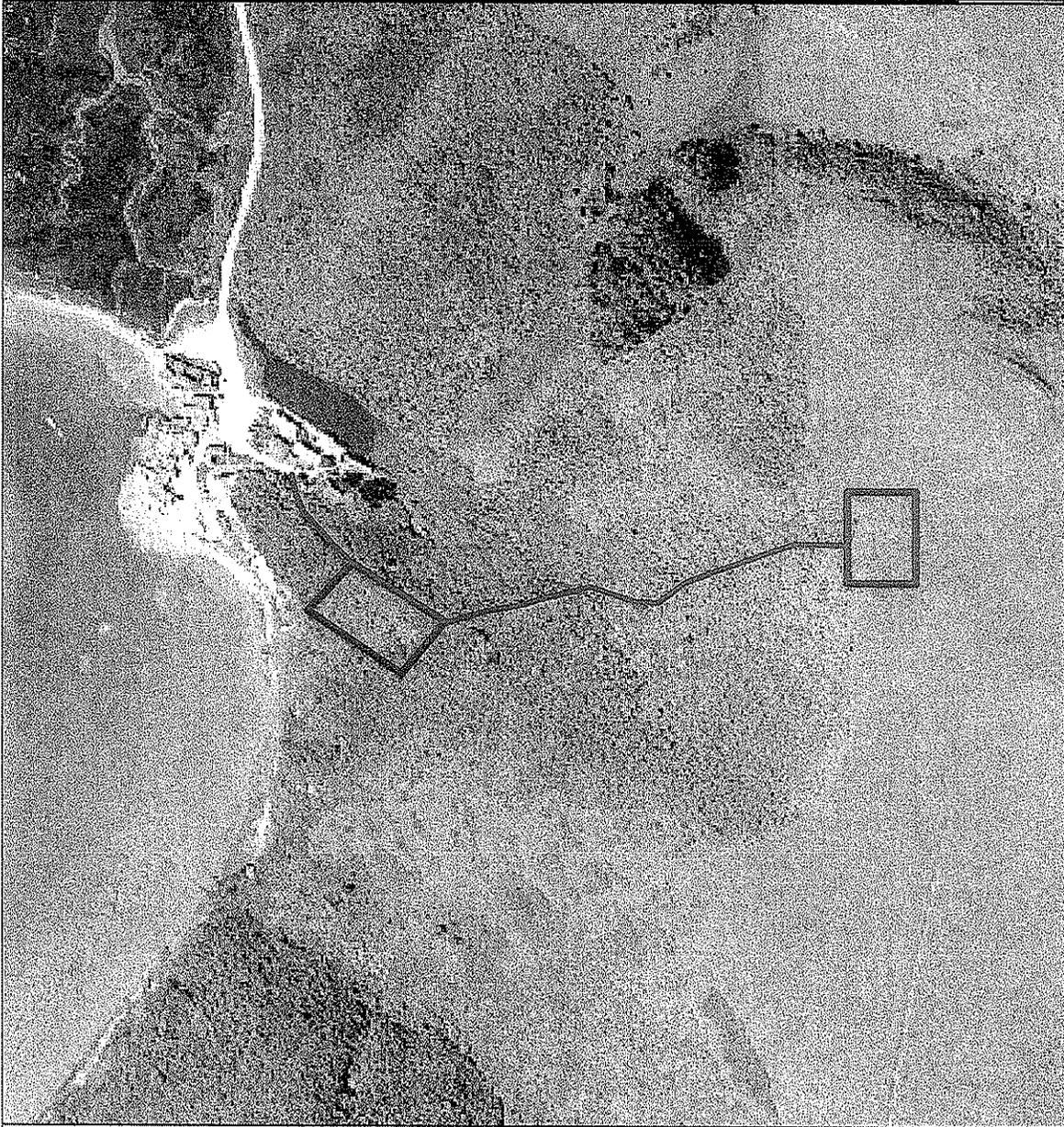


EXHIBIT E

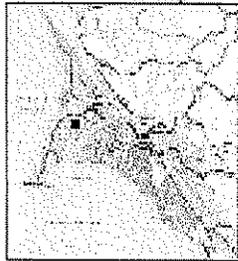
Map – Drakes Bay Oyster Company Sewage Area

EXHIBIT

Oyster Farm Leach Field (Approximate Location and Size)



Location Map



National Park Service
Point Reyes National Seashore
Marin County, CA

 Oyster Farm Leach Field

