Go to original staff report. Go to original addendum. Go to additional correspondence.

STATE OF CALIFORNIA
Edmund G. Brown Jr., Governor

Fish and Game Commission

Sonke Mastrup, Executive Director
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February 6, 2013

Ms. Mary K. Shallenberger, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Dear Chair Shallenberger:

The California Fish and Game Commission would like to express our concern regarding a possible overlap in authorities in regard to your February 7 agenda item number 11.1 Cease and Desist Order No. CCC-13-CD-01 (Drakes Bay Oster Company, Point Reyes National Seashore, Marin County). We request that you postpone possible action on this item until we clarify our respective authorities.

We recognize that our two Commissions have overlapping authority for conservation actions in California's coastal zone, and we need to clarify the extent of that overlap. For example, as you know, the Coastal Commission has authority under the Coastal Act and under the consistency provisions of the Federal Coastal Zone Management Act. At the same time, the California Fish and Game Commission has authority to permit aquaculture and mariculture operations in California waters. It's important that our two bodies work in close cooperation to avoid any conflicts that might arise from the unilateral exercise of our respective authorities.

We would like to suggest that in the future our two bodies to work more closely together in satisfying our responsibilities for conservation of California's coastal wildlife resources. We regret the late nature of this communication but we have only just learned of your proposed action. We hope that in the future, you will notify us in advance of such proposals and look forward to working more closely with you and your staff.

If you have any questions concerning this matter, please contact me or Executive Director Sonke Mastrup at the letterhead address or by telephone.

Sincerely,

Michael Sutton
President

Th 11.1, 11.2

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Southwest Region
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San Francisco, California 94104

Phone: (415) 296-3370
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February 7, 2013

Via email and U.S. mail

Dr. Charles Lester, Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2000

Re: Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-R0-01, Agenda Item No. Th. 11.1 and 11.2

Dear Dr. Lester:

On February 6, 2013, Drakes Bay Oyster Company (DBOC) and the California Fish and Game Commission (CFGC) requested that the California Coastal Commission postpone action on Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01. Commission staff has requested the Department of the Interior's views on this matter.

The Department supports the immediate issuance of the Cease and Desist Order and the Restoration Order because they ensure protection of Drakes Estero. DBOC is currently operating under a Limited Authorization issued by the National Park Service (NPS) on November 29, 2012. This Limited Authorization is focused on close out activities and requires DBOC to terminate its operations in Drakes Estero by February 28, 2013.[1] The 2008 Special Use Permit and 1972 Reservation of Use and Occupancy (RUO), which included resource protection measures restricting DBOC's commercial activities within Drakes Estero, expired on November 30, 2012. While the Department of Interior has questioned the validity of DBOC's State Water Bottom leases, those leases nevertheless provided some restrictions on DBOC's operations in Drakes Estero because DBOC has said that it was bound by those leases. We note however that the state leases were expressly "contingent on a concurrent federal Reservation of Use and Occupancy for fee land in Point Reyes National Seashore." This was a material condition of the state leases. Now that the RUO has expired and DBOC is only authorized to conduct close out operations in Drakes Estero until February 28th, DBOC can no longer meet the material

1 As part of a stipulation approved by the U.S. District Court for the Northern District of California on December 17, 2012, DBOC has until March 15, 2013 to remove its personal property from upland areas adjacent to the Estero. Also, the District Court denied DBOC's request for a Preliminary Injunction on February 4, 2013 and DBOC has now appealed that decision.

condition of having a concurrent federal authorization.

On a related matter, DBOC asserts in its February 6th letter to the Commission that it does not own the racks in Drakes Estero and that the racks belong to the NPS. DBOC has consistently maintained that it has authority to maintain, repair and replace the racks in Drakes Estero. The NPS's Limited Authorization specifically requires DBOC to remove its personal property from Drakes Estero "including shellfish and racks." In order to clarify our opinion regarding ownership of the racks for purposes of your proceedings today, the Department does not claim any ownership interest in the racks either for itself, the NPS or the United States. To the extent that DBOC believes that the Limited Authorization is incorrect and that DBOC has no such ownership, it is incumbent on DBOC to address this with NPS, not in separate forums.

The Department supports the issuance of the CDO and Restoration Order to DBOC because these orders will ensure that many resource protections, including seasonal closures associated with the harbor seal pupping season beginning March 1, 2013, are in place.

We appreciate your coordination with the Interior Department on this important issue.

Sincerely,

Barbara Goodyear
Field Solicitor

Th 11.1, 11.2

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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).

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[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.

* * * * *

TH 11.2 and TH 11.2

Coastal Commission Staff Response to Zach Walton's letter of February 6, 2013

In general, this letter, received at 4 pm the night before the hearing, reiterates several of the issues previously raised by counsel for Drakes, to which the Commission has previously responded, both in prior correspondence, and in the Staff Report and Addendum. However, as a courtesy, we provide the following brief responses.

1. Counsel for DBOC asserts that DBOC does not own the racks and cannot be required to remove them

Response:
--To the extent that any of the racks is a result of unpermitted development, the Commission has the authority to require its removal, although should they be legally permitted to remain in the estero, the orders clearly also provide for DBOC to apply to retain them as part of an overall CDP application.
--DBOC claims that they cannot remove the racks because they are owned by the federal government; however, the federal government has never claimed ownership of the racks and just this morning issued a letter affirmatively disclaiming any ownership over the racks. The NPS also wants the racks removed; in fact, NPS has demanded this in a letter dated November 29, 2012.
--We also note that Drakes is under an independent obligation pursuant to the 2004 Fish and Game Commission lease renewal to: 1. fund an escrow account for the removal of cultivation equipment, and 2. actually remove the racks.

2. Counsel for DBOC asserts that Fish and Game Commission leases remain in effect, that the Orders *rely* on the invalidity thereof, and that if the leases are in fact invalid then Section 5.1 of the Orders is unlawful.

Response:

-- While the Fish and Game Commission leases have now expired as a result of the loss of federal authorization to continue to operate on the property (as confirmed by Fish and Game Commission Counsel Thalhammer), the proposed Orders are not premised on the invalidity of the leases – in fact, they are structured so as to be independent of the state and federal leases for the very reason that they remain subject to ongoing legal dispute.

-- Furthermore, on November 30, 2012, Barbara Goodyear, NPS solicitor, sent a letter to Drakes explicating this issue and addressing the assumption that the FGC leases had in fact expired as a result of the federal action.

--An allegation that the leases are somehow valid on the grounds that Drakes has not been informed of their invalidity is specious; as a preliminary matter,

notice is irrelevant, and DBOC was in fact on constructive and actual notice of the expiration of the leases as the terms are clear on their face.

--Finally, the Orders do not purport to authorize any ongoing planting, harvesting, or processing; rather, Section 5.1 merely imposes resource protection restrictions (in the form of a maximum) should Drakes continue to be operational.

3. Drakes' counsel asserts that "the CDO and RO intrude on the Fish and Game Commission's constitutionally-delegated authority" and allege that an AG opinion saying that only they can administer the division of fish and game.

Response: This is fully addressed in the Staff Report section responding to their Statement of Defense. See the Staff Report at pages 41-45.

4. Drakes' counsel asserts that CEQA review is required before the order can be issued and no exemptions apply to this enforcement action.

a. They say it a project because would require removal of oyster racks.

Response:

--Actually the orders would only require that DBOC get a permit for the oyster racks OR, if they were to lose the litigation and have to remove the racks, to comply with the protective measures in the Order to diminish any potential impacts.

b. They say that no categorical exclusions apply because:

i. None of the exclusions listed applies to construction activities

Response:

--The phrase "construction activities" is not defined in the CEQA Guidelines, and a natural reading of it would not apply to the dismantling and removal of racks.

c. They claim that the exemptions do not apply if the activity will have a significant effect on the environment due to unusual circumstances—and that these orders present unusual circumstances.

Response:

--the activities required under these orders are designed to protect the environment, not to have an adverse effect on the environment.
--to the extent the orders may require removal, they includes provisions for Executive Director review to minimize any negative impacts.
-- The categorical exemptions relate to actions to restore the natural resources or the environment, and to enforcement actions. Whenever an environmental or land use agency engages in such activities, by their nature, these activities can involve land disturbance or other interim steps

that have the potential for some arguably adverse short-term impacts through, for example, suspension of sediment. However, they are, by their nature, designed to effect long-term benefits to the environment. Therefore, there is nothing particularly unusual about the issues that DBOC raises, and the Commission's analysis is that, even assuming there may be some interim adverse effects, the restoration will have a net benefit for the environment. This is supported by the Environmental Impact Statement that the National Department of Interior has issued related to its decision not to extend DBOC's Special Use Permit or entitlement to use the property.

--The case DBOC's counsel cited applied to a different category of exemption than the ones at issue here, and the court found that the exemption did not apply because the record was unclear about the nature of the project and the city had failed to consider whether the circumstances differed from the general circumstances of projects covered by the exemption.

5. Counsel for Drakes assert that the Staff Report has factual inaccuracies
    a. They say that DBOC did not operate its boats in the lateral channel in violation of the 2007 cease and desist order
        i. They say that the 2008 SUP was unclear on this definition
        ii. They say that the 2007 order was unclear, and say that that is why the Commission added gps coordinates in the proposed order

Response:

--Multiple resource agencies, including the National Park Service and the Commission, have maintained a consistent interpretation of the meaning of the Lateral Channel since it was first defined in the 1992 Multi Agency Seal Protocol. In fact, Drakes has been the only entity to claim confusion regarding the definition of the Lateral Channel.

--In an effort to address the allegations of ongoing confusion by Drakes and to offer a conciliatory clarification, staff accepted Drakes' own suggestion to demarcate the channel by GIS coordinates. Though this change was made to the proposed Orders in the context of working towards a negotiated compromise, staff retained this definition in the unilateral orders as a courtesy to Drakes.

6. Counsel for Drakes asserts that DBOC does not discharge marine debris from ongoing operations. It must all be legacy debris.

Response:

--This was addressed in the Staff Report. See pages 38-39.

--Per Drake's own admissions, there have been debris release events (coinciding with large storms).

--Furthermore, because the 2007 Order, to which Drakes consented, both incorporated the 2003 Order, which required debris removal, and

independently required that both historic and contemporary debris be addressed, this distinction continues to be irrelevant to Drake's obligations to remove it.
--Additionally, although Drakes knew debris release to be an ongoing problem in the estero and a source of contention when it purchased the property, rather than selecting equipment with even minor aesthetic variations from that which JOC used, Drakes used the exact equipment, thereby precluding any differentiation between historic and new debris.
--Staff has been given marine debris that has been collected from in and around the estero over the last several years. This debris includes the same plastic spacers and Styrofoam used by Drakes, and as Drakes is the only commercial facility in the entire National Seashore, attribution of the debris to Drake's is entirely reasonable.

7. Drakes counsel asserts that negotiations were truncated prematurely.

Responses:

a. We did have agreement on many of the issues, which is why we were so surprised that discussions broke down.
b. Although Drakes claimed that the negotiations broke down because of Commission staff's insistence on a restoration plan, the Restoration Order had been part of the proposed Orders since the beginning; our very first discussion with counsel (at the end of October) addressed the fact that Orders would need to include both interim operating conditions for the short term, and also have options for the longer term.
c. From the beginning, we were all aware of a variety of potential options: if the lease was extended, the DBOC needed to finally obtain the CDP required both by the Coastal Act and the 2007 Consent Order. On the other hand, if the lease were not extended, all parties were aware that other measures would be needed.
    i. As we discussed early on with Drakes' counsel, if Drakes were to have to leave the estero, it would be both easier and less expensive to do so via a Consent Order than it would be to have to go to the time and expense of obtaining a CDP to govern their closure activities. This was discussed openly and early on with Drakes. to be removed.
d. Despite this, in an effort to be responsive to Drake's requests for additional time, staff repeatedly extended deadlines and attempted to amend the terms of the proposed Orders to address Drakes stated concerns.

e. Furthermore, the argument that Drakes could not devote sufficient time to this process because it was involved in litigation, which they in fact filed against the federal government, is not persuasive. In fact it should be noted that this facility is entirely without any Coastal Act authorization, and this is extremely unusual. The Commission has gone to very unusual

lengths to be creative and flexible with Drakes, but it has been more than 5 years since they were ordered to obtain a CDP.

f. Finally, the claim that they were willing to continue working towards a settlement is not in fact substantiated by communications with drakes; at the close of the final discussions with drakes, staff expressed the continued desire to resolve this amicably, and the business day following the publication of the proposed unilateral order and staff report, staff called Drake's counsel and left a voicemail expressing willingness to continue settlement discussions. This call was never returned.

8. Finally, in support of their request that the Commission postpone this action, Drakes counsel offer to comply "voluntarily" with sections 5.2, 5.3, and 5.7 of the proposed orders. However, those provisions essentially just restate obligations to which they already agreed in the 2007 order. Notably, they don't offer to comply with sections 5.4 (regarding invasive species management) or 5.5 (regarding the cultivation of Manila clams).

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Go to original staff report

Additional correspondence

Th 11.1 & 11.2

ADDENDUM

February 5, 2013

TO: Coastal Commissioners and Interested Parties

FROM: Lisa Haage, Chief of Enforcement

SUBJECT: ADDENDUM TO **ITEM NOS. 11.1 & 11.2 –**CEASE AND DESIST ORDER CCC-13-CD-01 AND RESTORATION ORDER CCC-13-RO-01 (DRAKES BAY OYSTER COMPANY) FOR THE COMMISSION MEETING OF **February 7, 2013**

This addendum is designed to achieve the following objectives. First, it updates the record by supplementing it with several documents that Commission staff received after the staff report was issued, as well as two documents that pre-dated the staff report but were inadvertently omitted. Second, it provides some minor corrections to the proposed orders and the staff report. Finally, it provides responses to some of the issues raised in the recent correspondence, which responses Commission staff proposes the Commission incorporate into its findings.

I. Documents Received:

Documents included in this addendum are: two letters commenting on the Cease and Desist and Restoration Orders (items 1 and 2 below); a letter dated January 23, 2013, to be included as Exhibit 30 to the Staff Report (item 3 below); a stipulation filed on December 17, 2012 in the matter of *Drakes Bay Oyster Company et al. v Kenneth Salazar et al.*, to be included as Exhibit 31 to the Staff Report (item 4 below); the February 4, 2012 Order by United States District Court Judge Yvonne Gonzales Rogers denying the motion of Drakes Bay Oyster Company ("DBOC") for a preliminary injunction (item 5 below); and letters supporting Commission issuance of the proposed Orders (items 6a-6g below). In addition, on February 5, 2013, Commission staff received several hundred pages of declarations from DBOC's counsel that he asked be included in the administrative record for this matter. Those items were received too late and were too voluminous to include with this addendum, but they have been scanned and are available on the Commission's web-site at the following

address: http://documents.coastal.ca.gov/reports/2013/2/Th11.1-s-2-2013.pdf. The documents listed above are more precisely characterized as:

1. *Letter from Cicely Muldoon, Superintendent Point Reyes National Seashore, dated February 4, 2013* commenting on the proposed Orders.
2. *Letter from Gordon Bennett, President, Save Our Seashore, dated January 30, 2013* commenting on the proposed Orders.
3. *Letter from Zachary Walton on behalf of Drakes Bay Oyster Company, dated January 23, 2013*, which shall be attached as Exhibit 30 to the Staff Report.
4. *Stipulation Re: Briefing Schedule and Order* in the matter *of Drakes Bay Oyster Company et al. v Kenneth Salazar et al., N.D. Cal. Case No. 4:12-cv-06134-YGR, ("DBOC v. Salazar"), filed December 17, 2012*, which shall be attached as Exhibit 31 to the Staff Report.
5. *United States District Court Judge Yvonne Gonzalez Rogers' Order Denying Plaintiffs' Motion for Preliminary Injunction* in the matter of *DBOC v. Salazar, filed February 4, 2013*.
6. *Letters supporting Commission issuance of the proposed Orders from:*
    a. *Letter from Bridger Mitchell, dated February 1, 2013.*
    b. *Correspondence from Victoria Hanson, dated February 2, 2013.*
    c. *Correspondence from Amy Meyer, dated February 3, 2013.*
    d. *Letter from Melissa Samet, Senior Water Resources Counsel, National Wildlife Federation, dated February 4, 2013.*
    e. *Letter from Adam Keats, Senior Counsel, Center for Biological Diversity, dated February 4, 2013.*
    f. *Letter from Gordon Bennett, President, Save Our Seashore, dated February 4, 2013.*
    g. *Letter from Ann Notthoff, California Advocacy Director, National Resources Defense Council, dated February 5, 2013.*
7. *Declarations in Support of Motion for Preliminary Injunction* in the matter of *DBOC v. Salazar*, filed December 21, 2012, and January 16, 2013.

II. Errata:

A. Changes to proposed Cease and Desist Order CCC-13-CD-01 AND proposed Restoration Order CCC-13-RO-01:

Commission staff hereby revises its proposed Cease and Desist Order and Restoration Order. Language to be added is shown in *italic and underlined*, as shown below, and deletions are shown in ~~strikeout:~~

1. Section 4.2, Sentence 1 should read as follows:

    The property that is the subject of these Orders is described as follows:

    Approximately ~~1.5~~ *4.6* acres of dry land along the banks of Drake's Estero (designated by the Marin County Assessor's Office as *part of* Assessor's Parcel Number 109-13-017) and 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 Drakes Bay Oyster Company.

2. Section 5.3(A)(1) should read as follows:

   the spatial extent within which ~~1~~ Debris will be collected from the Estero,

B. Changes to staff report / Recommendations and Findings for Cease and Desist Order CCC-13-CD-01 AND Restoration Order CCC-13-RO-01:

Commission staff hereby revises its January 25, 2013 staff report and, thereby, its recommended findings in support of the Cease and Desist Order & Restoration Order. Language to be added is shown in *italic and underlined*, as shown below, and deletions are shown in ~~strikeout~~:

1. Page 24, paragraph 2, sentence 2 should read as follows:

   "Aerial photographs of the estero demonstrate the effects of propeller cuts from outboard motors used to facilitate placement and retrieval of oysters through the eelgrass canopy surrounding oyster racks and bottom bags. (Exhibit #~~XX~~ 5).

2. Page 44, top paragraph, numbered as defense 34 should end as follows:

   (hereinafter, "Jan. 23, 2013 letter"~~)~~, *attached hereto as Exhibit 30.)*

III. Responses to Comments Received

A. Responses to comments made by Cicely Muldoon on behalf of the National Park Service (NPS) in correspondence dated February 4, 2013:

1. Comment: *NPS suggests that Section 5.1(A) of the proposed Orders may not be consistent with the Limited Authorization issued by National Park Service on November 29, 2012.*
   a. Commission staff response: Section 5.1(A) of the proposed Orders is specifically stated as a prohibition rather than an authorization so as to avoid implicit authorization of any planting activity. Section 5.1(A) states that the number of clams and oysters planted in any year "shall not exceed the number planted in 2007." Therefore, if the National Park Service prevents DBOC from planting any shellfish at all, DBOC can comply with both the National Park Service directive and the proposed Orders by not planting any shellfish, thereby not exceeding the number planted in 2007 as the Orders require.

2. Comment: *NPS seeks to clarify that the five residential structures on the subject property would not be subject to removal under the proposed Orders.*

a. Commission staff response: In an attempt to avoid issues of inconsistency between the Orders and directives by the National Park Service, Section 7 of the proposed Orders provides that DBOC's obligations to remove and restore are contingent upon NPS authorization. If no such authorization is obtained for all or part of the actions addressed in the orders, those sections of the orders would not be operative. Therefore, should NPS not desire for the residential structures to be removed pursuant to the Orders, they only need deny Drakes authorization to do so and the provisions of the Orders relating to removal and restoration of those areas are nullified by design.

In addition, we note that NPS requests that we coordinate with them. Staff has endeavored to do so up to now and would plan to continue to coordinate with them, as the land owner, as well as to assist Drakes in complying with the proposed Orders in conjunction with whatever federal requirements apply to the site. Furthermore, Section 7.0 of the proposed Orders provides that should removal and restoration be triggered pursuant to Section 6.0 of the proposed Orders, both development and implementation of restoration plans are contingent upon National Park Service authorization to access the areas subject to the removal and restoration.

Additionally, we note that the references to successors and assigns in sections 1.1, 4.1, and 17.0 of the orders are intended to apply to successors to DBOC's business operations, not to any party who subsequently comes to hold a possessory interest in the real property at issue. Both for that reason and due to principles of federalism and sovereign immunity, the Commission's orders in this case would not apply to the federal government, should it retake the property.

Finally, if the federal government itself proposes activities on the subject property that might affect the land or water uses or natural resources of the area, any Commission review of such actions would be addressed via the federal consistency provisions of the federal Coastal Zone Management Act and the Coastal Act.

B. Responses to comments made and questions raised by Gordon Bennett on behalf of Save Our Seashore (SOS), in correspondence dated January 30, 2013.

1. Comment: SOS c*laims that Section 12 of the proposed Orders should include a requirement for payment of stipulated penalties and a requirement for a performance bond.*
   a. Commission staff response: Although used in permit actions, we have not typically included requirements for performance bonds in enforcement actions. We have been dealing with DBOC in a number of different contexts, and trying to work with them to get them into compliance with all aspects of the Coastal Act, including resolution of prior violations. For a significant amount of time, we were working with them to get them to apply for a CDP, and when it became

evident that that wasn't happening in a timely fashion, we began to work on an consent enforcement order which would provide protections of coastal resources quickly, and which would have also addressed the issue of outstanding stipulated penalties for violations of the prior order. Only on January 24 did we find out that this matter wasn't going to settle, and so the issue of stipulated penalties now remains outstanding and will need to be resolved through another mechanism.

2. Comment: *SOS alleges that there have been changes in the method of "floating cultivation" and asks whether this change isn't new development and a violation also.*
    a. Commission staff response: While the use of 'floating' bottom bags is a new cultivation method that has not received Coastal Act authorization, this violation is captured by the definition of Unpermitted Development in Section 4.3(A) of the proposed Orders, which defines unpermitted development to include, "Commencement of, or any substantial changes to, the operation of offshore aquaculture facilities, including significant changes in operation methods, volume species, or location." The use of floating culture is therefore enumerated as a violation and addressed by the proposed Orders.

3. Comment: *SOS alleges that the Orders 'independently authorize' Manila clam cultivation in the Estero.*
    a. Commission staff response: The proposed Orders contain prohibitory provisions relating to the cultivation of Manila clams but in no way authorize their cultivation anywhere in the estero. Moreover, Section 5.5 of the proposed Orders requires that DBOC develop and effectuate a removal plan to remove all non-triploidy clams from the Subject Property. Section 5.5(A) provides that any Manila clams that are subsequently seeded must be triploid, and must be cultivated in compliance with the terms of the State water bottom leases, but it does not authorize any such seeding. Therefore, pursuant to the proposed Orders, absent a valid lease from the California Fish and Game Commission, new Manila clams cannot be seeded.

4. Comment: *SOS alleges that there is a 'feral' population of Manila clams in the estero and requests that the Orders require the eradication thereof.*
    a. Commission staff response: Commission staff has seen no evidence of such a naturalized population of Manila clams in the estero which would necessitate estero-wide eradication. Nothing in these proposed orders would preclude future actions being taken by any party to address additional Coastal Act concerns.

5. Comment: *SOS requests amendment in the 5.3(a)(1) of the order language to require that DBOC remove debris from areas beyond the estero.*

    Commission staff response: . As the vast majority of debris remains within the estero, Commission staff determined that requiring expeditious debris removal from within this sensitive area would both yield the greatest ecological benefit and allow staff to assess the success of the removal in the near term. Staff notes

that the Interim Operating Conditions of these proposed orders are just that, and cover the interim use period and contemplate further measures being included either in a removal and restoration plan if the facility should close, or in a Coastal Development Permit if the facility were to remain in operation.

6. Comment: *SOS requests that the capping of production levels be undertaken in a manner distinct from that employed by the Orders and suggests that additional monitoring requirements are necessary.*
    a. Commission staff response: The proposed Orders would cap production levels by limiting seeding in the estero to not more than was done in 2007, while SOS proposes that production be limited to the number of bags and racks employed by DBOC in 2007. While the amount of equipment used in cultivation is undoubtedly relevant to potential resource impacts, as figures relating to bags and strings employed are not available for 2007, there would be no metric by which to measure current production to ensure no net change. Furthermore, even assuming that baseline data was available for equipment-type, there would be a fundamental lack of fungibility of this data as not all strings and bags are equal; they can yield differing number of cultivars and have differing resource impacts depending upon how they are employed – bags for example can be installed floating, staked, loose, etc. Requiring that the number of seed *planted* not exceed 2007 levels provides an easily enforceable rubric by which to measure compliance, as these numbers are subject to annual reporting requirements by the Department of Fish and Wildlife.

7. Comment: *SOS also requests that the Orders grant the Executive Director the ability to extend the exclusion area around seals from 100 meters outward in increments of 100 meters upon a showing of documented flushing incidences.*

    Commission staff response: The proposed Orders allow the Executive Director to extend the exclusion area around seals from 100 meters to not more than 200 meters during the Interim Use Period if it is determined that operations are causing flushing or disruption of behavioral patterns. This restriction, in conjunction with the year-round and seasonal closures also enumerated in Section 5.2 of the proposed Orders, was determined by staff to be, for the pendency of the interim use period, an appropriate balance between resource protection and any interim continued operations in the estero.

    Additionally, these interim measures are intended to be short-term place holders to govern operations: if the facility remains in operation, the appropriate time to engage in comprehensive resource impact review is during the permit process; at which point it is likely that wholly different measures, such as confining operations to certain locations within the estero, will be deemed appropriate and necessary for harbor seal protection, based on a full analysis of a permit application for operations.

8. Comment: *SOS states that Orders should require DBOC to mark its boats to assist in enforceability of boat restrictions.*
    a. Commission staff response: With the exception of DBOC's boats, no motorized vessel transit is allowed in Drakes Estero; even kayaking is limited to times of the year outside of the harbor seal pupping season. There is therefore a rebuttable presumption that any boats operating in the estero pertain to the DBOC operation; certainly they are the only boats legally present. However, as DBOC has sought to claim in the past that a boat operating in the estero in violation of the 2007 Order was not in fact part of its operations, it would be appropriate to require a permanent marking of DBOC's vessels. This demarcation would be required to be part of the Vessel Transit Plan submitted pursuant to Section 5.7 of the proposed Orders so as to allow staff to monitor compliance therewith.

C. Response to submittals made by Zachary Walton on behalf of Drakes Bay Oyster Company on February 5, 2013.

Timing: Two days before this hearing, Commission staff received a letter from DBOC's counsel with several hundred pages of declarations that had been prepared for a completely different proceeding,[1] The letter requested that the declarations be included in the administrative record for these proceedings. For the reasons stated below, these materials are not properly part of the administrative record in this case.

The first round of declarations had been executed on December 20, 2012, and filed with the federal district court for the Northern District of California on December 21. It wasn't until more than six weeks later, and more than a month after the deadline that the Executive Director had ultimately set for submittal of a statement of defense,[2] that DBOC's counsel sent these documents to the Commission, to arrive only two days before the hearing.

The Commission's regulations allow the Executive Director to extend the deadline for submittal of a Statement of Defense, as he did in this case (see footnote 2), but they also state that such extensions "shall be valid only for such additional time as the executive director allows." 14 C.C.R. § 13181(b). The first set of declarations were sent more than a month after the deadline.

Although the second set of declarations was not generated until after the deadline for a statement of defense had expired,[3] even those were signed on January 14-16, three weeks before DBOC's counsel decided to send them to the Commission for today's hearing.

[1] The declarations were generated for federal litigation related to the U.S. Department of Interior's decision not to extend a lease. Moreover, they were submitted in conjunction with a motion for a preliminary injunction, where the relevant legal and policy issues relate to four factors that do not align with the criteria for this Commission's issuance of a cease and desist or restoration order.

[2] The Executive Director had initially set this deadline for November 13, 2012, but extended it multiple times in furtherance of efforts to come to a settlement, eventually giving DBOC until the end of the year.

[3] This set of declarations was generated in support of DBOC's reply brief in the federal litigation over the preliminary injunction motion.

Relevance: Much if not most of these materials attached to counsel's letter were not relevant to these proceedings, yet the letter failed to identify in any way which documents or portions thereof they were asserting were relevant to these proceedings. Nor did they highlight which issues in the several hundred pages of documents attached to counsel's letter they wished the Commission to review and consider.

The cover letter for the submittal of the declarations states that they provide evidence of four things: (1) that DBOC'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." These factors have varying, but generally minimal, relevance to the instant proceeding. The issues before this Commission are: (1) whether development has occurred without the necessary Coastal Act authorization, (2) whether that development is inconsistent with the policies in Chapter 3 of the Coastal Act, and (3) whether the development is causing continuing resource damages. The policy, legal and legislative history issues surrounding the lease extension are wholly irrelevant to this proceeding, as is, for example, the "level of effort necessary to remove oyster racks from the estero." As for the last two points in DBOC's counsel's letter, the orders do not require the removal of the oysters from the estero unless it is independently required by the landowner, or as a result of a later permitting decision, and the potential for harm to the eelgrass (or any other environmental harm) from the removal of the racks is precisely the reason that the orders require the submittal of a removal and restoration plan, for the Executive Director's review – to ensure that any removal occurs in the least environmentally damaging manner possible.

Logistics: In addition, given that Commission staff received these several hundreds of pages of materials on Tuesday, when Commissioners and Commission staff were already on their way to Redondo Beach for the meeting, it was not possible to make copies of all of the materials for each of the Commissioners. Instead, as indicated above, Commission staff had the materials scanned and placed on the Commission's web-site. Commission staff then noted the availability of the materials in an addendum to the Commission staff report.

Conclusion: In sum given the lateness and volume of the material submitted, and the form of the submittal (providing materials from another proceeding without any specification of where in the hundreds of pages the Commission would find information relevant to this proceeding), a full review was impossible, as was normal distribution to Commissioners. Although not part of the record, as a courtesy, Staff did scan the materials and made them available on the Commission website with the other materials for this matter.

In sum, the materials submitted by DBOC's counsel were neither timely nor relevant, and they were far too voluminous to distribute normally or to address, given the late date on which they were received. Therefore, they are not part of the record.

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January 23, 2013

VIA FIRST CLASS and ELECTRONIC MAIL

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Drakes Bay Oyster Company

Dear Lisa:

Thank you for continuing to work with the Drakes Bay Oyster Company (DBOC) on our permitting issues. As you know, DBOC has had an after-the-fact CDP application pending since 2008. Staff is now offering DBOC the choice between signing a consent order or being brought before the Commission for a hearing on a unilateral cease and desist order. As you know, we are in the middle of preparing for the hearing on a preliminary injunction, so it is extraordinarily difficult to devote resources to addressing negotiations over your proposed order now. You have also not identified any real urgency that requires this matter to be decided before the Commission's February meeting. We ask again that we extend the time for our negotiations. Additionally, after consulting with our team, we need clarification on why staff's proposal is consistent with the California Constitution and four separate provisions of the Coastal Act that require the Commission to foster aquaculture and cooperate with the Department of Fish and Wildlife (DFW). We are also concerned that the restoration order has significant CEQA implications that have not been addressed.

Regarding the Coastal Act and the Constitution:

First, Public Resources Code § 30222.5 requires to Commission to give "priority" to aquaculture proposals. Instead of giving priority to DBOC's permit application, however, staff is considering preparing a cease and desist order.

Second, Public Resources Code § 30234 requires the Commission to "protect[] and, where feasible, upgrade[]" facilities serving "commercial fishing", such as DBOC's. Section 30234 also prohibits "reduc[ing]" existing facilities serving commercial fishing, except in circumstances not present here. Instead of working to protect and upgrade DBOC, however, the order would restrict DBOC's operations.

Third, Public Resources Code § 30411(c) expresses the Legislature's policy to "encourage[]" aquaculture, and says that the Commission "shall" provide aquaculture in the sites identified by the Department of Fish and Wildlife for aquaculture. Instead of encouraging aquaculture by DBOC in a location leased by the Department, the order would further constrain aquaculture.

Fourth, Public Resources Code § 30411(a) prohibits the Commission from imposing controls on aquaculture that "duplicate or exceed" those provided by the Department of Fish and Wildlife concerning wildlife and "fishery management" programs. Notwithstanding your view on whether the constitutional right to fish extends to aquaculture - we believe that it does - "fishery management" extends to commercial operations, including aquaculture. Indeed, the Commission previously acknowledged that 30411(a) applies to aquaculture at least beginning in the 1990s. The proposed order would impose controls that duplicate or exceed those imposed by DFW, which is unconstitutional. (See Cal. Const. art. 4 § 20; 17 Cal. Atty. Gen. Op. 72.) We are concerned about agreeing to a consent decree that imposes restoration obligations on DBOC until DFW is consulted.

Finally, we believe the restoration order constitutes a "project" under CEQA that would require environmental review. The oysters themselves provide environmental benefits to the estero; removing them will cause impacts. Similarly, removing equipment will cause impacts as well. Our understanding of CEQA is that environmental review can not be avoided simply through the auspices of an order.

We have reiterated on multiple occasions that we are committed to working with you collaboratively on the issues addressed by the proposed consent order. In addition, we have previously committed that we will not operate in the lateral channel as defined by your staff pending resolution of this issue. In light of this, we again ask for a reasonable extension of time to negotiate these matters.

Yours very truly,

Zachary R. Walton, Esq.

cc: Ryan Waterman
Kevin and Nancy Lunny
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
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DRAKES BAY OYSTER COMPANY, *et al.* Plaintiffs, v. KENNETH L. SALAZAR, in his official capacity as Secretary, U.S. Department of the Interior, *et al.*, Defendants.	Case No. 4:12-cv-06134-YGR **STIPULATION RE: BRIEFING SCHEDULE AND ORDER**

Plaintiffs Drakes Bay Oyster Company and Kevin Lunny ("Plaintiffs") and Defendants Kenneth L. Salazar, in his official capacity as Secretary of the Interior, the U.S. Department of the Interior, the National Park Service, Jonathan Jarvis, in his official capacity as Director of the National Park Service, and Does 1-100 ("Defendants"), having conferred through undersigned counsel following the December 13, 2012 Status Conference before the Hon. Yvonne Gonzalez Rogers, now hereby stipulate as follows:

(1) Plaintiffs and Defendants hereby stipulate and agree that Plaintiffs may under the terms of the November 29, 2012 limited authorization, and at Plaintiffs' sole business risk, conduct activities involving taking oyster spat existing in the water at Drakes Estero as of November 30, 2012 out of the water and stringing them, and planting them on oyster racks in Drakes Estero;

(2) Plaintiffs hereby withdraw their *Ex Parte* Application for Temporary Restraining Order, filed December 12, 2012 (Doc. # 20) in the above-captioned action;

(3) Plaintiffs intend to file a Motion for a Preliminary Injunction in the above-captioned action on or before December 21, 2012. In the event such a motion is filed, Defendants shall file their Opposition on or before January 9, 2013; Plaintiffs shall file their Reply on or before January 16, 2013.

(4) The Court has advised the parties that it will hear the Motion for Preliminary Injunction on January 25, 2013, at 2:00 p.m. pacific, in Courtroom 5;

(5) In the event the Court denies the Motion for Preliminary Injunction, Plaintiffs and Defendants stipulate: (a) Defendants will waive the responsibility of Plaintiffs to remove the mobile residential units located on site and currently inhabited by Drakes Bay Oyster Company

Employees; and (b) Defendants agree to allow Plaintiffs until March 15, 2013 to complete the removal of all other personal property within the onshore area.

Respectfully submitted this 14th day of December 2012, by:

CAUSE OF ACTION

By: /s/ Amber D. Abassi (per authorization)
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ATTORNEYS FOR DEFENDANTS KENNETH L. SALAZAR, *et al.*

ORDER

Pursuant to the above Stipulation, **IT IS SO ORDERED.**

This Order terminates Dkt. Nos. 20 & 29.

DATED: December 17, 2012

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

United States Department of the Interior

NATIONAL PARK SERVICE
Point Reyes National Seashore
Point Reyes, California 94956

IN REPLY REFER TO:

L1425

FEB 0 4 2013

Dr. Charles Lester, Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2000

RE: Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01

Dear Dr. Lester:

The National Park Service (NPS) has reviewed the Staff Recommendations and Findings regarding Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01 for Drakes Bay Oyster Company (DBOC) scheduled for the February 7 hearing of the California Coastal Commission (Commission). Department of Interior (DOI) and NPS staff have coordinated with Commission staff as part of this review.

It is our understanding that the interim operations section of the Cease and Desist Order (Section 5) would take effect if approved by the Commission and that Section 6 of the Order was specifically developed to address operational persistence and cessation associated with potential scenarios in ongoing litigation. With the exception of Section 5.1(A) , the protective measures identified within Section 5 of the CDO are consistent with the Limited Authorization issued by the NPS on November 29, 2012. We would also point out that Section 8 of the Limited Authorization requires prior written notification and approval of all ground disturbing activities to ensure protection of natural and cultural resources. We anticipate that the Commission review process for plans requiring Executive Director approval such as those described in Sections 5.1 (B) through 5.7 would include coordination with NPS prior to Executive Director approval.

With regard to the Restoration Order, the NPS wishes to bring attention to the residential structures on the site. DBOC employees and their families who live in housing on-site at DBOC (17171 Sir Francis Drake Blvd.) may be eligible for tenant relocation benefits under Public Law 91-646 the Uniform Relocation Assistance and Real Property Acquisition Act of 1970. In order to ensure that the NPS is able to complete this process with each of the eligible employees on site, the NPS took on responsibility for removal, at its own cost, of the three mobile residential units, in addition to the two fixed residential structures on site. The NPS

would like to clarify that these five residential structures would not be subject to removal under Section 7 of the Order, consistent with the December 14, 2012 stipulated agreement approved by the Court.

Thank you for your efforts on these matters. Should you have questions concerning these comments please contact Brannon Ketcham at 415-464-5192.

Sincerely,

Cicely A. Muldoon
Superintendent

Cc: Drakes Bay Oyster Company

Save Our Seashore
40 Sunnyside Dr Inverness CA 94937
415-663-1881 gbatmuirb@aol.com

January 30, 2012

Re: Comments on Proposed Order CCC-13-CD-01 Appendix A

4.2 Subject Property. The property that is the subject of these Orders is described as follows: Approximately 1.5 acres of dry land along the banks of Drake's Estero (designated by the Marin County Assessor's Office as Assessor's Parcel Number 109-13-017) and approximately 1060 acres of submerged areas within Drake's Estero....

COMMENT: This section contains "clerical errors." The referenced 1.5 acres of NPS land is used by Drakes Bay Oyster Company (DBOC) per the National Park Service (NPS) Reservation of Use and Occupancy (RUO). But there is also an additional 1.2 acres of NPS shoreline land leased to DBOC under the 2008 Special Use Permit (SUP) (also 2 more upland acres for the well and septic field). These additional 1.2 acres of shoreline land contain some of the unpermitted DBOC development (setting tanks, picnic tables) listed in the Order and thus need to be included in the description of the Subject Property.

Further, the reference to Assessor's Parcel Number 109-13-017 is not helpful since that parcel totals 1818.87 acres (not 1.5 acres). Perhaps the land described as Subject Property could be better described by reference to the SUP/RUO land shown on the SUP Map (Order Exhibit 24 page 44 of 74) or to the similar Figure ES-3 of the 2012 Final Environmental Impact Statement (FEIS) for DBOC.

Lastly, the referenced 1060 acres of submerged areas seemingly refers to the acreage in the California Department of Fish and Game (CDFG) leases. However, section 5.1 (B)(2) requires the removal of unpermitted development that is <u>outside</u> these 1060 acres. It would seem, then, that the description of the waters described as "Subject Property" should include areas where the Order mandates action, described perhaps as the (roughly) 2500 acres of Drakes Estero (per FEIS pg. vi) as shown in the Order's Exhibit 2.

5.1 (A) <u>Production Limits.</u> The number of oyster and clam seed planted within the State water bottom leases in Drake's Estero occurring in any calendar year during the Interim Use Period shall not exceed the number planted in 2007.

COMMENT: The 2013 Order's newly proposed metric of the number of "seed planted" (instead of "amount harvested" as in the 2007 Order) facilitates the monitoring of potential impact to the Estero resources but requires minor but important clarification. DBOC makes its own seed from larvae as well as purchasing seed. Whatever the source, these seeds are first "nursed" in indoor or outdoor tanks and then surviving juvenile oysters are "pre-planted" in nearby offshore waters in trays or floating bags. Subsequently surviving juveniles are then transferred to either bottom bags or "strings" for final planting in the Estero. There are substantial variations in mortality at each of these interim "nursery" and "pre-plant juvenile" stages, which emphasizes the importance of measuring potential impact to the Estero by defining the number of "seed planted" at the final "planting" stage (i.e. the number of bags and strings planted) rather than at interim "nursery" or "juvenile-preplant" stages. DBOC recorded the number of bags and strings planted in its 2005 and 2006 Proof of Use (PoU) Reports (and the respective conversion factors to the number of oysters in each), but subsequent PoUs reported only seed numbers at the interim stages. Effective monitoring requires DBOC to provide supplementary planting records that will indicate the number of bags and strings planted in year 2007, which the 2013 Order has set as the base year whose planting effort shall not be exceeded.

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5.1 (B) Spatial Extent of Cultivation and Equipment

(1) Within fifteen (15) days of the effective date of these Orders, Respondents shall furnish, for the Executive Director's review and approval, documentation demonstrating, under penalty of perjury, that any cultivation continuing during the Interim Use Period, including all production equipment, is and will continue to be confined to Cultivation Areas.

COMMENT: This section of the Order should resolve the violation brought to the CCC's attention in the SOS March 17, 2012 letter, namely DBOC boats operating outside of the CDFG Lease areas (and NPS Permit Area (i.e. transiting across middle of the Estero that is "closed to all boats" from March 1 - June 30 per DBOC's NPS SUP #4 B vii (6th sentence).

5.1 (D) Structures. No new structures, including oyster culture racks and production facilities, shall be installed onshore or offshore on the Subject Property during the Interim Use Period.

COMMENT: This section of the Order should resolve the violation brought to the CCC's attention in the SOS January 18, 2013 letter, namely that DBOC's use of floating cultivation methods represents unauthorized additional "development" and an unauthorized increase in "intensity of use" that violates both the NPS SUP and the CCC Order.

5.2 (AB) Respondents' personnel, boats, equipment and structures shall not enter...

COMMENT: This section of the Order should resolve the long-standing excuse by DBOC that boats and individuals observed or recorded disturbing seals or entering into seal protection areas are not connected to DBOC operations...provided the implementation of this section requires DBOC do what it promised to (and is recommended by) the Marine Mammal Commission, namely to clearly mark its boats and personnel and to provide on request by the CCC the GPS data that DBOC claims its boats regularly record.

5.2 (C) Should the Executive Director determine that operations are causing flushing or disruption of behavioral patterns of seals, the Executive Director may increase this minimum approach-distance to not more than 200 meters by providing written notice to Respondents.

COMMENT: The 2012 USGS analysis prepared for the FEIS showed that flushes occur on pupping sandbar UEN after the DBOC boat leaves its departure site that is due west of the seals. Likely due to noise carried on prevailing winds from the northwest and reflected off cliffs to the northwest, the DBOC boat flushes seals at a later point on its route that is further from the seals than the departure site, but northwest. This northwest position of the boat is more than 200 meters from the seals. Thus, uniform imposition of a 200-meter approach distance from all sites may be adequate for some sites but demonstrably not so for others. SOS thus requests that this section be amended to: *"Should the Executive Director determine that operations are causing flushing or disruption of behavioral patterns of seals, the Executive Director, by providing written notice to Respondents, may increase this minimum approach-distance ~~to not more than 200 meters by providing written notice to Respondents~~ by 100-meter increments around any site evidencing flushes until flushes cease."*

5.3 (A)(1): the spatial extent within which I (sic) Debris will be collected from the Estero,

COMMENT: This sentence was seemingly imperfectly edited and could perhaps be clarified by reversing the order of the final two phrases, i.e. "the spatial extent within which Debris from the Estero will be collected." This clarification is needed because neither the 2003 Order (that DBOC is responsible for) nor the 2007 Order (that DBOC agreed to) limits DBOC's obligation to collect its trash only when that trash is deposited inside the Estero. In fact, as Tom Baty's GPS evidence has shown, debris unique to DBOC is deposited inside the Estero and is also discharged from the Estero and subsequently deposited outside on nearby Drakes and Limantour beaches, on other more distant PRNS beaches (and beyond). Thus this sentence should be interpreted to require DBOC to collect oyster debris originating from its operations in the Estero wherever it is deposited.

5.5 Manila Clam Cultivation.

Respondents shall, within ten (10) days of the effective date of these Orders, furnish the Executive Director with a Manila Clam Removal Plan, for review and approval, identifying all nontriploidy Manila clams on the Subject Property, and detailing a plan for those clams. Respondents shall complete removal of all nontriploidy Manila clams pursuant to the approved plan within twenty (20) days of Executive Director approval thereof.

COMMENT: It should be clear that first, this section of the Order means that DBOC is responsible for not only removing its bags of diploid Manila clams, but also all diploid Manila clams throughout the Estero (all of which resulted from DBOC's cultivation, but have gone feral and are found both inside and outside the cultivation area); and second that such removal responsibility shall be DBOC's for as for as long as needed to extirpate the diploid Manila clam population in the Estero.

5.5 (a) Cultivation of Manila clams shall only be undertaken within California Department of Fish and Game lease area M438-01 and in compliance with the terms and conditions of M438-01, as enumerated in the June 5th, 2004 document entitled "Renewal of Lease", and as amended on December 10, 2009.

COMMENT: Page 41 of this CCC-13-CD-01 notes: *"The Coastal Commission has no ability to amend leases held by other parties."* That said, it is not clear how the this section can permit DBOC to cultivate Manila clams in Lease M-438-01 when the NPS, which is the primary permitting authority in Drakes Estero, has NOT given DBOC that permission per FEIS pg. 23: *"The addition of Manila clam cultivation to the area of Lease M-438-01 and outside the boundaries of Lease M-438-02 is not authorized under the NPS SUP."*

Further page 5 of the CCC-13-CD-01 notes, *"the Secretary of the Interior has declined to issue a new lease to DBOC, and as the state water bottom leases were made expressly contingent upon continued federal authorization to occupy the Property, the facility now exists without any governing resource protection operational controls..."*

This is not an accurate representation of the status of the state bottom leases, which state that they are *"contingent on a concurrent federal Reservation of Use and Occupancy for fee land..."* A Reservation of Use and Occupancy is a condition of the initial sale and cannot be "continued." Thus the expiration of the prior state water bottom leases is permanent, and NOT as stated on page 5, limited to the time *"during the pendency of current litigation filed over the lease renewal issues"* (after which these same referenced leases would come back into force).

Lastly, those expired state water bottom leases cannot be renewed, continued or reissued. Page 119 of the Final Environmental Impact Statement for DBOC states, "*the legal authority to determine whether DBOC may use the water bottoms in the Estero rests with the NPS, not the Fish and Game Commission. Therefore, should the Secretary issue a permit to DBOC under section 124, as a condition of receiving that permit, DBOC would be required to surrender its state water bottom lease effective November 30, 2012. DBOC would thereafter operate under the terms of the NPS permit. Relevant provisions of the existing CDFG leases would be incorporated into the SUP...*"

In summary, the CCC has no right to independently authorize Manila clam cultivation anywhere in the Estero without a prior authorization by NPS. Further, the CCC has no logic in basing continuing conditions of its Order on expired state water bottom leases that cannot come back into force and cannot be renewed, continued or reissued. Thus this section of the Order should be clarified to read: *"Cultivation of Manila clams shall only be undertaken ~~within California Department of Fish and Game lease area M438-01~~ after and in compliance with ~~the~~ terms and conditions previously authorized by NPS. ~~of M438-01, as enumerated in the June 5th, 2004 document entitled "Renewal of Lease", and as amended on December 10, 2009."~~*

5.6(1) provide a graphic depiction and written description of all extant cultivation equipment within the Estero, in use or otherwise.

COMMENT: This section of the Order should resolve the violation brought to the CCC's attention in the SOS January 18, 2013 letter, namely that DBOC's use of floating cultivation methods represents unauthorized additional "development" and an unauthorized increase in "intensity of use" that violates both the NPS SUP and the CCC Order.

5.7 (A) Within fifteen (15) days of the effective date of these Orders, Respondents shall submit, for the review and approval of the Executive Director, a Vessel Transit Plan consisting of a graphic and written depiction of intended transit patterns to access culture areas.

COMMENT: This section of the Order should resolve the violation brought to the CCC's attention in the SOS March 17, 2012 letter, namely DBOC boats operating outside of the CDFG Lease areas and NPS Permit Area (i.e. transiting across middle of the Estero that is "closed to all boats" from March 1 - June 30 per DBOC's NPS Special Use Permit condition #4 B vii (6th sentence).

12.0 Compliance Obligation. Strict compliance with these Orders by all parties subject thereto is required. Failure to comply with any term or condition of these Orders, including any deadline contained in these Orders, unless the Executive Director grants an extension under Section 13.0, will constitute a violation of these Orders and shall result in Respondents being liable for stipulated penalties in the amount of six thousand dollars ($6,000) per day per violation. If Respondents violate these Orders, nothing in these Orders shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available for the violations addressed herein, including imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30820, 30821.6, and 30822 as a result of the lack of compliance with these Orders and for the underlying Coastal Act violations described herein

COMMENT: SOS finds it inexplicable that:

- **This Order omits any requirement for a performance bond from DBOC to insure compliance; SOS urges that this omission be rectified.**
- **This Order omits any requirement for immediate payment of the $62,500 stipulated penalty (assessed in the CCC's December 7, 2009 letter to DBOC) that remains unpaid to-date; SOS urges that this omission be rectified.**
- **This Order omits any requirement for immediate payment additional stipulated penalties for the pattern of non-compliance in clear evidence throughout the Order; SOS urges that this omission be rectified.**

This Order's three omissions (of a performance bond, penalties for new violations, and its defacto condoning of DBOC's failure to pay the penalty for past violations)...all call into question this section's reliance on yet another penalty in the questionable hope of insuring future compliance.

These three omissions threaten to render this Order as simply a well-researched documentary covering a decade of CCC futility in dealing with oyster operator scofflaws who continue to act with impunity. SOS urges that these omissions be rectified.

Thank you for the opportunity to comment on Proposed Order CCC-13-CD-01.

Gordon Bennett

Gordon Bennett, President, Save Our Seashore

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DRAKES BAY OYSTER COMPANY, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, in his official capacity as Secretary, U.S. Department of the Interior, *et al.*,

Defendants.

Case No.: 12-cv-06134-YGR

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Drakes Bay Oyster Company (the "Company") and Kevin Lunny ("Lunny" and collectively, "Plaintiffs") initiated this action requesting that the Court declare void and unlawful the November 29, 2012 Memorandum of Decision of Defendant Kenneth L. Salazar, Secretary of the U.S. Department of the Interior ("Secretary"), in which he decided not to grant Plaintiffs a permit to allow for the continued operation of their oyster farm ("Decision"). Plaintiffs further ask the Court to order the Secretary to direct the National Park Service ("NPS" or "Park Service") to issue the Company a ten-year special use permit, and to enjoin the enforcement of the Decision thereby allowing the Company to continue operating until the Court decides the merits of the lawsuit.

Plaintiffs filed their Motion for Preliminary Injunction on December 21, 2012. (Dkt. No. 32.) Defendants filed their Opposition to Plaintiffs' Motion for Preliminary Injunction on January 9, 2013. (Dkt. No. 64.) On January 16, 2013, Plaintiffs filed their Reply in Support of Motion for Preliminary

Injunction ("Reply"). (Dkt. No. 79.)[1] Defendants thereafter filed an Errata and Corrected Opposition to Plaintiffs' Motion for Preliminary Injunction. (Dkt. No. 84.) The Court held oral argument on January 25, 2013. (Dkt. No. 85.)

Having carefully considered the papers, evidence, and oral arguments submitted, as well as the pleadings in this action, and for the reasons set forth below, the Court **DENIES** Plaintiffs' Motion for Preliminary Injunction. As a threshold issue, the Court must have subject matter jurisdiction over Plaintiffs' claims. The Court finds it does not have jurisdiction to review the Secretary's Decision. Moreover, even if Plaintiffs' claims could be construed to give this Court jurisdiction, based upon the record presented, Plaintiffs have not demonstrated a likelihood of success on the merits of the claims nor that the balancing of the equities favors injunctive relief.

I. BACKGROUND

A. STATUTORY BACKGROUND

In 1962, Congress created the Point Reyes National Seashore ("Seashore"), and placed it under the administrative authority of the Secretary of the Interior. Pub. L. No. 87-657, 76 Stat. 538, (codified at 16 U.S.C. §§ 459c *et. seq.*) (1962). The Seashore's 1962 enabling legislation recognized a pastoral zone in the Seashore where existing ranches and dairy farms could continue to operate. Pub. L. No. 87-657 § 4, 76 Stat. 538, 540.

Two years later, Congress passed the Wilderness Act, which directed the Secretary of the Interior to identify the suitability of certain national park acreage for wilderness designation. 16 U.S.C. § 1132(c). Under the Wilderness Act of 1964, Congress "established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas,'" to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and

[1] Environmental Action Committee of West Marin, National Parks Conservation Association, Natural Resources Defense Council, and Save Our Seashore (collectively, "Proposed Intervenors") filed a Motion to Intervene in this action. (Dkt. No. 11-1.) Proposed Intervenors filed a proposed opposition to Plaintiffs' Motion. The Court has issued herewith its Order Denying Motion to Intervene (Dkt. No. 11); and Denying Plaintiffs' Administrative Motion to Strike (Dkt. No. 83). For the reasons set forth therein, the Court has treated Proposed Intervenors' opposition brief as an amicus brief and permitted Plaintiffs to file their proposed reply.

dissemination of information regarding their use and enjoyment as wilderness." 16 U.S.C. § 1131(a). The Wilderness Act proscribes commercial enterprises in the wilderness. 16 U.S.C. § 1133(c) ("Except as specifically provided for in this chapter, and *subject to existing private rights*, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter . . .") (emphasis supplied.)

In 1976, Congress enacted the Point Reyes Wilderness Act, designating 25,370 acres of the Seashore as "wilderness" under the Wilderness Act of 1964 and 8,003 acres, including Drakes Estero, as "potential wilderness." Pub. L. No. 94-544, 90 Stat. 2515 (1976); *see also* Pub. L. No. 94-567, 90 Stat. 2692 (1976). The House Committee Report accompanying Pub. L. No. 94-544 states the following regarding the potential wilderness additions:

> As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3, reprinted in 1976 U.S.C.C.A.N. 5593, 5595. The legislative history of Public Law No. 94-544 indicates that Congress considered designating Drakes Estero and surrounding areas as "wilderness," but did not do so. The Department of the Interior, in a report to the House accompanying Public Law No. 94-544, noted that Drakes Estero could not be designated as "wilderness" so long as the existing commercial oyster farming operations, as well as California's reserved fishing rights on the State tidelands in the area, remained in place. H.R. Rep. No. 94-1680, 6 (1976) reprinted in 1976 U.S.C.C.A.N. 5593, 5597. Further Congressional guidance in Public Law No. 94-567 provided that lands and waters designated as "potential wilderness" would become designated wilderness "upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased. . . ." Pub. L. No. 94–567, 90 Stat 2692 (1976).

Two years later, Congress passed a further enabling act ("1978 Act") that gave the Secretary of the Interior the authority to lease federally-owned "agricultural land" within the Seashore in perpetuity, defining "agricultural land" as "lands which were in regular use for . . . agricultural, ranching, or dairying purposes as of May 1, 1978." Pub. L. No. 95-625 § 318, codified at 16 U.S.C. §

459c-5(b). At that time, Congress recognized certain "non-conforming" uses, including oyster farming. *See* S. Rep. No. 94-1357, at 3 (1976) ("National Park Service wilderness proposals have embodied the concept of 'potential wilderness addition' as a category of lands which are essentially of wilderness character, but retain sufficient non-conforming structures, activities, uses or private rights so as to preclude immediate wilderness classification. It is intended that such lands will automatically be designated as wilderness by the Secretary by publication of notice to that effect in the Federal Register when the non-conforming structures, activities, uses or private rights are terminated."); *see also* H.R. Rep. No. 94-1680 (1976) at 6, reprinted in 1976 U.S.C.C.A.N. 5593, 5597.

Relevant here, in 2009, Congress enacted appropriations legislation entitled the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010. Pub. L. No. 111-88 § 124, 123 Stat. 2904, 2932 (2009). As part of this Appropriations Act, Section 124 provided in full:

> **Prior to the expiration on November 30, 2012** of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit (''existing authorization'') within Drake's Estero at Point Reyes National Seashore, **notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization**, except as provided herein, **for a period of 10 years** from November 30, 2012: *Provided*, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) ("Section 124") (emphasis supplied).[2] As referenced therein, in 2009, the National Academy of Sciences ("NAS") had published a 179-page

[2] The House version of the bill would have made issuance of the special use permit for an additional ten years mandatory—*i.e.*, the House's version read that "the Secretary of the Interior shall extend the existing authorization . . . ." H.R. 2996, 111th Cong. § 120(a) (as reported in Senate, July 7, 2009). The Senate rejected that language and the appropriations bill ultimately included the language "is authorized to issue," rather than the House's mandatory language. The House Conference Report acknowledged that the change to the language "provid[ed] the Secretary discretion to issue a special use permit to Drake's Bay Oyster Company. . . ." 155 Cong. Rec. H11871, H11900 (daily ed. October 28, 2009).

report in 2009 entitled *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California.* (Declaration of Ryan Waterman in Support of Motion for Preliminary Injunction ("Waterman Decl.") (Dkt. No. 42), Attachment 4a to Ex. 1 (Dkt. No. 42-2 ["2009 NAS Report"]).)

B. FACTUAL BACKGROUND

Oyster farming in Drakes Estero began in the 1930s. (Declaration of Kevin Lunny in Support of Motion for Preliminary Injunction ("Lunny Decl.") ¶ 88 (Dkt. No. 38); *see also* Lunny Decl., Ex. 1 (Grant Deed) at ECF pp. 35–39 (Dkt. No. 38-1).) As early as 1934, the California Fish and Game Department began leasing the right to cultivate oysters in the waters of Drakes Estero and Estero de Limantour in Marin County. The Johnson Oyster Company, owned by Charles Johnson ("Johnson"), operated an oyster farm on the shores of Drakes Estero beginning in 1954. (Grant Deed at ECF p. 35.) The current-day Drakes Bay Oyster Company operates on a parcel of land which Johnson sold to the United States in 1972 for $79,200.00. (*Id.* at ECF p. 4.) The Grant Deed describes the parcel as "contain[ing] 5 acres, more or less," of beach and onshore property adjacent to Drakes Estero. (*Id.*; Declaration of Barbara Goodyear in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Goodyear Decl.") (Dkt. No. 65), Ex. 8 at ECF p. 3 (Dkt. No. 71-4).)

The Grant Deed contained a reservation of use and occupancy ("Reservation") pertinent here, which reads in full:

> THE GRANTOR RESERVES only the following rights and interests in the hereinabove described property: a reservation of the 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. CX800032073, signed by the GRANTOR on October 13, 1972, accepted on October 16, 1972, and on file with the National Park Service.

(Lunny Decl., Ex. 1 at ECF p. 4; Goodyear Decl., Ex. 8 at ECF p. 3.) The Reservation allowed Johnson to continue his oyster operations until November 30, 2012. (Lunny Decl., Ex. 1 at ECF p. 8 (Grant Deed filed on November 30, 1972); Goodyear Decl., Ex. 8 at ECF p. 7.) The United States and Johnson agreed that "[u]pon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property for the herein described purposes . . . [and a]ny permit for continued use will be issued in accordance with the National Park Service regulations in effect at the time the reservation expires." (Lunny Decl., Ex. 1 at ECF p. 19; Goodyear Decl., Ex. 8 at ECF p.18.)

The agreement also provided that upon expiration of the Reservation term, or any extension by permit, the Johnson Oyster Company was responsible to remove all structures and improvements on the property within 90 days. (Lunny Decl., Ex. 1 at ECF p. 19; Goodyear Decl., Ex. 8 at ECF p.18.)

Thirty-two years later, on December 17, 2004, Lunny entered into an Asset Purchase Agreement with the Johnson Oyster Company wherein Lunny agreed to pay a purchase price of $260,000 "at the Closing" which was to occur at a later "mutually convenient" date. (Goodyear Decl. Ex. 23 (Dkt. 72-8) ["Asset Purchase Agreement"]; *see* Lunny Decl. ¶¶ 2 & 5.) The parties agreed that during the "period between the execution of this Agreement and the Closing," Lunny would have "full access to all premises, properties, personnel, books, records . . . , contracts, and documents of or pertaining to the Acquired Assets" which were defined as "rights under any Lease or Permit required to conduct the Seller's business" and specifically included "that certain Reservation of Possession Lease dated 10/12/1972, entered into by Seller and the National Park Service." (Asset Purchase Agreement ¶¶ 1, 5, 5(e) & Ex. B.)

On January 25, 2005, the Park Service provided Lunny a letter ("January 2005 Letter") attaching a copy of a memorandum (dated February 26, 2004 ["2004 Memorandum"]) from the Department of the Interior's San Francisco Field Solicitor to the Superintendent of the Seashore so that "[b]efore [Lunny] closed escrow on the purchase," the Park Service could "make sure [he] had a copy for [his] review." (Goodyear Decl., Exs. 14 & 24 (Dkt. Nos. 71-10 & 72-9).) The January 2005 Letter indicates that the Park Service had met with Lunny during the prior week.[3]

The attached 2004 Memorandum detailed the legal history of the Seashore area and specified the Park Service's own view of its policy mandates:

> The Park Service's Management Policies clearly state that the Park Service must make decisions regarding the management of potential wilderness even though some activities may temporarily detract from its wilderness character. The Park Service is to manage potential wilderness as wilderness to the extent that existing non-

[3] The record includes evidence that in January 2005, Lunny stated he "had been informed by [the Park Service] of its decision not to extend operating rights past 2012, and that he had a 'business plan' to recoup his investment within the remaining seven years of operating rights." (Declaration of Gordon Bennett ("Bennett") (Dkt. No. 11-2) ¶ 6, submitted in support of Motion to Intervene.) While, in an apparent attempt to undermine Bennett's credibility, Lunny submitted a supplemental declaration but does not deny making that January 2005 statement. (Declaration of Kevin Lunny in Support of Plaintiffs' Opposition to Environmental Action Committee of West Marin, *et al.*'s Motion to Intervene (Dkt. No. 41-7) ¶¶ 7–11 & Ex. 1.)

> confirming conditions allow. The Park Service is also required to actively seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation. 6.3.1 Wilderness Resource Management, General Policy.

(*Id.* at Exs. 14 & 24.) The 2004 Memorandum concluded that "the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e., the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non[-]conforming use can be eliminated." (Goodyear Decl., Ex. 14 at 3; *id.*, Ex. 24 at 4.)[4]

Two months later, on March 28, 2005, the Superintendent again wrote "to reiterate our guidance to you regarding the transfer of the Johnson Oyster Company site to your family [and] . . . to ensure clarity and to avoid any misunderstanding." (Goodyear Decl., Ex. 25 (Dkt. No. 72-10).) Among other things, the letter stated that "[r]egarding the 2012 expiration date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date." (*Id.* at 2.)

In April 2008, the Company and the Park Service executed a Special Use Permit ("2008 SUP") that authorized the Company to conduct its operations on additional area adjacent to the Reservation area for purposes of: processing shellfish, providing an interpretive area for visitors, operating of well and pump areas for water supply, and maintaining of a sewage pipeline and sewage leachfield to service the Company's facilities. (Goodyear Decl., Ex. 26.) The 2008 SUP had an expiration date of November 30, 2012, which coincided with the expiration date of the Reservation. (*Id.*)

According to Lunny, in early July 2010 and pursuant to Section 124, the Company sent letters to the Secretary to apply for a ten-year special use permit to continue farm operations at the site after the expiration of the Reservation ("New SUP"). (Lunny Decl. ¶ 14; *see also* Waterman Decl.,

[4] With Plaintiffs' Reply, Lunny claims in his rebuttal declaration that when the Company purchased the farm in December 2004, he had no knowledge that the Park Service would not allow the farm to continue after 2012, or that the Solicitor's Opinion stated that it would not issue a new special use permit at the end of the Reservation term. (Rebuttal Declaration of Kevin Lunny in Support of Motion for Preliminary Injunction ("Lunny Rebuttal Decl.") (Dkt. No. 80) ¶ 64.) However, Lunny's first declaration suggests otherwise: "In 2005, Superintendant Don Neubacher informed me that he did not intend to issue a Special Use Permit (SUP) to [the Company] at the end of the [Reservation] on November 30, 2012, due to the 1976 wilderness laws that designated Drakes Estero as potential wilderness." (Lunny Decl. ¶ 10.) Lunny does not dispute receipt of the letters from 2005 referenced herein, and the record is silent as to the closing date of the purchase.

Attachment 1 to Ex. 1 at ECF pp. 11–19 (Dkt. No. 42-1).) In September of 2010, Park Service staff met with Lunny to discuss the National Environmental Policy Act ("NEPA") process and the "process and path forward until [the] existing [2008] SUP expires." (Lunny Decl. ¶ 15, Ex. 7 (Dkt. No. 39-2).) In October 2010, the Interior Department, through the Park Service, formally began the NEPA process to analyze the environmental impacts of Plaintiffs' request. *See* 75 Fed. Reg. 65,373 (Oct. 22, 2010) ("Pursuant to [NEPA], the National Park Service is preparing an Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company Special Use Permit[.] . . . Pursuant to [Section 124], the Secretary of the Interior has the discretionary authority to issue a special use permit for a period of 10 years to Drakes Bay Oyster Company . . . ."). The Federal Register notice does not reference any statutory guidelines against which the Secretary's review of the permit under Section 124 should be evaluated.

In September 2011, the Park Service released a Draft Environmental Impact Statement ("Draft EIS" or "DEIS") for public comment. (Lunny Decl., Ex. 9; *see also* cross-reference in the Final Environmental Impact Statement ["Final EIS" or "FEIS"], Goodyear Decl., Ex. 3 (Dkt. No. 66-2 at ECF p. 16).) The Company submitted comments critical of the DEIS, and a Data Quality Complaint. (Lunny Decl. ¶¶ 17, 27 & Ex. 14.)

In December 2011, Congress directed NAS to assess the Draft EIS. H.R. Rep. No. 112-331, at 1057 (2011) (Conf. Rep.). In August 2012, NAS released its report entitled *Scientific Review of the Draft Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit*, which Lunny alleges "was highly critical of the DEIS" and determined many of its conclusions were "uncertain, exaggerated, or based on insufficient information." (First Amended Complaint for Declaratory and Injunctive Relief ("FAC") ¶¶ 89–90 (Dkt. No. 44); Lunny Decl., Ex. 11.)

By letter dated September 17, 2012, Plaintiffs' counsel sent the Secretary a letter encouraging him to make his "decision without the benefit of a Final Environmental Impact Statement" arguing that "Section 124 repeal[ed] conflicting statutes, such as NEPA." (Waterman Decl., Ex. 1 (Dkt. No. 42-1 ["Plaintiffs' 9/17/12 Letter"]).) Plaintiffs reiterated their position on November 1, 2012:

> [W]hat effect does the NPS's failure to provide you with a legally adequate FEIS have on your discretion under Public Law 111-88, § 124 (Section 124)? In fact, none, because Section 124 includes a "general repealing clause" that allows you to override conflicting provisions in other laws—including NEPA—to issue the [New] SUP.

(Proposed Intervenors' Request for Judicial Notice in Support of Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 63); Declaration of George M. Torgun in Support of Proposed Intervenors' Opposition to Plaintiffs' Motion for Preliminary Injunction, Ex. 2 (Dkt. No. 63-1) ["Plaintiffs' 11/1/12 Letter"].)[5]

On November 20, 2012, the Park Service released the Final EIS. (Goodyear Decl., Ex. 3 (Dkt. Nos. 66–70); Lunny Decl., Ex. 12.) The FEIS stated the Secretary's position that the "notwithstanding" clause in Section 124 rendered NEPA analysis unnecessary to his Decision, but that "the Department has determined that it is helpful to generally follow the procedures of NEPA." (Goodyear Decl., Ex. 3 at ECF p. 34 (Dkt. No. 66-2).)[6]

On November 29, 2012, Secretary Salazar issued the Memorandum of Decision at issue here to the Director of the National Park Service and "directed the National Park Service (NPS) to allow the [Company's] permit to expire at the end of its current term." (Goodyear Decl., Ex. 1 (Dkt. No. 65-1).) At the outset, the Decision identified two law and policy rationales: (i) the United States purchased the property with a reservation of use which expired on November 30, 2012 and explicitly advised the Company in 2004 when it purchased the business that an additional permit would not be issued; and (ii) the Company's continued operation "would violate the policies of NPS concerning commercial use . . . within potential or designated wilderness."[7] (Decision at 1.) In reaching his

[5] The Court has been asked to take judicial notice of this document as part of the administrative record in this Administrative Procedure Act litigation. Plaintiffs did not object to the request for judicial notice, but instead argued in their reply to Proposed Intervenors' opposition that the letter is entirely consistent with their position in litigation. (*See* Dkt. No. 83-1 at 3.) Plaintiffs do not object to the authenticity of the letter, nor did they raise this at oral argument. As such, the Court **GRANTS** the request for judicial notice of Plaintiffs' 11/1/12 Letter.

[6] The Draft EIS had also reinforced this point: "Although the Secretary's authority under Section 124 is "notwithstanding any other provision of law," the Department has determined that it is appropriate to prepare an EIS and otherwise follow the procedures of NEPA." (Lunny Decl., Ex. 9 at ECF p. 9.)

[7] As a result, the Secretary further directed the Park Service to: (1) "[n]otify [the Company] that both the Reservation . . . and [2008 SUP] held by [it] expire according to their terms on November 30, 2012"; (2) "[a]llow [the Company] a period of 90 days . . . to remove its personal property . . . and to meet its

Decision, the Secretary "personally traveled to Point Reyes National Seashore, visited [the Company], met with a wide variety of interested parties on all sides of this issue, and considered many letters, scientific reports, and other documents." (*Id.* at 2.) The Secretary next referenced the enactment of Section 124 and the Parks Service's initiation of an environmental impact statement "to analyze the environmental impacts associated with various alternatives related to a decision to permit or not to permit [the Company's] continued operations." (*Id.* at 4.) In his Decision, the Secretary stated that "SEC. 124 does not require me (or the NPS) to prepare a DEIS or an [*sic*] FEIS or otherwise to comply with [NEPA] or any other law." (*Id.*) Rather, he used the NEPA process to "inform the decision" even though NEPA, like Section 124 itself, did "not dictate a result or constrain [his] discretion in this matter." (*Id.* at 4–5.)

Additionally, the Secretary readily admitted that the "scientific methodology employed by the NPS . . . generated much controversy and ha[s] been the subject of several reports." (Decision at 5.) Further, while there was "scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope of the impacts [of] [the Company's] operations," the Secretary's position was that the draft and final impact study did support the premise that "removal of [the Company's] commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment." (*Id.*) The Secretary further revealed that he had given "great weight" to the "public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness" and to "Congress's direction to 'steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.'" (*Id.* at 5, 7.)

On the same day, November 29, 2012, the Park Service notified the Company and Lunny of the Secretary's Decision. (Goodyear Decl., Ex. 2 (Dkt. No. 65-2).) Among other things, the Park Service directed the closure of the Company's operations but authorized limited commercial activities, as specified by the letter, until February 28, 2013. Plaintiffs were also informed that they had 90 days to vacate and surrender the property, remove all personal property, and repair any damage resulting from removal. (*Id.*)

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obligations to vacate and restore all areas covered by the [Reservation] and [2008 SUP]"; and (3) "[e]ffectuate the conversion of Drakes Estero from potential to designated wilderness." (Decision at 1–2.)

On December 4, 2012, the Park Service published a notice in the Federal Register announcing the change in status of Drakes Estero from potential wilderness to designated wilderness. 77 Fed. Reg. 71826 (Dec. 4, 2012).

C. CLAIMS IN THIS LITIGATION

Plaintiffs filed suit to have the Secretary's Decision not only declared "null and void" and "set aside," but, among other relief, to "Order [the] Secretary . . . to issue [the Company] a [New] SUP," or alternatively, "to vacate the decision . . . with instructions to make a new decision." (FAC ¶¶ 25–26 & Requested Relief ¶¶ 1–4.) The legal basis for the requested relief includes Count 1 for Violations of NEPA and the Administrative Procedure Act ("APA"), alleging that "Plaintiffs' interests, including their environmental concerns, fall within the zone of interested protected by NEPA" and the FEIS did not comply with the requirements set forth in the Code of Federal Regulations. (FAC ¶¶ 143–155.) Plaintiffs further allege that the Secretary's interpretation of Section 124 "as relieving him of his NEPA . . . obligations" was "arbitrary and capricious." (*Id.* ¶ 158.) Count 2 alleges Violation of the Data Quality Act and the APA by failing "to correct the FEIS to reflect the proposed corrections outlined" in their Data Quality Act complaint. (*Id.* ¶¶ 164–169.) Count 3 alleges Violation of the APA and Section 124 by authorizing the Park Service to publish a notice in the Federal Register converting Drakes Estero from "potential wilderness" to "wilderness," failing to consider the NAS reports, and denying the New SUP in contravention to the "plain language" of Section 124." (*Id.* ¶¶ 170–175.)[8] However, the FAC concedes that the Secretary's Decision was based on his "application of some federal laws, such as the 1965 Wilderness Act and the 1976 Point Reyes Wilderness Act." (*Id.* ¶ 173; *see also* ¶ 181 ("the Secretary's decision was made in reliance upon an arbitrary and capricious interpretation of the 1976 Point Reyes Wilderness Act, the 1972 Grant Deed and [Reservation] held by [the Company] . . . ").)

Based upon the allegations in the First Amended Complaint, Plaintiffs filed the instant motion for a preliminary injunction.

[8] Counts Four and Five allege Fifth Amendment violations in light of the issues referenced above (FAC ¶¶ 176–185) and Count Six alleges Unlawful Interference with Agency Functions (*id.* ¶¶ 186–190).

II. STANDARDS APPLICABLE TO THIS MOTION

Federal courts exercise limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Courts are presumptively without jurisdiction until it is established by the party asserting it. *Id.* Thus, the Court must always look first to questions of jurisdiction before proceeding to the merits of a dispute.

Assuming jurisdiction is established, a party seeking a preliminary injunction bears the burden of establishing four separate factors: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in its favor; and (4) the injunction is in the public interest. *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008).

III. JUSTICIABILITY

The Court first addresses the threshold issue of whether jurisdiction exists. Defendants advance two alternative theories for the proposition that the Court lacks jurisdiction, each of which the Court addresses in turn. *First*, does "agency action" include a failure to act to issue a special use permit? *Second*, if so, does the action here fall within the exception set forth in 5 U.S.C section 701(a)(2) of the APA exempting from judicial review any agency action which is "committed to agency discretion by law"? The Court finds that, generally, courts do have jurisdiction to review an agency's *in*action, or failure to act, on a permit. However, where, as here, Congress has authorized the Secretary to act (or not act) on a specific, discrete circumstance with discretion, that particular act falls within the exception established under Section 701(a)(2) and judicial review is precluded. On this basis, the Court declines to exercise jurisdiction. The Court explains its analysis on each theory below, but first discusses the statutory framework of the APA.

A. THE APA FRAMEWORK

Chapter 7 of Title 5 of the United States Code, popularly known as the Administrative Procedure Act or APA (5 U.S.C. §§ 701–706 ("Sections 701–706")), confers jurisdiction upon courts to review the claim of "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Section 702

(entitled "Right of review"). Unless a statute provides a private right of action, courts may only review "**final agency action** for which there is no other adequate remedy." Section 704 (entitled "Actions reviewable") (emphasis supplied); *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004). In this context, to the extent agency action is reviewable, "[t]he reviewing court" is charged with deciding "all relevant questions of law [and] interpret[ing] constitutional and statutory provisions." Section 706 (entitled "Scope of review"). Section 706 mandates the court to "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency actions, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Sections 706(1), 706(2)(A). The section does not permit the reviewing court to make the policy decisions nor to instruct an agency to make a particular discretionary choice. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) ("The APA does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts.").

Notwithstanding the foregoing, a carve-out exists in Section 701(a) which specifies that the "chapter applies . . . *except* to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[9] Section 701 (entitled "Application; definitions") (emphasis supplied). The facial inconsistency between this section which, on the one hand, prohibits judicial review of actions "committed to agency discretion" under Section 701(a)(2), and on the other hand, a court's authority to review agency actions under an "abuse of discretion" standard—as set forth in Section 706(2)(A)—has caused much confusion, and is explained in Section III.C. *infra.* Here, because Plaintiffs do not have a private right of action, the APA is the only basis upon which jurisdiction can exist.

B. FIRST GROUND: AN AGENCY'S FAILURE TO ACT MAY CONFER JURISDICTION

The Secretary urges that his Decision to allow the Reservation to expire by its own terms and not to issue a New SUP is not "agency action" and is therefore outside of the APA's scope of review. Plaintiffs urge the Court to consider the effect of the Decision, rather than its form, in determining whether the Decision is reviewable. Plaintiffs also note the Decision included an affirmative order to

[9] Neither party suggests Section 701(a)(1) applies here.

wind down the Company's operations and on that basis could be considered "action." (Reply at 2.) The Court finds that, in general, a decision not to issue a special use permit constitutes "agency action" under the APA.

First, the plain language of the APA supports this construction. "Agency action" is defined in the APA as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) ("Section 551(13)"), cross-referenced by Section 701(b)(2). As noted therein, an agency action is defined both in affirmative terms (a rule, order, license, sanction, relief, or the equivalent thereof) and in negative terms (the denial of the same or the failure to act on the same). Although a "special use permit" is not specifically listed, the included term "license" is further defined in Section 551(8) as including "the whole or a part of an agency permit . . . or other form of permission." Thus, action relating to the failure to issue a permit falls within the explicit terms of the APA generally.

Second, caselaw is in accord. In *Her Majesty the Queen in Right of Ontario v. U.S. Environmental Protection Agency*, the court addressed the justiciability of whether the EPA had "any present obligation to take action under section 115 of the Clean Air Act" and affirmatively to "set in motion section 115's international pollution abatement procedures." 912 F.2d 1525, 1527 (D.C. Cir. 1990). There, the controversy centered on whether *letters declining* to take action based upon the EPA's interpretation of section 115 could be deemed "final agency action" subject to review. *Id.* at 1530–31. The court held that the issue was reviewable because the letters were "'sufficiently final to demand compliance with its announced position.'" *Id.* at 1531 (internal citations omitted). Jurisdiction would not have existed if the letters had communicated a tentative position. Where decisions are not final, "judicial intervention may 'den[y] the agency an opportunity to correct its own mistakes and to apply its expertise . . . lead[ing] to piecemeal review which at the least is inefficient and . . . might prove to have been unnecessary." *Id.* (citing *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 242 (1980)) (first alteration in original). Here, the Decision communicates a final position—no doubt remains as to the Secretary's Decision to allow the Reservation to expire and not issue the New SUP.

Defendants' reliance on *Norton v. Southern Utah Wilderness Alliance ("Norton")* on this specific proposition is misplaced and does not compel a different result. 542 U.S. 55 (2004). While the Supreme Court did not find jurisdiction in *Norton*, it did not hold that an agency's failure to act on a request for a permit was not reviewable. Rather, the Court held the allegations of the agency's failures to act did not relate to specific, discrete actions and therefore, on that basis, were not reviewable.[10] The Court began with the basic premise that judicial review under the APA "insist[s] upon an 'agency action.'" *Id.* at 62. Congress defined "agency action" to include an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Section 551(13). With respect to a "failure to act," the Court held that it was "properly understood as a failure to take an *agency action*-that is, a failure to take one of the agency actions (including their equivalents) earlier defined in [Section] 551(13)" or, put differently, the failure to take limited, discrete action. *Norton*, 542 U.S. at 62–63.[11] Thus, the Supreme Court found that the action at issue must concern "discrete" conduct and not "broad programmatic attack[s]." *Id.* at 64 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U. S. 871 (1990)).[12] On that particular basis, the Court held that the alleged failures to act were not subject to review under the APA. *Id.* at 68–71.[13]

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[10] Respondents in that case alleged the Bureau: (i) violated its non-impairment obligation under the Wilderness Act by allowing degradation in certain wilderness study areas; (ii) failed to implement provisions of its own land use plans relating to off-road vehicles, and (iii) failed to determine whether a supplemental NEPA study should be undertaken in that regard. *Norton*, 542 U.S. at 60–61.

[11] *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d. 1093 (D.C. Cir. 1970), on which Plaintiffs relied, is in accord. That case arose after the Department of Agriculture failed to take any action on petitioners' request that it issue certain notices of cancellations related to pesticides. *Id.* at 1095. The Court held that "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.* at 1099. There, the court found that the act at issue "establishe[d] an elaborate procedure by which a registration may be cancelled" and remanded for a statement of reasons or fresh determination. *Id.* at 1095–96, 1100.

[12] The *Norton* Court also addressed the impact of the "failure to act" analysis under a claim based upon Section 706(1) specifically. *Norton*, 542 U.S. at 63–65. For purposes of this Motion, the parties argue that Section 706(1) does not apply. (Opp. at 13; Reply at 3.) However, the affirmative relief requested in the FAC and other portions of Plaintiffs' Reply suggest Plaintiffs believe otherwise. (FAC ¶ 25 (referencing Section 706(1) and "compel[ling] agency action unlawfully withheld") & Requested Relief ¶ 3 ("[o]rder Secretary Salazar . . . to direct NPS to issue to DBOC a 10-year SUP); *see also* Reply at 3 (arguing the definition of "agency action" is satisfied under *Norton*).) The Court notes that a Section 706(1) claim to compel action only allows a court to compel that which an agency is "legally *required*" to do, such as would be achieved historically through writs of mandamus. *Norton*, 542 U.S. at 63. Given Plaintiffs' wholesale failure to make any showing for a

Thus, based upon this analysis, the Court concludes a failure to issue a special use permit may confer jurisdiction.

C. SECOND GROUND: EXEMPTION FROM JUDICIAL REVIEW UNDER SECTION 701(a)(2)

Defendants contend that *even if* the Secretary's Decision could be construed as "action," Section 701(a)(2) of the APA exempts from judicial review any agency action "committed to agency discretion by law." For the reasons set forth below, the Court agrees that the exclusion applies here.

As a starting point, courts have interpreted Subsection 701(a)(2) to exclude from review "agency actions" that fall within one of two categories, either those actions where: (i) a court has no meaningful standard against which to judge the exercise of discretion and therefore no law to apply; or (ii) the agency's action requires a complicated balancing of factors peculiarly within the agency's expertise. *Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of U.S. Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008); *see Heckler v. Chaney*, 470 U.S. 821, 830 (1985) ("Congress has not affirmatively precluded review" but review cannot be had "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"—*i.e.*, law commits "decisionmaking to the agency's judgment absolutely"). The Supreme Court has held that construction of Section 701(a)(2) is consistent with Section 706 to the extent that "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler*, 470 U.S. at 830.

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mandatory order compelling action under Section 706(1), the Court finds that Plaintiffs concede that they would not be successful on the merits in this regard.

[13] Defendants also rely on *Hells Canyon Preservation Council v. U.S. Forest Servc.*, 593 F.3d 923 (9th Cir. 2010). There, the Ninth Circuit addressed, and rejected, plaintiffs' request that the court review the Forest's Service's "ongoing failure to act" by refusing to close a trail in the Hells Canyon Wilderness area to motorized use under Section 706(1) of the APA. *Id.* at 932, 934. The court affirmed the *Norton* analysis limiting review to discrete actions only, but focused and combined its analysis on the second element required under *Norton* that the action being "compelled" also be one the agency is "required to take." *Id.* at 932–33. In that case, while plaintiffs' request could be considered "discrete" in a vacuum, the practical effect of plaintiffs' request would have required the court to compel the Forest Service to disregard boundaries for the wilderness area established over 30 years prior and substitute it with those which plaintiffs themselves were advocating. *Id.* at 932–33. The court held that the action was framed as an "end run around" Section 706(2) requiring the court to review the Forest Service's boundary determination under an "arbitrary and capricious" standard, which itself was a time-barred claim. *Id.* at 933.

Ninth Circuit authority controls the analysis. In *Ness Inv. Corp. v. U.S. Dept. of Agriculture, Forest Service*, plaintiffs sued the Forest Service for denying an application for a special use permit. 512 F.2d 706, 711–12 (9th Cir. 1975). Noting confusion between the provision of the APA *precluding* review of agency action "committed to agency discretion by law" (Section 701(a)(2)) and the provision *permitting* review of agency action found to be "an abuse of discretion" (Section 706(2)(a)), the Ninth Circuit held: "(1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency." *Id.* at 712, 715. The court further held that the statute at issue there authorized the Forest Service to grant or deny the issuance of the special use permit and provided "no statutory restrictions or definitions *prescribing precise qualifications* for permittees." *Id.* at 715 (emphasis supplied). As such, the decision was "patently . . . left to the secretary or his delegate to answer . . . [as] [t]he statute is, with respect to the proper recipient of a special use permit, drawn in such broad terms that there is no law to apply." *Id.*

Plaintiffs contend that *Ness* has been superceded by *KOLA, Inc. v. United States*, 882 F.2d 361 (9th Cir. 1989) wherein the Ninth Circuit did exercise jurisdiction regarding a special use permit. The Court disagrees with Plaintiffs' reliance on *KOLA*. Unlike the court in *Ness*, the *KOLA* court had available meaningful standards upon which to evaluate the permit at issue. In that case, the Forest Service had promulgated "precise qualifications" not existing at the time *Ness* was decided. *KOLA*, 882 F.3d at 363. With these guidelines, the Ninth Circuit held that courts, moving forward, could inquire as to whether the Forest Service properly considered the promulgated factors. *Id.* at 364 (citing *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 813–14 (9th Cir. 1987)). For our purposes here, *KOLA* does not change the circumstances that existed in *Ness*, namely the lack of formal guidelines, nor did it change that fundamental holding.[14]

[14] The statute evaluated in *Ness*, 16 U.S.C. section 497, provided broadly that "[t]he Secretary of Agriculture is authorized, under such regulation as he may make and upon such terms and conditions as he may deem proper," to permit specific uses and occupancy of land and prohibited the Secretary from excluding the general public from full enjoyment of the natural forests. By contrast, the regulations enacted after *Ness*, 36 C.F.R.

Here, the record demonstrates that Congress afforded the Secretary discretion to make his Decision without sufficient meaningful standards for the Court to review the Decision within the confines of the APA. First, the Court finds that the Secretary's authority to issue the New SUP stemmed from Section 124. The express language and legislative history of Section 124 evidence Congress' intent to grant the Secretary complete discretion on the issue of whether to grant the Company the New SUP. The legislative history reveals that Congress considered, and rejected, a mandate requiring the Secretary to extend the permit. *See supra* n.2 (rejecting language that the Secretary "shall extend the existing authorization" and instead providing him "discretion to issue a special use permit to Drakes Bay Oyster Company"). Congress did not include any significant restriction: it acknowledged action could occur prior to the expiration of the then-existing Reservation—that is, before November 30, 2012. Otherwise, it granted authority "notwithstanding any other provision of law." The authority did not extend to any other permit, company, or "to any location other than Point Reyes National Seashore," nor did it comprise part of any comprehensive statutory scheme with specific requirements. *See* Section 124. To the contrary, it was created as part of an appropriations measure for a single permit to a single company at single location under terms previously defined. The only guidance included was for the Secretary to "take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in the Point Reyes National Seashore *before modifying* any terms and conditions of the extended authorization." *See* Section 124 (emphasis supplied).

Plaintiffs argue that Section 124's "notwithstanding any other provision of law" language does not confer complete discretion, but rather, operates unilaterally. More precisely, Plaintiffs argue that the Secretary was only authorized *to issue* the permit "notwithstanding any other provision of law," but the same did not apply for a denial. (Reply at 5; Mot. at 15.) Plaintiffs' reliance on *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991) for this proposition is meritless. That case simply holds that a court must look carefully at Congressional intent—nothing more. The Court agrees that when

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sections 251.54–251.56, included a detailed proposal process for special use permits requiring specific information about the applicant and proposed uses and a response. It also stated that an authorized officer (i) "will" perform certain assessments and make specific determinations, and (ii) may deny such applications if certain determinations were made. Plaintiffs have failed to establish that any similar applicable regulations exist here.

evaluating the limits of a "notwithstanding any other provision of law" phrase, courts must look to the entire statutory context. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1168 (9th Cir. 2007) (notwithstanding clause must "tak[e] into account the whole of the statutory context in which it appears") (internal citation omitted).

Here, the statutory context affords complete discretion. Discretion, by its very nature, affords the Secretary myriad outcomes. Plaintiffs have failed to provide any evidence of Congressional intent to the contrary.

Second, Section 124 provides the Court with "no meaningful standard" for the Court to apply in reviewing the Decision not to issue a New SUP, and thus, the Court has no basis upon which to review adequately the Decision. *Ctr. for Policy Analysis on Trade & Health (CPATH)*, 540 F.3d at 944–45; *Heckler*, 470 U.S. at 830. Even Plaintiffs, who contend Defendants were not excused "from complying with laws they would otherwise be required to obey," cannot identify the precise requirements against which the Court should review the matter. In their Reply, Plaintiffs refer to 36 C.F.R. sections 1.6 ("Section 1.6") and 5.3 ("Section 5.3")[15] as "regulations providing standards governing permit decisions." But, unlike the regulations promulgated post-*Ness*, the referenced provisions govern permit decisions generally and are not enacted as part of a statutory scheme under Section 124. Plaintiffs vaguely state in their Motion that Section 1.6(d) required the Secretary to provide a "written finding" of the basis for denial, including any adverse impact to the generic factors specified in subsection 1.6(a) noted below.[16] (Mot. at 16.) However, Plaintiffs never identify how

[15] Section 5.3 merely states that a permit must be obtained before engaging in a business in a park area: "[e]ngaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited." Plaintiffs do not establish how this regulation provides any standard by which to review the Secretary's decision.

[16] Section 1.6(a) provides generally that: "[w]hen authorized by regulations set forth in this chapter, the superintendent may issue a permit to authorize an otherwise prohibited or restricted activity or impose a public use limit. The activity authorized by a permit shall be consistent with applicable legislation, Federal regulations and administrative policies, and based upon a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted."

the Secretary's Decision was deficient, nor does their Requested Relief in the FAC seek written clarification of his Decision. *See* Section 1.6(d).

Third, Plaintiffs' own conduct confirms that the plain meaning of Section 124 provided the Secretary with discretion. *Twice* Plaintiffs urged the Secretary to act without reference to a Final EIS because it no longer had any bearing on the issue: "Section 124 includes a 'general repealing clause' that allows you to override conflicting provisions in other laws—including NEPA—to issue the [New] SUP." (Plaintiffs' 11/1/12 Letter at 2.) Moreover, Plaintiffs declared that "Section 124 permits you [the Secretary] to grant [the Company] a 10 year SUP even though NPS cannot provide a legally adequate Final EIS by November 30, 2012." (Plaintiffs' 9/17/12 Letter at 3.)

Fourth, the mere existence of NEPA does not change the analysis. At least three circuits have found that "NEPA cannot be used to make indirectly reviewable a discretionary decision not to take an enforcement action where the decision itself is not reviewable under the APA or the substantive statute. 'No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.'" *Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 102–03 (1st Cir. 2012) (quoting *Defenders of Wildlife v. Andrus,* 627 F.2d 1238, 1246 (D.C. Cir. 1980); *accord Greater Yellowstone Coal. v. Tidwell,* 572 F.3d 1115, 1123 (10th Cir. 2009).).

Finally, while never addressing adequately the issue of "meaningful standards," Plaintiffs argue that the Court should address four alleged misinterpretations of law. Namely, that Defendants misinterpreted: (1) the 1976 Point Reyes Wilderness Act by concluding that granting the New SUP under Section 124 would violate the act; (2) the 1978 Act by not construing it broadly enough to cover oyster farming; (3) the 1976 Act as evidencing an intent to convert Point Reyes National Seashore to wilderness; and (4) the applicability of NEPA. (Mot. at 12–15.) None of these are specific to the standards for *issuing* the New SUP itself under Section 124, and consequently, are not appropriate for judicial review.

As Congress envisioned, unless a court can *meaningfully review* the specific manner in which an agency must act, not dictating therein the conclusion the agency must reach, review under the APA is unavailable. Here, because Section 124 sought to address one specific special use permit for one

specific business on a specific timeframe, the Secretary was afforded the discretion to decide whether to issue the permit and judicial review is not authorized.

IV. AVAILABILITY OF INJUNCTIVE RELIEF

While the Court has found that jurisdiction does not exist, for the reasons set forth *supra*, the Court further finds that, based on this record, injunctive relief would not be available in any event. The Court begins with the premise that a preliminary injunction is an "extraordinary and drastic remedy," and never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008) (internal citations omitted). Thus, a plaintiff seeking a preliminary injunction bears the burden of establishing four separate factors: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) showing the balance of the equities tips in its favor; and (4) the injunction is in the public interest. *Winter*, 555 U.S. at 20. "'[S]erious questions going to the merits' [combined with] a balance of hardships that tips *sharply* towards the plaintiff can support issuance of a preliminary injunction, *so long* as the plaintiff also shows that there is a likelihood of irreparable injury *and* that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis supplied). A "serious question" is one on which the plaintiff "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software. Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). As a result, an injunction serves as "a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. The Court reviews each of the elements required to obtain a preliminary injunction.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

If the Court had jurisdiction, Plaintiffs would have to demonstrate the likelihood of success under a Section 706(2) analysis requiring a finding that Secretary's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See S.E.C. v. Small Bus. Capital Corp.*, No. 12-CV-03237 EJD, 2012 WL 6584953, at *1 (N.D. Cal. Dec. 17, 2012) ("Procedurally speaking, 'a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint.'" (quoting *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir.1994)). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to

consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "In conducting an APA review, the court must determine whether the agency's decision is 'founded on a rational connection between the facts found and the choices made . . . and whether [the agency] has committed a clear error of judgment.' 'The [agency's] action . . . need only be a reasonable, not the best or most reasonable, decision.'" *River Runners for Wilderness*, 593 F.3d at 1070 (internal citations omitted). As detailed above, Plaintiffs assert multiple causes of action requesting that the Court order the Secretary to issue the special use permit and overturn the Secretary's Decision to deny the issuance of a New SUP to replace the lapsed Reservation. Based upon this record, the Court does not find that Plaintiffs can show a likelihood of success under a Section 706(2) standard.[17]

First, the Secretary's rationale, though controversial, had a basis in law and policy, showed a "rational connection" between the choices made, and was not "so implausible" that differences in opinion could not account for the result. The Secretary's Memorandum of Decision identified, in pertinent part, policy considerations upon which he based his decision:

> I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.
>
> In enacting that provision, Congress clearly expressed its view that, but for the nonconforming uses, the estero possessed wilderness characteristics and was worthy of wilderness designation. Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when "all uses thereon prohibited by the Wilderness Act have ceased." The [Company's] commercial operations currently are the only use of the estero prohibited by the Wilderness Act. Therefore, [the

[17] Plaintiffs also claim that Defendants failed to comply with 36 C.F.R. section 1.5 by filing a false notice announcing the closure of the Company. Plaintiffs have not shown how the notice can be held patently false, where the Defendants merely announced the legal termination of the Company's right to operate, and Public Law No. 94-567 provided that a notice in the Federal Register would be sufficient to change a designation from potential wilderness to wilderness. *See id.* §§ 1(k) & 3 ("All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness."). The notice is not "false" simply because the Company had not vacated the property.

> Company's] commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness.

(Decision at 5–6.)

Second, the Secretary did not violate the private right of use which had existed for 40 years but considered the explicit terms of the conveyance from the Johnson Oyster Company to the United States and the subsequent purchase by the Company:

> Since the [Reservation] and [2008] SUP allowing [the Company's] commercial operations in the estero will expire by their own terms, after November 30, 2012, [the Company] no longer will have legal authorization to conduct those operations, and approximately 1,363 acres can become designated wilderness.

(*Id.* at 6.) The Secretary further articulated that the Superintendent of the Point Reyes National Seashore informed the Company in early 2005 that the Park Service did not intend to issue any new permit beyond the expiration in 2012. (*Id.* at 3–4.)

Third, the Secretary explicitly recognized the "debate" and "scientific uncertainty" regarding the impact of the Company's operations on "wilderness resources, visitor experience and recreation, socioeconomic resources and NPS operations." (*Id.* at 5.) While noting that both the Draft EIS and the Final EIS suggested that the removal of the Company's business operations would have a beneficial impact on the environment, the Secretary emphasized his Decision was "based on the incompatibility of commercial activities in the wilderness and not on the data that was asserted to be flawed." (Decision at 5 n.5.) He determined that the uncertainties regarding the impact were "not material to the legal and policy factors that provide the central basis for [his] decision." (*Id.* at 5.)[18]

Third, Plaintiffs strain credulity to argue that the Secretary's interpretation of Section 124 to afford discretion and not require compliance with NEPA is "arbitrary and capricious" when they themselves made the urged the same interpretation—not once, but twice.

Plaintiffs have argued that the rationale in the Secretary's Memorandum is faulty, but none of their arguments demonstrate why the Court should ignore the Secretary's explicit declaration of the policy considerations for his Decision. As discussed above, Section 124 contains no factors or considerations upon which the Secretary was to base his Decision, other than to consider the 2009

[18] The Court notes the 2009 NAS Report not only affirmed the same uncertainty, but cautioned that the associated costs to resolve the debate could be significant. (2009 NAS Report (Dkt. No. 42-2) at ECF p. 101 ("there is no scientific answer to the question of whether to extend the [Reservation] for shellfish farming").)

NAS Report in the event of a modification. Given the content in the Secretary's Decision, the Court would have to find that his consideration of the goals of the Wilderness Act was not legally proper or was in contravention to the law. Further, the Court would be forced to ignore Congress' statement that "those lands and waters designated as potential wilderness additions [were to] be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." H.R. Rep. No. 1680, H.R. REP. 94-1680, 3, 1976 U.S.C.C.A.N. 5593, 5595. Even a plain meaning interpretation of the phrase "potential wilderness" suggests on its face the appropriateness of full wilderness as the ultimate goal.

Finally, the Court notes that Plaintiffs have emphasized throughout their briefs Defendants' alleged commission and admission of "scientific misconduct." At best, the record before the Court is mixed with competing expert declarations, does not warrant injunctive relief, and cannot be resolved at this stage. Despite the Secretary's express statement that his Decision was not based on flawed data in the Final EIS, Plaintiffs assume that he did rely on false statements and did not ensure that all previously identified misconduct had been corrected. (Mot. at 18.) However, even the NAS itself recognized that policy considerations, not science, controlled the ultimate Decision:

> After evaluating the limited scientific literature on Drakes Estero . . . , there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current . . . [levels of production and operational practices.] . . . Importantly from a management perspective, lack of evidence of major adverse effects is not the same as proof of no adverse effects nor is it a guarantee that such effects will not manifest in the future. A more definitive understanding of the adverse or beneficial effects cannot be readily or inexpensively obtained[.] . . .
>
> *The ultimate decision* to permit or prohibit a particular activity, such as shellfish farming, in a particular location, such as Drakes Estero, necessarily requires *value judgments* and tradeoffs that *can be informed, but not resolved, by science. . . .* Because stakeholders may reasonably assign different levels of priority or importance to these effects and outcomes, there is no scientific answer to the question of whether to extend the [Reservation] for shellfish farming. Like other zoning and land use questions, *this issue will be resolved by policymakers charged with weighing the conflicting views and priorities of society as part of the decision-making process.*

(2009 NAS Report at ECF pp. 100–101 (emphasis supplied).)

For all these reasons, the Court finds that even if jurisdiction existed, Plaintiffs cannot establish that the Secretary's refusal to issue the New SUP was arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law such that they would ultimately be successful on the merits of their claim.

B. IRREPARABLE HARM

The Court next considers whether the party seeking such interim relief is likely to suffer irreparable harm if an injunction does not issue prior to trial on the merits. *Winter,* 555 U.S. at 20. Generally, the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray,* 415 U.S. 61, 90 (1974) (internal citation and quotations omitted). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Id.* "[A]lthough some injuries may usually be irreparable and thus a likelihood of irreparable injury easily shown, the plaintiff must still make that showing on the facts of his case and cannot rely on a presumption to do it for him." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,* 654 F.3d 989, 998 (9th Cir. 2011) (citing *Winter* and *eBay Inc. v. MercExchange, LLC,* 547 U.S. 388 (2006)).

Plaintiffs argue that they will suffer irreparable harm in the absence of a preliminary injunction because their oyster crop will be destroyed by premature removal of oysters from Drakes Estero, future crops will be destroyed due to inability to undertake regular planting activities and sustain the normal oyster growth cycle, and the business itself will be destroyed by requiring the Company to remove its equipment and lay off its workers. Plaintiffs further argue that injury to their business, including loss of business good will, customers, and reputation, constitute irreparable harm. Finally, Plaintiffs contend that, in the absence of interim relief, they will lose a unique, irreplaceable interest in real property.

Ordinarily, lost revenue does not establish irreparable harm. *Los Angeles Memorial Coliseum Comm'n v. NFL,* 634 F.2d 1197, 1202 (9th Cir. 1980). Similarly, courts have denied injunctive relief where the facts disclose that loss of business goodwill can be remedied by money damages. *See id.* at 1202 (evidence of loss of revenue, property value, and goodwill did not establish irreparable harm); *see also OG Int'l, Ltd. v. Ubisoft Entm't,* C 11-04980 CRB, 2011 WL 5079552, at *10 (N.D. Cal. Oct.

26, 2012) (finding in trademark action that customers and business goodwill "at least in theory may be compensated by damages" and therefore weigh against a claim of irreparable harm).

More often, however, courts find that intangible business-related injury, such as loss of customers and business goodwill can be difficult to valuate and *may*, in some instances, constitute irreparable harm. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (injury to goodwill and ongoing marketing efforts established irreparable harm); *Stuhlberg Int'l Sales Co., Inc. v John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) (loss of goodwill resulting from failure to fill customer orders would result in irreparable harm). Indeed, the Ninth Circuit has stated that "[t]he threat of being driven out of business is sufficient to establish irreparable harm." *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). Evidence of such a threat must be adequate and must be causally connected to the alleged wrongdoing. For example, in *American Passage Media,* the court held that evidence of past losses and forecasts of future losses, standing alone, were insufficient to show that the company was "threatened with extinction." *Id.* at 1474; *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (evidence of loss of goodwill and customers was speculative and did not support injunctive relief).

Loss of an interest in real property may also be considered irreparable harm since the unique nature of real property makes a damages remedy inadequate. *See, e.g., Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 756 (2011) (in action under federal housing law, affirming grant of preliminary injunction to stop eviction from apartment complex); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988) (affirming injunction to prevent foreclosure on orchard property). Nevertheless, expenses arising out of the loss of real property rights do not automatically establish irreparable harm. *See Goldie's Bookstore*, 739 F.2d at 471 (in action challenging statute denying stay of eviction from premises upon expiration of lease, damages sustained as a result of having to remove business from premises was mere financial injury and would not constitute irreparable harm).

In the present case, Plaintiffs' claimed loss of current and future oyster crops would generally be compensable by money damages. Indeed, Plaintiffs' evidence on these points consists mainly of

detailing the monetary value of the lost crops. (Lunny Decl. ¶¶ 32–44.) Plaintiffs have not offered evidence or argument indicating that they could not, "at a later date, in the ordinary course of litigation" recover money damages for such losses.[19] Plaintiffs also detail the cost, effort and difficulty of removing the oyster racks and other personal property from the site, ultimately arguing that it is economically and logistically infeasible to do so in the time required. (Lunny Decl. ¶¶ 46–68.) However, the expense and difficulty of removing the trappings of the business here, while inconvenient, are generally a matter of money lost rather than irreparable harm. Moreover, Plaintiffs fail to address why expense and difficulty, in and of themselves, are reasons that support an injunction pending an entire litigation.

More difficult to valuate, however, is the damage to the business itself. Plaintiffs offer evidence that they will face a gap in production down the line if they are unable to plant oyster and clam "seed" now. (Lunny Decl. ¶43.) They indicate that the immediate shutdown, along with the later gap in production, would prevent them from effectively resuming operations, destroying their business. (*See* Lunny Decl. ¶¶ 42–44, 69.) Likewise, the loss of Plaintiffs' rights with respect to the real property itself is not otherwise remediable. These injuries support a finding that irreparable harm is likely.

The Secretary argues that whatever irreparable harm is shown here should be weighed against the fact that the Company has known since it acquired the Reservation that the right to continue operations expired on November 30, 2012, with no guarantee of an additional special use permit. They argue the irreparable harm of which the Company complains was a foreseeable consequence of its acquisition of Johnson's assets in 2004 and not the result of some new action by the Secretary or the Park Service. The Secretary's arguments are more a reflection of his view of the merits or balancing of the equities than evidence affecting the existence of irreparable harm.

In sum, the Court finds that Plaintiffs have made a sufficient showing of irreparably harm in the absence of injunctive relief.

[19] The Court notes, however, that Plaintiffs have not sought an award of money damages in their First Amended Complaint, nor is it clear that money damages could eventually be awarded here. *See generally* 5 U.S.C. § 702 (APA waives sovereign immunity for relief other than money damages); 28 U.S.C. § 2680(a) (Federal Tort Claim Act exempts claims based upon discretionary functions).

C. BALANCE OF EQUITIES AND CONSIDERATION OF THE PUBLIC INTEREST

In deciding whether to grant an injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief . . . pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal citations and quotations omitted). "The assignment of weight to particular harms is a matter for district courts to decide." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).

Plaintiffs argue that the balance of equities favors them because Defendants will not be harmed by maintaining the status quo and allowing an oyster farm that has been operating for nearly eighty years to continue, while Plaintiffs will suffer the total destruction of their business. Plaintiffs further contend that, because Defendants did not act to prevent the transfer of the Reservation to the Company in 2004, no evidence of any exigency in removing the oyster farm exists now. Although Plaintiffs never explain how the Secretary could have so acted given the express Reservation in the Grant Deed and Defendants' determination that they were not required to approve the sale from Johnson to the Company.

Looking more broadly, Plaintiffs argue that the public interest favors an injunction in three ways: (1) it maintains the status quo and would avoid loss of jobs and housing for the Company's employees and their families; (2) an injunction would avoid the adverse impacts to water quality and the ecosystem associated with removing the oysters and equipment of the oyster farm[20]; and (3) the public benefits from maintaining a local landmark, a major oyster supplier, and the last oyster cannery in California.

Defendants counter that the equities do not favor injunctive relief. Defendants maintain that achievement of full wilderness status for Drakes Estero has been an express goal Congress defined for more than 36 years, and should not be delayed further, especially where the purchase of the property expressly envisioned a *terminable* reservation of use. They argue Plaintiffs have been permitted to carry on a non-conforming use for many years and were on notice of the impending expiration prior to

[20] (*See* Declaration of Scott Luchessa in Support of Motion for Preliminary Injunction ¶¶ 7–19 (Dkt. No. 34); Declaration of Richard Steffel in Support of Motion for Preliminary Injunction ¶¶ 6–12 (Dkt. No. 37); Declaration of Robert Abbott in Support of Motion for Preliminary Injunction ¶¶ 5–13 (Dkt. No. 48); Rebuttal Declaration of Scott Luchessa in Support of Motion for Preliminary Injunction ¶ 20 (Dkt. No. 79-2).)

their purchase in 2005. The Proposed Interveners also offered declarations regarding their own constituents' public interest in eliminating the non-conforming use. Congress' long-standing legislation and goals for the area indicate a strong public interest in bringing the land to wilderness status and thus the highest protection afforded to federal lands. *Cf. Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382, 1382–83 (9th Cir. 1977) (balancing of harms was an abuse of discretion where court weighed severe economic hardship to the tuna fishing industry imposed by the operation of the Marine Mammal Protection Act but failed to consider the public interests reflected in passage of the Act).

The Secretary further argues that the public interest favors closing down the Company without further delay because the oyster farm has negative environmental consequences such as providing a habitat for invasive and non-native species, with adverse effects on native ecosystems. (Declaration of Brannon Ketcham in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Ketcham Decl.") ¶¶ 15, 18 (Dkt. No. 64-2).) The Secretary acknowledges that the noise associated with the removal of the oyster racks will create short-term impacts. (Declaration of Dr. Kurt M. Fristrup in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ¶¶ 3–7 (Dkt. No. 64-3); Ketcham Decl. ¶ 38.) However, he argues that those short-term negative impacts will be minor and offset by the benefits of full wilderness protection.

Finally, given that the decision is one in equity, Defendants urge the Court to consider that the California Coastal Commission has issued cease and desist orders to the Company for alleged violations including the cultivation of Manila clams in harbor seal protected areas, boat transit in restricted areas, and unpermitted discharge of marine debris. (Declaration of Cicely Muldoon in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 28 (Dkt. No. 64-1); Goodyear Decl., ¶ 35 & Ex. 34.)

In balancing the equities, the Court, on the one hand, recognizes that Plaintiffs will suffer significant costs including the unfortunate impacts on the Company's employees and their families from loss of their jobs and their living quarters on the oyster farm. The close of any business frequently brings hardship. The Court weighs this consideration against Plaintiffs' ability and/or own

failure to conduct due diligence prior to its purchase from Johnson, their knowledge of the Park Services' intention to allow the Reservation to lapse in November 2012, and the Company's failure to prepare for the same. Plaintiffs claimed at oral argument that they had "every reason to hope" for a New SUP but the record does not reflect that their hope was based upon any assurances by the decisionmakers themselves.

On the other hand, the Court weighs Congress' long-standing intention to manage lands in the public trust in a manner that will "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" as an important consideration, as is the obligation to protect express property rights. H.R. Rep. No. 1680, H.R. REP. 94-1680, 3, 1976 U.S.C.C.A.N. 5593, 5595. Further, the record lacks evidence that Defendants misled Plaintiffs to believe that a New SUP would be issued. To the contrary, Defendants acted affirmatively to warn the Lunnys at the outset of their intention to allow the Reservation to lapse without a New SUP and reiterated this position over time. The Lunnys' refusal to hear the message weighs against them.

Ideally, the Secretary's final decision would have been made more promptly, and the political debate aired in a way not to increase acrimony among the interested parties. However, the Court is not in a position, on this record, to evaluate the reasons driving timing. Nor can the Court determine, on the record before it, that the adverse environmental consequences of denying an injunction and allowing the removal of the Company's personal property from the site weigh more strongly than the environmental consequences of enjoining that removal. Finally, the Court has no basis upon which to weigh the relative public interest in access to local oysters with the public's interest in unencumbered wilderness.

On balance, and combining the requirement of both the equities and the public interest more broadly, the Court does not find these elements weigh in favor of granting a preliminary injunction.

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Preliminary Injunction is **DENIED** on the grounds that: (i) the Court lacks jurisdiction under Section 701(a)(2) of the APA to provide any meaningful review of Section 124, given its discretionary character; and (ii) even if it did, Plaintiffs cannot satisfy all four elements necessary to obtain preliminary injunctive relief.

This Order terminates Dkt. No. 32.

IT IS SO ORDERED.

Dated: February 4, 2013

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California

Bridger M. Mitchell PO Box 31. Inverness, CA 94937

Dr. Charles Lester, Executive Director
Lisa Haage, Chief of Enforcement
California Coastal Commission
Via email: clester@coastal.ca.gov, lhaage@coastal.ca.gov

February 1, 2013

Re: Support for CCC-13-CD-01

Dear Dr. Lester and Ms. Haage:

I'm writing to support the enforcement staff's report and its recommendation that the Coastal Commission issue a Cease and Desist Order against the Drakes Bay Oyster Company (DBOC).

The staff's due diligence establishes that despite repeated Commission notices, DBOC violated multiple provisions of the Commission's 2007 Consent Order. Violations include ongoing unpermitted development, violations of harbor seal protection requirements, failure to control significant amounts of its plastic that has polluted the marine environment, failure to pay fines imposed in 2009 for illegal activities, and failure to correct ongoing violations of the California Coastal Act.

Despite the staff's repeated attempts to get DBOC into compliance, including numerous letters, phone calls, and in-person meetings, the company failed to uphold its clear responsibility to comply with the Coastal Act. That the staff has rejected DBOC's offered explanations as "without factual support" further shows how this perpetual Coastal Act violator continues to obfuscate its responsibility.

These violations of the Coastal Act add to the significant negative impacts that a legally compliant oyster operation would have on the Drakes Estero marine wilderness area and its wildlife. The staff's proposed Cease and Desist Order rightly expresses concerns over ongoing impacts to the ecology of Drakes Estero, including impacts to eelgrass from motorboat propeller cuts, impacts to water quality from wooden racks treated with chromated copper arsenate, the spread of the aggressive and highly invasive *Didemnum vexillum*, the spread of other invasive species including Manila clams, and the general nature of ongoing mariculture operations without required Commission review.

The issuance and enforcement of the Cease and Desist Order, beyond acting unambiguously to end the noncompliance by DBOC, will strengthen coastal protections state-wide by signaling the Commission's readiness to enforce Coastal Act regulations.

Sincerely yours,

B. Mitchell

TO: California Coastal Commission
RE: Support for CCC-13-CD-01

Drakes Bay Oyster Company's (DBOC) egregious record of non-compliance with the Coastal Act and the 2007 Consent Order, as detailed in the recent CCC staff report, clearly warrants issuance of the recommended Cease and Desist Orders. Staff correctly notes that DBOC's defensive claims lack factual support and fail to address relevant statutory issues. The Commission should take all steps necessary to collect past penalties of $61,250, and should impose new ones for DBOC's other violations.

The negative impacts that even legally compliant shellfish aquaculture would have on the natural environment and wildlife of Drakes Estero marine wilderness area, is significantly intensified by DBOC's violations of the Coastal Act and various provisions of the 2007 Consent Order. These include ongoing unpermitted development, violations of harbor seal protection requirements, and failure to control marine pollution from plastic aquaculture gear.

Despite the political power of its allies, DBOC deserves no further lenience. For eight years Commission staff has worked diligently to get DBOC into compliance with its lawful obligations. These efforts have failed. What results from such a precedent? Shall all companies now operate in the coastal zone with impunity?

As a resident of West Marin, I value the Commission's mandate. Reliable, effective enforcement of the Coastal Act is fundamental to supporting the quality of life and economic wellbeing of our community, and is vital for preserving coastal resources from intensifying pressures of commercial development and climate change. Regardless of strident appeals favoring DBOC's claims to exemption based on multi-generational entitlement to low-cost lease of public coastal lands, the vast majority of citizens support equitable treatment for all under law. The factual record shows that DBOC's tenure presents an insupportable threat to the public trust resources of Drakes Estero. The sum of efforts and actions to rectify and remedy this threat has failed. No reasonable dispute remains. The public interest is best served by ensuring DBOC's operations come into swift and orderly compliance with CCC-13-CD-01.

Thank you for considering my comments,
Victoria Hanson
PO 272
Tomales, CA

6b

February 3, 2013

Dr. Charles Lester, Executive Director
Ms. Lisa Haage, Chief of Enforcement

Dear Dr. Lester and Ms. Haage,

This letter is written in support of the Coastal Commission's staff recommendations concerning Drakes Bay Oyster Company and is intended for distribution to the Commissioners at their meeting this week.

I am one of the environmental advocates who worked for the passage of the original Act that established the California Coastal Commission. I have considered it a bulwark of protection for our coast for 40 years. I do not want to see the strength of the CCC and respect for this important government agency severely diminished by a scofflaw.

I am utterly dismayed by the way in which Drakes Bay Oyster Company has flouted the provisions of the Act and ignored its requirements for coastal development permits since taking over the Johnson's Oyster Company. I have seen the piles of the plastic debris with which the company has littered the shores of Drakes Estero— and picked up some of it myself. I have seen photographic evidence of the infestation of the noxious Didemnum vexillum. The company has introduced an exotic, invasive species of clams. They have operated in a manner that is egregiously destructive.

In 2009, the CCC fined the company $61,250 for its activities affecting harbor seal protection areas. Why has that fine not been collected?

It is high time and overdue that the Commission pull out all the stops and use every means to make this environmentally-destructive company pay for the damage it has caused. The CCC staff has stated this would begin with a Cease and Desist order. I urge the Commission to move forward to obtain this order as quickly as possible.

Sincerely yours,

Amy Meyer

6c

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February 4, 2013

Via email: clester@coastal.ca.gov

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California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Support for Issuance of Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01 against the Drakes Bay Oyster Company

Dear Executive Director Lester and Chief Haage:

The National Wildlife Federation urges the California Coastal Commission to issue the above-referenced Cease and Desist and Restoration Orders against the Drakes Bay Oyster Company (DBOC) as recommended in the January 25, 2013 staff report.

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization. NWF has more than four million members and supporters, including 120,000 members in California, and conservation affiliate organizations in forty-eight states and territories. NWF has a long history of working to protect the nation's coastal and inland waters and the fish and wildlife that depend on those vital resources.

As the January 25 staff report makes clear, DBOC has an egregious record of non-compliance with the California Coastal Act, the conditions of its special use permit, and the conditions of two separate Consent Cease and Desist Orders (CCC-03-CD-12 and CCC-07-CD-11). DBOCs violations include: operation of offshore and onshore aquaculture facilities without California Coastal Act authorization; ongoing unpermitted development; violations of harbor seal protection requirements; failure to prevent the release of significant amounts of plastic into the marine environment; failure to pay fines imposed in 2009 for illegal activities; and failure to correct ongoing violations of the California Coastal Act despite repeated notices from the Commission.

As fully documented in the staff report, the Coastal Commission has repeatedly advised DBOC of these violations in writing and through numerous emails, phone calls, and meetings. The

Coastal Commission has also advised DBOC that only "complete and consistent adherence" to the permit and order conditions can provide an adequate level of protection to Drakes Estero.[1]

As a result, it is clear that DBOC has knowingly operated in violation of the many legal requirements established to protect Drakes Estero and the incredible array of fish and wildlife species that rely on the Estero. It is equally clear that DBOC has knowingly ignored these requirements for the entire time it has operated in Drakes Estero.

This longstanding and knowing disregard for the health of Drakes Estero and the species that rely on it is wholly unacceptable. As the Coastal Commission is well aware, Drakes Estero is the ecological heart of Point Reyes National Seashore and provides vitally important habitat for California's harbor seals, tens of thousands of waterfowl and shorebirds, and dozens of species of fish. Drakes Estero has been designated as potential wilderness since 1976, and in December 2012 was awarded the full wilderness protection long promised to the American people.

As designated wilderness, the Estero is to be granted the highest possible level of protection. It is to be "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" and an area "retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."[2]

Ongoing operation of DBOC violates these requirements. Continued operation (even for a limited period) in violation of the California Coastal Act and the permit and order conditions imposed by the Coastal Commission adds to the significant damage that even wholly compliant operations would have on this marine wilderness. As the staff report concludes, DBOCs activities are having ongoing adverse impacts to the Estero that include: damage to eelgrass from motorboat propeller cuts; adverse impacts to water quality from wooden racks treated with chromated copper arsenate; the spread of the aggressive and highly invasive *Didendum vexillum*; the spread of other invasive species including Manila clams; and the general nature of ongoing mariculture operations without required Commission review.

To protect Drakes Estero and the integrity of the California Coastal Act, NWF urges the Coastal Commission to issue Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01 to DBOC, and to assess and collect appropriate penalties and fines. Failure to issue these orders would sanction illegal and environmentally destructive activity within the coastal zone, and would set a dangerous precedent that could undermine compliance with, and future enforcement of, the state's critically important Coastal Act requirements.

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[1] February 1, 2012 California Coastal Commission letter to DBOC. This letter also advised DBOC that it has been out of compliance with its special use permit since that permit was issued in 2008 and out of compliance with Consent Cease and Desist Order CCC-07-CD-11 since it was issued in 2007.
[2] 16 U.S.C. § 1131(c).

In light of the significant controversy surrounding the wilderness designation for Drakes Estero and the resulting potential for inadvertent ex parte communications by either opponents or proponents of the wilderness designation, NWF also believes that heightened attention to the Commission's ex parte communications requirements (Public Resources Code, sections 30319-30327) may be warranted to ensure the highest possible level of public confidence in the outcome of the Commission's decision.

Thank you for considering our recommendations.

Sincerely,

Melissa Samet
Senior Water Resources Counsel

CENTER for BIOLOGICAL DIVERSITY Because life is good.

February 4, 2013

Dr. Charles Lester, Executive Director
Lisa Haage, Chief of Enforcement
California Coastal Commission

Re: Support for Cease and Desist Order for Drakes Bay Oyster Company

The Center for Biological Diversity strongly supports the Coastal Commission staff recommendations and findings for Cease and Desist and Restoration Orders against the Drakes Bay Oyster Company (CCC-13-CD-01 and CCC-13-RO-01). We encourage the Coastal Commission to issue the recommended Cease and Desist Order against the Drakes Bay Oyster Company, for violations of the Coastal Act and violation of previous Coastal Commission orders.

The Coastal Commission findings are that Drakes Bay Oyster Company has a record of non-compliance with the Coastal Act, through unpermitted development, violation of marine mammal protection measures, and discharging of marine debris. Drakes Bay Oyster Company continues to refuse to abide by a 2007 Coastal Commission Consent Order. These egregious violations in a designated National Park wilderness area warrant immediate issuance of a Cease and Desist Order. We urge the Coastal Commission to take all possible and necessary steps to collect penalties and fines for ongoing unlawful behavior, including seeking payment of the $61,250 fine imposed in December 2009 for violations of harbor seal protection areas.

The Coastal Commission has found that Drakes Bay Oyster Company has failed to secure a coastal development permit during the entirety of its mariculture operations the past seven years. Despite Coastal Commission staff's repeated attempts to bring Drakes Bay Oyster Company into compliance, including numerous letters, phone calls, and in-person meetings, the company failed to comply with the Coastal Act and has yet to correct ongoing violations.

The proposed Cease and Desist Order cites concerns over ongoing impacts to the ecology of Drakes Estero, including impacts to eelgrass from motorboat propeller cuts, impacts to water quality from wooden racks treated with chromated copper arsenate, the spread of the aggressive and highly invasive *Didemnum vexillum*, the spread of other invasive species including Manila clams, and the general nature of ongoing mariculture operations without required Coastal Commission review.

Coastal Commission staff has rejected Drakes Bay Oyster Company excuses for noncompliance as "without factual support." We request that you do not allow this company to continue to operate within the coastal zone and within an important protected ecological area with impunity. Please issue the recommended Cease and Desist and Restoration Orders.

Sincerely,

Adam Keats
Senior Counsel

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Alaska · Arizona · California · Florida · Minnesota · Nevada · New Mexico · New York · Oregon · Vermont · Washington, DC
351 California St., Ste. 600 · San Francisco, CA 94104 tel: (415) 436.9682 fax: (415) 436.9683 www.BiologicalDiversity.org

Save Our Seashore
40 Sunnyside Dr Inverness CA 94937
415-663-1881 gbatmuirb@aol.com

February 5, 2013

Re: **SUPPORT Order CCC-13-CD-01**

Save Our Seashore urges the Commission to approve proposed Order CCC-13-CD-01.

We also request the Commission to direct staff to impose stipulated penalties for the infractions documented in the Order.

We further request the Commission to direct staff to issue a "Demand Letter" for payment of previously imposed (yet still unpaid) penalties.

Lastly, we request the Commission to authorize staff to issue a "Demand Letter" for payment of newly imposed penalties should those also remain unpaid.

Sincerely,

Gordon Bennett

Gordon Bennett, President

Save Our Seashore

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NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

February 5, 2012

Dr. Charles Lester
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Via email: charles.lester@coastal.ca.gov

Re: Support for Issuance of Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01 against the Drakes Bay Oyster Company

Dear Executive Director Lester:

We are writing on behalf of the Natural Resources Defense Council (NRDC) to urge the California Coastal Commission to issue the above-captioned Cease and Desist and Restoration Orders against the Drakes Bay Oyster Company (DBOC) as recommended in the January 25, 2013 staff report. In addition, we urge the Commission to take all necessary and appropriate steps to collect penalties and fines for DBOC's ongoing unlawful behavior.

As you know, NRDC is a non-profit environmental advocacy organization with a long history of support for protection of California's remarkable coastal zone and for full implementation of the state's landmark Coastal Act. In this case, as documented by the January 25 staff report, DBOC has an egregious record of non-compliance with that Act, the conditions of its special use permit, and the conditions of two separate Consent Cease and Desist Orders (CCC-03-CD-12 and CCC-07-CD-11). The integrity of the Coastal Act as well as the environmental harms that have resulted from DBOC's wrongful behavior require a strong and effective response from the Commission at this time.

The staff report reveals clearly that DBOC's unlawful activities include violations of harbor seal protection requirements, failure to prevent significant amounts of plastic aquaculture materials from entering the marine environment; failure to pay fines imposed in 2009 for illegal activities; operation of offshore and onshore aquaculture operations without Coastal Act authorization; and failure to correct ongoing violations of the Act despite repeated notices from the Commission. The staff report also documents repeated efforts by the Commission to inform DBOC of these violations through writing letters, meetings, phone calls and emails as well as to obtain the company's adherence to applicable permits.

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As a result, it is evident that DBOC has knowingly operated for many years in violation of conditions and requirements established to protect the unique Drakes Estero, the ecological heart of the Point Reyes National Seashore, and the wildlife and other species that inhabit the Estero from the adverse impacts of a commercial oyster operation. Designated a potential wilderness in 1976, Interior Secretary Ken Salazar gave the area the full wilderness protection that it deserves in December of 2012. As documented in the staff report, DBOC's operations are having adverse impacts on the Estero's resources, including but not limited to its eelgrass and water quality, impacts that are over and above those that fully compliant operations would have and impacts that are inconsistent with the protections required under the federal wilderness law.

To protect Drakes Estero and to maintain the authority to enforce the provisions of the California Coastal Act, NRDC urges the Coastal Commission to issue the recommended orders and to assess and collect appropriate penalties and fines. Thank you in advance for considering our views.

Sincerely,

Ann Notthoff
California Advocacy Director

Johanna H. Wald
Senior Counselor

SSL
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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

February 5, 2013

Dr. Charles Lester, Executive Director
Lisa Haage, Chief of Enforcement
California Coastal Commission
Via email: clester@coastal.ca.gov, lhaage@coastal.ca.gov

Re: Support for issuance of Cease and Desist Orders (CCC-13-CD-01 and CCC-13-RO-01) against Drakes Bay Oyster Company

Dear Dr. Lester and Ms. Haage:

We are writing on behalf of the Sierra Club, Environmental Action Committee of West Marin, and National Parks Conservation Association to express support for the California Coastal Commission's (CCC) staff report and recommendation that a Cease and Desist Order (CCC-13-CD-01 and CCC-13-RO-01) be issued against the Drakes Bay Oyster Company (DBOC). The DBOC operates in Drakes Estero, a congressionally-designated national park wilderness in Point Reyes National Seashore.

As documented by CCC staff in numerous letters to DBOC since the 2007 Cease and Desist Consent Order, the DBOC has had a dismal compliance record with the Coastal Act and other resource protection measures. These violations of the Coastal Act add to the significant negative impacts that a legally compliant oyster operation would have on the Drakes Estero marine wilderness area and its wildlife. We are not aware of any other oyster company operating in California that has failed, year after year, to comply with standard Coastal Act guidelines.

Moreover, the DBOC has failed to pay stipulated penalties for its violations of CCC regulations, and instead has continued to conduct operations in a manner that unveils new violations each year, including marine debris plastics pollution, harbor seal protection violations, and illegal development. This operation has negatively impacted the natural[1] and cultural resources[2] of Drakes Estero as well as diminished the visitor experience in this national park. The DBOC has forced the CCC to expend significant staff resources in efforts to simply to bring it in to compliance with the 2007 Order that DBOC signed and therefore agreed to abide by. To date, the DBOC does not even have a Coastal Development Permit on file.

The proposed Cease and Desist Orders outline concern over ongoing impacts to the ecology of Drakes Estero from DBOC, including impacts to eelgrass from motorboat propeller cuts, the spread of the

[1] See CCC enforcement letters from 2007-2012

[2] November 22, 2012 and May 21, 2007 letters from the Federated Indians of Graton Rancheria/Coast Miwok to Secretary Salazar and National Park Service, respectively, express support for the protection of their cultural resources. The FIGR states "We believe that the activities related to current oyster farming in Drakes Estero are harming the FIGR/Coast Miwok traditional cultural landscape." and "We hope you will continue your efforts to return this area to its wilderness status."

aggressive and highly invasive *Didemnum vexillum*, the spread of other invasive species including Manila clams, and the general nature of ongoing mariculture operations without required Commission review. The record before the CCC outlines in detail the numerous attempts by CCC staff to help DBOC achieve compliance. These actions by CCC staff include numerous letters, phone calls, and in-person meetings. The record also demonstrates that the CCC staff allowed DBOC to respond several times to allegations of Coastal Act violations and in the end, CCC staff rejected DBOC's offered explanations as "without factual support." The fact that this proposed Cease and Desist Order is unilateral rather than by consent further demonstrates how DBOC has not worked collaboratively with the CCC staff, despite their significant, resource-consuming efforts.

The Secretary of the Interior decided in November 2012 to let the DBOC lease expire on its own terms, and to designate the estero as the first marine wilderness in the continental United States[3]. This decision concerning precedent-setting public lands policy generated significant political support from Federal Officials from California and committees that have jurisdiction on matters of national park policy[4].

Related, the Federal Court has issued a ruling, dated February 4, 2013, that rejects the DBOC request for a Preliminary Injunction and preserves the February 28, 2013 deadline by which DBOC must remove its off-shore materials, such as their shellfish. Now is the time for the CCC to take all possible and necessary steps to collect penalties and fines for ongoing unlawful behavior, including directing Commission staff to send a demand letter to DBOC for payment of the $61,250 fine imposed in December 2009 for violations of harbor seal protection areas.

For these reasons, and to protect the jurisdiction of the CCC, we urge the adoption of the proposed Cease and Desist Orders.

Sincerely

Neal Desai
Pacific Region Associate Director
National Parks
Conservation Association

Amanda Wallner
California Organizer
Sierra Club California

Amy Trainer
Executive Director
Environmental Action Committee of
West Marin

[3] http://articles.latimes.com/2012/nov/29/local/la-me-1130-oysters-wilderness-20121130

[4] http://www.wyden.senate.gov/news/press-releases/bingaman-wyden-udall-and-markey-applaud-interior-departments-drakes-estero-decision

http://www.boxer.senate.gov/en/press/releases/112912.cfm

http://eacmarin.org/wp-content/uploads/2012/12/Secy-Salazar-Pt-Reyes-decision-support-packet-11.30.12.pdf

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Th 11.1 & 11.2

Staff: H. Johnston-SF
Staff Report: 01/25/2013
Hearing Date: 02/07/2013

STAFF REPORT: Recommendations and Findings for Cease and Desist and Restoration Orders

Cease and Desist Order No.: **CCC-13-CD-01**

Restoration Order No.: **CCC-13-RO-01**

Related Violation File: **V-7-03-04 & V-7-07-001**

Location: Within Point Reyes National Seashore, with onshore facilities located at 17171 Sir Francis Drake Boulevard in Inverness, Marin County (APN 109-13-017), and offshore facilities located in Drake's Estero.

Property Owner: United States National Park Service

Property Occupant[1]: Drakes Bay Oyster Company

Violation Description: Unpermitted development including but not limited to: the operation of offshore aquaculture facilities; the processing and sale of the product of the aquaculture operations and related operations; construction, installation, and alteration of structures; land alterations; and violations of Consent Cease and Desist Order No. CCC-07-CD-11 (Drakes Bay Oyster Company), including performing additional unpermitted development, conducting boat traffic in the lateral sand bar channel near the mouth of Drake's Estero during a seasonal restriction established for harbor seal

[1] Since 2005, Drakes Bay Oyster Company has occupied the Subject Property and operated a commercial facility thereon pursuant to a complicated set of authorizations discussed in more detail within.

	pupping sites, and discharging of marine debris in the form of abandoned, discarded, or fugitive aquaculture materials.
Persons Subject to these Orders:	Drakes Bay Oyster Company and related entities.
Substantive File Documents:	1. Public documents in the Cease and Desist and Restoration Order files No. CCC-13-CD-01 and CCC-13-RO-01 2. Appendix A and Exhibits 1 through 28 of this staff report
CEQA Status:	Exempt (CEQA Guidelines (CG) §§ 15060(c)(3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308, and 15321)

SUMMARY OF STAFF RECOMMENDATION

A) **OVERVIEW**

This action pertains to development associated with, including operation of, Drakes Bay Oyster Company ('DBOC'). DBOC operates a mariculture facility on approximately 1060 acres in and adjacent to Drakes Estero (the 'Property'), within Point Reyes National Seashore (Exhibit #1).[2] Staff recommends that the Commission approve Cease and Desist Order No. CCC-13-CD-01 and Restoration Order No. CCC-13-RO-01 (collectively, the 'Orders') to address development undertaken or maintained by DBOC in violation of the Coastal Act, some of which is also a violation of orders previously issued for the facility[3], as discussed further herein, by requiring a number of measures, including specifying operating conditions to protect coastal resources and addressing Coastal Act permitting requirements. The proposed Orders are included as Appendix A of this staff report.

The development at issue in this matter (hereinafter referred to as the 'Unpermitted Development') includes, but may not be limited to: the operation of offshore aquaculture facilities; the processing and sale of the product of aquaculture operations and other related operations; construction, installation, and alteration of structures; landform alteration; and

[2] The onshore portion of the property subject to the proposed Orders is identified as Marin County Assessor's Parcel Number 109-13-017.

[3] Section 2.0 of this Commission's Consent Cease and Desist Order No. CCC-07-CD-04, agreed to by Drakes Bay Oyster Co. provided an agreement to "cease and desist from performing any new development...on the property... and from expanding or altering the current development" prior to obtaining a Coastal Development Permit, and none has been obtained.

additional unpermitted development undertaken inconsistent with Consent Cease and Desist Order No. CCC-07-CD-11, including installation of unpermitted development, the presence of boat traffic in the lateral sand bar channel near the mouth of Drake's Estero during a seasonal restriction established for harbor seal pupping sites; and discharge of marine debris in the form of abandoned, discarded, or fugitive aquaculture materials.

The entity subject to the proposed Orders is the property occupant[4], DBOC, which occupies the property and conducts the mariculture operation thereon. Upon purchase of the facility from Johnson Oyster Company in December 2004, DBOC received the remainder of a Reservation of Use and Occupancy with the National Park Service ('NPS') for use of 1.5 acres of onshore land through November of 2012, and two state water bottom leases with the California Department of Fish and Game Commission to cultivate oysters on approximately 1060 acres of submerged land in Drake's Estero. The state water bottom leases were subsequently renewed for a period of 25 years in 2004, however the Renewal of Leases explicitly stipulated that the water bottom leases would expire if NPS authorization to occupy the land terminated.

As described more completely below in Section V(B), unpermitted development on the subject property was first addressed by the Commission in 2003 with the issuance of Cease and Desist Order No. CCC-03-CD-12 ('2003 Order') to Johnson Oyster Company ('JOC'), for numerous Coastal Act violations pertaining to unpermitted development and operation of the onshore aquaculture facilities. This order required removal of specified unpermitted development from the property and submittal of a coastal development permit ('CDP') application for after-the-fact authorization of limited items of unpermitted development.[5]

When DBOC purchased the facility in 2004, the facility's operations still lacked any authorization at all under the Coastal Act. By letter dated April 10, 2003, DBOC had expressly assumed the compliance obligations of the 2003 Order (which it did again in the 2007 Consent Order referenced in footnote 2). When DBOC purchased the facilities in 2004, several compliance obligations remained pursuant to the 2003 Order, and DBOC subsequently took steps to address a number of those pending commitments. Notwithstanding this and the outstanding order, however, all unpermitted development subject to the 2003 Order was not removed, and in fact, DBOC performed new unpermitted development activity on the Property, including installation of additional facilities and structures, grading, paving, and placement of oyster cultivation apparatus within Drake's Estero, all without permits. In 2007, the Commission issued Consent Cease and Desist Order No. CCC-07-CD-11 ('2007 Consent Order') to address

[4] Legal status of DBOC's right to continue to lease and occupy the Property is subject to ongoing litigation and is discussed more thoroughly in Section V.C.2 of this Staff Report.

[5] The 2003 Order and associated staff report can be accessed online at http://www.coastal.ca.gov/legal/Th16a-12-2003.pdf. Provision 1.0 (c) of the 2003 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.*

the aforementioned unpermitted development and provide a short-term means to protect coastal resources while DBOC sought a permit to authorize the facility under the Coastal Act.[6]

Although the 2007 Consent Order was intended, in part, to prevent additional unpermitted activity on the Property while a CDP was being sought, additional unpermitted development was subsequently undertaken. In addition, DBOC has failed to submit a complete CDP application, much less obtain a CDP, to address outstanding Coastal Act issues and the unpermitted status of the facility. As a result, the entire facility continues to lack Coastal Act authorization. Finally, DBOC violated multiple provisions of the 2007 Consent Order, through both its actions and its failures to act.

Since the resource protection measures enumerated in the 2007 Consent Order were intended to provide only short-term interim protection to coastal resources during the pendency of a CDP application, the development addressed therein was not subject to the full level of analysis that would otherwise have been required to develop measures to govern an entire operation for the multiple years that have since elapsed. Moreover, additional issues have arisen since the 2007 Consent Orders, including new instances of unpermitted development and additional concerns regarding potential operational impacts on coastal resources, which would have been addressed by a CDP, had one been obtained. These concerns include invasive species; both the accidental proliferation of invasive fouling tunicates, and the cultivation of reproductively viable invasive Manila clams in Drake's Estero. It has now thus become appropriate to take formal enforcement action to ensure that operations in the estero are carried out in a manner consistent with Coastal Act resource protection policies.[7]

Furthermore, DBOC has variously asserted that certain definitions and requirements of the 2007 Consent Order are ambiguous; this has been the subject of numerous correspondences between Commission staff and DBOC seeking to clarify any purported uncertainties, some of which are included as exhibits hereto. Additionally, the Secretary of the Interior has declined to issue a new lease to DBOC, and as the state water bottom leases were made expressly contingent upon continued federal authorization to occupy the Property, the facility now exists without any governing resource protection operational controls, which will be the case during the pendency of current litigation filed over the lease renewal issues. Commission staff has worked sedulously with DBOC over the past months in an effort to resolve these issues in the context of a consent settlement, but was ultimately unable to obtain agreement regarding the various resource-protection measures to be implemented in the context of both interim operations and potential retirement of the facility.

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[6] The 2007 Order and associated staff report can be accessed online at http://documents.coastal.ca.gov/reports/2007/12/W6-12-2007.pdf. Provision 2.0 of the 2007 Order states in part:

> *Respondent agrees to cease and desist from performing any new development…and from expanding or altering the current development that exists on the property.*

[7] It is also advantageous to make absolutely certain now that there is complete understanding regarding the protection of harbor seal pups and mothers, particularly in light of past apparent misunderstandings, given that the pupping season for this year is about to commence.

The proposed Orders are thus designed to serve multiple purposes, including: to 1) provide interim operating conditions necessary to protect coastal resources; 2) address the new issues that have arisen since the 2007 Consent Order; 3) to eliminate asserted ambiguities; 4) require Coastal Act compliance, including obtaining a Coastal Development Permit if the facility remains in operation and prohibiting further unpermitted development, and 5) to provide a means to regulate the removal process in the event that DBOC does not receive relief from their extant obligation to vacate the Property.

B) DESCRIPTION OF PROPERTY

The property subject to the proposed Orders is located within and immediately adjacent to Drake's Estero, which encompasses approximately 2,500 acres of tide and submerged lands within Point Reyes National Seashore ('PRNS'), on the southern side of the Point Reyes peninsula (Exhibit #2). Playing host to one of the largest harbor seal populations in California and one of the most expansive eelgrass meadows in the state, the shallow tidal estuary that makes up Drake's Estero is widely recognized as an area of prodigious biological productivity and significance. Harbor seals are year-round residents of Drake's Estero and annually rear between 300 and 500 pups in the Estero. Additionally, approximately 750 acres of eelgrass flourish in the submerged lands of Drake's Estero, providing critical habitat for a number of different fish and wildlife species. One such species is the Black Brant, a marine goose that has been included on the Audubon WatchList, is protected under the Migratory Bird Treaty Act, and for which eelgrass is preferential forage.

Federal law recognizes and seeks to protect the ecological import of the estero; the eastern portion, Estero de Limantour, was designated as 'wilderness' in 1999, and on December 4, 2012, the National Park Service announced the conversion of the remainder of the Drake's Estero to designated wilderness status.[8] Although not directly relevant to the Commission's standard of review, these designations further indicate the ecological significance of this area. Pursuant to federal law, there are strict limitations of use and development within designated wilderness areas.[9] This wilderness designation additionally carries with it various protections pursuant to the 1976 Point Reyes Wilderness Act and the 1962 enabling legislation, including the prohibition of commercial activities, roads, and motorized boats and vehicles within designated wilderness areas.[10]

Since the 1930s, some form of commercial oyster operations has been conducted on the land and waters of Drake's Estero. Through time, production amount, species, method, and spatial extent of cultivation have varied. Currently, there are approximately 19 million oysters and 1.99 million clams growing in Drake's Estero as part of DBOC's aquaculture operation. As described more thoroughly below, DBOC's extant operation on the Property includes the seeding, cultivation,

[8] 77 Fed.Reg. 233 (Dec. 4, 2012), pages 71826-71827.

[9] 16 U.S.C. § 1133(b).

[10] 16 U.S.C. §§ 1133(c) and 1133(d)(5).

harvesting, processing, and vending of the clams and oysters. Development associated with DBOC's mariculture business includes approximately 95 wooden cultivation racks on the bottom of the estero, plastic mesh bottom bags scattered across the mudflats and tidal sandbars within the estero, sales facilities, residential trailers, commercial buildings, processing and storage structures, picnic tables, and interpretive signage.

C) **SUMMARY OF VIOLATION AND PROPOSED RESOLUTION**

As described more completely below in Section IV, at the request of the County of Marin, the Commission addressed the unpermitted development on the land around the estero through the issuance of the 2003 Order to JOC. As further explicated below, this 2003 Order was designed to address concerns regarding Coastal Act resources by requiring that JOC: address unpermitted development on the site that posed risk to water quality and biological productivity in the estuary; remove unpermitted development on the Property that was inconsistent with Chapter 3 of the Coastal Act; and submit an application for a CDP for after-the-fact authorization of specified development, including a mobile home, cultivation equipment within the estuary and a horse paddock.

While JOC took various steps towards complying with the 2003 Order, unpermitted development that was to have been addressed pursuant to the Order persisted when, in late 2004, DBOC purchased JOC's right to continue to occupy and carry out aquaculture on the Property. In addition to this continued presence of unpermitted development, additional unpermitted activity was subsequently undertaken in violation of both the 2003 Order[11] and the Coastal Act, including installation of additional facilities and structures, grading, paving, and placement of oyster cultivation apparatus within Drake's Estero without permits. This failure to comply with the 2003 Order and continuation of unpermitted development activities on the Property resulted in additional Commission enforcement action, and culminated with the issuance of the 2007 Consent Order.

The 2007 Consent Order established protocols for vehicle traffic in Drake's Estero; precluded certain activities, including additional unpermitted development, including the placement of additional structures in the estero; established harbor seal protection areas; precluded increasing production without a Coastal Development Permit; and required that DBOC submit a CDP application to bring its entire operations into compliance with the Coastal Act, including obtaining Coastal Act authorization of any offshore aquaculture operations and onshore facilities they wished to retain or develop. Through this Order, DBOC additionally agreed to comply with the terms and conditions of the 2003 Order.

In the years since the 2007 Consent Order, DBOC has failed to fully comply with various resource protection measures included in the 2007 Consent Order and has failed to submit a complete CDP application to the Commission; therefore, the entire facility remains unpermitted. Furthermore, there have been instances of additional unpermitted development on the Property.

[11] The 2003 Order, incorporated by reference into the 2007 Consent Order, specifically prohibited unpermitted development: "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 ..." (Section 1.0(a))

The on-site unpermitted development that is the subject of these Orders include: 1) continued operation of offshore and onshore aquaculture facilities without Coastal Act authorization, and the commencement or substantial change in ongoing operations; 2) the processing and sale of the product of aquaculture operations and other operations; 3) construction/installation of structures; 4) construction and backfill of a 12" by 18" by 80' long electrical trench, placement and removal of clam cultivation bags within a harbor seal protection area and associated vessel use and worker operations, replacement of six picnic tables and placement of six additional picnic tables, and installation of a 8' by 40' refrigeration unit (Exhibits #3 & #4); 5) year-round operation of boats in an area subject to seasonal boat-traffic prohibitions (Exhibit #5); and 6) discharge of marine debris in the form of legacy, abandoned, discarded, or fugitive mariculture materials (Exhibit #6). The physical Unpermitted Development at issue herein remains on the property at present.

The proposed Cease and Desist and Restoration Orders will require DBOC to, among other things: 1) cease and desist from conducting any further unpermitted development on the Property; 2) remove specified items of Unpermitted Development; 3) limit their operations while they seek Coastal Act authorization; 4) implement enumerated resource protection measures; 5) apply for a coastal development permit to obtain permanent authorization for limited, specified development and operations that may be consistent with the Coastal Act; and 5) if they are required to vacate the premises under separate requirements, prepare and implement a plan to manage that process consistent with the Coastal Act.

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I. MOTION AND RESOLUTION

Motion 1:

> *I move that the Commission **issue** Cease and Desist Order No. CCC-13-CD-01 pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in the issuance of the proposed Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order:

> *The Commission hereby issues proposed Cease and Desist Order No. CCC-13-CD-01, as set forth below, and adopts the findings set forth below on grounds that Drakes Bay Oyster Company has conducted and maintained development without a coastal development permit, in violation of the Coastal Act, and that the requirements of the Order are necessary to ensure compliance with the Coastal Act.*

Motion 2:

*I move that the Commission **issue** proposed Restoration Order No. CCC-13-RO-01 pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in issuance of the proposed Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Restoration Order:

The Commission hereby issues Restoration Order No. CCC-13-RO-01, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred on the subject property without a coastal development permit, 2) the development is inconsistent with the Coastal Act, and 3) the development is causing continuing resource damage.

II. JURISDICTION

Normally, the Commission retains its original permitting jurisdiction over those lands seaward of the mean high tide line, and as Marin County has a certified Local Coastal Program, the County would have CDP-issuing authority over upland development. However, a 1997 stipulated judgment from Marin County District Court required that JOC obtain a coastal permit "from the California Coastal Commission." The County has interpreted this to mean that the Court assigned the State full CDP jurisdiction over the entire site and, moreover, has requested that the CCC take the lead on the enforcement for this facility. Finally, because the Commission retains permit review authority over the entire site, it also has primary enforcement authority.

III. COMMISSION'S AUTHORITY

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where it finds that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP. The Commission can issue a Restoration Order under section 30811 of the Coastal Act if it finds that development 1) has occurred without a CDP, 2) is inconsistent with the Coastal Act, and 3) is causing continuing resource damage. These criteria are all met in this case, as summarized briefly here, and discussed in more detail in Section V, below.

The unpermitted activity that has occurred on the subject property clearly meets the definition of "development" set forth in Section 30106 of the Coastal Act. Development is defined broadly under the Coastal Act, and includes, among many other actions, "on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any…solid…waste; grading…;…change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure…." All non-exempt development in the Coastal Zone requires a CDP. No exemption from the permit requirement applies here.

The development was undertaken without a CDP and insofar as there has been development without a CDP, it is also inconsistent with two previously issued cease and desist orders, both of

which specifically prohibited additional development without Coastal Act authorization[12] . As discussed below, the 2003 Order required removal of specified elements of unpermitted development, cessation of any further unpermitted development, and that fugitive marine debris released by the operation be addressed. The 2007 Order required that a CDP be sought for the entire operation and that certain enumerated resource protection measures be implemented during the pendency of the permit process. The release of aquaculture debris in the estero continues to be a problem, despite both Orders containing provisions requiring that marine debris be addressed. Additionally, various elements of unpermitted development to be removed by the Orders persist on the subject property, and in fact additional unpermitted development has since been installed, in violation of both the Orders and Section 30600 of the Coastal Act. Finally, several of the resource protection measures required by the 2007 Order were never satisfactorily undertaken.

Furthermore, some of the Unpermitted Development is: 1) inconsistent with the policies in Chapter 3 of the Coastal Act, including Section 30231 (protection of biological productivity of coastal waters), Section 30230 (protection of marine resources), and Sections 30210 and 30220 (protection of public access), which require protection of coastal resources within the Coastal Zone; and 2) causing continuing resource damage, as discussed more fully in Section V below.

All of the Unpermitted Development subject to these Orders is within or adjacent to estuarine habitat of Drake's Estero, and lacks authorization under the Coastal Act as well as any review, as required by the Coastal Act, which is designed to provide for an affirmative determination as to whether or not the various types of development are or could be conditioned so as to be consistent with the Coastal Act and the protections of coastal resources. Absent review and the imposition of limitations and coastal resource-protection conditions, the unpermitted development has the potential to alter and adversely impact the resources associated with this sensitive habitat-type. Such impacts meet the definition of "damage" provided in Section 13190(b) of Title 14 of the California Code of Regulations ("14 CCR"), which defines "damage" as "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development." If the Unpermitted Development, including, but not limited to, operation of on and offshore aquaculture facilities, boat traffic in the lateral channel, discharge of marine debris, and placement of structures, is allowed to persist without being subject to appropriate review and conditions, further adverse impacts are expected to result (including the temporal continuation of the existing impacts) to resources protected under Chapter 3 of the Coastal Act.

The Unpermitted Development and the impacts therefrom remain on the Property. The continued presence of the Unpermitted Development, as described below, will exacerbate and/or prolong the adverse impacts to the estuarine habitat and the water quality and biological productivity of this area. The continued presence of the unpermitted development on the Property is causing continuing resource damage, as defined in 14 CCR Section 13190. Thus, the

[12] See Section 1.0(a) of the 2003 Order, cited above, and Section 2.0 of the 2007 Consent Order ("Respondent agrees to cease and desist from performing any new development... and from expanding or altering the current development that exists on the property...").

Commission has the authority to issue both a Cease and Desist and a Restoration Order in this matter.

IV. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order and Restoration Order are outlined in 14 CCR Section 13185 and 14 CCR Section 13195, respectively.

For a Cease and Desist Order and Restoration Order hearing, the Chair shall announce the matter and request that all parties 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, at his or her discretion, to ask of any other party. 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 time 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 14 CCR Sections 13195 and 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner so 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 and Restoration Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the motion above, per the Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order and Restoration Order

V. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-13-RO-01 AND RESTORATION ORDER CCC-13-RO-01[13]

A. DESCRIPTION OF PROPERTY

1) 'SUBJECT PROPERTY'

The property at issue in this matter is located at 17171 Sir Francis Drake Blvd. in the town of Inverness in Marin County, identified by the Marin County Assessor's Office as Assessor's

[13] These findings also hereby incorporate by reference the introductory section of the January 25, 2013 staff report ("Staff Report: Recommendations and Findings for Cease and Desist and Restoration Orders") in which these findings appear, which section is entitled "Summary of Staff Recommendation."

Parcel No. 109-13-017, and includes a large swath of the adjacent offshore submerged land within Drake's Estero (Exhibit # 1). As discussed further in Section V.C.I. below, the property subject to the proposed Orders was, through various state and federal permits and agreements, effectively leased to DBOC for the cultivation of oysters from 2005 until November 30, 2012. This holding, which consisted of approximately 4.6 acres onshore and 1060 acres of submerged lands, is located entirely within the Point Reyes National Seashore (Exhibit # 2). Extant development within the onshore leasehold consists of commercial aquaculture production, and retail facilities and appurtenant structures, residential structures, and visitor serving amenities. Of the total offshore lease area, the actual scope of DBOC's mariculture activities, including oyster racks and clam bottom-bags, is largely confined to approximately 147 acres of submerged lands within Drake's Estero, though boat transit to and from cultivation areas utilizes a substantial portion of the lease-area .

2) DRAKE'S ESTERO AND POINT REYES NATIONAL SEASHORE

Drake's Estero is a shallow tidal estuary comprised of four inland branching bays, with a fifth bay known as Estero de Limantour, to the east near where Drake's Estero meets the Pacific Ocean (Exhibit # 1). The only development within the estero, which spans nearly 2300 acres at higher tides, is DBOC's mariculture facilities and equipment. Receiving relatively little freshwater influx, Drake's Estero is considered a 'coastal lagoon'; salinity levels within the estero are similar to those found along the open coast. These geographic attributes of Drake's Estero, combined with its relatively undeveloped status, render the estero an area of ecological significance for myriad wildlife species. The importance to fish of the estuarine habitats, including eelgrass, within Drake's Estero was recognized by the Pacific Fisheries Management Council when it designated those habitats as "Essential Fish Habitat" and "Habitat Area of Particular Concern" under the Magnuson-Stevens Fisher Conservation and Management Act.[14]

Approximately 750 acres of submerged land within the estero is covered in eelgrass (*Zostera marina)*, a benthic flowering plant that provides important habitat for large numbers of species of invertebrates and fish and that is often described as 'nursery habitat' because the important role it plays in the juvenile life stages of many species. This eelgrass helps stabilize the mud and silt substrate upon which it grows, plays an important role in nutrient cycling in the ecosystem, and is the preferential forage of the black brant (*Branta bernicla nigricans*). The black brant is a goose whose strong dependence on eelgrass as food, among other factors, has contributed to vulnerability to starvation, resulting in a decline in Pacific populations. Eelgrass additionally helps provide the foundation for the estero's trophic structure which regularly supports thousands of shorebirds and waterfowl, resulting in Drake's Estero having been designated a site of regional importance by the Western Hemisphere Shorebird Reserve Network.

Drake's Estero is additionally of regional significance for marine mammals; the population of harbor seals within the estero is one of the largest concentrations in California, and between 300 and 500 individuals are pupped there annually. Drake's Estero supports about one third of the breeding harbor seals in Point Reyes, which in total is utilized as breeding ground by twenty percent of all harbor seals in California.

[14] http://www.pcouncil.org/facts/habitat.pdf

As the only national seashore on the Pacific coast of the continental United States, and as an area replete with a unique biota, Point Reyes National Seashore yearly attracts approximately 2.5 million visitors. Popular activities for those visiting the 70,000 acre seashore include hiking, and kayaking in the waters of Drake's Estero. The estero is thus an integral element in both California's landscape of coastal biotic resources, and also in the public's experience of a singular portion of a national preserve.

3) OYSTER CULTIVATION IN DRAKE'S ESTERO

While aquaculture has been undertaken in Drake's Estero since the 1930s, cultivation levels, locations, techniques, and species-type have varied dramatically through the intervening years. In March 16, 1972, a professional real estate appraiser submitted an appraisal of the value of the Johnson Oyster Company as of 1972, which confirmed that at the time the aquaculture lease from the State was for 1,013 acres, of which JOC only used approximately 50 acres, though control of the larger area was apparently necessary to ensure food and proper environmental conditions. According to data from the California Department of Fish and Wildlife Marine Aquaculture Coordinator, in 2004, the year prior to DBOC's purchase of the facility, there were 71,500 commercial oysters seeded in the estero. As of December 2012, DBOC's extant mariculture operation consisted of approximately 19 million oysters and 1.99 million clams.

DBOC also began cultivating Manila clams (*Ruditapes philippinarum*), a species of clam from Japan that has been documented to successfully colonize coastal waters of Canada and the United States when introduced, using bottom bags placed on the intertidal flats of the estero. Bottom bags are plastic mesh bags that can either be tethered in place or scattered across the tidal flats. DBOC's oyster cultivation in Drake's Estero is accomplished using both bottom bags on intertidal flats and rack culture in subtidal eelgrass beds. There are currently a total of 95 wooden racks in the estero, constituting approximately 250,000 board feet of lumber. These racks are raised approximately 4 or 5 feet above the eelgrass beds in which they are placed, and typically have six parallel 2x4 beams spaced 2 feet apart spanning their lengths. Metal cables hang on each side of the 2x4 beams, and clumps of oysters are spaced along the length of the cable for cultivation (Exhibit# 7).

B. DESCRIPTION OF COASTAL ACT VIOLATION

Though mariculture activities have been carried out within the estero for decades, as mentioned above, the scope and nature of these activities has changed dramatically throughout the years such that the existing facility and production is substantially distinct from the historic operations. Specifically, based upon information and records provided by the Department of Fish and Wildlife, DBOC's planting levels are approximately 450 times higher than those of JOC in the three years prior to its sale of the operation. The level of production maintained by DBOC since it began operations is significantly above the historical maximum production level achieved in the estero between1950 and the advent of the Coastal Act, and also above DBOC's predecessor's levels since the inception of the Coastal Act (with the exception of a ten year period from 1985 to 1995, when production levels were higher than they are currently). Additionally, production methods employed by DBOC differ substantially from those used by its predecessor; current

DBOC operations rely largely on the use of loose bottom bags and bottom bags tethered together with floats and anchors to form bag lines that can be placed on intertidal sandbars. Neither of these operational methods were employed to the current extent by JOC. Further, DBOC has also engaged in cultivation with the use of treated pipes as settling and grow medium in place of the oyster shell stringers used exclusively by JOC. This is a new culture technique that has never before been practiced in the estero. In addition, since 2007 DBOC has dedicated a significant proportion of its growing area and effort to the cultivation of Manila clams, an invasive shellfish species that Department of Fish and Wildlife records indicate was neither planted nor cultivated in the estero by JOC or previous operators.

Consequently, the Unpermitted Development at issue in this matter therefore consists, in part, of the entire extant offshore aquaculture operation and facilities. Additional Unpermitted Development subject to the proposed Orders includes the construction, installation, and alteration of structures and equipment both onshore and within the estero, landform alteration, and the intensification and alteration of processing, sales, and associated aquaculture operations. Furthermore, some of DBOC's unpermitted development is additionally violative of the Commission's 2007 Order, including installation of additional unpermitted development, discharge of marine debris in the form of abandoned, discarded or fugitive aquaculture materials, and boat traffic in the lateral sand bar channel near the mouth of the estero during a seasonal restriction established for harbor seal pupping sites.

C. BACKGROUND, HISTORY OF DEVELOPMENT AND REGULATORY ACTION

The following discussion is included herein for the limited purpose of providing background information regarding the property ownership and lease history, and does not reflect Commission stance regarding disputes and litigation thereon.

1) POINT REYES NATIONAL SEASHORE

On September 13, 1962, through the Seashore Authorization Act of 1962,[15] Congress authorized the establishment of Point Reyes National Seashore, and subsequently began acquiring land to effectuate its creation. In 1965, the State of California adopted AB 1024,[16] thereby conveying all tide and submerged lands beneath the navigable waters within the boundaries of the Point Reyes National Seashore to the United States, excepting and reserving to the people of the State the right to fish in the waters.[17] Formal establishment of the national seashore was accomplished on October 20, 1972, with publication of the required notice in the Federal Register.[18]

[15] 16 U.S.C. §§ 459c through 459c-7 (2012).

[16] AB 1024 (1965).

[17] February 26, 2004 memo from DOI Field Solicitor to the Superintendent of PRNS states that this reserved right to fish is only for "public" fishing, as distinct from aquaculture activities, thus clarifying that the reservation of rights to the State did not extend to the aquaculture facility.

[18] 37 Fed. Reg. 23,366 (1972).

Throughout that time, Johnson Oyster Company was operating on five acres of dry land adjacent to the estero, which it owned, and on submerged land pursuant to a least from the California Fish and Game Commission. In November of 1972, Johnson Oyster Company sold five acres of the dry land adjacent to Drakes Estero to the National Park Service, subject to a Reservation of Use and Occupancy ('RUO'), allowing JOC to continue using the approximately 1.5 acres onshore for specified purposes until November 30, 2012. This 40-year right to use and occupy the land, including the processing facility, was specified in the RUO as being "for the purpose of processing and selling wholesale and retail oysters, seafood and compl[e]mentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incident thereto."

The Wilderness Act of 1964[19] created a legal definition of *wilderness* in the United States and provided protections attendant thereto. In 1976, Congress subsequently designated 25,370 acres of land within PRNS as *wilderness* and 8,003 acres as *potential wilderness*.[20] This *potential wilderness* designation was assigned to areas within which obstacles to the land being designated as actual *wilderness* were to be removed over time to allow conversion into full *wilderness* status. As the Wilderness Act explicitly prohibits commercial activities within *wilderness* areas, the waters of Drakes Estero and the adjoining intertidal land were designated *potential wilderness* in light of the presence of the aquaculture operation.[21]

2) NON-COMMISSION REGULATORY INVOLVEMENT

The California Department of Fish and Wildlife (formerly Fish and Game)[22] has exercised lease authority over shellfish aquaculture activities in the State. Since at least the 1950s, the State has issued permits for aquaculture in the estero, with JOC assuming control of state-issued water bottom leases in Drake's Estero in 1958.

In 1972, JOC conveyed fee title to its property to the United States, reserving in the deed a 40-year right to use and occupy 1.5 acres of land, including the processing facility, "for the purpose of processing and selling wholesale and retail oysters, seafood and compl[e]mentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incident thereto." On its face, this Reservation of Use and Occupancy was to expire November 30, 2012.

In 1979, the State redesignated two oyster allotments into one 1,059 acre area; M-438-01. The same year, JOC entered into another Lease Agreement (No. M-438-02) with the State for the cultivation of purple-hinged rock scallops on an additional acre of submerged land in the estero, for a total of approximately 1,060 acres. Together, these leases granted JOC permission to

[19] 16 U.S.C. §1131-1136.

[20] Act of October 18, 1976, Pub. L. No. 95-544, 90 Stat. 2515, and §1(k) of the Act of October 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692, 2693.

[21] *Id.*

[22] At most of the times discussed herein, the Department of Fish and Wildlife was known as the Department of Fish and Game, and it is therefore referred to as such herein.

engage in specified mariculture activities on 1,060 acres in Drake's Estero. Subsequently, on October 8, 1993, allotment M-438-02 was amended to allow the cultivation of Manila clams within the one acre allotment.

On June 25, 2004, the Department of Fish and Game ('DFG') issued two "Renewal of Lease" documents to the JOC per Fish and Game Code §15400 for the off-shore aquaculture activities: one for M-438-01 for cultivation of two types of oysters, Pacific and European flat oysters, in a 1,059-acre area; and one for M-438-02 for the cultivation of scallops and Manila clams on the one acre area. The Renewal of Leases were to run for 25 years, but stipulated that if NPS did not renew the Reservation of Use and Occupancy for fee land in 2012, the DFG leases would expire.

In late 2004 DBOC purchased the mariculture facility from JOC, including the remaining term of the RUO. At the time of the transfer of ownership, NPS reminded DBOC in writing that the RUO under which the facility operated was to expire in 2012. DBOC subsequently applied for, and in 2008 was issued, an NPS special use permit (SUP) authorizing it to use approximately 1,050 acres offshore and 3.1 additional acres onshore for its operations. Both the original RUO and the SUP were set to expire on their own terms on November 30, 2012.

Mariculture leasing authority in the estero has therefore historically been treated as within the province of both the State and the federal government. In a May 15, 2007 letter, however, the DFG Office of General Counsel stated that the DBOC mariculture operation "is properly within the primary management authority of the PRNS, not the Department," and that although the reserved right to fish "extends to both commercial and sport fishing, it does not extend to aquaculture operations…fishing involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property."

In 2010, DBOC requested that Secretary of the Interior Kenneth Salazar ('Secretary') grant a Special Use Permit to allow DBOC to continue to operate the aquaculture facility and occupy the Property. On November 29, 2012 the Secretary issued a memorandum indicating that the RUO and SUP would be allowed to expire according to their terms on November 30, 2012; no extension or additional SUP would be granted (Attachment # 2). This memorandum directed the NPS to allow DBOC a period of 90 days to remove personal property, including shellfish and racks, from the on and offshore portions of the property, and prohibited commercial activities in the waters of the estero after November 30, 2012. Also on November 29, 2012, NPS sent DBOC a letter providing additional detail regarding the expected decommissioning and removal process (Attachment #3), which explained that DBOC would be allowed to continue to process and sell shellfish within the onshore portion of the RUO/SUP, but would not be allowed to plant any additional larvae or shellfish within the estero.

On December 12, 2012, DBOC and Kevin Lunny filed suit against the Secretary and various other federal officials to, among other things, enjoin eviction of DBOC and require the Secretary to issue a new 10-year SUP to DBOC. As of the date of this Commission action, this litigation is actively pending; DBOC's legal right to continued presence and operation within the estero therefore remains in dispute. While the ultimate outcome of this litigation is obviously relevant to the whether DBOC will continue to undertake aquaculture in this area, it does not impact the

Commission's legal authority to pursue Coastal Act violations on the Property and to ensure that activities undertaken thereon, either continued production or removal of the facility, are carried out in a manner consistent with the resource protection policies of the Coastal Act. The proposed Orders are drafted to account for the various potential outcomes of this litigation and, significantly, enumerate resource protection measures to be undertaken during the pendency of this legal challenge.

D. HISTORY OF COMMISSION ACTION ON THE SUBJECT PROPERTY

1) PERMITTING

The Commission has found in past-action that onshore structures on the Property pre-dating the Coastal Act were limited to the building that then housed the shucking room and retail counter, two houses, and two mobile homes.[23] In 1984, the Commission authorized the addition of a third mobile home to the site through Consistency Certification No. CC-34-84. Beyond this consistency certification, no permits have ever been issued by the Commission for any of the new development undertaken on the Property, which has included, among other things, modifications to the pre-Coastal structures, installation of new structures, and expansion and alteration of mariculture operations.

2) 2003 CEASE AND DESIST ORDER

The National Park Service, the County of Marin ('County'), and the State Department of Health Services (DHS) were involved in enforcement proceedings with the former lessee, Johnson Oyster Company, since at least the early-1990s for violations that included sub-standard electrical, plumbing, and septic, improper handling of shellfish, and unpermitted buildings. The County had been attempting to resolve numerous zoning, building and health code violations at the site since the late 1980s, culminating in litigation by the County. After the County won judgment in 1997 requiring Johnson to bring the facilities up to code and submit permit applications for the unpermitted development, Johnson submitted an application to the Commission in September 1997 for new buildings and a new septic system. The applications were deemed incomplete, and as the various violations remained unresolved, the County requested enforcement assistance from the Commission in 2003.

The Commission issued Cease and Desist Order No. CCC-03-CD-12 ('2003 Order') on December 11, 2003, to address unpermitted development on the Property (Exhibit #9). This order required, among other things such as desist from any unpermitted development, Johnson to remove unpermitted development, undertake marine debris management, and bring the sub-standard buildings up to applicable code. After Johnson transferred the remaining ownership interests in the property to DBOC in 2005, DBOC wrote a letter to the Commission dated April 10, 2006 (Exhibit # 8) stating that "Drakes Bay Oyster Company assumed the responsibility to comply with the CDO with the purchase of the leasehold interest and shellfish business from

[23] http://www.coastal.ca.gov/legal/Th16a-12-2003.pdf

Johnson Oyster Company in 2005." Subsequently, steps were taken to address unpermitted development subject to the 2003 Order; some, but not all, of the unpermitted development implicated in the 2003 Order was removed.

The 2003 Order required that some instances of unpermitted development be removed and the area restored, and in the case of some specifically enumerated instances of unpermitted development (that is, a mobile home, oyster cultivation equipment and a horse paddock), that an application for a CDP be submitted to retain specified items of development. However, despite these requirements, unpermitted development which both Johnson and DBOC allowed to persist on the property included a concrete foundation slab and unpermitted additions to three mobile homes. Additionally, Section 1.0(a) of the 2003 Order required that Johnson "…refrain from performing future development at the site not specifically authorized by a coastal development permit or a Consistency Certification." Subsequent to the issuance of the 2003 Order, and in unambiguous violation of this prohibition, new, unpermitted grading and paving was undertaken, and two storage containers, a processing facility, and construction trailer were installed on the property without permits.

Furthermore, Section 1.0(d) of the 2003 Order mandated that Johnson "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 paddock." Similarly, Section 5.0 of the 2007 Consent Order required that DBOC submit a CDP application to include all of the unpermitted onshore and offshore development. While a permit application was submitted by DBOC pursuant to this requirement, it was never completed.

3) 2007 CEASE AND DESIST ORDER

Since purchasing the property, DBOC has increased intensity of the aquaculture operations from the 2004 pre-purchase harvest level of one million oysters, and no clams, to approximately nine million oysters and one million clams per annum. Furthermore, DBOC continued to engage in additional instances of unpermitted development, including the placement of two large storage containers, a construction trailer, fencing, a wedge of fill topped with paving, and relocation, partial burial, and plumbing of five oyster culture tanks. In addition to being unpermitted development under the Coastal Act, it was also in violation of the 2003 Order. In light of this additional unpermitted development, and lack of compliance with Sections 1.0(a) and 1.0(d) of the 2003 Order, further action was required to address Coastal Act issues and to protect coastal resources.

The Commission issued Consent Cease and Desist Order CCC-07-CD-11 on December 12, 2007, to DBOC, with Kevin Lunny as its Representative (Exhibit # 10). Intended to be a short-term interim step during the pendency of other proceedings (as explicitly provided for in the 2007 Consent Order itself), the central requirements of the 2007 Consent Order were that DOBC 1) obtain a CDP for the *entire* facility, including both on and off-shore operations and 2) adhere to interim resource protection operational restrictions during the permit application process. The interim resource protection measures enumerated in the 2007 Consent Order included development and adoption of a water quality/hazardous waste discharge management plan, a

vessel transit plan, and a debris removal plan. Specifically, Sections 3.2.2 and 3.2.3 of the 2007 Consent Order sought to address cultivation debris by requiring removal of present and future debris and abandoned equipment and the submittal of a Debris Removal Plan. Additionally, the interim operating measures included conditions addressing invasive species management, acceptable cultivation species, harbor seal protection areas, and the use of bottom bags in sensitive resource areas.

In addition, Section 2.0 of the 2007 Order specifically prohibited further unpermitted activity on the site, mandating that DBOC "cease and desist from performing any new development…or expanding or altering the current development that exists on the property." Finally, the 2007 Consent Order was designed to be supplemental to the 2003 Order, explicitly providing in Section 24 that, "nothing in this Consent Order is intended to interfere with or preclude DBOC's compliance with Cease and Desist Order No. CCC-03-CD-12."

The fundamental objective of the 2007 Consent Order and enforcement proceedings was to finally ensure that the aquaculture facilities in Drake's Estero were reviewed for consistency with Coastal Act resource protection policies, via a permit action which would both provide for Commission review and provide a means by which development could be appropriately conditioned to address any Coastal Act concerns. However, the permit application remains incomplete to this day, and many of the interim resource protection measures imposed by the order have not been complied with, and additional issues have arisen.

4) ONGOING ENFORCEMENT

Since the issuance of the 2007 Consent Order, there have been numerous occasions of non-compliance with order requirements, many of which have resulted in communications from Commission staff attempting to help effectuate compliance. Commission staff has, over the years, sent a number of letters concerning specific violations of the order. These concerns with continuing noncompliance and lack of compliance with Coastal Act requirements have led to this current enforcement action.

These letters included a letter sent on March 24, 2008 (Exhibit # 11). This letter concerned DBOC's use of mechanized equipment to dig a large trench proximate the intertidal portion of the estero, in violation of the Coastal Act and the 2007 Order, which specifically required that DBOC cease and desist from undertaking any new unpermitted development activities on the property. The same year, on September 10, 2008, Commission staff sent an additional letter to DBOC concerning non-compliance with a number of specific requirements of the 2007 Consent Order for submittal of information and materials (Exhibit # 12).

Upon confirmation that Manila clam cultivation was being undertaken in unauthorized locations within Drake's Estero, on September 16, 2009, staff again sent DBOC correspondence raising concerns of non-compliance with the 2007 Consent Order (Exhibit # 13). This letter explained that DBOC was in violation of the 2007 Consent Order for, among other things, having failed to submit required permit application materials by the date required in the order, and for cultivating clams in a manner inconsistent with Section 3.2.8 of the 2007 Consent Order which limited cultivation to a specified area.

Staff sent DBOC a subsequent letter December 7, 2009 again regarding the Manila clam cultivation, upon learning that Manila clams had been relocated on October 19, 2009, to an area designated for harbor seal protection (Exhibit # 14) and from which activities were precluded ("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…." Section 3.2.6). In this letter, staff specifically directed DBOC to "remove the Manila clams and all equipment and materials from the harbor seal protection area and into the one-acre shellfish aquaculture lease area within thirty days of receipt of this letter, *after receiving approval from the Coastal Commission and the National Park Service of the method of removal.*" (Emphasis added). Staff additionally indicated in this letter that stipulated penalties were to be assessed and were due on December 21, 2009, as a result of DOBC remaining in violation of the terms of five sections of the 2007 Orders. The content of this letter and the concerns about any activities taking place in this area were subsequently reiterated the next day by staff in a conversation with Kevin Lunny, in which it was emphasized that due to the sensitivity of the harbor seal protection area in which the bags were then located, the bags should not be moved until after coordination with the Commission and the NPS regarding method of removal and arrangements made for oversight.

Despite these communications, DBOC subsequently undertook unsupervised removal of the Manila clams. Upon receipt of this information, and after DBOC failed to remit payment of the stipulated penalties by the requested date, staff sent DBOC a letter on December 22, 2009, again requesting compliance with the 2007 Consent Order, as well as payment of the stipulated penalties by December 31, 2009 (Exhibit # 15). In correspondence dated December 21, 2009, DBOC disputed staff's characterization of the facts, calculation of penalties, and decision to impose a fine, and requested a meeting with Commission staff (Exhibit # 16). Following a meeting with staff and the Commission's Executive Director on January 6, 2010, to discuss the ongoing Coastal Act violations on the Property, DBOC sent staff correspondence on January 19, 2010, asserting variously that Commission staff was misinterpreting the Commission's 2007 Order, and continuing to dispute facts regarding cultivation of Manila clams (Exhibit # 17).

Concerns with DBOC's failure to comply with the 2007 Orders, including the debris management and harbor seal protection components, were again raised by staff in correspondence dated September 29, and October 26, 2011 (Exhibits #18 and #19). Further discourse regarding order non-compliance included a meeting on January 4, 2011, a letter from Commission staff dated February 1, 2012, seeking to clarify issues regarding the definition of the lateral channel, and a letter from DBOC dated February 29, 2012, disputing staff's characterization of the lateral channel (Exhibits # 20 and #21).

Following additional correspondence from DBOC to the Commission and NPS (Exhibits # 22 and # 23), on July 30, 2012, staff sent DBOC a letter comprehensively summarizing the various ways in which DBOC had failed to comply with the 2007 Order, and indicating that it had thus become necessary to commence a new enforcement action and order proceeding so as to ensure protection of coastal resources in Drake's Estero and finally obtain compliance with the Coastal Act (Exhibit # 24). DBOC responded to the issues raised by staff's July correspondence by reiterating claims that DBOC had complied with the 2007 Orders, asserting staff had

misinterpreted the 2007 Orders and attendant facts, and disputing the Commission jurisdiction to regulate aspects of their operation (Exhibit # 25).

Finally, in an attempt to obtain compliance with the Coastal Act and the requirements of orders issued for this facility, as well as to provide a forum for ensuring that the requirements were clear to all parties, on October 24, 2012, staff sent DBOC Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings (Exhibit # 26), and worked concertedly with DBOC for several months in an attempt to resolve these violations in a new, revised Consent Order. Unfortunately, on the day of late mailing for the hearing, Respondent's counsel informed staff that agreement had not been reached.

E. BASIS FOR ISSUANCE OF THE ORDERS

1) STATUTORY PROVISIONS

(a) Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states, in relevant part:

> *(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….*
>
> …
>
> *(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.*
>
> …

(b) Restoration Order

The statutory authority for issuance of this Restoration Order is provided in Section 30811 of the Coastal Act, which states, in relevant part:

> *In addition to any other authority to order restoration, the commission… may, after a public hearing, order restoration of a site if it finds that [a] the development has occurred without a coastal development permit from the commission, local government, or port governing body, [b] the development is inconsistent with this division, and [c] the development is causing continuing resource damage.*

The following paragraphs set forth the basis for the issuance of the proposed Cease and Desist and Restoration Orders and summarize the substantial evidence that the development meets all of the required grounds listed in Section 30810 and 30811 for the Commission to issue a Cease and Desist and Restoration Order.

2) APPLICATION TO FACTS

(a) Development has occurred without a Coastal Development Permit

As previously presented in Sections III, V.B., and V.D. of, and elsewhere within, this report, the activities at issue in this matter constitute 'development' as defined in the Coastal Act and are therefore subject to permitting requirements. As Commission staff has verified that the cited development on the Property was conducted without a CDP, the standard for issuance of a cease and desist order pursuant to Section 30810 has been met. In addition, and as enumerated immediately below, various elements of unpermitted development are inconsistent with resource protection policies of Chapter 3 of the Coastal Act and are potentially causing continuing impacts to resources such that the requirements for issuance of a restoration order pursuant to Section 30811 have been met.

(b) The Unpermitted Development at Issue is Inconsistent with the Coastal Act

The Unpermitted Development described herein raises a number of concerns under the Coastal Act policies, including Section 30231 (protection of biological productivity of coastal waters and water quality), Section 30230 (marine resource protection), and Sections 30210 and 30220 (public access), of the Coastal Act. Not only do the development activities raise these concerns, but since they are wholly unpermitted, the Commission has not had the opportunity to analyze the activities in sufficient detail and to consider and impose conditions in order to eliminate or minimize inconsistencies with the Coastal Act.

i) Protection of Biological Productivity, Water Quality, and Marine Resources

Coastal Act Section 30231 provides:

> *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 and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of streams.*

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 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.*

A. Eelgrass

At higher-high tides, the tidal lagoon system constituting Drake's Bay (including Drake's Estero and Estero de Limantour) covers approximately 2300 acres of land; nearly half of which is intertidal. Typically less than 6.5 feet deep, the subtidal portions of the estero are comprised of silty sands and muds and support almost 750 acres of eel grass (*Zostera marina*), nearly 7% of all eelgrass found in the state of California. Eelgrass is a flowering plant that grows from rhizomes in the subtidal sediment and is important to the juvenile life stage of many aquatic species, provides critical habitat for number of adult invertebrates and fish, and affords foraging habitat for many species of birds.[24] Specifically, eelgrass is the preferred forage for the black brant (*Branta bernicla nigricans*), 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 black brants migrate from the Artic to Point Reyes each year and Drake's Estero provides vital wintering habitat due to its large eelgrass beds.

In addition to providing critical habitat and ecosystem functions, eelgrass is highly sensitive to anthropogenic disturbance; in shallow water, propellers and even propeller wash can tear up the eelgrass canopy and displace the rhizomes from which the blades of grass grow, leaving the areas bare of vegetation. [25] Aerial photographs of the estero demonstrate the effects of propeller cuts from outboard motors used to facilitate placement and retrieval of oysters through the eelgrass canopy surrounding oyster racks and bottom bags. (Exhibit # XX). The cumulative effects of this propeller scarring may be significant because it takes years for scars to fully recover.[26] The boat traffic of the unpermitted operations therefore has the potential to negatively impact the biological productivity associated with the eelgrass habitat, inconsistent with Sections 32030 and 30231 of the Coastal Act. The proposed Orders require a vessel management plan to ensure that boat traffic is limited to prescribed areas reasonably necessary to carry out the operations.

Furthermore, during a visit to the estero in 2007, Commission staff scientist Cassidy Teufel

[24] Phillips, R.C. 1984. The ecology of eelgrass meadows in the Pacific Northwest: A community profile. U.S. Fish and Wildlife Service. 85 pp.

[25] Zeiman, J.C. 1976. The ecological effects of physical damage from motor boats to turtle grass beds of southern Florida. Aquatic Botany 2:127-139.

[26] Dawes, C.J., J. Andorfer, C.Rose, C. Uranowski, and N. Ehringer. 1997. Regrowth of the seagrass *Thalassia testudinum* into propeller scars. Aquatic Botany 59: 139-155.

noted the absence of eelgrass within the footprint of the oyster racks, despite the presence of dense eelgrass canopy on either side. As eelgrass is highly sensitive to variant light levels, it is likely that the exclusion of eelgrass from within and immediately around the racks is the result of shading.[27] The total area under active and abandoned oyster racks where eelgrass is excluded is estimated to be approximately 8 acres.[28] Finally, depending on orientation relative to currents, oyster racks can also cause scouring or increases in sedimentation, either of which could contribute to reduced eelgrass abundance.[29] The continued persistence of unpermitted equipment within the estero thus has the potential to contribute to the exclusion of eelgrass from otherwise suitable habitat, thereby reducing the availability of ecosystem services afforded by intact eelgrass habitat, inconsistent with Chapter 3 of the Coastal Act. The proposed Orders address these impacts by requiring the identification and removal of racks that have fallen into disuse during the pendency of the operation, which would reduce these effects.

B. Wood Preservatives

In addition to the exclusion of eelgrass from their footprint, the physical composition of the oyster cultivation racks raises concern regarding potential impacts to marine resources. DBOC's extant operation in Drake's Estero consists of approximately 95 racks, constituting 250,000 board feet of lumber,[30] which are constructed out of lumber pressure treated with a wood preservative. Chromated copper arsenate was almost uniformly used as to preserve wood prior to 2003 and is highly toxic to marine organisms.[31] It is designed to be very persistent in wood, however aquatic organisms are affected at a parts-per-million level, a level at which the chemicals do leach.[32] The leached toxic compounds are taken up and concentrated by marine organisms and accumulate in sediments.[33] The continued presence of pressure treated oyster racks in the estero is therefore likely to have a deleterious impact on water quality and fitness of marine organisms, inconsistent with Sections 30230 and 30231 of the Coastal Act.

C. *Didemnum*

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[27] Burdick, D.M. and F.T. Short. 1999. The effects of boat docks on eelgrass beds in coastal waters of Massachusetts. Enivornmental Management 23:231-240.

[28] Brown, D. and B. Becker. 2007. NPS Trip reports for March 13, 2007 (Oyster rack, bag, line and eelgrass assessment) and March 20, 2007 (Eelgrass satellite imagery ground trothing).

[29] Forrest, B.M. and R.G. Creese. 2006. Benthic impacts of intertidal oyster culture with consideration of taxonomic sufficiency. Environmental Monitoring and Assessment 112:159-176.

[30] Drakes Bay Oyster Company *Ex parte* Application for Temporary Restraining Order (December 12, 2012), at 1.

[31] Weis, J.S. and P. Weis. 1996. The effects of using wood treated with chromated copper arsenate in shallow-water environments: A review. Estuaries 19:306-310.

[32] Weis, J.S. and P. Weis. 1992. Transfer of contaminants from CCA-treated lumber to aquatic biota. Journal of Experimental Marine Biology and Ecology.

[33] *Id.*

With the limited exception of the mudstone found at Bull Point, there is very little naturally occurring hard substrate within Drake's Estero. One effect of oyster mariculture is that it introduces 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. In Drake's Estero, the oyster racks and oysters provide habitat for the tunicate *Didemnum sp*., a colonial ascidian that reproduces rapidly and fouls marine habitats. *Didemnum* colonizes hard substrates and alters marine habitats by covering siphons of infaunal bivalves, serving as a barrier between demersal fish and benthic prey, and overgrowing native organisms.[34]

A colonial organism, portions of *Didemnum* can be broken into numerous pieces, each of which is a viable individual capable of growth and subsequent fragmentation and dispersion. Routine mariculture activities, including harvesting and washing, therefore have the potential to cause proliferation of the *Didemnum* through unintentional fragmentation. Within Drake's Estero, colonies of *Didemnum* can be found in abundance on DBOC's racks and oysters as well as on Bull Point. Additionally, surveys of a marine ecosystem in north eastern United States with similar characteristics to Drake's Estero suggest that *Didemnum* is able to successfully colonize eelgrass meadows, a phenomenon which has additionally been observed more locally in Tomales Bay.[35] Colonization is likely to result in adverse impacts to the eelgrass, including blocking photosynthesis, release of seed, and natural defoliation.

Given the ease with which *Didemnum* can be spread throughout an ecosystem through fragmentation, it is critical that invasive species management be incorporated into the routine harvest and production practices at DBOC to ensure that any ongoing operations are consistent with Section 30231 of the Coastal Act. Currently, some initial washing and shucking activities occur on a dock located both above the estero's waters and along its shoreline. During these operations, *Didemnum* and other epibiotic organisms are frequently collected and deposited into the estero where they may be transported by currents and tides to eelgrass meadows and other locations. The proposed Orders address the biological productivity concerns raised by the presence of *Didemnum* by requiring an interim invasive species management plan during the pendency of the interim use period.

D. Invasive Species Concerns

An additional concern regarding the introduction of non-native and potentially invasive species into the estero is DBOC's cultivation of reproductively viable Manila clams. The Manila clams, native to the waters of Japan, have the documented ability to survive outside of aquaculture facilities in coastal waters of Canada and the United States. In an effort to protect native species abundance and diversity by preventing further naturalization of Manila clams, the Commission

[34] Marine Nuisance Species, Species *Didemnum vexillum. USGS National Geologic Studies of Benthic Habitats, Northeastern United States*. Retrieved January 7, 2013, from http://woodshole.er.usgs.gov/project-pages/stellwagen/didemnum/

[35] National Research Council, 2009. Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California. National Academies of Science, 139 pp. Pages 32-60.

has, in past permitting actions precluded the cultivation of reproductively viable Manila clams at aquaculture facilities.[36] DBOC's continued cultivation of almost 2 million reproductively viable Manila clams in the estero therefore raises concerns regarding consistency with the protective policies of Sections 30230 and 30231 of the Coastal Act, which direct the protection of biological productivity and marine resources.

E. Harbor Seals

DBOC's unpermitted activities additionally have the potential to negatively impact marine mammals residing in Drake's Estero. Harbor seals are year-round residents of the estero; 20% of California's harbor seal pupping takes place at Point Reyes, and one third of that occurs in Drake's Estero. During pupping season, March 1st through June 30th, nursing pups remain with their mothers for four to six weeks and are then weaned to forage on their own, during which time mothers will often leave pups hauled out on beaches while foraging for food. Pedestrian and boat activity can result in physiological and behavioral changes in harbor seals, causing them to delay haul-out behavior, delay returning to their pups, interrupt resting behavior, or to flush from the shore into the water. This can increase energy requirements by decreasing the haul-out period, create a trampling risk for pups, and increase the chance of pup abandonment.[37]

As part of DBOC's operation, there are large numbers of bottom-culture bags located near the intertidal sand islands near the mouth of the estero in areas used as seal haul-out sites. Additionally, human presence and vessel transit can disturb foraging birds such that birds are excluded from feeding or roosting areas, cause birds to take flight, and reduce feeding efficiency and feeding time.[38] Ongoing harvesting and production operations in the vicinity of birds and hauled-out seals therefore have the potential for negative impacts on the marine biota, inconsistent with Sections 30230 and 30231 of the Coastal Act. The vessel transit plan and harbor seal protection areas required by the proposed Orders seek to address and minimize impacts of DBOC's operation on these birds and mammals.

F. Debris

For the last several years, decaying and abandoned oyster cultivation equipment and infrastructure has been washing ashore in Drake's Estero. This debris is attributable to both historic and ongoing operations and includes racks, plastic and metal wires, ties, poles, posts, and other equipment and can result in displacement and degradation of native habitat, entanglement of marine organisms, and impairment of biological processes. As Section 30231 of the Coastal Act affords protection to biological productivity and water quality in coastal waters, this cultivation debris persists in the estero in contravention of Chapter 3 of the Coastal Act. The proposed Orders would require that this debris be addressed both by routinely removing existing

[36] Permit amendment staff report available at http://documents.coastal.ca.gov/reports/2012/8/F7a-8-2012.pdf

[37] Surya, R.M. and J.T. Harvey. 1999. Variability in reactions of Pacific harbor seals, *Phoca vitulina richardsi*, to disturbance. Fishery Bulletin 97:332-339.

[38] Stillman, R.A., A.D. West, R.W.G. Caldow, S.E.A. Le V. Dit Durell. 2007. Predicting the effect of disturbance on coastal birds. Ibis 149:73-87.

debris, and by prospectively preventing any additional release.

ii) Location of New Development and Fill of Wetlands

Section 30250 of the Coastal Act provides in part:

> *(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources….*

Coastal Act Section 30233 states in part:

> *(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*
>
> *…*
>
> *(6) Restoration purposes.*
>
> *(7) Nature study, aquaculture, or similar resource dependent activities.*
>
> *…*
>
> *(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary….*

In the context of the development subject to the proposed Orders, Coastal Act Sections 30250 and 30233 broadly require that development, including development within coastal waters, be sited and designed so as to minimize adverse impacts and maintain functional capacity of the surrounding environment. Grading, paving, and installation of structures on the onshore portion of the Property was undertaken without the benefit of a permit, thereby depriving the Commission of the opportunity to ensure that development was clustered and sited in a manner consistent with the minimization of impacts to coastal resources.

Furthermore, the ongoing unpermitted aquaculture activities in Drake's Estero have resulted in fill of coastal waters with mariculture-associated equipment, including racks, bags, and debris. While aquaculture is an enumerated use for which fill of coastal waters and estuaries may be permissible, Section 30233(c) explicitly requires that any such alteration be undertaken in a manner that maintains or enhances the functional capacity of the water body. Again, as the Commission has not been thus afforded the opportunity, though the permitting process, to review and develop any necessary protective conditions, the extant operation and associated off-shore development, it has been denied the occasion to develop and require implementation of resource-protection measures appropriate to the operation.

As mentioned above, by providing the framework for DBOC to seek authorization for specified elements of unpermitted development, the Orders ensure the Commission will have the opportunity to fully review and condition any unpermitted development, within and adjacent to the Estero, that DBOC desires to retain. Additionally, if during the permit-review process the Commission determines that the development at issue is inconsistent with these or other Chapter 3 policies and subsequently deny authorization of the development, the Orders require consequent removal of that development.

iii) Public Access

Coastal Act Section 30210 provides:

> *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Section 30220 of the Coastal Act states:

> *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses*

Uniquely, the Property is located within Drake's Estero of the Point Reyes National Seashore, a national seashore maintained by the National Park Service which annually attracts approximately 2 million visitors. Significantly, this specific area is used by kayakers as a put-in site from which to explore the publicly-owned Drake's Estero, Estero de Limantour, and the rest of the marine wilderness from the water. The addition of unpermitted structures, paving, and other development to the site, the discharge of marine debris, and the installation/relocation of cultivation racks and bags has the potential to negatively impact both the ability of the public to access the water and to safely recreate therein. The marine debris and oyster cultivation racks in particularly have the potential for deleterious impact on public recreation and enjoyment of the national seashore. The marine debris can cause entanglement and is blight on the natural landscape, while the oyster racks become exposed at lower tides, providing a potential hazard to those recreating in the overlying waters.

Through the proposed Orders, DBOC will remove the specified portions of Unpermitted Development, including the oyster racks that have fallen into disuse, and fugitive marine debris. By only requiring removal of abandoned racks, the proposed Orders would ensure that the ongoing needs of the mariculture operation are met while not unduly burdening public recreation by confining underwater development to that which is reasonably useful and necessary to the operation.

Furthermore, the proposed Orders require that DBOC apply for a permit to retain and continue any enumerated items of development or activities that they wish to maintain that are potentially consistent with the Coastal Act. This process will ensure that the Commission has the opportunity to review the development remaining on the Property for consistency with Chapter 3 of the Coastal Act. Pursuant to the proposed Orders, DBOC would additionally be obligated to

implement supplementary interim resource protection measures to ensure that any ongoing activities on the Property are consistent with the Coastal Act.

(c) Unpermitted Development is Causing Continuing Resource Damage

The unpermitted development is causing 'continuing resource damage', as those terms are defined by Section 13190 of the Commission's regulations.

(i) Definition of Continuing Resource Damage

Section 13190(a) of the Commission's regulations defines the term 'resource' as it is used in Section 30811 of the Coastal Act as follows:

> 'Resource' means any resource that is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.

The term 'damage' in the context of Restoration Order proceedings is defined in Section 13190(b) as follows:

> 'Damage' means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.

In this case, the resources affected include the habitat and ecosystem functions provided by the impacted eelgrass; the biological productivity and water quality of the waterways; and the integrity of the existing waterways. The damage includes the destruction and exclusion of eelgrass; the disturbance of marine organisms, including birds and marine mammals; the degradation of water quality and biological productivity; and the alteration of the waterways, as described in the Section V, above.

The term 'continuing' is defined by Section 13190(c) of the Commission's regulations as follows:

> 'Continuing', when used to describe 'resource damage', means such damage, which continues to occur as of the date of issuance of the Restoration Order.

As of this time, the unpermitted development that is the subject of these proceedings and the results thereof remain at the subject property. As described above, the unpermitted development results in impacts to coastal resources, including the habitat provided by eelgrass and estuarine mudflats; the biological productivity and quality of waterways; the physical integrity of those waterways; and human recreation within Drake's Estero. The operation of offshore aquaculture facilities, grading and fill within and adjacent to the Estero, placement of structures, boat traffic in the lateral channel, and discharge of marine debris continues to impact the coastal resources, both by continuing to disturb and displace native flora and fauna, preventing the native

ecosystem from existing or functioning and thereby disrupting the biological productivity of these areas, and by continuing to introduce debris and pollutants into the waterways.

As described above, the unpermitted development is causing adverse impacts to resources protected by the Coastal Act that continue to occur as of the date of this proceeding, and therefore damage to resources is "continuing" for purposes of Section 30811 of the Coastal Act. The damage caused by the unpermitted development, which is described in the above paragraphs, satisfies the regulatory definition of "continuing resource damage." The third and final criterion for issuance of a Restoration Order is therefore satisfied.

(d) Orders are Consistent with Chapter 3 of the Coastal Act

The proposed Cease and Desist and Restoration Orders attached to this staff report as Appendix A are consistent with the resource protection policies found in Chapter 3 of the Coastal Act. The proposed Orders require DBOC to address enumerated elements of unpermitted development on the Property, apply for authorization to retain certain specified items of development that may be consistent with the Coastal Act, undertake both near and long-term resource protection measures, and cease and desist from conducting any further unpermitted development on the Property. The proposed Orders require DBOC to implement resource protection measures during the pendency of any continued presence on the Property, including invasive species management, haul-out area and lateral channel avoidance, and debris management. Further, should DBOC's facility cease to be operational for want of state or federal authority to persist, the Orders direct DBOC to develop a removal plan to address both on and off-shore development.

Failure to undertake the actions required by the proposed Orders could lead to decreased water quality and biological productivity of the subject property's highly productive estuarine habitat, inconsistent with the resource protection policies of the Coastal Act. The primary function of the resource protection measures enumerated in the proposed Orders is the improvement of water quality and biological productivity by removing extant impediments to productivity and preventing future impacts to ecosystem resource cycling; therefore the proposed uses are consistent with Sections 30231 and 30230. Further, by ultimately providing for restoration of the natural condition of Drake's Estero upon cessation of mariculture activities, the proposed project will restore riparian ecosystem functions and increase nearshore terrain available for use by wildlife and for human recreation.

Therefore, the proposed Cease and Desist and Restoration Orders are consistent with the Chapter 3 policies of the Coastal Act.

F. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Commission finds that issuance of these Orders to compel compliance with the Coastal Act, to restore resources impacted by the Unpermitted Development activities, and to mitigate the impacts that resulted from the Unpermitted Development are exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 et seq., and will not have significant adverse effects on the environment, within the

meaning of CEQA. The Orders are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines, which are also in 14 CCR.

G. SUMMARY OF FINDINGS OF FACT

1. The National Park Service is the owner of the land located at 17171 Sir Francis Drake Blvd, in Inverness, Marin County, and property underlying the offshore facilities located in Drake's Estero at APN 109-13-017. The property is located within the Coastal Zone and is designated as actual wilderness as of December 4, 2012 (77 CFR 233; 71826-71827).

2. Drakes Bay Oyster Company is the lessee of the property specified in Finding 1, operator of the facility at issue, and has performed and maintained unpermitted development which is the subject of these Cease and Desist and Restoration Orders.

3. Drakes Bay Oyster Company knowingly undertook development, as defined by Coastal Act Section 30106, without a coastal development permit, and in violation of a previously issued cease and desist order, on the subject property.

4. Drakes Bay Oyster Company undertook unpermitted development, by placing and maintaining development and conducting development activities, all without a Coastal Development Permit.

5. The Unpermitted Development is inconsistent with Chapter 3 of the Coastal Act and is causing "continuing resource damage" within the meaning of Coastal Act Section 30811 and Title 14, California Code of Regulations, Section 13190.

6. Coastal Action Section 30810 authorizes the Commission to issue a cease and desist order in these circumstances. Coastal Act Section 30811 authorizes the Commission to issue a restoration order in these circumstances.

7. The work to be performed under these Orders, if completed in compliance with the Orders and the plans required therein, will be consistent with Chapter 3 of the Coastal Act.

H. ASSERTED DEFENSES AND COMMISSION'S RESPONSES

DBOC's counsel completed a statement of defense form; however, it primarily consists of references to prior correspondence with Commission staff. Commission staff excerpted from that correspondence, from the statement of the defense form itself, and from a letter submitted the morning before the staff report had to be issued, anything that could conceivably be characterized as a defense. As a result, the Commission notes that many of the issues raised below are not actually defenses in that they do not contest the elements necessary for the Commission's issuance of a Cease and Desist and Restoration Order under Sections 30810 and 30811 of the Coastal Act (whether or not there was unpermitted development, and whether this unpermitted development is inconsistent with Chapter 3 of the Coastal Act and having

continuing resource impacts). Despite this, as a courtesy and as background, we provide the following responses, grouped based on subject-matter, and with citations to the documents in which they claims appeared.

Boat Traffic

In addition to the specific responses below, as a general matter, the defenses listed in this section, all of which relate to boat traffic and the definition of the Lateral Channel, do not address the Commission's finding the DBOC's operation of boats in the Lateral Channel is a change in intensity of use from the pre-1973 levels of use of that area, and is therefore unpermitted development, which is the sole criterion that must be satisfied to support our issuance of a Cease and Desist Order ("CDO"). Thus, the contentions in this section do not constitute defenses to the Commission's issuance of a CDO. For the most part, they do not contest any of the criteria for the issuance of a restoration order either. Finally, they also do not address the other types of unpermitted development cited by the Commission or the other alleged violations of the 2007 Consent Order.

1. "*DBOC denies that it has operated any boats in the lateral channel in violation of the 2007 Consent Order*" (Statement of Defense Form.)

This is a general denial without any factual support. The body of the Commission's findings provides evidence in support of the Commission's contrary legal conclusion. The Commission's responses to DBOC's more specific arguments as to why DBOC believes it has not operated boats in the later channel in violation of the 2007 Consent Order are listed below.

2. "*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').*" (October 24, 2012 letter from Ryan R. Waterman, Stoel Rives, to Nancy Cave, California Coastal Commission (hereinafter, "Oct. 24, 2012 letter") at 2)

The Commission disagrees that the 1992 Multi-Agency Seal Protocol used the phrase "Lateral Channel" in the limited fashion suggested by DBOC. DBOC has been raising this argument with Commission staff since at least January of 2012. During a January 4, 2012 meeting, DBOC attorney Zachary Walton made a related argument when he asserted that the language of the SUP stating that "the 'Main Channel' and 'Lateral Channel' of Drakes Estero will be closed to boat traffic" during certain periods actually meant that only the *intersection* of those channels would be so closed. Commission staff responded formally in a letter dated February 1, 2012, in which they pointed out that the 1992 Multi-Agency Seal Protocol includes a map of the estero that clearly identifies the Lateral Channel and defines it precisely as Commission staff has interpreted it. For more detail, see pages 2-4 of the February 1, 2012 letter from Jo Ginsberg, California Coastal Commission, to Kevin Lunny, DBOC, (hereinafter, "Feb. 1, 2012 letter"), attached hereto as Exhibit 20.

In any event, how the 1992 Multi-Agency Seal Protocol used the phrase "Lateral Channel" is irrelevant to either the question of whether DBOC's boat traffic violates the Coastal

Act, or whether it violates the 2007 Consent Order. With respect to the latter, the 2007 Consent Order incorporates the SUP; and, as was also explained in the February 1, 2012 letter, the SUP supersedes and replaces the 1992 Multi-Agency Seal Protocol. Thus, it is the SUP that is relevant. The SUP contains an integration clause (provision 32 on page 14) that states that the SUP itself, with its exhibits, "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." Again, see page 2 of the Feb. 1, 2012 letter, attached as exhibit 20, for more detail.

DBOC also argues that the Commission misunderstands how the phrase "Lateral Channel" has been defined in the 2008 SUP itself. Unlike the definition in the 1992 Multi-Agency Seal Protocol, the definition in the 2008 SUP is relevant. However, the Commission strongly disagrees with DBOC's claim regarding the 2008 SUP's definition of the phrase "Lateral Channel." The Commission's interpretation is supported by the plain language of the SUP, as is confirmed by a January 23, 2012 letter from Superintendent Cicely Muldoon (NPS) letter of Jan 23, 2012, from Cicely Muldoon, Superintendent, Point Reyes National Seashore, attached hereto as Exhibit 27.

3. "*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.*" (Oct. 24, 2012 letter at 2.)

DBOC's "operational practice," even if it is as DBOC represents, does not demonstrate that its activities have been acknowledged and accepted, much less that the activities were in compliance with the Coastal Act or the 2007 Consent Order. DBOC does not cite to any evidence that its use of the Lateral Channel during the pupping season, despite the provisions against this activity in the 1992 Multi-Agency Seal Protocol and 2008 SUP, has been acknowledged or condoned by the resource agencies, and the Commission is not aware of any such evidence. Moreover, even if those agencies did condone DBOC's actions, that would not be relevant to whether those practices are in violation of the Coastal Act or the 2007 Consent Order.

4. "*. . . 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.*" (Oct. 24, 2012 letter at 2.)

See prior answers. The references in the 2008 SUP are sufficiently clear on their face so as to obviate the need for further definition or metrics.

5. "*Operational Practice Defines the Westernmost Extent of the 'Lateral Channel' During the Harbor Seal Pupping Season*" (Oct. 24, 2012 letter at 2, § I.A. heading.)

"*. . . restrictions on oyster boat travel in Drakes Estero during harbor seal pupping season have been in place since May 1992.*" (Id. at 2.)

See response to point 2.

6. "*CDFG official Tom Moore . . . is the most knowledgeable person regarding the protective actions taken . . . . 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.'*" (Oct. 24, 2012 letter at 2-3.)

Mr. Moore's interpretation of the 1992 Multi-Agency Seal Protocol is not relevant, as the protocol, which is comprised of a series of three letters and an attached map that clearly delineates the Lateral Channel and shows where it begins and ends, is clear on its face. Moreover, the 1992 Multi-Agency Seal Protocol itself is not relevant, for the reasons stated above (see response to point 2).

7. "*. . . 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.*" (Oct. 24, 2012 letter at 3.)

See responses to points 2 and 6. In addition, although the signatory agencies did not change the 1992 protocols to allow use of the Lateral Channel during the pupping season, NPS, through its 2008 SUP, did in fact revise its protocols based on operational experience by creating a year round harbor seal protection area in addition to the seasonal closure of the channel.

8. "*DBOC . .. has not entered the 'Lateral Channel' as defined by decades of operational practice.*" (Oct. 24, 2012 letter at 3.)

DBOC itself, its attorneys, agents, and other advocates, have all contradicted this statement, as indicated in the Feb. 1, 2012 letter, attached hereto as Exhibit 20. For more detail, see response to point 2.

9. "*NPS has never alleged that DBOC is out of compliance.*" (Oct. 24, 2012 letter at 3.)

Whether or not NPS has made such an allegation or believes that the proposition is true is irrelevant to the question of whether DBOC is in compliance with the Coastal Act or the 2007 Consent Order. In any event, as is the case in dealing with any agency with prosecutorial discretion, one cannot infer from the agency's failure to lodge an allegation that an agency believes such an allegation would be unfounded. See also response to point 3.

10. "*NMFS . . . 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.*" (Oct. 24, 2012 letter at 4.)

DBOC does not cite to any communication with or from NMFS in support of this statement. The Commission is not aware of NMFS having weighed in on this issue, and in fact,

Commission staff indicates that NMFS has *not* said that DBOC's use of the Lateral Channel during the pupping season is acceptable under the 1992 protocols. The lack of input from NMFS cannot be seen as support for DBOC's activities or interpretation of the facts. See, also, the response to point 9. Moreover, compliance with the 1992 Multi-Agency Seal Protocol is not relevant, for the reasons stated above (see response to point 2).

11. "*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. . . . 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. . . . it did not define the key terms 'Lateral Channel,' 'Main Channel,' or 'West Channel' . . . . Nor did the map included in Exhibit C to the 2008 SUP designate the geographic extent of the 'Lateral Channel.'*" (Oct. 24, 2012 letter at 4-5.)

With respect to the first point, see point 2. With respect to the second point, see point 4. In addition, it is worth noting that NPS was a signatory to the 1992 protocol and subsequently replaced it with the 2008 SUP. DBOC, to the contrary, was not a signatory to the 1992 protocol and does not provide any basis for its assertions about the nature of its predecessor's operations. DBOC refers to 16 years of operational practice, but it has been operating this facility for less than 10 years. It is inappropriate for DBOC to speculate about the specific practices of the previous operator without any evidence to support their claims regarding his behavior.

12. "*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.*" (Oct. 24, 2012 letter at 5.)

DBOC does not cite any authority for this statement or clarify what it means that it "was incumbent on the NPS to make that clear." However, as indicated above, the SUP contains an integration clause (provision 32 on page 14) that states that the SUP itself, with its exhibits, "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 is a standard legal practice for indicating that an agreement is self-contained and independent of any prior documents.

13. "*NPS has never cited DBOC for failure to comply.*" (Oct. 24, 2012 letter at 5.)

See response to point 9.

14. "*DBOC submitted a Boat Transit Map to NPS that demonstrated the year-round extent of its boat transit operations.*" (Oct. 24, 2012 letter at 5.) "*The CCC received this map . . . .The [CCC's] July 30 letter takes the position that the Boat Transit Map 'did not address the necessary seasonal closures,' but that is not the case . . . 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.*" (Oct. 24, 2012 letter at 5, footnote 2.)

Consistent with the requirements of the 2007 Consent Order, Commission staff interpreted the proposed map as establishing the baseline of areas where boats would never operate, with further, seasonal restrictions to apply as well.

The 2007 Order spoke specifically as to what areas were precluded: "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.". (Section 3.2.6). The 2007 Order goes on to provide that Respondents were required, within 60 days, to submit a plan outlining the removal of all equipment and materials located in these areas for the Executive Director's approval. It further provided that "In addition all Respondent's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals." The plan was merely to govern how and in what manner materials were to be removed. The Order established the parameters of the area and could not have been amended inadvertently by this Map that was prepared for other reasons and submitted to other entities.

In any event, Commission staff never issued anything to DBOC to suggest that Commission staff accepted the plan that DBOC had submitted or implied that it amended our Order. Further, the Boat Transit Map provided no information to suggest that it indicated year-round areas of operation and that it would not be further modified with additional seasonal restrictions.

Finally, regardless of how the Vessel Transit Plan is interpreted or what its status is, it does not override Section 3.2.5 or other sections of the 2007 Consent Order, which again incorporate the Section 7 of the order and thus the SUP. For more detail, see page 2 of the July 30, 2012 letter from Nancy Cave, California Coastal Commission, to Kevin Lunny, DBOC, attached hereto as Exhibit 24.

15. "*The July 30 letter cites to a January 23, 2012, letter from NPS to DBOC, which states in relevant part that the NPS interprets the term 'Lateral Channel' in the 2008 SUP as 'the entire channel between the Main Channel and West Channel.' . . . This letter is unhelpful, in that it uses undefined terms in an attempt to define an undefined term, and never relates to a map.*" (Oct. 24, 2012 letter at 6.)

This does not appear to present a defense to this action. However, the fact is that the Main Channel and West Channel are also defined and shown on the map from the 1992 protocol. Thus, defining the Lateral Channel in the manner of the above-referenced letter makes its location clear. In any event, the January 23, 2012 letter from NPS was not the original or primary basis for the Commission's interpretation of the 2008 SUP. That letter was generated in response to DBOC's insistence that NPS agreed with its position on how to interpret the phrase "Lateral Channel," which, as the letter indicates, it did not.

16. "*Mr. Moore . . . explains that the westernmost extent of the 'Lateral Channel' has always been undefined.*" (Oct. 24, 2012 letter at 6.)

See responses to point 4 and 6. In addition, this appears to conflict with DBOC's position that it has always known the extent of the channel and relied on that understanding to abide by the requirement to stay out of it during certain periods.

17. "*The Resource Agencies – particularly NPS – could easily resolve any controversy with readily available technology.*" (Oct. 24, 2012 letter at 7.)

There is no requirement for any entity, including NPS, to further address this issue, particularly given that, prior to DBOC's assertions about the meaning of the Lateral Channel, as listed above, there was no controversy of which the Commission is aware. No one questioned the clarity of the 1992 map or the location of the channel, and the Commission's position and 2007 Consent Order regarding what areas need to be protected from traffic, which is the purpose of defining the term, is clear on this point, and was endorsed by NPS as well.

18. "*. . . the 2008 SUP does not disturb in any way operational practice . . . . DBOC's interpretation . . . is confirmed by Mr. Moore . .. as well as by NPS's failure to cite DBOC for noncompliance at any point.*" (Oct. 24, 2012 letter at 7.)

See responses to points 2, 6, and 12.

19. "*. . . explanation that the 1992 Multi-Agency Seal Protocol was 'meant to be an adaptive management tool with new input from operational experience . . .' demonstrates why CCC's attempt to interpret the Protocol in absence of operational practice was doomed to fail.*" (Oct. 24, 2012 letter at 7.)

See response to point 7.

<u>Marine Debris</u>

20. "*DBOC denies that it has discharged any marine debris about which staff complains*" (Statement of Defense Form.)

This is a general denial without any factual support. The body of the Commission's findings provides evidence in support of the Commission's finding that DBOC did discharge subject debris. The Commission's responses to DBOC's more specific arguments as to why DBOC believes it has not discharged such debris are listed below. For example, DBOC itself has confirmed that, at a minimum, during storm events, there have been discharges of significant amount of marine debris, and agreed that management measures should be improved.

21. "*DBOC cannot agree with the [CCC's] 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. . . . DBOC does not dispute that JOC's operations permitted the loss of a substantial amount of aquaculture materials into the marine environment . . . .*" (Oct. 24, 2012 letter at 11.)

DBOC does not cite any basis for its disagreement regarding the distinction between new and legacy debris. The statement that DBOC operates under a self-imposed "zero loss" policy with respect to aquaculture materials DBOC uses is irrelevant as to whether it is responsible for legacy debris. And although the CCC appreciates any efforts at reducing debris in the estero, there has been no evidence submitted to support the success of a "zero loss" policy. Moreover, although it is, due to the practices and materials used by DBOC, difficult to tell what is new and old debris, the materials at issue here all come from mariculture in the estero, conducted either by DBOC or its predecessor. Since DBOC purchased all of the assets of JOC, and then continued to use many of the same sorts of mariculture materials, they have made it impossible to determine the extent to which any of the debris preexisted their operations. Again, there have been at least some known storm events causing releases of debris after their purchase of the property, and DBOC has not quantified these releases.

22. "*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.*" (Oct. 24, 2012 letter at 11.)

The Commission appreciates any steps taken by DBOC to reduce debris in the estero. These Orders would provide a mechanism to coordinate any such steps, and allow the Commission to work with DBOC on such plans to ensure protection of coastal resources.

<u>After-the-Fact Development</u>

23. "*DBOC denies that any after-the-fact development remains w/o the consent of staff.*" (Statement of Defense Form.)

This is a general denial without any factual support. Insofar as the 2007 Consent Order acknowledged the presence of some after-the-fact development, it also noted that a permit was required, and the 2007 Consent Order specifically required that DBOC obtain a permit to authorize any unpermitted development it wished to retain, which clearly included any conditions imposed which might be necessary to ensure any development is consistent with the Coastal Act. In fact, Section 3.0 of the 2007 Consent Order explicitly states, "Nothing in this Consent Order shall be construed to authorize the corresponding development or operations." Additionally, various elements of unpermitted development persist on the Property, including but not limited to the unpermitted trailers, picnic tables, processing facilities, settling tanks, and grading/paving. As no Coastal Act authorization has been granted for new development on the property since the 1984 Consistency Certification, the Commission has in no way 'consented' to the unpermitted development on the Property.

24. "*All after-the-fact development alleged by staff that occurred prior to the 2007 Consent Order was addressed by the 2007 Consent Order*." (Statement of Defense Form.)

This defense appears to imply that some unpermitted development was authorized by the 2007 Consent Order. In fact, the 2007 Consent Order explicitly noted that no exemptions

applied, and required that Respondent obtain a CDP for any unpermitted development, either onshore or off shore, and required that DBOC amend its permit application to include such unpermitted development. The entire 2007 Consent Order was premised on the requirement that DBOC obtain Coastal Act authorization for any unpermitted development, which has not happened. All unpermitted development addressed therein thus remains unpermitted under the Coastal Act.

25. "*. . . the CCC has long had knowledge of the activities described in Items 39 – 47 [of DBOC's May 7, 2012 letter], which the CCC describes as 'after the fact' development. . . . Items 39 – 47 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. . . . Item 47 – installation of several new picnic tables – also preceded the Consent Order.*" (Oct. 24, 2012 letter at 12.)

See response to point 24.

26. "*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" by 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.*" (Oct. 24, 2012 letter at 12.)

This is indeed one example of unpermitted development undertaken after the 2007 Consent Order. The Commission required DBOC to restore the area pursuant to the terms of the CDO, and DBOC did so.

Clams

27. *"The Fish and Game Commission corrected the clerical error in the leases on December 10, 2009…Well before this occurred, Drakes Bay Oyster Company notified the Coastal Commission of the clerical error…Costal Commission staff therefore had specific knowledge of the clerical error and that it was being corrected. It is difficult to understand why Coastal Commission staff would order the relocation of the clams, notwithstanding their misreading of the Consent Order…Because the Fish and Game Commission corrected a clerical error, this affirms that the approval to cultivate clams was valid in 1993. The authorization to cultivate clams has been long-established."*(January 19, 2010 letter at 2.)

Regardless of any purported clerical error in a permit from another state agency, no Coastal Act authorization to cultivate Manila clams *anywhere* in the estero has ever been granted. Therefore, authorization to cultivate clams has not in fact been "long established", and until clams were found within lease area M-438-01 by Commission staff in the summer of 2009, Commission staff had no reason to suspect that cultivation was occurring in any area outside of the then-approved M-438-02 lease area. Unless the argument is being made that the Commission should have been prescient enough to know that two years after the signing of the 2007 Consent Orders a subsequent action by another state agency would change peripheral circumstances, staff's request that clams be relocated to reflect legal requirements validly in place at the time the 2007 Consent Orders were signed was reflective of a reasonable demand for Respondent to comply with the conditions and requirements in place at the time the settlement was mutually agreed upon.

28. "*Nor does it make any sense to cultivate clams in Lease M-438-02 because it was created as a deep water lease for scallops. Clams and scallops are not grown the same way. Clams cannot be cultivated in deep water. They are not grown in trays or floating bags, as suggested by Coastal Commission staff, because they are grown on intertidal sandbars, beaches and mudflats, not in deep water…A requirement to cultivate clams in Lease M-438-02 is nonsensical and the insistence that such a requirement is valid reflects the Coastal Commission staff's lack of expertise with coastal dependent shellfish production techniques."* (January 19, 2010 letter at 2.)

The claim that it would have been inappropriate for the lease to have referred to the deep water portion of the estero is specious for two reasons. As a threshold matter, at the time the 2007 Consent Order was signed, lease area M-438-02 was the only location in the estero in which Manila clams were legally authorized to be cultivated, and therefore the only location in which the Coastal Commission could have permitted to be used, via the Consent Order. The Coastal Commission has no ability to amend leases held by other parties. It would have been inappropriate for Commission staff to presume that an existing, valid permit from another state agency did not reflect agency intent, particularly given that this issue had not at the time even been raised. Furthermore, despite the assertions in Respondent's counsel's letter, research has shown that both growth rates and survival of manila clams increases when they are cultivated in floating trays in deep water (*www.seafish.org/media/Publications/SR400.pdf).* Accordingly, Commission staff's assumption that DBOC would comply with the terms and conditions of a validly issued permit from the Fish and Game Commission to cultivate clams in a manner consistent with scientific research findings was therefore not ill-founded.

Jurisdictional Arguments and Arguments based on Chapter 3 Policies

29. "*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.*" (Oct. 24, 2012 letter, § I.E.) "*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.*" (Oct. 24, 2012 letter at 7.)

These are correct recitations of law. However, they are not relevant to the instant proceeding. They could only be relevant if DBOC were to: (1) identify existing "regulatory controls established by" the California Department of Fish and Wildlife ("DFW")[39] or the California Fish and Game Commission ("FGC") as part of a wildlife or fishery management program; (2) identify a way in which the orders proposed for the Commission's adoption would "establish or impose . . . controls with respect [to wildlife or fishery management programs]," and (3) explain how the controls in the proposed orders would "duplicate or exceed" the regulatory controls established by DFW or FGC. DBOC has done none of these things, and the Commission asserts that it cannot.

First, DFW and FGC have no regulatory controls in place. Even the DFW leases are no longer in place, since, by their terms, they expired with the expiration of DBOC's reservation of use and occupancy. Second, even the controls that were in place were to control an aquaculture operation. Both the Coastal Act (PRC § 30100.2) and the Fish and Game Code (§ 17) define aquaculture as a form of agriculture; it is not wildlife or a fishery. DFG is on record officially concurring in this point. See May 15, 2007 letter from L. Ryan Broddrick, Director, DFW, to Don Neubacher, Superintendent, Point Reyes National Seashore, attached hereto as Exhibit 28. Thus, the first criterion is not satisfied, for multiple reasons.

For the same reasons, the second criterion is also not satisfied here. Any controls the Commission's orders would impose would be controls imposed on an agricultural (aquaculture) operation, not on a wildlife or fishery management program. Given that neither of the first two criteria applies, it would be impossible for the third to apply. This issue was also addressed in the Feb. 1, 2012 letter, attached hereto as Exhibit 20, at pages 4-5.

30. "*. . . the [CCC's] 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) . . . . it is not DBOC's aquaculture operations that are the focus. . . the relevant CDFG action is the 1992 Multi-Agency Seal Protocol . . ., which was designed to 'minimize the disturbance to harbor seals . . . . the 1992 Multi-Agency Seal Protocol is a wildlife management program.*" (Oct. 24, 2012 letter at 8.)

The 1992 Multi-Agency Seal Protocol regulated an aquaculture operation. Although it did so, in part, to protect wildlife, that does not make it a wildlife management program. Similarly, the orders proposed for Commission adoption would not impose controls with respect to wildlife or fishery management programs, as they would be directed at the aquaculture operation. In addition, DBOC's argument would mean that section 30411(a) would divest the Commission of regulatory authority over any type of development that might affect a fishery or wildlife that is currently the subject of a fishery or wildlife management program. Section 30411(a) was designed to prevent the Commission from adopting controls with respect to wildlife or fishery management programs that duplicate or exceed controls established by DFW or FGC, not to prevent the Commission from regulating development that could affect wildlife or fisheries.

[39] The California Department of Fish and Wildlife was, until January 1, 2013, known as the California Department of Fish and Game, which is why it is referred to as such in the statutory quotation.

31. "*. . . 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.*" (Oct. 24, 2012 letter at 9.)

The fact that the Commission was not included in the 1992 Multi-Agency Seal Protocol is most likely due to the fact that the Commission had not become involved in the operation, and may not even have been aware of it, in the early 1990s. In any event, the Commission would not normally sign onto such a document because that is not the mechanism through which matters come before the Commission; the Commission regulates development through a permitting process.

32. "*Section 30411(c) further isolates the CCC's authority to coastal planning responsibilities. 30411(c) explains that aquaculture is a 'coastal-dependent use which should be encouraged' and that the '[CCC] . . . shall,* consistent with the coastal planning requirements of this division, *provide for as many coastal sites identified by the [DFG] for any uses that are consistent with the policies of Chapter 3. . . . This planning authority cannot be read as a blanket grant of authority over aquaculture operations.*" (Oct. 24, 2012 letter at 9.)

This argument conflicts with the prior arguments. By arguing that section 30411(c) "isolates" the Commission's authority over aquaculture, DBOC concedes that the Commission has such authority, whereas the prior points argued that the Commission lacked jurisdiction. Section 30411(c) confirms that the Commission has such jurisdiction. And while it directs the Commission to encourage salt water or brackish water aquaculture and to support the use of sites identified by DFW, it also expressly limits such directives to cases where it is "consistent with the coastal planning requirements of [the Coastal Act]" and "consistent with the policies of Chapter 3." Finally, the proposed Orders are not designed to discourage aquaculture or the use of the subject site. The Orders are designed to bring the operation under the Commission's appropriate regulatory control through the permitting process, address prior unpermitted development, and only if permitting fails or is deemed impossible due to restrictions imposed by the property owner, to then facilitate an orderly removal process.

33. "*Ultimately, the geographic extent of the harbor seal pupping closure in Drakes Estero is an issue for the Resource Agencies . . . . While DBOC stands ready to participate with the agencies on the issue, it sees no formal role for CCC in those discussions.*" (Oct. 24, 2012 letter at 10.)

Whether DBOC sees a role for the Commission is not relevant to whether the Commission does, in fact, have jurisdiction here. For the reasons stated in the body of the Commission's findings, the operations and activities at issue constitute development, and as such, the Commission has jurisdiction. And for the reasons stated above, section 30411 does not divest the Commission of that jurisdiction.

34. "*[PRC] § 30411(c) expresses the Legislature's policy to 'encourage[]' aquaculture, and says that the Commission 'shall' provide aquaculture in the sites identified by the Department of Fish and Wildlife for aquaculture. Instead of encouraging aquaculture by DBOC in a location leased by the Department, the order would further constrain aquaculture.*" (January 23, 2013 letter from Zachary R. Walton, Esq., SSL Law Firm, LLP, to Lisa Haage, California Coastal Commission (hereinafter, "Jan. 23, 2013 letter").)

The two positions are not inconsistent. The proposed orders are in response to unpermitted development. PRC section 30411(c) does not require the Commission to allow aquaculture to proceed unpermitted and unregulated. This facility has been operating without a CDP since the Coastal Act's inception. The Commission has already issued one order requiring that it secure a CDP for its operations, and in the five years since then, DBOC has failed to do so. See response to point 32.

35. "*[PRC] § 30411(a) prohibits the Commission from imposing controls on aquaculture that 'duplicate or exceed' those provided by the Department of Fish and Wildlife concerning wildlife and 'fishery management' programs. Notwithstanding your view on whether the constitutional right to fish extends to aquaculture – we believe that it does – 'fishery management' extends to commercial operations, including aquaculture. Indeed, the Commission previously acknowledged that 30411(a) applies to aquaculture at least beginning in the 1990s. The proposed order would impose controls that duplicate or exceed those imposed by DFW, which is unconstitutional. (See Cal. Const. art. 4 § 20; 17 Cal. Atty. Gen. Op. 72.) We are concerned about agreeing to a consent decree that imposes restoration obligations on DBOC until DFW is consulted.*" (Jan. 23, 2013 letter.)

See response to point 29. Additionally, Section 20 of Article 4 of the California Constitution simply authorizes the legislature to divide the state into fish and game districts and to protect fish and game in districts or parts thereof, and establishes the Fish and Game Commission. The Attorney General opinion cited, Opinion No. 50-215, from 1951, simply concludes that the addition of provisions to the California Constitution related to the Fish and Game Commission precluded the Legislature from delegating authority "to administer the Division of Fish and Game" to anyone other than the Fish and Game Commission (FGC). The proposed Orders would not involve the Commission administering the Division of Fish and Game and thus would not be in conflict with this ruling. DBOC's interpretation of Attorney General Opinion No. 50-215 would divest every state regulatory agency that exercises its power in part, to protect fish or wildlife, of its authority. The State Water Boards, for example, could not protect water quality in support of the Clean Water Act's "fishable, swimmable" mandate because it would be seen as an intrusion on FGC's purview. This is a misreading of the opinion.

36. "*[PRC] § 30222.5 requires to [sic] Commission to give 'priority' to aquaculture proposals. Instead of giving priority to DBOC's permit application, however, staff is considering preparing a cease and desist order.*" (Jan. 23, 2013 letter)

The two positions are not inconsistent. The proposed orders are in response to unpermitted development. PRC section 30222.5 does not require the Commission to allow aquaculture to proceed unpermitted and unregulated in order to give it priority. This facility has been operating without a CDP since the Coastal Act's inception. The Commission has already issued one order requiring that it secure a CDP for its operations, and in the five years since then, DBOC has failed to do so. The proposed CDO would not require cessation of aquaculture operations unless and until they failed to secure any sort of permit through the normal permitting process or were prevented from obtaining permitting because of a refusal by the landowner to permit the activity.

37. "*[PRC] § 30234 requires the Commission to 'protect[] and, where feasible, upgrade[]' facilities serving 'commercial fishing', such as DBOC's. Section 30234 also prohibits 'reduc[ing]' existing facilities serving commercial fishing, except in circumstances not present here. Instead of working to protect and upgrade DBOC, however, the order would restrict DBOC's operations.*" (Jan. 23, 2013 letter.)

As indicated by the May 15, 2007 letter from L. Ryan Broddrick, Director, DFW, to Don Neubacher, Superintendent, Point Reyes National Seashore, which is discussed in the response to point 29, aquaculture is not commercial fishing, but agriculture. However, even if section 30234 were to apply, it would not preclude the proposed action, as that action is not designed to undermine the operation but to bring it into compliance with the Coastal Act. See also responses to points 34 and 36.

General

38. "*Drakes Bay Oyster Company is in full compliance with the Consent Order.*" (Oct. 24, 2012 letter)

This is a general denial without any factual support. The body of the Commission's findings provides evidence in support of the Commission's contrary legal conclusion.

39. "*DBOC has had an after-the-fact CDP application pending since 2008.*" (Jan. 23, 2013 letter)

DBOC's application is not pending. Commission staff has repeatedly indicated what DBOC must do to complete its application. Until a complete application is received, the application is not filed, and no application is pending. The most recent letter from Commission staff regarding the incomplete application is from March 16, 2012, and lists several remaining deficiencies in the application (attached hereto as Exhibit 29).

40. "*. . . the restoration order constitutes a 'project' under CEQA that would require environmental review . . . . Our understanding of CEQA is that environmental review can not be avoided simply through the auspices of an order.*" (Jan. 23, 2013 letter.)

The restoration order does not constitute a project, pursuant to CEQA Guidelines (California Code of Regulations, Title 14 ("14 CCR")) section 15378. In addition, the

restoration order, and the Orders in general, are categorically exempt from CEQA pursuant to CEQA Guidelines sections 15061(b)(2), 15307, 15308, and 15321. Although categorical exemptions cannot 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 CCR § 15300.2), the phrase "significant effect on the environment" is defined in PRC section 21068 as "a substantial, or potentially substantial, adverse change in the environment (see also 14 CCR § 15382). In this case, for the reasons stated above, there is no reasonable possibility that the restoration will have a substantial adverse impact on the environment. In fact, the only argument DBOC has provided for why the restoration might have an adverse impact on the environment is that it would result in the removal of filter feeders. However, the restoration requirements only demand the removal of the oysters if they are required to be removed independently due to the denial of a CDP or the removal of DBOC's property right to occupy the Subject Property. These Orders are not designed to, and do not, independently require removal of the oysters.

CEASE AND DESIST ORDER CCC-13-CD-01 AND RESTORATION ORDER CCC-13-RO-01

1.0 CEASE AND DESIST ORDER CCC-13-CD-01.

1.1 Pursuant to its authority under California Public Resources Code ('PRC') Section 30810, the California Coastal Commission ('Commission') hereby orders and authorizes Drakes Bay Oyster Company (DBOC); those individuals exercising any degree of control over DBOC; and all their successors, assigns, employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter collectively referred to as 'Respondents') to:

(A) Cease and desist from engaging in any further development, as that term is defined in PRC Section 30106, that would normally require a coastal development permit on any of the property identified in Section 4.2 below ('Subject Property'), including by expanding or altering, unless simply reducing or in compliance with the removal requirements of these orders, current extant operations on the Subject Property, unless authorized pursuant to the Coastal Act (PRC Sections 30000-30900), which includes through these orders.

(B) Cease and desist from maintaining on the Subject Property any Unpermitted Development, as defined in Section 4.3, below.

(C) Remove, pursuant to the approved removal plan required by Section 7.3, below, and pursuant to the terms and conditions set forth herein, all physical items placed or allowed to come to rest on the Subject Property as a result of the Unpermitted Development, as defined in Section 4.3, below.

(D) Fully and completely comply with the terms and conditions of the Restoration Order CCC-13-RO-01 as provided in Sections 2 and 7, below.

1.2 Notwithstanding Sections 1.1(B), 1.1(C), and 1.1(D), above, if a court of competent jurisdiction issues an order giving DBOC the right to continue to occupy the Subject Property despite the Federal Actions (as defined in section 4.12, below), then the obligations (including prohibitions) listed in Sections 1.1(B), 1.1(C), and 1.1(D) are tolled for the time during which any such order is in effect. Similarly, if a final judicial action allows DBOC to continue to occupy the Subject Property for a limited time, solely to provide additional time for DBOC to vacate the premises, or if the executive branch of the federal government does so, the obligations (including prohibitions) listed in Sections 1.1(B), 1.1(C), and 1.1(D) are

tolled for the period during which DBOC is allowed to remain. If the final disposition of any judicial challenge to the Interior Decision or any administrative action(s) flowing therefrom gives DBOC the right to continue to occupy the Subject Property indefinitely and to continue its operations, or if the federal government alters its position so as to allow the same, then Sections 1.1(B), 1.1(C), 1.1(D), and 6.2 of these Orders are inoperative.

2.0 RESTORATION ORDER CCC-13-RO-01

Pursuant to its authority under PRC Section 30811, the Commission hereby orders and authorizes Respondents to restore the Subject Property by implementing the Restoration Order described, and taking all other restorative actions listed, in Section 7, below, including through conducting the restoration of native habitat and monitoring of the restoration.

3.0 NATURE OF ORDERS

Respondents, employees and agents, and any person acting in concert with any of the foregoing are jointly and severally subject to all the requirements of Cease and Desist Order CCC-13-CD-01 and Restoration Order CCC-13-RO-01 (hereinafter referred to as "Orders"). Respondents shall cause current and future employees and agents, and any contractors performing any of the work contemplated or required herein, and any persons acting in concert with any of these entities to comply with the terms and conditions of these Orders. Respondents shall condition any contracts for work related to these Orders upon an agreement that any and all employees, agents, and contractors; and any persons acting in concert with any of the foregoing or with any of the other Respondents, adhere to and comply with the terms and conditions set forth herein.

These Orders authorize and contingently require removal and restoration activities, among other things, as outlined in these Orders. Any development subject to Coastal Act permitting requirements that is not specifically authorized under these Orders requires a Coastal Development Permit. Nothing in these Orders guarantees or conveys any right to development on the Subject Property other than the work expressly authorized by these Orders.

These Orders are intended to supplement previous Commission action on the Subject Property, including Commission Cease and Desist Orders No. CCC-07-CD-11 and CCC-03-CD-12, and supersede past-action only to the extent that terms are irreconcilably incompatible.

PROVISIONS COMMON TO BOTH ORDERS

4.0 DEFINITIONS

4.1 **Persons Subject to these Orders**

Persons subject to these Orders are Drakes Bay Oyster Company (DBOC); those individuals exercising any degree of control over DBOC; and all their successors, assigns, employees, agents, contractors, and any persons acting in concert with any of the foregoing. Kevin Lunny, as owner and operator of Drakes Bay Oyster Company, is the representative and agent for service of documents for Respondents.

4.2 **Subject Property.** The property that is the subject of these Orders is described as follows:

Approximately 1.5 acres of dry land along the banks of Drake's Estero (designated by the Marin County Assessor's Office as Assessor's Parcel Number 109-13-017) and 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 Drakes 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 was effectively leased to DBOC under a reservation of use and occupancy agreement and special use permit through November 30, 2012.

4.3 **Unpermitted Development.**

"Unpermitted Development" refers to 'development', as that term is defined in the Coastal Act (PRC Section 30106), including the materials, structures, topographic changes, or other changes resulting therefrom, and changes in density or intensity of use of land and/or water from its 1973 status, that occurred on the Subject Property without the authorization required pursuant to the Coastal Act, including, but not limited to, the following:

(A) Commencement of, or any substantial changes to, the operation of offshore aquaculture facilities, including significant changes in operation methods, volume, species, or location;

(B) Performance of substantial changes to ongoing processing or sales of aquaculture products, and other related onshore operations;

(C) Construction, installation, or alteration of structures and equipment and land alteration, including:

(1) Development taking place since December 2007, including but not limited to: excavation and backfill of a 12" by 18" by 80' long electrical trench; removal and replacement of a porch on a residential unit; installation of a split rail fence along the edge of a parking area; installation of asphalt pavement surrounding the processing facility; placement and removal of clam cultivation bags within a harbor seal protection area and associated vessel use and worker operations; replacement of six picnic tables and placement of six additional picnic tables; placement of five outdoor seed setting tanks and associated water intake, discharge and circulation infrastructure; installation of a temporary construction trailer; installation of a temporary 8'x40' container for oyster shucking and packing; and installation of a 8' by 40' refrigeration unit, all of which was in violation of Sections 2.0, 3.1.2 and 3.2.1 of Consent Cease and Desist Order No. CCC-07-CD-11 (the "2007 Order").

(D) Operation of boats in the Lateral Channel (as defined in section 4.7, below), which is also in violation of Section 3.2.6 of the 2007 Order; and

(E) Discharge of marine debris in the form of legacy, abandoned, discarded, or fugitive mariculture materials, which is also in violation of Section 3.2.2 of the 2007 Order.

4.4 **Interim Use Period.**

The Interim Use Period is that period beginning upon the effective date of these Orders, as defined in Section 9.0, and terminating when Respondents either (a) secure issuance of a Coastal Development Permit authorizing and regulating their operations at the Subject Property and agree to abide by its terms or (b) complete all removal and restoration activities enumerated in Sections 6.0 and 7.0 of these Orders.

4.5 **Cultivation Areas.**

Cultivation Areas are those areas that meet all of the following criterion: 1) they are included in the most recent, current iterations of the California Department of Fish and Game leases M438-01 and M438-02; 2) they are consistent with the California Department of Health, the Food and Drug Administration, and the National Shellfish Sanitation Program approved shellfish harvest areas within Drake's Estero; and 3) they are outside of

areas identified as harbor seal protection areas on the map attached to these Orders as Attachment 4.

4.6 **Lateral Channel.**

The phrase "Lateral Channel" is defined herein as the entire channel eastward of the line connecting Point A at 38°3'0.72"N, 122°56'50.62"W and Point B at 38°2'55.75"N, 122°56'53.76"W, as depicted on the map attached to these Orders as Attachment 1.

4.7 **Debris.**

The term "Debris" as used in this order includes mariculture equipment and refuse generated either by Respondents or Johnson's Oyster Company within Drake's Estero and Estero de Limantour, from both contemporary and historic operations, which no longer form part of active production activities.

4.8 **Harbor Seal Breeding Season.**

The Harbor Seal Breeding Season is defined as beginning March 1 and ending June 30 annually.

4.9 **Executive Director.**

The phrase "Executive Director" refers to the Executive Director of the California Coastal Commission.

4.10 **Interior.**

The United States Department of the Interior.

4.11 **Interior Decision**

The decision of Interior Secretary Kenneth Salazar as effectuated and/or memorialized in his November 29, 2012 letter to the Director of the National Park Service regarding "Point Reyes national Seashore – Drakes Bay Oyster Company", which letter is attached hereto as Attachment 2.

4.12 **Federal Actions.**

The phrase "Federal Actions" refers to the Interior Decision and associated actions by Interior; the actions of the National Park Service through its November 29, 2012 letter to Kevin and Nancy Lunny, attached hereto as Attachment 3; and any other related actions by Interior or any subdivisions thereof.

SUBSTANTIVE OBLIGATIONS OF THESE ORDERS

5.0 INTERIM USE PROVISIONS

5.1 **Ongoing Operation.**

(A) Production Limits. The number of oyster and clam seed planted within the State water bottom leases in Drake's Estero occurring in any calendar year during the Interim Use Period shall not exceed the number planted in 2007.

(B) Spatial Extent of Cultivation and Equipment

(1) Within fifteen (15) days of the effective date of these Orders, Respondents shall furnish, for the Executive Director's review and approval, documentation demonstrating, under penalty of perjury, that any cultivation continuing during the Interim Use Period, including all production equipment, is and will continue to be confined to Cultivation Areas.

(2) Should equipment come to be located in an area of the Subject Property outside of the Cultivation Areas or cultivation occur outside those areas after the effective date of these Orders, Respondents shall, within 48 hours of receipt of knowledge of said location, provide notice to the Executive Director thereof, and shall furnish the Executive Director with a detailed plan for removing the concerned equipment. Respondents shall implement the removal plan within five (5) days of Executive Director approval thereof, and shall furnish the Executive Director with evidence of removal of the equipment, including at a minimum photographs and logs.

(C) Bottom Culture. Within fifteen (15) days of the effective date of these Orders; Respondents shall verify, in the form of a declaration, under penalty of perjury, no bottom culture bags are located on or within eelgrass. Should any bottom culture bags be (re)located during the Interim Use Period, Respondents shall not place them on or within eelgrass habitat.

(1) Should any bottom bags come to be located within eelgrass habitat after the effective date of these Orders, Respondents

shall, within 48 hours of receipt of knowledge of said location, provide notice to the Executive Director thereof, and shall furnish the Executive Director with a detailed plan for removing all such bottom bags. Respondents shall implement the removal plan within five (5) days of Executive Director approval thereof, and shall furnish the Executive Director with evidence of removal of all bottom bags from eelgrass habitat, including at a minimum photographs and logs.

(D) Structures. No new structures, including oyster culture racks and production facilities, shall be installed onshore or offshore on the Subject Property during the Interim Use Period.

5.2 **Harbor Seal Protection Measures.**

(A) Permanent Closure. Respondents' personnel, boats, equipment and structures shall not enter harbor seal protection areas identified in Attachment 4.

(B) Seasonal Closure. Respondents' personnel, boats, structures and their equipment not enter the Lateral Channel, as defined in Section 3.7, above, during the Harbor Seal Breeding Season, as defined in Section 4.9, above.

(C) Haul-Out Buffers. Respondents shall maintain a distance of a minimum of 100 meters from any hauled out harbor seals.

(1) Should the Executive Director determine that operations are causing flushing or disruption of behavioral patterns of seals, the Executive Director may increase this minimum approach-distance to not more than 200 meters by providing written notice to Respondents.

5.3 **Operational Debris Management.**

(A) Debris Management Plan. Within fifteen (15) days of the effective date of these Orders, Respondents shall submit, for the review and approval of the Executive Director, a Debris Management Plan. The Debris Management Plan shall provide the date by which Respondents shall begin collecting debris on a monthly basis and shall delineate:

(1) the spatial extent within which l Debris will be collected from the Estero,
(2) the method of detection and collection of Debris, and

(3) the location and method of disposal of collected Debris.

Respondents shall undertake the monthly debris management pursuant to the terms of the approved Debris Management Plan commencing the first full calendar month after Executive Director approval of the Debris Management Plan.

(B) If, during implementation, the Executive Director determines that the Debris Management Plan is insufficient, based on continuing debris issues, Respondent shall revise and resubmit the plan for approval by the Executive Director, to address the ongoing concerns.

(C) Reporting. Within ten (10) days of each monthly debris removal deadline established in the Debris Management Plan, Respondents shall submit a document to the Executive Director attesting that debris removal was carried out pursuant to the approved plan, indicating the date(s) and time(s) during which the Debris removal was undertaken, and the type and amount of debris collected.

5.4 **Invasive Species Management.**

(A) Invasive Species Management Plan. Within fifteen (15) days of the effective date of these Orders, Respondents shall submit, for the review and approval of the Executive Director, an Invasive Species Management Plan to address *Didemnum* colonization. The Invasive Species Management Plan shall require removal of all *Didemnum* from cultivation equipment and commercially cultivated shellfish within thirty (30) days of Executive Director approval of the management plan. Additionally, the Invasive Species Management Plan shall provide a description of how *Didemnum* will be managed throughout the Interim Use Period on an on-going bi-monthly basis during oyster harvest, including a description of timing and methodology for identification and removal of *Didemnum* growing on commercially cultivated shellfish and newly colonized *Didemnum*, and a monthly reporting provision. The on-going management of *Didemnum* enumerated in the plan shall include a description of proposed modifications to shellfish planting, maintenance, harvesting, washing, and processing practices to be employed to prevent *Didemnum* fragmentation and re-introduction.

(1) Respondent shall fully implement operational modifications pursuant to the approved Invasive Species Management Plan within thirty (30) days of approval of the Plan by the Executive Director.

(B) Reporting.

(1) Within thirty (30) days of Executive Director approval of the Invasive Species Management Plan, Respondents shall submit to the Executive Director a document, with substantiating evidence, detailing the date, time, location, and amount of *Didemnum* removed during the facility-wide eradication.

(2) Within ten (10) days of the bi-monthly invasive species monitoring and removal deadline established in the Invasive Species Management Plan, Respondents shall submit a document to the Executive Director attesting that invasive species monitoring and removal was carried out pursuant to the approved plan, indicating the date and time which the monitoring and removal was undertaken, and the location and amount of *Didemnum* collected.

5.5 **Manila Clam Cultivation.** Respondents shall, within ten (10) days of the effective date of these Orders, furnish the Executive Director with a Manila Clam Removal Plan, for review and approval, identifying all non-triploidy Manila clams on the Subject Property, and detailing a plan for removing those clams. Respondents shall complete removal of all non-triploidy Manila clams pursuant to the approved plan within twenty (20) days of Executive Director approval thereof.

(A) Respondents shall not introduce any non-triploid Manila clams onto the Subject Property; if any Manila clams are seeded after the effective date of these Consent Orders, they shall be certified as triploidy. Cultivation of Manila clams shall only be undertaken within California Department of Fish and Game lease area M438-01 and in compliance with the terms and conditions of M438-01, as enumerated in the June 5th, 2004 document entitled "Renewal of Lease", and as amended on December 10, 2009.

5.6 **Equipment Management.**

(A) Within fifteen (15) days of the effective date of these Orders, Respondents shall submit, for the review and approval of the Executive Director, an Equipment Management Plan. The Equipment Management Plan shall:

(1) provide a graphic depiction and written description of all extant cultivation equipment within the Estero, in use or otherwise.

(2) identify the equipment that will continue to be maintained and the equipment to be considered abandoned. Equipment shall be deemed abandoned for the purposes of the revised Equipment Management Plan if it has not been used for more than a twelve month period, excepting when such disuse was explicitly commenced to comply with the 2007 Order, or is not capable of use without repairs which would exceed the scope of "repair and maintenance" as defined by Section 13252 of the California Coastal Commission administrative regulations .

(3) describe the timing and methodology to be used in order to accomplish the removal of all abandoned equipment.

(B) Respondents shall complete the removal of all abandoned equipment pursuant to the approved plan within twenty (20) days of Executive Director approval of the plan.

5.7 **Vessel Transit.**

(A) Within fifteen (15) days of the effective date of these Orders, Respondents shall submit, for the review and approval of the Executive Director, a Vessel Transit Plan consisting of a graphic and written depiction of intended transit patterns to access culture areas.

(B) Boat routes to culture areas shall be marked in accordance with the approved Vessel Transit Plan within ten (10) days of approval by the Executive Director, and traffic shall be confined to those defined lanes.

5.8 **Reporting.** All plans, reports, photographs and other materials required by these Orders shall be sent to:

California Coastal Commission
Statewide Enforcement Unit
Attn: Heather Johnston
45 Fremont Street, Ste 2000
San Francisco, CA 94105

With a copy sent to:

California Coastal Commission
Energy, Ocean Resources, and Federal Consistency Division
Attn: Cassidy Teufel

45 Fremont Street, Ste 2000
San Francisco, CA 94105

6.0 OPERATIONAL PERSISTENCE AND CESSATION.

6.1 If a court of competent jurisdiction issues an order granting DBOC the right to continue to occupy the Subject Property despite the Federal Actions (other than solely to give DBOC additional time to vacate the premises), or the federal government alters its position so as to allow DBOC the right to continue to occupy the Subject Property (other than solely to give DBOC additional time to vacate the premises), then within thirty (30) days of that action or of the effective date of these Orders, whichever occurs later, Respondents shall:

(A) Submit, and shall not withdraw, postpone, or otherwise impede final Commission action in any way on, a 'complete' coastal development permit application for any Unpermitted Development, as defined in Section 4.3, that they wish to retain.

(1) Respondents shall comply with the terms and conditions of any permit issued pursuant to the application submitted under Section 6.1(A), above, within ninety (90) days of final Commission action, unless Respondents seek judicial review of such permit within the allotted timeframe and receive relief from the court, in which case they shall comply with any requirements that remain effective.

(2) After the Commission acts on the application submitted pursuant to section 6.1(A), Respondents shall submit, for the review and approval of the Commission's Executive Director, a Removal, Erosion Control, Restoration, Revegetation, and Monitoring Plan (collectively "Restoration Plan") for the removal of any Unpermitted Development for which Respondents sought authorization pursuant to section 6.1(A), but for which the Commission denies authorization, and for restoration of areas impacted by that development. This Restoration Plan shall be submitted within ninety (90) days of final action on said denial, and shall be consistent with the provisions set forth in Section 7.0, below.

(B) Submit, for the review and approval of the Commission's Executive Director, a Removal, Erosion Control, Restoration, Revegetation, and Monitoring Plan for the removal of any Unpermitted Development for which authorization is not sought pursuant to the permit application submitted under Section 6.1(A) and for restoration of areas impacted by that development.

6.2 If no court of competent jurisdiction has issued an order giving DBOC the right to continue to occupy the Subject Property despite the Federal Actions, and the federal government has not altered its position so as to allow DBOC the right to continue to occupy the Subject Property, or if DBOC has obtained such authorization solely to provide it additional time to vacate the premises, then:

(A) Within thirty (30) days of the effective date of these Orders, Respondents shall submit for the review and approval of the Commission's Executive Director, a Removal, Erosion Control, Restoration, Revegetation, and Monitoring Plan (collectively "Restoration Plan") for the removal of all Unpermitted Development, both onshore and offshore, on the Subject Property. This Restoration Plan shall be consistent with the provisions set forth in Section 7.0, below.

(B) Once the Executive Director has approved a version of the Restoration Plan submitted pursuant to the prior section, Respondents shall implement the approved plan according to its terms and timeline.

(C) If, at any point after the initiation of the requirements of this Section 6.2, a court of competent jurisdiction issues an order giving DBOC the right to continue to occupy the Subject Property despite the Federal Actions (other than solely to give DBOC additional time to vacate the premises), or the federal government alters its position so as to allow DBOC the right to continue to occupy the Subject Property (other than solely to give DBOC additional time to vacate the premises), the obligations (including prohibitions) flowing from this Section 6.2 are tolled for the time during which any such order is in effect or as long as the federal government allows DBOC to remain.

7.0 RESTORATION. Under certain circumstances indicated in Section 6.0 of these Orders, that section requires the preparation and implementation of a plan to, among other things, remove Unpermitted Development and to restore areas on the Subject Property impacted by such Unpermitted Development. If that section's obligations are triggered, Respondents shall, contingent upon National Park Service authorization to access the Restoration Areas, submit any such Restoration Plan for review and approval of the Commission's Executive Director, within the deadlines set forth in these Orders. The Restoration Plan shall outline all proposed removal activities, proposed remedial grading, and proposed re-vegetation activities and mitigation, in the subject area, as well as monitoring plans, and shall include the following elements and requirements.

7.1 **General Provisions.**

(A) The Restoration Plan shall be prepared by a qualified restoration ecologist(s), resource specialist(s), and/or engineer ('Specialist'). Prior to the preparation of the Restoration Plan, Respondents shall submit for the Executive Director's review and approval the qualification of the proposed Specialist, including a description of the proposed Specialist's educational background, training and experience related to the preparation and implementation of the Restoration Plan described herein. If the Executive Director determines that the qualifications of Respondents' resource specialist is not adequate to conduct such restoration work, he/she shall notify Respondents and, within 10 days of such notification, Respondents shall submit for the Executive Director's review and approval a different Specialist.

(B) The Restoration Plan shall include a schedule/timeline of activities, the procedures to be used, and identification of the parties who will be conducting the restoration activities.

(C) The Restoration Plan shall include a detailed description of all equipment to be used. All tools utilized shall be hand tools unless the Specialist demonstrates to the satisfaction of the Executive Director that mechanized equipment is needed and will not impact resources protected under the Coastal Act, including, but not limited to: geological stability, water quality, integrity of landforms, native vegetation, freedom from erosion, biological productivity.

(1) If the use of mechanized equipment is proposed, the Restoration Plan shall include limitations on the hours of operations for all equipment and a contingency plan that addresses, at a minimum: 1) impacts from equipment use; 2) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment and responses thereto; and 3) any water quality concerns. The Restoration Plan shall designate areas for staging of any construction equipment and materials, including receptacles and temporary stockpiles of graded materials, all of which shall be covered on a daily basis.

(D) The Restoration Plan shall specify that no demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wind or runoff erosion and dispersion.

(1) All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.

(E) The Restoration Plan shall identify the location of the disposal site(s) for the off-site disposal of all materials removed from the Subject Property and all waste generated during restoration activities pursuant to these Orders. If a disposal site is located in the Coastal Zone and is not an existing sanitary landfill, a coastal development permit is required for such disposal. All hazardous waste must be disposed of at a suitable licensed disposal facility.

(F) The Restoration Plan shall specify the methods to be used during and after restoration to stabilize the soil and make it capable of supporting native vegetation. Such methods shall not include the placement of retaining walls or other permanent structures, grout, geogrid or similar materials. Any soil stabilizers identified for erosion control shall be compatible with native plant recruitment and establishment. The Restoration Plan shall also include all measures that will be installed on the Subject Property and maintained until the impacted areas have been revegetated to minimize erosion and the transport of sediment.

(G) The Restoration Plan shall identify all areas, onshore and offshore, on which the Restoration Plan are to be implemented, and upon which the restoration will occur ('Restoration Area'). The Restoration Plan shall also state that prior to the initiation of any restoration or removal activities, as appropriate, the boundaries of the Restoration Area shall be physically delineated in the field, using temporary measures such as fencing stakes, colored flags, or colored tape. The Restoration Plan shall state further that all delineation materials shall be removed when no longer needed and verification of such removal shall be provided in the annual monitoring report that corresponds to the reporting period during which the removal occurred.

7.2 **Erosion Control and Turbidity Management.**

(A) Respondents shall submit an Erosion Control and Turbidity Management Plan, prepared by a qualified Specialist, approved pursuant to Section 7.1(A), as part of the Restoration Plan, to address ground disturbance during any construction, removal, or restoration activities, and during the establishment of eelgrass and vegetation planted pursuant to Section 7.5, below.

(B) The erosion control measures are required to be installed and fully functional on the Restoration Area prior to or concurrent with the initial removal and restoration activities required by these Orders and maintained throughout the removal/restoration process to minimize erosion or turbidity across the site and sedimentation of Drake's Estero or streams, tributaries, drains and culverts.

(1) The Erosion Control and Turbidity Management Plan shall: 1) include a narrative report describing all temporary run-off, turbidity, and erosion control measures to be used during removal/restoration activities; and 2) identify and delineate on a site or grading plan the locations of all temporary erosion and turbidity control measures.

(a) All temporary construction related erosion control materials shall be comprised of bio-degradable materials and shall be removed from the construction site once the permanent erosion control features are established.

(C) The turbidity management measures shall describe techniques and implements to be employed to minimize turbidity-related disturbances to Drake's Estero and the nearshore environment during removal activities. These measures should include a description of how turbidity generated as a result of vessel transport and physical removal activities will be minimized and mitigated. Such measures shall include the use of timing of removal activities with relation to tides as a means of minimizing turbidity.

7.3 **Removal Plan.**

(A) As part of the Restoration Plan, Respondents shall submit a Removal Plan, prepared by a qualified Specialist, approved pursuant to Section 7.1(A), to govern the removal and off-site disposal of all Unpermitted Development required to be removed pursuant to these Orders.

(1) The Removal Plan shall include a site plan showing the location and identity of all Unpermitted Development, onshore and offshore, to be removed from the Subject Property.

(2) The Removal Plan shall address and include details regarding different types of Unpermitted Development to be removed, including applicable removal conditions and procedures relevant to the type of Unpermitted Development being removed and the location (e.g. offshore/onshore).

(B) The Removal Plan shall indicate that removal activities shall not disturb areas outside of the removal and restoration area, and shall not violate the Harbor Seal Protection measures enumerated in Section 5.2, above. Measures for the restoration of any area disturbed by the removal activities shall be included within the Revegetation Plan. These measures shall include the restoration of the areas from which the Unpermitted Development was removed, and any areas disturbed by those removal activities.

(1) The Removal Plan shall provide for third-party monitoring of all offshore removal activities.

(C) The Removal Plan shall provide that visible shell and equipment debris shall be removed with hand tools from all areas beneath cultivation racks to remove impediments to the proliferation of eelgrass.

7.4 **Remedial Grading Plan.**

(A) As part of the Restoration Plan, Respondents shall submit a Remedial Grading Plan for onshore development prepared by a qualified Specialist approved pursuant to Section 7.1(A) for the review and approval of the Commission's Executive Director. The Remedial Grading Plan shall include sections showing original and finished grades, and a quantitative breakdown of grading amounts (cut/fill), drawn to scale with contours that clearly illustrate, as accurately as possible, the pre-development and the current, unpermitted topography. The Remedial Grading Plan shall demonstrate how the proposed remedial grading will restore the Subject Property to the original, pre-violation topography, as determined in consultation with Commission staff biologist and engineer.

7.5 **Survey and Revegetation Plan.**

(A) Respondents shall submit a Survey and Revegetation Plan, prepared by a qualified Specialist, as approved under Section

7.1(A), above, as part of the Restoration Plan, outlining the measures necessary to survey and revegetate the Restoration Area.

(1) The Survey and Revegetation Plan shall demonstrate that the onshore areas impacted by the Unpermitted Development on the Subject Property will be restored using plant species endemic to and appropriate for the area in which the unpermitted activities occurred.

(2) The Survey and Revegetation Plan shall demonstrate that offshore areas beneath cultivation racks will be restored with eelgrass.

(B) The Survey and Revegetation Plan shall specify that a post-removal eelgrass survey shall be completed within thirty (30) days of the completion of removal activities and during the first active growth period for eelgrass (May through September) following the completion of removal activities. These eelgrass surveys shall be conducted in substantial conformance with survey recommendations in the document entitled, "Recommendations Concerning Surveys for Assessing Impacts to Eelgrass" of the Draft California Eelgrass Mitigation Policy prepared by the National Marine Fisheries Service (NMFS), Southwest Region, dated December 7, 2011 (published in the Federal Register March 9, 2012).

(1) Density and extent of vegetative cover shall be estimated at no less than three control areas during the post-removal eelgrass surveys and during subsequent follow-up surveys. Changes in density and extent of vegetated cover of the surveyed control areas shall be used to account for natural variability of eelgrass growth in interpreting site survey results. Selection of appropriate control sites shall be performed in consultation with Commission staff.

(C) The Survey and Revegetation Plan shall specify that Respondent shall commence revegetation efforts described in the Survey and Revegetation Plan within thirty (30) days of the completion of the initial post-removal survey to actively restore the eelgrass in areas beneath the cultivation racks in order to meet the enumerated success criteria.

(1) The Survey and Revegetation Plan shall enumerate success and monitoring criteria, including the requirement that the eelgrass within the areas under cultivation racks be restored to 100% coverage of eelgrass and 85% density of the

control site within two growing seasons of the commencement of the active restoration work.

(D) The Revegetation Plan shall also explicitly lay out the restoration goals and objectives for the onshore revegetation and restoration. Based on these goals, the plan shall identify the species that are to be planted, and provide a rationale for and describe the size and number of container plants and the rate and method of seed application.

(1) The Survey and Revegetation Plan shall include a detailed description of the methods that shall be utilized to restore the onshore portion of the Restoration Area to the condition that existed prior to the unpermitted development occurring.

(E) The Survey and Revegetation Plan shall include a map showing the type, size, and location of all plant materials that will be installed onshore in the Restoration Area; the location of all non-native plants to be removed from the onshore portion of the Restoration Area; the topography of all other onshore landscape features on the site; and the location of photographs of the onshore Restoration Areas that will provide reliable photographic evidence for annual monitoring reports, as described in Section 7.6(B), below.

(F) The onshore portion of the Survey and Revegetation Plan shall include a detailed explanation of the performance standards that will be utilized to determine the success of the restoration. The performance standards shall identify that ‘x’ native species appropriate to the habitat should be present, each with at least ‘y’ percent cover or with a density of at least ‘z’ individuals per square meter. The description of restoration success shall be described in sufficient detail to enable an independent specialist to duplicate it.

(G) The onshore portion of the Survey and Revegetation Plan shall describe the proposed use of artificial inputs, such as irrigation, fertilizer or herbicides, including the full range of amounts of the inputs that may be utilized. The minimum amount necessary to support the establishment of the plantings for successful restoration shall be utilized. No permanent irrigation system is allowed in the Restoration Area.

(H) If, after the three (3) year time limit, the onshore vegetation planted pursuant to the Survey and Revegetation Plan has not become established, the Executive Director may, upon receipt of a

written request from Respondents, allow for the continued use of the temporary irrigation system. The written request shall outline the need for and duration of the proposed extension.

7.6 **Monitoring Plan.**

(A) The plan shall indicate that Respondents shall submit a Monitoring Plan, as part of the Restoration Plan, that describes the monitoring and maintenance methodology, including sampling procedures, sampling frequency, and contingency plans to address potential problems with restoration activities or unsuccessful restoration of the area. The Monitoring Plan shall specify that the restoration Specialist shall conduct at least four site visits annually for the duration of the monitoring period set forth in Section 7.6(B), at intervals specified in the Restoration Plan, for the purposes of inspecting and maintaining, at a minimum, the following: all erosion control measures; non-native species eradication; trash and debris removal; and the health and abundance of original and/or replacement plantings.

(B) Respondents shall submit, on an annual basis and during the same one-month period of each year (no later than December 31st of the first year), for five (5) years from the completion of implementation of the Revegetation Plan, according to the procedure set forth under Section 7.9, a written report, for the review and approval of the Executive Director, prepared by the qualified Specialist, evaluating compliance with the approved Restoration Plan. These reports shall also include photographs taken during the periodic site inspections pursuant to Section 7.6(A), at the same time of year, from the same pre-designated locations (as identified on the map submitted pursuant to Section 7.5(D)) indicating the progress of recovery in the Restoration Areas.

(1) The locations from which the photographs are taken shall not change over the course of the monitoring period unless recommended changes are approved by the Executive Director, pursuant to Section 13.0 of these Orders.

(C) If periodic inspections or the monitoring reports indicate that the restoration project or a portion thereof is not in conformance with the Restoration Plan, or these Orders, or has failed to meet the goals and/or performance standards specified in the Restoration Plan, Respondents shall submit a revised or supplemental Restoration Plan (‘Revised Restoration Plan’) for review and

approval by the Executive Director. The Revised Restoration Plan shall be prepared by a qualified Specialist, approved by the Executive Director, and shall specify measures to correct those portions of the restoration that have failed or are not in conformance with the original approved Restoration Plan, or these Orders. The Executive Director will then determine whether the Revised Restoration Plan must be processed as a modification of these Orders, a new Restoration Order, or a new or amended coastal development permit. After the Revised Restoration Plan has been approved, these measures, and any subsequent measures necessary to carry out the original approved Restoration Plan, shall be undertaken by Respondents as required by Executive Director until the goals of the original approved Restoration Plan have been met. Following completion of the Revised Restoration Plan's implementation, the duration of the monitoring period, set forth in Section 7.6(D), shall be extended for at least a period of time equal to that during which the project remained out of compliance, but in no case less than two annual reporting periods.

(D) At the end of the five (5) year monitoring period (or other duration, if the monitoring period is extended pursuant to Section 7.6(C)), Respondents shall submit, according to the procedure set forth under Section 7.9, a final detailed report prepared by a qualified Specialist for the review and approval of the Executive Director.

(1) If this report indicates that the restoration has in part, or in whole, been unsuccessful, based on the requirements of the approved Restoration Plans, Respondents shall submit a Revised Restoration Plan, in accordance with the requirements of Section 7.6(C) of the Orders, and the monitoring program shall be revised accordingly.

7.7 Upon approval of the Restoration Plan (including the Removal, Remedial Grading, Revegetation, and Monitoring Plans) by the Executive Director, Respondents shall commence implementation of the Restoration Plan within fifteen (15) days after the Restoration Plan is approved. Respondents shall complete all elements of the Restoration Plan, excepting the Monitoring Plan, no later than thirty (30) days from commencing implementation of the Restoration Plan. The Monitoring Plan shall be implemented consistent with the terms of each subject Monitoring Plan. The Executive Director may extend this deadline or modify the approved schedule for good cause pursuant to Section 13.0 of these Orders.

(A) Within thirty (30) days of the completion of the work described pursuant to each phase (Removal Plan, Remedial Grading Plan,

and Revegetation Plan), Respondents shall submit, according to the procedures set forth under Section 7.9, a written report, prepared by a qualified Specialist, for the review and approval of the Executive Director, documenting all restoration work performed on the Subject Properties pursuant to the specific component of the Restoration Plan. This report shall include a summary of dates when work was performed and photographs taken from the pre-designated locations (as identified on the map submitted pursuant to Section 7.5(D)) documenting implementation of the respective components of the Restoration Plan, as well as photographs of the Subject Properties before the work commenced and after it was completed.

ADDITIONAL PROVISIONS COMMON TO BOTH ORDERS

8.0 **Revision of Deliverables.** The Executive Director may require revisions to deliverables under these Orders, and the Respondents shall revise any such deliverables consistent with the Executive Director's specifications, and resubmit them for further review and approval by the Executive Director, by the deadline established by the modification request from the Executive Director. The Executive Director may extend the deadline for submittals upon a written request and a showing of good cause, pursuant to Section 13.0 of these Orders.

9.0 **Commission Jurisdiction.** The Commission has jurisdiction over resolution of these alleged Coastal Act violations pursuant to PRC Section 30810 and 30811.

10.0 **Effective Date and Terms of these Orders.** The effective date of these Orders is the date these Orders are issued by the Commission. These Orders shall remain in effect permanently unless and until rescinded by the Commission.

11.0 **Findings.** These Orders are issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "Staff Report: Recommendations and Findings for Cease and Desist and Restoration Orders." The activities authorized and required in these Orders are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. The Commission has authorized the activities required in these Orders as being consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act.

12.0 **Compliance Obligation.** Strict compliance with these Orders by all parties subject thereto is required. Failure to comply with any term or condition of these Orders, including any deadline contained in these Orders, unless the Executive Director grants an extension under Section 13.0, will constitute a violation of these Orders and shall result in Respondents being liable for stipulated penalties in the amount of six thousand dollars ($6,000) per day per violation. If Respondents violate these Orders, nothing in these Orders shall be construed as

prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available for the violations addressed herein, including imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30820, 30821.6, and 30822 as a result of the lack of compliance with these Orders and for the underlying Coastal Act violations described herein

13.0 **Deadlines.** Prior to the expiration of the deadlines established by these Orders, Respondents may request from the Executive Director an extension of the deadlines. Such a request shall be made in writing, 10 days in advance of the deadline, and directed to the Executive Director, care of Heather Johnston, in the San Francisco office of the Commission. The Executive Director may grant an extension of deadlines upon a showing of good cause, if the Executive Director determines that Respondents have diligently worked to comply with their obligations under these Orders, but cannot meet deadlines due to unforeseen circumstances beyond their control.

14.0 **Severability.** Should any provision of these Orders be found invalid, void or unenforceable, such illegality or unenforceability shall not invalidate the whole, but the Orders shall be construed as if the provision(s) containing the illegal or unenforceable part were not a part hereof.

15.0 **Site Access.** Respondents shall provide access to the Subject Property at all reasonable times to Commission staff and any other agency having jurisdiction over the work being performed under these Orders. Nothing in these Orders 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 Subject Property for purposes, including, but not limited to: viewing the areas where development is being performed pursuant to the requirements of these Orders; inspecting records; operating logs and contracts relating to the site; and overseeing, inspecting and reviewing the progress of Respondents' implementation of the Restoration Plan and compliance with these Orders.

16.0 **Government Liabilities.** Neither the State of California, the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by Respondents in carrying out activities pursuant to these Orders, nor shall the State of California, the Commission or its employees be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to these Orders.

17.0 **Successors and Assigns.** These Orders shall run with the land, binding Respondents, including successors in interest, heirs, assigns. Respondents shall provide notice to all successors, assigns, and potential purchasers of the facilities operations or any portion thereof of any remaining obligations under these Orders. These Orders create personal legal obligations, and Respondents are responsible

for the work required by these Orders without regard to the ownership of their property adjacent to the Subject Property.

18.0 **Modifications and Amendments.** Except as provided in Section 13.0, and other minor non-substantive modifications, these Orders may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) and Section 13197 of the Commission's administrative regulations.

19.0 **Government Jurisdiction.** These Orders shall be interpreted, construed, governed, and enforced under and pursuant to the laws of the State of California.

20.0 **Limitation of Authority.** Except as expressly provided herein, nothing in these Orders 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 these Orders.

Executed in _____ on behalf of the California Coastal Commission:

_____ _____
Charles Lester, Executive Director Date

Attachment 1
CCC-13-CD-01 & CCC-13-RO-01
Page 1 of 1

THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 2 9 2012

To: Director, National Park Service

Through: Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

From: Secretary Ken Salazar

Subject: Point Reyes National Seashore – Drakes Bay Oyster Company

After giving due consideration to the request of the Drakes Bay Oyster Company ("DBOC") to conduct commercial operations within Point Reyes National Seashore in the State of California ("Point Reyes"), I have directed the National Park Service (NPS) to allow the permit to expire at the end of its current term. This decision is based on matters of law and policy including:

1) The explicit terms of the 1972 conveyance from the Johnson Oyster Company to the United States of America. The Johnson Oyster Company received $79,200 for the property. The Johnson Oyster Company also reserved a 40 year right of use and occupancy expiring November 30, 2012. Under these terms and consideration paid, the United States purchased all the fee interest that housed the oyster operation. In 2004, DBOC acquired the business from Johnson Oyster Company, including the remaining term of the reservation of use and occupancy and was explicitly informed "no new permit will be issued" after the 2012 expiration date.

2) The continuation of the DBOC operation would violate the policies of NPS concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore.

The area within Point Reyes that Congress identified as potential wilderness includes a biologically rich estuary known as Drakes Estero, consisting of several tidal inlets tributary to Drakes Bay, on the southern side of the Point Reyes peninsula. Drakes Estero encompasses approximately 2,500 acres of tidelands and submerged lands and is home to one of the largest harbor seal populations in California. In 1999 the eastern portion of Drakes Estero, known as the Estero de Limantour, was converted from potential to designated wilderness, becoming the first (and still the only) marine wilderness on the Pacific coast of the United States outside of Alaska. DBOC's commercial mariculture operation is the only use in the remaining portion of Drakes Estero preventing its conversion from potential to designated wilderness.

Therefore, I direct you to:

1) Notify DBOC that both the Reservation of Use and Occupancy ("RUO") and the Special Use Permit ("SUP") held by DBOC expire according to their terms on November 30, 2012.

2) Allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.

3) Effectuate the conversion of Drakes Estero from potential to designated wilderness.

Because of the importance of sustainable agriculture on the pastoral lands within Point Reyes, I direct that you pursue extending permits for the ranchers within those pastoral lands to 20-year terms.

Finally, I direct you to use all existing legal authorizations at your disposal to help DBOC workers who might be affected by this decision, including assisting with relocation, employment opportunities, and training.

I have taken this matter very seriously. I have personally traveled to Point Reyes National Seashore, visited DBOC, met with a wide variety of interested parties on all sides of this issue, and considered many letters, scientific reports, and other documents. The purpose of this memorandum is to document the reasons for my decision and to direct you to take all necessary and appropriate steps to implement it.

I. Factual and Legal Background

A. Point Reyes National Seashore

Congress authorized the establishment of Point Reyes National Seashore in the Act of September 13, 1962, Pub. L. No. 87-657, 76 Stat. 538, codified as amended at 16 U.S.C. §§ 459c through 459c-7 (2012). The NPS subsequently began to acquire privately owned lands within Point Reyes's legislated boundaries. In 1965 the State of California granted the United States all of the State's right, title, and interest to the tide and submerged lands within the national seashore except for certain mineral rights. On October 20, 1972, the national seashore was formally established by publication of the required notice in the Federal Register. 37 Fed. Reg. 23,366 (1972). The legislation does authorize the Secretary of the Interior to lease agricultural ranch and dairy lands within Point Reyes' pastoral zone in keeping with the historic use of that land. The enabling legislation does not authorize mariculture.

Point Reyes comprises approximately 71,067 acres, of which approximately 65,090 are federally owned. The National Seashore, located about an hour's drive north of San Francisco, currently attracts more than two million visitors per year. In 1976, Congress designated 25,370 acres of land within Point Reyes as wilderness and identified an additional 8,003 acres of land and water as potential wilderness. Act of October 18, 1976, Pub. L. No. 95-544, 90 Stat. 2515, and § 1(k)

of the Act of October 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692, 2693.[1] With respect to the area identified as potential wilderness, Congress provided, "All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness." *Id.* § 3.[2] The House of Representatives committee report accompanying the October 18, 1976, act states, "As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." H.R. REP. NO. 94-1680 at 3 (1976).[3] Sections 4(c) and 4(d)(5) of the Wilderness Act prohibit commercial activities such as mariculture in designated wilderness. 16 U.S.C. §§ 1133(c) and 1133(d)(5).

B. Commercial Mariculture Operations within Point Reyes National Seashore

Since the 1930s commercial oyster operations have been conducted on lands and waters now included within Point Reyes. In 1958 Charles W. Johnson assumed control over state-issued water-bottom leases in Drakes Estero, and in 1961 he purchased five acres of uplands near the estero and expanded an existing oyster processing facility on it. In 1972 Mr. Johnson, dba Johnson Oyster Company (JOC), conveyed fee title to his property to the United States, reserving in the deed a 40-year right to use and occupy 1.5 acres of land, including the processing facility, "for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary [*sic*; probably should read "complementary"] food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incident thereto." The reservation indicated that possibility of a new permit after the RUO's expiration but in no way suggested that one would definitely be issued. The United States paid JOC fair market value for the interest the United States acquired, taking into consideration the value of the 40-year reserved use and occupancy. The deed of conveyance refers to the reservation as "a terminable right to use and occupy."

In 2004 DBOC purchased the assets of Johnson's Oyster Company, including the remaining term of the RUO, with full knowledge that the reserved use and occupancy would expire in 2012.

On March 28, 2005, then Superintendent of Point Reyes, Don Neubacher, sent a letter to DBOC "to ensure clarity and avoid any misunderstanding....[r]egarding the 2012 expiration date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date."

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[1] The official map referenced in both pieces of legislation indicated that Congress actually designated approximately 24,200 acres of land as wilderness and identified approximately 8,530 acres of additional land as potential wilderness.

[2] It is worth noting that under the statute's clear terms the conversion from potential to designated wilderness occurs automatically by operation of law when the required Federal Register notice is published.

[3] In 1999 approximately 1,752 acres of uplands, tidelands, and submerged lands within Point Reyes were converted from potential to designated wilderness. 64 Fed. Reg. 63,057 (1999).

The DBOC subsequently applied for, and was issued, an NPS special use permit authorizing it to use approximately 1,050 acres offshore and 3.1 additional acres onshore for its operations. Both authorizations—the RUO and the SUP— expire by their own terms on November 30, 2012.

C. SEC. 124

In 2009 Congress enacted SEC. 124 of the Act of October 30, 2009, Pub. L. No. 111-88, 123 Stat. 2932, which provides in its entirety as follows:

> SEC. 124. Prior to the expiration on November 30, 2012, of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drake's (sic) Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

D. Preparation of Draft and Final Environmental Impact Statements

After SEC. 124 was enacted in 2009, the NPS initiated the process of preparing a draft environmental impact statement (DEIS) to analyze the environmental impacts associated with various alternatives related to a decision to permit or not to permit DBOC's continued commercial operations in Drakes Estero and to obtain robust public input into this matter. The NPS issued a scoping notice, hosted public scoping meetings, produced and released to the public a thousand-page-long DEIS, and invited and accepted public comments on the DEIS. As a result of that public process, the NPS prepared a final environmental impact statement (FEIS), which includes responses to public comments on the DEIS. The NPS released the FEIS to the public earlier this month.

SEC. 124 does not require me (or the NPS) to prepare a DEIS or an FEIS or otherwise to comply with the National Environmental Policy Act of 1969 (NEPA) or any other law. The "notwithstanding any other provision of law" language in SEC. 124 expressly exempts my decision from any substantive or procedural legal requirements. Nothing in the DEIS or FEIS that the NPS released to the public suggests otherwise. As the FEIS explained:

> Although the Secretary's authority under Section 124 is 'notwithstanding any other provision of law,' the Department has determined that it is helpful to

> generally follow the procedures of NEPA. The EIS provides decision-makers with sufficient information on potential environmental impacts, within the context of law and policy, to make an informed decision on whether or not to issue a new SUP. In addition, the EIS process provides the public with an opportunity to provide input to the decision-makers on the topics covered by this document.

FEIS at 2. The FEIS also stated, "The NEPA process will be used to inform the decision of whether a new [special use permit] should be issued to DBOC for a period of 10 years." *Id.* at 5. The NEPA process, like SEC. 124 itself, does not dictate a result or constrain my discretion in this matter.

II. Discussion

I understand and appreciate that the scientific methodology employed by the NPS in preparing the DEIS and FEIS and the scientific conclusions contained in those documents have generated much controversy and have been the subject of several reports. Collectively, those reports indicate that there is a level of debate with respect to the scientific analyses of the impacts of DBOC's commercial mariculture operations on the natural environment within Drakes Estero.

Although there is scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope of the impacts that DBOC's operations have on wilderness resources, visitor experience and recreation, socioeconomic resources and NPS operations, the DEIS and FEIS support the proposition that the removal of DBOC's commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment.[4] Thus while the DEIS and FEIS do not resolve all the uncertainty surrounding the impacts of the mariculture operations on Drakes Estero, and while they are not material to the legal and policy factors that provide the central basis for my decision, they have informed me with respect to the complexities, subtleties, and uncertainties of this matter and have been helpful to me in making my decision.[5]

SEC. 124 grants me the authority and discretion to issue DBOC a new special use permit, but it does not direct me to do so. SEC. 124 also does not prescribe the factors on which I must base my decision. In addition to considering the documents described above, I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.

In enacting that provision, Congress clearly expressed its view that, but for the nonconforming uses, the estero possessed wilderness characteristics and was worthy of wilderness designation.

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[4] While NEPA review was not legally required, NEPA as a general matter does not require absolute scientific certainty or the full resolution of any uncertainty regarding the impacts of the federal action. *See League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060 (9th Cir. 2012) and *Lands Council v. McNair, 537F.3d 981,988 (9th Cir 2008) (en banc)* (overruled in part on other grounds by *Winter v. Natural Res. Def. Council,, 555 U.S. 7 (2008).*

[5] In a letter to me dated November 27, 2012, counsel for DBOC has asserted that the FEIS is "fatally flawed" and I should avoid any consideration "of the FEIS in its entirety." My decision today is based on the incompatibility of commercial activities in wilderness and not on the data that was asserted to be flawed.

Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when "all uses thereon prohibited by the Wilderness Act have ceased." The DBOC's commercial operations currently are the only use of the estero prohibited by the Wilderness Act. Therefore, DBOC's commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness. Since the RUO and SUP allowing DBOC's commercial operations in the estero will expire by their own terms, after November 30, 2012, DBOC no longer will have legal authorization to conduct those operations, and approximately 1,363 acres can become designated wilderness.

Although SEC. 124 grants me the authority to issue a new SUP and provides that such a decision would not be considered to establish any national precedent with respect to wilderness, it in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero. With that in mind, my decision effectuates that Congressional intent.

III. Implementation

Based on the foregoing, I hereby direct that you expeditiously take all necessary and appropriate steps to implement my decision. My decision means that, after November 30, 2012, DBOC no longer will be legally authorized to conduct commercial operations within Point Reyes. Accordingly, I direct that the NPS publish in the Federal Register the notice announcing the conversion of Drakes Estero from potential to designated wilderness. I direct that the NPS allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.

I am aware that allowing DBOC's existing authorizations to expire by their terms will result in dislocation of DBOC's business and may result in the loss of jobs for the approximately 30 people currently employed by DBOC. I therefore direct that you use existing legal authorities to ameliorate to the extent possible the economic and other impacts on DBOC's employees, including providing information and other assistance to those employees to the full extent authorized under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, codified as amended at 42 U.S.C. §§ 4601-4655. Additionally, I direct you to develop a plan for training and to work with the local community to identify job opportunities for DBOC employees..

Finally, the Department of the Interior and the NPS support the continued presence of dairy and beef ranching operations in Point Reyes' pastoral zone. I recognize that ranching has a long and important history on the Point Reyes peninsula, which began after centuries old Coast Miwok traditions were replaced by Spanish mission culture at the beginning of the 19th century. Long-term preservation of ranching was a central concern of local interests and members of Congress as they considered legislation to establish the Point Reyes National Seashore in the late 1950s and early 1960s. In establishing the pastoral zone (Point Reyes enabling legislation PL 87-657, Section 4) Congress limited the Government's power of eminent domain and recognized "the

value to the Government and the public of continuation of ranching activities, as presently practiced, in preserving the beauty of the area." (House Report No. 1628 at pages 2503-04). Congress amended the Point Reyes enabling legislation in 1978 to authorize the NPS to lease agricultural property that had been used for ranching or dairying purposes. (Section 318, Public Law 95-625, 92 Stat. 3487, 1978). The House Report explained that the "use of agricultural lease-backs is encouraged to maintain this compatible activity, and the Secretary is encouraged to utilize this authority to the fullest extent possible." (House Report 95-1165, page 344).

Accordingly, I direct that the Superintendent work with the operators of the cattle and dairy ranches within the pastoral zone to reaffirm my intention that, consistent with applicable laws and planning processes, recognition of the role of ranching be maintained and to pursue extending permits to 20-year terms for the dairy and cattle ranches within that pastoral zone. In addition, the values of multi-generational ranching and farming at Point Reyes should be fully considered in future planning efforts. These working ranches are a vibrant and compatible part of Point Reyes National Seashore, and both now and in the future represent an important contribution to the Point Reyes' superlative natural and cultural resources.

IV. Conclusion

My decision honors Congress's direction to "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status" and thus ensures that these precious resources are preserved for the enjoyment of future generations of the American public, for whom Point Reyes National Seashore was created. As President Lyndon Johnson said on signing the Wilderness Act in 1964, "If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it."

cc: Regional Director, Pacific West Region, NPS
Superintendent, Point Reyes National Seashore

United States Department of the Interior

NATIONAL PARK SERVICE
Pacific West Region
333 Bush Street, Suite 500
San Francisco, California 94104-2828

IN REPLY REFER TO:
L30 (PWR-RD)

November 29, 2012

Kevin and Nancy Lunny
Drakes Bay Oyster Company
17171 Sir Francis Drake
Inverness, CA 94937

Dear Mr. and Mrs. Lunny:

This letter is to advise you that the Secretary of the Interior has declined to exercise the discretionary permitting authority granted to him under Section 124 of the Act of October 30, 2009, Pub. L. No. 111-88, 123 Stat. 2932. As a result, your 2008 Special Use Permit ("SUP") and Reservation of Use and Occupancy ("RUO") will expire by their own terms at midnight on November 30, 2012.

Although your existing authorizations will expire, and although you are not authorized to conduct commercial activities in the waters of Drakes Estero after November 30, 2012, the Secretary has directed the National Park Service ("NPS") to allow you time to remove your personal property from the park and close out your operations. In accordance with the Secretary's November 29, 2012, decision and consistent with 36 C.F.R.§ 5.3,this letter therefore constitutes a limited authorization effective December 1, 2012, for you to conduct the actions identified below, and only those actions. Except as provided herein, nothing in this limited authorization relieves any post-expiration requirements of Drakes Bay Oyster Company ("DBOC") under either the RUO or the SUP.

1. In order to minimize the loss of its personal property, DBOC will have 90 days (until February 28, 2013) to remove its personal property, including shellfish and racks, from the tide and submerged lands within Drakes Estero. Only DBOC-owned vessels may be used to remove DBOC's personal property from the Estero. No other use of motorized vessels is allowed without the express, prior written approval of the NPS. DBOC's boats and personnel are prohibited from entering the harbor seal protection areas as identified on the map entitled "Offshore Area of Operation." In addition, DBOC's boats and personnel are prohibited from coming within 100 yards of any hauled out harbor seal no matter where it is located.

2. DBOC will be allowed to process and sell shellfish within the onshore RUO area and the upland portion of the SUP area for 90 days (until February 28, 2013).
3. DBOC will have 90 days (until February 28, 2013) to vacate and surrender the Premises (which are defined as the designated RUO area and the designated SUP areas as depicted in the maps entitled "Onshore Area of Operation" and "Offshore Area of Operation").
4. DBOC may not plant or place any additional larvae or shellfish within Drakes Estero.
5. DBOC may not install or construct any new structures or facilities on the Premises, nor may it make improvements to any existing facilities or structures.
6. During this 90 day period, DBOC shall maintain the Premises in a safe and sanitary condition and shall not conduct its activities in a manner that results in waste or nuisance.
7. On or before the conclusion of this 90 day period, DBOC shall surrender and vacate the Premises, remove all personal property therefrom (including DBOC-owned structures and improvements), and repair any damage resulting from such removal. Subject to the approval of the NPS, DBOC shall also return the Premises to a good order and condition (subject to ordinary wear and tear and damage that is not caused directly or indirectly by DBOC). If DBOC fails to satisfactorily remove its personal property and repair the Premises within this 90 day period, then at the NPS's option and after notice to DBOC, DBOC's personal property shall either become the personal property of the NPS without compensation therefore, or the NPS may cause it to be removed and the Premises to be repaired at the expense of DBOC, and no claim for damages against NPS or its agents shall be created or made on account of such removal or repair work.

This limited authorization is also subject to the following terms and conditions:

8. To ensure the protection of natural and cultural resources, DBOC may not conduct any ground disturbing work or excavation without the express, prior written approval of the NPS.
9. On behalf of itself and other state, local and federal agencies, the NPS reserves the right to enter upon the Premises at any time to inspect, inventory and monitor DBOC's activities under this limited authorization.
10. This limited authorization is a mere license. It does not convey any right, title or interest in the Premises to DBOC, nor does it convey any right, title and interest in NPS-owned structures located on the Premises. This limited authorization does not grant exclusive use of the Premises to DBOC.
11. This limited authorization does not entitle DBOC to any benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.
12. Time is hereby expressly declared to be of the essence for every provision of this limited authorization.
13. The laws of the United States shall govern the validity, construction and effect of this limited authorization.
14. Failure to comply with these terms and conditions may result in the revocation of this limited authorization.
15. DBOC's employees who have lived on site for at least 90 days prior to November 30, 2012, may have an opportunity to continue to live on site for a limited period of time afterwards. The NPS will contact these employees directly regarding relocation assistance and work with them to establish a timeframe for moving offsite.

16. This limited authorization is issued due to the special circumstances presented by this situation and is not to be construed as precedent for any future situation at Point Reyes or elsewhere.

If you have questions regarding this letter or the limited authorization that it grants, please contact Point Reyes National Seashore Superintendent Cicely Muldoon at 415-464-5120 or cicely_muldoon@nps.gov.

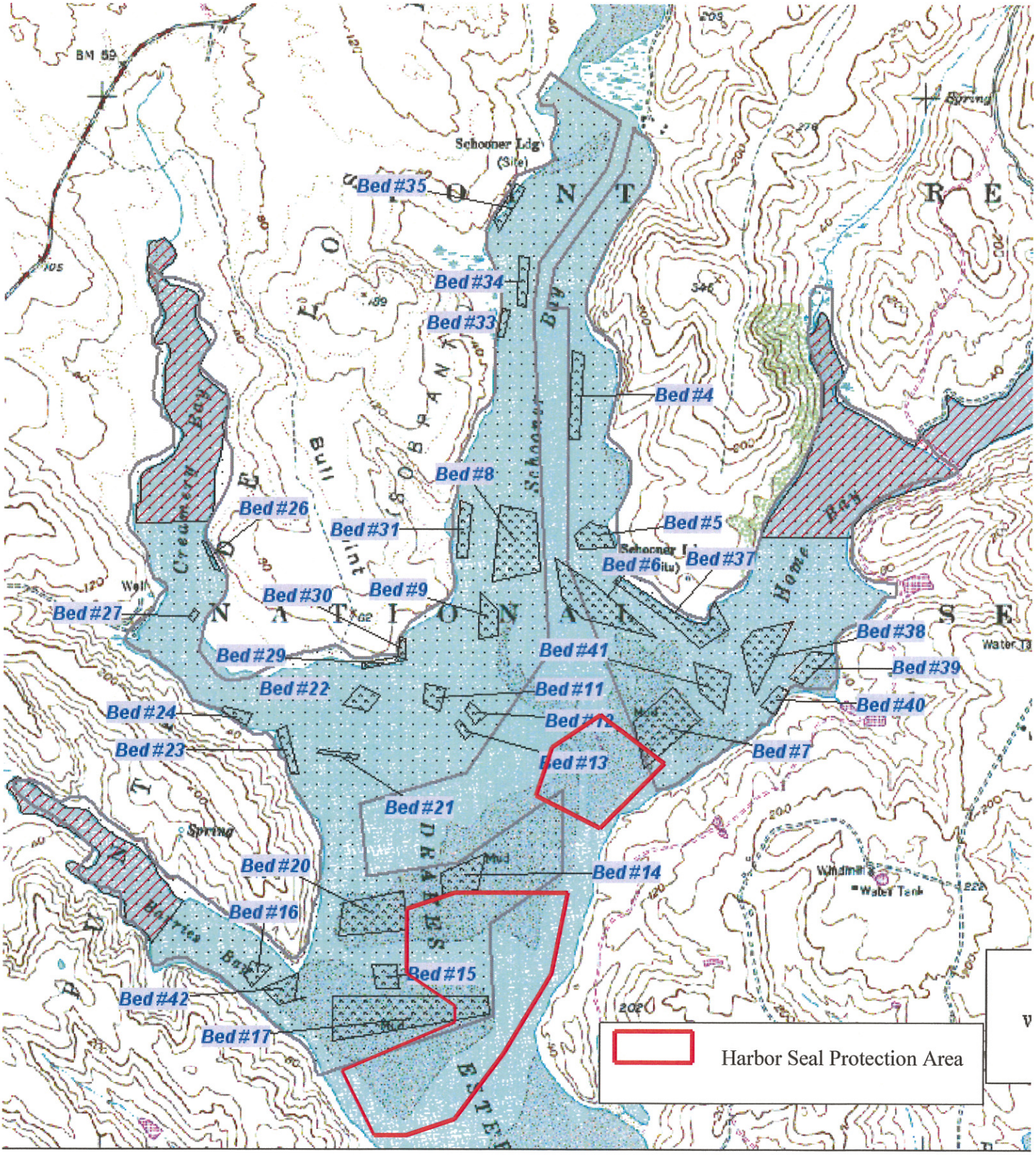
Sincerely,

/s/

Christine S. Lehnertz
Regional Director, Pacific West Region

Enclosures

cc: David Schifsky, Chief Ranger, Point Reyes National Seashore
Cicely Muldoon, Superintendent, Point Reyes National Seashore



Attachment 4
CCC-13-CD-01 & CCC-13-RO-01
Page 1 of 1

EXHIBITS

Exhibit 1
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)
Page 1 of 1

Exhibit 2
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

UNPERMITTED STRUCTURES

Exhibit 3
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

Unpermitted Electrical Trench

Exhibit 4
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

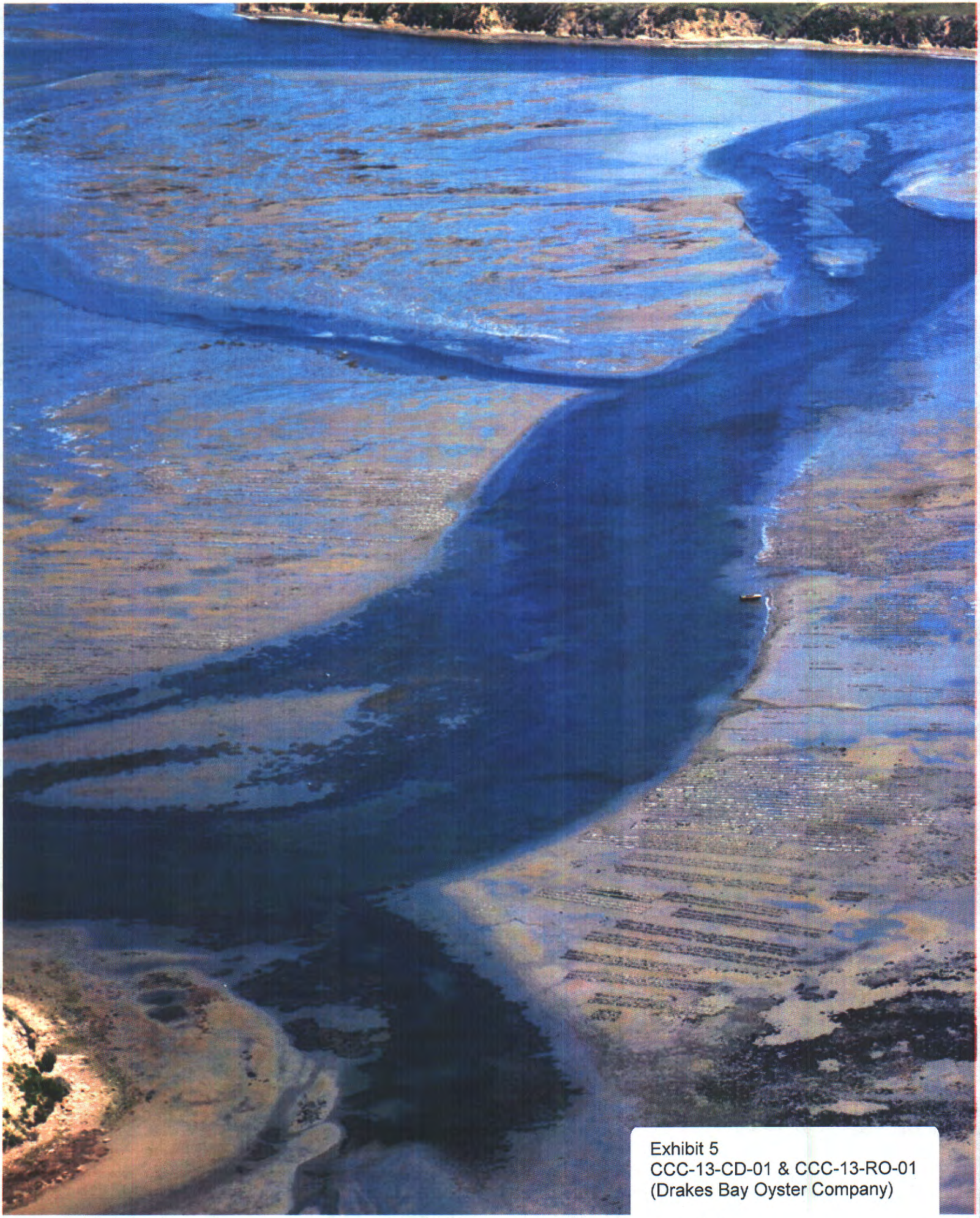


Exhibit 5
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

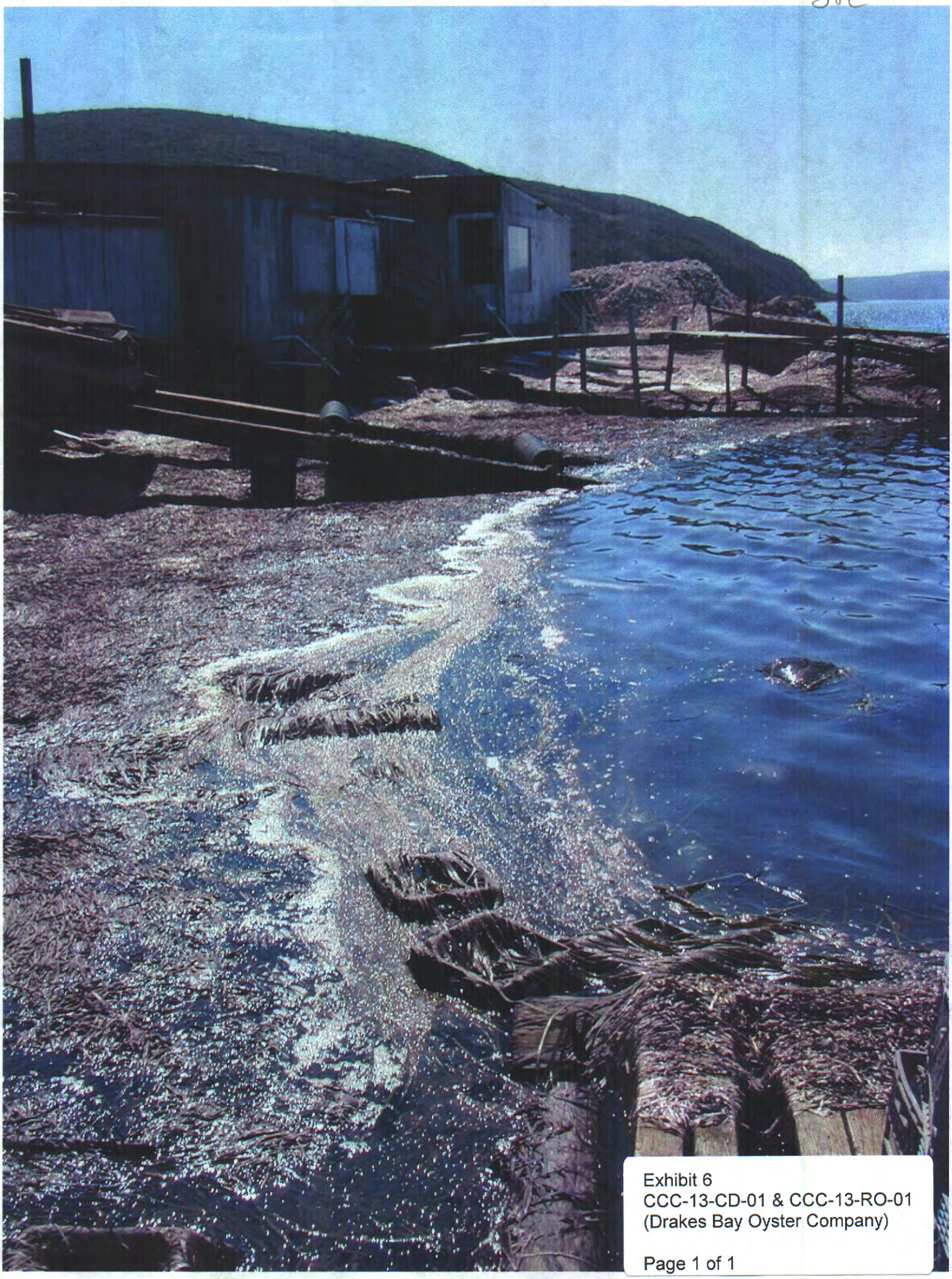


Exhibit 6
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

Exhibit 7
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

Drakes Bay Oyster Company

17171 Sir Francis Drake Boulevard, Inverness, CA 94937

04/10/06

Sheila Ryan
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Drakes Bay Oyster Farm Coastal Development Permit and Cease and Desist Order

Dear Ms. Ryan,

Drakes Bay Oyster Company appreciates the California Coastal Commission's guidance in completing the application for the Coastal Development Permit, originally submitted in January 2006. The project architect has incorporated all items that the California Coastal Commission has required for re-submittal, including, but not limited to: a storage container, a shucking facility inside another container, a temporary construction trailer, shellfish seed setting tanks, fencing and paving. No new development will occur without the appropriate CDP.

Your letter is in error regarding the concrete foundation for the addition on building "J". Had you brought up this concern during your site visit of February 17th, we would have been able to show you that this removal had already been completed. The foundation was constructed of concrete, extending approximately 3' below finished grade, with steel pipes extending vertically above the top of the concrete. Your photo, dated March 15th, 2005, shows the subject foundation, but a more current photo would show the area without the foundation. The only items remaining on this side of the building are a concrete slab and a refrigeration unit, neither of which were we asked to remove. Bruce Dombrowski, Park Ranger, Point Reyes National Seashore, took photos of this area during some extreme high tides in December 2005. Perhaps you can contact the Point Reyes National Seashore for copies of these photos to confirm the foundation removal.

The cease and desist order (CCC-03-CD-12) was issued to the Johnson Oyster Company in 2003. Drakes Bay Oyster Company assumed the responsibility to comply with the CDO with the purchase of the leasehold interest and the shellfish business from Johnson Oyster Company in 2005. Drakes Bay Oyster Company has worked diligently to complete the items required by the order, thereby accomplishing what the Point Reyes National Seashore, the California Coastal Commission, the County of Marin and Johnson Oyster Company had not been able to accomplish for decades. Every demand set forth in the CDO has been accomplished, except for one item. This item is dependent on action by the Point Reyes National Seashore. (Please refer to the attached letter, dated January 9, 2006, for clarification.)

Sincerely,

Kevin Lunny

Enclosure: Drakes Bay Oyster Company letter, dated 01/09/06

CC: Peter Douglas, Executive Director, CCC
Lisa Haagge, 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, Esq., Attorney for Drakes Bay Oyster Company

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. (JOC), 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 1976[9] 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.[10] The plan must also characterize any impacts to coastal resources from the unpermitted development onshore and in the estuary and provide for remediation of those impacts, including but not limited to restorative grading and soil remediation and the use of best management practices to protect the

[9] 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.

[10] JOC 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).

water quality of the estuary.[11] 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

JOC'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.

[11] 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 JOC 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 JOC 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 JOC is unable to comply with the deadlines contained in Section 1.0 of this Order, JOC may request from the Executive Director in writing an extension of said deadlines. If the Executive Director determines that JOC 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

JOC 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.

11.0 APPEALS AND STAY RESOLUTION

Pursuant to Public Resources Code Section 30803(b), Respondents against whom this Order is issued may file a petition with the Superior Court for a stay of the 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

Date

ION

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 phillipinarum* 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, CA94105-2219

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

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 — Date 11/29/07

Executed in San Francisco on behalf of the California Coastal Commission:

Peter Douglas, Executive Director — Date

FIGURE 1: HARBOR SEAL PROTECTION AREA

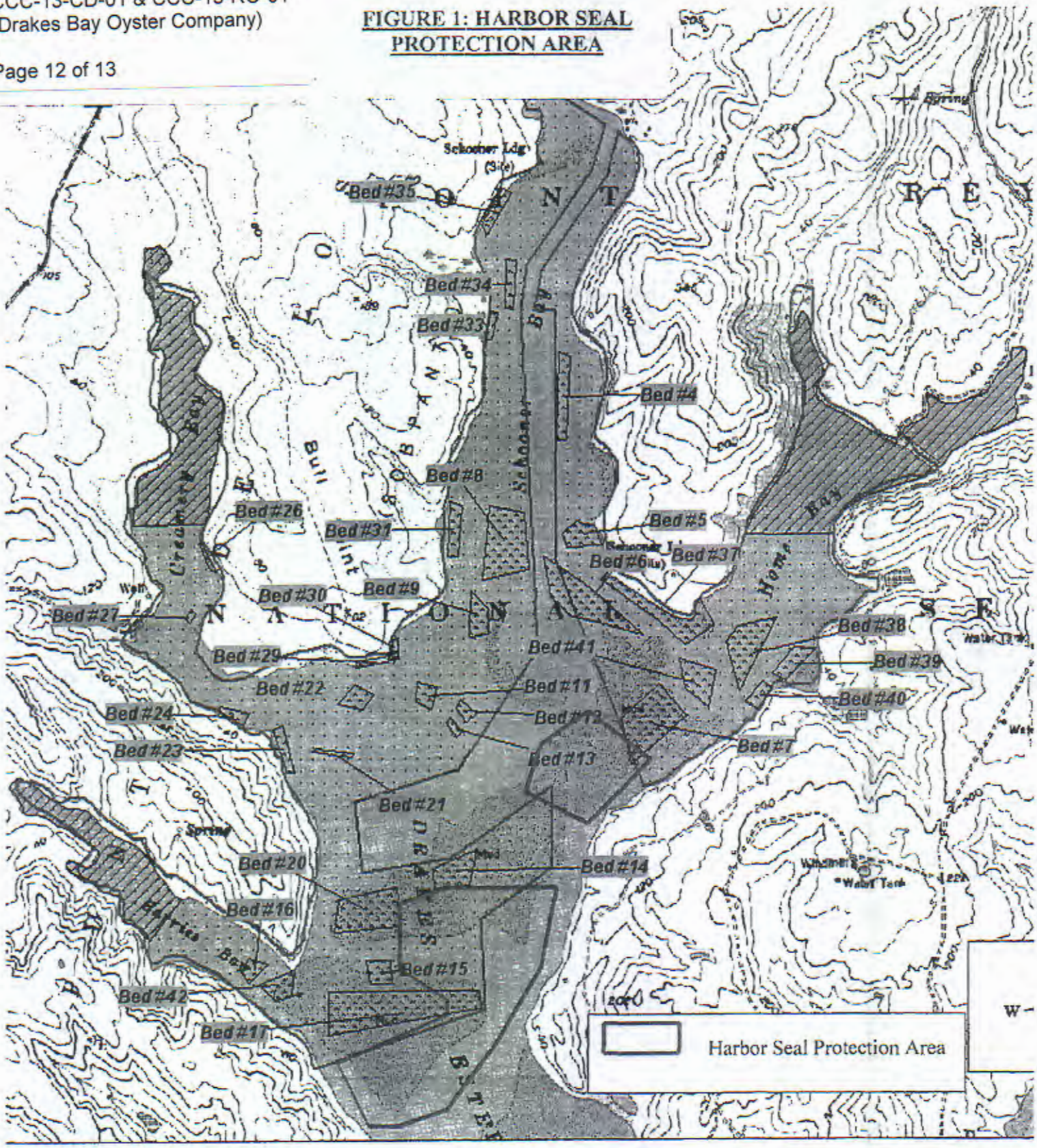
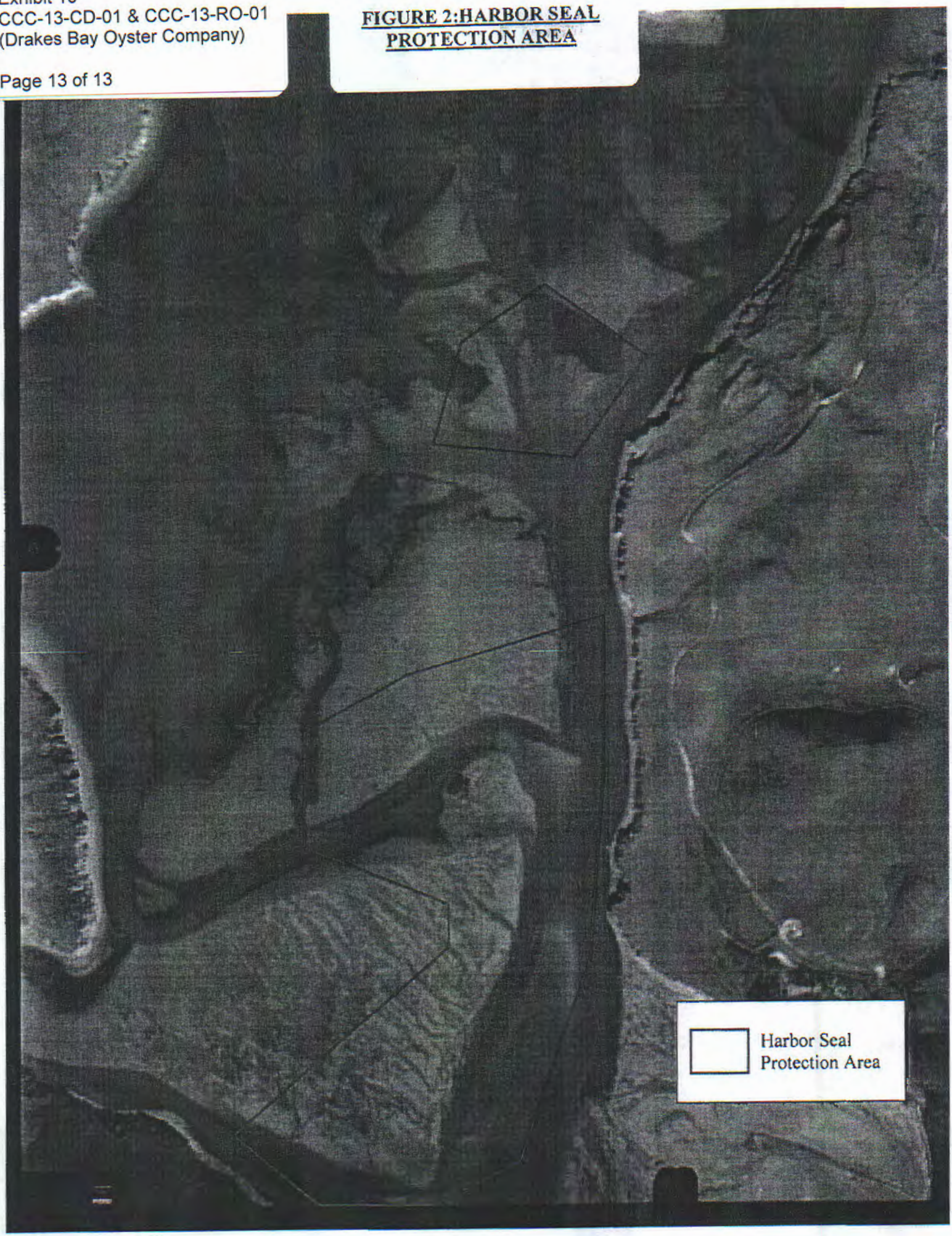


FIGURE 2:HARBOR SEAL PROTECTION AREA



STATE OF CALIFORNIA – THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2 219
VOICE (415) 904-5 200
FAX (4 15) 904-5 400
TDD (415) 597-5885

VIA REGULAR AND CERTIFIED MAIL

March 24, 2008

Drake's Bay Oyster Company
Attn: Kevin Lunny
1777 Sir Francis Drake Blvd.
Inverness, CA 94937

Dear Mr. Lunny,

As you are aware, on March 6, 2008, Commission enforcement staff received a report that mechanized equipment was being used to dig a large trench on the Drake's Bay Oyster Company site, which you lease from the National Park Service. During a site visit on March 10, 2008, we confirmed that this development activity had taken place. This is not the first time that we have received a report of or observed unpermitted development activities on your property since you have become aware of Coastal Act permitting requirements. As you are well aware, development, as defined under Section 30106 the Coastal Act, requires a coastal development permit. Consent Cease and Desist Order No. CCC-07-CD-04 ("Consent Order") specifically requires you to, among other things, cease and desist from undertaking any new unpermitted development activities on the property. Digging an 80-foot long trench in close proximity to the waters of Drake's Estero constitutes development under the Coastal Act and, therefore, requires a coastal development permit (CDP). No CDP was applied for or obtained for the development at issue. As you are aware, this is an area of high resource value, and we would like to work with you to ensure all precautions are taken to protect coastal resources.

We feel that the appropriate and most efficient way for you to seek to resolve this violation is to seek authorization for the development as part of CDP Application No. 2-06-003, the project-wide, all-inclusive permit application that you will complete pursuant to Provision 5.0 of the Consent Order. Provision 5.1 of the Consent Order requires that you revise your permit application to include all current unpermitted and proposed onshore and offshore development on the property. Thus, although a new permit application is not needed for this activity, please include the excavation of the trench and the subsequent restoration of the area as part of the project description for your pending permit application.

We remain interested in resolving the overall lack of permits for the facility and believe that this is critical to avoid similar situations arising in the future, and save all parties time and resources. We remain concerned that this is done as quickly as possible. To this end, once you have revised your project description, you must obtain a Special Use Permit from the National Park Service ("NPS"), to

complete your permit application and to move forward with Commission action on the application, which will address all unpermitted development on the property (including the trench). The NPS Special Use Permit will provide evidence to satisfy the standard CDP application requirement that an applicant has the necessary authorization from the property owner to undertake proposed development activities on the property, which in this case involves the operation of a commercial aquaculture facility. As of the date of this letter, we have not received a signed copy of a Special Use Permit and, therefore, we assume that you have not yet obtained one. If this is not accurate, please let us know as soon as possible. Please be aware that Provision 5.5 of the Consent Order states the following:

> *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.*

Please work with NPS to obtain the Special Use Permit. If there is anything our office can do to assist you in this process, please let us know. This is a critical element of your CDP application and, as you know, without a CDP, your operations remain unpermitted.

In addition to the CDP requirement, stipulated penalties in the amount of $250.00 have been assessed for the trench violation, though without prejudice to the Commission's ability to demand, in the context of any future violation, that penalties be paid for each day the violation persists. Provision 17.0 of the Consent Order states the following:

> *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 has 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.*

You agreed, under Provision 2.0 of the Consent Order, not to conduct any additional unpermitted development on the property. Construction of the trench constituted unpermitted development. Therefore, stipulated penalties apply. On March 10, 2008, when we confirmed the violation, you expressed a willingness to resolve this violation as soon as possible through whatever method Commission staff deemed appropriate. In acknowledgement of your prompt response and stated willingness to cooperate after the fact, only one day of stipulated penalties has been assigned. Please submit payment of the full penalty amount within fifteen of receipt of this letter, as set forth in Provision 17.0 of the Consent Order.

In the future, please contact Cassidy Teufel, at (415) 904-5502, or me to discuss whether a proposed activity requires a CDP. As we have discussed with you, waivers and exemptions may apply in certain

situations, but are not always an option. Stipulated penalties under the Consent Order will apply to any development that requires a permit and is undertaken without one. Thus, it is extremely important for you to contact Commission staff, to discuss what, if any, authorizations are necessary, **prior** to undertaking any development activities. We are more than willing to work with you to determine what if any steps are necessary.

We look forward to working with you to address this situation and hope that you intend to fully comply with the Coastal Act and the Consent Order by conducting no additional unpermitted development on the property. If you have any questions, please contact me at (415) 904-5294.

Sincerely,

Christine Chestnut
Statewide Enforcement Analyst

cc: 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
Zach Walton, Attorney for Mr. Lunny

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

Via Regular Mail

September 10, 2008

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

Re: Compliance with **Consent Cease and Desist Order No. CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

Thank you for the submittal of documents required under the Consent Cease and Desist Order No. CCC-07-CD-011 ("Consent Order"). We have reviewed the documents and have determined that additional information is needed and revisions are required before we can find you in compliance with the Consent Order.

As you are aware, the Consent Order that embodied the interim settlement between Drakes Bay Oyster Company ("DBOC") and the California Coastal Commission ("the Commission"), and then was approved on December 12, 2007, required DBOC to cease and desist from performing any new development and to (1) establish protocols for vessel traffic in Drakes Estero; (2) refrain from unpermitted development activities such as cultivation outside of current cultivation areas; (3) refrain from placing additional structures in the Estero; (4) avoid activities within designated harbor seal protection areas; (5) maintain cultivation at or below current production levels; (6) obtain shellfish larvae and seed only from sources certified by the California Department of Fish and Game as free of pathogens and invasive species; (7) submit a hazardous materials/discharge management plan; (8) minimize the onshore facility's use of seawater and release of thermal discharges; (9) remove cultivation equipment and infrastructure from the Estero when production ceases; (10) submit a debris removal plan to carry out the removal of abandoned equipment in the Estero; (11) submit a plan for the removal of all shellfish and equipment from outside of designated cultivation areas; (12) refrain from the cultivation of species other than Pacific oyster, European oyster, Manila clam, and purple-hinged rock scallops; (13) maintain bottom culture bags only in intertidal areas devoid of eelgrass; (14) submit a revised project description for Coastal Development Permit ("CDP") application number 2-06-003 that includes all unpermitted onshore and offshore development; and (15) submit all materials which are required to complete CDP application number 2-06-003.

To date, your submittal of information in compliance with these requirements has consisted of ten letters provided to Coastal Commission staff over the past eight months, including a letter dated January 11, 2008 regarding section 3.2.4 of the Consent Order; four letters dated January 30, 2008 regarding sections 3.2.6, 3.2.7, 3.2.8, and 3.2.9 of the Consent Order; a letter dated January 31, 2008 regarding section 3.2.10 of the Consent Order; a letter dated February 8, 2008 requesting an additional 30 days to submit a vessel management plan and a revised project description; a letter dated February 11, 2008 regarding section 3.2.5 of the Consent Order; a letter dated June 22, 2008 regarding section 3.2.3 of the Consent Order; and a recent letter dated August 20, 2008 regarding the revised project description for CDP application number 2-06-003. All of the letters listed above that are dated between January 30 and February 8, 2008 were simultaneously received by Commission staff on February 10, 2008.

While we appreciate the time and energy you have spent in compiling these materials and providing them to us, our review of your submittal has indicated that several requirements specified in the Consent Order have not been complied with and that several other requirements have not been met in sufficient detail to fully address all the requirements of the Consent Order.

The following is a list of items that have yet to be provided to Commission staff in compliance with the Consent Order and additional information that is needed to supplement the materials that have already been submitted:

1. Section 3.1.2 of the Consent Order states:

> **Water Quality/Hazardous Waste.** Within 60 days of the issuance of this Consent Order [in other words, by February 11, 2008], Respondent shall submit a hazardous materials/discharge management plan which: 1) identifies and outlines procedures for the removal and replacement of any receptacle for oil, paint or other hazardous material 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.

In response to Section 3.1.2 of the Consent Order, on February 10, 2008, DBOC submitted a document titled, "Drakes Bay Oyster Company – Standard Sanitation Operating Procedures." This document details the sanitary reviews that occur at the facility to maintain health standards but it does not provide any of the specific information described above and required under Section 3.1.2 of the Consent Order. In particular, the "Standard Sanitation Operating Procedures" document does not identify or outline procedures for the removal and replacement

of oil, paint, or other hazardous material containers that are leaking or could leak in the near future; does not identify current and potential polluted discharges or outline protocols for addressing these discharges; does not provide a contingency plan for potential leaks; does not state that DBOC shall take all necessary measures to prevent leaks or spills; and does not state 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. As such, the document titled "Drakes Bay Oyster Company – Standard Sanitation Operating Procedures" does not meet the requirements of Section 3.1.2 of the Consent Order and a hazardous materials/discharge management plan must still be submitted in compliance with this section of the Consent Order. Please develop this plan as specified above and provide it to Commission staff.

2. Section 3.1.3 of the Consent Order states:

> **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.

We have not yet received information to address this requirement of the Consent Order. Please provide information demonstrating your compliance with this section of the Consent Order by identifying what measures are being implemented to minimize the facility's use and intake of seawater and by verifying that intake velocity and thermal discharge requirements are being satisfied.

3. Section 3.2.3 of the Consent Order states:

> **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 Consent 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.

On June 22, 2008, 103 days after the deadline specified in this section of the Consent Order, you submitted a letter in response to Section 3.2.3. This letter stated that "all abandoned racks have been removed" and that "all racks that exist in Drakes Estero at this time are either in good condition or have been identified for repair." We appreciate this, but note that a Debris Removal Plan was not submitted with this letter and racks identified for repair were not specified. Please provide an aerial map of Drakes Estero that identifies those oyster racks that have been identified for repair and those that have been identified as being in good condition.

4. Section 3.2.4 of the Consent Order states:

> **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.

Here again, additional information is required to comply with the Consent Order. In response to this section of the Consent Order, Commission staff received from you a letter dated January 11, 2008, as well as several attached documents. The attached documents included shellfish seed and larvae purchase invoices from Kona Coast Shellfish L.L.C., Kuiper Mariculture, Inc., Whiskey Creek Shellfish Hatchery, Inc., and Coast Seafoods Company as well as a Long-Term Permit to Import Live Aquatic Animals into California from both Whiskey Creek Shellfish Hatchery and Coast Seafoods Company. It appears, however, that a Long-Term Permit to Import Live Aquatic Animals into California may also be required for the purchase and importation of shellfish seed and/or larvae from Kona Coast Shellfish – a hatchery located in the State of Hawaii. Please provide evidence that this permit was held by DBOC in 2007 and also provide current importation permits for 2008 if importation of shellfish larvae or seed has occurred or will occur this year. Please also provide evidence that these four shellfish larvae/seed providers have been certified by California Department of Fish and Game to be free to pathogens.

5. Section 3.2.5 of the Consent Order states:

> **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 shall make every effort to use only established channels. Within 60 days of the issuance of this Consent 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.

In response to this section of the Consent Order, Commission staff received from you a letter dated February 11, 2008, as well as an attached map of Drakes Estero. This letter and map are not sufficient to meet the requirements of Section 3.2.5 of the Consent Order because they lack sufficient refinement and detail, do not meet the specific parameters described within the Consent Order, and do not include much of the information specifically required in the Consent Order. Please provide a more refined Vessel Transit Plan that includes a higher resolution aerial map of Drakes Estero with mooring areas and access lanes (both commonly-used channels and channels only used when certain racks/bags are active described and differentiated) clearly marked. This plan and map should be of sufficient clarity and resolution so that DBOC employees can use it when traveling within Drakes Estero and easily adhere to the access routes and mooring areas that are specified on it, to help avoid any avoidable problems.

6. Section 3.2.6 of the Consent Orders states:

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 the Respondent's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

In response to this section of the Consent Order, Commission staff received from you a letter dated January 30, 2008, which stated that "there are no equipment or materials located within the area defined on the Consent Order map as harbor seal protection areas" and that "therefore no plan for removal of equipment or materials from these areas is necessary." Information provided to Commission staff on October 10, 2007 from the California Department of Public Health appears to indicate that oyster cultivation areas are located within designated harbor seal protection areas, however. Please provide additional information regarding the frequency and extent of use of these areas -- specifically those located in proximity to water quality monitoring site number 17 – and describe how, when, and if cultivation equipment has been removed from these locations.

7. Section 3.2.7 of the Consent Order states:

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.

In response to this section of the Consent Order, Commission staff received from you a letter dated January 30, 2008 indicating that "a 'plan outlining the removal of all shellfish and equipment from prohibited areas' is not necessary, as no cultured shellfish or equipment exist outside of cultivated areas." Your letter also stated that Kumamoto oysters are currently being grown within Drakes Estero and that DBOC "will remove all of these Kumamoto oysters from Drakes Estero by August 2008."

The continued cultivation of Kumamoto oysters within Drakes Estero is in conflict with the provisions of section 3.2.7 of the Consent Order and is also not permitted by the California Department of Fish and Game under the terms of aquaculture lease numbers M438-01 and M438-02. Please immediately provide Commission staff with evidence that all Kumamoto oysters have been removed from Drakes Estero. This evidence shall include detailed information regarding the locations in which Kumamoto oysters have been cultivated as well as harvest records demonstrating that all prohibited oyster species have been removed from these areas.

Despite the statement in your letter regarding the lack of need to submit a plan outlining the removal of all shellfish and equipment from prohibited areas, Commission staff has reason to believe that shellfish and cultivation equipment exist outside of the cultivation area defined in Provision 3.2.11. As demonstrated in the attached aerial map of Drakes Estero (Exhibit A from the National Park Service Special Use Permit), possibly as many as five shellfish cultivation racks and several bottom bag areas appear to be located within portions of the estero in which aquaculture is prohibited. Please either provide evidence that this equipment is located within California Department of Fish and Game aquaculture lease areas M438-01 or M438-02 **or** submit a removal plan as specified in section 3.2.7 of the Consent Order.

8. Section 3.2.9 of the Consent Order states:

> **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.

In response to this section of the Consent Order, Commission staff received from you a letter dated January 30, 2008. This letter includes location and practice protocols for the placement of bottom bags as well as specifications for the bags and anchoring/mooring devices. While the information you have submitted is adequate and satisfies the specific provisions of this section of the Consent Order, it would also be valuable for Commission staff to know the frequency with which bags locations are checked, the measures that are employed to reduce the ability of intertidal bags to move into eelgrass areas, and whether or not contingency plans are in place for recovering bags that may move or shift into eelgrass areas. Please also consider providing this additional information as a supplement to the protocols included with your letter of January 30, 2008.

9. Section 3.2.10 of the Consent Order states:

> **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."

In response to this section of the Consent Order, Commission staff received from you a letter dated January 31, 2008, indicating that a detailed record of planting in 2006 and 2007 had been submitted; that 2006 and 2007 planting schedules were very similar; and that based on the planting records, it is expected that the total shellfish harvest from Drakes Estero would be around 770,000 lbs but could possibly be as high as 850,000 lbs. In this letter, you stated that "for the purposes of this consent order, the production limit should be set at 'approximately 850,000 lbs' as 'current production.'" Information included with your letter did not specify the number or quantity of non-oyster species harvested in 2006 or 2007.

Based on the information provided with your letter, primarily the monthly tax reports submitted to the California Department of Fish and Game for 2007 which indicate monthly oyster harvest numbers, DBOC produced approximately 466,719 lbs of oysters in 2007. Additionally, information provided by the California Department of Fish and Game aquaculture coordinator from March 30, 2007 indicates that DBOC produced approximately 252,468 lbs of oysters in 2006.

If, as stated in your letter, planting schedules for 2006 and 2007 were very similar, it can reasonably be expected that the 2008 harvest will be similar in quantity to the 2007 harvest. Based on this information, Commission staff finds that the harvest of 850,000 lbs of shellfish by DBOC would represent a substantial increase over current production levels. Commission staff does not find sufficient evidence within your January 31, 2008 letter to support an assumption that current production would be 850,000 lbs of shellfish. To further inform Commission staff regarding recent and ongoing production, planting, and harvest and to aid in the establishment of an accurate measure of current production, please provide copies of the monthly tax reports

submitted to the California Department of Fish and Game for January through August of 2008 as well as seed and larvae purchase documentation for 2005 and 2006.

10. Section 5.1 of the Consent Order states:

> **Completion of Coastal Development Permit Application.** 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.

On August 20, 2008, 192 days after the deadline specified in this section of the Consent Order, you submitted a letter in response to Section 5.1. Due to the recent arrival and length of this letter Commission staff is still in the process of reviewing it and will provide a response regarding its completeness in a separate letter.

Please note that, pursuant to Section 17.0 of the Consent Order, "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." As mentioned above, Section 3.2.3 of the Consent Order required within 90 days of the issuance of this Consent Order (that is, March 11, 2007), DBOC to submit a Debris Removal Plan to the National Park Service and Executive Direction of the Coastal Commission for approval. The Plan was to include location of debris identified for removal, proposed techniques and equipment to be used for debris removal, and identification of the debris disposal facility.

However, it was not until June 22, 2008 (103 days after the deadline specified in the Consent Order) that you submitted a letter in response to Section 3.2.3; and even then, no Debris Removal Plan was submitted with the letter and the letter did not completely address all the requirements of Section 3.2.3 of the Consent Order. Therefore, stipulated penalties for missing the deadline required by the Consent Order would be calculated in the amount of $22,750 ($250/day for 103 days).

Further, Section 5.1 of the Consent Order required within 60 days from the issuance date of this Consent Order (that is, February 10, 2008), DBOC to revise the project description in CDP application No. 2-06-003 to include all unpermitted onshore and offshore development. A letter addressing the requirements of Section 5.1 of the Consent Order was not submitted until August 20, 2008, which was 192 days after the deadline specified in the Consent Order. Stipulated penalties for this violation would be calculated in the amount of $48,000 ($250/day for 192

days). The total amount of stipulated penalties for the two violations of the Consent Order would be $70,750.

We appreciate the information you have submitted, and appreciate that some progress is being made toward compliance with the Consent Order. We are more than willing to work with you to achieve full compliance with its terms. However, delays undercut this progress and we remind you of the legal commitment to adhere to the deadlines and processes set forth in the Consent Order. In the interest of resolving all Coastal Act violations expeditiously and in the continuing effort to work cooperatively with DBOC, we are willing to forego assessing the $70,750 in stipulated penalties at this time. However, we do reserve the right to collect stipulated penalties in the future, should there be additional violations of the terms and conditions of the Consent Order, or should future deadlines be missed.

We very much desire to keep this process moving quickly; therefore, please provide the materials and information described above in items 1 through 10 by **October 15, 2008.**

As you know, the Consent Order itself (Section 18.0) provides a mechanism for extension of deadlines, for demonstrated good cause, but also requires notice to the Coastal Commission and an affirmative granting of specific extension. This is intended to provide an opportunity for us to work cooperatively toward completion of all requirements of the Consent Order, and we urge that, in the future, you both adhere to the deadlines for the work, and let us know in a timely manner if you need to extend a deadline.

As you are aware, Christine Chestnut of our Enforcement Staff has left the agency. Please feel free to contact me at 415-904-5269 if you have any questions concerning Coastal Act enforcement. If you have questions regarding the permit application process, please contact Cassidy Teufel of our Energy and Ocean Resources Division at 415-904-5502.

Thank you in advance for your continued cooperation.

Sincerely,

JO GINSBERG
Enforcement Analyst

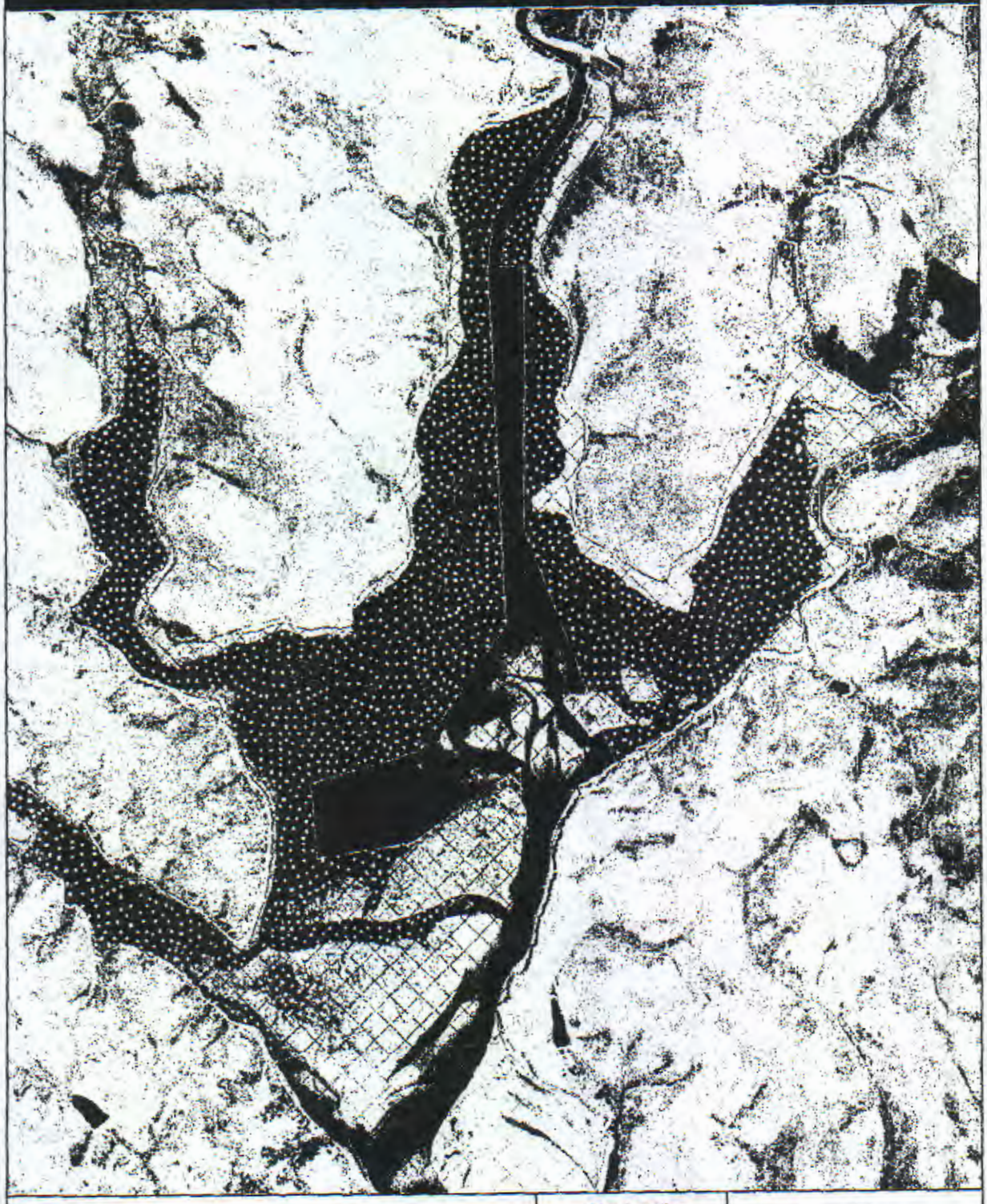
Enclosure: Drake's Estero Aquaculture & CDFG Leases

cc: Cassidy Teufel, CCC, Coastal Program Analyst
Alison Dettmer, CCC, Coastal Program Manager
Lisa Haage, CCC, Chief of Enforcement

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

N
W E
S

0 0.5 Miles

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
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SENT BY REGULAR AND CERTIFIED MAIL
No. 7006 2760 0005 5883 7044

September 16, 2009

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Compliance with **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

I am writing concerning compliance with the Coastal Commission's Consent Cease and Desist Order No. CCC-07-CD-11 (the Order), which was issued to Drakes Bay Oyster Company (DBOC) on December 12, 2007. As you know, the Order contains a number of terms and conditions, and it has come to our attention that you are out of compliance with one or more of these terms and conditions, as described below.

1. **Completion of Coastal Development Permit (CDP) Application. Section 5.2** of the Order requires, within 120 days from the date of issuance of a National Park Service (NPS) Special Use Permit for the operations on the property, submittal to the Coastal Commission (Commission) of all materials which are required to complete Coastal Development Permit (CDP) application No. 2-06-003. The NPS Special Use Permit was issued on April 22, 2008; therefore, all materials required to complete your CDP application should have been submitted no later than **August 20, 2008**, which was more than a year ago.

As noted in a June 10, 2009 letter sent to you from Cassidy Teufel of our staff, your CDP application is still incomplete; there are a number of outstanding items requested in letters to you from Commission staff dated February 22, 2006, May 8, 2006, and September 17, 2008. Since your application is still incomplete, you are out of compliance with **Section 5.2** of the Order.

Section 17.0 of the Order, *Compliance Obligation*, states that failure to comply with any term or condition of the Order, including any deadline contained in the Order, will constitute a violation of the Order and shall result in Respondent being liable for stipulated penalties in the amount of $250 per day per violation. Thus, staff could assess substantial stipulated penalties

(approximately $100,000) for your failure to meet the deadline imposed by **Section 5.2** of the Order.

In addition, our Energy and Ocean Resources Division has indicated that staff wishes to have your CDP application heard at the December 2009 Commission hearing. Thus, to allow adequate time for preparation of a staff recommendation, all materials necessary to complete the CDP application must be received in our office by October 5, 2009.

2. **Cultivation of Manila clams. Section 3.2.8** of the Order requires that cultivation of Manila clams shall only occur where currently cultivated in the "cultivation area" defined in **Section 3.2.11** of the Order. **Section 3.2.11** of the Order states that all cultivation shall be confined to areas which are currently included in the Department of Fish and Game (DFG) lease numbers M438-01 and M438-02. **Section 7.0** of the Order requires full compliance with the terms and conditions of any Commission or NPS permit, and also with all applicable laws and regulations.

Commission staff has confirmed that Manila clams are currently being cultivated outside the designated one-acre clam area specified in the DFG Mariculture Lease Number M438-02. We understand that in August of 1993, the Johnson Oyster Company requested a modification of DFG Oyster Allotment Number M438-01 which would have allowed them to cultivate Manila clams within this area. We also understand that in October of 1993, the Fish and Game Commission instead approved a modification of DFG Mariculture Lease Number M438-02 that allowed the cultivation of Manila clams within this one-acre lease. We further understand that in June of 2007, at your request, the Fish and Game Commission was set to consider a modification of DFG Oyster Allotment Number M438-01 to add Manila clams and several other species of shellfish to the list of species able to grown for mariculture purposes in this area. Prior to the Fish and Game Commission's consideration of this modification, it was removed from the agenda at your request.

Although the circumstances underlying the Fish and Game Commission's decision regarding the Johnson Oyster Company's request in 1993 are unclear, it is apparent that you had the opportunity to legally modify DFG lease Oyster Allotment Number M438-01 several years ago. Despite declining to carry out this legal change, you have undertaken the cultivation of Manila clams in DFG Oyster Allotment Number M438-01, an area specified in the DFG lease which "is for the sole purpose of cultivating Pacific oyster (Crassostrea gigas), and European flat oyster (Ostrea edulis)." We have been in contact with DFG staff about this matter and it is our understanding that they will be working with you to resolve the current issues of compliance with your existing DFG leases. However, until this matter is resolved, you are out of compliance with **Sections 3.2.8, 3.2.11,** and **7.0** of the Order.

3. **Thermal Discharges and Seawater Use. Section 3.1.3** of the Order states that 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. It is not clear that such required measures have been adopted. Please describe in writing what measures have been

adopted to minimize the facility's intake and use of seawater, and provide documentation of those measures.

4. **Repair of Oyster Racks. Section 3.2.1** of the Order states that construction and/or placement of any additional offshore aquaculture racks/cultivation infrastructure is prohibited until Respondent obtains a coastal development permit. It has been alleged that, without benefit of a coastal permit, repair work has begun on oyster racks that have been out of production for so long that eelgrass has re-grown. If repair work has already begun on any oyster racks, that would constitute a violation of **Section 3.2.1** of the Order. Please address this allegation in writing, and discuss whether oyster rack repair has begun, and, if so, describe such repair in detail.

Please send us a written response to this letter by **October 5, 2009**. We appreciate the progress you have made so far toward compliance with the Consent Order. As we have noted in the past, we are more than willing to work with you to achieve full compliance with its terms. However, continued delays undercut this progress and we remind you once again of the legal commitment to adhere to the deadlines and processes set forth in the Consent Order. In the interest of resolving all Coastal Act violations expeditiously and in the continuing effort to work cooperatively with DBOC, we are willing to forego assessing stipulated penalties at this time, but we continue to reserve the right to collect stipulated penalties in the future for both this and future issues, should there be continued missed deadlines, additional violations of the terms and conditions of the Consent Order, or should future deadlines be missed. As you know, moving quickly towards a permit application and addressing the lack of a permit for your operation is both legally required, and the original intent of the Consent Order and so we are concerned about the fact that, almost two years later, this hasn't been accomplished. We continue to be concerned about this and would like to work with you to move this process forward quickly.

Thank you for your cooperation. If you have any questions concerning any enforcement matters, please contact me at 415-904-5269. If you have questions concerning completion of your CDP application, you may contact Cassidy Teufel at 415-904-5502.

Sincerely,

Jo Ginsberg
Enforcement Analyst

cc: Cassidy Teufel, CCC, Coastal Program Analyst
Alison Dettmer, CCC, Coastal Program Manager
Lisa Haage, CCC, Chief of Enforcement

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION

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SENT BY CERTIFIED AND REGULAR MAIL
Certification Number 7006 2760 0005 5883 7037

December 7, 2009

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Compliance with **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

I am writing concerning compliance with the Coastal Commission's Consent Cease and Desist Order No. CCC-07-CD-11 (Consent Order), which was issued to Drakes Bay Oyster Company (DBOC) on December 12, 2007.

In a letter dated September 16, 2009, we indicated that you were out of compliance with **Sections 3.2.8** and **3.2.11** of the Consent Order. **Section 3.2.8** of the Consent Order requires that cultivation of Manila clams shall only occur in the "cultivation area" defined in **Section 3.2.11** of the Consent Order. **Section 3.2.11** of the Consent Order requires that all cultivation shall be confined to areas which are currently identified in the Department of Fish and Game (DFG) Mariculture Lease numbers M438-01 and M438-02. We further indicated that Commission staff had confirmed that Manila clams were currently being cultivated outside the designated one-acre shellfish aquaculture lease area specified in the DFG Mariculture Lease Number M438-02, in violation of the Consent Order.

In response to our letter, you indicated to Cassidy Teufel of our Energy, Ocean Resources and Federal Consistency Division that the clams would be moved from their present location into the designated one-acre shellfish aquaculture lease area. Mr. Teufel has informed me that you confirmed in an email that the clams were moved on October 19, 2009. However, it has come to our attention that the clams were actually not moved into the designated one-acre shellfish

aquaculture lease area but, rather, into one of the two areas specifically designated for harbor seal protection (the smaller of the two), and in which all of your boats, personnel, and any structures and materials owned or used by you were to be excluded under the explicit requirements of the Consent Order. This fact was confirmed by Mr. Teufel, who conducted a site visit on December 7, 2009. This violates a number of sections of the Consent Order, as described below. Since you spoke on October 18, 2009 with Alison Dettmer, Deputy Director, and indicated that you intended to comply with the Consent Order and move the Manila clams to the designated lease area, and that you were hiring a surveyor for this purpose, we are perplexed as to how it came about that the clams were moved instead into a harbor seal protection area, in direct contradiction with the Consent Order's terms. We welcome a written explanation as to how this could have occurred.

A. **Violations of the Consent Order**

1. **Section 3.2.6, Harbor Seal Protection Areas. Section 3.2.6** of the Consent Order requires that all of your boats, personnel, and any structures and materials owned or used by you shall be prohibited from the harbor seal protection areas defined on the map. As Manila clams have been moved into a harbor seal protection area, you are in violation of **Section 3.2.6** of the Consent Order. We are particularly concerned about this violation, as by signing the Consent Order, you agreed to the specific requirements of the Consent Order that established the harbor seal protection areas, and you were well aware of the location of these harbor seal protection areas, which were clearly designated on maps that were included with the Consent Order. It is very disturbing that boats, personnel, structures, and materials for the cultivation of the Manila clams were brought into a harbor seal protection area that was established specifically to protect the sensitive resources within it, and it calls into question your ability and commitment to carry out the resource protection requirements of the Consent Order.

In addition, it concerns us that, if the harbor seal protection area and its protections under the Consent Order were not honored for such a deliberate act as moving the clam bags, that we have no assurances that there have not also been other less easily observable activities in these areas.

As you know from our prior discussions, and from the discussions in the Staff Report for the Consent Order, protection of the species in this area has been a paramount and continuing concern of the Commission. Indeed, this was reflected in a number of the specific provisions of the Order itself and it is unacceptable that your actions have not complied with these provisions.

2. **Section 3.2.8, Non-Oyster Species Area.** As noted above, **Section 3.2.8** of the Consent Order requires that cultivation of Manila clams shall only occur where currently cultivated in the "cultivation area" defined in **Section 3.2.11** of the Order. As Manila clams are now occupying a harbor seal protection area, not the designated one-acre shellfish aquaculture lease area, you are in violation of Section 3.2.8 of the Consent Order.

3. **Section 3.2.11, Cultivation Area.** As noted above, **Section 3.2.11** of the Consent Order states that all cultivation shall be confined to areas which are currently included in the DFG lease

numbers M438-01 and M438-02. The area into which Manila clams have been moved is not one of the DFG lease areas; thus, you are in violation of Section **3.2.11** of the Consent Order.

4. **Section 3.2.5, Boat Transit**. Section 3.2.5 provides that "boat traffic shall be limited to established channels that do not violate the protective measures set forth in this Consent Order." Obviously, placing cultivation materials which require servicing by boats does not comply with this section of the Consent Order. Thus, you are in violation of **Section 3.2.5** of the Consent Order.

5. **Section 7.0, Compliance with Permits and Applicable Laws. Section 7.0** of the Consent Order requires full compliance with the terms and conditions of any Commission or National Park Service (NPS) permit, and also with all applicable laws and regulations. Your NPS Special Use Permit prohibits all aquacultural cultivation from two designated harbor seal protection areas. As you are currently cultivating Manila clams in one of the designated harbor seal protection areas, you are in violation of **Section 7.0** of the Consent Order.

B. **Stipulated Penalties.**

Section 17.0 of the Consent Order, *Compliance Obligation*, states that failure to comply with any term or condition of the Order, including any deadline contained in the Order, will constitute a violation of the Order and shall result in Respondent being liable for stipulated penalties in the amount of $250 per day per violation. Since you are in violation of five sections of the Consent Order, as of today, under the terms of the Consent Order, you are responsible for a stipulated penalty in the amount of $61,250 for your failure to meet the terms of the Consent Order (five violations for 49 days, at $250 per day per violation.)

C. **Resolution of the Violations of the Consent Order.**

To resolve the above described violations to the Consent Order, you must remove the Manila clams and all equipment and materials from the harbor seal protection area and into the designated one-acre shellfish aquaculture lease area within thirty days of receipt of this letter, after receiving approval from the Coastal Commission and the National Park Service of the method of removal. Once notified that the clams have been moved, Commission staff will conduct a site visit to confirm that the clams have been properly moved to the approved designated area.

You will also need to submit a check in the amount of $61,250, made payable to the California Coastal Commission.

Please send us a written response to this letter by **December 21, 2009**, and indicate when and in what manner you will move the Manila clams from the harbor seal protection area to the designated one-acre shellfish aquaculture lease area. Please also submit by this date a check in the amount of $61,250.

Please note that in our letter of September 16, 2009 we indicated that in the interest of resolving all Coastal Act violations expeditiously and in the continuing effort to work cooperatively with DBOC, we were willing to forego assessing stipulated penalties at that time for the compliance matters then at issue, but we reserved the right to collect stipulated penalties in the future, should there be continued missed deadlines, additional violations of the terms and conditions of the Consent Order, or should future deadlines be missed. In light of your failure to abide by the terms of the Consent Order, and, in particular, due to the nature of the violations, which have resulted in the introduction of boats, personnel, structures, and materials into a resource protection area, we are assessing stipulated penalties at this time for these latest violations.

Failure to meet the above noted deadlines may result in assessment of additional stipulated penalties, pursuant to **Section 17.0** of the Consent Order.

Thank you for your cooperation. If you have any questions concerning any enforcement matters, please contact me at 415-904-5269. If you have questions concerning completion of your CDP application, you may contact Cassidy Teufel at 415-904-5502.

Sincerely,

Jo Ginsberg
Enforcement Analyst

cc: Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Cassidy Teufel, CCC, Coastal Program Analyst
Lisa Haage, CCC, Chief of Enforcement

CALIFORNIA COASTAL COMMISSION
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SENT BY CERTIFIED AND REGULAR MAIL
Certification Number 7006 2760 0005 5883 7006

December 22, 2009

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Compliance with **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

On the afternoon of December 9, 2009, we received a copy of a letter from you to Don Neubacher, Superintendent of Point Reyes National Seashore, in which you indicate that you have moved all the clam bags that were located in the harbor seal protection area and that they have been "returned to their original location in the Estero." Please note that in Section C (Resolution of the Violations of the Consent Order) of our letter dated December 7, 2009, I specifically directed you to "remove the Manila clams and all equipment and materials from the harbor seal protection area and into the one-acre shellfish aquaculture lease area within thirty days of receipt of this letter, *after receiving approval from the Coastal Commission and the National Park Service of the method of removal.*" (Emphasis added). This is consistent with the direction provided to you in a letter from the Pacific West Region of the National Park Service dated December 4, 2009, which did not discuss the method of removal but stated that "DBOC has thirty days from the date of this letter to remedy this permit violation."

In addition, Cassidy Teufel of our Energy, Ocean Resources, and Federal Consistency Division spoke with you on December 8, 2009, and told you that due to the unfortunate result of your initial relocation of the clam bags as well as the sensitivity of the harbor seal protection area in which the bags were located, the bags should not be moved until after you had coordinated with

both the Coastal Commission and the National Park Service regarding an appropriate method of relocation and after arrangements had been made for oversight and supervision of this activity. After receiving calls from a reporter that you had contacted, Andrea Blum, on the morning of December 9, 2009, and hearing that you intended to move the clams that day, Mr. Teufel left messages for you at your offices at the Drakes Bay Oyster Company and the Lunny Grading and Paving Company in a third attempt to advise you not to move the clams until a plan for supervised relocation had been approved. Prior to speaking with you on that day, we received an email from you with a copy of your letter to the Point Reyes National Seashore attached, indicating that your employees had again carried out work in the harbor seal protection area and that the clams had already been moved, despite the express direction from our staff that you not do so.

We are very disappointed in your continued disregard for our instructions, and repeated violations of Consent Cease and Desist Order CCC-07-CD-11 (Consent Order) that you agreed to and signed. In our letter of December 7, 2009, we made it very clear that we were extremely concerned about the infringement into the harbor seal protection area by boats, personnel, and materials, and that this violation of the Order was unacceptable. After receipt of our letter, you nevertheless authorized the additional unsupervised movement of personnel and equipment into this area in order to remove the clams, even though you had repeatedly and specifically been told not to do so until we had given approval for such activities. It had been our intent to ensure that disturbance to the sensitive resources in this area was minimized through coordinated oversight over the transport of clams out of the protected area. By moving the clams without oversight, you potentially put the harbor seals in this sensitive area at additional risk.

In conversations our staff has had with you, you have repeatedly asserted that our instructions were ambiguous, and/or not in concert with the instructions provided by the National Park Service. You have indicated, in particular, that our instructions concerning payment of the stipulated penalty amount were ambiguous. We want to reiterate that there has never been any ambiguity, nor have our directions been contrary to the directions provided by the National Park Service. We have provided very clear and specific directions as to what actions you would need to take to resolve the violations of our Order, which were also clearly spelled out in our letters, including our most recent letter dated December 7, 2009. In this letter, for example, under Section B, which is entitled "Stipulated Penalties," it says:

> *Since you are in violation of five sections of the Consent Order, as of today, under the terms of the Consent Order, you are responsible for a stipulated penalty in the amount of $61,250 for your failure to meet the terms of the Consent Order (five violations for 49 days, at $250 per day per violation.)*

In Section C of our letter, which is entitled "Resolution of the Violations of the Consent Order," it says:

> *You will also need to submit a check in the amount of $61,250, made payable to the California Coastal Commission. Please send us a written response to this letter by December 21, 2009...Please also submit by this date a check in the amount of $61,250.*

Also included in Section C of our letter is the sentence, "In light of your failure to abide by the terms of the Consent Order, and, in particular, due to the nature of the violations, which have resulted in the introduction of boats, personnel, structures, and materials into a resource protection area, *we are assessing stipulated penalties at this time for these latest violations.*" (Emphasis added.)

If at any time in the future you have questions or concerns or feel that there is ambiguity in our directions, please contact us immediately to obtain clarification.

We received late last night an emailed copy of a letter of response from you concerning our letter of December 7, 2009. After we have had a chance to discuss your latest letter with Commission management, we will send a separate letter of response. However, we do note that you have missed the deadline imposed (December 21, 2009) for submission of a check in the amount of $61,250 in stipulated penalties. In your emailed letter of December 21, 2009, you request that the $61,250 penalty be withdrawn. This stipulated penalty amount that we have assessed you for violations of the Consent Order is much less than the full amount of stipulated penalties that we could assess, if we had assessed such penalties all of the previous times you have violated terms of the Consent Order. As you know, in our letters dated September 10, 2008 and September 16, 2009, we declined at those times to assess stipulated penalties for violations of the Consent Order, although we reserved the right to do so in the future for those or any future violations of the Consent Order.

We are no longer willing to decline collecting stipulated penalties for your continued violations of the Consent Order, but are assessing only a fraction of the full amount we could collect pursuant to the Order to which you agreed. However, we are flexible and willing to discuss with you a payment schedule. To this end, we suggest meeting with you in our San Francisco office on January 5th, 6th, or 7th, 2010, at which time we can negotiate payment deadlines. Please let us know by **December 31, 2009** if you can meet with us on one of these three days. Also, if you believe that the clams were moved into the harbor seal protection area on some date other than October 19, 2009, and can provide us with documentation to that effect, we will recalculate the stipulated penalty amount.

We urge you in the strongest possible way to adhere to our directions concerning all future development proposed to take place at Drakes Estero. We continue to be very concerned about your ability and commitment to carry out the resource protection provisions of the Consent

Order. Any future violations of the Consent Order will result in the assessment of additional stipulated penalties.

Thank you.

Sincerely,

JO GINSBERG
Enforcement Analyst

cc: Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Cassidy Teufel, CCC, Coastal Program Analyst
Lisa Haage, CCC, Chief of Enforcement

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KEVIN LUNNY
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) NANCY C. LUNNY
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt ~~for Merchandise~~
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7006 2760 0005 5883 7006

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

Exhibit 15
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

Drakes Bay Oyster Company

17171 Sir Francis Drake Boulevard
Inverness, CA 94937
(415) 669-1149
kevin@drakesbayoyster.com
nancy@drakesbayoyster.com

December 21, 2009

Jo Ginsberg
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA94105-2219

Re: CCC-07-CD-11 Drakes Bay Oyster Company

Dear Ms. Ginsberg,

Manila clams have been cultured on M-438-01 since 1993 when Johnson Oyster Company (JOC) asked that they be added to M-438-01 as a cultured species, and the California Fish and Game Commission (FGC) approved the request. Inadvertently, however, through a FGC clerical error, the FGC added the Manila clams to the farm's other lease (M-438-02) that was created by the FGC in 1979 for the purpose of culturing native rock scallops. Pursuant to the actual FGC approval, JOC clam culture began on M-438-01. Since 2007, Drakes Bay Oyster Company (DBOC) and the California Department of Fish and Game (CDFG) have been working toward correcting the error.

DBOC brought the FGC clerical error to the attention of the California Coastal Commission (CCC) in its Coastal Development Permit (CDP) application 2-06-003, on August 20, 2008. In so doing, DBOC made the CCC aware that the FGC error was to be corrected.

The CCC 2007 Consent Cease and Desist Order CCC-07-CD-11 (CDO) reflected the clerical error. The approved cultured species included in the CDO was taken from the FGC lease language that contained the 1993 FGC error. A correction to both the FGC lease and the CCC Consent CDO was necessary, so that the clams could stay on M-438-01 where they had been officially permitted.

Prior to the correction by the FGC, DBOC received an enforcement letter from CCC dated September 16, 2009. The letter stated that DBOC was out of compliance with the Consent CDO because Manila clams were located outside of M-438-02. DBOC contacted CDFG about this matter. Devin Bartley, State Aquaculture Coordinator, told

DBOC that the matter was submitted to the FGC for the correction, and would be placed on an upcoming agenda.

On October 2, 2009, DBOC submitted a letter to CCC noting that the FGC would be acting on the issue soon and that CDFG would be in contact with CCC regarding the clam location.

On October 15, 2009, I asked Cassidy Teufel and Allison Dettmer if the clams could remain where they had always been, on M-438-01, until the upcoming FGC meeting that would address the clerical error issue. At the time, Allison and Cassidy recommended that DBOC move the clams for two reasons: first, Peter Douglas was considering an enforcement action against DBOC because of the clam location and second, the Coastal Commissioners were not likely to approve a CDP if DBOC was out of compliance with clams. Given this CCC position, DBOC agreed to move the clams from M-438-01 to M-438-02.

In response to the CCC directive, DBOC initiated a process to move the clams. Step one was to contact the CDFG to obtain coordinates for the new location. Even though M-438-02 was an eligible area to grow shellfish, as a practical matter, DBOC had not used it previously, thus were unfamiliar with it. CDFG provided the latitude/longitude coordinates in "minutes/seconds." Step two; convert the coordinates to decimals so they could be entered into a hand-held GPS. In making these calculations, an error was made.

On October 29, 2009, DBOC notified the agencies that the clams had been moved to M-438-02 as directed by CCC.

On November 25, 2009, CDFG provided the December 9-10 FGC meeting agenda to the CCC. On the Consent Calendar for that meeting, included as item 15, was the correction of the 1993 Manila clam error.

On November 30, 2009, I receive a copy of an email from CDFG to NPS scientist Ben Becker with the coordinates of M-438-02. Various other agencies were copied, as was DBOC.

On December 03, 2009, I sent an email to Ben Becker and said: "DFG forwarded me a copy of the email of November 30, 2009. Apparently, you have questions about our lease with the State. Would you please detail your concerns to us? Why didn't you ask us, or copy us with copy of your inquiry. We would be happy to work with you." NPS did not respond.

On December 8, 2009, DBOC first learned of the clam placement error. I received a call from US Senator Dianne Feinstein's office with questions about clams having been placed in a prohibited area. I told them that I did not know what they were talking about. I explained that we had moved the clams onto M-438-02 as directed by the CCC. While on the call, the Senator's staff sent me an aerial photo and map prepared by the NPS describing where the clams were. I was astonished at what I saw. I explained to them

that this had not been brought to our attention and we would address the problem immediately. During the same day, the CCC and the NPS called to also notify DBOC of the problem. The message was clear – get the clams out of the prohibited area.

DBOC has worked very hard to develop a good rapport with CCC and was moving steadily towards the CDP. The call from Cassidy clearly revealed that CCC perceived an unintentional mistake as intentional, resulting in a loss of trust for DBOC. The calls I had received on December 8, 2009, included a call from a US Senator's office, a call from the NPS Pacific West Regional Director's office and the Point Reyes National Seashore Superintendent, a call from the California Coastal Commission informing me of a $61,250.00 fine and a loss of trust. NPS directed us to move the clams. We moved the clams the next day.

In the process of retrieving the clam bags, DBOC kept the boat in deep water and outside of the seal protection area so that there would be no damage to eelgrass or other resources. It was not seal pupping season and there were no seals around during the placement or recovery of the clam bags. Removing the bags was a simple three hour task of lifting the bags up off the sandbar and hand carrying them to the two barges that were attached to the boat. The bags were in an area devoid of eelgrass and the bags left no marks on the sand. (To give you a sense of volume, the clams in question would have fit in the back of a pickup truck.) It is important to note, according to NPS data, the largest causes of seal disturbances in Drakes Estero---kayaks and seashore visitors---, are allowed to use and enjoy the very areas prohibited to DBOC.

In 1992 NOAA, CDFG and NPS created harbor seal protection protocols. NOAA and NPS records show that the protocols have worked. Moreover, recent reports from both agencies reveal that harbor seals along the California coast are at carrying capacity. Today, at the request of the Sierra Club and National Parks Conservation Association, the Marine Mammal Commission is undertaking a new review and DBOC is working closely with them in that review.

I had a conversation with Cassidy Teufel about the clam placement error. From this conversation, I learned that it appeared to CCC that DBOC must not "know" where the boundaries of the protected areas are, if they placed clams within the prohibited area. DBOC is aware of the locations of these areas. DBOC uses established routes to each and every shellfish bed. Those well known routes do not interfere or cross either protected area. DBOC boats will continue to use the established routes. There is no reason to expect that boat traffic is entering the prohibited areas or that boat traffic will enter these areas in the future. This is an unusual situation which resulted in an isolated error. Cassidy and I agreed that it would be a good idea to mark the boundaries of the seal protected areas with buoys so that there would be no inadvertent boat traffic within these areas. This would make it clear to all parties concerned.

CCC has expressed the concern that this mistake was intentional. It was not.

DBOC understands that an error occurred while undertaking a very unusual task and DBOC takes responsibility for that error.

Locating a growing area is not a normal task and does not suggest that a similar error could occur in the future. DBOC staff is fully aware of the locations of all of the historic oyster beds. The well established oyster beds do not move and are well known to the staff. The staff never looks for "new areas" to place shellfish.

At the December 10, 2009 FGC meeting, the Commission formally acknowledged, by a unanimous vote, that in 1993, the commission approved Manila Clams as a cultured species on M-438-01. The FGC corrected the clerical error that erroneously indicated Manila clams on M-438-02. Manila clams are legal and approved on M-438-01 with FGC, CDFG and NPS. In light of the FGC determination, we respectfully request that the CCC conform all applicable records and documents. When the record is conformed there will be consistency between all agencies and the clams will remain in the same location that they have historically been grown.

As previously stated, the placement of clams in a prohibited area was unintentional. Harbor seals were not present and eel grass was not disturbed. DFG informed CCC of the FGC error and the movement of clams should not have been required. We therefore respectfully request that the $61,250.00 penalty be withdrawn. Please confirm that our CDP application and all applicable records have been changed to reflect the action taken by the FGC.

Enclosed, please find a check in the amount of $8,500.00. This represents the balance due for the DBOC CDP application. We look forward to working with CCC staff through the completion of the CDP process.

Sincerely,

Kevin Lunny

Nancy Lunny

Cc: George Turnbull, Deputy Regional Director, National Park Service
Don Neubacher, Superintendent, Point Reyes National Seashore
John McCamman, Director, California Department of Fish and Game
John Carlson, Executive Director, California Fish and Game Commission
Gregg Langlois, Senior Environmental Scientist, California Department of Public Health, Environmental Management Branch
Allison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Cassidy Teufel, CCC, Coastal Program Analyst
Lisa Hagge, CCC, Chief of Enforcement
Zachary Walton, Esq., Paul, Hastings, Janofsky & Walker LLP

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January 19, 2010 73344.00002

VIA E-MAIL AND U.S. MAIL

Peter Douglas
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Drakes Bay Oyster Company Consent Order and Coastal Development Permit Process

Dear Mr. Douglas:

Thank you for meeting with us on January 6, 2010. We felt the meeting was productive. We wish to address a few points relevant to our meeting:

The Coastal Commission misinterpreted its own Consent Order.

Section 3.2.8 of Consent Order CCC -07-CD-11 (Dec. 12, 2007) (Consent Order) allows the cultivation of clams where they are "currently cultivated" in the "Cultivation Area" as defined in section 3.2.11. Section 3.2.11 defines the Cultivation Area in relevant part as the areas subject to Lease M-438-01 and M-438-02. Clams have been and currently are cultivated in beds located within Lease M-438-01. Therefore, clams have been cultivated in the Cultivation Area.

The Coastal Commission position that the Consent Order prohibits the cultivation of clams in any area other than Lease M-438-02 is wrong. The notion that clams should be cultivated in Lease M-438-02 reflects a complete misunderstanding of the intent of the Consent Order, which was to preserve the status quo pending the Commission's evaluation of a Coastal Development Permit (CDP). The Coastal Commission directive to relocate clams from Lease M-438-01, where they have only been cultivated, to Lease M-438-02, where they have never been cultivated, would have resulted in a change in conditions, which is exactly what the Consent Order is designed to prevent.

Nor does it make any sense to cultivate clams in Lease M-438-02 because it was created as a deep water lease for scallops. Clams and scallops are not grown the same way. Clams cannot be cultivated in deep water. They are not grown in trays or floating bags, as suggested by Coastal Commission staff, because they are grown on intertidal sandbars,

beaches and mudflats, not in deep water. The Fish & Game Commission and Department of Fish & Game, because of their knowledge and expertise with shellfish production, never would have ordered the relocation of clams to a deep water lease where they cannot be grown. This basic fact highlights that a clerical error was made when, in 1993, the approval by the Fish & Game Commission to cultivate clams in Lease M-438-01 was incorrectly reflected in Lease M-438-02.

A requirement to cultivate clams in Lease M-438-02 is nonsensical and the insistence that such a requirement is valid reflects the Coastal Commission staff's lack of expertise with coastal dependent shellfish production techniques. Had Coastal Commission staff correctly interpreted the Consent Order, there would be no dispute today.

The Coastal Commission knew the Fish & Game Commission was in the process of correcting the clerical error.

The Fish & Game Commission corrected the clerical error in the leases on December 10, 2009. This is final agency action and it has the force of law. Well before this occurred, Drakes Bay Oyster Company notified the Coastal Commission of the clerical error, which is why the Consent Order defines the Cultivation Area so carefully. And we are aware of communications by Department of Fish & Game staff informing Coastal Commission staff that the acknowledged clerical error was in the process of being addressed. Coastal Commission staff therefore had specific knowledge of the clerical error and that it was being corrected. It is difficult to understand why Coastal Commission staff would order the relocation of the clams, notwithstanding their misreading of the Consent Order.

During our January 6, 2010 meeting, almost a month after the Fish & Game Commission formally voted to correct the 1993 clerical error, Coastal Commission staff continued to express doubt as to whether or not there was, in fact, a clerical error. This is absurd.

- The agenda for the Fish & Game Commission's December 9 – 10, 2009, meeting identifies the mistake as a "clerical error".
- The Department of Fish & Game submitted a staff report to the Fish & Game Commission explaining that it was an error.
- The Fish & Game Commission voted to correct the clerical error.

We have attached the relevant information for your files.

Coastal Commission staff knows full well that the Fish & Game Commission's action is final and binding and has the force of law. There is an additional important point of law at issue here. Because the Fish & Game Commission corrected a clerical error, this affirms that the approval to cultivate clams was valid in 1993. The authorization to cultivate clams has been long-established.

The Commission's directive to move the clams, and its intent to evaluate whether to allow the cultivation of clams under the CDP, violate the Coastal Act.

Section 30411(a) of the Coastal Act states,

> The Department of Fish and Game and the Fish and Game Commission are the principal state agencies responsible for the establishment and control of wildlife and fishery management programs and the [Coastal] Commission shall not establish or impose any controls with respect thereto that duplicate or exceed regulatory controls established by these agencies pursuant to specific statutory requirements or authorization. (Emphasis added).

The Fish & Game Commission authorized the cultivation of clams in Lease M-438-01. The Coastal Commission therefore has no authority to duplicate or exceed these regulatory controls. Section 30411(a) also explains why the Commission has not as a general practice required CDPs for shellfish production.

In light of the above, the Coastal Commission's demand for penalties should be immediately withdrawn. The demand should have never been issued in the first place, and the refusal to withdraw the demand would amount to a deprivation of due process. Instead, we should move forward with the processing of the CDP. However, any CDP must be issued in accordance with section 30411(a) of the Coastal Act.

Sincerely,

Zachary R. Walton
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

Attachments

cc: Kevin Lunny
Nancy Lunny
Lisa Haage
Alison Dettmer
Cassidy Tuefel

State of California
FISH AND GAME COMMISSION
(916) 653-4899
www.fgc.ca.gov

Meeting of
December 9, 2009 (Wednesday)
10:00 a.m. [2]

Radisson Hotel at Los Angeles Airport
ABC Ballroom [1]
6225 West Century Blvd.
Los Angeles

AGENDA[3]

ALL MEETINGS OPEN TO THE PUBLIC

PUBLIC SPEAKER CARDS WILL BE AVAILABLE AT 9:00 AM AND MUST BE TURNED IN TO COMMISSION STAFF BY 10:10 AM FOR CONSIDERATION. PUBLIC TESTIMONY WILL BE HEARD FROM APPROXIMATELY 10:15 AM - 12:30 PM TODAY. THE TIME ALLOTTED PER INDIVIDUAL WILL BE DETERMINED BASED ON THE NUMBER OF SPEAKER CARDS RECEIVED, AND ANNOUNCED AT THE START OF THE MEETING.

NOTE: Items may be heard on either day and in any order pursuant to the determination of the Commission President.

AT APPROXIMATELY 1:30 PM A JOINT SESSION WILL CONVENE WITH THE FISH AND GAME COMMISSION AND THE MARINE LIFE PROTECTION ACT (MLPA) BLUE RIBBON TASK FORCE (BRTF).

1. PRESENTATION OF INTEGRATED PREFERRED ALTERNATIVE (IPA) RECOMMENDED BY THE MLPA BLUE RIBBON TASK FORCE, ALONG WITH MARINE PROTECTED AREA PROPOSALS DEVELOPED BY THE SOUTH COAST REGIONAL STAKEHOLDER GROUPS.

   A. OVERVIEW OF THE SOUTH COAST MLPA INITIATIVE PROCESS.

      1. TIMELINE, PUBLIC PARTICIPATION AND BUDGET.
      2. COMPARISON OF THE FOUR PROPOSALS.
      3. SCIENCE ADVISORY TEAM ANALYSIS.
      4. ECOTRUST POTENTIAL NEGATIVE ECONOMIC IMPACT ANALYSIS.
      5. DEPARTMENT OF FISH AND GAME FEASIBILITY ANALYSIS.
      6. DEPARTMENT OF PARKS FEASIBILITY ANALYSIS.

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[1] These facilities are accessible to persons with disabilities. To request reasonable accommodations for a disability, please contact California Relay Service at 1 (800) 735-2929 (TT) or 1 (800) 735-2922 (Voice) and ask them to contact the California Fish and Game Commission at (916) 653-4899.

[2] The Commission may break for lunch at approximately 12:30 noon.

[3] The public is encouraged to comment on any item on the agenda. In order for the Commission to adequately consider public comments, the public is requested to submit written comments no later than ten days prior to the meeting. Written comments received fewer than ten days preceding the meeting will be submitted to the Commission at the meeting; however, Commission staff is unable to deliver material received one day before and on the day of the meeting to the Commissioners when the meeting is not in Sacramento. Please send your comments to be received no later than two days before the meeting.

If you decide to speak at the Commission meeting, please begin by giving your name and affiliation (if any) and the number of people represented by your organization. Then tell the Commission your concerns. Time allotted for each agenda item depends upon the number of speakers for each item and the length of the agenda. The Commission is interested in your views; don't worry about how to say them. If several people have spoken, try not to be repetitious. If there are several with the same concerns, please try to appoint a spokesperson. The Commission is particularly interested in the specific reasons you are for or against a proposal because the Commission's decision needs to be based on specific reasons.

If you would like to present handouts/written material to the Commission at the meeting, please provide eight (8) copies.

B. BUDGET DISCUSSION.

C. PRESENTATION BY STAKEHOLDER GROUPS' CO-LEADS ON EACH OF THE THREE STAKEHOLDER PROPOSALS.

D. BRTF PRESENTATION AND DISCUSSION OF THE IPA.

E. COMMISSION GUIDANCE TO STAFF ON COMMISSION PREFERRED PACKAGE AND ALTERNATIVES FOR REGULATORY AND CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) PROCESSES. **(NO FINAL DECISIONS WILL BE MADE AT THIS MEETING. THE COMMISSION WILL ANNOUNCE THE START OF THE REGULATORY AND CEQA PROCESSES AT A FUTURE DATE.)**

State of California
FISH AND GAME COMMISSION
(916) 653-4899
www.fgc.ca.gov

Meeting of
December 10, 2009 (Thursday)
8:30 a.m.

Radisson Hotel at Los Angeles Airport
ABC Ballroom
6225 West Century Blvd.
Los Angeles

AGENDA

ALL MEETINGS OPEN TO THE PUBLIC

2. PUBLIC FORUM– Any member of the public may address and/or ask questions of the Commission relating to the implementation of its policies or any other matter within the jurisdiction of the Commission. The issue to be discussed should not be related to any item on the current agenda. As a general rule, action cannot be taken on issues not listed on the agenda. At the discretion of the Commission, staff may be requested to follow up on such items. Submittal of written comments is encouraged to ensure that all comments will be included in the record before the Commission. Please be prepared to summarize your comments to the time allocated by the President.

3. SCOPING OF POSSIBLE DEPARTMENT AND COMMISSION 2010 MAMMAL HUNTING REGULATION CHANGE PROPOSALS AND UPDATE ON CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) DOCUMENTS. (This includes tag application and big game drawing procedures.)

4. CALIFORNIA GAME WARDEN'S ASSOCIATION PRESENTATION ON GAME WARDEN ISSUES AND POSSIBLE COMMISSION ACTION.

5. PURSUANT TO FISH AND GAME CODE SECTION 2084, CONSIDERATION AND POSSIBLE EMERGENCY ACTION TO RE-ADOPT SECTION 749.5, TITLE 14, CCR, FOR AN ADDITIONAL 90 DAY PERIOD, RE: SPECIAL ORDER RELATING TO INCIDENTAL TAKE OF PACIFIC FISHER DURING CANDIDACY PERIOD.

6. RECEIPT OF DEPARTMENT OF FISH AND GAME INFORMATIONAL ITEMS.

   (A) RECEIPT OF DEPARTMENT OF FISH AND GAME DIRECTOR'S REPORT.

   (B) UPDATE ON THE DEPARTMENT'S STATUS REPORT AND RECOMMENDATION ON THE PETITION TO LIST THE CALIFORNIA TIGER SALAMANDER (*Ambystoma californiense*) AS AN ENDANGERED SPECIES.

   (C) STATUS REPORT ON HUNTING MOURNING DOVES WITHIN ROSEVILLE CITY LIMITS.

   (D) UNVEILING OF THE WARDEN'S STAMP.

   (E) UPDATE ON ENFORCEMENT.

   (F) OTHER.

7. RECEIPT OF COMMISSION INFORMATIONAL ITEMS.

   (A) 2010 WESTERN ASSOCIATION OF FISH AND WILDLIFE AGENCIES (WAFWA) MID-WINTER MEETING.

   (B) OTHER.

8. SUBCOMMITTEE REPORTS AND RECOMMENDATIONS.

   (A) MARINE RESOURCES COMMITTEE.

   (B) AL TAUCHER'S PRESERVING HUNTING AND SPORT FISHING OPPORTUNITIES ADVISORY COMMITTEE.

   (C) AQUACULTURE COMMITTEE.

9. RECEIPT OF FEDERAL AGENCIES INFORMATIONAL ITEMS.

10. RECEIPT OF LEGAL COUNSEL INFORMATIONAL ITEMS.

11. NEW BUSINESS.

12. ANNOUNCEMENT OF RESULTS FROM EXECUTIVE SESSION.

13. (A) COMMISSION GUIDANCE AND DIRECTION ON HOW TO PROCEED WITH THE PREPARATION OF THE STATE WATER BOTTOMS LEASE TEMPLATE.

    (B) EXTENSION OF STATE WATER BOTTOM LEASE NO. M-430-12 FOR JOHN FINGER, HOG ISLAND OYSTER COMPANY, MARIN COUNTY.

    (C) EXTENSION OF STATE WATER BOTTOM LEASE NO.M-430-02 FOR MICHAEL TOUSSAINT, MARIN OYSTER COMPANY, MARIN COUNTY.

    (D) EXTENSION OF STATE WATER BOTTOM LEASE NO. M-430-14 FOR MARTIN STRAIN, POINT REYES OYSTER COMPANY, MARIN COUNTY.

14. CERTIFICATION OF FINAL ENVIRONMENTAL DOCUMENT, ADOPTION OF FINDINGS AND PROPOSED PROJECT (OR ALTERNATIVE), AND FINAL ADOPTION OF THE 2010-2012 SPORT FISHING REGULATIONS RELATING TO FISH, AMPHIBIANS, REPTILES AND INVERTEBRATES.

CONSENT CALENDAR

15. CORRECTION OF CLERICAL ERROR FROM FISH AND GAME COMMISSION MEETING OF OCTOBER 8, 1993 REGARDING ADDITION OF MANILA CLAMS TO DRAKES ESTERO AQUACULTURE LEASE M-438-01.

16. RECEIPT OF DEPARTMENT'S TENTATIVE RECOMMENDATIONS FOR ANTLERLESS/EITHER-SEX DEER HUNTS FOR 2010-2011.

17. APPROVAL OF PRIVATE LANDS HABITAT ENHANCEMENT AND WILDLIFE AREA LICENSE (2009-2014) AND 2009-2010 MANAGEMENT PLAN FOR:

    (A) SPURLOCK RANCH, GLENN COUNTY
    (B) ORDWAY RANCH, CALAVERAS COUNTY

18. REINSTATEMENT OF MIKE BOYLE'S EXPIRED TRAPPING PERMIT.

19. REINSTATEMENT OF BRUCE R. RYAN'S EXPIRED TRAPPING PERMIT.

20. APPROVAL TO TRANSFER EDWARD J. SYLVESTER'S CALIFORNIA HALIBUT BOTTOM TRAWL VESSEL PERMIT.

21. RECEIPT OF DEPARTMENT REPORT TO THE FISH AND GAME COMMISSION AND LEGISLATURE ON THE ANNUAL ACCOUNTING OF THE DEPOSITS INTO, AND EXPENDITURES FROM, THE FISH AND GAME PRESERVATION FUND, AS RELATED TO THE REVENUES GENERATED PURSUANT TO SECTION 8587 OF THE FISH AND GAME CODE AND REQUIRED BY SECTION 8589.7 OF THE FISH AND GAME CODE.

OTHER

22. COMMISSION FOLLOW-UP, MEETING REVIEW, AND STAFF DIRECTION.

23. ANNOUNCEMENT OF FUTURE MEETINGS.

TENTATIVE 2010 FISH AND GAME COMMISSION MEETING SCHEDULE

www.fgc.ca.gov

February 3 (Wed.) **February 4** (Thurs.)	State of California Resources Agency Building Auditorium 1416 Ninth Street **Sacramento**
March 3 (Wed.) **March 4** (Thurs.)	**Upland**
April 7 (Wed.) **April 8** (Thurs.)	**Monterey**
April 21 (Teleconference)	**Sacramento** (Via Telephone)
May 5 (Wed.) **May 6** (Thurs.)	**Stockton**
June 23 (Wed.) **June 24** (Thurs.)	**Greater Sacramento Area**
August 4 (Wed.) **August 5** (Thurs.)	**Santa Barbara**
September 1 (Wed.) **September 2** (Thurs.)	**Greater Sacramento Area**
October 6 (Wed.) **October 7** (Thurs.)	**San Diego**
November 3 (Wed.) **November 4** (Thurs.)	**Greater Sacramento Area**
December 1 (Wed.) **December 2** (Thurs.)	State of California Resources Agency Building Auditorium 1416 Ninth Street **Sacramento**

EXECUTIVE SESSION
(NOT OPEN TO PUBLIC)

PURSUANT TO THE AUTHORITY OF GOVERNMENT CODE SECTION 11126(a)(1) AND (e)(1), AND SECTION 309 OF THE FISH AND GAME CODE, THE COMMISSION WILL MEET IN CLOSED EXECUTIVE SESSION. THE PURPOSE OF THIS EXECUTIVE SESSION IS TO CONSIDER:

A. PENDING LITIGATION TO WHICH THE COMMISSION IS A PARTY.

I. BIG CREEK LUMBER COMPANY AND CENTRAL COAST FOREST ASSOC. vs. CALIFORNIA FISH AND GAME COMMISSION RE: COHO LISTING, SOUTH OF SAN FRANCISCO.

II. LINDY O'LEARY vs. CALIFORNIA FISH AND GAME COMMISSION RE: R.R.S.A.C. AND R.R.S.S. PERMIT DENIALS.

III. JAMES BUNN AND JOHN GIBBS vs. CALIFORNIA FISH AND GAME COMMISSION RE: SQUID PERMITS.

IV. KERN COUNTY WATER AGENCY vs. CALIFORNIA FISH AND GAME COMMISSION, DEPARTMENT OF FISH AND GAME, DEPARTMENT OF WATER RESOURCES RE: STATE WATER PROJECT AND CALIFORNIA ENDANGERED SPECIES ACT.

V. CENTER FOR BIOLOGICAL DIVERSITY vs. CALIFORNIA FISH AND GAME COMMISSION RE: AMERICAN PIKA.

B. POSSIBLE LITIGATION INVOLVING THE COMMISSION.

C. STAFF PERFORMANCE AND COMPENSATION.

D. RECEIPT OF HEARING OFFICER RECOMMENDATIONS ON LICENSE AND PERMIT ITEMS.

State of California
Department of Fish and Game
Memorandum

te: November 18, 2009

To: John Carlson
Executive Director
Fish and Game Commission

From: John McCamman
Acting Director

Subject: Consent Calendar item for the December 9-10,2009 Fish and Game Commission Meeting Re: Request to correct clerical error from Fish and Game Commission meeting of October 8, 1993 regarding addition of Manila clams to Drakes Estero Aquaculture lease M- 438-01.

The department requests that the Fish and Game Commission effect a technical change to the leases M- 438-01 and M- 438-02 granted to Drakes Bay Oyster Company. It has recently come to the attention of the department that an error was made in responding to a request from the original lessee, Johnson Oyster Company, to add Manila clams to their state water bottom lease, M- 438-**01**. During the commission's meeting of October 8, 1993, the commission incorrectly approved the addition of Manila clams to lease M- 438-**02**.

The attached correspondence documents that:

- on August 6, 1993 Johnson Oyster Company made a request to the commission to add Manila clams to lease M- 438-**01**;
- on August 19, 1993 Mr. Johnson was notified that the request would be on the commission's meeting of October 8 1993, and that Mr. Johnson's presence at the meeting was not necessary;
- on October 8, 1993 the commission addressed the issue on the consent calendar, but a clerical error had assigned the addition to M- 438-02 rather than M 438-01;
- on October 18, 1993 Mr. Johnson was notified that the addition had been made to M- 438-**02**.

The error was not addressed at the time because Mr. Johnson did not attend the meeting, the recent death of the founder of Johnson Oyster Company and because of efforts to get the struggling company back on its feet and resume former high levels of production. With the sale of Johnson Oyster Company to Kevin Lunney in 2005 and the subsequent change of name to Drakes Bay Oyster Company, the error was again not addressed.

We wish now to correct that error and add Manila clams to lease M- 438-01 as originally requested and remove Manila clam from M-438-02. As the original request was addressed on the consent calendar for the 1993 meeting, we request that the correction also be put on the consent calendar for the December 9-10, 2009 meeting of the commission. Drakes Bay Oyster Company is aware of this error and would like to have the error corrected and be able to farm Manila clams in compliance with state regulations concerning their lease.

ou have further questions please contact Dr. Devin M. Bartley, State Aquaculture ordinator (dbartley@dfg.ca.gov).

Attachments

State of California
FISH AND GAME COMMISSION
(916) 653-4899

Meeting of
October 8, 1993 (Friday)
8:30 a.m.

State Building
Room B-109
1350 Front Street
San Diego

AGENDA

ALL MEETINGS OPEN TO THE PUBLIC

DISCUSSION ITEMS (continued)

22. AMENDMENT OF SECTION 670.2, TITLE 14, CCR, RE: LISTING THE VAIL LAKE CEANOTHUS (Ceanothus ophiochilus) AS AN ENDANGERED SPECIES.

23. AMENDMENT OF SECTION 705, TITLE 14, CCR, RE: APPLICATION FOR HUNTING AND FISHING LICENSES.

24. RECEIPT OF INFORMATION FROM SOUTHERN PACIFIC TRANSPORTATION COMPANY RELATIVE TO THE UPPER SACRAMENTO RIVER.

25. DEPARTMENT STATUS REPORT ON RECOVERY OF THE UPPER SACRAMENTO RIVER FROM A TOXIC SPILL AND ITS RECOVERY CRITERIA.

26. RECEIPT OF DEPARTMENT RECOMMENDATION FOR CATCH-AND-RELEASE WATERS PURSUANT TO SECTION 1727 OF THE FISH AND GAME CODE (SB 192).

27. DISCUSSION OF RECOMMENDATIONS FOR CHANGES IN THE 1994-96 SPORT FISHING REGULATIONS.

CONSENT CALENDAR

28. AMENDMENT OF SECTION 180.2, TITLE 14, CCR, RE: TRAP DESTRUCTION DEVICES.

29. AMENDMENT OF SECTION 630, TITLE 14, CCR, RE: ADDING TWO SPECIAL AREA REGULATIONS FOR THE EXISTING NAPA RIVER ECOLOGICAL RESERVE.

30. REQUEST TO PUBLISH NOTICE OF INTENT TO AMEND SECTION 238, TITLE 14, CCR, RE: SALE AND TRANSPORTATION OF AQUATIC PLANTS AND ANIMALS.

31. REQUEST TO PUBLISH NOTICE OF INTENT TO AMEND SECTION 670.1, TITLE 14, CCR, RE: LISTING OF ENDANGERED AND THREATENED SPECIES.

32. RECEIPT OF DEPARTMENT'S 1992 ANNUAL REPORT ON THE STATUS OF CALIFORNIA'S THREATENED AND ENDANGERED SPECIES (CONSIDERATION OF REPORT SCHEDULED FOR NOVEMBER 4, 1993 COMMISSION MEETING IN REDDING).

33. RECEIPT OF DEPARTMENT REPORT RE: ANNUAL PROOF OF USE STATEMENTS FOR AQUACULTURE LEASES.

34. REQUEST OF TOM JOHNSON, JOHNSON OYSTER COMPANY, TO ADD MANILA CLAMS (Tapes japonica) TO THE LIST OF SPECIES FOR MARICULTURE PURPOSES AT THEIR DRAKES ESTERO LEASE NO. M-438-02.

35. DEPARTMENT REQUEST FOR AUTHORIZATION TO ACCEPT CONSERVATION EASEMENTS FOR:

(A) BEAR GULCH ENTERPRISES, SHASTA COUNTY (16.1± ACRES)
(B) KELUCHE CREEK PROPERTIES, SHASTA COUNTY (62.2± ACRES)
(C) TAYLOR FAMILY TRUST, SONOMA COUNTY

36. DESIGNATION OF DEPARTMENT LANDS AS STATE WILDLIFE AREAS:

(A) MONACHE MEADOWS WILDLIFE AREA, TULARE COUNTY (248± ACRES)
(B) WEST HILLMAR WILDLIFE AREA, MERCED AND STANISLAUS COUNTIES (340± ACRES)

37. REQUEST OF ROBYNE GARNETT AND DAVID KANELLIS, AIRBORNE RAPTORS, NO STRINGS ATTACHED, FOR AUTHORIZATION TO IMPORT, POSSESS AND TRANSPORT NON-NATIVE RAPTORS FOR EXHIBITION PURPOSES.

38. REQUEST OF RANDY RANDAZZO, PACIFIC GROVE, FOR RENEWAL OF HIS EXPERIMENTAL GEAR PERMIT TO TAKE SQUID IN MONTEREY BAY.

OTHER

39. ANNOUNCEMENT OF FUTURE MEETINGS.

Note: "The public is encouraged to comment on any item on the agenda. Written comments received in the Commission office by noon on the Friday preceding the meeting will be forwarded to the Commissioners that same day for their leisurely review. Written comments received after that date will be submitted to the Commission at the meeting.

"If you decide to speak at the Commission meeting, please begin by giving your name and affiliation (if any) and the number of people represented by your organization. Then tell the Commission your concerns in 5 minutes or less. The Commission is interested in your views; don't worry about how to say them. If several people have spoken, try not to be repetitious. If there are several with the same concerns, please try to appoint a spokesperson. The Commission is particularly interested in the specific reasons you are for or against a proposal because the Commission's decision needs to be based on specific reasons."

F. ROBERT STUDDERT
ATTORNEY AT LAW

REPLY TO NORTHGATE OFFICE

August 6, 1993

Robert R. Treanor
CALIFORNIA FISH & GAME
1416 Ninth Street, RM 1207-5
Sacramento, CA 94244

Re: Water Bottom Allotment Lease No. M-438-01
Johnson Oyster Company

Dear Bob:

Johnson Oyster Company would like to start culturing Manila Clams on the captioned lease in Drakes Estero. Accordingly, please consider this a request to add that species, Manila clams *(Venerupis japonica)*, to the other species specified at page 4 of the captioned allotment at the top of the page.

If memory serves correctly, we had been able to change the species cultured on other leases by administrative change rather than having to go to a noticed procedure. I would hope that the foregoing request could be processed in the same manager. Thank you for your usual courtesy and cooperation in this matter.

Very truly yours,

F. Robert Studdert

cc: Tom Johnson,
Johnson Oyster Company
Bob Hulbrock

FRS/lcy
JOC1*1
JOC1/2

NORTHGATE OFFICE: 36 PROFESSIONAL CENTER PARKWAY • SAN RAFAEL, CA 94903 • (415) 499-1155
WEST MARIN OFFICE: P.O. BOX 6 • INVERNESS, CA 94937 • (415) 663-8235
FAX: (415) 479-8416

August 19, 1993

Mr. F. Robert Studdert, Esq.
Northgate Office
36 Professional Center Parkway
San Rafael, CA 94903

Dear Mr. Studdert:

Your request on behalf of your client, Johnson Oyster Company, to add Manila clams (Tapes japonica) to the list of species for mariculture purposes at their Drakes Estero lease has been scheduled for the Commission's October 8, 1993 meeting in San Diego. That meeting will commence at 8:30 a.m. in the State Building, Room B-109, 1350 Front Street. Unless otherwise notified, it will not be necessary for you to attend that meeting. You will be notified of any Commission action shortly after the meeting.

Sincerely,

COPY ORIGINAL SIGNED BY ROBERT R. TREANOR

Robert R. Treanor
Executive Director

cc: Marine Resources Division
Region 3
Fish and Game - Menlo Park and Monterey
Bob Hulbrock, Aquaculture Coordinator

Exhibit 17
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

AUG 23 24 1993

October 18, 1993

Mr. Tom Johnson
Johnson Oyster Company
c/o F. Robert Studdert, Esq.
Northgate Office
36 Professional Center Parkway
San Rafael, CA 94903

Dear Mr. Johnson:

The Commission, at its October 8, 1993 meeting in San Diego, approved your request to add Manila clams (Tapes japonica) to the list of species for mariculture purposes at your Drakes Estero Lease M-438-02. You should be receiving your amended lease from the Department shortly.

Sincerely,

COPY ORIGINAL SIGNED BY ROBERT R. TREANOR

Robert R. Treanor
Executive Director

cc: Marine Resources Division
Region 3
Bob Hulbrock, Aquaculture Coordinator

AMENDMENT NO. 1
TO LEASE OF STATE WATER BOTTOMS FOR AQUACULTURE,
LEASE NUMBER M-438-02

This Amendment of Aquaculture Lease made and entered into as of the 8th day of October, 1993, 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".

W I T N E S S E T H:

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 has 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

WHEREAS, the request tendered by Lessee at a duly called and noticed hearing of the Fish and Game Commission of the State of California, pursuant to law, has been determined to be in the best interest of the State of California.

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

That Lessor does hereby grant Lessee the exclusive privilege of cultivating Manila clams (*Tapes japonica*) on the lease, in addition to other previously authorized species.

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_____

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By_____
Lessor

JOHNSON OYSTER COMPANY

By_____
Lessee

By_____

JNSHOYS.AM1


LOCATION MAP
DRAKES ESTERO
AQUACULTURE LEASES
Radio Towers
Starting Point
True Point of Beginning
M-438-01
Parcel 1
M-438-01
Parcel 2
USGS Grid Coordinates
Bull Point
DEPARTMENT OF FISH AND GAME - MARINE RESOURCES DIVISION

F. ROBERT STUDDERT
ATTORNEY AT LAW

REPLY TO NORTHGATE OFFICE

August 6, 1993

Robert R. Treanor
CALIFORNIA FISH & GAME
1416 Ninth Street, RM 1207-5
Sacramento, CA 94244

Re: Water Bottom Allotment Lease No. M-438-01
Johnson Oyster Company

Dear Bob:

Johnson Oyster Company would like to start culturing Manila Clams on the captioned lease in Drakes Estero. Accordingly, please consider this a request to add that species, Manila clams *(Venerupis japonica)*, to the other species specified at page 4 of the captioned allotment at the top of the page.

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FRS/lcv
JOC1*1
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(Drakes Bay Oyster Company)

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WEST MARIN OFFICE: P.O. BOX 6 • INVERNESS, CA 94937 • (415) 663-8235
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Sincerely,

COPY ORIGINAL SIGNED BY ROBERT R. TREANOR

Robert R. Treanor
Executive Director

cc: Marine Resources Division
Region 3
Fish and Game - Menlo Park and Monterey
Bob Hulbrock, Aquaculture Coordinator

October 18, 1993

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Johnson Oyster Company
c/o F. Robert Studdert, Esq.
Northgate Office
36 Professional Center Parkway
San Rafael, CA 94903

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Robert R. Treanor
Executive Director

cc: Marine Resources Division
Region 3
Bob Hulbrock, Aquaculture Coordinator

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APPROVED:

FISH AND GAME COMMISSION

By_____

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By_____
Lessor

JOHNSON OYSTER COMPANY

By_____
Lessee

By_____

JNSNOYS.AM1

Exhibit 17
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., *GOVERNOR*

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2 219
VOICE (415) 904-5 200
FAX (4 15) 904-5 400
TDD (415) 597-5885

SENT BY CERTIFIED AND REGULAR MAIL
Certification Number 7006 2760 0005 5883 5460

September 29, 2011

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Compliance with the Coastal Act and **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

Concerns have recently been raised with the California Coastal Commission ("Commission") regarding non-compliance with the terms and conditions of Consent Cease and Desist Order CCC-07-CD-11 (Drakes Bay Oyster Company) ("the Order"), which was issued to you on December 12, 2007. I have attached a copy of the Order for your convenience. These recent concerns have focused primarily on 1) marine debris in Drakes Estero and on nearby coastal beaches, especially from abandoned, discarded, or fugitive plastic aquaculture materials; and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area.

Commission staff has received several letters raising these concerns, and at the Commission hearing in Crescent City on September 8, 2011, these issues were raised to the Commission during the Public Comment period when a packet of information was distributed and a presentation was made by representatives of the Environmental Action Committee of West Marin and National Parks Conservation Association. Marine debris, especially plastics, and the use of motorized vessels near sensitive harbor seal areas pose serious threats to marine habitats and wildlife, and we are concerned about these issues in Drakes Estero. I am therefore writing to you to share these concerns and to request that we set up a meeting soon to discuss them and develop some possible solutions.

1. **Marine Debris.** The issue has been raised to the Commission that there is a substantial amount of marine debris in Drakes Estero and on Point Reyes beaches, and that a large portion of this marine debris comprises plastic spacers and other materials used in Drakes Bay Oyster Company's (DBOC) aquaculture operation. It has been reported to us that on ten days during a three week period, a hiker retrieved from the beaches of the Point Reyes peninsula more than

700 pieces of plastic debris that appear to have originated from DBOC, including black spacer tubes, small-mesh grow-out bags, and polystyrene flotation blocks. This is, of course, of great concern to us, and it is suggestive of possible violations of **Sections 3.2.2** and **3.2.3** of the Order.

Section 3.2.2, Future Abandonment and Removal of Equipment, states that "*To prevent the degradation of oyster cultivation apparatus and the release of debris into Drake's Estero, within 30 days of cessation of harvesting on any plot that is temporarily taken out of production, Respondent shall remove oyster culture apparatus from that plot except for the permanent structures including oyster racks located within certified harvest areas.*

Section 3.2.3, Removal of Abandoned Equipment, states "*All currently abandoned materials including cultivation equipment/apparatus...shall be removed.*" This Section further required submittal of a Debris Removal Plan that was to include location of debris identified for removal, proposed techniques and equipment to be used for debris removal, and identification of the debris disposal facility. The matter of the Debris Removal Plan was discussed in a letter from you to Commission staff dated November 14, 2008. In this letter, you indicated that all debris from currently abandoned materials would be pulled out by hand, loaded by hand onto a barge or boat, taken to the DBOC dock, loaded onto a truck, and hauled offsite to an approved dump site.

It is not clear to Commission staff at this time what aspect of the DBOC operation is apparently resulting in the release of plastic marine debris. If the marine debris now being found in and near Drakes Estero is coming from abandoned areas or equipment that has not been addressed consistent with the Debris Removal Plan and Order, we would welcome a discussion with you about updating or modifying the Debris Removal Plan to address this issue. If, however, the plastic debris is being released due to improper storage of active-use (non-abandoned) aquaculture equipment at the DBOC facility or some other operational oversight, the dispersion of these new materials throughout the Point Reyes coastal area would constitute new unpermitted development and may require a different set of solutions. In either case, as I'm sure you will agree, the continued presence and release of plastic marine debris poses a hazard to the marine environmental and natural resources of Drakes Estero and needs to be aggressively and comprehensively addressed in the immediate future.

2. **Boat Transit in the Lateral Channel. Section 7.0** of the Order, **Compliance with Permits and All Applicable Laws,** states that Respondents 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 [Coastal Development Permit Application] and 6.0 [National Park Service Special Use Permit] above. Respondents shall also comply with all applicable laws and regulations." In order to protect the harbor seal population in Drakes Estero, **Section 4(b)(vii)** of the National Park Service (NPS) Special Use Permit (SUP), signed on April 22, 2008, states that the Permittee must avoid disturbance to marine mammals and marine mammal haul-out sites and must maintain a distance of at least 100 yards from hauled-out seals throughout the year (per National Oceanic and Atmospheric Administration recommendations). In addition, during the harbor seal breeding season, March 1-June 30, the designated wilderness area (outside of Permit area) is closed to all boats. Finally,

Section 4(b)(vii) of the NPS SUP also states that the Permittee must follow the "Drakes Estero Aquaculture and Harbor Seal Protection Protocol," (attached to the SUP as Exhibit C) which states that "*during the breeding season, March 1 through June 30, the "Main Channel" and "Lateral Channel" of Drakes Estero will be closed to boat traffic.*"

It has been brought to our attention that there have been DBOC boats in the Lateral Channel during this restricted period. A photograph of Drakes Estero recently displayed by Corey Goodman, dated April 26, 2011, and attributed to Todd Pickering and John Hulls, demonstrates the presence of a motorized vessel apparently in support of aquaculture activities within the Lateral Channel of Drakes Estero. In addition, photographs of Drakes Estero taken by NPS and available on their website show motorized vessels in the Lateral Channel of Drakes Estero on at least 20 different days during April and May of 2008 and 2009. The presence of boat traffic in this area during these times is not allowed pursuant to the NPS SUP, and, therefore, is inconsistent with **Section 7.0** of the Order. We are concerned about adverse impacts from the boats and DBOC personnel on the sensitive harbor seals and their habitat during the breeding and pupping season.

We would like to meet with you as soon as possible to discuss these two important issues and to ensure both full compliance with the Order and the Coastal Act more generally, and protection of the aforementioned resources. Please let us know when you would be available to meet with us in our San Francisco offices. As you know, in the past we have raised various concerns with violations of the Order, and we are again anxious to avoid such violations in the future and to work cooperatively with you to achieve compliance and avoid damage to Drakes Estero's many sensitive resources.

Thank you for your cooperation. If you have any questions concerning any enforcement matters, please contact me at **415-904-5269**.

Sincerely,

Jo Ginsberg
Enforcement Analyst

Attachment: Copy of the CDO

cc: Charles Lester, CCC, Executive Director
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Lisa Haage, CCC, Chief of Enforcement
Nancy Cave, CCC, Northern California Enforcement Supervisor
Cassidy Teufel, CCC, Coastal Program Analyst
Cicely Muldoon, Superintendent, Point Reyes National Seashore

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2 219
VOICE (415) 904-5 200
FAX (4 15) 904-5 400
TDD (415) 597-5885

October 26, 2011

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Compliance with the Coastal Act and **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

I sent you a letter dated September 29, 2011, in which I discussed some issues that have been raised recently concerning possible non-compliance with the terms and conditions of Consent Cease and Desist Order CCC-07-CD-11 (Drakes Bay Oyster Company) ("the Order"), which was issued to you on December 12, 2007. Specifically, our recent concerns relate to marine debris and boat transit in the lateral channel of Drakes Bay.

In my letter, I asked you to contact us as soon as possible to let us know when you would be available to meet to discuss these important issues and to ensure full compliance with the Order and with the Coastal Act. I have not heard from you to date. Please call me at **415-904-5269** by **November 4, 2011** so that we can select some possible dates for a meeting.

Thank you. I look forward to hearing from you and meeting soon.

Sincerely,

Jo Ginsberg
Enforcement Analyst

cc: Charles Lester, CCC, Executive Director
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Lisa Haage, CCC, Chief of Enforcement
Nancy Cave, CCC, Northern California Enforcement Supervisor
Cassidy Teufel, CCC, Coastal Program Analyst
Cicely Muldoon, Superintendent, Point Reyes National Seashore

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION

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SENT BY CERTIFIED AND REGULAR MAIL
Certification Number 7006 2760 0005 5883 4234

February 1, 2012

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: **Compliance with the Coastal Act and with Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

In my letter to you dated September 29, 2011, I raised two issues that appear to constitute non-compliance with the Coastal Act and with Consent Cease and Desist Order CCC-07-CD-11 ("the Order"), which was issued to you on December 12, 2007. These issues are: 1) discharge of marine debris into Drakes Estero and onto nearby coastal beaches, especially in the form of abandoned, discarded, or fugitive plastic aquaculture materials, and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area. The same issues were the subject of my letter of October 26, 2011, which, as you know, was sent in an attempt to urge a response to the earlier letter and to establish a meeting date to discuss resolution of these matters. On January 4, 2012, we met with you to discuss these enforcement issues and express our concern about your non-compliance with some of the existing measures that had been negotiated with you to allow your operation to proceed while providing protection for harbor seals in Drakes Estero during their most sensitive life stages. It is our position that complete and consistent adherence to these measures is crucially important as they were not designed to provide a level of protection that would be considered adequate with only partial compliance. Marine debris, especially plastics, and the use of motorized vessels near sensitive harbor seal areas pose serious threats to marine habitats and wildlife, and we are therefore concerned about these issues at Drakes Estero.

1. **Boat Transit in the Lateral Channel/Special Use Permit (SUP).** Concerning the issue of motorized vessels in the lateral channel during the restricted period, at our January 4 meeting,

Exhibit 20
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

your attorney, Mr. Walton, argued that the language of the SUP stating that "the 'Main Channel' and 'Lateral Channel' of Drakes Estero will be closed to boat traffic" during certain periods actually meant that only the intersection of those channels would be so closed. We pointed out that this interpretation is at odds with the plain language of the prohibition. In support of your interpretation, Mr. Walton argued that the 1992 protocol only prohibited passage through that intersection and that it was not superseded by the SUP, so it is still binding. In fact, he argued that the SUP was intended to extend the prohibitions contained in the 1992 protocol. However, nothing in the SUP so indicates. To the contrary, the SUP contains an integration clause (provision 32 on page 14) that states that the SUP itself, with its exhibits, "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." Thus, the SUP clearly did supersede the 1992 protocol, and Mr. Walton's claim that you were abiding by the terms of the 1992 protocol and that there have always been motorized boats in the lateral channel year-round[1] is not only irrelevant to whether this is a violation of the SUP and the Consent Order, but an admission of a longer violation. We have discussed this matter with the National Park Service (NPS), and NPS has confirmed that a) they agree with our reading of the SUP (i.e., boat traffic *is* indeed prohibited in the entire lateral channel between March 1 and June 30); and b) the 1992 protocol has been superseded by the SUP and was *in no way* memorialized or authorized as part of the SUP. I believe that you were copied on the recent letter from NPS on this point, but I attach a copy for your reference.

Moreover, after the meeting, in order to be responsive to the issues your counsel raised, we again reviewed the 1992 protocol as well as correspondence from you and Corey Goodman to the National Academy of Sciences in 2008 and 2009 in which your understanding of the protocol is described. The prohibition in that protocol is also not limited to the intersection of the two channels. As you know, the 1992 protocol was set forth in a series of letters between John Sansing, then Superintendent of Point Reyes National Seashore (National Park Service), and Bob Hulbrock, Aquaculture Coordinator for the California Department of Fish and Game (DFG); a Record of Agreement Regarding Drake's Estero Oyster Farming and Harbor Seal Protection dated May 15, 1992; and a simplified map that delineates the areas subject to closure during the harbor seal pupping season (copies attached). The protocol set forth in these documents memorialized an agreement reached by the parties present at a January 15, 1992 meeting between NPS, National Marine Fisheries Service (NMFS), DFG, and Johnson's Oyster Company (JOC). It is very clearly stated in the May 15, 1992 Record of Agreement portion of this protocol that "*the 'lateral channel' between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.*" For additional clarity, the "figure 1" referred to in this Record of Agreement demonstrates this seasonal closure area on a simplified map of the estero.[2] Thus, boat traffic has been prohibited seasonally in the lateral channel since May of

[1] Until December of 2008, at which point the Order established a Harbor Seal Protection Area that prohibited aquaculture vessels from the eastern most section of the lateral channel.

[2] This "figure 1" map was created by NPS and provided to the parties to the agreement as an attachment to a letter from NPS Superintendent John Sansing to DFG Aquaculture Coordinator Bob Hulbrock dated April 28, 1992. In a letter dated May 15, 1992, from DFG Aquaculture Coordinator Bob Hulbrock, to NPS Superintendent John Sansing, the "figure 1" map was amended to allow the "western channel" to remain open so as to facilitate boat access to a

1992, when this protocol was agreed upon. Upon review of several letters sent from you and Corey Goodman to Dr. Susan Roberts of the Ocean Studies Board of the National Academy of Sciences in 2008 and 2009, it now appears that this is consistent with your self-described understanding of the protocol. These letters,[3] dated November 1, 2008, February 3, 2009, and February 10, 2009, provide a detailed description of the 1992 protocol as it relates to the lateral channel. Specifically, in his November 1, 2008, letter Corey Goodman states:

> *The NPS, CDFG, and National Fisheries Service came to an agreement with Johnson's Oyster Company on May 15, 1992, called the 1992 protocol, which Johnson's and now DBOC have been following ever since. The 1992 protocol explicitly prohibits oyster boats from entering the lateral channel (between islands OB and UEN) during the pupping season from March to June...DBOC has repeatedly stated that they have not used the lateral channel during the pupping season, in accord with the 1992 protocol.*

This understanding of the 1992 protocol is echoed by you in your letter of February 3, 2009, in which you state:

> *The interagency agreement reached between NPS, NMFS, CDFG and Johnson Oyster Company in 1992 created protocols (attached) for the oyster operation regarding harbor seals – which include a pupping season lateral channel closure. DBOC has always known about these protocols and has always followed these protocols, including the lateral channel closure. These protocols were provided to us and explained in detail by CDFG when we were assigned the shellfish leases in 2005.*

Operation of boat traffic in the lateral channel year-round, therefore, is inconsistent with, first, the 1992 protocol, and, later, the April 22, 2008 NPS Special Use Permit (SUP) issued to Drakes Bay Oyster Company (DBOC), which superseded this protocol, and is therefore a violation of the Consent Order reached between you and the Commission. As provided for in the Order (including sections 5.0, 6.0, and 7.0), and as discussed in our meeting of January 4, 2012, the Order incorporates by reference the requirements of other legal requirements, and includes a commitment by DBOC to comply with all applicable laws and regulations, and permits issued to DBOC, specifically including the SUP.

In an email from you to Cicely Muldoon dated January 12, 2012, you request a meeting with NPS to review implementation of the current SUP for DBOC. You refer to the claim of the Coastal Commission (Commission) that "DBOC boats, going to and from Sandbars OB and UEN, are in violation of the SUP," and you state that you need to understand the basis of the alleged violation of the SUP in order to respond to the Commission. Cassidy Teufel sent you and Ms. Muldoon a clarifying email noting that the issue of concern to the Commission is not the

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point from which foot access to the beds normally accessed by the lateral channel would be provided. In a letter dated June 2, 1992, from NPS Superintendent John Sansing to DFG Aquaculture Coordinator Bob Hulbrock, this amendment was accepted.

[3] All three letters are available for review on the Marine Mammal Commission website at: http://mmc.gov/drakes_estero/de_docs_12210.shtml

origin or destination of the vessels, but, rather, the route they use and timing of that use. In other words, it is not the fact that the vessels are "going to and from Sandbars OB and UEN" that is, in and of itself, a violation of the SUP and, thus, the Order, but the fact that the boats use the lateral channel between these sandbars and some of that use occurs during the restricted March 1 through June 30th harbor seal breeding season. Again, we believe that the language of the documents is clear on the face, but appreciate your reaching out to obtain confirmation of the requirements. As you are no doubt aware, NPS recently clarified that the documents are in fact correct and that the prohibition is as stated above and in our letter to you.

To summarize these points: The 2008 SUP between DBOC and NPS has superseded the 1992 protocol and is currently binding. This SUP prohibits boat traffic in the entire lateral channel from March 1 through June 30, as has been confirmed by NPS. Further, even if the 1992 protocol were still in effect, which it is not, boat traffic in the lateral channel would ***also*** be prohibited during a restricted period (March 15 through June 1). Thus, as demonstrated by numerous photographs reviewed by Commission staff and corroborated by your admission during our meeting of January 4, 2012, DBOC has been consistently acting in a manner inconsistent with a) the 1992 protocol that was in place prior to 2008; and b) the 2008 SUP that has been in place since April 22, 2008. As a result, DBOC has been in violation of the Order since April 22, 2008. Moreover, as indicated in our meeting, this has apparently been a standard practice of DBOC, and the pictures may not capture a full representation of the number of times that the DBOC boats have been in the areas in times inconsistent with the SUP and Order. As noted above and in the recent letter from NPS, NPS and Commission staff are in full agreement that there is no ambiguity in the language of the SUP.

2. **Coastal Act Section 30411.** During a January 12, 2012, telephone conversation with Commission Senior Staff Counsel Alex Helperin, Mr. Walton also asked about our interpretation of Coastal Act Section 30411(a), which states that

> *The Department of Fish and Game and the Fish and Game Commission are the principal state agencies responsible for the establishment and control of wildlife and fishery management programs and the commission shall not establish or impose any controls with respect thereto that duplicate or exceed regulatory controls established by these agencies pursuant to specific statutory requirements or authorization.*

As requested, we have reviewed this section and can confirm that a) oysters and clams are not considered by DFG (or the Commission) to be "wildlife" or "fish," and b) aquaculture is not considered by DFG (or the Commission) to be a "fishery," so the restrictions imposed in Section 30411 do not apply here. The Commission has issued permits for numerous aquaculture operations over the years and we have written confirmation from DFG that aquaculture is ***not*** a fishery. In addition, both the Coastal Act (in Section 30100.2) and Fish and Game Code (in Section 17) define aquaculture as "a form of agriculture." Thus, Section 30411 is not relevant here, and the Commission has the authority to regulate aquaculture operations in the Coastal Zone, including DBOC's operation in Drakes Estero. We explained this a year ago, in our January 13, 2011 letter to you, Donna Wieting (of OCRM), and Cicely Muldoon (of the Point

Reyes National Seashore) regarding the Commission's request for federal consistency review authority over the proposed extension of your license to operate within the park.

3. **DBOC Response to Allegations of Coastal Act Violations.** Please note that we first wrote to you on September 29, 2011, and again on October 26, 2011, concerning the recently alleged outstanding violations of the Coastal Act and the Order, and we requested that we meet as soon as possible to discuss these allegations. I also telephoned you several times in furtherance of this effort. We were unable to meet until January 4, 2012, more than three months after my initial letter. At our meeting, we requested that you respond in writing to these allegations, and you indicated that within a week, you or your attorney would let us know how long it would take before you would give us a full written response. In fact, it wasn't until January 12, 2012 (more than a week later) that Mr. Walton spoke with Mr. Helperin, at which time Mr. Walton indicated that it would be approximately two additional weeks (i.e., by January 26, 2012) before we would receive a response concerning the marine debris, and that he couldn't say when we might get a response concerning the boat transit in the lateral channel because of your need to discuss this matter with NPS. To date, we have not gotten a written response concerning either of the alleged violations of the Coastal Act and the Order.

Please note that you have known of our concerns on these two issues for more than four months, and we have yet to receive any written response. We feel that we have been very patient concerning resolution of these most recently alleged violations, especially in light of the many alleged violations we have brought to your attention over the years, in letters dated June 5, 2007; September 10, 2008; September 16, 2009; December 7, 2009; and December 22, 2009; not all of which have been adequately addressed and resolved. We are concerned that you have not responded to our letters, and we hope this failure to respond is not indicative of a lack of willingness on your part to resolve the outstanding alleged violations of the Coastal Act and the Order, and to comply with the Order in the future. Should this prove to be the case, we may have little choice but to seek such remedies as assessment of stipulated penalties and/or filing a lawsuit, pursuant to Chapter 9 of the Coastal Act, to resolve the alleged violations, and ensure compliance with the Order and Coastal Act.

As you know, the Coastal Act contains many enforcement remedies for Coastal Act violations, and we have attempted to avoid the need to invoke them, by offering to discuss with you an amicable resolution of these violations of the Consent Order.[4]

[4] Section 30809 states that if the Executive Director of the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. Section 30810 states that the Coastal Commission may also issue a cease and desist order. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. Section 30811 also provides the Coastal Commission the authority to issue a restoration order to address violations at a site. A violation of a cease and desist order or restoration order can result in civil fines of up to $6,000 for each day in which the violation persists.

Additionally, Sections 30803 and 30805 authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) provides that any person

Therefore, please submit by February 29, 2012 a written response to the concerns raised in my letter of September 29, 2011: 1) discharge of marine debris into Drakes Estero and onto nearby coastal beaches, especially in the form of abandoned, discarded, or fugitive plastic aquaculture materials, and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area. In this letter, please describe in detail specifically how and when you intend to resolve these alleged violations of the Coastal Act and the Order, including a proposal for resolution of the outstanding stipulated penalties for failure to comply with the Order. We would still like to understand your plans to come into compliance and would prefer to resolve this amicably, and look forward to hearing from you.

If you have any questions concerning any enforcement matters, please contact me at **415-904-5269**.

Sincerely,

Jo Ginsberg
Enforcement Analyst

Attachments: Copy of the Record of Agreement and Map
Copy of Superintendent Cicely Muldoon (NPS) letter of Jan 23, 2012

cc: Zach Walton
Cicely Muldoon, Superintendent, Point Reyes National Seashore, NPS
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
Nancy Cave, CCC, Northern California Enforcement Supervisor
Cassidy Teufel, CCC, Coastal Program Analyst

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who violates any provision of the Coastal Act may be subject to a penalty amount that shall not exceed $30,000 and shall not be less than $500 per violation. Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than $1,000 nor more than $15,000 per violation for each day in which the violation persists.

Drakes Bay Oyster Company

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February 29, 2012

Jo Ginsberg
California Coastal Commission
45 Fremont Street
San Francisco, CA 94105

Re: Lateral Channel Use

Dear Ms. Ginsberg,

It has been alleged by the Environmental Action Committee (EAC) and the National Parks Conservation Association (NPCA) that Drakes Bay Oyster Company (DBOC) is in violation of a provision of the National Park Service (NPS) DBOC 2008 Special Use Permit. These CCC complainants claim an NPS permit violation by DBOC. It was clear in our meeting on January 4th that CCC did not discuss these allegations with the NPS, the National Marine Fisheries Service (NMFS) or the California Department of Fish & Game (CDFG)---the agencies that created the seal protection protocols---regarding this alleged violation.

The claim that oyster farm use of the western portion of the lateral channel constitutes a "violation" is incorrect. This accusation is not in accord with the plain language of the Consent Order, or the more than 18 years of protocol history. Complainants rely on a distorted and incorrect interpretation – they somehow confused the "harbor seal protection area" and with the designated boat "transit" maps. Drakes Bay Oyster Company has respected the harbor seal protection area and we adhere to the requirements set forth in the transit maps.

The environmental complainants "cherry pick" selected portions of the NPS SUP language referencing "lateral channel" and then present the CCC with a distortion of facts, policy and the federal permit. The complainants cite selected language from 2008 NPS SUP while ignoring (a) 1992 Federal-State, Multi-Agency Harbor Seal Protocols; (b) 2007 CCC Consent Order 3.2.5 Boat Transit language; (c) 2007 CCC Consent Order 3.2.6 Harbor Seal Protection area language; (d) 2007 CCC Consent Order, Figures 1 and 2, Harbor Seal Protection Area (maps) displaying areas of protection (red polygons); (e) DBOC email to NPS, February 2008 transmitting Boat Transit Maps (submitted to CCC);

(f) 2008 NPS-DBOC SUP at 4)(b) directing DBOC to avoid harbor seal disturbance, maintain a 100-yard distance from harbor seal haul out sites and to not use the prohibited zones; (g) 2008 NPS-DBOC SUP at Exhibit C – Map (same map as in CCC Consent Order); (h) 2008 NPS-DBOC-SUP at Exhibit C language; and (i) NPS Draft EIS September 2011, Figure ES-2, page vii (front matter).

NPS, throughout the DEIS, repeatedly shows various maps in multiple configurations all of which display DBOC boats coming and going to/from the western end of the lateral channel consistent with the protocols, the CCC order and the NPS SUP. In at least one map, NPS stated that the use of the western end of the lateral channel during pupping season was validated and confirmed by DBOC GPS data records.

CCC ignores the fact that DBOC operated pursuant to Protocols, Orders and SUPs without violation since they were signed in 2008. The NPCA-EAC accusations are only valid if one unilaterally overturns the almost two-decades of legal and administrative history of the oyster farm's harbor seal management.

In June 2010, at a Marine Mammal Commission meeting, we first learned of the NPS secret camera program (initiated in May 2007). A scientific misconduct complaint was filed with Secretary Salazar in November, 2010. An investigation was conducted by Gavin Frost, Office of the DOI Solicitor. He found that five NPS officials and scientists violated the NPS Code of Scientific and Scholarly Conduct. He also reported that NPS officials stated that the 281,000 photos did not show any violations or disturbances. In 2011, the NPS decided to exclude all photos from the DEIS because NPS never bothered to establish protocols for their use. According to what NPS told Frost, as of December 2010, there were no violations and no disturbances. None are reported in the DEIS issued nine months later. Does NPS now claim disturbances? If so, did NPS misrepresent the facts to Field Solicitor Frost and then in the DEIS?

Until the NPCA-EAC complaint, there was no issue with our operations at the west end of the lateral channel. Their complaint is based on a lack of understanding of the protocols, their history and/or their practice. The complainants have distorted the application of the term "lateral channel" and insist that it has a meaning that has not existed for almost two decades. Their complaint relies on a failure to understand boat access routes and/or an inability to understand the maps cited by CCC and/or NPS.

Harbor seal protection protocols were originally established in the early 1990's, with the active participation of Johnson's Oyster Company (predecessor of DBOC), to manage access to the oyster beds on Barries Bar (OB and UEN). In lieu of access to OB and UEN via the main channel to the lateral channel and then across the lateral channel (past and immediately adjacent to an established harbor seal haul out site) during pupping season, Federal and State agencies and JOC agreed to modify the access (or boat transit) route during pupping season. JOC agreed to avoid the intersection of the main channel and the eastern end of the lateral channel to avoid the possibility of harbor seal disturbance and instead, use the west channel to access the growing areas at the western portion of the lateral channel, which is some 600+ yards away from harbor seals haul out

areas. DBOC honored and followed the 1992 agreement, a fact which is supported by NPS photos and logs (from the 281,000 undisclosed photo program and the GPS tracking in place during the past several seasons).

Shortly after acquiring the oyster farm, I sat down with NPS Chief Scientist, Sarah Allen, and reviewed the protocols in detail, including boat access. Her descriptions, in 2005, were fully consistent with the history and record that has since occurred. There was no controversy about our use of the west end of the lateral channel.

In our meeting on January 4, 2012, CCC staff members acknowledged that they did not consult with CDFG, NMFS, NPS or CDPH before initiating the pending enforcement action against DBOC. Staff told us at the meeting that NMFS is "*out of the picture*" and that NMFS has been "*gone for a long time.*" This is contradicted by formal comments from NMFS to NPS in the draft EIS.

We request CCC withdraw the pending enforcement action and that we work together to complete the CDP process that was initiated in 2005.

CCC staff's recent letter also discusses why staff believes Public Resources Code Section 30411(a) does not apply to aquaculture, but this misses the point. The protocol that DBOC was accused of violating was designed to protect seals, not oysters. Section 30411(a) clearly applies to the matter at hand.

Respectfully,

Kevin & Nancy Lunny

Drakes Bay Oyster Company

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March 5, 2012

Mr. Charles Lester
California Coastal Commission
45 Fremont Street
San Francisco, CA 94105

Re: March 5, 2012 Meeting

Dear Mr. Lester,

Thank you for hosting the meeting today with Commissioner Kinsey, Mark Delaplaine, Allison Dettmer, Cassidy Teufel, my wife Nancy and myself. Nancy and I appreciate having the opportunity to meet you in person.

We also appreciate the progress we made in our meeting in understanding the current CDP and Coastal Consistency Certification processes. We recognize that this process is not yet fully understood by CCC staff and that further research needs to be done to plan the next steps. We will await further guidance once staff has had a chance to fully comprehend the federal consistency requirements of the NPS, the Record of Decision and the Special Use Permit. Based on our meeting discussion, we will pursue a CDP that permits the continuation of the 80-year ongoing operations. Additionally, it was agreed today that we will contact PRNS to make certain that the ongoing operations described in the CDP are permitted uses in the current SUP.

Given the Coastal Act's clear supportive language of mariculture,as w ell as the specific support for continued mariculture in Drakes Estero in the current LCP, we look forward to a cooperative CDP process. Under your leadership, we are certain that this CDP process will be based on good science,mutual r espect,t ransparency,and invitation and collaboration with other services and agencies with resource management authority and expertise.

We were told that counsel could not accompany us to the meeting. Due process allows us to be represented by counsel in enforcement matters. We were informed, in advance, that the agenda would be restricted to the pending CDP and that, specifically, enforcement actions related to the lateral channel and marine debris were not to be considered or discussed. However, in light of

your clear directive that no decisions or agreements would be made during our meeting, Commissioner Kinsey offered us the opportunity to present the history of the farm's use of the lateral channel. We then explained to you that oyster boats have operated in the western end of the lateral channel during pupping season since the seal protection protocols were established in 1992 by NPS, NOAA, CDFG, CDPH and Johnson Oyster Company (including the years following the 2008 NPS special use permit). Each of those regulatory agencies agreed to this and has known about this reality for these past nearly 20 years. DBOC, adheres to and follows the harbor seal pupping season protocols.

The NPS letter on this matter is factually, legally and programmatically incorrect. Following receipt of the CCC letter, we requested meetings with Superintendent Muldoon, but she refused to even acknowledge the requests. No meetings occurred. The lack of NPS cooperation in this matter was the reason for the delay in our response to your agency.

We look forward to a response to our letters to Ms. Jo Ginsberg dated February 27, 2012 and February 29, 2012 so that the enforcement actions can be promptly dismissed and we can focus our collective efforts on the CDP process.

We congratulate you on your new position at the CCC. We look forward to a CDP that is consistent with the California Coastal Act and ensures the rights of the people of the State of California the continued attributes of the oyster farm: coastal access, public education, a coastal dependent use, a coastal economy and locally raised sustainable seafood.

Sincerely,

Kevin Lunny

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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

piping, 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,lo cated 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,lo cated 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,le aving 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

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

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July 30, 2012

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: **Compliance with the Coastal Act and Consent Cease and Desist Order CCC-07-CD-11 (Drakes Bay Oyster Company)**

Dear Mr. Lunny:

The purpose of this letter is to further respond to your letters to the Coastal Commission (Commission) Enforcement staff dated February 27, 2012, and February 29, 2012, concerning 1) boat traffic in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction established for harbor seal pupping sites in the area, and 2) the discharge of marine debris into Drakes Estero and on nearby coastal beaches, in the form of abandoned, discarded, or fugitive plastic aquaculture materials. In addition, you met on March 5, 2012, with the Commission's Executive Director, Charles Lester, Commissioner Steve Kinsey, as well as Alison Dettmer and Cassidy Teufel of our Energy, Ocean Resources and Federal Consistency Division staff to discuss various issues associated with this facility. This letter serves as a follow up to your two letters and the meeting, as well as a clarification of the status and next steps regarding DBOC's compliance with Commission Consent Cease and Desist Order CCC-07-CD-11 (the Order).

As we have explained previously, according to Section 7.0 of the Order and the National Park Service (NPS) Special Use Permit (SUP), the lateral channel is closed to boat traffic from March 1 to June 30 each year. Commission staff has received reports of Drakes Bay Oyster Company (DBOC) boats in the lateral channel during this time period. Additionally, Commission staff has also received reports of marine debris in Drakes Estero and on Point Reyes beaches, which suggests possible violations of Sections 3.2.2 and 3.2.3 of the Order.

Boat Traffic in the Lateral Channel
Section 7 of the Order, entitled Compliance with all Permits and All Applicable Laws, requires that Respondents "*comply fully with the terms and conditions of any permit that the Commission or the National Park Service issues. . .*" Four months after the Commission issued the Order,

the NPS issued the SUP, prohibiting boat traffic in the lateral channel from March 1 to June 30 due to harbor seal breeding. Commission staff has received multiple complaints that there have been DBOC boats in the lateral channel during this restricted period, and in fact, DBOC confirmed that this was part of its standard operations, in our meeting with you and your counsel. As we told you, we continue to be concerned about adverse impacts from the boats and DBOC personnel on the sensitive harbor seals and their habitat during breeding seasons.

As discussed in our February 1, 2012 letter to you, the 2008 SUP issued to DBOC by the NPS superseded the 1992 protocol and is currently binding. DBOC has frequently been in violation of the SUP since April 22, 2008, the date DBOC was issued the SUP, as demonstrated through photographs reviewed by Commission staff and corroborated by your statements during our meeting on January 4, 2012. Since DBOC's continued boat traffic within the lateral channel violates the conditions of the SUP, it also violates Section 7 of the Order.

Your February 29, 2012 letter asserts that you are in compliance with the Order based on your adherence to the Vessel Transit Plan required by Section 3.2.5. You submitted a Vessel Transit Plan to us on November 14, 2008, which indicated the portion of the lateral channel that is closed year-round. The submitted Plan shows only year-round closures, and unfortunately did not address the necessary seasonal closures. The Plan's failure to address seasonal closures could not some how impliedly authorize boat transit in the lateral channel during that time merely due to the fact that the Plan did not address seasonal closures. Moreover, no matter the status or interpretation of the Vessel Transit Plan, it clearly does not override other provisions of Section 3.2.5 or other sections of the Order. Section 3.2.5 of the Order begins by stating that boat traffic in general *"shall be limited to established channels that do not violate the protective measure set forth in this Consent Order."* One such protective measure is set forth in Section 7 of the Order, which, again, requires compliance with the NPS SUP that imposes a seasonal closure of the lateral channel to boat traffic. Thus, the Commission had no reason to think DBOC would not also adhere to the seasonal restrictions set forth in the SUP and Section 7 of the Order. Section 7 of the Order is also a separate prohibition that is applicable independently of any other aspect of the Order, and any DBOC boat traffic in the lateral channel during the restricted season is a violation of the SUP permit and of Section 7 of the Order. A letter to you from NPS dated January 23, 2012, expressly states that the lateral channel is "the entire channel between the Main Channel and West Channel," and that the entire lateral channel is closed during the harbor seal breeding season. Your letter also references GPS data that you assert shows DBOC is in compliance with the SUP and the Order. Commission staff would welcome the opportunity to view that data.

Notwithstanding your arguments above, during your meeting on March 5, 2012, with Commission staff and Commissioner Kinsey, you committed to abide by the closure of the lateral channel to boat traffic during the restricted period from March 1 through June 30. I confirmed this during a phone call with you on April 17, 2012. We appreciate your willingness to cooperate on this matter.

Water Sampling

It has also come to our attention that DBOC boats have been in the lateral channel to collect water sampling data for the California Department of Public Health (CDPH). In emails to National Park Service Superintendent Cicely Muldoon on March 12 and March 13, 2012, you stated that you believed that accessing the lateral channel to collect samples is in compliance with the SUP. Superintendent Muldoon states in her response to your emails that DBOC can use the lateral channel only to access sampling station 17 to conduct monthly water samples. Sampling at Stations 18 and 19, secondary stations which are not part of the required monthly sampling protocol, is not authorized. Superintendent Muldoon's response further notes that DBOC is not authorized to conduct other activities while collecting water quality samples at Station 17. We are aware that NPS and CDPH are in discussions over the sampling procedures and the best location for a new secondary sampling station outside the lateral channel that will avoid conflicts with the SUP. We were previously unaware of the sampling stations in the channel and of the need to collect from them, but we support the understanding reached with the National Park Service that you may collect monthly water quality samples at Station 17 only. Accordingly, future access of the secondary sampling stations located inside the lateral channel and any other activities beyond monthly sampling at Station 17 during the restricted harbor seal breeding season should not occur, and if such activities did occur, we would consider this to be a violation of the Order.

Marine Debris

Marine debris, especially plastics, poses a serious threat to marine habitats and wildlife. Commission staff has been informed that there is a substantial amount of marine debris in Drakes Estero and on Point Reyes beaches, and that a large portion of the debris consists of materials used in aquaculture operations, such as plastic spacers, small-mesh bags, and polystyrene flotation blocks. Sections 3.2.2 and 3.2.3 of the Order require removal of abandoned equipment, and the reported presence of marine debris is suggestive of possible violations of these Sections, as well as a general problem that should be addressed to avoid such threats to marine habitats and wildlife. In addition, Section 3.2.3 of the Order required submission of a Debris Removal Plan. This matter was discussed in a letter from you to Commission staff dated November 14, 2008. In this letter, you submitted a spreadsheet and map indicating the racks marked for removal, and indicated that all debris from currently abandoned materials would be pulled out by hand, loaded by hand onto a barge or boat, taken to the DBOC dock, loaded onto a truck, and hauled offsite to an approved dump site. We received and are reviewing your proposed revisions to the Debris Removal Plan, which were submitted with your letter on February 27, 2012. The Commission appreciates the efforts you have made so far to collect and dispose of mariculture debris and your willingness to adopt more stringent monitoring and reporting guidelines in response to this ongoing problem. However, it seems clear that the 2008 Debris Removal Plan has proven to be insufficient, and that both new and old debris from the aquaculture operations need to be addressed.

Since you took ownership of all of the Johnson Oyster Company's assets and liabilities in 2005 and remain the sole mariculture operator in Drakes Estero, all mariculture debris originating from Drakes Estero is the responsibility of DBOC. Commission staff believes that at least some of the debris is attributable to current DBOC operations, but in any event, the distinction you have made between new and legacy debris is irrelevant since the debris issue needs to be

addressed regardless of when the materials were last in use as part of the active operation. Section 3.2.2 and 3.2.3 of the Order require the removal of current and future abandoned equipment. Additionally, Section 24 of the Order states "*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*" (Johnson Order). As you know, the Johnson Order requires the removal of abandoned equipment. Section 1.0(c) of the Johnson Order calls for a removal plan, which should include "*submerged oyster cultivation equipment and materials in the estuary*" and "*measures to minimize the negative impacts to coastal resources from the removal.*" Furthermore, you have acknowledged DBOC's responsibility and commitment to clean up all debris from past and present aquaculture operations in Drakes Estero.

Coastal Act Section 30411

Your letter of February 29, 2012, again questioned the authority of the Commission to regulate DBOC operations under Section 30411 of the Coastal Act. As previously explained in our letter of February 1, 2012, the Commission has regulatory authority over the facility and its operations. Commercial aquaculture operations are not wildlife or fisheries management programs (a position supported by the California Department of Fish and Game), and therefore Section 30411 is not applicable. The Order is not directly regulating or managing the seals in any way, but rather is regulating DBOC's aquaculture operations.

After the Fact Development

Commission staff received a copy of the letter DBOC sent to Superintendent Muldoon on May 7, 2012, regarding DBOC's CDP application. The Commission permit staff are evaluating the information provided in this letter and will be responding to you in a separate letter, in order to clarify our understanding of the March 5th meeting we held with you (which differs from the characterization of this meeting that was provided in your letter) and to request additional information regarding the proposed amendments and modifications to DBOC's CDP application that you also describe in your letter. However, because your May 7, 2012 letter to Superintendent Muldoon also discusses development activities that DBOC has pursued without benefit of a CDP, we would also like to provide a brief response to this aspect of your letter here.

Despite any misunderstandings DBOC might have had about the requirements for CDPs due to previous experience with ranch repairs, as you have been informed in our many letters to you, including the Notices of Violation and the Notices of Intent to proceed to an order hearing, any development in the coastal zone portion of Point Reyes National Seashore requires a CDP from the Commission unless otherwise exempt from permit requirements. While there are some types exempt development, DBOC should not assume without verification from Commission staff that a development activity falls into this category. In addition to our recent letters written in September 2011 and February 1, 2012, this issue has been mentioned in letters to you dated May 11, 2005, January 20, 2006, March 21, 2006, April 18, 2006, June 5, 2007, March 24, 2008, and Sept 16, 2009. Commission Enforcement staff attempts to investigate alleged violations, as possible, and find an appropriate resolution. The type and nature of the alleged violation are always taken into account. While some types of unpermitted development activity occur more frequently than others, this does not mean they are exempt from the permitting process. Additionally, given the particular circumstances under which DBOC purchased the Johnson

Oyster Company, there is no reason for DBOC to assume for some reason that CDPs were unnecessary for any development activities undertaken by DBOC after purchase. It is not possible for, or the responsibility of, the Commission to inform entities of the permitting requirements for development activities; rather, it is the responsibility of the entity pursuing development to seek out and obtain the necessary permits and authorizations before carrying out that desired development. Despite this, in fact, in this case, the Commission staff has repeatedly informed both Johnson Oyster Co. and DBOC of the Commission's permitting requirements and the requirements for the facility to comply with the Coastal Act.

Despite our repeated meetings and discussions with DBOC regarding the requirements of the Coastal Act and the CDP authorization process, as well as two formal hearings before the Commission and the issuance of two Orders (one to Johnson and one to DBOC), all of which occurred prior to all of the unpermitted development activities you acknowledged performing in your letter of May 7, 2012, DBOC pursued each of these activities without either contacting or consulting with Commission staff or obtaining the necessary authorizations from the Commission. While the Commission staff is aware that the staff of other agencies, including the NPS and Marin County, may have reviewed some of these activities as part of their authorization process, it is neither the role nor responsibility of such agencies to interpret the role of the Commission in authorizing development within the coastal zone. Responsibility rests solely with DBOC to obtain all necessary permits and authorizations prior to its initiation of development activities. In Section 2.0 of the Order, DBOC agreed to "*cease and desist from performing any new development*" as defined by the Coastal Act Section 30106, as well as from "*expanding or altering the current development that exists on the property.*" Sections 3.1.1 and 3.2.1 specify that the placement of any onshore or offshore structures is prohibited without a CDP.

New Enforcement Action. Commission staff continues to believe that there are ongoing violations of the Order and the Coastal Act, and that the current Order is not achieving the desired effect of bringing DBOC's operations into compliance with the Coastal Act. There have been continuing unresolved violations of the Order, brought to your attention in letters dated September 10, 2008, September 16, 2009, December 7, 2009, December 22, 2009, and September 20, 2011, as well as in numerous telephone conversations and meetings. Considering the current uncertainty of a new lease and SUP permit being granted to DBOC, the delays in the various proceedings, your apparent confusion over certain terms of the Order, and the continuing difficulties in bringing DBOC operations into compliance with the Coastal Act, Commission staff believes it is appropriate at this time to consider a new enforcement action through a new Cease and Desist Order that could address any outstanding issues and any items which DBOC has stated they believe are not clear in the prior Order. As you know, the original Order was intended to be a short-term, interim step during the pendency of the other proceedings, and to address Coastal Act issues prior to a permit and federal consistency matter coming before the Commission. For a variety of reasons, this has not yet occurred, despite several years elapsing in the interim. It appears that a new order may be the best course of action to update the provisions, clarify any provisions, avoid misunderstandings, bring DBOC operations into compliance with the Coastal Act and protect the many sensitive resources in Drakes Estero. However, any new

action will not detract from Commission Enforcement staff follow-up on prior violations or reported alleged violations.

In our letter of February 1, 2012, we requested a written response describing how and when you intend to resolve the violations of the Coastal Act regarding boat traffic in the lateral channel as well as a proposal for the resolution of the outstanding stipulated penalties for failure to comply with the Order. Unfortunately, these issues were not addressed in your most recent letters. Therefore, please submit a written response to these concerns. Furthermore, please contact our office as soon as possible to discuss the next steps in regards to an amendment to the Order or a new enforcement action.

If you have any questions regarding enforcement matters, please contact me at 415-904-5290.

Sincerely,

Nancy Cave
Northern California Enforcement Program Supervisor

cc: Zach Walton
Cicely Muldoon, Superintendent, Point Reyes National Seashore, NPS
Charles Lester, CCC, Executive Director
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
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October 24, 2012

VIA ELECTRONIC MAIL AND U.S. MAIL
(ncave@coastal.ca.gov)

Nancy Cave
Northern California Enforcement Program Supervisor
California Coastal Commission
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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.

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.

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.

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.

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[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.

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

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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.

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.

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).

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).

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 Superintendant 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.*

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

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.

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.

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

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

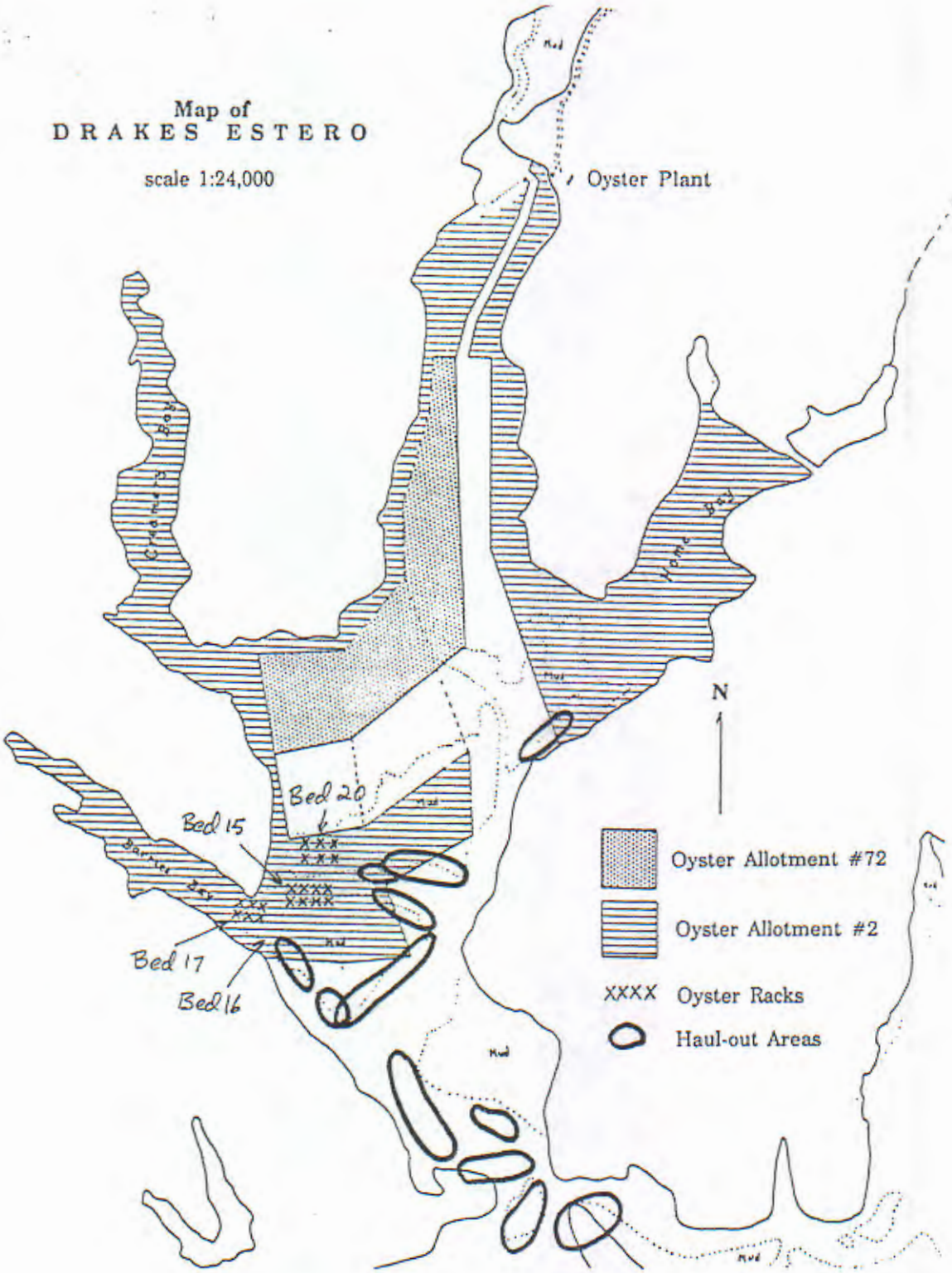
As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor 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.

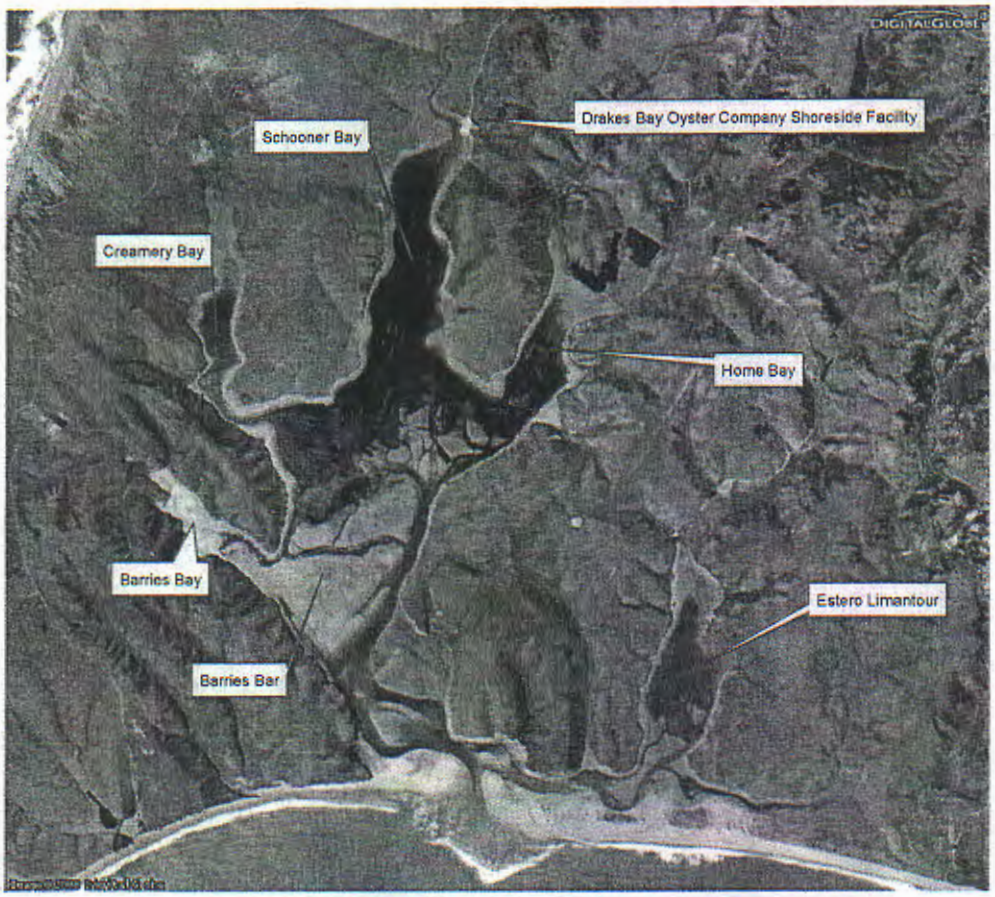
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.

- 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.

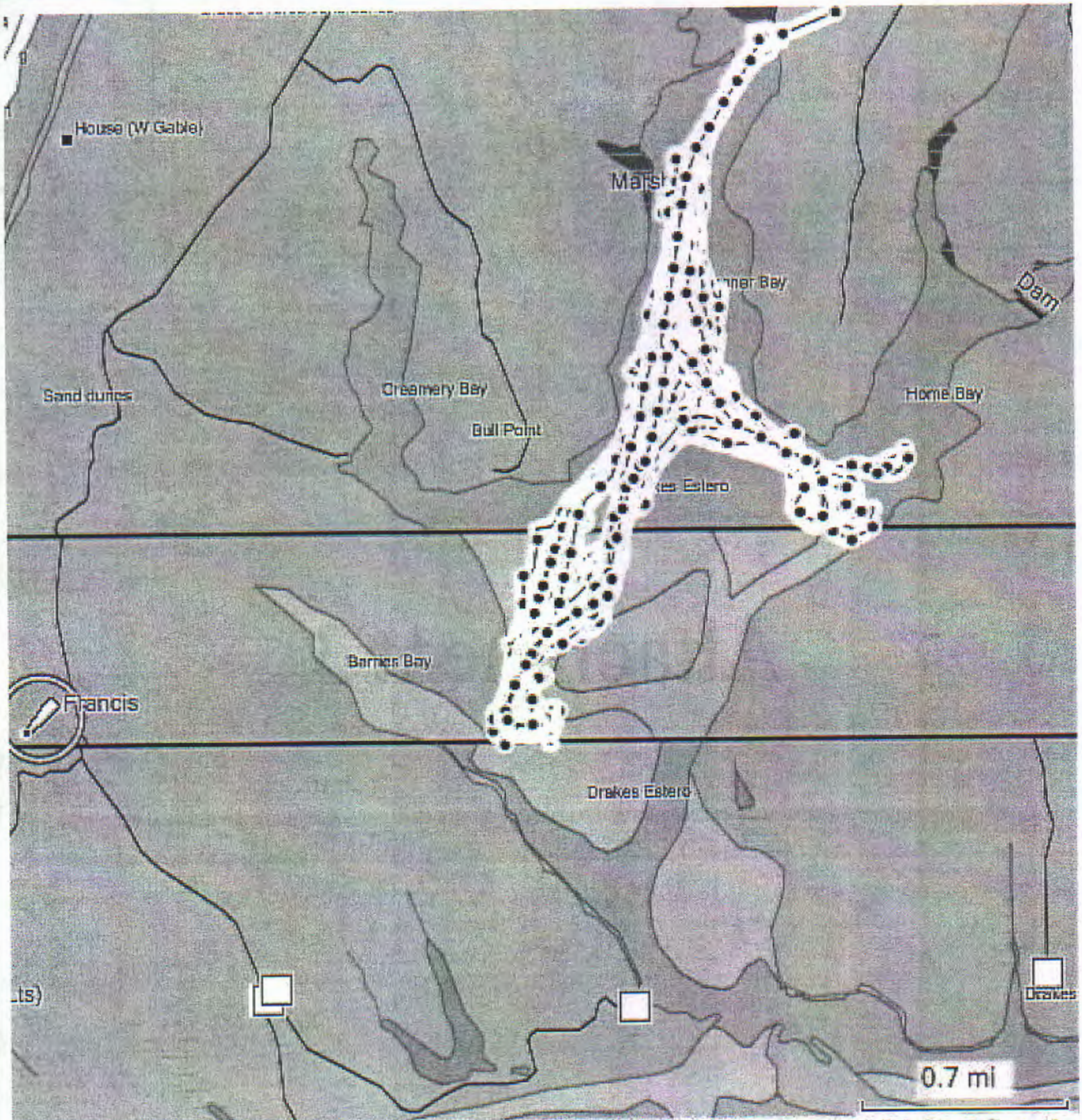
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.


Map of
DRAKES ESTERO
scale 1:24,000
Oyster Plant
Creamery Bay
Home Bay
Mud
N
Bed 20
Bed 15
Bed 17
Bed 16
Oyster Allotment #72
Oyster Allotment #2
XXXX Oyster Racks
Haul-out Areas

Drakes Estero and Estero Limantour



Attachment 2



Attachment 3

Form 10-114
Rev. Jan. 00

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: _____ Drakes Bay Oyster Company 4/22/08
Signature — Organization — Date

Authorizing Official: George J. Tully George Turnbull 4/22/08
Signature — Deputy Regional Director — Date

Exhibit 25
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)
Page 25 of 74

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 SUPPRESION

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 Section10(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 Permitter), 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) Permitter 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 Permitter. 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) Permitter 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 Permitter 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 Permitter 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 wavier 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
N
W
E
S
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

N
W E
S

0 50 100 150 200 Feet

Permit Type

- ROP - 1.5 acres
- SUP - 1.1 acres

Exhibit 25
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

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

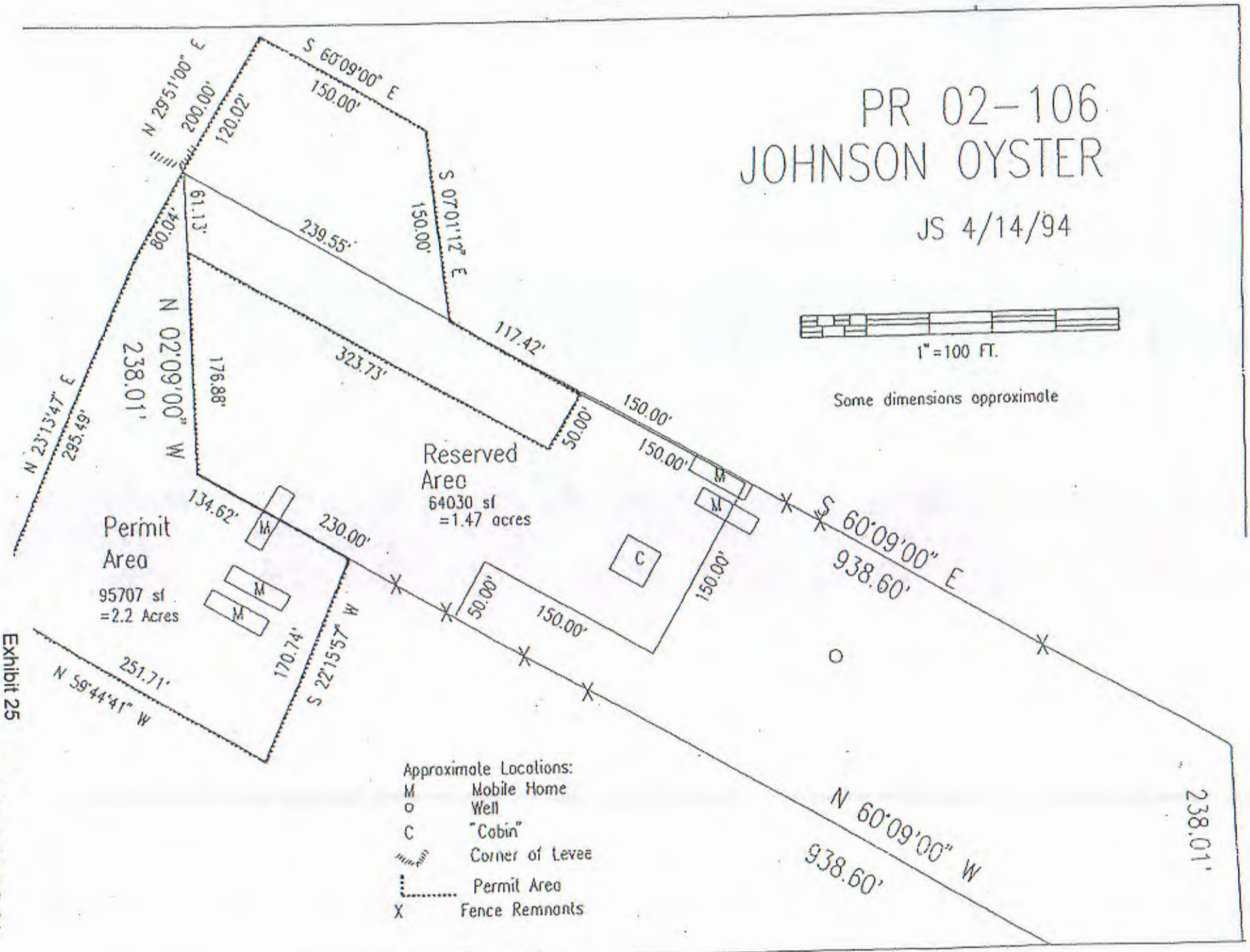


Exhibit 25
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

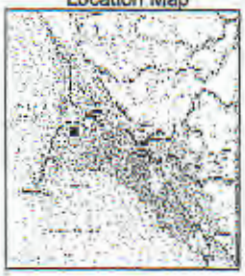
EXHIBIT E

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

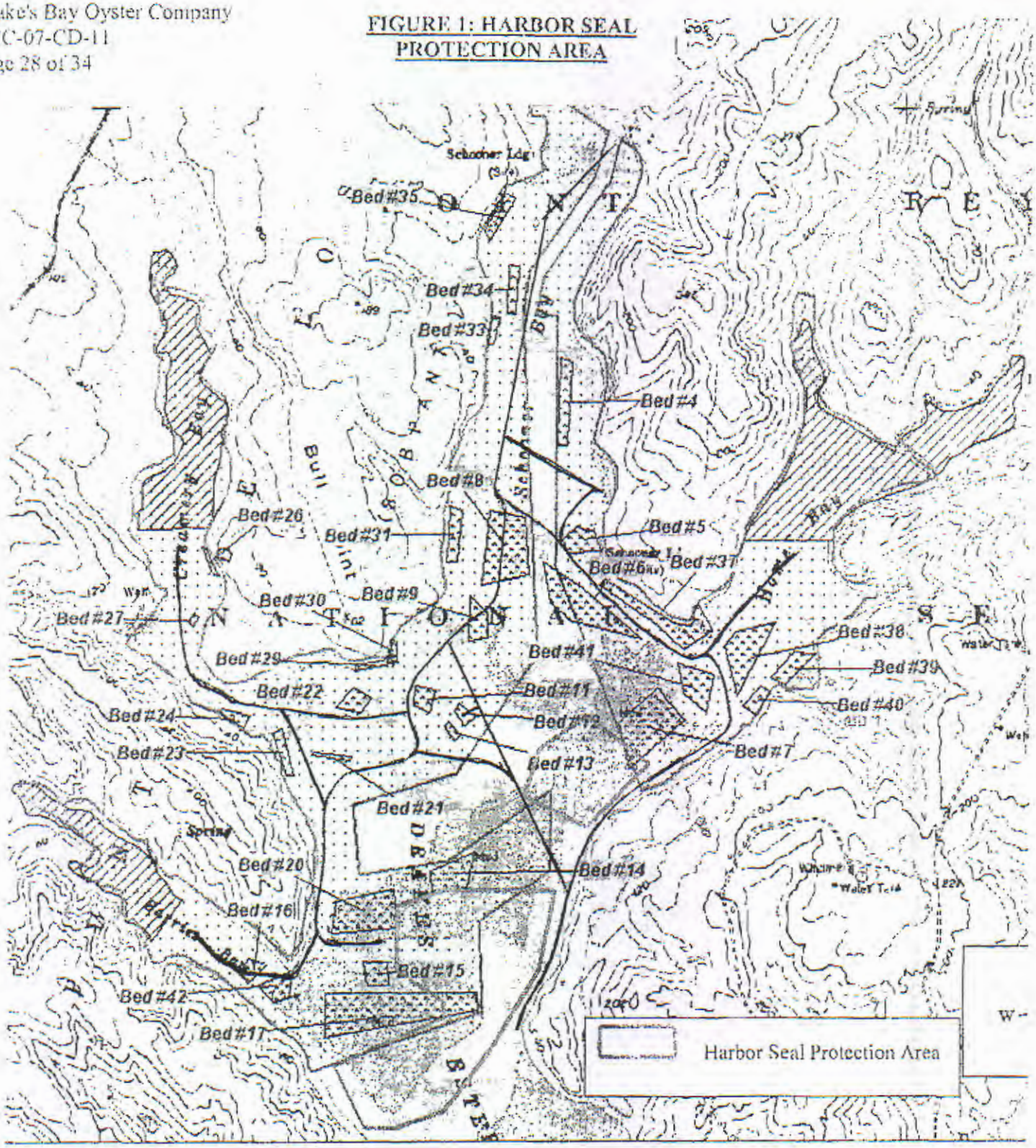
Oyster Farm Leach Field

0 175 350 525 700 Feet

Plot Date: 1/7/08 S:/GIS/projects1/Range/SpecialParkUses/DBOLeachField.mxd

Attachment 4

FIGURE 1: HARBOR SEAL PROTECTION AREA



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

Dear Mr. ~~Lunny~~ Kevin:

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,

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 94244-2090
(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

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:

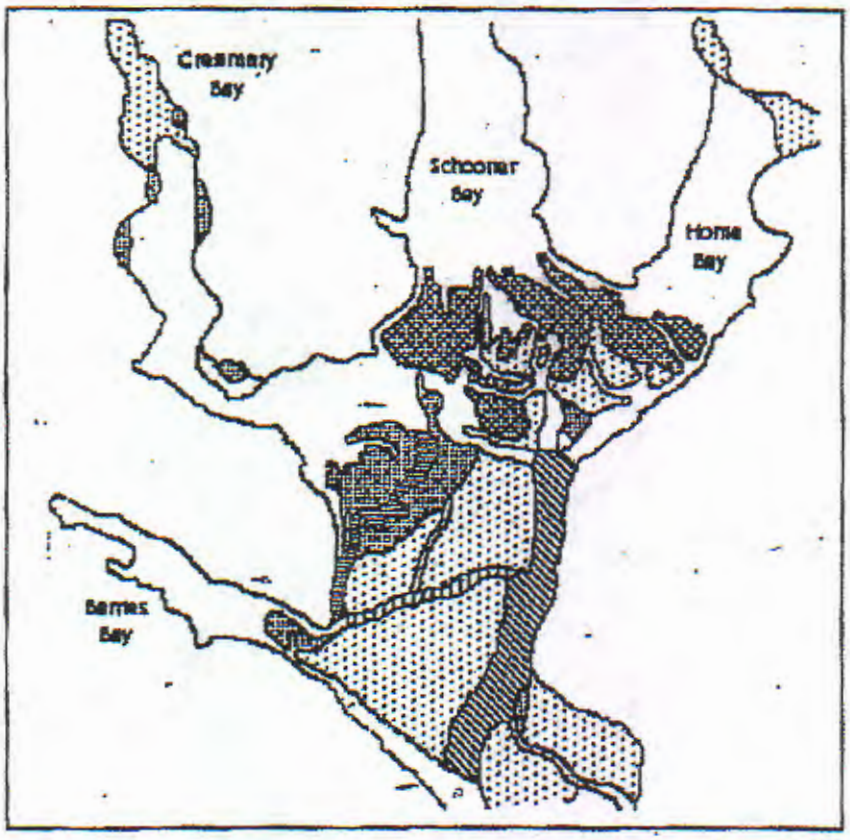
- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.

- 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



Mud Flat

Eelgrass

Main Channel - Closed March 15 through June 30

Lateral Channel - Closed March 15 through June 1

West Channel - Closed March 15 through June 1

Figure 1

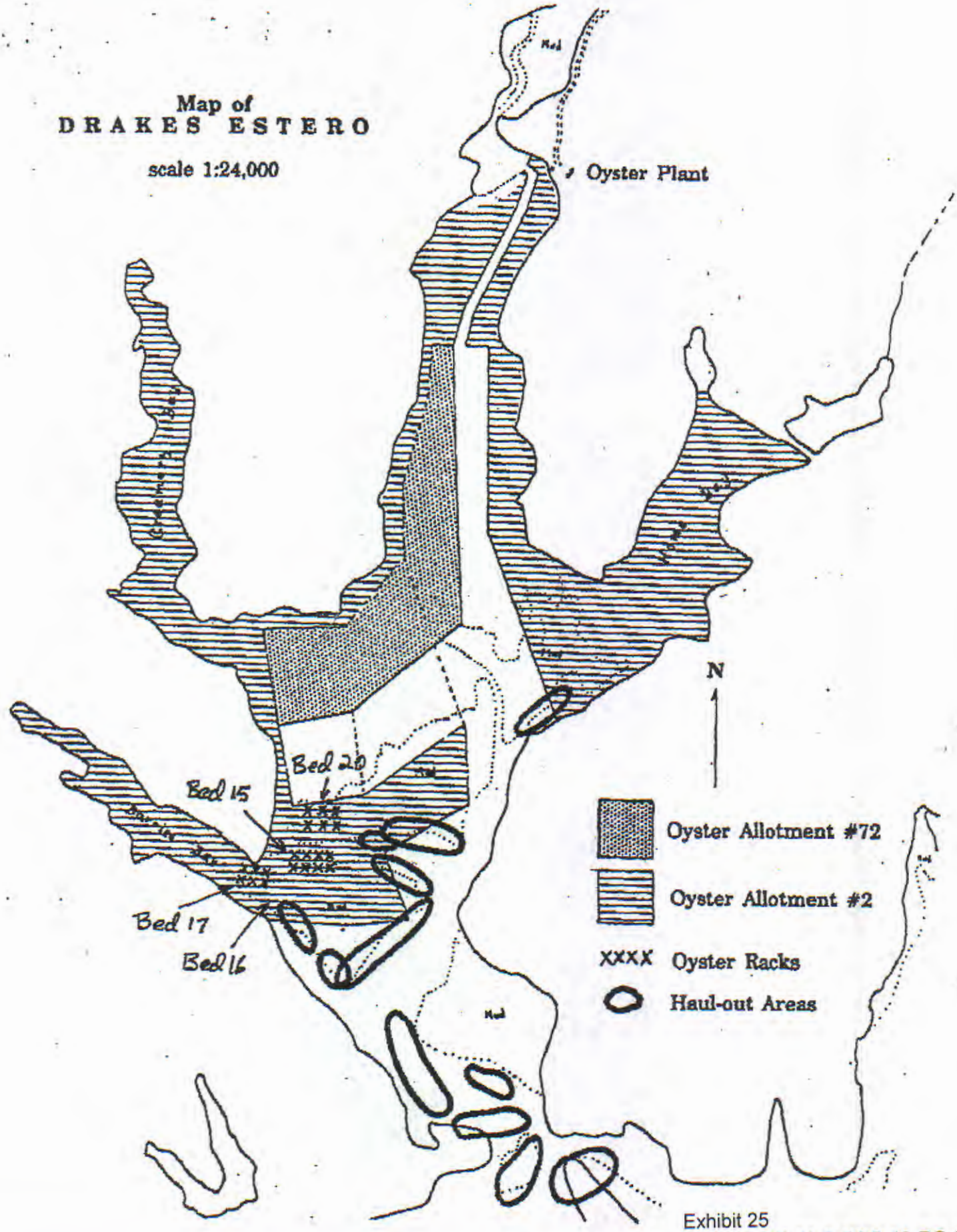


Exhibit 25
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

Attachment 7

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

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

piping, 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

STATE OF CALIFORNIA – NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

SENT VIA CERTIFIED AND REGULAR MAIL

October 24, 2012

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Boulevard
Inverness, CA 94937
(Certified Receipt No. 7005 0390 0001 2128 0477)

Subject:	**Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings**
Property Location:	The property is located within the Point Reyes National Seashore and consists of onshore facilities located at 17171 Sir Francis Drake Boulevard in Inverness, Marin County, and an offshore facility located in Drake's Estero (APN 109-13-017).
Violation Description:	Unpermitted development including but not limited to: operation of offshore aquaculture facilities; construction/installation of structures and the performance of ongoing harvesting, processing, sales, and other operations; and violations of Consent Cease and Desist Order No. CCC-07-CD-11 (Drakes Bay Oyster Company) including installation of additional unpermitted development, boat traffic in the lateral sand bar channel near the mouth of the Estero during a seasonal restriction established for harbor seal pupping sites, and discharge of marine debris in the form of abandoned, discarded, or fugitive aquaculture materials.

Dear Mr. Lunny:

I am directing this notice to you as the representative of the Drakes Bay Oyster Company (DBOC). We have yet to receive any substantive response from our letter of July 30, 2012, which asked you to address a variety of on-going unpermitted activities associated you're your Oyster operation. In particular, that letter notified you that adequately addressing ongoing aquaculture activities on the site that still do not have the necessary Coastal Act authorization, as

well as resolution of ongoing alleged Coastal Act violations, which include violations of Consent Cease and Desist Order No. CCC-07-CD-11 ('2007 Order') may now require that a new cease and desist order be issued by the California Coastal Commission ('Commission'). You are currently bound by the Commission's2003 cease and desist order to DBOC's predecessor in interest, the Johnson Oyster Company, which was issued to address Coastal Act violations on the Subject Property ('Johnson Order'). Upon purchase of the property in January of 2005, and again as signatory to the 2007 Commission Order, DBOC agreed to abide by the terms of the Johnson Order.

The purpose of this communication is to notify you of my intent, as the Executive Director of the Commission, to commence proceedings for issuance of cease and desist and restoration orders to address unpermitted development as well as development inconsistent with the Johnson Order and the 2007 Order (collectively 'the Orders') through a formal enforcement action, either through a consent or regular order proceeding, and to continue the process of discussions that my staff and you have already begun.

Commission staff has confirmed that additional unpermitted development activities and development inconsistent with the Orders have been undertaken on property located within the Point Reyes National Seashore, with onshore facilities located at 17171 Sir Francis Drake Boulevard in Inverness, Marin County, and offshore facilities located in Drake's Estero on property described as Marin County Assessor's Parcel Number 109-13-017 (collectively the 'Subject Property').

As you know, your facility remains unpermitted under the Coastal Act; the 2007 Order was intended to provide a short-term means to protect coastal resources while such a permit was being sought, but in no way purported to authorize the facility under the Coastal Act, nor serve as a long term solution. In addition, unpermitted development since the 2007 order has occurred and includes, but may not be limited to: (1) operation of boats in the lateral channel[1] in violation the National Park Service (NPS) Special Use Permit (SUP) issued in April, 2008, and therefore additionally in violation of Section 7.0 of the 2007 Order, which specifically anticipates and requires compliance with all permits; (2) unpermitted discharge of marine debris in the form of abandoned, discarded, or fugitive mariculture materials in violation of Section 3.2.2 of the 2007 Order, which requires removal of abandoned equipment, and Section 1.0(c) of Cease and Desist Order No. CCC-03-CD-12 (the 'Johnson Order'), which mandates a removal plan to address submerged oyster cultivation equipment and materials in the estuary; and (3) new unpermitted development, including but not limited to, construction and backfill of a 12" by 18" by 80' long electrical trench, placement and removal of clam cultivation bags within a harbor seal protection area and associated vessel use and worker operations, placement of three 4' diameter concrete planters, removal and replacement of six picnic tables and placement of six additional picnic tables and installation of an 8'by 40' refrigeration unit within the last month, in violation of Sections 2.0, 3.1.2 and 3.2.1 of the 2007 Order, which expressly prohibit the performance of any new development including onshore or offshore structures, without some sort of Coastal Act authorization.

[1] Defined as "the entire channel between the Main Channel and West Channel" in correspondence from the National Park Service to DBOC dated January 23, 2012.

We had hoped that the 2007 Order would have prevented additional unpermitted development at the site, and have on several occasions, communicated our willingness to work with DBOC to address any emergency situations or to consider whether administrative or other expedited permit proceedings would be applicable. Despite this, there have been a number of instances in which additional unpermitted development was undertaken at the facility, which are violations of the Orders.

In 2007 the Commission had envisioned that DBOC would timely seek and obtain a CDP to address the outstanding Coastal Act issues and the fact that the facility had no authorization under the Coastal Act. Unfortunately, this has not occurred and the facility remains in operation, but continues to lack Coastal Act permits.

The above-mentioned unpermitted development has occurred on federally owned land located entirely within the Point Reyes National Seashore, with the offshore portion of the facility located in Drake's Estero. Drake's Estero is a shallow tidal estuary that supports large areas of eelgrass (*Zostera marina*), which is habitat for many species of invertebrates and fish and provides important forage habitat for many birds. Drake's Estero is a primary pupping site for harbor seals and is additionally home to one of the largest harbor seal populations in California. As these coastal resources are both ecologically significant and susceptible to degradation from the ongoing development, marine debris, and motorized vessel use, it is essential that the unpermitted activities being undertaken by DBOC be brought into compliance with the Coastal Act.

As has been mentioned in previous correspondence from Commission staff, this formal enforcement action is necessitated by the DBOC's failure to comply with terms of the 2007 Order and the Johnson Order and the various delays in permit proceedings that have perpetuated the overall state of noncompliance of DBOC's operations with the Coastal Act. Although Commission staff is aware that the current Special Use Permit (SUP) issued by the National Park Service expires at the end of November 2012, and that DBOC awaits the Secretary of the Interior's final decision as to whether or not to renew DBOC's current aquaculture lease, compliance with the Coastal Act is still required, and staff is confident that a new cease and desist and restoration order could comprehensively address the range of potential outcomes that the Secretary's decision will determine, while providing increased clarity on how to ensure Coastal Act compliance of any operations that may continue on the Subject Property.

Violation History

As you know, upon purchase of the Subject Property in January of 2005, DBOC agreed to accept responsibility for compliance with the Johnson Order, including the requirement for submittal of an application for after-the-fact authorization for unpermitted onshore and offshore development. This application was never completed, no Coastal Development Permit (CDP) was obtained, the unpermitted development was not completely removed, and in fact, additional unpermitted development was undertaken on the Subject Property by DBOC.

To address the ongoing Coastal Act violations on the Subject Property, on December 12, 2007, the Commission issued to DBOC the 2007 Order. The 2007 Order was intended to be a short-term, interim settlement to be in place while DBOC obtained Coastal Act authorization. The 2007 Order required DBOC's submittal of a CDP application within 120 days of the issuance of a National Parks Service SUP, so that outstanding violations would be resolved and the unpermitted facilities and operations could be brought into compliance with the Coastal Act. For a variety of reasons, this permit application was never completed, despite a lapse of more than four years since compliance with the requirement became due.

Since 2008, Commission staff has exchanged many letters, and had repeated meetings and discussions, with DBOC regarding the requirements of the Coastal Act, the CDP authorization process, as well as compliance with the Orders. There have been continuing unresolved violations of the Orders brought to your attention in letters dated September 10, 2008; September 16, 2009; December 7, 2009; December 22, 2009; September 29, 2011; October 26, 2011; February 1, 2012; and July 30, 2012; as well as in numerous telephone conversations, email exchanges, and in meetings.

For example, by letter dated September 16, 2009, Commission enforcement staff contacted you regarding noncompliance with the Orders. In that letter, staff raised DBOC's failure to submit a complete CDP application as required by the 2007 Order and noted that there had been other violations of that Order as well. The 2007 Order allowed the assessment of stipulated penalties for violations of the Order, including the cultivation of Manila clams, thermal discharges, seawater use, and repair of oyster racks without the issuance of a permit for said activities.

By letter dated October 8, 2009, staff responded to DBOC's letter dated October 5, 2009, and addressed DBOC's stated confusion regarding compliance with the 2007 Order and application for a CDP and again reiterated that DBOC's CDP application had at that time remained incomplete after nearly four years.

Commission enforcement staff again addressed DBOC's failure to comply with the Orders by letter on December 7, 2009. This correspondence addressed both prior violations and additional unpermitted actions, including the cultivation of Manila clams in a harbor seal protection area; DBOC's failure to keep all of its operations out of harbor seal protection areas; boat transit in restricted areas; and non-compliance with the National Park Service's SUP. This letter also again raised the issue of collecting stipulated penalties. Staff followed this correspondence with an additional letter on December 22, 2009, responding to claims made by DBOC and restating staff's commitment to facilitate the submittal of a complete application and bring DBOC into compliance with the 2007 Order and the Coastal Act.

After receiving additional complaints from the public regarding DBOC's operations, staff again contacted DBOC regarding compliance with the Orders in a letter dated September 29, 2011. This communication addressed the issue of continuing problems with marine debris in Drake's Estero and surrounding beach areas, and motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites, and concluded by requesting a meeting with DBOC to discuss these ongoing issues.

On October 26, 2011, having received no response to the September 29, 2011 letter, Commission staff again sent DBOC a letter requesting that a representative contact staff by November 4, 2011, to discuss possible dates to meet to discuss the previously enumerated matters of concern regarding ongoing operations. On January 4, 2012, three months after the initial requests for a meeting were made by Commission staff, DBOC and legal counsel finally met with Commission permitting and enforcement staff to discuss the enforcement issues, at which time Commission staff again expressed concern that DBOC continued to be out of compliance with the Orders.

This meeting was followed by a letter from staff on February 1, 2012, which sought to clarify some of the facts in response to claims made by DBOC's counsel regarding legality of continued use of the lateral channel and jurisdictional issues regarding aquaculture regulation. This letter from CCC staff additionally requested a written reply responding to the previously raised allegations of unpermitted development and indicating how DBOC intends to bring the facility into compliance with the Coastal Act. In an effort to enhance coordination and facilitate compliance over the last several years, staff has continued to work with DBOC to complete the permit application process and resolve outstanding issues. Finally, although this is not a comprehensive listing of correspondence, in a letter dated July 30, 2012, staff sought to clarify the status of the enforcement action and to delineate potential next steps to be taken towards resolution of this matter.

Despite repeated meetings and discussions with DBOC regarding the requirements of the Coastal Act and the CDP authorization process by both the enforcement staff and permit staff, as well as two formal hearings before the Commission and the issuance of two Orders regarding this property (the Johnson Order and the 2007 Order), DBOC has continued repeatedly to engage in activities without first obtaining the requisite Coastal Act authorization, and has continued to violate the explicit terms and conditions of the previously issued orders. As explained above, there have been continuing unresolved violations of the Orders, which have been brought to DBOC's attention on numerous occasions, including via letters dated September 10, 2008; September 16, 2009; December 7, 2009; December 22, 2009; September 20, 2011; and July 30, 2012, and in various meetings and telephone conversations. As it is evident that the 2007 Order is not achieving the desired effect of bringing DBOC's operations into compliance with the Coastal Act even on an interim basis, and as the enumerated subsequent interactions have additionally failed to effectuate compliance; a restoration order and a new cease and desist order are apparently necessary to clarify obligations and further govern activities moving forward.

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, in part, the following:

> *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.

Section 30810(b) of the Coastal Act states that the Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act- including removal of any unpermitted development or material.

As previously discussed, Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. "Development" is defined by Section 30106 of the Coastal Act as follows:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the 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 water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....*

The unpermitted development described herein clearly constitutes "development" within the meaning of the above-quoted definition, is not otherwise exempt from permitting requirements under the Coastal Act, and therefore is subject to the permit requirement of Section 30600(a). A CDP was not issued to authorize the subject unpermitted development. Therefore, the activities at issue required a permit from the Commission, and none was obtained, so the criteria of Section 30810(a) of the Coastal Act have been met. For these reasons, I am issuing this Notice of Intent to commence Cease and Desist Order proceedings. The procedures for the issuance of cease and desist orders are described in Sections 13180 through 13188 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

It is expected that a Cease and Desist Order for the Subject Property will contain both additional interim operational restraints and a more explicitly defined path to obtaining Coastal Act review of any continuing operation of the existing aquaculture facility. Furthermore, a new cease and desist order would provide an opportunity to memorialize and formalize the verbal commitment that you made on March 5, 2012 to refrain from operating vessels in the lateral channel from March 1 through June 30. The proposed Cease and Desist Order will therefore direct Drakes Bay Oyster Company and others subject to the control and/or in a legal relationship with the aforementioned party to 1) cease and desist from maintaining any development on the Subject Property not addressed pursuant to the Coastal Act; 2) cease and desist from engaging in any further development on the Subject Property unless authorized pursuant to the Coastal Act or

addressed by interim measures in the Cease and Desist Order; and 3) take all steps, as identified, necessary to comply with the Coastal Act.

Restoration Order

Section 30811 authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission..., the development is inconsistent with this division, and the development is causing continuing resource damage.*

Pursuant to Section 13191 of the Commission's regulations, I have determined that the specified activities meet the criteria of Section 30811 of the Coastal Act, based on the following:

1) Unpermitted development has occurred, including, but not limited to, (1) operation of boats in the lateral channel[2] in violation the National Park Service (NPS) Special Use Permit (SUP) issued in April, 2008, and therefore additionally in violation of Section 7.0 of the 2007 Order, which specifically anticipates and requires compliance with all permits; (2) unpermitted discharge of marine debris in the form of abandoned, discarded, or fugitive mariculture materials in violation of Section 3.2.2 of the 2007 Order, which requires removal of abandoned equipment, and Section 1.0(c) of the Johnson Order, which mandates a removal plan to address submerged oyster cultivation equipment and materials in the estuary; and (3) installation of new unpermitted development in violation of Sections 2.0, 3.1.2 and 3.2.1 of the 2007 Order, which expressly interdict the performance of any new development without some sort of Coastal Act authorization, including onshore or offshore structures without a coastal development permit.

2) This development is inconsistent with the resource protection policies of the Coastal Act including, but not limited to the following:
   a. Coastal Act Section 30233 (limiting fill of open coastal waters);
   b. Coastal Act Section 30231 (protecting biological productivity and water quality);
   c. Coastal Act Section 30230 (marine resource protection);
   d. Coastal Act Section 30253 (minimization of adverse impacts).

3) The unpermitted development remains in place and is thereby causing continuing resource damage, as defined by Section 13190 of the Commission's regulations. The impacts from the unpermitted development remain unmitigated; therefore, the damage to resources protected by the Coastal Act is continuing.

[2] Defined as "the entire channel between the Main Channel and West Channel" in correspondence from the National Park Service to DBOC dated January 23, 2012.

For the reasons stated above, I have decided to commence proceedings for the Commission's issuance of a Restoration Order to restore the Subject Property. The procedures for the issuance of Restoration Orders are described in Sections 13190 through 13197 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

Response Procedure

In accordance with Section 13181(a) and 13191(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 to commence Cease and Desist and Restoration Order proceedings by completing the enclosed Statement of Defense (SOD) form. **The SOD form must be returned to the Commission's San Francisco office, directed to the attention of Heather Johnston, no later than, November 13, 2012.** However, should this matter be resolved via a settlement agreement, a statement of defense form would not be necessary. In any case, and in the interim, staff would be happy to accept any information you wish to share regarding this matter.

Commission staff currently intends to schedule the hearings for the Cease and Desist and Restoration Order during the Commission's December 2012 San Francisco hearing.

Civil Liability/ Exemplary Damages

You should be aware that the Coastal Act includes a number of penalty provisions for unpermitted development. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed $30,000 and shall not be less than $500 for each instance of development that is in violation of the Coastal Act. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development, in an amount not less than $1,000 and not more than $15,000 per day for each day in which each violation persists. Section 30821.6 provides that a violation of a cease and desist order, including an EDCDO, or a restoration order can result in civil fines of up to $6,000 for each day in which the violation persists. Section 30822 provides for additional exemplary damages.

Resolution

As we have stated in previous correspondence and communications, we would like to work with you to resolve these issues amicably, and to continue the discussions we have had in the past regarding this matter. As you know, one option that you may want to consider is agreeing to consent orders.

Consent cease and desist and restoration orders would provide you with an opportunity to have more input into the process and timing of activity cessation and restoration of the Subject Property and mitigation of the damages caused by the unpermitted activity, and could potentially allow you to negotiate a penalty amount with the Commission staff in order to resolve the complete violation without any further formal legal action. Consent cease and desist and restoration orders could provide for a permanent resolution of this matter and restoration of the Subject Property. If you are interested in discussing the possibility of agreeing to a consent order, please contact or send correspondence to the attention of Heather Johnston in the Commission's San Francisco office by no later than November 10, 2012, to discuss options to resolve this case. Again, should we settle this matter, you would not need to expend time and resources filling out and returning the SOD form mentioned above. We look forward to working with you towards an amicable resolution of these issues and will make ourselves available for discussion so that this matter may be resolved expeditiously.

Should you have any questions regarding any of the above items, please contact Heather Johnston at (415) 904-5293.

Sincerely,

Charles Lester

CHARLES LESTER
Executive Director
California Coastal Commission

Enclosure: Statement of Defense Form

cc: Lisa Haage, Chief of Enforcement, CCC
Nancy Cave, Northern California Enforcement Supervisor, CCC
Alison Dettmer, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division, CCC
Cassidy Teufel, Environmental Scientist, CCC
Alex Helperin, Senior Staff Counsel, CCC
Heather Johnston, Statewide Enforcement Analyst, CCC
Jo Ginsberg, Enforcement Analyst, CCC
Cicely Muldoon, Superintendent, Point Reyes National Seashore, NPS

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

Dear Mr. Kevin 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,

Cicely A. Muldoon
Superintendent

cc: Alison Dettmer, California Coastal Commission
Cassidy Teufel, California Coastal Commission
Jo Ginsberg, California Coastal Commission

DOC1462

State of California - The Resources Agency
ARNOLD SCHWARZENEGGER, Governor
DEPARTMENT OF FISH AND GAME
OFFICE OF THE GENERAL COUNSEL
1416 Ninth Street
Sacramento, CA 95814
http://www.dfg.ca.gov
(916) 654-3821

L1425
02-106

May 15, 2007

Mr. Don Neubacher, Superintendent
Point Reyes National Seashore
Point Reyes Station, California 94956

Re: Drake's Bay Oyster Company

Dear Superintendent Neubacher:

The purpose of this letter is to memorialize the position of the Department of Fish and Game (Department) regarding the lease status of the above-referenced mariculture operation at Drakes Estero, within the Point Reyes National Seashore (PRNS). For the reasons discussed below, we conclude that the mariculture operation in question is properly within the primary management authority of the PRNS, not the Department.

By way of review, the leasing of state water bottoms at Drakes Estero dates to at least 1934. In 1965, the California Legislature granted to the United States, subject to certain limitations, "all of the right, title, and interest...to all of the tide and submerged lands or other lands beneath navigable waters" situated within the boundaries of the PRNS (Chapter 983, Statutes of 1965). The tidelands and submerged lands encompassed by this legislative grant include the leased state water bottoms. Consistent with article 1, section 25 of the California Constitution, this conveyance carried a reservation of the right to fish in the waters overlying these lands. Although the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations. Regardless of whether its purpose is commercial or recreational, *fishing* involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property (Fish and Game Code §§ 17, 15001, 15002, 15402). In November 1972, the Johnson Oyster Company (Johnson) conveyed its property to the United States, subject to a reservation of occupancy and use in the grant deed, which provided:

> "Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property...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 Services regulations in effect at the time the reservation expires."

The reservation specifies a 40-year term and additionally requires, among other things, that Johnson comply with all applicable health and safety laws, and all rules and regulations of the National Park Service. This reservation expires in November 2012.

Exhibit 28
CCC-13-CD-01 & CCC-13-RO-01
(Drakes Bay Oyster Company)

After that time, aquaculture operations must continue subject to a special use permit that would run concurrently with, and would terminate upon, the expiration of the assigned State water bottom allotments. Since such allotments are subject to a maximum lease term of 25 years, both the grantor and grantee apparently contemplated that the state water bottom leases then in effect could be renewed, and this was in fact done in 1979. In June 2004, the Fish and Game Commission (Commission) renewed the state water bottom lease for an additional twenty-five years, contingent on this reservation, and also required Johnson to comply "with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law..." In March 2005, the Commission authorized the assignment of the state water bottom lease to Johnson's successor, Drakes Bay Oyster Company.

The 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with the 1972 grant reservation and, after its expiration, with any special use permit that PRNS may issue in its discretion. The reservation requires compliance with all applicable health and safety laws and, specifically, with all rules and regulations of the National Park Service. Conversely, the renewal imposes an additional requirement of compliance with all other applicable laws, which reasonably includes those of the National Park Service and of PRNS in particular. For these reasons, we believe the mariculture operation in Drakes Estero is properly within the primary management authority of the PRNS, not the Department.

Should you or any of your staff require any additional assistance, please contact Senior Staff Counsel Joseph Milton, Office of the General Counsel, at (916) 654-5336 or jmilton@dfg.ca.gov.

Sincerely,

for L. RYAN BRODDRICK
Director

cc: Mr. Ralph Mihan, Office of the Solicitor
U.S. Department of the Interior

Mr. Joseph Milton, Senior Staff Counsel
Department of Fish and Game

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION
NORTH CENTRAL COAST DISTRICT
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5260
FAX (415) 904-5400

March 16, 2012

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, California 94937

RE: Coastal Development Permit Application Number E-09-008

Dear Mr. Lunny:

I am writing in response to the documents you submitted to the California Coastal Commission (Commission) staff via email on February 17, 2012, in support of coastal development permit application number E-09-008[1]. The Commission staff have reviewed these documents and determined that the coastal development permit (CDP) application remains incomplete because there is no evidence of landowner approval of the proposed work, a portion of the permit fee has not been submitted, and you have not provided sufficient detail regarding the additional work that you added to your project description in your latest submittal. Your application therefore cannot be filed in accordance with Section 13056 of the Commission's regulations.

As we discussed during our recent meeting on March 5, 2012, and noted in previous letters (most recently in a letter to you dated December 6, 2010), the Commission's regulations require a prospective applicant to provide evidence of landowner approval in order to complete and file their CDP application. To date, this evidence has not been provided. Please refer to the discussion in our letter to you dated December 6, 2010 (attached for your reference), for options on obtaining landowner approval of the development activities proposed in your CDP application. Please also be aware that this landowner approval must include all of the proposed additions and modifications to your project description that were submitted with your supplemental CDP application materials on February 17, 2012.

In addition, the revised project cost estimate document you provided does not include cost estimates for the 26 proposed ongoing maintenance and operational activities or expenditures such as the costs for planning, engineering, architectural, and other services made, or to be made for designing the project. Please provide cost estimate information for these activities and expenditures as well as any additional permit fees that may be required based on the revised

[1] In 2009, the Commission staff determined that the project described in your original CDP application (2-06-003) had been modified enough to be considered as a new application. Please refer to this new CDP application number, E-09-008, in future correspondence.

development cost. In addition, please provide an additional permit filing fee of $500 for the proposed 100 cubic yards of cut/dredging proposed in your revised project description.

Your recent cover letter notes that you have proposed only one minor addition to the project described within your CDP application, the proposed installation of 12 outdoor cooking grills. Upon review of the documents you provided, however, it appears that several other modifications and additions to the project description are also proposed. These new proposed activities include dredging; installation of an outdoor seawater aquarium; installation of six additional picnic tables; installation of a hot ash receptacle; installation of a cover over the work station; replacement of ramps connecting the work platform to the floating dock; and non-compliance with the harbor seal protection protocols described in Commission Cease and Desist Order no. CCC-07-CD-11 and the Special Use Permit issued to you by NPS in 2008. Please provide the following additional information regarding these new proposed activities:

1. Please describe any proposed best management practices or techniques that are proposed to be used to reduce the spread of turbidity and/or sediment into the waters of the estero during the proposed dredging activities.
2. Please provide information regarding the location and manner of proposed dredge spoils transport and disposal.
3. Please describe the size, materials, and installation method of the proposed outdoor aquarium.
4. Please indicate the source of seawater for this aquarium and its approximate annual seawater use.
5. Please indicate if any water or materials from the aquarium would be discharged into the estero.
6. Please describe the proposed location of the hot ash receptacle.
7. Please describe the size, material, color, design, installation method, and location of the proposed work station cover.

I also wanted to provide you with our perspective on another section of the cover letter included with the CDP application documents you submitted to us on February 17, 2012. While this cover letter suggests that the Commission staff "elected to postpone the [CDP application review] process" as a result of NPS initiating a review of a proposed new ten-year special use permit under the National Environmental Protection Act, it is our understanding that your CDP application has remained incomplete in part because we do not have evidence of landowner approval (as discussed in our letter to you dated December 6, 2010).

Finally, I wanted to acknowledge that we received another letter from you on March 6, 2012, in response to the meeting we held with you in our offices on the previous day. We are currently reviewing the points you make in this letter and completing our evaluation of the permitting options we discussed during our meeting. We anticipate providing an additional response to you soon regarding both of these issues.

Please don't hesitate to contact me directly if you have any questions.

Sincerely,

Cassidy Teufel
Environmental Scientist

Enclosure