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28 May 2013

By ECF

Molly C. Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA

Subject: Drakes Bay Oyster Company et al. v. Jewell et al. (no. 13-15227)

Dear Ms. Dwyer:

We are writing to inform the Court of an incorrect statement made during oral argument by counsel for Defendants. Counsel for Drakes Bay Oyster Company ("DBOC") had argued that:

NEPA requires that they [i.e. Defendants] submit the final statement to the EPA, that they issue a record of decision, that they allow 30 days for review by other agencies and the public, before a decision is made. The Secretary didn't do that. The final statement claimed that there were two disturbances to the harbor seals attributable to the farm, and used that as evidence that there were adverse impacts from the farm's activities. However, shortly after the Secretary made his accelerated decision, it was revealed that the underlying data showed that there were zero disturbances.... This is not a matter of interpretation, experts disagreeing; this is a matter of misrepresentation of data.... And if they [i.e. Defendants] had followed the NEPA process, if they had given the full review period, this might have been uncovered before the Secretary had a chance to make his decision.¹

¹ <http://www.youtube.com/watch?v=3uqQfFBP0Gc>, at 15:30-16:37.

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In response to a question about “the procedural breaches [of NEPA] that Drakes Bay has alleged,” counsel for Defendants incorrectly asserted that the Final EIS responded to DBOC’s comments about harbor seals:

A. ... [Ms. Abbasi] mentioned a failure to respond to comments about harbor seals. I think really that’s an issue that wasn’t directly raised in the briefs. If it had been, then we would have pointed to the sections in the EIS, which I believe actually are cited in our supplemental excerpts, in which the Secretary responded to those criticisms and explained how he used the harbor seal data²

The Final EIS could not have “responded to [DBOC’s] criticisms” – i.e. that Defendants have misrepresented the fact that there were zero disturbances of harbor seals – because DBOC did not discover the misrepresentation until *after* the Final EIS had been made public and the Secretary had made his decision.

We wrote Defendants and requested that they agree to a joint letter informing this Court of the error. This issue is addressed in the first three-and-a-half pages of the letter (without its attachment) that is attached as Exhibit 1.

In response, counsel for Defendants asserted that “to the extent I made a mistake in my argument, that mistake was not material.” Defendants declined to file a joint letter, and argued that DBOC had made an error in its oral argument. Defendants’ letter is attached as Exhibit 2.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter S. Prows

² <http://www.youtube.com/watch?v=3uqQfFBP0Gc>, at 34:40 – 35:45.

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16 May 2013

By Email

Mr. David Gunter
U.S. Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, DC 20044

Subject: Drakes Bay Oyster Company et al. v. Sally Jewell et al.

Dear Mr. Gunter:

I write to request that you correct an inaccurate assertion you made at this week's oral argument before the Ninth Circuit Court of Appeals. I also request Defendants' cooperation in timely responding to the complaint Dr. Corey Goodman submitted to Secretary Jewell on 13 May, and in instituting an appropriate litigation hold to preserve all records and communications related to the allegations in that complaint.

At oral argument, you asserted that Defendants did not violate NEPA because, among other reasons, "the Secretary responded" to DBOC's criticisms of the FEIS's conclusions about DBOC's alleged impacts to harbor seals:

Q. ... [W]ould you address the breaches, the procedural breaches, that Drakes Bay has alleged, with respect to the merits side ... of the denial of the preliminary injunction?

A. ... [Ms. Abbasi] mentioned a failure to respond to comments about harbor seals. I think really that's an issue that wasn't directly raised in the briefs. If it had been, then we would have pointed to the sections in the EIS, which I

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believe actually are cited in our supplemental excerpts, in which the Secretary responded to those criticisms and explained how he used the harbor seal data

* * *

So, I think that the scientific violations of NEPA that DBOC is alleging, although they are not clearly presented in the brief as a reason for the Secretary's discretion to have been arbitrarily exercised, there is really nothing there. Their brief really claims that a lot of other parties have found problems with the scientific, with the use of scientific data that the Secretary had included in the EIS here, but they do not really point out any of those areas and argue them as a basis for an arbitrary and capricious decision here.¹

But neither the Secretary nor the FEIS could have "responded" to DBOC's criticism of the FEIS's conclusions about harbor seals. This is for the simple reason that DBOC did not discover that those conclusions were flawed until shortly *after* the Secretary had made his decision.

Here are the undisputed facts:

- The FEIS was released on 20 November 2012. The FEIS concluded that granting DBOC the permit would cause "long-term moderate adverse impacts" to harbor seals. (FEIS at 377.) In support of this conclusion, the FEIS stated that an analysis of some 250,000 photographs of Drakes Estero found that "[t]wo flushing disturbance events were attributed to [i.e. caused by] boat traffic at nearby sand bars". (FEIS at 376.)
- In fact, Dr. Brent Stewart, the harbor seal expert NPS had retained to analyze those photographs, actually concluded in

¹ <http://www.youtube.com/watch?v=3uqQfFBP0Gc>, at 34:40 – 36:44.

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May 2012 that there was “no evidence” of any harbor seal disturbance attributable to DBOC boats on either of those two days. (ER 290 ¶ 13.)

- On 29 November 2012, Secretary Salazar decided to deny the permit, and in so doing he cited the FEIS for his conclusion that removing the oyster farm “would result in long-term beneficial impacts to the estero’s natural environment.” (ER 122.)
- In early December, Interior Department officials went back to Dr. Stewart and asked him to re-analyze the photographic data from the two days for which the FEIS alleged that DBOC’s boats had caused disturbances. On 10 December 2012, Dr. Stewart responded with a supplemental report that again found “[n]o evidence” of disturbances attributable to DBOC boats on either of the two days in question.²
- On 20 December 2012 – 30 days after the FEIS was made publicly available – Dr. Goodman issued a report that concluded: “Dr. Stewart’s finding of no harbor seal disturbances by DBOC oyster boats was transformed by two sequential misrepresentations ... from a finding of no evidence of DBOC boat disturbances of harbor seals to the cause-and-effect conclusion made in the FEIS.” (ER 290 ¶ 13.) DBOC filed that report with the District Court in support of DBOC’s motion for a preliminary injunction. (*Id.*)
- Defendants have never responded to Dr. Goodman’s report or explained why the FEIS misrepresented Dr. Stewart’s analysis. (*See* ER 188 ¶ 14 (“none of the declarations submitted by Defendants contradict my conclusion that the FEIS misrepresents the conclusion reached by [Dr. Stewart]

² A copy of this supplemental report is enclosed with this letter as Attachment 1. DBOC obtained this supplemental report only after Dr. Stewart submitted it to Congressman Huffmann in April 2013.

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... which was that there was no evidence of any harbor seal disturbances caused by DBOC's operations").) Nor did any of the briefs Defendants filed in the District Court or Court of Appeals respond to Dr. Goodman's report.

Your first statement on the issue was made at oral argument in the Ninth Circuit. As quoted above, you asserted that this issue "wasn't directly raised in the briefs" and that the "EIS ... responded to those criticisms and explained how [Defendants] used the harbor seal data." Your assertion was inaccurate for the simple reason that the 20 November FEIS could not have responded to criticisms first made in December. Inaccurate statements to the Ninth Circuit should be corrected promptly. I ask that you send me a proposed joint letter correcting the error that we can submit to the Ninth Circuit.³

DBOC also asks Defendants to cooperate in a timely process of responding to Dr. Goodman's 13 May complaint to Secretary Jewell. Dr. Goodman submitted this complaint at the direction of Rachel Leonard, General Counsel of the White House Office of Science and Technology Policy (OSTP). Dr. Goodman's complaint alleges that the FEIS's misrepresentation of Dr. Stewart's finding of no disturbances as being two flushing events that support the conclusion of long-term moderate adverse impacts from continued oyster farming was scientific misconduct. Dr. Goodman also alleges

³ Your assertions that DBOC has not briefed this issue, and that it relies solely on the claims of other parties, are also wrong. In every brief it has filed relating to its motion for a preliminary injunction, DBOC argued that Defendants' reliance upon, and failure to correct, the FEIS's flawed conclusions about impacts to harbor seals that DBOC independently identified violated the APA and NEPA. (*See Memorandum Of Points And Authorities In Support Of Motion For A Preliminary Injunction* (21 December 2012) at 8:13-18, 19:19-23, 20:14-21:2; *Reply In Support Of Motion For Preliminary Injunction* (16 January 2013) at 11:6-8; *Emergency Motion For Injunction Pending Appeal* (12 February 2013) at 17; *Reply To Opposition To Emergency Motion For Injunction Pending Appeal* (21 February 2013) at 5, 9; *Appellants' Opening Brief On Preliminary Injunction Appeal* (6 March 2013) at 2, 31; *Appellants' Reply Brief On Preliminary Injunction Appeal* (22 April 2013) at 20-21.)

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that Interior Department officials withheld Dr. Stewart's actual conclusions as part of a coverup. Dr. Goodman's complaint requests that Secretary Jewell meet with him to discuss his allegations and a proper solution, that the Interior Department establish an independent blue-ribbon panel of impartial scientists to conduct an investigation into the allegations, and that the investigation be conducted in a transparent fashion.

Because these allegations are likely to be subject to discovery in this or other litigation, it is appropriate for Defendants to institute a litigation hold to preserve all documents and communications related to the allegations in Dr. Goodman's complaint and to any analysis or data related to harbor seals in Drakes Estero. That litigation hold should encompass, but not be limited to, all documents and communications created at any time relating to the photographs of Drakes Estero, Dr. Stewart's analysis of those photographs, and the FEIS's conclusions about DBOC's alleged impacts to harbor seals. You should remind your clients that this litigation hold should include copies of documents stored on electronic backups and archives, documents stored on personal computers, and emails sent or received from private email accounts.

We would appreciate receiving a proposed joint letter to the Ninth Circuit by Monday, 20 May. By the end of the month, we would also appreciate you getting back to us with Defendants' procedure and timeline for responding to Dr. Goodman's complaint, and confirmation that a litigation hold has been instituted.

Thank you for your cooperation. Please call me with any questions.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter S. Prows



U.S. Department of Justice

Environment and Natural Resources Division

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May 20, 2013

Mr. Peter Prows
Briscoe Ivester & Bazel LLP
155 Sansome Street
San Francisco, CA 94104

Re: *Drakes Bay Oyster Co. v. Jewell*, No. 13-15227 (9th Cir.)

Dear Mr. Prows:

I have received your letter of May 16, in which you suggest that it is necessary for me to correct an inaccurate assertion in my oral argument before the Ninth Circuit on May 14. After reviewing the video, I believe that no correction is necessary. To the extent I made a mistake in my argument, that mistake was not material and will have no bearing on the Court's consideration of the case.

In her argument, Ms. Abbasi claimed that the Secretary failed to respond to DBOC's comments on the draft EIS, and she supported that claim only with an example from the soundscape analysis. *See* video at 15:14-15:30. Twenty minutes later, I mistakenly recalled that she had used an example from the harbor seal analysis, so I mentioned the Secretary's comment responses on both the harbor seal and the soundscape issues. *See* video at 35:25-36:06. However, my comment merely directed the Court to the supplemental excerpts of record. *See* SER 223-24 (harbor seals); SER 225-26 (soundscape). To the extent the Court deems this issue relevant to its decision, it will surely examine those supplemental excerpts for itself to see whether there is any merit to the claim Ms. Abbasi raised.

Ms. Abbasi went on to discuss harbor seal data that DBOC did not raise until after the administrative record was closed. *See* video at 15:35-16:37. Because Ms. Abbasi strongly emphasized the fact that DBOC did not obtain that data until after the Secretary's decision, *see* video at 16:10-16:20, and reiterated that fact at the very

beginning of her rebuttal, *see* video at 44:42-45:01, the Court could not have taken my reference to the final EIS as an answer to that point. Instead, the Court will understand that, by referring to the final EIS, I intended to answer Ms. Abbasi's claim that the Park Service failed to respond to comments on the draft EIS.

Another reason that this point is immaterial is that, as I pointed out in my oral argument, it relates to an issue that DBOC did not raise in its briefs. The claim that an agency has failed adequately to respond to comments on a draft EIS is a distinct claim under NEPA. *See, e.g., Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008). Ms. Abbasi described that as one of DBOC's merits claims here, *see* video at 14:50-15:30, even though DBOC did not raise it in its opening brief, *see* pp. 30-31, or its reply brief, *see* pp. 19-21. If you believe that my argument warrants a correction, you must also consider informing the Court that Ms. Abbasi had first inaccurately stated the nature of DBOC's NEPA claims in this case.

In my experience, courts do not look favorably on attempts by parties to seize upon minor points, made in the give-and-take of oral argument, and use them as a pretext for supplemental briefing. I therefore invite you to consider this case submitted, and leave the Court to weigh the serious arguments that both sides raised at last Tuesday's hearing.

The other matters raised in your May 16 letter will be addressed in a separate response.

Sincerely,

/s/ David Gunter

David Gunter