No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary,
U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR;
U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official
capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

AMICI CURIAE BRIEF OF WILLIAM T. BAGLEY, PETE MCCLOSKEY, PHYLLIS FABER, MARK DOWIE, PATRICIA UNTERMAN, INDIVIDUALLY & DBA THE HAYES STREET GRILL [A RESTAURANT], TOMALES BAY ASSOCIATION, ALLIANCE FOR LOCAL SUSTAINABLE AGRICULTURE, CALIFORNIA FARM BUREAU FEDERATION, MARIN COUNTY FARM BUREAU, SONOMA COUNTY FARM BUREAU, FOOD DEMOCRACY NOW, AND TOMALES BAY OYSTER COMPANY SUPPORTING APPELLANTS' PETITION FOR REHEARING EN BANC

Judith L. Teichman (CSBN 39434)
2558 Clay Street, #1
San Francisco, California 94115-1832
Telephone: (415) 921-2483
Email: judyteichman@gmail.com
Attorney for Amici Curiae

CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

The California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, the Alliance for Local Sustainable Agriculture, the Tomales Bay Oyster Company, and the Hayes Street Grill do not have any parent corporations and no publicly held corporation owns 10% or more of their stock**.**

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STATEMENT OF AMICI'S IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

This brief is filed pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. Amici are:

William T. Bagley, a 60 year member of the California State Bar (Boalt Hall - 1952) who, as an Assemblyman (1961 to 1974) in 1965 authored Assembly Bill 1024 transferring the Point Reyes tidelands to the National Park Service, specifically reserving to the State's "the right to fish." That reservation applied to the pre-existing oyster farm in Drakes Estero. Bagley's interest in this matter is both personal and legal. His comments on the Draft Environmental Impact Statement [DEIS] in the form of a Declaration appear as Exhibit 3 [Ex 3] to the Appendix at page 00020 [App 00020].

"Pete" McCloskey, another 60 year member of the California State Bar (Stanford Law – 1953), as a member of Congress (1975-1983) coauthored the Endangered Species Act and intervened with the Office of the President to secure the 1970 Congressional appropriation that enabled the National Park Service to acquire in 1972 the land and facilities onshore Drakes Estero used by the oyster farm. His continuing commitment and interest in the Point Reyes National Seashore is demonstrated in the Bagley, Burton, McCloskey August 2011 letter to former Secretary Salazar, Ex 8, App 00095.

Phyllis Faber is a noted wetland scientist, who was co-chair of the Marin County Prop. 20 effort in 1972 to form a Coastal Commission, and was a member of the first North Central California Coastal Commission for eight years, chair for

two years. She is also the co-founder of the Marin Agricultural Land Trust that has protected almost 50% of Marin's agricultural land through the use of conservation easements. For over 40 years she has worked to preserve agriculture in Marin, including in the coastal zone.

Mark Dowie is an award-winning investigative environmental and science reporter and resident of Marin County. His interest "is in ensuring that public policy and decisions impacting the environment are based on accurate facts and sound science."

Tomales Bay Association is a 50-year old West Marin County environmental organization that has been at the forefront of many environmental issues throughout the years.[1] Among other reasons, it supports DBOC as:

> . . . a critical component of on-going habitat restoration projects for Threatened & Endangered species, especially native oyster restoration projects in SF Bay and elsewhere in the State, because it is the last operating cannery in California and therefore the only readily available source of shell in California.

Patricia Unterman dba the Hayes Street Grill, who committed to serve only fresh fish, seafood and produce when she and her partner opened the Hayes Street Grill in the Civic Center in 1979. In her words,

> "Our mission was, and is, to stay as local as possible in selecting all our ingredients. We know exactly where every fish and shellfish comes from, who caught it or harvested it and how it was caught or harvested. We only buy sustainably managed fish and shellfish. The loss of the oysters produced by DBOC would have a devastating impact on our mission, our menu and the expectations and pleasure of our customers. We cannot replace the fresh, local, shucked oysters from DBOC."

[1] See Tomales Bay Association letter to the Court, Ex 9, App 100.

Tomales Bay Oyster Company [TBOC] is one of two oyster farms located on Tomales Bay in Marin County with retail shops along State Highway One. Its retail and picnic area is at capacity and its customers will be adversely affected if DBOC's 50,000 customers attempt to visit TBOC. In addition, TBOC's lease payments and privilege use taxes are likely to increase or services decrease to offset the loss of revenue from DBOC's operation that goes into the State Trust Fund that supports administration of the State's aquaculture program.

Alliance for Local Sustainable Agriculture is an unincorporated association of people who believe that "a diversified and healthy agricultural community is important to our individual health and to our community's and our nation's safety, economy and environment." They are "advocates for the use of good science and fair processes."

The California Farm Bureau Federation and the Marin and Sonoma County Farm Bureaus, which are active in the San Francisco Bay Area "foodshed," are nonprofit voluntary membership corporations whose purpose is, respectively, to protect and promote agricultural interests in the State and in their Counties, and to find solutions to the problems of the farm and rural communities. Their participation as *amici* is an extension of their concern for the future of DBOC as expressed in comments on the DEIS.

Food Democracy Now is a grassroots movement of more than 350,000 American farmers and citizens dedicated to reforming policies relating to food, agriculture and the environment. They support DBOC because they support

"recreating regional food systems, supporting the growth of humane, natural and organic farms, and protecting the environment."

Marin Organic, founded in 2001, fosters "direct relationship between organic producers, restaurants, and consumers" to strengthen the commitment and support for local organic farms, such as DBOC.

I. INTRODUCTION

The Drakes Bay Oyster Company is a treasured part of California's coastal zone in the Point Reyes National Seashore. Shellfish from Drakes Estero are an important part of the San Francisco Bay Area's world famous local, sustainably raised food movement. Modern environmentalists hail Marin County and DBOC as a model for sustainable agriculture. Consistent with Federal policies supporting increasing the Nation's supply of sustainably raised seafood, California, which leases Drakes Estero to DBOC, has declared shellfish cultivation there to be "in the public interest."[2]

II. ISSUES

At issue is the Secretary of the Interior's Order of November 29, 2012 [Secretary's Order] denying the Drakes Bay Oyster Company [DBOC or Oyster Farm] [3] a permit to continue to operate in the Point Reyes National Seashore [PRNS]. The majority decision fails to consider or answers wrongly these important questions:

A. Does the "notwithstanding any other law" clause in Section 124[4] insulate the Secretary from compliance with the Federal Coastal Zone Management Act

[2] Counsel for DBOC provided some comments on this brief, but it was authored by the undersigned. Other than the undersigned, no person, party, or party's counsel contributed money to fund the preparation or submission of this brief.
[3] "Oyster Farm" sometimes refers to the Drakes Estero farm under prior ownership.
[4] Section 124, P.L 111-88.

[CZMA] requirement that federal agencies comply with the "enforceable policies" of State coastal plans to the extent "practicable"? [5]

B. Is the Secretary's Order prohibiting aquaculture in Drakes Estero an improper usurpation of the State's constitutionally mandated, statutorily retained and historically administered jurisdiction over fish and aquaculture, including oyster cultivation, in Drakes Estero?

C. May the Secretary grant a permit solely for DBOC's use of the land and facilities onshore Drakes Estero, a permit that does not interfere with the State's aquaculture leases?

D. Is NEPA review required to ensure that the Secretary follows a fair and transparent process when exercising the discretion to grant or deny DBOC the permit authorized in Section 124?

III. FEDERAL COASTAL ZONE MANAGEMENT ACT AND CALIFORNIA COASTAL ZONE POLICIES REQUIRE DBOC BE GRANTED A PERMIT IF "PRACTICABLE"

Citing and quoting Ness Inv. Corp., v. U.S. Dep't of Agr., Forest Serv., 512 F2d 706, at 715 (9th Cir. 1975), the majority acknowledges that the court has jurisdiction to review agency action for an abuse of discretion when the alleged abuse "'involves violation by the agency of constitutional, statutory . . . or other legal mandates or restrictions.'" The majority goes on to state that:

[5] 16 U.S.C. Section 1456(c)(1)(A).

> The Secretary's decision did not violate any statutory mandate . . . . Section 124 . . . left [the Secretary] free to consider wilderness values and the competing interests underlying a commercial operation in an area set aside as a natural seashore. (Opinion, page 22 [Op22].)

Contrary to the majority decision, the Secretary's Order *does violate a statutory mandate*. The PRNS and DBOC are located in California's coastal zone. The CZMA requires that *federal activities* comply with the "enforceable policies" of the state coastal plan "to the extent practicable."[6] The District Court found that the decision to deny the Oyster Farm a permit was "agency action."[7] The California coastal plan defines aquaculture as agriculture.[8] With regard to agriculture, the "enforceable policies" of the coastal plan provide that:

> . . . lands suitable for agricultural use shall not be converted to nonagricultural uses unless continued or renewed agricultural use is not feasible . . .."[9]

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[6] In addition, California Public Resources Code [PRC] Section 30003 provides that federal agencies shall comply with the California Coastal Act "to the extent possible under federal law."

[7] See the district court's order at ER 27:23 – 30:2.

[8] PRC Section 30100.2.

[9] PRC Section 30242. See similar terms in the National Aquaculture Act of 1980 [Aquaculture Act], 16 U.S.C. 2801, *et seq*. It states a national policy requiring all federal agencies "to encourage the development of aquaculture." "Federal consistency" requirements direct Federal agencies with jurisdiction over any activity that may affect "the achievement of the purpose and policy of this chapter" to "perform such . . . activity in a manner that is consistent with the purpose and policy of this chapter." 16 U.S.C. 2805(d). The National Marine Fisheries Service [NMFS] asked that the Aquaculture Act be added "as relevant law to be considered

Section 124 explicitly gives the Secretary authority to "issue a special use permit" to DBOC. Unless Congress proclaims it has preempted State law, under Article X of the United States Constitution the "notwithstanding any other law" phrase in Section 124 *cannot exempt the Secretary from compliance with California law.* And there is no basis for the Secretary to claim that it is not "practicable" or "feasible" to comply with the State's policy that requires that aquacultural/agricultural uses continue in the PRNS. In City of Sausalito v. O'Neill, 386 F.3d 1186 (2004), the Ninth Circuit found a "compelling reason" for overturning a "consistency determination"[10] that was based on a ground not consistent "to the maximum extent practicable" with an enforcement policy in the State plan. 386 F.3d at 1222.

Interestingly, CZMA requirements are described in the EIS and include the policy of state/federal comity implicit in the Act, which is that the Act:

> . . . provides states with the ability to review federal activities and federally permitted activities, and ensure that such activities are consistent, to the maximum extent practicable, with their coastal zone management plans."

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in . . . informing this EIS," and said, *"NMFS believes that the removal of the oyster facility should be considered an action."* [Emphasis added.] EIS, Appendix D-46-47, Exhibit 1 [Ex 1], Appendix page 00102 [App 00102]. Nevertheless, the Aquaculture Act is not among the federal laws listed in the EIS, pages 53-59 [EIS 53-59], App 00007-14.

[10] 15 CFR Section 930.34.

Also described in the EIS is the obligation of DBOC to file a "consistency certification" if granted a permit, but there is *no reference in the EIS to the federal defendants obligation to file a "consistency determination*" for an activity that clearly violates an "enforceable policy" in the State coastal plan.[11]

En banc review is needed to ensure that the 9th Circuit decision concluding that the "notwithstanding any other law" provision in Section 124 is not interpreted as freeing the Secretary from compliance with the CZMA.[12]

[11] EIS 57, Ex 1, App 00011.
[12] This issue was not raised previously in this proceeding, however, 28 U.S.C. Section 2106 authorizes courts of appellate jurisdiction to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

IV. STATE'S RETAINED FISHING RIGHTS ARE AN INTEREST IN PROPERTY, A FORM OF EASMENT ON THE DRAKES ESTERO WATER BOTTOMS

A. Secretary's Order Conflicts With State's Retained Fishing Rights.

The majority opinion overlooks key provisions in the Secretary's Order when it describes the case as nothing more than a:

> . . . challenge to the Secretary of the Interior's discretionary decision to let the Drakes Bay [Oyster Company] permit for commercial oyster farming expire according to its terms. . . . (Op 22-23)

In fact, the Secretary's November 29, 2012 Order has two distinct aspects. It:

> (a) Denies the DBOC a permit to continue to occupy premises legitimately under the control of the DOI, and
>
> (b) Directs that DBOC cease cultivating shellfish without regard to the State's retained fishing rights and DBOC's rights and obligations under State leases for shellfish cultivation in Drakes Estero.

The Secretary's Order directing that DBOC cease cultivating shellfish contradicts the July 11, 2012 [July 2012] statement of intent of the California Fish and Game Commission [F&G Commission] to lease the water bottoms to DBOC at least through 2029:

> The Commission, in the proper exercise of its jurisdiction, supports and continues to support the agricultural business of aquaculture, and to that end, has clearly authorized the shellfish cultivation in Drakes Estero through at least 2029 . . . in accordance with the Commission water bottom lease granted to [the Drakes Bay Oyster Company].[13]

Even if the Secretary denies DBOC a permit for use of the onshore land and facilities, the State can continue to lease and DBOC can continue to cultivate shellfish in the Drakes Estero water bottoms. The loss of the last oyster cannery in California would mean the loss of a source for the oyster shells used in San Francisco Bay restoration projects and the fresh shucked oysters that are an important part of the local organic food supply, but under the California Constitution, Article I, Section 10, the United States must grant access to Drakes Estero if it "serves a public purpose" and shellfish could be transported to a remote location for processing.[14]

B. Fish and Game Commission Jurisdiction

The fishing rights the State retained when it transferred the PRNS tidelands to the United States in 1965 include the right to continue leasing the Drakes Estero

[13] Ex 2, App 00017.
[14] See Tomales Bay Association letter, Ex. 9, App 00100 and "interest" of amicus Hayes Street Grill.

water bottoms for shellfish cultivation. The State's retained right to lease the water bottoms is "an interest in property," a form of easement on Drakes Estero. This was the contemporaneous interpretation of the 1965 bill by the parties in 1965-1966, [15] and it has been confirmed by over 45 years of usage since the tidelands were transferred to the U.S.[16]

Officials at the highest level in the federal government have confirmed this understanding of the scope of the State's retained fishing rights. The 1972 Deed transferred ownership of the onshore land and facilities to the United States "in accordance with the terms of the "Offer to Sell Real Property." The terms include the 40-year RUO and said that when the RUO expired a permit could be granted for continued occupancy of the property, provided:

> . . . that such permit shall run concurrently with and terminate upon the expiration of State water bottom [leases] assigned to [the Oyster Farm].

The U.S. Attorney General in a December 12, 1972 letter from then Acting Attorney General Robert Bork to the Secretary of DOI Rogers Morton explicitly approved the terms and conditions in the Deed:

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[15] Bagley comment on Draft Environmental Impact Statement [DEIS]. Ex.3 App 00020.

[16] Great weight is given to contemporaneous and long-standing administrative interpretations of a statute. See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208 (1978) [administrative construction of Prop 13] and State of South Dakota v. Brown, 20 Cal.3d 765 (March 1978) [long-standing interpretation of the extradition powers and duties of the Governor].

> The title evidence and accompanying data disclose valid title to be vested in the United States of American subject to the rights and easements noted . . . which you have advised will not interfere with the proposed use of the land.

(ER 587.) In 1974 DOI further confirmed the federal understanding that scope of the State's retained fishing rights when it stated in an Environmental Impact Statement on the proposed Point Reyes Wilderness Area that Drakes Estero could never be given "wilderness" status because of the State's retained fishing rights. The history of the 1976 legislation designating Drakes Estero "potential wilderness" is set out in the dissenting opinion.

These authorities were dismissed in the EIS as reflecting "confusion" over the scope of the State's retained fishing rights as "evidenced by comments received during the public scoping process." NPS resolved the "confusion" by consulting with the California *Department* of Fish and Game [CDFG], a State agency within the Natural Resources Agency that is responsible for *administering* the leases, leases which under California's Constitution are *and can only be authorized by the F&G Commission*.[17]

In a 1951 Opinion, California Attorney General Edmund G. Brown advised:

[17] EIS 9, Ex 1, App 00006.

> The Legislature does not have authority to delegate the power to administer the Division of Fish and Game to any person or agency other than the Fish and Game Commission established by the Constitution.[18]

Consistent with the policies reflected in the CZMA, in establishing PRNS in 1962 Congress specifically provided that the federal government may only acquire an "interest" in State-owned property within the PRNS boundaries with the State's "concurrence."[19]

C. <u>EIS Sets Up A "Catch-22" for DBOC If Permit Granted</u>

After an extensive planning and environmental review process under the California Marine Life Protection Act,[20] effective May 2010 the F&G Commission adopted the "preferred alternative," which allows "commercial aquaculture of shellfish" in Drakes Estero. Regulations issued by the F&G Commission provide that shellfish cultivation in Drakes Estero *is only allowed if pursuant to a State*

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[18] 17 Ops. Cal. Atty Gen. 72 (February 20, 1950). Ex 4, App 00031. See also the discussion of allotments for shellfish culture in 46 Ops. Cal. Atty Gen 68 (September 30, 1965), in which the Attorney General noted that "Oyster and shellfish are 'fish', Section 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." [Citations omitted.] Ex.5, App 00040.

[19] See Pub. L. 87-657 Section 3(a) and 43 U.S.C. Section 1311(a) (states have primary responsibility over management and use of submerged lands).

[20] The PRNS Superintendent Don Neubacher and Chief Scientist Dr. Sarah Allen participated in the process as members of a Stakeholder Group and the Science Advisory Team, respectively. See http://www.dfg.ca.gov/marine/mpa/northcentralcoast.asp and http://www.dfg.ca.gov/marine/mpa/mpsat.asp.

lease.[21] Nevertheless, and inexplicably, *all alternatives in the EIS* that would allow DBOC to continue to operate *would condition the granting of a permit on DBOC relinquishing its State leases.*[22] This set up a Catch 22 situation for DBOC in that the EIS goes on to provide that:

> Section 124. . . *does not relieve* DBOC of its *obligations to comply with the Marine Life Protection Act.*[23] [Emphasis added.]

Although we applaud this recognition that federal law cannot excuse compliance with State law, this action is indicative of defendants' lack of "*good faith*" in preparing the never-completed EIS. The Secretary's Order is *ultra vires* insofar as it directs action that interferes with the State's leases and DBOC's rights and obligations under its State leases and asserts rights DOI may not acquire without the "concurrence" of the State.[24]

If there remains any question about the scope of the State's retained fishing rights, we urge the Court to refer the issue for decision to the California Supreme Court pursuant to Rule 8.548 of the California Rules of Court for the Supreme Court and Courts of Appeal.[25]

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[21] ". . . the commercial aquaculture of shellfish pursuant to a valid State Water Bottom Lease and permit." See http://www.dfg.ca.gov/marine/mpa/nccmpas_list.asp.
[22] Executive Summary, EIS, p. xxxii.
[23] *Supra*.
[24] See footnote 18, *supra.*
[25] E.g., see Klein v. United States of America, 50 Cal.4th 68 [July 2010].

V. IN THE ABSENCE OF SAFEGUARDS IN SECTION 124, NEPA REVIEW IS REQUIRED BEFORE SECRETARY CAN ORDER DBOC CLOSED.

Unlike the majority opinion, modern environmentalism recognizes that "wilderness" as "an area where the earth and its community of life are untrammeled by man,"[26] is a romantic notion, a mythical place. The impact of humans on the global environment is an irrefutable fact. Contemporary conservationists, *who are environmentalists*, recognize that because of the role humans have played over the centuries the land – and sea – must be *managed*, not left to spin into a new ecological framework, one which will inevitably reflect the changes flowing from human impacts over time, whether due to overharvesting of native shellfish decades earlier or the current impact of ocean acidification.[27]

Most discouraging to the amici who participated in the earlier briefing is the majority's citing Douglas County v. Babbitt, 48 F. 3d 1495, 1505-06 (9th Cir.1995) as holding that:

> . . . NEPA did not apply to a critical habitat designation under the Endangered Species Act [ESA] because it did "not alter the natural, untouched physical environment at all and because the ESA *furthers the*

[26] See the definition of "wilderness," Section (2) of the 1964 Wilderness Act.
[27] See the discussion "Environmentalism: Evolving Conservation Theories" in amici brief in support of appellants appeal, pp 11-14, Ex 7, App 00075-78.

> *goals of NEPA* without demanding an EIS. *Id.* at 1505-06 (emphasis added)" (Op 31)

The majority justified relying on the quoted Douglas language saying that in this instance:

> *The Secretary's decision is essentially an environmental conservation effort,* which has not triggered NEPA in the past. . . . . "*removing the oyster farm is a step toward restoring the "natural, untouched physical environment.*" **. . . .** *The Secretary's decision to allow the permit to expire. . . "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose*. *Id.* at 1507," [Emphasis added.]

The majority's reliance on Douglas is misplaced. NEPA is not about "restoring the 'natural, untouched physical environment.'" Rather, the purpose of NEPA is to "*encourage productive and enjoyable harmony between man and his environment*," to "prevent or eliminate damage to the environment," and to "enrich the understanding of the ecological systems and natural resources important to the Nation"[28] [Emphasis added.] NEPA does so by establishing a fair and open procedure for considering the environmental consequences of proposed actions.

Citing Merrell v. Thomas, 807 F.2d 776, 777-778 (9th Cir. 1986), *cert denied*, 484 U.S. 949 (1987), the Court in Douglas describes NEPA requirements

[28] 42 U.S.C. 4321.

as:

> ." . . a procedural obligation designed to assure that agencies give proper consideration to the environmental consequences of their actions." . . . The EIS also insures that the public is informed about the environmental impact of proposed agency actions. [Citations omitted.][29]

The Douglas Court cites ESA provisions requiring the Secretary to:

> . . . decide what area to designate as a critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." [Citation omitted.][30]

And in examining the statutory framework of ESA, the Court observes:

> The ESA requires the Secretary to follow a clear set of procedures for public notification and comment after he or she designates a critical habitat." [Citation omitted.][31]

In contrast to the ESA and NEPA, Section 124 provides no procedure, much less a procedure comparable to those provided by ESA or NEPA, to ensure that the

[29] Douglas, *supra*, 48 F.3d at 1498.
[30] Douglas, *supra*, 48 F.3d at 1497
[31] Douglas, *supra*, 48 F.3d at 1497.

Secretary's exercise of discretion is both transparent and based on good science. Without compliance with NEPA review requirements there is no basis to challenge the Secretary's decision if, in fact and effect, it is "arbitrary and unreasonable." Surely Congress did not intend to insulate the Secretary's decision from environmental review under NEPA when it was so very specific with references to the National Academy of Sciences [NAS] Report and the Wilderness Act, and a Congressional Committee directed NAS review of the science used in the DEIS.

En banc review of the Secretary's decision is both appropriate and necessary.

VI. CONGRESS INTENDED TO ENABLE THE SECRETARY TO GRANT DBOC PERMIT(S) NEEDED TO CONTINUE TO OPERATE.

When DBOC purchased the Oyster Farm in December 2004, the assets consisted of the years remaining on a 40-year RUO, short-term permits for a well and a leach field and an expired permit for parking.[32] As a condition of renewing the permits in 2008, PRNS issued a single "permit" that incorporated the RUO, the permits for well, septic and parking, and, for the first time, terms inconsistent with the State leases for shellfish cultivation in Drakes Estero. For example, PRNS capped shellfish production at the "current level"[33] while the State leases provide

[32] EIS vi, Ex 1, App 00005.
[33] 2008 SUP, Conditions of Permit 4)b)i). Appendix A to EIS, page 5.

that production is to "be improved at no less than the minimum rate established by Commission regulations."[34]

In July 2010, DBOC requested a permit for use of the *onshore* land and facilities only. DBOC objected to federal defendants' expansion of the scope of the "project" in the DEIS to include terms impacting shellfish cultivation in Drakes Estero pursuant to State leases. The National Park Service [NPS] responded in the EIS:

> . . . DBOC's goal that a new permit be limited to its onshore operations only is inconsistent with section 124, which specifies that a new permit must mirror the terms of the existing permit. . . .[35]

Implicit in the NPS interpretation of Section 124 is that Congress (a) was aware of the expanded scope of the 2008 permit and (b) thus intended that the permit needed for the onshore land and facilities *be conditioned on the State, in effect, relinquishing its retained leasing rights.* The *F&G Commission* has not, and under the California Constitution cannot, lawfully relinquish the State's fishing rights, nor can any other State agency, and Congress has evidenced no intent to preempt State law.

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[34] Lease M-438-01, p 5, Paragraph C, Ex 6, App 00049.
[35] EIS v, Ex 1, App 00004. NPS uses this interpretation to set up a catch-22 in which DBOC either has no onshore facilities to support shellfish cultivation in Drakes Estero or cultivates shellfish in Drakes Estero in violation of State law. See the discussion in Section VII below.

The context in which Section 124 was adopted; the elevation of a decision that would ordinarily be made by the PRNS Superintendent to the level of the Secretary; and inclusion of a requirement regarding use of the NAS Report on defendants use of science and specific provisions regarding the effect of the Secretary's decision for purposes of the Wilderness Act all belie the defendants' interpretation of Section 124.

The context for interpreting Section 124 includes several stages in an obvious effort by federal officials and wilderness advocates to force closure of the Oyster Farm by any tactic necessary, beginning with the San Francisco Field Solicitor's February 2004 Memorandum that Congress intended that Drakes Estero be converted to wilderness when the Oyster Farm's RUO expired:[36]

- The legislative history of applicable wilderness laws is set out in the dissent, in which the Solicitor's 2004 "legal analysis" is rightly described as concluding, "*bizarrely*, given the legislative history . . . that Congress had 'mandated' elimination of the oyster farm." [Emphasis added.] (Op 38-44, dissent.) The Solicitor's opinion is also disingenuous in that it implicitly assumes that Congress could have and intended to terminate the State's retained fishing rights simply by designating Drakes Estero "potential wilderness."
- In 2006-2007, NPS began disseminating false claims that operation of the Oyster Farm harms the ecology of Drakes Estero.

[36] Solicitor's Memorandum, ER 228-230.

- In April 2008, NPS conditioned a permit for use of onshore areas on DBOC accepting terms applicable to the submerged lands and NPS controls over shellfish cultivation in Drakes Estero. Defendants' false science was used to justify including terms that impact shellfish cultivation in Drakes Estero. DBOC's acceptance of these terms under those circumstances is understandable.
- The May 2009 NAS report finds NPS "selectively presented, over interpreted, or misrepresented available scientific information on DBOC operations by exaggerating the negative and overlooking potentially beneficial effects."

A grave injustice will be perpetuated that will, among other things, impact DBOC, the community that supports local sustainable agriculture and State's shellfish production capacity if the government officials' unconscionable conduct that led to the use of "permit" rather than "permits" in Section 124 is allowed to thwart Congress' efforts to ensure that the decision on the Oyster Farm be without conditions impeding the ability to operate successfully.[37]

En banc review is appropriate and necessary to ensure that federal defendants' egregious conduct is not rewarded with success.

[37] For examples of the variety of interests negatively impacted if the Oyster Farm is closed, see the amici brief in support of Appellants' appeal, pages 8 – 11. Ex 7, App 00072-75.

VII. CONCLUSION

There is no basis in the text of Section 124 read as a whole and taking into account the purpose it was intended to serve to conclude that the "notwithstanding" clause frees federal defendants from the CZMA requirement that federal activities in the State of California's coastal zone "*be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.*"

Likewise, it is clear that the State retained the right to lease the Drakes Estero water bottoms for shellfish cultivation. The Secretary's Order is *ultra vires* insofar as it directs action that interferes with the State's leases and DBOC's rights and obligations under its State leases.

The "notwithstanding" clause does not excuse NEPA compliance, or exempt federal defendants from compliance with State law. The scope of the "permit" referenced in Section 124 must not be interpreted so as to violate State law or frustrate Congressional intent that the Secretary have authority to grant DBOC any permit needed to be able to continue to operate at PRNS.

En banc review of the September 3, 2013 decision is both appropriate and necessary.

DATED: October 22, 2013

Respectfully submitted,

/s/ Judith L. Teichman

Judith L. Teichman

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Circuit Rule 29-2(c)(2), that this brief contains 4,164 words, excluding the parts exempted by FRAP 32(a)(7)(B)(iii); and that this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 and 14 point Times New Roman.

_/s/ Judith L. Teichman_____
Judith L. Teichman

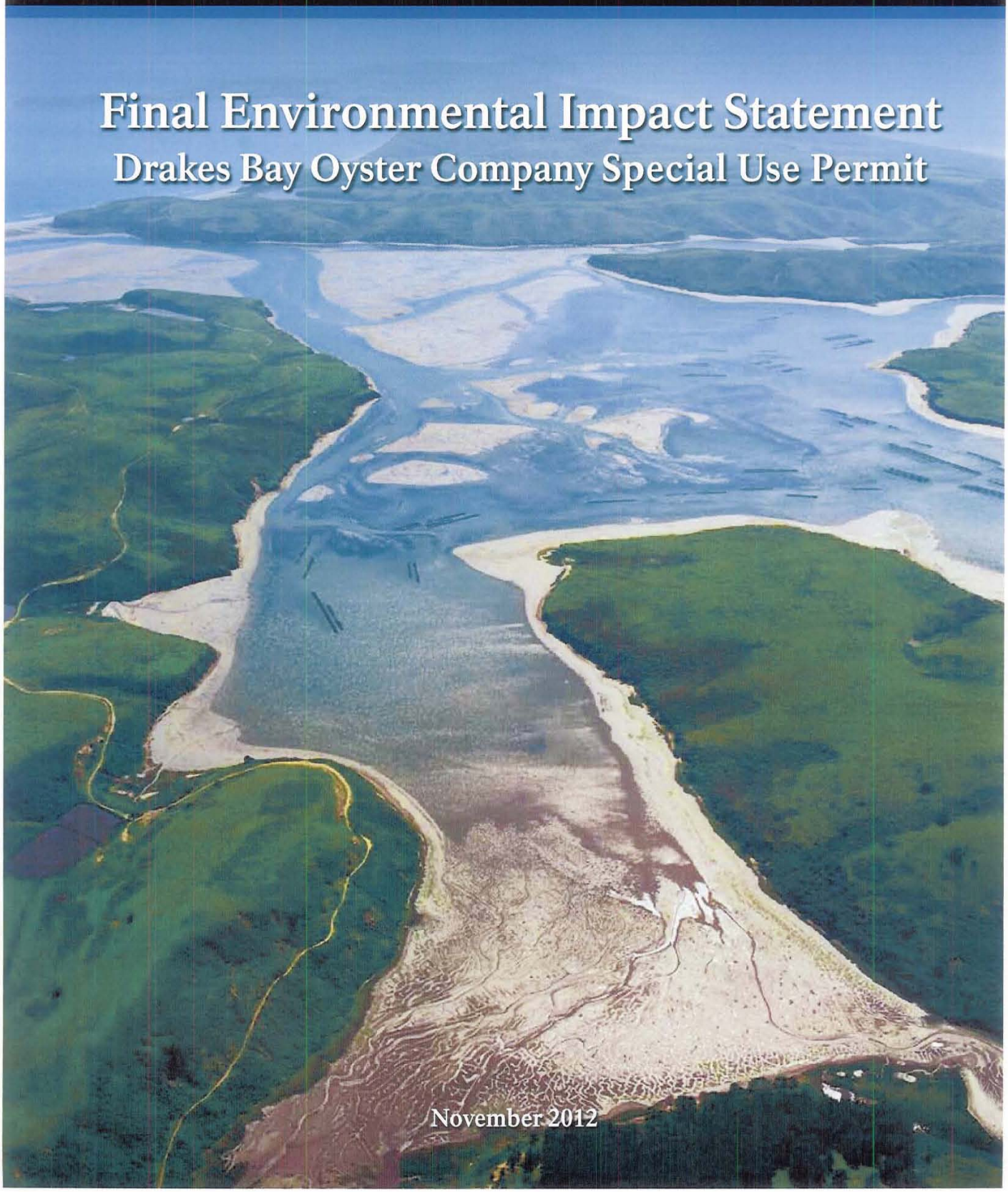
EXHIBIT 1

National Park Service
U.S. Department of the Interior

Point Reyes National Seashore
California

Final Environmental Impact Statement

Drakes Bay Oyster Company Special Use Permit



November 2012

lacked authority to allow DBOC to operate after November 30, 2012. PL 94-544 and PL 94-567 of 1976 designated Drakes Estero as potential wilderness. House Report 94-1680, which accompanied the public law, provided that, "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." The commercial shellfish operation in Drakes Estero, now operated by DBOC, is the only nonconforming use that prevents conversion of the waters of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness. The discretionary authority contained in section 124 now allows the Secretary to permit DBOC's operations for a new 10 year term, until November 30, 2022.

PURPOSE OF AND NEED FOR ACTION

PURPOSE AND NEED

Action is needed at this time because pursuant to section 124 of Public Law 111-88, the Secretary has the discretionary authority to issue a SUP for a period of 10 years to DBOC for its shellfish operation, which consists of commercial production, harvesting, processing, and sale of shellfish at Point Reyes National Seashore. The existing RUO and SUP held by DBOC will expire on November 30, 2012. DBOC has submitted a request for the issuance of a new permit upon expiration of the existing authorizations. Consistent with Department of the Interior (DOI) NEPA regulations (43 CFR 46.30), the proposed action for this EIS is the Secretary's decision whether to issue a permit under section 124.

The purpose of the document is to use the NEPA process to engage the public and evaluate the effects of issuing a SUP for the commercial shellfish operation. The NEPA process will be used to inform the decision of whether a new SUP should be issued to DBOC for a period of 10 years.

PROJECT OBJECTIVES

Project objectives build from the project purpose and identify those goals that are "critical to meet if NPS is to consider the proposal successful" (NPS 2001b). Project objectives should be grounded in the park's enabling legislation, purpose, significance, and mission goals; as well as relevant legislation; NPS plans (such as general management plans [GMPs]); or other NPS standards and guidelines. Project objectives should be broad enough to allow for a reasonable range of alternatives without narrowing the focus or intentionally excluding an alternative. The following project objectives have been identified:

- Manage natural and cultural resources to support their protection, restoration, and preservation.
- Manage wilderness and potential wilderness areas to preserve the character and qualities for which they were designated.
- Provide opportunities for visitor use and enjoyment of park resources.

DBOC GOALS

On July 6, 2010, DBOC submitted a request for the issuance of a new SUP upon expiration of the existing permit. Specifically, DBOC seeks to "occupy and utilize the buildings and lands on the shores of Drakes Estero" (Latham & Watkins, LLP 2010). DBOC requested that the EIS consider DBOC's needs and goals, as the project applicant. DBOC requested that its objective of "operating an environmentally-friendly and sustainable oyster farm for a renewable 10-year period under a Service-issued SUP" be included both during scoping as well as during public review of the Draft EIS (DBOC 2010n, 2011i). DBOC also requested that the purpose and need be modified "to reference DBOC's request that the renewed SUP be issued under [the] same terms and conditions present in the RUO/SUP, for permission to complete work authorized under the 1998 Environmental Assessment, and for permission to make select physical improvements." DBOC suggested that language regarding discussion of mitigation measures and historical context be added to the purpose and need, as well (DBOC 2011i).

The goals provided by DBOC are included here as background information. DBOC's goals have not been added to the NPS purpose, need, and objectives because doing so would limit the range of reasonable alternatives to only those that further DBOC's goals, which may not reflect the broader public interest, and would be inconsistent with the Secretary's discretion under section 124.

Specifically, DBOC's goal that NPS issue a "renewable" SUP is not consistent with section 124, which authorizes only one, 10-year permit term. Similarly, DBOC's goal that the new permit be limited to its onshore operations only is inconsistent with section 124, which specifies that a new permit must mirror the terms of the existing permit. DBOC's existing SUP authorizes onshore and offshore operations, consistent with NPS's jurisdiction over Drakes Estero. A new permit issued under section 124 would therefore authorize both onshore and offshore operations.

BACKGROUND

The original Drakes Bay Oyster Company (no relation to the present day DBOC) operated on the banks of Drakes Estero near the head of Schooner Bay, from 1938 to 1945 (Caywood and Hagen 2011). In 1946, the Drakes Estero oyster allotment was transferred to Larry Jensen (Caywood and Hagen 2011). During the Jensen tenure, the ownership of the 5-acre parcel containing the processing plant was integrated with the state water allotment lease in Drakes Estero. In April 1954, Larry Jensen entered into an "agreement of sale" with Van Camp Seafood for his oysters, state oyster allotments, and the 5 acres of upland real property that accompanied the state water bottom leases. In turn, it was quickly transferred to the Coast Oyster Company (Caywood and Hagen 2011; CDFG 1954, 1955). In 1958, Charles W. Johnson took over the oyster operation in Drakes Estero and soon founded the Johnson Oyster Company (JOC). Mr. Johnson cultivated shellfish (mostly oysters) in Drakes Estero and operated onshore processing facilities from 1961 through 2003. Mr. Johnson purchased 5 acres of onshore land where the existing processing facilities were located in 1961. He and his wife moved to the oyster plant at Creamery Bay.

Although the Seashore was established in 1962, NPS did not acquire ownership of all lands and waters within the Seashore's boundary immediately. In 1965, the state-held water bottoms of Drakes Estero were conveyed to NPS by the State of California. In 1972, NPS purchased fee title to the 5-acre upland parcel where the oyster processing facilities were located from Mr. Johnson. As part of the purchase agreement, Mr. Johnson elected to

retain a 40-year RUO over 1.5 acres of the 5-acre parcel. The RUO allowed for "processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public and residential purposes reasonably incidental thereto" (NPS 1072a).

In December 2004, DBOC purchased the assets of JOC, assuming the remaining seven years of the RUO and SUP that NPS had issued to JOC for the well and septic leach field (DBOC 2011f). There were no changes to the terms of the RUO or to its expiration date. In April 2008, DBOC and NPS signed a SUP (NPS Permit No. MISC-8530-6000-8002) that would allow the commercial shellfish operation in Drakes Estero to remain, with provisions, until November 30, 2012, when it expires concurrently with the RUO.

DESCRIPTION OF THE PROJECT AREA

The Seashore is located in western Marin County in central California, approximately 30 miles northwest of San Francisco and within 50 miles of the nine-county San Francisco Bay Area, the fifth largest metropolitan area in the United States. The Seashore is bounded to the north, west, and southwest by the Pacific Ocean and to the east by the residential communities of Inverness, Inverness Park, Point Reyes Station, Olema, and Dogtown. Western Marin County is primarily rural, with scattered, small, unincorporated towns that serve tourism, agriculture, and local residents. In addition, the Seashore administers the Northern District of the Golden Gate National Recreation Area, adjacent to the Seashore, for a combined management area and legislated boundary of approximately 94,000 acres (figure ES-1).

Drakes Estero is a system of five branching bays encompassing approximately 2,500 acres. The branching bays are stretched to the north and separated by low converging ridges. From west to east, they are: Barries Bay, Creamery Bay, Schooner Bay, Home Bay, and Estero de Limantour (see figures ES-1 and ES-2). Nearly half of the Estero's surface area consists of mud and sand flats that are exposed at low tide (Press 2005). Because of the shallow character of the bay, and its tendency to flush completely within a normal tidal cycle, currents in the main stem and secondary channels are relatively strong.

The Drakes Estero watershed covers approximately 31 square miles, including Drakes Estero itself (Baltan 2006). The Seashore leases most of the lands surrounding Drakes Estero for cattle grazing (approximately 14 square miles within the watershed). Areas draining to and surrounding the Estero de Limantour are primarily within congressionally designated wilderness (approximately 8 square miles within the watershed).

This EIS examines DBOC operations and facilities in and adjacent to Drakes Estero. The project area is roughly 1,700 acres and includes DBOC structures, facilities, and operations in much of the congressionally designated potential wilderness (1,363 acres), 2.6 acres of onshore property, and 2 acres incorporating the well and septic areas, as delineated in the RUO and SUP (see figures 1-3 and 1-4). In order to provide a comprehensive analysis of potential impacts of the alternatives presented in this EIS, the project area also includes the kayak launch parking area and the access road leading from Sir Francis Drake Boulevard. All land and water portions of the project area are owned by NPS. Resources outside the project area may be described if they are subject to impacts resulting from any of the proposed alternatives. The project area as a whole is depicted on figure ES-2, with figures ES-3 and ES-4 showing the detailed location of the onshore operations.

In the case of Drakes Estero, CFGC has issued, and CDFG administers, state water bottom leases to DBOC despite the fact that the underlying tidelands and submerged lands have been owned by the United States since 1965. CFGC issued the most recent lease in 2004. It is currently set to expire in 2029. The state water bottom lease is "contingent on a concurrent Federal Reservation of Use and Occupancy" (CDFG 2004d, 2004e). Even though the state lease explains that it is contingent on the RUO, the overlay of a state water-bottom lease on the federally owned tidelands and submerged lands in Drakes Estero has caused confusion, as evidenced by comments received during the public scoping process that sought clarification on the roles and responsibilities of NPS, the CFGC, and CDFG with respect to DBOC's operation.

To address this confusion, NPS has consulted with CDFG, which is a cooperating agency for this EIS, throughout the process of preparing this EIS. NPS and CDFG agree that the right to fish does not authorize the state to issue water-bottom leases for aquaculture (CDFG 2007b[ix], 2008a[x]; DOI 2012a[xi]). Moreover, the 1965 conveyance divested the state of any real property interest in the tide and submerged lands in Drakes Estero except for certain mineral interests. The state therefore does not retain real property interest in the Estero sufficient for it to issue state water-bottom leases for aquaculture (CSLC 2007[xii]; DOI 2012a[xiii]). As a result, NPS, not CFGC, has the legal authority to determine whether DBOC may occupy water bottoms in Drakes Estero for its operation.

NPS and CDFG agree that 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 to the CFGC prior to issuance of a new SUP by NPS. DBOC would thereafter operate under the terms of the NPS permit. NPS would include certain provisions from the state water bottom lease in the new SUP, such as that relating to the "Escrow Account for Cleanup of Aquaculture Leases." This will ensure that certain provisions relating to DBOC operations that are currently incorporated into the SUP by reference remain in force. While it would no longer administer a state water bottom lease, CDFG would continue to exercise regulatory authority over DBOC. Thus, CDFG would regulate DBOC's operation with respect to the stocking of aquatic organisms, brood stock acquisition, disease control, importation of aquatic organisms into the state, and the transfer of organisms between water bodies.

Under section 124, if the Secretary decides to issue a new 10-year permit to DBOC, DBOC must pay the United States the fair market value of the federal property permitted to DBOC. A permit under section 124 would encompass the federally owned onshore and offshore areas used by DBOC. By terminating the state water bottom lease, DBOC would avoid any obligation to make lease payments to the state.

OTHER JURISDICTIONS

Several other agencies have jurisdiction over activities taking place within the waters of Drakes Estero and on the uplands where the oyster processing facilities are located, including the California Coastal Commission (CCC); the San Francisco Bay Regional Water Quality Control Board; the California Department of Public Health (CDPH); the U.S. National Marine Fisheries Service (NMFS) Division of the National Oceanic and Atmospheric Administration (NOAA); the U.S. Army Corps of Engineers (USACE); and the U.S. Fish and Wildlife Service (USFWS). Specific agency jurisdictions and their applicability to this project are described in more detail in the "Related Laws, Policies, Plans, and Constraints" section of this chapter.

(emphasis added) (see Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, H.R. 2996, 111th Congress, section 120 [as reported by Senate Committee on Appropriations, July 7, 2009]). This provision was later amended on the Senate floor, and the mandatory language was changed to the current discretionary language (see 155 Congressional Record Section 9769 [September 24, 2009]). The House Conference Report on the final bill summarizes the amendment from the Senate, explaining that it "*modifie[d] language* included by the Senate providing the Secretary *discretion* to issue a special use permit" (emphasis added) (H.R. Report No. 111-316, at 107 [2009] [Conference Report]).

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 will provide 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. Below are the primary laws that are being considered for this analysis.

OTHER PROVISIONS OF SECTION 124

There are two other provisions of section 124 that apply should a new 10-year permit be issued to DBOC. First, section 124 requires that the United States receive annual payments based on the "fair market value" of DBOC's use of the federal property for this new 10-year period. The DOI Office of Valuation Services has conducted an appraisal to determine the fair market rental value of the use of the federal property. By terminating the state water bottom lease, DBOC would avoid any obligation to make lease payments to the state. Second, the terms and conditions of the existing authorizations for DBOC may be modified after considering the recommendations of the NAS report. This EIS identifies, where appropriate, possible changes to permit terms.

RELEVANT FEDERAL LAWS AND POLICIES

National Park Service Organic Act

In the NPS Organic Act of 1916 (Organic Act), Congress created the NPS and directed it to manage units of the national park system, "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (16 U.S.C. 1). The 1978 Redwood Amendment reiterates this mandate by stating that the NPS must conduct its actions in a manner that will ensure no "derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress" (16 U.S.C. 1a-1). The legislative history of the Redwood Amendment further clarified that all units of the national park system, whether designated as parks, recreation areas, seashores, or lakeshores, were to be managed to the same high standard unless Congress specifically provided otherwise.

Although the Organic Act and the Redwood Amendment use different wording ("unimpaired" and "derogation") to describe what NPS must avoid, both acts define a single standard for the management of the national park system—not two different standards. For simplicity, NPS *Management Policies 2006* uses "impairment," not both statutory phrases, to refer to that single standard.

Based on its authority under the Organic Act, the NPS has promulgated a series of regulations contained in title 36 of the Code of Federal Regulations (CFR). The provisions in title 36 provide a comprehensive suite of regulations that govern activities within units of the national park system.

Wilderness Act of 1964, Point Reyes Wilderness Act of 1976, and Directors Order 41: Wilderness Preservation and Management

The Wilderness Act establishes the national wilderness preservation system, consisting of federal lands designated by Congress as wilderness. Wilderness is defined as "an area where earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." An area of wilderness is further defined as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation which is protected and managed so as to preserve its natural conditions" (16 U.S.C. 1132).

According to section 4(c) of the Wilderness Act, there shall be no commercial enterprise and no permanent road within any wilderness area and, except as necessary to meet minimum requirements for the administration of the area (including measures required in emergencies involving the health and safety of people within the area), there shall be no temporary road; no use of motor vehicles, motorized equipment, or motorboats; no landing of aircraft; no other form of mechanical transport; and no structure or installation within any such area.

In the Point Reyes Wilderness Act of 1976, Congress designated the waters within Drakes Estero (approximately 1,363 acres within the project area) as "potential wilderness." Drakes Estero was designated as potential wilderness rather than full wilderness due to the presence of the commercial oyster operation, a nonconforming use. The House Committee Report accompanying the 1976 Point Reyes Wilderness Act states: "As is well established, it is the intention that those . . . 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. Rep. No. 94-1680 [1976]).

In 2004, the Solicitor's Office issued an opinion interpreting the 1976 Point Reyes Wilderness Act. Based on the language of the law and its legislative history, the opinion concluded that NPS was mandated to convert the potential wilderness in Drakes Estero to full wilderness as soon as the nonconforming use could be eliminated. The oyster operation in Drakes Estero was dependent on the 40-year RUO that Charles Johnson had retained when he sold his 5-acre parcel to the NPS in 1972. The RUO expires on November 30, 2012, making this date the earliest date on which the nonconforming use would cease. In order to affect Congress's intent that Drakes Estero be converted to full wilderness, the Solicitor's Office advised the NPS that it lacked discretion to allow the oyster operation to continue beyond November 30, 2012.

Section 124 now gives the Secretary the discretion to issue a 10 year permit notwithstanding the 1976 Point Reyes Wilderness Act.

Endangered Species Act

Under section 7 of the Endangered Species Act of 1973, as amended, the NPS is required to coordinate with the USFWS and NMFS to ensure that its actions affecting federally listed species do not jeopardize their continued existence or result in the destruction or adverse modification of their critical habitat. Consultation is required whenever such species or habitat may be affected by a proposed project. Through the consultation process, the agencies develop a biological opinion setting forth their assessment of the impact of the project on listed species and on any critical habitat that may exist within the area of effect. The biological opinion may contain conservation recommendations and reasonable and prudent measures for the agency or applicant to follow.

Several federally designated threatened and endangered species and/or their critical habitat exist in the project area. As described in the special status species section of this EIS, NPS has determined that some of the actions proposed in this EIS have the potential to impact these listed species and/or their critical habitat. In order to fully understand the possible effects of the actions proposed in this EIS on listed species and their critical habitat, the NPS has initiated consultation with the USFWS and NMFS.

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) of 1918 implements several treaties protecting birds that migrate across national borders. MBTA makes it unlawful to take, possess, or sell protected species, or any product or parts thereof (eggs, nests, feathers, plumes, etc.), except as permitted by the Secretary. Take is defined as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or any attempt to carry out these activities." It does not necessarily include destruction or alteration of habitat, unless there is a direct taking of birds, nests, eggs, or other such parts. All waterfowl, shorebirds, hawks, owls, eagles, native doves and pigeons, swifts, common native songbirds, and other species are protected under the act. A complete list of protected species is found at 50 CFR 10.13. Several species of migratory birds, such as the brant goose, have been identified within the project area.

NPS Management Policies 2006

NPS *Management Policies 2006* (NPS 2006d) sets the framework and provides the direction for actions of the NPS. Adherence to policies is mandatory unless allowed by enabling legislation, or waived or modified by the Secretary, Assistant Secretary, or the Director, or if a law directly and specifically directs an action contrary to NPS policy. *Management Policies 2006* also contains guidance applicable to the alternatives contained in this document.

This EIS assesses the effects of the alternatives on park resources and values and provides information used in determining if these effects would cause impairment or unacceptable impacts. NPS *Management Policies 2006* require an analysis of potential effects to determine whether or not actions would impair park resources (NPS 2006d). To assess the impacts of the proposed action, policies relating to resource protection were considered during EIS preparation, including biological resource management (4.4), native plants and animals (section 4.4.2), water quality (section 4.6.3), floodplains (section 4.6.4), wetlands (section 4.6.5), protection of geologic processes (section 4.8.1), soundscape management

(section 4.9), protection and preservation of cultural resources (section 5.3.1), treatment of cultural resources (section 5.3.5), wilderness resource management (section 6.3), and wilderness use management (section 6.4). For example, NPS *Management Policies 2006* instructs park units to maintain, as parts of the natural ecosystems of parks, all plants and animals native to the park ecosystems, in part by minimizing human impacts on native plants, animals, populations, communities, and ecosystems, and the processes that sustain them (NPS 2006d, section 4.4.1). NPS *Management Policies 2006* direct park units to determine all management actions for the protection and perpetuation of federally, state-, or locally listed species through the park management planning process, and to include consultation with lead federal and state agencies as appropriate.

NPS *Management Policies 2006*, section 1.4.7.1 also apply a standard that avoids impacts it determines to be unacceptable. Managers must not allow uses that would cause unacceptable impacts, such as those which "impede the attainment of a park's desired future condition for natural and cultural resources." Furthermore, section 1.4.3.1 of NPS *Management Policies 2006* gives park managers the authority to manage and regulate uses to ensure that impacts from the uses are acceptable (NPS 2006d).

Potential wilderness is congressionally designated and the management policies starting with 6.3 and beyond address management of designated wilderness. Pursuant to NPS *Management Policies 2006* section 6.3.1, the NPS will take no action to diminish potential wilderness qualities and will ensure that potential wilderness is "managed as wilderness to the extent that existing nonconforming conditions allow." Section 6.3.1 also directs the NPS to "apply the principles of civic engagement and cooperative conservation as it determines the most appropriate means of removing the temporary, nonconforming conditions that preclude wilderness designation from potential wilderness. All management decisions affecting wilderness will further apply the concept of 'minimum requirement' for the administration of the area regardless of wilderness category" (NPS 2006d, section 6.3.1).

National Historic Preservation Act

The NHPA, as amended, is legislation intended to preserve historical and archaeological sites. The act created the National Register of Historic Places, the list of National Historic Landmarks, and the State Historic Preservation Offices (SHPO). Under Section 106 of the NHPA and implementing regulations 36 CFR 800, federal agencies must take into account the effects of their undertakings on significant historic properties and afford SHPO and the Advisory Council on Historic Preservation an opportunity to comment as appropriate. The agency must seek ways to avoid, minimize or mitigate any adverse effects on historic properties. Historic properties include districts, sites (both historic and prehistoric), buildings, structures, and objects that are included in or eligible for inclusion in the National Register. For a discussion of NHPA applicability to this EIS, see the "Cultural Resources" section above under "Issues and Impact Topics Considered but Dismissed."

Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) of 1972 establishes a national policy to prevent marine mammal populations from declining and to protect marine mammals. Under MMPA, the Secretary of Commerce has the responsibility to protect cetaceans (whales, porpoises, and dolphins) and pinnipeds

(seals and sea lions) except walruses. Section 101(a)(5)(A–D) of MMPA prohibits, with certain exceptions, the taking of marine mammals in the waters of the United States and on the high seas. Congress defines "take" as "harass, hunt, capture, or attempt to harass, hunt, capture or kill any marine mammal." In 1986, Congress amended MMPA to authorize takings of depleted stocks of marine mammals, again provided that the number of mammals taken (killed, injured, or harassed) was small and the taking had a negligible impact on marine mammals. In 1994, MMPA section 101(a)(5) was further amended to establish an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by "harassment" pursuant to Incidental Harassment Authorizations. The term harassment means, "any act of pursuit, torment, or annoyance that (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb…by causing disruption of behavioral patterns, including but not limited to migration, breathing, nursing, breeding, feeding, or shelter" (16 U.S.C.1362[18]).

Coastal Zone Management Act

Congress passed the Coastal Zone Management Act (CZMA) in 1972 to "preserve, protect, develop, and where possible, restore and enhance the resources of the nation's coastal zone." The act encourages coastal states to develop and implement comprehensive programs to manage and balance competing coastal resource uses (e.g., balancing resource protection with economic growth and development). CZMA allows states with approved plans to review federal actions that have a reasonably foreseeable effect on any land or water use or natural resources of the state's coastal zone. The CZMA provides states with the ability to review federal activities and federally permitted activities, and ensure that such activities are consistent, to the maximum extent practicable, with their coastal zone management plans. The processes used to implement this requirement are called "consistency determinations" and "consistency certifications." If a proposed action is inconsistent with the requirements of the state's approved program, the applicant and federal agency are prohibited from conducting the activity unless certain significant additional procedures are followed.

The NOAA Office of Ocean and Coastal Resource Management (OCRM) oversees the state implementation of CZMA. At the state level, CCC implements the CZMA as it applies to federal activities, development projects, permits, and licenses within the project area. CZMA consistency certifications are reviewed in accordance with the California Coastal Act and the state's coastal plan. CCC made a request to NOAA-OCRM to review the new DBOC SUP application. NOAA-OCRM granted the request because it determined that the activity had the potential to have a "foreseeable effect" on coastal resources (NOAA-OCRM 2011b). Furthermore, NOAA-OCRM determined that DBOC must prepare and submit to CCC a certification that the activities undertaken will be conducted in a consistent fashion with the federally approved enforceable policies of the California Coastal Management Program. This would include submission of necessary data and information, as required by 15 CFR 930.58. Within their letter to CCC, NOAA-OCRM stated that NPS may not issue an SUP until CCC concurs with the consistency certification or that concurrence is presumed based on a lack of response within regulated timeframes (NOAA-OCRM 2011b).

Clean Water Act

The Clean Water Act of 1972 (33 U.S.C. 1344 et seq.), as amended, is the primary federal law in the United States governing water integrity. The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's water." Waters of the United States generally include tidal waters, lakes, ponds, rivers, streams (including intermittent streams), and wetlands.

Section 404 of the CWA authorizes USACE to issue permits to project applicants for the "discharge of dredged and/or fill material in waters of the U.S." and is the primary federal authority for the protection of wetlands. USACE jurisdiction for waters of the United States is based on the definitions and limits contained in 33 CFR 328, which encompasses all navigable waters, their tributaries, and adjacent wetlands, and includes ocean waters within 3 nautical miles of the coastline. Projects involving the discharge of dredged and/or fill material into waters of the United States require authorization from USACE.

Under section 404, USACE has established a nationwide permit (USACE 2007) for existing commercial shellfish aquaculture operations that "authorizes the installation of structures necessary for the continued operation" as well as "discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities." However, the nationwide permit does not apply to new operations or expansions; to cultivation of additional species; to the construction of attendant features such as docks, piers, boat ramps, stockpiles, or staging areas; or to the deposition of shell material into the water as waste (USACE 2007). The purpose of this nationwide permit is to reduce permitting timeframes and simplify continued operation of existing shellfish mariculture projects. State and local authorities may require a separate certification or waiver for authorization of continued operations. It is possible, however, that DBOC would be considered a "new operation" for purposes of permitting, as DBOC does not have an existing permit.

Projects resulting in discharges of dredged or fill material into waters of the United States must comply with the guidelines promulgated by the Administrator of the Environmental Protection Agency (EPA) under section 404(b) of the CWA (33 U.S.C. 1344[b]). Under these guidelines, USACE may only permit discharges of dredged or fill material into waters of the United States that represent the least environmentally damaging practicable alternative, provided that the alternative does not have other significant adverse environmental consequences. Practical alternatives must be presented and evaluated during the permit process so USACE can determine which alternative will have a less adverse impact on aquatic ecosystems. On November 16, 2010, USACE stated that "aquaculture activities are within our jurisdiction and a permit is required" (USACE 2010, see relevant correspondence in appendix D). USACE also reiterated the need for DBOC to obtain a permit for impacts on waters of the U.S., including wetlands, vegetated shallows, and open waters pursuant to section 404 of the CWA in their comment letter on the Draft EIS (USACE 2011a, see relevant correspondence in appendix D). It would be the responsibility of DBOC to obtain all relevant permits.

Section 401 of the CWA requires that any applicant for a section 404 permit also obtain a water quality certification from the state. The purpose of the certification is to confirm that the discharge of fill materials will comply with the state's applicable water quality standards. Section 401 gives the authority to the State of California either to concur with USACE approval of a section 404 permit or to place special conditions on the approval, or deny the activity by not issuing a 401 certification. States were granted this authority to ensure that federally approved projects are in the best interests of the state. The

section 404 permit is not valid without a section 401 certification or waiver of the certification by the state. The 401 certification also applies to any application for a federal license or permit that might result in discharge of any type, including gray-water disposal, into waters of the United States. Section 401 certifications are issued by the San Francisco Bay Regional Water Quality Control Board.

Routine operations associated with DBOC commercial shellfish operations, such as the placement of oyster racks on the floor of Drakes Estero, placement of culture bags near the surface, and discharge of wash from the operations into Drakes Estero, may require both a section 404 permit and section 401 certification. DBOC also proposes to dredge the area around the boat ramp. Section 124 of PL 111-88 does not relieve DBOC of its obligations to comply with the Clean Water Act.

Rivers and Harbors Act

Section 10 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. 403 et seq.) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. This section provides that the construction of any structure in or over any navigable water of the United States, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of such waters, is unlawful unless the work is approved by USACE. On November 16, 2010, USACE stated that, "aquaculture activities are within our jurisdiction and a permit is required" (USACE 2010, see relevant correspondence in appendix D). USACE also reiterated the need for DBOC to obtain a permit for impacts on waters of the U.S., including wetlands, vegetated shallows, and open waters pursuant to section 10 of the Rivers and Harbors Act in their comment letter on the Draft EIS (USACE 2011a, see relevant correspondence in appendix D). The Rivers and Harbors Act also requires section 401 certification from the state (as described above). It would be the responsibility of DBOC to obtain all relevant permits.

RELEVANT STATE LAWS AND POLICIES

California Coastal Act

This state law regulates all state and private actions affecting the California coastal zone. As discussed above, CCC is the state agency responsible for CZMA determinations. The regulatory authority also extends to federal actions affecting the coastal zone, as the California Coastal Act is part of the NOAA-approved California Coastal Management Program under the CZMA. The California Coastal Act addresses issues such as shoreline public access and recreation, lower cost visitor accommodations, terrestrial and marine habitat protection, visual resources, landform alteration, agricultural lands, commercial fisheries, industrial uses, water quality, offshore oil and gas development, transportation, development design, power plants, ports, and public works.

The California Coastal Act also imposes obligations on entities that conduct commercial businesses in the state's coastal zone. DBOC's commercial shellfish operation is located in the state coastal zone and is thus subject to CCC oversight and permitting requirements. CCC has issued two Cease and Desist Orders regarding the shellfish operation, one in 2003 to JOC and one in 2007 to DBOC (CCC 2003, 2007b). The 2003 Cease and Desist Order (No. CCC-03-CD-12) to JOC required the removal of some unpermitted development from the property (the shucking room and the retail counter, two houses, and two of the four

lands, but the state did not retain the right to issue aquaculture leases. The state also retained, on behalf of the people, the right to fish. However, as explained earlier in this chapter, the right to fish does not encompass commercial aquaculture like that practiced by DBOC.

Although the leasing provisions of the Fish and Game Code do not apply to DBOC, other provisions of the code do apply. These include provisions related to stocking of aquatic organisms (sections 15200-15202), brood stock acquisition (sections 15300-15301), disease control (sections 15500-15516), aquaculture registration for all operators (sections 15100-15105), and the importation of aquatic animals (sections 15600-15605). CDFG coordinates disease and health certification for shellfish with other agencies. Section 124 of PL 111-88 does not relieve DBOC of its obligations to comply with these state law requirements.

California Marine Life Protection Act

This state law directs the reevaluation and redesign of California's system of marine protected areas (MPAs) to increase coherence and effectiveness in protecting the state's marine life and habitats, marine ecosystems, and marine natural heritage, as well as to improve recreational, educational, and study opportunities provided by marine ecosystems subject to minimal human disturbance. The establishment of a combination of state marine reserves, state marine conservation areas, and state marine parks helps achieve these goals. The Marine Life Protection Act (MLPA) also requires that the best readily available science be used in the redesign process, as well as the advice and assistance of scientists, resource managers, experts, stakeholders, and members of the public. This process was recently completed for the North Central Coast Study Region, including the Seashore, and resulted in the designation of MPAs within and adjacent to Drakes Estero. Point Reyes Headlands to the west of the project area and Estero de Limantour to the southeast have been designated as state marine reserves where the take of all living marine resources is prohibited. Drakes Estero is identified as a state marine conservation area where take of all living marine resources is prohibited, except for (1) recreational take of clams and (2) commercial aquaculture of shellfish pursuant to a valid state water bottom lease and permit. The Fish and Game Code definition of take is "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." This is slightly different than the definition used by the MMPA (see the section entitled "Marine Mammal Protection Act"). Due to the proximity of the proposed action to the MPAs, the MLPA was considered during preparation of this EIS.

Section 124 of PL 111-88 does not relieve DBOC of its obligations to comply with the California Marine Life Protection Act.

California Health and Safety Code and Other State Requirements

Shellfish cultivated under the provisions of an aquaculture registration may only be grown, processed, and marketed for human consumption under the California Health and Safety Code and other California statutes and regulations, including the California Shellfish Law (California Health and Safety Code sections 28500-28519.5) and Shellfish Regulations (California Code Regulations 17 sections 7706–7761). Section 124 of PL 111-88 does not relieve DBOC of its obligations to comply with these state law requirements. The public health code requirements are monitored and enforced by the California Department of Public Health.

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

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

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

EXHIBIT 2

STATE OF CALIFORNIA
Edmund G. Brown Jr., Governor

Fish and Game Commission

Sonke Mastrup, Executive Director
1416 Ninth Street, Room 1320
Sacramento, CA 95814
(916) 653-4899
(916) 653-5040 Fax
www.fgc.ca.gov

July 11, 2012

Secretary Salazar
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Secretary Salazar:

Subject: Drakes Bay Oyster Company

The California Fish and Game Commission, at its May 23, 2012 meeting, requested a letter be sent to interested parties regarding its position on the continued operation of Drakes Bay Oyster farm in Drakes Estero. To that end, let it be known that:

The Commission, in the proper exercise of its jurisdiction, supports and continues to support the agricultural business of aquaculture, and to that end, has clearly authorized the shellfish cultivation in Drakes Estero through at least 2029 through the lease granted to Drakes Bay Oyster Company. The Commission will continue to regulate and manage oyster aquaculture in Drakes Estero pursuant to state law. In this context, the Commission expresses its desire that the cultivation of oysters in Drakes Estero be recognized by the National Park Service as a valuable resource to the public and to the economy within the Point Reyes National Seashore. The Commission respectfully requests that, to the degree possible and consistent with the National Park Service's obligations to carry out federal law in cooperation with the State of California, the National Park Service grant the Drakes Bay Oyster Company all necessary onshore permits to continue shellfish cultivation operations within and in accordance with the Commission water bottom lease granted to that Company.

Sincerely,

Sonke Mastrup
Executive Director

cc: Senator Dianne Feinstein
One Post Street, Suite 2450
San Francisco, CA 94104

California Governor Edmund Brown Jr.
California State Capitol
State Capitol
Sacramento, CA 95814

Secretary John Laird
California Natural Resources Agency
1416 Ninth Street, 13th Floor
Sacramento, CA 95814

Superintendent Cicely Muldoon
Brannon Ketcham, Hydrologist
National Park Service
Point Reyes National Seashore
1 Bear Valley Road
Point Reyes Station, CA 94956

Chuck Bonham, Director
Department of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

EXHIBIT 3

Declaration of William T. Bagley as follows:

For the purpose of some credibility, my educational and professional background includes: 1949 graduate of the University of California – Phi Beta Kappa and Class Valedictorian; UC Boalt Hall Law School – Board of Editors, California Law Review, 1952; law practice 59 years, admitted to practice before the United States Supreme Court. Public offices, among others: Assemblyman, Marin and Sonoma counties, 1961-1974; First Chairman, Commodity Futures Trading Commission, Washington, DC, 1975-79; Member, California Public Utilities Commission, 1983-1986; Member and then Chairman, California Transportation Commission, 1983-1989; Member, UC Board of Regents, 1989-2002.

Recently my daughter Lynn Bagley, who started the Farmers Market movement in Marin County, reminded me of the fact that I authored Assembly Bill 1024 in 1965. Thus I called the UC Berkeley Bancroft Library, where approximately 500 of my 14 years of authored statutes and related files are stored, and received a packet of AB 1024 materials.

As the local Assemblyman, I received a request, dated January 4, 1965, from the Point Reyes National Seashore asking that I introduce legislation granting State-owned tidelands surrounding Seashore properties to the National Park Service. The request made no mention of fishing rights.

Since I was raised in West Marin (Woodacre) and had hunted brant (a small goose) in Limantour Bay, fought rural fires for the Marin County Fire Department as summer employment to pay for college (1945-1952), I knew of the existing oyster propagation and fishery in Drake's estuary. I was acquainted with oysterman Charlie

Johnson and his wife who he had brought back from Japan after the war. He was my constituent and ran an important local enterprise. I certainly would not have done anything to jeopardize his oyster fishing operations as his Assemblyman and as his friend and constituent representative.

In 1965, the legislature met in General Session every other year – sessions limited to 180 legislative days, members had no individual professional staff, just one secretary during the session. (There were no caucus staffs telling members "how to vote" and no partisan aisles.) Without personal staff, it was my practice to personally visit Legislative Counsel's office to deliver bill requests and discuss drafting. I have no present recollection of those discussions, but when the draft bill was delivered to me for introduction (across the Assembly desk), it reserved the "absolute right to fish." When I noted this provision (constitutionally required), I believed that the oyster operation was thus included and preserved, especially since I had earlier authored and passed AB 767 as requested by the Department of Fish and Game. AB 767 made many administrative changes regarding planting and propagation, but one major provision was to specify that "shellfish" included "oysters" and to expand "fish" to include all shellfish, not just oysters. To me and to the entire legislature, AB 767 included oyster propagation and stated that allotments must be "in the public interest", a finding to be made only by the Commission. AB 767 was signed by the Governor on July 12, 1965, three days after the signing of AB 1024. Further, and most relevantly in 1965, there existed on-going allotments and a lease or license, all having been granted by the Commission to Charlie Johnson.

All of the above was confirmed by the Department of Fish and Game Director's letter of October 22 – two weeks after these bills became effective. The Department wrote to the Seashore, to me and to Johnson: "[t]hat all State laws and regulations pertaining to shellfish cultivation (including planting requirements, land rentals, etc.) remain in effect since the conveyance by the Legislature reserves fishing rights to the State." This memorandum followed a September 30, 1965 Attorney General's Opinion (26 Cal. Atty.Gen.Ops. 68) addressed to the Director of the Department, advising that "oysters and shellfish are 'fish'", within the meaning of Fish and Game Code Section 45 . . . and "as such are subject to the prerogative of the sovereign [the State] to protect and preserve them in such a manner and upon such terms as the Legislature deems best . . .". Had these authoritative statements not been issued, I certainly would have taken corrective action to prevent possible damage to the oyster operations in my District. All of this was re-confirmed by the National Park Service in a 1974 environmental review of possible "wilderness" status which described the oyster operation: "This the only oyster farm in the Seashore, control of the lease [called a license at times] from the California Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved by the State on these submerged lands." [1]

Almost 40 years later, from about 2004 forward, other memoranda and opinion pieces began to be issued making claims that the reservation in my AB 1024 only applied to "wild fish" and further that "oysters were not fish." None of those writings, repeated by others within State agencies, makes any reference to any of the above

[1] I did not see this item at the time as there was then no controversy and I was not following this process.

related facts and of the evidence of legislative intent. Interestingly, and in the face of some of those contentions, the Fish and Game Commission continued oyster allotments and issued a new lease/license – in the public interest – in 2004 for a term of 25 years until 2029.

As the relevant National Park Service ostensible deadline year 2012 approaches re the reissuance of its own version of an oyster permit, interest in this matter accelerates. (The "Wilderness Act" is technically not controlling since Senator Dianne Feinstein, by a 2009 amendment, allowed a renewal for 10 to 15 years.) Former Congressman Pete McCloskey (1967-83) became immersed in efforts to determine whether the continuation of the oyster farm in Drake's Estero would endanger the seal population as claimed by the Park Service as the basis for terminating the oyster permit. He had been asked by a neighboring rancher to check into the question. He was acting *pro bono* in this inquiry. It was then I was reminded that it was my AB 1024 that effected the reservation of the "absolute right to fish" which prompted my own *pro bono* research and involvement.

Those who attempt to revise history perhaps did not know of the contemporaneous background facts recited here, and at times have avoided comment on the open public record available. They also avoid any discussion of the State's long-held public policy of fostering oyster culture and retrieval commencing with Fish and Game statutes first enacted in 1851. (See material developed by retired public law attorney Judith Teichman reciting this history and referencing multiple constitutional and statutory materials – also all *pro bono*).

The true meaning of the 1965 reservation of "absolute right to fish" is derived from 1965 legislative action and contemporaneous execution by authorized agencies and not by a much later interpretation by those never involved in and not aware of the 1965 process. What was reserved in 1965 was and is the extant of rights as they existed in 1965 – related in detail above. Subsequent references to "aquaculture" and other such descriptions by some State authorities in the late 2000 decade may be true today but are irrelevant to what was in fact and law reserved in 1965. Most recently one of those State commentators stated in a media interview that, "You have to look at the ink on the page. It is difficult to come to any other conclusion than this Tideland belongs to the United States." This, however, was uttered before any review of this declaration and all of the contemporaneous ink cited above.

As set forth in *Martin v. Szeto*, 32 Cal.4th 445 (2004) – headnote:

> "When statutory text is ambiguous, or it otherwise fails to resolve the question of its intended meaning, the Court looks to the statutes legislative history and the historical circumstances behind its enactment. Finally, the Court may consider the likely effects of a proposed interpretation because, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation." [emphasis added]

That consequence would be the complete obliteration of the rights reserved by the Legislature meant to encompass existing rights then extant and then described when the Legislature acted. I will leave it to others to fully brief this subject if necessary, but here add words to describe California's rules when interpreting legislative tideland grants. These seem to be broader and more result-oriented than those applied to ordinary statutes. *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983) at

437-438 quotes favorably from *People v. California Fish Co.*, 166 Cal. 576, a case involving the grant of tidelands, stating:

> "The court first set out principles to govern the interpretation of statutes conveying that property: '[S]tatutes purporting to authorize an abandonment of ... public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.'"

While an absolutist would argue that the Drake's oyster operation's "absolute right" exists independent of any Seashore restraints, I am not such an absolutist. A both legal and practical conclusion would and should be a State accommodation to effect the 2009 Congressional action sponsored by Senator Dianne Feinstein – to allow renewal of National Park Services processes leading at least to a continuation of the contested use pursuant to that enactment. To reconfirm again, all of the above, I enclose and attach this letter of March 14, 1966 from the Department of Fish and Game to the Seashore and the Seashore's reply of March 25 totally agreeing with the Department.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Prepared this 1st day of August, 2011 – to be signed later.

Signed this 2nd day of August, 2011 in San Rafael, California.

William T. Bagley

March 14, 1966

Mr. Leslie P. Arnberger, Superintendent
Point Reyes National Seashore
Point Reyes, California 94956

Dear Mr. Arnberger:

Thank you for your recent letter requesting advice on regulation of the Johnson Oyster Company now within the bounds of Point Reyes National Seashore.

Upon reviewing this matter it becomes apparent that the legislation transferring the submerged lands at Point Reyes to the Federal Government specifically reserved the fishing rights to the State. (AB 1024 (Bagley) Ch. 983, Stats. of 1965).

It thus appears that all State laws and regulations pertaining to shellfish cultivation remain in effect and are applicable to the operations of Johnson Oyster Company. This would include annual rental, privilege taxes, planting requirements, etc. - in short all current sections of the Fish and Game Code, and of Title 14, California Administrative Code, which relate to shellfish cultivation.

We will appreciate your interpretation of this legislation and suggest that, if differences in opinion do exist, you so advise us and that a discussion be arranged between representatives of our agencies.

As you request, we are including copies of the maps and complete descriptions of shellfish allotments numbers 2 and 72 which are now held by the Johnson Oyster Company.

Sincerely,

← Robert L. Jones
Dep. Dir.
Dept Fish & Game

Director

cc Mr. Johnson
Assemblyman Bagley
Mr. Edgerton
Mr. Savage
Mr. Ralph Scott
Region 3
MRO

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
POINT REYES NATIONAL SEASHORE
Point Reyes, California 94956

NATIONAL PARK SERVICE 1916 1966 50TH ANNIVERSARY

IN REPLY REFER TO:
L1425

March 25, 1966

MAR 29 1966

Mr. Robert L. Jones, Deputy Director
Department of Fish and Game
1416 Ninth Street
Sacramento, California 95814

Dear Mr. Jones:

Thank you for your letter of March 14, in regard to the Johnson Oyster Company. This office is quite agreeable with the interpretation your department has placed upon the legislation transferring the submerged lands at Point Reyes to the Federal Government. I have discussed the matter with Mr. Charles Johnson, and this is in accord with his understanding also. Accordingly the Johnson Oyster Company will continue operation under appropriate sections of California Fish and Game Code as in the past.

Copies of this exchange of correspondence are being provided to our Regional Office for their review. Should their conclusion be different from that stated above, I will notify you promptly.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Leslie P. Arnberger
Superintendent

MAR 29 1966

17

CORRESPONDENCE ID: 51240

NOSSAMAN LLP

ATTORNEYS AT LAW

50 California Street
34th Floor
San Francisco, CA 94111
T 415.398.3600
F 415.398.2438

William T. Bagley
wbagley@nossaman.com

Refer To File #: 111111-2222

I submit the item below to follow up on my December 5 submission entitled "New Legal Issue". The Marin I-J will print this as a column this week.

William T. Bagley

December 5, 2011

Brad Breithaupt
Editor
Marin Independent-Journal
P. O. Box 6150
Novato, CA 94949

Brad:

The current "wilderness" controversy over long-time oyster production in Drake's Estero including factual misrepresentations by some opponents may all be rendered irrelevant by simple legal rules of statutory interpretation. Thus, I retrieved records from UC Berkeley's Bancroft Library which contain 475 of my authored and signed bills.

My 1965 Assembly Bill 1024 deeded State-owned Point Reyes tidelands to the National Park Service but reserved, as required by State Public Trust law, the people's "right to fish" in these waters. My AB 767, requested by the Department of Fish and Game, had earlier amended various statutes and specified the word "fish" included "oysters and other shellfish." An Attorney General opinion also confirmed that oysters were "fish", dated September 30, 1965.

There then existed a Fish and Game Commission Estero Oyster Allotment lease to which all of this was and is applicable. The current State lease expires in 2029; lease and license fees are paid to the State annually by the lessee.

The law and rules of contemporaneous interpretation and implementation trump any future claims, by the Federal government or any others, that would change history or alter the vested property rights of the State of California. In specific reference to the Estero lease, after the issuance of the Attorney General's opinion and two weeks after these bills became law, dispositive contemporaneous execution of the statute occurred. Thus, the rights of the State under the 1965 legislative grant were then established in law, just as with any other grant of

land establishing boundary lines or reserving usage rights to the grantor – obviously with access to those rights. Again, future federal claims have no relevancy.

My files contain an October 22, 1965 letter from the Director of the Department of Fish and Game to the Superintendent of the Point Reyes Seashore stating that since AB 1024 "reserved fishing rights to the State, [it] appears all State laws and regulations pertaining to shellfish cultivation remain in effect [and thus] are applicable to the Johnson Oyster Company." The letter requested a response. On March 25, 1966 Superintendent Arnberger responded: "This office is quite agreeable with [your] interpretation [and] should [the Regional office] conclusion be different, I will notify you promptly." There is no such notification.

All of this was confirmed by the National Park Service in a 1974 environmental review of possible wilderness status: "This is the only oyster farm in the Seashore, control of the lease, called a license at times, from the California Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved by the State."

California appellate courts have been clear regarding statutes conveying public rights to others, to prevent the abandonment of the State's constitutional ownership of public trust properties – and thus the right to lease the fishing rights so reserved. It is clear that the State, and not the federal government, owns the fishing rights in Drake's Estero and thus the right to lease and license their usage in perpetuity. Folks who wish to change history or legal rights should not try to do so while the author is still alive. Simply stated, California cannot give up its Public Trust properties including its rights, protected by the State Constitution, to control fishing rights in the Estero.

I was raised in West Marin in the '30s, hunted Brant geese in the Estero, and I know and love the area but I am not an absolutist. Rather than insist on perpetual rights, a most reasonable accommodation would and should be to effect the 2009 Congressional action sponsored by our Senator Dianne Feinstein to allow continuation of this contested usage for 10 more years. The State's rights and the rights of its lessee can accommodate to that practical resolution. End of controversy.

Bill

Bill Bagley

WTB/jw

264670_1.DOC

EXHIBIT 4

against a winning score are greatly increased. The machines are unquestionably gambling slot machines and come within the prohibition of the code sections above mentioned, which makes their mere possession a misdemeanor.

"The engineers who examined and tested the machines are prepared to testify to their findings and conclusions and are available as expert witnesses. Their names and addresses will be sent upon request."

In our opinion the machines in question are prohibited by the Penal Code sections above mentioned.

Opinion No. 50-215—February 20, 1951

SUBJECT: FISH AND GAME COMMISSION created under Art. IV, section 25½ of Constitution is the only agency to which the Legislature may delegate power to administer the Division of Fish and Game.

Requested by: ASSEMBLYMAN, FIFTIETH DISTRICT.

Opinion by: EDMUND G. BROWN, Attorney General.
Ralph W. Scott, Deputy.

The Assemblyman from the Fiftieth District has presented the following question:

"In view of Article 4, Section 25½ of the Constitution does the Legislature have authority to delegate to any person or agency other than the Fish and Game Commission power to administer the Division of Fish and Game?"

The conclusions reached are summarized as follows:

The Legislature does not have authority to delegate the power to administer the Division of Fish and Game to any person or agency other than the Fish and Game Commission established by the Constitution.

ANALYSIS

For many years prior to November of 1940 the Fish and Game Commission was a statutory agency of the State, having been created by an Act of the Legislature and charged with the administration of the Division of Fish and Game (section 373e, Political Code; section 10, Fish and Game Code as enacted by Stats. 1933, Chap. 73).

The power of the Legislature during those years to set up such an agency and to prescribe its functions and duties is beyond challenge, since the Legislature is invested with the legislative power of the State, except as otherwise reserved, pursuant to Article IV of the Constitution. Moreover, it is well established that all powers of government, which are not otherwise allocated by the Constitution, are left to the disposal of the Legislature. In other words, the Legislature has plenary legislative power, except as limited or restrained by express words of the Constitution or by necessary implication (*Jensen* v. *McCullough,* 94 Cal. App. 382;

Mitchell v. *Winnek,* 117 Cal. 520; *Macmillan* v. *Clarke,* 184 Cal. 491). The pertinency of these rules of law appears later in this discussion.

The statutory Commission continued to function as administrator of the Division of Fish and Game until the appointment and confirmation of a new Commission of five members created in November of 1940 when the electors of California adopted Assembly Constitutional Amendment No. 45 (Op. NS 3165 and Op. NS 3245). This amendment modified and enlarged section 25½, Article IV of the Constitution to read in part as follows:

> "The legislature *may* provide for the division of the state into fish and game districts and *may* enact such laws for the protection of fish and game in such districts or parts thereof as it may deem appropriate.
>
> "There *shall* be a Fish and Game Commission of five members appointed by the Governor, subject to confirmation by the Senate, with a term of office of six years . . . The legislature *may* delegate to the commission such powers relating to the protection, propagation and preservation of fish and game as the legislature sees fit . . ." (Italics added).

Two of the salient features of the amendment are that a constitutional Fish and Game Commission was established for the first time in the history of California and that that Commission is the *only* agency upon which powers relating to fish and game may be conferred by the Legislature pursuant to the amendment. No other board, body, commission or officer is mentioned. This omission gives rise to the possible application of the doctrine *expressio unius est exclusio alterius,* namely, that the expression of one thing necessarily excludes others not mentioned. In construing a constitution resort may be had to this well recognized rule (*Wheeler* v. *Herbert,* 152 Cal. 224) provided, of course, that its application does not violate or modify the underlying intent of the law making power, in this case, the voters (cf. *Gibson* v. *Civil Service Commission,* 27 Cal. App. 396; 16 C. J. S. 62).

This doctrine (*expressio unius* etc.) has been invoked in aid of constitutional construction on many occasions in California and a few examples will serve to illustrate its proper application. The *Wheeler* case, supra, construed section 6, Article IV of the California Constitution as a limitation on the power of the Legislature to form new senatorial and assembly districts but once during the period between one U. S. census and the following census. The maxim was also applied in *In re Werner,* 129 Cal. 567, it being held that the Legislature could not invest a public corporation such as a sanitary district with the police powers conferred only on municipalities by Article XI of the Constitution. In *Speer* v. *Baker,* 120 Cal. 370, it was held that the Legislature could not extend the privilege of suffrage to those not mentioned in section 1, Article II. *People* v. *Wells,* 2 Cal. 198, held that the Supreme Court, consisting of "a Chief Justice and two Associate Justices" precluded the possibility of there being any more than three members of that court. In *People* v. *Whitman,* 10 Cal. 38, it was held that the enumeration in the Constitution of events constituting a vacancy in the office of the Governor excluded all other causes of vacancy. And, in *Martello* v. *Superior Court,* 202 Cal. 400, it was held that the amendment to section 8, Article VI of the Constitution prescribing only three methods of investment of judicial authority, namely, by election, appointment and

assignment, precluded such investment by stipulation under the *expressio* rule. Quoting from Lewis' Sutherland on Statutory Construction 2d ed., vol. 1, sec. 249, the court said:

> "In the grants (of powers) and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode . . . Affirmative words may and often do imply a negative, not only of what is not affirmed, but of what has been previously affirmed, and as strongly as if expressed. An affirmative enactment of a new rule implies a negative of whatever is not included, or is different; and if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. . . ."

Many other cases might be cited, but a review of the foregoing decisions satisfies us that the doctrine *expressio unius est exclusio alterius* should be invoked here because the Fish and Game Commission is the *only* agency mentioned in section 25½, Article IV, of the Constitution, as amended by the electorate, upon which "powers relating to the protection, propagation and preservation of fish and game" may be conferred. Hence, it follows that the Legislature has no authority to delegate such "powers" to any other officer, board, commission or body of its own creation, *in so far as section 25½ is concerned.* "Powers relating to the protection, propagation and preservation of fish and game" are all embracing and necessarily include the power to administer (section 3536, Civil Code; *In re Opinion to the Governor,* 178 Atl. 433, 55 R.I. 56). If, then, section 25½ limits the power of the Legislature in the foregoing respect, does it have authority to delegate such "powers" to others, by virtue of its inherent right to legislate or under any *other* section or article of the Constitution? This question warrants a negative answer for the following reasons:

As pointed out hereinabove, the Legislature has plenary legislative power, except as reserved or restricted by the Constitution, and as said *In re Madera Irrigation District,* 92 Cal. 296 at page 308 "it is incumbent upon anyone who will challenge an act of the Legislature as being invalid to show, either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the Constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the Legislature. . . ." In other words, the question is whether the amendment to section 25½, adopted by the people in 1940, expressly or by necessary implication limits the power of the Legislature, with respect to the "particular subject-matter" of fish and game.

It has been consistently held that a special constitutional enactment on a specific subject must control general constitutional provisions (*McGuire* v. *Wentworth,* 120 Cal. App. 340, 344; *Martin* v. *Election Commissioners,* 126 Cal. 404; *Key System Transit Co.* v. *Oakland,* 124 Cal. App. 733). Section 25½ itself has been declared by the courts to be special treatment of a specific subject. In the case of *Ex parte Prindle,* 7 Cal. Unrep. 223, 94 Pac. 871, the court said in part at page 873:

"This section (25½, as adopted in 1902) and the other sections of the Constitution relating to the uniform application of the laws and the delegation of police power must be read and construed together; and in such construction the more specific provisions control the general, without regard to their comparative dates. . . . This section 25½ is manifestly a scheme for the regulation and control of a specific subject; and, according to the well-established rules of construction obtaining in relation to statutes, the latter will prevail, and the earlier be held to have been superseded" (citing cases).

Section 25½ is the latest expression of the sovereign power in point of time on matters which are germane to the subject of this discussion. Moreover it is specific. These two phases of the matter leave no doubt that section 25½ has placed a limitation on the power of the Legislature, both under the express power granted by section 1 of Article IV and by virtue of its general inherent power, to delegate authority relating to fish and game affairs. This view is bolstered by reference to *In re Cencinino,* 31 Cal. App. 238 and *Ex parte Prindle,* supra. In the *Cencinino* and *Prindle* cases the court held that the word "may" used in the first paragraph of section 25½ is mandatory and means "shall" or "must." As said in the Cencinino case, the reason for this is because:

"Such interpretation always depends largely if not altogether, on the object sought to be accomplished by the law in which that word is used. It seems to be the uniform rule that, where the purpose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done — then the language, though permissive in form, is peremptory" (pages 241 and 242). Cf. *City of Los Angeles* v. *Board of Supervisors,* 108 Cal. App. 655.

Thus the provisions of the first sentence or paragraph of section 25½ are mandatory notwithstanding the use of the word "may."

Applying the reasoning of the *Cencinino* and *Prindle* cases to the second paragraph of section 25½, it follows that the word "may" is also mandatory and that, whenever powers "relating to the protection, propagation and preservation of fish and game" are to be delegated by the Legislature, they must be delegated to the constitutional Fish and Game Commission. This precludes the idea that the Legislature could delegate such "powers" to others under the inherent right heretofore discussed. Moreover, the *Prindle* case held that the amendment to the Constitution in 1902 by the addition of section 25½ revoked the authority of the Legislature to delegate legislative power to the counties in respect to fish and game under the County Government Act of 1897. If the 1902 amendment thus revoked legislative power in such respect it follows that the 1940 amendment did likewise. In respect to the 1902 amendment the court said (94 Pac. 783):

"We are of the opinion, therefore, that any authority reposing in the Legislature to delegate legislative power to the counties in reference to this subject (fish and game) was revoked by the amendment 25½. . . ."

Intent is always the cardinal rule of interpretation whether it be of a statute, the constitution, or a contract (*Kaiser* v. *Hopkins,* 6 Cal. 2d 537). And in construing section 25½ the subject matter should be considered to ascertain the true meaning (*In re Makings,* 200 Cal. 474, 479).

The object sought by an amendment to the Constitution by the electorate is a highly important factor in ascertaining that intent (*City and County of San Francisco* v. *San Mateo County,* 17 Cal. 2d 814). Therefore the printed arguments submitted to the people at the polls may be considered in construing the Constitution and to ascertain what the electorate intended (*Story v. Richardson,* 186 Cal. 162; *Cudahy Packing Co.* v. *Johnson,* 12 Cal. 2d 583; *McMillan* v. *Simeon,* 36 Cal. App. 2d 721).

Assembly Constitutional Amendment No. 45 appeared as Proposition No. 8 of the proposed amendments to the Constitution, propositions and proposed law submitted to the electors of California on Tuesday, November 5, 1940. The printed argument in favor of the amendment is cogent here because it shows what the electors of California expected to accomplish. This argument reads as follows:

> "It has long been apparent to conservationists, lovers of nature and sportsmen throughout California that definite and immediate action must be taken to revamp the constitutional set-up of our Fish and Game Commission in order to maintain for ourselves, and to pass on to our posterity, an adequate and reasonable supply of wild-life, fish and game. To this end the efforts of practically every conservation, fish and game, sportsmen's and nature loving society in the State has been given and Assembly Constitutional Amendment No. 45 is the result of the collective best efforts of the above mentioned groups to find a solution to this very important problem.
>
> "California is a rapidly growing state and as it grows and develops, demand becomes greater upon our wild-life resources, while the area and natural facilities for the propagation and maintenance of wild-life, fish and game is consistently diminishing. The necessary steps must, therefore, be taken to produce fish and game more abundantly in this restricted area and also at a price which will permit the citizens in every walk of life to continue to enjoy the great outdoor sports which are naturally and characteristically American. This is the primary purpose of the aforesaid Constitutional Amendment.
>
> "This proposition is a modified form of the Model Fish and Game Commission as outlined by the Hawes Committee, appointed by the President of the International Association of Game, Fish and Conservation Commissioners and adopted at their 28th convention in September 1934, and subsequently approved by the American Game Association and the American Fishery Society. It has since been adopted, in a form modified to meet local conditions, by some twenty States of the Union.
>
> "The Hawes Committee consisted of leading conservationists, biologists, fish and game administrators from the entire North American Con-

tinent. Much thought was given by the Committee to the model set-up and this proposition, which is a modified form thereof, is as nearly perfect as possible.

"This proposition will remove the Fish and Game Commissioners from political influence by:

1. Providing a nonsalaried board of five commissioners.
2. Appointment of commissioners for staggered terms so that no one administration can dominate the commission. This avoids a sudden reversal of policy.
3. The Governor's appointment of commissioners are to be confirmed by the Senate which will nullify poor appointments.

"This proposition will give an opportunity to the Division of Fish and Game to manage the wild-life resources of the State on a basis of sound, scientific and factual knowledge by:

1. Allowing Legislature to delegate regulatory powers to the commission so that regulations may be based on scientific knowledge rather than on supposition and hearsay from self-interested pressure groups.
2. Allowing the commission to establish and follow through long term policies and plans for scientific fish and game management.
3. *Allowing the commission to employ and retain thoroughly trained personnel so that the management policies of 'sustained yield without endangering future supply' may be effectively carried through.* (Italics added).

"This is the most progressive fish and game proposition ever offered to the electorate of the State."

One of the arguments against the amendment was that "it might work to the disadvantage of the people" if they became dissatisfied with the administration of any one Governor because they could not change the administration of fish and game affairs as a majority of the constitutional commissioners would remain in office after another Governor took office.

It should also be observed that the argument in favor of the Constitutional Amendment incorporated by reference the "Model Fish and Game Commission as outlined by the Hawes Committee." This refers to the "Model State Game and Fish Administrative Law" prepared at the instance and request of the International Association of Game, Fish and Conservation Commissioners and adopted at their annual meeting in 1934. The model law was widely circulated in California and throughout the United States. The model law provided for a fish and game commission to administer fish and game laws and affairs through a "director," who was given immediate supervision and control of all activity, functions and employees of the game and fish department. It also provided that he be appointed by the model commission for an indefinite term and to serve at its pleasure. His was to be a

non-civil service position. In this respect it should be observed in passing that the present position of the Executive Officer of the Fish and Game Commission is in all respects similar to "director" proposed by the model law of the Hawes Committee. The Executive Officer administers the affairs of the Division of Fish and Game under the direction and supervision of the Commission. He is appointed by and serves at the pleasure of the Commission for an indefinite term. The position does not have civil service status.

The arguments submitted to the electorate in 1940 leave no doubt that it was their intention, in amending section 25½, to leave the constitutional Commission in full control of the execution and enforcement of the laws pertaining to fish and game. While it may be that the Legislature is not required to delegate regulatory powers, such as those contained in sections 14 to 19.6 of the Fish and Game Code, it could not withhold the powers of administration without leaving such public affairs in a chaotic condition (see Opinions NS 3443 and 3165). As said in the latter opinion:

> "Section 10 of said code (Fish and Game) has been superseded by Constitutional Amendment 45, and it would be advisable for the Legislature to enact a new section on the same subject-matter, to conform to the provisions of such constitutional amendment."

In such respects the courts say the Legislature has a mandate from the Constitution and must act (*Hayes* v. *County,* 99 Cal. 74, 80; *Supervisors* v. *United States,* 71 U.S. 436, 18 L. Ed 419; *Ex parte Prindle,* supra; *In re Cencinino,* supra).

In keeping with Opinion NS 3165, section 10 of the Fish and Game Code was amended by the Legislature in 1941 transferring the power to administer the Division of Fish and Game from the old or statutory Fish and Game Commission to the new or constitutional Commission. This amendment to section 10 and the enactment of section 13 of the Fish and Game Code in 1941 (Stats. 1941, chap. 752) specifically refer to the constitutional Commission and such can be construed as recognition by the Legislature of the new limitation imposed by the amendment to section 25½ (5 Cal. Jur. 604, sec. 37 and cases cited). Although it is expressed as dictum, it may be inferred that the District Court of Appeal likewise recognized that limitation when it said in *White* v. *Towers,* 99 A.C.A. 996, 997 and 998, "The division of Fish and Game in the Department of Natural Resources is administered through the Fish and Game Commission provided for by section 25½ of Article IV of the Constitution."

If section 25½, as amended, is not construed as a limitation of authority in the Legislature to delegate powers relating to fish and game, under any of the theories herein discussed, it is conceivable that the Legislature might set up any number of boards, agencies or commissions and delegate to each one certain powers relating to the protection, preservation and conservation of fish and game. Thus it might create a commission to deal with upland game, another to treat with migratory waterfowl, another to exercise powers relating to warm water fish, or to marine fish, or to trout, thus leaving the constitutional Commissioners with nothing to do but hold office. In other words, the constitutional Commission could be empowered

to concern itself only with the "welfare of the skunk." * Surely this was not contemplated or intended by the voters when they amended section 25½. The factual aspects of the situation, as reflected in the arguments submitted to the voters, indicate clearly that the voters intended, among other things, to confine the administration of fish and game matters to the new constitutional Commission. If the electors had intended otherwise, there would have been no occasion to create a constitutional Commission at all. The Commission could have been left as a creature of the Legislature, with full power in it to legislate the Commission out of existence or to establish from time to time any number of officers or boards to administer the affairs of fish and game in all their ramifications. Instead of continuity in the administration of such affairs, they would be subjected to change at each session of the Legislature. This is what the voters intended to avoid when they adopted the 1940 amendment to section 25½. Through a Commission of staggered terms of office, the administration of fish and game affairs would carry over from year to year without disruption.

In conclusion, it has been held that where the Constitution is silent as to the powers and duties conferred on constitutional officers, such duties are implied from the "definition of the office" (*Love* v. *Baehr*, 47 Cal. 364, 367). Applying this rule to the constitutional Fish and Game Commission, it is not difficult to perceive where lies the implied power relating to fish and game.

*From address of the late Governor Alfred E. Smith to the New York Legislature in 1927.

Opinion No. 50-209—February 21, 1951

SUBJECT: COMMUNITY APARTMENT HOUSE—Initial offering of apartments in, where grantee is to receive not only the right to exclusive occupancy of particular apartment, but also undivided interest in property on which building stands, is subject to requirements of Subdivision Act.

Requested by: REAL ESTATE COMMISSIONER.

Opinion by: EDMUND G. BROWN, Attorney General.
Leonard M. Friedman, Deputy.

The Real Estate Commissioner inquires as to the application of the Subdivision Law (B. & P. C., secs. 11000, et seq) to a community apartment house arrangement in which each buyer receives an undivided interest in the property together with the exclusive right to occupy a particular apartment.

Our conclusion is summarized as follows:

The initial offering of apartments in a community apartment house in which each grantee receives an undivided interest in the property plus exclusive occupancy of an apartment is subject to the subdivision law (B. & P. C., secs. 11000, et seq).

EXHIBIT 5

QUESTION 14

The Sale of Stock by an Insurer to Its Holding Company Where a Director of the Insurer Is a Director and Principal Stockholder of the Holding Company Is a Violation of Section 1101.

Supplementary facts submitted by the Insurance Commissioner indicate that the shares of stock were sold by the insurer to the parent holding company at an average loss of $2 per share and that the stock was bought and sold by the insurer within approximately one year. These facts further point out that the sale gives controlling interest in the bank to the holding company.

Under such circumstances there was clearly a violation of both sections 1101(b) and 1101(c). Mr. X was pecuniarily interested in the sale of such stock since he was a director of both the insurer and the holding company and a principal stockholder of the holding company. He would thus benefit from the sale of such stock under section 1101(b). He would also be *interested* in the *purchase* of such stock, an asset, within the meaning of section 1101(c) since he was principal shareholder of the holding company as well as chairman of the board of the holding company.

Opinion No. 65-36—September 30, 1965

SUBJECT: FISH—Allotment of State water bottoms for shellfish culture discussed.

Requested by: DIRECTOR OF THE DEPARTMENT OF FISH AND GAME

Opinion by: THOMAS C. LYNCH, Attorney General
Ralph W. Scott, Deputy

The Honorable W. T. Shannon, Director of the Department of Fish and Game, has requested an opinion on the following questions:

1. Does the amendment to former Section 820 of the Fish and Game Code in 1955, placing a 25-year limit on the period of allotments of State water bottoms for shellfish culture, apply to allotments made prior to the effective date of the amendment, or may earlier allotments be held until such time as they are abandoned?

2. If two or more allotments having terminal dates are consolidated, will the expiration date of the consolidated area be determined by the earlier date or the later date? If an allotment having a terminal date is consolidated with an allotment made prior to the 1955 amendment, will the consolidated area be subject to the expiration date of the former allotment, or will the consolidated area be subject to no specified terminal or expiration date?

The conclusions are:

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The conclusions are:

1. The 1955 amendment to former section 820 of the Fish and Game Code (now § 6495)[1] placing a 25-year limit on the period of allotments of State water bottoms for shellfish culture applies to allotments made prior to the effective date of the amendment. Such earlier allotments may not be held until abandonment, but will terminate by operation of law on September 7, 1980, if not sooner abandoned or terminated for cause.

2. Where allotments having different terminal dates are consolidated, the expiration date of the new allotment for the consolidated area will depend on the action of the Fish and Game Commission taken pursuant to section 131(*f*), title 14, California Administrative Code, irrespective of whether the consolidation includes an allotment made prior to September 7, 1955.

ANALYSIS

Former section 820 of the Fish and Game Code is derived from the Act of 1874, Stats. 1873-1874, ch. 671, p. 940, which was adopted to permit and encourage the cultivation of oysters. The code section was enacted in 1933 (Stats. 1933, ch. 73, p. 468), and provided in substance that the State water bottoms may be allotted to any citizen of California for the purpose of growing oysters "to be held by the petitioner until such time as it is abandoned." In 1955 section 820 was amended (Stats. 1955, ch. 1263, p. 2300), by the addition, *inter alia,* of the following sentence:

> "An allotment may be made for a period of not to exceed twenty-five (25) years and if, at the termination of the period of an allotment, the water bottom allotted is still subject to allotment the allottee shall have a prior right to the allotment of such bottom to him."

On recodification of the Fish and Game Code in 1957, this sentence was embodied in section 6495, Stats. 1957, ch. 456, p. 1410. Allotments may now be made for all shellfish. § 6490.

The 1955 amendment to former section 820 did not act retrospectively. It contains no express declaration that it should be so applied, and, hence, the 25-year period does not commence on the date of an earlier allotment. However, the section acts prospectively. For the reasons hereinafter noted, it affects all shellfish allotments outstanding on the effective date of the 1955 amendment, namely, on September 7, 1955, from which date the 25-year period commences.

Oysters and shellfish are "fish" (§ 45), and as such are subject to the prerogative

[1] All section references are to the Fish and Game Code unless otherwise specified.

of the sovereign to protect and preserve them in such manner and upon such terms as the Legislature deems best for the common good. See *In re Makings,* 200 Cal. 474 (1927); *People* v. *Stafford Packing Co.,* 193 Cal. 719 (1924); *In re Marincovich,* 48 Cal. App. 474 (1920). For example, an implied license extending over a long period of time to use lands for oyster cultivation may be revoked by the legislative body. *Cf. Lowndes* v. *Huntington,* 153 U.S. 1 (1893). In California and other jurisdictions it has been held that the cultivation of shellfish on public lands is a mere privilege, revocable at the pleasure of the State. *Darbee & Immel Oyster & Land Co.* v. *Pacific Oyster Co.,* 150 Cal. 392 (1907); *Phipps* v. *State,* 22 Md. 380, 85 Am. Dec. 654 (1864); *Payne & Butler* v. *Providence Gas Co.,* 31 R.I. 295, 77 Atl. 145 (1910). The power to terminate a license entirely includes the power to curtail the length of its term. *Cf.* Civ. Code § 3536. Thus in *Darbee* the Court said:

> "In *Phipps* v. *State,* 22 Md. 380, [5 [sic] Am. Dec. 654], the court was dealing with statutes like ours and it said: 'It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of the state's title to lands covered by navigable water was contemplated. Permission to use given areas . . . for a particular purpose [oyster cultivation] seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the legislature.' Again, in *Hess* v. *Muir,* 65 Md. 586, [5 Atl. 540, 6 Atl. 673], Alvey, C.J., said: 'These statutes, the better to promote the growth and to increase the supply of oysters . . . provide that any of the citizens of the state may locate one lot . . . and plant the same with oysters, and thereupon he is given exclusive control thereof. This, however, is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state. [Citing *Phipps*]. It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot.' 150 Cal. at 394-95."

It is a rule of long standing that pertinent statutory provisions are to be read into contracts. See 5B McK. Dig. § 154 (1961). In *State Bonded Audit Bureau, Inc.* v. *Pomona Mut. Bldg. & Loan Assn.,* 37 Cal. App. 2d (Supp.) 765, 769 (1940) (quoting from *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U.S. 398 (1938)) it was said:

> "Not only are existing laws read into contracts. . . but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order . . . The economic interests of the State may

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> justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

The same is equally true of a privilege conferred under State permit. This office has consistently ruled that a license from the State to carry on a lawful business, although unexpired, is subject to cancellation or modification in such manner as the Legislature deems meet and proper. 42 Ops. Cal. Atty. Gen. 99, 105 (1963); 38 Ops. Cal. Atty. Gen. 45, 49 (1961); 16 Ops. Cal. Atty. Gen. 28, 30 (1950); 12 Ops. Cal. Atty. Gen. 238, 240 (1948); *cf. In re Carlson,* 87 Cal. App. 584, 588 (1927); *Anthony* v. *Veatch,* 189 Ore. 462, 220 P.2d 493 (1950).

In the latter case the appellants had been licensed to fish with fixed appliances at a certain location. An intervening Oregon statute prohibited further use of the appliance. The fishermen claimed impairment of the obligation of a contract claiming that their payment of the imposed fees had the effect of making the license irrevocable. The court rejected their contentions, stating that the license to fish with a fixed appliance in a certain location was the granting of a special privilege conferred by the government, creates no vested rights, and is not a contract.

Thus a shellfish or oyster allotment is a mere privilege, the terms of which are subject to modification by the Legislature. The privilege is subject to cancellation if the Legislature should elect at any time to terminate or foreclose all shellfish cultivation, or a limitation may be placed on the duration of the license period. The 1955 amendment did not expressly or impliedly except preexisting allotments from the limitation of the 25-year period. Therefore the amendment affects preexisting shellfish allotments of State water bottoms, and such allotments will expire on September 7, 1980 unless abandoned or sooner terminated for cause.

The terminal dates of consolidated allotments will depend on the action of the Fish and Game Commission, taken pursuant to section 131(f), title 14, California Administrative Code, which reads as follows:

> "When several allotments are consolidated the effective date of the new allotment will be determined by the commission."

The terminal date of the consolidated allotment could not extend more than 25 years from and after the effective date of consolidation (§ 6495), irrespective of whether the new effective date is based on the date of the earlier or later allotment. Presumably, the Commission will give reasonable consideration to the terms of the application of the allottee or allottees for consolidation and all aspects of the matter. *Cf., People* v. *Globe Grain & Mill. Co.,* 211 Cal. 121, 128 (1930).

EXHIBIT 6

Number M-438-01

RENEWAL OF LEASE

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

WITNESSETH:

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

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

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

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

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

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

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

described as follows, to wit:

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

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

Parcel 1.

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

Parcel 2.

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

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

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

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

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

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

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

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

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

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

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

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

A. This lease may, at the option of Lessee, be renewed for additional periods not to exceed 25 years each. If the Lessee desires to enter into a new lease for a period commencing after expiration of the initial 25-year term, Lessee shall give notice to Lessor one (1) year prior to termination of the lease. The lease may be renewed if, during the notification period, terms for a new lease are agreed upon by Lessee and the Commission. Lessor retains the right to renegotiate terms of the lease, including annual rental rates, subject to adjustment considering changes in the Consumer Price Index and current lease rates, at the Fish and Game Commission's discretion, no more often than every ten (10) years during the current renewal period.

B. Lessee shall keep records as required in accordance with Fish and Game Code Section 15414 on forms to be supplied by Lessor, and shall maintain adequate accounting records sufficient to determine monies due to Lessor by the 10th day of each month for all shellfish harvested during the preceding calendar month. Lessor reserves the right to inspect Lessee's premises, equipment and all books at any time, and Lessee's records pertaining to its cultivation on the leased

premises.

C. The lease shall be improved at no less than the minimum rate established by Commission regulations (Section 237(i)(A) - (C), Title 14, CCR). A minimum rate of planting shall be negotiated for option periods. Lessor may declare this lease terminated if Lessee fails to meet these requirements, and if Lessee, at any time, is proven to be failing in good faith, to pursue the purpose of this lease.

D. If, at any time subsequent to the beginning date of this lease the use of stakes or racks authorized herein shall fall into a state of disrepair or otherwise become an environmental or aesthetic degradation, as determined by Lessor, then upon written notice by Lessor, Lessee shall have sixty (60) days to repair and correct conditions cited by Lessor. Failure to comply with the written notice shall be grounds for termination of this lease and Lessee shall, at the option of Lessor, remove all improvements located on lands covered by this lease.

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

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

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

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

of lost growing equipment or materials. Lessee shall keep a record of date of surveys and materials recovered and shall provide this information in the annual Proof-of-Use Report.

F. Lessee shall observe and comply with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law, including but not limited to State Water Resources Control Board, State Coastal Commission, State Lands Commission, and U.S. Army Corps of Engineers. Any other permits or licenses required by such agencies will be obtained by Lessee at his own sole cost and expense.

G. Lessee recognizes and understands in accepting this lease that his interest therein may be subject to a possible possessory interest tax that the county may impose on such interest, and that such tax payment shall not reduce any rent or royalty due the Lessor hereunder and any such tax shall be the liability of and be paid by Lessee.

H. Any modification of natural or existing features of the real property described in this lease, which are not consistent with the authorized uses under this lease are expressly prohibited without prior written consent of the Lessor.

I. As evidence of progress in aquaculture, Lessee shall submit each year to the State at the Marine Region office, P.O. Box 1560, Bodega Bay, California 94923, a written declaration under penalty of perjury, showing the date and amount of each type of aquaculture development and date and amount of designated species comprising each planting, including a diagram (map) showing area, amounts, and dates planted. Such annual proof-of-use shall be submitted on or before February 1 of each year for the previous year, January 1 -- December 31, inclusive.

J. This lease shall be canceled at any time Lessee fails to possess a valid aquaculture registration issued pursuant to Section 15101 of the Fish and Game Code. Lessee agrees not to commit, suffer, or permit any waste on said premises or any act to be done thereon in violation of any laws or ordinances. This lease shall be subject to termination by Lessee at any time during the term hereof, by giving Lessor notice in writing at least ninety (90) days prior to the date when such termination shall become effective. In the event of such termination by Lessee, any unearned rental shall be forfeited to the Lessor.

K. This lease of State water bottoms only grants Lessee the exclusive right to cultivate marine life as described in the lease. The lease does not imply that any guarantee is given that shellfish may be grown or harvested for human consumption. The Lessor only has the statutory authority to enter into aquaculture leases (Fish and Game Code Section 15400 et. seq.). The California Department of Heath Services has the authority (Health and Safety Code Section

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

L. In addition to the conditions and restrictions herein provided for in this lease, and any right or privilege granted, conveyed or leased hereunder, shall be subject to, and Lessee agrees to comply with all applicable provisions of the California Fish and Game Code, and regulation of the Fish and Game Commission, in particular Sections 15400 - 15415, inclusive, of the Fish and Game Code, and expressly recognizes the right of the Legislature and the Fish and Game Commission to enact new laws and regulations. In the event of any conflict between the provisions of this lease and any law or regulation, the latter will control. This lease shall be deemed amended automatically upon the effective date of such conflicting law or regulation.

M. This lease is personal to the Lessee and shall not be transferred, assigned, hypothecated or subleased, either voluntarily or by operation of law, without prior approval of the Fish and Game Commission.

N. The waiver by the Lessor of any default or breach of any term, covenant or condition shall not constitute a waiver of any other default or breach, whether of the same or any other term, covenant or condition, regardless of the Lessor's knowledge of such other defaults or breaches. The subsequent acceptance of monies hereunder by the Lessor shall not constitute a waiver of any preceding default or breach of any term, covenant or condition, other than the failure of the Lessee to pay the particular monies so accepted, regardless of the Lessor's knowledge of such preceding default or breach at the time of acceptance of such monies, nor shall acceptance of monies after termination constitute a reinstatement, extension or renewal of the agreement or revocation of any notice or other act by the Lessor. In the event of any breach by Lessee of any of the provisions hereof, other than the payment of any sum due from Lessee to Lessor hereunder, which breach is not remedied, abated and cured by Lessee within sixty (60) days after notice in writing, shall cause this lease to thereupon cease and terminate.

O. Lessee shall not assign or transfer this agreement without prior written approval. Such written approval of the assignment or transfer of lease shall be subject to any and all conditions required by the Fish and Game Commission including, without limitation by reason of the specifications herein, the altering, changing or amending of this agreement as deemed by the Commission to be in the best interest of the State.

P. All notices herein provided to be given or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and

deposited in the United States Mail, certified and postage prepaid and addressed as follows:

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

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

Q. Lessee hereby indemnifies and holds harmless the Lessor, its officers, agents and employees against any and all claims and demands of every kind and nature whatsoever arising out of or in any way connected with the use by the Lessee of said lease or the exercise of the privilege granted herein.

S. The terms, provisions, and conditions hereof shall be binding upon and inure to the benefit of the parties and the successors, and assigns of the parties hereto.

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

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

U. The attached Nondiscrimination Clause (OCP-1) Is hereby made a part of this agreement.

Number M-438-01

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

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

APPROVED:

FISH AND GAME COMMISSION

By: _____

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By: _____
Lessor
Renee Renwick Deputy Director, Administration

TOM JOHNSON
JOHNSON OYSTER COMPANY

By: _____
Lessee

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA
COUNTY OF Sonoma } ss

On 12/08/04 before me, Sara L. Huddleston, Notary Public,

personally appeared Tom Johnson
NAME(S) OF SIGNER(S)

personally known to me

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

OFFICIAL SEAL - 1454967
SARA L. HUDDLESTON
NOTARY PUBLIC - CALIF.
COUNTY OF SONOMA
My Comm. Exp. Dec. 6, 2007

WITNESS my hand and official seal.

Sara L Huddleston
SIGNATURE OF NOTARY

OPTIONAL

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

CAPACITY CLAIMED BY SIGNER

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

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

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

DESCRIPTION OF ATTACHED DOCUMENT

Renewal of Lease
TITLE OR TYPE OF DOCUMENT

10 pages total
NUMBER OF PAGES

12/08/04
DATE OF DOCUMENT

N/A
SIGNER(S) OTHER THAN NAMED ABOVE

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

NONDISCRIMINATION CLAUSE

(OCP - 1)

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

2. This contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

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

STD. 17A (NEW 5-83)

Number M-438-01

AMENDMENT NO. 2
TO
INDENTURE OF LEASE

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

WITNESSETH:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

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

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

Parcel 1.

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

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

Parcel 2.

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

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

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

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

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

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

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

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

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

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

Number M-438-01

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

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

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

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

APPROVED:

FISH AND GAME COMMISSION

By: _____
Robert R. Treanor, Executive Director

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

By: _____
Lessor

KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

By: _____
Lessee

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA
COUNTY OF Sonoma } SS

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

personally appeared Kevin Cunny,
NAME(S) OF SIGNER(S)

~~personally known to me~~

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

CHRIS MARK KRUPANSKY
COMM. #1617812
NOTARY PUBLIC - CALIFORNIA
SONOMA COUNTY
My Comm. Expires Nov. 1, 2009

WITNESS my hand and official seal.

Chris Mark Krupansky
SIGNATURE OF NOTARY

OPTIONAL

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

CAPACITY CLAIMED BY SIGNER
- INDIVIDUAL
- CORPORATE OFFICER

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

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

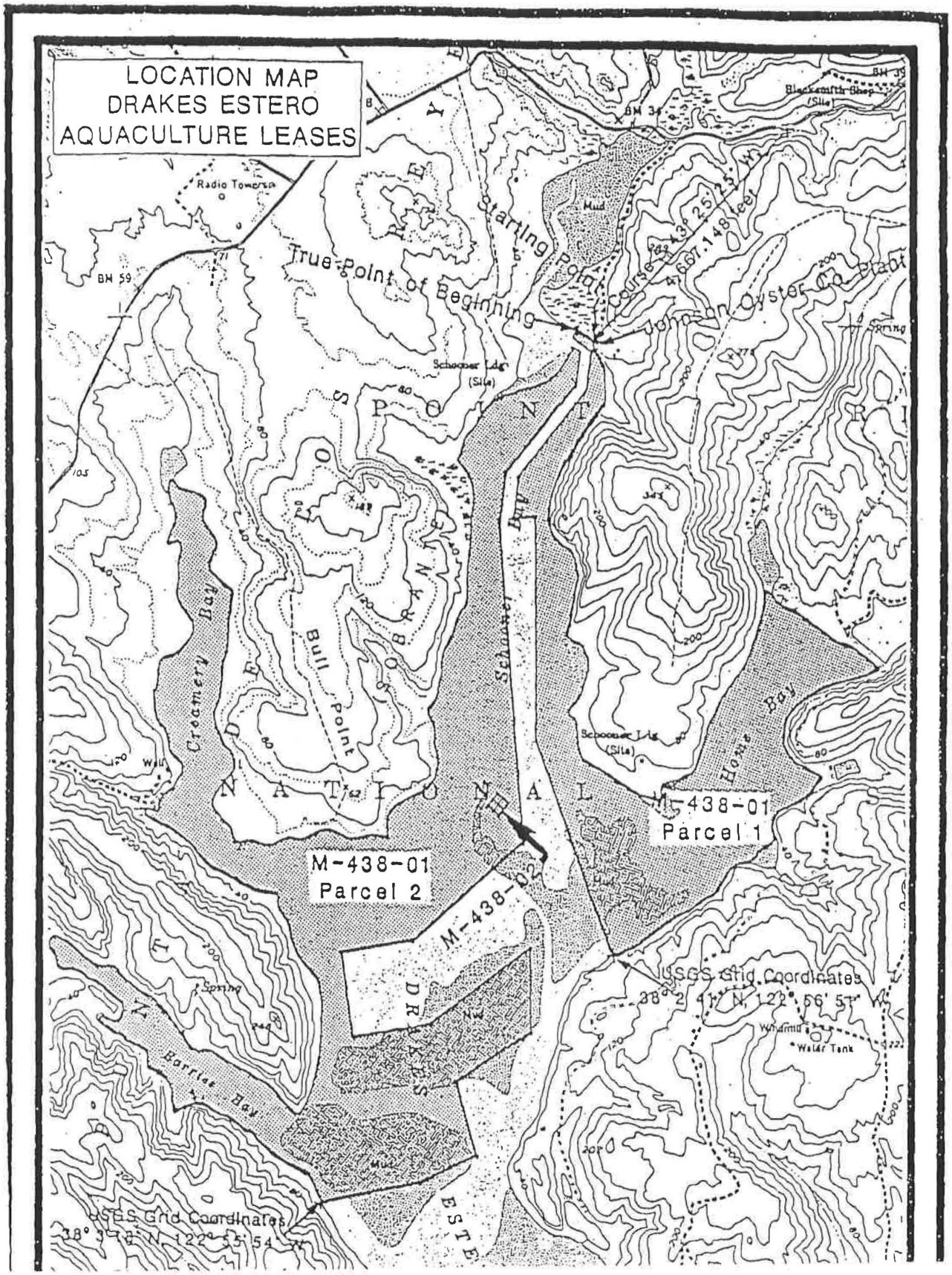
DESCRIPTION OF ATTACHED DOCUMENT

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

5 pages
NUMBER OF PAGES

12/2/05
DATE OF DOCUMENT

Robert R Treanor
SIGNER(S) OTHER THAN NAMED ABOVE


LOCATION MAP
DRAKES ESTERO
AQUACULTURE LEASES
Starting Point
True Point of Beginning
Course 3° 25' 25" W
667.148 feet
Johnson Oyster Co. Prod
Schooner Ridge
SPOIT
Bull Point
Creamery Bay
Schooner Bay
Home Bay
M-438-01
Parcel 1
M-438-01
Parcel 2
M-438-02
DRAKES
ESTE
Barries Bay
Windmill
Water Tank
Spring
Mud
BM 59
BM 34
Radio Towers
USGS Grid Coordinates
38° 2' 4" N, 122° 56' 57" W
USGS Grid Coordinates
38° 1' 48" N, 122° 55' 54" W

Number M-438-01

AMENDMENT NO. 3
TO
INDENTURE OF LEASE

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

WITNESSETH:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOW, THEREFORE, THIS AMENDMENT WITNESSETH:

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

Number M-438-01

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

Parcel 1.

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

Parcel 2.

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

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

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

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

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

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

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

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

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

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

Number M-438-01

17171 Sir Francis Drake Boulevard
Inverness, CA 94937

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

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

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

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

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

APPROVED:

FISH AND GAME COMMISSION

By: _____
John Carlson, Jr., Executive Director

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND GAME

Number M-438-01

By: _____
Lessor

KEVIN LUNNY
DRAKES BAY OYSTER COMPANY

By: _____
Lessee

EXHIBIT 7

No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, *et al.*,
Plaintiff-Appellants,
v.
KENNETH L. SALAZAR, *et al.*

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

[PROPOSED] AMICI CURIAE BRIEF OF ALICE WATERS; THE HAYES STREET GRILL [A RESTAURANT]; TOMALES BAY OYSTER COMPANY; MARIN COUNTY AGRICULTURAL COMMN'R; STACY CARLSEN; CALIFORNIA FARM BUREAU FEDERATION; MARIN COUNTY FARM BUREAU; SONOMA; COUNTY FARM BUREAU; FOOD DEMOCRACY NOW; MARIN ORGANIC; AND ALLIANCE FOR LOCAL SUSTAINABLE AGRICULTURE; SUPPORTING APPELLANTS AND REVERSAL

JUDITH L. TEICHMAN (CSBN 39434)
2558 Clay Street, #1
San Francisco, California 94115-1832
Telephone: (415) 921-2483
Email: judyteichman@gmail.com
Attorney for [Proposed] Amici Curiae

CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

The Tomales Bay Oyster Company, The Hayes Street Grill, the California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and the Alliance For Local Sustainable Agriculture, do not have any parent corporations and no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF AMICI'S IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

This brief is filed pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing.

Alice Waters, chef, author, and the proprietor of Chez Panisse restaurant, is an American pioneer of a culinary philosophy that maintains that cooking should be based on the finest and freshest seasonal ingredients that are produced sustainably and locally, such as shellfish from Drakes Bay Oyster Farm. She is a passionate advocate for a food economy that is "good, clean and fair." Over the course of nearly forty years, Chez Panisse has helped create a community of scores of local farmers and ranchers, such as the Lunnys, whose dedication to sustainable aquaculture and agriculture assures the restaurant a steady supply of fresh and pure ingredients.

Hayes Street Grill is a fish restaurant in San Francisco's Civic Center district. Drawing inspiration from old San Francisco grills in the financial district when it opened in 1979, and using a unifying theme of fish and seafood, the restaurant took the grill concept a step farther by seeking out local ingredients and cooking them in a modern style so the "freshness and pristine quality of the fish, produce, and naturally-raised meats" can "speak for themselves." The loss of the shellfish DBOC produces and sells in the San Francisco Bay Area would have a devastating impact on the Grill's ability to serve fresh shellfish.

Tomales Bay Oyster Company [TBOC] is one of two oyster farms located on Tomales Bay in Marin County with retail shops along State Highway One. TBOC's retail and picnic area is at capacity. The demand for oysters is too high for the Tomales Bay oyster farms to meet even with DBOC in production. They do not have the capacity to expand, and there is no other source for local shellfish. TBOC customers will be adversely affected if DBOC's 50,000 customers attempt to visit TBOC. TBOC is also concerned about the impact on DBOC's experienced workers, who have been living and working in the community for as long as 30 years, and who are an integral part of the West Marin community and economy. TBOC's additional concerns are set out in comments on the Draft Environmental Impact Statements [DEIS], a copy of which is attached to the Appendix as Exhibit 7.

Marin County Agricultural Commissioner Stacy Carlsen is concerned, among other things, with the impact of closing DBOC on the lives of the children and the working families who would be impacted, working families who are part of the "social fabric of the community where they live;" of the impact on indirectly related jobs in markets and restaurants; and the impact on the availability of fresh, locally grown food for local markets. His additional concerns are set out in more deal in his comments on the DEIS, a copy of which is attached to the Appendix as Exhibit 5.

The California Farm Bureau Federation, the Marin County Farm Bureau and the Sonoma County Farm Bureau are nonprofit voluntary membership corporations whose purpose is, respectively, to protect and promote agricultural interests in the State and in their Counties, and to find solutions to the problems of the farm and rural communities. The participation of the California Farm Bureau Federation and the Marin County Farm Bureau as *amici* is an extension of their concern for the future of DBOC as expressed in comments on the Draft Environmental Impact Statement, which appear in the Appendix as Exhibits 21 and 22 respectively. A copy of an undated letter to President Obama asking him to rescind Secretary Salazar's Order is posted on the Sonoma County Farm Bureau's website. A copy is attached to the Appendix as Exhibit 24.

Food Democracy Now is a grassroots movement of more than 350,000 American farmers and citizens dedicated to reforming policies relating to food, agriculture and the environment. They want to support DBOC because they "believe in recreating regional food systems, supporting the growth of humane, natural and organic farms, and protecting the environment."

Marin Organic was founded in 2001 by "a passionate group of farmers, ranchers, and agricultural advisors to put Marin County on the map as a committed organic county." Marin Organic fosters "direct relationship between organic producers, restaurants, and consumers" to strengthen commitment and support for

local organic farms, such as DBOC.

Alliance for Local Sustainable Agriculture [ALSA] is an unincorporated association of people who believe that "a diversified and healthy agricultural community is important to our individual health and to our community's and our nation's safety, economy and environment." They are "advocates for the use of good science and fair processes." They are also the author of a proposed "Collaborative Management Alternative" to the alternatives proposed by the NPS in the DEIS/Plan, which was supported by 1750 commentators, including several of the *amici*. ALSA's comments on the DEIS include the Alternative. A copy is attached to the Appendix as Exhibit 23.

I. INTRODUCTION

There is *no single voice* that can speak for the "public interest" in keeping the Drakes Bay Oyster Company [Oyster Farm or DBOC] open until the Secretary of the Department of the Interior's [DOI] Order to close can be reviewed.

Closing the Oyster Farm would have a broad, negative and immediate impact, on the local economy and the sustainable agriculture and food industry in the San Francisco Bay Area, on the school children of the workers who live in the housing units onsite, and, in the longer term, on food security and the U.S. balance of trade. Closing down the oyster farm in Drakes Estero, which has existed since the early 1930s, would be inconsistent with the best thinking of the modern environmental movement and further tear at the fabric of an historic rural community that the Point Reyes National Seashore [Seashore] was created to help preserve.

On the other hand, the sounds of motorcycles racing by Drakes Estero on the adjacent highway will not cease if the Oyster Farm is closed. The ranches that surround Drakes Estero will remain in the area zoned "pastoral" right up to its shoreline. California's retained fishing and mineral rights in Drakes Estero will still exist. Closing down the Oyster Farm would simply be a mark in the "win column" for the National Park Service [NPS] and

other traditional conservationists, wilderness advocates stuck in an archaic and discredited preservationist paradigm, whose apparent aim is to convert Drakes Estero to titular wilderness status at any cost.

This brief identifies a wide variety of public interests that will be seriously and negatively impacted if the Secretary's Order to close down the Oyster Farm is not enjoined pending a decision on the merits of the case. These interests are all part of the administrative record, in "comments" on the Draft Environmental Impact Statement [DEIS] on a proposed Special Use Permit [SUP] for the Oyster Farm. These interests were disregarded when the Secretary based his decision on a false interpretation of Section 124;[1] ignored the State's fishing and mineral rights; and "was informed" by discredited National Park Service [NPS] science despite Congress directing that the National Academy of Sciences [NAS] review the science in the DEIS.[2]

[1] Section 124 of Public Law 111-88.

[2] Counsel for DBOC provided some thoughts and comments on this brief, but it was authored entirely by the undersigned. Other than the undersigned, no person, party, or party's counsel contributed money to fund the preparation or submission of this brief.

II. SHELLFISH AS A FOOD SOURCE IN CALIFORNIA

The practice and right of people to obtain nourishment from fish, in particular mollusks such as oysters, which are relatively easy to gather, have a long history and the rights have a unique character. There is DNA evidence indicating that the first hominids to emigrate from Africa to the Middle East, Europe and Asia emanated from a shellfish rich coastal region of South Africa, Pinnacle Point, where many of their shell mounds have been found. Similar shell mounds exist, of course on the shores of Drakes Estero and Tomales Bay and similar inlets along the Pacific Coast.[3]

Fish generally, but shellfish in particular, have been an important food source for California for centuries, where fish, fishing and fisheries are managed as resources held in trust for the People of the State. The California Constitution contains multiple provisions designed to protect the

[3] *Water's Edge Ancestors: Human evolution's tide may have turned on lake and sea shores,* by Bruce Bower, Science News, August 13, 2011, pages 22 et seq. Appendix, Exhibit 1. Counsel for *amici* respectfully requests that the Court take judicial notice of the exhibits in the Appendix pursuant to Fed R Evid 201(c). All exhibits are easily accessible on the web. Most of the exhibits are copies of "comments" on the Draft Environmental Impact Statement that are part of the administrative record, which, because of the circumstances under which this issue has arrived with the Court, has not yet been assembled and submitted to the Court. That correspondence is published on the Seashore's website: http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_deis_public_comments.htm. A few other exhibits are copies of commentary in the press, not evidence offered to prove underlying facts.

interest of the People in fish as food. The California Fish and Game Commission, which authorizes State leases for shellfish cultivation, is the *only* body to which the California Legislature may delegate policy-making authority. Article IV, Section 20. See 17 Ops. Cal. Atty. Gen. 72, at 78 (February 20, 1951).[4] The Legislature must retain the People's "right to fish" in any transfer of the State's tidelands. Cal. Const., Article 1, Section 25. "Money collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto." *Id.*, Article XVI, Section 9. And shellfish cultivation pursuant to a State lease serves a public purpose that would require the United States to provide the State's lessee with a right of way to the water, even if the SUP is not granted. *Id.*, Article X, Section 4.

In upholding a 1919 statute that authorized the Fish and Game Commission to regulate and control "the handling of fish or other fishery products for the purpose of preventing deterioration or waste," the California Supreme Court elaborated on the importance of fish as food in California:

> The public policy of this state in its relation to the food fish within its waters has been clearly, consistently, and unmistakably manifested through out the history of its fish and game legislation. It aims at the protection and conservation of food fish for the benefit of the present and future generations of the people of the state and the devotion of such fish to the

[4] Appendix, Exhibit 2, California Attorney General Opinion, 17 Ops. Cal. Atty Gen. 72 (February 20, 1951).

> purposes of human consumption. . . . *People v. Monterey Fish Products Co*. (1925) 195 Cal.548, at 557.

Today California is second only to the State of Washington in shellfish production on the West Coast. Almost 40% of the oysters grown in California and 50% of the Marin-County produced oysters are grown in Drakes Estero. The Drakes Estero water bottoms are 55% of the water bottoms in the State of California that are leased for shellfish cultivation and 85% of the shellfish growing area in Marin County and the San Francisco Bay Area.[5] Shellfish produced in Drakes Estero play an important role in the local, regional and statewide economy, and there are no options for relocating these oyster beds in California.[6]

III. SHELLFISH IN DRAKES ESTERO

Shellfish from Drakes Estero are an integral and important part of the Bay Area's world famous local sustainable agriculture and food industry. Closing down Drakes Estero as a source of fresh, sustainably raised shellfish would wreak havoc with this industry. The California Fish and Game Commission has said that it intends to lease the Drakes Estero water bottoms

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[5] Appendix, Exhibit 4. October 10, 2012 letter to Seashore Superintendent Cicely Muldoon from California Fish and Game Director Charles Bonham. [Exhibit 5 to Lunny Rebuttal Declaration, page 91 of docket 80-1.]

[6] Appellants' Excerpts Of Record [ER] at ER0180 ¶ 66.

at least until 2029.[7] And the Commission can continue to lease the water bottoms whether or not the Secretary grants the Oyster Farm a permit to continue to utilize the onshore facilities.

However, if the permit for the onshore facilities is denied, the supply of shellfish that local retail establishments depend on having available for their customers will be interrupted; there will be a loss of employment for many of the 31 workers employed by Oyster Farm, in particular the women who work in the only oyster cannery remaining in California; and the loss of five affordable housing units in an area where affordable housing is in desperate short supply. Many restaurants and other retail establishments that feature locally and sustainably raised seafood will have no alternative but to cease including shellfish on their menus or import shellfish from distant locations.[8]

In 1979 and again in 2004 the California Fish and Game Commission found it "in the public interest" to renew the State leases for shellfish

[7] Appendix, Exhibit 4: July 11, 2012 Letter from California Fish and Game Commission to Secretary Salazar. [Also, ER0617.]

[8] Appendix, Exhibit 5: Marin Agricultural Commissioner Stacy Carlsen Comments on DEIS, Correspondence #51124.

cultivation in Drakes Estero for 25 years.[9] In a July 11, 2012 Fish and Game Commission letter to Secretary Ken Salazar the Commission asserted the State's continuing right to lease the Drakes Estero water bottoms:

> The Commission, in the proper exercise of its jurisdiction . . . has clearly authorized shellfish cultivation in Drakes Estero through at least 2029 through the lease granted to Drakes Bay Oyster Company. The Commission will continue to regulate and manage oyster aquaculture in Drakes Estero pursuant to State law . . . .

Shellfish raised in Drakes Estero are only a few minutes or hours from market and consumption. If oysters are no longer raised in Drakes Estero, shellfish imported to fill the gap will travel great distances, e.g., from China, Korea and uncertain locations of origin, "increasing the chances for food safety problems, poor quality and product contamination" as well as adding to the carbon footprint associated with their transportation.[10] Importing shellfish to replace those now grown in Drakes Estero will defeat the principle of local sustainable farm production and food security and further worsen the US trade balance.

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[9] See recitals in Exhibits 17, 18, 19, and 20 to Declaration of Barbara Goodyear in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

[10] Marin Agricultural Commissioner Stacy Carlsen. See footnote 8, supra.

IV. IMPACT ON SHELLFISH CULTIVATION ON TOMALES BAY

The Tomales Bay Oyster Compay [TBOC] and the Hog Island Oyster Company are Marin County oyster growers with retail outlets located on Tomales Bay. Their companies cannot meet the local demand for shellfish. They already buy shellfish from DBOC and in some instances out of area. "Closing DBOC will cause a loss of local shellfish production that cannot be replaced." The Tomales Bay growers were not contacted during the environmental impact process about the economic or other impacts that would flow from closing down DBOC.[11]

If DBOC is closed and no longer obligated to make lease payments or pay other user fees to the State, other California shellfish growers, including the TBOC and Hog Island will be required either to pay higher user fees or receive reduced State services in support of their aquacultural operations, which are paid for through fees deposited in the constitutionally-prescribed trust funds.[12]

Due to State concerns about run-off from cattle ranches above Tomales Bay, TBOC and Hog Island are not allowed to harvest oysters from Tomales Bay when local rainfall is a half-inch or more. If DBOC is not

[11]Appendix, Exhibit 6: John Finger, President and CEO, Hog Island Oyster Company Comments on DEIS, Correspondence #52047.
[12] See footnote 11, *supra*.

available as a source for oysters needed to supply the retail shops on Tomales Bay during these events, the retail shops will either have to close or obtain oysters from out-of-area sources to meet the demand for oysters in their retail operations.

Shellfish growing operations in Tomales Bay are at capacity. The demand for fresh oysters is too high for Tomales Bay growers to meet even with DBOC in operation. TBOC's retail and picnic areas located alongside Highway One are at capacity and cannot expand. They already "struggle with parking issues and traffic congestion." This is a comment on the DEIS submitted on behalf of TBOC:

> DBOC customer base of 50,000-plus people will also lose the opportunity to be educated about the sustainable food production that farmed shellfish represents. Our customers will be adversely affected because former DBOC customers will attempt to utilize our area if DBOC is closed. . . . Tomales Bay oyster businesses do not offer oysters shucked and packed in jars. Oyster consumers who prefer jarred oysters will be disproportionately affected by the closure of DBOC, the State's last operating cannery. The EIS must consider the fact that DBOC offers a product that cannot otherwise be supplied locally . . . .[13]

Similarly, the Bay Area restaurants that feature locally grown oysters from DBOC will have either to cease serving oysters or stop featuring local sustainably raised shellfish on their menus.

[13] Appendix, Exhibit 6: Martin Seiler, Tomales Bay Oyster Company Comments on DEIS, Correspondence 50395.

V. IMPACT ON WEST MARIN SCHOOLS AND CHILDREN LIVING AT THE OYSTER FRM.

In December 2012 Interim School Principal Jim Patterson and West Marin School Principal Matt Nagle attended a meeting of "soon-to-be-displaced workers" of the Oyster Farm and representatives of the DOI and NPS staff. After the meeting Mr. Patterson wrote an open letter to President Obama expressing frustration at the likely loss of the value of the school's work to close the achievement gap of the children of the workers who had been given a 90-day eviction notice. He went on to say:

> . . . As the meeting proceeded, however, I began to realize that there were other issues that needed to be addressed.
>
> The Secretary stated that he made his decision after "careful consideration." The staff explained that he made the decision solely on the 1972 contract language and the subsequent 1976 "potential wilderness" legislation. They stated he did not even consider the scientific or environmental issues that the government has spent tens of millions of dollars on.
>
> This is probably what made the workers feel most disrespected. They were hopeful when they heard of his visit, but it turned out to be what they described as a 20-minute photo op, without any real discussion, listening, questions or understanding (he didn't even go out on the water to see the condition of "the pristine jewel" he is trying to save). I wish I could remember the Spanish word for mockery, because that is how the workers felt – mocked . . . .

Expressing many thoughts heard locally, Principal Patterson concluded:

> This decision seems to go against everything . . . this current administration stands for. Does it create jobs? No. Does it address affordable housing? No. Does it help with immigration? No. Does it support sustainable farming? No. Does it help the economy? No. Does it help the environment? No. Consider this: Drakes Bay Oyster Company supplies oysters to a multi-million if not billion-dollar food industry in California. Will that industry stop consuming oysters? No. Oysters will be imported from Washington, Mexico, China. The impact of our carbon footprint on the whole region and

> world will far outweigh any good that might be gained from turning this estuary [into] a wilderness.[14]

VI. ENVIRONMENTALISM: EVOLVING CONSERVATION THEORIES

The environmental movement is evolving. Chief Scientist for The Nature Conservancy, Peter Kareiva, is a leading advocate for the need for 21st century conservationists to become more "people friendly" and to deal with "working landscapes," including fisheries. Writing with Michelle Marvier, a professor of environmental studies at Santa Clara University, and Robert Lalasz, director of science communications for The Nature Conservancy, Kareiva pointed out that while parks and wilderness will continue to be created the:

> . . . bigger questions for the 21st century conservation regard what we will do with . . . the working landscapes, the urban ecosystems, the fisheries and tree plantations . . . . In answering these questions, conservation cannot promise a return to pristine, prehuman landscapes. Humankind has already profoundly transformed the planet and will continue to do so. [footnote omitted] What conservation could promise instead is a new vision of a planet in which nature – forests, wetlands, diverse species, and other ancient ecosystems – exists amid a wide variety of modern, human landscapes. For this to happen, conservationists will have to jettison their idealized notions of nature, parks, and wilderness – ideas that have never been supported by good conservation science – and forge a more optimistic, human-friendly vision.[15]

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[14] Appendix, Exhibit 8: *Open Letter to President Obama* from West Marin School Principal Jim Patterson, as published in the Point Reyes Light on 12/13/12.

[15] "*Conservation in the Anthropocene: Beyond Solitude and Fragility*", Winter 2012 issue of Breakthrough Journal. http://thebreakthrough.org/index.php/journal/past-issues/issue-

In a Slate article, "*Environmentalists Are Battling Over the Nature of Nature*," author Keith Kloor asks, "[c]an modern greens loosen nature's grip on environmentalism." He quotes a leader of the "modernist environmental movement", Emma Marris, as arguing "'we must temper our romantic notion of untrammeled wilderness' and embrace the jumbled bits and pieces of nature that are all around us – in our backyards, in city parks, and farms."[16]

Closer to home, in a September 12, 2012, guest column in the *West Marin Citizen*, Sonoma State University Associate Professor of Environmental Studies and Planning, Laura Watt, commented that what makes the controversy over the future of DBOC "somewhat unique is that both 'sides' are environmentalists:"

> Because here in West Marin, we have two powerful strands of environmentalism, wilderness advocacy and sustainable agriculture, arguing over the same patch of tidelands. . . .
>
> After all, the wilderness status at Point Reyes is not in danger here: Drakes Estero was designated potential wilderness in 1976 and has been *managed as wilderness* ever since, with the sole exception of maintaining the oyster rack structures, which long pre-date the designation (and the park). The "commercial operation" itself is on the shore, on land that is historically part of the pastoral zone, and which is not part of the wilderness designation. DBOC is part of a long history of fishing and mariculture in West Marin, and many families have

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2/conservation-in-the-anthropocene.

[16] http://www.slate.com/articles/health_and_science/science/2012/12/modern_green_movement_eco_pragmatists_are_challenging_traditional_environmentalists.single.html

> maintained traditions of hiking the estero or kayaking its water and then gathering around a picnic table to celebrate with a plateful of oysters. For them, there is no either/or between sustainable agriculture and the wild.
>
> . . . an oyster even tastes wild, bringing the sharp brininess of the sea to our mouths along with a deep appreciation of place, like the idea of *terroir* in winemaking.

In closing Prof. Watt returns to a discussion of a new book on national parks, *Uncertain Path: A Search for the Future of National Parks*, by William Tweed, a long time NPS employee, who articulates a "strong need for a shift in NPS management," and argues "that the old idea of park preservation as 'keeping things the same forever' no longer applies in today's evolving circumstances." In this same vein, Prof. Watt says:

> . . . I would argue that Point Reyes represents the future, as we will increasingly need to reconcile the two "sides" of environmentalism, finding new ways for them to coexist and complement one another . . . .[17]

Less poetic, but equally compelling is the comment regarding visitor experience from the University of California Agriculture and Natural Resources Department, Cooperative Extension, Marin County:

> . . . Local producers, and regional and national consumers, recognize Point Reyes and West Marin as a special place, one with authentic foods of exceptional quality. . . . If embraced as an interpretive opportunity, agriculture and aquaculture, including both historic and current practices, could be a positive addition to the other wonderful natural assets this unique national seashore provides . . . .

[17] Appendix, Exhibit 9: *Realizing the potential*, by Professor Laura Watt in West Marin Citizen on 9/6/12.

> The DEIS states that preferred forms of visitor enjoyment are those that are uniquely suited to the superlative natural and cultural resources found in the parks. These preferred forms of use contribute to the personal growth and well being of visitor by taking advantage of the inherent educational value of the parks. The NPS publication, *Stewardship Begins With People* (Diamant et al. 2007) describes Point Reyes as . . . "a place that can reconnect people to their natural heritage through a richness of wilderness and recreational experiences; and *a place that can also reconnect people to the food they eat, the landscapes where it is grown, and the honorable labor of producing it.*[18] [Emphasis added.]

VII. SCIENTISTS AND OTHER SHELLFISH GROWERS SPEAK OUT

Writing that an "anti-science mania is sweeping parts of the United States," water and climate scientist Peter Gleick of the Pacific Institute says, "bad science leads to bad policy, no matter your political beliefs." Using the controversy over the future of DBOC as his example, Gleick points out that good science could play a key role in the dispute over wilderness versus local sustainable agriculture, but "we're not getting good science:"

> Science is not democratic or republican. Scientific integrity, logic, reason, and the scientific method are core to the strength of our nation. We may disagree among ourselves about matters of opinion and policy, but we (and our elected representatives) must not misuse, hide, or misrepresent science and fact in service of our political wars.[19]

A California shellfish grower, Phillip Dale of Coast Seafoods,

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[18] Appendix, Exhibit 10: University of California, Agriculture and Natural Resources, Cooperative Extension Comments on DEIS, Correspondence #51237.

[19] Appendix, Exhibit 11: *Bad Science Leads to Bad Policy, No Matter Your Political Beliefs*, by Peter H. Gleick, Water and climate scientist, President, Pacific Institute, Blog in HUFFPOST San Francisco.

commented that the [DEIS] "document and project troubles me deeply" because of its failure to consider the "peer reviewed science" developed through research "to identify and address both positive and negative impacts resulting from shellfish culture." He concluded:

> With out the benefit of shellfish farmers fighting for good water quality and healthy environment many of the bays around the nation would be in much worse shape.[20]

Similarly, a Puget Sound shellfish farmer, Vicki Wilson, part-owner of Arcadia Point Seafood, commented:

> As a person trained in research methods (University of Washington, 1983) who spent a career using science as a touchstone for solid policymaking in government, I am compelled to share my dismay at the continued and misplaced credibility the DEIS gives to the work of the National Park Services' "scientists". Proposing and analyzing alternative courses of action for consideration by policy makers based on flawed science (misused, selectively interpreted, incomplete, purposefully ignored or undisclosed, etc.) is beyond reason.

Ms. Wilson went on to say that she found the following statement in the DEIS equally troubling:

> "The NPS fully considered DBOC's interests in developing the range of alternatives and impact topics that are addressed in this EIS." (Chapter 1, pp 22).
>
> Any of the proposed alternatives in the DEIS will put DBOC out of business: it is a bit of a stretch to imagine the "good faith" behind this statement – perhaps "considered and discarded" would be more accurate.[21]

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[20] Appendix, Exhibit 12: Phillip G. Dale, Coast Seafoods Company Comments on DEIS, Correspondence #33043.

[21] Appendix, Exhibit Exhibit 13. Viki Wilson, Arcadia Point Seafood Comments on DEIS, Correspondence #52025. Although it is beyond the scope of discussion in this brief, we note that Section 124 specifically

Thoughtful and detailed comments regarding deficiencies in the DEIS both as an environmental document generally and because of the inadequacies of the "science" set out in it were provided by or on behalf of the Pacific Coast Shellfish Growers Association [PCSGA] and the East Coast Shellfish Growers Association [ECSGA]. They, too, reflect an underlying concern that mistaken "science" used to force closure of the Oyster Farm could hurt the shellfish industry as a whole.

The ECSGA notes that the DEIS "fails entirely to mention or address the negative social, cultural and environmental impacts that would result if the farm is removed from Drakes Estero." Along with a list of the benefits to the ecology of Drakes Estero provided by the Oster Farm, it lists the Oyster Farm's role as "tourist attraction that explains to hundreds of visitors annually how sustainable aquaculture can produce local, nutritious food in harmony with nature," and the "economic multiplier impacts that flow

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provides that with the exception of a requirement that the Oyster Farm pay the fair market value for the use of the property and possible inclusion of recommendations of the NAS, the authorized permit is to be issued "with the same terms and conditions as the existing authorization." The "existing authorization", that is, the RUO, explicitly provided that a Special Use Permit could be granted when the RUO expired so long as the Oyster Farm has a State of California lease for shellfish cultivation in Drakes Estero. Proposing a ten-year SUP with no renewal is another example of NPS interpreting the law to facilitate closing down the Oyster Farm so Drakes Estero will have full wilderness status.

through the community" resulting from the employment opportunities and income thus provided.[22]

A letter on behalf of the PCSGA describes the DEIS as "fundamentally flawed" because of the failure to use "existing environmental conditions as the baseline against which the alternatives are measured. . . ." PCSGA described the DEIS "methodology" as "highly speculative," as not comporting with "applicable regulations guiding NEPA implementation" as failing to "ensure that a decision regarding the proposed action will be fully informed and well-considered," and as skewing "the discussion of environmental consequences throughout the entirety of the document." After some 17 pages of analysis, the authors express a thought shared by many commentators:

> Any one of the above-identified deficiencies render the DEIS inadequate under NEPA. Cumulatively considered, these deficiencies raise the question whether the DEIS's conclusions were carefully constructed to support a pre-determined outcome. The DEIS . . . selectively cites evidence supporting conclusions that continuing shellfish aquaculture operations will have adverse environmental consequences, while ignoring or dismissing contradictory evidence. The DEIS does not comport with NEPA's standards, and does not reflect well on the National Park Service . . . .[23]

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[22] Appendix, Exhibit 14:East Coast Shellfish Growers Association Comments on DEIS, Correspondence #52027.

[23] Appendix, Exhibit 15. Comments on DEIS on behalf of Pacific Coast Shellfish Growers Association, Correspondence #52029.

VIII. CYNICAL USE OF NEPA UNDERMINES SUPPORT FOR ENVIRONMENTAL REVIEW AND RESPECT FOR GOVERNMENT

A. Examples: Wilderness Experience and Visitor Services.

There are two particularly pertinent examples of NPS ignoring, manipulating or using very technical distinctions to avoid taking into account facts that reflect positively on retaining DBOC as a permittee, one relating to the impact of DBOC on kayakers who enjoy a "wilderness" experience on Drakes Estero, the second to the educational value of DBOC's interpretive services.

A portion of the Drakes Estero tidelands is designated "potential wilderness." NPS and wilderness advocates say that the presence of the oyster racks and boats and sounds associated with shellfish cultivation in Drakes Estero have a negative impact on the experience of visitors to the area designated potential wilderness. However, the commercial kayak companies offering tours of Drakes Estero report a contrary reaction. Despite risking retaliation for speaking out in support of a permit for DBOC, the three kayak touring companies, who took a reported total of 221 guests out on Drakes Estero in 2010, submitted both a joint comment and individual comments reporting that many of their guests express appreciation for the opportunity to see an example of sustainable aquaculture. The companies reported that DBOC staff often explain to

kayakers the importance of not disturbing the seals and provide backup safety support when needed. They explained that NPS had "misrepresent[ed]" the Oyster Farm's sound impacts.[24]

The failure of NPS staff to contact the kayak companies for feedback on their experience, and the failure to reveal in the Final EIS visitors section the kayak companies' support for the Oyster Farm experience, are brazen examples of NPS avoiding information or ignoring comments inconsistent with the decision to convert Drakes Estero to wilderness status by any means necessary. The NPS acknowledges that there is no data to show the number of individual kayakers that use Drakes Estero annually. But rather than acknowledge the kayak companies' comments about their clients' appreciation for the opportunity to see a sustainable aquaculture operation, the FEIS added "radios used by staff for music" to the list of distractions from the wilderness experience for kayakers.

The opening paragraphs in the Visitor Experience Section describe NPS-preferred forms of visitor use as including those which contribute to personal growth and take "advantage of the inherent educational value of

[24] Appendix**,** Exhibit 16: Kayak Tour Operators Comments on DEIS, Correspondence #51105.

parks"[25] In her extensive comment on the "Visitor Experience and Recreation" section of Chapter 3 in the EIS, Oyster Farm Manager Ginny Lunny Cummings commented in detail on the opportunities for personal growth and education that DBOC already provides. By way of credentials to provide the interpretive services offered by DBOC seven days a week, she cites her early experience as a NPS Interpretive Ranger at the Seashore, and her degree in education and prior teaching experience. She challenges the Seashore's authority to say in the EIS that the "primary focus of DBOC is the commercial operation for the sale of shellfish to restaurants and the wholesale shellfish market outside the park." She describes the ways in which DBOC reaches out to groups and individuals with invitations for educational tours. She urges NPS to "fully consider the adverse impact to 50,000 seashore visitors per year if NPS chooses to evict DBOC," and asks that a "more informed study be made" of DBOC's contribution to "visitor services:"

> . . . Drakes Bay Oyster Farm is an interpretive goldmine that the NPS should embrace, not eradicate. Our entire nation is beginning to understand the social, environmental and health benefits of supporting local farms, local farmers markets and local sustainable foods. NPS/PRNS have one of the finest examples right in the heart of the Seashore, in Drakes Estero, where the wildlife, mammals, a pristine estuary and healthy local food production coexist in harmony in Point Reyes National Seashore. Let the citizens of our United States not

[25] See the full quotation from the U.C. Extension Comments, beginning on page 11, *supra*.

loose this "pearl" of an example of coexistence and harmony with Drakes Estero.[26]

The Final EIS dismisses DBOC's interpretive services as "not a visitor service."[27] The FEIS also makes no attempt to consider what the loss of DBOC's interpretive services would mean for visitors to the Seashore because "data is not available to determine what percentage of DBOC visitors" come to the Seashore "only" to visit DBOC.[28] The FEIS misses the point of how people actually use the Seashore. The beauty of the Seashore is that it is composed of diverse uses: for example, a family can spend the morning kayaking around Drakes Estero, stop for lunch and a tour of the Oyster Farm, and then spend the afternoon at the beach. The presence of the Oyster Farm enhances the appeal and educational value of the Seashore for all—which is what NPS says it wants.

B. Environmental Review: Yesterday "Yes", Today "No", Tomorrow -?

NPS undermines support for the NEPA and environmental review generally when it alternately says that environmental review will be done,

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[26] Appendix Exhibit 17: Ginny Lunny Cummings, Farm Manager, DBOC, Comments on DEIS, Correspondence #52044 along with a sample of "thank you" notes she received after a school group tour of the Oyster Farm

[27] FEIS at 269.

[28] *Id.*

and then that environmental review is not necessary, and when it asserts that environmental review is required, and then denies that environmental review is necessary.

Until recently, NPS supported the continued presence of commercial oyster farming in Drakes Estero. In 1980, NPS published a General Management Plan, which made it a goal "to monitor and improve maricultural operations, in particular the oyster mariculture operation in Drakes Estero."[29] In 1998, NPS approved an *expansion* of the oyster farm facilities, finding that it would have "no significant impact" on the environment.[30] In 2005, however, NPS informed the Oyster Farm that "no new permits will be issued" when the 40-year Reservation of Use and Occupancy [RUO] expires in 2012,[31] a decision made without the benefit of environmental review. When the Oyster Farm asked for a SUP pursuant to Section 124, NPS said that environmental review was required and set a schedule for the process to be completed.

To comply with NEPA regulations and NPS's own NEPA Handbook a "Notice of Availability" for the FEIS is required and should have been

[29] FEIS 65.

[30] FEIS 66.

[31] Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction page 5, lines 17-20. Also Lunny Dec. Para. 10.

published by the U.S. Environmental Protection Agency by October 26, 2012. In fact, although the FEIS, dated November 2012, was made available just before Secretary Salazar's visit to the Oyster Farm on November 21, the FEIS has never been officially published. Rather, at this stage, NPS and Secretary Salazar assert that the "notwithstanding any other law" phrase in Section 124 excused preparation of an EIS, and that the FEIS was used merely to "inform" Salazar's decision and Order.

By its actions, NPS induced the public and DBOC to invest time and resources into participating in a scoping process and in commenting on the DEIS. It may prove to be part of a pattern intended to wear down the owners of DBOC emotionally and financially. Whether or not *that* is true, the NPS last minute assertion that the Section 124's "notwithstanding any other law" clause excuses completing environmental review before the Oyster Farm is denied a permit communicates disdain for those who participated in the environmental review process. It is particularly disrespectful of those commentators who took a significant amount of time and made a genuine effort to respond in good faith to a request for their input.

C. Public Effort To Provide Helpful Assessment Of The Environmental Impact Of DEIS Alternatives.

Comments on the Draft EIS came from people from all age groups and walks of life and with a variety of interests.

Comments came from school children and from grandparents who expressed appreciation for an easily-scheduled lecture on shellfish cultivation given to their family on a summer outing to the Oyster Farm.[32]

The retired State aquaculture coordinator did a detailed review of the DEIS sharing his "institutional memory" about the Oyster Farm and the attention the State paid to its impact on the ecology of Drakes Estero, as well as his expertise as a career aquaculturist.[33] Three pages of comments offering additions to or corrections of statements in specific paragraphs in the DEIS is prefaced, in part, with this general comment:

> The DEIS is a document that represents what happens when working relationship fall apart and the parties who need to work together in a cooperative manner no longer talk to each other. . . . the DEIS is not an unbiased environmental review, it represents how re-interpreting history and the legislative intent of the original authors of Seashore legislation can be used to further an agenda. . . . As the former [California State Department of Fish and Game] Marine Aquaculture Coordinator very familiar with aquaculture permitting issues

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[32] Appendix, Exhibit 18: Doug and Margaret Moore, grandparents, Comments for DEIS, Correspondence #50078 and see attachments to Cummings letter, *supra*, Exhibit 17.

[33] Appendix, Exhibit 19. Thomas O. Moore, Retired California Department of Fish and Game marine biologist and Marine Aquaculture Coordinator Comments on DEIS, Correspondence # 51547.

> and an expert on the state aquaculture practices, given the 10-year maximum time period allotted for an SUP for DBOC, all the alternatives presented in this DEIS will put DBOC out of business. Only a cooperative management alternative will allow DBOC [to] secure the necessary permits and to remain in operation. . . .

The University of California Extension Service personnel comments, cited above, and comments from the nonprofit Marin Agricultural Land Trust[34] each provided in depth discussions of the consequences for agriculture and the community of the alternatives set out in the DEIS. Other examples include the comments of *amic*i California Farm Bureau Federation[35] and Marin County Farm Bureau.[36]

One of the most creative commentaries came in the form of a proposed "collaborative management alternative" submitted on behalf of the Alliance for Local Sustainable Agriculture and, according to NPS statistics, endorsed by some 1,750 commenters.[37] This proposed alternative builds on the suggestions of the scientists with the National Academy of Sciences and the Marine Mammal Center that an interpretive center be established "that

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[34] Appendix, Exhibit 10.

[35] Appendix, Exhibit 21: For California Farm Bureau, Elsa Noble Comments on DEIS, Correspondence #51561.

[36] Appendix, Exhibit 22: For Marin County Farm Bureau, Dominic Grossi Comments on DEIS, Correspondence #51043.

[37] FEIS: Appendix F, Table F-4, page f-14.

would include exhibits on the ecology of the Estero, including its shellfish mariculture," and that a "collaborative adaptive management approach" be used to managing shellfish cultivation in Drakes Estero. The Alternative calls for relevant organizations, including the Oyster Farm, to work together for the benefit of all. This Alternative would support the goals of the National Shellfish Initiative announced by the Department of Commerce and National Oceanic and Atmospheric Agency [NOAA] in June 2011. It would protect the "desperately needed affordable housing for farmworkers on remote Point Reyes ranches all while contributing to retention of the "distinctive 'sense of place and character'" that makes West Marin and the Seashore a beloved destination.[38]

In the NPS response to the proposal, different aspects of the "Collaborative Management Alternative" were rejected for typical bureaucratic and "legal" reasons, summed up in this phrase, "because its key elements lack legal foundation." The allegedly "missing" elements include a lack of authority to issue a renewable SUP, which, at least in part, depends on a disputed interpretation of the reference to the "same terms" as the RUO in Section 124. There is a reference to a claim that the State lacks authority to lease Drakes Estero water bottoms for shellfish cultivation despite having

[38] Appendix, Exhibit 21: Jeffrey Creque for Alliance for Local Sustainable Agriculture Comments on DEIS, Correspondence ID: 51993.

done so for some 80 years.

The Alternative was also rejected on the grounds that the primary focus of the Oyster Farm is the sale of shellfish, which NPS deigns not a "service" "offered to the visiting public to further the public's use and enjoyment of the Seashore." This despite the Oyster Farm Manager's eloquent description of the Oyster Farm's commitment to providing interpretive services discussed above.[39] Since the SUP is to replace an RUO that explicitly stated that the onshore facilities were to provide interpretive services, these are not legitimate justifications for dismissing support for the Collaborative Management Alternative.

When the work of correspondents, who provide thoughtful comments, is essentially disrespected, the environmental review process is rendered meaningless and leads to distrust of the agency purporting to engage in environmental review. It is not surprising that distrust of the agencies motives is reflected in several of the more thoughtful comments on the DEIS.

[39] See Appendix, Exhibit 17.

IX. CONCLUSION

To spend what appears to be enormous amounts of money on a process and then dismiss it peremptorily when ordinary people are feeling the impact of the economic downturn, and low income workers are facing a loss of jobs and housing, is akin to rubbing salt into the wound. Just as Secretary Salazar's visit to the Oyster Farm made a mockery of the workers' concerns for their livelihood and home, Salazar's dismissal of comments offered during the environmental review process made a mockery of the public interest in having the decision on the future of DBOC made after a meaningful review process. This Court can best serve the public interest in this case by issuing the preliminary injunction requested and returning the case to the District Court along with instructions in which misstatement of both pertinent facts and applicable law are corrected.

DATED: March 13, 2013

/s/ Judith L. Teichman
JUDITH L. TEICHMAN
Attorney for [Proposed] *Amici Curiae*

CERTIFICATE OF COMPLIANCE

(FED. R. APP. P. 32(A)(7)(B))

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because this brief contains 6587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point.

DATED: March 13, 2013

/s/ Judith L. Teichman
JUDITH L. TEICHMAN
Attorney for [Proposed] *Amici Curiae*

EXHIBIT 8

WILLIAM T. BAGLEY
40 Lockwood
San Rafael, CA 94901
(415) 453-3355
diane_bagley@comcast.net

JOHN L. BURTON
465 California Street, #400
San Francisco, CA 94104
(415) 362-4405
johnb@cadem.org

PAUL N. "PETE" McCLOSKEY, JR.
P.O. Box 3
Rumsey, CA 95679
(530) 796-2124
rumseyfarm@aol.com

August 11, 2011

RECEIVED AT
APR 12 2012
COMMISSION MEETING
AGENDA ITEM 24

Secretary Ken Salazar
Department of the Interior
1839 C Street, NW
Washington, D.C. 20240

Former Congressman Pete McCloskey

Re: ***Continuance of a Permit in Drakes Estero, Point Reyes National Seashore for the Drakes Bay Oyster Company***

Dear Mr. Secretary:

We write to recommend that you exercise your discretion to grant a Special Use Permit for the continuance of the Drakes Bay Oyster Company in the Point Reyes National Seashore when its present Reservation of Use and Occupancy expires in November, 2012.

We write as three former Northern California legislators who were personally involved in either the transfer of state tidal lands in 1965 to the Park Service, the necessary additional $35 million funding authorized in 1969 to acquire the 20,000 acres of ranches for the Park's pastoral zone, or the 1976 Wilderness Act which assigned a portion of the Park to wilderness, but retained the 20,000 acres of ranchlands to be operated by lease to private ranchers and the oyster farm to continue to operate as a "prior, non-conforming use."

As you know this has been a controversial issue since April, 2007 when Superintendent Don Neubacher and a senior Park Service scientist accused the oyster operator of endangering the seal population in the Park. The charges were subsequently determined to be false by the Department of Interior in 2008 and by a National Academy of Sciences panel in 2009. Not until 2010, did the Service release three years of logs and daily photographs secretly taken of the seal pupping areas which disclosed that kayakers and others than the oyster operators were the primary cause of seal disturbances.

For some ten weeks we have been talking to leaders on both sides of the controversy and examining the documents, particularly with regard to the environmental issues and the legislative history of the Seashore. The Seashore is somewhat unique in the National Park System in that from the beginning, it was intended to have a considerable part of its area, consisting of the historic scenic ranches being leased back to their owners, and to retain an oyster farm and California's only oyster cannery in the Drakes Estero. The Estero sits in the middle of those 20,000 acres of ranches designated as a pastoral zone; the oyster plant and cannery on the shores of Drakes Estero are in that pastoral zone.

Point Reyes National Seashore was created in 1962 through the leadership of three remarkable men, Congressman Clem Miller, Secretary of Interior Stuart Udall, and Park Director Conrad Wirth.

Wirth's words to the Congress and to the people of Marin County in 1961 were specific:

"EXISTING COMMERCIAL OYSTER BEDS AND THE OYSTER CANNERY AT DRAKES ESTERO.....SHOULD CONTINUE UNDER NATIONAL SEASHORE STATUS BECAUSE OF THEIR PUBLIC VALUES. THE CULTURE OF OYSTERS IS AN INTERESTING AND UNIQUE INDUSTRY WHICH PRESENTS EXCEPTIONAL EDUCATIONAL OPPORTUNITIES FOR INTRODUCING THE PUBLIC, ESPECIALLY STUDENTS, TO THE FIELD OF MARINE BIOLOGY."

In 1965, Assemblyman William Bagley, at the request of the Park Service, caused to be enacted A.B. 1024, conveying the State of California's tidelands and bottomlands within the Seashore to the Park Service, reserving however the fishing rights which then included shell fishing rights, traditionally leased by the state for oyster production.

Then in 1969, when the initial appropriation of $19 million became exhausted, with the threat of subdivision hanging over the Seashore, a second term Congressman was able to convince a reluctant Nixon White House to grant an additional $35 million to purchase the remaining ranch lands, which were to be continued to be operated in the 20,000 pastoral zone surrounding the Estero.

In 1972, the late Congressman Phil Burton gave the Bay Area the priceless gift of the Golden Gate National Recreation Area (GGNRA) situated just south of Point Reyes.

In 1974, Congressman John Burton and Senator John Tunney introduced bills to designate a portion of the Seashore as wilderness. Department of Interior Secretary Jon Kyl pointed out that the State of California had reserved fishing rights in the submerged lands, which was inconsistent with the submerged lands qualifying as pure wilderness. The bills were amended to add 8,000 acres surrounding and including Drakes Estero as potential wilderness. Both Congressman Burton and Senator Tunney testified that the oyster farm was intended to continue as a prior, non-conforming use within the potential wilderness area.

BURTON: "THERE ARE TWO AREAS PROPOSED FOR WILDERNESS WHICH MAY INCLUDED AS WILDERNESS WITH 'PRIOR, NON-CONFORMING USE.' ONE IS DRAKES ESTERO WHERE THERE IS A COMMERCIAL OYSTER FARM. ...."

TUNNEY: "ESTABLISHED PRIVATE RIGHTS OF LANDOWNERS AND LEASEHOLDERS WILL CONTINUE TO BE RESPECTED AND PROTECTED. THE EXISTING AGRICULTURAL AND AQUACULTURAL USES CAN CONTINUE."

Prior to the passage of the Act, both the Citizens' Advisory Commission of the GGNRA and the Sierra Club also concluded, and so recommended that the oyster farm and cannery could continue as a prior, non-conforming use.

For your convenience, we have attached the precise words of Park Director Wirth in 1961, and the words of the principals approving the continuation of the oyster farm at the time of the 1976 Wilderness Act as **Exhibit A**. Relevant excerpts from the California Bancroft Library's historical essay, SAVING POINT REYES NATIONAL SEASHORE, 1969-70, are attached as **Exhibit B**, and the affidavit of Assemblyman Bagley, with related documents attached as **Exhibit C**.

We think you will find the words of former Assistant Secretary Nathaniel Reed (last page of **Exhibit A**) or particular significance.

In our inquiries we have identified three opposing views held by honorable people, all of whom, however, have forgotten or want to set aside as no longer applicable, the commitments made in 1962 and particularly their own words and those of Senator Tunney, Congressman Burton and Assistant Secretary Reed regarding the preservation of the oyster farm as a non-conforming use in 1976/1975.

Former State Secretary of Resources Huey Johnson argues that all private operations in National Parks should be eliminated. Another group center on the single sentence in the House Committee Report accompanying the 1976 Act, setting forth the expectancy that non-conforming uses will be removed with all due speed. A third view is held that whenever there is a chance to add additional "pure" wilderness, for use only by kayakers, canoeists and hikers, the opportunity should be seized.

We have weighed these views, but believe that they are far less compelling than the commitments made back in 1976 and earlier. We are satisfied after hearing from several leading scientists outside the Service, and from the report of the National Academy of Sciences panel requested by Senator Feinstein that the 77 years of operation of the oyster farm has not endangered the local seal or bird life populations. The cannery is perhaps visited by more school children and other visitors than any other spot in the Park. The Academy of Sciences panel, in addition to finding that there was no substantial evidence of any danger to the seal population, has pointed out that the oyster farm serves as a wonderful basis for future research. Finally, producing 80% of the Bay Area's oysters, over 440,000 pounds annually, for human consumption, it meets the Commerce Department's new emphasis on local mariculture.

Each of us agreed some weeks ago that we would not make this recommendation to you if we found that the oyster farm represented any significant danger to the Estero's environment, its seal population or its bird life. It's only drawback seems to be that kayakers, canoeist and hikers will see some 140 acres of the 2,200 acre Estero covered with oyster racks and bags at low tide when they go out to see the seals and wildlife.

The convincing point was made by the Coastal Commission biologist, Dr. John Dixon, when he stated: "I don't think there is any non-correlative evidence either way whether the oyster operation endangers the seal population." This of course put the lie to the Park Service's claims back in 2007 that started this whole controversy.

We are also compelled to note that the deliberate misrepresentations of science by the Park Service, and particularly its failure for three years to disclose its logs and photographs which not only disproved its contentions of damage to the seals by the oyster farm, but put the blame on kayakers and others for most of the seal disturbances has created a wide distrust of a one of the few remaining revered institutions of our Government. None of us have ever met a Park Ranger who wasn't courteous, helpful, truthful and competent. The Neubacher Administration, however has been guilty of misconduct and deceit, as found by the Department's Inspector General. We have attached a summary of the deceits and withholding of factual data prepared by a Member of the National Academy of Sciences whose home overlooks the Seashore as **Exhibit D**. A copy of the Seashore's brochure, with a map of the pastoral and wilderness areas is appended as **Exhibit E**.

It seems highly possible to us that the there are elements in the Park Service Administration, which have had a secret agenda for some years to drive out not only the oyster farm, but the privately-leased ranches as well. There have been a whole series of small impositions on the ranchers which serve to make their operations more difficult. As of last weekend, for example, the Park Service had made no attempt to keep the wild tule elk herds in the northern wilderness section of the Seashore from breaking out onto the cattle ranches in the pastoral zone.

We think it might go a long way to restore public confidence in the Park Service to hold appropriate congressional committee hearings to ascertain why the Service seems dedicated to setting aside the words of Director Wirth of fifty years ago, and the testimony of Congressman Burton and Senator Tunney and the words of former Assistant Secretary Nat Reed regarding the 1976 Wilderness Act.

Thanking you for your public service which has done so much to restore the integrity of the Department of Interior after the scandals of the previous Administration, we remain,

Respectfully,

WILLIAM T. BAGLEY
California State Assembly, 1961-74

JOHN L. BURTON
Member of Congress, 1974-82

PETE McCLOSKEY
Member of Congress, 1967-82

EXHIBIT 9

Tomales Bay Association
P.O. Box 369
Pt. Reyes Station, California 94956

October 2013

Tomales Bay Association has been in existence since the 1960's and has been at the forefront of many environmental issues throughout those years.

- We led the fight against a major 7-fold expansion of a local Landfill and effected the eventual closure of the facility.
- We were directly involved in State Water Resources Control Board Hearings for Lagunitas Creek in 1982 and 1992, which led to Decision 1582 and ultimately the 1995 SWRCB Order 95-17 controlling water rights, stream flows, and restoration of critical habitat and enhancing coho and steelhead (salmonid) populations on Lagunitas Creek in Marin County
- We organized the first official coho and steelhead Spawner Surveys on Olema Creek, tributary to Lagunitas Creek and within the GGNRA-Point Reyes National Seashore and have participated in ongoing surveys on local streams.
- We have sponsored and/or constructed hands-on Salmonid Restoration projects including planting thousands of willows and hundreds of trees, installing exclusionary fencing to restore riparian habitat, designing removal of fish-passage barriers, etc., also within the jurisdiction of the National Seashore.
- TBA was the first group in West Marin to strongly encourage the National Park Service (NPS) to buy and restore the former Giacomini Ranch. In fact, we dedicated an entire issue of our *Tomales Bay Watershed* as a digest of the initial review by Phil Williams and Associates in order to help inform the public. We continue to look forward to the restoration both as benefit to species habitat and for educational value for the public.

As an important local environmental group, we object to the decision to close the Drakes Bay Oyster Company's (DBOC) facility on Drakes Bay by terminating its NPS land-lease, primarily because the facility is within the Pastoral Zone, just as the continuing and supported Ranch Leases within the Seashore. The National Park Service has continued to harass the operator and block efforts to resolve issues related to the previous operators shortcomings with the California Coastal Commission, and fabricated bogus reasons to justify closing the facility under pretense of creating Wilderness Designation for the area the operator uses for a growing area, which is actually completely separate from the NPS lease in question.

Additionally, the oyster operation (including both growing areas and processing facility) were seen as being compatible with Parks Purpose and the Wilderness Designation by the drafters of the Acts that created the Park and Wilderness Area. The oyster operation preceded the park and is seen as compatible, even if it is an existing non-conforming use.

The continued operation in no way threatens the Wilderness Act, and its closure would in no way restore the area to "wilderness." It is a valuable resource to local residents as well as visitors.

The Drakes Bay Oyster Company is a critical component of on-going habitat restoration projects for Threatened & Endangered species, especially native oyster restoration projects in SF Bay and elsewhere in the State, because it is the last operating cannery in California and therefore the only readily available source of shell in California.

The Park Service's positions, behavior and decisions in this matter have been arbitrary and capricious. Please regard the DBOC request to reconsider without prejudice, as we think it has merit.

Sincerely,

Kenneth J. Fox, President

9th Circuit Case Number(s) 13-15227

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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Signature (use "s/" format) s/ Judith L. Teichman

****

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