

# EXHIBIT 3



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October 24, 2012

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**VIA ELECTRONIC MAIL AND U.S. MAIL**

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**Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11**

Dear Ms. Cave:

This letter responds to your July 30, 2012, letter asserting that the Drakes Bay Oyster Company may be in violation of California Coastal Commission Consent Cease and Desist Order No. CCC-07-CD-11 ("Consent Order").

Drakes Bay Oyster Company is in full compliance with the Consent Order. Its actions and positions are transparent. Perhaps no coastal activity in California is as carefully managed and heavily scrutinized as the Drakes Bay Oyster Company.

This letter responds to the three compliance issues raised in the July 30 letter by providing relevant evidence, analyzing and answering the CCC's allegations, and proposing a path forward to resolve each issue.

There is no basis for CCC to consider, much less engage in, a new enforcement action against Drakes Bay Oyster Company.

**I. DRAKES BAY OYSTER COMPANY COMPLIES WITH THE HARBOR SEAL PROTOCOL FOR ACCESSING THE "LATERAL CHANNEL" OF DRAKES ESTERO DURING HARBOR SEAL PUPPING SEASON**

Two errors have misled the CCC into alleging that Drakes Bay Oyster Company ("DBOC") has been in violation of the protocol for accessing the "Lateral Channel" in Drakes Estero during harbor seal pupping season.



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First, the CCC fails to understand how the “Lateral Channel” has been defined over nearly twenty years of operational history under both the 1992 Record of Agreement Regarding Drake’s Estero Oyster Farming and Harbor Seal Protection (“1992 Multi-Agency Seal Protocol”), and the 2008 Special Use Permit (“2008 SUP”) between DBOC and the National Park Service (“NPS”). As documented in this letter, operational practice makes clear that DBOC’s activities during the harbor seal pupping season have been long acknowledged and accepted by the NPS, the National Marine Fisheries Service (“NMFS”), the California Department of Fish and Game (“CDFG”), and California Department of Health Services (now known as the California Department of Public Health, or “CDPH”) (collectively, the “Resource Agencies”).

Second, although the CCC asserts that the terms and conditions found in the 2008 SUP between DBOC and the NPS establish that DBOC is in violation of the harbor seal pupping protocol, the 2008 SUP does not define the key terms or provide any metrics that are inconsistent with operational practice under the 1992 Multi-Agency Seal Protocol. Accordingly, the 2008 SUP does not provide any basis for a finding that DBOC has failed to comply with the harbor seal pupping season protocol.

**A. Operational Practice Defines the Westernmost Extent of the “Lateral Channel” During the Harbor Seal Pupping Season**

As the CCC understands, restrictions on oyster boat travel in Drakes Estero during harbor seal pupping season have been in place since May 1992, when the operator at that time, the Johnson Oyster Company (“JOC”), entered into the 1992 Multi-Agency Seal Protocol with the Resource Agencies. Accordingly, by the time DBOC took over from JOC in 2005, over a decade of operations under the 1992 Multi-Agency Seal Protocol had already occurred.

CDFG official Tom Moore, a biologist with responsibility for managing aquaculture operations in Drakes Estero and the agency official with the longest continuous involvement with aquaculture operations in Drakes Estero, is the most knowledgeable person regarding the protective actions taken to ensure harbor seals are not disturbed by aquaculture operations. He was an original participant in developing the 1992 Multi-Agency Seal Protocol and was responsible for implementing it over nearly two decades—first with JOC, and later with DBOC. At the time of Mr. Moore’s retirement in 2009, he was CDFG’s Marine Region Aquaculture Coordinator, and was responsible for managing all the state’s marine aquaculture.



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Mr. Moore notes that when the 1992 Multi-Agency Seal Protocol took effect, there was “no exact beginning of the western edge of the ‘lateral channel,’ whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map.” Attachment 1, Moore letter to Cave, at 2 (October 3, 2012). Without either GPS or GIS ability “to mark, using latitude and longitude, this undefined point in 1992 . . . JOC employees landed at the western ‘edge’ of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.” *Id.* This operational practice persisted throughout the remainder of JOC’s operations, without complaint by NPS (or any other agency) about harbor seal disturbances. *Id.*

In fact, Mr. Moore always understood that the 1992 Multi-Agency Seal Protocol was “meant to be an adaptive management tool with new input from operational experience revising the protocols.” Attachment 1, Moore letter to Cave, at 3.

When DBOC began operations, Mr. Moore provided Mr. Lunny with the 1992 Multi-Agency Seal Protocol and took him and DBOC employees to “the lateral channel area . . . to indicate the permissible extent of access during the harbor seal pupping season.” Attachment 1, Moore letter to Cave, at 2. According to Mr. Moore, “DBOC’s use of this area is essentially in the same manner (stocking, working and harvesting) as JOC’s *except with less use* of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations.” *Id.* at 2 (emphasis added). In Mr. Moore’s opinion, “DBOC has shown good faith and adherence to the protocols in both the [1992 Multi-Agency Seal Protocols] and the 2008 Special Use Permit (SUP) . . . .” *Id.* at 2-3.

Throughout its operations, DBOC has respected both the 1992 Multi-Agency Seal Protocol and the 2008 SUP, and has not entered the “Lateral Channel” as defined by decades of operational practice during the harbor seal pupping season. GIS records demonstrate the consistency of DBOC’s operations in the western side of Drakes Estero and confirm that DBOC boats are not accessing the “Lateral Channel” during harbor seal pupping season. Attachment 2, DBOC GIS map of June 2010 boat transit (“June 2010 Boat Map”).

Notably, since 2005, the NPS has closely monitored DBOC’s activities, especially during the harbor seal pupping season. Despite this scrutiny, NPS has never alleged that DBOC is out of compliance with the 1992 Multi-Agency Seal Protocol, or the 2008 SUP.



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More importantly, NMFS—the agency with jurisdiction under the Marine Mammal Protection Act to protect harbor seals—has never alleged that DBOC is out of compliance with the 1992 Multi-Agency Seal Protocol, and does not consider DBOC’s long-standing boat transit patterns to cause any impacts to harbor seals during the pupping seal closure.

It is unsurprising that the Resource Agencies have long allowed oyster boats to access Beds 15, 17, and 20 during the March 1 to June 30 period. This is so because the Drakes Estero harbor seal haul out areas are approximately 600 yards from the point where DBOC’s boats stop, a distance six times greater than the 100 yard buffer generally required by the 1992 Multi-Agency Protocol, and the 2008 SUP.

Furthermore, Mr. Moore notes that since 1992, the aquaculture sites have become even further removed from harbor seals using the “Lateral Channel” because “shallower water [in the western end of the “Lateral Channel”] has caused [the seals] to abandon the haul-out sites nearer to the aquaculture operations.”<sup>1</sup> Attachment 1, Moore letter to Cave, at 2.

#### **B. The 2008 Special Use Permit Does Not Contradict Operational Practice**

The CCC’s July 30 letter asserts that DBOC frequently has been in violation of the 2008 SUP’s boat transit restrictions by accessing the “Lateral Channel” in Drakes Estero during the March 1 to June 30 harbor seal pupping season. The CCC bases this claim on its interpretation of Exhibit C of the 2008 SUP, which provides a “Drakes Estero Aquaculture and Harbor Seal Protection Protocol.”

The CCC’s contention that DBOC is out of compliance with the 2008 SUP turns on how the term “Lateral Channel” is defined in the 2008 SUP, and in practice.

<sup>1</sup> As the CCC is likely aware, harbor seals choose haul-out sites proximate to deep water, not shallow water. In a recent online journal, NMFS researchers noted that “[l]ower tides often expose rocky reefs, sandy beaches and mudflats that are favorable haul-out sites for seals because of isolation from land predators and *quick access to deep water.*” LONDON, J. M., J. M. Ver HOEF, S. J. JEFFRIES, M. M. LANCE, and P. L. BOVENG, “Haul-Out Behavior of Harbor Seals (*Phoca vitulina*) in Hood Canal, Washington, PLoS One, 7(6):e38180 (June 18, 2012) (emphasis added), *available at* <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0038180>.



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At the time it was issued, the 2008 SUP did not disturb in any way the sixteen years of operational practice under the 1992 Multi-Agency Seal Protocol already in place with respect to where oyster boats travel on the western side of Drakes Estero during the harbor seal pupping season. For example, it did not define the key terms “Lateral Channel,” “Main Channel,” or “West Channel,” used in Exhibit C (the “Drakes Estero Aquaculture and Harbor Seal Protection Protocol”), despite the fact that an understanding of the geographic extent of these areas is critical to compliance. *See* Attachment 3, 2008 SUP, Exhibit C. Nor did the map included in Exhibit C to the 2008 SUP designate the geographic extent of the “Lateral Channel,” “Main Channel,” or “West Channel”—in fact, those areas were not even labeled on the map.

The four corners of the 2008 SUP provide no metrics for determining the geographic extent of the “Lateral Channel” in Drakes Estero, or for determining what constitutes a violation of the “Lateral Channel” under the Exhibit C “Drakes Estero Aquaculture and Harbor Seal Protection Protocol.” Had the NPS and DBOC intended to change sixteen years of operational practice, it was incumbent on the NPS to make that clear to DBOC in the 2008 SUP.

In fact, the record demonstrates no intent to change DBOC’s operational practice on the western side of Drakes Estero during harbor seal pupping season through the 2008 SUP.

Since 2008, NPS has never cited DBOC for failure to comply with the 2008 SUP or the 1992 Multi-Agency Seal Protocol, despite full and continuous knowledge of DBOC’s boat transit patterns from at least three different sources.

First, in 2008 as part of the SUP process, DBOC submitted a Boat Transit Map to NPS that demonstrated the year-round extent of its boat transit operations.<sup>2</sup> Attachment 4, DBOC

<sup>2</sup> The CCC received this map as part of the Consent Order process. The July 30 letter takes the position that the Boat Transit Map “did not address the necessary seasonal closures,” but that is not the case. *Id.* at 2. In fact, the Boat Transit Map shows DBOC’s operations year-round, and never purported to do anything else. CCC’s misunderstanding is a direct result of its divorce from operational practice in Drakes Estero. The annual harbor seal protection zones implemented with the Consent Order, and subsequently incorporated into the 2008 SUP, effectively closed the “Lateral Channel” to DBOC boats year-round because an harbor seal protection zone covers the intersection of the Main Channel and the “Lateral Channel,” and much of the “Lateral Channel” itself. When DBOC agreed to the annual harbor seal protection zones, it effectively agreed to operate with respect to the “Lateral Channel” as if it was harbor seal pupping season all year long.



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Boat Transit Map (2007). Second, NPS's secret camera program took over 281,000 photos during harbor seal pupping season from May 2007 through 2010, which documented DBOC's boat operations near the harbor seal protection zones. Finally, as part of the NPS Environmental Impact Statement ("EIS") preparation process, DBOC submitted GPS data detailing its boat transit operations in June 2010. This data also demonstrated the extent of DBOC boat transit, and was replicated into Figure ES-2 in the Draft EIS. *See* NPS Draft EIS, Fig. ES-2, Existing Conditions (Offshore Operations); Attachment 2, June 2010 Boat Map.

In response to this full and continuous knowledge of DBOC's boat transit patterns the NPS did . . . nothing. Why? Two decades of boat transit patterns under the 1992 Multi-Agency Seal Protocol, combined with the 2008 SUP's failure to effect any change to that operational practice, explains perfectly why NPS reacted as it did—DBOC has been and continues to be in full compliance with the harbor seal protocols.

The July 30 letter cites to a January 23, 2012, letter from NPS to DBOC, which states in relevant part that NPS interprets the term "Lateral Channel" in the 2008 SUP as "the entire channel between the Main Channel and West Channel." Attachment 5, Muldoon letter to DBOC at 1 (January 23, 2012). This letter is unhelpful, in that it uses undefined terms in an attempt to define an undefined term, and never relates to a map. Furthermore, it does nothing to explain how long-standing operational practice was changed by the 2008 SUP, if at all.

**C. The Resource Agencies Could Easily Resolve Any Controversy With Readily Available Technology**

Mr. Moore, the CDFG biologist responsible for managing aquaculture operations in Drakes Estero from 1988 until 2009 and a participant in the 1992 Multi-Agency Seal Protocol, explains that the westernmost extent of the "Lateral Channel" has always been undefined. Attachment 1, Moore letter at 2 ("In reality, there is no exact beginning of the western edge of the 'lateral channel,' whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map.").

In fact, Drakes Estero is a dynamic tidal environment where physical features like sand bar location, tidal height, current, wind speed, visibility, and water conditions are constantly in flux. Mr. Moore explains that some of the navigational difficulties associated with determining the location of the westernmost extent of the "Lateral Channel" boundary in Drakes Estero include tidal levels obscuring mudflat areas and algal bloom conditions. *Id.* at 2-3. Mr. Moore notes, "I am frankly quite amazed that the 'lateral channel' remains undefined and that no buoy or channel marker has been placed to provide a reference point." *Id.* at 3.



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Today, technology exists to enable DBOC to navigate its oyster boats with precision by using GPS navigational tools. In fact, DBOC uses GPS navigational tools routinely in its operations in Drakes Estero. Furthermore, physical markers designate the geographic extent of the annual harbor seal protection zones. The Resource Agencies—particularly NPS—could easily resolve any controversy with readily available technology.

#### **D. DBOC Is In Compliance With the 2008 SUP and the Consent Order**

The July 30 letter contends that DBOC has been in violation of the 2008 SUP's March 1 to June 30 harbor seal pupping protocol since approximately April 22, 2008, when the 2008 SUP came into effect, through March 5, 2012, when DBOC voluntarily agreed to suspend boat transit in the disputed area until this issue could be resolved. *Id.* at 2.

The CCC has no basis to contend that DBOC has been in violation of the 2008 SUP during the 2008, 2009, 2010, 2011, or 2012 harbor seal pupping seasons because the 2008 SUP does not disturb in any way operational practice for boat transit on the western side of Drakes Estero during the harbor seal pupping season. Furthermore, taken in context with the record, DBOC's interpretation of the harbor seal pupping season closure protocol is confirmed by Mr. Moore, the person most knowledgeable, as well as by NPS's failure to cite DBOC for non-compliance at any point.

More to the point, Mr. Moore's explanation that the 1992 Multi-Agency Seal Protocol was "meant to be an adaptive management tool with new input from operational experience revising the protocols," demonstrates why CCC's attempt to interpret the Protocol in absence of operational practice was doomed to fail from the outset. Attachment 1, Moore letter at 3. It also indicates why it was imperative that NPS clearly define key terms in the 2008 SUP if it intended to change long-standing operational practice under the 1992 Multi-Agency Seal Protocol.

#### **E. The California Coastal Commission Lacks Jurisdiction to Duplicate or Exceed the California Department of Fish and Game's Long-Standing Program for Protecting Harbor Seals In Drakes Estero**

Section 30411(a) of the Coastal Act recognizes that the Fish and Game Commission and CDFG are "the principal state agencies responsible for the establishment and control of wildlife and fishery management programs", and prohibits the CCC from establishing or imposing "any controls with respect thereto that duplicate or exceed regulatory controls established by [CDFG or the Fish and Game Commission] pursuant to specific statutory requirements or authorization." Cal. Pub. Res. Code § 30411(a).



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The July 30 letter continues to assert that the CCC—despite the CDFG’s long-standing establishment and implementation of a program to prevent aquaculture operations in Drakes Estero from impacting harbor seals—has jurisdiction to duplicate and exceed the controls in the CDFG program. There are three key problems with this position.

First, the July 30 letter asserts that Section 30411(a) does not apply because “aquaculture operations are not wildlife or fisheries management programs” within the meaning of Section 30411(a). *Id.* at 4. This frames the issue exactly in reverse—it is not DBOC’s aquaculture operations that are the focus when applying Section 30411(a), but rather, CDFG’s actions as the principle state agency responsible for wildlife management programs. Here, the relevant CDFG action is the 1992 Multi-Agency Seal Protocol and over twenty years of CDFG implementation of the same, which was designed to “minimize the disturbance to harbor seals resulting from [] oystering operations.” Attachment 6, 1992 Multi-Agency Seal Protocol.

The CCC cannot escape Section 30411(a)’s exclusionary effect because the 1992 Multi-Agency Seal Protocol is a wildlife management program, and CDFG acted within its statutory authority when it entered into the Protocol.

It is axiomatic that CDFG’s wildlife management programs include those programs that are designed to control human activities to protect wildlife. This is so because CDFG’s mission is extremely broad. *See* Fish & Game Code § 1802 (giving CDFG jurisdiction over the “conservation, protection, and management of fish, wildlife, native plants, and habitat” and designating CDFG as the “trustee for fish and wildlife resources”). When it entered into the 1992 Multi-Agency Seal Protocol, CDFG was clearly acting within its capacity as the State trustee to protect wildlife in Drakes Estero.

Furthermore, the Fish and Game Code includes explicit statutory provisions directing the CDFG and the Fish and Game Commission to regulate aquaculture for the benefit of wildlife. *See* Cal. Fish & Game Code §§ 15005(a) (“[w]hen necessary for the protection of native wildlife, the [Fish and Game Commission] may regulate the transportation, purchase, possession, and sale of specific aquaculture products . . . .”); 15101(b) (authorizing CDFG to establish procedures to “ensure the [aquaculture] operation will not be detrimental to native wildlife . . . .”); 15102 (authorizing CDFG to “prohibit an aquaculture operation or the culturing of any species at any location where it is determined it would be detrimental to adjacent native wildlife”); 15500-15516 (scheme for regulating aquaculture to prevent diseases and parasites).



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By entering into the 1992 Multi-Agency Seal Protocol and implementing the same for more than twenty years to protect harbor seals in Drakes Estero, the CDFG established controls that fall squarely within the scope of Section 30411(a) because the CDFG was acting: (1) within its role as the trustee for wildlife, and (2) pursuant to explicit statutory authority in the Fish and Game Code. The CCC has no discretion to exceed or duplicate those controls. Notably, the fact that the CCC was not included in the 1992 Multi-Agency Seal Protocol serves as a pointed demonstration of CCC's lack of jurisdiction in this regard.

Second, the July 30 letter's assertion that Section 30411(a) does not apply because the Consent Order "is not directly regulating or managing the seals in any way, but rather is regulating DBOC's aquaculture operations," makes little sense. *Id.* at 4. Neither the CCC nor the CDFG have any authority to manage or regulate harbor seals—only the NMFS has that authority under the Marine Mammal Protection Act.

Third, the July 30 letter's claim without citation to authority to regulate DBOC's operations fails to read Section 30411 as a whole by ignoring the one portion of Section 30411 that does refer to the CCC's role with respect to aquaculture. When it comes to aquaculture, Section 30411(c) further isolates the CCC's authority to coastal planning responsibilities. Section 30411(c) explains that aquaculture is a "coastal-dependent use which should be encouraged" and that the "[CCC], and where appropriate, local governments shall, *consistent with the coastal planning requirements of this division*, provide for as many coastal sites identified by the Department of Fish and Game for any uses that are consistent with the policies of Chapter 3 (commencing with Section 30200) of this division." *Id.* (emphasis added). This planning authority cannot be read as a blanket grant of authority over aquaculture operations.

In fact, the July 30 letter's assertion of jurisdiction over DBOC's aquaculture operations flies in the face of CDFG's long-standing control over aquaculture operations in Drakes Estero. CDFG has consistently regulated aquaculture in Drakes Estero since well before the enactment of the California Coastal Act and the creation of Point Reyes National Seashore. The CDFG has continually expressed its intent to continue to regulate aquaculture into the future. Not only did the CDFG issue new state water bottom leases that run to 2029, but also the CDFG recently wrote that "[c]orrespondence between [CDFG and NPS] shortly after the conveyance [of bottom lands in Drakes Estero to the U.S. in 1965] strongly suggests that [CDFG and NPS] then believed that the State's reservation of fishing rights included the right to lease bottom lands at Drakes Estero indefinitely for shellfish cultivation." Attachment 7, CDFG Director Bonham to Superintendent Muldoon at 1 (October 10, 2012). The letter further urged continued cooperation between NPS and CDFG to continue to manage the resource into the future. *Id.*



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The July 30 letter attempts to bootstrap jurisdiction by turning the analysis under Section 30411(a) on its head. The CDFG's twenty year history of protecting harbor seals in Drakes Estero pursuant to the 1992 Multi-Agency Seal Protocol, along with its express statutory authority to do so, excludes any attempt by the CCC to duplicate or exceed those controls.

#### **F. No Path Forward for the CCC at This Time**

DBOC recognizes the difficulties the CCC has encountered when attempting to analyze the 2008 SUP and the 1992 Multi-Agency Seal Protocol due to the fact that the CCC is not a party to either agreement, never consulted with CDFG, NMFS, or CDPH, and as a third party observer, failed to gain the benefit of operational practice surrounding either agreement.

In the course of the communications with the NPS, however, it has become clear that the NPS does not consider the 1992 Multi-Agency Seal Protocol to be in effect, and that the 2008 SUP lacks clarity with respect to permitted boat transit during the harbor seal pupping season.

That has been a surprise to the other parties to the 1992 Multi-Agency Seal Protocol, including NMFS, CDFG, and CDPH. NPS's failure to coordinate with these other agencies has also caused inadvertent conflict. For example, as noted in the July 30 letter, NPS and CDPH are currently attempting to resolve a NPS-created conflict over DBOC's monthly access to water sampling stations to take public health water samples in the "Lateral Channel" during the harbor seal pupping season. This is so because NPS unilaterally prohibited DBOC access to CDPH sampling stations that DBOC is required to monitor year-round to protect public health.

Ultimately, the geographic extent of the harbor seal pupping closure in Drakes Estero is an issue for the Resource Agencies—NPS, NMFS, CDFG, and CDPH—to resolve together with DBOC. While DBOC stands ready to participate with the agencies on the issue, it sees no formal role for CCC in those discussions beyond that of an interested observer.

#### **II. DBOC REQUESTS THAT THE CCC SHARE THE AQUACULTURE DEBRIS FROM DRAKES ESTERO IN ITS POSSESSION WITH DBOC**

The July 30 letter asserts that DBOC's 2008 Debris Removal Plan "has proven to be insufficient, and that both *new and old debris* from the aquaculture operations need to be addressed", and suggests possible violations of Sections 3.2.2 and 3.2.3 of the Consent Order. *Id.* at 3 (emphasis added). Respectfully, DBOC cannot respond until the CCC shares what marine debris it has obtained, and where and when the debris was found. It is especially important for the CCC to share the marine debris it has recovered in order for DBOC to



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determine whether any “new” debris (i.e., originating from DBOC’s current aquaculture operations) has been found.

DBOC cannot agree with the July 30 letter’s assertion that the “distinction [DBOC has] made between *new and legacy debris is irrelevant . . .*” *Id.* at 3 (emphasis added). This is so because DBOC operates under a self-imposed “zero loss” policy with respect to the aquaculture materials DBOC uses in Drakes Estero. DBOC takes this commitment seriously, and has designed its operations to prevent loss of aquaculture material into the marine environment. If CCC has evidence (in the form of “new” aquaculture debris) that DBOC is not succeeding in achieving its goal, DBOC can only evaluate and correct its operational practices to prevent future loss if CCC shares the marine debris it has recovered with DBOC.

As extensively documented in DBOC’s February 27, 2012, letter to the CCC, DBOC does not dispute that JOC’s operations permitted the loss of a substantial amount of aquaculture materials into the marine environment. For example, it is not uncommon after a storm event for DBOC employees to find aquaculture materials that were last used in the 1990s—nearly twenty years ago—on the shores of Drakes Estero. *See also* Attachment 1, Moore letter at 1 (describing JOC operational losses of aquaculture materials and process by which such materials are deposited on the shores of Drakes Estero years after they were lost).

Setting aside for the moment CCC’s assertion that all historic aquaculture debris is DBOC’s legal obligation, DBOC’s revised Debris Removal Plan (currently under CCC review) evidences DBOC’s commitment to clean up marine debris—regardless of origin—in Drakes Estero. DBOC has spent hundreds of thousands of dollars to remove historic aquaculture operations and to clean up debris put into the marine environment by others. In fact, much of the marine debris that DBOC collects on a regular basis does not come from historic aquaculture activities, but rather, has been deposited into the marine environment through other processes.

To move this issue forward, DBOC looks forward to working with the CCC to make sure that DBOC’s extensive marine debris recovery activities provide the information necessary for CCC to appreciate the time and attention DBOC invests on a regular basis to keeping the Estero clean. In particular, Kevin and Nancy Lunny will be in touch to arrange a mutually convenient time to meet to evaluate the debris in the CCC’s possession.



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### **III. DBOC HAS NOT PERFORMED ANY “AFTER THE FACT” DEVELOPMENT THAT HAS NOT BEEN LONG ACKNOWLEDGED BY THE CCC**

The July 30 letter asserts that a May 7, 2012, DBOC letter to Superintendent Muldoon admits that DBOC has performed unpermitted development activities after the 2007 Consent Order came into being. *Id.* at 5. It also implies that the May 7 letter contained new information that the CCC has never received before. *Id.*

DBOC regrets that its May 7 letter inadvertently caused some concern for CCC permit staff. DBOC’s May 7 letter responded to Superintendent Muldoon’s request for more information about DBOC’s ongoing activities, and also informed her that DBOC has agreed to limit its Coastal Development Permit (“CDP”) application with the CCC to its existing activities. Attachment 8, DBOC letter to Muldoon at 1 (May 7, 2012).

DBOC regrets that it failed to make clear in its May 7 letter that the CCC has long had knowledge of the activities described in Items 39 – 47, which the CCC describes as “after the fact” development. Items 39 – 45 in the May 7 letter recount activities completed at the direction of the NPS, the County of Marin, and/or the CCC in the period immediately after DBOC took over the oyster farm. These activities preceded the Consent Order, and were actually what spurred the process that the CCC and DBOC have been engaged in since 2006, which resulted in the Consent Order and DBOC’s long-pending CDP application. Item 47—installation of several new picnic tables—also preceded the Consent Order.

Only one activity described in the May 7 letter occurred after the Consent Order, and the CCC has long had knowledge of the event. With respect to Item 46, on March 5, 2008, DBOC experienced an electrical emergency involving an underground conduit. In the process of attempting to perform an emergency replacement of the conduit, DBOC dug a 12” x 18” x 80’ trench. As stated in the May 7 letter, DBOC did not believe that the emergency repair constituted “new development” under the Coastal Act. CCC enforcement staff immediately informed DBOC that it could not perform the work without a permit. DBOC stopped the work before it was completed and backfilled the trench as directed by the CCC. DBOC complied fully with CCC enforcement at the time, and paid the one-day violation fee assessed under the Consent Order.

To be clear: DBOC’s May 7 letter did not propose any new activities, or describe any past activities of which the CCC has not long been aware. DBOC is in compliance with the Consent Order. Nothing in the May 7 letter changes that fact.



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The July 30 letter notes that CCC permit staff will be responding with a separate letter, however, DBOC believes that this response should resolve the issue.

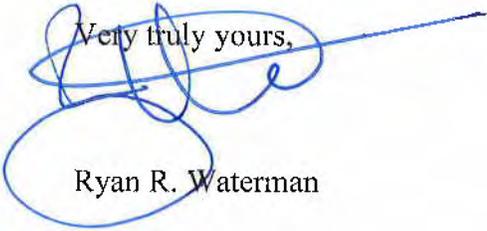
**IV. NO NEW ENFORCEMENT ACTION IS WARRANTED**

The July 30 letter raises the specter of additional enforcement action by the CCC for alleged violations of the Consent Order. As demonstrated in this response, no such action is warranted because DBOC is not in violation of the Consent Order.

Furthermore, the July 30 letter closes by asking for “a proposal for the resolution of the outstanding stipulated penalties . . . .” *Id.* at 6. DBOC submitted its detailed explanation of the issues surrounding its inadvertent placement of clams by letter on December 21, 2009, and DBOC’s counsel, Zachary Walton, submitted further response by letter on January 19, 2010. DBOC continues to await the CCC’s response to those letters.

Please do not hesitate to contact me if you have any questions about the foregoing. Kevin and Nancy Lunny will be in touch soon to arrange a mutually convenient opportunity for them to view the Drakes Estero marine debris in your possession.

Very truly yours,



Ryan R. Waterman

Attachments

cc: Kevin and Nancy Lunny, Drakes Bay Oyster Company  
Zachary Walton, SSL Law Firm  
Charles Lester, CCC, Executive Director  
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division  
Lisa Haage, CCC, Chief of Enforcement  
Alex Helperin, CCC, Senior Staff Counsel  
Jo Ginsberg, CCC, Enforcement Analyst  
Cassidy Teufel, CCC, Coastal Program Analyst  
Senator Diane Feinstein  
Cicely Muldoon, Superintendent, Point Reyes National Seashore



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Kirsten Ramey, CDFG, Marine Aquaculture Coordinator  
Diane Windham, NOAA NMFS, Southwest Region Aquaculture Coordinator  
Gregg Langlois, CDPH, Senior Environmental Scientist

# Attachment 1

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45 Fremont Street, Suite 2000  
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October 3, 2012

Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11

Dear Ms. Cave:

I would like to take this opportunity to provide some historical background on both marine debris in Drakes Estero and that pertaining to the 1992 Interagency Meeting that led to the development of protocols contained in the Record of Agreement regarding the timing and use of various areas in Drakes Estero with regard to oyster operations as practiced by the Johnson Oyster Company (JOC) and Drakes Bay Oyster Company (DBOC).

From 1988 until 2009, I was the Department of Fish and Game (CDFG) biologist managing aquaculture operations in Drakes Estero and the Agency person with the longest continuous involvement with aquaculture operations in Drakes Estero. At the time of my retirement, I was the CDFG Marine Region Aquaculture Coordinator managing all the state's marine aquaculture.

### **Marine Debris in Drakes Estero**

By 1991, CDFG had received numerous letters about marine debris in Drakes Estero from concerned citizens forwarded to CDFG by then PRNS Superintendent John Sansing. I was actively working with JOC on containment, clean-up and removal of oyster cultivation materials. Many years of oyster culture by JOC using methods that utilized long-lasting plastics and polyvinyl products (PVC pipe and coffee can lids) had created a persistent problem (legacy debris). Neither of these products floats, so escaped materials sink to the bottom and get moved by currents or get buried. Waves from storms, winds, and strong tidal currents all work to unearth buried materials and wash them ashore where they are continually found even today.

JOC regularly conducted clean-up of debris on the shores of Drakes Estero and took steps to contain and minimize loss of oyster culture growing structure materials. Additionally, they were also looking for new ways to grow and harvest their oysters that would not release these products into the environment.

DBOC has moved to new culture methods and containment at harvest and regularly picks-up marine debris from beaches in the Estero, when they are not prohibited by seasonal and other closures. Materials used for culture are not cheap, so there is also a financial incentive to contain and re-use these materials. Documented collection efforts and a categorization of collected materials would provide evidence of compliance with mandated clean-up efforts. It would also provide a baseline to look at the decline of legacy materials over time. Also, it may surprisingly show, as JOC found, that there is a fair amount of plastics, foam from buoys, etc. that enters Drakes Estero from the ocean and also from PRNS visitors.

## Harbor Seal Pupping Season Closure

In late 1991, allegations of take under terms of the Marine Mammal Protection Act (MMPA) of harbor seals by JOC and their oyster operations led to the involvement of NOAA National Marine Fisheries Service (NMFS). Two meetings were held, one inter-agency meeting with NMFS, NPS, CDFG and CDHS (now California Department of Public Health) on December 9, 1991, and a follow-up meeting with the Agency personnel and JOC on January 15, 1992. NMFS Enforcement did not pursue action under the MMPA and felt that JOC's normal operations did not constitute a take. NMFS Enforcement did direct the parties (NPS, CDFG and JOC) to work together to develop a mutual plan for minimizing the disturbance to harbor seals from aquaculture operations by JOC in Drakes Estero.

This Record of Agreement (see attached) resulted in the closure of the "lateral channel" during harbor seal pupping season (March 15- June 1). The "lateral channel" was generally defined as the channel running between the main channel and the western channel and illustrated as such on a map included in correspondence from NPS to CDFG on April 28, 1992. This map shows the maximum mudflat area exposed on very low tides (less than -1.0 ft.) in Drakes Estero. However, the vast majority of the time these areas are under water and not visible on the surface.

Since the Record of Agreement was finalized, JOC oyster farm employees have accessed the oyster beds adjacent to the lateral channel from the western channel during closures and year around. In reality, there is no exact beginning of the western edge of the "lateral channel," whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map. There was not the GPS or GIS capability available to mark, using latitude and longitude, this undefined point in 1992. Accordingly, JOC employees landed at the western "edge" of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.

This worked for 15 years since complaints from NPS about harbor seal disturbance ceased. As a party to the Record of Agreement, CDFG tried to ensure that JOC operated within the agreed upon protocols.

When DBOC took over the lease from JOC, I provided Mr. Lunny with a copy of the Record of Agreement and made onsite visits to the lateral channel area with Mr. Lunny and DBOC employees to indicate the permissible extent of access during the harbor seal pupping season. DBOC's use of this area is essentially in the same manner (stocking, working and harvesting) as JOC's except with less use of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations. If there had been complaints or evidence of adverse impacts, CDFG would have, with input from parties to the Record of Agreement, defined the exact location and placed a buoy or channel marker to define the westernmost permissible extent of access to the "lateral channel" area.

The shallowing of the western end of the lateral channel since 1992 has provided additional protection to harbor seals using the lateral channel since the shallower water has caused them to abandon the haul-out sites nearer to the aquaculture operations. The Marine Mammal Commission found no scientific evidence or basis to suggest the current usage of the western edge of the lateral channel, as practiced by DBOC and formerly JOC, to work Barries Bar is causing any adverse impacts to the harbor seals. Additionally, DBOC has shown good faith and adherence to the protocols in both the Record of Agreement and the

2008 Special Use Permit (SUP), and did not violate the terms of either with regard to not using the main channel during closure as shown in the 250,000 photographs taken by NPS over three years.

The Record of Agreement was meant to be an adaptive management tool with new input from operational experience revising the protocols. The technology now exists (aerial photography, Google Earth) and has been used to view accustomed usage patterns of DBOC's oyster workers in the lateral channel area and place them within the currently undefined "lateral channel" boundary. It is very easy to determine the position of an object from an altitude of several thousand feet but much more difficult in a large embayment from a boat at high tide with an algal bloom limiting water visibility. The reason there are channel markers and buoys in the marine environment is because it is very difficult to define your position on open water. It is also the reason that the CDPH has buoys for their water quality sampling stations so the samples are taken from the same place over time.

I am frankly quite amazed that the "lateral channel" remains undefined and that no buoy or channel marker has been placed to provide a reference point. I cannot imagine that in a terrestrial setting that a sign or fence would not have been posted to define the closure point or area.

DBOC has not violated the "lateral channel" boundary since they have been going about their accustomed normal operating procedures as per the Record of Agreement and in the same manner as JOC did in the past.

### **Proposing a Solution**

A sensible solution would be to convene all the parties (CDFG, NPS, NMFS, DBOC) to the original Record of Agreement, and addressing this apparent need to define the exact boundaries for the "lateral channel." An additional item at this meeting might be for the NPS to provide the exact coordinates for the corners of the harbor seal protection polygons.

It seems that there is currently an adversarial component to the agency interactions that is not in the spirit of fostering working relationships that produce products such as the Record of Agreement. While I worked for CDFG, I tried to keep aquaculturists operating within the laws and regulations pertaining to aquaculture and their lease provisions. I also provided help in compliance if I had the resources or tools to assist them. If my experience and long history with aquaculture can be of any assistance, please feel free to contact me.

Thank You.

Sincerely,



Thomas Moore  
Retired CDFG Marine Aquaculture Coordinator  
1136 Duer Rd.  
Sebastopol, CA 95472  
707-480-4939  
tmoore2003@sbcglobal.net

May 15, 1992

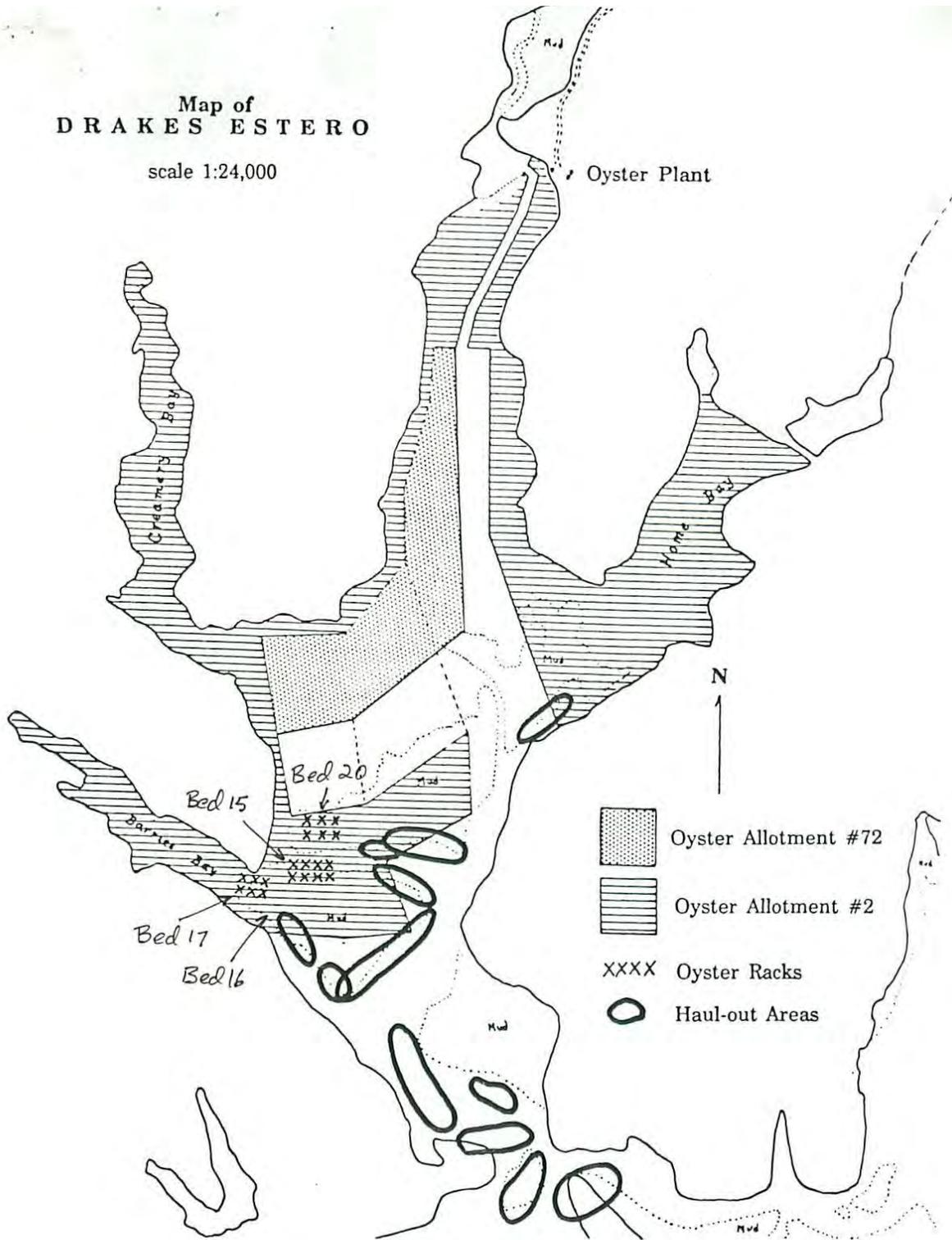
Record of Agreement  
Regarding  
Drake's Estero Oyster Farming  
and  
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.

Map of  
DRAKES ESTERO

scale 1:24,000



Drakes Estero and Estero Limantour



# Attachment 2



# Attachment 3

Form 10-114  
Rev. Jan. 00

Page 1 of 17

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

Name of Use: Aquaculture

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

Long Term X  
Short Term

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

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

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

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

For the purpose(s) of:

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

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

NEPA & NHPA Compliance: NEPA compliance pending

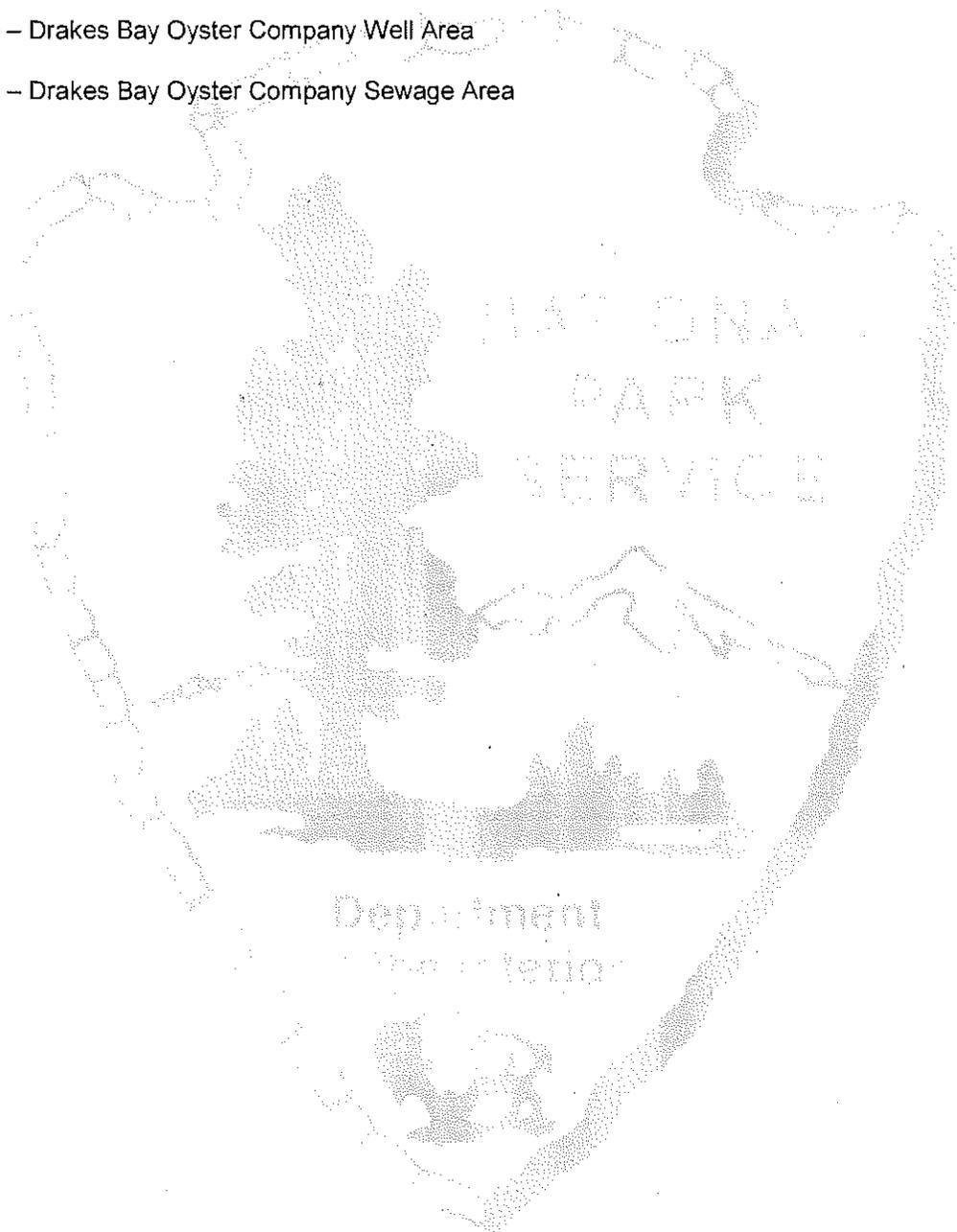
PERFORMANCE BOND: Required Not Required X Amount:  
LIABILITY INSURANCE: Required X Not Required Amount: As set forth in Article 15 of this Permit.

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

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

**LIST OF EXHIBITS**

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



## CONDITIONS OF THIS PERMIT

### 1) DEFINITIONS

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

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

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

2) GENERAL CONDITIONS

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

- c) Damages - The Permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the Permittee is authorized to make of the land and areas described in this Permit.
  - d) Benefit - Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this Permit or derive, either directly or indirectly any pecuniary benefits to arise therefrom: Provided, however, that nothing herein contained shall be construed to extend to any incorporated company if the Permit be for the benefit of such corporation.
  - e) Assignment and Subletting - This Permit may not be transferred or assigned without the consent of the Permitter, in writing. Permittee shall not sublet the Premises or any part thereof or any property thereon, nor grant any interest, privilege or license whatsoever in connection with this Permit without the prior written approval of the Permitter.
  - f) Revocation - This Permit may be terminated upon Default or at the discretion of the Permitter.
  - g) The Permittee is prohibited from giving false information; to do so will be considered a breach of conditions and be grounds for revocation [Re: 36 CFR 2.32(4)]
- 3) USE OF PREMISES
- a) Permittee is authorized to use the Premises only for the Permitted Uses.
  - b) Permittee shall not engage in any activity that may be dangerous or harmful to persons, property, or the Park; that constitutes or results in waste or unreasonable annoyance (including, without limitation, signage and the use of loudspeakers or sound or light apparatus that could disturb park visitors and wildlife outside the Premises); that in any manner causes or results in a nuisance; or that is of a nature that it involves a substantial hazard, such as the manufacture or use of explosives, chemicals or products that may explode.
  - c) The Parties hereby acknowledge and agree that Permittee's covenant that the Premises shall be used as set forth in this Article 3 is material consideration for Permitter's agreement to enter into this Permit. The Parties further acknowledge and agree that any violation of said covenant shall constitute a Default under this Permit and that Permitter may inspect the premises at any time.
  - d) This Permit is subject to the right of the NPS to establish trails and other improvements and betterments over, upon, or through the Premises and further to the use by travelers and others of such established or existing roads and trails. The Permittee understands that occasional park visitors are authorized to walk, use non-motorized watercraft, or hike in the various areas included in this Permit even though no trails are formally established.
  - e) Permitter reserves the right for Permitter, its employees, contractors and agents to enter and to permit any Agency to enter upon the Premises for the purposes of inspection, inventory or when otherwise deemed appropriate by the Permitter for the protection of the interests of Permitter, including Permitter's interests in any natural or cultural resources located on, in or under the Premises.
  - f) Permitter reserves the right at any time to close to travel any of its lands, to erect and maintain gates at any point thereon, to regulate or prevent traffic of any kind thereon, to prescribe the methods of use thereof, and to maintain complete dominion over the same; provided, however, that at all times during the Term, Permitter shall provide Permittee and Permittee's invitees with reasonable access to the Premises subject only to interruptions caused by necessary maintenance or administrative operations or by matters beyond Permitter's control.
  - g) Permittee hereby waives any claim for damages for any injury, inconvenience to or interference with Permittee's use and occupancy of the Premises, any loss of occupancy or quiet enjoyment of the Premises, or any other loss occasioned by Permitter's exercise of its rights under this Article 3 except to the extent that the damages, expenses, claims or suits result from the willful misconduct or gross negligence of Permitter, its employees, contractors or agents; provided, further, that Permitter shall be liable only to the extent such claims are allowed

under the Federal Tort Claims Act.

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

#### 4) SPECIAL PERMIT CONDITIONS

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

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

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

#### 5) ACCEPTANCE OF PREMISES

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

#### 6) CONSTRUCTION OF IMPROVEMENTS OR ALTERATIONS

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

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

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

7) TREATMENT OF REFUSE

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

8) PESTICIDE AND HERBICIDE USE

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

9) FIRE PREVENTION AND SUPPRESSION

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

10) EXCAVATION, SITE AND GROUND DISTURBANCE

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

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

11) NONPOINT SOURCE POLLUTION

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

12) TREE AND VEGETATION REMOVAL

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

13) WILDLIFE PROTECTION

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

14) HAZARDOUS MATERIALS; ENVIRONMENTAL HEALTH AND SAFETY

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

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

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

#### 15) INSURANCE

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

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

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

#### 16) INDEMNITY

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

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

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

17) PROPERTY INTEREST

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

18) RENTS, TAXES AND ASSESSMENTS

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

19) CYCLIC MAINTENANCE

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

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

20) COMPLIANCE WITH APPLICABLE LAWS: NEPA, NHPA

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

21) ANNUAL MEETING

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

22) PENALTY

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

23) SURRENDER AND VACATE THE PREMISES, RESTORATION

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

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

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

24) LIMITATION ON EFFECT OF APPROVALS

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

25) WAIVER NOT CONTINUING

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

26) LIENS

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

27) HOLDING OVER

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

28) NOTICES

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

If to Permitter:

Superintendent  
Point Reyes National Seashore  
Point Reyes Station, CA 94956

If to Permittee:

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

29) NO PARTNERSHIP OR JOINT VENTURE

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

30) ANTI-DEFICIENCY ACT

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

31) COMPLIANCE WITH EQUAL OPPORTUNITY LAWS

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

32) ENTIRE AGREEMENT AND AMENDMENT

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

33) NO PAYMENTS BY PERMITTER

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

34) NO THIRD PARTY BENEFICIARIES

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

35) NO PREFERENTIAL RENEWAL AND RELOCATION ASSISTANCE

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

Policies Act of 1970, Public Law 91-646.

36) SEVERABILITY

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

37) EXHIBITS

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

38) TIME OF THE ESSENCE

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

39) HEADINGS

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

40) PERMIT CONSTRUED AS A WHOLE

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

41) MEANING OF TERMS

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

42) FEDERAL LAW

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

**EXHIBIT A**

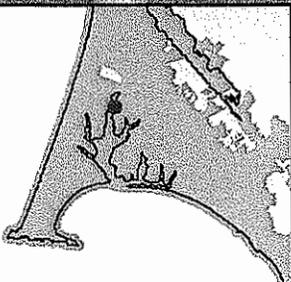
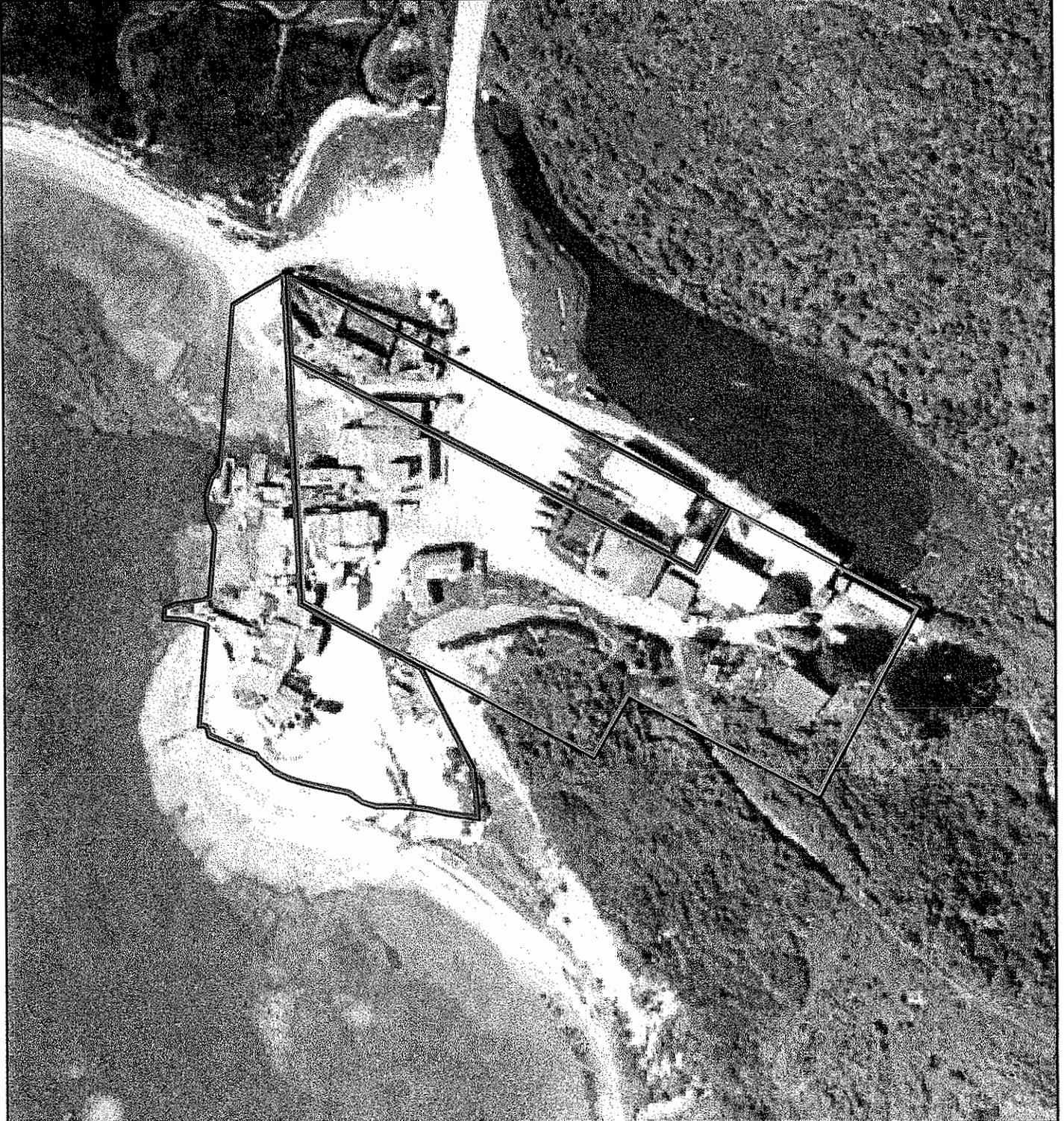
Map – Drake's Estero Aquaculture & CDFG Leases: NPS Resources and SUP Area



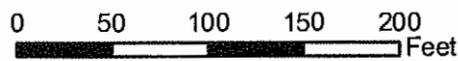
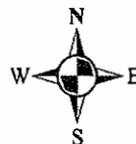
**EXHIBIT B**

Map – Drake's Estero Oysters – SUP & ROP

# Drake's Estero Oysters - SUP & ROP



National Park Service  
Point Reyes National Seashore  
Marin County, CA



### Permit Type

-  ROP - 1.5 acres
-  SUP - 1.1 acres

**EXHIBIT C**

Drakes Estero Aquaculture and Harbor Seal Protection Protocol



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

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

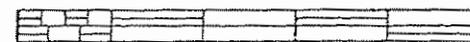
1. During the breeding season, March 1 through June 30, the “Main Channel” and “Lateral Channel” of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone.
2. During the breeding season,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

**EXHIBIT D**

Map – Drakes Bay Oyster Company Well Area

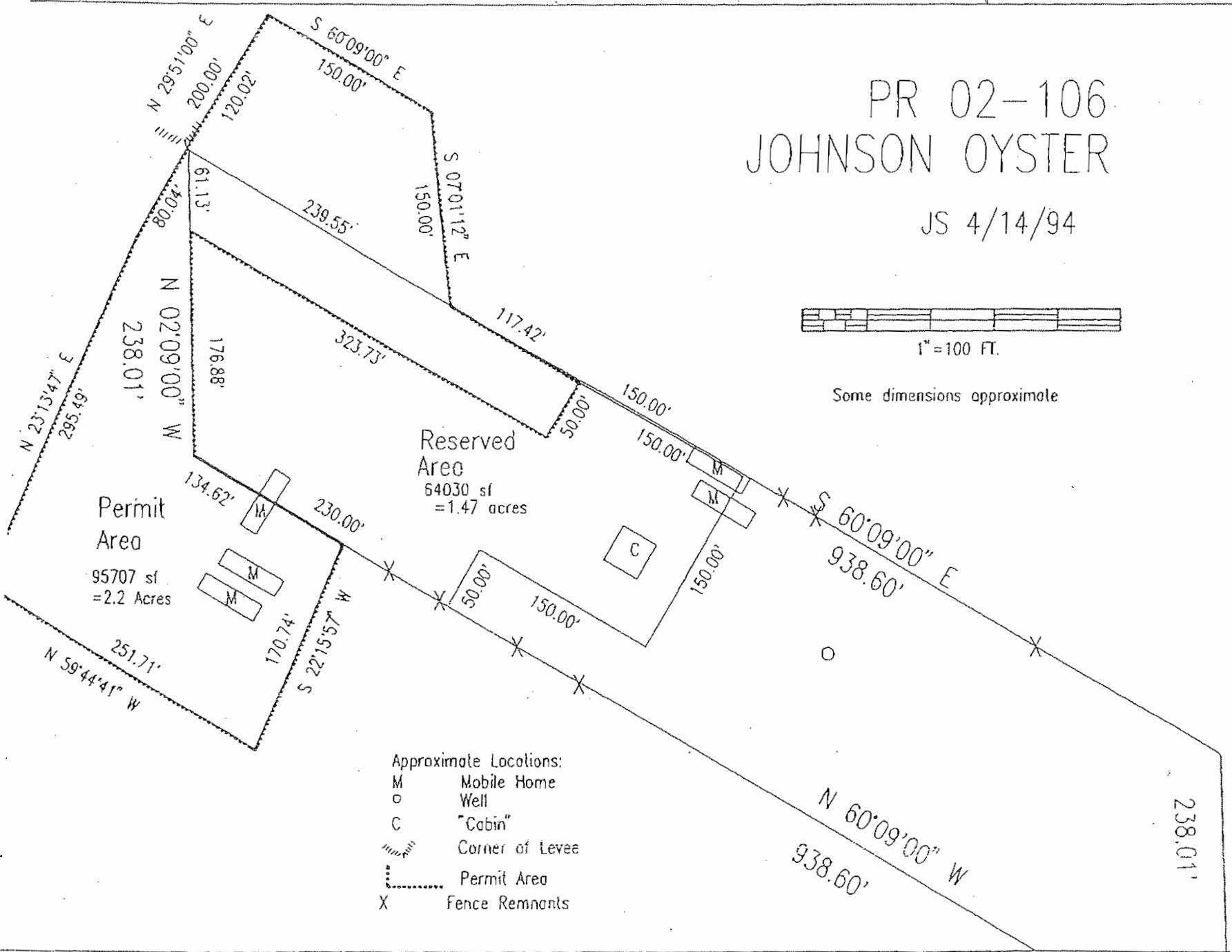
# PR 02-106 JOHNSON OYSTER

JS 4/14/94



1" = 100 FT.

Some dimensions approximate



Permit Area  
95707 sf  
=2.2 Acres

Reserved Area  
64030 sf  
=1.47 acres

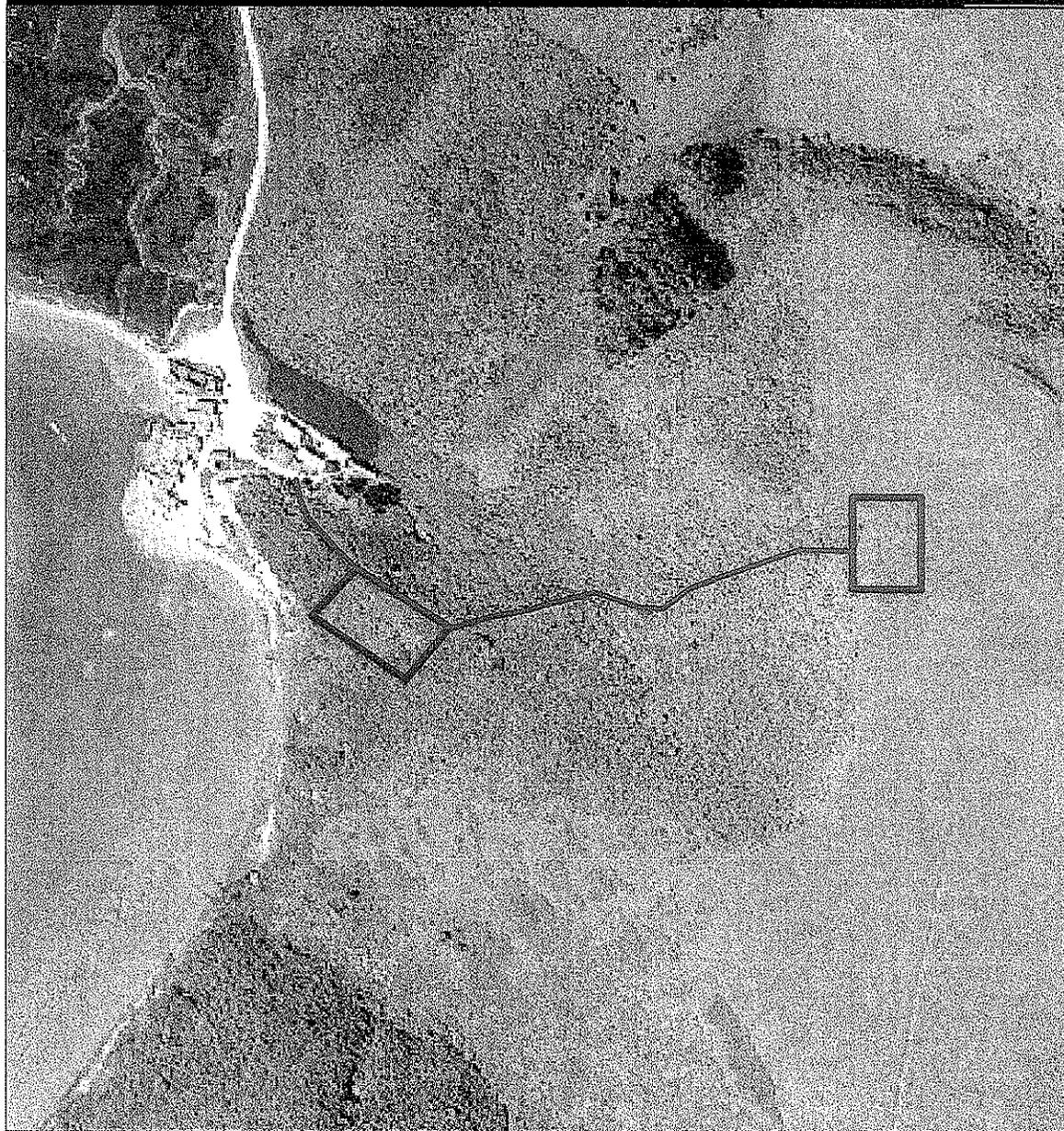
- Approximate Locations:
- M Mobile Home
  - O Well
  - C "Cabin"
  - Corner of Levee
  - Permit Area
  - X Fence Remnants

**EXHIBIT E**

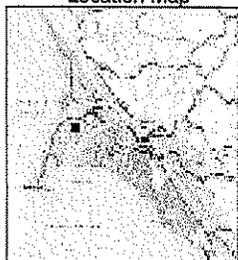
Map – Drakes Bay Oyster Company Sewage Area

# EXHIBIT

## Oyster Farm Leach Field (Approximate Location and Size)

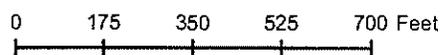


Location Map



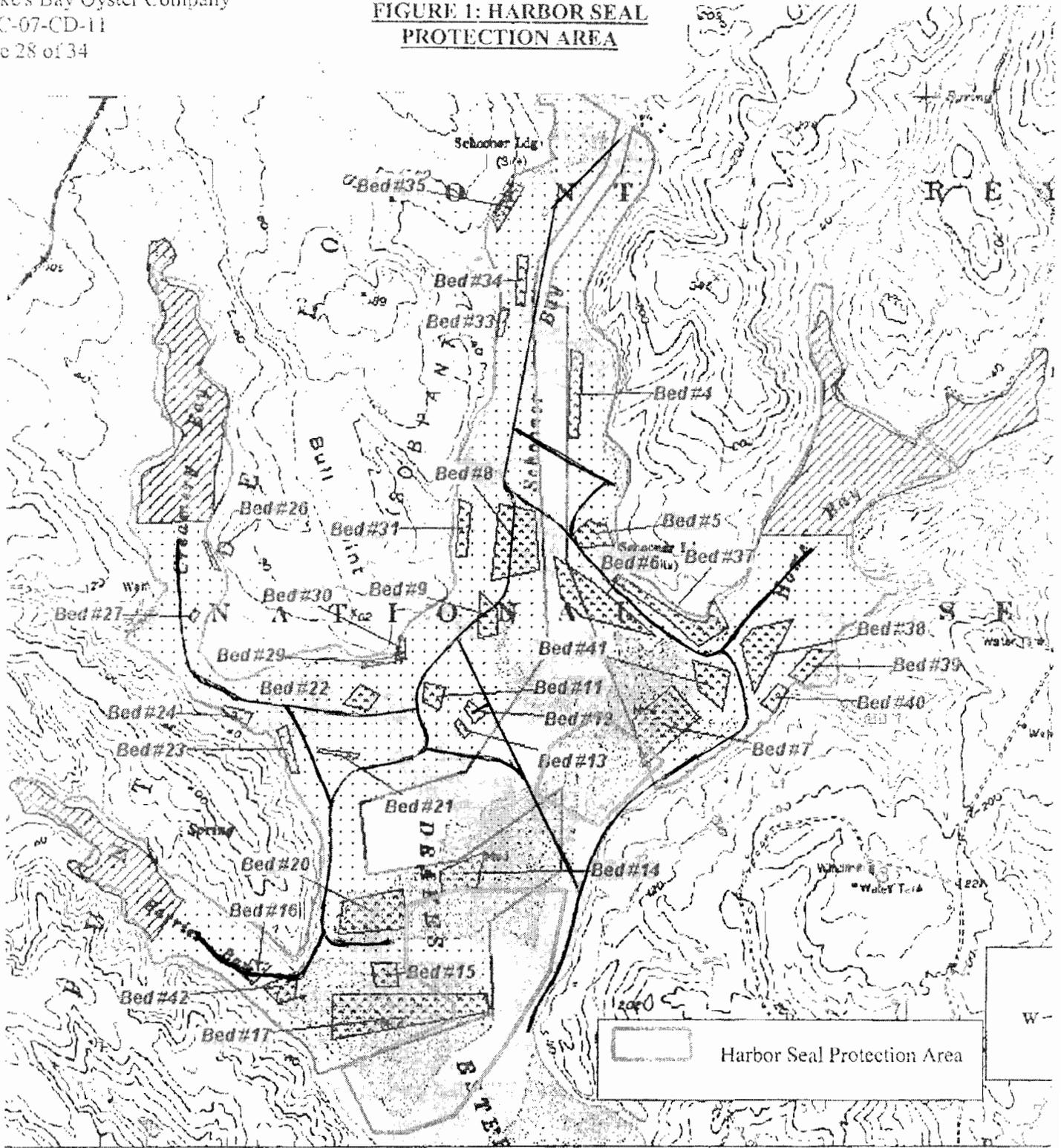
National Park Service  
Point Reyes National Seashore  
Marin County, CA

 Oyster Farm Leach Field



# Attachment 4

**FIGURE 1: HARBOR SEAL PROTECTION AREA**



# Attachment 5



## United States Department of the Interior

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

IN REPLY REFER TO:

L7617  
(Special Use Permit – MISC-8530-6000-8002)

JAN 23 2012

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

KEVIN

Dear Mr. ~~Lunny~~:

On January 12, 2012, you requested a meeting with the NPS regarding implementation of the current Special Use Permit (SUP) with respect to your communications with the California Coastal Commission (CCC). It is our understanding that the CCC is reviewing this information under your current Cease and Desist Order (CDO) because the CDO requires compliance with the terms and conditions of the SUP.

In your request you state that the CCC claims that Drakes Bay Oyster Company (DBOC) boats going to and from sandbars OB and UEN are a violation of the SUP. Subsequently the CCC responded to clarify that the issue is not the destination of the boats but the use of the Lateral Channel during the March 1 – June 30 seasonal closure.

Section 4(b)(vii) of the SUP includes provisions specific to harbor seals and directs the Permittee to follow “Drakes Estero Aquaculture and Harbor Seal Protection Protocol” (Exhibit C). Clause 1 of the Harbor Seal Protection Protocol states: “During the breeding season, March 1 through June 30, the ‘Main Channel’ and ‘Lateral Channel’ of Drakes Estero will be closed to boat traffic. During the remainder of the year, the Lateral Channel and Main Channel are open to boat traffic outside of the protection zone.”

The plain meaning of this provision is that the entirety of the Lateral Channel is closed during the harbor seal breeding season (March 1-June 30). The SUP references the Lateral Channel, Main Channel and West Channel. The Lateral Channel is the entire channel between the Main Channel and West Channel. The eastern portion of the Lateral Channel is within the permanent harbor seal protection area and is thus closed to boat use all year. The west portion of the Lateral Channel (outside of the harbor seal protection area) is subject to the seasonal closure (March 1-June 30).

During the negotiations for the current SUP, DBOC introduced a 1992 protocol for consideration, but it was not incorporated into the final signed SUP. As explained above, Section 4(b)(vii) and Exhibit C are the operative provisions of the SUP specific to harbor seals. Boat use of any portion of the Lateral Channel during the seasonal closure period is not allowed under the SUP.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cicely A. Muldoon". The signature is fluid and cursive, with the first name "Cicely" being more prominent.

Cicely A. Muldoon  
Superintendent

cc: Alison Dettmer, California Coastal Commission  
Cassidy Teufel, California Coastal Commission  
Jo Ginsberg, California Coastal Commission

# Attachment 6

STATE OF CALIFORNIA—THE RESOURCES AGENCY

PETE WILSON, Governor

## DEPARTMENT OF FISH AND GAME

P.O. BOX 944209  
SACRAMENTO, CA 94244-2090  
(916) 653-6194



May 15, 1992

Mr. John L. Sansing, Superintendent  
Point Reyes National Seashore  
Point Reyes, California 94956

Dear Mr. Sansing:

Thank you for following up on the meeting we had with you, Johnson Oyster Company (JOC), and National Marine Fisheries Service (NMFS). I am pleased to hear that operations appear to be occurring without incident. I am optimistic that the agreement reached at our meeting will provide the protection necessary for continued well-being of the harbor seals in Drakes Estero and, at the same time, provide guidelines for JOC that will allow them to continue their operations without undue hardship.

I have reviewed your synopsis of the issues and discussed it with Frank Henry and Tom Moore of our Department. During discussion at the meeting, Frank Henry took notes on the boating practices and mariculture procedures to be included in the agreement. As you may recall, at meeting's end, Frank read the proposed guidelines from his notes to those present and, after some discussion, all agreed to the language and content. His notes and the recollections of the three Department staff agree, in general, with your synopsis.

One significant difference we noted, was regarding operations in the western channel. Our notes do not reflect any agreement by JOC to not use that channel, even during the pupping season. The three of us all recollect that operation in this western channel was required for the minimal servicing of oyster beds 1, 2, and 3. We remember agreement from JOC not to use the lateral channel but to use the western channel, and then to travel by foot, if necessary to reach the beds. Our recollection is that this was acceptable to you, since operation in the western channel is a good distance from potential haul out areas at the east ends of the islands.

Another difference in our notes and recollections regards the timing of planting on these beds. You are correct that those present at the meeting, including JOC, agreed that, if possible, planting should be put off until after June 1. However, your language that seeding "may begin on June 1. Earlier commencement dates may be permitted ..." , we think, overstates the authority of the agreement.

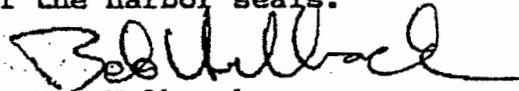
Our recollections are that JOC agreed to plan on, and make every effort to, beginning seeding after June 1. JOC noted, however, that they do not have absolute control over seed

Mr. John L. Sansing  
May 15, 1992  
Page Two

availability, and no control over weather and tides. The spirit of the agreement, we recall, was that JOC would plan on seeding after June 1, and would work with Gary Fellers to minimize the impacts of any earlier seeding. We do not believe there is existing authority to "permit" or to deny a "permit" for earlier seeding.

Also, in the spirit of positive agreement, and without changing any substance, we would strike "and restrictions" from the first sentence of the introductory paragraph. I have attached a copy of the complete Record of Agreement, with the three amendments. If these amendments are not acceptable to you, please let me know so that we may come to full agreement.

Thank you again John, for the cooperation and efforts of you and your staff on this issue. I believe they have made possible this resolution in the interest of the harbor seals.



Bob Hulbrock  
Aquaculture Coordinator

cc: Johnson Oyster Co.

Tom Johnson  
Bob Studdert  
Manuel Solorzano

Point Reyes National Seashore

Russ Case  
Gary Fellers  
LeeRoy Brock

Department of Fish and Game

Frank Henry  
Tom Moore

National Marine Fisheries Service

Diane Windham  
Charles Clark

Department of Health Services

Gregg Langlois

May 15, 1992

Record of Agreement  
Regarding  
Drake's Estero Oyster Farming  
and  
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.

## Drakes Estero Harbor Seal Pupping Season Closures

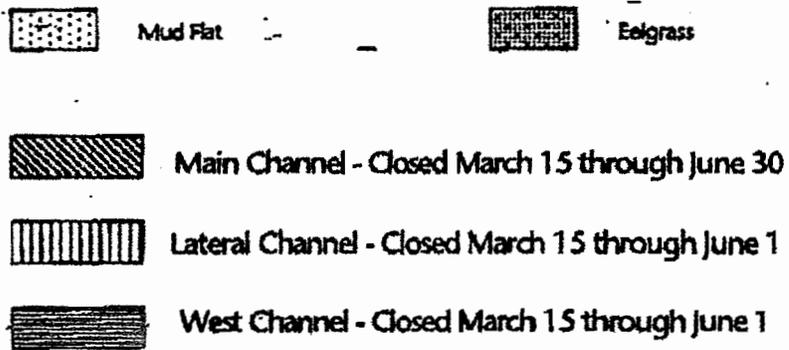
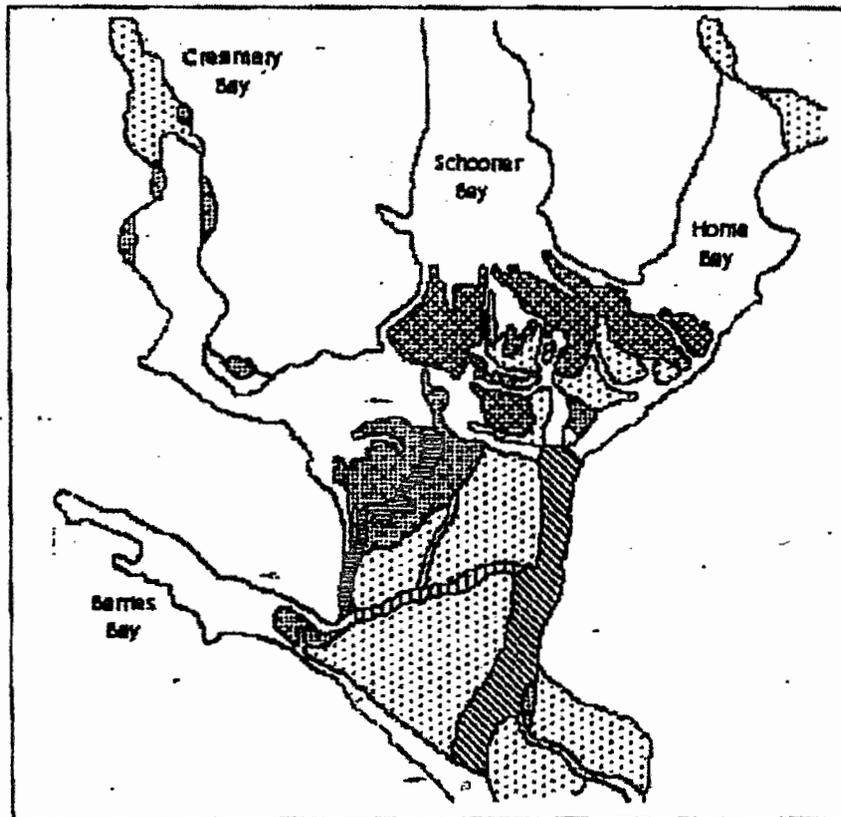
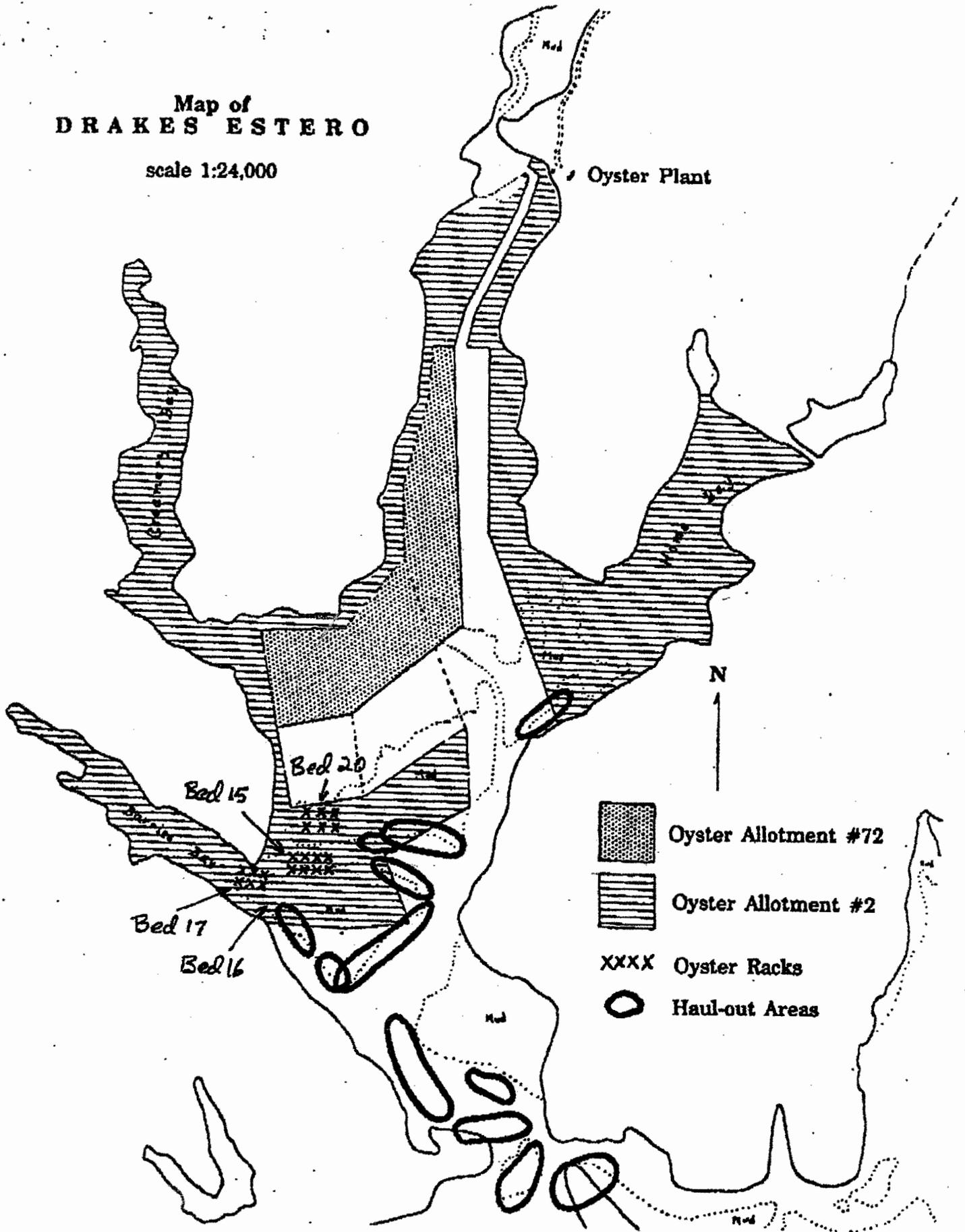


Figure 1

# Map of DRAKES ESTERO

scale 1:24,000



# Attachment 7

## DEPARTMENT OF FISH AND GAME

CHARLTON H. BONHAM, Director

1416 9<sup>th</sup> Street  
Sacramento, CA 95814  
<http://www.dfg.ca.gov>



October 10, 2012

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

Dear Ms. Muldoon:

I am writing to encourage continued cooperation between the National Park Service, the California Department of Fish and Game ("Department"), and Drakes Bay Oyster Company, as renewal of the Special Use Permit for the Drakes Bay Oyster Company is considered.

The state and federal government have worked together for 47 years—since the State originally conveyed the bottom lands in Drakes Estero to the United States in 1965—to allow continued aquaculture operations in Drakes Estero. Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottom lands at Drakes Estero indefinitely for shellfish cultivation.

For almost five decades, the State has supported aquaculture in Drakes Estero. It has done so by regulating the Drakes Bay Oyster Company on an ongoing basis, by renewing the water bottom leases in 1979 and 2004, and by authorizing aquaculture in 2010 when establishing the Drakes Estero State Marine Conservation Area. Regulations implementing the California Marine Life Protection Act prohibit the cultivation of oysters in Drakes Estero without a valid state water bottom lease. The current state issued water bottom lease with Drakes Bay Oyster Company extends to 2029.

It is also important to recognize that California now is second only to Washington in shellfish production on the west coast and that Drakes Bay Oyster Company represents 55% of the water bottoms leased and 40% of the oysters cultivated in the state.

The continued cooperation between Drakes Bay Oyster Company, the National Park Service and the California Department of Fish and Game will benefit the environment, the community, and the local economy, consistent with our agencies' unique history of managing this property. Please contact me at 916.653.7667 if you have any questions or would like to discuss this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "CHB", with a long horizontal line extending to the right.

Charlton H. Bonham  
Director

cc: Senator Dianne Feinstein

# Attachment 8

# *Drakes Bay Oyster Company*

17171 Sir Francis Drake Boulevard

Inverness, CA 94937

(415) 669-1149

[kevin@drakesbayoyster.com](mailto:kevin@drakesbayoyster.com)

[nancy@drakesbayoyster.com](mailto:nancy@drakesbayoyster.com)

May 7, 2012

Cicely Muldoon  
Superintendent  
Point Reyes National Seashore  
One Bear Valley Road  
Point Reyes Station, CA 94937

Re: Coastal Development Permit Application No: 2-06-003

Dear Cicely,

In a meeting at the California Coastal Commission office in San Francisco on March 5, 2012, CCC and DBOC reached an agreement that DBOC would limit its current CDP application to the existing activities. In keeping with that process, DBOC has removed all new development from its application to the CCC. DBOC will apply to CCC for a CDP amendment in the future, as necessary, prior to future development.

In your letter dated November 10, 2010, you identified a number of ongoing activities for which NPS would like more information. This letter provides the necessary information, and will address the items in the order requested. NPS has requested this letter to improve the consistency with the NPS SUP.

9. *Continue to carry out oyster and clam culture using 24" x 24" x 3" plastic or plastic coated wire containers or trays.*

This tray culture has been used in Drakes Estero for many years. DBOC purchased the trays from Johnson Oyster Company. Oysters, clams and scallops are grown using these materials. The trays are primarily used for small seed rearing. The trays are stackable and can be placed directly on the bottom, can be floated by placing floatation material in the top tray and attaching the unit to an anchored long line, or hanging the unit from the racks.

10. *Continue to use established boat traffic lanes through Drakes Estero eelgrass beds for use during low tide.*

DBOC makes every effort to keep the boats within the channels during low tide to reduce potential impacts to eelgrass by boat propellers. This item simply states that DBOC will continue to do so.

11. *Continue to operate the picnic area.*

DBOC will continue to allow seashore visitor access to the picnic areas within the RUO and SUP areas. DBOC will continue to provide and maintain tables and keep the areas clean and safe. Picnicking at the oyster farm has been enjoyed by thousands of visitors for many decades. DBOC believes that this type of coastal access is a vital component of the visitor experience.

16. *Continue Manila clam culture using bottom bags within areas throughout DFG lease area number M-438-01 within Drakes Estero.*

All clam culture will be confined to the approved CDFG and CDPH growing areas. Clams will be cultured using similar methods as are used for oysters.

18. *Resume purple hinged rock scallop production using a floating system within DFG lease number M-438-02.*

Purple hinged rock scallops have traditionally been raised in Drakes Estero using floating racks, floating trays and lantern nets. DBOC plans to continue to culture these native scallops using similar techniques.

21. *Continue to operate non-motorized barges within estero to facilitate shellfish planting and harvesting.*

DBOC uses barges (“scows”) in Drakes Estero. DBOC uses motorboats to move the barges throughout the estero. The barges are used to transport seed for planting and for harvested shellfish.

30. *Continue to implement the Hazardous Materials Business Plan.*

DBOC conducts its daily operations consistent with its Hazardous Materials Business Plan.

[NOTE: To fully understand the following items referred to as “after the fact development” (also referred to as “ongoing violations” by CCC staff, and later characterized as such by others), one must look at these items in context.

The owners of DBOC (the Lunnys) have lived in the coastal zone since before the PRNS was established in the 1960’s and before the coastal act was passed in the 1970’s. The Lunny Ranch buildings, as well as much of the Lunny Ranch rangeland, are within the coastal zone. Throughout the 1970s, 1980s, 1990s and 2000s, the Lunnys have replaced fences, done excavation for underground utilities, installed water troughs with associated

pipng, replaced porches and decks, placed storage containers, and paved portions of the ranch driveway and livestock feeding areas. Throughout the years, the NPS has been aware of these and other similar activities. We are also cognizant of the fact that other ranchers and farmers within PRNS and within the coastal zone have continuously made similar repairs and improvements to their infrastructures without CDPs. We do not believe that any of the seashore ranchers have been led to believe that they are in “violation of the coastal act” when they make necessary repairs on their ranches without a CDP.

It is with this history and experience that the Lunnys assumed the responsibility to cleanup, operate and maintain the neighboring oyster farm. Our family has tried to do the right thing to protect public health, public safety, public enjoyment and the environment. We have never intended to avoid obtaining appropriate permissions and authorizations. We simply assumed that these activities would not require a CDP, similar to surrounding ranches within the seashore.]

*39. Installation of one 8-foot by 40-foot storage container.*

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

*40. Removal and replacement of a porch at worker residence.*

DBOC was directed by CCC and NPS to remove a large covered wooden porch and steps that were connected to one of the worker residences because the porch was originally constructed without a CDP. This large porch had been in place for many years and was old and dilapidated. The finished floor elevation of the residence is approximately 3 feet above the ground level and the door was inaccessible after the covered porch was removed. DBOC did not replace the

porch or the roof over the porch. DBOC simply installed steps leading to the door so that the residence could be safely accessed. DBOC was unaware that a CDP was required for the steps.

41. *Installation of split rail fence along the edge of parking area.*

DBOC removed the remains of a dilapidated fence in this location. The previous barrier was beyond repair and missing some sections. DBOC recognized the need to replace the barrier to keep automobile traffic off the vegetated area near the pond and off the grassy area where the septic tanks are located. DBOC was unaware that a CDP would be required to replace this fence.

42. *Installation of asphalt pavement surrounding the processing facility.*

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

43. *Installation of a temporary construction trailer.*

DBOC placed an 8' x 20' trailer on site for use as an office during the extensive demolition and cleanup activities performed by DBOC. The trailer is rented from Modular Space, a company that specializes in temporary construction facilities. Because the oyster farm office was demolished and removed from the site as directed by the CCC, DBOC is currently using the trailer for its office and administrative activities. DBOC was unaware that placement of this trailer would require a CDP.

44. *Installation of a temporary 8-foot by 40-foot container for oyster shucking and packing.*

DBOC received permission from NPS and obtained permits from the County of Marin for the placement of two 8' x 40' containers. During a meeting on site with the County of Marin, California Department of Public Health (CDPH), DBOC and NPS to discuss the placement and use of these containers, NPS chose the specific locations to place the containers. During this meeting, CDPH pointed out the very poor condition of the existing asphalt paving, located in the area where food transportation would occur between the existing cannery and the NPS-chosen location for the new containers. Because of the unsafe route for hand trucks moving the food between the two processing locations, CDPH required that the area be re-paved. This was agreed to by all parties at the meeting. Following the meeting, DBOC placed the containers as directed by NPS, and had the electrical and septic systems inspected by the County of Marin and CDPH prior to using the containers. DBOC also re-paved the area and paved a small additional area around the containers in order to facilitate safe door access, as directed. During the group meeting, neither the NPS nor the County of Marin mentioned to DBOC that an additional and separate permit would need to be obtained from the CCC. Furthermore, in an email from NPS, NPS advised DBOC that it would require approvals from both County of Marin and CDPH. The email made no mention of CCC or any potential for CCC requirements. DBOC was, therefore, unaware that a separate CDP was required for the placement of the containers or for the asphalt paving.

45. *Use of five outdoor seed setting tanks and associated water intake, discharge and circulation infrastructure.*

These setting tanks have been used continuously in this location for approximately 30 years. The same is true with the associated intake and piping to provide water and electricity to this location. The previous oyster farmers, Johnson Oyster Company, built a shed around the tanks. The CCC determined that the shed was constructed by JOC without a CDP and required DBOC to remove the structure. DBOC complied with the order to remove the shed, but kept the tanks in place so that the oyster farm could continue to operate. DBOC simply re-set the tanks in the identical location and made minor repairs to the associated plumbing that had been damaged or removed during the demolition activities. DBOC was unaware that a CDP would be required to continue using these same setting tanks.

46. *Construction and backfilling of a 12-inch by 18-inch by 80-foot long trench.*

During setting season, the electrical panel that serves the setting tanks shorted out, requiring an emergency replacement. DBOC hired a licensed electrician who immediately (same day) obtained a permit from the County of Marin to authorize the work. The electrician met with the representative of the utility company (PG&E). The PG&E expert required that the existing underground conductors

and conduit be replaced (the conduit and wire were visibly damaged). DBOC re-dug the existing trench and removed the failed conduit and wire. This trench is located in a level, shell-covered, un-vegetated work area. There was no rainfall during the period that the work took place, leaving no risk of sediment travel in storm water runoff. DBOC was unaware that the County permit was insufficient and that an additional permit would be required from CCC for this simple emergency repair of existing infrastructure.

47. *Replacement of six picnic tables and six additional picnic tables.*

The oyster farm has always provided important coastal access as well as other visitor services. One of the beloved visitor services offered by DBOC is the picnic area. DBOC, at its own expense, continues to offer picnic tables for the use of the visiting public, free of charge. This visitor service requires significant staff time to maintain the area in a safe and sanitary condition. It also requires that the picnic tables be replaced when necessary. In addition to replacing old tables, DBOC recognized that many visitors were using unsanitary and unsafe areas around the farm to have their picnics because there were not enough tables to use. In an effort to improve visitor safety and enjoyment, DBOC, at its own expense, purchased six additional tables. DBOC accepted the responsibility to add the necessary staff time to maintain these additional tables. DBOC was unaware that the CCC would require a CDP to replace existing picnic tables or to add picnic tables for an activity that has existed and has been enjoyed at the farm by thousands of coastal visitors for many decades. Furthermore, the NPS has pledged to add more picnic tables at the farm. It is unknown if the NPS has applied for a CDP to add these tables.

DBOC originally applied for a CDP in January of 2006 and will continue to work with NPS and CCC to complete the CDP process. DBOC expects that the process will be completed easily and quickly now that the CDP will cover existing activities – activities that pre-exist the creation of PRNS and pre-exist the establishment of the coastal act. DBOC will apply for a CDP amendment prior to any new development.

DBOC has been told that NPS is required to obtain a CDP prior to construction of new development or making any repairs within the coastal zone. For our records, would you please provide DBOC with a copy of the CDP application as well as the CDP issued for 1) the pit toilet NPS installed within the flood zone at the oyster farm (which was new development and required more excavation than the DBOC electrical trench repair) and 2) the split rail fence that the NPS installed around the kayak parking area (which was new development directly adjacent to the estero and is very similar to the split rail fence installed by DBOC).

Thank you,

Kevin Lunny

Attachments: 1

Cc: Cassidy Teufel, CCC

## **DRAKES BAY OYSTER COMPANY**

17171 Sir Francis Drake Blvd., Inverness, CA 94937

### **Project Description**

05/07/12

#### *Proposed New Site Development*

- ~~1. Construct and install required ADA compliant restroom facility.~~
- ~~2. Construct and install split rail and solid board fencing around proposed storage area and retail facility.~~
- ~~3. Construct and install paved walkway to the restrooms to meet ADA requirements.~~
- ~~4. Construct cover over existing wooden oyster washing pier per CDPH and FDA requirements to keep oysters out of direct sunlight after harvest.~~
- ~~5. Demolish and remove existing wooden pier (south pier).~~
- ~~6. Implement Vessel Transit Plan with mooring areas and access lanes clearly marked.~~

#### *Ongoing Maintenance for Existing Operation*

7. Continue to carry out regular repairs and maintenance to existing oyster racks using only CDFG, CCC and NPS approved materials.
8. Continue compliance with 1992 Harbor Seal Management Plan as well as final CCC and NPS harbor seal protection conditions.
9. Continue to carry out oyster and clam culture using 24" x 24" x 3" plastic or plastic coated wire containers or trays.
10. Continue to use established boat traffic lanes through Drakes Estero eelgrass beds for use during low tide.
11. Continue to operate the picnic area.
12. Continue Pacific and European oyster culture using hanging cluster method, both on "strings" and on "French Tubes" on racks located throughout DFG lease area number M-438-01 within Drakes Estero.
13. Continue Pacific and European oyster culture using anchored bottom bags within intertidal areas throughout DFG lease area number M-438-01 within Drakes Estero
14. Continue Pacific and European oyster culture using un-anchored bottom bags within intertidal areas throughout DFG lease area number M-438-01 within Drakes Estero
15. Continue Pacific and European oyster culture using anchored floating bags within intertidal areas throughout Department of Fish and Game lease area number M-438-01 within Drakes Estero
16. Continue Manila clam culture using bottom bags within areas throughout DFG lease area number M-438-01 within Drakes Estero
17. Continue to carry out marine biotoxin monitoring and water quality sampling within the estero.
18. Resume purple hinged rock scallop production using a floating system within DFG lease number M-438-02
19. Continue to import Pacific oyster larvae and seed; Manila clam larvae and seed, European oyster larvae and seed and purple hinged rock scallop larvae and seed only from CDFG approved sources with current CDFG permits.
20. Continue to operate motor driven vessels within Drakes Estero to plant and harvest approved shellfish species, for water quality monitoring, marine biotoxin monitoring, or any other farm related purpose.
21. Continue to operate non-motorized barges within estero to facilitate shellfish planting and harvesting.
22. Continue to operate retail sales facility.

23. Continue to operate the only state certified and FDA approved shellfish shucking and packing facility, pursuant to the requirements of the California Department of Public Health, Food and Drug Branch; the US Food and Drug Administration and the National Shellfish Sanitation Program.
24. Continue to operate onsite wastewater and septic systems.
25. Continue to store limited quantities of hazardous substances such as paints, gasoline, chlorine, detergents, solvents and cleaning products.
26. Continue to discharge wastewater from hatchery operations, wet storage, setting systems and oyster washing into estero (heated water to remain below 20 degrees above ambient water temperature)
27. Continue to carry out interpretive services to visiting public, conduct tours of onshore facilities for school groups, local non-profit organizations, private organizations, government agencies, etc.
28. Continue to provide onsite housing for employees and their families.
29. Continue to operate indoor hatchery/seed production facility and carry out remote setting activities both indoor and outdoor.
30. Continue to implement the Hazardous Materials Business Plan.
31. Continue to operate the state certified Drakes Bay Oyster Company non-transient, non-community, public water system, pursuant to the requirements of the California Department of Public Health, Drinking Water Unit and the National Shellfish Sanitation Program.

#### Repairs

- ~~32. Repair existing wooden oyster washing pier with similar materials.~~
- ~~33. Replace existing 12' X 60' floating dock at the end of the oyster washing dock.~~
- ~~34. Replace oyster washing / conveyor / sediment retention system.~~
- ~~35. Repairs to stringing shed.~~
- ~~36. Repairs to hatchery building.~~
- ~~37. Repairs to processing building.~~
- ~~38. Repairs to retail sales building.~~

#### After the Fact Development

39. Installation of one 8-foot by 40-foot storage container.
40. Removal and replacement of a porch at worker residence.
41. Installation of split rail fence along the edge of parking area.
42. Installation of asphalt pavement surrounding the processing facility.
43. Installation of a temporary construction trailer.
44. Installation of a temporary 8-foot by 40-foot container for oyster shucking and packing.
45. Use of five outdoor seed setting tanks and associated water intake, discharge and circulation infrastructure.
46. Construction and backfilling of a 12-inch by 18-inch by 80-foot long trench.
47. Replacement of six picnic tables and six additional picnic tables

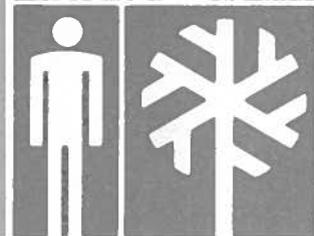
# EXHIBIT 4

# general management plan

september 1980

**SUPERINTENDENT  
POINT REYES NATIONAL SEASHORE  
POINT REYES, CA 94956-9799**

**POINT REYES**

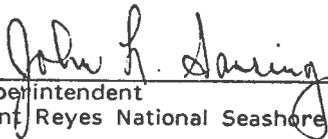


**NATIONAL SEASHORE / CALIFORNIA**

RECOMMENDED:

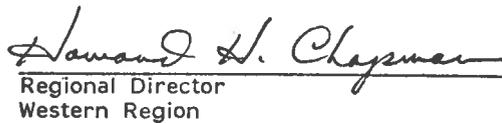


Assistant Manager, Western Team  
Denver Service Center



Superintendent  
Point Reyes National Seashore

APPROVED:

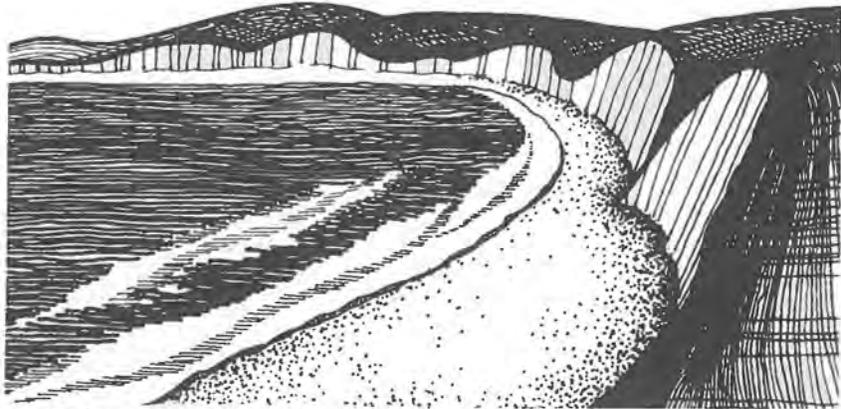


Regional Director  
Western Region

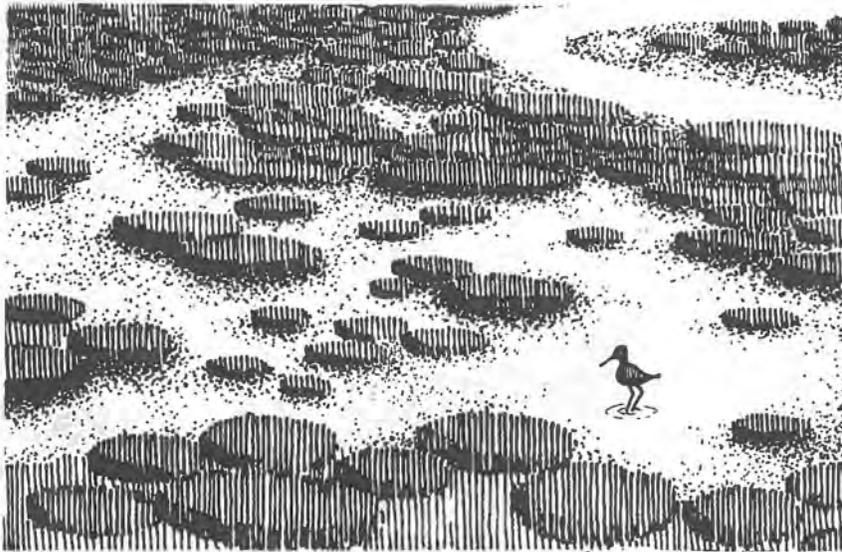
# Point Reyes



POINT REYES NATIONAL SEASHORE / CALIFORNIA  
GENERAL MANAGEMENT PLAN



Drake's Beach



Salt Marsh - Drake's Estero

## PREFACE

Confronted by the accelerating deterioration of life on earth, perceptive people reach out for benchmarks of natural integrity--places in which to recharge the mind and body, and learn of the things that are vital to the quality of our existence. To such people, the Point Reyes peninsula speaks eloquently of the past, and offers priceless hope for the future. There is no better place for man to contemplate his origins, the factors that sustain him, and the threats that may destroy him, than at the edge of the sea. Its magnetism is expressed in the words of Rachel Carson: "Like the sea itself, the shore fascinates us who return to it, the place of our dim ancestral beginnings. In the recurrent rhythms of tides and surf and in the varied life of the tide lines there is obvious attraction of movement and change and beauty. There is also, I am convinced, a deeper fascination born of inner meaning and significance."

This sense of attraction--whether consciously felt or not--modifies the objectives and responses of all who come to the shore seeking recreation. The resulting activities, though often dissimilar, derive their meaning from the inherent qualities of the land. As early as 1970, annual visitation at Point Reyes exceeded a million, with less than half of its acreage available for public use. Since this is one of the windiest and foggiest spots on the coast, such a visitation figure suggests that this is apparently something more than simply a place to play.

Even without its unusual variety of resources, Point Reyes would loom large in importance when viewed in proper context. In the 1959 survey of the recreation potential of the Pacific Coast, the National Park Service made this recommendation concerning the entire western shoreline: "As much of the seashore as possible should be preserved in its present undeveloped state and there should be no further invasion of coastal wilderness by highways except for incidental access and appropriate minimum development." The coast of California offers spectacular impressions to the automobile-borne traveler. However, nearly 90 percent of the state's shoreline is rimmed with a ribbon of asphalt--California Highway 1. This thoroughfare for many constitutes a permanent dilution of the seashore experience, constantly interrupting the continuity between the mountains and the sea.

Unfortunately, most state parks that include coastal frontage are either hemmed in as tiny enclaves between the highway and the ocean, or are bisected by the pavement. Less than half of the California coastline lies in public ownership, and even this is primarily preserved in isolated patches and strips of land which are

frequently vulnerable, both aesthetically and ecologically, to surrounding development. In only a few places is there a piece of coastal land large enough and undisturbed enough to convey the full impact and range of seashore experiences that this stimulating environment deserves. Point Reyes is one of a tiny number of such places that are permanently dedicated to the American public.

These attributes are basic to what this coastal remnant means to the people, and are expressed in the opening statement of the enabling legislation, in which Congress proclaimed that the national seashore was being established "in order to save and preserve . . . a portion of the diminishing seashore of the United States that remains undeveloped."

Point Reyes can perhaps be described best as a relict of the aboriginal California coast, serving as a vital and convenient outlet for a people becoming more and more pressured by technology. To many, it represents a last frontier--so near to the urban core, yet remaining unviolated by the symbols of contemporary life. Pristine it is not, for it bears the scars of miles of unsurfaced ranch roads. But these in themselves are anachronistic. The entire peninsula contains few reminders of the urgency of today, and in this condition it serves the present as usefully as any piece of land could. As a sharply contrasting complement to other public places in the San Francisco Bay Area, Point Reyes provides a major contribution to an effectively balanced system of recreational opportunities.

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NOT TO SCALE 

UNITED STATES DEPARTMENT OF THE INTERIOR  
NATIONAL PARK SERVICE

# REGION

## POINT REYES NATIONAL SEASHORE

LAND MANAGEMENT ZONING

The following zone designations represent a composite picture of how the park will be managed and developed in the future based on its resource values, management objectives, and public expectations.

Natural Zone--41,867.95 Acres

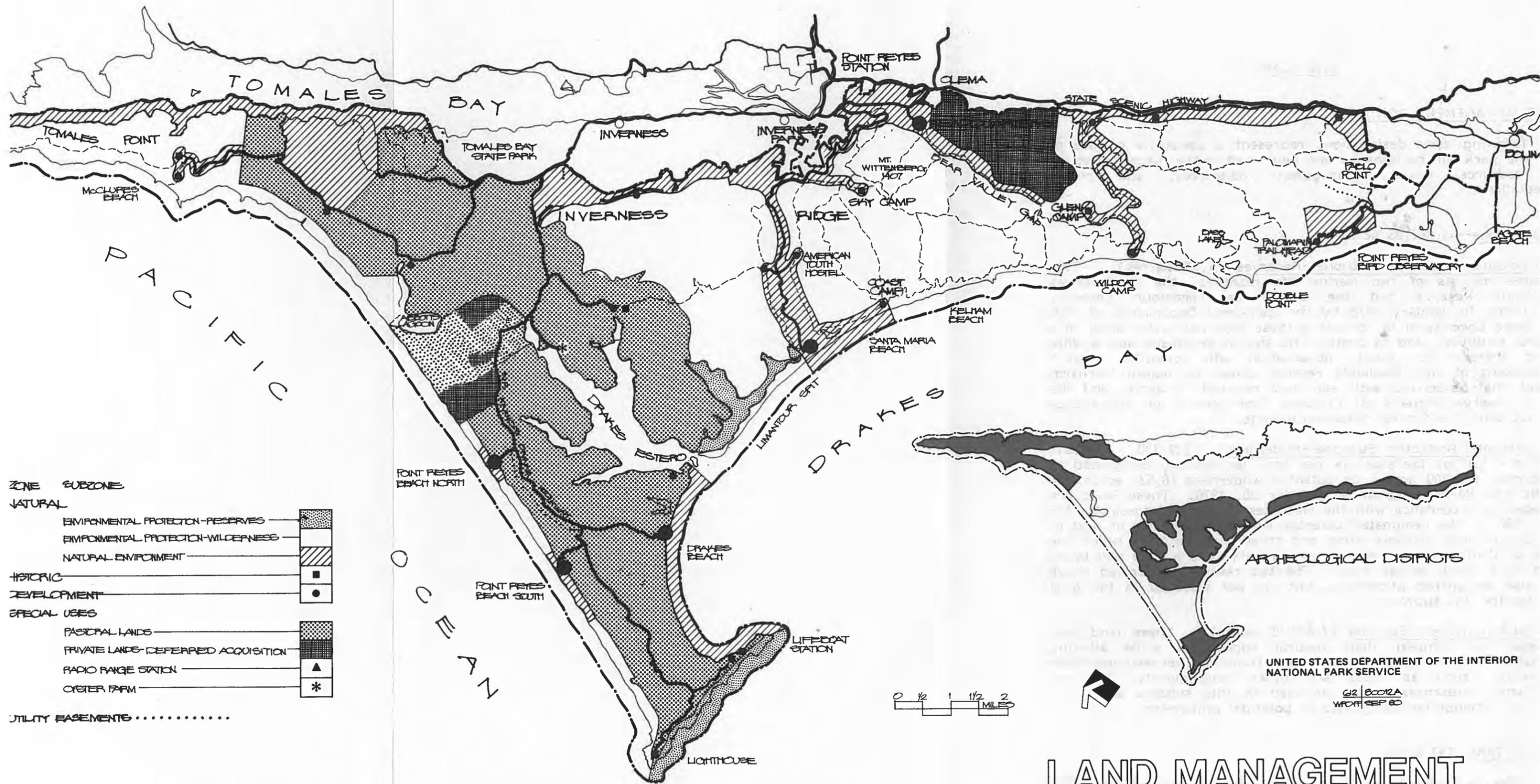
Environmental Protection Subzone--Reserves (1,300 acres). This subzone consists of two marine life reserves, the Point Reyes Headlands Reserve and the Estero de Limantour Reserve, established in January 1972 by the California Department of Fish and Game Commission to "preserve these land and water areas in a natural condition, and to protect the aquatic organisms and wildlife found thereon for public observation and scientific study." Management of the headlands reserve allows no human intrusion except that associated with approved research projects, and the estero reserve protects all lifeforms from removal or disturbance without state and federal collecting permits.

Environmental Protection Subzone--Wilderness (32,730 acres). Over one-half of the seashore has been legislatively designated as wilderness (24,200 acres) or potential wilderness (8,530 acres) by Public Law 94-567, signed on October 20, 1976. These lands are managed in accordance with the mandates of the Wilderness Act (78 Stat. 890). The designated potential wilderness consists of most of the quarter-mile offshore strip and other wetlands over which the state of California has retained some rights, and a strip still being used as a ranch access road. The two reserves described above are also designated wilderness, but are not included in the total acreage for this subzone.

Natural Environment Subzone (7,837.95 acres). These lands are managed to maintain their natural appearance while allowing compatible visitor use and providing a transition between man-made intrusions, such as roads and other developments, and the designated wilderness. Also included in this subzone are 3,413 acres of wetlands not designated as potential wilderness.

Historic Zone--157 acres

The following buildings or groups of buildings appear on the list of classified structures: Point Reyes lighthouse complex, Olema lime kilns, Point Reyes lifeboat station, Teixeira Ranch complex, Home



Ranch complex, Pierce Point Ranch complex, and the Drake Monument. These resources are managed to preserve the historic remains and to allow visitor access where such access is not adversely affecting those remains.

A total of 95 archeological sites have been recorded within the national seashore. Five archeological districts have been designated. These districts encompass 74 individual sites of which 15 possess more than local significance. The 2,950 acres contained within these districts are all included within the totals shown for other zones, as management of the districts is generally in accord with the zone in which they are found unless proximity to visitor use areas requires specific preservation measures.

The historic properties shown have been included on the list of classified structures and have been or are in process of being nominated for inclusion on the National Register of Historic Places. The archeological districts are already nominated to the National Register and are currently undergoing review. These areas will be managed as National Register properties until final determination has been made.

#### Development Zone--85 acres

This classification includes all areas of development ranging in size and complexity from that at Bear Valley headquarters to trailhead parking for 10 cars. This zone is managed to provide essential visitor service and administrative facilities. Areas of heavy visitor concentration are shown with a larger circle on the map. In addition to Bear Valley these include the four areas where parking is available adjacent to beaches at North Beach, South Beach, Drakes Beach, and Limantour. Relatively minor developments include ten trailhead parking areas of from 10 to 100 cars, the American Youth Hostel, the Clem Miller Environmental Education Center, the Point Reyes Bird Observatory, backcountry campgrounds, the lighthouse, and the lifeboat station.

#### Special Use Zone--23,271.2 acres

These lands include those over which the National Park Service does not have complete jurisdiction, or upon which activities are permitted other than preservation and visitor use. Four subzones have been shown in this category.

Pastoral Lands (19,854.23 acres). This subzone was established to permit the continued use of existing ranchlands for ranching and dairying purposes, although owned by the United States. The permits, which run until 1990, and in two cases until 2000, restrict

the use of the lands to traditional ranching only. Trails for public use may be established over these lands provided they do not materially interfere with ranching activities. The concept of these pastoral lands has the support of the public and many organizations and groups, and it is probable that this use will continue indefinitely.

Radio Range Station (4 acres). This small area on Point Reyes Hill is leased to the Federal Aviation Administration and houses a directional signal station which guides planes to the San Francisco Airport. It was in existence at the time the national seashore was established.

Oyster Farm (5 acres). This property on the upper end of Drakes Estero is under a reservation of possession. The company has a lease which runs until the year 2015 from the California Department of Fish and Game for oyster culture in the estero.

Lands Not to Be Acquired (3,407.97 acres). This classification includes four ownerships excluded from acquisition although they are within the boundary. These are the American Telephone and Telegraph, the Radio Corporation of America, and the United States Coast Guard communication facilities located near North Beach, totaling 804.22 acres, and the Vedanta Society property near Bear Valley, totaling 2,144.98 acres. The exclusions are subject to removal if other than the present use is made of the properties. Other minor exclusions are as follows: U.S. Coast Guard automated lighthouse and U.S. Coast Guard communications stations, totaling 334.87 acres; Pacific Telephone, 2.83 acres; North Marin Water District, 1.06 acres; Inverness Water Company, 6.71 acres; County of Marin, 17.22 acres; and the Bolinas Community Public Utilities District, 96.08 acres.

Lands to Be Acquired--2,303.06 acres.

These lands were added by the National Parks and Recreation Act of 1978. When acquired, the lands will be added to the special use zone and the natural zone. The total acreage for the national seashore is now 67,684.21 acres.

#### NATURAL RESOURCES MANAGEMENT

Management strategies for perpetuating the biotic diversity and scenic quality of the park are contained in a separate natural resource management plan, which was approved in 1976.

As reflected in the land management zones, most of the national seashore is either legally designated as wilderness or is under lease

or permit for grazing purposes in accordance with its enabling legislation. Within the legal and administrative constraints imposed by these two designations, the unusual variety of scenic qualities and biotic communities that make the seashore attractive to scientists as well as recreationists will be aggressively maintained. Although the majority of the seashore is generally viewed as a wild area where natural processes are allowed to predominate, manipulation of those processes through methods such as selective thinning, burning, and mowing will be cautiously pursued when necessary to protect its scenic, ecological, and recreational values. Restoration of historic natural conditions (such as reestablishment of Tule elk) will continue to be implemented when such actions will not seriously diminish scenic and recreational values.

## CULTURAL RESOURCES MANAGEMENT

### Description of Resources

At Point Reyes, the complete story of northern California Indians is represented--from prehistory through European contact to recent times. For many centuries, the Coast Miwok Indians occupied this land; archeological evidence indicates that by A.D. 1500 the peninsula supported a greater population of people than today. Locked in the archeological sites of the Point Reyes peninsula lies the story of 350 years of European contact with native Californians--a contact that eventually displaced the Indian way of life. Five archeological districts containing a total of approximately 65 significant sites have been nominated to the National Register of Historic Places. These districts are Tomales Point, Headlands, Double Point Coast, Drakes Estero, and Bear Valley.

The attraction of Point Reyes to European explorers is also an important part of the area's history. Francis Drake, the English seaman, may have repaired his vessel the Golden Hinde here in 1579 at what is now known as Drakes Estero. Although Drake claimed the peninsula for England, the Spanish made the same proclamation 17 years later and gave it the name Punta de los Reyes. Pacific coast explorers continued to visit Point Reyes, and during the 19th century the area was familiar to traders, whalers, and fur hunters of the United States, Great Britain, and Russia.

The shipping trade along the coast resulted in frequent shipwrecks--56 of them from 1841 to 1934, perhaps fewer in number due to the Point Reyes lighthouse and the Point Reyes lifeboat station. The Point Reyes lighthouse (1870-1975, 9 structures), which includes the site of a weather bureau station, and the lifeboat station (1927-1969, 6 structures) have been nominated to the National Register as facilities that represent the rugged navigational history of this coastline, particularly treacherous due to harsh climate and currents.

# EXHIBIT 5

## DEPARTMENT OF FISH AND GAME

CHARLTON H. BONHAM, Director

1416 9<sup>th</sup> Street  
Sacramento, CA 95814  
<http://www.dfg.ca.gov>



October 10, 2012

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

Dear Ms. Muldoon:

I am writing to encourage continued cooperation between the National Park Service, the California Department of Fish and Game ("Department"), and Drakes Bay Oyster Company, as renewal of the Special Use Permit for the Drakes Bay Oyster Company is considered.

The state and federal government have worked together for 47 years—since the State originally conveyed the bottom lands in Drakes Estero to the United States in 1965—to allow continued aquaculture operations in Drakes Estero. Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottom lands at Drakes Estero indefinitely for shellfish cultivation.

For almost five decades, the State has supported aquaculture in Drakes Estero. It has done so by regulating the Drakes Bay Oyster Company on an ongoing basis, by renewing the water bottom leases in 1979 and 2004, and by authorizing aquaculture in 2010 when establishing the Drakes Estero State Marine Conservation Area. Regulations implementing the California Marine Life Protection Act prohibit the cultivation of oysters in Drakes Estero without a valid state water bottom lease. The current state issued water bottom lease with Drakes Bay Oyster Company extends to 2029.

It is also important to recognize that California now is second only to Washington in shellfish production on the west coast and that Drakes Bay Oyster Company represents 55% of the water bottoms leased and 40% of the oysters cultivated in the state.

The continued cooperation between Drakes Bay Oyster Company, the National Park Service and the California Department of Fish and Game will benefit the environment, the community, and the local economy, consistent with our agencies' unique history of managing this property. Please contact me at 916.653.7667 if you have any questions or would like to discuss this matter.

Sincerely,

Charlton H. Bonham  
Director

cc: Senator Dianne Feinstein

# EXHIBIT 6

COMMISSIONERS

Jim Kellogg, President  
Discovery Bay  
Richard Rogers, Vice President  
Carpinteria  
Michael Sutton, Member  
Monterey  
Daniel W. Richards, Member  
Upland  
Don Benninghoven, Member  
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STATE OF CALIFORNIA

**Fish and Game Commission**

April 14, 2010

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

Dear Mr. Lunny:

The Commission, at its December 10, 2009, meeting in Los Angeles, approved the correction of a clerical error from the Fish and Game Commission meeting of October 8, 1993, regarding addition of manila clams to Drakes Estero Aquaculture lease M-438-01. Manila clams were added to lease M-438-01, as originally requested, and Manila clams were removed from lease M-438-02.

Sincerely,

John Carlson, Jr.  
Executive Director

cc: Deputy Director Mastrup  
Marija Vojkovich, Manager, Marine Region  
Kirsten Ramey, Marine Aquaculture Coordinator  
Eric Dockter, Fiscal and Administrative Services Branch

# EXHIBIT 7

Nancy Cave  
Northern California Enforcement Program Supervisor  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

October 3, 2012

Re: Drakes Bay Oyster Company and Consent Cease and Desist Order CCC-07-CD-11

Dear Ms. Cave:

I would like to take this opportunity to provide some historical background on both marine debris in Drakes Estero and that pertaining to the 1992 Interagency Meeting that led to the development of protocols contained in the Record of Agreement regarding the timing and use of various areas in Drakes Estero with regard to oyster operations as practiced by the Johnson Oyster Company (JOC) and Drakes Bay Oyster Company (DBOC).

From 1988 until 2009, I was the Department of Fish and Game (CDFG) biologist managing aquaculture operations in Drakes Estero and the Agency person with the longest continuous involvement with aquaculture operations in Drakes Estero. At the time of my retirement, I was the CDFG Marine Region Aquaculture Coordinator managing all the state's marine aquaculture.

### **Marine Debris in Drakes Estero**

By 1991, CDFG had received numerous letters about marine debris in Drakes Estero from concerned citizens forwarded to CDFG by then PRNS Superintendent John Sansing. I was actively working with JOC on containment, clean-up and removal of oyster cultivation materials. Many years of oyster culture by JOC using methods that utilized long-lasting plastics and polyvinyl products (PVC pipe and coffee can lids) had created a persistent problem (legacy debris). Neither of these products floats, so escaped materials sink to the bottom and get moved by currents or get buried. Waves from storms, winds, and strong tidal currents all work to unearth buried materials and wash them ashore where they are continually found even today.

JOC regularly conducted clean-up of debris on the shores of Drakes Estero and took steps to contain and minimize loss of oyster culture growing structure materials. Additionally, they were also looking for new ways to grow and harvest their oysters that would not release these products into the environment.

DBOC has moved to new culture methods and containment at harvest and regularly picks-up marine debris from beaches in the Estero, when they are not prohibited by seasonal and other closures. Materials used for culture are not cheap, so there is also a financial incentive to contain and re-use these materials. Documented collection efforts and a categorization of collected materials would provide evidence of compliance with mandated clean-up efforts. It would also provide a baseline to look at the decline of legacy materials over time. Also, it may surprisingly show, as JOC found, that there is a fair amount of plastics, foam from buoys, etc. that enters Drakes Estero from the ocean and also from PRNS visitors.

## Harbor Seal Pupping Season Closure

In late 1991, allegations of take under terms of the Marine Mammal Protection Act (MMPA) of harbor seals by JOC and their oyster operations led to the involvement of NOAA National Marine Fisheries Service (NMFS). Two meetings were held, one inter-agency meeting with NMFS, NPS, CDFG and CDHS (now California Department of Public Health) on December 9, 1991, and a follow-up meeting with the Agency personnel and JOC on January 15, 1992. NMFS Enforcement did not pursue action under the MMPA and felt that JOC's normal operations did not constitute a take. NMFS Enforcement did direct the parties (NPS, CDFG and JOC) to work together to develop a mutual plan for minimizing the disturbance to harbor seals from aquaculture operations by JOC in Drakes Estero.

This Record of Agreement (see attached) resulted in the closure of the "lateral channel" during harbor seal pupping season (March 15- June 1). The "lateral channel" was generally defined as the channel running between the main channel and the western channel and illustrated as such on a map included in correspondence from NPS to CDFG on April 28, 1992. This map shows the maximum mudflat area exposed on very low tides (less than -1.0 ft.) in Drakes Estero. However, the vast majority of the time these areas are under water and not visible on the surface.

Since the Record of Agreement was finalized, JOC oyster farm employees have accessed the oyster beds adjacent to the lateral channel from the western channel during closures and year around. In reality, there is no exact beginning of the western edge of the "lateral channel," whose approximate location is pictured in the Record of Agreement solely by tidal height of a minus tide less than -1.0 foot on an outdated map. There was not the GPS or GIS capability available to mark, using latitude and longitude, this undefined point in 1992. Accordingly, JOC employees landed at the western "edge" of the lateral channel as best defined by tidal height and visual reckoning at the time they were working.

This worked for 15 years since complaints from NPS about harbor seal disturbance ceased. As a party to the Record of Agreement, CDFG tried to ensure that JOC operated within the agreed upon protocols.

When DBOC took over the lease from JOC, I provided Mr. Lunny with a copy of the Record of Agreement and made onsite visits to the lateral channel area with Mr. Lunny and DBOC employees to indicate the permissible extent of access during the harbor seal pupping season. DBOC's use of this area is essentially in the same manner (stocking, working and harvesting) as JOC's except with less use of the more easterly portions of Bed 15 on Barries Bar. This had been normal operating procedure and appeared to work, as evidenced by lack of complaints and no scientific finding of adverse impacts to harbor seals by DBOC operations. If there had been complaints or evidence of adverse impacts, CDFG would have, with input from parties to the Record of Agreement, defined the exact location and placed a buoy or channel marker to define the westernmost permissible extent of access to the "lateral channel" area.

The shallowing of the western end of the lateral channel since 1992 has provided additional protection to harbor seals using the lateral channel since the shallower water has caused them to abandon the haul-out sites nearer to the aquaculture operations. The Marine Mammal Commission found no scientific evidence or basis to suggest the current usage of the western edge of the lateral channel, as practiced by DBOC and formerly JOC, to work Barries Bar is causing any adverse impacts to the harbor seals. Additionally, DBOC has shown good faith and adherence to the protocols in both the Record of Agreement and the

2008 Special Use Permit (SUP), and did not violate the terms of either with regard to not using the main channel during closure as shown in the 250,000 photographs taken by NPS over three years.

The Record of Agreement was meant to be an adaptive management tool with new input from operational experience revising the protocols. The technology now exists (aerial photography, Google Earth) and has been used to view accustomed usage patterns of DBOC's oyster workers in the lateral channel area and place them within the currently undefined "lateral channel" boundary. It is very easy to determine the position of an object from an altitude of several thousand feet but much more difficult in a large embayment from a boat at high tide with an algal bloom limiting water visibility. The reason there are channel markers and buoys in the marine environment is because it is very difficult to define your position on open water. It is also the reason that the CDPH has buoys for their water quality sampling stations so the samples are taken from the same place over time.

I am frankly quite amazed that the "lateral channel" remains undefined and that no buoy or channel marker has been placed to provide a reference point. I cannot imagine that in a terrestrial setting that a sign or fence would not have been posted to define the closure point or area.

DBOC has not violated the "lateral channel" boundary since they have been going about their accustomed normal operating procedures as per the Record of Agreement and in the same manner as JOC did in the past.

### **Proposing a Solution**

A sensible solution would be to convene all the parties (CDFG, NPS, NMFS, DBOC) to the original Record of Agreement, and addressing this apparent need to define the exact boundaries for the "lateral channel." An additional item at this meeting might be for the NPS to provide the exact coordinates for the corners of the harbor seal protection polygons.

It seems that there is currently an adversarial component to the agency interactions that is not in the spirit of fostering working relationships that produce products such as the Record of Agreement. While I worked for CDFG, I tried to keep aquaculturists operating within the laws and regulations pertaining to aquaculture and their lease provisions. I also provided help in compliance if I had the resources or tools to assist them. If my experience and long history with aquaculture can be of any assistance, please feel free to contact me.

Thank You.

Sincerely,



Thomas Moore  
Retired CDFG Marine Aquaculture Coordinator  
1136 Duer Rd.  
Sebastopol, CA 95472  
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tmoore2003@sbcglobal.net

May 15, 1992

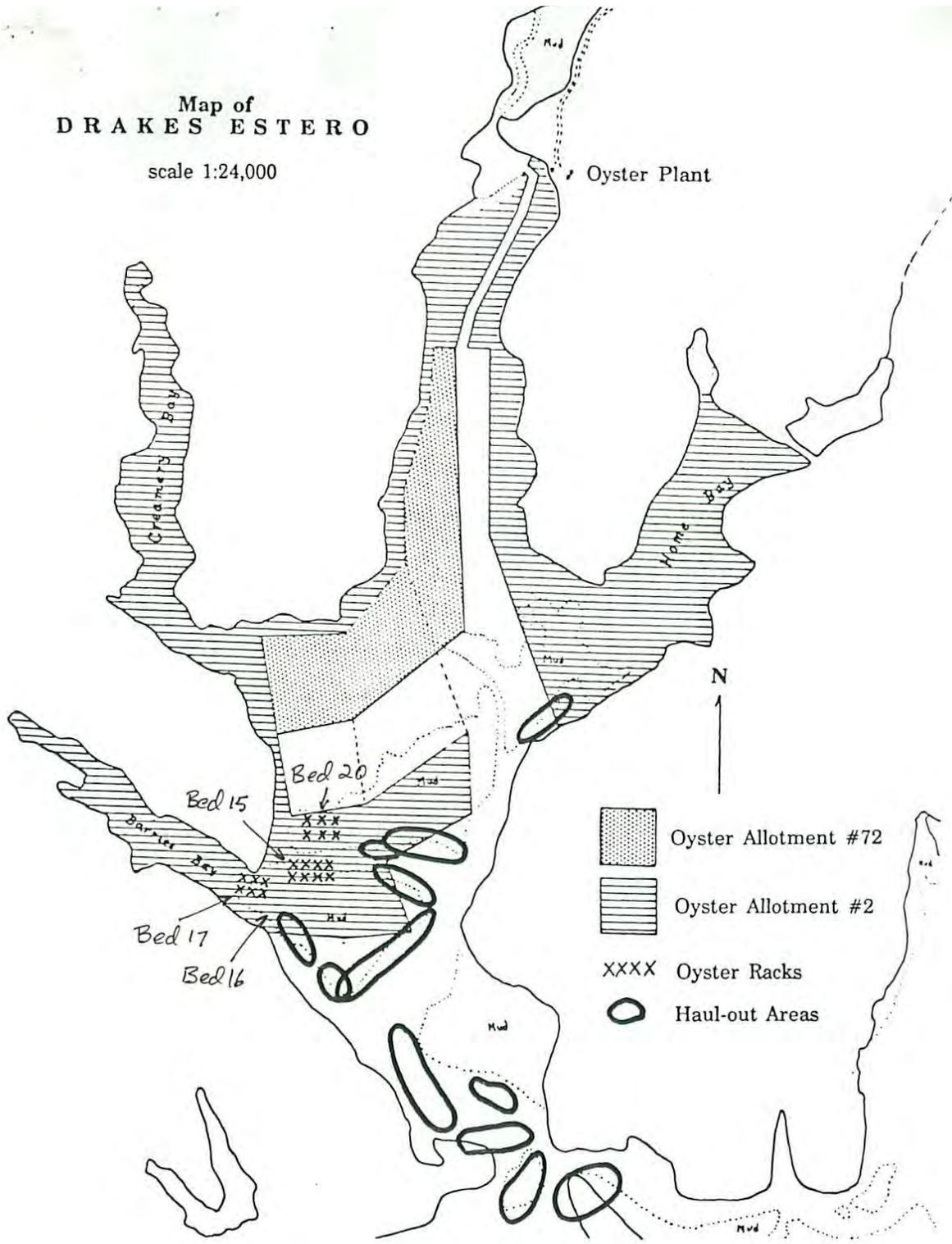
Record of Agreement  
Regarding  
Drake's Estero Oyster Farming  
and  
Harbor Seal Protection

As a result of a meeting held January 15, 1992, between the National Park Service (NPS), National Marine Fisheries Service (NMFS, the California Department of Fish and Game (DFG) and Johnson's Oyster Company (JOC), a series of operating procedures was agreed upon to minimize the disturbance to harbor seals resulting from JOC oystering operations. The following items were mutually agreed to by all parties:

- During the pupping season, March 15 through June 30, the main channel (Figure 1) of Drake's Estero will be closed to boat traffic.
- The "lateral channel" between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.
- Oyster seeding operations in beds #1, #2, and #3, located between Creamery Bay and Barries Bay, be deferred until June 1, if possible. Earlier commencement dates, if any, should be coordinated between JOC and NPS.
- The "lateral channel" should be used as little as possible between June 1 and June 30. Oyster beds #2 and #3 should be approached from the north at low speed, and the beds themselves planted from north to south so that disturbance near the "lateral channel" will occur toward the end of the pupping season.

Map of  
DRAKES ESTERO

scale 1:24,000



Drakes Estero and Estero Limantour



# EXHIBIT 8



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May 7, 2012

Dr. Ralph Morgenweck  
Department of the Interior  
Scientific Integrity Officer  
134 Union Blvd.  
Lakewood, CO 80228

Subject: Response to letter from R. Morgenweck to T. St Clair dated April 19, 2012

Dear Ralph:

Attached is a letter of clarification from Dr. Chris Clark of Cornell University, documenting his current opinions regarding the Draft Environmental Impact Statement (DEIS) at Point Reyes National Seashore and the Drakes Bay Oyster Company (DBOC) operation. The gist of his response is that the new data made available by DBOC and ENVIRON during the DEIS comment period provide additional value to the impact assessment process and could usefully be included in the National Park Service's Final EIS. However Dr. Clark does mention that a full evaluation of these new data (and indeed the situation at Drakes Bay in general) would require new measurements and analysis over an extended period of time. As it stands, Dr. Clark's original opinion regarding the conclusions he drew of the current DEIS is unchanged.

In Atkins' opinion, the 'currently best available scientific information' has now been fully aired, and Dr. Clark's opinion is unchanged. If there were to be a much longer decision period, then a more detailed and comprehensive analysis could be designed and carried out. However, absent such a prolonged and potentially open-ended process, the currently available information is clear. It is also by no means certain that new research and analysis would lead to new conclusions. Hence we feel that the currently available scientific information provides a framework for decision-making.

Sincerely,

Tom St Clair  
Program Manager

**Letter from Ralph Morgenweck (DOI, Scientific Integrity Officer) to Dr. St. Clair on 19 April 2012:** This letter listed three questions addressed to me in order to “clarify his (*my*) views on the DEIS acoustic chapter so that the National Parks Service (NPS) clearly understands his (*my*) suggestions for improving it. The three questions were:

1. Please review the data provided by ENVIRON and provide your opinion as to whether the ENVIRON measurements provide sound and reasonable information regarding the acoustic environment at Drakes Bay including whether the information was collected using appropriate techniques and whether any additional information would benefit NPS in addressing the ENVIRON data in the Final EIS (e.g. measurement protocols, weather conditions, operating condition of equipment).
2. Based solely on your interpretation of the scientific information related to acoustics are there different values and/or references for acoustic measurements (other than those in the DEIS) that appear credible and should be addressed in the final EIS?
3. Does new attention on the sources of the data in Table 3.3, the ENVIRONS data, or any additional or different values of references for measurements identified in response to question 2 alter your view of the DEIS chapter on acoustics? If so, what is your current assessment of the discussion of soundscapes in the DEIS?

I therefore carefully reviewed the DEIS, my comments on the DEIS, and the materials I received on 19 April, 2012. After this review I answered the three questions from Ralph Morgenweck’s 19 April 2012 letter. I have tried to make my answers strictly based on science and not include anything but my professional scientific opinions. The following are my answers to the three questions.

**Question 1.**

*Please review the data provided by ENVIRON and provide your opinion as to whether the ENVIRON measurements provide sound and reasonable information regarding the acoustic environment at Drakes Bay including whether the information was collected using appropriate techniques and whether any additional information would benefit NPS in addressing the ENVIRON data in the Final EIS (e.g. measurement protocols, weather conditions, operating condition of equipment).*

The Environ document (ED) provides some additional synthesis of measurements. Section H provided critical review of the DEIS but did not provide any data, while Appendix B provided additional noise data in the form of charts based on sound level measurements collected on 22 November 2011 using a certified B&K 2250 Type 1 SL meter.

My simple answer to this question is that the ED information does provide some “reasonable information regarding the acoustic environment at Drakes Bay,” that the data seem to have been collected “using appropriate techniques,” and that both the DEIS and this ED could benefit from additional acoustic data as well as data interpretation. These additional ED noise level (in dBA) charts provide calibrated measurements of specific DBOC events relative to a distance of 50 feet. The ED data charts represent measurements of very short snapshots of specific DBOC acoustic activity events. One could go through a litany of issues related to the physical conditions under which those measurements were taken (e.g., humidity, ground reflection) and the need for a wider variety of data analyses to better address acoustic issues of spatial and temporal and spectral variability, but relative to the tolerances under discussion here, these are important and useful charts.

Neither the DEIS or ED document provides a full evaluation of the acoustic dynamics in Drakes Bay relative to the noise generating activities of DBOC. The DEIS (Chapter 3, page 202) refers to measurements collected in the Seashore in 2009 on a bluff on the eastern shore of Drakes Estero over the course of 30 days in July/August of 2009, “at a site “located approximately 2 miles from the onshore DBOC operations.” These measurements were used to calculate  $L_{50}$  values for that site and time period. The context of these NPS measurements and those in the ED are very different, and cannot be effectively compared.

The photographs in the appendix provided very useful visualizations of the DBOC operational contexts.

**Question 2**

*Based solely on your interpretation of the scientific information related to acoustics are there different values and/or references for acoustic measurements (other than those in the DEIS) that appear credible and should be addressed in the final EIS?*

There are some additional DBOC noise level data that have become available since submission of the DEIS. These data were collected by ENVIRON International Corp and made available to me in their 9 December 2011 "Comments on the Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement" document. These are credible data relative to the received noise levels of specific DBOC noise-generating activities at relatively close ranges. As such, they revise the noise level values as presented in the DEIS Chapter 3, Table 3.3. These are the only additional data that I am aware of, which could inform the DEIS relative to the potential influence of DBOC generated noises on the Drakes Estero soundscape.

If there were additional time and resources, the NPS and/or others could carry out additional analyses on existing data and/or conduct additional acoustic studies. Although such efforts to collect more data and conduct more analyses would likely take several more years to complete, they would provide a quantitative mechanism by which to more fully assess the acoustic influences of DBOC operations on the Drakes Estero soundscape.

**Question 3**

*Does new attention on the sources of the data in Table 3.3, the ENVIRONS data, or any additional or different values of references for measurements identified in response to question 2 alter your view of the DEIS chapter on acoustics? If so, what is your current assessment of the discussion of soundscapes in the DEIS?*

The additional ENVIRONS' data is appropriate and helpful in that it provides some actual noise level measurement data for specific DBOC noise-generating activities at close range. Some of those activity level values in the DEIS Table 3.3 were not representative of actual DBOC noise-generating activities.

As mentioned in my responses to question-2, above, the DEIS would benefit from a richer set of data and acoustic metrics by which to evaluate the contributions of DBOC acoustic activities on the Park's physical soundscape. This will involve the application of a sound transmission model as a function of environmental conditions, terrain, and distance between the source and a potential visitor or wildlife. The dynamics of sound transmission are complex and site specific, and significantly influence the level and quality of sound received by a listener. As discussed in the DEIS, the subjective perception of sound by humans and wildlife is highly contextual and cannot be predicted simply by an estimate or measure of receive sound level, and there are numerous scientific publications attesting to the this subject. Therefore, relying on a richer set of empirically derived measurement data and sound transmission model is not by itself going to address the issue of a person's subjective experience in the Park.

In conclusion, I still find the DEIS discussion regarding potential future impacts from human-caused noise-generating activities (Chapter 4) reasonable and appropriate.