

1 Amber D. Abbasi [CSBN 240956]
Cause of Action
2 1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
3 Phone: 202.400.4232
4 Fax: 202.300.5842

5 S. Wayne Rosenbaum [CSBN 182456]
Stoel Rives LLP
6 12255 El Camino Real, Suite 100
San Diego, CA 92130
7 Phone: (858) 794-4114
8 Fax: (858) 794-4101

9 Attorneys for Plaintiffs
10 DRAKES BAY OYSTER COMPANY and KEVIN LUNNY

11 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 **DRAKES BAY OYSTER COMPANY,**)
13 17171 Sir Francis Drake Blvd)
14 Inverness, CA 94937, and)
15 **KEVIN LUNNY,**)
16 17171 Sir Francis Drake Blvd)
17 Inverness, CA 94937)

18 Plaintiffs,)

19 v.)

20 **KENNETH L. SALAZAR,**)
in his official capacity as Secretary, U.S.)
21 Department of the Interior,)
1849 C Street, NW, Washington, D.C., 20240;)
22 **U.S. DEPARTMENT OF THE INTERIOR**)
1849 C Street, NW, Washington, D.C., 20240;)
23 **U.S. NATIONAL PARK SERVICE**)
1849 C Street, NW, Washington, D.C. 20240;)
24 **JONATHAN JARVIS,**)
25 in his official capacity as Director, U.S.)
National Park Service,)
26 1849 C Street, NW, Washington, D.C. 20240;)
27 and)
28 **DOES 1-100,**)
Defendants.)

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Administrative Procedure Act Case)

Date:
Time:
Court:

INTRODUCTION

1
2 1. This civil action challenges Defendant Secretary of Interior Kenneth Salazar's
3 decision to deny Plaintiffs Drakes Bay Oyster Company (DBOC) and Kevin Lunny a Special
4 Use Permit (SUP) for the continued use of land and facilities on the shores of Drakes Estero in
5 Point Reyes National Seashore. If allowed to stand, Secretary Salazar's decision will terminate
6 31 full-time jobs, deprive 15 employees of affordable housing, hijack a property right of the
7 State of California, and permanently tear the fabric of a rural community. Secretary Salazar's
8 decision was a final agency action in violation of the National Environmental Policy Act of 1969
9 (NEPA), as amended, 42 U.S.C. §§ 4321 *et seq.*; the Data Quality Act (DQA), 44 U.S.C. § 3516
10 Note; the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706; and the United States
11 Constitution.

12 2. DBOC, a small, environmentally sustainable, family-owned oyster farm with
13 thirty-one full-time employees, is located on the shores of Drakes Estero, in the Point Reyes
14 National Seashore. Mr. Kevin Lunny and his wife Nancy Lunny are owners of DBOC, and Mr.
15 Lunny serves as DBOC's President. DBOC carries on a cultural and historical legacy of
16 cultivating oysters in Drakes Estero, where oysters have been continuously cultivated for
17 approximately eighty years. DBOC currently produces approximately 40% of the oysters
18 cultivated in the State of California, and is the last remaining shellfish cannery in the state.
19 Fifteen people (DBOC employees and their families) live in affordable housing on the farm.

20 3. DBOC and Mr. and Mrs. Lunny purchased the farm from the Johnson Oyster
21 Company (JOC) in December 2004. In the transaction, JOC transferred to DBOC and Mr. Lunny
22 a renewable Reservation of Use and Occupancy (RUO) with the National Park Service (NPS) for
23 a 1.5 acre area where onshore operations are conducted, and two State water bottom leases with
24 the California Fish and Game Commission (CFGC) to cultivate oysters in approximately 1,060
25 acres of Drakes Estero. The RUO had an expiration date of November 30, 2012, with a renewal
26 clause that grants NPS the right to issue a SUP at the end of the RUO.

27 4. In 2005, Point Reyes National Seashore Superintendent Donald Neubacher
28 notified Mr. Lunny that the RUO would not be renewed upon its expiration because the NPS

1 lacked jurisdiction to issue a SUP, in contradiction of ¶ 11 of the RUO, which expressly
2 contemplated that NPS could issue a SUP upon the expiration of the RUO.

3 5. In 2009, in answer to NPS’s claim that it lacked jurisdiction to grant a new SUP
4 to DBOC upon the expiration of the RUO, Congress enacted Section 124 of the Department of
5 the Interior, Environment, and Related Agencies Appropriations Act of 2010 (hereinafter
6 “Section 124”), Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009), which authorized the
7 Secretary of the Interior to issue DBOC a new SUP “with the same terms and conditions ... for a
8 period of 10 years from November 30, 2012.” Before modifying any of the terms and conditions,
9 Section 124 directed the Secretary to “take into consideration recommendations of the National
10 Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National
11 Seashore.”

12 6. Section 124 was promulgated in 2009, providing nearly three years for NPS and
13 DOI to prepare a NEPA-compliant environmental impact statement to enable the Secretary to
14 make the well-informed decision NEPA requires.

15 7. Because the decision whether to issue DBOC a SUP constitutes a major federal
16 action under 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1508.18, and 43 C.F.R. § 46.100(a),
17 Defendants were required to comply with NEPA and prepare a NEPA-compliant environmental
18 impact statement to enable the Secretary to make an informed, reasoned decision whether to
19 extend DBOC’s SUP for an additional ten years. NPS initiated the NEPA environmental impact
20 statement process in September 2010.

21 8. NPS, with the assistance of a government contractor, Vanasse Hangen Brustlin,
22 Inc. (VHB), prepared and publicly released a NEPA-mandated draft environmental impact
23 statement, *Draft Environmental Impact Statement: Drakes Bay Oyster Company Special Use*
24 *Permit* (hereinafter “DEIS”) in September 2011. NPS released a NEPA-mandated final
25 environmental impact statement, *Final Environmental Impact Statement: Drakes Bay Oyster*
26 *Company Special Use Permit* (hereinafter “FEIS”) late on November 20, 2012. Neither of these
27 documents complied with NEPA’s substantive and procedural requirements.

1 9. In complete disregard for NEPA’s public notice and comment process for FEIS
2 documents, NPS never provided written notice to interested parties that the FEIS had been
3 released; did not publish a Notice of Availability (NOA) for the FEIS in the Federal Register;
4 and did not submit the FEIS to the U.S. Environmental Protection Agency (EPA). Accordingly,
5 EPA never published a NOA for the FEIS to trigger an official public notice and comment
6 process on the FEIS. NPS did not offer any explanation why it began the NEPA process and
7 subsequently did not comply with NEPA’s procedural requirements.

8 10. Various NPS employees have represented that it is the intention of the Service to
9 evict the Lunnys and convert Drakes Estero to a wilderness area in reliance on the Wilderness
10 Act of 1964 and Point Reyes Wilderness Act of 1976 without regard to the express intent of
11 Congress as expressed in Section 124, thereby demonstrating that the conclusions in the DEIS
12 and FEIS were tainted by the biases of these NPS employees.

13 11. Despite NPS’s failure to even minimally observe public notice and comment
14 procedures on a FEIS, on November 29, 2012, the Secretary issued a memorandum of decision
15 informing DBOC that it would not be issued another SUP. The Secretary stated that he was
16 “informed” by the DEIS and FEIS and found them “helpful to me in making my decision.” In
17 fact, the DEIS and FEIS are the only environmental or scientific reports cited in the
18 memorandum of decision. The NAS report explicitly referenced in Section 124 is not cited.

19 12. The Secretary did not issue a NEPA-compliant Record of Decision (ROD) and
20 did not affirm that his decision was based on a NEPA-compliant FEIS or DEIS.

21 13. Despite maintaining that the NEPA process would inform his decision whether to
22 issue DBOC a 10-year SUP for the 789-day period of NEPA review—from scoping, the
23 beginning of the NEPA process, in September 2010 to the Secretary’s decision on November 29,
24 2012—the Secretary asserted for the first time in the November 29, 2012, memorandum that his
25 decision and NPS’s actions regarding the DBOC SUP are not subject to any substantive or
26 procedural legal requirements, including those prescribed by NEPA, on the basis of a clause in
27 Section 124 that the Secretary was authorized to issue a SUP to DBOC, “notwithstanding any
28 other provision of law”

1 14. In his November 29, 2012, memorandum, the Secretary directed NPS to notify
2 DBOC that its existing RUO and SUP would expire one day later—on November 30, 2012—and
3 require DBOC to remove all of its personal property, including shellfish and racks, from Drakes
4 Estero within 90 days. The Secretary’s memorandum of decision prohibits DBOC from engaging
5 in any “commercial activities ... in the waters of Drakes Estero after November 30, 2012,” in
6 contravention of DBOC’s State water bottom leases. The memorandum of decision also prohibits
7 DBOC from engaging in even “limited commercial activities onshore” during this 90-day period
8 except “to the extent authorized in writing by NPS.” The Secretary’s memorandum of decision
9 also directed NPS to publish in the Federal Register a notice announcing the conversion of
10 Drakes Estero from potential to designated wilderness.

11 15. The memorandum of decision will cause immediate irreparable pecuniary and
12 nonmonetary harm to DBOC, Mr. and Mrs. Lunny, and DBOC’s employees, including but not
13 limited to a substantial risk of lost customers and business reputation, risk of damage to unique
14 DBOC property, and stress and emotional harm to Mr. and Mrs. Lunny and DBOC’s employees
15 as a result of the job losses that will occur if DBOC is forced to abruptly cease all operations and
16 remove all personal property, shellfish and oyster racks, and structures, and to relinquish its valid
17 State water bottom leases in Drakes Estero.

18 16. Plaintiffs seek declaratory and permanent injunctive relief preventing Defendants
19 and all persons and entities acting in active concert or participation with Defendants from taking
20 any action to implement the decision to deny DBOC the 10-year SUP contemplated by Section
21 124 or otherwise authorize or commence activities that would cause harm to DBOC pending
22 compliance with NEPA, APA, DQA, the United States Constitution, and other legal
23 requirements.

24 17. Plaintiffs also seek a temporary restraining order (TRO) and preliminary
25 injunctive relief during the pendency of this litigation to prevent irreparable nonmonetary harm
26 to DBOC, Mr. and Mrs. Lunny, and DBOC’s thirty-one full-time employees.

27 18. Plaintiffs request that the memorandum of decision, DEIS, and FEIS be vacated.
28

1 Upon reviewing this matter it becomes apparent that the legislation transferring
2 the submerged lands at Point Reyes to the Federal Government specifically
3 reserved the fishing rights to the State. (AB 1024 (Bagley) Ch. 983, Stats. of
4 1965.

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

10 38. The April 1974 Environmental Impact Statement for the proposed Point Reyes
11 Wilderness Area confirms the contemporaneous interpretation of the rights retained by the State
12 in 1965. It provides that “[c]ontrol of the lease from the California Department of Fish and
13 Game, with presumed renewal indefinitely, is within the rights reserved by the State on these
14 submerged lands.”

15 39. JOC held valid State water bottom leases in Drakes Estero from the 1950s until
16 December 2004 to cultivate oysters. In 2004, the CFGC granted JOC an extension of its two
17 State water bottom leases in Drakes Estero for twenty-five (25) years, until 2029.

18 40. Effective November 30, 1972, JOC granted fee title to 1.5 acres on the shores of
19 Drakes Estero where the oyster farm was located to the United States in exchange for a forty (40)
20 year RUO, ending November 30, 2012. The RUO contained a renewal clause, which provided
21 that a SUP could issue at the end of the RUO period. This RUO was transferred to DBOC and
22 Mr. Lunny in December 2004.

23 Disputed Analysis of DBOC Impact

24 41. Between 2007 and 2012, NPS scientists made public claims to elected officials
25 that DBOC’s operations were causing harm to the environment at Drakes Estero, specifically to
26 harbor seals in Drakes Estero. These claims were criticized as being without scientific merit by
27 numerous commentators, including but not limited to Dr. Corey Goodman, Ph.D., an
28 independent scientist and elected member of the National Academy of Sciences, and Dr. Roberto
Anima, of the U.S. Geologic Service (USGS).

42. These criticisms resulted in the official withdrawal of a 2007 NPS report, *Drakes
Estero: A Sheltered Wilderness Estuary*, from the NPS website.

1 43. Between 2007 and 2010, the NPS operated a secret camera program in Drakes
2 Estero that ultimately took over 300,000 digital photographs.

3 44. After the program came to light in 2010, complaints were filed over the NPS's
4 failure to disclose the secret camera program. In 2011, Gavin Frost, of the Office of the Solicitor
5 of the Department of the Interior, issued his report (hereinafter the "Frost Report") concluding
6 that NPS employees committed scientific errors and appeared to have acted improperly,
7 including "blurring the line between exploration and advocacy through research" and
8 withholding relevant, material, and necessary research and data from DBOC and the National
9 Academy of Sciences. The Frost Report found five NPS officials and scientists guilty of
10 violating the NPS Code of Scientific and Scholarly Conduct, and concluded that "NPS, as an
11 organization and through its employees, made mistakes which may have contributed to an
12 erosion of public confidence."

13 45. In 2007, the National Academy of Sciences was directed to study NPS science at
14 Drakes Estero, pursuant to an agreement reached between Sen. Dianne Feinstein, DBOC, and
15 Mary A. Bomar, then-Director of the NPS.

16 46. The National Academy of Sciences, Ocean Studies Board, National Research
17 Council, published two reports, entitled *Shellfish Mariculture in Drakes Estero, Point Reyes*
18 *National Seashore, California* (2009) (hereinafter "2009 NAS Report"), and *Ecosystem Concepts*
19 *for Sustainable Bivalve Mariculture* (2010), relevant in assessing DBOC's continued presence in
20 Drakes Estero.

21 47. The 2009 NAS Report concluded that "that there is a lack of strong scientific
22 evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the
23 current (2008–2009) levels of production and under current (2008–2009) operational practices."
24 The 2009 NAS Report also stated that NPS had "in some instances selectively presented,
25 overinterpreted, or misrepresented the available scientific information on DBOC operations."

26 48. In July 2010, DBOC applied for a SUP from NPS consistent with the terms found
27 in Article 11 of the RUO, and Section 124.

1 49. During a September 2010 meeting held in NPS’s Oakland, California, regional
2 headquarters regarding DBOC’s SUP application, NPS Staff provided DBOC with a document
3 entitled “Agenda for Meeting Between Drake’s Bay Oyster Company and the National Park
4 Service Regarding EIS for Special Use Permit Application by DBOC” and a document entitled,
5 “Point Reyes National Seashore Drakes Bay Oyster Company Special Use Permit Environmental
6 Impact Statement, Draft Schedule of Major Milestones, September 2010” (hereinafter “Draft
7 NEPA Schedule”). A copy of the Draft NEPA Schedule is lodged with this Complaint as Exhibit
8 A and incorporated by reference herein.

9 50. The Draft NEPA Schedule’s agenda items included “Scope and Timing of NEPA
10 Process for DBOC’s permit application,” “Points of Contact during NEPA process,” and
11 “Composition of NPS NEPA Team.”

12 51. The Draft NEPA Schedule indicated that the NEPA-required “publication of
13 notice of intent (NOI) in [the] Federal Register” and NEPA-required public meetings would
14 occur within thirty days and provided a “Target Completion Date” of October 2010.

15 52. The Draft NEPA Schedule stated that the NEPA-mandated publication of a NOA
16 of the DEIS would be published in the Federal Register, a sixty-day public review of the DEIS
17 would occur, and that public meetings would be held by a “Target Completion Date” of “August-
18 September 2011.”

19 53. The Draft NEPA Schedule stated that a NOA of the FEIS would be published in
20 the Federal Register by a “Target Completion Date” of June 2012 and that a 30-day waiting
21 period would occur prior to the Secretary’s decision whether to issue DBOC a SUP.

22 54. The Draft NEPA Schedule stated that July 2012 was the “Target Completion
23 Date” by which the Secretary was to issue a record of decision (ROD) regarding whether to issue
24 DBOC a SUP, and that a NOA of that ROD would be published in the Federal Register.

25 55. On October 22, 2010, NPS published a Notice of Intent to prepare an
26 Environmental Impact Statement for the Drakes Bay Oyster Company Special Use Permit, Point
27 Reyes National Seashore in the Federal Register stating that “[p]ursuant to the National
28 Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service is preparing

1 an Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company Special Use
2 Permit, Point Reyes National Seashore, California.” 75 Fed. Reg. 65,373.

3 56. NPS’s October 2010 Public Scoping Handout regarding the NEPA-required
4 environmental impact statement concerning the DBOC SUP decision stated that NPS was
5 beginning to prepare an environmental impact statement on this issue “in accordance with the
6 National Environmental Policy Act (NEPA).”

7 57. The October 2010 Public Scoping Handout stated that “[o]n behalf of the
8 Secretary [of the Interior], the NPS will use the NEPA process” and that “[t]he results of the
9 NEPA process will be used to inform the decision of whether a new special use permit should be
10 issued to DBOC for a period of 10 years.”

11 58. As required by NEPA, NPS and a government contractor, VHB, prepared the
12 DEIS, which was released for public comment in September 2011. Public comment on the DEIS
13 closed on December 9, 2011.

14 59. The DEIS outlines four “alternatives.” Under “Alternative A,” denominated the
15 “no action” alternative, DBOC would not be issued a 10-year SUP and would be forced to close
16 and remove its buildings and structures in late 2012. The DEIS concludes that Alternative A is
17 the “environmentally preferred alternative” based upon the agency’s claims that continued
18 DBOC operations will have long-term “major” and “moderate” adverse impacts on the
19 environment in Drakes Estero. Alternatives B, C, and D were the “action” alternatives that
20 contemplated granting a SUP to DBOC under a variety of operating conditions. The DEIS
21 assessed DBOC’s impact on the following categories: “wetlands,” “eelgrass,” “bethnic fauna,”
22 “fish,” “harbor seals,” “birds and bird habitat,” “coastal flood zones,” “water quality,”
23 “soundscapes,” “wilderness,” “visitor experience and recreation,” “socioeconomic resources,”
24 and “NPS operations.” In the DEIS, NPS claimed that renewing DBOC’s SUP would have
25 “major” long-term adverse impacts on Drakes Estero’s environment for two of those fourteen
26 categories: “soundscapes” and “wilderness.” The DEIS also claimed that DBOC would have
27 “moderate” long-term adverse impacts on Drakes Estero’s “birds and bird habitat,” “harbor
28 seals,” and “visitor and recreation experience.”

1 60. The DEIS stated that after the public comment period, “[a] final version of this
2 document will then be released, and a 30-day no-action period will follow. Following the 30-day
3 period, the alternative or actions constituting the approved plan will be documented in a record
4 of decision that will be signed by the Regional Director of the Pacific West Region.” This 30-day
5 no-action period and ROD are both procedurally required by NEPA.

6 61. During the DEIS public comment period, NPS received scores of public
7 comments pointing out substantial procedural and substantive problems with the DEIS, including
8 comments submitted by DBOC and a professional consulting firm, ENVIRON International.

9 62. Among other things, DBOC’s comment letter informed NPS that the DEIS uses
10 an incorrect environmental baseline for the “action” alternatives in violation of NEPA.
11 Specifically, NEPA requires that the “action” alternatives be analyzed with a baseline drawn
12 from existing conditions, but the DEIS’s Alternatives B, C, and D used an imaginary “expected
13 future conditions” state that was undefined, could not be measured, and did not include the
14 existing oyster farm.

15 63. DBOC’s comment letter also explained that the DEIS failed to define the
16 proposed action as required by NEPA, and failed to comply with NEPA’s requirement to
17 adequately assess reasonable mitigation measures.

18 64. ENVIRON International’s December 9, 2011, comment letter described in
19 substantial detail why the DEIS’s Soundscape environmental analysis was inadequate.
20 (hereinafter “ENVIRON Comment”). For example, ENVIRON criticized NPS’s failure to
21 actually measure sound generated by DBOC’s boats and equipment. ENVIRON submitted the
22 noise measurements that it took onsite at DBOC and its analysis of that data, which found that
23 the DEIS exaggerated the amount of noise generated by DBOC’s boats and equipment and
24 consistently underestimated the background noise level at Drakes Estero.

25 65. The National Marine Fisheries Service (NMFS), the federal agency tasked with
26 protecting marine mammals, commented on the inadequacy of the DEIS’s analysis of DBOC’s
27 relationship with Drakes Estero. NMFS stated that “the harbor seal population in Drakes Estero
28 appears stable and healthy”; “there is no indication of negative impacts to fish species of concern

1 to NMFS, including ESA-listed salmonids and their critical habitat”; “[w]e have no records to
2 indicate that DBOC is impacting eelgrass to the degree that eelgrass is not healthy or not
3 providing adequate habitat values to the estero.”

4 66. In response to the substantial criticism of the validity of the science underlying
5 the DEIS, in December 2011 Congress directed the National Academy of Sciences “to assess the
6 data, analysis, and conclusions in the DEIS in order to ensure there is a solid scientific
7 foundation for the Final Environmental Impact Statement expected in mid-2012.” Conference
8 Report, Consolidated Appropriations Act, 2012 (Dec. 2012), Pub. L. No. 112-74.

9 67. Instead of immediately asking the National Academy of Sciences to perform the
10 Congressionally-mandated review of the DEIS, NPS commissioned Atkins North America, Inc.,
11 to conduct a confidential peer review of the DEIS. In March 2012, DOI released a report by
12 Atkins North America, Inc., entitled “Final Report on Peer Review of the Science Used in the
13 National Park Service’s Draft Environmental Impact Statement: Drakes Bay Oyster Company
14 Special Use Permit” (hereinafter “Atkins Peer Review Report”).

15 68. The Atkins Peer Review Report essentially endorsed some of the DEIS’s
16 conclusions, but it did so based on a misunderstanding of the basic nature of the data the DEIS
17 relied on to reach its conclusions regarding DBOC’s impact on Drakes Estero’s environment.

18 69. After the Atkins Peer Review Report was released, Dr. Corey Goodman learned
19 that the “soundscape” analysis in the DEIS not only did not rely on actual measurements of
20 DBOC noise generation but also misrepresented data and contained gross inaccuracies, which
21 were concealed using misleading short-form citations in the DEIS.

22 70. Dr. Goodman also discovered that the peer reviewer who drafted the Soundscape
23 section of the Atkins Peer Review Report had been deceived by these short-form citations into
24 believing that NPS had actually measured sound levels of DBOC’s two small oyster boats and
25 equipment, when in fact NPS used proxies instead of taking onsite noise measurements.

26 71. Dr. Goodman discovered flaws of similar magnitude in the “harbor seals,”
27 “wilderness,” “eelgrass,” “birds and bird habitat,” and “special-status species” analysis.

28

1 72. In April 2012, Dr. Goodman filed a formal misconduct complaint with DOI
2 Acting Inspector General Mary Kendall, which remains pending as of the filing of this
3 Complaint.

4 73. In May 2012, NPS finally requested that the National Academy of Sciences begin
5 the Congressionally-mandated review of the DEIS.

6 DBOC's and Dr. Corey Goodman's Data Quality Act Complaint

7 74. On August 7, 2012, pursuant to the DQA and NPS's Director's Order #11B,
8 Cause of Action, a nonprofit 501(c)(3), submitted a Complaint About Information Quality to
9 NPS on behalf of Mr. and Mrs. Lunny and Dr. Goodman detailing the reasons why many of the
10 DEIS's claims are demonstrably incorrect and proposing specific corrections.

11 75. The Complaint About Information Quality identified to NPS conclusions and
12 analysis in the DEIS that were not accurate; not timely and based on the most current
13 information available; not objective and unbiased in presentation and substance; not highly
14 transparent about data, sources, and methods; not reproducible by qualified third parties; not
15 generated using site-specific data and on-site measurements, where required by NEPA, binding
16 NPS policy, and other applicable law; not based on reliable data and sound and well-accepted
17 scientific practices for data collection and analysis; and not based on the best available science
18 and supporting studies.

19 76. The Complaint About Information Quality noted that NPS's information-quality
20 guidelines in Director's Order #11B require that all information that NPS disseminates to the
21 public in agency publications must meet all of these criteria, and that NPS's information-quality
22 guidelines incorporate by reference DOI's information-quality guidelines, NPS Director's Order
23 #12 and DO-12 Handbook, NPS's 2006 Management Policies, DOI and CEQ NEPA regulations,
24 and many other sources of minimum information-quality standards.

25 77. The Complaint About Information Quality stated that, although doing so would
26 have been inexpensive, simple, and accurate, NPS did not take on-site measurements of noise
27 generated by DBOC's equipment.

1 78. The Complaint About Information Quality stated that the DEIS inappropriately
2 relied on scientifically unsupportable proxies for DBOC’s oyster boats. The DEIS used 1995
3 sound measurements from loud, fast, high-horsepower racing and police patrol boats and 70 HP
4 jet skis operating at full throttle measured from two feet away as “representative” of noise
5 generated by DBOC’s slow-moving oyster skiffs measured from a distance of fifty feet.

6 79. As stated in the Complaint About Information Quality, the DEIS inappropriately
7 used data from a 2006 study measuring sound generated by heavy highway construction
8 equipment such as jackhammers, concrete mixers, and drill rig trucks, claiming that it was
9 “representative” of noise generated by DBOC’s onshore equipment.

10 80. As stated in the Complaint About Information Quality, actual on-site
11 measurements of sound generated by DBOC boats and equipment taken by ENVIRON
12 International in 2011 and reported to NPS reveal that the DEIS’s conclusions concerning
13 DBOC’s noise profile are substantially exaggerated; and 2009 recordings of DBOC’s oyster
14 boats captured by a government microphone can be matched with GPS data from DBOC’s oyster
15 boats and NPS’s own photographs of DBOC’s oyster boats to independently confirm the
16 accuracy of the ENVIRON data.

17 81. As stated in the Complaint About Information Quality, the DEIS also used an
18 inappropriate and nonstandard baseline for the ambient noise in Drakes Estero, thus overstating
19 the relative amount of noise added to the environment by DBOC.

20 82. As stated in the Complaint About Information Quality, the DEIS used the
21 foregoing inaccurate, misrepresented ambient sound level data and inappropriate and overstated
22 “representative” sound levels for DBOC’s boats and equipment to dramatically overstate the
23 distance at which sound from DBOC’s boats and equipment can be detected.

24 83. As stated in the Complaint About Information Quality, the DEIS’s conclusion that
25 DBOC’s mariculture operations have a “major” long-term adverse impact on Drakes Estero’s
26 “soundscape” were based on misrepresented and inaccurate data.

27 84. As stated in the Complaint About Information Quality, the conclusion that DBOC
28 causes “major” adverse impacts on Drakes Estero’s “wilderness” was driven not only by

1 inaccurate soundscape data in the DEIS but also by on the use of vague, subjective, unbounded
2 “Impact Intensity” definitions—allegedly used to scientifically measure DBOC’s impact on
3 Drakes Estero’s “wilderness”—which are identical to or indistinguishable from those that federal
4 courts have repeatedly rejected on the basis that they violate NEPA or are arbitrary and
5 capricious.

6 85. The Complaint About Information Quality informed NPS that the DEIS analysis
7 ignored highly credible, probative data that the government had in its possession or was actually
8 aware of, such as actual on-site measurements of DBOC’s noise-generating activities, over
9 300,000 high-resolution photographs of harbor seals that were secretly taken between 2007 and
10 2010 by sophisticated cameras NPS installed and GPS data that is critical to analyzing the
11 location, speed, noise generation, and frequency of DBOC boat trips.

12 86. The Complaint About Information Quality informed NPS that the peer reviewer
13 responsible for assessing the adequacy of the DEIS’s “soundscape” analysis for the Atkins Peer
14 Review Report, Dr. Christopher Clark, when informed of the origin of the data claimed to be
15 representative of DBOC noise-generating activities, responded that he was unaware that NPS
16 had not actually taken on-site measurements of DBOC’s boats, 12-volt plastic oyster tumbler,
17 and other mariculture-related equipment and essentially retracted his conclusion regarding the
18 adequacy of the DEIS’s soundscape analysis.

19 87. Because the DEIS constitutes information disseminated to the public via agency
20 publication, applicable law required NPS to make corrections to the DEIS to conform to
21 minimum information quality standards set forth in Director’s Order #11B and other binding
22 sources of minimum information-quality standards.

23 88. On October 3, 2012, NPS responded to the Complaint About Information Quality,
24 as required by Director’s Order #11B and the DQA. In its decision letter, NPS stated that it
25 considered the Complaint About Information Quality “as a matter of discretion,” and was not
26 required to treat the Complaint About Information Quality as a comment on the DEIS as
27 described in Director’s Order #11B.

1 89. On October 16, 2012, Cause of Action submitted an Administrative Appeal Letter
2 to NPS pursuant to Director's Order #11B, thereby exhausting administrative remedies.

3 The National Academy of Science's Review of the DEIS

4 90. In response to NPS's May 2012 request, the National Research Council of the
5 National Academy of Sciences organized a panel to assess the NPS science as presented in the
6 DEIS. The NAS panel released its report on August 30, 2012, entitled *Scientific Review of the*
7 *Draft Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit*
8 (hereinafter "NAS DEIS Review"), which, although limited in scope, was highly critical of the
9 DEIS.

10 91. In the NAS DEIS Review, NRC determined that many of the DEIS's Impact
11 Level conclusions are highly or moderately uncertain, exaggerated, or based on insufficient
12 information.

13 92. The NAS DEIS Review echoed concerns raised by DBOC's and ENVIRON's
14 comment letters, and the Complaint About Information Quality, expressly concluding that
15 DBOC's "adverse impact" on Drakes Estero's "soundscape," "harbor seals," and many other
16 resource categories could be minor, negligible, or beneficial, even though the DEIS claimed that
17 they were "moderate" or, in the case of "soundscape," "major" adverse impacts.

18 93. The NAS DEIS Review also echoed DBOC's comment regarding the
19 inappropriate baseline used for the "action" alternatives, stating that NPS should "segregate
20 impact assessments for alternative A from alternatives B, C, and D and indicate that the
21 assessments are not comparable due to use of different baselines" and that the FEIS should be
22 revised to "include additional mitigation options."

23 94. The NAS DEIS Review's Suggestions for DEIS Revisions, at a minimum,
24 required major revisions to the DEIS's conclusions, methodology, and data:

25 The committee provides the following high priority suggestions for revising the
26 final EIS: (1) use definitions of impact intensities that demonstrably scale with
27 their magnitude (e.g. , minor, moderate, major), and fully reflect the range of both
28 adverse and beneficial impacts including a category for negligible impacts; (2)
provide a discussion of the levels of uncertainty for the impact intensities (e.g.,
Table 8.1); (3) specify all assumptions used in assessing impact and in scaling the

1 intensity of impact; (4) describe potential alternate conclusions as appropriate
2 (e.g., Table 8.1); (5) segregate impact assessments for alternative A from
3 alternatives B, C, and D and indicate that the assessments are not comparable due
4 to use of different baselines; (6) use all relevant and available information,
5 especially for soundscapes and water quality (from research in Drakes Estero and
6 in other comparable systems) and; (7) include additional mitigation options as
7 possible permit conditions for the action alternatives to reduce impacts, e.g. , an
8 option to discontinue the culture of Manila clams would address some concerns
9 about the establishment of that nonindigenous species in Drakes Estero; impacts
10 of many DBOC practices (i.e., boat use, culture techniques, marine debris,
11 soundscape disturbance) could potentially be reduced by the implementation of
12 appropriate mitigation measures.

13 95. The NAS DEIS Review, which emphasized the high to moderate levels of
14 uncertainty regarding the DEIS's conclusions, the inadequacy of the information and data it
15 relied on, and the fundamental flaws with the DEIS's methodology, confirms that the DEIS was
16 so inadequate as to preclude meaningful analysis.

17 NPS's FEIS

18 96. Based on the NAS DEIS Review and other public comments, including those
19 submitted by DBOC, ENVIRON International, and Mr. and Mrs. Lunny, NPS knew or should
20 have known that, under 40 C.F.R. § 1502.9(a), it was required by NEPA to revise and recirculate
21 a new Draft EIS for public review. Instead, NPS elected to publish the FEIS.

22 97. NPS was required by 40 C.F.R. § 1506.9, 40 C.F.R. § 1506.10(b)(2), and NPS's
23 DO-12 Handbook, to submit the FEIS to EPA and provide at least a thirty-day notice-and-
24 comment period from the time when EPA publishes a NOA for the FEIS in the Federal Register
25 before a federal agency may issue a record of decision relying or based on a FEIS.

26 98. NPS posted the 800-page FEIS on the Internet late on Tuesday, November 20,
27 2012. The FEIS was posted the evening before Secretary Salazar's Wednesday, November 21,
28 2012, visit to DBOC to tour the farm and meet with Mr. and Mrs. Lunny, community leaders,
and employees; one day before the Thanksgiving long holiday weekend; and only four business
days before Secretary Salazar issued his memorandum of decision on November 29, 2012.

99. The FEIS stated that "[t]he NEPA process will be used to inform the decision of
whether a new [SUP] should be issued to DBOC for a period of 10 years."

1 100. The Plaintiffs had scant opportunity to review the technical and substantive data
2 and analysis presented in the FEIS before Secretary Salazar issued his memorandum of decision
3 on November 29, 2012. Furthermore, by letter on November 26, 2012, DBOC requested certain
4 new technical materials relied upon in the FEIS that were not included in the Appendix. NPS did
5 not respond to this request.

6 101. The FEIS did not acknowledge the Complaint About Information Quality and its
7 specific proposed corrections.

8 102. The FEIS dismissed ENVIRON's on-site measurements of noise generated by
9 DBOC's small oyster boats and equipment without explaining how or why NPS believed
10 ENVIRON's Report was deficient. NPS did not take any of its own onsite noise measurements
11 as mandated by NPS Policies 2006 and 40 C.F.R. § 1502.22(b).

12 103. On November 27, 2012, ENVIRON prepared a new report analyzing the FEIS's
13 Soundscapes analysis (hereinafter "ENVIRON FEIS Noise Report"). It concludes that the FEIS
14 continues to use inappropriate proxies for DBOC's onshore equipment, including a metal
15 concrete mixer for the plastic oyster tumbler. The ENVIRON FEIS Noise Report stated that the
16 NPS comparison of the oyster tumbler to a concrete mixer was "ludicrous" and a comparison
17 that "would be laughable were it not so dishonest." Furthermore, the ENVIRON FEIS Noise
18 Report found that a new NPS noise analysis presented in Appendix I of the FEIS that claimed to
19 "unambiguously" detect boat noise in Drakes Estero "reflect[s] so many false positives (i.e.,
20 incorrect identification of DBOC boats when none were present) and false negatives (i.e., failing
21 to identify DBOC boats when they were present) that all of the boat noise data presented in FEIS
22 Appendix I lack scientific validity." A copy of the ENVIRON FEIS Noise Report is lodged with
23 this Complaint as Exhibit B and incorporated by reference herein.

24 104. The September 2011 DEIS cited a 2011 published paper by NPS scientists Dr.
25 Ben Becker, Mr. David Press, and Dr. Sarah Allen for the claim that DBOC caused a spatial
26 displacement of harbor seals out of Drakes Estero. In November 2011, after the DEIS was
27 released, the Marine Mammal Commission (MMC) released a report that concluded that while
28 the data are "scant and have been stretched to the limit," that the MMC review provided "some

1 support for the conclusion that harbor seal habitat-use patterns and mariculture activities in
2 Drakes Estero are at least correlated.”

3 105. The FEIS quoted this MMC report as supporting the NPS correlation presented by
4 Becker et al., 2011. The FEIS failed to explain that the conclusion from the MMC report quoted
5 in the FEIS had come under scientific criticism, that NPS had done further analysis (at the
6 request of the MMC), and that based upon the further NPS analysis, on June 17, 2012, the MMC
7 Executive Director Dr. Tim Ragen wrote: “Given the uncertainty associated with the analyses,
8 the results are not proof of a correlation....”

9 106. Point Reyes National Seashore Superintendent Cicely Muldoon was provided a
10 copy of Dr. Ragen’s letter on June 18, 2012, yet the FEIS failed to cite this letter, and failed to
11 correctly note that the 2011 MMC Report no longer supported the NPS correlation.

12 107. The FEIS presented an entirely new analysis performed by the United States
13 Geologic Service (USGS) of over 165,000 digital photographs from 2008, by Lellis, W.A., C.J.
14 Blakeslee, L.K. Allen, B.F. Molnia, S.D. Price, S. Bristol, and B. Stewart, entitled “Assessment
15 of Photographs from Wildlife Monitoring Cameras in Drakes Estero, Point Reyes National
16 Seashore, California: U.S. Geological Survey Open-File Report” (2012) (hereinafter “USGS Seal
17 Photo Report”). A copy of the USGS Seal Photo Report is lodged with this Complaint as Exhibit
18 C and incorporated by reference herein.

19 108. The USGS Seal Photo Report, publicly released on November 26, 2012, did not
20 attribute any harbor seal disturbances to DBOC’s oyster boats, and did not find any causal
21 connection between DBOC’s use of its oyster boats and harbor seal flushing events (in which
22 seals quickly rush into the water). Instead, the report found that of the two flushing events
23 identified where a DBOC boat was visible, in one there was no visible connection between the
24 stimulus and seals flushing, since seals flushed into the water “just after boat leaves the area.”
25 Furthermore, for the second event, the report noted that while “[m]inor flushing [occurred]
26 before boat arrival, [the] cause [is] unknown.”

27 109. In contrast to conclusions in the USGS Seal Photo Report, the FEIS
28 misrepresented the analysis, falsely stating that “[t]wo flushing disturbance events were

1 attributed to [DBOC] boat traffic at nearby sandbars” by the USGS assessment. Thus, where the
2 USGS review found some association (or correlation), the FEIS claimed that the USGS review
3 found attribution (or causation).

4 110. The FEIS retained the DEIS’s conclusions regarding DBOC’s impact on Drakes
5 Estero’s environment.

6 111. The FEIS continued to use vague, unbounded Impact Intensity definitions in the
7 “wilderness” resource category to support its conclusion that DBOC causes a “major” long-term
8 adverse impact to Drakes Estero’s wilderness.

9 112. The FEIS included no changes to any of the DEIS’s conclusions regarding
10 DBOC’s impact on Drakes Estero’s environment in response to the NAS DEIS Review and did
11 not acknowledge that the NAS had concluded that many of the DEIS’s claims regarding
12 “moderate” or “major” long-term adverse impacts on Drakes Estero’s environment were highly
13 uncertain and likely exaggerated.

14 113. Even though an oyster farm has been continuously operating in Drakes Estero for
15 eight decades, the FEIS used undefined “expected future conditions” in which no oyster farm
16 was present as the baseline for its “action” alternatives, Alternative B, C, and D, in violation of
17 43 C.F.R. § 46.30. In the FEIS’s Appendix, NPS claimed that it was authorized to use this
18 baseline by 43 C.F.R. § 46.30(2), even though § 46.30(2) makes clear that a “no action”
19 alternative can only be a “no project” alternative “in cases where a *new* project is proposed for
20 implementation.”

21 114. The FEIS acknowledged that denying DBOC’s SUP would result in adverse
22 impacts on “visitor experience and recreation” for some visitors and local and regional
23 socioeconomic resources and “could result in long-term major adverse impacts on California’s
24 shellfish market.”

25 115. The FEIS did not inform decisionmakers and the public of the reasonable
26 alternatives which would avoid or minimize adverse impacts, even though NPS was informed by
27 the NRC DEIS Review and DBOC’s comment of its obligation to do so.

1 116. The FEIS failed to meaningfully discuss the NAS DEIS Review’s criticisms and
2 alternate conclusions.

3 117. The FEIS’s failed to discuss the Complaint About Information Quality and the
4 NAS DEIS Review.

5 118. The FEIS did not stress areas of controversy (including issues raised by agencies
6 and the public).

7 119. The FEIS failed to include NPS sound level measurements of DBOC’s
8 mariculture operations despite the fact that complete soundscape data is essential to a reasoned
9 choice among alternatives and the costs of obtaining it would not have been exorbitant.

10 120. The FEIS did not make clear that there was incomplete or inaccurate information
11 regarding DBOC’s impact on the environment in Drakes Estero.

12 121. The FEIS failed to provide an adequate cost-benefit analysis.

13 122. The FEIS did not identify a preferred alternative, and instead merely identified an
14 “environmentally preferred alternative.”

15
16 The Secretary’s Decision

17 123. On November 27, 2012, DBOC notified Secretary Salazar that he could not rely
18 on the FEIS because it violated NEPA, and also provided him with Dr. Goodman’s and
19 ENVIRON’s preliminary analysis of the FEIS’s soundscape analysis explaining some of the
20 ways in which the FEIS violated NEPA.

21 124. The Secretary has not issued a NEPA-required ROD memorializing his decision
22 whether to grant DBOC a SUP and the reasons for that decision; no NOA of a ROD in this
23 matter has been published in the Federal Register.

24 125. On November 29, 2012, the Secretary issued a memorandum of decision that
25 noted that the DEIS and FEIS “informed” him and were “helpful to [him] in making [his]
26 decision.” The memorandum of decision claims that the Secretary’s decision was not based on
27 data asserted to be flawed in DBOC’s November 27, 2012, letter.

1 126. The memorandum of decision directed NPS to allow DBOC’s existing RUO and
2 SUP to expire; to publish a notice in the Federal Register to convert Drakes Estero from
3 “potential wilderness” to “wilderness”; and to allow DBOC ninety days to terminate its
4 operations.

5 127. The November 29, 2012, memorandum expressly interpreted Section 124 to
6 exempt the Secretary’s decision from all NEPA and other legal requirements: “Sec. 124 does not
7 require me (or the NPS) to prepare a DEIS or an [sic] FEIS or otherwise to comply with the
8 National Environmental Policy Act of 1969 (NEPA) or any other law. ... Sec. 124 expressly
9 exempts my decision from any substantive or procedural legal requirements.”

10 128. In contrast to the Secretary’s memorandum, the DEIS published in September
11 2011 stated that “[a]lthough the Secretary’s authority under Section 124 is ‘notwithstanding any
12 other provision of law,’ the Department has determined that it is appropriate to prepare an EIS
13 and otherwise follow the procedures of NEPA.” When the FEIS was published on November 20,
14 2012, however, the sentence quoted above was amended as follows (underlining indicating
15 addition / strikeout indicating deletion): “[a]lthough the Secretary’s authority under Section 124
16 is ‘notwithstanding any other provision of law,’ the Department has determined that it is
17 ~~appropriate~~ helpful to ~~prepare an EIS and otherwise~~ generally follow the procedures of NEPA.”

18 129. The November 29, 2012, memorandum does not discuss the 2009 NAS Report’s
19 assessment of the relationship between DBOC’s mariculture operations and Drakes Estero’s
20 environment, as contemplated by Section 124.

21 130. The Secretary did not issue a NEPA-compliant ROD, as required by 40 C.FR.
22 § 1505.2, and did not discuss his analysis of the environmental impact of adopting the various
23 alternatives and other required matters. The Secretary did not assert that his decision was based
24 on a NEPA-compliant FEIS or DEIS.

25 131. Instead, the Secretary stated that his decision was “based on the incompatibility of
26 commercial activities in wilderness” and suggested that the legislative purpose of the Wilderness
27 Act of 1964 and Point Reyes Wilderness Act of 1976 trumped the congressional intent and
28 language in Section 124.

1 132. The Secretary’s memorandum stated that Section 124, which was enacted in
2 2009, “in no way overrides the intent of Congress as expressed in the 1976 [Point Reyes
3 Wilderness Act] to establish wilderness at the estero. With that in mind, my decision effectuates
4 that [1976] Congressional intent.”

5 133. The Secretary’s memorandum, interpreting and relying on the 1976 Point Reyes
6 Wilderness Act, reasoned that denying DBOC a SUP “honors Congress’s direction to ‘steadily
7 continue to remove all obstacles to the eventual conversion of the[] lands and waters [in the Point
8 Reyes National Sea Shore] to wilderness status.”

9 134. The Secretary’s selective application of NPS policies and the 1964 Wilderness
10 Act and 1976 Point Reyes Wilderness Act as binding precedent to his decision, while excusing
11 compliance with NEPA, demonstrates the arbitrary and capricious nature of the Secretary’s
12 decision and violated the plain language of NEPA and Section 124.

13 The Secretary’s Decision Attempts to Seize the State’s Retained Water Bottoms

14 135. DBOC holds two water bottom leases from the State of California, issued by the
15 CFGC in 2004 and managed by the CDFG.

16 136. DBOC’s State water bottom leases—M-438-01 and M-438-02—are valid through
17 2029.

18 137. As explained above, California conveyed fee title to the water bottoms in Drakes
19 Estero in 1965, but retained the rights to lease the water bottoms in Drakes Estero for
20 aquaculture.

21 138. California has continuously exercised its right to lease the water bottoms in
22 Drakes Estero for aquaculture operations since 1965, including reissuing leases in 1979 and
23 2004. The CFGC has the authority to regulate aspects of these operations, including stocking,
24 disease control, and transportation of aquatic organisms. The CFGC collects from DBOC both an
25 annual lease fee, based on the number of acres in the lease, and a privilege use tax, based on the
26 number of gallons of shucked oyster meats produced each month. The State has continually
27 leased the water bottom in Drakes Estero to DBOC for as long as DBOC has been cultivating
28 oysters in the bay.

1 148. The FEIS violates NEPA because it does not contain a “full and fair” discussion
2 of environmental impacts as required by 40 C.F.R. § 1502.1.

3 149. In violation of 40 C.F.R. § 1502.1, the FEIS did not “inform decisionmakers and
4 the public of the reasonable alternatives which would avoid or minimize adverse impacts.”

5 150. The FEIS does not contain a summary that stresses “areas of controversy
6 (including issues raised by agencies and the public),” as required by 40 C.F.R. § 1502.12.

7 151. In violation of 40 C.F.R. § 1502.2, the FEIS failed to use data that was essential to
8 a reasoned choice among alternatives.

9 152. In violation of 40 C.F.R. § 1502.9(b), the FEIS failed to “respond to comments”
10 and “discuss at appropriate points in the final statement any responsible opposing view which
11 was not adequately discussed in the draft statement and shall indicate the agency's response to
12 the issues raised.”

13 153. In violation of 40 C.F.R. § 1506.10(b)(2) and 40 C.F.R. § 1506.9, NPS did not
14 submit the FEIS to EPA, EPA did not publish a NOA for the FEIS in the Federal Register and no
15 public comment and notice period was initiated, much less completed, at least thirty days prior to
16 the Secretary’s November 29, 2012, decision, depriving the public of a meaningful opportunity
17 to comment on the FEIS.

18 154. The FEIS did not adequately analyze and discuss potential mitigation measures, in
19 violation of 43 C.F.R. § 46.130; 40 C.F.R. § 1502.16(h).

20 155. The FEIS did not include adequate cost-benefit analysis as required by 40 C.F.R.
21 § 1502.2 and did not make clear that it was based on incomplete, inaccurate, or unavailable
22 information, in violation of 40 C.F.R. § 1502.22; 43 C.F.R. § 46.125.

23 156. NPS failed to ensure the scientific integrity of discussions and analysis in the
24 FEIS, in violation of 40 C.F.R. § 1502.24.

25 157. Secretary Salazar did not issue a ROD that complies with 40 C.F.R. § 1505.2, in
26 violation of NEPA.

1 158. Secretary Salazar’s decision to interpret Section 124 as relieving him of his NEPA
2 and other substantive and procedural legal obligations violated NEPA’s plain language and was
3 arbitrary and capricious and otherwise unlawful under 5 U.S.C. § 706(2).

4 159. Defendants’ noncompliance with NEPA is reviewable under the APA. 5 U.S.C.
5 §§ 704, 706(2).

6 160. Defendants’ failure to comply with NEPA requirements established by the NEPA
7 statute and Council of Environmental Quality (CEQ), DOI, and NPS regulations implementing
8 NEPA, as well as other sources of binding NEPA standards, including but not limited to
9 Director’s Order #12, NPS’s DO-12 Handbook, and NPS’s 2006 Management Policies was
10 arbitrary and capricious; in excess of statutory authority, jurisdiction, or limitations and short of
11 statutory right; an abuse of discretion; and otherwise not in accordance with law. 5 U.S.C.
12 § 706(2).

13 161. The Secretary’s unreasoned, arbitrary decision to suddenly reverse course—after
14 maintaining for the 789-day period between the scoping in September 2010 and November 29,
15 2012, that the NEPA process would inform his decision whether to issue DBOC a SUP—and
16 claim for the first time in the November 29, 2012, decision memorandum that his decision
17 whether to issue a SUP was not subject to NEPA or any other substantive or procedural
18 requirements was arbitrary and capricious and an abuse of discretion.

19 162. The DEIS and FEIS were issued by Defendants and used and relied upon by
20 Defendant Salazar and other decisionmakers in violation of NEPA.

21 163. The Secretary’s November 29, 2012, decision to deny DBOC a 10-year SUP was
22 made in violation of NEPA.

23 **COUNT 2: VIOLATION OF DQA AND THE APA**

24 164. Plaintiff repeats and incorporates by reference the allegations contained in
25 paragraphs 1-163.

26 165. The DEIS, FEIS, and Atkins Peer Review Report are “information” that was
27 “disseminated” by NPS, within the meaning of the DQA, Director’s Order #11B, DOI’s
28 Information Quality Guidelines, the Office of Management and Budget’s (OMB) Information

1 Quality Guidelines, and subject to binding minimum information-quality standards established
2 therein.

3 166. Defendants' failure to correct the FEIS to reflect the proposed corrections
4 outlined in the Complaint About Information Quality violated the DQA, Director's Order #11B,
5 and other binding minimum standards for information-quality, including but not limited to DOI's
6 Information Quality Guidelines; Director's Order #47; Director's Order #12; NPS's DO-12
7 Handbook; NPS's 2006 Management Policies; and all other applicable laws, regulations, and
8 binding policies and procedures.

9 167. NPS failure to treat the Complaint About Information Quality as a comment on
10 the DEIS to which it was obligated to respond violated Director's Order #11B.

11 168. NPS failed to ensure that information it disseminated to the public met the
12 accuracy, transparency, objectivity, reliability, timeliness, and other minimum information-
13 quality standards established by the DQA, Director's Order #11B, OMB Information Quality
14 Guidelines, and other sources of binding minimum information-quality standards.

15 169. NPS's failure to comply with the DQA, Director's Order #11B, and related
16 binding information-quality-related standards was arbitrary and capricious; in excess of statutory
17 authority, jurisdiction, or limitations and short of statutory right; an abuse of discretion; and
18 otherwise not in accordance with law. 5 U.S.C. § 706(2).

19 **COUNT 3: VIOLATION OF THE APA**

20 170. Plaintiff repeats and incorporates by reference the allegations contained in
21 paragraphs 1-169.

22 171. The Secretary's decision denying DBOC a SUP was in excess of his statutory
23 jurisdiction in violation of 5 U.S.C. § 706(2)(C), because he had no authority to order NPS to
24 publish a notice in the Federal Register converting Drakes Estero from "potential wilderness" to
25 "wilderness."

26 172. The Secretary's failure to consider NAS reports regarding DBOC and mariculture
27 in Drakes Estero as contemplated by Section 124 was arbitrary and capricious, in excess of
28 statutory authority, and otherwise unlawful under 5 U.S.C. § 706(2).

1 173. The Secretary’s selective application of some federal laws, such as the 1965
2 Wilderness Act and the 1976 Point Reyes Wilderness Act, while waiving others, such as NEPA,
3 was arbitrary, capricious, and otherwise not in accordance with law.

4 174. The Secretary’s decision was arbitrary and capricious and contrary to Section
5 124’s plain language because it was made in reliance on the 1964 Wilderness Act, the 1976 Point
6 Reyes Wilderness Act, and/or NPS Wilderness Policies, all of which Congress intended to and
7 did supersede by including the “notwithstanding any other provision of law” clause in Section
8 124.

9 175. The Secretary’s decision to deny DBOC a SUP was arbitrary and capricious; in
10 excess of statutory authority, jurisdiction, or limitations and short of statutory right; an abuse of
11 discretion; without observance of procedure required by law, and otherwise not in accordance
12 with law. 5 U.S.C. § 706(2).

13 **COUNT 4: VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH**
14 **AMENDMENT**

15 176. Plaintiff repeats and incorporates by reference the allegations contained in
16 paragraphs 1-175.

17 177. The Secretary’s decision to deny DBOC a SUP expressly authorized by Section
18 124 deprived DBOC of a property interest protected by the Due Process Clause of the Fifth
19 Amendment to the U.S. Constitution.

20 178. DBOC was not afforded a constitutionally adequate hearing to present its case for
21 extension of the SUP.

22 179. Defendants failed to comply with the procedural requirements of NEPA, the
23 APA, the DQA, and other applicable federal law that would have given DBOC a meaningful
24 opportunity to respond to the FEIS, explain why the FEIS was flawed, and present evidence
25 negating the FEIS’s claims.

26 180. Because the Secretary’s decision was made in reliance upon these procedurally
27 deficient and unlawful processes, DBOC was directly and proximately deprived of its property
28

1 absent procedural due process of law, in violation of the Fifth Amendment to the U.S.
2 Constitution.

3 181. Because the Secretary's decision was made in reliance upon an arbitrary and
4 capricious interpretation of the 1976 Point Reyes Wilderness Act, the 1972 Grant Deed and RUO
5 held by DBOC, and/or the flawed and inadequate data in the DEIS and FEIS, DBOC was
6 directly and proximately deprived of its property absent substantive due process of law, in
7 violation of the Fifth Amendment to the U.S. Constitution.

8 **COUNT 5: VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH**
9 **AMENDMENT**

10 182. Plaintiff repeats and incorporates by reference the allegations contained in
11 paragraphs 1-181.

12 183. The Secretary's November 29, 2012, memorandum directing NPS to order DBOC
13 to cease all "commercial shellfish activities ... in the waters of Drakes Estero after November 30,
14 2012" deprived DBOC of all economically beneficial use of its personal property (immature
15 oysters in Drakes Bay) without just compensation.

16 184. The Secretary's November 29, 2012, memorandum directing NPS to order DBOC
17 to cease all "commercial shellfish activities ... in the waters of Drakes Estero after November 30,
18 2012" deprived DBOC of economically beneficial use of the valid State water-bottom leases
19 without just compensation.

20 185. The Secretary's November 29, 2021, memorandum caused a regulatory and
21 physical taking of DBOC's property without just compensation in violation of the Takings
22 Clause of the Fifth Amendment to the U.S. Constitution.

23 **COUNT 6: UNLAWFUL INTERFERENCE WITH AGENCY FUNCTIONS**

24 186. Plaintiff repeats and incorporates by reference the allegations contained in
25 paragraphs 1-185.

26 187. NPS employees are prohibited from "[t]hreatening, resisting, intimidating, or
27 intentionally interfering with a government employee or agent engaged in an official duty, or on
28 account of the performance of an official duty." 36 C.F.R. § 2.32(a)(1).

1 D. Declaration that the State of California retained the right to lease the State
2 water bottoms in Drakes Estero when it conveyed them to the U.S. in
3 1965, and that DBOC's State water bottom leases are valid.

4 2. Set aside and hold unlawful Secretary Salazar's November 29, 2012, decision.

5 3. Order Secretary Salazar or his successor to direct NPS to issue DBOC a 10-year
6 SUP.

7 4. Alternatively, remand this matter to the NPS and issue an order to NPS to prepare
8 a new draft environmental impact statement subject to the NEPA-required public comment
9 period and a new final environmental impact statement that complies with all NEPA and other
10 applicable substantive and procedural requirements to enable a new, neutral decisionmaker to
11 issue a NEPA-compliant ROD, allowing DBOC to continue to operate consistent with the terms
12 of the RUO and SUP that expired on November 30, 2012.

13 5. Permanently enjoin Defendants and all persons and entities in active concert or
14 participation with Defendants from relying on the DEIS or FEIS in any decisionmaking process.

15 6. Permanently enjoin Defendants and all persons and entities in active concert or
16 participation with Defendants from relying on a DEIS or FEIS unless it is issued in accordance
17 with all procedural and substantive due process requirements of NEPA and the APA.

18 7. Permanently enjoin NPS from evicting DBOC or its employees until NPS
19 considers the DBOC application for a SUP in accordance with due process.

20 8. Permanently enjoin all NPS employees and contractors involved in the previous
21 NEPA process from participating in the NEPA process, including VHB.

22 9. Permanently enjoin NPS from publishing a notice in the Federal Register
23 converting Drakes Estero from "potential wilderness" to "wilderness."

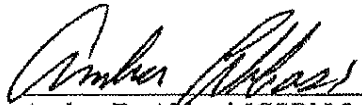
24 10. Issue a TRO and a preliminary injunction preventing NPS from enforcing or
25 implementing the Secretary's decision until this Court decides the merits of this lawsuit.

26 11. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action;
27 and

28 12. Grant all other such relief as the Court may deem just and proper.

DATED: December 3, 2012

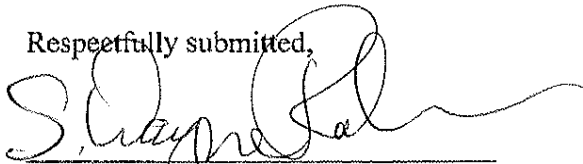
Respectfully submitted,



Amber D. Abbasi [CSBN 240956]
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.400.4232
Fax: 202.300.5842

DATED: December 3, 2012

Respectfully submitted,



S. Wayne Rosenbaum [CSBN 182456]
Stoel Rives LLP
12255 El Camino Real, Suite 100
San Diego, CA 92130
Phone: (858) 794-4114
Fax: (858) 794-4101

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