

# EXHIBIT 5

PLAINTIFF-APPELLANTS' REPLY  
TO DEPARTMENT OF THE INTERIOR'S OPPOSITION TO EMERGENCY  
MOTION FOR INJUNCTION PENDING APPEAL

DISTRICT COURT DOCKET # 81-3

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17 **DRAKES BAY OYSTER COMPANY and KEVIN LUNNY**

18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 **DRAKES BAY OYSTER COMPANY,**  
21 17171 Sir Francis Drake Blvd  
22 Inverness, CA 94937, and

23 **KEVIN LUNNY,**  
24 17171 Sir Francis Drake Blvd  
25 Inverness, CA 94937

26 Plaintiffs,

27 v.

28 **KENNETH L. SALAZAR,**  
in his official capacity as Secretary, U.S.  
Department of the Interior,  
1849 C Street, NW, Washington, D.C., 20240;  
**U.S. DEPARTMENT OF THE INTERIOR**  
1849 C Street, NW, Washington, D.C., 20240;  
**U.S. NATIONAL PARK SERVICE**  
1849 C Street, NW, Washington, D.C. 20240;  
and **JONATHAN JARVIS,**  
in his official capacity as Director, U.S.  
National Park Service,  
1849 C Street, NW, Washington, D.C. 20240.

Defendants.

Case No. 12-cv-06134-YGR

**DECLARATION OF RICHARD STEFFEL IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Date: January 25, 2013

Time: 2:00 p.m.

Court: Oakland Courthouse 5 – 2nd Floor

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1 I, Richard Steffel, declare as follows:

2 1. I am a Principal at ENVIRON International Corporation, specializing in  
3 environmental impact assessments related to air quality and environmental noise. The following  
4 facts are based on my own personal knowledge and, if called as a witness, I could and would testify  
5 competently thereto.

6 2. I have a BA in Anthropology from Georgia State University (1975) and an MS in  
7 Environmental Studies from the University of Montana (1981). I have more than 30 years of  
8 experience conducting air quality and/or environmental noise impact and mitigation assessments.  
9 (my CV is attached as Exhibit 1 to this document; a list of references cited in this Declaration is  
10 attached as Exhibit 2).

11 3. I have reviewed the declarations of Dr. Kurt Fristrup and Mr. Brannon Ketcham  
12 submitted by the Defendants, which purport to respond to issues regarding air-borne noise levels  
13 associated with removal of the oyster racks. I offer the following responses to their statements and  
14 representations of the issues.

15 4. Dr. Fristrup acknowledges that “the accelerated removal scenario involving heavy  
16 equipment . . . will generate higher noise levels [than the Lunny-proposed removal process].”  
17 Declaration of Dr. Kurt M. Fristrup (Fristrup Dec.) D. 64-3 ¶ 4. But he does not address or respond  
18 to the issue of the greater extent of the noise impact “footprint” that these higher levels of noise  
19 would cause, nor does he even comment on the noise impacts or to the fact that “any kayakers,  
20 hikers, or birds and mammals within about 10,000 feet of the rack removal operation would be  
21 subjected to airborne noise levels higher than the 40-42 dBA (Leq) average existing daytime  
22 background sound levels.” Declaration of Richard Steffel (Steffel Dec.) D. 37 ¶ 10. Dr. Fristrup  
23 does, however, acknowledge that these levels “will plausibly, but temporarily, change the  
24 distribution and behavior of animals in Drakes Estero.” Fristrup Dec. D. 64-3 ¶ 4. Thus, Dr.  
25 Fristrup agrees noise generated by the equipment required to remove the DBOC oyster racks will  
26 be substantial, and that this noise will cause major impacts on the harbor seals in terms of  
27 disturbance and displacement.

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1           5.       Dr. Fristrup asserts that ENVIRON “did not adequately describe the measurement  
2 conditions or the operating status of the DBOC equipment to comply with common engineering  
3 practice and the requirements of relevant national and international standards” when it provided  
4 comments on the Draft Environmental Impact Statement (DEIS) in 2011. Fristrup Dec. D. 64-3 ¶

5 5. Dr. Fristrup fails to acknowledge the following: (1) the ENVIRON sound level measurements  
6 were not intended to comprise absolutely definitive representations of DBOC sound sources, but  
7 were instead used in ENVIRON comments to prove that DEIS noise levels for DBOC equipment  
8 were grossly overstated; (2) NPS rules and policies make it the NPS’s responsibility to take  
9 representative measurements for consideration in the noise impact assessment; (3) that after  
10 providing direct measurement data disproving overstated source sound level used in the DEIS,  
11 ENVIRON comments on the DEIS suggested that NPS use the period between the DEIS and the  
12 FEIS to take their own measurements of said equipment, and (4) that the outside peer reviewer for  
13 the DEIS concluded that the ENVIRON measurements represented new, actual, informative sound  
14 level data regarding the equipment used by DBOC. Rebuttal Declaration of Kevin Lunny Ex. 8.

15           6.       Dr. Fristrup also fails to explain why, when he must have known the DBOC  
16 equipment noise data were critical to the assessment of potential impacts from DBOC operations,  
17 NPS never took the simple step of taking direct measurements instead of relying on truly  
18 unrepresentative industrial noise sources to represent these few, discrete, and easily measureable  
19 DBOC sources. In fact, there has never been any explanation of this failure of the NPS to carry out  
20 its clear responsibility to use the best data available, and Dr. Fristrup carries on with this approach  
21 in his declaration.

22           7.       Dr. Fristrup indicates ENVIRON direct measurement data of DBOC noise sources  
23 “were substantially lower than levels reported by other authoritative reports.” Fristrup Dec. D. 64-  
24 3 ¶ 5. I am unaware of any “authoritative reports” regarding the noise generation profile of DBOC  
25 equipment beyond the ENVIRON report, which I previously described above. Dr. Fristrup’s  
26 statement ignores the fact that the reports he cites were considering unrepresentative, much larger,  
27 much louder industrially-sized equipment (e.g., a metal cement mixer filled with rock and gravel  
28 to represent a plastic cylinder being turned by a low-power electric motor, and a 70-hp jet ski to

1 represent a 20-hp skiff). Although NPS had plenty of time and clearly more than adequate  
 2 resources to take their own definitive sound level measurements of the equipment in question, they  
 3 did not. Instead they chose to criticize the only direct measurements of the subject equipment  
 4 without asking for additional clarifying information or ever explaining what they perceive the  
 5 problem to be with these measurements. This is, I believe, a smokescreen to conjure up uncertainty  
 6 where none exists, and in the absence of any alternative explanation, I am forced to conclude that  
 7 NPS and Dr. Frstrup’s decision not to take direct source noise measurements may have been  
 8 based on the knowledge that using actual representations of DBOC noise sources would *not* have  
 9 supported their preconceived (but still unproven) determination that these sources are causing a  
 10 major noise impact on the soundscape of Drakes Estero.

11 8. Dr. Frstrup writes, “NPS was able to extract estimates of the noise generated by  
 12 DBOC motorboats” and that “[these] estimates were inconsistent with the ENVIRON  
 13 measurements, and consistent with the measurements reported elsewhere.” Frstrup Dec. D. 64-3 ¶  
 14 5. These statements have been completely discredited by an ENVIRON report submitted to  
 15 Secretary Salazar on November 27, 2012, which proved NPS was absolutely *not* able to develop  
 16 credible estimates of boat noise levels or that their estimates were in any way representative of  
 17 actual DBOC boat noise levels. Waterman Dec. D. 43 Ex. 3, ENVIRON Report at 7, Attachment 1  
 18 thereto at 15-19. Contrary to the claim repeated here by Dr. Frstrup that NPS was able to  
 19 “unambiguously” detect and characterize the noise generated by DBOC motorboats from  
 20 recordings from a remote microphone along the banks of Drakes Estero taken in summer 2009 and  
 21 winter 2010, Dr. Goodman’s analysis of the collected data showed that the NPS analysis contained  
 22 “so many false positives . . . and false negatives . . . that all of the boat noise data presented in  
 23 FEIS Appendix I lack scientific validity.” *Id.*, ENVIRON Report at 7. No one at NPS, including  
 24 Dr. Frstrup, has responded to this detailed critique of the soundscape section of the FEIS, and  
 25 without some explanation of how these fatally flawed data are actually of any use, repeating the  
 26 false claim to suggest that NPS has used this information to prove its case is, at best, disingenuous.

27 9. Dr. Frstrup states that in spite of the NPS uncertainty regarding the validity of the  
 28 ENVIRON sound level measurements of DBOC equipment they nonetheless “retained the

1 ENVIRON values for the FEIS analysis to reveal the range of spatial impacts that would occur  
2 under different assumptions for equipment noise levels.” Fristrup Dec. D. 64-3 ¶ 5. This suggested  
3 largesse by NPS obscures the false dichotomy represented by this approach that insinuated both  
4 greater uncertainty and an unrealistically large range of possible equipment noise levels than  
5 actually exist. This artificial complexity could have been completely avoided by direct  
6 measurements of DBOC equipment noise, but NPS never took this simple step. I have come to  
7 believe this approach was intentionally selected to serve the NPS agenda of suggesting a much  
8 larger potential for noise impacts than actually exists.

9         10. Dr. Fristrup notes that ENVIRON has commented several times regarding NPS  
10 use of selected noise metrics to provide an indicator of noise impacts and the application of  
11 incomplete and misrepresentative data to characterize existing conditions in the study area.  
12 Fristrup Dec. D. 64-3 ¶ 6. In the original analysis reported in the DEIS the NPS applied a  
13 heretofore unknown noise metric they called “lowest daily ambient level” along with the median  
14 (L50) metric from a single measurement location to represent existing ambient noise levels  
15 throughout the study area. The L90 was not mentioned, defined, or applied in the DEIS.

16         11. In the FEIS, NPS switched to using the L90 metric (and the L50) as indicators of  
17 existing conditions, and used the L90 as the reference point for assessing impacts. Dr. Fristrup  
18 claims use of the L90 “conforms to a practice suggested by American Standards Institute S 12.9  
19 Part 1.” Fristrup Dec. D. 64-3 ¶ 6.

20         12. While the L90 is tangentially defined by the cited ANSI standard (i.e., as a “time-  
21 above” metric and as a potential metric for describing “residual sound”), this ANSI standard does  
22 not suggest applying the L90 to assess *impacts* of transient sources such as those represented by  
23 DBOC equipment and, especially, the DBOC boats. And even if this standard could be construed  
24 to suggest such comparisons, the overly simplistic noise calculations performed by NPS to  
25 estimate sound levels at distance from DBOC sources would not be sufficient to make credible  
26 determinations regarding the actual potential for impacts. (See further discussion of modeling  
27 under paragraph 17, below.)  
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1           13.       ENVIRON comments on the DEIS and FEIS suggested using the equivalent sound  
2 level ( $L_{eq}$ ) as the best metric for comparing levels and for discerning the potential for adverse  
3 effects on people. This approach was confirmed by the National Research Council of the National  
4 Academy of Sciences (NAS) in the their review of the NPS DEIS in which they stated, “[an]  $L_{eq}$   
5 measurement gives a more representative value because it accounts for duration, although it tends  
6 to overestimate noise in quiet environments because it is sensitive to high amplitude transients.  
7 Alternatively, characterizing the variability of sound could also be accomplished using several  
8 percentiles (e.g.,  $L_{90}$ ,  $L_{50}$ ,  $L_5$ ). Volpe (2011) reports both  $L_{50}$  and  $L_{eq}$  values, which differ by up to  
9 6 dBA, a difference large enough to affect the estimated levels of impact of the alternatives which  
10 compare ambient sound levels for equipment similar to those used by DBOC. Assessment of the  
11 natural variability of the Drakes Estero soundscapes is essential for providing the proper context in  
12 which to analyze the influence of DBOC activities on the soundscapes.” Lunny Dec. D. 40 Ex. 11  
13 at 37.

14           14.       In support of using the  $L_{90}$  metric, Dr. Frstrup claims that, “NPS policy focuses  
15 on the sustained capacity of the environment to mask sounds.” Frstrup Dec. D. 64-3 ¶ 6. Be that  
16 as it may, this approach was not part of the impact criteria defined in the Draft and Final EIS, and  
17 such comparisons did not comprise the “major” noise impact determination reported in the FEIS.  
18 These “impact” criteria were based on the levels and durations of DBOC noise compared with an  
19 estimated existing background level *and* an amount of time DBOC sources exceeded the  
20 background in the DEIS. Findings of “major” impacts based on these criteria were questioned in  
21 the NAS review of the DEIS, *and/or* for “minor” and “moderate” impacts in the FEIS, which  
22 found a high degree of uncertainty associated with stated soundscape impact findings of the DEIS  
23 and stated that alternatively, the noise impacts of the continued DBOC operations could be  
24 “moderate to minor.” Lunny Dec. D. 40 Ex. 11 at 50. This review may have contributed to the  
25 NPS decision to change noise impact metrics – so as to make their goal of finding major impacts  
26 achievable.

27           15.       Dr. Frstrup claims that, “Although the noise analysis in the FEIS contains  
28 considerable detail, its findings are fairly simple to express. DBOC airborne noise sources range

1 from 60-80 dBA, loud enough to interfere with conversation more than 50 feet from the noise  
2 source.” Fristrup Dec. D. 64-3 ¶ 6. Neither of these statements is accurate, and both are  
3 misleading. The statement regarding DBOC noise levels is an unsubstantiated assertion not  
4 supported by any direct measurement data collected by NPS. Direct measurements by ENVIRON  
5 of the specific DBOC equipment in question suggest this characterization is a gross overstatement  
6 of actual equipment noise levels. No *measured* DBOC equipment noise levels even approached the  
7 80-dBA upper end of this supposed range (i.e., the very loudest source reached 70 dBA Leq), and  
8 several were less than the low-end of this stated range. In addition, the loudest DBOC sources are  
9 more than 50 feet from the water (where curious kayakers might possibly be exposed) and/or,  
10 DBOC *could* easily employ mitigation measures that would substantially reduce noise  
11 transmission from their equipment. But such mitigation measures were never even mentioned,  
12 much less considered by the FEIS. Waterman Dec. D. 43 Ex. 3, ENVIRON Report at 7.  
13 Consequently, DBOC equipment noise level already are, or could be reduced to levels where they  
14 would not interfere with the conversation of park visitors, or there would be no people near  
15 enough this equipment for conversation to be disrupted. Consequently, noise from this equipment  
16 would *not* represent an impact as defined in the FEIS. I therefore believe Dr. Fristrup’s statements  
17 here are nothing more than another smokescreen to obscure both the immediate issue at hand and  
18 the even larger question of the accuracy and utility of the entire noise impact assessment prepared  
19 by NPS.

20 16. Dr. Fristrup writes, “Background sound levels in Drakes Estero are about 26 dBA,  
21 nearly an order of magnitude lower than the quiet background recommended for primary school  
22 classrooms or bedrooms (35 dBA).” Fristrup Dec. D. 64-3 ¶ 7. This comparison is spurious. The  
23 measured L90 sound level (which was exceeded by other sound levels 90% of the time) *during one*  
24 *month at one location* was 26 dBA, but this level is neither representative of true existing levels,  
25 nor is there any evidence that it is representative of levels at other locations throughout Drakes  
26 Estero. This point was raised in ENVIRON comments on the DEIS, and clearly substantiated in  
27 the NAS review of the DEIS which said, “An essential feature of a soundscape is the variation  
28 over space and time. However, the environmental sound levels presented within the DEIS were

1 based on measurements taken from a single location (on a bluff above Drakes Estero) over 30 days  
2 in late summer. This does not accurately represent the temporal or spatial variability of the project  
3 area. Using data from a single month misses variability due to seasonal weather and wind patterns.  
4 At the same time, limiting measurements to a single location cannot capture gradients in sound  
5 levels with distance from the source. Propagation characteristics are complex in coastal regions  
6 and extrapolating a single set of measurements to an area as large as Drakes Estero does not  
7 capture this complexity or variability.” Lunny Dec. D. 40 Ex. 11 at 37. In addition, Dr. Fristrup’s  
8 comparison to a recommended classroom or bedroom background level of 35 dBA is, at best,  
9 misleading, because the recommended levels for such receiving locations are typically based on  
10 the  $L_{eq}$  metric and *not* the  $L_{90}$  NPS is attempting to use to represent existing background  
11 conditions in the Drakes Estero. So again, Dr. Fristrup is only serving to confuse and not clarify  
12 the issues at hand.

13         17. Dr. Fristrup writes, “Industrial noise sources – like DBOC equipment – have huge  
14 spatial footprints in quiet natural environments.” Fristrup Dec. D. 64-3 ¶ 7. This is an  
15 unsubstantiated, grossly exaggerated, misleading statement. The NPS has no evidence supporting  
16 the contention that DBOC noise sources are similar to what would typically be regarded as  
17 “industrial” sources, and simply saying it does not make it so. NPS has taken no direct  
18 measurements of this equipment and has instead relied on unrepresentative estimates of much  
19 larger and louder noise sources to overstate noise from these sources. The only direct  
20 measurements of these noise sources by ENVIRON indicate they are relatively minor sources that  
21 do not rise to the level of what would typically be considered an “industrial” source. But using  
22 inflated source values, NPS performed very simplistic calculations that they then construe to  
23 grossly overstate both the levels and durations of noise events. ENVIRON strongly suggested  
24 replacing this simplistic approach by performing actual noise modeling using correct  
25 representations of the noise sources in its comments on the DEIS. Waterman Dec. D. 43 Ex. 3 at 3.  
26 NAS suggested a similar approach based on their review of the DEIS, saying, “There are many  
27 propagation models available to model sound from a source to a receiver. The DEIS provides  
28 sound levels from motorboats and associated consequences. The committee assumes simple

1 spherical spreading was used for these calculations, as this method was used elsewhere in the  
2 DEIS. Simple spherical spreading is often not the most accurate model to use. In addition,  
3 consequences for communication disruption within 50 feet of a source would only realistically  
4 impact DBOC staff near the source. Kayakers or park visitors would be unlikely to spend time in  
5 such close proximity to DBOC activities and sources. It would be more accurate to show  
6 propagation model results from sources in different places around the area of DBOC operations to  
7 more accurately illustrate propagation between sources and potential receivers.” Lunny Dec. D. 40  
8 Ex. 11 at 38. But NPS ignored these suggestions and maintained their simplistic and grossly  
9 exaggerated estimates of DBOC noise. I disagree with this approach and with the conclusions they  
10 reached using it.

11           18.       Mr. Ketcham does not respond to the issue of potential noise impacts from the  
12 oyster rack removal process in the discussion of soundscape in his declaration. Ketcham Dec. D.  
13 64-2 ¶ 38. Instead, he attempts to refute the discussion in my and Dr. Corey Goodman’s comments  
14 on the FEIS regarding the NPS’s misuse of their own noise impact criteria, which are based on  
15 defined amounts of time that sources of interest exceed background levels. Mr. Ketcham asserts  
16 that we misunderstood the impact criteria in saying that noise impacts must be assessed based on  
17 noise received at a single location instead of being considered based on noise emitted into the  
18 project study area as a whole. I disagree with his assertion because it makes no sense for NPS to  
19 argue that noise causes impacts due to potential interference with normal conversation, while at  
20 the same time saying the impact determination can be based on noise emitted anywhere within the  
21 Drakes Estero. For noise to have the potential to cause an impact at all, it must first be perceived  
22 by a receiver. If either the noise emitting source or the noise receiver is moving during the noise  
23 event, or if the source and receiver are separated by great distance, the amount of noise received  
24 and the potential impact of that noise will be very different than if the source and receiver are close  
25 enough for the noise to interfere with conversation during the entirety of the noise event.

26           19.       The noise impact criteria to be applied in this assessment were redefined in the  
27 FEIS as follows:  
28

1 Intensity definitions for noise levels are rendered in terms of speech interference in order to  
2 interpret decibel values in relation to familiar, everyday experiences for park visitors and  
3 public stakeholders. . . . Intensity definitions based on function consequences to human  
4 communication also serve as reasonable proxies for the magnitude of human-caused noise  
5 inference with animal behavior.

6 For short-term impacts, percentages are based on the percentage of time during a year  
7 (taking into consideration 24 hours a day) that human-made noise impacts the ambient  
8 soundscape. For long-term impacts, percentages are based on the percentage of time during  
9 the 10-year SUP term (taking into consideration 24 hours a day) that human-made noise  
10 impacts the ambient soundscape . . . .

11 [Soundscape impacts are defined as follows]

12 **Negligible:** The impact is not detectable or measurable.

13 **Minor:** Human-caused noise would be at a level (less than 35 dBA) that enables normal  
14 voice conversation at distances exceeding 32 feet, *and/or* the natural soundscape is  
15 interfered with less than 5 percent of the time.

16 **Moderate:** Human-caused noise would be at a level that enables normal voice  
17 conversation at distances greater than 16 feet (less than 41 dBA) and less than 32 feet  
18 (greater than 35 dBA), *and/or* the natural soundscape is interfered with 5 to 10 percent of  
19 the time.

20 **Major:** Human-caused noise would be at a level (greater than 41 dBA) that requires  
21 elevated vocal effort for communication between people separated by 16 feet, *and* the  
22 natural soundscape is interfered with more than 10 percent of the time.

23 Goodyear Dec. Ex. 3 at 444-45 (emphasis added). Note that the first two “and/or” were simply  
24 “and” in the DEIS. Because these impact criteria are at least partially based on interference with  
25 normal conversation, it is clear that for such impacts to occur there must be a receiver present,  
26 which means the accumulated time used to assess impact *must be* for a single location. And  
27 contrary to Ketcham, I would argue a similar requirement for any portion of the soundscape,  
28 because without a receiver there is no impact, so again the cumulative exposure must be based on

1 sound levels over time at a single location. And as shown in a previous submittal, DBOC sources  
2 *do not* rise to the level of impact based on cumulative noise duration. Waterman Dec. D. 43 Ex. 3,  
3 ENVIRON Report at 4-7. This same conclusion is echoed by the findings of the DEIS review by  
4 the NAS, which found a high degree of uncertainty associated with stated findings of impact and  
5 that alternatively, the noise impacts of the continued DBOC operations could be “moderate to  
6 minor.” Lunny Dec. D. 40 Ex. 11 at 50.

7 20. In contrast with the typical noise levels from DBOC equipment sources that do not  
8 actually result in anything more than occasional, short-term, temporary, and minor noise impacts to  
9 the soundscape within Drakes Estero, the noise associated with removing the oyster racks, would  
10 cause major noise impacts, as acknowledged by Dr. Fristrup. In my opinion, the oyster rack  
11 demolition process would cause greater noise impacts within the Estero than anything the oyster  
12 farm’s operational noises have probably ever caused, and certainly while the facility has been  
13 operated by DBOC. For these reasons, I urge granting of the injunction to prevent such demolition  
14 until such time as the larger legal issues in this case have been resolved.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 14<sup>th</sup> day of January, 2013, in Lynnwood, Washington.



Richard Steffel