



Ann Nelson/PORE/NPS  
07/30/2010 07:44 AM

To  
cc  
bcc  
Subject Fw: CDFG Letter



Cicely Muldoon/PORE/NPS  
07/22/2010 01:55 PM

To Natalie Gates/PORE/NPS, George Turnbull/OAKLAND/NPS,  
Brannon Ketcham/PORE/NPS@NPS, Gordon  
White/PORE/NPS, John A Dell'Oso/PORE/NPS,  
Suzanne.Carlson@exchange.sol.doi.gov  
cc  
Subject Fw: CDFG Letter



**Cicely Muldoon, Superintendent**  
**POINT REYES NATIONAL SEASHORE**

1 Bear Valley Road  
Point Reyes Station, CA 94956  
phone (415) 464-5101  
cicely\_muldoon@nps.gov



*Commitment to mission is commitment to excellence*

— Forwarded by Cicely Muldoon/PORE/NPS on 07/22/2010 01:54 PM —



"Kevin Lunny"  
<kevin@drakesbayoyster.com>  
07/22/2010 01:50 PM

To "Cicely Muldoon" <Cicely\_Muldoon@nps.gov>  
cc "Nancy Lunny" <nancy@drakesbayoyster.com>  
Subject CDFG Letter

Dear Cicely,

Attached is our response to your letter to Fish and Game.

I left a message on you voice mail. I wanted to talk to you before I sent this to you. Please give me a call after you have had a chance to read our letter.

Thank you,



Kevin 20100722 DBOC to Cicely Muldoon.pdf

# *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)

July 22, 2010

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

Dear Cicely,

We were surprised to receive a copy of a letter from your office, dated June 28, 2010, to John McCamman, Director, California Department of Fish and Game (CDFG), regarding our mariculture leases with the State of California. We wish we could have responded sooner, but we did not receive a copy of the letter until July 15, 2010, two weeks after-the-fact.

1. DBOC submitted its request to the California Department of Fish & Game first, per the terms of the Special Use Permit approved by the National Park Service in 2008

At the outset, we want to respond to the concern voiced in your letter that DBOC should have submitted its requests to modify the boundaries of its lease and to alter mariculture use in Lease No. M-438-01 to include Olympia oysters and purple-hinged rock scallops to the National Park Service (NPS) first before contacting CDFG. The process outlined in your letter is contrary to the process outlined in the Special Use Permit (SUP) that NPS issued in 2008. Section 4(b)(vi) of the SUP states,

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.

This provision clearly spells out a procedure, followed by DBOC in this instance, for DBOC to first seek to modify leases with CDFG and then once any modification is approved by CDFG, to seek approval by NPS. This process makes good sense because CDFG has special expertise with

mariculture activities, an expertise NPS lacks. The correct process is outlined in the SUP, and we followed it.

Given the above, the suggestion in your letter that NPS should "make a determination" about our proposed modifications to the lease before any consideration by CDFG is inappropriate. The process your letter suggests violates the express terms of the SUP that your office approved. Not only that, but the added delay will impose significant costs on DBOC.

2. DBOC's request does not involve an expansion of use

Our request to address the lease boundary corrects an error that was made many decades ago when a prior survey inadvertently excluded portions of Bed 6 that were already under cultivation from the lease area. The oyster racks in this area have been in production since at least the 1950s. We are proposing to correct the lease boundary to include this area and to remove an equal amount of area from the lease in the vicinity of where the harbor seals haul out. The net effect is to increase the buffer zone for harbor seals from 300 feet as recommended by the Marine Mammal Act to 500 to 1000 feet. The boundary change would not result in any expansion of use.

We have also requested authorization from CDFG to cultivate Olympia oysters and Purple Hinged Rock Scallops within Lease No. M-438-01. Both species are indigenous to Drakes Estero and can be found today under natural conditions. In fact, Purple Hinged Rock Scallops are already authorized for cultivation within Lease No. M-438-02. No new culture methods will be required to cultivate Olympia oysters or Rock Scallops. Nor will there be any expansion in production, as the Olympia oysters and Rock Scallops will displace Pacific oysters currently under cultivation.

We are particularly excited by the prospect of cultivating Olympia oysters. Olympia oysters are the only native oysters on the Pacific coast. If given approval, DBOC will operate the only hatchery of Olympia oysters in California.

\*\*\*\*\*

We note that your letter seeks to improve communication and coordination with CDFG about the leases in Drake's Estero. We trust you wish to improve communication and coordination with DBOC as well. During your recent visit to the Estero on July 14, 2010, we felt as if progress had been made in that regard. Indeed, during your visit we discussed the requests we had submitted to CDFG. You can therefore understand why we found your letter disappointing, given that it mischaracterizes the facts and disregards the process the SUP so very clearly spells out. We respectfully request that you withdraw your letter to John McCamman.

Sincerely,

Kevin Lunny

Nancy Lunny



Cicely Muldoon/PORE/NPS  
07/28/2010 08:34 AM

To Ann Nelson/PORE/NPS  
cc  
bcc  
Subject Fw: 7/26/10 Letter Regarding NPS Camera Data



**Cicely Muldoon, Superintendent**  
**POINT REYES NATIONAL SEASHORE**

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cicely\_muldoon@nps.gov

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— Forwarded by Cicely Muldoon/PORE/NPS on 07/28/2010 08:34 AM —



"Kevin Lunny"  
<kevin@drakesbayoyster.com>  
07/26/2010 09:06 AM

To <Cicely\_Muldoon@nps.gov>  
cc "'Lunny, Nancy'" <nancy@drakesbayoyster.com>  
Subject 7/26/10 Letter Regarding NPS Camera Data

Hi Cicely,

Corey and I are still anxious to meet with you to go over the photographic data.



Kevin 20100726 DBOC to Cicely Muldoon.pdf

# *Drakes Bay Oyster Company*

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

July 26, 2010

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

Dear Cicely,

On June 6, 2010, we became aware of the 2008 hidden camera at Drakes Estero. On June 7, NPS confirmed the existence of one camera. A few days later NPS reported the existence of two cameras to a local newspaper reporter. On June 22, by email to the Marine Mammal Commission (MMC) and to us (DBOC), you reported that the first camera was installed in 2007, which was not previously reported or known (and not mentioned in the May 1, 2009 NPS Briefing Statement or at the June 7, 2010 MMC meeting). And on June 30, also by email to MMC and us, you informed us that this camera was installed for the first time on May 5, 2007.

Both NPS Regional officials and members of your staff told the local press that the purpose of the camera(s) was *"to improve seal observations and reduce disturbances at the different sites."* (West Marin Citizen, "Hidden cameras discovered observing Drakes Estero")

In the four years of this NPS experiment, the cameras have taken approximately 250,000 photographs, all focused on, among other things, key oyster growing areas in Drakes Estero and key channels used by oyster boats going to and from the oyster growing regions.

According to NPS records from the Inventory and Monitoring Harbor Seal Database, as reported to the MMC and DBOC, there are only two disturbance events recorded that allege disturbance from DBOC workers, boats or oyster activities during part of four harbor seal pupping seasons from May 5, 2007 to the present – one on May 8, 2007 and the other on March 14, 2008.

**Since cameras were placed to look at disturbances beginning May 5, 2007, the following is asked regarding the two disturbance events of May 8, 2007 and March 14, 2008:**

- (1) Did any of the following:
  - (a) Jon Jarvis
  - (b) David Graber
  - (c) Don Neubacher
  - (d) Sarah Allen
  - (e) David Press
  - (f) Ben Becker
  - (g) Unnamed student(s)

- (h) and/or others at DOI and/or NPS including, but not limited to the Office of the Solicitor

request, prepare, or receive any reports, memorandums, summaries, emails, analyses, evaluations and/or other materials or documents regarding the harbor seal disturbance events of May 8, 2007 or March 14, 2008? If so, for each person or category of person identified above, please provide copies of all documents, emails, and materials.

- (2) Who analyzed the photographs from May 8, 2007 or March 14, 2008? Who compared the photographs to the disturbance events as recorded on the observer Disturbance forms?
- (3) What instructions were given to the reviewer of the photographs? What were they looking for? What comparisons did they make? Identify all who participated in the review. Provide the review documents, emails and materials.
- (4) How was the review conducted? If the photographs were enlarged or manipulated in any fashion, please describe in detail and provide all documentation.
- (5) Did the analysis lead to reviews, comparisons or analyses of NPS harbor seal observer's Disturbance Reports for the disturbance events on May 8, 2007 or March 14, 2008? If so, please provide it, along with all documents and materials, including emails, related to the review.
- (6) To whom did the reviewer submit, circulate or otherwise provide these review(s)?
- (7) Finally, did NPS share this information with anyone outside Interior and/or NPS and/or the Point Reyes National Seashore? If so, please identify the recipients and provide copies of (a) transmittal letters or other documents; and, (b) copies of the materials furnished.

**This letter is focused on two disturbance dates – May 8, 2007 and March 14, 2008.** By our estimate, this request involves, at most, about 50 of the approximately 250,000 photographs from the NPS Drakes Estero harbor seal photographic data files.

NPS has alleged that DBOC disturbed seals during this period. NPS has testified, published and used the data from these disturbances in peer-reviewed papers and other documents. At no time did NPS discuss or review these data or resulting documents with DBOC or the Lunny family prior to making public allegations and/or publishing this information in one form or another. DBOC, in the MMC process, is attempting to analyze the NPS allegations, review them, and understand them. These questions – and requested information and documentation – represent an effort on our part to validate these claims or demonstrate that they are not correct.

We request that every effort be made to provide full and complete answers. And, we further request that this information be expedited. As referenced at our recent meeting, and in other correspondence, we have obligations to the MMC and cannot fulfill those obligations absent the requested information.

Thank you.

Kevin Lunny

Nancy Lunny



Cicely Muldoon/PORE/NPS  
07/20/2010 09:33 AM

To "Kevin Lunny" <kevin@drakesbayoyster.com>, "Nancy Lunny" <nancy@drakesbayoyster.com>  
cc tragen@mmc.gov, agresources@erols.com  
bcc Ann Nelson/PORE/NPS  
Subject Re: NPS 06/28/10 Letter to Fish and Game 

Dear Kevin and Nancy:

First, let me thank you for spending the time to give me a tour of the oyster operation last Wednesday. It was good to meet one on one. It is clear that your passion for and knowledge of the oyster farm runs deep.

A few thoughts in response to your letter from this Sunday. I am copying Tim, as the Marine Mammal Commission is referenced, and as we all share a hope for improved communications. David, I'm copying you as well, as your signature block appears at the bottom of the letter signed by Kevin and Nancy.

I regret that you find our letter to CDFG so objectionable, it was certainly not intended to be, and I welcome further discussion on this. Although the park was not copied on your proposal, I thought as a matter of courtesy I should cc you on our response. We spoke last week of the complexity of permitting operations within the Estero. I would welcome a way to at least synchronize our approaches and to ensure we all understand where we are in the process.

In spite of your assertion, I fully support Tim Ragen's efforts to change the tone of this discussion, respect one another's viewpoints, stand down from independent courses of action, and pursue an adaptive management approach. Defining a collaborative approach among Estero stakeholders seems like a good place to start. We all care deeply about this extraordinary public resource, and share, I firmly believe, a commitment to its health. As I mentioned last Wednesday, a clear path to resolving the future of the Estero is in everybody's interest.

My sincere hope is that we can forge a positive working relationship, in spite of any differences we may have about the issues that surround the Estero. We have to start from a place of respecting one another's outlook on this very complex issue, finding those places on which we can agree, and defining how we can work together. Long after the current issues are behind us, and the lawyers and lobbyists have left the discussion, we will still be neighbors. Kevin, I thought you said it eloquently early on in our discussion last Wednesday, when you spoke of well intended people on both sides of this issue trying to do the right thing. I couldn't agree more. To me, this seems like a fundamental basis for a more positive discussion.

Sincerely,

Cicely



Cicely Muldoon, Superintendent  
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"Kevin Lunny" <kevin@drakesbayoyster.com>



"Kevin Lunny"  
<kevin@drakesbayoyster.com>  
07/17/2010 06:34 PM

To "Cicely Muldoon" <Cicely\_Muldoon@nps.gov>  
cc "Nancy Lunny" <nancy@drakesbayoyster.com>  
Subject NPS 06/28/10 Letter to Fish and Game

Cicely,

The NPS letter of June 28 to California Department of Fish and Game was received earlier today.

By this letter, you accomplish two things. First, you ratify Don Neubacher's approach to business here at Point Reyes -- needlessly impose delays, drive up costs and maximize conflict. Second, you unilaterally reject the efforts of Tim Ragen and the Marine Mammal Commission to improve the way business has been conducted and to improve relations.

Remarkably, you have now positioned NPS to oppose efforts to enhance the native oyster here in Drakes Estero.

The errors and distortions contained in the NPS letter will be addressed next week.

On Wednesday at the oyster farm, you offered words of cooperation. By this letter, you withdrew them.

Deeply saddened,

Kevin Lunny      Nancy Lunny

**David M. Weiman**  
*Agricultural Resources*  
635 Maryland Ave., N.E.  
Washington, D.C. 20002  
(202) 546-5115  
(202) 546-4472 fax  
[agresources@erols.com](mailto:agresources@erols.com)



## United States Department of the Interior

NATIONAL PARK SERVICE

Point Reyes National Seashore  
Point Reyes Station, California 94956

IN REPLY REFER TO:  
L1425

June-28, 2010

7/7/10

Jim McCamman, Director  
California Department of Fish and Game  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, California 95814

Dear Director McCamman:

It has come to our attention that the Drakes Bay Oyster Company (DBOC) has proposed alterations to their leases within Drakes Estero. This includes expansion of mariculture use in Drakes Estero Lease No. M-438-01 (the "lease") to include the cultivation of Olympia oysters (*Ostrea conchaphila*), and purple-hinged rock scallops (*Crassadoma gigantean*), and a request for a collecting permit for these two species within Drakes Estero. In addition, we understand that DBOC has requested to modify the boundaries of their existing lease. We are concerned that these requests have not also been made to NPS, whose authorization would be needed to implement any of these proposed expansions. To date, no specific information or maps regarding these proposed alterations has been provided to the National Park Service (NPS). The NPS requests that, prior to consideration of these proposals by the CDFG, the NPS be allowed to make a determination regarding whether the NPS would authorize this expansion of DBOC's activities. We would also welcome the opportunity to discuss with you and your staff ways in which we can improve communication and coordination of our consideration of these issues.

In his letter of May 15, 2007 to the NPS, CDFG Director L. Ryan Broddrick wrote the following, regarding the oyster operation in Drakes Estero:

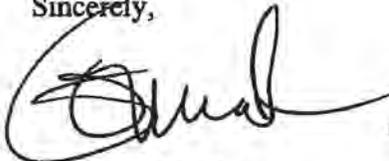
"The 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with the 1972 grant reservation and, after its expiration, with any special use permit that PRNS may issue in its discretion. The reservation requires compliance with all applicable health and safety laws and, specifically, with all rules and regulations of the National Park Service. Conversely, the renewal imposes an additional requirement of compliance with all other applicable laws, which reasonably includes those of the National Park Service and of PRNS in particular. For these reasons, we believe the mariculture operation in Drakes Estero is properly within the primary management authority of the PRNS, not the Department."

The DBOC currently operates under a National Park Service Special Use Permit (SUP) signed in April 2008. Under the terms of the SUP, the DBOC "will not introduce species of shellfish

beyond those described in the existing leases..." Any modifications to the existing CDFG leases may not be implemented without the prior written approval the NPS. We are also concerned with new information that the DBOC is requesting to alter the boundary of the shellfish growing leases in Drakes Estero. The SUP boundaries are drawn to match the boundaries of the CDFG lease areas. This request has not been submitted to the NPS, and we are concerned that any CDFG recommendation or action on this proposal would make the CDFG lease areas inconsistent with the SUP.

As the new Superintendent at Point Reyes, I would like to work with you and your staff to improve communications and develop an effective process to evaluate proposed modifications related to the leases within Drakes Estero. I am happy to meet with you and your staff at your earliest convenience to discuss these issues. In the meantime, the NPS respectfully requests that you postpone any consideration of these proposals until we have had a chance to make a determination regarding the proposed modifications.

Sincerely,



ACTING

Cicely A. Muldoon  
Superintendent

Cc: Kirsten Ramey, CDFG  
Cassidy Teufel, CCC  
Kevin Lunny, DBOC

MODE = MEMORY TRANSMISSION

START=JUL-07 13:22

END=JUL-07 13:22

FILE NO. = 070

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
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\*\*\*\*\* -POINT REYES' NS - \*\*\*\*\* 415 663 8132- \*\*\*\*\*



Point Reyes  
National Seashore

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415-484-5100 phone  
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Administration Office

### Point Reyes National Seashore Fax

To: Jim McCamman  
 Fax number: 916 653 7387  
 From: Cicely Muldoon, Supt.  
 Date: 7.7.10  
 Pages to follow: 2  
 Subject: Drakes Bay Oyster Co lease  
 expansion request.

7/12/10 NOTE

I mistakenly sent letter out with incorrect date. Letter was finalized and sent on July 7 2010.

Gordon

GORDON WHITE  
PT REYES NAT SEASHORE

# Drakes Bay Oyster Company

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

# COPY

July 1, 2010

Dear Secretary Salazar,

We were heartened and gratified to hear your recent statement at the Great Outdoors Conference about our family being able to continue to operate the Drakes Bay Oyster Farm. We can relate to your story about growing upon a ranch, working the fields, tending cattle, and believing in the stewardship and conservation values that have been passed on by American farmers. We feel the same way.

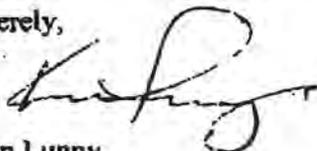
When Kevin was growing up on a ranch overlooking Drakes Estero, the oyster farm was a fixture in the West Marin and Point Reyes Station communities. As an animal science major in college, Kevin took a course in aquaculture. Years later, our family was privileged to acquire the oyster farm. The oyster farm is compatible with our commitment to practicing sustainable agriculture. For example, we were the first Point Reyes National Seashore ranch to raise certified grass fed and organic beef, and our land management practices are certified by Salmon Safe.

We have poured our time, money and hearts into turning the oyster farm around, correcting at great expense a number of environmental problems that had developed during the years prior to our involvement. Working with others in the field and the California Department of Fish and Game, we have developed new methods for raising spat (young oysters) at the facility to reduce the likelihood of harmful nonnative species infiltrating Drakes Estero. We've also donated oyster shells to aid in restoration of San Francisco Bay.

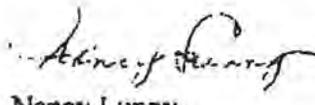
This year's appropriation bill for the Department of the Interior states that you are authorized to extend our use of the shoreside facilities needed to support the offshore cultivation of shellfish, which is done pursuant to leases with the California Department of Fish and Game that expire in 2029. People who value mariculture are rallying around the oyster farm in support of realizing the "Drakes Estero Mariculture Interpretive Center" suggested in National Research Council study of the impact of our farm on the Estero. Your extending our lease is pivotal to making this vision a reality.

You are in our thoughts and have our heartfelt sympathy as you deal with the tragic environmental disaster in the Gulf of Mexico. While we would like to meet with you personally to discuss the future of the oyster farm, we understand that may not be realistic at this moment. In the alternative, our attorneys at Latham & Watkins LLP and we would appreciate an early opportunity to sit down with a senior member of your staff to discuss the future of the oyster farm in Drakes Estero.

Sincerely,



Kevin Lunny



Nancy Lunny

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File No. 502976-0000

## LATHAM &amp; WATKINS LLP

July 6, 2010

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

Re: Special Use Permit for Drakes Bay Oyster Company

Dear Secretary Salazar:

I am writing to you on behalf of Kevin and Nancy Lunny ("the Lunnys"), owners of the Drakes Bay Oyster Company ("DBOC"), to request that you enable DBOC to continue to occupy and utilize the buildings and lands on the shores of Drakes Estero, located within Point Reyes National Seashore ("PRNS"), a unit of the National Park Service ("NPS").

DBOC is a family business operated by the Lunny family, fourth and fifth generation farmers and long-term Point Reyes residents who have lived at the historic "G" Ranch, overlooking Drakes Estero. Since acquiring the business in 2004, the Lunnys have been operating a sustainable, environmentally-friendly local business that provides jobs for the community and gives visitors to PRNS a valuable cultural and historic experience.

We were encouraged to hear of your recent statement at the Great Outdoors Conference that DBOC would continue to operate within PRNS. As you acknowledged, the oyster farm has existed in PRNS for many years. In fact, commercial oyster production has taken place within Drakes Estero for over seventy years—since the early 1930s, approximately three decades before Congress established PRNS in 1962. DBOC now produces both oysters and clams as part of its operations and is the last operating oyster cannery in the State of California.

As background, and as discussed in more detail below, DBOC operates under both State and Federal permits. With respect to the former, DBOC cultivates shellfish on the bottomlands in Drakes Estero pursuant to leases from the California Department of Fish and Game, which were renewed for 25 years in 2004, and thus expire in 2029. As to the latter, DBOC operates under a Reservation of Use and Occupancy ("RUO") executed in 1972 between NPS and the previous owners of the oyster farm and under several ancillary special use permits issued by NPS. The RUO and the other permits expire in 2012; however, the RUO contains a renewal

SF755222.5

**LATHAM WATKINS**

clause, which provides for the issuance of a special use permit that would “run concurrently with and...terminate upon expiration of the State water bottom allotments...”

Questions have been raised regarding the legal authority of NPS to issue a special use permit that would allow DBOC to continue operating past 2012, given that Drakes Estero was designated “potential wilderness” in 1976, pursuant to the Point Reyes Wilderness Act, Public Law 95-544. Notably though, the designation of Drakes Estero as “potential wilderness” was never meant to preclude the continued operations of DBOC. As is evident from relevant legislative history and environmental reviews, Drakes Estero was designated as “potential wilderness” rather than wilderness because of the understanding that oyster cultivation would continue, in light of California’s retained interest in leasing the bottomlands for shellfish cultivation.

Moreover, and importantly, in October of 2009 Congress expressly authorized the Department of the Interior to issue DBOC a special use permit to continue its operations past 2012. As this letter describes, and given Congress’s recent directive, there are multiple important reasons to issue such a permit, including the rich history of oyster farming in Drakes Estero and the myriad cultural, recreational, educational and ecological benefits DBOC provides.

**I. RICH HISTORY OF MARICULTURAL OPERATIONS IN DRAKES ESTERO**

Oyster farming has enjoyed a long history in Drakes Estero. The Miwok Indians were the original “oyster-farm operators,” with their harvesting of native shellfish beginning thousands of years ago. In fact, their ancient oyster middens are still present in the estero. Commercial oyster farming began in the estero in the 1930s, with the original allotment recorded in the name of David C. Drier on January 18, 1934 for the purpose of growing oysters.<sup>1</sup> Although several transfers occurred during those early years, for most of its commercial history, the estero was farmed by Johnson’s Oyster Company. In 2004, the Lunny family purchased the farm from Johnson’s Oyster Company and have sought to adopt many of the same sustainable practices used by the Miwoks in order to conserve the important natural resources of the area.

This long history of maricultural operations has been routinely recognized as a valid and important use of Drakes Estero. The legislative history of the Point Reyes National Seashore Act, for example, is replete with references to both the history and legacy of oyster farming and the important benefits it provides to PRNS. For instance, during congressional hearings on the establishment of PRNS, former NPS Director Conrad Wirth explained that the “[e]xisting commercial oyster beds and an oyster cannery at Drakes Estero...should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.”<sup>2</sup> Comments made during the Senate hearings

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<sup>1</sup> See NPS, Environmental Assessment/Initial Study Joint Document, Johnson Oyster Company, Marin County, Point Reyes National Seashore, at 8 (May 1998).

<sup>2</sup> NPS, Conrad L. Wirth, Director, Report on the Economic Feasibility of the Proposed Point Reyes National Seashore at 20 (1961), included in the Hearings Before the Subcommittee on Public Lands of the Committee on

LATHAM & WATKINS LLP

on the proposed PRNS legislation echoed this view: "[t]his proposed legislation provides a balanced use between the public and private interests concerned [because] the oyster and commercial fisheries would be able to continue operation and provide both recreation and economic value to the seashore."<sup>3</sup>

In the early 1970s, when Congress began considering designating wilderness areas within PRNS, the importance of the oyster operations was affirmed. Senator John Tunney, who introduced the PRNS wilderness legislation, reiterated that "[e]stablished private rights of landowners and leaseholders will continue to be respected and protected. The existing agriculture and aquaculture uses can continue."<sup>4</sup> Similarly, Representative John Burton underscored that the legislation's intent was to "preserve the present diverse uses of the Seashore," including the commercial oyster operations in Drakes Estero.<sup>5</sup> The Department of Interior itself recommended that an express wilderness designation would be inappropriate: "Commercial oyster farming operations take place in this estuary and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness."<sup>6</sup>

Until very recently, NPS consistently agreed with these conclusions and appeared supportive of the continued use of Drakes Estero for maricultural operations. The RUO itself, for example, contains a renewal clause, which provides that "[u]pon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property...."<sup>7</sup>

Additionally, in the Final Environmental Impact Statement prepared by NPS evaluating the potential impacts associated with designating certain PRNS lands as wilderness, NPS discussed the "oyster-farm operation" and noted that while removing the oyster farm might remove human activities from the estero, there would be a "loss of some compensating values. Besides its economic benefits to the community, the farm has decided interpretive importance as a popular 'living exhibit,' where visitors have the unique opportunity to observe the operation

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Interior and Insular Affairs. U.S. Senate, 87th Congress, First Session on S.486, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes (Mar. 28, 29, and 31, 1961).

<sup>3</sup> Hearings Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S.476, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes at 17 (Mar. 28, 29, and 31, 1961).

<sup>4</sup> Hearings on S.1093 and S.2472 Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, 94th Cong. 271 (1976).

<sup>5</sup> *Id.* at 272-73.

<sup>6</sup> Letter dated September 8, 1976, from John Kyl, Assistant Secretary of the Interior, to U.S. Representative James A. Haley, Chairman, Committee on Interior and Insular Affairs, House of Representatives, U.S. House Report No. 94-1680, 94 U.S. Code and Congressional News 5593.

<sup>7</sup> JOC Grant Deed to the United States, Exh. C, § 11 (Nov. 9, 1972). The clause, in fact, only requires that the special use permit "run concurrently with and will terminate upon the expiration of the State water bottom allotments...." Those "State water bottom allotments" refer to a renewable lease issued by the California Department of Fish and Game, which has granted DBOC the right to cultivate oysters in Drakes Estero through 2029. California Department of Fish & Game Amendment No. 2 to Indenture of Lease, M-438-01 (Dec. 2, 2005). Accordingly, issuance of a SUP that would "run concurrently with" the State water bottom allotments would be consistent with the state authorizations and would allow the oyster farm to continue operating through 2029.

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and to purchase freshly grown oysters. These are appropriate purposes at Point Reyes, a recreational-category park."<sup>8</sup>

NPS continued to recognize the value of the oyster operations in its 1980 PRNS General Management Plan (still in effect), which includes the following management objectives: "[t]o monitor and improve maricultural operations, in particular the oyster farm operation in Drakes Estero," and "[t]o monitor and support productive land uses and activities [including maricultural activities] which are consistent with historic patterns."<sup>9</sup> As recently as 1998, NPS conducted an environmental assessment pursuant to the National Environmental Policy Act ("NEPA") of the potential impacts of improving and substantially expanding the oyster farm operations. Although the planned expansion did not take place because of funding shortfalls, NPS' support of the project demonstrates the agency's recognition that oyster farm operations are a valid use of PRNS land.<sup>10</sup>

## II. DBOC IS A BENEFICIAL USE OF PRNS

Recently, some questions have been raised regarding the types of environmental impacts oyster farming may be having on Drakes Estero. In 2006 and 2007, for example, PRNS staff prepared and released several versions of a report entitled *Drakes Estero: A Sheltered Wilderness Estuary* that purported to evaluate the impacts of DBOC on Drakes Estero and erroneously concluded that oyster farming is having an adverse ecological impact on PRNS resources. This effort to portray DBOC as having detrimental impacts appeared to be part of an attempt to "eliminate" DBOC as a "non conforming use" so that Drakes Estero and the surrounding tract of land could be converted to wilderness status. Indeed, PRNS staff took the position that they were legally precluded from issuing a special use permit to DBOC to extend operations past 2012 because of the "potential wilderness" designation.<sup>11</sup> However, there is no such restriction on NPS' authority.<sup>12</sup> Moreover, NPS has allowed non conforming uses in other potential wilderness areas.<sup>13</sup>

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<sup>8</sup> See NPS, Final Environmental Statement FES 74-18, Proposed Wilderness: Point Reyes National Seashore, California, at 56 (Apr. 23, 1974).

<sup>9</sup> NPS, General Management Plan: Point Reyes National Seashore, at 2-3 (Sept. 1980).

<sup>10</sup> See, e.g., Letter from Don Neubacher, Superintendent, PRNS, to Bank of Oakland (Nov. 22, 1996) (explaining the relationship between the oyster farm and NPS and noting that NPS is "genuinely excited about the planned changes" to the oyster farm and "pledge[s] to work with the Johnsons and the Bank of Oakland to make the project successful"); see also Thomas Yeatts, Point Reyes Light, *Park Planned Big New Oyster Plant* (Aug. 2, 2008) (documents obtained by the newspaper indicate that, beginning in 1996, "Point Reyes National Seashore (PRNS) staff developed a plan to renovate the Johnson Oyster Company's rickety buildings and septic system, and proposed new two-story development").

<sup>11</sup> See, e.g., Field Solicitor Opinion Re: Point Reyes Wilderness Act (Feb. 26, 2004) (concluding that the Wilderness Act, the Point Reyes Wilderness Act, and NPS Management Policies mandate that NPS convert potential wilderness, such as Drakes Estero, to wilderness status "as soon as the non conforming use can be eliminated").

<sup>12</sup> For clarification, we disagree with NPS' legal interpretation that any law precludes the agency from allowing DBOC to continue operating past 2012. There is no mandate found in any applicable law or guidance that

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From the outset it should be noted that since purchasing the farm in 2004, the Lunnys have dedicated significant time and resources to cleaning up the oyster farm and resolving past violations of law that had occurred during their predecessor's operations. See, e.g., Peter Jamison, Point Reyes Light, *Park Service to Close Historic Oyster Farm* (June 15, 2007) (discussing DBOC's cleanup and quoting PRNS spokesman John Dell'Osso, "Kevin [Lunny] has done a fantastic job of cleaning up. Everything we've asked him to do, he's done."). The Lunnys remain committed to continuing those cleanup efforts and ensuring that DBOC is operated in a sustainable, environmentally-friendly manner.<sup>14</sup> As such, the family—along with their many supporters in western Marin County environmental and agricultural circles—was disheartened by the NPS report, which appeared to, among other things, overlook the many beneficial effects of oyster culture operations on the environment.<sup>15</sup>

In order to help resolve the debate regarding the scope of impacts of DBOC and the availability of scientific analysis, the National Academy of Sciences ("NAS") agreed to help clarify the scientific issues regarding maricultural activities and produced two reports. The first report, which was released in May of 2009, assessed the adequacy of the claimed scientific bases for NPS staff's preliminary conclusions in their Drakes Estero reports, and evaluated the

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would require NPS to convert "potential wilderness" to wilderness on a particular timetable. The Wilderness Act, for example, does not use the phrase "potential wilderness," much less define when "potential wilderness" must become actual wilderness, if ever. NPS management policies, director's orders, and reference manuals are all silent with respect to a specific timetable for conversion and only provide that, once "non conforming uses" have ceased, NPS will publish a Federal Register notice to change the designation from potential wilderness to wilderness. See NPS Reference Manual #41 at Appendix II, *Wilderness Preservation and Management* (1999). There is no requirement, however, mandating that NPS ensure that such operations cease by a certain date, and there has been no environmental review of the impact of removing the oyster cultivation operation in Drakes Estero.

<sup>13</sup> Examples of non conforming uses that NPS has allowed in other potential wilderness areas include: i) operation of motorized boats in potential wilderness areas of Grand Canyon National Park; ii) public use of Five High Sierra camps and the Ostrander ski hut in potential wilderness areas of Yosemite Valley; iii) operation by Southern California Edison of hydroelectric dams in potential wilderness areas of Sequoia-Kings Canyon National Park; and iv) use of roads in Cumberland National Seashore located in potential wilderness. As discussed below, the oyster farm provides greater cultural, recreational, educational and ecological benefits than these examples of non conforming uses.

<sup>14</sup> Prior to the Lunny family's ownership, the oyster farm had suffered from a degree of deterioration that led to a number of violations of law, including the Coastal Development Act, and enforcement actions by the California Coastal Commission ("CCC"). The Lunnys are working with the CCC to resolve those violations and ensure that DBOC's operations fully comply with all applicable local, state, and federal regulations. Additionally, an incident recently occurred at the farm in which clam-growing equipment was inadvertently placed into a Harbor Seal Protection Area. The Lunnys immediately took steps to rectify this mistake and are implementing processes to ensure that such mistakes do not occur in the future. Moreover, many of NPS' allegations that the oyster farm adversely impacts harbor seals have since been retracted at very recent Marine Mammal Commission ("MMC") hearings. Like the NAS, the MMC has become involved specifically to resolve the debate surrounding the oyster farm's impact on harbor seals. The MMC has held a series of panel hearings, and is working on a report that is due out in the near future.

<sup>15</sup> The Department of Interior's Inspector General investigated the various versions of the NPS Report and found that scientific inaccuracies undermined NPS' conclusions regarding the oyster farm's ecological impact on Drakes Estero.

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available data specifically regarding the impact of DBOC's maricultural activities.<sup>16</sup> The second report, which was released in February of 2010, broadly addresses best management practices and performance standards to enhance the overall benefits of shellfish mariculture and minimize any negative ecological effects.<sup>17</sup>

The first NAS report reasonably concluded that "there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current (2008-2009) levels of production and under current (2008-2009) operational practices, including compliance with restrictions to protect eelgrass, seals, water-birds, and other natural resources." NAS 2009 Report at 6. The report goes on to discuss some of the over-looked beneficial effects that DBOC is having on the estero, including: (i) the potential that oyster culture in Drakes Estero is replacing the important "filtering capacity and biogeochemical processing that was lost in the mid-19th century and subsequent decades with the overharvest and functional elimination of the native *Olympia* oyster" (*id.* at 68); (ii) the possible beneficial effects on eelgrass in the area, given that eelgrass has approximately doubled in Drakes Estero from 1991 to 2007 (*id.*); (iii) the positive economic impact for the region—including employment, tax revenue, and local food production (*id.* at 64); and (iv) the positive visitor experience, given that DBOC "preserves a piece of local and regional culture and history" (*id.* at 65).

As noted above, the oyster farm provides significant ecological benefits to Drakes Estero. DBOC's oysters are helping to "restor[e] an historic baseline ecosystem" by acting as a proxy for native oysters. *Id.* at 22; *see also* NAS 2010 Report at 13-14. The oysters are also known as "ecosystem engineers" and "foundation species" (NAS 2009 Report at 18) that bolster the ecosystem's resilience against abnormal events like phytoplankton blooms or sedimentation from storm water run-off (*id.* at 22, 23).<sup>18</sup>

In addition to the work done by the oysters, the Lunnys themselves are committed to conserving and protecting PRNS. For example, DBOC is the only oyster farm in California to produce and hatch its own seeds on site, greatly reducing the risk of introducing contaminants and invasive species. And it employs an environmentally-friendly off-bottom "hanging culture" method, used by less than 5% of U.S. oyster farmers due to the labor-intensive hand harvesting required. The Lunnys are also dedicated to educating others about conservation and the environment. The oyster farm offers free tours to the public to inform them about the history of oyster farming in PRNS, oysters' value as a beneficial source of protein, coastal ecosystems, and the nature and efficacy of organic sustainable farming. Similarly, the oyster farm offers its

<sup>16</sup> See National Academy of Sciences, National Research Council, Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California (2009) ("NAS 2009 Report").

<sup>17</sup> See National Academy of Sciences, National Research Council, Ecosystem Concepts for Sustainable Bivalve Mariculture (2010) ("NAS 2010 Report").

<sup>18</sup> The second NAS report provides further detailed discussion of the general ecosystem services that bivalves perform. NAS 2010 Report at 10-11. In fact, these ecosystem services are so significant that the report recommends quantifying their economic value, as well as developing policies to encourage restoration of bivalves in more ecosystems so they can improve and benefit from these services. *See id.*

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facilities to researchers and participates in research on native oysters, estuarine biodiversity, and human health protection.

For all these reasons, many of PRNS' 2.5 million annual visitors flock to DBOC, which carries on the long-standing tradition of oyster farming in Drakes Estero and remains as the last operating oyster cannery in the State. With its cultural, recreational, educational and ecological benefits, the oyster farm undoubtedly "enhances visitors' experience in the estero." *Id.* at 65.

By contrast, should the oyster farm be shut down, the community would be adversely impacted in significant ways. Not only would PRNS lose the numerous visitors for whom DBOC is a destination, but the oyster farm employees who have specialized skills would lose their livelihood, and the low-income housing that DBOC provides for their employees would be demolished. This in turn would effect the local ranches, where many of DBOC's employees' family members work. Furthermore, removing the oysters could have an adverse effect on the Drakes Estero ecology, including its water quality.

Both NAS reports ultimately affirm that there is no ecological justification to deny DBOC a special use permit. And given that Congress has expressly authorized NPS to issue a special use permit, there is no legal justification either. NPS should issue DBOC a special use permit to continue its operations past 2012.<sup>19</sup>

**III. NPS AUTHORITY TO ISSUE A SPECIAL USE PERMIT FOR CONTINUED OPERATIONS PAST 2012**

In October of 2009, Congress provided a definitive answer to the legal question of whether NPS has the authority to issue a special use permit to DBOC to continue operating past 2012. The answer was a resounding yes.

Specifically, Congress directed that:

Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ('existing authorization') within Drake's Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior *is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take*

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<sup>19</sup> As you know, Senator Dianne Feinstein contacted you when the first NAS report was issued and expressed her concern that NPS had "exaggerated the effects of the oyster population on the Estero's ecosystem" and appeared to be continuing to ignore the potential beneficial impacts of maricultural operations. See Letter from Dianne Feinstein to the Honorable Ken Salazar (May 5, 2009). We agree with Sen. Feinstein's conclusion that the NAS report "does not present any compelling ecological reason for refusing to renew the Drakes Bay Oyster Company lease in 2012."

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into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization.

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88 § 124 (2009) (emphasis added).

As such, now that the second NAS report has been issued, DBOC respectfully requests that NPS provide a proposed special use permit to DBOC incorporating the same terms and conditions under which DBOC currently operates, including an appropriate annual fee.

Thank you very much for your attention to this matter. We understand that Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks, recently visited DBOC on February 4, 2010. The Lunnys would be happy to host you, Secretary Salazar, and any other interested Department of Interior officials on a tour of the oyster farm, and/or provide any follow-up information requested. We look forward to meeting with you and your staff to discuss this matter in further detail, and will be in touch to set this up. If you have any questions or would like additional information, please do not hesitate to reach me at (415) 395-8136.

Best regards,

*Karl Lytz* M.B.

Karl S. Lytz  
of LATHAM & WATKINS LLP

cc: The Honorable Dianne Feinstein  
Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks  
Jonathan Jarvis, Director, National Park Service  
George Turnbull, Acting Regional Director, Pacific West Region, National Park Service  
Cicely Muldoon, Superintendent, Point Reyes National Seashore