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Item W6

Staff: Christine Chestnut-SF
Staff Report: November 29, 2007
Hearing Date: December 12, 2007

STAFF REPORT AND FINDINGS FOR CONSENT CEASE AND DESIST ORDER

ORDER NUMBER: CCC-07-CD-11

RELATED VIOLATION FILE: V-7-07-001

PROPERTY LOCATION: The property, referred to as the Drake's Bay Oyster Company facility, is located within the Point Reyes National Seashore and consists of an onshore area located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and an offshore area in Drake's Estero (APN 109-13-017). **(Exhibit 1)**

DESCRIPTION OF PROPERTY: Approximately 3.7 acres onshore and approximately 1060 acres offshore, containing shellfish cultivation and processing equipment, commercial aquaculture facilities, and related business and residential buildings and associated development including septic systems.

PROPERTY OWNER: National Park Service, United States Department of the Interior

LESSEE/ENTITY SUBJECT TO THIS ORDER: Drake's Bay Oyster Company

REPRESENTATIVE: Kevin Lunny, owner/operator of Drake's Bay Oyster Company

VIOLATION DESCRIPTION: Unpermitted development consisting of offshore aquaculture operations, onshore processing and retail facilities, and related residential use. The unpermitted development activities at issue include

both the construction/installation of structures and the performance of ongoing activities.

SUBSTANTIVE FILE DOCUMENTS: 1. Cease and Desist Order File for CCC-07-CD-11
2. Exhibits 1 through 10

CEQA STATUS: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2)), and Categorically Exempt (CG §§ 15061(b)(2), 15037, 15038, and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

Staff recommends that the California Coastal Commission ("Commission") approve Consent Cease and Desist Order No. CCC-07-CD-11 ("Consent Order") to address unpermitted development at the Drake's Bay Oyster Company ("DBOC") facility located at 17171 Sir Francis Drake Blvd. in Inverness in Marin County, including the adjacent offshore area in Drake's Estero ("property"). The property consists of approximately 1060 acres of offshore area in Drake's Estero and approximately 3.7 acres of onshore area immediately adjacent to Drake's Estero and is identified by the Marin County Assessor's Office as Assessor's Parcel Number 109-13-017.

Property Description

The property is federally owned and located entirely within the Point Reyes National Seashore ("PRNS"), which is part of the National Park system and managed by the National Park Service (NPS), a bureau of the United States Department of the Interior. PRNS, a popular visitor destination, was established in 1962 to "save and preserve [the area], for purposes of public recreation, benefit, and inspiration." [1] The property was designated as potential wilderness under the Point Reyes Wilderness Act of 1976.[2] The variety of habitats and the unique geology of the park provide a home for at least forty-five percent of North American avian species, almost eighteen percent of California's plant species, and thirty-eight threatened and endangered species.[3]

The offshore portion of the property is located in Drake's Estero, a shallow tidal estuary located along the southern coast of the PRNS immediately north of Drake's Bay. Drake's Estero supports large areas of eelgrass (*Zostera marina*) ,[4] which is habitat for many species of invertebrates and fish and important foraging habitat for many birds, such as black brant (*Branta bernicla nigricans*). Drake's Estero has been designated a site of regional importance by the

[1] Pub. L. 87-657, Sept. 13, 1962, 76 Stat. 538 (16 U.S.C. 459c et seq.).
[2] Pub. L. 94-544, Oct. 18, 1976 and Pub. L. 94-567, Oct. 20, 1976 (16 U.S.C. 459c et seq).
[3] National Park Service website at http://www.nps.gov/pore/naturescience/index.htm (last accessed on November 15, 2007).
[4] Memorandum from Dr. John Dixon, Commission biologist, dated September 11, 2007, at page 1 attached as **Exhibit 3b**.

Western Hemisphere Shorebird Reserve Network.[5] The eelgrass beds and other estuarine habitats of Drake's Estero have also been designated as Essential Fish Habitat/ Habitat Area of Particular Concern by the Pacific Fisheries Management Council.[6] In addition to avian, fish, and invertebrate species, Drake's Estero is also home to one of the largest harbor seal populations in California. Collectively, the harbor seal colonies on the Point Reyes Coast represent approximately 20% of the California population, and of those colonies, Drake's Estero is one of the primary pupping sites.[7]

Throughout the world, eelgrass and other seagrass habitats are declining due to a number of factors, including physical disturbance.[8] In an effort to protect the eelgrass beds in Drake's Estero, the proposed Consent Order will establish protocols for vehicle traffic in Drake's Estero (using established channels) to reduce the potential for resource impacts, and will preclude unpermitted development activities such as cultivation outside of current cultivation areas and the placement of additional structures in the Estero, which could displace eelgrass habitat. Additional onshore and offshore protective measures include: 1) the establishment of harbor seal protected areas, 2) a production limit, 2) the requirement that all shellfish larvae and seed from outside sources be certified as free of pathogens, and 3) the requirements for the submittal of water quality information.

Issuance of this Order under Coastal Act Section 30810, does not require that the Commission take a position, through this enforcement action, on whether resource impacts have occurred on the property or are occurring as a result of the development activities at issue. Rather, it is the intent of the proposed Consent Order to proactively address resource concerns, given the sensitivity of the area and the importance of the resources[9]. Accordingly, DBOC has agreed to the protective measures set forth in the Consent Order, which are designed to protect and reduce any potential impacts to sensitive resources and other coastal resources under the Coastal Act while DBOC seeks authorization from NPS and the Commission for the development currently located on the property and for any proposed new development.

<u>History of Use of the Property and Commission Action</u>

In 1972, NPS purchased approximately five acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from the owner at that time, Johnson Oyster Company ("Johnson"), subject to the reservation of a right allowing Johnson to use approximately 1.5 acres of the land for "processing and selling… oysters, seafood, and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto". NPS then issued a Special Use Permit to Johnson for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the

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[5] *Id.*, at page 2. *See also* http://www.nps.gov/pore/parknews /newsreleases_20071111_oilspill_ coscobusan.htm (last accessed on November 29, 2007).
[6] *Id.* at 3 (citing http://www.pcouncil.org/facts/habitat.pdf., last accessed November 29, 2007)..
[7] *Id*.
[8] Orth et al., *A Global Crisis for Seagrass Ecosystems*, BioScience, Volume 56, Issue 12 (December 2006), at 987.
[9] Dr. John Dixon Memorandum, September 11, 2007.

operation and the utilization of tidelands for purposes related to the operation of the oyster farm." DBOC, as successor in interest to Johnson, uses onshore areas for shellfish harvesting, processing, packaging, and retail facilities, and for employee housing. Oysters and clams are cultivated in offshore areas located in Drake's Estero. Currently, DBOC is in the process of obtaining updated special use permits from NPS for onshore operations outside of the reservation of use area and including, for the first time, the offshore operations.

In 2003, after Marin County requested that the Commission assume primary enforcement authority with regards to Coastal Act violations on the property, the Commission issued Cease and Desist Order No. CCC-03-CD-12 ("Johnson Order") to Johnson to address unpermitted development on the property. DBOC purchased the operation from Johnson in January of 2005. At that time, DBOC agreed to accept responsibility for compliance with the Johnson Order, which includes a requirement for the submittal of a CDP application for after-the-fact authorization of the unpermitted development on the onshore and offshore areas of the property at that time.[10] That application has been submitted, but, as of the date of this report, it is not complete.

DBOC has not yet removed all of the unpermitted development that was the subject of the Johnson Order and has constructed additional development on the property without a CDP since it took over the operation, subsequent to the Commission's issuance of the Johnson Order. Therefore, under the Consent Order, DBOC has agreed to submit a CDP application to the Commission for all onshore and offshore development on the property that requires a permit.[11] The proposed Consent Order will set a reasonable timeframe for submittal of the CDP application. However, due to the scientific, procedural, and legal complexities of this matter, Commission staff does not expect that permit application to be filed for many months. In the interim, since the Commission does not have the information necessary to determine the exact parameters of approvable operations, the Consent Order establishes some agreed-upon conditions on operations, and lists specific activities that can reasonably be expected to result in negative impacts, and which DBOC will therefore, under the terms of the Consent Order, avoid while it seeks Commission approval for the development. The terms and conditions of the proposed Consent Order are designed to ensure that current operations are not expanded, and to provide significant protections for the valuable resources on the property until the Commission can consider DBOC's CDP application and take appropriate action.

Proposed Enforcement Action

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[10] Neither Johnson nor DBOC has obtained a CDP for the onshore or offshore development at issue in this matter. As part of the proposed Consent Order, DBOC has agreed to apply for a CDP for all of the development currently on the property and for any proposed expansion of their operations, which would include the placement of additional development on the property.

[11] The Consent Order requires DBOC to apply for a CDP for all development requiring a CDP that is currently located on the property. However, nothing in the Consent Order precludes DBOC from applying for authority to conduct additional, proposed development, including expansion of the operations and replacement of structures with larger structures. The Consent Order does, however, clearly state that DBOC must obtain a CDP prior to undertaking of any proposed development.

The activities at issue in this matter consist of offshore aquaculture operations, onshore processing and retail facilities, and related residential use. The development includes both the construction/installation of structures and the performance of ongoing activities. These activities constitute development under Coastal Act Section 30106[12] and, therefore, require a coastal development permit ("CDP") under Coastal Act Section 30600 unless exempt under Coastal Act Section 30610. No such exemptions apply to the development, and no CDP was obtained for the development. Therefore, the development is unpermitted, in violation of the Coastal Act, and the Commission has the authority under Coastal Act Section 30810 to undertake enforcement action to resolve the violations.

Although Marin County has a certified Local Coastal Program ("LCP"), and some of the property is within its jurisdiction, Marin County requested that the Commission take enforcement action in 2003 for the portion located in their jurisdiction. Additionally, much of the property addressed by this Consent Order is in the Commission's retained jurisdiction.[13] Consequently, the property was the subject of a previous Commission enforcement action that resulted in the issuance of the Johnson Order. Provision 1.0 (d) of the Johnson Order requires the submittal of a CDP application "to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act." The permit application is not yet complete. In the meantime, DBOC has undertaken new development. Therefore, under Coastal Act Section 30810(a), the Commission has the authority to take a new enforcement action with respect to both the portion of the property located within Marin County's certified LCP jurisdiction and the portion in the Commission's retained jurisdiction. The provisions of the Johnson Order that have not yet been fulfilled, such as the requirement to submit a CDP application for development on the property, will be supplanted by the proposed Consent Order, which requires, among other things, the submittal of a comprehensive CDP application including all current onshore and offshore operations.

In addition, Provision 1.0(b) of the Johnson Order specifically requires that the following be addressed:

> *…the unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.*

Similarly, this Commission has the authority under Section 30810(b) to include protective measures in the Consent Order at issue here, to ensure that these potential resource concerns are addressed.

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[12] The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further Coastal Act section references are to that code.

[13] For a more detailed discussion of the jurisdiction issue, see Section IV.E.2, *infra*.

Staff worked closely with DBOC to reach an amicable resolution in this matter and commends DBOC for its cooperation. On November 29, 2007, Kevin Lunny signed the proposed Consent Order, as the representative for DBOC, and a copy of the signed Consent Order is attached to this staff report on page 17. The proposed Consent Order reflects DBOC's agreement to work cooperatively with the Commission to resolve the violations on the property and to protect the unique and valuable resources of the Estero.

Staff recommends that the Commission approve the proposed Consent Order, directing DBOC to take actions including the following: 1) cease from performing any additional development activity on the onshore and offshore portions of the property without first obtaining a CDP or other Coastal Act approval; 2) cease from expanding operations, including the placement of structures, without first obtaining a CDP or other Coastal Act approval; 3) comply with the protective measures set forth in the Consent Order; 4) cooperate in good faith with the National Park Service to obtain a special use permit within a reasonable time period, and implement any steps authorized or required by any special use permit obtained; 5) revise the project description in CDP Application No. 2-06-003 to include all onshore and offshore development; 6) complete the CDP application by the deadline set forth in the Consent Order and allow the application to proceed through the Commission permitting process according to applicable laws; and 7) implement and comply with all the terms of any permit issued, including the removal of any development that is denied under a Commission permit action in this matter if such removal is necessary.

As stated above, staff greatly appreciates DBOC's cooperation and efforts in reaching this settlement. The proposed Consent Order represents the best current course of action in this matter and staff looks forward to working collaboratively with DBOC to address the violations on the property in a timely fashion.

II. CEASE AND DESIST ORDER HEARING PROCEDURES

The procedures for a hearing on a proposed Cease and Desist Order are set forth in Section 13185 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8. For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all alleged violators or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, in his or her discretion, to ask of any other party. Commission staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR section 13185 and

13186, incorporating by reference section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions of any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the motion, per staff recommendation or as amended by the Commission, will result in issuance of the order.

III. STAFF RECOMMENDATION

A. Motion Re: Consent Cease and Desist Order:

I move that the Commission issue Consent Cease and Desist Order No. CCC-07-CD-11 pursuant to the staff recommendation.

B. Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the issuance of the Consent Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

C. Resolution to Issue Consent Cease and Desist Order:

The Commission hereby issues Consent Cease and Desist Order No. CCC-07-CD-11, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and in violation of the Coastal Act, and that the requirements of the Consent Order are necessary to ensure compliance with the Coastal Act.

IV. FINDINGS FOR CONSENT CEASE AND DESIST ORDER NO. CCC-07-CD-11[14]

A. Property Description

The property at issue in this matter, identified by the Marin County Assessor's Office as Assessor's Parcel No. 109-13-017 (**Exhibit 2**), is located at 17171 Sir Francis Drake Blvd. in the town of Inverness in Marin County and includes the adjacent offshore area in Drake's Estero. The property consists of approximately 3.7 acres of onshore area[15] and approximately 1060 acres

[14] These findings also hereby incorporate by reference Section I of the November 29, 2007 staff report in which these findings appear, entitled "Summary of Staff Recommendation and Findings."

[15] Although the federal government has owned this land since 1972, the seller reserved the right to use 1.5 acres for 40 more years after the sale, and NPS issued the seller a Special Use Permit for use of an additional 2.2 acres of land. The seller thereby remained in occupation until DBOC succeeded to those interests, though NPS has indicated that the Special Use Permit has actually expired.

of offshore area[16], all located within the PRNS. The federally-owned PRNS is part of the National Park system and is managed by the National Park Service, a bureau of the United States Department of the Interior. PRNS, a popular visitor destination, was established in 1962 to "save and preserve [the area], for purposes of public recreation, benefit, and inspiration." [17] Drake's Estero and the property at issue was designated potential wilderness under the Point Reyes Wilderness Act of 1976. [18] The variety of habitats and the unique geology of the PRNS provide a home for at least forty-five percent of North American avian species, almost eighteen percent of California's plant species, and thirty-eight threatened and endangered species.[19] DBOC uses the property as a commercial aquaculture facility through a Reservation of Use and Occupancy Agreement with the National Park Service.

Drake's Estero is a shallow tidal estuary located along the southern coast of PRNS, immediately north of Drake's Bay. (**Exhibit 3**) The Estero supports a vibrant population of eelgrass (*Zostera* marina), which in turn provides habitat for a large abundance and diversity of fish and invertebrates and foraging habitat for waterfowl such as the black brant (*Branta bernicla nigricans*), a goose species found in coastal areas. Worldwide, eelgrass and other seagrass species are in decline due to multiple stressors, including physical disturbance.[20] DBOC has agreed, as part of the proposed Consent Order, to limit vessel traffic in the Estero to the channels designated on an approved Vessel Transit Plan, to submit water quality information, and to restrict the importation of outside larvae and seed to those certified by the California Department of Fish and Game as being free of pathogens and, therefore, posing no threat of introducing invasive species into the Estero. In addition to the fish, invertebrate, and avian species found in therein, Drake's Estero, is also home to one of the largest concentrations of harbor seals in the state and to one of the primary pupping sites within the Point Reyes harbor seal colonies, which together comprise approximately 20% of the California population. (**Exhibit 4**) As part of the proposed Consent Order, DBOC has agreed not to enter into Harbor Seal Protected Areas, which were established as part of the proposed Consent Order and are shown on Figures 1 and 2 of the Order (attached to this report at page 17) nor operate within 100 yards of any hauled-out seal outside of the protected areas.

B. <u>Violation History</u>

In 1972, NPS purchased approximately five acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from Johnson Oyster Company ("Johnson"), the owner at that time, subject to the reservation of a right allowing Johnson to use approximately 1.5 acres of the land for "processing and selling… oysters, seafood, and complimentary food items, the

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[16] Although the State of California ceded the bottom of the Estero to the National Park Service in 1965, the boundaries of the property at issue in this matter still correspond to California Department of Fish and Game leases M-438-01 (1059 acres) and M-438-02 (1 acre).
[17] Pub. L. 87-657, Sept. 13, 1962, 76 Stat. 538 (16 U.S.C. 459c et seq.).
[18] Pub. L. 94-544, Oct. 18, 1976, 90 Stat. 2515 *et seq.*, and Pub. L. 94-567, Oct. 20, 1976, 90 Stat. 2692 *et seq.*, (16 U.S.C. § 459c *et seq*.).
[19] National Park Service website at http://www.nps.gov/pore/naturescience/index.htm (last accessed on November 15, 2007).
[20] *Orth et al.*, at 987.

interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012.[21] (**Exhibit 5**) NPS then issued Special Use Permit No. 8530-121 to Johnson for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the operation and the utilization of tidelands for purposes related to the operation of the oyster farm." (**Exhibit 6**)

In 2003, after attempting to resolve numerous Coastal Act/LCP, building code, and health and safety code violations, which had been occurring on the property since 1989, Marin County requested that the Commission assume enforcement authority over the property with respect to Coastal Act violations. Accordingly, the Commission issued Cease and Desist Order No. CCC-03-CD-12 ("Johnson Order") in December 2003, which required the removal of some of the unpermitted development from the property and submittal of a CDP application for after-the-fact authorization of other items of unpermitted development.[22]

In January of 2005, DBOC purchased the business from Johnson and currently operates a commercial aquaculture business on the property. (**Exhibit 7**) At that time, DBOC assumed the compliance obligations of the Johnson Order. Commission staff has worked with DBOC for two years to bring the property into compliance with the Johnson Order and with the Coastal Act. During that time, DBOC has removed the following items of unpermitted development:[23]

1. Two storage containers
2. The western portion and the second story of the oyster processing building and retail facility
3. A refrigerated trailer
4. The seed setting area
5. The western portion of the storage facility
6. A mobile home

Unfortunately, DBOC has not removed all of the unpermitted development that was the subject of the Johnson Order and has undertaken new development activities on the property, including, but not limited to, the installation of two large containers being used to house production facilities (including shucking and packing), construction of a processing facility, placement of a temporary construction trailer, grading, paving, and placement of oyster cultivation apparatus in

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[21] The quotation in this sentence can be found in Schedule C of the *Offer to Sell Real Property*, entered into by Johnson and NPS, dated October 21, 2003.

[22] The Johnson staff report and order can be accessed online at http://www.coastal.ca.gov/legal/ Th16a-12-2003.pdf. Provision 1.0 (c) of the Johnson Consent Order states in part:

> *The development that must be addressed in the removal and restoration plan consists of several commercial buildings, modifications to buildings that pre-date the Coastal Act, three storage/refrigeration containers, an above-ground diesel tank with a concrete containment structure, and a mobile home and submerged oyster cultivation equipment and materials in the estuary.*

[23] Prior to selling the business to DBOC, Johnson contained the waste water from the shucking building, removed equipment and refuse materials from the shoreline and from the estuary, and contained and removed used motor oil from the property pursuant to the Johnson Order. (See letter from Commission staff to Carol Whitmire, dated March 3, 2004.)

the Estero without any CDPs. Commission staff sent multiple violation letters to DBOC regarding this new unpermitted development. (For examples, *see* **Exhibit 8**) In the letters, Commission staff requested that DBOC submit a CDP application with a site plan and project description including the structures remaining on the property, new structures placed on the property, and any proposed development.

In January of 2006, DBOC submitted a CDP application seeking after-the-fact authorization for the placement of an 8x40' trailer containing a shucking plant, 20'x8' trailers, 40'x8' containers, construction of a porch at the managers residence/office, installation of fencing, a parking lot, a display aquarium and shellfish tanks, and for authorization to remodel four existing buildings including replacing roofs, paint, and trim, and adding ADA-compliant bathrooms. The application is not yet complete. One of the outstanding items, which DBOC must submit to complete the application, is a special use permit from the National Park Service. The special use permit will provide evidence for the standard CDP application requirement that an applicant has the necessary authorization from the property owner, in this case, to operate a commercial aquaculture business on the property. In June, 2007, the Executive Director sent a letter to DOC regarding the lack of a CDP for offshore operations. (**Exhibit 11**) Commission staff began discussions with DBOC regarding resolution of this issue, and on October 3, 2007, the Executive Director sent a "Notice of Intent to Commence Cease and Desist Order Proceedings." (**Exhibit 12**). As part of the proposed Consent Order, DBOC has agreed to participate in good faith in the process of obtaining a special use permit from NPS and has agreed to make a good faith effort to obtain the permit within a reasonable time period.

The proposed Consent Order establishes a reasonable timeline to proceed through the NPS permit process and, subsequently, the Commission permitting process. The Consent Order will also include protective measures to be undertaken immediately to address potential impacts to the valuable resources that are protected under Chapter 3 of the Coastal Act.

C. <u>Resource Concerns Addressed Through the Consent Order</u>

A showing of inconsistency with the resource protection policies of Chapter 3 of the Coastal Act is not required for the issuance of a Cease and Desist Order under Coastal Act Section 30810. Moreover, it is important to note that issuance of the proposed Consent Order does not require a finding that resource impacts addressed through the proposed Consent Order are occurring. Rather, the proposed Consent Order requires DBOC to establish protocols and to take other proactive measures to ensure that these potential resource impacts do not occur. However, a brief discussion of some of the relevant Chapter 3 policies may assist in illuminating the Coastal Act issues, and underscore the importance of the proposed Consent Order and, specifically, the protective measures.

Coastal Act Section 30230 states:

> *Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will*

> *sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Coastal Act Section 30231 states:

> *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

The relatively pristine waters of Drake's Estero support a unique ecosystem including eelgrass and a diverse array of bird, invertebrate, fish, and mammal species. Impacts to this marine environment that affect the biological productivity therein or that cause the decline of certain populations of species would be inconsistent with Coastal Act Sections 30230 and 30231.[24] Potential resource impacts to these sensitive resources from both onshore and offshore oyster cultivation activities on the property include water quality impacts, impacts to harbor seals such as decreased reproductive success, direct and indirect loss of eelgrass habitat from boat propellers and oyster bags and racks, impacts to federally listed and protected bird species such as the black brant and brown pelican from boating in roosting areas and loss of foraging habitat, and the potential introduction of invasive species. One of the main goals of the Consent Order is to take steps to protect the waters and eelgrass beds of the Estero and the many invertebrate, fish, mammal, and bird species that rely on this sensitive habitat from identified potential resource impacts. The proposed Consent Order is intended to proactively address these potential impacts by setting forth protective measures.[25] In addition, the proposed Consent Order will also as establish a reasonable timeline for completion of the CDP application for all DBOC operations on the property. Through the permitting process, the Commission will be able to assess all existing and proposed development and impose conditions on any approved development to protect the natural resources of the Estero.

D. <u>Description of Development Undertaken Without a CDP</u>

Development activities were undertaken on the property without a CDP, and no exemptions to Coastal Act permitting requirements apply. This unpermitted development located on the property includes offshore aquaculture operations, and onshore processing and retail facilities. (**Exhibit 9**) In addition, three trailers and two single-family homes that provide onsite employee

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[24] In addition, development located on onshore areas of the property may be inconsistent with other Coastal Act sections, including Section 30251, which protects scenic and visual resources and requires that development in scenic areas, such as PRNS, be visually compatible with the character of surrounding areas. These issues will be analyzed and addressed through the permitting process.

[25] The protective measures are listed in Provision 3.0 of the proposed Consent Order.

housing have been placed along the northern boundary of the property immediately adjacent to a fresh water pond. (**Exhibit 10**) A separate septic system serves this residential development. A construction/maintenance trailer has been placed among the residential development. The unpermitted development activities at issue include both the construction/installation of structures and the performance of ongoing and new activities. No CDP has been obtained for this development and the development is not exempt, under Coastal Act Section 30610, from the permitting process.

E. Basis for Issuance of Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states:

> *(a) If the commission, after public hearing, determines that any person…has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person … to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:*
>
> > *(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.*
>
> …
>
> *(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.*

Development activities were undertaken on the property without a CDP and no exemptions, under Coastal Act Section 30610, to the Coastal Act permitting requirements apply. The Commission has primary enforcement authority and permit jurisdiction with regards to this development. The following two subsections of this report set forth the basis for the issuance of the proposed Consent Order in this matter.

1. Development Requiring a CDP Occurred on the Property

Development is defined in Coastal Act Section 30106 as:

> *"… on land, in or under water, <u>the placement or erection of any solid material or structure</u>; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials;*

> *<u>change in the density or intensity of use of land</u>, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; <u>change in the intensity of use of water</u>, or of access thereto; …* (emphasis added).

The activities at issue in this matter clearly constitute development under Section 30106. Once development has been identified, Section 30600(a) provides:

> *(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone… shall obtain a coastal development permit.*

Thus, the development on the property requires authorization in the form of a Commission CDP pursuant to Coastal Act Section 30600(a). No CDP has been obtained to authorize the development and the development is not exempt from permitting requirements. Therefore, all of the cited development on the property constitutes unpermitted development and the Commission has the authority to issue the proposed Order to address this unpermitted development under Coastal Act Section 30810.

2. <u>The Commission Has Jurisdiction in This Matter</u>

The Commission has primary permitting jurisdiction over areas of the property located below the mean high tide line,[26] and therefore has primary authority under Coastal Act Section 30810 to take enforcement action in this matter with respect to that portion of the property. In 2003, the County requested that the Commission assume primary enforcement authority with regards to Coastal Act violations resulting from aquaculture activities on the portion of the property above the mean high tide line as well. Moreover, in accordance with the County's request, the property is now the subject of a Commission Order that is still in effect and has not yet been fully complied with. For these reasons, the Commission has enforcement authority under Coastal Act Section 30810(a)(1) with respect to the portion of the property within Marin County's certified LCP jurisdiction.

Provision 1.0 (d) of the Johnson Order, issued by the Commission in 2003, requires the submittal of a CDP application "to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act."

---

[26] Coastal Act Section 30519(b) states that the Commission retains permitting jurisdiction in Coastal Act matters involving tidelands, submerged lands, and public trust lands, even after the local government with municipal jurisdiction over such areas establishes a Local Coastal Program covering those areas. The areas of the property that are located below the mean high tide line are either tidelands or submerged lands depending on the tidal height. Moreover, for purposes of enforcement, Chapter 9 of the Coastal Act provides that the Commission can undertake enforcement action, under certain circumstances, within the entire Coastal Zone.

Therefore, the Commission has permit jurisdiction with respect to the development at issue in this matter, and any CDP application addressing that development shall be submitted to the Commission for consideration of the onshore and offshore operations as a whole. Furthermore, Provision 1.0(b) of the Johnson Order requires that the following be addressed:

> *[T]he unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.*

Therefore, under Coastal Act Section 30810(b), the proposed Consent Order includes protective measures and requires a CDP for all unpermitted development related to DBOC's onshore and offshore operations to address these concerns.

F. <u>California Environmental Quality Act (CEQA)</u>

The Commission finds that the issuance of CCC-07-CD-11 to compel compliance with the Coastal Act is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA) and will not have any significant adverse effects on the environment, within the meaning of CEQA. The Order is exempt from the requirements of CEQA based on Sections 15060(c)(2), 15061(b)(2), 15307, 15308, and 15321 of the CEQA Guidelines.

G. <u>Summary of Findings</u>

1. The property, commonly referred to as the Drake's Bay Oyster Company site, is located within the Point Reyes National Seashore and consists of onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County, and offshore facilities in Drake's Estero. The property is located within the Coastal Zone.

2. The property is federally-owned and managed by the National Park Service, a bureau of the United States Department of the Interior.

3. The facilities on the property are operated by Drake's Bay Oyster Company, of which Kevin Lunny is the representative and agent for service of documents.

4. In 1972, the National Park Service purchased the onshore property and granted a reservation of use to 1.5 acres to the owner at that time. The National Park Service then issued a Special Use Permit for an additional 2.2 acres to the former owner. DBOC is in the process of obtaining a special use permit for the onshore and offshore operations on the property that are located outside of the reservation of use area.

5. In 2003, the Commission issued Cease and Desist Order No. CCC-03-CD-12 to Johnson Oyster Company to address unpermitted development on the property that resulted from Johnson's commercial aquaculture business.

6. Drake's Bay Oyster Company purchased the business from Johnson in January 2005.

7. Drake's Bay Oyster Company removed some unpermitted development from the property, including two storage containers, the western portion and the second story of the oyster processing building and retail facility, a refrigerated trailer, a seed setting area, the western portion of a storage facility, and a mobile home, as required under Cease and Desist Order No. CCC-03-CD-12. However, some of the unpermitted development at issue in that order remains on the property, and Drake's Bay Oyster Company has undertaken new development including but not limited to the placement of two large containers being used to house the production facilities (including shucking and packing), construction of a processing facility, placement of a temporary construction trailer, grading, and paving on the property without a coastal development permit.

8. Unpermitted development activities at issue include offshore aquaculture operations, onshore processing and retail facilities, and related residential use (including associated placement of structures).

9. The activities that were undertaken on the property constitute "development" as that term is defined in Coastal Act Section 30106.

10. No coastal development permit was obtained to authorize the development at issue in this matter. No permit exemptions, under Coastal Act Section 30610, apply to these activities.

11. The Estero and intertidal areas of the property contain significant areas of sensitive and valuable eelgrass habitat that provides habitat for invertebrates and fish and provides important foraging habitat for birds. The area is also of regional importance for harbor seals. The unpermitted development at issue is located in or immediately adjacent to these habitat areas.

12. No formal determination regarding the consistency of the cited development with Coastal Act Chapter 3 resource protection policies has been made because DBOC has not yet submitted a complete CDP application.

13. On October 3, 2007, the Executive Director of the Coastal Commission issued a Notice of Intent to Commence Cease and Desist Order Proceedings, addressing the unpermitted development on the property.

14. On November 29, 2007, Drake's Bay Oyster Company agreed to the proposed Consent Order that is attached to this report, beginning on page 17.

15. The Commission has the authority under Coastal Act Section 30810 to take enforcement action in this matter with respect to the portion of the property below the mean high tide line and under Coastal Act Section 30810(a)(1) with respect to the portion of the property within Marin County's certified LCP jurisdiction.

H. Violator's Defenses and Commission Response

Commission staff and DBOC have reached an agreement and have signed the proposed Consent Order to resolve the violations at issue. Accordingly, DBOC did not submit a Statement of Defense, and, under Provision 21.0 of the Consent Order, has waived its right to challenge the issuance of the Consent Order. DBOC has not, however, waived its legal rights, positions, or defenses with respect to any other proceeding in front of the Commission or other governmental agency.

Staff recommends that the Commission issue the following Consent Cease and Desist Order:

CALIFORNIA COMMISSION
45 FREMONT
SAN
VOI
FAX
TDD (415) 597-5885

CONSENT ORDER NO. CCC-07-CD-04
(DRAKE'S BAY OYSTER COMPANY)

1.0 General

Pursuant to its authority under Public Resource Code §30810,[1] the California Coastal Commission ("Commission") hereby orders and authorizes Drake's Bay Oyster Farm, run by Drake's Bay Oyster Company (hereinafter referred to as "Respondent"), its employees, agents, contractors, and anyone acting in concert with any of the foregoing, and successors in interest and future owners/operators of the business or lessees to comply with the terms and conditions of this Consent Cease and Desist Order (hereinafter referred to as "Consent Order"). Respondent agrees to undertake the following, pursuant to this Consent Order and in the interest of resolving and settling this matter:

2.0 Further Unpermitted Development

Respondent agrees to cease and desist from performing any new development, as the term "development" is defined in Coastal Act §30106, on the property, which is defined in Provision 10.0 of this Consent Order, and from expanding or altering the current development that exists on the property. Nothing in this Consent Order prohibits the Respondent from continuing current operational activities, provided that all protective measures set forth in Provision 3.0 of this Consent Order are implemented as required and that the current activities are not expanded.

3.0 Resource Protection Measures

Respondent agrees to implement the following measures to minimize potential resource impacts to onshore and offshore areas caused by the operation of the facility. Nothing in this Consent Order shall be construed to authorize the corresponding development or the operations.

3.1 Onshore Conditions

3.1.1 Additional Structures. Construction and/or placement of any additional onshore structures are prohibited until Respondent obtains a coastal development permit. Nothing in this Consent Order precludes Respondent from seeking a waiver for de minimis development, as set forth in Coastal Act §30624.7, or from seeking a CDP for development on the property.

[1] The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

3.1.2 Water Quality/Hazardous Waste. Within 60 days of the issuance of this Consent Order, Respondent shall submit a hazardous materials/discharge management plan which: 1) identifies and outlines procedures for the removal or replacement of any receptacle for oil, paint, or other hazardous materials that is leaking or could leak in the near future; 2) identifies current and potential polluted discharges and outlines protocols for addressing the discharges; 3) provides a contingency plan for potential leaks; 4) states that Respondent shall take all necessary measures to prevent leaks or spills; and 5) states that all adequate or new receptacles shall be moved at least 100 feet from sensitive areas, or to paved areas or inside structures, securely stored, and properly labeled. If the information required under this provision has been provided to a county or state agency in order to comply with that agency's regulations or requirements, the information supplied to that agency may be submitted in lieu of the hazardous materials/discharge management plan.

3.1.3 Thermal Discharges and Seawater Use. Elevated temperature waste discharges shall comply with limitations necessary to ensure protection of marine resources and biological productivity. The maximum temperature of waste discharges, as measured from the point of discharge of the "incubation area", shall not exceed the maximum temperature of the receiving waters by more than 20 degrees F. In addition, all seawater intake structures shall be designed to ensure that maximum through-screen intake velocity does not exceed 0.5 feet per second. Measures shall be adopted to minimize the facility's intake and use of seawater, including the use of a seawater collection and re-circulation system in the grow-out room.

3.2 Offshore Conditions

3.2.1 Additional Structures. Construction and/or placement of any additional offshore aquaculture racks/cultivation infrastructure is prohibited until Respondent obtains a coastal development permit.

3.2.2 Future Abandonment and Removal of Equipment. To prevent the degradation of oyster cultivation apparatus and the release of debris into Drake's Estero, within 30 days of the cessation of harvesting on any plot that is being temporarily taken out of production, Respondent shall remove oyster culture apparatus from that plot except for permanent structures including oyster racks located within certified harvest areas. Notwithstanding the foregoing, Respondent may resume harvesting on any plot temporarily taken out of production. Within 30 days of the cessation of harvesting on any plot that is being permanently taken out of production, Respondents shall remove all oyster cultivation apparatus from that plot, including permanent structures such as oyster racks, stakes, and pallets.

3.2.3 Removal of Abandoned Equipment. All currently abandoned materials including cultivation equipment/apparatus, including those stakes and racks not currently and actively being used to produce shellfish, except those plots that are identified for repair, shall be removed. Within 90 days of the issuance of this order, Respondent shall submit a Debris Removal Plan to the National Park Service and Executive Director of the Coastal Commission for approval. The plan shall include location of debris identified for removal, proposed techniques and equipment to be used for debris removal, and identification of the debris disposal facility. Within 60 days of approval by the Executive Director and National Park Service of the Debris Removal Plan, Respondents shall remove all debris as approved in the Debris Removal Plan. Within 30 days of completing debris removal, Respondent shall submit to the Executive Director and National Park Service a final report detailing the material that was removed, the locations from which this material was removed, the techniques and equipment used, and the location of the disposal facility.

3.2.4 Invasive Species. To minimize the chances of introducing invasive species or pathological microorganisms to Drake's Estero, Respondent will only import shellfish in the form of larvae and seed. Within 30 days of the issuance of this Consent Order, Respondent shall produce sufficient evidence, for the review and approval of the Executive Director, that larvae and seed from outside sources have been certified by California Department of Fish and Game to be free of pathogens. If the Executive Director determines that the evidence is insufficient, Respondent shall cease from importing larvae within 30 days of receiving notification of the determination from the Executive Director.

3.2.5 Boat Transit. Boat traffic shall be limited to established channels that do not violate the protective measures set forth in this Consent Order. In situations where visibility is poor, Respondent will make every effort to use only the established channels. Within 60 days of the issuance of this order, Respondent shall submit to the National Park Service and the Executive Director a Vessel Transit Plan for review and approval. This plan shall include proposed access lanes (distinguishing between commonly-used channels and channels only used when certain racks/bags are active) and mooring areas for maintenance and harvesting of oysters, clams, and scallops. Once approved, only the vessel lanes and mooring areas described and mapped in the Vessel Transit Plan shall be used by Respondent and Respondent's employees.

3.2.6 Harbor Seal Protection Areas. All of Respondent's boats, personnel, and any structures and materials owned or used by Respondent shall be prohibited from the harbor seal protection areas defined on the map, which is attached to this Consent Order as Figure 1. Within 60 days of issuance of this Consent Order, Respondents shall submit a plan outlining the removal of all equipment and materials located in these areas. Within 60

days of the approval of this plan by the Executive Director, Respondents shall implement the plan as approved. In addition all of Respondent's boats and personnel shall be prohibited from coming within 100 yards of hauled out harbor seals.

3.2.7 Pacific Oyster and European Flat Oyster. Cultivation of Pacific oyster (*Crassostrea gigas*) and European flat oyster (*Ostrea edulis*) shall only occur in the "cultivation area" defined in Provision 3.2.11 of this Consent Order. Cultivation of additional oyster species within this area shall not be allowed and cultivation of these oyster species outside of this lease area shall also not be allowed. Within 60 days of the issuance of this Consent Order, Respondent shall submit a plan outlining the removal of all shellfish and equipment from prohibited areas, as defined in this provision, and setting forth protocols for cultivation of allowable species and prevention of intrusion by prohibited species in the areas defined in this provision. Within 30 days of the approval of this plan by the Executive Director, Respondent shall implement the plan as approved.

3.2.8 Non-Oyster Species Areas. Cultivation of manila clams (*Venerupis phillipinarum* formerly *Tapes japonica*) and purple-hinged rock scallops (*Crassodoma gigantean* formerly *Hinnities multirugosus*) shall only occur where currently cultivated in the "cultivation area" defined in Provision 3.2.11 of this Consent Order. Cultivation of additional non-oyster species shall not be allowed. Within 60 days of the issuance of this Consent Order, Respondent shall submit a plan outlining the removal of all clams, scallops or any unpermitted species and any associated cultivation equipment located outside of the cultivation area. Within 30 days of the approval of this plan by the Executive Director, Respondent shall implement the plan as approved.

3.2.9 Use of Bottom Bags. Bottom bags shall only be placed in intertidal areas devoid of eelgrass. No eelgrass shall be removed to create additional areas for bottom bags. Within 60 days of the issuance of this Consent Order, Respondent shall submit protocols for the location and practices regarding the use of bottom bags according to this provision and the terms and conditions of this Consent Order.

3.2.10 Maximum Annual Production Limit. Within 60 days of the issuance of this Consent Order, Respondents shall provide documentation showing the "current production level," including the amount harvested in the last year and any projected increases in yield for the coming year. Production of all shellfish species shall be capped at this "current production level."

3.2.11 Cultivation Area. All cultivation shall be confined to areas which are: 1) currently included in the California Department of Fish and Game lease numbers M438-01 and M438-02; 2) consistent with the California Department of Health, the Food and Drug Administration, and the

National Shellfish Sanitation Program approved shellfish harvest areas within Drakes Estero; and 3) specified as oyster beds or primary water quality sites on the map attached to this Consent Order as Figure 1.

4.0 Plan Revisions

If the Executive Director determines that any immaterial modifications or additions to the plans submitted under Provision 3.0 of this Consent Order are necessary, he shall notify Respondent. Respondent shall complete the requested modifications and resubmit the plan(s) for approval within 10 days of the notification.

5.0 Completion of Coastal Development Permit (CDP) Application

5.1 Within 60 days from the issuance date of this Consent Order or within such additional time as the Executive Director may grant for good cause, pursuant to Section 18.0 of this Consent Order, Respondent shall revise the project description in Coastal Development Permit (CDP) application No. 2-06-003 to include all unpermitted onshore and offshore development, as that term is defined and addressed in the Coastal Act and Commission's regulations (California Code of Regulations (CCR), Title 14, Division 5.5), subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0.

5.2 Within 120 days from the date of issuance of a National Park Service Special Use Permit for the operations on the property, or within such additional time as the Executive Director may grant for good cause, Respondent shall submit all materials which are required to complete CDP application No. 2-06-003, to:

California Coastal Commission
Energy, Ocean Resources, and Federal Consistency Division
Attn: Cassidy Teufel
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

The application shall address all existing development, as that term is defined and addressed in the Coastal Act and Commission's regulations (Title 14 of the California Code of Regulations), that is unpermitted, including but not limited to the development identified in Provision 11.0, on the property identified in Provision 10.0, subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0. If Respondent believes that one or more items of development listed in Provision 11.0 do not exist on the property, Respondent shall submit evidence supporting the claim(s) to the Executive Director. If the Executive Director determines that the claim is valid, this Consent Order shall not apply to that portion of cited development.

5.3 Respondent shall not withdraw the application submitted under Provision 5.1 and shall allow the application to proceed through the Commission permitting process

according to applicable laws, subject to Respondent's reservation of rights, positions and defenses as specified in Provision 13.0.

5.4 If the Executive Director determines that additional information is required to complete CDP application No. 2-06-003, the Executive Director shall send a written request for the information to the Respondent, which will set forth the additional materials required and provide a reasonable deadline for submittal. Respondent shall submit the required materials by the deadline specified in the request letter.

5.5 Respondent shall fully participate and cooperate in good faith in the Commission permitting process, provide timely responses, and work to move the process along as quickly as possible, including responding to requests for information.

5.6 Based on the understanding that the Respondent will fully cooperate in good faith with the National Park Service permitting process and that process will be completed within a reasonable amount of time, it is the intent of the Commission to process the Commission CDP after the National Park Service has taken action on the permit currently before it, conditioned upon the Respondent taking any procedural steps necessary to accommodate this sequence of events.

6.0 National Park Service Special Use Permit

Respondent shall fully participate and cooperate in good faith in the National Park Service permitting process, provide timely responses, and work to advance the process as efficiently as possible, including responding to requests for information.

7.0 Compliance with Permits and All Applicable Laws

Respondent shall comply fully with the terms and conditions of any permit that the Commission or the National Park Service issues in response to the applications referenced in Provisions 5.0 and 6.0 above. Respondent shall also comply with all applicable laws and regulations.

8.0 Status Updates

Respondent shall attend status conferences in person or by telephone with Commission staff at least once every 2 months to discuss the status of compliance with this Consent Order. Commission permit staff may report on progress in this matter to the Commission as appropriate.

9.0 Persons Subject to the Order

Persons subject to this Consent Order are Respondent, their agents, contractors, and employees, and any persons acting in concert with any of the foregoing. Kevin Lunny, as an owner and operator of Drake's Bay Oyster Company, is the representative and agent for service of documents for Respondent.

10.0 Identification of the Property

The property that is subject to this Consent Order is described as follows:

Approximately 1.5 acres of dry land along the banks of Drake's Estero and approximately 1600 acres, including approximately 1060 acres of submerged areas within Drake's Estero, all of which is located within the Point Reyes National Seashore and is referred to as Drake's Bay Oyster Company. The street address for the operation is 17171 Sir Francis Drake Blvd., Inverness, California, 94937. The property is owned by the National Park Service and leased to Respondent under a reservation of use agreement and related documents.

11.0 Description of Unpermitted Development

Notwithstanding any permits from other state and local agencies that the Respondent may have, development activities were undertaken on the property without a CDP. These development activities were not exempt from Coastal Act permitting requirements under Coastal Act §30610. The development at issue includes but is not limited to the following: grading (cut and fill); change in intensity of use of the land and water; removal of major vegetation; and placement of solid materials and structures including two large storage containers, a construction trailer, tanks, fencing, paving, residences, abandoned vehicles, generators, two septic systems, refrigeration units, processing, storage, and retail buildings, rack and bag aquaculture equipment including stringing, growing, harvesting, shucking, and bottling equipment.

12.0 Commission Jurisdiction and Authority to Act

The Commission has enforcement authority under §30810 due to the fact that the Commission has original jurisdiction over development in submerged areas of the property under Coastal Act §30519(b) and that the property was the subject of previous enforcement action undertaken by the Commission at the request of the County under Coastal Act §30810(a)(2). In addition, because proposed activities involve the private use of federally owned submerged lands within the coastal zone, the Commission has the authority to review proposed activities on the property to determine consistency with the resource protection policies of Chapter 3 of the Coastal Act. Furthermore, because the existing and continued operation of shellfish aquaculture in Drakes Estero appears to require the issuance of federal permits that can reasonably be expected to affect the coastal zone, the Commission has the authority, under the federal Coastal Zone Management Act of 1972 (CZMA) §306(d)(6) and 15 CFR 930.11(o), to review proposed activities on the property to determine consistency with the resource protection policies of Chapter 3 of the Coastal Act and with the CZMA.

13.0 Consent to Issuance

In light of the intent of the parties to resolve these matters in settlement, Respondent has agreed not to contest the legal and factual basis for this Consent Order and the terms and issuance of this Consent Order. Specifically, Respondent agrees not to present defenses or evidence to contest the issuance of the Consent Order. Respondent agrees to comply with the specific terms of this Consent Order, and the Commission shall enforce any noncompliance with this Consent Order. Respondent agrees not to contest the Commission's jurisdiction to issue and enforce this Consent

Order. The parties agree that all of the necessary elements for issuance of an order under Coastal Act Section 30810 have been met. Except as provided herein, Respondent is not waiving any legal rights, positions, or defenses, by entering into this Consent Order, and Respondent retains the right to assert its legal rights, positions, and defenses in any other proceeding before the Commission, any other governmental agency, any administrative tribunal, or a court of law.

14.0 Effective Date and Terms of the Consent Order

The effective date of the Consent Order is the date of approval by the Commission. The Consent Order shall remain in effect in perpetuity unless and until modified or rescinded by the Commission pursuant to §13188 of the Commission's administrative regulations (CCR, Title 14, Division 5.5).

15.0 Submittal of Documents

According to the terms and conditions of this Consent Order, and in addition to the recipient(s) designated herein, copies of all documents pertaining to this property and the matter at issue that are submitted to the Commission or the National Park Service pursuant to this Consent Order must be sent to:

California Coastal Commission
Statewide Enforcement Unit
Attn: Christine Chestnut
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

California Coastal Commission
Energy, Ocean Resource, and Federal Consistency
Attn: Cassidy Teufel
45 Fremont St., Suite 2000
San Francisco, CA94105-2219

16.0 Findings

The Consent Order is issued on the basis of the findings adopted by the Commission at the December 2007 hearing, as set forth in the document entitled: Staff Report and Findings for Consent Cease and Desist Order as well as the testimony and any additional evidence presented at the hearing. The activities authorized and required in this Consent Order are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act and the resource protection policies of the certified Marin County Local Coastal Program.

17.0 Compliance Obligation

Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director grants an extension under 18.0, will constitute a violation of this Consent Order and shall result in Respondent being liable for stipulated penalties in the amount of **$250** per day per violation. Respondent shall pay stipulated penalties within fifteen days of receipt of written demand by the Commission for such penalties regardless of whether Respondent have subsequently complied. If Respondent violates this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil

penalties and other remedies pursuant to Coastal Act §§30821.6, 30822, and 30820 as a result of the lack of compliance with the Consent Order and for the underlying Coastal Act violations as described herein.

18.0 Extension of Deadlines

The Executive Director may extend deadlines for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least ten days prior to expiration of the subject deadline. The Executive Director shall grant an extension of deadlines upon a showing of good cause, if the Executive Director determines that Respondent has diligently worked to comply with their obligations under this Consent Order but cannot meet deadlines due to unforeseen circumstances beyond their control.

19.0 Site Access

Respondent agrees to provide access to the subject property at all reasonable times to Commission staff and any agency having jurisdiction over the work being performed under this Consent Order. Nothing in this Consent Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission staff may enter and move freely about the portions of the subject property on which the violations are located, and on adjacent areas of the property for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting and reviewing the progress of Respondents in carrying out the terms of this Consent Order.

20.0 Modifications and Amendments to this Consent Order

Except as provided in Section 18.0 of this order, this Consent Order may be amended or modified only in accordance with the standards and procedures set forth in §13188(b) of the Commission's administrative regulations (CCR, Title 14, Division 5.5).

21.0 Waiver of the Right to Appeal and Seek Stay

Persons against whom the Commission issues a Cease and Desist Order have the right pursuant to §30803(b) of the Coastal Act to seek a stay of the order. However, pursuant to the agreement of the parties as set forth in this Consent Order, Respondent agrees to waive whatever right it may have to seek a stay or to challenge the issuance and enforceability of this Consent Order in a court of law.

22.0 Government Liability

The State of California, the Commission, and its employees shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Respondent in carrying out activities pursuant to this Consent Order, nor shall the State of California, the Commission, or its employees be held as a party to any contract entered into by Respondent or its agents in carrying out activities pursuant to this Consent Order.

23.0 Settlement of Claims

The Commission and Respondent agree that this Consent Order settles their monetary claims for relief for those violations of the Coastal Act specifically resolved through the commitments contained in this Consent Order, and occurring prior to the date of this Consent Order (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including §§30805, 30820, and 30822), with the exception that, if Respondents fail to comply with any term or condition of this Consent Order, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of this Consent Order. This Consent Order does not limit the Commission from taking enforcement action to enforce this Consent Order, or due to Coastal Act violations at the subject property not resolved herein, provided however, future commission actions regarding matters beyond this Consent Order would constitute new actions, for which notice and the opportunity for submittal of a Statement of Defense under Chapter 9 of the Coastal Act would be provided. This Consent Order does not preclude Respondent from applying for a Coastal Development Permit to authorize development on the property including expansion of the property.

24.0 Cease and Desist Order Obligations

Nothing in this Consent Order is intended to interfere with or preclude Respondent's compliance with Cease and Desist Order No. CCC-03-CD-12, which is attached as Attachment A to this Consent Order and thereby incorporated by reference.

25.0 Successors and Assigns

This Consent Order applies to Drake's Bay Oyster Company and all successors in interest, heirs, assigns, and future lessees including future owners/operators of Drake's Bay Oyster Company or any other facility on the property. Respondent shall provide notice to all successors, assigns, and potential purchasers of the property of any remaining obligations under this Consent Order.

26.0 Governmental Jurisdiction

This Consent Order shall be interpreted, construed, governed, and enforced under and pursuant to the laws of the State of California.

27.0 Scope of Order

This agreement is designed to assist in establishing a process for resolving the situation as it currently exists in a timely fashion. It does not provide a final resolution as to the disposition of the development at the site. Except as expressly provided herein, nothing herein shall limit or

restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Consent Order.

28.0 Representative Authority

The signatory below attests that he has the authority to represent and bind in this agreement the Respondents.

29.0 Integration

This Consent Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in this Consent Order.

30.0 Stipulation

Respondent and its representatives attest that they have reviewed the terms of this Consent Order and understand that their consent is final and stipulate to its issuance by the Commission.

IT IS SO STIPULATED AND AGREED:
On behalf of Respondents:

Kevin Lunny, Representative for Respondent — Date 11/29/07

Executed in San Francisco on behalf of the California Coastal Commission:

Peter Douglas, Executive Director — Date

FIGURE 1: HARBOR SEAL PROTECTION AREA

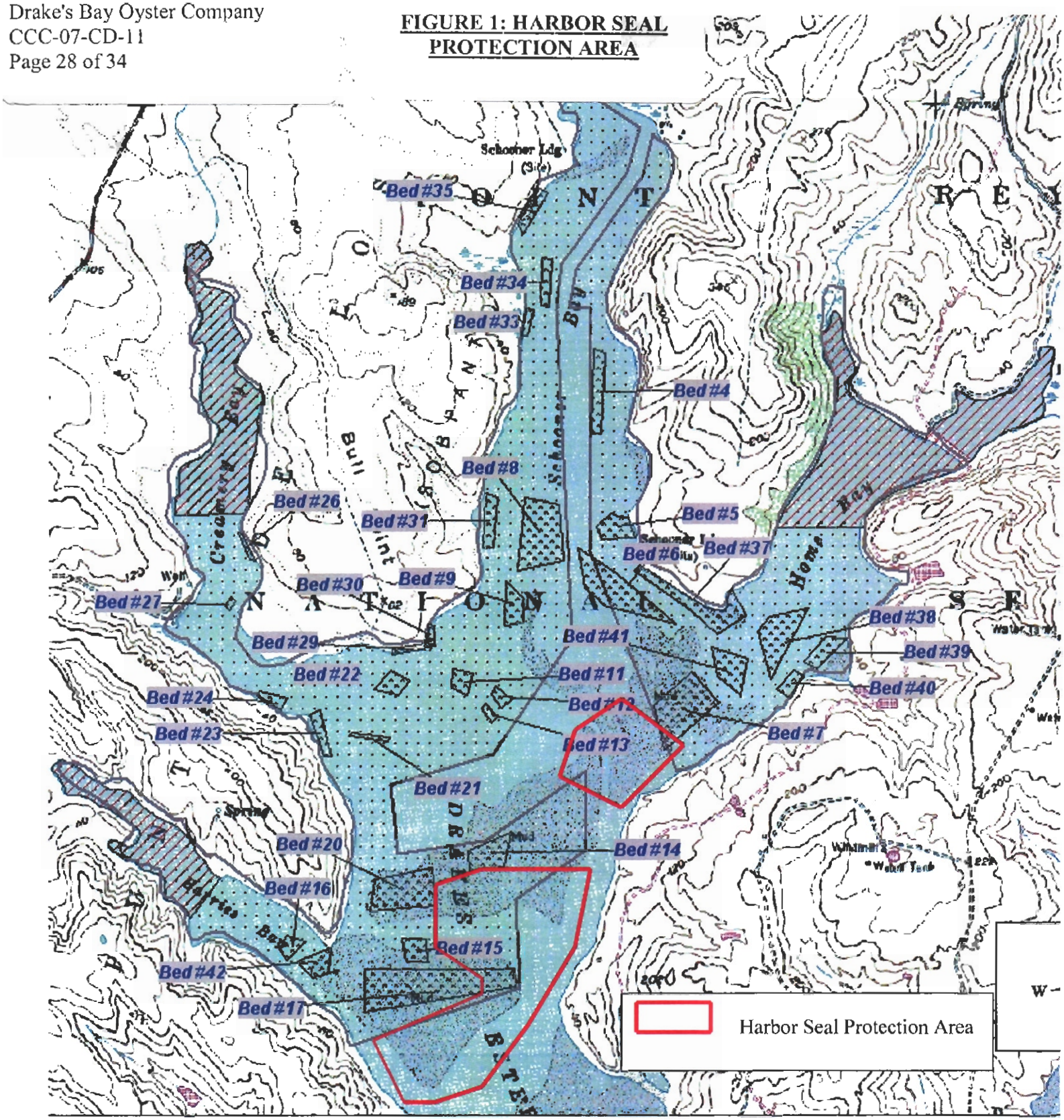

FIGURE 2:HARBOR SEAL PROTECTION AREA

URCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR
L COMMISSION
VOICE AND TDD (415) 904- 5200
FAX (415) 904- 5400

ATTACHMENT A

COMMISSION CEASE AND DESIST ORDER NO. CCC-03-CD-12

1.0 REQUIRED-AUTHORIZED ACTIONS

Pursuant to authority provided in Public Resources Code Section 30810, the California Coastal Commission hereby orders and authorizes Johnson Oyster Company, Inc. (hereinafter "Johnson"), doing business in Point Reyes National Seashore under a lease agreement with the National Park Service (NPS) to:

(a) Cease and desist from maintaining unpermitted development at the site, and refrain from performing future development at the site not specifically authorized by a coastal development permit or a Consistency Certification.

(b) Within 60 days of the issuance of this Cease and Desist Order (hereinafter "Order"), address the unpermitted development that the Executive Director determines has the potential to impair the water quality and biological health of the estuary, including but not limited to the storage of oyster cultivation equipment and disposal of refuse in the estuary and along the shore, drainage of wastewater onto the ground and into the estuary, and improper storage of used motor oil.

(c) Within 90 days of the issuance of this Order, submit for the approval of the Executive Director, a plan prepared by a qualified land use planner and a certified engineer for the complete removal of all of the unpermitted development constructed or brought to the site after the Coastal Act of 1976[1] that the Commission would be unlikely to find consistent with Coastal Act policies, remediation of coastal resource impacts, and restoration of the site. The development that must be addressed in the removal and restoration plan consists of several commercial buildings, modifications to buildings that pre-date the Coastal Act, three storage/refrigeration containers, an above-ground diesel tank with a concrete containment structure, and a mobile home and submerged oyster cultivation equipment and materials in the estuary.[2] The plan must also characterize any impacts to coastal resources from the unpermitted development onshore and in the estuary and provide for remediation of

[1] The buildings that pre-date the Coastal Act include the building that houses the shucking room and the retail counter, the two houses, and two of the four mobile homes. In 1984, the Commission authorized a third mobile home at the site through Consistency Certification No. CC-34-84.

[2] Johnson may apply to the Commission for a coastal development permit to retain the unpermitted mobile home and oyster cultivation equipment in the estuary pursuant to Section 1.0(d).

those impacts, including but not limited to restorative grading and soil remediation and the use of best management practices to protect the water quality of the estuary.[3] Should the plan call for the removal of oyster cultivation equipment and materials in the estuary, the plan must provide measures to minimize negative impacts to coastal resources from the removal.

(d) Within 60 days of the issuance of this Order, submit a complete application for a coastal development permit to authorize after-the-fact the unpermitted mobile home and any oyster cultivation equipment or materials in the estuary that were installed after the Coastal Act, and the recently constructed horse paddock.

(e) Complete implementation of the removal and restoration plan within 90 days of its approval by the Executive Director.

2.0 IDENTIFICATION OF THE PROPERTY

The property that is the subject of this Order is located at the northern terminus of Schooner Bay in Drakes Estero, Point Reyes National Seashore, Marin County, Assessor's Parcel No. 109-130-17 (hereinafter "Subject Property").

3.0 PERSONS SUBJECT TO THIS ORDER

The entity subject to this Order is the Johnson Oyster Company, Inc., its officers, employees, agents, and anyone acting in concert with the foregoing.

4.0 DESCRIPTION OF COASTAL ACT VIOLATION

Johnson's Coastal Act violation is its failure to obtain a coastal development permit or a consistency certification to authorize: (1) construction of several commercial buildings, additions to buildings that pre-date Proposition 20, and a horse paddock; (2) placement of a mobile home, three metal refrigeration containers and an above-ground diesel fuel tank with a concrete containment structure; (3) drainage of waste water from the shucking room and retail building onto the ground and into the estuary; and (4) storage of oyster cultivation equipment and disposal of debris in the estuary and along the shore. The precise dates that the development was performed are unknown but all of the development subject to this order occurred after the date of the Coastal Act.

[3] Nothing in this Order shall be interpreted or construed to represent Commission approval of any new or existing development that may be proposed in the removal and restoration plan Johnson is required to submit pursuant to this Order.

5.0 COMMISSION AUTHORITY TO ACT

The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

This Order is being issued on the basis of the findings adopted by the Commission on December 11, 2003, as set forth in the attached document entitled Staff Report for Cease and Desist Order No. CCC-03-CD-12

7.0 EFFECTIVE DATE

This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

Strict compliance with the terms and conditions of this Order is required. If Johnson fails to comply with the requirements of Section 1.0 of this Order, including any deadline contained therein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars ($6,000) per day for each day in which compliance failure persists.

9.0 EXTENSIONS OF DEADLINES

Notwithstanding Section 10.0, if Johnson is unable to comply with the deadlines contained in Section 1.0 of this Order, Johnson may request from the Executive Director in writing an extension of said deadlines. If the Executive Director determines that Johnson has made a showing of good cause, he/she shall grant extensions of the deadlines. Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline.

10.0 SITE ACCESS

Johnson agrees to provide full access to the Subject Property at all reasonable times to Commission staff, and employees of the County of Marin and National Park Service for the purpose of inspecting the progress of work being carried in compliance with the terms of this Order.

12.0 GOVERNMENT LIABILITY

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by JOC in carrying out activities authorized under this Order, nor shall the State of California be held as a party to any contract entered into by JOC or their agents in carrying out activities pursuant to this Order.

13.0 GOVERNING LAW

This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 11th day of December, 2003

Peter Douglas

Peter M. Douglas, Executive Director
California Coastal Commission

12/12/03
Date

CCC-07-CD-11
Exhibit List

Exhibit Number	Description
1.	Site Map and Location.
2.	Assessor's Parcel Map.
3.	Photographs of Drake's Estero.
3b.	Memorandum from Dr. John Dixon, Commission biologist, dated September 11, 2007.
4.	Photographs of harbor seals in Drake's Estero.
5.	Grant deed, transferring onshore property from Johnson to NPS, dated November 30, 1072.
6.	Special Use Permit No. WRO-PORE-6000-306 (renewed permit), dated April 5, 1993.
7.	Photographs of DBOC operations.
8.	Two of the letters from Commission staff to DBOC, dated May 11, 2005 and March 21, 2006.
9.	Photographs of non-residential buildings on the property.
10.	Photographs of residential structures on the property.
11.	Letter to DBOC from Executive Director, dated June 5, 2007
12.	Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 3, 2007.

Exhibit 1: Map showing location of the property.

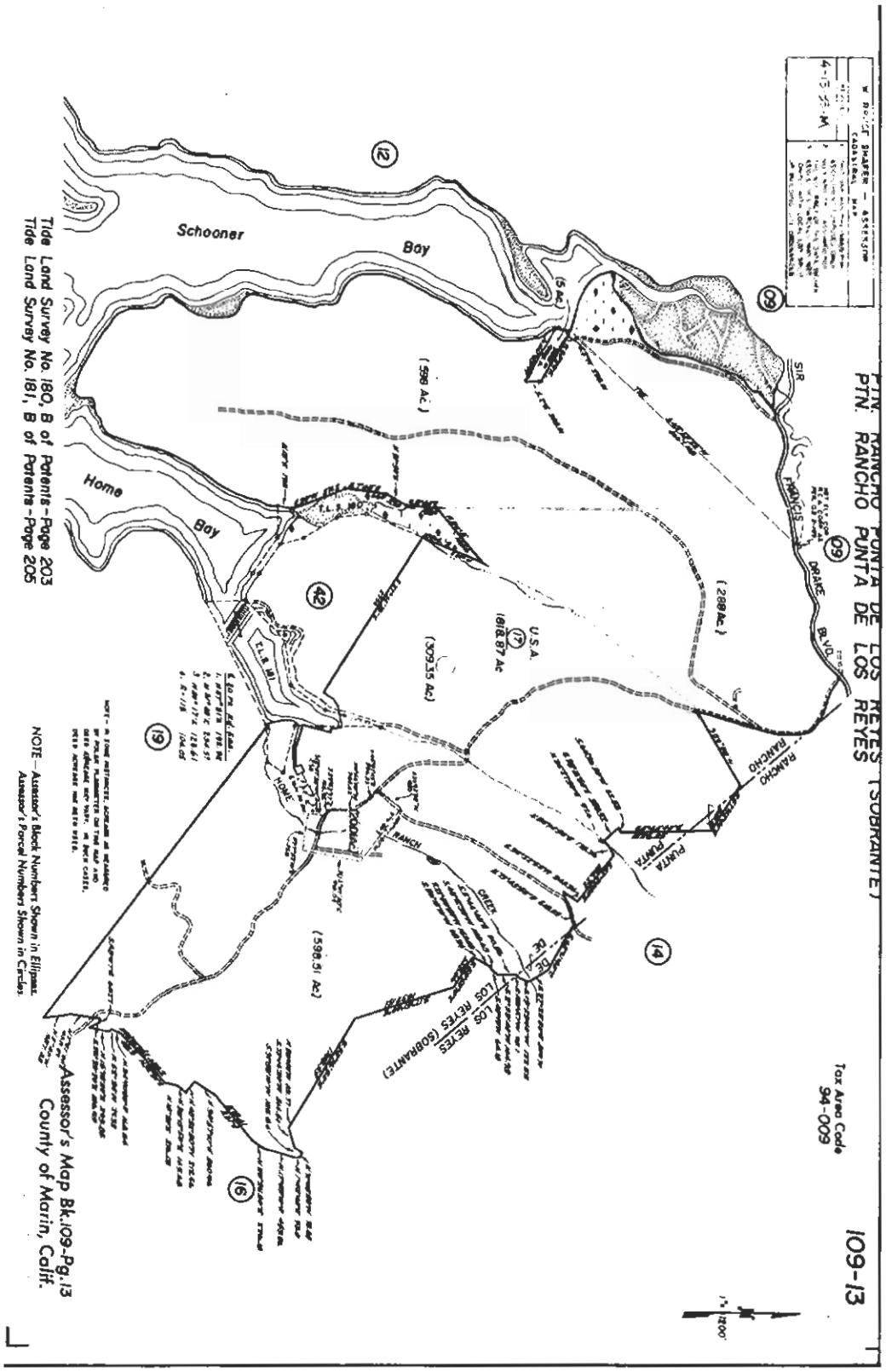

Exhibit 2
Drake'e Bay Oyster Co.
CCC-07-CD-11

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Exhibit 3: Photographs of Drake's Estero (top photograph was taken during a May 8, 2007 site visit).

STATE OF CALIFORNIA—THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
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MEMORANDUM

FROM: John Dixon, Ph.D.
Ecologist

TO: Alison Dettmer

SUBJECT: Effects of Oyster Mariculture on the Natural Resources in Drake's Estero

DATE: September 11, 2007

Habitat Characteristics of Drake's Estero

Drake's Estero is a shallow tidal estuary with four inland branching bays (Figures 1 & 2). A fifth bay to the west, Estero de Limantour, is somewhat isolated but its mouth is also inside the sand spit that shelters these areas from the open ocean and, to some degree, it is functionally a part of Drake's Estero. Anima (1990) categorizes Drake's Estero as a "coastal lagoon" because there is relatively little freshwater influence. Salinity throughout the estuary is generally similar to that on the open coast. At higher high tide, the lagoon system (including Estero de Limantour) covers about 2323 ac (9.4 km^2) of which some 1186 ac (4.8 km^2) are intertidal. The subtidal portions of the Estero are shallow, generally less than 6.5 ft (2 m). The deepest areas (23-26 ft; 7-8 m) are at the entrance and within a portion of the main channel. There is very little natural hard substrate present. The dominant substrates are silty sands and muds.

Large areas of subtidal sand and mud currently support eelgrass. Eelgrass (*Zostera marina*) is one of about 50 species of seagrasses, a polyphyletic group of specialized flowering plants that have evolved adaptations to live and reproduce in the marine environment. They are distinct from the algae that are the most common photosynthetic organisms in the oceans. Like other seagrasses, eelgrass provides important habitat for large numbers of species of invertebrates and fish (Phillips 1984). Thirty-five species of fish have been observed within eelgrass beds in either Drakes Estero or Estero de Limantour (Wechsler 1996). Eelgrass is often described as "nursery habitat" because of its importance to the juvenile life stages of many species. It also provides foraging habitat for many species of birds, including black brant (*Branta bernicla nigricans*) for which eelgrass itself is a preferred food (Ganter 2000). Eelgrass also has important indirect effects on community organization by stabilizing the substrate and affecting nutrient cycling (Phillips 1984). A demonstration of the importance of eelgrass habitats occurred in the 1930s when disease destroyed 90% to 100% of beds of eelgrass in various locations in the north Atlantic. This was followed by a precipitous decline in many fish and invertebrate species, including commercial species, which

caused significant economic hardship (Stauffer 1937; Cottam & Munroe 1954; Phillips 1984). Coincident with the loss of eelgrass, the overwintering population of brant in the Netherlands dropped two orders of magnitude to about 100 individuals. This natural catastrophe has been largely forgotten by all but eelgrass specialists. However, a widespread appreciation of the critical ecological functions of eelgrass is re-emerging as seagrass habitats are again in decline, now being imperiled by the intensive development of the world's coastlines (Orth et al. 2006).

Like most species, eelgrass waxes and wanes in local abundance and spatial distribution over time (e.g., Griffin 1997). Where appropriate data are available, the best estimate of suitable habitat is generally the cumulative distribution of eelgrass over some long period. In 1990 when Anima mapped eelgrass in Drake's Estero, it was mostly confined to the central portion of the estero. Today, there are also significant eelgrass beds in Schooner Bay and Home Bay (personal observations on July 17, 2007 and aerial photograph in NPS 2007) and probably in other areas. Brown and Becker (2007) estimate that there are currently 740 acres[1] of eelgrass in Drake's Estero, of which 355 acres have dense cover and 385 acres have patchy cover. Obviously the appropriate habitat is more extensive than would have been estimated by the distribution of eelgrass in 1990. Since there apparently are few estimates of eelgrass distribution in Drake's Estero, all areas of appropriate substrate and depth should be considered potential eelgrass habitat.

Drake's Estero is relatively pristine. Water quality is high with little evidence of herbicides or pesticides and human activities within the watershed (mostly grazing) do not appear to have resulted in high levels of sediment inputs (Anima 1990). There are few roads or buildings in the area. Within the estero itself, the only development is related to oyster mariculture. Drake's Estero is part of Point Reyes National Seashore and has received special congressional designation as "wilderness[2]" (NPS 2007). Drakes Estero is particularly important for shorebirds and waterfowl. Thousands of birds are regularly present and during the winter the number of individuals occurring in Drakes Estero and Estero de Limantour are thought to be around 20,000 (Hickey et al. 2003). Drake's Estero (including Estero de Limantour) has been designated a site of regional importance by the Western Hemisphere Shorebird Reserve Network. Drake's Estero is also of regional significance for harbor seals. Twenty percent of the mainland breeding population in California utilizes the Point Reyes coast (Allen et al. 2004). Within this important area, Drake's Estero is one of the primary pupping sites. In 2006, Drake's Estero supported the largest number of harbor seals and contributed the largest number of pups within Point Reyes (Manna et al. 2006). The significance to fish of eelgrass and other estuarine habitats within Drake's Estero was recognized by the Pacific Fisheries Management Council when it designated those habitats as "Essential

[1] No methods were described in this Trip Report (Brown & Becker 2007), so this should be considered a preliminary estimate until a formal report is available.

[2] Estero de Limantour is currently designated "wilderness" (and a California State Ecological Reserve) and Drake's Estero is "potential wilderness" due to the nonconforming mariculture operation. The 1972 agreement that "grandfathered" the mariculture operation for 40 years expires in 2012, at which time Drake's Estero will be eligible for full "wilderness" status.

Fish Habitat" and a "Habitat Area of Particular Concern[3]" under the Magnuson-Stevens Fishery Conservation and Management Act (http://www.pcouncil.org/facts/habitat.pdf).

Oyster mariculture in Drake's Estero

Oysters have been grown in Drake's Estero since about 1930 (Anima 1990). The processing facility is located close to the shore in the upper northeast section of Schooner Bay. Currently, there are at least four methods of cultivation employed. Oysters are grown suspended from wooden racks, on the bottom in plastic mesh bags individually scattered in a haphazard fashion on intertidal flats, on the bottom in plastic mesh bags tethered in lines on intertidal flats, and in buoyed plastic mesh bags that are tethered in lines on intertidal flats but that float when the area is inundated by the tide. Each of these culture techniques has the potential for negative environmental impacts.

Bottom bag culture is generally restricted to intertidal areas and so avoids the eelgrass beds which grow from rhizomes in the subtidal sediments. However, some of the individual bags have found their way into the adjacent eelgrass. I suspect that this is an accidental result of placing the bags by dropping them from a boat at high tide. It is also possible that some bags have been moved by waves or currents. Regardless of how they arrived, these bags should be removed from the eelgrass beds because they preempt habitat. The bags that are left on the intertidal flats probably add nutrients to the sediments and isolate the sediment from the water column. Taken together, these factors probably result in anaerobic conditions developing closer to the surface[4], which would likely result in changes to the composition of the infaunal community. To my knowledge, this hypothesis remains untested. I have found no studies of the effects of bottom bags on infauna. A potentially more serious environmental impact of bottom bags is the preemption of shorebird foraging habitat. In Tomales Bay, oyster mariculture is avoided by western sandpipers and dunlins but preferentially utilized by willets (Kelley et al. 1996). Overall, the abundance of foraging shorebirds is reduced in Tomales Bay by the mariculture operation. However, Kelley et al (1996) did not distinguish the effects of bottom bag culture and culture in bags on raised racks. Although a reduction in shorebird foraging opportunities is a potentially serious environmental impact of oyster bottom culture, the significance of such an impact will be directly related to the proportion of foraging habitat that is preempted. An estimation of that proportion would help in the assessment of the significance of the environmental impact. If the proportion of the suitable intertidal foraging habitat that is covered by bottom bags is relatively small, then the impact is probably not very significant. The effects of bottom bag culture on harbor seals is potentially much more serious. Some of the bags are being placed on intertidal flats which have been documented to be haul-out sites for harbor seals (Allen 2007). The bags preempt space and create barriers to

[3] "Habitat Area of Particular Concern" refers to the subset of Essential Fish Habitat which is rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area.

[4] When I disturbed the substrate by tugging on bottom bags that were scattered on the intertidal flat at Bull Point, there was a strong hydrogen sulfide odor released, which indicates shallow reducing conditions.

movement and are a locus of disturbance when they are placed, maintained, and retrieved.

Oyster culture within eelgrass beds generally has deleterious effects (Everett, et al. 1995; De Casabianca, et al. 1997; Griffin 1997; Rumrill and Poulton 2004; Bertin & Chamillon 2006). These are related to preemption of space, changes in currents that result in either scour or sedimentation, shading, biodeposition that may result in increased sedimentation and eutrophication, and physical disturbance of the substrate (e.g., trampling & propeller scarring) related to routine mariculture activities. The type and severity of mariculture impacts are related to the type of culture technique (e.g., ground culture[5], bottom bag culture or rack culture), the depth distribution of eelgrass relative to optimal mariculture habitat, the spatial extent of the mariculture manipulations, the biomass of cultured oysters, and the hydrological characteristics of the site.

At Drake's Estero, only rack culture using suspended lines is intentionally located in eelgrass beds. The most obvious effect of the oyster culture is that eelgrass tends to be excluded from the footprint of the racks (Wechsler 2004, Brown & Becker 2007, NPS 2007[6], pers. obs. July 17, 2007). National Park Service personnel counted 89 culture racks in eelgrass beds and found no eelgrass under the 62 useable racks and no eelgrass under 20 of the 27 dilapidated racks (Brown & Becker 2007). The total area under active and abandoned oyster racks where eelgrass is excluded is estimated to be about 8 acres (Brown & Becker 2007). Eelgrass is very sensitive to light levels (Backman & Barilotti 1976; Burdick & Short 1999) and the lack of eelgrass within the footprint of culture racks is probably a result of shading. Depending on their orientation relative to currents oyster racks can also cause scouring or increases in sedimentation (Forrest & Creese 2006), either of which could also reduce eelgrass abundance. However, regardless of mechanism, there is less eelgrass present today than there would be in the absence of the oyster racks.

Eelgrass is also impacted by the boat traffic associated with the oyster operation. The deep channel in Schooner Bay is thought to be caused by scour from regular boat use associated with the oyster operation (Anima 1990). In the absence of frequent motor boat activity this channel would probably be shallow and winding, as is the case elsewhere in the estero, and portions of what is now channel would be shallow flats that could support eelgrass. Propeller scarring in seagrass beds is a well-known phenomenon that is of increasing concern in heavily populated areas (Sargent et al.

[5] Ground culture differs from bottom bag culture in that shells with oyster spawn (cultch) are scattered directly on the substrate and are not confined.

[6] NPS (2007) incorrectly cites Elliott-Fisk et al. (2005) as also noting a lack of eelgrass under mariculture racks. In fact, the latter state that, "We found the oyster racks to have no pronounced impacts on the eelgrass beds, which existed both under and away from the racks as an incredibly rich habitat type." Elliott-Fisk et al. is largely a summary of the research that was conducted by several U.C. Davis graduate students, including Wechsler. Since the quoted passage directly contradicts the findings of Wechsler (2004) and recent observations, it was probably simply a mistake by the author of that section. In any event, the current presence or absence of eelgrass under culture racks is a simple matter of fact that can be easily verified.

1995; Madley et al. 2004). In shallow water, propellers and propeller wash tear up the sea grass canopy but also displace rhizomes and leave bare areas (Zieman 1976). Even in Drake's Estero where boating activity is relatively low, the cumulative effects of propeller scarring may be significant because it may take years for scars to recover (Dawes et al. 1997). The direct impacts on eelgrass are obvious and the area affected could be determined from aerial imagery. There may also be indirect impacts to organisms that depend upon the eelgrass for habitat. The patchy disturbance to the seagrass bed affects different species in different ways, with motile swimming species being less affected than more sedentary species (Bell et al. 2002; Uhrin & Holmquist 2003). Although the community effects of propeller scarring in Drake's Estero are difficult to quantify, it is clear that they constitute a negative impact.

Biodeposition is a phenomenon that can have deleterious effects by increasing sedimentation and nutrients. Oysters feed by filtering materials that are suspended in the water column. This includes plankton, particulate organic matter, and inorganic particles. Oysters do not ingest filtered inorganic particles. Both organic residue from the digestive tract and rejected inorganic particles are bound in a mucus matrix and ejected (Newell et al. 2005). The former are termed feces and the latter are called pseudofeces since they have not passed through the digestive system. If the concentration of suspended particles is so high that the filtering rate exceeds the processing rate, oysters will reject plankton and particulate organic matter in addition to the indigestible inorganic particles and the pseudofeces will then have a relatively high organic content. The strings of feces and pseudofeces are much larger than the constituent materials and settle around seven times as fast as unbound suspended particles (Haven & Morales-Alamo 1966). Where oyster culture is intense and tidal flushing is low, biodeposition has been shown to have very serious deleterious effects (Ito & Imai 1955; De Casabianca 1997; Bertin & Chaumillon 2006). However, in Drake's Estero there is good tidal flushing and individual rack areas are fairly small. Therefore, at current levels of oyster production it seems unlikely that biodeposition would result in significant environmental impacts to eelgrass or to the local infauna. According to Elliott-Fisk et al. (2005), Harbin-Ireland (2004) found little difference in the number of infaunal taxa or individuals under the racks and at various distances up to 50 m away. Nor was there a significant difference in the concentration of organic materials in the sediments. Qualitatively, however, the effect of oyster culture is to remove plankton, particulate organic matter, and inorganic particles from the water column, process them, and deposit them on the bottom. Whether this is a positive or negative ecological effect depends on the context. In Drake's Estero where water quality is good and where millions of bivalves may not have been present historically (although the history of native oysters is probably unknown), the effects of oyster culture on natural ecological processes is probably negative but not easily measured.

A salient effect of oyster mariculture is to introduce hard substrates to areas where they are naturally rare. The oyster racks, the oyster cultch, and the cultured oysters all provide surfaces that can be colonized by sedentary "fouling" organisms. The novel surfaces associated with pilings and floats are particularly attractive to non-indigenous species (Glasby et al. 2007). Where both natural reefs and pilings are present, the

latter are disproportionately colonized by the exotics. In Drake's Estero, one such species is the tunicate identified as *Didemnum* species A (Bullard et al. 2007; NPS 2007). This invasive species is common on oysters and has also colonized patches of intertidal mudstone. Although *Didemnum* is unlikely to become a pest in Drake's Estero due to the lack of appropriate substrate, the oyster racks and oysters provide a continuing source of larvae that can colonize other areas.

The oyster racks themselves are constructed of lumber that was pressure treated with a wood preservative. Prior to 2003, the preservative used was almost always chromated copper arsenate. This chemical compound is highly toxic to marine organisms (Weis & Weis 1996). It is designed to be very persistent in wood and retention studies show little change in concentration over time at the parts-per-hundred level. However, aquatic organisms are affected at a parts-per-million level and the chemicals do leach at this level, although the rate of leaching decreases with time (Weis et al. 1992). The leached toxic compounds are taken up and concentrated by marine organisms and accumulate in sediments (Weis & Weis 1992; Weis & Weis 1996). The most toxic element for aquatic organisms is the copper, which has even been found at elevated levels in oysters growing on structures constructed of treated wood (Weis et al. 1993).

Oyster racks and the suspended strings of oysters with their attached fouling organisms also create a physical habitat that is not naturally present and that might alter the species composition and abundance of the local fish community. Such structures provide habitat and may also simply act as fish aggregating devices. Wechsler (2004) attempted to assess the effects of the oyster racks on the fish community. However, his fishing methods prevented him from sampling within the footprint of the oyster rack itself. Trawls were conducted within eelgrass 1 to 2 m from the racks. Gill nets were attached to the racks and may provide a better indication of the community actually associated with the racks, but the data were not separated by fishing method. The results indicated no differences in the number of species or number of individuals next to the racks, 75 m distant, and in Estero de Limantour.[7]

A potentially very significant environmental impact associated with oyster culture is disturbance of foraging birds and disturbance of harbor seals. Disturbance may exclude birds from feeding or roosting areas, increase energy demands both by increasing metabolic rate before flight and causing them to take flight, and reduce feeding efficiency and feeding time (Stillman et al. 2007). Similarly, both pedestrian and boat activity can result in physiological and behavioral changes in harbor seals. Disturbance that causes seals to leave the shore and enter the water is particularly serious, especially when pups are present (Suryan & Harvey 1999). Such disturbance increases energy requirements by decreasing the haul-out period, creates a trampling risk for pups, and increases the chances of pup abandonment. The significance of disturbance varies with tidal height, frequency, distance, and season. At higher tides most habitat will be inundated and the effects of human activities will be less consequential. Obviously, more frequent disturbance will have more serious consequences. The

[7] The analysis of variance resulted in tiny F-values which were incorrectly associated with a P-value of 0.01. However, Wechsler appropriately described his results as statistically not significant.

closer the source of disturbance, the more likely it will have a negative effect on behavior. For example, in Washington, it was found that of all cases of harbor seal harassment from boat operation, none took place at distances >260 m, 25% occurred at a distance of 200-260 m, 50% at a distance of 100-200m, and 25% at a distance of <100 m (Suryan & Harvey 1999). The seasons of greatest concern are probably the spring and fall migratory periods and winter for birds and the breeding and pupping season (March – June) for harbor seals. In Drake's Estero, both human presence and boat operation are potential sources of disturbance to birds and harbor seals. For example, an oyster operation boat was observed to disturb 90 hauled out harbor seals, of which 7 adults and 7 pups flushed into the water, and around 300 black brant, which were flushed from an eelgrass bed where they were feeding (Allen 2007).

Summary and Recommendations

Oyster mariculture in Drake's Estero causes a number of environmental impacts. Those that are most significant are the preemption of space by culture racks that results in the loss of about 8 acres of eelgrass, the damage to eelgrass beds by boating (propeller scars and channel scour), the provision of suitable habitat for exotic fouling species by placing mariculture infrastructure in the estero, the placement of bottom culture bags on harbor seal haul-out areas, and disturbance to harbor seals and birds from pedestrians and boats. Some impacts are not mitigable, but the negative effects of others can be significantly reduced. I suggest that the following mitigation measures be implemented:

1. Oyster mariculture should not occur on tidal flats that are harbor seal haul-out and pupping sites.
2. Boat operation and other human activities should stay a safe distance away from haul-out areas. Data suggest that an adequate buffer would be between 100 and 200 meters, depending on the type of disturbance (Allen et al. 1984; Suryan & Harvey 1999; Johnson & Acevedo-Gutierrez 2007).
3. Boat routes to culture areas should be marked and traffic confined to those defined lanes. This would reduce both impacts to eelgrass and disturbance to wildlife.
4. No bottom culture should take place in eelgrass habitat and bottom bags that are currently in eelgrass habitat should be removed.
5. No new structures should be added and discarded materials and culture racks that are no longer used should be removed. These materials provide habitat for non-indigenous species and the racks are constructed of lumber that contains toxic compounds.
6. No aquaculture organisms from other areas or aquaculture materials, including shell, that have been used in the marine environment elsewhere should be placed in Drake's Estero.
7. To the extent feasible, mariculture operations should be spatially consolidated.

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Figure 1. Drake's Estero and Estero de Limantour. Google Earth photograph.

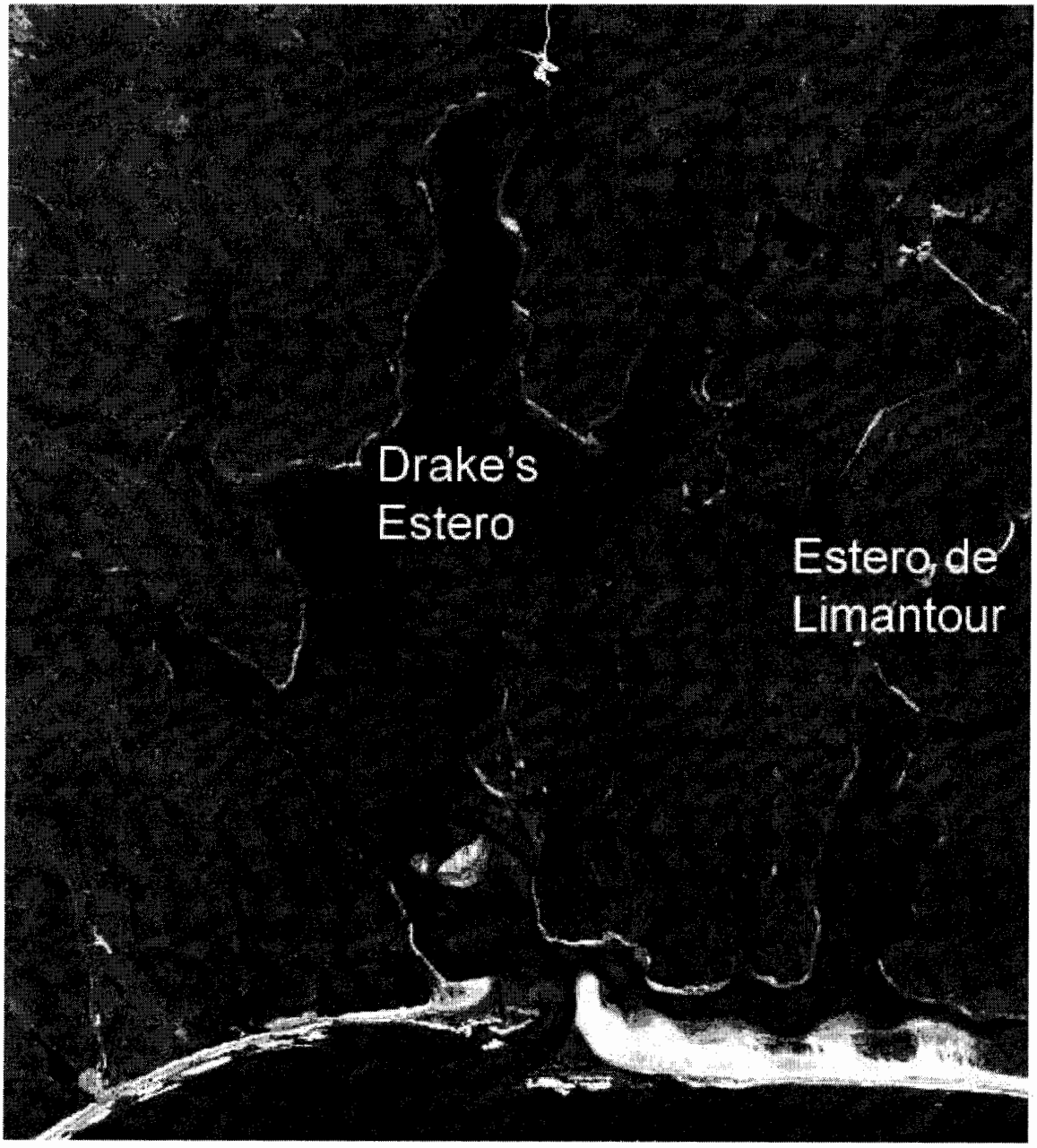

Figure 2. Schematic showing significant features of Drake's Estero (From Anima 1990). The Johnson's Oyster Company is now Drakes Bay Oyster Farm.

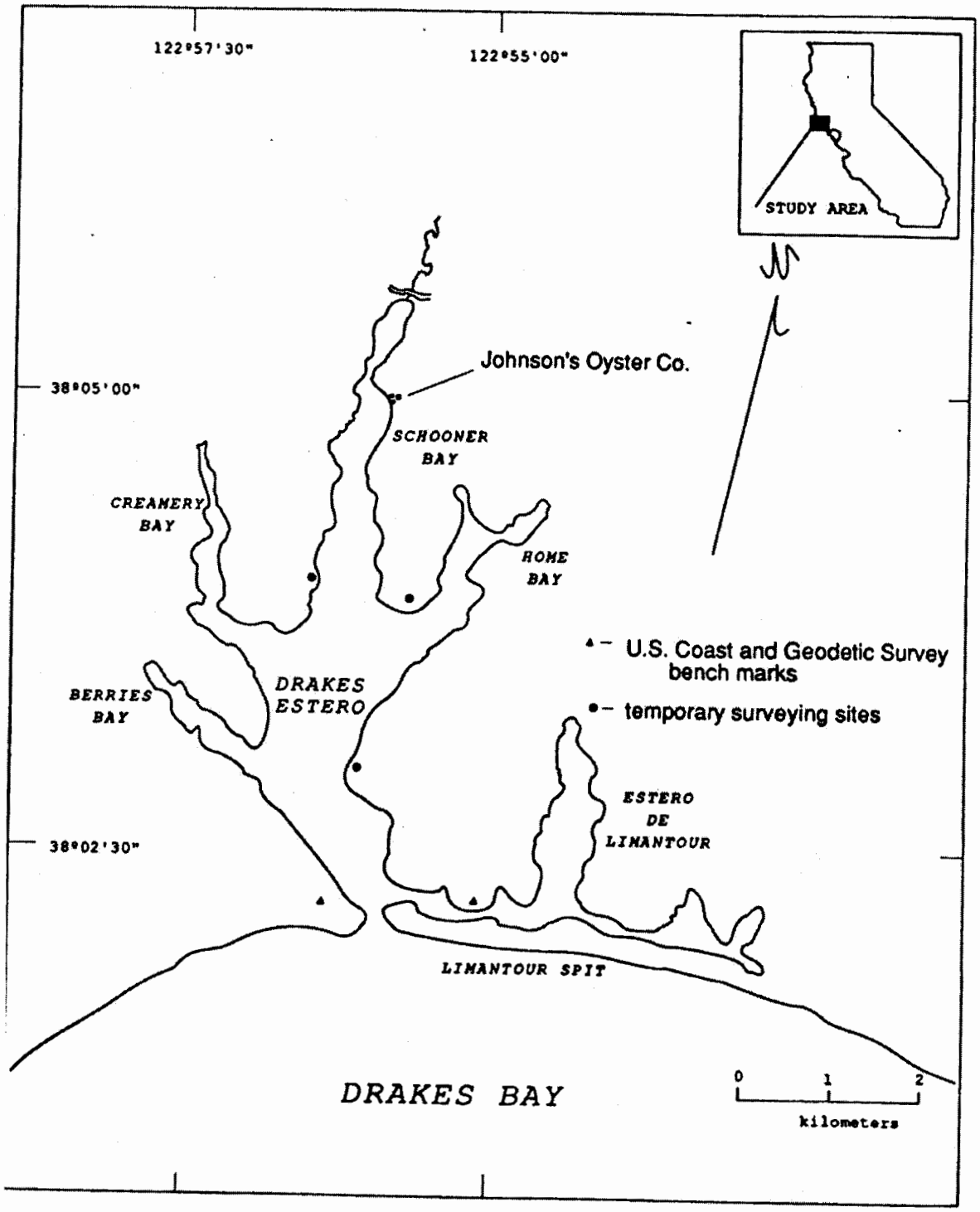

Exhibit 4: Photographs taken during May 8, 2007 site visit.

Exhibit 4
Drake's Bay Oyster Co.
CCC-07-CD-11

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RECORDED AT REQUEST OF
MARIN TITLE GUARANTY CO.
AT 30 MIN. PAST 1 P M.
NOV 3 0 1972
Official Records of Marin County, Calif.
N. J. Giacomini
FEE $ 5.00 RECORDER

16827

After recording, return to:
NATIONAL PARK SERVICE
WESTERN REGION, DIVISION OF LANDS
450 Golden Gate Avenue, Box 36063
San Francisco, California 94102

POINT REYES NATIONAL SEASHORE
Tract 02-106

109-130-03

46827

BOOK 2634 PAGE 641

GRANT DEED

JOHNSON OYSTER COMPANY, a California corporation, GRANTOR, pursuant to a Resolution of the Grantor's Board of Directors September 2, 1972, in consideration of SEVENTY NINE THOUSAND TWO HUNDRED ($79,200.00) DOLLARS, to it in hand paid, receipt of which is hereby acknowledged, does hereby grant and convey to the UNITED STATES OF AMERICA, and its assigns, GRANTEE, the following described property located in the County of Marin, State of California:

EXHIBIT "A" attached hereto and made a part hereof

TOGETHER WITH all buildings and improvements thereon and all water rights appurtenant thereto and all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

The land is conveyed subject to existing easements of record for public roads and highways, public utilities, railroads, ditches and canals.

The land hereinabove conveyed contains 5 acres, more or less, and is being acquired by the Department of the Interior, National Park Service.

THE GRANTOR RESERVES only the following rights and interests in the hereinabove described property: a reservation of use and occupancy for a period of forty (40) years in accordance with the terms of the Offer to Sell Real Property, assigned Contract No. CX8000320073, signed by the GRANTOR on October 13, 1972, accepted on October 16, 1972, and on file with the National Park Service.

TO HAVE AND TO HOLD the same unto said UNITED STATES OF AMERICA and its assigns, forever.

THE GRANTOR further remises, releases, and forever quitclaims to the UNITED STATES OF AMERICA and its assigns, all right, title, and interest which the GRANTOR may have in the banks, beds, and waters of any streams bordering the land conveyed and also all interest in and to any alleys, roads, streets, ways, strips, gores or railroad rights-of-way abutting or adjoining the land conveyed and in any means of ingress or egress appurtenant thereto.

IN WITNESS WHEREOF, Johnson Oyster Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officer, this 9th day of November, 1972.

JOHNSON OYSTER COMPANY

By Charles W. Johnson
Charles W. Johnson, President

By Milton Simmons
Milton Simmons, Secretary-Treasurer

DOCUMENTARY TRANSFER TAX $ None
___ Computed on full value of property conveyed,
___ OR Computed on full value less liens and encumbrances remaining at time of sale.
Albert Fraser
Signature of Declarant or Agent determining tax.
Firm Name Marin Title Guaranty Co

ACKNOWLEDGMENT

OFFICIAL SEAL
J. M. POHLMANN
NOTARY PUBLIC
PRINCIPAL OFFICE IN
SAN FRANCISCO COUNTY
My Commission Expires April 18, 1976

STATE OF California
County of San Francisco } ss.

On this 9 day of November in the year 1972 before me, John M. Pohlmann, a Notary Public of said State, duly commissioned and sworn, personally appeared Charles W. Johnson & Milton T. Simmons and acknowledged to me that such corporation executed the same.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

My commission expires:
April 18, 1976

J. M. Pohlmann
Notary Public in and for said State

BOOK 2634 PAGE

Exhibit 5
Drake's Bay Oyster Co.
CCC-07-CD-11
Page 1 of 3

STATE OF CALIFORNIA, County of MARIN

On November 9, 1972

before me, the undersigned, a Notary Public, in and for said County and State, personally appeared Charles W. Johnson and Milton Simmons

known to me to be the VICE President and Secretary-Treasurer of the corporation that executed the within instrument, and also known to me to be the persons who executed it on behalf of such corporation and acknowledged to me that such corporation executed the same.

J. M. Pohlmann Notary Public

OFFICIAL SEAL
J. M. POHLMANN
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN FRANCISCO COUNTY
My Commission Expires April 15, 1976

BOOK 6034 PAGE 642

Exhibit 5
Drake's Bay Oyster Co.
CCC-07-CD-11
Page 2 of 3

PARCEL ONE:

BEGINNING at a point which bears South 43° 25' 25" West 4667.148 feet from the most Easterly corner of that certain parcel of land conveyed by James and Margaret McClure to R.C.S. Communications, Inc. by Deed dated September 28, 1929 and recorded October 15, 1929 in Liber 185 of Official Records, at page 93, Marin County Records; and running thence South 60° 09' East 938.6 feet, South 2° 09' East 238.01 feet, North 60° 09' West 938.6 feet and North 2° 09' West 238.01 feet to the point of beginning

PARCEL TWO:

A RIGHT OF WAY for roadway purposes over a strip of land 14 feet in width, the center line of which is described as follows: BEING that certain property in the County of Marin, State of California, more particularly described as follows: BEGINNING at a point on the Northeasterly boundary line of that certain tract of land conveyed from Edward H. Heims et ux to Larry Jensen et ux, by Deed dated February 2, 1951, distant on said line South 60° 09' East 198.25 feet from the most Northerly corner of said tract; and running thence North 42° 47' West 171.66 feet, North 21° 12' West 107.84 feet, North 4° 48' West 105.70 feet, North 25° 45' East 168.34 feet, North 11° 06' East 96.79 feet, North 6° 29' West 224.11 feet, North 13° 57' West 110.34 feet, North 01° 18' West 91.41 feet, North 22° 51' East 349.15 feet, North 44° 19' East 145.39 feet, North 17° 40' East 137.40 feet, North 04° 58' East 225.42 feet, North 12° 20' East 151.12 feet, North 26° 04' East 173.97 feet, North 11° 55' East 285.05 feet, North 22° 56' East 166.80 feet, North 32° 14' East 170.88 feet, North 53° 27' East 161.26 feet, North 47° 12' East 126.93 feet, North 65° 02' East 76.43 feet, North 45° 17' East 78.38 feet, North 31° 38' East 91.54 feet, North 55° 55' East 99.86 feet and North 35° 11' East 177.94 feet to the Inverness-Pt. Reyes County Road.

EXHIBIT "A"

BOOK 2634 PAGE 643

Form 10-114
Rev. Aug. 86
OMB No. 1024-0026

UNITED STATES DEPARTMENT OR THE INTERIOR
National Park Service

Special Use Permit

Name of Use Parking and Launching Space

Date Permit Reviewed 19 ___
Reviewed 19 ___
Reviewed 19 ___
Expires 19 97 Nov. 15

Long Term X
Short Term ___

Permit # WRO PORE 6000 306
Region Park Type No #

Point Reyes National Seashore
Name of Area

Johnson Oyster Co. of P.O. Box 68, Inverness, CA 94937 (415) 669-1149
Name or Permittee — Address — Phone

is hereby authorized during the period from (Time 12:01a.m day 15 Month 11 19 96), through (Time 11:59 p.m. day 14 Month 11 19 97), to use the following described land or facilities in the above named area:

Two and two tenths (2.2) acres of tract 02-106 as shown on the attached sketch as agreed in discussions during meetings relative to acquisition and the reservation of a portion of Tract 02-106.

For the purpose(s) of: To continue providing parking space for Seashore and Johnson Oyster Co. visitors, including an area for launching canoes, kayaks or other non-motorized boats.

Authorizing legislation or other authority (RE- NPS-53 Appendix 1):

NEPA Compliance: CATEGORICALLY EXCLUDED X EA/FONSI ___ EIS ___ OTHER APPROVED PLANS ___

PERFORMANCE BOND: Required ___ Not Required X Amount $ ___

LIABILITY INSURANCE: Required X Not Required ___ Amount $ 100,000.00

ISSUANCE of this permit is subject to the conditions on the reverse hereof and appended pages and when appropriate to the payment to the U.S. Dept. of the Interior, National Park Service of the sum of $ 250.00 semi-annually.

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied herein.

PERMITTEE ___ Signature — 3-02-93 Date

Authorizing Official John H. Sansing, JOHN L SANSING 4/5/93
Signature — Superintendent — Date

Additional Authorizing Official (If Required) ___ Signature, ___ Tit

PARK

Exhibit 6
Drake's Bay Oyster Co.
CCC-07-CD-11
Page 1 of 3

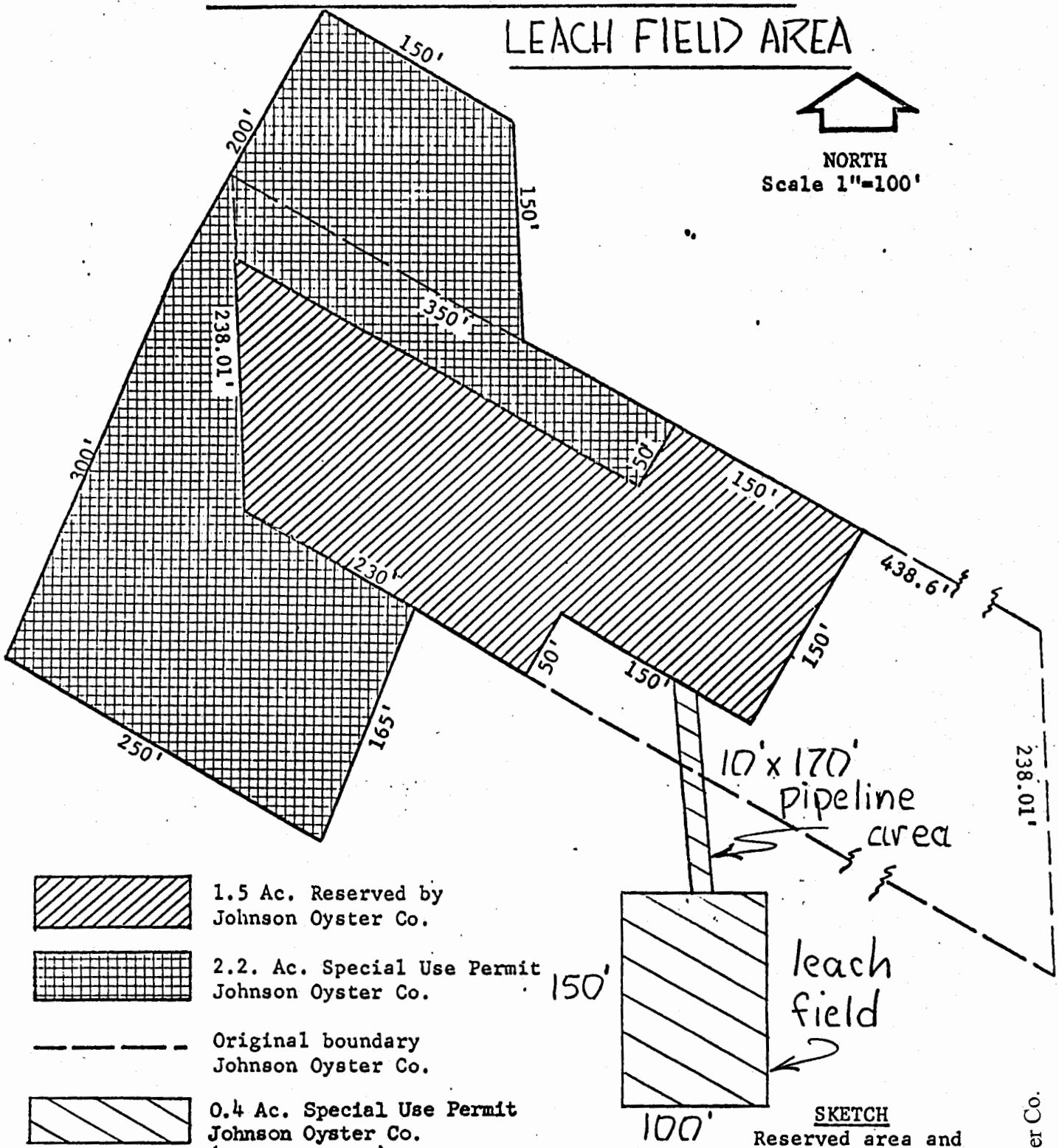
9. The issuance of this permit does not convey any right, title, interest or estate in or to the land covered by the permit.

10. This permit may be reissued for additional periods providing the land is not needed for Park purposes and the permit has not been terminated for a breach of conditions.

11. Permittee agrees to pay the Marin County Possessory Use Tax, if applicable, or other taxes if properly assessed by the County or the State.

12. Permittee agrees to meet State or County environmental requirements and requirements imposed by the California Coastal Zone Conservation Commission.

SEPTIC SYSTEM PIPELINE AND LEACH FIELD AREA



1.5 Ac. Reserved by Johnson Oyster Co.

2.2. Ac. Special Use Permit Johnson Oyster Co.

Original boundary Johnson Oyster Co.

0.4 Ac. Special Use Permit Johnson Oyster Co. (Sewage System)

SKETCH
Reserved area and special use permit Johnson Oyster Co. Point Reyes N. S.

Exhibit 7: Photographs of DBOC operations (these photographs were taken during an August 9, 2007 site visit).

Exhibit 7: Photographs of DBOC operations (these photographs were taken during a July 17, 2007 site visit).

STATE OF CALIFORNIA -- THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, *Governor*

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA CERTIFIED AND REGULAR MAIL

May 11, 2005

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

SUBJECT: Status of Compliance with Cease and Desist Order No. CCC-03-CD-12

Dear Mr. Lunny:

I am writing to provide an update regarding compliance with Cease and Desist Order CCC-03-CD-12, regarding the removal of unpermitted development at Drakes Bay Oyster Company (formerly Johnson Oyster Company). Thank you for meeting with Commission and County staff at the property on March 15, 2005. Enforcement staff greatly appreciates your efforts to date in complying with the Cease and Desist Order.

Regarding the removal of the addition to the processing building (labeled Building J on the 2004 building location exhibit) the cement foundation must also be removed. Staff has examined a 1972 photograph of this building, and it is clear that the addition and its foundation were not part of the structure in 1972, just prior to when the permit requirements of the Coastal Act came into effect. I have attached a copy of this photograph for your review. The foundation is part of the unpermitted addition that was subject to removal under the enforcement order, and must be removed in order to fully comply with the Cease and Desist Order.

During the March 2005 site visit, Commission and County staff noted the presence of a large storage container that has recently been placed on the property. While we understand that compliance with the Cease and Desist Order has eliminated some storage areas, the storage container constitutes new development as defined in the Coastal Act, and would require a coastal development permit. Please indicate in your site plans and project description whether you are proposing to retain this structure and if you are proposing new storage structures elsewhere on the property.

The remaining structures that must still be removed under the terms of the Cease and Desist Order are Building C (small storage shed), the additions to the three trailers (Buildings D) and Building E (garage building with existing power connection to inhabited trailer). Staff understands that you may be proposing to completely remove and replace these trailers with three new trailers that have a smaller

overall footprint, which would improve upon the original intent of the Cease and Desist Order. Please indicate your proposal for these structures in your site plan and project description. If you have decided to leave the original trailers in place, please proceed with removal of the trailer additions as required by the Cease and Desist Order.

Finally, as mentioned in Don Neubacher's March 28, 2005 letter to you, the National Park Service, Marin County, and the Coastal Commission must all review your proposed site plan and project description in order to issue any permits for future operations at the site. Please submit your site plan and project description to all reviewing agencies (including a complete coastal development permit application to the Coastal Commission) no later than **June 1, 2005**.

Thank you for your ongoing cooperation and we look forward to working further with you in resolving this matter. Please feel free to call me at 415-597-5894 if you have any questions. I will be out of the office from May 12-23 of this month. If you have any enforcement-related questions during that time, please contact Lisa Haage at 415-904-5220.

Sincerely,

Sheila Ryan
Headquarters Enforcement Officer

Enclosure: 1972 photograph of processing building ("Building J")

cc without enclosure: Lisa Haage, Chief of Enforcement, CCC
Chris Kern, North Central District Office Supervisor, CCC
Don Neubacher, Superintendent, Point Reyes National Seashore
Debbie Poiani, Code Enforcement Specialist, Marin County Community Development Agency
Curtis Havel, Planner, Marin County Community Development Agency

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STATE OF CALIFORNIA -- THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, Governor

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA CERTIFIED AND REGULAR MAIL

March 21, 2006

Mr. Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

SUBJECT: Ongoing violation of Cease and Desist Order No. CCC-03-CD-12 and violation of the Coastal Act; deadline for completion of CDP Application No. 2-06-003

Dear Mr. Lunny:

I am writing to formally reiterate to you that Drakes Bay Oyster Company (formerly Johnson Oyster Company) is in continuing violation of Cease and Desist Order CCC-03-CD-12 ("Order") and is in violation of the Coastal Act. Unpermitted development on the property has occurred without the required Coastal Development Permit ("CDP"), which violates both the Order and the Coastal Act. On January 3, 2006 Commission staff became aware of new unpermitted development on the property, including a large storage container (next to another large storage container that we previously notified you was unpermitted in a letter dated May 11, 2005), a construction trailer, and five plumbed oyster culture tanks. Staff notified you in a letter dated January 20, 2006 that Drakes Bay Oyster Company was in violation of both the Order and the Coastal Act. Staff visited the property on February 17, 2006, at which time staff observed this unpermitted development as well as other new unpermitted development including fencing and a wedge of fill topped with freshly paved asphalt located between the two unpermitted storage containers and the retail building. Staff also observed several instances of non-compliance with the removal requirements of the Order, which are discussed in more detail below.

During last month's site visit, staff observed that the concrete foundation of the retail building addition (Building "J") is still present on site. This foundation is part of the building addition that was required to be removed under the Order, and as staff informed you

to you, the foundation must be completely removed. Although you have asserted that photographs show that this foundation is pre-Coastal, you have not provided any evidence to Commission staff, photographic or otherwise, that supports this assertion. In fact, a January 1972 photograph (staff has already provided you with a copy), clearly shows that neither the addition nor its concrete foundation were present on the property just prior to the enactment of Coastal Act permit requirements, and this is why the addition (and its foundation) were subject to removal under the Order. As previously noted in staff's May 11, 2005 letter to you:

> "Regarding the removal of the addition to the processing building (labeled Building J on the 2004 building location exhibit) the cement foundation must also be removed. Staff has examined a 1972 photograph of this building, and it is clear that the addition and its foundation were not part of the structure in 1972, just prior to when the permit requirements of the Coastal Act came into effect. I have attached a copy of this photograph for your review. The foundation is part of the unpermitted addition that was subject to removal under the enforcement order, and must be removed in order to fully comply with the Cease and Desist Order."

Drakes Bay Oyster Company will not be in compliance with this portion of the Order's removal requirements until this foundation is completely removed up to the existing building edge.

Staff also observed five partially buried and plumbed oyster culture tanks located in the area labeled "M: Seed setting area" on the 2004 building location exhibit. These tanks were not present in this location during staff's March 15, 2005 site visit (see attached photo), and were presumably removed as required under the Order when all of the Area M buildings and their contents were removed. During last month's site visit, you stated that you simply put the tanks back near where they used to be inside the buildings that were removed. The removal requirements of the Order, however, include not just the buildings that were slated for removal, but their contents as well. The relocation, partial burial, and plumbing of these tanks in this location therefore constitute new unpermitted development and are in violation of the Order's removal requirements.

When staff arrived for the February 17, 2005 site visit, we observed new asphalt paving on a new wedge of fill between the two unpermitted storage containers and the retail building. We also observed new unpermitted fencing near the unpermitted construction trailer. You must add detailed descriptions and site plan locations of all of the cited unpermitted development to your CDP application, and clearly indicate whether you are seeking to retain this development. You mentioned during the site visit that you intend to extend the asphalt paving in the direction of the retail building, but this is not included in your current proposed site description or proposed site plans. **Please note that as of the date of this notification letter, any additional unpermitted development that occurs on the property without the required CDP will be considered a knowing and intentional violation of both the Order and the Coastal Act.**

Although staff appreciates that you submitted a CDP application by the January 27, 2006 deadline, we note that the application is incomplete and is lacking numerous essential information that we previously instructed you to submit as part of your application, including a detailed project description and site plan describing **all** proposed development on the property.

proof of legal interest in the property, and verification of all other permits, permissions or approvals granted by other public agencies. Staff's February 22, 2006 letter to you details additional materials and information that you must provide in order for the application to be filed and scheduled for hearing. Please submit the required materials and information to the attention of Al Wanger in the Commission's North Central District office in San Francisco **no later than April 28, 2006**.

Staff reminds you that Section 8 of the Order details the compliance obligation for the Order. Violation of the Order may result in the imposition of civil penalties of up to $6,000 per day for each day in which compliance failure persists (Public Resources Code Section 30821.6). In the event we have to take formal action to enforce the Order, the Commission would also seek attorney's fees under Code of Civil Procedures Section 1021.8. The Commission may also seek other remedies pursuant to Public Resources Code Sections 30810 and 30811 regarding any new Coastal Act violations on the site and Sections 30820 and 30822 regarding knowing and intentional violations of the Coastal Act. In addition, Section 30812 of the Coastal Act allows the Executive Director, after providing notice and opportunity for a hearing, to record a Notice of Violation of the Coastal Act against the property. Commission staff will send you a subsequent notice prior to proceeding with recordation of a Notice of Violation in this matter. We look forward to resolving this matter and hope to do so without needing to take any such formal actions.

Please call me at 415-597-5894 if you have any questions about this letter.

Sincerely,

Sheila Ryan
Headquarters Enforcement Officer

Enclosure: March 15, 2005 site visit photo

cc: Lisa Haage, Chief of Enforcement, CCC
Al Wanger, North Central District Office, CCC
Don Neubacher, Superintendent, Point Reyes National Seashore
Todd Carr, Senior Planner, Marin County Community Development Agency
Judy Davidoff, attorney for Mr. Lunny

Exhibit 9: Photographs of commercial facilities (photographs on this page were taken during an August 9, 2007 site visit).

Exhibit 9: Photographs of commercial facilities (photograph on this page was taken during a July 17, 2007 site visit).

Exhibit 10: Photographs of residential development on the property, taken during an August 9, 2007 site visit.

STATE OF CALIFORNIA – THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

June 5, 2007

Kevin Lunny
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

RE: Drakes Bay Oyster Company Aquaculture Operations in Drakes Estero

Dear Mr. Lunny:

I am writing concerning the Drakes Bay Oyster Company's aquaculture operations in Drakes Estero. As you know, the Coastal Commission issued a Cease and Desist Order to the previous owner, Johnson's Oyster Company ("JOC") for various Coastal Act violations concerning the onshore oyster operations along Drakes Estero. Commission staff has been in communication with you concerning compliance with this Order, including information required to complete your application for a Coastal Development Permit as required under the Order.

Recent information has come to our attention regarding your offshore aquaculture operations that raises concerns about potential impacts to sensitive resources in Drakes Estero. In particular, we are concerned about adverse impacts your operations may be having on coastal resources such as eelgrass, harbor seals, and black brant and other shorebirds, as well as the potential introduction of exotic and invasive species in this sensitive area. In addition, it appears your expanded operations have not received necessary permits, including a coastal development permit from the California Coastal Commission. These concerns are discussed in more detail below.

Background. Drakes Estero is within Point Reyes National Seashore ("Point Reyes"), which was established in 1962[1]. Drakes Bay Oyster Company is the only aquaculture operation located within the Drakes Estero portion of Point Reyes, an area designated as potential wilderness under the Point Reyes Wilderness Act of 1976[2]. In the early 1960s, prior to the designation of Point Reyes, JOC was operating aquaculture activities in Drakes Estero pursuant to a lease/allotment from the State of California ("State")[3]. In 1965, after the designation, the State conveyed the submerged lands within Drakes Estero to the federal government, subject to certain limitations, including the reserved right of "the people of the state . . . to fish in the waters."[4] In 1972, the National Park Service ("NPS"), which administers Point Reyes, purchased approximately five acres of dry land along the banks of Drakes Estero from JOC, subject to a reservation of a terminable right allowing JOC to use and occupy approximately 1.5 acres of the land for

[1] Public Law 87-657 (Sept. 13, 1962)
[2] Public Laws 94-544 (Oct. 18, 1976) and 94-567 (Oct. 20, 1976)
[3] State Department of Fish and Game Oyster Allotment No. 2 and, later, Allotment No. 72.
[4] Stats. 1965, Chap. 983

"processing and selling . . . oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012, at which time it is expected that aquaculture operations will cease and the NPS will obtain a full wilderness designation for Drakes Estero. The federal government thus came to own both the onshore and offshore property upon which the aquaculture operation is located. At about the same time, the NPS issued a term-limited Special Use Permit to JOC, NPS Special Use Permit No. 8530-121, for the use of both the dry land and the tidelands for purposes similar to those listed in the reservation of right. In 2005, you purchased JOC, and you began operations under the business name Drakes Bay Oyster Company ("DBOC").

According to a recent California Department of Fish and Game ("DFG") Report from March 2007, DBOC has increased the number of oysters being cultivated in the Estero from a pre-purchase level of roughly one million oysters in 2004 to a current production level of approximately nine million oysters and one million clams. We believe that this increase in operations within the Estero may be adversely affecting coastal resources.

Impacts to Coastal Resources.

Harbor Seals. Drakes Estero is one of only five major seal colonies at Point Reyes. The Point Reyes harbor seal population represents the largest concentration of harbor seals in the State of California outside of the Channel Islands and accounts for as much as 20% of the total mainland breeding population. Drakes Estero and the nearby Double Point area of Point Reyes provide habitat for as much as half of this population during both the breeding and molting seasons, and the beaches and intertidal sand bars within the Estero function as essential seal haul-out and pupping areas through the spring and summer seasons. Harbor seals are year-round residents of the Estero, with as many as 2,000 breeding/molting individuals and 300-500 pups annually.

The regional significance of Drakes Estero as a harbor seal mating, molting, and pupping area, combined with the sensitivity to disturbance of this population during these critical life stages, was instrumental to Drakes Estero's designation as potential wilderness and in 1995 prompted the NPS to prohibit the use of the Estero for recreational kayaking and canoeing each year from March to July.

Harbor seals have been directly affected by oyster operations in the past, but disturbances to resting and breeding seals appear to have increased in 2007. Since March of this year, park biologists documented oyster boats disturbing mothers with pups, and the placement of oyster bags on and near sandbars where seals would normally give birth and nurse their pups. The science advisor to the National Park Service, who has amassed 25 years of continuous data about the harbor seal nursery at the Estero, has documented evidence of recent adverse impacts to harbor seals in intertidal areas affected by oyster and/or clam culture operations. Disturbance to seals by oyster boats and aquaculture activities in these areas has reportedly caused seals and

pups to be "flushed"[5] into the water on at least several occasions and may have interfered with the use of these important haul-out areas by breeding and pupping seals. Accordingly, we are concerned that your operations near these intertidal sandbars are having an adverse affect on harbor seals in the Estero.

Eelgrass. Drakes Estero is one of only a few sites with significant eelgrass beds in California. These beds represent approximately 7% of all eelgrass in California, and at 750 acres, comprise one of the most expansive contiguous eelgrass sites in the state. These eelgrass beds provide important habitat and food resources for many species, including spawning and larval fish, over-wintering black brant, and invertebrates. Within Drakes Estero, many species such as Pacific herring, bay pipefish, gammarid and caprellid amphipods, the sea slug (*Phyllaplysia taylori*), and several shrimp species are directly dependent on eelgrass beds. Eelgrass is very sensitive to light, nutrients, pollution and sedimentation, and is thus an excellent indicator of estuarine health. Oyster farming has a number of impacts on eelgrass: it reduces the amount of light available to eelgrass beds because of shading by racks; it increases the amount of sedimentation and turbidity due to deposition of oyster pseudo-feces and trapping sediment; and it can contribute biocides and chemical pollutants to the marine environment from treated construction materials and from general operations.

As much as 96% of DBOC's oyster racks are located in the Estero's eelgrass beds and the eelgrass beds in these areas appear to have been significantly affected by the oyster racks, with approximately eight acres of eelgrass directly lost due to shading from the oyster racks, and an additional 50 acres potentially suffering secondary impacts from propeller cuts, anchoring, etc.

Black Brant and Other Birds Species. Recent reports from the NPS science advisor and NPS volunteer monitors have shown that oyster cultivation operations have resulted in the periodic flushing and abandonment of roosting sites by up to several hundred black brant – a species of marine goose that has been included on both the Audubon WatchList and the IUCN Red List of threatened species and is protected under the Migratory Bird Treaty Act. Large numbers of these birds migrate from the Arctic to Point Reyes each year, and Drakes Estero provides vital wintering habitat due to its large eelgrass beds. Also, hundreds to thousands of brown pelicans, a federally protected species, congregate at the Esteros (Drakes and Limantour) from the summer through December, feeding on large schooling fish such as anchovies, herring, and smelt, and resting on tidal mudflats. Other species that occur in large numbers are Caspian terns, gadwall, ruddy duck, American widgeon, bufflehead, green-winged teal, Western and least sandpiper, dunlin, and black-bellied plover. Based on the observed effects on black brants and your operation's use of tidal mudflats that may serve as roosting and foraging habitat for shorebirds, we are concerned that your aquaculture operations in the Estero may be adversely affecting these bird species as well.

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[5] In this context "flushing" refers to the behavioral response of harbor seals that causes them to leave their haul-out sites and enter the water when confronted with a disturbance.

Other Environmental Impacts. The Drakes Bay Oyster Company operation also has the potential to cause negative impacts throughout both Drakes Estero and the larger coastal region through inadvertent or intentional introduction of exotic invasive species that may result from aquaculture activities. The marine ecologist with the Point Reyes National Seashore has noted that many of the apparently older and larger oysters growing on racks had extensive non-native, highly invasive tunicates (*Didemnum* species) growing on them. This species is an aggressive invader that has had substantial ecosystem and financial impacts in New Zealand, several west coast estuaries and the Grand Banks off Newfoundland. Other fouling organisms (native and non-native sponges, tunicates, bryozoans, and mussels) have been observed by Park Service staff, as well as researchers from UC Davis, on both oysters and racks throughout the estuary. Introduced species released within Drakes Estero have the potential to become established and spread to other adjoining water bodies resulting in potentially significant and widespread economic, commercial, and ecological effects.

In addition, the placement of large amounts of hard substrate (oyster racks and bags) and the cultivation of large numbers of filter-feeding non-native oysters within Drakes Estero, an area traditionally characterized by eelgrass, intertidal sand flats, and other areas of soft benthic habitat, has the potential to alter the overall ecology of the Estero. Increases in the availability and abundance of hard substrate within the Estero, due to the placement of human-made structures and materials, would not only enable the cultivation of exotic commercial species of clams and oysters but may also result in the establishment and spread of suites of additional species that specialize on these habitat types and would not typically be found within the Estero during more natural conditions when the amount of available hard substrate would be very limited. This would increase competition for resources within the Estero and could substantially alter the types and numbers of species making use of the Estero and its corresponding ecological vitality. The cultivation of large numbers and quantities of filter-feeding exotic species within the Estero would result in the removal of substantial quantities of planktonic organisms and organic matter from the Estero's waters. Based on an individual oyster's estimated potential to filter and remove planktonic organisms from up to 50 gallons of water per day, the current cultivation of as many as nine million oysters within the Estero can be estimated to result in the filtration of approximately 450 million gallons of water per day. On a continual basis, this level of filtration could potentially result in competition for food resources and negative impacts to native clams and benthic filter-feeders that naturally occur within the Estero and rely on the same types of planktonic food sources that are being removed by cultivated exotic oysters and clams.

Authorizations. It appears that you may not have all the required permits and authorizations for your expanded aquaculture operation, including but not limited to coastal permits from the Coastal Commission, federal permits from the U.S. Army Corps of Engineers ("Army Corps"), and use permits from the NPS. A coastal development permit ("CDP") may be necessary to authorize your current operations in, and use of, the Estero. Pursuant to the definition of development in the Coastal Act[6], a CDP from the Coastal Commission is required for, among other things, any "change in the intensity of use of water" that occurred anytime after February 1,

[6] Cal. Pub. Res. Code § 30106

1973, the effective date of the Coastal Zone Conservation Act of 1972.[7] If, after the above-referenced date, the racks have been moved to different locations, or new racks have been installed for the increase in oyster production, a CDP may have also been required for the following additional form of "development": "on land, in or under water, the placement or erection of any solid material or structure." Therefore, a CDP may be required for such actions as: 1) increase in the intensity of the aquaculture operations from the 2004 pre-purchase level of one million oysters to the current level of nine million oysters and one million clams, and the geographic expansion into seal pupping areas; 2) addition of new species (addition of new oyster, mussel, or clam species not previously authorized under DFG or NPS permits); 3) the addition of new materials or structures to the environment (installation of new racks and/or changing locations of existing racks); and 4) change in the type of aquaculture (new and/or expanded use of bottom culture bags).

Finally, if either Section 404[8] or Section 10[9] Permits are required by the Army Corps of Engineers, the Coastal Commission would have the authority under the Coastal Zone Management Act ("CZMA")[10] to review these permits for consistency with the Coastal Act. The Coastal Commission may also have the authority under the CZMA to review the National Park Service's special use permits for consistency with the Coastal Act.

In summary, Commission staff has identified several types of potentially significant adverse impacts to coastal habitat and wildlife resulting from aquaculture operations in Drakes Estero, including concerns about adverse impacts on harbor seals and the potential for reduced reproductive success; direct and indirect loss of eelgrass habitat; impacts to a number of bird species including federally listed and protected species; and the potential introduction of invasive species. We would like to work with you and the NPS to find ways to minimize adverse impacts from your operation, and to work with you to process your application for the necessary authorizations under the Coastal Act.

Please contact Alison Dettmer, Deputy Director, of my staff to discuss the matter of obtaining coastal permits for offshore operations. She can be reached at 415-904-5205. We recommend that you also contact the Army Corps to pursue any appropriate federal permits that they are authorized to grant.

Sincerely,

PETER M. DOUGLAS
Executive Director

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[7] Cal. Pub. Res. Code § 27000 *et seq.* (repealed).
[8] 33 U.S.C. § 1344
[9] 33 U.S.C. § 403
[10] 16 U.S.C. §§ 1451 *et seq.*

cc: Senator Dianne Feinstein
Steve Kinsey, Marin County Supervisor, District 4
Don Neubacher, Superintendent, Point Reyes National Park
Jane Hicks, Army Corps of Engineers
Al Wanger, Deputy Director
Alison Dettmer, Deputy Director
Lisa Haage, Chief of Enforcement
Michael Endicott, North Central Coast District Manager
Jo Ginsberg, Enforcement Analyst
Cassidy Teufel, Coastal Program Analyst

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
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VIA CERTIFIED AND REGULAR MAIL

October 3, 2007

Kevin Lunny
Drake's Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937

Subject:	**Notification of Intent to Commence Cease and Desist Order Proceedings**
Violation No.:	V-7-07-001
Property Location:	Property is located within the Point Reyes National Seashore and is referred to as Drake's Bay Family Farms, with onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and offshore facilities in Drake's Estero.
Violation Description:	Unpermitted development consisting of offshore aquaculture facilities and operations and onshore harvesting and processing facilities and operations.

Dear Mr. Lunny:

Thank you very much for meeting with my staff at the Commission's San Francisco office on August 30, 2007, to discuss resolution of this situation and to clarify the current extent of your operations and the protocols that you have implemented to protect the valuable and sensitive resources in Drake's Estero. Staff has informed me that the meeting was very informative and productive and that they look forward to continuing to work collaboratively with you. As we have previously stated, the necessary and appropriate first step in the resolution of this matter is the issuance of a Commission cease and desist order, to address the fact that operations are ongoing in the absence of any Commission authorization, and, as you know, we would prefer to address this matter through a consent cease and desist order. During the August 30, 2007

meeting, my staff reviewed a draft consent order with you and intends to continue to work with you to reach a resolution through the consent order process. This letter is a formal requirement, under Section 13181(a) of the Commission's regulations (Cal. Code Regs., Title 14, § 13181) for the issuance of a cease and desist order, and is intended to facilitate that process. Thus, I am hereby, in accordance with the Commission's regulations, notifying you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to commence proceedings for the issuance of a cease and desist order addressing unpermitted development on property located within the Point Reyes National Seashore that is referred to as Drake's Bay Oyster Company, including onshore facilities located at 17171 Sir Francis Drake Blvd. in Inverness, Marin County and offshore facilities in Drake's Estero (the onshore and offshore areas will hereinafter collectively be referred to as "the property").

As you know, the property is owned by the National Park Service (NPS) but you currently occupy the onshore portion pursuant to a reservation of "right to use and occupy," which accompanied the 1972 deed through which NPS obtained title to the property, and you use both the onshore and offshore portions for an oyster cultivation venture. The property consists of approximately 1600 acres offshore and approximately 1.5 acres onshore. The proposed order will direct you to: 1) cease from performing any further development activity on the onshore and offshore portions of the property without first obtaining a Coastal Development Permit (CDP) or other Coastal Act approval[1]; 2) cease from expanding or increasing the intensity of use of any existing unpermitted development on the property without first obtaining a CDP; 3) comply with the protective measures set forth in the Order; 4) complete the National Park Service's special use permit process by the schedule set forth in the Order, and implement any steps authorized or required by any special use permit obtained, unless inconsistent with another term of this Order; 5) revise the project description in CDP Application No. 2-06-003 to include all onshore and offshore development; 6) complete the CDP application by the deadline set forth in the Order and allow the application to proceed through the Commission permitting process according to applicable laws; and 7) implement and comply with all the terms of any permit issued, including the removal of any development that is denied under a Commission permit action in this matter if such removal is necessary.

As discussed with staff, please include in your application all items of the unpermitted development that you would like to retain, and any new development which you would like to apply for under the Coastal Act. The Order may include a provision that required removal of any development, as that term is defined in Section 30106 of the Coastal Act, that is not included in your application, as it will continue to constitute unpermitted development even if a permit is granted, or any development denied by the Commission as part of the Commission action on the permit application. Staff is happy to work with you once an order is issued to help you to comply with these conditions and with all terms and conditions of the order to reach a comprehensive resolution in this matter.

[1] The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

The unpermitted development activities at issue were undertaken on the property, and include both the construction/installation of structures and the performance of ongoing activities. The activities constitute "development" as defined by Section 30106 of the Coastal Act and Policy 22.56.0301C of the Marin Local Coastal Program (LCP) Implementation Plan and require a CDP pursuant to Coastal Act Section 30600 and LCP Policy 22.56.040I.[2] No CDP has been obtained to authorize the development. Consequently, the unpermitted development violates the Coastal Act and the LCP. We appreciate your willingness to resolve these violations.

Commission staff most recently conducted site visits on July 17, 2007 and August 9, 2007, to observe current site conditions and to preliminarily evaluate the potential adverse impacts from your operations, which should be addressed through the NPS permitting and Commission enforcement and permitting processes. These potential impacts include water quality impacts, impacts to harbor seals such as decreased reproductive success, direct and indirect loss of eelgrass habitat from boat propellers and oyster bags and racks, impacts to federally listed and protected bird species such as the black brant and brown pelican from boating in roosting areas and loss of foraging habitat, and the potential introduction of invasive species. These impacts require immediate attention. The proposed order will set forth protective measures meant to preliminarily address the impacts and will as establish a reasonable timeline for completion of the NPS and Commission permitting processes.

Violation History

In 1972, NPS purchased approximately 5 acres of land along the banks of Drake's Estero, in the Point Reyes National Seashore, from Johnson's Oyster Company ("Johnson's"), the owner at that time, subject to the reservation of a right allowing Johnson's to use approximately 1.5 acres of the land for "processing and selling... oysters, seafood, and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto" until 2012. NPS then issued Special Use Permit No. 8530-121 to Johnson's for the use of an additional 2.2 acres of land for the purpose of providing interpretive and visitor services "and for the operation and the utilization of tidelands for purposes related to the operation of the oyster farm."

In 2003, after attempting to resolve numerous Coastal Act/LCP, building code, and health and safety code violations on the property since 1989, Marin County requested that the Commission assume enforcement authority over the property with respect to Coastal Act violations. Accordingly, the Commission issued Cease and Desist Order No. CCC-03-CD-12 in December 2003, which required the removal of some of the unpermitted development from the property and submittal of a CDP application for after-the-fact authorization of some of the unpermitted development.

After you purchased the business from Johnson's at the beginning of 2005 and began operations as Drake's Bay Oyster Company, you generally undertook compliance with the Cease and

[2] The Commission certified the Marin County LCP on April 1, 1981.

Desist Order. Commission staff has worked with you for two years to bring the property into compliance with the Cease and Desist Order and with the Coastal Act. Unfortunately, during this time, new development, including the installation of two large containers being used to house the production facilities including shucking and packing, construction of a processing facility, placement of a temporary construction trailer, grading, and paving has occurred on the property without any CDPs, and there are concerns that your current, unpermitted operations may have adverse impacts on the flora and fauna of the Estero and the water quality of the Estero and surrounding areas. For example, Commission staff has received reports that boats owned and operated by Drake's Bay Oyster Company have veered too close to harbor seal pupping/haul out areas while en route to work on oyster racks and bags in the Estero. A consent order in this matter may help resolve such issues and avoid misunderstandings in the future.

You submitted a CDP application in January of 2006, seeking after-the-fact authorization for the placement of an 8x40' trailer containing a shucking plant, 20'x8' trailers, 40'x8' containers, construction of a porch at the managers residence/office, installation of fencing, a parking lot, a display aquarium and shellfish tanks, and for authorization to remodel four existing buildings including replacing roofs, paint, and trim, and adding ADA-compliant bathrooms. The application is not yet complete. Commission staff is aware that a conditional use permit from NPS is required to complete your application and that you are in the process of obtaining such a permit from NPS. The proposed order establishes a reasonable timeline to proceed through the NPS permit process and, subsequently, the Commission permitting process. The order will also include provisions to be undertaken immediately in an attempt to ensure protection, in the interim, of the valuable resources that are protected under Chapter 3 of the Coastal Act and upon which you rely for your aquaculture operation. We believe such measures are in the best interests of you and the Commission, and we look forward to working with you on a consent order that will allow us to work cooperatively toward resolving the violations and getting all necessary permit requirements addressed at the site, while protecting the sensitive natural resources on which those operations rely.

Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states the following:

> *(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:*
>
> *(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.*

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

The unpermitted development at issue in this matter clearly constitutes "development", and therefore, requires a CDP. No CDP authorizing any item of the cited development has been issued. You have expressed your willingness to complete your CDP application in an effort to obtain the necessary authorization for the development at issue. The mechanism to facilitate this process and to ensure that it proceeds in a timely manner, which is in the Commission's and your best interests, is a cease and desist order. As I have previously stated, we would prefer that the order be a consent order, which will provide you with the opportunity to collaborate with staff and to have input into the process and timing of any removal of unpermitted development should such removal be required. Therefore, I am issuing this notice of intent to formally begin the order process, with the intent to accomplish our goals through a consent order.

In accordance with Sections 13181(a) of the Commission's regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent for the proposed cease and desist order by completing the enclosed Statement of Defense form. **The Statement of Defense form must be returned to Christine Chestnut in the Commission's San Francisco office, using the address provided on the letterhead, no later than October 22, 2007**. Submittal of a Statement of Defense will not be necessary if you reach agreement with Commission staff on a consent order, although you are not precluded from submitting a Statement of Defense form in that instance.

Please be advised that Coastal Act Sections 30803 and 30805 authorize the Coastal Commission to initiate litigation to seek injunctive relief and an award of civil penalties in response to any violation of the Coastal Act. Coastal Act Section 30820(a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty not to exceed $30,000 per violation. Further, Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs any development in violation of the Coastal Act can be subject to a civil penalty of up to $15,000 for each day in which each violation persists. Additional penalties of up to $6,000 per day per violation can be imposed if a cease and desist or restoration order is violated. Section 30822 further provides that exemplary damages may also be imposed for knowing and intentional violations of the Coastal Act or of any orders issued pursuant to the Coastal Act.

Commission staff has tentatively scheduled the hearing for the proposed cease and desist order during either the October or November 2007 Commission meeting, depending on the progress made during further consent order discussions and the time necessary for additional discussions in order to reach an effective and comprehensive resolution. Thank you again for all of the time and effort that you have put into this process. We appreciate your cooperation and commitment to ensuring that your operations are conducted in a way that complies with the Coastal Act and

other applicable laws. If you have any questions or concerns regarding this letter or any aspect of this matter, please contact Christine Chestnut at 415-904-5294.

Sincerely,

Peter Douglas
Executive Director

Enc. Statement of Defense Form for Cease and Desist Order

cc w/o Enc.: Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Nancy Cave, Northern California Enforcement Program Supervisor
Alison Dettmer, Energy and Ocean Resources Program Manager
Cassidy Teufel, Energy and Ocean Resources Analyst
Charles Lester, Deputy Director
Michael Endicott, North Central District Manager
Jo Ginsberg, North Central District Enforcement Analyst
Christine Chestnut, Statewide Enforcement Analyst