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Marine Mammal Commission (MMC) Attn: Drs. Tim Ragen and Samantha Simmons
4340 East-West Highway, Suite 700 Bethesda, MD 20814
301-504-0087 / ssimmons@mmc.gov / tragen@mmc.gov

Re: Draft Terms of Reference: Review of Harbor Seal and Human Interactions in Drakes Estero

Dear Drs. Ragen and Simmons:

Thank you for your explanation of your decision to agree with 2 of our 4 panelist recommendations and with 2 of 3 of the commercial interest's recommendations. We will accept these decisions. However, we would like to confirm that further MMC decision-making will be similarly based on substance rather than efforts to create an arbitrary "balance" or "consensus" between a commercially-funded interest and non-profit interests that are already "not in balance" and which have had great difficult in achieving any consensus or agreement throughout the history of this issue. For example, if non-profits present 10 recommendations that the MMC believes are all valid and appropriate, but the commercial interest does not support or agree with any of the 10, then we would hope that the MMC would not discard 5 appropriate recommendations just to create an arbitrary "balance." Please confirm.

Please find below our twelve concerns re the Terms of Reference as represented by underlined additions and ~~struckthrough deletions~~ with discussion of our rationale.

- 1) "Do oyster farming and other human activities have ~~potentially significant~~ effects on the Drake's Estero harbor seals ~~population~~..." (Pg 2)

Discussion: As we indicated in our May 2009 letter, the Marine Mammal Protection Act (MMPA) defines "take" broadly and does not limit or qualify the definition to effects only on "population" nor to only "potentially significant" effects. The correct scientific baseline should be the existing law as indicated by the Draft's unqualified text on page 5: "*effects on harbor seals*"... "*risks to the seals*" (emphasis ours)

- 2) "The Estero is ~~protected~~ afforded the highest level of resource protection as a part of the Point Reyes National Seashore under the 1976 Wilderness Act and other applicable laws and NPS policies." (Pg 2)

Discussion: We agree that the question of whether aquaculture should be allowed in a wilderness area "is a matter of policy beyond the scope of this review." However, NPS policies and federal laws applicable to Drakes Estero, including the MMPA and the Wilderness Act, must all be acknowledged in order to establish the correct scientific baseline from which to judge potential seal impacts and by which to review NPS management actions. The seal impact baseline for the Estero should ideally be the wilderness condition, or at least the condition of the Estero in 2004, the NEPA "existing condition" at the time the oyster operation was sold (and a NEPA analysis should have been done).

- 3) “The population in Drake’s Estero PRNS has been thought to represent about 20 percent of the total California population, which has recently been estimated to be about 34,000 (Caretta et al. 2008). ~~However, whether the number of seals using the estero approaches 6,800 is not yet clear.~~ The harbor seal population in Drake’s Estero is estimated to produce 300 to 500 pups annually, ~~which is somewhat less than might be expected from an overall population of 6,800 seals. . . .~~location and timing of haul out vary with time of day, tide level, current direction, weather, season, year, disease outbreaks, preferential use by seals with pups, disturbances from other wildlife, and human activities.”(Pg 3)

Discussion: We believe the 20% figure applies to the entirety of PRNS, not to Drakes Estero alone, thus the concern about expected Estero pup numbers not matching this total is unfounded. Another Sierra Club concern was that the NAS Report appeared to treat all haul-outs equally such that if seals were simply displaced from one haul-out to another, then there would be no effect on the population. Conversely, our May 2009 letter pointed out that mothers with pups preferentially select the safest haul-outs (those not connected to land and thus predator access) and that chronic displacement would likely result in increased predation and long-term population impacts.

- 4) “Historically and currently, the shellfish species produced include Pacific oysters, ~~Kumamoto oysters~~, Manila clams and purple hinged rock scallops. These are non-native species that it is claimed do not spawn independently in Drake’s Estero because the water temperature is too cold, however, it no longer seems safe to assume that Pacific oysters can’t become established.”(Pg 3)

Discussion: Kumamoto oysters are not permitted per the aquaculture lease. Additionally the NAS Report was criticized for omitting scientific evidence that Pacific oysters may be spawning in areas of the Central Coast of California (and elsewhere) formerly thought too cold. San Francisco Estuary Institute 2008 Exotic Oyster Survey, Removal and Research in San Francisco Bay (Pg 19-20): *“In the past two decades, C. gigas has also spread invasively in the Dutch and German Wadden Sea, where it was thought it could not establish...the recent collection of nearly 500 settled C. gigas in San Francisco Bay at two apparently distinct sites, possibly from two different source populations, and apparently involving settlement in more than one year, is striking, and suggests that something now differs from the circumstances of previous decades. . . .despite the several decades that C. gigas have been cultured in central California without becoming established, it no longer seems safe to assume that they can’t become established here.”*

- 5) “Oyster production numbers are depicted in the following figure (from the National Academy of Sciences report), however, there is currently no independent way of verifying these numbers.” (Pg 3)

Discussion: There have been considerable efforts made to question the authenticity of NPS data, but the self-reported oyster production data (based on tax payments that may create a bias to undercounting) have been accepted to date without question. Becker’s analysis that found an annual correlation between seal counts and oyster production (adjusted for ENSO effects) relied on this data. If the undercounting is consistent year-to-year, then such reliance may be acceptable. Nonetheless, a proportionate effort should be made to insure the reliability of oyster production data.

- 6) ● ~~“hikers~~ who also may disturb seals, ~~particularly where one of the hiking trails passes close to one of the seal haul-out sites...~~
- ~~predators~~ (e.g., coyotes) that have access to one haul-out site from land and may kill seal pups or disturb hauled out seals; and
- **human-caused disease, contaminants, and other environmental factors, including seasonality and duration of disturbances all...**”(Pg 4)

Discussion: Hikers: we are not aware of any hiking trails that pass close to seal haul outs, however, we have suggested closure during pupping season of certain trails that facilitate *off-trail use* that can impact seals. Predation: The issue, as correctly stated in the Risk Factor opening paragraph is “human effects on harbor seals.” Thus predation should not be considered a “disturbance” but rather part of the natural processes that NPS is mandated to allow to occur in the Estero untrammled. Human caused: disease etc should only be considered when caused by humans. The Becker-demonstrated ENSO impact on the Estero’s seals, for example, should not be considered a “disturbance” because it would inflate the baseline and incorrectly minimize all human impacts if natural causes were included. Thus, oyster impacts to pupping seals in the Estero should only be compared to other human impacts to pupping seals in the Estero. Additionally, disturbances during pupping season are more likely to impact population than disturbances during other seasons. And long-term habitat impact (e.g. the placement of oyster equipment on a haulout when seals are not present) may not even count as a “seal disturbance” yet is more likely to impact population than a fleeting disturbance to individual seals.

- 7) “Request to Commission: In Spring 2007, the Superintendent of Point Reyes National seashore brought to the attention of the MMC Executive Director that activities associated with oyster farming were leading to disturbance of harbor seals in Drakes Estero. On 9 June 2009 the National Parks Conservation...”(Pg 4)

Commission Response: The Executive Director responded to PRNS on May 8, 2007, ‘I would appreciate an opportunity to inform our Commissioners regarding this situation so that we might comment...’ On 1 July 2009 the Commission responded to the environmental organizations ...” (Pg 4)

Discussion: We believe it important to include the full history, given that the Inspector General criticized the PRNS Superintendent for “exaggerating” that the MMC was going to take up the seal disturbance issue in his May 2007 statement to the Marin Supervisors when in fact the MMC is indeed taking up the issue albeit two years later.

- 8) “To that end, the Commission will focus its review on the question of whether oyster farming or other human activities are having significant adverse effects on harbor seals in Drake’s Estero. The review will (1) use existing data, (2) evaluate the strengths and weaknesses of those data, including information gaps, and (3) recommend research and management activities to reduce scientific uncertainty and insure the protection of harbor seals and their habitat consistent with all laws and policies applicable to Drakes Estero. “(pg 5)

Discussion: see Discussion under #1 and #2 of this letter.

- 9) “...one day of invited, data-based presentations, including all laws and policies applicable to Drakes Estero from involved parties including National Park Service, Drakes Bay Oyster Company, California Department of Fish and Game, Sierra Club, National Parks Conservation Association, Marin County Board of Supervisors and the California Coastal Commission. Presentations and other meetings will be open to the public and, except as noted below, will be followed by an opportunity for public comment...”

Discussion: see Discussion under #2 of this letter.

- 10) 1965: State transfers Drakes Estero and primary shellfish jurisdiction to NPS (Pg 8)

1972: NPS purchase of the Johnson Oyster Company land includes a 40-year terminable Reservation of Use for commercial shellfish production. (Pg 8)

1976: “Congress passed the Point Reyes Wilderness Act designating Drake’s Estero as ‘potential wilderness.’ The Act’s House Committee Report notes ‘...with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.’ Commercial operations and structures are considered as obstacles to wilderness status. The designation granted the oyster farm a special federal lease to continue operation until 2012” (Pg 8)

2005: “Kevin Lunny purchased the oyster farm after having been provided with the NPS Solicitor’s written legal opinion that the commercial operation’s Reservation of Use could not be extended past 2012 due to the intervening Wilderness Act. and Mr. Lunny petitioned the Coastal Commission for a special-use permit to continue operating the farm. Mr. Lunny, agreed to clean up the farm and take responsibility to correct the previous owners violations. Mr. Lunny began negotiations with the National Park Service a lobbying effort to extend the federal lease the commercial operation past 2012.” (Pg 8)

Discussion: It is unclear why the MMC includes this background given its position that “should aquaculture be allowed in a designated wilderness area...is a matter of policy beyond the scope of this review. “ However, if this background is included, then it is critical to get the facts right beginning with the recognition of the State’s 1965 grant to NPS of primary jurisdiction over the Estero and the aquaculture operation. Furthermore, the 1976 Wilderness designation did not grant the oyster farm a “special lease” to continue until 2012. Instead, the Act grandfathered the pre-existing 1972 Reservation of Use and Occupancy (RUO) that was terminable by NPS prior to 2012. The ROU stated that use past 2012 could be authorized by NPS only if consistent with applicable laws and policies in effect at the time. The NPS position (stated to Mr. Lunny prior to his 2005 purchase) is thus that NPS did not have the authority to negotiate extending operations past 2012 due to the intervening Wilderness Act. So Mr. Lunny could not and did not begin negotiations with NPS and instead began a successful lobbying effort to override the Act.

- 11) Dec 2007 Goodman claim to NAS of scientific misconduct
Sept 2008 Goodman letter and presentation to NAS
Hulls letter to NAS rebutting NPS/Becker re seals
Hulls letter to Marine Mammal Science rebutting NPS/Becker re seals
Goodman to NAS rebutting NAS/Becker re seals (Pg 8-9)

Discussion: These documents were promised by NAS to us in July 2009, requested of NAS by us in August 2009, requested again from NAS per FACA in September 2009 and have still not been provided for our review. Would the MMC please forward to us these documents as well as Mr. Lunny's letter re appointments to the MMC Review Panel so that this discussion can proceed in the promised state of full transparency?

- 12) Sept 2008 NPS wrote to NAS rebutting Goodman claim of "misusing data regarding an 80% decline in harbor seals..."
- May 2009 NPS wrote to NAS prior to release of the NAS Report: "The [NAS] assertion [that abundant native oysters evidenced in archeological shell middens form the ecological baseline of the Estero] is not supported by the [NAS referenced] Archaeological Overview of Point Reyes National Seashore..."
- May 2009 "National Academies of Science published its final Drake's Estero report omitting reference to the Archeological Overview but continuing to assert that that abundant native oysters form the ecological baseline of the Estero and to assert that "inclusion by Becker of the 2008 seal data could 'call into question' the continued significance of results showing 'potential negative interactions between oyster harvest and seal attendance""
- June 2009 NPS wrote to NAS rebutting the NAS criticism of the Becker seal study: "Here we include the 2008 data in the model using more robust methods than those found in Becker et al 2009, and show that these new data are fully consistent and supportive of the previously reported model..."
- June 2009 NPS wrote to NAS: "NPS identifies errors of fact and logic [regarding seal impacts and oyster baseline], inappropriate references to law and regulation ...the [NAS] report ignores NPS policies and specific park legislation that require maximizing natural processes and preservation of natural conditions through restoration of native species and natural processes and avoidance of introduction of nonnative species. Overall, the report inadequately considers the appropriate application of its scientific findings to informing decisions about the natural resource meaning for a landscape that is included in the natural zone of a unit of the National Park System and that also is designated as potential wilderness. The report strays from its scientific foundation because it is unable to ground the valuable general scientific concepts the Committee synthesized from the broader scientific process literature to known site-specific conditions reported for Drakes Estero. Such straying is contrary to the caution the report itself expresses on page 64: "The ultimate decision to permit or prohibit a particular activity ... necessarily requires value judgments and tradeoffs that can be informed, but not resolved, by science.""

12(cont) July 2009 NAS wrote to NPCA “there may be merit in having the committee consider additional evidence regarding two issues associated with the native Olympia oyster in Drakes Estero”

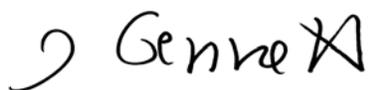
Aug 2009 NPS wrote to NAS: “The [NPS] finds this [NAS Report’s] conclusion to be improbable and indefensible.”

Discussion: Lastly, recognizing the NPS criticism of the NAS conclusions regarding seal impacts and the NPS rebuttal of Goodman’s criticisms regarding seal impacts is critical since it underlines the Sierra Club’s concerns re the appropriate design of the proposed MMC study of seal impacts.

Recognizing the NPS criticism of the NAS scientific baseline and the NPS criticism of the NAS omission of applicable law and policy is critical since it underlines the Sierra Club’s concerns re any proposed MMC baseline. For example, NPS wilderness policies generally preclude their own use of NPS motorboats to patrol and oversee the oyster operation, whose own use of motorboats in the Estero is grandfathered. These NPS wilderness policies create a difficult management situation for NPS comparable to requiring that the California Highway Patrol only use bicycles to patrol the freeways. Thus to accept the impact of the Wilderness Act in NPS management actions, but ignore the impact of the Wilderness Act in determining the scientific baseline would be an incorrect double standard. All of the existing laws and NPS policies applicable to Drakes Estero, not just the MMPA, must be recognized as data that form part of the MMC study’s scientific baseline.

Thank you for the opportunity to review and comment. We look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "Gordon Bennett". The signature is written in a cursive style with a large initial "G" and a stylized "B".

Gordon Bennett, Sierra Club
Marin Group Parks Chair