



Gordon Bennett – Sierra Club Marin Group
40 Sunnyside Dr, Inverness CA 94937
gordonbennett.415.938.7553@gmail.com

December 31, 2009

To: National Park Service (NPS) Attn: Director Jon Jarvis

Re: Drakes Bay Oyster Company (DBOC): NPS Special Use Permit (SUP) and
California Coastal Commission (CCC) Cease and Desist Order (CDO)

Dear National Park Service:

The Sierra Club expresses our deep concern that since signing the SUP, DBOC has violated:

- ▶ All three critically important harbor seal pup nursery areas, then
- ▶ The CCC order not to remove cultivation from the nursery without CCC supervision and now
- ▶ Continues to violate the SUP/CDO by growing clams in locations with environmental risks.

The Sierra Club urges NPS that DBOC's pattern of violations and implausible excuses demands:

- ▶ Imposition of fines for violating the SUP
- ▶ A third-party SUP compliance monitor
- ▶ Expansion of harbor seal protection areas and consolidation of cultivation areas

Harbor Seal Protection Areas

The CCC ordered DBOC not to remove without CCC supervision clam bags in a harbor seal protection area that Mr. Lunny, the DBOC owner, asserted had been misplaced due to an "employee GPS error." Given that the correct site is subtidal and visually separate from the harbor seal sandbar, we question the credibility of the asserted "employee GPS error."

Furthermore, Mr. Lunny also asserted to the CCC that the original move of the clam bags would be done under the direction of a licensed surveyor, not an employee. So at least one of Mr. Lunny's two contradicting assertions is not credible. Now Mr. Lunny has removed the clam bags from the seal area without CCC supervision and offers the further unsubstantiated assertion that no seals were present during the removal. However, this seal haulout is one of only three seal pup nursery sandbars never connected to the mainland. Seals continue to use haulouts covered by higher tides, but their greatest use occurs at lower tides when Mr. Lunny's employees removed the bags. Thus, if Mr. Lunny's assertion is credible that there were no seals present during the bag removal, then it is at least as credible that the reason there were no seals present was due to either the deterrence of the bags themselves and/or the activity associated with the bag removal. Regardless, Mr. Lunny has again violated express orders intended to insure protection of wildlife, which is a violation of the NPS SUP.

In addition to the current incident of clam bags inside seal protection area UEF, attached NPS maps also show DBOC conducting 2008 (ie post SUP/CDO) cultivation activity inside the protection areas OB and EUN. These invasions of all three seal haulouts demonstrate our concern that Mr. Lunny's claimed "GPS" error is not an isolated incident. Furthermore, NPS maps show cultivation activity along the boundary of protection area UEF (presumably when the GPS was working). However, we believe boundaries of the "protection areas" are based on a misapplication of the NMFS Marine Mammal Viewing Guidelines that proposed a minimum approach distance of 100 yards. Ongoing cultivation activity along the length of protection area boundary is not a "viewing" activity and is not an "approach."

The National Academy of Sciences (NAS) Report on Shellfish Mariculture in Drakes pg 39-40 notes: *"The mean distance at which seals are flushed into the water by small boats and people ranges between 80 m and 530 m, with some disturbances recorded at distances of over 1,000 m (Appendix D). These empirical studies have been used to underpin zonation of marine protected areas, for example where a 1.5-km buffer exists around harbor seal haul-out sites in the Dutch Wadden Sea...and where a 500-m exclusion zone around breeding and molting haul-out sites has been included in the mariculture industry's best practice guidelines in Shetland (UK). The 100-yd (91-m) buffer between seal haul-out sites and mariculture activities... follows the guidelines of... the Marine Mammal Protection Act...Some oyster rack and oyster bag areas within Drake Estero are located within 500 m of sand flats used by harbor seals as haul-out sites. Based upon the findings in the studies outlined above and the informal observations of*

biologists who study seals, visits to these areas by oyster farm workers can be expected to lead to the short-term disturbance of any seals using these haul-out areas at the time. Depending upon visibility and wind conditions, disturbance may also occur at greater distances. Furthermore, the work by Brasseur and Reijnders (2001) suggests that seals could be disturbed before they come ashore if boats pass through haul-out areas at high tide."

NPS maps also show '07-'08 cultivation outside the Fish and Game (F+G) lease on UEN within 500m of sandbar A (unmarked bar to the southwest). This undermines the credibility of the much-publicized excuse that DBOC could not possibly have caused the 80% seal decline (2005-2007) on sandbar A because sandbar A was outside the F+G lease. But so was DBOC cultivation. These "location" incidents demonstrate our concern that existing "seal protection areas" are too small, too irregular, and too non-intuitively sited to protect seals. Per NAS, NPS should impose a buffer of 1500m during the pupping season and 500m at all other times until empirical studies show that other buffers result in no change in seal behavior ("take"). DBOC's unused rack should be repaired to consolidate cultivation areas well away from expanded and standardized seal areas that would not require a GPS to locate. After-the-fact fines deter, but going forward, expanded seal protection areas and consolidated cultivation areas would clearly help Mr. Lunny to comply without GPS error and thus seal moms to pup without disturbance.

Growing Clams

NPS should enforce the existing terms of the SUP limiting clams to Lease M-438-02 despite the asserted "clerical error." No credible evidence has been presented of any clerical error and we continue to maintain that the 4-year statute of limitations for correcting clerical errors has long passed for a 1993 contract, yet Mr. Lunny continues to grow Manila clams in Lease M-438-01 based on the previously undisclosed "clerical error." Mr. Lunny offered as evidence of the error a 1993 letter from Johnson Oyster Company (JOC), requesting clams in Lease M-438-01 and a response from F+G allowing clams in Lease M-438-02. However, clerical errors do not occur when an agency with discretionary authority responds to a request to change a permit with a different permit condition. F+G staff described the asserted error in the 12/10/09 Fish and Game Commission meeting as "typographical," yet provided as evidence only a copy of the pre-1993 Lease M-438-02 for scallops. The implication was that since scallop habitat is subtidal yet clam habitat is intertidal, then the 1993 assignment of clams to Lease M-438-02, which is subtidal, must have been a "clerical error." However, F+G staff failed to mention that Lease M-438-02 includes methods (racks and trays) by which intertidal species such as Manila clams can be cultivated in subtidal areas. So the former lease M-438-02 is not inconsistent with clam cultivation and does not evidence a "typographical error."

Even if a clerical error does exist, F+G's ex post facto approval is not sufficient when the approvals of both NPs and CCC are required before the activity occurs. Furthermore, F+G itself has acknowledged that NPS is the primary regulatory authority in Drakes Estero and thus F+G cannot approve new clam production absent the assertion of a previous "clerical error." Mr. Lunny claims the F+G clam lease "clerical error" was just one of the things he had to clean up from JOC, but the JOC violations he agreed to clean up (as well as his own additional violations) were transparently described in the CDO. Yet while Mr. Lunny first asserted a "clerical error" in a personal email to F+G on Dec 29, 2006, he failed to disclose his intention to significantly change the terms of the "existing leases" that NPS and CCC incorporated into the 2007 CDO and the 2008 Use Permit, both of whose existing terms Mr. Lunny agreed to comply with. Mr. Lunny only disclosed the asserted "clerical error" to CCC and NPS after he was caught growing unauthorized clams.

The CCC ordered Mr. Lunny to move the clams to Lease M-438-02, the only area where his clams were permitted by NPS, F+G and CCC. Instead Mr. Lunny successfully appealed to F+G to grow clams only in Lease M-438-01, thus creating a regulatory inconsistency himself that Mr. Lunny then complained to the media that he was a victim of. Regardless, Mr. Lunny signed the SUP that requires clam cultivation in Lease area M-438-02. When his violation was discovered, he told the CCC that he would move the clams to Lease M-438-02. Then he said he had indeed moved the clams to Lease M-438-02. We urge that M-438-02 is where the clams belong now.

NPS should continue to require that the clams be moved to Lease M-438-02 at whatever growing level is appropriate for that area (even if only a few clams) regardless of the number of clams grown without authorization in Lease M-438-01. Only after Mr. Lunny obtains the consent of all 3 agencies to grow clams in Lease M-438-01 should he begin to grow clams there.

Mr. Lunny in his December 9, 2009 letter to NPS makes the unsubstantiated claim that *“the clams were there (in lease M-438-01) prior to 1993-and have been there since...the production is the same.”* However, that claim is not credible. Since the clams take 3-5 years to mature and no clams have been “produced” by DBOC since their acquisition of JOC in 2005, then no clams were planted in the Estero since at least ~2001 and the current planting must have taken place sometime after ~2006. We urge NPS to survey the currently growing clams to independently assess their age and thus when they were planted. Our recent Public Records Act Request to F+G should provide the history of clam production, but regardless it is clear that given a production gap that extends at least back to ~2001, then production cannot be, as Mr. Lunny claims “the same.” In our opinion, the authorization to grow clams in the 1-acre Lease M-438-02 vs the 1059-acre Lease M-438-01 represents a 105,800% increase. The Sierra Club’s 12/02/09 letter to F+G concluded that this change is subject to environmental review under the California Environmental Quality Act (CEQA). NPS in its 12/08/09 letter to F+G added that the change is also subject to the National Environmental Policy Act (NEPA).

Environmental Risks

NPS’s 12/08/09 letter to F+G supported two concerns raised in our 12/2/09 letter to F+G:

- 1) *Potential expansion of Manila clams as an invasive species is a major concern. While Manila clams have been introduced and have spread in other estuaries of California, there is currently no evidence to our knowledge that they escaped or invaded Drakes or Limantour Esteros...Before any expansion of the cultivation of this non-native species, a thorough survey should be conducted...*
- 2) *The addition of bag culture for cultivating manila clams throughout the estero has the added concern of providing a substrate for the highly invasive non-native tunicate, Didemnum”*

Re this second NPS concern, we note that in a 6/07/07 email, California Department of Fish and Game staff attempted to minimize this concern by repeating the opinions of neuroscientist Corey Goodman, who stated to the Marin Supervisors that he was told by an expert that the tunicate would not grow on eelgrass and *“There is no evidence that the Didemnum colonial tunicate has a negative effect on the ecology of Drakes Estero. It is found [only on] oyster racks, it cannot and has not spread to any other substrate...”* However reports from experts in marine biology directly contradict every one of the neuroscientist’s claims. The National Academy noted (pg 52) *“Didemnum...has been reported to have colonized the limited natural solid mud and sandstone substrates and rocks at Bull Point in Drakes Estero. (pg 55) [and] has recently been reported colonizing eelgrass...Its rapid growth and competitive overtopping abilities make it an ecological threat to many native and nonnative invertebrate taxa.”*

Our 12/2/09 letter to F+G also raised two additional concerns

- 3) Manila clam authorization in Lease M-438-01 will greatly increase cultivation activity. The unauthorized placement and subsequent removal of clam bags from the harbor seal protection areas demonstrates this concern. Resident and migrating birds on the Estero will also be impacted by increased cultivation activity.
- 4) Manila clam cultivation in Lease M-438-01 also could increase beyond natural levels the number of shellfish, which consume larvae from the coastal current. Drakes and Limantour Esteros were recently recognized as key links in a network of Marine Reserves designated to facilitate larval transfer.

These concerns underline the need for CEQA/NEPA analyses to inform any decision regarding clam growing in Lease M-438-01, where pre-decision cultivation should not be permitted.

Independent Monitor

Mr. Lunny claims he is a "small family farmer" battling oppressive government bureaucracies despite the fact that Mr. Lunny also owns a paving business with government contracts and a compost business with government subsidies. Furthermore, the July '08 Inspector General Report found no evidence to support Mr. Lunny's accusation that NPS was trying to drive him out of business. To the contrary, the Report showed Mr. Lunny had operated without NPS use permits, violations of federal law for which no penalties were ever assessed. Our review of the CDO indicates that Mr. Lunny has similarly violated virtually every one of its provisions yet has almost always been granted exceptions or extensions by the CCC staff. We suggested to CCC that their forbearance to-date is now beyond adequate. Mr. Lunny's pattern of violations demands a third-party SUP and CDO compliance monitor who can unravel Mr. Lunny's excuses and determine what is truth and what is in reality a sophisticated media campaign.

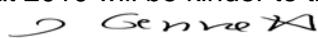
Summary

Mr. Lunny 12/9/09 letter to NPS claims: *"this matter [clam bags in the seal area] could have been addressed far more expeditiously had you or your staff simply picked up the telephone and called us."* But Mr. Lunny has systematically dismissed all NPS communications about seal impacts and thus established the pattern that he now complains he is the victim of. Furthermore, Mr. Lunny failed to pick up the phone to disclose to NPS and CCC the asserted clerical error that significantly changed the terms of the "existing leases" that NPS and CCC accepted and Mr. Lunny agreed to follow. Mr. Lunny only disclosed the "clerical error" to NPS and CCC after he was caught. By failing to disclose this asserted "clerical error" and then by obtaining concurrence from F+G to grow Manila clams where not authorized by NPS or CCC, Mr. Lunny has himself created the regulatory conflict that he again complains he is the victim of.

Mr. Lunny has now not only been caught with unauthorized Kumamoto oysters and Manila clams but also with unauthorized cattle. The NPS Lunny Ranch permit allowed 90 "animal units" or roughly 45 cows producing 45 harvestable 1000-lb yearlings annually. However, Marin County Ag records show that just before Mr. Lunny purchased DBOC, he ramped up cattle from the permitted 90 to about 500, an egregious violation of the NPS permit and the U.S. Fish and Game Biological Opinion. Annual harvests rose from 45 to 281, 290 and 200, which at ~ \$1/lb generated illicit profits of ~\$636,000 (which financed DBOC's \$425,000 purchase price and set-up costs). After the grazing violation was discovered and stopped, Mr. Lunny asserted the was not in violation because he rotated excess cattle off the ranch despite that fact he also stated on the ranch's grass-fed/organic certifications that he grazed all the cattle on the ranch. As with Mr. Lunny's two contradictory statements about the clam move, his two statements about grazing cannot both be true. If his cattle were rotated, then they were misrepresented to consumers as grassfed/organic and if they weren't rotated, then they were misrepresented to US taxpayers as products of correct NPS grazing fees. In either case, Mr. Lunny pocketed illicit profits.

Mr. Lunny has demonstrated a continuing pattern of violations including unauthorized growing of cattle, oysters, clams and who knows what else since Mr. Lunny "picks up the phone" only after he is discovered. This demands a third-party SUP/CDO compliance monitor. The Sierra Club urges NPS not to follow F+G in approving any change in clam cultivation until credible evidence of a clerical error is obtained and even if so, then subsequent CEQA/NEPA analyses have occurred and a resulting NPS decision has been made. In the meantime the clams should be limited to Lease M-438-02 at the level appropriate to the habitat of Lease M-438-02 irrespective of the ~800 bags now growing in Lease M-438-01. Unlike profits reaped from his unauthorized grazing, profits from unauthorized clam growing should not benefit and incentivize Mr. Lunny to further violations. Fines should be imposed by NPS until clams are moved to M-438-02 as Mr. Lunny agreed to do in the SUP, as he said he would do, and as he falsely confirmed he did do.

In hopes that 2010 will be kinder to the Estero's wildlife than 2009,



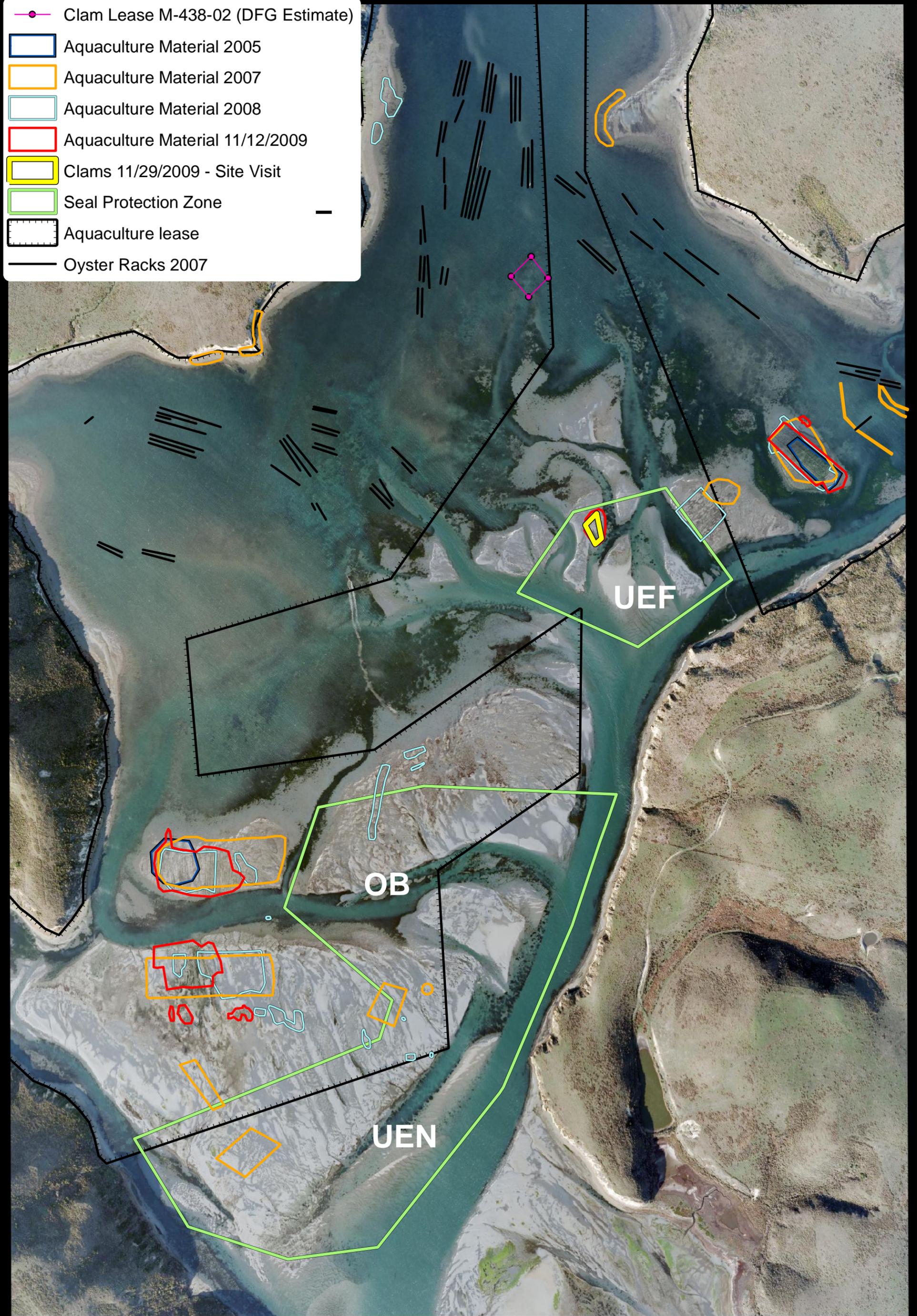
Gordon Bennett, Sierra Club Marin Group Parks Chair

cc: MMC, NPS, Senators Feinstein and Boxer, Rep. Woolsey, Marin Supervisors

Drake's Estero Aquaculture and Seal Habitat



- Clam Lease M-438-02 (DFG Estimate)
- Aquaculture Material 2005
- Aquaculture Material 2007
- Aquaculture Material 2008
- Aquaculture Material 11/12/2009
- Clams 11/29/2009 - Site Visit
- Seal Protection Zone
- Aquaculture lease
- Oyster Racks 2007



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