

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
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September 17, 2009

Honorable Jeff Bingaman
Chair, Senate Energy and Natural Resources Committee
703 Hart Senate Office Building
US Senate
Washington DC, 20510

Dear Chairman Bingaman:

I have been asked by several members of the public to write in connection with the proposed rider to the National Parks Service appropriation that would specifically require an extension for ten years of an exclusive lease to the Drakes Bay Oyster Company (DBOC) located in Drake's Estero within the Point Reyes National Seashore. Obviously, whether such a legislative intervention on behalf of a single commercial operator within a designated potential wilderness area of a National Park is good public policy is a matter for the Congress to decide.

Our concern is that as you deliberate on the proposed rider, you are aware of the regulatory compliance issues relating to this commercial operation pursuant to California's Coastal Act. This operation has a history of State regulatory compliance problems under both the prior owner/operator as well as the current lessee-permittee. I have enclosed a November 29, 2007, Commission staff report prepared in connection with an enforcement action taken pursuant to the California Coastal Act that sets forth the background and then current legal status of various uses DBOC had undertaken without benefit of required State permits. I also enclose a copy of a recent letter sent to DBOC notifying the Company that it is not in compliance with some of the provisions of the Commission's Cease and Desist Order approved pursuant to its staff recommendation on December 12, 2007. Such failure to comply has now necessitated additional enforcement action by the Commission.

In addition to our concerns about ongoing non-compliance with the Commission's previous law enforcement order, we note that the DBOC currently does not have a required coastal development permit for the facility, in its entirety, notwithstanding the fact we have been diligent and accommodating in an effort to bring this operation into compliance with State law. It seems to us that before the Congress bestows a valuable benefit on the DBOC by extending its right to continue its commercial operation for ten years beyond the current required

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expiration date of 2012, it would be prudent to ensure that the beneficiary of such special treatment be required to comply with all State regulatory requirements.

If you or your staff have any questions, please contact me (415 904-5202) or Cassidy Teufel (415 904-5200). We appreciate your consideration of our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Douglas". The signature is fluid and cursive, with the first name "Peter" being more prominent than the last name "Douglas".

PETER DOUGLAS
Executive Director

cc: The Honorable Dianne Feinstein
The Honorable Barbara Boxer

Enclosures:

1. [Coastal Commission's November 29, 2007, Staff Report and Recommendation for Cease and Desist Order](#)
2. Coastal Commission's September 16, 2009, Letter to Drakes Bay Oyster Company

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**SENT BY REGULAR AND CERTIFIED MAIL**

No. 7006 2760 0005 5883 7044

September 16, 2009

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

RE: Compliance with **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

I am writing concerning compliance with the Coastal Commission's Consent Cease and Desist Order No. CCC-07-CD-11 (the Order), which was issued to Drakes Bay Oyster Company (DBOC) on December 12, 2007. As you know, the Order contains a number of terms and conditions, and it has come to our attention that you are out of compliance with one or more of these terms and conditions, as described below.

1. Completion of Coastal Development Permit (CDP) Application. Section 5.2 of the Order requires, within 120 days from the date of issuance of a National Park Service (NPS) Special Use Permit for the operations on the property, submittal to the Coastal Commission (Commission) of all materials which are required to complete Coastal Development Permit (CDP) application No. 2-06-003. The NPS Special Use Permit was issued on April 22, 2008; therefore, all materials required to complete your CDP application should have been submitted no later than **August 20, 2008**, which was more than a year ago.

As noted in a June 10, 2009 letter sent to you from Cassidy Teufel of our staff, your CDP application is still incomplete; there are a number of outstanding items requested in letters to you from Commission staff dated February 22, 2006, May 8, 2006, and September 17, 2008. Since your application is still incomplete, you are out of compliance with **Section 5.2** of the Order.

Section 17.0 of the Order, *Compliance Obligation*, states that failure to comply with any term or condition of the Order, including any deadline contained in the Order, will constitute a violation of the Order and shall result in Respondent being liable for stipulated penalties in the amount of \$250 per day per violation. Thus, staff could assess substantial stipulated penalties

(approximately \$100,000) for your failure to meet the deadline imposed by **Section 5.2** of the Order.

In addition, our Energy and Ocean Resources Division has indicated that staff wishes to have your CDP application heard at the December 2009 Commission hearing. Thus, to allow adequate time for preparation of a staff recommendation, all materials necessary to complete the CDP application must be received in our office by October 5, 2009.

2. Cultivation of Manila clams. **Section 3.2.8** of the Order requires that cultivation of Manila clams shall only occur where currently cultivated in the "cultivation area" defined in **Section 3.2.11** of the Order. **Section 3.2.11** of the Order states that all cultivation shall be confined to areas which are currently included in the Department of Fish and Game (DFG) lease numbers M438-01 and M438-02. **Section 7.0** of the Order requires full compliance with the terms and conditions of any Commission or NPS permit, and also with all applicable laws and regulations.

Commission staff has confirmed that Manila clams are currently being cultivated outside the designated one-acre clam area specified in the DFG Mariculture Lease Number M438-02. We understand that in August of 1993, the Johnson Oyster Company requested a modification of DFG Oyster Allotment Number M438-01 which would have allowed them to cultivate Manila clams within this area. We also understand that in October of 1993, the Fish and Game Commission instead approved a modification of DFG Mariculture Lease Number M438-02 that allowed the cultivation of Manila clams within this one-acre lease. We further understand that in June of 2007, at your request, the Fish and Game Commission was set to consider a modification of DFG Oyster Allotment Number M438-01 to add Manila clams and several other species of shellfish to the list of species able to grown for mariculture purposes in this area. Prior to the Fish and Game Commission's consideration of this modification, it was removed from the agenda at your request.

Although the circumstances underlying the Fish and Game Commission's decision regarding the Johnson Oyster Company's request in 1993 are unclear, it is apparent that you had the opportunity to legally modify DFG lease Oyster Allotment Number M438-01 several years ago. Despite declining to carry out this legal change, you have undertaken the cultivation of Manila clams in DFG Oyster Allotment Number M438-01, an area specified in the DFG lease which "is for the sole purpose of cultivating Pacific oyster (*Crassostrea gigas*), and European flat oyster (*Ostrea edulis*)." We have been in contact with DFG staff about this matter and it is our understanding that they will be working with you to resolve the current issues of compliance with your existing DFG leases. However, until this matter is resolved, you are out of compliance with **Sections 3.2.8, 3.2.11, and 7.0** of the Order.

3. Thermal Discharges and Seawater Use. **Section 3.1.3** of the Order states that 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. It is not clear that such required measures have been adopted. Please describe in writing what measures have been

adopted to minimize the facility's intake and use of seawater, and provide documentation of those measures.

4. **Repair of Oyster Racks.** Section 3.2.1 of the Order states that construction and/or placement of any additional offshore aquaculture racks/cultivation infrastructure is prohibited until Respondent obtains a coastal development permit. It has been alleged that, without benefit of a coastal permit, repair work has begun on oyster racks that have been out of production for so long that eelgrass has re-grown. If repair work has already begun on any oyster racks, that would constitute a violation of Section 3.2.1 of the Order. Please address this allegation in writing, and discuss whether oyster rack repair has begun, and, if so, describe such repair in detail.

Please send us a written response to this letter by **October 5, 2009**. We appreciate the progress you have made so far toward compliance with the Consent Order. As we have noted in the past, we are more than willing to work with you to achieve full compliance with its terms. However, continued delays undercut this progress and we remind you once again of the legal commitment to adhere to the deadlines and processes set forth in the Consent Order. In the interest of resolving all Coastal Act violations expeditiously and in the continuing effort to work cooperatively with DBOC, we are willing to forego assessing stipulated penalties at this time, but we continue to reserve the right to collect stipulated penalties in the future for both this and future issues, should there be continued missed deadlines, additional violations of the terms and conditions of the Consent Order, or should future deadlines be missed. As you know, moving quickly towards a permit application and addressing the lack of a permit for your operation is both legally required, and the original intent of the Consent Order and so we are concerned about the fact that, almost two years later, this hasn't been accomplished. We continue to be concerned about this and would like to work with you to move this process forward quickly.

Thank you for your cooperation. If you have any questions concerning any enforcement matters, please contact me at 415-904-5269. If you have questions concerning completion of your CDP application, you may contact Cassidy Teufel at 415-904-5502.

Sincerely,



Jo Ginsberg
Enforcement Analyst

cc: Cassidy Teufel, CCC, Coastal Program Analyst
Alison Dettmer, CCC, Coastal Program Manager
Lisa Haage, CCC, Chief of Enforcement