State of California - The Resources Agency ARNOLD SCHWARZENEGGER, Governor
DEPARTMENT OF FISH AND GAME
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March 25, 2008

The Honorable Jared Huffman
Assemblymember, Sixth District
Post Office Box 942849
State Capitol Building
Sacramento, California 94249-0006

Re: Drakes Bay Oyster Farm

Dear Assemblymember Huffman:

The purpose of this letter is to explain the position of the Department of Fish and Game (Department) regarding the ongoing issues between the Drakes Bay Oyster Farm and the Point Reyes National Seashore (PRNS). The Department Office of the General Counsel has provided the following discussion.

By way of review, in 1965 the Legislature granted to the United States certain tide and submerged lands in Drakes Estero for the PRNS. This grant contains a reservation of "the public right to fish" on the granted lands, consistent with article 1, section 25 of the California Constitution, and includes the area used by the oyster farm under two state water bottom leases. In November 1972, the prior owner of the oyster farm conveyed his property to the United States, subject to a reservation of occupancy and use in the grant deed.[1] By its terms, the reservation expected the state water bottom leases to continue until the 30-year term expired in 2012, after which the oyster farm would operate under a special use permit from PRNS that would run concurrently for remainder of the leases. Since the leases were subject to a maximum term of 25 years, the agreement anticipated that the leases could and would be renewed, and this in fact was done by the Fish and Game Commission (Commission) in 1979. The leases were renewed again in 2004, but made contingent upon compliance with the 1972 reservation and, after its expiration, with any PRNS special use permit. In 1976, the Point Reyes Wilderness Act designated over 25,000 acres as wilderness, and another 8003 acres as "potential wilderness." The oyster farm lies within this latter area.

In 2006, the PRNS questioned how "the public right to fish" reservation in the 1965 tidelands grant affected the status of the state water bottom leases.[2] In

[1]The State of California was not a party to this transaction; it is unknown whether it was legally reviewed by the United States Department of the Interior, Office of the Solicitor.

[2]Much has been made of correspondence in 1965 and 1966 by then-Department Director W.T. Shannon, stating that the oyster farm is covered by "the right to fish" reservation. The two

May 2007, the Department concluded that since fishing was distinct from aquaculture, it was not subject to this tidelands grant reservation. Since both the 1972 grant reservation and the 2004 state water bottom lease renewal require compliance with all rules and regulations of the National Park Service, the Department concluded that "primary management authority" for the oyster farm lies with the PRNS. However, given the context of the original question, this conclusion properly refers only to primary management authority *over the state water bottoms that are the subject of the leases* and not to any other aspect of the aquaculture operation. The 1965 legislative grant did not create an area of exclusive federal jurisdiction, and the oyster farm continues to be subject to ongoing Department management, oversight, and enforcement. [3]

Three considerations are evident here. First, the Fish and Game Code expressly designates aquaculture as a form of agriculture[4] and distinguishes it from commercial fishing.[5] Such a distinction is apparent in statutes pre-dating the 1965 grant.[6] Further, aquaculture involves the culture and harvesting of animals that are private property while fishing involves the permitted take of fish that are part of the public trust.[7] A corollary to this second consideration is that "the right

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letters are brief, general, and conclusory. However, while the link between the reservation and ongoing state authority is legally incorrect, the letters correctly assert concurrent jurisdiction over the oyster farm. This is consistent with the Department's May 2007 conclusion that the PRNS has "primary management authority" over the state water bottoms that are the subject of the leases, as well as the conclusions in this letter. See also footnote 3, below.

[3]This includes the payment of taxes and fees, facility registration, regulation of aquaculture products, facility inspections, stocking of aquatic organisms, brook stock acquisition, disease control, and importation of aquatic plants and animals.

[4]Fish and Game Code § 17. This 1982 provision codifies the long-standing concepts of common law (Hagenburger v. City of Los Angeles (1942) 51 Cal.App.2d 161 [a *farm* is a tract of land devoted to agricultural purposes]); ordinary dictionary meaning (*to farm* is "to grow or cultivate in quantity <shellfish>" (Webster's New Collegiate Dictionary 450 (9th ed. 1991)); a *farm* is "a tract of water reserved for the artificial cultivation of some aquatic food; *as an oyster farm*" [emphasis added] (Webster's Third New International Dictionary 824 (1961)); and usage of trade (California Aquaculture Association at: **http://www.californiaaquacultureassociation.org** [mission statement objective is to "assure the recognition of aquaculture as agriculture"]).

[5]Fish and Game Code § 15000(a). The commercial tax on oysters is also separate from the commercial fishing tax on mollusks. See Fish and Game Code §§ 8051, 15406.7.

[6]See e.g. Fish and Game Code of 1933 §§ 815, 820 [distinguishing cultivation of oyster beds from fishing].

[7]Fish and Game Code § 15001. See also Fish and Game Code §§ 45 [defining *fish*], 86 [defining *take*]; see also § 15 [defining *angling*]. These provisions derive from Fish and Game Code of 1933, § 2. This analysis is consistent with that in Pazolt v. Director of Division of Marine Fisheries (1994) 631 N.E.2d 547, 572-573 where the court stated that aquaculture is "a contemporary method of farming shellfish" and "is not fishing, nor can it legitimately be considered a 'natural derivative' of the public's right to fish."

to fish" over tidelands is a *public right* and cannot be exclusive.[8] By contrast, a state water bottom lease confers on a person the *private right* to exclusively cultivate and harvest aquatic organisms in the leased area.[9] While the Fish and Game Code guarantees the right of public access over the leased areas for reasonable public trust uses, including fishing,[10] we do not believe aquaculturists would agree that "the right to fish" authorizes the public to take their cultivated products.[11] Finally, while "the right to fish" secures public access to state lands that are compatible with fishing, *it does not authorize fishing* on those lands[12] and confers on the public no right they did not already have.[13] The provision is properly read in connection with (now) article 4, section 20 of the California Constitution, which allows the Legislature to delegate to the Commission such powers relating to the protection and propagation of fish and game as it sees fit.[14] It is this provision, not "the public right to fish," which authorizes the leasing of state water bottoms for aquaculture. The irrelevancy of "the public right to fish" to the future of the oyster farm is underscored by two additional factual considerations. First, the existing state water bottom leases are contingent upon the 30-year reservation of use and occupancy which, after it expires, requires a special use permit. If the oyster farm does not receive a special use permit to operate beyond 2012, a material condition of the lease renewals will not have been met. *This situation would be the same even if the underlying tidelands had never been granted to the United States.* Second, it cannot be contested that the 1965 legislative grant and "the public right to fish" only applies to the tidelands, not the adjacent terrestrial areas upon which the oyster farm is physically dependent, and which are part of the potential wilderness designation.

In July 2007, the Department attended a meeting with United States Senator Diane Feinstein and representatives of the oyster farm, the NPS, and the Coastal Commission. The NPS agreed to work with the oyster farm for a special use permit to continue operations through 2012, and all participants recognized that the future of the oyster farm after 2012 depends on the outcome of the wildness area designation. The Department stands ready to work with all stakeholders in providing the requisite biological and program expertise on any proposed action

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[8] Pacific Steam Whaling Co. v. Alaska Packers' Association (1903) 138 Cal. 632, 636.
[9] Fish and Game Code §15402; see also Fish and Game Code of 1933 § 815.
[10] Fish and Game Code §15411.
[11] In fact, the taking of such organisms without lawful entitlement constitutes theft. See Fish and Game Code § 15002; see also Fish and Game Code of 1933 § 821 [requiring consent or permission of owner/occupier of the land].
[12] In re Quinn (1973) 35 Cal.App.3d 473; State v. San Luis Obispo Sportsman's Association (1978) 22 Cal.3d 440.
[13] Paladini v. Superior Court (1918) 178 Cal. 369, 372; California Gillnetters Association v. Department of Fish and Game (1995) 39 Cal.App.4th 1145, 1154.
[14] Ex parte Parra (1914) 24 Cal.App. 339.

involving the oyster farm to help move this situation to a final resolution. However, for the reasons discussed above, the reservation of "the right to fish" in the 1965 tidelands grant is clearly inapplicable to this situation. We hope this responds to your concerns. Should you or any of your staff require any additional assistance, please contact Senior Staff Counsel Joseph Milton, Office of the General Counsel, at (916) 654-5336 [jmilton@dfg.ca.gov].

Sincerely,

John McCamman
Acting Director