



United States Department of the Interior

NATIONAL PARK SERVICE
Pacific West Region
333 Bush Street, Suite 500
San Francisco, California 94104-2828



IN REPLY REFER TO:

L7617 (PWR-NR)

August 1, 2013

Robert M. Smith
Plauche and Carr LLP
811 First Avenue, Suite 630
Seattle, WA 98104

Margaret Pilaro Barrette, Executive Director
Pacific Coast Shellfish Growers' Association
120 State Avenue NE #142
Olympia, WA 98501

Dear Mr. Smith and Ms. Barrette:

This letter responds to the May 30, 2013 complaint about Information Quality (Complaint) that you submitted to Doris Lowery of the National Park Service on behalf of your client, the Pacific Coast Shellfish Growers Association. In general, your Complaint alleges scientific flaws in the Draft and Final Environmental Impact Statements (DEIS and FEIS) prepared by the National Park Service regarding the possible issuance of a Special Use Permit to the Drakes Bay Oyster Company. Your Complaint states that the DEIS and FEIS selectively use data and studies to “emphasize potential negative effects associated with shellfish cultivation, while ignoring or downplaying any science establishing the beneficial impacts of shellfish cultivation, despite the fact that numerous comment letters submitted during the DEIS comment period referenced and described such scientific data and studies.” Complaint at 2.

At the outset, we note that your Complaint concerns documents that are associated with the Secretary’s discretionary authority under Section 124 of Public Law 111-88. Section 124 authorized the Secretary to issue a 10-year permit to Drakes Bay



Oyster Company (DBOC) to continue cultivating shellfish in Drakes Estero. Importantly, the grant of authority contained in Section 124 stated that it was “notwithstanding any other provision of law.” As a result of the notwithstanding clause, the Secretary did not have to adhere to the legal procedures that would normally apply to a decision on whether to issue a permit. For example, although it was not required to do so, the Department decided as a matter of discretion to prepare a DEIS and FEIS and to generally use the procedures of the National Environmental Policy Act (NEPA) to help inform the Secretary’s decision on whether to issue a permit. Your Complaint asserts that the DEIS and FEIS fail to conform to the legal requirements of the Information Quality Act (IQA) and NEPA. Because of the “notwithstanding” clause, however, the Secretary was not required to comply with NEPA’s requirements, nor were the DEIS and FEIS subject to the requirements of the IQA. The National Park Service has nevertheless decided to respond to your Complaint as a matter of discretion.

Your information quality complaint appears to have been mooted by the Secretary of the Interior’s November 29, 2012, memorandum, which announced his decision to allow DBOC’s authorizations to expire by their own terms. That memorandum stated that the decision was “based on matters of law and policy,” that the documents challenged in your complaint “are not material to the legal and policy factors that provide the central basis” for the decision, and that the decision was “based on the incompatibility of commercial activities in wilderness and not on the data that was asserted to be flawed.”

Accordingly, the information challenged in your complaint has not been used and will not be used in a decision-making process, particularly now that the authority provided by section 124 of Public Law 111-88 has lapsed. An EIS is a public disclosure document and cannot simply be withdrawn from the public domain, so there does not appear to be any further relief left for NPS to grant under section IV(G) of Director’s Order 11B.

You attempt to distinguish a prior complaint we found to be moot by arguing that this Complaint “is not directly related to the Secretary’s decision,” but your client’s motivations are irrelevant to the analysis of this issue. Moreover, we note that the only specific example of alleged harm to date cited in your Complaint is an unsubstantiated quotation of an aquaculture advocate in a report written by DBOC’s former counsel. Complaint at n.13 and 21-22. In any event, what matters in the IQA process is whether the information is disseminated and whether there is any relief that can be offered. Here, no further dissemination of the information is expected, and it cannot be withdrawn from the public domain.

Your Complaint alleges that the FEIS and DEIS present inaccurate information regarding the effects of the Drakes Bay Oyster Company's operation on eelgrass, benthic fauna, the spread of *Didemnum*, fish species, birds and bird habitat, and water quality. Your Complaint also claims that the FEIS and DEIS are flawed because they identify the "No Action" alternative as environmentally superior. Finally, your Complaint claims that the analysis in the FEIS and DEIS "must be corrected to provide an accurate comparison between the stated alternatives, using a consistent baseline." Complaint at 3. Even if it is not moot, your Complaint is nevertheless rejected for the following reasons.

Section IV(E) of Director's Order 11B provides that information quality complaints related to draft NEPA documents such as a DEIS "will generally be treated as a comment on the draft document." Both you and your client submitted comment letters on the DEIS for the Drakes Bay Oyster Company Special Use Permit. The National Park Service responded to all substantive comments received in the DEIS in the FEIS. All of the issues raised in your Complaint were raised in your December 9, 2011, DEIS comment letter. The Information Quality Act is not to be used as a means of circumventing the NEPA public comment process.

Director's Order 11B also provides guidance on how to treat complaints that relate to final documents, such as a Final EIS. When a "request pertains to a final document, the NPS will first determine whether the request pertains to an issue discussed in the draft document upon which the requester could have commented. If the NPS determines that the requester had the opportunity to comment on the issue at the draft stage and failed to do so, it may consider the request to have no merit." You and your client not only had the opportunity to comment on the DEIS, you did comment and at length. As explained above, the NPS responded to those comments in the FEIS. Your IQA Complaint essentially resubmits those comments, and does not present any significant new information.

We also note that you specifically allege that the NPS's choice of the No Action alternative was improper under the Information Quality Act because it skewed the analysis in the DEIS and FEIS. The choice of a No Action alternative is not a scientific decision. It is a legal decision made in accordance with the regulations implementing the National Environmental Policy Act. As such, it is not a proper basis for a claim under the Information Quality Act.

Finally, we note that based on your Complaint, it is not clear that your client is an affected person. You do not claim to represent DBOC or anyone directly affected by it, but instead argue that your client's members might be harmed at some point in the future by some hypothetical arguments that could be raised by unnamed

opponents, or that this site-specific EIS might somehow affect nationwide processes that might affect your members. These arguments fail to take into consideration Section 124's directive that "[n]othing in this section shall be construed to have any application to any location other than Point Reyes National Seashore." In any event, these alleged harms appear far too speculative to render your client an "affected person." And, as already noted above, the only more specific example of alleged harm offered in your Complaint concerns decisions made in states where your client has no members, and that example is based on an unsubstantiated quotation in a report by DBOC's former counsel. While it is possible, given the nature of your client's organization, that it could in fact be an "affected person," we cannot reach that conclusion based on the information provided. Because we have responded to this Complaint on other grounds as a matter of discretion, it is not necessary to resolve the issue.

In conclusion, we find that your May 30, 2013, letter is without merit under Director's Order 11B. If you wish to appeal this decision, as described in Section IV(G) of Director's Order 11B, please send the appeal to:

National Park Service
Office of the Director
Attention: Information Quality Request
1849 C Street, NW, Mail Stop 3115
Washington DC 20240

Sincerely,



Christine S. Lehnertz
Regional Director, Pacific West Region