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July 6, 2010

The Honorable Ken Salazar
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

File No. 502976-0000

Re: Special Use Permit for Drakes Bay Oyster Company

Dear Secretary Salazar:

I am writing to you on behalf of Kevin and Nancy Lunny (“the Lunnys”), owners of the Drakes Bay Oyster Company (“DBOC”), to request that you enable DBOC to continue to occupy and utilize the buildings and lands on the shores of Drakes Estero, located within Point Reyes National Seashore (“PRNS”), a unit of the National Park Service (“NPS”).

DBOC is a family business operated by the Lunny family, fourth and fifth generation farmers and long-term Point Reyes residents who have lived at the historic “G” Ranch, overlooking Drakes Estero. Since acquiring the business in 2004, the Lunnys have been operating a sustainable, environmentally-friendly local business that provides jobs for the community and gives visitors to PRNS a valuable cultural and historic experience.

We were encouraged to hear of your recent statement at the Great Outdoors Conference that DBOC would continue to operate within PRNS. As you acknowledged, the oyster farm has existed in PRNS for many years. In fact, commercial oyster production has taken place within Drakes Estero for over seventy years—since the early 1930s, approximately three decades before Congress established PRNS in 1962. DBOC now produces both oysters and clams as part of its operations and is the last operating oyster cannery in the State of California.

As background, and as discussed in more detail below, DBOC operates under both State and Federal permits. With respect to the former, DBOC cultivates shellfish on the bottomlands in Drakes Estero pursuant to leases from the California Department of Fish and Game, which were renewed for 25 years in 2004, and thus expire in 2029. As to the latter, DBOC operates under a Reservation of Use and Occupancy (“RUO”) executed in 1972 between NPS and the previous owners of the oyster farm and under several ancillary special use permits issued by NPS. The RUO and the other permits expire in 2012; however, the RUO contains a renewal

clause, which provides for the issuance of a special use permit that would “run concurrently with and...terminate upon expiration of the State water bottom allotments....”

Questions have been raised regarding the legal authority of NPS to issue a special use permit that would allow DBOC to continue operating past 2012, given that Drakes Estero was designated “potential wilderness” in 1976, pursuant to the Point Reyes Wilderness Act, Public Law 95-544. Notably though, the designation of Drakes Estero as “potential wilderness” was never meant to preclude the continued operations of DBOC. As is evident from relevant legislative history and environmental reviews, Drakes Estero was designated as “potential wilderness” rather than wilderness because of the understanding that oyster cultivation would continue, in light of California’s retained interest in leasing the bottomlands for shellfish cultivation.

Moreover, and importantly, in October of 2009 Congress expressly authorized the Department of the Interior to issue DBOC a special use permit to continue its operations past 2012. As this letter describes, and given Congress’s recent directive, there are multiple important reasons to issue such a permit, including the rich history of oyster farming in Drakes Estero and the myriad cultural, recreational, educational and ecological benefits DBOC provides.

I. RICH HISTORY OF MARICULTURAL OPERATIONS IN DRAKES ESTERO

Oyster farming has enjoyed a long history in Drakes Estero. The Miwok Indians were the original “oyster-farm operators,” with their harvesting of native shellfish beginning thousands of years ago. In fact, their ancient oyster middens are still present in the estero. Commercial oyster farming began in the estero in the 1930s, with the original allotment recorded in the name of David C. Drier on January 18, 1934 for the purpose of growing oysters.¹ Although several transfers occurred during those early years, for most of its commercial history, the estero was farmed by Johnson’s Oyster Company. In 2004, the Lunny family purchased the farm from Johnson’s Oyster Company and have sought to adopt many of the same sustainable practices used by the Miwoks in order to conserve the important natural resources of the area.

This long history of maricultural operations has been routinely recognized as a valid and important use of Drakes Estero. The legislative history of the Point Reyes National Seashore Act, for example, is replete with references to both the history and legacy of oyster farming and the important benefits it provides to PRNS. For instance, during congressional hearings on the establishment of PRNS, former NPS Director Conrad Wirth explained that the “[e]xisting commercial oyster beds and an oyster cannery at Drakes Estero...should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.”² Comments made during the Senate hearings

¹ See NPS, Environmental Assessment/Initial Study Joint Document, Johnson Oyster Company, Marin County, Point Reyes National Seashore, at 8 (May 1998).

² NPS, Conrad L. Wirth, Director, Report on the Economic Feasibility of the Proposed Point Reyes National Seashore at 20 (1961), included in the Hearings Before the Subcommittee on Public Lands of the Committee on

on the proposed PRNS legislation echoed this view: “[t]his proposed legislation provides a balanced use between the public and private interests concerned [because] the oyster and commercial fisheries would be able to continue operation and provide both recreation and economic value to the seashore.”³

In the early 1970s, when Congress began considering designating wilderness areas within PRNS, the importance of the oyster operations was affirmed. Senator John Tunney, who introduced the PRNS wilderness legislation, reiterated that “[e]stablished private rights of landowners and leaseholders will continue to be respected and protected. The existing agriculture and aquaculture uses can continue.”⁴ Similarly, Representative John Burton underscored that the legislation’s intent was to “preserve the present diverse uses of the Seashore,” including the commercial oyster operations in Drakes Estero.⁵ The Department of Interior itself recommended that an express wilderness designation would be inappropriate: “Commercial oyster farming operations take place in this estuary and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness.”⁶

Until very recently, NPS consistently agreed with these conclusions and appeared supportive of the continued use of Drakes Estero for maricultural operations. The RUO itself, for example, contains a renewal clause, which provides that “[u]pon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property....”⁷

Additionally, in the Final Environmental Impact Statement prepared by NPS evaluating the potential impacts associated with designating certain PRNS lands as wilderness, NPS discussed the “oyster-farm operation” and noted that while removing the oyster farm might remove human activities from the estero, there would be a “loss of some compensating values. Besides its economic benefits to the community, the farm has decided interpretive importance as a popular ‘living exhibit,’ where visitors have the unique opportunity to observe the operation

Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S.486, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes (Mar. 28, 29, and 31, 1961).

³ Hearings Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S.476, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes at 17 (Mar. 28, 29, and 31, 1961).

⁴ Hearings on S.1093 and S.2472 Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, 94th Cong. 271 (1976).

⁵ *Id.* at 272-73.

⁶ Letter dated September 8, 1976, from John Kyl, Assistant Secretary of the Interior, to U.S. Representative James A. Haley, Chairman, Committee on Interior and Insular Affairs, House of Representatives, U.S. House Report No. 94-1680, 94 U.S. Code and Congressional News 5593.

⁷ JOC Grant Deed to the United States, Exh. C, § 11 (Nov. 9, 1972). The clause, in fact, only requires that the special use permit “run concurrently with and will terminate upon the expiration of the State water bottom allotments....” Those “State water bottom allotments” refer to a renewable lease issued by the California Department of Fish and Game, which has granted DBOC the right to cultivate oysters in Drakes Estero through 2029. California Department of Fish & Game Amendment No. 2 to Indenture of Lease, M-438-01 (Dec. 2, 2005). Accordingly, issuance of a SUP that would “run concurrently with” the State water bottom allotments would be consistent with the state authorizations and would allow the oyster farm to continue operating through 2029.

and to purchase freshly grown oysters. These are appropriate purposes at Point Reyes, a recreational-category park.”⁸

NPS continued to recognize the value of the oyster operations in its 1980 PRNS General Management Plan (still in effect), which includes the following management objectives: “[t]o monitor and improve maricultural operations, in particular the oyster farm operation in Drakes Estero,” and “[t]o monitor and support productive land uses and activities [including maricultural activities] which are consistent with historic patterns.”⁹ As recently as 1998, NPS conducted an environmental assessment pursuant to the National Environmental Policy Act (“NEPA”) of the potential impacts of improving and substantially expanding the oyster farm operations. Although the planned expansion did not take place because of funding shortfalls, NPS’ support of the project demonstrates the agency’s recognition that oyster farm operations are a valid use of PRNS land.¹⁰

II. DBOC IS A BENEFICIAL USE OF PRNS

Recently, some questions have been raised regarding the types of environmental impacts oyster farming may be having on Drakes Estero. In 2006 and 2007, for example, PRNS staff prepared and released several versions of a report entitled *Drakes Estero: A Sheltered Wilderness Estuary* that purported to evaluate the impacts of DBOC on Drakes Estero and erroneously concluded that oyster farming is having an adverse ecological impact on PRNS resources. This effort to portray DBOC as having detrimental impacts appeared to be part of an attempt to “eliminate” DBOC as a “non conforming use” so that Drakes Estero and the surrounding tract of land could be converted to wilderness status. Indeed, PRNS staff took the position that they were legally precluded from issuing a special use permit to DBOC to extend operations past 2012 because of the “potential wilderness” designation.¹¹ However, there is no such restriction on NPS’ authority.¹² Moreover, NPS has allowed non conforming uses in other potential wilderness areas.¹³

⁸ See NPS, Final Environmental Statement FES 74-18, Proposed Wilderness: Point Reyes National Seashore, California, at 56 (Apr. 23, 1974).

⁹ NPS, General Management Plan: Point Reyes National Seashore, at 2-3 (Sept. 1980).

¹⁰ See, e.g., Letter from Don Neubacher, Superintendent, PRNS, to Bank of Oakland (Nov. 22, 1996) (explaining the relationship between the oyster farm and NPS and noting that NPS is “genuinely excited about the planned changes” to the oyster farm and “pledge[s] to work with the Johnsons and the Bank of Oakland to make the project successful”); see also Thomas Yeatts, Point Reyes Light, *Park Planned Big New Oyster Plant* (Aug. 2, 2008) (documents obtained by the newspaper indicate that, beginning in 1996, “Point Reyes National Seashore (PRNS) staff developed a plan to renovate the Johnson Oyster Company’s rickety buildings and septic system, and proposed new two-story development”).

¹¹ See, e.g., Field Solicitor Opinion Re: Point Reyes Wilderness Act (Feb. 26, 2004) (concluding that the Wilderness Act, the Point Reyes Wilderness Act, and NPS Management Policies mandate that NPS convert potential wilderness, such as Drakes Estero, to wilderness status “as soon as the non conforming use can be eliminated”).

¹² For clarification, we disagree with NPS’ legal interpretation that any law precludes the agency from allowing DBOC to continue operating past 2012. There is no mandate found in any applicable law or guidance that

From the outset it should be noted that since purchasing the farm in 2004, the Lunnys have dedicated significant time and resources to cleaning up the oyster farm and resolving past violations of law that had occurred during their predecessor's operations. *See, e.g.,* Peter Jamison, Point Reyes Light, *Park Service to Close Historic Oyster Farm* (June 15, 2007) (discussing DBOC's cleanup and quoting PRNS spokesman John Dell'Osso, "Kevin [Lunny] has done a fantastic job of cleaning up. Everything we've asked him to do, he's done."). The Lunnys remain committed to continuing those cleanup efforts and ensuring that DBOC is operated in a sustainable, environmentally-friendly manner.¹⁴ As such, the family—along with their many supporters in western Marin County environmental and agricultural circles—was disheartened by the NPS report, which appeared to, among other things, overlook the many beneficial effects of oyster culture operations on the environment.¹⁵

In order to help resolve the debate regarding the scope of impacts of DBOC and the availability of scientific analysis, the National Academy of Sciences ("NAS") agreed to help clarify the scientific issues regarding maricultural activities and produced two reports. The first report, which was released in May of 2009, assessed the adequacy of the claimed scientific bases for NPS staff's preliminary conclusions in their Drakes Estero reports, and evaluated the

would require NPS to convert "potential wilderness" to wilderness on a particular timetable. The Wilderness Act, for example, does not use the phrase "potential wilderness," much less define when "potential wilderness" must become actual wilderness, if ever. NPS management policies, director's orders, and reference manuals are all silent with respect to a specific timetable for conversion and only provide that, once "non conforming uses" have ceased, NPS will publish a Federal Register notice to change the designation from potential wilderness to wilderness. *See* NPS Reference Manual #41 at Appendix H, *Wilderness Preservation and Management* (1999). There is no requirement, however, mandating that NPS ensure that such operations cease by a certain date, and there has been no environmental review of the impact of removing the oyster cultivation operation in Drakes Estero.

¹³ Examples of non conforming uses that NPS has allowed in other potential wilderness areas include: i) operation of motorized boats in potential wilderness areas of Grand Canyon National Park; ii) public use of Five High Sierra camps and the Ostrander ski hut in potential wilderness areas of Yosemite Valley; iii) operation by Southern California Edison of hydroelectric dams in potential wilderness areas of Sequoia-Kings Canyon National Park; and iv) use of roads in Cumberland National Seashore located in potential wilderness. As discussed below, the oyster farm provides greater cultural, recreational, educational and ecological benefits than these examples of non conforming uses.

¹⁴ Prior to the Lunny family's ownership, the oyster farm had suffered from a degree of deterioration that led to a number of violations of law, including the Coastal Development Act, and enforcement actions by the California Coastal Commission ("CCC"). The Lunnys are working with the CCC to resolve those violations and ensure that DBOC's operations fully comply with all applicable local, state, and federal regulations. Additionally, an incident recently occurred at the farm in which clam-growing equipment was inadvertently placed into a Harbor Seal Protection Area. The Lunnys immediately took steps to rectify this mistake and are implementing processes to ensure that such mistakes do not occur in the future. Moreover, many of NPS' allegations that the oyster farm adversely impacts harbor seals have since been retracted at very recent Marine Mammal Commission ("MMC") hearings. Like the NAS, the MMC has become involved specifically to resolve the debate surrounding the oyster farm's impact on harbor seals. The MMC has held a series of panel hearings, and is working on a report that is due out in the near future.

¹⁵ The Department of Interior's Inspector General investigated the various versions of the NPS Report and found that scientific inaccuracies undermined NPS' conclusions regarding the oyster farm's ecological impact on Drakes Estero.

available data specifically regarding the impact of DBOC's maricultural activities.¹⁶ The second report, which was released in February of 2010, broadly addresses best management practices and performance standards to enhance the overall benefits of shellfish mariculture and minimize any negative ecological effects.¹⁷

The first NAS report reasonably concluded that "there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current (2008-2009) levels of production and under current (2008-2009) operational practices, including compliance with restrictions to protect eelgrass, seals, water-birds, and other natural resources." NAS 2009 Report at 6. The report goes on to discuss some of the over-looked beneficial effects that DBOC is having on the estero, including: (i) the potential that oyster culture in Drakes Estero is replacing the important "filtering capacity and biogeochemical processing that was lost in the mid-19th century and subsequent decades with the overharvest and functional elimination of the native *Olympia* oyster" (*id.* at 68); (ii) the possible beneficial effects on eelgrass in the area, given that eelgrass has approximately doubled in Drakes Estero from 1991 to 2007 (*id.*); (iii) the positive economic impact for the region—including employment, tax revenue, and local food production (*id.* at 64); and (iv) the positive visitor experience, given that DBOC "preserves a piece of local and regional culture and history" (*id.* at 65).

As noted above, the oyster farm provides significant ecological benefits to Drakes Estero. DBOC's oysters are helping to "restor[e] an historic baseline ecosystem" by acting as a proxy for native oysters. *Id.* at 22; *see also* NAS 2010 Report at 13-14. The oysters are also known as "ecosystem engineers" and "foundation species" (NAS 2009 Report at 18) that bolster the ecosystem's resilience against abnormal events like phytoplankton blooms or sedimentation from storm water run-off (*id.* at 22, 23).¹⁸

In addition to the work done by the oysters, the Lunnys themselves are committed to conserving and protecting PRNS. For example, DBOC is the only oyster farm in California to produce and hatch its own seeds on site, greatly reducing the risk of introducing contaminants and invasive species. And it employs an environmentally-friendly off-bottom "hanging culture" method, used by less than 5% of U.S. oyster farmers due to the labor-intensive hand harvesting required. The Lunnys are also dedicated to educating others about conservation and the environment. The oyster farm offers free tours to the public to inform them about the history of oyster farming in PRNS, oysters' value as a beneficial source of protein, coastal ecosystems, and the nature and efficacy of organic sustainable farming. Similarly, the oyster farm offers its

¹⁶ See National Academy of Sciences, National Research Council, Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California (2009) ("NAS 2009 Report").

¹⁷ See National Academy of Sciences, National Research Council, Ecosystem Concepts for Sustainable Bivalve Mariculture (2010) ("NAS 2010 Report").

¹⁸ The second NAS report provides further detailed discussion of the general ecosystem services that bivalves perform. NAS 2010 Report at 10-11. In fact, these ecosystem services are so significant that the report recommends quantifying their economic value, as well as developing policies to encourage restoration of bivalves in more ecosystems so they can improve and benefit from these services. *See id.*

facilities to researchers and participates in research on native oysters, estuarine biodiversity, and human health protection.

For all these reasons, many of PRNS' 2.5 million annual visitors flock to DBOC, which carries on the long-standing tradition of oyster farming in Drakes Estero and remains as the last operating oyster cannery in the State. With its cultural, recreational, educational and ecological benefits, the oyster farm undoubtedly "enhances visitors' experience in the estero." *Id.* at 65.

By contrast, should the oyster farm be shut down, the community would be adversely impacted in significant ways. Not only would PRNS lose the numerous visitors for whom DBOC is a destination, but the oyster farm employees who have specialized skills would lose their livelihood, and the low-income housing that DBOC provides for their employees would be demolished. This in turn would effect the local ranches, where many of DBOC's employees' family members work. Furthermore, removing the oysters could have an adverse effect on the Drakes Estero ecology, including its water quality.

Both NAS reports ultimately affirm that there is no ecological justification to deny DBOC a special use permit. And given that Congress has expressly authorized NPS to issue a special use permit, there is no legal justification either. NPS should issue DBOC a special use permit to continue its operations past 2012.¹⁹

III. NPS AUTHORITY TO ISSUE A SPECIAL USE PERMIT FOR CONTINUED OPERATIONS PAST 2012

In October of 2009, Congress provided a definitive answer to the legal question of whether NPS has the authority to issue a special use permit to DBOC to continue operating past 2012. The answer was a resounding yes.

Specifically, Congress directed that:

Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ('existing authorization') within Drake's Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior *is authorized to issue a special use permit with the same terms and conditions as the existing authorization*, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take

¹⁹ As you know, Senator Dianne Feinstein contacted you when the first NAS report was issued and expressed her concern that NPS had "exaggerated the effects of the oyster population on the Estero's ecosystem" and appeared to be continuing to ignore the potential beneficial impacts of maricultural operations. *See* Letter from Dianne Feinstein to the Honorable Ken Salazar (May 5, 2009). We agree with Sen. Feinstein's conclusion that the NAS report "does not present any compelling ecological reason for refusing to renew the Drakes Bay Oyster Company lease in 2012."

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into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization.

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88 § 124 (2009) (emphasis added).

As such, now that the second NAS report has been issued, DBOC respectfully requests that NPS provide a proposed special use permit to DBOC incorporating the same terms and conditions under which DBOC currently operates, including an appropriate annual fee.

Thank you very much for your attention to this matter. We understand that Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks, recently visited DBOC on February 4, 2010. The Lunnys would be happy to host you, Secretary Salazar, and any other interested Department of Interior officials on a tour of the oyster farm, and/or provide any follow-up information requested. We look forward to meeting with you and your staff to discuss this matter in further detail, and will be in touch to set this up. If you have any questions or would like additional information, please do not hesitate to reach me at (415) 395-8136.

Best regards,

 M.B.

Karl S. Lytz
of LATHAM & WATKINS LLP

cc: The Honorable Dianne Feinstein
Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks
Jonathan Jarvis, Director, National Park Service
George Turnbull, Acting Regional Director, Pacific West Region, National Park Service
Cicely Muldoon, Superintendent, Point Reyes National Seashore

ATTACHMENT B

Proposed Project Description Drakes Bay Oyster Company Special Use Permit

Proposed Project Description

Drakes Bay Oyster Company Special Use Permit

DBOC requests that the EIS consider a SUP that permits the following activities:

1. Operation and maintenance of the farm under the same terms and conditions, with a reasonable annual fee, as the existing Reservation of Use and Occupancy and associated permits, including the possibility of renewal commensurate with DBOC's bottomland leases from CDFG in Drakes Estero.
2. Completion of activities evaluated and found to have no significant impact on the environment in the 1998 NPS Environmental Assessment and FONSI for Replacement and Rehabilitation of Facilities ("1998 EA"). The 1998 EA authorized several building replacement and rehabilitation projects, of which some have not yet been completed. *See* Table 1.

TABLE 1: Status of Activities Studied in 1998 EA

Activity Permitted By 1998 EA	Status / Permitting Authority
New septic systems	Completed pursuant to 1998 EA
Debris removal	Completed pursuant to 1998 EA
Demolition of 6,590 sf building space	Completed pursuant to 1998 EA
Demolition of 2,600 sf building space	To be completed pursuant to 2012 SUP
Build new garage [900 square feet (sf)]	To be completed pursuant to 2012 SUP
Build new seed plant (hatchery) [2,625 sf]	To be completed pursuant to 2012 SUP
Rehabilitate stringing plant [500 sf]	To be completed pursuant to 2012 SUP
Build two-story Processing Plant / Interpretive Center [7,600 sf]	To be completed pursuant to 2012 SUP
Build new fencing to screen residential use area	To be completed pursuant to 2012 SUP
Replace piers and docks	To be completed pursuant to 2012 SUP

3. Provide for future consideration of renewable energy investments, including installation of solar panels.
4. Extension of the existing seawater intake pipeline to improve public health and hatchery efficiency, pursuant to plans previously provided to NPS. This extension will be 1,050 feet across the bottom of Drakes Estero, alongside the boat channel, for access to deeper, cleaner water. The pipeline will be anchored to the substrate and the screened end will be two meters, at a minimum, above the estero bottom. Plans for this pipeline have been delivered to CCC and the NPS.
5. Relocation of existing outdoor live-holding system used for seed storage and wet storage of retail shellfish.
6. Build cover over oyster washing pier per CDPH and FDA requirements to keep oysters out of direct sunlight after harvest.
7. Install outdoor display aquarium for interpretive purposes.