

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2 219
VOICE (415) 904-5 200
FAX (4 15) 904-5 400
TDD (415) 597-5885

**SENT BY CERTIFIED AND REGULAR MAIL****Certification Number 7006 2760 0005 5883 4234**

February 1, 2012

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

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

Dear Mr. Lunny:

In my letter to you dated September 29, 2011, I raised two issues that appear to constitute non-compliance with the Coastal Act and with Consent Cease and Desist Order CCC-07-CD-11 ("the Order"), which was issued to you on December 12, 2007. These issues are: 1) discharge of marine debris into Drakes Estero and onto nearby coastal beaches, especially in the form of abandoned, discarded, or fugitive plastic aquaculture materials, and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area. The same issues were the subject of my letter of October 26, 2011, which, as you know, was sent in an attempt to urge a response to the earlier letter and to establish a meeting date to discuss resolution of these matters. On January 4, 2012, we met with you to discuss these enforcement issues and express our concern about your non-compliance with some of the existing measures that had been negotiated with you to allow your operation to proceed while providing protection for harbor seals in Drakes Estero during their most sensitive life stages. It is our position that complete and consistent adherence to these measures is crucially important as they were not designed to provide a level of protection that would be considered adequate with only partial compliance. Marine debris, especially plastics, and the use of motorized vessels near sensitive harbor seal areas pose serious threats to marine habitats and wildlife, and we are therefore concerned about these issues at Drakes Estero.

1. **Boat Transit in the Lateral Channel/Special Use Permit (SUP).** Concerning the issue of motorized vessels in the lateral channel during the restricted period, at our January 4 meeting,

your attorney, Mr. Walton, argued that the language of the SUP stating that “the ‘Main Channel’ and ‘Lateral Channel’ of Drakes Estero will be closed to boat traffic” during certain periods actually meant that only the intersection of those channels would be so closed. We pointed out that this interpretation is at odds with the plain language of the prohibition. In support of your interpretation, Mr. Walton argued that the 1992 protocol only prohibited passage through that intersection and that it was not superseded by the SUP, so it is still binding. In fact, he argued that the SUP was intended to extend the prohibitions contained in the 1992 protocol. However, nothing in the SUP so indicates. To the contrary, the SUP contains an integration clause (provision 32 on page 14) that states that the SUP itself, with its exhibits, “constitutes the entire agreement between Permittee and Permittee with respect to the subject matter of this Permit and supersedes all prior offers, negotiations, oral and written.” Thus, the SUP clearly did supersede the 1992 protocol, and Mr. Walton’s claim that you were abiding by the terms of the 1992 protocol and that there have always been motorized boats in the lateral channel year-round¹ is not only irrelevant to whether this is a violation of the SUP and the Consent Order, but an admission of a longer violation. We have discussed this matter with the National Park Service (NPS), and NPS has confirmed that a) they agree with our reading of the SUP (i.e., boat traffic *is* indeed prohibited in the entire lateral channel between March 1 and June 30); and b) the 1992 protocol has been superseded by the SUP and was *in no way* memorialized or authorized as part of the SUP. I believe that you were copied on the recent letter from NPS on this point, but I attach a copy for your reference.

Moreover, after the meeting, in order to be responsive to the issues your counsel raised, we again reviewed the 1992 protocol as well as correspondence from you and Corey Goodman to the National Academy of Sciences in 2008 and 2009 in which your understanding of the protocol is described. The prohibition in that protocol is also not limited to the intersection of the two channels. As you know, the 1992 protocol was set forth in a series of letters between John Sansing, then Superintendent of Point Reyes National Seashore (National Park Service), and Bob Hulbrock, Aquaculture Coordinator for the California Department of Fish and Game (DFG); a Record of Agreement Regarding Drake’s Estero Oyster Farming and Harbor Seal Protection dated May 15, 1992; and a simplified map that delineates the areas subject to closure during the harbor seal pupping season (copies attached). The protocol set forth in these documents memorialized an agreement reached by the parties present at a January 15, 1992 meeting between NPS, National Marine Fisheries Service (NMFS), DFG, and Johnson’s Oyster Company (JOC). It is very clearly stated in the May 15, 1992 Record of Agreement portion of this protocol that “the ‘lateral channel’ between beds #2 and #3 and bed #1 (figure 1) are closed to boat traffic from March 15 through June 1.” For additional clarity, the “figure 1” referred to in this Record of Agreement demonstrates this seasonal closure area on a simplified map of the estero.² Thus, boat traffic has been prohibited seasonally in the lateral channel since May of

¹ Until December of 2008, at which point the Order established a Harbor Seal Protection Area that prohibited aquaculture vessels from the eastern most section of the lateral channel.

² This “figure 1” map was created by NPS and provided to the parties to the agreement as an attachment to a letter from NPS Superintendent John Sansing to DFG Aquaculture Coordinator Bob Hulbrock dated April 28, 1992. In a letter dated May 15, 1992, from DFG Aquaculture Coordinator Bob Hulbrock, to NPS Superintendent John Sansing, the “figure 1” map was amended to allow the “western channel” to remain open so as to facilitate boat access to a

1992, when this protocol was agreed upon. Upon review of several letters sent from you and Corey Goodman to Dr. Susan Roberts of the Ocean Studies Board of the National Academy of Sciences in 2008 and 2009, it now appears that this is consistent with your self-described understanding of the protocol. These letters,³ dated November 1, 2008, February 3, 2009, and February 10, 2009, provide a detailed description of the 1992 protocol as it relates to the lateral channel. Specifically, in his November 1, 2008, letter Corey Goodman states:

The NPS, CDFG, and National Fisheries Service came to an agreement with Johnson's Oyster Company on May 15, 1992, called the 1992 protocol, which Johnson's and now DBOC have been following ever since. The 1992 protocol explicitly prohibits oyster boats from entering the lateral channel (between islands OB and UEN) during the pupping season from March to June... DBOC has repeatedly stated that they have not used the lateral channel during the pupping season, in accord with the 1992 protocol.

This understanding of the 1992 protocol is echoed by you in your letter of February 3, 2009, in which you state:

The interagency agreement reached between NPS, NMFS, CDFG and Johnson Oyster Company in 1992 created protocols (attached) for the oyster operation regarding harbor seals – which include a pupping season lateral channel closure. DBOC has always known about these protocols and has always followed these protocols, including the lateral channel closure. These protocols were provided to us and explained in detail by CDFG when we were assigned the shellfish leases in 2005.

Operation of boat traffic in the lateral channel year-round, therefore, is inconsistent with, first, the 1992 protocol, and, later, the April 22, 2008 NPS Special Use Permit (SUP) issued to Drakes Bay Oyster Company (DBOC), which superseded this protocol, and is therefore a violation of the Consent Order reached between you and the Commission. As provided for in the Order (including sections 5.0, 6.0, and 7.0), and as discussed in our meeting of January 4, 2012, the Order incorporates by reference the requirements of other legal requirements, and includes a commitment by DBOC to comply with all applicable laws and regulations, and permits issued to DBOC, specifically including the SUP.

In an email from you to Cicely Muldoon dated January 12, 2012, you request a meeting with NPS to review implementation of the current SUP for DBOC. You refer to the claim of the Coastal Commission (Commission) that “DBOC boats, going to and from Sandbars OB and UEN, are in violation of the SUP,” and you state that you need to understand the basis of the alleged violation of the SUP in order to respond to the Commission. Cassidy Teufel sent you and Ms. Muldoon a clarifying email noting that the issue of concern to the Commission is not the

point from which foot access to the beds normally accessed by the lateral channel would be provided. In a letter dated June 2, 1992, from NPS Superintendent John Sansing to DFG Aquaculture Coordinator Bob Hulbrock, this amendment was accepted.

³ All three letters are available for review on the Marine Mammal Commission website at: http://mmmc.gov/drakes_estero/de_docs_12210.shtml

origin or destination of the vessels, but, rather, the route they use and timing of that use. In other words, it is not the fact that the vessels are "going to and from Sandbars OB and UEN" that is, in and of itself, a violation of the SUP and, thus, the Order, but the fact that the boats use the lateral channel between these sandbars and some of that use occurs during the restricted March 1 through June 30th harbor seal breeding season. Again, we believe that the language of the documents is clear on the face, but appreciate your reaching out to obtain confirmation of the requirements. As you are no doubt aware, NPS recently clarified that the documents are in fact correct and that the prohibition is as stated above and in our letter to you.

To summarize these points: The 2008 SUP between DBOC and NPS has superseded the 1992 protocol and is currently binding. This SUP prohibits boat traffic in the entire lateral channel from March 1 through June 30, as has been confirmed by NPS. Further, even if the 1992 protocol were still in effect, which it is not, boat traffic in the lateral channel would *also* be prohibited during a restricted period (March 15 through June 1). Thus, as demonstrated by numerous photographs reviewed by Commission staff and corroborated by your admission during our meeting of January 4, 2012, DBOC has been consistently acting in a manner inconsistent with a) the 1992 protocol that was in place prior to 2008; and b) the 2008 SUP that has been in place since April 22, 2008. As a result, DBOC has been in violation of the Order since April 22, 2008. Moreover, as indicated in our meeting, this has apparently been a standard practice of DBOC, and the pictures may not capture a full representation of the number of times that the DBOC boats have been in the areas in times inconsistent with the SUP and Order. As noted above and in the recent letter from NPS, NPS and Commission staff are in full agreement that there is no ambiguity in the language of the SUP.

2. **Coastal Act Section 30411.** During a January 12, 2012, telephone conversation with Commission Senior Staff Counsel Alex Helperin, Mr. Walton also asked about our interpretation of Coastal Act Section 30411(a), which states that

The Department of Fish and Game and the Fish and Game Commission are the principal state agencies responsible for the establishment and control of wildlife and fishery management programs and the commission shall not establish or impose any controls with respect thereto that duplicate or exceed regulatory controls established by these agencies pursuant to specific statutory requirements or authorization.

As requested, we have reviewed this section and can confirm that a) oysters and clams are not considered by DFG (or the Commission) to be "wildlife" or "fish," and b) aquaculture is not considered by DFG (or the Commission) to be a "fishery," so the restrictions imposed in Section 30411 do not apply here. The Commission has issued permits for numerous aquaculture operations over the years and we have written confirmation from DFG that aquaculture is *not* a fishery. In addition, both the Coastal Act (in Section 30100.2) and Fish and Game Code (in Section 17) define aquaculture as "a form of agriculture." Thus, Section 30411 is not relevant here, and the Commission has the authority to regulate aquaculture operations in the Coastal Zone, including DBOC's operation in Drakes Estero. We explained this a year ago, in our January 13, 2011 letter to you, Donna Wieting (of OCRM), and Cicely Muldoon (of the Point

Reyes National Seashore) regarding the Commission's request for federal consistency review authority over the proposed extension of your license to operate within the park.

3. DBOC Response to Allegations of Coastal Act Violations. Please note that we first wrote to you on September 29, 2011, and again on October 26, 2011, concerning the recently alleged outstanding violations of the Coastal Act and the Order, and we requested that we meet as soon as possible to discuss these allegations. I also telephoned you several times in furtherance of this effort. We were unable to meet until January 4, 2012, more than three months after my initial letter. At our meeting, we requested that you respond in writing to these allegations, and you indicated that within a week, you or your attorney would let us know how long it would take before you would give us a full written response. In fact, it wasn't until January 12, 2012 (more than a week later) that Mr. Walton spoke with Mr. Helperin, at which time Mr. Walton indicated that it would be approximately two additional weeks (i.e., by January 26, 2012) before we would receive a response concerning the marine debris, and that he couldn't say when we might get a response concerning the boat transit in the lateral channel because of your need to discuss this matter with NPS. To date, we have not gotten a written response concerning either of the alleged violations of the Coastal Act and the Order.

Please note that you have known of our concerns on these two issues for more than four months, and we have yet to receive any written response. We feel that we have been very patient concerning resolution of these most recently alleged violations, especially in light of the many alleged violations we have brought to your attention over the years, in letters dated June 5, 2007; September 10, 2008; September 16, 2009; December 7, 2009; and December 22, 2009; not all of which have been adequately addressed and resolved. We are concerned that you have not responded to our letters, and we hope this failure to respond is not indicative of a lack of willingness on your part to resolve the outstanding alleged violations of the Coastal Act and the Order, and to comply with the Order in the future. Should this prove to be the case, we may have little choice but to seek such remedies as assessment of stipulated penalties and/or filing a lawsuit, pursuant to Chapter 9 of the Coastal Act, to resolve the alleged violations, and ensure compliance with the Order and Coastal Act.

As you know, the Coastal Act contains many enforcement remedies for Coastal Act violations, and we have attempted to avoid the need to invoke them, by offering to discuss with you an amicable resolution of these violations of the Consent Order.⁴

⁴ Section 30809 states that if the Executive Director of the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. Section 30810 states that the Coastal Commission may also issue a cease and desist order. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. Section 30811 also provides the Coastal Commission the authority to issue a restoration order to address violations at a site. A violation of a cease and desist order or restoration order can result in civil fines of up to \$6,000 for each day in which the violation persists.

Additionally, Sections 30803 and 30805 authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) provides that any person

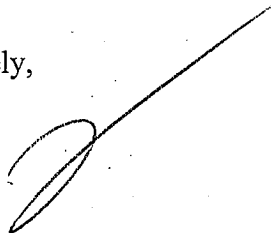
KEVIN LUNNY

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Therefore, please submit by February 29, 2012 a written response to the concerns raised in my letter of September 29, 2011: 1) discharge of marine debris into Drakes Estero and onto nearby coastal beaches, especially in the form of abandoned, discarded, or fugitive plastic aquaculture materials, and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area. In this letter, please describe in detail specifically how and when you intend to resolve these alleged violations of the Coastal Act and the Order, including a proposal for resolution of the outstanding stipulated penalties for failure to comply with the Order. We would still like to understand your plans to come into compliance and would prefer to resolve this amicably, and look forward to hearing from you.

If you have any questions concerning any enforcement matters, please contact me at **415-904-5269**.

Sincerely,



Jo Ginsberg
Enforcement Analyst

Attachments: Copy of the Record of Agreement and Map
Copy of Superintendent Cicely Muldoon (NPS) letter of Jan 23, 2012

cc: Zach Walton
Cicely Muldoon, Superintendent, Point Reyes National Seashore, NPS
Charles Lester, CCC, Executive Director
Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal Consistency Division
Lisa Haage, CCC, Chief of Enforcement
Alex Helperin, CCC, Senior Staff Counsel
Nancy Cave, CCC, Northern California Enforcement Supervisor
Cassidy Teufel, CCC, Coastal Program Analyst

who violates any provision of the Coastal Act may be subject to a penalty amount that shall not exceed \$30,000 and shall not be less than \$500 per violation. Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than \$1,000 nor more than \$15,000 per violation for each day in which the violation persists.