

No. 13-15227

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DRAKES BAY OYSTER COMPANY, *et al.*,
Plaintiff-Appellants,
v.
KENNETH L. SALAZAR, *et al.*
Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

**[PROPOSED] AMICI CURIAE BRIEF OF
ALICE WATERS; THE HAYES STREET GRILL [A RESTAURANT];
TOMALES BAY OYSTER COMPANY; MARIN COUNTY
AGRICULTURAL COMMN'R; STACY CARLSEN; CALIFORNIA FARM
BUREAU FEDERATION; MARIN COUNTY FARM BUREAU; SONOMA;
COUNTY FARM BUREAU; FOOD DEMOCRACY NOW; MARIN
ORGANIC; AND ALLIANCE FOR LOCAL SUSTAINABLE
AGRICULTURE; SUPPORTING APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

The Tomales Bay Oyster Company, The Hayes Street Grill, the California Farm Bureau Federation, the Marin County Farm Bureau, the Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and the Alliance For Local Sustainable Agriculture, do not have any parent corporations and no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF AMICI'S IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

This brief is filed pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing.

Alice Waters, chef, author, and the proprietor of Chez Panisse restaurant, is an American pioneer of a culinary philosophy that maintains that cooking should be based on the finest and freshest seasonal ingredients that are produced sustainably and locally, such as shellfish from Drakes Bay Oyster Farm. She is a passionate advocate for a food economy that is “good, clean and fair.” Over the course of nearly forty years, Chez Panisse has helped create a community of scores of local farmers and ranchers, such as the Lunnys, whose dedication to sustainable aquaculture and agriculture assures the restaurant a steady supply of fresh and pure ingredients.

Hayes Street Grill is a fish restaurant in San Francisco's Civic Center district. Drawing inspiration from old San Francisco grills in the financial district when it opened in 1979, and using a unifying theme of fish and seafood, the restaurant took the grill concept a step farther by seeking out local ingredients and cooking them in a modern style so the “freshness and pristine quality of the fish, produce, and naturally-raised meats” can “speak for themselves.” The loss of the shellfish DBOC produces and sells in the San Francisco Bay Area would have a devastating impact on the Grill's ability to serve fresh shellfish.

Tomales Bay Oyster Company [TBOC] is one of two oyster farms located on Tomales Bay in Marin County with retail shops along State Highway One. TBOC's retail and picnic area is at capacity. The demand for oysters is too high for the Tomales Bay oyster farms to meet even with DBOC in production. They do not have the capacity to expand, and there is no other source for local shellfish. TBOC customers will be adversely affected if DBOC's 50,000 customers attempt to visit TBOC. TBOC is also concerned about the impact on DBOC's experienced workers, who have been living and working in the community for as long as 30 years, and who are an integral part of the West Marin community and economy. TBOC's additional concerns are set out in comments on the Draft Environmental Impact Statements [DEIS], a copy of which is attached to the Appendix as Exhibit 7.

Marin County Agricultural Commissioner Stacy Carlsen is concerned, among other things, with the impact of closing DBOC on the lives of the children and the working families who would be impacted, working families who are part of the "social fabric of the community where they live;" of the impact on indirectly related jobs in markets and restaurants; and the impact on the availability of fresh, locally grown food for local markets. His additional concerns are set out in more detail in his comments on the DEIS, a copy of which is attached to the Appendix as Exhibit 5.

The California Farm Bureau Federation, the Marin County Farm Bureau and the Sonoma County Farm Bureau are nonprofit voluntary membership corporations whose purpose is, respectively, to protect and promote agricultural interests in the State and in their Counties, and to find solutions to the problems of the farm and rural communities. The participation of the California Farm Bureau Federation and the Marin County Farm Bureau as *amici* is an extension of their concern for the future of DBOC as expressed in comments on the Draft Environmental Impact Statement, which appear in the Appendix as Exhibits 21 and 22 respectively. A copy of an undated letter to President Obama asking him to rescind Secretary Salazar's Order is posted on the Sonoma County Farm Bureau's website. A copy is attached to the Appendix as Exhibit 24.

Food Democracy Now is a grassroots movement of more than 350,000 American farmers and citizens dedicated to reforming policies relating to food, agriculture and the environment. They want to support DBOC because they "believe in recreating regional food systems, supporting the growth of humane, natural and organic farms, and protecting the environment."

Marin Organic was founded in 2001 by "a passionate group of farmers, ranchers, and agricultural advisors to put Marin County on the map as a committed organic county." Marin Organic fosters "direct relationship between organic producers, restaurants, and consumers" to strengthen commitment and support for

local organic farms, such as DBOC.

Alliance for Local Sustainable Agriculture [ALSA] is an unincorporated association of people who believe that “a diversified and healthy agricultural community is important to our individual health and to our community’s and our nation’s safety, economy and environment.” They are “advocates for the use of good science and fair processes.” They are also the author of a proposed “Collaborative Management Alternative” to the alternatives proposed by the NPS in the DEIS/Plan, which was supported by 1750 commentators, including several of the *amici*. ALSA’s comments on the DEIS include the Alternative. A copy is attached to the Appendix as Exhibit 23.

I. INTRODUCTION

There is *no single voice* that can speak for the “public interest” in keeping the Drakes Bay Oyster Company [Oyster Farm or DBOC] open until the Secretary of the Department of the Interior’s [DOI] Order to close can be reviewed.

Closing the Oyster Farm would have a broad, negative and immediate impact, on the local economy and the sustainable agriculture and food industry in the San Francisco Bay Area, on the school children of the workers who live in the housing units onsite, and, in the longer term, on food security and the U.S. balance of trade. Closing down the oyster farm in Drakes Estero, which has existed since the early 1930s, would be inconsistent with the best thinking of the modern environmental movement and further tear at the fabric of an historic rural community that the Point Reyes National Seashore [Seashore] was created to help preserve.

On the other hand, the sounds of motorcycles racing by Drakes Estero on the adjacent highway will not cease if the Oyster Farm is closed. The ranches that surround Drakes Estero will remain in the area zoned “pastoral” right up to its shoreline. California’s retained fishing and mineral rights in Drakes Estero will still exist. Closing down the Oyster Farm would simply be a mark in the “win column” for the National Park Service [NPS] and

other traditional conservationists, wilderness advocates stuck in an archaic and discredited preservationist paradigm, whose apparent aim is to convert Drakes Estero to titular wilderness status at any cost.

This brief identifies a wide variety of public interests that will be seriously and negatively impacted if the Secretary's Order to close down the Oyster Farm is not enjoined pending a decision on the merits of the case. These interests are all part of the administrative record, in "comments" on the Draft Environmental Impact Statement [DEIS] on a proposed Special Use Permit [SUP] for the Oyster Farm. These interests were disregarded when the Secretary based his decision on a false interpretation of Section 124;¹ ignored the State's fishing and mineral rights; and "was informed" by discredited National Park Service [NPS] science despite Congress directing that the National Academy of Sciences [NAS] review the science in the DEIS.²

¹ Section 124 of Public Law 111-88.

² Counsel for DBOC provided some thoughts and comments on this brief, but it was authored entirely by the undersigned. Other than the undersigned, no person, party, or party's counsel contributed money to fund the preparation or submission of this brief.

II. SHELLFISH AS A FOOD SOURCE IN CALIFORNIA

The practice and right of people to obtain nourishment from fish, in particular mollusks such as oysters, which are relatively easy to gather, have a long history and the rights have a unique character. There is DNA evidence indicating that the first hominids to emigrate from Africa to the Middle East, Europe and Asia emanated from a shellfish rich coastal region of South Africa, Pinnacle Point, where many of their shell mounds have been found. Similar shell mounds exist, of course on the shores of Drakes Estero and Tomales Bay and similar inlets along the Pacific Coast.³

Fish generally, but shellfish in particular, have been an important food source for California for centuries, where fish, fishing and fisheries are managed as resources held in trust for the People of the State. The California Constitution contains multiple provisions designed to protect the

³ *Water's Edge Ancestors: Human evolution's tide may have turned on lake and sea shores*, by Bruce Bower, *Science News*, August 13, 2011, pages 22 et seq. Appendix, Exhibit 1. Counsel for *amici* respectfully requests that the Court take judicial notice of the exhibits in the Appendix pursuant to Fed R Evid 201(c). All exhibits are easily accessible on the web. Most of the exhibits are copies of "comments" on the Draft Environmental Impact Statement that are part of the administrative record, which, because of the circumstances under which this issue has arrived with the Court, has not yet been assembled and submitted to the Court. That correspondence is published on the Seashore's website: http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_deis_public_comments.htm. A few other exhibits are copies of commentary in the press, not evidence offered to prove underlying facts.

interest of the People in fish as food. The California Fish and Game Commission, which authorizes State leases for shellfish cultivation, is the *only* body to which the California Legislature may delegate policy-making authority. Article IV, Section 20. See 17 Ops. Cal. Atty. Gen. 72, at 78 (February 20, 1951).⁴ The Legislature must retain the People’s “right to fish” in any transfer of the State’s tidelands. Cal. Const., Article 1, Section 25. “Money collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto.” *Id.*, Article XVI, Section 9. And shellfish cultivation pursuant to a State lease serves a public purpose that would require the United States to provide the State's lessee with a right of way to the water, even if the SUP is not granted. *Id.*, Article X, Section 4.

In upholding a 1919 statute that authorized the Fish and Game Commission to regulate and control “the handling of fish or other fishery products for the purpose of preventing deterioration or waste,” the California Supreme Court elaborated on the importance of fish as food in California:

The public policy of this state in its relation to the food fish within its waters has been clearly, consistently, and unmistakably manifested through out the history of its fish and game legislation. It aims at the protection and conservation of food fish for the benefit of the present and future generations of the people of the state and the devotion of such fish to the

⁴ Appendix, Exhibit 2, California Attorney General Opinion, 17 Ops. Cal. Atty Gen. 72 (February 20, 1951).

purposes of human consumption. . . . *People v. Monterey Fish Products Co.* (1925) 195 Cal.548, at 557.

Today California is second only to the State of Washington in shellfish production on the West Coast. Almost 40% of the oysters grown in California and 50% of the Marin-County produced oysters are grown in Drakes Estero. The Drakes Estero water bottoms are 55% of the water bottoms in the State of California that are leased for shellfish cultivation and 85% of the shellfish growing area in Marin County and the San Francisco Bay Area.⁵ Shellfish produced in Drakes Estero play an important role in the local, regional and statewide economy, and there are no options for relocating these oyster beds in California.⁶

III. SHELLFISH IN DRAKES ESTERO

Shellfish from Drakes Estero are an integral and important part of the Bay Area's world famous local sustainable agriculture and food industry. Closing down Drakes Estero as a source of fresh, sustainably raised shellfish would wreak havoc with this industry. The California Fish and Game Commission has said that it intends to lease the Drakes Estero water bottoms

⁵ Appendix, Exhibit 4. October 10, 2012 letter to Seashore Superintendent Cicely Muldoon from California Fish and Game Director Charles Bonham. [Exhibit 5 to Lunny Rebuttal Declaration, page 91 of docket 80-1.]

⁶ Appellants' Excerpts Of Record [ER] at ER0180 ¶ 66.

at least until 2029.⁷ And the Commission can continue to lease the water bottoms whether or not the Secretary grants the Oyster Farm a permit to continue to utilize the onshore facilities.

However, if the permit for the onshore facilities is denied, the supply of shellfish that local retail establishments depend on having available for their customers will be interrupted; there will be a loss of employment for many of the 31 workers employed by Oyster Farm, in particular the women who work in the only oyster cannery remaining in California; and the loss of five affordable housing units in an area where affordable housing is in desperate short supply. Many restaurants and other retail establishments that feature locally and sustainably raised seafood will have no alternative but to cease including shellfish on their menus or import shellfish from distant locations.⁸

In 1979 and again in 2004 the California Fish and Game Commission found it “in the public interest” to renew the State leases for shellfish

⁷ Appendix, Exhibit 4: July 11, 2012 Letter from California Fish and Game Commission to Secretary Salazar. [Also, ER0617.]

⁸ Appendix, Exhibit 5: Marin Agricultural Commissioner Stacy Carlsen Comments on DEIS, Correspondence #51124.

cultivation in Drakes Estero for 25 years.⁹ In a July 11, 2012 Fish and Game Commission letter to Secretary Ken Salazar the Commission asserted the State's continuing right to lease the Drakes Estero water bottoms:

The Commission, in the proper exercise of its jurisdiction . . . has clearly authorized shellfish cultivation in Drakes Estero through at least 2029 through the lease granted to Drakes Bay Oyster Company. The Commission will continue to regulate and manage oyster aquaculture in Drakes Estero pursuant to State law

Shellfish raised in Drakes Estero are only a few minutes or hours from market and consumption. If oysters are no longer raised in Drakes Estero, shellfish imported to fill the gap will travel great distances, e.g., from China, Korea and uncertain locations of origin, "increasing the chances for food safety problems, poor quality and product contamination" as well as adding to the carbon footprint associated with their transportation.¹⁰ Importing shellfish to replace those now grown in Drakes Estero will defeat the principle of local sustainable farm production and food security and further worsen the US trade balance.

⁹ See recitals in Exhibits 17, 18, 19, and 20 to Declaration of Barbara Goodyear in Support of Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

¹⁰ Marin Agricultural Commissioner Stacy Carlsen. See footnote 8, *supra*.

IV. IMPACT ON SHELLFISH CULTIVATION ON TOMALES BAY

The Tomales Bay Oyster Company [TBOC] and the Hog Island Oyster Company are Marin County oyster growers with retail outlets located on Tomales Bay. Their companies cannot meet the local demand for shellfish. They already buy shellfish from DBOC and in some instances out of area. “Closing DBOC will cause a loss of local shellfish production that cannot be replaced.” The Tomales Bay growers were not contacted during the environmental impact process about the economic or other impacts that would flow from closing down DBOC.¹¹

If DBOC is closed and no longer obligated to make lease payments or pay other user fees to the State, other California shellfish growers, including the TBOC and Hog Island will be required either to pay higher user fees or receive reduced State services in support of their aquacultural operations, which are paid for through fees deposited in the constitutionally-prescribed trust funds.¹²

Due to State concerns about run-off from cattle ranches above Tomales Bay, TBOC and Hog Island are not allowed to harvest oysters from Tomales Bay when local rainfall is a half-inch or more. If DBOC is not

¹¹Appendix, Exhibit 6: John Finger, President and CEO, Hog Island Oyster Company Comments on DEIS, Correspondence #52047.

¹² See footnote 11, *supra*.

available as a source for oysters needed to supply the retail shops on Tomales Bay during these events, the retail shops will either have to close or obtain oysters from out-of-area sources to meet the demand for oysters in their retail operations.

Shellfish growing operations in Tomales Bay are at capacity. The demand for fresh oysters is too high for Tomales Bay growers to meet even with DBOC in operation. TBOC's retail and picnic areas located alongside Highway One are at capacity and cannot expand. They already "struggle with parking issues and traffic congestion." This is a comment on the DEIS submitted on behalf of TBOC:

DBOC customer base of 50,000-plus people will also lose the opportunity to be educated about the sustainable food production that farmed shellfish represents. Our customers will be adversely affected because former DBOC customers will attempt to utilize our area if DBOC is closed. . . . Tomales Bay oyster businesses do not offer oysters shucked and packed in jars. Oyster consumers who prefer jarred oysters will be disproportionately affected by the closure of DBOC, the State's last operating cannery. The EIS must consider the fact that DBOC offers¹³ a product that cannot otherwise be supplied locally

Similarly, the Bay Area restaurants that feature locally grown oysters from DBOC will have either to cease serving oysters or stop featuring local sustainably raised shellfish on their menus.

¹³ Appendix, Exhibit 6: Martin Seiler, Tomales Bay Oyster Company Comments on DEIS, Correspondence 50395.

V. IMPACT ON WEST MARIN SCHOOLS AND CHILDREN LIVING AT THE OYSTER FRM.

In December 2012 Interim School Principal Jim Patterson and West Marin School Principal Matt Nagle attended a meeting of “soon-to-be-displaced workers” of the Oyster Farm and representatives of the DOI and NPS staff. After the meeting Mr. Patterson wrote an open letter to President Obama expressing frustration at the likely loss of the value of the school’s work to close the achievement gap of the children of the workers who had been given a 90-day eviction notice. He went on to say:

. . . As the meeting proceeded, however, I began to realize that there were other issues that needed to be addressed.

The Secretary stated that he made his decision after “careful consideration.” The staff explained that he made the decision solely on the 1972 contract language and the subsequent 1976 “potential wilderness” legislation. They stated he did not even consider the scientific or environmental issues that the government has spent tens of millions of dollars on.

This is probably what made the workers feel most disrespected. They were hopeful when they heard of his visit, but it turned out to be what they described as a 20-minute photo op, without any real discussion, listening, questions or understanding (he didn’t even go out on the water to see the condition of “the pristine jewel” he is trying to save). I wish I could remember the Spanish word for mockery, because that is how the workers felt – mocked

Expressing many thoughts heard locally, Principal Patterson concluded:

This decision seems to go against everything . . . this current administration stands for. Does it create jobs? No. Does it address affordable housing? No. Does it help with immigration? No. Does it support sustainable farming? No. Does it help the economy? No. Does it help the environment? No. Consider this: Drakes Bay Oyster Company supplies oysters to a multi-million if not billion-dollar food industry in California. Will that industry stop consuming oysters? No. Oysters will be imported from Washington, Mexico, China. The impact of our carbon footprint on the whole region and

world will far outweigh any good that might be gained from turning this estuary [into] a wilderness.¹⁴

VI. ENVIRONMENTALISM: EVOLVING CONSERVATION THEORIES

The environmental movement is evolving. Chief Scientist for The Nature Conservancy, Peter Kareiva, is a leading advocate for the need for 21st century conservationists to become more “people friendly” and to deal with “working landscapes,” including fisheries. Writing with Michelle Marvier, a professor of environmental studies at Santa Clara University, and Robert Lalasz, director of science communications for The Nature Conservancy, Kareiva pointed out that while parks and wilderness will continue to be created the:

. . . bigger questions for the 21st century conservation regard what we will do with . . . the working landscapes, the urban ecosystems, the fisheries and tree plantations In answering these questions, conservation cannot promise a return to pristine, prehuman landscapes. Humankind has already profoundly transformed the planet and will continue to do so. [footnote omitted] What conservation could promise instead is a new vision of a planet in which nature – forests, wetlands, diverse species, and other ancient ecosystems – exists amid a wide variety of modern, human landscapes. For this to happen, conservationists will have to jettison their idealized notions of nature, parks, and wilderness – ideas that have never been supported by good conservation science – and forge a more optimistic, human-friendly vision.¹⁵

¹⁴ Appendix, Exhibit 8: *Open Letter to President Obama* from West Marin School Principal Jim Patterson, as published in the Point Reyes Light on 12/13/12.

¹⁵ “*Conservation in the Anthropocene: Beyond Solitude and Fragility*”, Winter 2012 issue of Breakthrough Journal. <http://thebreakthrough.org/index.php/journal/past-issues/issue->

In a Slate article, “*Environmentalists Are Battling Over the Nature of Nature*,” author Keith Kloor asks, “[c]an modern greens loosen nature’s grip on environmentalism.” He quotes a leader of the “modernist environmental movement”, Emma Marris, as arguing “we must temper our romantic notion of untrammelled wilderness’ and embrace the jumbled bits and pieces of nature that are all around us – in our backyards, in city parks, and farms.”¹⁶

Closer to home, in a September 12, 2012, guest column in the *West Marin Citizen*, Sonoma State University Associate Professor of Environmental Studies and Planning, Laura Watt, commented that what makes the controversy over the future of DBOC “somewhat unique is that both ‘sides’ are environmentalists:”

Because here in West Marin, we have two powerful strands of environmentalism, wilderness advocacy and sustainable agriculture, arguing over the same patch of tidelands. . . .

After all, the wilderness status at Point Reyes is not in danger here: Drakes Estero was designated potential wilderness in 1976 and has been *managed as wilderness* ever since, with the sole exception of maintaining the oyster rack structures, which long pre-date the designation (and the park). The “commercial operation” itself is on the shore, on land that is historically part of the pastoral zone, and which is not part of the wilderness designation. DBOC is part of a long history of fishing and mariculture in West Marin, and many families have

2/conservation-in-the-anthropocene.

¹⁶http://www.slate.com/articles/health_and_science/science/2012/12/modern_green_movement_eco_pragmatists_are_challenging_traditional_environmentalists.single.html

maintained traditions of hiking the estero or kayaking its water and then gathering around a picnic table to celebrate with a plateful of oysters. For them, there is no either/or between sustainable agriculture and the wild.

. . . an oyster even tastes wild, bringing the sharp brininess of the sea to our mouths along with a deep appreciation of place, like the idea of *terroir* in winemaking.

In closing Prof. Watt returns to a discussion of a new book on national parks, *Uncertain Path: A Search for the Future of National Parks*, by William Tweed, a long time NPS employee, who articulates a “strong need for a shift in NPS management,” and argues “that the old idea of park preservation as ‘keeping things the same forever’ no longer applies in today’s evolving circumstances.” In this same vein, Prof. Watt says:

. . . I would argue that Point Reyes represents the future, as we will increasingly need to reconcile the two “sides” of environmentalism, finding new¹⁷ ways for them to coexist and complement one another

Less poetic, but equally compelling is the comment regarding visitor experience from the University of California Agriculture and Natural Resources Department, Cooperative Extension, Marin County:

. . . Local producers, and regional and national consumers, recognize Point Reyes and West Marin as a special place, one with authentic foods of exceptional quality. . . . If embraced as an interpretive opportunity, agriculture and aquaculture, including both historic and current practices, could be a positive addition to the other wonderful natural assets this unique national seashore provides

¹⁷ Appendix, Exhibit 9: *Realizing the potential*, by Professor Laura Watt in West Marin Citizen on 9/6/12.

The DEIS states that preferred forms of visitor enjoyment are those that are uniquely suited to the superlative natural and cultural resources found in the parks. These preferred forms of use contribute to the personal growth and well being of visitor by taking advantage of the inherent educational value of the parks. The NPS publication, *Stewardship Begins With People* (Diamant et al. 2007) describes Point Reyes as . . . “a place that can reconnect people to their natural heritage through a richness of wilderness and recreational experiences; and *a place that can also reconnect people to the food they eat, the landscapes where it is grown, and the honorable labor of producing it.*”¹⁸ [Emphasis added.]

VII. SCIENTISTS AND OTHER SHELLFISH GROWERS SPEAK OUT

Writing that an “anti-science mania is sweeping parts of the United States,” water and climate scientist Peter Gleick of the Pacific Institute says, “bad science leads to bad policy, no matter your political beliefs.” Using the controversy over the future of DBOC as his example, Gleick points out that good science could play a key role in the dispute over wilderness versus local sustainable agriculture, but “we’re not getting good science:”

Science is not democratic or republican. Scientific integrity, logic, reason, and the scientific method are core to the strength of our nation. We may disagree among ourselves about matters of opinion and policy, but we (and our elected representatives) must not misuse, hide, or misrepresent science and fact in service of our political wars.¹⁹

A California shellfish grower, Phillip Dale of Coast Seafoods,

¹⁸ Appendix, Exhibit 10: University of California, Agriculture and Natural Resources, Cooperative Extension Comments on DEIS, Correspondence #51237.

¹⁹ Appendix, Exhibit 11: *Bad Science Leads to Bad Policy, No Matter Your Political Beliefs*, by Peter H. Gleick, Water and climate scientist, President, Pacific Institute, Blog in HUFFPOST San Francisco.

commented that the [DEIS] “document and project troubles me deeply” because of its failure to consider the “peer reviewed science” developed through research “to identify and address both positive and negative impacts resulting from shellfish culture.” He concluded:

With out the benefit of shellfish farmers fighting for good water quality and healthy environment many²⁰ of the bays around the nation would be in much worse shape.

Similarly, a Puget Sound shellfish farmer, Vicki Wilson, part-owner of Arcadia Point Seafood, commented:

As a person trained in research methods (University of Washington, 1983) who spent a career using science as a touchstone for solid policymaking in government, I am compelled to share my dismay at the continued and misplaced credibility the DEIS gives to the work of the National Park Services’ “scientists”. Proposing and analyzing alternative courses of action for consideration by policy makers based on flawed science (misused, selectively interpreted, incomplete, purposefully ignored or undisclosed, etc.) is beyond reason.

Ms. Wilson went on to say that she found the following statement in the DEIS equally troubling:

“The NPS fully considered DBOC’s interests in developing the range of alternatives and impact topics that are addressed in this EIS.” (Chapter 1, pp 22).

Any of the proposed alternatives in the DEIS will put DBOC out of business: it is a bit of a stretch to imagine the “good faith” behind this statement – perhaps “considered and discarded” would be more accurate.²¹

²⁰ Appendix, Exhibit 12: Phillip G. Dale, Coast Seafoods Company Comments on DEIS, Correspondence #33043.

²¹ Appendix, Exhibit Exhibit 13. Viki Wilson, Arcadia Point Seafood Comments on DEIS, Correspondence #52025. Although it is beyond the scope of discussion in this brief, we note that Section 124 specifically

Thoughtful and detailed comments regarding deficiencies in the DEIS both as an environmental document generally and because of the inadequacies of the “science” set out in it were provided by or on behalf of the Pacific Coast Shellfish Growers Association [PCSGA] and the East Coast Shellfish Growers Association [ECSGA]. They, too, reflect an underlying concern that mistaken “science” used to force closure of the Oyster Farm could hurt the shellfish industry as a whole.

The ECSGA notes that the DEIS “fails entirely to mention or address the negative social, cultural and environmental impacts that would result if the farm is removed from Drakes Estero.” Along with a list of the benefits to the ecology of Drakes Estero provided by the Oyster Farm, it lists the Oyster Farm’s role as “tourist attraction that explains to hundreds of visitors annually how sustainable aquaculture can produce local, nutritious food in harmony with nature,” and the “economic multiplier impacts that flow

provides that with the exception of a requirement that the Oyster Farm pay the fair market value for the use of the property and possible inclusion of recommendations of the NAS, the authorized permit is to be issued “with the same terms and conditions as the existing authorization.” The “existing authorization”, that is, the RUO, explicitly provided that a Special Use Permit could be granted when the RUO expired so long as the Oyster Farm has a State of California lease for shellfish cultivation in Drakes Estero. Proposing a ten-year SUP with no renewal is another example of NPS interpreting the law to facilitate closing down the Oyster Farm so Drakes Estero will have full wilderness status.

through the community” resulting from the employment opportunities and income thus provided.²²

A letter on behalf of the PCSGA describes the DEIS as “fundamentally flawed” because of the failure to use “existing environmental conditions as the baseline against which the alternatives are measured. . . .” PCSGA described the DEIS “methodology” as “highly speculative,” as not comporting with “applicable regulations guiding NEPA implementation” as failing to “ensure that a decision regarding the proposed action will be fully informed and well-considered,” and as skewing “the discussion of environmental consequences throughout the entirety of the document.” After some 17 pages of analysis, the authors express a thought shared by many commentators:

Any one of the above-identified deficiencies render the DEIS inadequate under NEPA. Cumulatively considered, these deficiencies raise the question whether the DEIS’s conclusions were carefully constructed to support a pre-determined outcome. The DEIS . . . selectively cites evidence supporting conclusions that continuing shellfish aquaculture operations will have adverse environmental consequences, while ignoring or dismissing contradictory evidence. The DEIS does not comport with NEPA’s standards, and does not reflect well on the National Park Service²³

²² Appendix, Exhibit 14: East Coast Shellfish Growers Association Comments on DEIS, Correspondence #52027.

²³ Appendix, Exhibit 15. Comments on DEIS on behalf of Pacific Coast Shellfish Growers Association, Correspondence #52029.

VIII. CYNICAL USE OF NEPA UNDERMINES SUPPORT FOR ENVIRONMENTAL REVIEW AND RESPECT FOR GOVERNMENT

A. Examples: Wilderness Experience and Visitor Services.

There are two particularly pertinent examples of NPS ignoring, manipulating or using very technical distinctions to avoid taking into account facts that reflect positively on retaining DBOC as a permittee, one relating to the impact of DBOC on kayakers who enjoy a “wilderness” experience on Drakes Estero, the second to the educational value of DBOC’s interpretive services.

A portion of the Drakes Estero tidelands is designated “potential wilderness.” NPS and wilderness advocates say that the presence of the oyster racks and boats and sounds associated with shellfish cultivation in Drakes Estero have a negative impact on the experience of visitors to the area designated potential wilderness. However, the commercial kayak companies offering tours of Drakes Estero report a contrary reaction. Despite risking retaliation for speaking out in support of a permit for DBOC, the three kayak touring companies, who took a reported total of 221 guests out on Drakes Estero in 2010, submitted both a joint comment and individual comments reporting that many of their guests express appreciation for the opportunity to see an example of sustainable aquaculture. The companies reported that DBOC staff often explain to

kayakers the importance of not disturbing the seals and provide backup safety support when needed. They explained that NPS had “misrepresent[ed]” the Oyster Farm’s sound impacts.²⁴

The failure of NPS staff to contact the kayak companies for feedback on their experience, and the failure to reveal in the Final EIS visitors section the kayak companies’ support for the Oyster Farm experience, are brazen examples of NPS avoiding information or ignoring comments inconsistent with the decision to convert Drakes Estero to wilderness status by any means necessary. The NPS acknowledges that there is no data to show the number of individual kayakers that use Drakes Estero annually. But rather than acknowledge the kayak companies’ comments about their clients’ appreciation for the opportunity to see a sustainable aquaculture operation, the FEIS added “radios used by staff for music” to the list of distractions from the wilderness experience for kayakers.

The opening paragraphs in the Visitor Experience Section describe NPS-preferred forms of visitor use as including those which contribute to personal growth and take “advantage of the inherent educational value of

²⁴ Appendix, Exhibit 16: Kayak Tour Operators Comments on DEIS, Correspondence #51105.

parks”²⁵ In her extensive comment on the “Visitor Experience and Recreation” section of Chapter 3 in the EIS, Oyster Farm Manager Ginny Lunny Cummings commented in detail on the opportunities for personal growth and education that DBOC already provides. By way of credentials to provide the interpretive services offered by DBOC seven days a week, she cites her early experience as a NPS Interpretive Ranger at the Seashore, and her degree in education and prior teaching experience. She challenges the Seashore’s authority to say in the EIS that the “primary focus of DBOC is the commercial operation for the sale of shellfish to restaurants and the wholesale shellfish market outside the park.” She describes the ways in which DBOC reaches out to groups and individuals with invitations for educational tours. She urges NPS to “fully consider the adverse impact to 50,000 seashore visitors per year if NPS chooses to evict DBOC,” and asks that a “more informed study be made” of DBOC’s contribution to “visitor services:”

. . . Drakes Bay Oyster Farm is an interpretive goldmine that the NPS should embrace, not eradicate. Our entire nation is beginning to understand the social, environmental and health benefits of supporting local farms, local farmers markets and local sustainable foods. NPS/PRNS have one of the finest examples right in the heart of the Seashore, in Drakes Estero, where the wildlife, mammals, a pristine estuary and healthy local food production coexist in harmony in Point Reyes National Seashore. Let the citizens of our United States not

²⁵ See the full quotation from the U.C. Extension Comments, beginning on page 11, *supra*.

loose this “pearl” of an example of coexistence and harmony with Drakes Estero.²⁶

The Final EIS dismisses DBOC’s interpretive services as “not a visitor service.”²⁷ The FEIS also makes no attempt to consider what the loss of DBOC’s interpretive services would mean for visitors to the Seashore because “data is not available to determine what percentage of DBOC visitors” come to the Seashore “only” to visit DBOC.²⁸ The FEIS misses the point of how people actually use the Seashore. The beauty of the Seashore is that it is composed of diverse uses: for example, a family can spend the morning kayaking around Drakes Estero, stop for lunch and a tour of the Oyster Farm, and then spend the afternoon at the beach. The presence of the Oyster Farm enhances the appeal and educational value of the Seashore for all—which is what NPS says it wants.

B. Environmental Review: Yesterday “Yes”, Today “No”, Tomorrow -?

NPS undermines support for the NEPA and environmental review generally when it alternately says that environmental review will be done,

²⁶ Appendix Exhibit 17: Ginny Lunny Cummings, Farm Manager, DBOC, Comments on DEIS, Correspondence #52044 along with a sample of “thank you” notes she received after a school group tour of the Oyster Farm

²⁷ FEIS at 269.

²⁸ *Id.*

and then that environmental review is not necessary, and when it asserts that environmental review is required, and then denies that environmental review is necessary.

Until recently, NPS supported the continued presence of commercial oyster farming in Drakes Estero. In 1980, NPS published a General Management Plan, which made it a goal “to monitor and improve maricultural operations, in particular the oyster mariculture operation in Drakes Estero.”²⁹ In 1998, NPS approved an *expansion* of the oyster farm facilities, finding that it would have “no significant impact” on the environment.³⁰ In 2005, however, NPS informed the Oyster Farm that “no new permits will be issued” when the 40-year Reservation of Use and Occupancy [RUO] expires in 2012,³¹ a decision made without the benefit of environmental review. When the Oyster Farm asked for a SUP pursuant to Section 124, NPS said that environmental review was required and set a schedule for the process to be completed.

To comply with NEPA regulations and NPS’s own NEPA Handbook a “Notice of Availability” for the FEIS is required and should have been

²⁹ FEIS 65.

³⁰ FEIS 66.

³¹ Federal Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction page 5, lines 17-20. Also Lunny Dec. Para. 10.

published by the U.S. Environmental Protection Agency by October 26, 2012. In fact, although the FEIS, dated November 2012, was made available just before Secretary Salazar's visit to the Oyster Farm on November 21, the FEIS has never been officially published. Rather, at this stage, NPS and Secretary Salazar assert that the "notwithstanding any other law" phrase in Section 124 excused preparation of an EIS, and that the FEIS was used merely to "inform" Salazar's decision and Order.

By its actions, NPS induced the public and DBOC to invest time and resources into participating in a scoping process and in commenting on the DEIS. It may prove to be part of a pattern intended to wear down the owners of DBOC emotionally and financially. Whether or not *that* is true, the NPS last minute assertion that the Section 124's "notwithstanding any other law" clause excuses completing environmental review before the Oyster Farm is denied a permit communicates disdain for those who participated in the environmental review process. It is particularly disrespectful of those commentators who took a significant amount of time and made a genuine effort to respond in good faith to a request for their input.

C. Public Effort To Provide Helpful Assessment Of The Environmental Impact Of DEIS Alternatives.

Comments on the Draft EIS came from people from all age groups and walks of life and with a variety of interests.

Comments came from school children and from grandparents who expressed appreciation for an easily-scheduled lecture on shellfish cultivation given to their family on a summer outing to the Oyster Farm.³²

The retired State aquaculture coordinator did a detailed review of the DEIS sharing his “institutional memory” about the Oyster Farm and the attention the State paid to its impact on the ecology of Drakes Estero, as well as his expertise as a career aquaculturist.³³ Three pages of comments offering additions to or corrections of statements in specific paragraphs in the DEIS is prefaced, in part, with this general comment:

The DEIS is a document that represents what happens when working relationship fall apart and the parties who need to work together in a cooperative manner no longer talk to each other. . . . the DEIS is not an unbiased environmental review, it represents how re-interpreting history and the legislative intent of the original authors of Seashore legislation can be used to further an agenda. . . . As the former [California State Department of Fish and Game] Marine Aquaculture Coordinator very familiar with aquaculture permitting issues

³² Appendix, Exhibit 18: Doug and Margaret Moore, grandparents, Comments for DEIS, Correspondence #50078 and see attachments to Cummings letter, *supra*, Exhibit 17.

³³ Appendix, Exhibit 19. Thomas O. Moore, Retired California Department of Fish and Game marine biologist and Marine Aquaculture Coordinator Comments on DEIS, Correspondence # 51547.

and an expert on the state aquaculture practices, given the 10-year maximum time period allotted for an SUP for DBOC, all the alternatives presented in this DEIS will put DBOC out of business. Only a cooperative management alternative will allow DBOC [to] secure the necessary permits and to remain in operation. . . .

The University of California Extension Service personnel comments, cited above, and comments from the nonprofit Marin Agricultural Land Trust³⁴ each provided in depth discussions of the consequences for agriculture and the community of the alternatives set out in the DEIS. Other examples include the comments of *amici* California Farm Bureau Federation³⁵ and Marin County Farm Bureau.³⁶

One of the most creative commentaries came in the form of a proposed “collaborative management alternative” submitted on behalf of the Alliance for Local Sustainable Agriculture and, according to NPS statistics, endorsed by some 1,750 commenters.³⁷ This proposed alternative builds on the suggestions of the scientists with the National Academy of Sciences and the Marine Mammal Center that an interpretive center be established “that

³⁴ Appendix, Exhibit 10.

³⁵ Appendix, Exhibit 21: For California Farm Bureau, Elsa Noble Comments on DEIS, Correspondence #51561.

³⁶ Appendix, Exhibit 22: For Marin County Farm Bureau, Dominic Grossi Comments on DEIS, Correspondence #51043.

³⁷ FEIS: Appendix F, Table F-4, page f-14.

would include exhibits on the ecology of the Estero, including its shellfish mariculture,” and that a “collaborative adaptive management approach” be used to managing shellfish cultivation in Drakes Estero. The Alternative calls for relevant organizations, including the Oyster Farm, to work together for the benefit of all. This Alternative would support the goals of the National Shellfish Initiative announced by the Department of Commerce and National Oceanic and Atmospheric Agency [NOAA] in June 2011. It would protect the “desperately needed affordable housing for farmworkers on remote Point Reyes ranches all while contributing to retention of the “distinctive ‘sense of place and character’” that makes West Marin and the Seashore a beloved destination.³⁸

In the NPS response to the proposal, different aspects of the “Collaborative Management Alternative” were rejected for typical bureaucratic and “legal” reasons, summed up in this phrase, “because its key elements lack legal foundation.” The allegedly “missing” elements include a lack of authority to issue a renewable SUP, which, at least in part, depends on a disputed interpretation of the reference to the “same terms” as the RUO in Section 124. There is a reference to a claim that the State lacks authority to lease Drakes Estero water bottoms for shellfish cultivation despite having

³⁸ Appendix, Exhibit 21: Jeffrey Creque for Alliance for Local Sustainable Agriculture Comments on DEIS, Correspondence ID: 51993.

done so for some 80 years.

The Alternative was also rejected on the grounds that the primary focus of the Oyster Farm is the sale of shellfish, which NPS deigns not a “service” “offered to the visiting public to further the public’s use and enjoyment of the Seashore.” This despite the Oyster Farm Manager’s eloquent description of the Oyster Farm’s commitment to providing interpretive services discussed above.³⁹ Since the SUP is to replace an RUO that explicitly stated that the onshore facilities were to provide interpretive services, these are not legitimate justifications for dismissing support for the Collaborative Management Alternative.

When the work of correspondents, who provide thoughtful comments, is essentially disrespected, the environmental review process is rendered meaningless and leads to distrust of the agency purporting to engage in environmental review. It is not surprising that distrust of the agencies motives is reflected in several of the more thoughtful comments on the DEIS.

³⁹ See Appendix, Exhibit 17.

IX. CONCLUSION

To spend what appears to be enormous amounts of money on a process and then dismiss it peremptorily when ordinary people are feeling the impact of the economic downturn, and low income workers are facing a loss of jobs and housing, is akin to rubbing salt into the wound. Just as Secretary Salazar's visit to the Oyster Farm made a mockery of the workers' concerns for their livelihood and home, Salazar's dismissal of comments offered during the environmental review process made a mockery of the public interest in having the decision on the future of DBOC made after a meaningful review process. This Court can best serve the public interest in this case by issuing the preliminary injunction requested and returning the case to the District Court along with instructions in which misstatement of both pertinent facts and applicable law are corrected.

DATED: March 13, 2013

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CERTIFICATE OF COMPLIANCE

(FED. R. APP. P. 32(A)(7)(B))

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point.

DATED: March 13, 2013

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