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**RE: National Park Service Special Use Permit Application by Drakes Bay Oyster Company for Aquaculture Operations in Drakes Estero, Point Reyes National Seashore**

Dear Addressees:

This letter responds to the December 1, 2010, letter from Drakes Bay Oyster Company (DBOC) to the National Oceanic and Atmospheric Administration (NOAA) and Office of Ocean and Coastal Resource Management (OCRM) and its supporting attachment from Dr. Corey Goodman dated November 23, 2010. These two documents contain a variety of assertions regarding the legal, procedural, and scientific merits of the California Coastal Commission's (Commission) November 10, 2010 request to obtain permission from OCRM to proceed with federal consistency review of a proposed ten year authorization for commercial shellfish aquaculture operations in the Drakes Estero portion of the Point Reyes National Seashore. While many of these assertions are not relevant to OCRM's consideration of the Commission's request, for the sake of factual accuracy, we have made an effort to respond to each of the points raised in these documents. Several of these responses are included below and the remainders are provided in a supplementary attachment to this letter.

DBOC's letter obscures the only issue before OCRM at this time, which is whether the coastal effects of DBOC's proposed activity are reasonably foreseeable. The CZMA's implementing regulations state that "[t]he sole basis for the Director's approval or disapproval of the State agency's request will relate to whether the proposed activity's coastal effects are reasonably foreseeable." 15 C.F.R. § 930.54(c) (emphasis added). Nothing in PL 111-88 changes or supersedes this requirement. Public Law 111-88 is aimed solely at clarifying the scope of the Secretary of Interior's (Secretary) authority and does not address OCRM's authority under the CZMA. Even if DBOC is correct that PL 111-88 would allow the Secretary to issue an SUP

over an objection to DBOC's consistency certification, that is an issue for the Secretary, Commission and DBOC to address if such a circumstance arises. At least two things would need to happen for this to even be an issue: the Commission would need to object to DBOC's consistency certification, and the Secretary would need to exercise his discretion to issue an SUP. It is pure speculation at this time whether either of these events would occur, and the potential for such an outcome is not a sufficient basis on which to ignore the regulatory language laying out the sole basis for OCRM's decision regarding the Commission's request.

With regard to the substance of OCRM's review, as discussed in more detail below, the evidence clearly shows that DBOC's current operations have coastal effects,<sup>1</sup> so it is reasonably foreseeable that new authorization for DBOC to engage in ten years of commercial shellfish mariculture operations will have coastal effects. Even the primary report on which DBOC relies, *Shellfish Mariculture in Drake's Estero, Point Reyes National Seashore, California*, acknowledges these effects. It states: "[o]yster mariculture necessarily has ecological consequences in Drake's Estero."<sup>2</sup> (emphasis added). This report, and others discussed below and in the attachment, show that DBOC's activities currently have coastal effects. Thus, under the relevant federal regulations, NOAA should approve the Commission's request to perform federal consistency review in this case because coastal effects from the new proposed ten year authorization are reasonably foreseeable.

### **Scientific Basis for Commission Request**

As noted in both the Commission and DBOC letters, the standard of review for OCRM's consideration of the Commission's request and the foundation upon which the Commission's request is based, relates to "whether the proposed activity's coastal effects are reasonably foreseeable."<sup>3</sup> In this case, the proposed activity is a new authorization for shellfish mariculture in Drakes Estero for ten years, beginning on November 30, 2012. As noted repeatedly by the DBOC letter and Goodman attachment, the report titled *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*, produced by the National Research Council's Committee on Best Practices for Shellfish Mariculture and the Effects of Commercial Activities in Drakes Estero, provides a wealth of information regarding the current DBOC commercial mariculture operation. Commission staff did not reference or cite this report in our November 10, 2010, request letter because we made an effort to base that letter on peer-reviewed, primary source materials as much as possible. With the exception of a few references to more general reports and memoranda that provide a summary of some relevant papers and studies, the 50+ citations included in our previous letter are predominately to direct scientific research and journal publications. We readily acknowledge that the National Research Council (NRC) report contains pertinent discussions that OCRM may wish to draw upon in its consideration of the

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<sup>1</sup> The California Coastal Management Program, most notably, the enforceable policies of Chapter Three of the California Coastal Act, establishes a standard for the determination of coastal effects. Several of these policies require protection of marine resources, habitat, and water quality. Pub. Res. Code §§ 30230 and 30231.

<sup>2</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 2.

<sup>3</sup> 15 C.F.R. § 930.54(c).

Commission's request. We have therefore attached to this letter the 70 initial pages of this report that were omitted from the excerpt included with DBOC's letter.<sup>4</sup> These initial sections of the report provide a much more detailed and thorough discussion of the ecological implications of shellfish mariculture in Drakes Estero than the selective summary included with DBOC's recent letter, and in many cases, the complete discussion more appropriately describes the current, potential, and foreseeable coastal effects resulting from DBOC's operation. Although we have concerns regarding some of the assumptions underlying portions of the NRC report's analysis and conclusions, as discussed further below and in the attachment to this letter, we fully support many of the report's findings and have provided in the body of this letter a discussion of the NRC report as it relates to the Commission's request.

One of the more relevant findings to the question of whether coastal effects are reasonably foreseeable from a new, ten year authorization of DBOC's operation is included in a primary opening statement of the NRC report:

*Oyster mariculture necessarily has ecological consequences in Drakes Estero as in other lagoons and estuaries, the magnitude and significance of which vary with the intensity of the culturing operation. These effects derive from two different sources: the presence of and biological activity of the oysters, and the activities of the culturists.*<sup>5</sup>

This concept is described further in another more recent report published by the National Academy of Sciences (NAS) in 2010, titled, *Ecosystem Concepts for Sustainable Bivalve Mariculture*, which states in its introduction that "[c]ulturing of suspension-feeding bivalves has effects on the plants, animals, biogeochemical processes, food webs, and habitats of estuarine and coastal ocean ecosystems."<sup>6</sup> This 2010 NAS report also includes a table listing the potential problems and resulting impacts associated with bivalve mariculture, most of which are noted and discussed in the Commission's November 10, 2010, request letter to OCRM. An excerpt of this table is included below:

<u>Potential Problem</u>	<u>Impact</u>
<i>Excessive localized organic loading to sediments via biodeposits from bivalve mariculture</i>	<i>Low oxygen (hypoxia) in sediments and loss of benthic biota</i>
<i>Decreased planktonic biomass by overstocking</i>	<i>Shift planktonic composition; reduce turbidity allowing greater light penetration</i>

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<sup>4</sup> The entire report may be found online: [http://www.mmc.gov/drakes\\_estero/pdfs/nas\\_shellfish\\_mariculutre.pdf](http://www.mmc.gov/drakes_estero/pdfs/nas_shellfish_mariculutre.pdf)

<sup>5</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 2.

<sup>6</sup> Committee on Best Practices for Shellfish Mariculture and the Effects of Commercial Activities in Drakes Estero, Pt. Reyes National Seashore, California. 2010. *Ecosystem Concepts for Sustainable Bivalve Mariculture*, National Academies of Science. 180 pp. Page 4

...	<i>and hence more benthic plant production; deprive native suspension feeders of food</i>
<i>Introduction and transmission of disease organisms</i>	...
	<i>Large losses of cultured bivalves; transmission of disease to native species with possible biodiversity losses and reduction in wild stocks of bivalves</i>
<i>Establishment of breeding populations of nonnative bivalves introduced through culture</i>	<i>Loss of native biodiversity resulting from competition, predation, and habitat modification</i>
<i>Spread of nonnative species associated with mariculture</i>	<i>Loss of native biodiversity resulting from competition, predation, and habitat modification</i>
<i>Overfishing, depleted stocks, and habitat degradation and loss</i>	<i>Reduction in seafood supply Food web changes and biodiversity loss</i>
<i>Displacement of native species and/or Predation on cultured stock</i>	<i>Disturbance of birds, marine mammals, and marine turtles</i>
...	...

In other words, the commercial shellfish mariculture operation in Drakes Estero, by its very nature, currently has actual and potential coastal effects. It is therefore clear that these effects would be “reasonably foreseeable” if a new ten year Special Use Permit were issued to DBOC, as proposed.

#### *Harbor Seals*

As noted in the NRC report, “[t]he activities of the oyster culturists can disturb wildlife such as harbor seals, which are of particular concern because they use the estero for resting, mating, pupping, suckling, molting, foraging, and sheltering from oceanic predators.”<sup>8</sup> This statement closely matches the conclusion reached by Commission staff in the Commission request letter to OCRM, which states: “Human activities associated with shellfish aquaculture within Drakes Estero have the potential to cause disturbances to the resident harbor seal population.” In this letter, Commission staff also notes that:

*For example, the operation of motorized watercraft and the placement, maintenance, and retrieval of bottom culture shellfish bags, if carried out in close proximity to harbor seal*

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<sup>7</sup> Ibid. Pages 6-8.

<sup>8</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 3.

*haul-out sites and intertidal sandbars, may cause seals in these areas to alter their behavior, flush towards the water, and/or flush into the water.*<sup>9</sup>

The detailed discussion on page 49 of the NRC report also closely matches this conclusion reached by Commission staff. It states, in part:

*Some oyster rack and oyster bag areas within Drakes Estero are located within 500 m of sand flats used by harbor seals as haul-out sites. Based upon the findings in the studies outlined above and the informal observations of biologists who study seals, visits to these areas by oyster farm workers can be expected to lead to the short-term disturbance of any seals using these haul-out areas at the time. Depending on visibility and wind conditions, disturbance may also occur at greater distances. Furthermore, the work by Brasseur and Reijnders (2001) suggests that seals could be disturbed before they come ashore if boats pass through haul-out areas at high tide. (emphasis added)*<sup>10</sup>

The Goodman attachment specifically questioned these exact conclusions made by Commission staff, despite their support in the NRC report. Goodman used these conclusions as examples to support his allegations of “false claims against DBOC” and “false science” that is being spread by the Commission. Clearly, these allegations are unwarranted and inappropriate, as the conclusions drawn by Commission staff are the same as those in the report on which Goodman relies. Goodman also went on to call into question the Commission staff’s reference to Becker et al. (2009), alleging that “Becker et al., 2009, your citation #49, is seriously flawed.”<sup>11</sup> Commission staff notes that Becker et al. (2009) has undergone both an internal and external peer review process as well as an extensive evaluation in the NRC report, none of which has suggested that this scientific publication is seriously flawed. Further, similar to the discussion included in our supplementary attachment to this letter regarding the NPS report, *Drakes Estero: A Sheltered Wilderness Estuary*, though aspects of Becker et al. (2009) have been debated, none of this debate has focused on the aspect of this publication that is relevant to its citation by Commission staff, namely, the potential for human activities in close proximity to hauled-out marine mammals to result in disturbances to these animals.

### *Eelgrass*

In our request letter to OCRM of November 10, 2010, Commission staff details many of the ecological functions of eelgrass meadows as a means of demonstrating the importance of this coastal resource. Our letter also describes several ways in which the current shellfish mariculture operation appears to be affecting eelgrass in Drakes Estero. The Commission has long considered the potential or actual loss, disturbance, removal, and/or degradation of eelgrass

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<sup>9</sup> Becker, B.H., D.T. Press, S.G. Allen. 2009. Modeling the effects of El Nino, density dependence, and disturbance on harbor seals (*Phoca vitulina*) counts in Drakes Estero population, California: 1997-2007. *Marine Mammal Science*, 25(1): 1-18. 19 pp.

<sup>10</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 49.

<sup>11</sup> Goodman, C. Letter to Executive Director of the California Coastal Commission, November 23, 2010. Page 6.

and eelgrass habitat to be coastal effects. As noted in our letter, coastal effects to eelgrass appear to be resulting from the current DBOC operation, and a variety of first-hand observations, photographic documentation, and scientific research supports this conclusion. These effects appear to have resulted from three main factors: (1) the operation of outboard motor driven vessels in eelgrass meadows; (2) shading from oyster racks and hanging culture; and (3) habitat loss and displacement resulting from the presence of mariculture structures, equipment, and debris in eelgrass habitat. Because a new ten year authorization of commercial shellfish mariculture activities in Drakes Estero would involve the continuation of all three of these factors, Commission staff finds coastal effects to eelgrass to be reasonably foreseeable from the proposed activity.

Contrary to Dr. Goodman's allegations that Commission staff's eelgrass discussion (summarized above) represents "false science" that was "refuted by the [NRC] report in 2009,"<sup>12</sup> we find the actual observations and conclusions of the NRC report to completely support the analysis included in our letter. For example, with regard to the disturbance and loss of eelgrass from motorized vessels, the NRC report notes:

*A secondary impact to eelgrass arises from damage by boat propellers; scars or disturbance tracks are visually documented in aerial photos of Drakes Estero (total area with scars loosely quantified to be about 50 acres; NPS GIS Map, July 27, 2007). The committee infers that these scars were caused by DBOC boats because the scars are located near the site of rack deployment and are aligned in the direction that leads from or to those racks. In addition, all other motorboats were excluded from Drakes Estero upon passage of the Point Reyes Wilderness Act of 1976. This photograph was thus taken in 2007 and is therefore indicative of current impacts of mariculture boating activities.<sup>13</sup>*

In other words, the NRC report found that in 2007, the DBOC mariculture operation disturbed roughly 50 acres of eelgrass and that this disturbance is "indicative of current impact of mariculture boating activities."<sup>14</sup> This is clearly evidence of a current coastal effect of the current DBOC operation.

With regard to shading effects of the mariculture equipment on eelgrass habitat, the NRC report again supports Commission staff's discussion:

*Perhaps the most relevant to off-bottom rack-and-line culture—the dominant form of oyster culture in Drakes Estero—is work conducted by Everett et al. (1995) in Coos Bay, Oregon. This study demonstrated complete absence of eelgrass directly under oyster racks and lines, presumably due to shading and sediment erosion (10–15 cm at the base of the structure). The absence of eelgrass immediately beneath racks in Drakes Estero (as*

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<sup>12</sup> Goodman, C. Letter to Executive Director of the California Coastal Commission, November 23, 2010. Page 4.

<sup>13</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 33.

<sup>14</sup> *Ibid.* Page 33.

reported by Harbin-Ireland [2004] and Wechsler [2004]) can therefore be reasonably attributed to mariculture.<sup>15</sup>

Finally, with regard to habitat loss and displacement due to the presence of oyster mariculture structures, equipment, and debris, the opening phrase of the NRC report's eelgrass discussion appears to be especially relevant: "Shellfish mariculture and eelgrass compete directly for space..."<sup>16</sup> The NRC report also summarizes recent research carried out on a similar mariculture operation in Washington where "all culture methods were shown to result in decreased production of eelgrass" and notes that "In Drakes Estero, the mariculture footprint is roughly 8 acres for racks predominately in areas of eelgrass..."<sup>17</sup>

Overall, as concluded in the NRC report, it appears that the 2007 level of mariculture operation resulted in the degradation, disturbance, and/or loss of approximately 58 acres of eelgrass habitat in Drakes Estero. Because the activities that resulted in these coastal effects would be carried out if a ten year authorization were provided to DBOC in 2012, as proposed, Commission staff believes that the proposed activity's coastal effects are reasonably foreseeable.

While the NRC notes that 58 acres of eelgrass represent less than 8% of the total coverage of eelgrass in the estero, we do not believe that a secondary evaluation of an impact's magnitude in proportion to a potentially greater level of impact is relevant to our conclusion regarding the reasonable foreseeability of coastal effects that would result from the proposed activity.

#### *Invasive Species*

Neither the DBOC letter nor the Goodman attachment appear to dispute the reasonable foreseeability of coastal effects resulting from the presence and spread of invasive species in Drakes Estero. It is well established that invasive species and non-native species with the potential to become invasive currently exist in Drakes Estero and are associated with the current mariculture operation. The NRC report notes that "[t]he introduction of nonnative species can result in dramatic environmental and economic impacts (Parker et al., 1999; Ruiz et al., 1999)" and provides a thorough discussion on pages 50-56 that identifies a series of important questions that need to be further studied to better inform the scope of current and future exotic species related effects on Drakes Estero. The NRC report also describes the widespread presence of an invasive tunicate, *Didemnum vexillum*, on mariculture equipment in Drakes Estero and notes that "[*D. vexillum*]'s rapid growth and competitive over-topping abilities make it an ecological threat to many native and nonnative invertebrate taxa..."<sup>18</sup>

Recently published research on *D. vexillum* provides further support for the likelihood that a ten year authorization of shellfish mariculture activities in Drakes Estero would result in coastal

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<sup>15</sup> Ibid..Page 32.

<sup>16</sup> Ibid. Page 31.

<sup>17</sup> Ibid. Pages 32-33.

<sup>18</sup> Ibid. Page 56.

effects. Specifically, surveys of a *D. vexillum* invaded marine system in the north eastern U.S. with similar characteristics to Drakes Estero suggest that this tunicate is able to successfully colonize eelgrass meadows.<sup>19</sup> This phenomenon has been observed several miles away in Tomales Bay, as noted by the NRC report, and the New England case suggests that when space is limited on artificial hard surfaces, eelgrass may provide suitable substrate for supporting *D. vexillum*. As noted by Carman and Grunden, this is likely to result in adverse effects on eelgrass:

*Attached tunicates probably block photosynthesis, release of seed, and natural defoliation. Eelgrass serves as a juvenile shellfish and fish habitat and threats to it are of concern by coastal managers and the fishing industry. The effect of D. vexillum overgrowth of eelgrass, and the community dependent upon eelgrass, should be assessed further because D. vexillum can negatively impact habitat such as is occurring on Georges Bank (Valentine et al. 2007b). The use of eelgrass as a mechanism of transport for D. vexillum may be contributing to its spread. The results of our study demonstrate that D. vexillum is continuing to spread, occupying substrate not typically used, and posing a threat to the protected species Z. marina.*<sup>20</sup>

The abundance of *D. vexillum* observed by Commission staff to be growing on DBOC's mariculture equipment, infrastructure, and cultured shellfish suggests that the mariculture operation may be the primary habitat for *D. vexillum* in Drakes Estero and thus a key reason for its continued presence in this system. As the infestation of *D. vexillum* continues and additional space for further *D. vexillum* expansion on these materials becomes scarcer, however, the invasive tunicate may potentially begin to colonize other available substrate – namely eelgrass – as suggested by the New England case and recent evidence in nearby Tomales Bay. DBOC may also be further promoting the spread of *D. vexillum* through other aspects of its mariculture operation as well. Currently, some initial washing and shucking activities occur on a dock located both above the estero's waters and along its shoreline. During these operations *D. vexillum* and other epibiotic organisms are frequently collected and deposited into the estero where they may be transported by currents and tides to eelgrass meadows and other locations. In these ways, it is reasonably foreseeable that a new ten year authorization for DBOC's mariculture operation would facilitate the persistence and spread of *D. vexillum* in Drakes Estero, a situation with the potential to also adversely affect eelgrass and thereby cause coastal effects.

### *Birds*

The NRC report also provides a discussion of the potential effects of the current mariculture operation on birds. Although little research on this topic is available and uncertainty exists concerning specific effects on some species, as noted in the NRC report, "Oyster culture bags placed on intertidal flats in Drakes Estero clearly prevent access by probing shorebirds to the sediments beneath them, thereby removing typical foraging habitat for many species."<sup>21</sup> The

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<sup>19</sup> Carman, M.R. and D.W. Grunden. 2010. First occurrence of the invasive tunicate *Didemnum vexillum* in eelgrass habitat. *Aquatic Invasions* 5(1): 23-29.

<sup>20</sup> Ibid.

<sup>21</sup> National Research Council, 2009. *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California*. National Academies of Science, 139 pp. Page 58.

report also provides support for this conclusion by referencing research carried out in nearby Tomales Bay where “two of the most abundant shorebirds, dunlin and western sandpipers, demonstrated significant avoidance of mariculture plots.”<sup>22</sup> These conclusions closely mirror the discussion of this issue included in our November 10, 2010, request letter to OCRM. Overall, because the proposed ten year authorization of shellfish mariculture activities in Drakes Estero would result in the placement of shellfish cultivation bags in intertidal flats (totaling approximately 140 acres according to DBOC), Commission staff believes coastal effects, including the loss of 140 acres of shorebird foraging habitat, are reasonably foreseeable.

### **Legal and Procedural Issues**

#### *Section 124 of Public Law 111-88 Does Not Supersede the CZMA*

As explained at the beginning of this letter, because OCRM should be simply evaluating whether it is reasonably foreseeable that a new ten year authorization for commercial shellfish mariculture in Drakes Estero will cause coastal effects, it is not necessary for OCRM to determine the scope of the “notwithstanding” clause found in PL 111-88 when considering the Commission’s request. A determination of PL 111-88’s scope, if necessary at all, would only need to occur if the Commission objected to DBOC’s consistency certification and the Secretary determined that he intended to exercise his discretion to issue an SUP. With that said, even if this circumstance were to arise, PL 111-88 would not remove the Commission’s authority under the CZMA.

PL 111-88 provides that “notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit [to Drake’s Bay Oyster Company].” Pub. L. 111-88, § 124, 2009 H.R. 2996. DBOC argues that this language prevents the Commission from even undertaking federal consistency review.<sup>23</sup> Such a broad interpretation of this phrase, however, is not warranted in this context. Courts have held that the phrase “notwithstanding any other provision of law” must be construed by considering the statutory context within which it is found, rather than construing it literally. *Consejo de Desarrollo Economico de Mexicali v. United States*, 482 F.3d 1157, 1168 (9th Cir. 2006); *Miccosukee Tribe of Indians v. U.S. Army Corps*, 619 F.3d 1289, 1298 (11th Cir. 2010). Moreover, courts limit the effect of such language to that which is the “minimum” necessary to effect the “clear and manifest demonstration of legislative intent.” *Northwest Forest Resource Council v. Pilchuck Audubon Society*, 97 F.3d 1161, 1166-67 (9th Cir. 1996) (citing *E.P. Paup Co. v. Director*, 999 F.2d 1341, 1348 (9th Cir. 1993)).

Here, as DBOC acknowledges, the purpose of PL 111-88 was to address the National Park Service’s concern that it was legally prohibited from issuing a new Special Use Permit (SUP) to DBOC.<sup>24</sup> This is explained further on pages 2 and 3 of the attached NPS document, *National Park Service Clarification of Law, Policy, and Science on Drakes Estero*, which notes that in 1976, Congress designated certain parts of Point Reyes National Seashore as wilderness and

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<sup>22</sup> *Ibid.* page 59 referencing Kelly et al. (1996).

<sup>23</sup> Drakes Bay Oyster Company. Letter to NOAA and OCRM dated December 1, 2010.

<sup>24</sup> *Ibid.* Page 2.

potential wilderness (PL 94-544 Oct. 18, 1976), including Drakes Estero, and the Congressional report accompanying this legislation established that these lands would be “essentially managed as wilderness” and that efforts would be made to “remove all obstacles to the eventual conversion of these lands and waters to wilderness status.”<sup>25</sup> Because the mariculture operation in Drakes Estero is the primary obstacle to the conversion of this area to wilderness status, NPS interpreted this and other NPS and Point Reyes National Seashore laws and management policies as a limit to their ability to authorize a new SUP. These were the concerns that gave rise to the enactment of section 124 of PL 111-88. Given that the CZMA process had not even commenced, much less concluded in a manner affecting issuance of an SUP, NPS’s position in 2009 that it could not issue an SUP was not based on a concern that application of the CZMA would prevent it from issuing an SUP. The intent of PL 111-88 was to authorize the Secretary to exercise his own authority to issue an SUP, regardless of the laws that NPS had already identified that would prevent issuance of such a permit. In this context, the language of PL 111-88 should not be read so broadly as to repeal unrelated federal laws, such as the CZMA.

Even ignoring the context in which PL 111-88 was passed, the language in PL 111-88 shows no intent to supersede the CZMA. One context in which courts have interpreted “notwithstanding” clauses to have a broader reach is when they are drafted in connection with language mandating an agency take immediate action. For example, in *Consejo*, the plaintiffs had sued the Department of Interior and Bureau of Land Management for, among other allegations, failing to comply with the National Environmental Protection Act, the Endangered Species Act, the Migratory Bird Treaty and the Settlement Act when the BLM pursued a project to line the All American Canal. *Consejo*, 482 F.3d at 1168. Defendants claimed that those causes of action were moot due to passage of the Tax Relief and Health Care Act of 2006 (2006 Act) stating: “[n]otwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project” *Id.* at 1167. This language mandated certain action to take place “without delay.” The court found that this language requiring immediate action, coupled with the “notwithstanding any other provisions of law” language, showed Congress’s intent that the project proceed without compliance with the “usual course of administrative proceedings.” *Id.* at 1169. It held that the 2006 Act rendered the challenges under the cited environmental statutes moot, as compliance with the environmental statutes would delay commencement of the project, which was what was specifically prohibited in the 2006 Act.

Unlike *Consejo*, the plain language of PL 111-88 does not mandate any specific action be taken nor does it require action by the Secretary within a given timeframe. It simply allows the Secretary to take action and does not limit the information that the Secretary may consider when deciding whether to take that action. It in no way prohibits normal regulatory review procedures, including federal consistency review under the CZMA, from occurring. PL 111-88, therefore, does not alter the legal standard for OCRM in reviewing the Commission’s request to conduct consistency review of DBOC’s application for the SUP.

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<sup>25</sup> National Park Service. 2007. *National Park Service Clarification of Law, Policy, and Science on Drakes Estero*, 18 pp. Page 3 quoting House Report No. 94-1680.

*CZMA Procedures Should Still Apply, Even if PL 111-88 Overrides a Portion of the CZMA*

Even if a court were to determine that the Secretary could exercise his discretion to issue an SUP to DBOC over the Commission's objection, it would not render the Commission's review under the CZMA moot. Thus, PL 111-88 does not conflict with and does not prevent application of the procedures found in the CZMA, even if the ultimate outcome of the Commission's review could be ignored. The text of PL 111-88 deliberately does not direct or require the Secretary to take any specific action; the original version of the bill would have required the Secretary to issue an SUP, but the final version simply provides him with the authority to do so. It therefore merely allows him to exercise his discretion to issue an SUP. Pub. L. 111-88, § 124. Under the CZMA, the Commission is obligated to analyze a proposed activity's consistency with California's Coastal Management Plan (CCMP). 16 U.S.C. § 1456(c)(3)(A). After completing such an analysis, the Commission could concur or object to DBOC's certification of consistency with the CCMP. Under either of these scenarios, the Commission's conclusion regarding CCMP consistency could inform the Secretary's exercise of his discretion under PL 111-88. If the Commission were to object to DBOC's consistency certification, such an objection would still provide the Secretary with valuable insight into California's assessment of the proposed activity and its consistency with the CCMP. Thus, even if PL 111-88 would allow the Secretary to issue an SUP over the Commission's objection, the Commission's analysis of the proposed project would not in itself be inconsistent with the language of PL 111-88. This aspect of the CZMA is therefore not superseded by PL 111-88.

*The Timing of the Commission's Review Is Not Inconsistent with PL 111-88*

DBOC also argues that there is a possibility that the Commission's review of DBOC's consistency certification could delay the Secretary's ability to issue the SUP. First, the argument that the Commission's review would not be completed prior to November 30, 2012, is highly speculative, as evidenced by the very language used in DBOC's letter. It notes that it is "entirely possible" that the Commission's review could go beyond November 30, 2012, and that this "could cause" a conflict with PL 111-88.<sup>26</sup> Thus, DBOC would like OCRM to refuse to grant the Commission's request because there is a possibility that the Commission might not have fulfilled its obligations under the CZMA prior to November 30, 2012. Moreover, since the CZMA requires the Commission to act within 6 months of submittal of a consistency certification, there is no reason to assume the Commission will not act in a timely manner.

Second, and more importantly, the language of PL 111-88 does not support the conclusion DBOC urges OCRM to adopt. PL 111-88 does not require any action of the Secretary, much less action by a certain date. It authorizes issuance of an SUP prior to November 30, 2012, but it does not require action before that date. Pub. L. 111-88, § 124. Congress has included temporal requirements in similar provisions, but it did not do so here. *See, e.g.*, Tax Relief and Health Care Act of 2006 Pub. Law No. 109-432, § 385(a), 120 Stat. 2922, ("[n]otwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project"); 1995 Supplemental Appropriations for Disaster Assistance and Rescissions Act. Pub. L. No. 104-19, § 2001(k), 109 Stat. 194, 240-47 (requiring agency action with 45 days); and Omnibus Appropriations Act 2009, Pub. L. No. 111-8, 123 Stat. 524 ("the Army Corps of Engineers ... shall, notwithstanding any other provision of law,

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<sup>26</sup> Drakes Bay Oyster Company. Letter to NOAA and OCRM dated December 1, 2010. Page 4.

immediately and without further delay construct ... Alternative 3.2.2.a to U.S. Highway 41”). Congress can, and has, required immediate action or action by a certain date, but it did not do so in PL 111-88. Thus, there is nothing in PL 111-88 that would prevent the Commission from undertaking consistency review on the basis that such review might take too long.

#### *Marin County Local Coastal Program*

DBOC’s recent letter includes claims that: (1) the Commission’s consistency review request to OCRM contradicts the Marin County Local Coastal Program; (2) the Marin County Local Coastal Program governs the shellfish mariculture operation; and (3) Section 30411(a) of the California Coastal Act provides the California Fish and Game Department with primary authority over mariculture operations under the Coastal Act. These claims are neither accurate nor relevant to the Commission’s federal consistency review request.

The DBOC mariculture operation is located entirely within the federally owned lands and tidelands of Point Reyes National Seashore. As noted in the Marin County Local Coastal Program, “the federal Coastal Zone Management Act of 1972 provides that federal lands be legally excluded from the coastal zone and thus exempt from a state’s coastal planning and regulatory jurisdiction. However, the federal act also provides that federal activities within the coastal zone boundary must be consistent with a state’s coastal zone management program.”<sup>27</sup>

For all of the California coast, except the San Francisco Bay, the Commission is the state agency responsible for implementing the Coastal Zone Management Act (CZMA). The Commission is responsible for reviewing proposed federal and federally authorized activities to assess their consistency with the enforceable policies of the approved state coastal management program (CCMP). To the extent that it has been incorporated into the CCMP, the Marin County LCP is used solely as guidance. Therefore, Marin County’s LCP is not the standard of review for the Commission’s consideration of whether the proposed activity is consistent with its coastal management program. Any mariculture-related policies included in the Marin County Local Coastal Program are provided for guidance purposes only.

The claim that Section 30411(a) of the California Coastal Act provides the California Fish and Game Department with primary authority over mariculture operations is also misinformed. The Commission has a long history of regulating mariculture activities throughout the state in coordination with the California Department of Fish and Game and numerous other state and federal resource agencies. Section 30411(a) of the Coastal Act specifies that “The Department of Fish and Game and the Fish and Game Commission are the principle state agencies responsible for the establishment and control of wildlife and fisheries management programs...” The proposed continuance of commercial shellfish mariculture operation by DBOC for ten years beginning in 2012 is neither a wildlife nor fishery management program. Section 30411(a) of the Coastal Act therefore does not apply to these proposed activities.

#### *DBOC Production Levels*

Commission staff disagrees with the characterization of previous correspondence and the current and maximum production levels described by DBOC in its recent letter. However, we do not

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<sup>27</sup> Marin County Community Development Agency. 2010. *Marin County Local Coastal Program Unit 2 Land Use Plan*, 295 pp. Page 53 – Federal Parklands.

find this discussion to be pertinent to the decision currently before OCRM or the substance of the Commission's request. We therefore propose to pursue this issue directly with DBOC. If, however, OCRM finds this issue to be relevant or pertinent to its review, we would be happy to provide a more detailed response.

#### *Right to Fish*

DBOC's letter appears to suggest that shellfish cultivation is fishing. This assertion contradicts both reason and fact. The relevant state and federal resource agencies are in agreement on this point, as demonstrated by the attached letter from the Director of the California Department of Fish and Game to the Superintendent of Point Reyes National Seashore which clearly states that:

*Although the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations. Regardless of whether its purpose is commercial or recreational, fishing involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property (Fish and Game Code Sections 17, 15001, 15002, 15402).*

This understanding is also reflected in the California Coastal Act which states in Section 30100.2 that " 'Aquaculture' means a form of agriculture as defined in Section 17 of the Fish and Game Code..."

#### *DBOC's Existing National Park Service Authorizations*

Commission staff also does not find the discussion included in DBOC's letter regarding the specific provisions of DBOC's Reservation of Use and Occupancy to be relevant to the request currently before OCRM. Even if DBOC is correct that continued operation of the oyster farm was contemplated nearly forty years ago, such a lease renewal provision would not preclude the Commission's review of a federal agency's renewal of such a lease.

#### **Conclusion**

As described above and in the attachment to this letter, we believe that the legal, procedural and scientific assertions made by DBOC and its supporters do not provide compelling evidence that the coastal effects resulting from the proposed ten year continuance of commercial shellfish mariculture activities in Drakes Estero are not reasonably foreseeable. Commission staff is therefore reiterating our request for permission to review this proposed activity.

Please call Deputy Director Alison Dettmer, at 415/ 904-5205 if you have any questions.

Sincerely,



PETER M. DOUGLAS  
Executive Director

Attachments

cc: Dr. Jane Lubchenco, NOAA  
David Kaiser, OCRM