



July 28, 2011

Response to Mr. Bagley

Former Assemblyman Bill Bagley represented the West Marin Sanitary Landfill, a 25-acre dump north of Point Reyes Station, in its opposition to State concerns that the Landfill was violating its permit and threatening Tomales Bay. Thanks to the State and many of us locals, the dump is now closed, but Mr. Bagley is now fighting a new battle with the State, this time about “fishing rights.”

In 1965, Mr. Bagley sponsored a bill that granted state tidelands to the newly formed Point Reyes National Seashore (PRNS). The state constitution requires such bills to reserve “fishing rights” for the public. However, Mr. Bagley now claims that his bill secretly retained for the California Department of Fish and Game (CDFG) “total ongoing property-right jurisdiction” over his friend’s oyster operation in PRNS.

But CDFG’s own chief attorney has disavowed Mr. Bagley’s claim, stating that “*the link between the reservation (of fishing rights) and ongoing state authority (over the oyster operation) is legally incorrect.*” There is no link in law because mariculture, which cultivates privately-owned species, is distinct from fishing, which captures publicly-owned species. This distinction is long-established at CDFG, the State Lands Commission, the Coastal Commission, in the state constitution, in state law, in common law and in common sense.

But as with opposing the state over the Landfill, Mr. Bagley claims all these state agencies are wrong and that he successfully hid a secret “pork barrel” in the otherwise innocuous language of his 1965 bill. This is a revealing confession from Mr. Bagley but is meaningless as to the interpretation of the bill itself.

As a former legislator, Mr. Bagley should know that the secret intentions of a bill’s author are meaningless compared to the plain language of a bill that is passed not by any single legislator, but rather by the legislative body as a whole.

If Mr. Bagley intended in 1965 to carve out a pork-barrel gift for his friend, then Mr. Bagley should have made that clear in the bill’s language for his fellow legislators. Instead, the legislature passed a wholly uncontroversial bill that carved out nothing more than the standard reservations required by the state constitution.

Fishing rights and the flood of former legislators' newly proclaimed "intentions" are red-herrings diverting attention from Congress's 1976 inclusion of Drakes Estero with its oyster operation as "Potential Wilderness." Designating Drakes Estero as "Potential Wilderness" was an unambiguous acknowledgement that the operation was "terminable." This is also clearly stated in the operation's 1972 Reservation of Use for its land base. Thus NPS's incontestable jurisdiction over the oyster operation's land base requires that NPS not extend these land-based rights irrespective of the state's water-based rights. So even if Mr. Bagley is right, which he is not, then he is still wrong in asserting that his bill protects the oyster operation.

NPS, like the Sierra Club and many others, provided statements leading up to the 1976 Wilderness Act that supported allowing the oyster operation to continue until its rights were expired, but not forever. Recently some media have taken these statements completely out of context by referencing the "to continue" part of these statements but then failing to include the immediate following references in these statements to the "1972 Reed Memo" that provide the context needed to understand the "to continue" part.

The Reed Memo first outlined NPS policy for terminating non-conforming uses in response to Congressional criticism that NPS was recommending that too many acres be excluded from Wilderness simply because they had then-existing non-conforming uses. Central to the Reed Memo is the concept of terminability, irrespective of a concurrent ability to determine exactly when such terminability would occur.

Despite suggestions for "permanent" non-conforming uses in the 1976 PRNS Wilderness as a compromise between the immediate termination of non-conforming uses in Wilderness and the complete exclusion of non-conforming uses from Wilderness, Congress instead went out of its way to disavow such a compromise. Instead, the compromise that came out of Congress was to allow non-conforming uses to continue to run in "Potential Wilderness" until their existing rights ran their course (not forever).

The oyster operation in Drakes Estero is the only obstacle preventing PRNS visitors from rediscovering a spot of wilderness solitude, as Congress intended, free from the commercial sights, structures and roaring motors that impose on our senses everywhere else. Mariculture operations may be welcomed elsewhere, but not in wilderness.

Humboldt Bay, for example, produces over 70% of California's oysters, yet has 3700 unused acres certified for mariculture and begging for mariculture development. Elkhorn Slough was formerly used for mariculture, but is now also unused and begging for mariculture development. These other places are available for mariculture in California, but Drakes Estero is irreplaceable as the only estuary on the West Coast suitable for Wilderness.

Sacrificing Tomales Bay for the Landfill's commercial profit, as Mr. Bagley wanted then, was just as unconscionable as sacrificing Drakes Estero for the oyster company's commercial profit, as Mr. Bagley wants now.

Gordon Bennett, President, Save Our Seashore
Inverness, CA