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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF MARIN**

13 PHYLLIS FABER, an individual, and
14 ALLIANCE FOR LOCAL SUSTAINABLE
15 AGRICULTURE, an unincorporated
organization, DRAKES BAY OYSTER
16 COMPANY, a California corporation,

17 Petitioners and Plaintiffs,

18 v.

19 CALIFORNIA COASTAL COMMISSION,
CHARLES LESTER, DOES 1 through 10,
20 inclusive,

21 Respondents and Defendants,

22 And Related Cross Actions
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Case No. CIV 1301469 and 1301472
CONSOLIDATED

**MEMORANDUM IN SUPPORT OF
DRAKES BAY OYSTER COMPANY'S
MOTION FOR PEREMPTORY
WRIT OF MANDATE**

Hearing Date: March 11, 2014
Time: 9:00 a.m.
Department: D22
Judge: Honorable Mark A.
Talamantes

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I. INTRODUCTION

Agency action must be invalidated when the accused does not receive a fair trial (or administrative hearing), or when the agency’s decision is not supported by the evidence. Here Drakes Bay Oyster Company did not receive a fair trial, and the decision of the California Coastal Commission is not supported by the evidence. The Commission’s decision should be invalidated.

Drakes Bay did not get a fair trial for two reasons. First, the Commission refused even to consider the expert opinions, declarations, and documentary evidence submitted by Drakes Bay on February 4, 2013, three days before the hearing. Instead of considering this evidence—due process requires an agency to consider evidence offered in a quasi-judicial hearing—the Commission voted to exclude the evidence from the record. As a matter of law, an accused does not receive a fair trial when the agency refuses to consider any of the expert testimony submitted in support of the accused. Drakes Bay therefore did not receive a fair trial as a matter of law.

Second, Drakes Bay did not get a fair trial because the Commission’s hearing procedure did not allow Drakes Bay to cross-examine Commission witnesses. Here the decision turned on complex factual questions about whether the farm is environmentally beneficial, as established by the expert testimony submitted by Drakes Bay, or environmentally harmful, as asserted by the three lawyers who made the staff presentation. The three lawyers made many assertions about ultimate facts, but they hid the truly relevant facts: which staff conducted the investigation, what qualifications they had, what methods they used, whether they were concealing exculpatory evidence, what evidence they collected, and how they bridged the analytical gap from the raw data to the ultimate conclusions. “Cross-examination is the greatest legal engine ever invented for the discovery of truth.” (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712, citation and quotation marks omitted.) Here, because the three lawyers did not disclose the underlying facts, cross-examination was essential to the search for truth.

The Commission’s findings, which were drafted by one of the three lawyers, are not supported by the evidence, because the three lawyers provided no evidence. What lawyers say is not evidence. Although the Commission’s report occasionally cites to studies from elsewhere, these citations say nothing about Drakes Estero, where the oyster farm is located. Drakes Bay, in

1 comparison, submitted expert testimony that relied on local data and studies from Drakes Estero.
2 This evidence established that the oyster farm does no harm, and that it provides an environmental
3 benefit. There is no evidence to the contrary.

4 The writ of mandate should issue, and the Commission’s decision should be invalidated.

5 **II. BACKGROUND**

6 **A. The Historic Shellfish Farm In Drakes Estero**

7 California, through its Fish and Game Commission and Department of Fish and Game¹, has
8 leased Drakes Estero—an ideal place for growing oysters—for shellfish farming since 1932.
9 (Administrative Record (“AR”) 731-732.²) The oyster farm has operated continuously ever since.
10 (*Id.* at 7.) It is one of the most popular and visited places in Point Reyes. (*Id.* at 693:26.) It is
11 California’s last oyster cannery. (*Id.* at 694:15.) It produces some of the world’s finest oysters. (*Id.*
12 at 695:5-6.) It is the only remaining California source of oyster shells, which are used for the
13 restoration of native oysters in San Francisco Bay and threatened and endangered species habitat
14 across the State. (*Id.* at 694:10-20.) Drakes Bay has earned the well-deserved reputation of being a
15 model for sustainable agriculture working in harmony with the environment. (*Id.* at 695:7-9.) In its
16 well-publicized struggles with the National Park Service, it has attracted a wide range of support
17 from many groups, including the local community, foodies, the scientific and academic community,
18 environmentalists, legislators, farmers, and the resident farm workers and their families.³

19 **B. The Commission Alleges Coastal Act Violations**

20 Although the farm predates the Coastal Act by more than four decades, in recent years the
21 Commission has asserted jurisdiction over Drakes Bay’s operations. In 2007, the Commission and

22 ¹ The Department of Fish and Game was recently renamed the Department of Fish and Wildlife.

23 ² Citations to the AR are citations to the administrative record lodged in this action by petitioners
24 and plaintiffs Phyllis Faber and Alliance for Local Sustainable Agriculture on April 10, 2013.

25 ³ In the Ninth Circuit Court of Appeals, the following individuals and organizations submitted
26 amicus briefs supporting Drakes Bay: William T. Bagley, Pete McCloskey, Alice Waters, Phyllis
27 Faber, Mark Dowie, Patricia Unterman, Tomales Bay Association, Alliance for Local Sustainable
28 Agriculture, California Farm Bureau Federation, Marin County Farm Bureau, Sonoma County Farm
Bureau, Food Democracy Now, Tomales Bay Oyster Company, Dr. Corey S. Goodman, Dr. Laura
A. Watt, Pacific Legal Foundation, California Cattlemen’s Association, Building Industry
Association of the Bay Area, Sarah Rolph, Monte Wolfe Foundation, Jorge Mata, Isela Meza, and
the Pacific Coast Shellfish Growers Association.
(http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000654.)

1 Drakes Bay entered into an agreement (“2007 Consent Order”) that provided conditions for the
2 operation of the oyster farm pending the Commission’s issuance of a permit. (*Id.* at 97-109.) Since
3 the 2007 Consent Order was issued, the Commission and Drakes Bay agreed that the Commission
4 would process Drakes Bay’s permit after a federal environmental review process was complete.
5 (AR 1400:4-12, 1473:18-1474:2.)

6 Before that review was complete, in October 2012, the Commission sent Drakes Bay a
7 9-page notice of intent to commence new enforcement proceedings. (*Id.* at 264-272.) The notice
8 alleged three violations of the 2007 Consent Order: (1) operation of boats in a restricted area,
9 (2) discharge of marine debris, and (3) new unpermitted development, such as picnic tables,
10 primarily onshore. (*Id.* at 265.) The notice did not allege that Drakes Bay caused any specific
11 environmental harm. (*See id.* at 264-272.)

12 Although the Commission made clear that it was “not necessary”, Drakes Bay submitted a
13 statement of defense form on January 3, 2013. (*Id.* at 1224-1228.) Drakes Bay denied the
14 Commission’s allegations, referred to information previously submitted that showed the allegations
15 were wrong, asserted various defenses, and reserved the right to present additional information
16 should the need arise. (*Id.*)

17 On January 25, 2013, the Commission staff released a nearly 280-page document, consisting
18 of a 46-page report and more than 200 pages of attachments, recommending that the Commission
19 adopt two new enforcement orders against Drakes Bay. (*Id.* at 3-279.) The report was authored by
20 an attorney, Heather Johnston (*id.* at 3), who did not profess to have ever visited Drakes Bay or to
21 have any expertise about aquaculture. (*See id.* at 3-279 (laying no foundation for report).) The
22 report raised issues that were not raised in the October notice of intent. The report asserted that “the
23 entire extant offshore aquaculture operation and facilities” violated the Coastal Act. (*Id.* at 17.)
24 Without citing any data or reports on Drakes Estero, the report declared war on Drakes Bay. It
25 asserted that Drakes Bay’s operations were harming water quality (*id.* at 27), had the potential to
26 harm harbor seals (*id.* at 29), were spreading “invasive” species (*id.* at 27-29), and were impeding
27 public access to the coast (*id.* at 31-32).

28

1 **C. Drakes Bay Responds**

2 On February 4, 2013, Drakes Bay submitted 12 declarations from 7 experts comprising more
3 than 500 pages and refuting each of the Commission’s new claims. (*Id.* at 621-1192.) Drakes Bay
4 argued that this evidence was relevant because it established that Drakes Bay’s operations “do not
5 harm the estero.” (*Id.* at 621.)

6 Those declarations included evidence establishing that the farm and its offshore oyster racks
7 long pre-date the Coastal Act (*id.* at 693:10-12, 731-732), and are therefore exempt from the
8 Commission’s jurisdiction. There was evidence establishing that the farm’s shellfish, which are
9 filter feeders, improve water quality. (*Id.* at 626:19-627:6, 668:20-669:12.) There was evidence
10 establishing that eelgrass coverage had doubled in recent years, and was especially thriving in areas
11 near the oyster racks, at least in part because of the farm’s positive water quality benefits. (*Id.* at
12 628:22-23-629:4, 695:12-13.) There was evidence establishing that the farm’s oyster racks provided
13 habitat that was likely to increase the biodiversity and ecological abundance of Drakes Estero. (*Id.*
14 at 796:19-25.) There was evidence establishing that there was no potential for the farm to harm
15 harbor seals, because the National Park Service’s expert had exhaustively studied the issue and
16 found “no evidence” that the farm’s operations *ever* disturbed seals. (*Id.* at 815:3-6, 822:17-19.)
17 There was evidence establishing that Drakes Bay was not spreading any species, invasive or
18 otherwise. (*Id.* at 904:3-4, 911:2-24.) There was evidence establishing that Drakes Bay improved
19 public access to the coast. (*Id.* at 693:26-694:14.) There was evidence establishing that Drakes Bay
20 was cleaning up other people’s debris, not discharging any of its own. (*Id.* at 907:15-909:25.)
21 Dr. Corey Goodman, an elected member of the National Academy of Sciences and former biology
22 professor at Stanford and Berkeley, summed it up best when he concluded that “continuation of
23 [Drakes Bay’s] operations ... will not cause a negative impact on Drakes Estero.” (*Id.* at 824:13-14;
24 *accord id.* at 825:8-10.)⁴

25 _____
26 ⁴ For the Court’s information, Dr. Goodman was recently named Chair of the California Council on
27 Science and Technology, which was established by the California Legislature “to offer expert advice
28 to the state government and to recommend solutions to science and technology-related policy
issues.” (<http://www.ccst.us/news/2014/0117chairs.php>) Dr. Goodman has a long history of
advising the government and the public about the scientific implications of public policy decisions.
(*See generally* <http://www.ptreyeslight.com/article/goodman-state-science-council>.)

1 **D. The Hearing On The Enforcement Orders**

2 On February 7, 2013, the Commission held a hearing to consider adopting the new
3 enforcement orders. (*See id.* at 1359-1506 (transcript of hearing).) At the start of the hearing, the
4 Commission announced the procedure that would be used: Commission enforcement staff would
5 make a presentation, then Drakes Bay would make a presentation, then the public could comment,
6 then the hearing would be closed. (*Id.* at 1363:8-21.) The procedure did not contemplate that any
7 witnesses would be sworn, that Drakes Bay would have the opportunity to cross-examine, or that
8 Drakes Bay would be able to respond to any comments from the public. (*See id.*) These procedures
9 are established and required by the Commission’s regulations. (14 Cal. Code Regs. § 13185.)

10 Commission enforcement staff then made its presentation. (AR 1364:1-1396:24.) The
11 presentation was given by three lawyers—Lisa Haage, Heather Johnston, and Alex Halperin—who
12 did not claim to have any personal knowledge of Drakes Bay’s operations or any expertise about
13 aquaculture or any other factual issue raised by the proposed orders. (*See id.* (no foundation laid).)⁵
14 They also did not take any oath before making their presentation. (*See id.* (no oath).)

15 Even though the three lawyers acknowledged that this is a “long complicated matter” (*id.* at
16 1366:7-8), and “fact-intensive” (*id.* at 1390:15), they were not willing to give Drakes Bay the
17 freedom to make a complicated and fact-intensive response. On the contrary, they took the position
18 that the Commission should not even consider the declarations and documentary evidence submitted
19 by Drakes Bay on February 4. (*Id.* at 1386:3.) But the three lawyers did include in the record
20 documents received on or after February 4 from many others. (*See id.* at 294-295 (February 4 letter
21 from National Park Service), 300-33 (February 4 court order), 334-336 (February 4 letter from third
22 party), 337 (February 4 letter from third party), 338 (February 5 letter from third party), 339-40
23 (February 5 letter from third party).)

24 Drakes Bay then gave a presentation, disputing the Commission staff’s presentation point-by-
25 point. (*Id.* at 1397:5-1427:5.) Drakes Bay argued that its February 4 submittal was “relevant” (*id.* at
26 1411:5) and “should very clearly be in the record” (*id.* at 1411:11-12). Drakes Bay also asked that
27 the hearing be continued. (*Id.* at 1413:13-14, 1427:1-3.)

28 ⁵ Ms. Haage, Ms. Johnston, and Mr. Halperin also represent the Commission in this case.

1 Drakes Bay’s presentation was followed by several public comments against Drakes Bay.
2 (*Id.* at 1428:8-1437:18.) Following the public comments, the Commission changed the procedure
3 announced at the start of the hearing, and prescribed by the Commission’s regulations, to allow
4 Commission staff to respond to Drakes Bay’s presentation as well as the public comments. (*See id.*
5 at 1437:19-23 (Commission giving staff chance to respond), 1437:24-1453:7 (staff response).)
6 Drakes Bay was not given an opportunity to reply to the staff response or to the public comments.
7 (*See id.* at 1453:8-10 (following staff response, matter returned to Commissioners).)

8 The Commissioners then discussed the matter, asked questions of staff, and passed three
9 motions. (*Id.* at 1453:11-1481:17.) The first motion was to exclude all of the materials Drakes Bay
10 submitted on February 4. (*Id.* at 1477:3-1479:21.) The second motion was to issue a cease and
11 desist order against Drakes Bay. (*Id.* at 1479:22-1481:9.) The third motion was to issue a
12 restoration order against Drakes Bay. (*Id.* at 1481:10-17.) (The cease and desist and restoration
13 orders will be referred to together as the “Orders”).⁶

14 Drakes Bay then filed a timely petition for writ of mandate challenging the Orders.

15 **III. THE COMMISSION DID NOT GIVE DRAKES BAY A FAIR TRIAL**

16 CCP § 1094.5(b) requires courts to review an agency’s orders or decisions to determine
17 whether they were adopted without a “fair trial”. “The statute’s requirement of a ‘fair trial’ means
18 that there must have been a fair administrative hearing.” (*Gonzalez v. Santa Clara County Dept. of*
19 *Social Services* (Jan. 21, 2014, H038241) __ Cal.App.4th __ [2014 Cal.App.LEXIS 48, *55]
20 (internal citation and some quotation marks omitted).) “Where ... the issue is whether a fair
21 administrative hearing was conducted, the petitioner is entitled to an independent judicial
22 determination of the issue.” (*Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1140 (internal
23 citation and quotation marks omitted).) Because Drakes Bay challenges whether a fair
24 administrative hearing was conducted, this Court should independently determine the issue.

25
26
27 ⁶ In adopting the Orders, the Commission adopted the staff report. (AR 11-12 (staff’s recommended
28 motions to issue Orders, incorporating findings of staff report), 1453:12-14 (moving staff’s
recommendation on cease and desist order), 1480:2-1481:9 (approving motion); 1481:10-12
(moving staff’s recommendation on restoration order), 1481:14-17 (approving motion).)

1 **A. The Commission’s Wholesale Exclusion Of All Of Drakes Bay’s Witness**
2 **Declarations Was A Denial Of A Fair Trial As A Matter Of Law**

3 The “wholesale disqualification” of a party’s experts “render[s] the administrative
4 proceedings unfair as a matter of law.” (*Sinaiko v. Superior Court*, 122 Cal.App.4th at 1141; *see*
5 *also Gaytan v. Workers’ Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 219 (finding due process
6 violation where agency excluded “credible and substantial” expert report).) Here there was a
7 “wholesale disqualification” because the Commission excluded all of the expert opinions offered by
8 Drakes Bay in its defense. (*See* Section II.D above.) Among the reports excluded were “credible
9 and substantial” declarations, submitted under penalty of perjury, from Dr. Corey Goodman—an
10 elected member of the National Academy of Sciences, and former professor at both Stanford and
11 Berkeley—opining that Drakes Bay causes no harm to the environment and ecology of Drakes
12 Estero. (*See* Section II.C above.) The proceedings were thus unfair as a matter of law.

13 Commission staff argued, and the Commission agreed, that the Commission should exclude
14 the February 4 submission, and all the evidence it contained, because it was “neither timely nor
15 relevant.” (AR 287 (staff argument), 1477:13-1478:8 (Commissioner making same argument in
16 support of motion to exclude submission).) This was wrong. Due process requires “[t]he
17 opportunity to be heard ... at a meaningful time and in a meaningful manner.” (*Today’s Fresh Start,*
18 *Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (internal citations and
19 quotation marks omitted).) Here, to provide an opportunity to respond “at a meaningful time and in
20 a meaningful manner”, the Commission was required to give Drakes Bay a reasonable amount of
21 time to respond to the 280-page January 25 submission, and to consider information commensurate
22 with the 280-page submission. By allowing no time to respond and a page limit of zero, the
23 Commission violated due process. Timeliness also did not stop the Commission staff from including
24 in the record materials from other parties that were received on or after February 4. (*See* Section
25 II.D above.) If the Commission needed more time, it should have granted Drakes Bay’s request to
26 continue the hearing. (*See* 14 Cal. Code Regs. § 13185(d) (Commission may trail or continue
27 hearing “to give the staff an opportunity to review and respond to the new evidence”).)

28 And the submission could not have been more relevant. It undermined the entire premise of

1 the proceeding by establishing that the farm’s operations and structures long pre-date the Coastal Act
2 (the Commission lacks jurisdiction over operations and structures that pre-date the act). And it
3 rebutted the Commission staff’s accusations of environmental harm, by providing expert opinions
4 that the farm does *not* cause environmental harm. These opinions, which were provided under oath
5 (unlike the assertions of the three lawyers), were provided by experts who made clear they were
6 qualified to, and did, study the extensive data on Drakes Estero (unlike the three lawyers).

7 “The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be
8 given] notice of the case against him and opportunity to meet it.’” (*Today’s Fresh Start*, 57 Cal.4th
9 at 212 (quoting *Mathews v. Eldridge* (1976) 424 U.S. 319, 348).) By rejecting Drakes Bay’s
10 February 4 submission, the Commission refused to give Drakes Bay a meaningful opportunity to
11 respond to the 280-page staff report and attachments, and issued orders that put Drakes Bay “in
12 jeopardy of a serious loss” without giving Drakes Bay the “opportunity to meet” the case against it.
13 Refusing to let a party respond to the case against it is the essence of a due-process violation.

14 Because Drakes Bay was denied a fair hearing, the Orders should be vacated.

15 **B. The Commission’s Prohibition On Cross-Examination Was A Denial Of A**
16 **Fair Trial As A Matter Of Law**

17 Many years ago, the California Supreme Court held that the right to cross-examine applies in
18 administrative proceedings:

19 Administrative tribunals exercising quasi judicial powers which are required
20 to make a determination after a hearing cannot act on their own information.
21 Nothing may be treated as evidence which has not been introduced as such,
22 inasmuch as a hearing requires that the party be apprised of the evidence
23 against him in order that he may refute, test and explain it. And the action of
24 such a tribunal based upon the report of an investigator, assuming it is
25 competent evidence, when forming the basis for the tribunal's determination,
26 is a denial of a hearing, unless it is introduced into evidence and the accused is
27 given an opportunity to *cross-examine* the maker thereof and refute it.

28 (*La Prade v. Department of Water & Power* (1945) 27 Cal.2d 47, 51-52, emphasis added, citations
omitted.) This principle remains strong today: “The right to cross-examine witnesses in quasi-
judicial administrative proceedings is considered as fundamental an element of due process as it is in
court trials.” (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167
Cal.App.4th 705, 711, citation and quotation marks omitted.) Although the courts of appeal have

1 held that cross-examination is not required in some informal proceedings, especially when the key
2 facts can be determined from documents, *Manufactured Home* explains that “in ‘almost every setting
3 where important decisions turn on questions of fact, due process requires an opportunity to confront
4 and cross-examine adverse witnesses.’” (*Id.*, quoting *Goldberg v. Kelly* (1970) 397 U.S. 254, 269.)
5 The court noted that “[t]he right to cross-examine applies in a wide variety of administrative
6 proceedings”, and cited to several.⁷ The right to cross-examine “is especially important where
7 findings against a party are based on an adverse witness’s testimony.” (*Id.*, citing *Fremont*
8 *Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971.) The
9 *Manufactured Home* court found that “cross-examination was essential” in that case because “[t]he
10 Board made several findings against [the petitioner] based on the tenants’ testimony”. (*Id.*)

11 Here, as in *Manufactured Home*, cross-examination was essential. This case was not one in
12 which the facts were undisputed or easily determined from documents. The three lawyers conceded
13 that this case was a “complicated” and “fact-intensive” matter (*see* section II.D above). The
14 Commission adopted the findings made in the staff report, which was drafted by one of the three
15 lawyers. (*Id.*) These findings include accusations that the oyster farm is causing harm to water
16 quality, eelgrass, harbor seals, invasive species, debris, and public access. (*See* Section IV below.)
17 Drakes Bay’s evidence was directly to the contrary: There is no evidence of any harm, and
18 substantial evidence that the oyster farm provides environmental benefits to Drakes Estero. (*See*
19 Section II.C above and Section IV below.) The crux of the matter, therefore, was whether the three
20 lawyers were right, or whether the experts who supported Drakes Bay were right. Because the
21 matter turned on the truth of the assertions, cross-examination was necessary.

22 Cross-examination was especially necessary because the three lawyers professed neither
23 percipient knowledge nor credentials sufficient to support an expert opinion. (*See* section II.D
24 above.) The three lawyers did not present *evidence*. They made *accusations* that the Commission
25 accepted as true. (*See* section IV below.) The lawyers presented a screen behind which the real

26 ⁷ “(*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1330 [disciplinary hearings]; *Davis v. Mansfield*
27 *Metropolitan Housing Authority* (6th Cir. 1984) 751 F.2d 180, 185 [housing authority]; *Welfare*
28 *Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769 [welfare]; *Pence v. Industrial Acc. Com.*
141 Cal.App.2d 446, 455 [use permit].)” (*Id.*, parallel citations omitted, square brackets in original.)

1 facts—which staff conducted the investigation, what qualifications they had, what methods they
2 used, what evidence they collected, and how they bridged the analytical gap from the raw data to the
3 ultimate conclusions—were hidden from Drakes Bay. By hiding information behind the three
4 lawyers, the Commission deprived Drakes Bay of a fair trial. (*See English v. City of Long Beach*
5 (1950) 35 Cal.2d 155, 159 (“the right of a hearing before an administrative tribunal would be
6 meaningless if the tribunal were permitted to base its determination upon information received
7 without the knowledge of the parties”).) In *English*, the board took information outside the hearing.
8 (*Id.* at 157.) Here the three lawyers took information outside of the hearing and then drafted the
9 findings, which were adopted by the Commission. Either way, the real information, on which the
10 Commission’s findings were based, was hidden.

11 Without cross-examination, there was no way for Drakes Bay to uncover the hidden evidence
12 (or lack of evidence) on which the three lawyers (or one of the three lawyers) relied when drafting
13 the findings. Cross-examination was needed here to uncover the truth. (*See Manufactured Home*
14 *Communities* at 712 (“[c]ross-examination is the greatest legal engine ever invented for the
15 discovery of truth”, internal citation and quotation marks omitted).)

16 Cross-examination was not available because the Commission’s announced procedure for the
17 hearing (AR 1363:8-21), and its regulations specifying how enforcement hearings *shall* be
18 conducted (14 Cal. Code Regs. § 13185), make no provision for cross-examination. The
19 Commission’s regulations specify that an enforcement hearing “shall” proceed with a presentation
20 by Commission staff (§ 13185(b)), followed by a presentation by the “alleged violator” (§ 13185(c)),
21 then by public comment (§ 13185(e)), after which the hearing “shall” be closed (§ 13185(f)). That
22 was how the hearing was conducted, except that the three lawyers were given an extra opportunity to
23 respond to Drakes Bay’s presentation and to the public comments. (*See* Section II.D above.) The
24 regulations allow for questions by Commission members, but by no one else. (14 Cal. Code Regs.
25 § 13185(g).)

26 Because without cross-examination the truth of the accusations by the three lawyers could
27 not be tested, the Commission was required to allow for cross-examination here. Because it did not
28 provide for cross-examination, the Commission’s decision violated fundamental due-process

1 protections and deprived Drakes Bay of a fair trial. The writ of mandate should be issued.

2 **IV. THE COMMISSION’S FINDINGS ARE NOT SUPPORTED BY**
3 **COMPETENT EVIDENCE**

4 CCP § 1094.5(b) requires courts to review an agency’s orders or decisions to determine
5 whether they were based on findings that are “supported by the evidence.” When agencies apply
6 new laws that “interfere[] with the right to continue an established business”, the findings are
7 reviewed under the “independent judgment” test. (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6
8 Cal.App.4th 1519, 1529; *accord The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 407
9 (independent judgment test applies to agency decision not to allow longstanding oil well to reopen).)
10 The shellfish farm and its offshore oyster racks long pre-date the Coastal Act. (*See* Sections II.A
11 and II.C above.) The Orders interfere with the right to continue an established business by
12 (according to Commission staff) reducing the number of oyster larvae that can be planted,
13 eliminating existing clam production, and requiring the immediate removal of some of the oyster
14 racks. (*See, e.g.,* AR 1246 § 5.1(A) (limiting planting of oyster seed); 1249 § 5.5 (requirement to
15 remove clams), 1249-1250 § 5.6 (requirement to remove unused racks within 20 days).) Because the
16 Orders interfere with Drakes Bay’s right to continue its established business, the independent
17 judgment test applies.

18 Under the independent judgment test, “the trial court must exercise its independent judgment
19 on the evidence and find an abuse of discretion if the findings are not supported by the weight of the
20 evidence.” (*Goat Hill Tavern* at 1525.) “A decision which is contrary to the weight of the evidence
21 is one which is contrary to the preponderance of the evidence.” (*Chamberlain v. Ventura County*
22 *Civil Service Com.* (1977) 69 Cal.App.3d 362, 368.) Here, the Commission’s findings are not
23 supported by the weight of the evidence because they are not supported by *any* evidence.

24 “It is axiomatic that the unsworn statements of counsel are not evidence.” (*In re Zeth S.*
25 (2003) 31 Cal.4th 396, 414 n.11.) Here, the Commission based its decision on the staff report and
26 on the unsworn statements of the three lawyers. (*See* Section II.D above.) The staff report was
27 written by a lawyer and it was not submitted under oath. (*Id.*) So the staff report was not evidence.
28 The presentation by the three lawyers was also not under oath. (*Id.*) So that presentation was not

1 evidence. Because the Commission’s Orders were based on the unsworn statements of counsel,
2 which are not evidence, the Orders are not supported by any evidence.

3 The Commission’s regulations only allow it to consider “the sort of evidence on which
4 responsible persons are accustomed to rely in the conduct of serious affairs”. (14 Cal. Code Regs.
5 § 13065; *see also* § 13186 (making § 13065 applicable to hearings on enforcement orders).) Here
6 the evidence on which the Commission relied was unsworn statements by three lawyers who
7 professed no personal knowledge about Drakes Bay and no expertise about its operations. (*See*
8 Section II.D above.) This is not the sort of evidence on which responsible agencies should rely in
9 the conduct of serious affairs. (*See Layton v. Merit System Commission* (1976) 60 Cal.App.3d 58,
10 68 (reasoning that “[a] statement of charges is not evidence”, and vacating agency decision based on
11 findings not supported by personal knowledge).) Because the Commission’s findings were not
12 based on the sort of evidence on which it should have relied, the Orders should be invalidated.

13 The staff report does not provide competent evidence on any of the issues it raises: harbor
14 seals, water quality, invasive species, debris, public access, and eelgrass.

15 *Harbor Seals.* In support of the Orders’ requirements to impose new restrictions on Drakes
16 Bay’s boats, the staff report found that Drakes Bay’s operations “have the potential” to negatively
17 impact harbor seals. (AR 29.) The report cited two reports about harbor seals from other locations,
18 but no data or analysis of Drakes Bay’s operations or Drakes Estero. (*See id.*) Remarkably, the
19 report completely ignored the extensive harbor seal dataset and analyses that do exist on Drakes
20 Estero. The National Park Service had taken time-lapse photos of harbor seals in Drakes Estero for
21 the purpose of assessing whether the oyster farm was disturbing them. (*Id.* at 813:9-16.) The
22 National Park Service also had hired an expert, Dr. Brent Stewart, to analyze those photographs.
23 (*Id.*) Dr. Stewart found “no evidence” that Drakes Bay’s boats *ever* disturbed harbor seals. (*Id.* at
24 814:13-17.) Because the Commission’s staff report cited only studies from other locations, and
25 ignored conclusive evidence from Drakes Estero, this finding was supported only by impermissible
26 speculation, not real evidence. (*See Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 223
27 n.13, 237 (“speculation” cannot support agency findings).)

28 *Water quality.* In support of the Orders’ requirements to remove oyster racks, the staff report

1 found that the racks are “likely to have a deleterious impact on water quality.” (AR 27.) The report
2 cited two studies for the propositions that, before 2003, lumber was “almost uniformly” treated with
3 a chemical that “affect[s]” aquatic organisms in small doses. (*Id.*) Those studies were of wood and
4 organisms in other locations, and did not study Drakes Bay or the organisms in Drakes Estero. (*See*
5 *id.*) The report also did not say whether those chemicals can continue leaching from wood that has
6 been subject to the weather and tides of Drakes Estero for 50 years, as has the wood in Drakes Bay’s
7 racks. (*See id.*; *see also* Section II.C above.) The report also ignored the substantial evidence
8 Drakes Bay submitted showing that its operations improve water quality. (*See* Section II.C above;
9 *see also* *Ass’n to Protect Hammersley v. Taylor Res.* (9th Cir. 2002) 299 F.3d 1007, 1016 (Clean
10 Water Act “listed the ‘protection and propagation of ... shellfish’ as one of the goals of reduced
11 pollution and cleaner water”, quoting 33 U.S.C. § 1251(a)(2)).) Because this finding relied on
12 inconclusive studies of different locations, different organisms, and different wood, and ignored the
13 actual evidence from Drakes Estero, it is supported only by impermissible speculation, not the
14 evidence.

15 “*Invasive*” *Species*. In support of the Orders’ requirements to remove oyster racks and
16 farmed clams, the staff report found that Drakes Bay’s operations raised “concerns” that it was
17 spreading an invasive tunicate (or “sea squirt”)⁸ and Manila clams (AR 26-29.) The staff report
18 cited to a study of the National Research Council of the National Academy of Sciences for the
19 proposition that the sea squirt can colonize eelgrass. (AR 28.) But the staff report did not identify
20 any harm caused by the sea squirt to eelgrass in Drakes Estero. (*Cf.* Section II.C above (Drakes
21 Bay’s evidence on lack of harm by sea squirt).) And the staff report leaves out the main finding of
22 the National Academy’s study, which evaluated the data on the oyster farm’s operations in Drakes
23 Estero and concluded that “there is a lack of strong scientific evidence that shellfish farming has
24 major adverse ecological effects on Drakes Estero.”⁹

25 The staff report asserts that Manila clams, which are grown by the farm and many other

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27 ⁸ The organism is called a sea squirt because it gets its nutrition from taking in sea water and
squirting it out. (<http://en.wikipedia.org/wiki/Tunicate>.)

28 ⁹ National Research Council (2009) *Shellfish Mariculture in Drakes Estero, Point Reyes National
Seashore, California*, at 6, available at http://www.nap.edu/catalog.php?record_id=12667.

1 aquaculture operations, are an “invasive” species, but provided no support for this assertion.¹⁰ But
2 the staff report does not identify any problem caused by raising clams in Drakes Estero.¹¹ And the
3 three lawyers ignored the evidence to the contrary. (See Sections II.C and II.D above.) Because this
4 finding cited no evidence from Drakes Estero, it is supported only by impermissible speculation, not
5 evidence.

6 *Debris.* In support of the Orders’ requirements relating to debris removal, the staff report
7 found that debris “attributable to both historic and ongoing operations” had been washing ashore in
8 Drakes Estero. (AR 29.) The report cited no evidence whatsoever in support. (See *id.*) The three
9 lawyers ignored the evidence Drakes Bay submitted that it is cleaning up other people’s debris, not
10 discharging any of its own. (See Sections II.C and II.D above.) Because this finding cited no
11 evidence in support, and ignored evidence to the contrary, it was not supported by the evidence.

12 *Public Access.* In support of the Orders’ requirements to remove unused oyster racks, the
13 staff report found that the racks inhibit public access to the coast by “providing a potential hazard to
14 those recreating in the overlying waters.” (AR 31.) The report cited no evidence whatsoever in
15 support. (See *id.*) The three lawyers ignored the evidence Drakes Bay submitted that it attracts
16 people to the coast as one of the most popular and visited destinations in Point Reyes. (See Section
17 II.C and II.D above.) Because this finding cited no evidence in support, and ignored the evidence to
18 the contrary, it was not supported by the evidence.

19 *Eelgrass.* In support of the Order’s requirement that racks be removed, the staff report
20 asserted “the absence of eelgrass within the footprint of the oyster racks”, which was thought to be
21 the “likely ... result” of shading caused by the racks. (AR 26-27.) The staff report asserted that the
22 observation had been made by a staff member who had actually visited Drakes Estero many years
23 before (*id.*), but there was no citation to a written site inspection report. Within Drakes Estero, the

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25 ¹⁰ Neither the California nor the Federal governments consider Manila clams to be an invasive
26 species. (See California Department of Fish and Wildlife, California Aquatic Invasive Species
Management Plan, App. G at 74-78 (Jan. 2008), *available at* <http://www.dfg.ca.gov/invasives/plan/>
(listing all invasive species, but not listing Manila clams).)

27 ¹¹ According to the California Department of Fish and Wildlife, Manila clams are “particularly
28 abundant in San Francisco Bay and other estuaries to the north in the intertidal zone”; most
harvesting is by “sport diggers”. (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=34292> at
2.)

1 area in which eelgrass grows has doubled in recent years, and it has increased most dramatically in
2 the parts of the estero where the racks are located. (AR 628:22-629:4.) The farm's positive
3 contributions to water quality are at least partly responsible for that expansion. (See Section II.C
4 above.) The Commission's finding is not supported by the evidence.

5 In support of the Orders' restrictions on boat traffic, the staff report found that boats have
6 "the potential" to negatively impact eelgrass habitat. (AR 26.) The report cited two studies of other
7 locations, but no data or analysis from Drakes Estero. (*Id.*) At the hearing, the Commission chair
8 noted that the National Academy's study of Drakes Estero (which considered the effects of boat
9 operations on eelgrass) "dismissed the concerns ... about eelgrass". (AR 1473:8-9.) Because this
10 finding cited only evidence about other locations, and ignored the only real evidence about Drakes
11 Bay, it is supported only by impermissible speculation, not the evidence.

12 In the end, the Commission's war against Drakes Bay is full of sound and fury, but signifies
13 nothing. The Commission has no evidence to support any of its findings of environmental harm. In
14 fact, the only real evidence points to exactly the opposite conclusion: the environment in Drakes
15 Estero is thriving and Drakes Bay causes no adverse effects.

16 The Commission's reckless accusations just go to show that it cannot be trusted to regulate
17 an 80-year old farm that the Commission plainly does not understand. The Orders should be
18 invalidated.

19 V. CONCLUSION

20 This motion should be granted and the Court should issue a peremptory writ of mandate
21 invalidating the Orders.

22
23 DATED: February 14, 2014

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24
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28 DRAKES BAY OYSTER COMPANY