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10 *Attorneys for Plaintiffs*

11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 OAKLAND DIVISION

13 **TOMALES BAY OYSTER COMPANY;**  
14 **SALTWATER OYSTER DEPOT;**  
15 **OSTERIA STELLINA; HAYES STREET**  
16 **GRILL; CAFÉ REYES; ALLIANCE**  
17 **FOR LOCAL SUSTAINABLE**  
18 **AGRICULTURE; MARGARET**  
19 **GRADE; LORETTA MURPHY;**  
20 **JEFFREY CREQUE; and PATRICIA**  
21 **UNTERMAN,**

**Case No.**

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

18 Plaintiffs,

19 v.

20 **UNITED STATES DEPARTMENT OF**  
21 **THE INTERIOR; SALLY JEWELL,** in  
22 her official capacity as Secretary of the  
23 Interior; **UNITED STATES NATIONAL**  
24 **PARK SERVICE; JONATHAN JARVIS,**  
25 in his official capacity as Director of the  
26 National Park Service; **NATIONAL**  
27 **OCEANIC AND ATMOSPHERIC**  
28 **ADMINISTRATION OFFICE OF**  
**OCEAN AND COASTAL RESOURCE**  
**MANAGEMENT,** and **MARGARET**  
**DAVIDSON,** in her official capacity as  
Acting Director of the Office of Ocean and  
Coastal Resource Management,

Defendants.

## INTRODUCTION

1  
2 1. Defendant Secretary of Interior Sally Jewell’s predecessor (the “Secretary”),  
3 acting in his official capacity, on November 29, 2012, issued a memorandum of decision  
4 ordering the closure of Drakes Bay Oyster Company’s (“DBOC”) oyster farm and facilities on  
5 the shores of Drakes Estero in Point Reyes National Seashore.

6 2. In making the decision to close the DBOC oyster farm, the Secretary erroneously  
7 took the position that the Department of the Interior Appropriations Act, Pub. L. No. 111-88, §  
8 124, 123 Stat. 2904, 2932 (2009) (“Section 124”) swept away any statute or regulation that might  
9 otherwise have applied to his decision whether to close the DBOC’s oyster farm.

10 3. Accordingly, the Secretary, Defendant Department of the Interior (the “DOI”), its  
11 subdivision the Defendant National Park Service (the “NPS,” collectively with the DOI and the  
12 Secretary, “Interior Defendants”) arbitrarily, capriciously, and in violation of the law ignored  
13 procedural constraints that legally applied to this decision and failed to comply with them. These  
14 include: (a) the Interior Defendants’ obligation under *inter alia* 16 U.S.C. § 2805(d) to ensure the  
15 decision whether to close the DBOC oyster farm was consistent to the maximum extent possible  
16 with the purpose and policy of the National Aquaculture Act and to consult with the aquaculture  
17 coordinating group, a Joint Subcommittee on Aquaculture of the Federal Coordinating Council  
18 on Science, Engineering, and Technology, to ensure that occurred; (b) the Interior Defendants’  
19 obligation under *inter alia* 16 U.S.C. § 1456(c)(1) to ensure that the decision to close the DBOC  
20 oyster farm was consistent to the maximum extent practicable with the enforceable policies of  
21 the California Coastal Management Program, and obtain a determination from the California  
22 Coastal Commission (“CCC”) that it was so; and (c) the Interior Defendants’ obligation under  
23 *inter alia* 5 U.S.C. §§ 701, 702, 704, and 706(2)(A) to consider the impacts of the decision  
24 whether to close the DBOC oyster farm on the public trust rights enshrined in the California  
25 Constitution and those with an interest in their protection.

26 4. In turn, Defendants National Oceanic and Atmospheric Administration Office of  
27 Ocean and Coastal Resource Management (“NOAA-OCRM”) and Margret Davidson, in her  
28 official capacity as Acting Director thereof, (collectively, “NOAA Defendants”) arbitrarily,

1 capriciously, and in violation of the law determined the continued operation of the DBOC's  
2 oyster farm had the potential to have a foreseeable effect on coastal resources and thus issued an  
3 order purportedly requiring the DBOC to submit a consistency certification to the CCC, when, in  
4 fact, it could only be a decision by Interior Defendants to close the DBOC's oyster farm that  
5 could have had a potential to have a foreseeable effect on coastal resources, as an oyster farm  
6 had been operating in the same location for approximately eighty years.

7 5. Pursuant to the decision to close the DBOC oyster farm, the DBOC is set to cease  
8 operations on July 31, 2014 and begin dismantling its facilities. If this occurs, Plaintiffs, which  
9 include West Marin businesses that depend on the availability of locally harvested oysters, will  
10 either completely lose access to locally harvested oysters or lose access to a substantial and  
11 critical component of their locally harvested oyster supply. This would cause them to suffer  
12 irreparable losses of business goodwill. Due to Defendants' procedural failures this and other  
13 critical factors and interests were not adequately analyzed or considered in the context of the  
14 Interior Defendants' decision whether to close the DBOC oyster farm.

15 6. Accordingly, pursuant to the 5 U.S.C. § 706, Plaintiffs' respectfully request that  
16 the Court hold unlawful and set aside the Interior Defendants' decision to close the DBOC oyster  
17 farm, and the NOAA Defendants' decision requiring the DBOC submit a consistency  
18 certification and enjoin Defendants to engage in a new decision making process that complies  
19 with the law. In the interim, Plaintiffs seek a temporary restraining order and preliminary  
20 injunctive relief during the pendency of this litigation to prevent their irreparable harm.

#### 21 **JURISDICTION, VENUE, AND RELIEF**

22 7. This action arises under the Administrative Procedures Act ("APA"), 5 U.S.C.  
23 §§ 701 *et seq.*, the National Aquaculture Act, 16 U.S.C. §§ 2801 *et seq.*, and the Coastal Zone  
24 Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* This Court has jurisdiction under 28  
25 U.S.C. § 1331.

26 8. An actual controversy exists between the parties within the meaning of 28 U.S.C.  
27 § 2201. The decision to close the DBOC oyster farm was a final agency action that is subject to  
28 this Court's review under the APA, 5 U.S.C. § 704. Plaintiffs were not required under any

1 applicable law to exhaust any administrative remedies before bringing this action. Furthermore,  
2 any attempt to do so would have been futile based *inter alia* on the Secretary's erroneous  
3 position that his discretion in making the decision whether to close the DBOC oyster farm was  
4 unfettered by any legal constraints.

5 9. This Court may grant declaratory and additional relief, including an injunction,  
6 pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 702, 705, and 706. This Court may  
7 allow Plaintiffs to recover reasonable costs and attorneys' fees incurred in connection with this  
8 action pursuant to 28 U.S.C. § 2412.

9 10. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e), as the  
10 Defendants are officers and employees of the United States, a substantial part of the events  
11 and/or omissions giving rise to the claims at issue in this action occurred in this judicial district,  
12 and a substantial part of the property that is the subject of this action is situated in this judicial  
13 district.

14 11. Intradistrict assignment to the Oakland Division is proper under Civil Local Rule  
15 3-2(c) because a substantial portion of the events and/or omissions giving rise to the claims in  
16 this case occurred in Marin County and a related matter captioned *Drakes Bay Oyster Company*  
17 *v. Salazar*, No. 12-6134-YGR is pending in the Oakland Division.

#### 18 **PARTIES**

19 12. Plaintiff Tomales Bay Oyster Company ("TBOC") is a California company  
20 located in Marshall California. TBOC is California's oldest continuously run shellfish farm  
21 located in Marshal. TBOC has a retail operation on the shore of Tomales Bay. TBOC During the  
22 summer months, TBOC sells between 25,000 and 30,000 oysters a week. During the winter  
23 months sales are more in the 20,000 oysters a week range. On special weekends, like Father's  
24 Day, or holidays, TBOC sells many more oysters. Since the owner began keeping records in the  
25 fall of 2012, TBOC has purchased between 6,000 to 15,000 oysters a week from the DBOC.  
26 Many customers make the trip to TBOC's retail location specifically and exclusively to purchase  
27 locally grown oysters. If it became known that TBOC was not able to provide this product, these  
28 customers would reduce or eliminate their purchases from TBOC's retail operation. This would

1 cause severe and significant harm to TBOC's business and business reputation. At a minimum, it  
2 is estimated that TBOC will lose between \$250,000 and \$400,000 in income a year if oysters are  
3 no longer available from DBOC.

4 13. Plaintiff Saltwater Oyster Depot is a small farm to table restaurant in Inverness,  
5 California that relies on locally sourced shellfish to offer guests a taste of the area and support a  
6 tightly knit food production network. Locally sourced oysters are a key element in the Saltwater  
7 Oyster Depot's menu. Losing DBOC as a source for oysters would greatly diminish the value of  
8 what Saltwater has to offer its customers. Furthermore, oysters from DBOC typically cost  
9 Saltwater about a third less than oysters from out of state. If oysters were no longer available  
10 from DBOC, the price differential for oysters that have to be shipped in from out of area would  
11 significantly impact the ability of this small and remotely located restaurant to remain  
12 competitive.

13 14. Osteria Stellina is an Italian restaurant in Point Reyes Station, California with an  
14 unwavering commitment to local organic products. Osteria Stellina serves Drakes Bay Oyster  
15 DBOC oysters raw, and their pizza choices include fresh shucked (canned) oyster from DBOC  
16 coupled with Straus cream braise leeks, lemon thyme and parsley, all ingredients locally sourced.  
17 They also serve DBOC oysters in other forms as a menu "specials." Osteria Stellina has been  
18 described in the press as "particularly noteworthy for making all – or at least the vast majority of  
19 its dishes from ingredients that are produced within 50 miles of the restaurant." This is  
20 particularly true during prime the growing season when nearly everything – around 90% - of the  
21 items on their menu come from within 50 miles of the restaurant. DBOC is the only oyster  
22 cannery remaining in California, and the only local source for fresh-shucked oysters. Without  
23 DBOC oyster the restaurant will no longer be able to consistently serve fresh locally sourced  
24 seafood. While it cannot estimate the loss in their customer base, it will be significant.

25 15. Plaintiff Hayes Street Grill is restaurant located in San Francisco, California. It  
26 was opened in 1979 with the mission of serving only fresh, locally produced foods with a focus  
27 on fish and seafood. The owners seek out small local fishermen and local shellfish producers  
28 because they strongly believe that the most delicious and nutritious food is the freshest food,

1 harvested as close to the restaurant as possible, using production practices that assure  
2 renewability of earth, ocean and fish supply. The Hayes Street Grill has featured Drakes Bay  
3 Oysters on its menu since the Lunny family bought DBOC, improved its infrastructure and  
4 harvesting practices, and began delivering to San Francisco. Pan-fried extra small Drake's Bay  
5 Oysters are a centerpiece of both the lunch and dinner menu. DBOC shucked oysters are unique  
6 and irreplaceable. They are a fresh, nutritious and affordable protein, especially compared in  
7 price to wild local king salmon, local halibut or black cod. They are one of the most popular  
8 offerings at the restaurant.

9 16. Plaintiff Café Reyes is a casual restaurant in Point Reyes Station, California  
10 where, among others, hikers, bikers, and locals who enjoy the outdoors come for a beer, fresh  
11 local oysters, and wood-fired pizza. They come in the middle of the day or after a day spent  
12 outdoors in this spectacular countryside. Many people go to Point Reyes because of the  
13 reputation that restaurants have for serving fresh organic and locally sourced cuisine, such as  
14 oysters from nearby Drakes Estero. They go in the middle of the day or after a day spent  
15 outdoors in this spectacular countryside. Point Reyes is known for oysters. Café Reyes'  
16 customers have come to expect the fresh oysters from DBOC that are served at Café Reyes.

17 17. Plaintiff Alliance for Local Sustainable Agriculture ("ALSA") was formed in  
18 Marin County in 2006 to advocate for local sustainable agricultural practices and systems, to  
19 encourage local food production and the local agricultural economy. An unincorporated  
20 association, ALSA's members include conservationists, farmers and business people from  
21 diverse backgrounds that have joined together to address the challenges that threaten our local  
22 agriculture. ALSA has been involved in such efforts as advocating for installation of a wind  
23 electric turbine on a local olive ranch; participating in the two-year Marine Life Protection Act  
24 process for the North Central Coast region of California; and advocating for the continuation of  
25 the sustainable shellfish farming in Drakes Estero. Drakes Estero is known as the cleanest  
26 estuary on the California coast. ALSA members believe that the loss of the Pacific oyster from  
27 Drakes Estero will lead to degradation of water quality in the Estero, and that livestock managed  
28 by producers surrounding the Estero may be held responsible for this decline. This could result in

1 efforts to shut down livestock operations in the Estero watershed and further losses to the  
2 sustainable agricultural infrastructure of the region. ALSA members believe that actions to force  
3 the closing down of shellfish cultivation in Drakes Estero are in contravention of the Defendants'  
4 national shellfish initiative and in violation of State shellfish regulations and California Fish and  
5 Game Commission authorities.

6 18. Plaintiff Margaret Grade is a partner in a Sir and Star, a destination restaurant in  
7 Olema. Sir and Stir's menu, which changes with the season and what is available, is grounded in  
8 the products that are farmed, foraged or fished locally. The direct farm to table connection is  
9 celebrated at Sir and Star, where fresh oysters on the half shell and fresh-shucked canned oysters  
10 are virtually staples on the menu. Despite all of the efforts to "save the salmon" and other fish  
11 that were available from local sources in the past, oysters from Drakes Estero have become the  
12 only truly fresh and locally sourced fish consistently available to restaurants like Sir and Stir. If  
13 the National Park Service succeeds in closing down DBOC, Sir and Stir's menu will be changed  
14 forever.

15 19. Plaintiff Loretta Murphy is the manager at the DBOC and resides in Point Reyes  
16 Station, California, where she has raised two daughters with her husband, a probation officer.  
17 She has been a West Marin community member for the past 28 years. She has been an active  
18 member of the Marin County Sheriff's Posse Search and Rescue for 18 years; was the 4-H equine  
19 youth leader for 5 years; and was on the Board of Directors of the Mountain Play. Loretta  
20 Murphy's family highly value the very special quality that makes Point Reyes unique; namely, a  
21 rich agricultural heritage amidst a spectacular natural landscape, and a series of small towns that  
22 have remained true to their ranching and farming history. Loretta Murphy's job includes  
23 speaking with the restaurant owners and chefs throughout the week to make sure their needs are  
24 met. They know that they will not be able to get a quality California oyster if DBOC is closed. If  
25 the DBOC is closed down, Loretta Murphy will be unemployed in a market that has few  
26 opportunities for a professional with her background.

27 20. Plaintiff Jeffrey Creque is an agricultural ecologist with over 30 years of  
28 experience focused on the challenges attendant to producing food in a matter that is ecologically

1 benign or even beneficial. Creque is serving as a Director of the Carbon Cycle Institute, where  
2 he provides senior leadership on carbon farming and land management. Creque is an agricultural  
3 and rangeland consultant and Natural Resources Conservation Service certified nutrient  
4 management planning specialist. He holds a PhD in Rangeland Ecology from Utah State  
5 University and is a California State Board of Forestry Certified Professional in Rangeland  
6 Management. Creque is also a founding member and a member of the board of ALSA, a citizens'  
7 group dedicated to the preservation and enhancement of the natural environment and  
8 ecologically sustainable agriculture in Marin County. Mr. Creque is deeply in favor of the  
9 encouragement of the cultivation of shellfish, which is an ecologically benign and even  
10 beneficial food production system, for environmental reasons. These include the fact that  
11 shellfish aquaculture, particularly oyster culture, is widely recognized as a carbon neutral or  
12 carbon beneficial source of highest quality marine protein. Furthermore, shellfish aquaculture is  
13 a critical tool for the preservation and restoration of the world's threatened marine ecosystems.  
14 Currently all shellfish cultivated in Drakes Estero are sold locally thereby directly reducing the  
15 carbon costs associated with global food production and transport. He has an interest in ensuring  
16 that federal agencies adhere to national policies that call for increased – not decreased – shellfish  
17 production.

18 21. Plaintiff Patricia Unterman is the chef and co-owner of Hayes Street Grill. She is  
19 also a journalist who has covered the food and restaurant scene in the Bay Area for over 40  
20 years. She currently writes a private newsletter, "Unterman on Food." She is a pioneering  
21 advocate for renewable fishing practices and shellfish production. She has served on and testified  
22 before California State and Federal panels on seafood labeling and sustainable fishing practices.  
23 She is a founding board member of CUESA (Center for Urban Education about Sustainable  
24 Agriculture), which started and operated the Ferry Plaza Farmers' Market at the Ferry Building  
25 in San Francisco. Unterman believes that "[e]ach plate of Drake's Bay oysters we serve  
26 represents the ethos that makes San Francisco and northern California a food destination known  
27 throughout the world" and that the oyster farm at Drakes Estero "is intrinsic to the Bay Area's  
28 sustainable food family."



1 22. Defendant U.S. Department of the Interior (“DOI”) is an Executive Branch  
2 department of the United States, a “Federal agency” within the meaning of 5 U.S.C. §§ 701 *et*  
3 *seq.*, 16 U.S.C. §§ 2801 *et seq.*, and 16 U.S.C. §§ 1451 *et seq.*, charged with managing the public  
4 lands and resources in accordance and in compliance with federal laws and regulations.

5 23. Defendant Sally Jewell (“Jewell”) is the Secretary of the DOI. She is named as a  
6 defendant in her official capacity. Ms. Jewell’s predecessor, Secretary Salazar, made the decision  
7 to close the DBOC oyster farm on behalf of the DOI.

8 24. Defendant U.S. National Park Service (“NPS”) is an Executive Branch agency of  
9 the United States DOI and is a “Federal agency” within the meaning of 5 U.S.C. §§ 701 *et seq.*,  
10 16 U.S.C. §§ 2801 *et seq.*, and 16 U.S.C. §§ 1451 *et seq.* NPS is responsible for implementing  
11 and enforcing the Secretary’s decision to close the DBOC oyster farm.

12 25. Defendant Jonathan Jarvis is the Director of the NPS. He is named as a defendant  
13 in his official capacity.

14 26. Defendants DOI, Jewell, NPS, and Jarvis are collectively referred to herein as the  
15 “Interior Defendants.”

16 27. Defendant National Oceanic and Atmospheric Administration Office of Ocean  
17 and Coastal Resource Management (“NOAA-OCRM”) is an Executive Branch agency of the  
18 United States Department of Commerce. NOAA-OCRM is responsible for implementing the  
19 National Coastal Zone Management Program.

20 28. Defendant Margret Davidson (“Davidson”) is acting director of Acting Director  
21 of NOAA-OCRM. She is named as a defendant in her official capacity.

22 29. NOAA-OCRM and Davidson are collectively referred to herein as the “NOAA  
23 Defendants.”

24 **FACTS**

25 30. Since 1934, the State of California has continuously leased the water bottoms of  
26 Drakes Estero for the purpose of cultivating shellfish, [and shellfish have continuously been  
27 cultivated thereon.]  
28

1           31.     In 1965, the State of California conveyed the water bottoms of Drakes Estero to  
2 the United States but reserved the right to fish, including the right to lease the State water  
3 bottoms for aquaculture. In an exchange of letters in March 1966, the Director of the California  
4 Department of Fish and Game (“CDFG”) confirmed with the Superintendent of Point Reyes  
5 National Seashore and the NPS Pacific Regional Office that the State’s conveyance reserved the  
6 right to lease the water bottoms for aquaculture, as described below in the Director’s letter:

7           Upon reviewing this matter it becomes apparent that the legislation transferring  
8 the submerged lands at Point Reyes to the Federal Government specifically  
9 reserved the fishing rights to the State. (AB 1024 (Bagley) Ch. 983, Stats. of  
10 1965.

11           It thus appears that all State laws and regulations pertaining to shellfish  
12 cultivation remain in effect and are applicable to the operations of the Johnson  
13 Oyster Company. This would include annual rental, privilege taxes, planting  
14 requirements, etc. – in short all current sections of the Fish and Game Code, and  
15 of Title 14, California Administrative Code, which relate to shellfish cultivation.

16           32.     Indeed, when the State of California grants property rights to bottomlands under  
17 navigable waters the grant is always subject to the public trust rights of others to fish in those  
18 waters. *See* California Const. Art. X, §3; *People v. Cal. Fish Co.*, 166 Cal. 576 (1913); Cal.  
19 Public Resource Code §6009.1. The California State Legislature and State executive agencies  
20 thus lack the legal authority to include within a grant of property rights to bottom lands below  
21 navigable waters a right to exclude others that would interfere with their public trust rights to fish  
22 such waters, subject to certain very narrow exceptions not applicable here.

23           33.     The April 1974 Environmental Impact Statement for the proposed Point Reyes  
24 Wilderness Area confirms the contemporaneous interpretation of the rights retained by the State  
25 in 1965. It provides that “[c]ontrol of the lease from the California Department of Fish and  
26 Game, with presumed renewal indefinitely, is within the rights reserved by the State on these  
27 submerged lands.”

28           34.     The Johnson Oyster Company (“JOC”) held valid State water bottom leases in  
Drakes Estero from the 1950s until December 2004 to cultivate oysters. In 2004, the California

1 Fish and Game Commission (“CFGC”) granted JOC an extension of its two State water bottom  
2 leases in Drakes Estero for twenty-five (25) years, until 2029.

3 35. California has continuously exercised its right to lease the water bottoms in  
4 Drakes Estero for aquaculture operations since 1965, including reissuing leases in 1979 and  
5 2004. The CFGC has the authority to regulate aspects of these operations, including stocking,  
6 disease control, and transportation of aquatic organisms. The CFGC collects from DBOC both an  
7 annual lease fee, based on the number of acres in the lease, and a privilege use tax, based on the  
8 number of gallons of shucked oyster meats produced each month. The State has continually  
9 leased the water bottom in Drakes Estero to DBOC for as long as DBOC has been cultivating  
10 oysters in the bay.

11 36. Effective November 30, 1972, JOC granted fee title to 1.5 acres on the shores of  
12 Drakes Estero where the oyster farm was located to the United States in exchange for a forty (40)  
13 year renewable Reservation of Use and Occupancy (“RUO”), ending November 30, 2012. The  
14 RUO contained a renewal clause, which provided that a special use permit (“SUP”) could issue  
15 at the end of the RUO period. This RUO was transferred to DBOC and its owner Kevin Lunny in  
16 December 2004.

17 37. In July 2010, DBOC applied for a SUP from NPS consistent with the terms found  
18 in Article 11 of the RUO, and Section 124.

19 38. On November 29, 2012, the Secretary issued the decision to close the DBOC  
20 oyster farm, directing NPS to allow DBOC’s existing RUO and SUP to expire; to publish a  
21 notice in the Federal Register to convert Drakes Estero from “potential wilderness” to  
22 “wilderness”; and to allow DBOC ninety days to terminate its operations.

23 39. The Secretary’s November 29, 2012 memorandum, directing that DBOC must  
24 cease all oyster farming 90 days after November 30, 2012, would deprive DBOC of all future use  
25 and enjoyment of its water bottom leases and completely prevent DBOC from benefiting from  
26 them in any manner.

27 40. The November 29, 2012 memorandum communicated the Interior Defendants’  
28 interpretation that Section 124 exempted the Secretary’s decision from all substantive and

1 procedural legal requirements: “Sec. 124 does not require me (or the NPS) . . . to comply with  
2 the National Environmental Policy Act of 1969 (NEPA) or any other law. . . . Sec. 124 expressly  
3 exempts my decision from any substantive or procedural legal requirements.”

4 41. Consistent with this erroneous determination, the Interior Defendants made no  
5 effort to: (a) consult with the aquaculture coordinating group to ensure the decision whether to  
6 close the DBOC oyster farm was consistent with the purpose and policy of the National  
7 Aquaculture Act; (b) obtain a determination from the California Coastal Commission (“CCC”)  
8 that the decision to close the DBOC oyster farm was consistent to the maximum extent  
9 practicable with the enforceable policies of the California Coastal Management Program; or (c)  
10 consider the impacts of the decision to close the DBOC oyster farm on the public trust right to  
11 fish enshrined in the California Constitution and those with an interest in their protection.

12 42. On January 14, 2014, the Ninth Circuit issued a decision expressly rejecting the  
13 Interior Defendants’ interpretation of Section 124 as having given the Secretary the discretion to  
14 make the decision whether to close the DBOC oyster farm unbridled by any substantive legal or  
15 procedural requirements.

16 **CAUSES OF ACTION**  
17 **COUNT 1:**  
18 **VIOLATION OF THE NATIONAL AQUACULTURE ACT AND THE APA**  
19 **(Against Interior Defendants)**

20 43. Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth  
21 herein.

22 44. Plaintiffs’ interests—including, without limitation: their interests in the  
23 preservation, encouragement and development of aquaculture within West Marin and the Greater  
24 San Francisco Bay area; in the preservation, encouragement and development of domestic and  
25 local sources of aquatic food, particularly oysters; in a consistent and reliable supply of domestic  
26 and local aquatic food, especially oysters, within West Marin and the Greater San Francisco Bay  
27 area; and in the private sector development of aquaculture within West Marin and the Greater  
28 San Francisco Bay area—fall within the zone of interests protected by the National Aquaculture  
Act.

1           45. The National Aquaculture Act was enacted to promote and support the  
2 development of private aquaculture and domestic aquatic food supplies and to ensure  
3 coordination among the various federal agencies that have aquaculture programs and policies and  
4 those that have jurisdiction over activities that affects aquiculture.

5           46. Pursuant to that policy, 16 U.S.C. § 2805(d) requires “[e]ach Federal department  
6 and agency that has functions or responsibilities with respect to aquaculture or has jurisdiction  
7 over any activity that affects, or that may affect, the achievement of the purpose and policy of  
8 this Act, . . . in consultation with the coordinating group and to the maximum extent practicable,  
9 perform such function, responsibility, or activity in a manner that is consistent with the purpose  
10 and policy of this Act.”

11           47. The Interior Defendants’ decision whether to close the DBOC oyster farm  
12 constituted an activity that affects, or may effect, the achievement of the National Aquaculture  
13 Act’s purpose and policy of promoting and supporting the development of private aquaculture  
14 and domestic aquatic food supplies.

15           48. In violation of this provision, the Interior Defendants: (a) did not consult with the  
16 aforementioned aquaculture coordinating group concerning whether to close the DBOC oyster  
17 farm; and (b) did not make the decision to close the DBOC oyster farm in a manner that to the  
18 maximum extent practicable was consistent with the purpose and policy of the National  
19 Aquaculture Act.

20           49. Accordingly, the Interior Defendants’ decision to close the DBOC oyster farm  
21 was made “without observance of procedure required by law,” in violation of 5 U.S.C. §  
22 706(2)(D), was further “arbitrary, capricious, an abuse of discretion, or otherwise not in  
23 accordance with law,” in violation of 5 U.S.C. § 706(2)(D), and was “in excess of statutory  
24 jurisdiction, authority, or limitations, or short of statutory right,” in violation of 5 U.S.C. §  
25 706(2)(C).

26           50. The Interior Defendants’ decision to interpret Section 124 as relieving him of his  
27 legal obligations under the National Aquaculture Act was arbitrary and capricious and otherwise  
28

1 unlawful under 5 U.S.C. § 706(2) and was “in excess of statutory jurisdiction, authority, or  
2 limitations, or short of statutory right,” in violation of 5 U.S.C. § 706(2)(C).

3 51. Due to Interior Defendants’ failure to observe procedures required by the National  
4 Aquaculture Act and their otherwise arbitrary, capricious, unlawful, and *ultra vires* actions taken  
5 in this regard, Plaintiffs have suffered legal wrongs and have been adversely affected and  
6 aggrieved within the meaning of 5 U.S.C. § 702. These wrongs include without limitation the  
7 failure by Interior Defendants to adequately consider, or consult with the aquaculture  
8 coordinating group, in a manner that would ensure that Plaintiffs’ interests described *supra* and  
9 the purpose and policy of the National Aquaculture Act, including promoting and supporting the  
10 development of private aquaculture and domestic aquatic food supplies, were furthered to the  
11 maximum extent practicable.

12 52. Interior Defendants’ foregoing actions in violation of the National Aquaculture  
13 Act are reviewable under the APA, 5 U.S.C. §§ 704, 706.

14 **COUNT 2:**  
15 **VIOLATION OF THE CZMA AND THE APA**  
16 **(Against the Interior Defendants)**

17 53. Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth  
18 herein.

19 54. Plaintiffs’ interests—including, without limitation, their interests in: the proper  
20 citing and preservation of aquaculture facilities within the coastal zone of the West Marin and  
21 the Greater San Francisco Bay; the proper management and regulation by the State of California  
22 of commercial fishing and aquaculture within the coastal zone of the West Marin and the Greater  
23 San Francisco Bay; and the preservation of agricultural lands in productive agricultural use  
24 embodied in the California coastal zone management plan and the California Coastal Act—fall  
25 within the zone of interests protected by the CZMA.

26 55. The CZMA requires Federal agency activities that have coastal effects be  
27 consistent to the maximum extent practicable with federally approved enforceable policies of a  
28 state’s coastal management plan. 16 U.S.C. § 1456(c)(1)(A).

1           56.     “The term ‘consistent to the maximum extent practicable’ means fully consistent  
2 with the enforceable policies of management programs unless full consistency is prohibited by  
3 existing law applicable to the Federal agency.” 15 C.F.R. § 930.32.

4           57.     The California coastal zone management plan defines aquaculture as  
5 “agriculture,” Cal. Public Resources Code § 30100.2, and the enforceable policies of the plan  
6 provide that “lands suitable for agricultural use shall not be converted to nonagricultural uses  
7 unless continued or renewed agricultural use is not feasible.” Cal. Public Resources Code §  
8 30242.

9           58.     Federal agencies are required to provide the applicable State agency, here, the  
10 CCC “with consistency determinations for all Federal agency activities affecting any coastal use  
11 or resource,” and to “coordinate with the State agency prior to providing the determination.” 15  
12 C.F.R. § 930.34. As this indicates, coastal effects “are not just environmental effects, but include  
13 effects on coastal uses.” 15 CFR § 930.11(G).

14           59.     The Interior Defendants’ decision to close the DBOC’s oyster farm after almost  
15 80 years of continuous operation of an oyster farm in Drakes Estero constitutes a Federal agency  
16 activity that affects a coastal use or resource.

17           60.     The Interior Defendants did not seek a consistency determination from CCC  
18 concerning this activity.

19           61.     Accordingly, the Interior Defendants decision to close the DBOC’s oyster farm  
20 was made “without observance of procedure required by law,” in violation of 5 U.S.C. §  
21 706(2)(D), was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
22 law,” in violation of 5 U.S.C. § 706(2)(D), and was “in excess of statutory jurisdiction, authority,  
23 or limitations, or short of statutory right,” in violation of 5 U.S.C. § 706(2)(C).

24           62.     The Interior Defendants’ decision to interpret Section 124 as relieving him of his  
25 legal obligations under the CZMA was arbitrary and capricious and otherwise unlawful under 5  
26 U.S.C. § 706(2) and was “in excess of statutory jurisdiction, authority, or limitations, or short of  
27 statutory right,” in violation of 5 U.S.C. § 706(2)(C).

28

1 63. Due to Interior Defendants' failure to observe procedures required by the CZMA  
2 and their otherwise arbitrary, capricious, and unlawful actions taken in this regard, Plaintiffs  
3 have suffered legal wrongs and have been adversely affected and aggrieved within the meaning  
4 of 5 U.S.C. § 702. These wrongs include without limitation the failure by Interior Defendants to  
5 ensure their decision whether to close the DBOC oyster farm was consistent with California's  
6 enforceable policies, including that "lands suitable for agricultural . . . not be converted to  
7 nonagricultural uses unless continued or renewed agricultural use is not feasible," Cal. Public  
8 Resources Code, § 30242, and the foreclosure of Plaintiffs' ability to participate in the CCC's  
9 review of such a consistency determination as provided by law.

10  
11 **COUNT 3:**  
12 **VIOLATION OF THE APA**  
**(Against the Interior Defendants)**

13 64. Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth  
14 herein.

15 65. The Interior Defendants erroneously took the position that their decision whether  
16 to close the DBOC oyster farm was exempted from any substantive or procedural legal  
17 requirements. Accordingly, the Interior Defendants failed to consider all relevant factors and  
18 failed to conduct a full analysis of the foreseeable effects of their decision to close the DBOC  
19 oyster farm. This includes without limitation the Interior Defendants' failure to adequately  
20 consider or analyze the effects that their decision to close the DBOC oyster farm would have on  
21 the public trust right to fish. This was arbitrary, capricious, unlawful and contrary to the  
22 procedures required by law, in violation of 5 U.S.C. §§ 706(2)(A) and 706(2)(D), as were the  
23 Interior Defendants' decision that they were exempted from the legal requirements to adequately  
24 consider or analyze such factors, and their decision to close the DBOC's oyster farm based on  
25 that inadequate analysis.

26 66. Due to Interior Defendants' failure to observe procedures required by the APA  
27 and their otherwise arbitrary, capricious, and unlawful actions taken in this regard, Plaintiffs  
28 have suffered legal wrongs and have been adversely affected and aggrieved within the meaning



1 of 5 U.S.C. § 702. These wrongs include without limitation the failure by Interior Defendants to  
2 adequately consider the effect that their decision to close the DBOC oyster farm would have on  
3 the interests of the Plaintiffs in the preservation of public trust rights to fish in Drakes Estero.

4 67. The Interior Defendants’ foregoing actions in violation of the CZMA are  
5 reviewable under the APA, 5 U.S.C. §§ 704, 706.

6 **COUNT 4:**  
7 **VIOLATION OF THE CZMA AND THE APA**  
8 **(Against the NOAA Defendants)**

9 68. Plaintiffs incorporate by reference the foregoing paragraphs as if fully set forth  
10 herein.

11 69. Under 16 U.S.C. § 1456 and 15 C.F.R. § 930.54, an applicant for a federal license  
12 for an unlisted activity is only required to submit a consistency certification to the applicable  
13 state agency, here, the CCC, if the NOAA-OCRM decides that the applicant is required to do so.

14 70. 15 C.F.R. § 930.54(c) states that “[t]he sole basis” on which the NOAA-OCRM  
15 may make this decision “whether the proposed activity’s coastal effects are reasonably  
16 foreseeable.”

17 71. As a matter of basic logic, the proposed activity here, continuation of oyster  
18 farming that has occurred in the estero uninterrupted for approximately 80 years cannot be  
19 deemed to have coastal effects that are reasonably foreseeable, but rather only the cessation of  
20 such farming could have such effects.

21 72. The definition in 15 CFR § 930.11(G) of “effect on any coastal use or resource”  
22 conforms with the natural reading of the phrase, to wit to “affect coastal resources” an activity  
23 must effect some kind of change from the status quo. The definition defines the term as “any  
24 reasonably foreseeable effect on any coastal use or resource *resulting from* a Federal agency  
25 activity or federal license or permit activity.” (emphasis added). Maintenance of the status quo  
26 cannot, absent tortured interpretation, be deemed to “result from” anything.

27 73. Furthermore the latter definition states explicitly, “Effects are not just  
28 environmental effects, but include effects on coastal uses.” Again, the only context in which

1 coastal uses could be affected here was not as a result of the continued operation of the oyster  
2 farm, but rather its cessation.

3 74. Furthermore still the latter definition states that “[e]ffects include both direct  
4 effects which result from the activity and occur at the same time and place as the activity, and  
5 indirect (cumulative and secondary) effects which result from the activity and are later in time or  
6 farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects  
7 resulting from the incremental impact of the federal action when added to other past, present, and  
8 reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.” Again,  
9 the key is a change from the status quo. The continued operation of the oyster farm could not  
10 have any such indirect effects, while, in contrast, its cessation would. For example, Plaintiffs that  
11 depend on locally harvested oysters from the DBOC for the continued operation of their  
12 respective businesses cannot sensibly be described as being foreseeably affected, indirectly, by  
13 the continued operation of the DBOC’s oyster farm; however, the cessation of its operations  
14 would indubitably have foreseeable indirect effects on them. They would lose their critical  
15 supply of local oysters.

16 75. Accordingly, the NOAA Defendants’ decision to require that the DBOC submit a  
17 consistency determination to CCC in connection with its continued operation of the oyster farm  
18 was arbitrary, capricious, and lawful in violation of 6 U.S.C. § 706(2)(A) and was made without  
19 observance of the procedures required by law in violation of 6 U.S.C. § 706(2)(D).

20 76. Due to the NOAA Defendants’ failure to observe procedures required by the  
21 CZMA and their otherwise arbitrary, capricious, and unlawful, actions taken in this regard,  
22 Plaintiffs have suffered legal wrongs and have been adversely affected and aggrieved within the  
23 meaning of 5 U.S.C. § 702. These wrongs include without limitation potentially foreclosing the  
24 Interior Defendants’ submission of a consistency determination to the CCC concerning the  
25 Interior Defendants’ decision to close the DBOC oyster farm, and the harms that flow to  
26 Plaintiffs based thereon.

27 77. The NOAA Defendants’ foregoing actions in violation of the CZMA are  
28 reviewable under the APA, 5 U.S.C. §§ 704, 706.

**REQUESTED RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment with the following:

A. Declaration that Secretary Salazar’s November 29, 2012, decision is null and void, of no effect, as:

- i. arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the APA;
- ii. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right in violation of the APA;
- iii. without observance of procedure required by law in violation of 5 APA.

B. Declaration that the NOA Defendants’ decision to require the DBOC submit a consistency determination for the continued operation of the oyster farm is null and void, of no effect, as:

- i. arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the APA;
- ii. without observance of procedure required by law in violation of the APA.

2. Set aside and hold unlawful Secretary Salazar’s November 29, 2012, decision.

3. Set aside and hold unlawful the NOA Defendants’ decision to require the DBOC submit a consistency determination for the continued operation of the oyster farm.

4. Permanently enjoin NPS from evicting DBOC or its employees until NPS considers whether to close the DBOC oyster farm consistent with the law.

5. Preliminary enjoin the NPS from enforcing or implementing the Secretary’s decision to close the DBOC oyster farm, and allowing the continued operation of the oyster farm, until this Court decides the merits of this lawsuit.

6. Award Plaintiffs their costs and reasonable attorneys’ fees incurred in this action;  
and

7. Grant all other such relief as the Court may deem just and proper.

DATED: July 17, 2014

Respectfully submitted,

*/s/ Stuart G. Gross*

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