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10 Attorneys for
Drakes Bay Oyster Company

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF MARIN

14 PHYLLIS FABER, an individual, and
ALLIANCE FOR LOCAL SUSTAINABLE
15 AGRICULTURE, an unincorporated organization,
DRAKES BAY OYSTER COMPANY, a
16 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
23 And Related Cross Actions.
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27
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Nos. CIV 1301469 and 1301472
CONSOLIDATED

**DECLARATION OF PETER PROWS
IN SUPPORT OF DRAKES BAY'S
OPPOSITION TO COMMISSION'S
MOTION FOR NEW TRIAL**

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DECLARATION OF PETER PROWS

I, PETER PROWS, DECLARE:

1. I am a lawyer licensed to practice law in the State of California, and I represent Drakes Bay Oyster Company (“Drakes Bay”) in this case. I am making this declaration in support of the Drakes Bay’s opposition to the Commission’s motion for a new trial. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify to them under oath.

2. At the oral argument on the merits of the writ petitions, the Commission argued for the better part of an hour that petitioners had not carried their supposed burden of showing that the key provisions of the 2013 Orders carry a reasonable possibility of adverse impacts.

3. Attached as **Exhibit 1** is an accurate copy of an excerpt of a declaration filed by the Commission in this case.

4. Attached as **Exhibit 2** is an accurate copy of a letter I sent to counsel for the Commission on July 25, 2014, without its attachment.

5. Attached as **Exhibit 3** is an accurate copy of the attachment to the letter attached to this declaration as Exhibit 2.

6. Attached as **Exhibit 4** is an accurate copy of an email I received from counsel for the Commission on July 30, 2014.

I declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct and that this declaration was executed on August 14, 2014.



PETER PROWS

EXHIBIT 1

1 KAMALA D. HARRIS
Attorney General of California
2 CHRISTIANA TIEDEMANN
Supervising Deputy Attorney General
3 JOEL S. JACOBS
Deputy Attorney General
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7 E-mail: Joel.Jacobs@doj.ca.gov
Attorneys for Respondents and Defendants
8 California Coastal Commission and Charles Lester

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN

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

15
16 Petitioners and Plaintiffs,

17 v.

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

20 Respondents and Defendants.

21 _____
22 DRAKES BAY OYSTER COMPANY,
23 Real Party in Interest.

24 AND RELATED CROSS-COMPLAINT
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Case Nos. CIV 1301469 and
1301472 CONSOLIDATED

Actions Filed: April 5, 2013

TEUFEL DECLARATION IN
OPPOSITION TO (1) MOTION
FOR RECONSIDERATION; (2)
MOTION FOR RELIEF; AND (3)
MOTION FOR STAY

Department L
Honorable Lynn Duryee
August 27, 2013 9:00 a.m.

1 Additionally, various methods have been proven effective in removing or dramatically reducing
2 existing populations from the water in areas similar to Drake's Estero (including exposure to air²⁰,
3 plastic wrap,²¹ and applications of dilute bleach,²² vinegar,²³ acetic acid, or calcium hydroxide²⁴).

4 OTHER ISSUES

5 16. DBOC has not advised the Commission about how many oyster racks in Drake's
6 Estero are not currently in use. The oyster racks have been in place for decades; if they are not
7 removed or maintained, gradual degradation of the 250,000 board feet of lumber racks will result
8 in their fragmentation into a substantial quantity of woody marine debris. Beyond adding
9 anthropogenic waste to the ecosystem, because the racks were installed several decades ago, it is
10 likely that they were pressure treated with chemicals highly deleterious to the natural environment.
11 Prior to 2003, chromated copper arsenate was almost uniformly used to preserve wood; it has
12 been shown to leach at a level that can negatively impact aquatic organisms. Ensuring that racks
13 that have fallen into disuse or disrepair are either repaired or retired is therefore a critical
14 component to natural resource protection in the Estero.

15 17. A true and correct copy of a letter from Kevin and Nancy Lunny to Jo Ginsberg,
16 December 21, 2009, is attached hereto as Exhibit B.

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21 ²⁰ Katayama, K.; Ikeda, Z., 1987: Tolerance of fresh water, hot water and sun-drying by *Didemnum moseleyi*, fouling
organisms attached to culture oyster: Bull. Fish. Exp. Stat., Okayama Prefecture 2, 104-106.

22 ²¹ Coutts, A. D. M.; Sinner, J., 2004: An updated benefit-cost analysis of management options for *Didemnum*
vexillum in Queen Charlotte Sound. Cawthron Report No. 925, Biosecurity New Zealand, Wellington, 14 pp; Sinner,
23 J.; Coutts, A. D. M., 2003: Benefit-cost analysis of management options for *Didemnum vexillum* in Shakespeare Bay.
Cawthron Report No. 924, Biosecurity New Zealand, Wellington, 12 pp.; Pannell, A. and Coutts, A. 2007. Treatment
24 methods used to manage *Didemnum vexillum* in New Zealand.

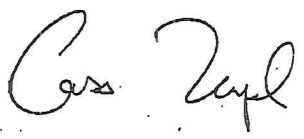
25 ²² Denny, C. M., 2008: Development of a method to reduce the spread of the ascidian *Didemnum vexillum* with
aquaculture transfers. ICES J. Mar. Sci. 65, 805-810.

26 ²³ Carver, C. E.; Chisholm, A.; Mallet, A. L., 2003: Strategies to mitigate the impact of *Ciona intestinalis* (L.)
biofouling on shellfish production. J. Shellfish Res. 22, 621-631.

27 ²⁴ Locke, A.; Doe, K. G.; Fairchild, W. L.; Jackman, P. M.; Reese, E. J., 2009: Preliminary evaluation of effects of
invasive tunicate management with acetic acid and calcium hydroxide on non-target marine organisms in Prince
28 Edward Island, Canada. Aquat. Invasions 4, 221-236.

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I declare under penalty of perjury under California law that the foregoing is true. Sworn to
this 13th day of August, 2013, in San Francisco, CA.



Cassidy Teufel

EXHIBIT 2

BRISCOE IVESTER & BAZEL LLP

155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630

Peter S. Prows
(415) 402-2708
pprows@briscoelaw.net

25 July 2014

By Email

Joel S. Jacobs
Deputy California Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550

Subject: Faber et al. v. California Coastal Commission

Dear Joel:

Your motion, dated 15 July 2014, makes two arguments: (1) that entry of judgment was "premature", and (2) that "intervening authority" has rendered the judgment erroneous. These arguments are clearly wrong, and so your motion should be withdrawn.

As for your first argument, it has long been the law in California that courts may enter a judgment disposing of one party's claims entirely, even if claims between other parties remain pending. (*See Howe v. Key System Transit Co.* (1926) 198 Cal. 525, 529 ("[s]eparate parties ... may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties"; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 759 ("orders amounting to de facto judgments as to some but not all parties could be treated as final judgments").) That is exactly what has happened here. The Court's 26 June 2014 judgment entirely disposes of the claims brought by Ms. Faber and ALSA against the Commission and Dr. Lester. It is understandable that the Court, which noted the "heated agreement" between the parties that the writ claims should be resolved quickly, would have the claims of Ms. Faber and ALSA proceed to final judgment now, without requiring them to wait for resolution of the complicated cross-claims filed by Drakes Bay and the Commission after you brought your motion to consolidate. Because the claims brought by Ms. Faber and ALSA have been entirely disposed of, judgment on their claims was perfectly proper, even if separate claims remain pending between Drakes Bay and the Commission.

BRISCOE IVESTER & BAZEL LLP

Joel Jacobs

25 July 2014

Page 2

Perhaps your concern is that the judgment should not be read to dispose of the remaining claims between Drakes Bay and the Commission. The judgment does not refer to those remaining claims, and Drakes Bay does not read the judgment to have adjudicated them. Nevertheless, that concern could be resolved by a stipulation and order that recognizes that claims remain pending between Drakes Bay and the Commission, and that sets a case management conference. A draft stipulation and proposed order to accomplish this is attached.

As for your second argument, “intervening authority” is not a proper ground for a motion for a new trial or for vacatur of a judgment. (See CCP § 657 (listing grounds for new trial, but not including intervening authority); CCP § 663 (listing grounds for vacating judgment, but not including intervening authority).) Because your motion for a new trial or for vacatur of the judgment has been brought on invalid grounds, it is improper.

While “new ... law” can be a proper basis for a motion for reconsideration (CCP § 1008(a)), a motion for reconsideration may not be brought after judgment has been entered. (See *Ramon v. Aero. Corp.* (1996) 50 Cal.App.4th 1233, 1238 (“[a]fter judgment a trial court cannot correct judicial error except in accordance with statutory proceedings. ... A motion for reconsideration is not such a motion” (internal brackets, citation, and quotation marks omitted).) Because judgment has been entered, the Court lacks jurisdiction over your motion for reconsideration.

Nor does the *North Coast Rivers* case you cite as “intervening authority” create any new law. You cite that case for the unremarkable principle that the “unusual circumstances” exception to categorical CEQA exemptions “requires consideration of baseline conditions”. (Memorandum at 10:17-18.) Baseline conditions, according to *North Coast Rivers*, are those “physical conditions existing at the time” the agency makes its decision:

In determining whether there is a potential for such an adverse change in the environment, the “baseline” environmental conditions against which a project is to be

BRISCOE IVESTER & BAZEL LLP

Joel Jacobs

25 July 2014

Page 3

compared are the physical conditions existing at the time the agency makes its CEQA determination and/or approves the project.

(*North Coast Rivers Alliance v. Westlands Water Dist.*, 2014 Cal.App.LEXIS 590, *76, emphasis added.) *North Coast Rivers* cited and quoted no less than three cases, including a Supreme Court case, for this principle:

Communities for a Better Environment [v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310], 321–322 [“the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis ...”]; *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 558–559 (East Shore Parks) [same]; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 [“environmental impacts should be examined in light of the environment as it exists when a project is approved”].

(*North Coast Rivers* at **76-77.) *North Coast Rivers* simply followed existing precedent; it is not intervening authority.

It should be obvious that *North Coast Rivers* supports the Court’s judgment, and leaves no doubt that the Court applied the proper rule of law. The baseline “physical conditions existing at the time” the Commission issued the 2013 Orders was an 80-year-old farm cultivating shellfish using techniques and equipment that long predated those Orders. The Court recognized that the Commission’s 2013 Orders would change the baseline “physical environment of the Estero and the species that live there”:

[T]he administrative record shows that the Coastal Commission itself recognizes the reasonable possibility its removal and restoration orders may have a significant negative impact on the physical environment of the Estero and the species that live there.

BRISCOE IVESTER & BAZEL LLP
Joel Jacobs
25 July 2014
Page 4

(Judgment at 14:18-21.)

You must recognize that *North Coast Rivers* does not support your motion, because the motion makes no effort to argue that the Court applied the wrong rule of law. In fact, your motion says nothing at all about the Court's conclusion quoted above, which is the basis of the Court's decision to invalidate the Commission's Orders.

Instead, your argument comes down to a quibble about the sufficiency of the evidence: whether petitioners "sustain[ed] their burden of showing that the key provisions of the 2013 Orders carry a reasonable possibility of adverse impacts". (Memorandum at 8:12-13.) The Court will surely remember that you made this same argument in your papers and for the better part of an hour at oral argument. (See Judgment at 16:1-7 ("Petitioners have presented substantial evidence ...").)

Your motion, in short, cites "intervening authority" as pretext for rearguing points you've made previously, and lost. Your motion is improper and should be withdrawn. If it is not, we expect to ask for sanctions. (See CCP § 1008(d) (an improper motion for reconsideration "may be punished as a contempt and with sanctions").)

Please let us know by 1 August how you intend to proceed.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter S. Prows

Attachment

EXHIBIT 3

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10 Attorneys for
Drakes Bay Oyster Company

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
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,

Petitioners and Plaintiffs,

17 v.

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

20 Respondents and Defendants,

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

**STIPULATION AND [PROPOSED]
ORDER ON REMAINING CLAIMS**

1 The parties—Phyllis Faber, the Alliance for Local Sustainable Agriculture (“ALSA”),
2 Drakes Bay Oyster Company (“Drakes Bay”), the California Coastal Commission (“Commission”),
3 and Dr. Charles Lester—hereby stipulate as follows:

4 1. The Court’s June 26, 2014 judgment (“Judgment”) resolves all claims brought by Ms.
5 Faber and ALSA against the Commission and Dr. Lester.

6 2. The Judgment does not resolve all claims brought by Drakes Bay. Cross-claims
7 brought by the Commission against Drakes Bay and by Drakes Bay against the Commission remain
8 pending.

9 3. The Court should set a case management conference for September 3, 2014.

10 DATED: July __, 2014

BRISCOE IVESTER & BAZEL LLP

11
12 By: _____
13 Peter Prows
14 Attorneys for
DRAKES BAY OYSTER COMPANY

15 DATED: July __, 2014

SSL LAW FIRM LLP

16
17 By: _____
18 Zachary Walton
19 Attorneys for
20 PHYLLIS FABER and
ALLIANCE FOR LOCAL
SUSTAINABLE AGRICULTURE

21
22 DATED: July __, 2014

KAMALA D. HARRIS
Attorney General of California
CHRISTIANA TIEDEMANN
Supervising Deputy Attorney General

23
24
25
26 By: _____
27 Joel S. Jacobs
28 Deputy Attorney General
CALIFORNIA COASTAL
COMMISSION and
DR. CHARLES LESTER

[PROPOSED] ORDER

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A case management conference is set for _____.

IT IS SO ORDERED.

Dated:

HON. ROY O. CHERNUS
JUDGE OF THE SUPERIOR COURT

EXHIBIT 4

Peter S. Prows

From: Joel Jacobs <Joel.Jacobs@doj.ca.gov>
Sent: Wednesday, July 30, 2014 5:46 PM
To: Peter S. Prows
Cc: Lawrence S. Bazel; Zachary Walton; richard.idell@idellseitel.com
Subject: Motion for New Trial

Peter:

We have discussed your letter of last week. The Commission believes the judgment is defective, in ways that cannot be remedied by your draft stipulation. Accordingly, the Commission declines to withdraw its motion.

Regards,
Joel

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen years and not a party to this action. I am
3 employed in the City and County of San Francisco and my business address is 155 Sansome St.,
Suite 700, San Francisco, California 94104.

4 On August 14, 2014, at San Francisco, California, I served the attached document(s):

5 **DECLARATION OF PETER PROWS IN SUPPORT OF DRAKES BAY'S**
6 **OPPOSITION TO COMMISSION'S MOTION FOR NEW TRIAL**

7 on the following parties:

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11 *Attorney for Nonparties Amici Curiae*
William T. Bagley, Patty Unterman, The
12 *Marin County Farm Bureau, Sonoma*
County Farm Bureau, The California Farm
13 *Bureau Federation and The Mendocino*
14 *County Farm Bureau*

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Facsimile: (415) 392-9259
18 Richard.idell@idellseitel.com

19 *Attorneys for Real Party in*
20 *Interest Drakes Bay Oyster*
Company

21
22 X **BY FIRST CLASS MAIL:** On the date written above, I deposited with the United States Postal Service a true copy of the
23 attached document in a sealed envelope, with postage fully prepaid, addressed as shown on the service list. I am aware that
on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than
one day after the date of deposit for mailing contained in this declaration.

24 X **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons
25 on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any
26 electronic message or other indication that transmission was unsuccessful.
27
28

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2 Christina Tiedemann
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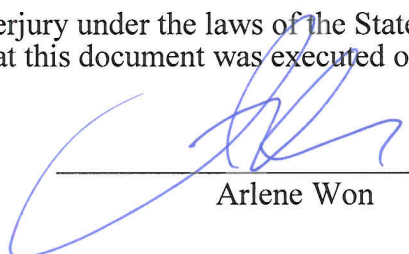
8 *Attorneys for*
Defendant/Respondent/Cross-
9 *Complainant California Coastal*
Commission

Attorneys for Petitioner and
Plaintiff Phyllis Faber

10
11
12 X **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location authorized
by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by
Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses
13 shown above.

14 X **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons
on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any
15 electronic message or other indication that transmission was unsuccessful.

16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct and that this document was executed on August 14, 2014, at San
Francisco, California.

18
19 
20 _____
Arlene Won