

No. 13-1244

IN THE
Supreme Court of the United States

DRAKES BAY OYSTER COMPANY
and KEVIN LUNNY,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE UNITED
STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF *AMICI CURIAE*
WILLIAM T. BAGLEY, *ET AL.*,
IN SUPPORT OF PETITIONERS**

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I. INTERESTS OF AMICI CURIAE¹

A. Elder Environmentalists As Amici.

William T. Bagley: as a California Assemblyman (1961-1974) Bagley authored 1965 legislation transferring the Point Reyes tidelands to the National Park Service [NPS], specifically reserving the State’s “right to fish.” Bagley serves as an amicus because “they shouldn’t try to reinterpret the law while the author is still living.”

Paul Norton “Pete” McCloskey: As a member of Congress (1967-1983), McCloskey co-authored the Endangered Species Act and intervened with the Office of the President to secure the 1970 Congressional appropriation that enabled the NPS to acquire in 1972 the land and facilities onshore Drakes Estero owned by the predecessor to the Drakes Bay Oyster Company [DBOC]. His continuing commitment and interest in preserving aquaculture and agriculture in the Point Reyes National Seashore [Seashore] was demonstrated in a Bagley, [former Congressman John] Burton, McCloskey August 2011 letter to then U.S. Department of the Interior [DOI] Secretary

¹ Pursuant to this Court’s Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent are being submitted to Clerk of the Court herewith. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Ken Salazar.²

Phyllis Faber: a noted wetland ecologist, was a co-founder of the Marin Agricultural Land Trust [MALT], which has protected almost 50% of Marin's agricultural land through the use of conservation easements. Because of her commitment to saving agriculture in Marin, Faber is on leave from the MALT Board to devote more time to the effort of saving DBOC.

Tomales Bay Association: DBOC's cannery, the only remaining oyster cannery in California, is the only source for shucked oysters and the shells DBOC has donated to native oyster restoration projects and wildlife habitat enhancement projects in and around San Francisco Bay. A 50-year old West Marin County environmental organization at the forefront of many environmental issues through the years, Tomales Bay Association supports DBOC as "a critical component of on-going habitat restoration projects for Threatened & Endangered species, especially native oyster restoration projects in SF Bay and elsewhere in the State."

**B. Restaurant Owners And
Restaurants As Amici.**

The following serve as amici to emphasize the importance of DBOC shellfish to the menus of the myriad Bay Area restaurants of all sizes that feature fresh, local and sustainably raised food:

² Ninth Circuit Docket No. 74, at ECF p.137 of 143.

- Patricia Unterman, both individually and dba the Hayes Street Grill, a San Francisco Civic Center restaurant that has specialized in fish since opening in 1979;
- Sheryl Cahill, individually and dba Station House Cafe, Point Reyes Station, celebrating its 40th anniversary, where oyster stew is a signature dish;
- Christian Caizzo, individually and dba Osteria Stellina, Point Reyes Station, an Italian restaurant “with an unwavering commitment to local organic products” serves DBOC oysters raw and on pizza; and
- Luc Chamberland, individually and dba Saltwater Oyster Depot, Inverness, features oysters shucked “moments after they leave the bay.”

C. Agriculturalists And Agricultural Support Organizations As Amici.

The interests of the following are described more fully in the brief:

Dr. Stephanie Larson: Livestock and Range Manager and Director of the University of California Cooperative Extension [UCCE], Sonoma County.

Dr. Paul Olin: Aquaculture Specialist for California Sea Grant, Scripps Institution of Oceanography [SIO], UC San Diego [UCSD]. The Sea Grant program promotes the wise use of coastal and marine resources and sustainable aquaculture development.

Mike and Sally Gale: Owners of Marin ranch where they raise apples and grass fed beef.

Peter Martinelli: Third generation Marin farmer.

West Marin Compost Coalition [WMCC]: A group of individuals working to divert all organic wastes from landfill disposal to composting for the benefit of Marin farms, gardens and ranches.

D. Other Agricultural Support Organizations As Amici.

Agricultural Institute of Marin [AIM]: DBOC only sells its product locally, to retailers, restaurants and consumers. AIM is a nonprofit corporation that operates “Certified Farmers’ Markets” in Marin, Alameda and San Francisco. It joins as an amicus because of its commitment to supporting environmentally sound *local* agriculture.

Alliance for Local Sustainable Agriculture [ALSA]: An unincorporated association of “environmentalists supporting and promoting local sustainable agriculture through education, research, conflict resolution and advocacy.”

California Farm Bureau Federation and Marin and Sonoma County Farm Bureaus: These amici are nonprofit membership corporations whose purpose is, respectively, to protect and promote agricultural interests in the State and in their Counties and to find solutions to the problems of their farms and rural communities.

Marin Organic: Founded in 2001 by “a passionate group of farmers, ranchers and agricultural advisors to put Marin County on the map as a committed

organic county,” Marin Organic fosters a “direct relationship between organic producers, restaurants, and consumers” to strengthen commitment and support for local organic farms, such as DBOC.

II. SUMMARY OF ARGUMENT

This brief sets out the facts that establish the importance of this case to aquaculture and agriculture in the San Francisco North Bay and to related businesses and to the development of innovative, ecologically sound and sustainable agriculture practices consistent with the purposes of the National Environmental Policy Act [NEPA].

III. INTRODUCTION

The Ninth Circuit held that removing cultivated oysters from Drakes Estero constitutes a “conservation” effort, and that the DOI Secretary is not obligated to comply with the “technical” environmental review requirements of the NEPA prior to ordering Petitioner DBOC to cease cultivating oysters in Drakes Estero.³

This case provides the Court with a clear cut opportunity to clarify the environmental review requirements of NEPA, and in the process, bring Ninth Circuit Court decisions on NEPA into line with decisions in other circuits⁴ and move the DOI land management practices into compliance with contemporary environmental protection standards.

³ Pet. App., pp.31-33 (Jan. 14, 2014 Order and Amended Opinion).

⁴ See Pet. Brief, p.27, *et seq.*

The most succinct and pertinent statement on contemporary environmental thinking appears on The Nature Conservancy website:

“Is there any wild left? ‘No,’ says our chief scientist – ‘which means *we have to manage nature wisely*.’”⁵ [Emphasis added.]

Oysters provide multiple ecosystem services, consuming algae, filtering particulates and excess nutrients and creating habitat for other organisms. By the 1930s, the native Olympia oysters that performed these ecological services in Drakes Estero for millennia were nearly extirpated by overharvesting. Culture of the Pacific oyster began in 1932, and the State of California has leased the water bottoms in Drakes Estero for shellfish cultivation, including cultivation of the Pacific oyster, continuously since 1934.⁶ “Managing nature wisely” does not include removing the cultivated oysters that replaced the native oysters that performed ecosystem services without identifying alternative resources for providing those services, if any there be. Even NPS

⁵ See the report on an article, “Domesticated Nature: Shaping Landscapes and Ecosystems for Human Welfare,” by The Nature Conservancy’s Chief Scientist Peter Kareiva, and Sean Watts, Robert McDonald, and Tim Boucher. *Science*, June 2007, Vol. 316, no. 5833, pp.1866-69. In the accompanying interview published online, Dr. Kareiva was asked if it is “misleading to think about nature as apart from human activity.” Kareiva said, “it is a huge mistake . . . anytime we [humans] have the hubris to think we can separate ourselves from nature, we are prone to some profound foolishness.” <http://www.nature.org/science-in-action/our-scientists/the-end-of-the-wild.xml>.

⁶ Summary, National Academy of Sciences, National Resource Study.

policies recognize that simply removing a man-made condition does not automatically restore resources that have been impacted by humans:

*Biological or physical processes altered in the past by human activities may need to be actively managed to restore them to . . . maintain the closest approximation of the natural condition when a truly natural system is no longer attainable. [Emphasis added.]*⁷

This brief opens with a description of the importance of DBOC to aquaculture, agriculture, and the farm-to-table movement locally and beyond, and, because of the ripple effect, to the development of innovative, ecologically sound and sustainable agricultural practices in California, nationally and internationally; agriculture consistent with the purposes of NEPA, that is, “to encourage productive and enjoyable harmony between man and his environment.”⁸

Following a more full discussion of the NEPA issue, this brief identifies federal, state and local laws, policies and other mandates pertaining to coastal zone management and support for aquaculture and agriculture that the Secretary failed to consider in making his decision to deny DBOC a permit.

⁷ Excerpt from 2006 NPS Management Policies, § 4.1: General Management Concepts. www.nps.gov/policy/mp2006.pdf

⁸ 42 U.S.C. § 4221(a).

IV. FACTUAL BACKGROUND

A. The Oyster Farm Is A Small Presence In The Seashore's Marine Wilderness But A Large Presence In California Aquaculture And A Critical Source Of Fresh Shellfish For The Bay Area.

Occupying less than five acres on the shores of Drakes Estero, DBOC is a negligible presence in the Seashore's 38,000 acre pastoral zone. The 142 acres used to cultivate shellfish in the Drakes Estero tidewaters pursuant to leases authorized by the constitutionally-established California Fish and Game Commission [CFGC]⁹ are less than .6% of the Seashore's 2,500 acre marine wilderness,¹⁰ but 55% of the CFGC leased shellfish acreage. Nevertheless, during 2009-2011 DBOC produced almost 50% of the Pacific oysters raised in California and almost 70% of

⁹ Cal. Const. art. IV, § 20.

¹⁰ "FEIS" pp.10 & 13. What is referred to in the Ninth Circuit decision as the "Final Environmental Impact Statement" was "issued" by the Department of the Interior [DOI] on November 20, 2012, nine days (including Thanksgiving Day) before the Secretary announced his decision on the DBOC request to replace the permit that expired on November 30, 2012. Environmental Protection Agency [EPA] regulations require federal agencies to issue a "record of decision" a minimum of 30 days before an agency takes any action that would "have an adverse environmental impact" or "limit the choice of reasonable alternatives." Each week EPA publishes a Federal Register notice of the statements filed during the preceding week. There is no record of a notice filed for what DOI refers to as the "FEIS," hence the quotation marks. See 40 C.F.R. §§ 1505.2, 1506.1 and 1506.10.

the Pacific oysters raised in Marin.¹¹ Thus, although a small presence in the Seashore's tidal zone, DBOC is a large presence in California aquaculture and an irreplaceable source of fresh shellfish for Bay Area restaurants.

Oysters and other shellfish from Drakes Estero are an important part of the Bay Area's world famous local, sustainably raised food movement. According to Joyce Goldstein, chef and cookbook author, oysters have long been:

. . . a popular Northern California specialty. The Olympia oyster flourished in the San Francisco Bay and was a staple in the days of the forty-niners. Hangtown Fry, a combination of oysters, bacon and eggs, has reputedly been on the menu at San Francisco's Tadich Grill for over 160 years. Oyster farming in California dates back to the 1850s, and in the 1890s oyster culture was practiced in Tomales Bay and Drake's Bay in Marin County

The Bay Area still harbors a passion for oyster, and they are featured on the menu at many San Francisco restaurants. . . .¹²

¹¹ "FEIS" p.279. Oysters are sometimes described by weight, volume or number. Only small amounts of other varieties of oysters are raised in California.

¹² See Goldstein, J., Inside the California Food Revolution: Thirty Years That Changed Our Culinary Consciousness, Univ. of Cal. Press (2013), a history of the farm-to-table movement in California, and how it has raised the consciousness about what is eaten throughout the United States and the world, at pp.236-37. The history begins in the mid-1970s with the origins of

Producers in California and around the country are unable to meet the growing demand for shellfish.¹³ On behalf of the Hayes Street Grill, and the many Bay Area restaurants, including other amici, amicus Patricia Unterman confirms:

The loss of oysters produced by DBOC would have a devastating impact on our mission, our menu, and the expectations and pleasure of our customers. We cannot replace the fresh, local shucked oysters from DBOC.¹⁴

In comments on the Draft Environmental Impact Statement [DEIS], the other Marin shellfish producers, the Tomales Bay Oyster Company and Hog Island, urged that DBOC be granted the permit. Among other grounds, they said they couldn't meet the local demand for fresh oysters and that closing DBOC would harm them and their customers.¹⁵

“California cuisine,” featuring fresh seasonal ingredients combined in ways that reflect the ethnic and cultural diversity in the State. A Northern California “cliente eager for food rather than froufrou” is among the factors cited as responsible for the virtually overnight emergence of this new style of food preparation and delivery.

¹³ “FEIS” p.274. See also, “The New Wave of Oyster Bars,” by Brett Anderson, NY Times, May 6, 2014.

¹⁴ Patricia Unterman is recognized in Goldstein’s history of California cuisine as one of the Bay Area women chefs who “hired, mentored, and promoted other women.” p.90.

¹⁵ DEIS Comments 50395 and 52047. The DOI response in the “FEIS”? “[I]f the demand . . . is great enough . . . it is likely that the market would adapt . . .” “FEIS” p.480.

B. Survival Of The Oyster Farm Is Vital To The Survival Of The Ranches In The Seashore And The Ranches In The Seashore Are An Essential Component Of Agriculture In Marin And Sonoma Counties.

About half of Marin County, roughly 167,000 acres, is productive agricultural land. According to the University of California Cooperative Extension [UCCE] Service, there are 255 agricultural operations in Marin, of which only 64 have an annual gross income in excess of \$100,000. The average size of a Marin farm is 588 acres. Over 70% of Marin's farms are operated by a third, fourth or fifth generation member of the founding family.¹⁶ Farm operators are engaged in agriculture because they love the land and the opportunity to work as a family and part of the community, not for wealth. They appreciate wildlife and feel privileged to be stewards of their land for the years it is in their care.¹⁷

¹⁶ U.C.C.E. "Amazing But True: Facts About Marin County Agriculture." Available online at <http://cemarlin.ucanr.edu/files/30457.pdf>.

¹⁷ For example, amici Sally and Mike Gale demonstrate their commitment through "green award" winning stream conservation work on their Marin ranch and to preserving their agricultural heritage and their community through their volunteer work. A fourth generation rancher and member of the Marin County Resource Conservation District [RCD] Board for over 15 years, Sally Gale uses a slide presentation in talks she gives about RCD's work that reflects Marin's very special "farm-culture." Gale, Sally, "Environmental Effects by Ranchers and the Marin RCD in Marin County," MRCD, Apr. 11, 2014, available at <http://www.marinrcd.org/wp/reference-library>.

There are six cattle ranches in the Drakes Estero watershed.¹⁸ Although not scientifically verified, NPS considers cattle waste from these ranches “the primary source of nonpoint-source pollution” in the watershed:

. . . Specifically, fecal coliform levels in most of Drakes Estero have been shown to intermittently rise after rain events associated with runoff from pastures in the watershed [citation omitted]. In addition other pollution sources include residential septic facilities associated with ranching operations. . . . Continued ranching in the vicinity of the project area has the potential to impact the following resources: water quality and socioeconomic resources.¹⁹

Amicus Dr. Stephanie Larson, Livestock and Range Manager and Director of the UCCE, Sonoma County, develops and implements projects that integrate dairy and livestock production with rangeland management in Sonoma and Marin. She has extensive experience working with Seashore ranchers to develop individual ranch plans, which address water quality issues in the Drakes Estero watershed. Dr. Larson is concerned that despite these efforts the ranches in the Drakes Estero watershed may be held responsible for declining water quality in the Estero and required to take additional cost prohibitive measures if the filter feeding oysters are removed from Drakes Estero. Dr.

¹⁸ Unless otherwise specified, “ranches” includes dairies as well as grazing operations.

¹⁹ “FEIS” p.303.

Larson warns of a domino effect from the loss of these ranches that would cause the rest of the Seashore ranches and livestock agriculture throughout Marin and Sonoma Counties to fail.

Almost 20% of Marin's agricultural products come from ranches in the Seashore's pastoral zone. Ranches in Marin are remote from the sources of agricultural services. There must be active ranches in the Seashore to maintain sufficient demand for agricultural suppliers to provide needed services in the rest of Marin and in Sonoma County.

C. Marin And Sonoma Farms And Ranches And Bay Area Restaurants And Consumers Were Leaders In The Farm-To-Table Movement And The Oyster Farm Is The Bay Area's Only Source For Fresh, Locally-Raised And Shucked Oysters.

Marin and Sonoma County farms and San Francisco Bay Area restaurants and consumers were among the early leaders in what is recognized even in federal farm legislation as the "farm-to-table" movement. It is a movement away from the use of processed foods for a healthier population and a healthier environment.²⁰

When the food revolution began in Marin and Sonoma counties in the 1970s, the nation's food system had grown to an industrial scale. There was limited variety in the food supply, and the environmental impact of chemically and mechanically intensive food production was a

²⁰ See Goldstein's book, Inside the California Food Revolution, *supra*.

growing concern. The recently reported poisoning of arable land in China is an unfortunate and dramatic example of the consequences of poorly managed agriculture.²¹

As described above, DBOC raises almost 70% of Marin's oysters and sells all of them in the San Francisco Bay Area. As the operator of the last oyster cannery in California, DBOC is the Bay Area's only source for the fresh, locally raised and shucked oysters used in many recipes and menu items. DBOC is a critical element in the health of the farm-to-table movement for which the Bay Area foodshed is famous.

D. Agriculture In Marin And Sonoma Is Poised To Lead National And International Movements In Ecological And Sustainable Agriculture.

San Francisco's North Bay agricultural communities are leaders in valuing both productive agricultural land and the role it plays in habitat protection. Marin County food producers, including DBOC and their partnering farm advisors, are leaders in the practice of ecological farming. Their work is helping to transform how agriculture is practiced throughout the world, just as their involvement in the farm-to-table movement led to a revolution in eating that is reducing such diseases as childhood obesity.

²¹ "One-Fifth of China's Farmland Is Polluted, State Study Finds," Edward Wong, NY Times, April 17, 2014. As reported, the main agricultural sources are "irrigation of land by polluted water, the improper use of fertilizers and pesticides, and livestock breeding"

In A Sand County Almanac, the revered ecologist Aldo Leopold “called for an ethical relationship between people and the land they own and manage, which he called ‘an evolutionary possibility and an ecological necessity.’”²² By way of example, two Marin dairies have been recognized nationally for their “ethical relationship” to the land.

The Straus family dairy stopped using herbicides in the mid-1970s. In the early 1980s it stopped using chemical fertilizers and adopted a no-till method of planting to prevent soil erosion and reduce fuel consumption. In the 1990s Straus became the first certified organic dairy west of the Mississippi, installed one of the first methane digesters in Marin County, and opened the first 100% certified organic creamery in the United States.²³ In 1998, the American Farmland Trust honored dairy matriarch Ellen Straus with its “steward of the land” award for her efforts in land stewardship, farmland conservation and pioneering of environmentally and economically sustainable farming practices.”²⁴

In December 2013, the Sand County Foundation gave its “Leopold Award” to the owners of Point Reyes Farmstead Cheese Company, Bob Giacomini and his four daughters. The award honors “private landowner achievement in the voluntary stewardship and management of natural resources.”

²² See the Leopold Conservation Award website: leopoldconservationaward.org.

²³ See www.farmland.org/programs/campaign/documents/14-StrausFamilyCreamery.pdf.

²⁴ www.farmland.org/programs/award/Winners-1998.asp.

The Leopold Award is considered the Nobel Prize for agriculture.

Second, third and fourth generations bring history and a unique understanding to the land. This is illustrated by the different perspectives in a report about the voluntary Pine Gulch Creek restoration project. According to an urban environmentalist:

Under the plan, a viable population of coho will eventually be re-established in Pine Gulch Creek. The project demonstrates that with knowledgeable and caring land stewards and community support, coho salmon and steelhead trout habitats can be restored and co-exist with sustainable agriculture.

Third generation farmer, amicus Peter Martinelli said:

While the basic facts [in the report] are accurate and the message is generally positive, I have trouble with the implied message that somehow the fish population will rebound, but without the project, the farmer's pumping has been the cause of low fish populations. . . . Many factors have contributed to the fish declines We must also consider changing ocean conditions, the heavy siltation of Bolinas Lagoon over the decades, the condition of the riparian canopy, and the growth of a hungry seal and sea lion colony along the channel where spawning fish hold for weeks and

sometimes months before running upstream.²⁵

As another example of this unique community's contribution to ecologically sound agriculture, in the quest of Marin farmers and ranchers to better care for the land and environment, amicus WMCC,²⁶ working with University of California scientists, discovered that compost applied to California's grasslands can catalyze carbon dioxide removal from the atmosphere and put it to beneficial use as soil organic matter, thus increasing the soil's fertility and retention of water. As a result of just one application of compost to several small research plots in Marin and in the Sierra Nevada foothills, the soil in each plot sequestered over 2,000 pounds of carbon as beneficial soil carbon and retained up to an additional 16,000 liters of water:

This result from that one application of compost has been repeated in each of six years, and similar results are projected to continue for at least another 25 years.²⁷

²⁵ Marin Conservation League [MCL] Sept/Oct Newsletter, pp.6-7. Also, for a snapshot of two proud multiple generation dairy operators in the Seashore, see the Kehoe and McClure families on the Clover Stornetta website: <http://cloverstornetta.com/our-story/family-farms-2>.

²⁶ There is overlap in membership of some amici most active in promoting ecologically sound agriculture. E.g. petitioner Kevin Lunny and agroecologist Dr. Jeffrey Creque are members of the WMCC. Creque is also a member of amicus ALSA.

²⁷ See announcement in the May/June MCL Newsletter, p.5: www.conservationleague.org/images/stories/Newsletters/nl14c_mayjun2014_forweb.pdf

If a means for financing the purchase and spreading of compost on grasslands throughout Marin and California can be found, such as the sale of carbon credits, organic waste could become a means by which the State and Nation could begin to offset today's dangerous levels of carbon emissions and the impacts of drought conditions.

In the past forty years West Marin has become internationally recognized as a leader in environmentally sound food production. This reputation led England's Prince Charles, a longtime advocate and food producer in the sustainable food movement, to tour West Marin farms, including DBOC, in November of 2005. In the wake of declining tobacco subsidies in 2007 noted agrarian author Wendell Barry sought examples of food producers able to thrive economically while caring for the environment. Barry invited a contingent of West Marin food producers, including amicus Peter Martinelli, to a symposium, "Growing Kentucky".²⁸

If DBOC is closed and the domino effect renders agriculture in Marin and Sonoma less viable, inevitably the efforts that led to successes of the carbon project and other ecologically promising agricultural practices with roots in Marin will diminish. Agriculture and the environment in California, the nation, and internationally will be diminished as a consequence.

²⁸ See also, "Agritourism in Marin," on the UCCE, "Grown in Marin" website:
http://ucanr.edu/sites/Grown_in_Marin/files/152641.pdf, and
www.foodandfarmtours.com.

V. **TREATING THE LACK OF A PERMIT TO OPERATE IN DRAKES ESTERO AS THE “EXISTING CONDITION” FOR NEPA REVIEW AND ASSUMING THAT REMOVING DBOC WOULD BENEFIT THE ENVIRONMENT IS ABSURD.**

Oyster production requires no external input of feed, fertilizers, chemicals or fresh water while consuming algae, filtering particulates and excess nutrients and creating habitat for other organisms. Amazingly, one oyster can filter more than 50 gallons of water in 24 hours. Cultivated pursuant to CFGC leases, the Pacific oyster has performed these ecological services in Drakes Estero continuously since 1934.²⁹

On November 29, 2012, without examining the ecological consequences of removing the cultivated oysters from Drakes Estero, or consultation with the CFGC, the Secretary ordered the State’s lessee, DBOC, to cease cultivating oysters in Drakes Estero and to remove the existing 20 million oysters, other shellfish, and long established oyster racks and cultivation materials within 90 days. The Secretary asserted, contrary to scientific evidence and findings, that eliminating DBOC “would result in long-term beneficial impacts to the estero’s natural environment.”³⁰ The Secretary did not consider the predictable adverse consequences that would result from his order.

²⁹ Summary, National Academy of Sciences, National Resource Study.

³⁰ See Pet. App., p.26. Cf. widespread efforts to restore oyster beds, including in San Francisco Bay, New York Harbor, Chesapeake Bay and the Gulf of Mexico.

The Ninth Circuit panel found it had jurisdiction over the NEPA claim. Dismissing what it captioned “technical deficiencies” in the NEPA process as “without consequence,”³¹ the Ninth Circuit upheld the action on the grounds that “[t]he Secretary’s decision is essentially an environmental conservation effort, which has not triggered NEPA in the past,” and that “removing the oyster farm is a step toward restoring the ‘natural untouched physical environment.’”³² In discussing the likelihood of success on the merits, the majority upheld the Secretary’s decision because he “chose to give weight to the *policies* underlying wilderness legislation”³³

Authors of the DEIS and “FEIS” declined to treat the existing tidal waters with their 80-year-old existing oyster farm as a baseline and to examine the impact on the ecosystem of removing oysters and their ecological services from Drakes Estero. Rather, the DOI used the absence of a NPS permit, a piece of paper with writing on it, as the baseline “existing condition” for purposes of NEPA review of both use of the onshore facilities owned by the United States and for continued cultivation of oysters in the Drakes Estero tidal zone pursuant to leases authorized by the CFGC.³⁴ NEPA requires an examination of the

³¹ See footnote 10, *supra*.

³² Pet. App., pp.31-33.

³³ Pet. App., pp.24-25.

³⁴ In a bizarre example of “heads I win, tails you lose,” the “FEIS” provides that DBOC would be required to “surrender its state water bottom lease to the CFGC prior to issuance of a new SUP by NPS.” “FEIS” p.9. Immediately following a description of a State plan that identifies Drakes Estero as “a state marine conservation area where take of all living marine resources is

impact *on the physical environment* of alternative courses of action, not a review of policies abstracted from the consequences of their application.

Reliance on a *contemporaneous* decision not to renew the DBOC lease as the “existing condition,” the baseline for purposes of NEPA review, defies common sense. The Ninth Circuit majority’s *assumption* that removing DBOC would necessarily benefit the environment is the antithesis of what Congress intended in adopting the NEPA. It would reduce NEPA review to a procedural nicety, at most. If left to stand, the Ninth Circuit decision that the denial of a permit *under these circumstances* doesn’t require environmental review will serve as precedent for and encourage the NPS to identify a sham “existing condition” for the purpose of environmental review whenever it suits its purposes.³⁵

prohibited, except for . . . commercial aquaculture of shellfish pursuant to a valid state water bottom lease and permit,” the “FEIS”, p.63, states: “Section 124 . . . does not relieve DBOC of its obligation to comply with the California Marine Life Protection Act.”

³⁵ Note: there is both authority and precedent for *granting the Oyster Farm a permit without additional environmental review*. The indefinite continuation of the Oyster Farm and the ranches in the pastoral zone was contemplated in the 1980 General Management Plan [1980 GMP] for the Seashore, which remains in effect following the NPS’s failure to follow through on an effort to update it that began in 1999. Permits for the ranches in the Seashore’s pastoral zone are routinely reissued or renewed without additional environmental review on the ground that *the granting of a permit simply allows an existing use, which has already been subject to environmental review, to continue unchanged*. See NPS Director’s Order 12: 3.4.A.3 Categorical Exclusions.
<http://www.nps.gov/policy/catexguidance.pdf>.

The Petition for a Writ of Certiorari fully discusses the conflict in the Circuit Courts over “whether NEPA applies to ‘conservation efforts,’” pages 27-32. That discussion will not be repeated here.

VI. APPLICABLE FEDERAL, STATE AND LOCAL LAWS AND POLICIES IN SUPPORT OF AQUACULTURE AND AGRICULTURE HAVE YET TO BE CONSIDERED.

A. Coastal Zone Management Act And California Coastal Zone Policies Require Federal Agencies To Support Aquaculture In Federal Activities.

The 1972 Coastal Zone Management Act [CZMA] requires federal agencies to defer to State policies on management in State coastal zones whenever “practicable.”³⁶ The California coastal zone management plan defines aquaculture as “agriculture,”³⁷ and the enforceable policies of the plan provide that:

. . . lands suitable for agricultural use shall not be converted to nonagricultural uses unless continued or renewed agricultural use is not feasible. . . .³⁸

In addition, under State law, local jurisdictions adopt “local coastal plans.” The

³⁶ 16 U.S.C. §1456(c)(1).

³⁷ Cal. Public Resources Code, § 30100.2.

³⁸ Cal. Public Resources Code, § 30242.

Secretary's decision ignored the Marin County Community Development Agency comments advising that the DBOC request for a permit "for commercial harvesting and processing of shellfish is consistent with County agricultural and mariculture policies set forth in the Marin County Local Coastal Program" Relevant excerpts from the LCP, including a paragraph specifically referring to the Oyster Farm by its former name, followed:

The Coastal Act strongly supports the preservation of agricultural lands in productive agricultural use and strictly controls the conversion of agricultural lands to other uses

Mariculture operations in the area of the federal parks consist of the 1060-acre Johnson's Oyster Farm in Drake's Estero Johnson's Oyster Farm is a major oyster producer statewide producing some 20% of the state's total marketable oyster crop. . . .³⁹

The "FEIS" and the Secretary's decision disregard an October 10, 2012, letter from the Director of the California Department of Fish and Game⁴⁰ pointing out that:

The state and federal government have worked together for 47 years – since the State originally conveyed the bottom lands in Drakes Estero to the United States in 1965 – to allow

³⁹ Comments on DEIS, Correspondence #4106.

⁴⁰ Ninth Circuit Docket 80-1 at p.91.

continued aquaculture operations in Drakes Estero. Correspondence between our agencies shortly after the conveyance strongly suggests that our agencies then believed that the State's reservation of fishing rights included the right to lease the bottomlands at Drakes Estero indefinitely for shellfish cultivation.

* * * * *

The continued cooperation between Drakes Bay Oyster Company, the National Park Service and the California Department of Fish and Game will benefit the environment, the community, and the local economy, consistent with our agencies' unique history of managing this property

B. The National Aquaculture Act Of 1980 Obligates The Secretary To Support Aquaculture.

In comments on the DEIS, the National Marine Fisheries Service [NMFS] of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, recommended that the NPS "improve the overall technical quality of the FEIS" by adding a discussion of:

. . . The National Aquaculture Act [NAA] . . . which applies to all federal agencies, states that it is "in the national interest, and it is the national

policy, to encourage the development of aquaculture in the United States.’ . . .”⁴¹

Despite this comment, and the Secretary’s statutory obligation to perform his duties consistent with the Congressionally declared national policy “to encourage the development of aquaculture in the United States,”⁴² there is no reference to the NAA in the “FEIS” or in the Secretary’s 2012 decision to close DBOC.

Dr. Paul Olin’s participation as an amicus is a follow-up to his extensive comments critiquing the DEIS, including the fact that all of the alternatives offered would force this almost 100 year old enterprise out of business. Similar to the NMFS comments, Dr. Olin also targeted the failure “to provide a valid status-quo baseline,” to consider the environmental benefit of the Oyster Farm, and “to assess the economic impacts of DBOC closure”⁴³

The Secretary’s decision to deny DBOC a permit did not take into account and is inconsistent with the foregoing federal, state and local laws, policies and mandates.

VII. SUMMARY

Marin’s agricultural community may be small, but it is mighty. It is out of the marriage of Marin’s

⁴¹ National Marine Fisheries Service letter to NPS, dated November 17, 2011, “FEIS” Appendix F: Relevant Agency Correspondence, pp.46-47.

⁴² See 16 U.S.C. 2801 §§ 2(b-c), 16 U.S.C. 2802(7), and 16 U.S.C. 2805(d) (Nat’l Aquaculture Act of 1980).

⁴³ DEIS, Comment 47007.

community and the restaurants that began to serve farm fresh products in the 1970s that the farm-to-table movement grew. It is out of this community that new methods of agriculture, including methods that enhance the sustainability of the soil, are being birthed. It would be ludicrous if it were not so tragic that in Marin County, the very epicenter of the sustainable farming movement, the federal government would seek to destroy a long established oyster farm. A farm that:

- Furnishes the region with highest quality marine protein without the use of pesticides, chemical fertilizer or the use of large mechanized fuel consuming equipment;
- Includes the last oyster cannery in California, which can and does provide the only source of oyster shells used to restore oysters to San Francisco Bay; and
- Returns revenues to the State and federal governments while the oysters benefit the environment through filtration of the water.

Powerful local support for the Oyster Farm in the form of thoughtful comments on the DEIS, the diversity of the amici on this brief, and the hundreds of volunteer-produced “Save Our Drakes Bay Oyster Farm” signs posted around San Francisco, Marin, Sonoma and Napa counties⁴⁴ reflect the respect in these communities for DBOC and the role it plays in the local sustainable agriculture movement. This “agricultural environmentalism” is entirely consistent with modern environmentalist thinking

⁴⁴ See www.saveourshellfish.com

that recognizes that there remains virtually no land in the world that is untouched by human impacts.

This case is an opportunity for the Court to bring Ninth Circuit decisions on NEPA into line with decisions in other circuits; to clarify the responsibilities of federal agencies for conducting meaningful environmental review before changing an existing use that was subject to environmental review,⁴⁵ and to require a federal agency responsible for managing extensive public lands to reconsider what it means “to manage nature wisely.”

VIII. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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⁴⁵ See footnote 35, *supra*.