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November 1, 2012

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VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Hon. Secretary Ken Salazar
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Re: Drakes Bay Oyster Company Special Use Permit

Dear Secretary Salazar:

The National Park Service (NPS) has failed to meet a critical National Environmental Policy Act (NEPA) public review deadline. As a result, the NPS cannot publish a Final Environmental Impact Statement (FEIS) for the Drakes Bay Oyster Company Special Use Permit (DBOC SUP) that provides even the minimum period of public review prior to November 30, 2012.

NEPA regulations and NPS guidance require that there be at least thirty (30) days between the issuance of an Environmental Protection Agency (EPA) Notice of Availability of a FEIS, and final agency action based on that FEIS. The last day to publish notice has come and gone, with no notice being given by EPA. Accordingly, there simply is not enough time before November 30, 2012, to allow for the minimum thirty-day public review period on a FEIS before you make your decision on the DBOC SUP, much less allow time for you to consider public comment on such a FEIS.

By letter on September 17, 2012, we also documented legal inadequacies identified by the National Research Council of the National Academy of Sciences in the Draft EIS (DEIS) for the DBOC SUP, which make the DEIS so inadequate as to preclude meaningful analysis pursuant to NEPA regulations. These inadequacies also prohibit NPS from proceeding to finalize the DEIS into a FEIS, but instead, require revision and republication of the DEIS (an exercise that also cannot be completed prior to November 30, 2012).

These problems with the NEPA process for the DBOC SUP raise a legitimate question: what effect does the NPS's failure to provide you with a legally adequate FEIS have on your discretion under Public Law 111-88, § 124 (Section 124)?



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In fact, none, because Section 124 includes a “general repealing clause” that allows you override conflicting provisions in other laws—including NEPA—to issue the SUP.

DBOC respectfully requests that you issue a SUP with the same terms and conditions as the existing authorization, based on the wealth of information in the public record that demonstrates that DBOC’s operations do not cause impairment in Point Reyes National Seashore.

NEPA Regulations and NPS Guidance Require at least Thirty (30) Days Between Issuance of a Notice of Availability of a FEIS and a Final Agency Decision

NEPA regulations require that a FEIS be published at least thirty (30) days before a federal agency uses a FEIS to make a decision. 40 C.F.R. § 1506.10(a), (b)(2); *see Del Norte County v. United States*, 732 F.2d 1462, 1465 (9th Cir. 1984) (acknowledging required 30-day public review period). This thirty-day time clock starts with EPA’s publication of a Notice of Availability (NOA) for the FEIS in the Federal Register. EPA meets this obligation by publishing every Friday a NOA reporting all of the EIS documents filed during the preceding week. *Id.*; *see* <http://www.epa.gov/compliance/nepa/submiteis/index.html>.

The NPS Director’s Order 12 Handbook (DO-12 Handbook), which guides the NPS on how to comply with NEPA, acknowledges this thirty-day requirement. The DO-12 Handbook states that when a FEIS is ready to be released, “you must file the final EIS with EPA and send an NOA to the Federal Register. As with the filing requirements for a draft EIS (see 4.8(C)), EPA will publish a separate NOA. Your park must wait at least 30 days from the time EPA publishes the NOA before the park signs a record of decision.” DO-12 Handbook, Section 4.8.G.

NEPA caselaw also indicates that an agency decision immediately after the close of public review on a FEIS may demonstrate the agency’s failure to adequately consider comments on the FEIS. *See Int’l Snowmobile Mrs. Ass’n v. Norton*, 304 F. Supp. 2d 1278, 1292 (D. Wyo. 2004) (questioning NPS ability to adequately review and consider all submitted public comments due to rapidity of decision after close of public comment period).

Searches of the electronic Federal Register confirm that EPA has not published a NOA of a FEIS for the DBOC SUP. In addition, the “Public Inspection” section of the Federal Register—which gives notice of documents to be published on the next business day—shows that EPA’s November 2, 2012, weekly NOA for NEPA documents it has received in the past week also does not include a FEIS for the DBOC SUP. *See* <https://www.federalregister.gov/public-inspection>.



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Although it has no effect on the minimum thirty-day public review period under NEPA regulations, it is also worth noting that NPS has not taken any of the procedural steps that proceed publication of EPA's NOA, such as transmitting a FEIS to the commenting agencies, making a FEIS available to the public, or publishing its own NOA of a FEIS for the DBOC SUP in the Federal Register. 40 C.F.R. § 1506.9.

Accordingly, it is no longer possible for NPS to release a FEIS for the DBOC SUP that complies with NEPA's minimum thirty-day public review period. Furthermore, even if EPA were to publish a NOA that includes a FEIS for the DBOC SUP at some point before November 30, 2012, not only would there be insufficient time for even a minimal thirty-day public review period, but also it would truncate your time to consider public comments received on such a FEIS before November 30, 2012.

It is worth noting that no exceptions to the thirty-day public review rule for FEIS's apply here because this is not a rulemaking, and Section 124 elevates the final decision on the DBOC SUP to the highest point in the Department of the Interior, from which no administrative appeal rights exist. *See* 40 C.F.R. § 1506.10(b) (allowing FEIS to be published at the same time that agency decision is made where agency has established a formal appeal process that allows the public or other agencies to appeal a decision "where a real opportunity exists to alter the decision.").

We recognize that EPA has the discretion to extend or reduce prescribed review periods where the lead agency makes a showing of "compelling reasons of national policy." 40 C.F.R. § 1506.10(d). In this circumstance, while there may be compelling reasons of national policy to *increase* the public review period beyond thirty days, there are no compelling reasons of national policy to *reduce* the public review period for at least three reasons. First, the August 2012 National Academy of Sciences report identifies legal inadequacies in the DEIS so profound that they require revision and republication of the DEIS. Accelerating the finalization of a flawed DEIS by reducing the minimum public review period for such a FEIS does not accord with NEPA policy (*see, e.g.*, 42 U.S.C. §§ 4331, 4332, etc.), or the policy behind Section 124, which includes a "general repealing clause" in the statute to ensure the timeliness of your decision.

Second, the level of controversy over the validity of scientific analysis in the DEIS—as evidenced by Congressional direction in Public Law 112-74 to the National Academy of Sciences to "assess the data, analysis, and conclusions in the DEIS in order to ensure there is a solid scientific foundation for the Final Environmental Impact Statement"—suggests that national policy is to provide for more, not less, public review by cooperating agencies and the public.



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Finally, the high degree of public interest in the DEIS for the DBOC SUP demonstrates that NPS's cooperating agencies and many private citizens are watching this process closely. Limiting the time both cooperating agencies and private citizens have to review and comment on an EIS—and your time to review and consider such comments—also does not comport with national policy for the federal government to cooperate with the concerned public to use all practicable means and measures in the NEPA process. 42 U.S.C. § 4331(a).

Conclusion

NPS's struggle to prepare a legally adequate FEIS for your consideration has been overtaken by the passage of time.

NEPA regulations require, and the NPS DO-12 Handbook acknowledges, at least a thirty-day minimum public review period between EPA's publication in the Federal Register of Notice of Availability of a FEIS, and an agency's final decision based on such a FEIS. There no longer remains sufficient time for a Notice to be published in the Federal Register and still provide for even a minimal thirty-day public review period before November 30, 2012.

Accordingly, it is now impossible for NPS to release a FEIS for the DBOC SUP that allows for the minimum thirty-day review period, much less allows you time to consider comments made on a FEIS before November 30, 2012.

Despite the NPS failure to provide you with a legally adequate FEIS, Section 124 permits you to issue a SUP with the same terms and conditions as the existing authorization. We respectfully request that you grant Drakes Bay Oyster Company a Special Use Permit for 10 years before November 30, 2012, based on the wealth of information already in the public record demonstrating that DBOC's operations do not cause impairment in Point Reyes National Seashore.

Very truly yours,



Ryan R. Waterman

Cc: Kevin & Nancy Lunny, Drakes Bay Oyster Company
Cicely Muldoon, Superintendent, Point Reyes National Seashore
Sen. Dianne Feinstein



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Sen. Barbara Boxer
Rep. Lynn Woolsey
Steve Kinsey, President, Marin County Board of Supervisors
Susan Adams, Marin County Board of Supervisors
Judy Arnold, Marin County Board of Supervisors
Katie Rice, Marin County Board of Supervisors
Kathrin Sears, Marin County Board of Supervisors
Jonathan Jarvis, Director, National Park Service
Christine Lehnertz, Regional Director, Pacific West Region, National Park Service
Dr. David Graber, Chief Scientist, Pacific West Region, National Park Service
Cliff Rader, Director, NEPA Compliance Division, Environmental Protection Agency
Horst Greczmiel, Associate Director, NEPA, White House Council on Env. Quality