

## CALIFORNIA COASTAL COMMISSION

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**SENT BY CERTIFIED AND REGULAR MAIL**  
**Certification Number 7006 2760 0005 5883 7037**

December 7, 2009

Mr. Kevin Lunny  
Drakes Bay Oyster Company  
17300 Sir Francis Drake Blvd.  
Inverness, CA 94937

RE: Compliance with **Consent Cease and Desist Order CCC-07-CD-11** (Drakes Bay Oyster Company)

Dear Mr. Lunny:

I am writing concerning compliance with the Coastal Commission's Consent Cease and Desist Order No. CCC-07-CD-11 (Consent Order), which was issued to Drakes Bay Oyster Company (DBOC) on December 12, 2007.

In a letter dated September 16, 2009, we indicated that you were out of compliance with **Sections 3.2.8 and 3.2.11** of the Consent Order. **Section 3.2.8** of the Consent Order requires that cultivation of Manila clams shall only occur in the "cultivation area" defined in **Section 3.2.11** of the Consent Order. **Section 3.2.11** of the Consent Order requires that all cultivation shall be confined to areas which are currently identified in the Department of Fish and Game (DFG) Mariculture Lease numbers M438-01 and M438-02. We further indicated that Commission staff had confirmed that Manila clams were currently being cultivated outside the designated one-acre shellfish aquaculture lease area specified in the DFG Mariculture Lease Number M438-02, in violation of the Consent Order.

In response to our letter, you indicated to Cassidy Teufel of our Energy, Ocean Resources and Federal Consistency Division that the clams would be moved from their present location into the designated one-acre shellfish aquaculture lease area. Mr. Teufel has informed me that you confirmed in an email that the clams were moved on October 19, 2009. However, it has come to our attention that the clams were actually not moved into the designated one-acre shellfish

aquaculture lease area but, rather, into one of the two areas specifically designated for harbor seal protection (the smaller of the two), and in which all of your boats, personnel, and any structures and materials owned or used by you were to be excluded under the explicit requirements of the Consent Order. This fact was confirmed by Mr. Teufel, who conducted a site visit on December 7, 2009. This violates a number of sections of the Consent Order, as described below. Since you spoke on October 18, 2009 with Alison Dettmer, Deputy Director, and indicated that you intended to comply with the Consent Order and move the Manila clams to the designated lease area, and that you were hiring a surveyor for this purpose, we are perplexed as to how it came about that the clams were moved instead into a harbor seal protection area, in direct contradiction with the Consent Order's terms. We welcome a written explanation as to how this could have occurred.

**A. Violations of the Consent Order**

1. **Section 3.2.6, Harbor Seal Protection Areas.** Section 3.2.6 of the Consent Order requires that all of your boats, personnel, and any structures and materials owned or used by you shall be prohibited from the harbor seal protection areas defined on the map. As Manila clams have been moved into a harbor seal protection area, you are in violation of Section 3.2.6 of the Consent Order. We are particularly concerned about this violation, as by signing the Consent Order, you agreed to the specific requirements of the Consent Order that established the harbor seal protection areas, and you were well aware of the location of these harbor seal protection areas, which were clearly designated on maps that were included with the Consent Order. It is very disturbing that boats, personnel, structures, and materials for the cultivation of the Manila clams were brought into a harbor seal protection area that was established specifically to protect the sensitive resources within it, and it calls into question your ability and commitment to carry out the resource protection requirements of the Consent Order.

In addition, it concerns us that, if the harbor seal protection area and its protections under the Consent Order were not honored for such a deliberate act as moving the clam bags, that we have no assurances that there have not also been other less easily observable activities in these areas.

As you know from our prior discussions, and from the discussions in the Staff Report for the Consent Order, protection of the species in this area has been a paramount and continuing concern of the Commission. Indeed, this was reflected in a number of the specific provisions of the Order itself and it is unacceptable that your actions have not complied with these provisions.

2. **Section 3.2.8, Non-Oyster Species Area.** As noted above, Section 3.2.8 of the Consent Order requires that cultivation of Manila clams shall only occur where currently cultivated in the "cultivation area" defined in Section 3.2.11 of the Order. As Manila clams are now occupying a harbor seal protection area, not the designated one-acre shellfish aquaculture lease area, you are in violation of Section 3.2.8 of the Consent Order.

3. **Section 3.2.11, Cultivation Area.** As noted above, Section 3.2.11 of the Consent Order states that all cultivation shall be confined to areas which are currently included in the DFG lease

numbers M438-01 and M438-02. The area into which Manila clams have been moved is not one of the DFG lease areas; thus, you are in violation of Section **3.2.11** of the Consent Order.

4. **Section 3.2.5, Boat Transit.** Section 3.2.5 provides that "boat traffic shall be limited to established channels that do not violate the protective measures set forth in this Consent Order." Obviously, placing cultivation materials which require servicing by boats does not comply with this section of the Consent Order. Thus, you are in violation of **Section 3.2.5** of the Consent Order.

5. **Section 7.0, Compliance with Permits and Applicable Laws.** Section 7.0 of the Consent Order requires full compliance with the terms and conditions of any Commission or National Park Service (NPS) permit, and also with all applicable laws and regulations. Your NPS Special Use Permit prohibits all aquacultural cultivation from two designated harbor seal protection areas. As you are currently cultivating Manila clams in one of the designated harbor seal protection areas, you are in violation of **Section 7.0** of the Consent Order.

**B. Stipulated Penalties.**

**Section 17.0** of the Consent Order, *Compliance Obligation*, states that failure to comply with any term or condition of the Order, including any deadline contained in the Order, will constitute a violation of the Order and shall result in Respondent being liable for stipulated penalties in the amount of \$250 per day per violation. Since you are in violation of five sections of the Consent Order, as of today, under the terms of the Consent Order, you are responsible for a stipulated penalty in the amount of \$61,250 for your failure to meet the terms of the Consent Order (five violations for 49 days, at \$250 per day per violation.)

**C. Resolution of the Violations of the Consent Order.**

To resolve the above described violations to the Consent Order, you must remove the Manila clams and all equipment and materials from the harbor seal protection area and into the designated one-acre shellfish aquaculture lease area within thirty days of receipt of this letter, after receiving approval from the Coastal Commission and the National Park Service of the method of removal. Once notified that the clams have been moved, Commission staff will conduct a site visit to confirm that the clams have been properly moved to the approved designated area.

You will also need to submit a check in the amount of \$61,250, made payable to the California Coastal Commission.

Please send us a written response to this letter by **December 21, 2009**, and indicate when and in what manner you will move the Manila clams from the harbor seal protection area to the designated one-acre shellfish aquaculture lease area. Please also submit by this date a check in the amount of \$61,250.

KEVIN LUNNY

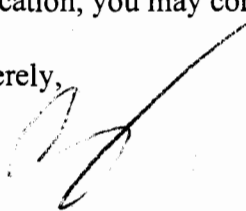
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Please note that in our letter of September 16, 2009 we indicated that in the interest of resolving all Coastal Act violations expeditiously and in the continuing effort to work cooperatively with DBOC, we were willing to forego assessing stipulated penalties at that time for the compliance matters then at issue, but we reserved the right to collect stipulated penalties in the future, should there be continued missed deadlines, additional violations of the terms and conditions of the Consent Order, or should future deadlines be missed. In light of your failure to abide by the terms of the Consent Order, and, in particular, due to the nature of the violations, which have resulted in the introduction of boats, personnel, structures, and materials into a resource protection area, we are assessing stipulated penalties at this time for these latest violations.

Failure to meet the above noted deadlines may result in assessment of additional stipulated penalties, pursuant to **Section 17.0** of the Consent Order.

Thank you for your cooperation. If you have any questions concerning any enforcement matters, please contact me at 415-904-5269. If you have questions concerning completion of your CDP application, you may contact Cassidy Teufel at 415-904-5502.

Sincerely,



Jo Ginsberg  
Enforcement Analyst

cc: Alison Dettmer, CCC, Deputy Director, Energy, Ocean Resources, and Federal  
Consistency Division  
Cassidy Teufel, CCC, Coastal Program Analyst  
Lisa Haage, CCC, Chief of Enforcement