

No. 13-15227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of California,
No. 4:12-CV-6134-YGR (Hon. Yvonne Gonzales Rogers)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

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INTRODUCTION

In its Motion, Plaintiff Drakes Bay Oyster Company (“DBOC”) seeks permission from the Court to operate its commercial business within a designated wilderness area on federal land without a permit. DBOC had the necessary authorizations to operate its business until November 30, 2012, when they expired of their own terms without any action by Defendants (collectively, the “Park Service”). At that time, the Secretary of the Interior decided not to issue a new, 10-year special use permit. DBOC has challenged that decision and has asked the district court to command the Secretary to issue a permit, despite a statute in which Congress committed this decision to the Secretary’s discretion “notwithstanding any other provision of law.” DBOC also sought a preliminary injunction that would prevent the Park Service “from interfering with the continuing operations of Plaintiffs’ oyster farm” during this litigation. *See* DBOC PI Mot. (Abbasi Decl. Ex. 4) at vii.

The district court rightly rejected the request for a preliminary injunction, finding no jurisdiction to review agency action “committed to agency discretion by law.” Order (Abbasi Decl. Ex. 9) at 16; *see also* 5 U.S.C. § 701(a)(2). In a thorough and well-reasoned opinion, the court also found that, even if it were to consider DBOC’s claims, those claims would be without merit. And after considering the evidence of harm that DBOC presented in district court – but does not present here – the court considered the balance of equities to weigh against an injunction. For the same reasons, this Court should not grant an injunction pending appeal.

LEGAL BACKGROUND AND STATEMENT OF FACTS

Point Reyes National Seashore is a coastal peninsula of about 70,000 acres in Marin County, California. At the heart of Point Reyes lies Drakes Estero, a series of estuarial bays encompassing about 2,500 acres. Drakes Estero is “an exceptional nursery that provides abundant food, resting habitat, and shelter for a wide array of marine organisms and migratory waterbirds.” Final Environmental Impact Statement (“EIS”) (Ex. 1) at 14. All of the upland, tidal, and submerged lands at issue in this case are located within the Point Reyes National Seashore and are owned by the United States. *See id.* at 6.¹

In 1972, as it was working to acquire title to the lands within the National Seashore, the United States purchased a five-acre property in the Drakes Estero area from the Johnson Oyster Company (“Johnson”). As part of the terms of transfer, Johnson reserved the right to use and occupy part of that property for the purpose of operating an oyster farm (the “Reservation”) for a fixed term of forty years. *Id.* at 6. When the Reservation expired, Park Service regulations in effect at that time would govern whether activities could continue. *See* Order at 6; *see also* 36 C.F.R. § 1.6 (currently applicable regulations for “special use permits”). The Reservation expired by its own terms on November 30, 2012, at the end of that forty-year period.

¹ The history of Point Reyes National Seashore, Drake Estero, and the DBOC property cannot be fully treated in this Response, but the district court record contains additional detail. *See, e.g.*, Order at 2-11; EIS (Ex. 1) at 6-24.

In 1976, Congress designated parts of the Point Reyes National Seashore under the Wilderness Act. *See* Pub. L. No. 94-544, 90 Stat. 2515 (1976); Pub. L. 94-567, 90 Stat. 2692 (1976). The Wilderness Act protects designated “wilderness areas” where “present and future generations” may enjoy “the benefits of an enduring resource of wilderness” – areas “where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(a), (c). Congress considered designating Drakes Estero as wilderness at that time, but due to existing uses that were inconsistent with wilderness, Congress instead designated about 8,000 acres, including Drakes Estero, as “potential wilderness.” *See* Point Reyes Wilderness Act, Pub. L. No. 94-544, 90 Stat. 2515 (1976); Pub. L. No. 94-567, 90 Stat. 2693 (1976). The House Report accompanying the statute stated:

As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3, reprinted in 1976 U.S.C.C.A.N. 5593, 5595. The Park Service’s own Management Policies help to implement this Congressional intent, providing that the Park Service will seek “the most appropriate means of removing the temporary, nonconforming conditions that preclude wilderness designation from potential wilderness.” NPS Management Policies § 6.3.1 (2001) (Ex. 2).

The Johnson Oyster Company continued to operate until 2004, when its assets were purchased by Kevin Lunny and operations were assumed by DBOC. The purchase agreement explicitly included the Reservation. Before the purchase was

complete, the Park Service informed Mr. Lunny of its policy of removing nonconforming uses from potential wilderness areas, including specifically Drakes Estero. *See* January 25, 2005 Letter (Ex. 3). Two months later, the Park Service again notified Mr. Lunny that “based on our legal review, no new permits will be issued” after the Reservation expired. *See* March 28, 2005 Letter (Ex. 4).²

The conflict between DBOC’s operations and a wilderness designation for Drakes Estero came before Congress in 2009. Congress considered a proposal that would *require* the Secretary to issue a new special use permit for DBOC’s operations, overriding any conflicting Park Service regulations or policy. *See* Order at 4 n.2 (citing the relevant legislative history). However, the final provision, known as “Section 124,” replaced existing regulations and policy without dictating the content of the Secretary’s decision. Section 124 provides that: “[N]otwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization.” Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009).³ The Conference Report confirmed that this change “provid[ed] the Secretary discretion” beyond the original proposed language. *See* H.R. Rep. No. 111-316, at 107 (2009).

² In 2008, the Park Service also issued DBOC a special use permit authorizing the use of areas outside the Reservation for shellfish cultivation and processing. That special use permit expired with the Reservation on November 30, 2012.

³ The full text of Section 124 is reprinted as an Addendum to this memorandum.

In 2010, DBOC requested by letter that the Secretary issue a new ten-year special use permit under Section 124 that would replace its existing, expiring Reservation and special use permit. *See* July 6, 2010 Letter (Ex. 5). Although this decision was committed to the Secretary's discretion, the Park Service sought public input through the preparation of an Environmental Impact Statement. Although the Park Service did not consider the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"), to apply to the Secretary's decision, it believed an EIS would help "engage the public" and "inform the decision of whether a new special use permit should be issued." *See* 75 Fed. Reg. 65,373 (Oct. 22, 2010). A final EIS, published in November 2012, provided extensive information to the Secretary as he considered DBOC's request. *See* FEIS (Ex. 1) at lxxvii-lxxix (describing the scope of public consultation).⁴ The Park Service reiterated in the EIS that "the Secretary's authority under section 124 is 'notwithstanding any other provision of law.'" *Id.* at i, 2. Secretary Salazar also devoted personal attention to DBOC's permit request, visiting the facility and meeting with Mr. Lunny, his employees, and other interested parties.

Secretary Salazar issued a memorandum on November 29, 2012 directing that the Reservation and existing permit be allowed to expire, but also authorizing a period of 90 additional days for DBOC to remove its property from Drakes Estero. (This 90-day period has since been extended.) In his Decision Memorandum (Ex. 6), the

⁴ The EIS that informed the Secretary's decision may be found at: http://www.nps.gov/pore/parkmgmt/planning_dboc_sup.htm .

Secretary acknowledged “a level of debate” about the environmental impacts of DBOC’s operations within Drakes Estero. Decision Memorandum at 5. However, the Secretary principally relied upon “the public policy inherent in the 1976 Act of Congress that identified Drakes Estero as potential wilderness,” including “Congress’s direction to ‘steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.’” *Id.* at 5, 7.

DBOC filed suit challenging the Decision Memorandum and seeking wide-ranging injunctive relief, including a court order commanding the Secretary to issue a 10-year special use permit (as Congress itself had specifically chosen not to do). *See* Amended Complaint at 32 (Docket #44). DBOC also sought a preliminary injunction that would allow it to continue its commercial activities in Drakes Estero, without any statutory or regulatory authority, after the expiration of the Reservation.

The district court denied DBOC’s motion for a preliminary injunction. *See* Order at 30-31. DBOC sought the preliminary injunction based solely on its claims under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See* DBOC PI Mot. (Abbasi Decl. Ex. 4) at 12. The district court held that the Secretary’s decision here falls within the APA’s exception for agency action “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), and is therefore unreviewable. *See* Order at 16.

Considering Section 124, the court found that it allowed the Secretary either to issue or deny a new special use permit, but provided “no meaningful standard” for the court to apply in reviewing that decision. *Id.* at 19.

In the alternative, the district court held that even if APA review were available here, DBOC had not met the standard for a preliminary injunction. The court found the Decision Memorandum to have “a basis in law and policy” and to demonstrate a “rational connection” between the facts and the Secretary’s decision. *Id.* at 22. The court stated that Congress’s use of the term “‘potential wilderness’ suggests on its face the appropriateness of full wilderness as the ultimate goal.” *Id.* at 24. Although the court believed that potential damage to DBOC’s business would constitute irreparable harm, it also found the balance of equities did not favor an injunction. *Id.* at 27-30.

DBOC appeals from this denial of preliminary relief, claiming both that the district court has jurisdiction and that DBOC met the requirements for an injunction.

ARGUMENT

A. Standard of Review

To obtain the “extraordinary remedy” of an injunction pending appeal, DBOC must clearly establish four elements: that it is “likely to succeed on the merits,” that it is “likely to suffer irreparable harm in the absence of preliminary relief,” that “the balance of equities tips in [its] favor,” and that “an injunction is in the public interest.” *See Winter v. NRDC*, 129 S. Ct. 365, 374, 376 (2008) (describing factors in the context of preliminary injunction); *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

With respect to the merits of DBOC’s appeal, this Court will review the district court’s denial of a preliminary injunction for abuse of discretion. This is a “limited and deferential” standard. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir.

2010). Thus, “as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result.” *Id.* (citing *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)).

B. DBOC cannot show a likelihood of success on the merits.

1. The district court correctly concluded that the APA precludes review of the Secretary’s discretionary decision.

The district court held that the APA does not grant jurisdiction to review the Secretary’s decision, which is “committed to agency discretion by law.” *See* Order at 16 (citing 5 U.S.C. § 701(a)(2)). DBOC cannot prevail on the merits of its appeal because this ruling was correct.

An action is “committed to agency discretion by law” if a statute is “drawn in such broad terms that in a given case there is no law to apply” – that is, where there are “no substantive standards on which a court could base its review.” *Webster v. Doe*, 486 U.S. 592, 599-600 (1988); *see also, e.g., Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718-19 (9th Cir. 2011); *Center for Policy Analysis on Trade and Health v. U.S. Trade Representative*, 540 F.3d 940, 944-47 (9th Cir. 2008). In *Webster v. Doe*, for example, the Supreme Court considered the authority of the Director of Central Intelligence to terminate personnel “[n]otwithstanding . . . the provisions of any other law.” *Id.* at 615 (Scalia, J., dissenting) (quoting statutory language). In part due to this language, the Court held that such decisions were purely discretionary and unreviewable under Section 706(a)(2) of the APA.

Although Section 706(a)(2) creates a narrow exception to APA jurisdiction, Section 124 fits squarely within it, providing “clear and convincing evidence” that Congress intended to exempt the Secretary’s decision from review. *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986). It provides that the Secretary “is authorized” to issue a permit, but not that the Secretary is required to issue a permit. The clause “notwithstanding any other provision of law” indicates Congress’s clear intent that any constraints on the Secretary’s discretion are found within Section 124 itself. Thus, if the Secretary chooses to issue a permit, he must charge DBOC a fair market rent, and if he wishes to modify the terms of the permit, he must take into account a National Academy of Sciences report. In contrast, if the Secretary chooses not to issue a permit, Section 124 does not place any constraints on his discretion.

The scope of APA jurisdiction to review the Secretary’s decision is controlled by this Court’s decision in *Ness Inv. Corp. v. U.S. Dep’t of Agriculture*, 512 F.2d 706 (9th Cir. 1975). The plaintiff in *Ness* claimed that the Forest Service had “unreasonably, arbitrarily and capriciously denied” a special use permit. *Id.* at 711-12. The applicable statute “authorized” the Secretary “to issue permits,” and to set regulations, terms and conditions for permits “as he may deem proper.” *Id.* at 715. The Court found this language so broad that “there is no law to apply,” and held that the permit denial was not reviewable under the APA. *Id.* at 715. Instead, the question whether to grant a particular permit was “best answered by the forest service, which is involved on a daily basis with the management and use of the national forests.” *Id.* at 716. Likewise

here, Section 124 gives the Secretary the authority to grant a special use permit for DBOC, but does not require it, and does not provide any standard by which the Secretary should make the decision (or by which the court could review it).

DBOC claims that courts often review agency actions within the scope of a discretionary authority, and that this case should be no different. *See* DBOC Mot. at 10. But in most such cases, there is “law to apply” in the form of a statutory directive or duly promulgated regulation. Thus, in *Pinnacle Armor*, this Court recognized that both the statute, which established the purpose for agency action, and the agency’s own regulations provided a “meaningful standard for review.” Similarly, the broad discretion that this Court found to be unreviewable in *Ness* was subsequently constrained by new regulations that imposed “specific obligations” on the agency, and those regulations constituted sufficient “law to apply” for purposes of APA jurisdiction. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 813 (9th Cir. 1987), rev’d on other grounds, 490 U.S. 332 (1989).⁵ Here, the Park Service had advised DBOC that similar existing constraints, based in established regulations and policy, would preclude a new special use permit in the potential wilderness of Drakes Estero. *See supra* p. 4 & Ex. 3, 4. DBOC agrees that, by enacting Section 124,

⁵ The district court here correctly recognized this distinction in comparing *Ness* to *KOLA, Inc. v. United States*, 882 F.2d 361 (9th Cir. 1989). *See* Order at 17. The court noted that in *KOLA*, the agency had promulgated “precise qualifications” that a court could use to judge the agency’s action. *Id.* at 17-18 & n.14. Likewise, the Park Service has regulatory standards that would ordinarily apply to special use permits, *see, e.g.*, 36 C.F.R. § 1.6, but Section 124 replaces those standards here.

Congress removed those constraints. *See* DBOC Mot. at 9. But Congress did not replace them with another governing standard that applies to DBOC's permit request.

DBOC offers a fundamentally different interpretation of Section 124, claiming that it authorized the Secretary to *issue* a permit "notwithstanding any other provision of law," but that the Secretary would have had to follow all other applicable laws before he could *deny* a permit. *See* DBOC Mot. at 8-10. This interpretation is more self-serving than it is logical, and the district court was right to reject it.

DBOC begins with the plain language of Section 124, which provides only that the Secretary "is authorized *to issue* a special use permit with the same terms and conditions as the existing authorization." DBOC Mot. at 8. This is too narrow a construction of the statute, which, read as a whole, must confer the authority to act upon DBOC's permit request in a way other than simply "to issue." Indeed, even though it does not state it explicitly in the "is authorized" clause, Section 124 obviously contemplates that the Secretary may issue a permit with *different* terms and conditions from the existing authorization.

Case law supports the interpretation that the statutory authority to issue a permit encompasses the authority to deny it. In *Ness*, the statute at issue provided that the "Secretary of Agriculture is authorized . . . to permit" special uses; that statute is silent about any authority to deny such uses. *See Ness*, 512 F.2d at 707 n.3 (citing 16 U.S.C. § 497). But this Court in *Ness* found that the APA did not provide jurisdiction to review the denial of a special use permit, holding that this statute did not provide

the Court “any standards by which acceptance *or rejection* of a particular applicant could be tested.” *Id.* at 716 (emphasis added). *See also Confederated Salish & Kootenai Tribes v. United States ex rel. Norton*, 343 F.3d 1193, 1196 (9th Cir. 2003) (holding that the plain meaning of “authorize” includes the authority to act or not to act).

The legislative history here also supports the interpretation that the “notwithstanding” clause of Section 124 applies to any decision the Secretary might make about a new permit for DBOC, regardless of the content of that decision. Perhaps Congress did intend, as DBOC argues, to “encourage the Secretary to issue the permit, not to deny it.” DBOC Mot. at 8. But when it enacted the actual statute, Congress rejected a proposal that would require the Secretary to issue the permit, and adopted a provision that “authorized” the Secretary to issue a permit. *See* Order at 4 n.2, 18. The only reasonable conclusion to draw from this legislative sequence is that, pursuant to his authority under Section 124, Congress intended the Secretary to be able to deny the permit. *See* H.R. Rep. No. 111-316, at 107 (changing Section 124 to “provid[e] the Secretary discretion” that mandatory language would not have provided).⁶ Congress may have wanted to assist DBOC, but it thought that freeing the Secretary’s decision from “any other provision of law” was assistance enough, without further dictating how he should exercise his discretion.

⁶ DBOC also cites a conference report, without any statutory text, for “a related statute enacted after Section 124.” DBOC Mot. at 9-10. That report is not a proper basis for statutory interpretation of Section 124. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 529-30 & n.27 (2007) (rejecting “post-enactment legislative history”).

This interpretation of Section 124 is also appropriate because it avoids fragmenting the Secretary's statutory authority to act upon DBOC's permit request. DBOC would find only the power to issue a permit in Section 124, free of any legal constraints, and would find the power to deny the same permit in 16 U.S.C. § 3 and 36 C.F.R. § 1.6(d), subject to a variety of constraints. Such an asymmetrical authorization could easily lead to illogical outcomes.⁷ The better reading of Section 124 is simply that, for purposes of DBOC's permit request, it displaces 36 C.F.R. § 1.6 – which contains the procedures and standards that the Park Service would ordinarily use to issue, deny, or modify a permit – and confers that entire authority upon the Secretary “notwithstanding any other provision of law.”

Even DBOC has a hard time maintaining any logical separation between the Secretary's authority to issue a permit, “notwithstanding any other provision of law,” and his authority to deny one. DBOC claims that, given the “notwithstanding” clause, the Secretary could not rely on “specific wilderness legislation” or “any other provision of law” to *deny* DBOC's permit request, and was instead required to ignore

⁷ For example, in this case, DBOC relied on Section 124, not on 36 C.F.R. § 1.6, to request a new permit directly from the Secretary. *See* July 26, 2010 Letter (Ex. 5). Under DBOC's theory, therefore, Section 124 replaces 36 C.F.R. § 1.6 for purposes of establishing the procedure for its permit request and for purposes of any decision to grant that request. But 36 C.F.R. § 1.6 remains in place as “law to apply” if (and only if) the Secretary chooses not to grant its request, despite the fact that DBOC did not even apply for a permit under that regulation. This is not a logical interpretation of the preemptive scope of Section 124, or of the scope of discretion that Congress intended to confer upon the Secretary.

other laws. *See* DBOC Mot. at 11, 14. But elsewhere, DBOC argues that the “notwithstanding” clause applies only when the Secretary decides to *issue* a permit, and that in denying a permit, the Secretary must follow other laws. *See id.* at 8-9 (arguing that Section 124 “says nothing about a denial”); *id.* at 15 (“Congress intended to apply the ‘notwithstanding’ clause to the issuance of a permit only.”). The district court also recognized the inconsistency in DBOC’s arguments, noting that DBOC had previously urged the Secretary to act without regard to NEPA. *See* Order at 20.

If the Court concludes, as it should, that the “notwithstanding” clause applies whether the Secretary chooses to issue or deny a permit, then DBOC’s argument that NEPA and 36 C.F.R. § 1.6 constitute “law to apply” are irrelevant. Congress exempted the Secretary from those constraints in Section 124, committing his permit decision to agency discretion and removing APA jurisdiction to review that decision. Because DBOC is not likely to succeed in obtaining reversal of the district court on this point, it is not entitled to an injunction pending appeal.

2. DBOC would not be likely to prevail on the merits of its claims.

Even if the phrase “notwithstanding any other provision of law” were not strong enough to preclude APA review of the Secretary’s action, that phrase still indicates that the Secretary had broad discretion to consider law and policy factors in making his permit decision. If the district court had jurisdiction, therefore, it wisely would have applied a broad APA standard of review to DBOC’s claims, rather than particular details of the statutes that DBOC cites. *See* Order at 22-23 (citing *Motor*

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Using that standard, this Court has upheld the denial of a special use permit where the agency “clearly explained its reasons” for denying the permit and it “acted within the sphere of its expertise.” *McFarland v. Kempthorne*, 545 F.3d 1106, 1113 (9th Cir. 2008).

DBOC’s arguments about existing fishing, mineral, or agricultural rights, *see* DBOC Mot. at 14-15, do not demonstrate legal error in the Secretary’s decision. The Secretary recognized that, at the time of the Point Reyes Wilderness Act, Congress expected “efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.” H.R. Rep. No. 94-1680 at 3, 1976 U.S.C.C.A.N. at 5595. Even if any of California’s residual rights applied to DBOC’s operations – and they do not⁸ – the Secretary could still reasonably decide not to issue a permit, on the basis of Congress’s intent that the Park Service “steadily” remove non-wilderness uses. DBOC also claims that the Secretary made a legal error by interpreting the Point Reyes National Seashore enabling legislation to prohibit mariculture. *See* DBOC Mot. at 15 (citing Decision Memorandum at 2). But under Section 124, the Secretary clearly understood that he had the discretion to issue a new permit to DBOC. He simply chose not to do so, for other legal and policy reasons that are fully explained in the record. *See* Decision Memorandum (Ex. 6) at 5-6.

⁸ In California’s view, its state fishing rights do not cover DBOC’s operation, and DBOC “is properly within the primary management authority of the [Point Reyes National Seashore], not the [California] Department [of Fish and Game].” *See* Declaration of Cicely Muldoon (Ex. 7) at 13-16.

DBOC also cannot prevail on the merits of its NEPA claims. Even if the “notwithstanding” clause of Section 124 is not so strong as to preclude APA jurisdiction, it must at least exempt the Secretary’s decision from the requirements of NEPA for the reasons discussed above. *See* Order at 23. The district court also relied on DBOC’s own statements that Section 124 constitutes a “general repealing clause” that supersedes any conflicting requirements of NEPA. *See* Order at 20 (citing Plaintiffs’ Letter of November 1, 2012 (Ex. 8) at 2). DBOC must also fail on its claim that “NEPA prohibits decisions . . . from being made based on defective data and junk science.” DBOC Mot. at 17. The Secretary was aware of DBOC’s concerns about scientific data, and did not rely on any data “that was asserted to be flawed.” *See* Decision at 5 n.5; *see also infra* n. 11.

Finally, DBOC cannot prevail on its “false notice” claim. *See* DBOC Mot. at 17-18 & n.7. The permitted uses of Drakes Estero did not change due to the Federal Register notice, but due to the expiration of DBOC’s existing authorizations. The notice merely noted the end of any further legal obstacles to a wilderness designation. *See* 77 Fed. Reg. 71,826 (Dec. 4, 2012). In any event, DBOC cannot prevail on the merits of this claim because it lacks standing to bring it. The injuries that DBOC alleges here flow only from the Secretary’s denial of a special use permit. Without a permit, DBOC cannot operate commercially within the National Seashore, regardless of whether Drakes Estero is “wilderness” or only “potential wilderness.” Vacating the Federal Register notice would therefore not redress DBOC’s alleged injuries.

C. The equities do not favor an injunction pending appeal.⁹

1. DBOC makes no showing of irreparable harm.

As the party seeking an injunction pending appeal, DBOC bears the burden of showing this it is “likely to suffer irreparable harm” if the injunction is not granted. *Winter*, 555 U.S. at 20. DBOC has completely failed to carry this burden, omitting to submit any evidence, or cite any from the district court record, that establishes a likelihood of irreparable harm. DBOC’s Motion does not offer any support for the claim (asserted only in its Introduction) that, absent an injunction, its oyster farm will be “permanently destroyed.” DBOC Mot. at 1. DBOC does not even attempt to show that it would be impossible for it to relocate its operations, or to resume them at Drakes Estero if it prevails in this litigation. Park Service relocation assistance will mitigate harm to DBOC’s employees. *See* Muldoon Declaration (Ex. 7), at 5. DBOC also does not discuss how the cessation of its operations will cause “irreparable environmental harm.” DBOC Mot. at 1. The district court reviewed evidence showing that the removal of DBOC’s operations would not harm water quality or

⁹ The equitable factors relevant to injunctive relief, discussed here in the context of an injunction pending appeal, are also necessary to the merits of DBOC’s appeal of the denial of a preliminary injunction. DBOC can succeed on the merits of its appeal only if it can show that the district court abused its discretion in weighing the equities. Even if this court might weigh those equities differently, the district court’s careful recitation and balancing of the relevant factors was not an abuse of discretion. *See* Order at 30; *Earth Island Inst.*, 626 F.3d at 468. This further shows why DBOC cannot prevail on the merits of its appeal.

have unacceptable noise impacts on the marine environment. *See* Ketcham Declaration (Ex. 9) at 2-4; Fristrup Declaration (Ex. 10) at 2-7; *see also infra* pp. 19-20.

Even if harm to DBOC's business might be "easily shown," DBOC "must still make that showing on the facts of [its] case." *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011). DBOC has waived the issue of irreparable harm by failing to argue it in its opening brief. It may not introduce new arguments in its reply, when the Park Service can no longer answer them. *See, e.g., Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011). This alone is enough to deny an injunction.

2. The public interest is strongly against an injunction.

DBOC also bears the burden of showing that the public interest favors an injunction pending appeal. *Winter*, 555 U.S. at 20. Here, DBOC offers the Court only one reason why the public interest might favor an injunction: a general interest in "Defendants' compliance with federal law." DBOC Mot. at 18. This merely assumes success on the merits of the questions of statutory interpretation discussed above. If NEPA and the Park Service's regulations do not apply to the Secretary's decision, for the reasons discussed above, they also can carry no weight here.

To the extent DBOC would have this Court consider the "public interest, as reflected in an Act of Congress," DBOC Mot. at 19, that factor does not favor an injunction pending appeal. There is no act of Congress that favors DBOC's continued commercial operation in Drakes Estero; Section 124 committed to the Secretary the discernment of the public interest on this point. There is, however, a

statute that designated Drakes Estero as potential wilderness, and Congress contemplated that the Secretary would act to end those uses that had been preventing a wilderness designation for the area. *See supra* p. 3; Order at 30.¹⁰

In the record, the Park Service described additional reasons that returning Drakes Estero to wilderness is in the public interest. DBOC's presence at Drakes Estero has prevented the area from becoming part of the only marine wilderness on the West Coast, outside of Alaska. *See* Muldoon Decl. (Ex. 7) at 2. As wilderness, Drakes Estero will receive "the highest level of conservation protection for federal lands," and will be "devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." *Id.* This will enhance Drakes Estero for millions of visitors to Point Reyes National Seashore. *Id.* at 2-3.

Finally, the public interest in the quality of the Drakes Estero environment weighs against an injunction. The California Coastal Commission has issued two Cease and Desist Orders to DBOC for unpermitted operations. *See* Muldoon Decl. at 7-8; California Coastal Commission, Agenda of Feb. 7, 2013, at 7 (Ex. 11). DBOC increases the risk of invasive species within Drakes Estero, *see* Ketcham Decl. (Ex. 9)

¹⁰ DBOC raises one other "public interest" point, claiming that the district court should not have considered DBOC's reasonable expectation, at the time it purchased the Johnson property, that its Reservation would expire in 2012. *See* DBOC Mot. at 19. This was only one of many equitable factors that the district court considered and balanced. *See* Order at 28-30. In any event, even if DBOC's own reasonable expectations might have changed upon the enactment of Section 124, that is not a reason that an injunction pending appeal is in the *public's* interest.

at 7-9, and introduces industrial noise into the natural environment, *see* Fristrup Decl. at 5-6. The FEIS also discussed at length the environmental effects of DBOC's operations, finding that DBOC's operations have "long-term moderate adverse impacts" on eelgrass, *see* Table ES-4 (Ex. 1) at liii; on native shellfish species, *id.* at lv-lvi; on harbor seals, *id.* at lix-lx; and on birds, *id.* at lxi-lxii; and have "major adverse impacts" on the natural soundscape, *id.* at lxxviii, and on wilderness values, *id.* at lxx.¹¹

CONCLUSION

DBOC is not likely to succeed on the merits of its appeal. Allowing it to continue its operations while that appeal continues would conflict with the interest that Congress has recognized, and that the public will enjoy, in the wilderness character and environmental quality of Drakes Estero.

For the foregoing reasons, Plaintiffs' motion for an injunction pending appeal should be denied.

¹¹ Although DBOC contests the scientific validity of the EIS, that information is in the administrative record and is relevant to the equities here. Moreover, the Inspector General of the Department of the Interior recently issued a report finding "no evidence, documents, [draft EIS] revisions, or witnesses" that supported any allegations of scientific misconduct. *See* Ex. 12 (Synopsis).

Respectfully submitted,

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Dated: February 19, 2013
DJ # 90-1-1-13861

CERTIFICATES

I certify that on February 19, 2013, I filed the foregoing Opposition using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this Opposition upon its filing.

/s/ David Gunter

J. David Gunter II

Counsel for Defendant-Appellees

STATUTORY ADDENDUM

Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) (“Section 124”)

SEC. 124. Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit (“existing authorization”) within Drake's Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: *Provided*, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

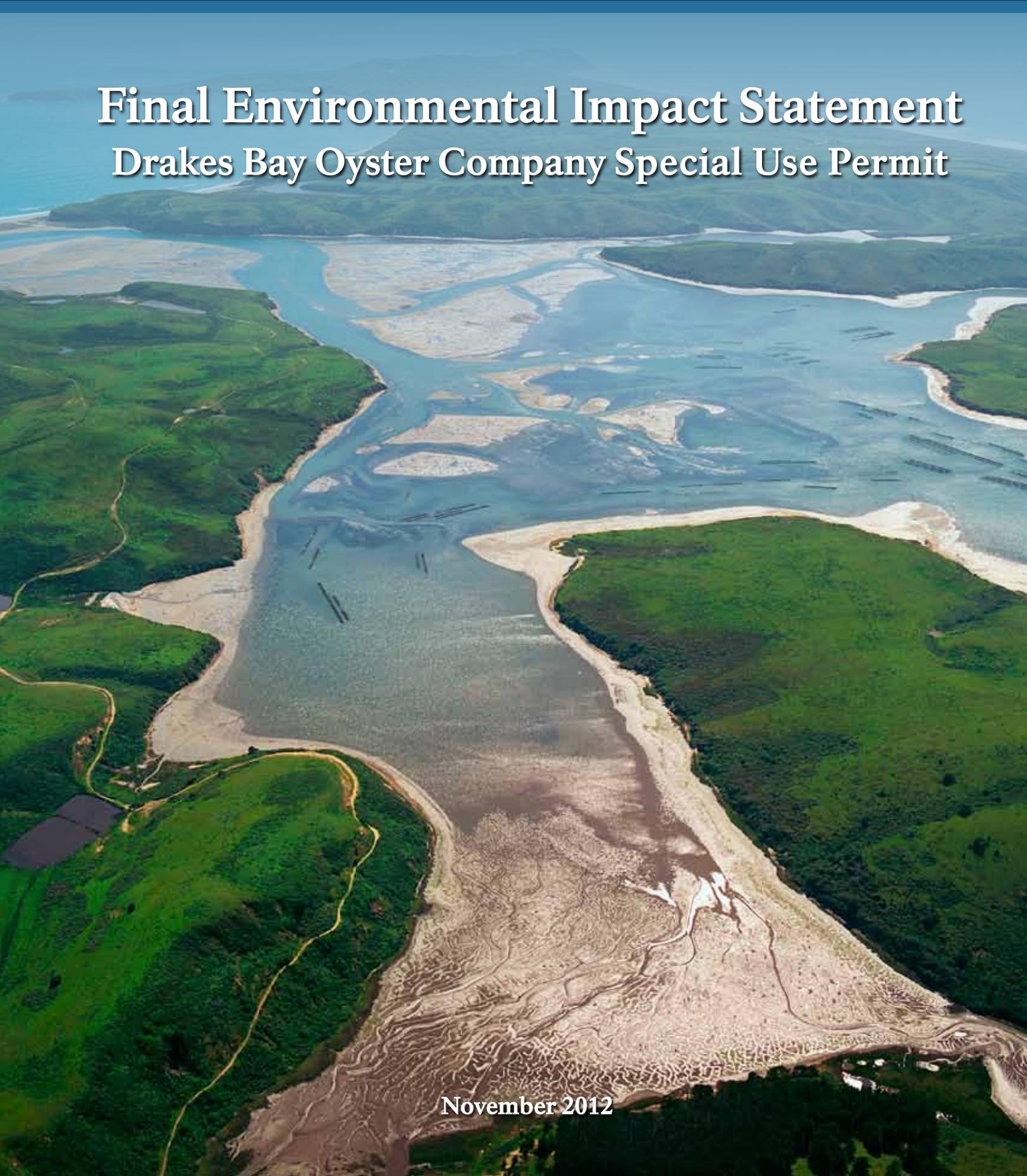
Exhibit 1

Excerpts from Final Environmental Impact Statement – Drakes Bay
Oyster Company Special Use Permit (November 2012)



Point Reyes National Seashore
California

Final Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit



November 2012

**Final Environmental Impact Statement for the Drakes Bay Oyster Company Special Use Permit
Point Reyes National Seashore
California
November 2012**

Lead Agency: National Park Service (NPS), U.S. Department of the Interior

Cooperating Agencies: California Department of Fish and Game (CDFG), U.S. Army Corps of Engineers (USACE), National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA-NMFS), and U.S. Environmental Protection Agency (EPA)

The NPS has used the NEPA process to engage the public to evaluate the effects of issuing a Special Use Permit (SUP) for the commercial shellfish operation of Drakes Bay Oyster Company at Point Reyes National Seashore. As the culmination of the NEPA process, the NPS is making available the Final Environmental Impact Statement (EIS) assessing four alternatives and identifying the environmentally preferable alternative. However, it should be noted that Section 124 of Public Law 111-88 provides that the Secretary's decision whether to issue this permit is "notwithstanding any other provision of law." As such, the NPS has not identified a preferred alternative in the Final EIS.

The Final EIS describes and analyzes four alternatives for federal action related to the operation of DBOC within Point Reyes National Seashore (the Seashore). On October 30, 2009, Congress enacted Section 124 of Public Law (PL) 111-88, which provides to the Secretary of the Interior (Secretary) the discretionary authority to issue a new SUP to DBOC for a period of 10 years. The discretionary authority contained in section 124 now allows the Secretary to permit DBOC's operations for a new 10 year term, until November 30, 2022. The EIS presents a no-action alternative, which considers expiration of existing authorizations and subsequent conversion of the area to congressionally designated wilderness, and three action alternatives, which consider the issuance of a new SUP to DBOC for a period of 10 years with differing levels of onshore facilities and infrastructure and offshore operations.

Alternative A, No New Special Use Permit – Conversion to Wilderness (No-action) considers the expiration of the existing RUO and SUP and subsequent conversion to wilderness consistent with PL 94-567. The existing SUP and RUO expire on November 30, 2012. Under alternative A, the Secretary would not exercise the discretion granted to him under section 124 to issue a new 10-year SUP. Upon cessation of the nonconforming use from Drakes Estero, NPS would convert the area to wilderness. The three action alternatives describe differing levels of onshore facilities and infrastructure and offshore operations associated with the issuance of a new SUP for a period of 10 years.

Alternative B, Issue New Special Use Permit - Existing Onshore Facilities and Infrastructure and Offshore Operations Would be Allowed for a Period of 10 Years, considers a level of use consistent with conditions that were present in fall 2010 when NPS initiated evaluation under the EIS. The existing SUP and RUO expire on November 30, 2012. The Secretary would exercise the discretion granted to him under section 124 to issue a new 10-year SUP to DBOC, expiring November 30, 2022.

Alternative C, Issue New Special Use Permit - Onshore Facilities and Infrastructure and Most Offshore Operations Present in 2008 Would be Allowed for a Period of 10 Years, considers a level of use that was occurring at the time the current SUP was signed in April 2008. The existing SUP and RUO expire on November 30, 2012. Under alternative C, the Secretary would exercise the discretion granted to him under section 124 to issue a new 10-year SUP to DBOC, expiring November 30, 2022.

Alternative D, Issue New Special Use Permit - Expanded Onshore Development and Offshore Operations Would be Allowed for a Period of 10 Years, considers expansion of operations and development of new infrastructure as requested by DBOC as part of the EIS process. The existing SUP and RUO expire on November 30, 2012. Under alternative D, the Secretary would exercise the discretion granted to him under section 124 to issue a new 10-year SUP to DBOC, expiring November 30, 2022.

The Draft EIS was available for public and agency review and comment between September 23, 2011 and December 9, 2011. An electronic copy of the Draft EIS was posted at www.parkplanning.nps.gov/PORE. Copies of the document were distributed to individuals, agencies, and organizations, and were available in local public libraries, at the public meetings, and upon request. This Final EIS provides responses to substantive agency and public comments, and incorporates those comments and suggested revisions, where necessary.

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EXECUTIVE SUMMARY

The Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company (DBOC) Special Use Permit (SUP) presents four alternatives. The no-action alternative considers expiration of existing authorizations and subsequent conversion of the area to congressionally designated wilderness. Three action alternatives consider the issuance of a new SUP to DBOC for a period of 10 years with differing levels of onshore facilities and infrastructure and offshore operations. Beneficial and adverse impacts are assessed for all four alternatives evaluated in this EIS. Existing authorizations for DBOC to operate expire November 30, 2012. The National Environmental Policy Act of 1969 (NEPA), as amended, process is being used to inform the decision of whether a new SUP should be issued. If a new SUP is issued, it would authorize DBOC to operate its onshore and offshore¹ operations until November 30, 2022. In the event that a new SUP is issued, it would incorporate all of DBOC's National Park Service (NPS) authorized onshore and offshore operational requirements. There is no authority to issue or extend a reservation of use and occupancy (RUO).

The authority for NPS to issue a new permit to DBOC came about as a result of congressional action. On October 30, 2009, Congress enacted section 124 of Public Law (PL) 111-88, which was part of the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010. Section 124 states:

Prior to the expiration on November 30, 2012, of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drakes Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. (Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, section 124, 123 Stat. 2904, 2932 [2009])

Section 124, as it will be referred to in this EIS, provides to the Secretary of the Interior (Secretary) the discretionary authority to issue a new SUP to DBOC for a period of 10 years. Congress granted the Secretary the discretionary authority contained in section 124 in response to NPS's determination that it

¹ In this document, the term offshore is used to refer to operations and facilities in Drakes Estero, including waters, tide and submerged lands, and intertidal areas such as the shoreline and mudflats.

lacked authority to allow DBOC to operate after November 30, 2012. PL 94-544 and PL 94-567 of 1976 designated Drakes Estero as potential wilderness. House Report 94-1680, which accompanied the public law, provided that, “it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.” The commercial shellfish operation in Drakes Estero, now operated by DBOC, is the only nonconforming use that prevents conversion of the waters of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness. The discretionary authority contained in section 124 now allows the Secretary to permit DBOC’s operations for a new 10 year term, until November 30, 2022.

PURPOSE OF AND NEED FOR ACTION

PURPOSE AND NEED

Action is needed at this time because pursuant to section 124 of Public Law 111-88, the Secretary has the discretionary authority to issue a SUP for a period of 10 years to DBOC for its shellfish operation, which consists of commercial production, harvesting, processing, and sale of shellfish at Point Reyes National Seashore. The existing RUO and SUP held by DBOC will expire on November 30, 2012. DBOC has submitted a request for the issuance of a new permit upon expiration of the existing authorizations. Consistent with Department of the Interior (DOI) NEPA regulations (43 CFR 46.30), the proposed action for this EIS is the Secretary’s decision whether to issue a permit under section 124.

The purpose of the document is to use the NEPA process to engage the public and evaluate the effects of issuing a SUP for the commercial shellfish operation. The NEPA process will be used to inform the decision of whether a new SUP should be issued to DBOC for a period of 10 years.

PROJECT OBJECTIVES

Project objectives build from the project purpose and identify those goals that are “critical to meet if NPS is to consider the proposal successful” (NPS 2001b). Project objectives should be grounded in the park’s enabling legislation, purpose, significance, and mission goals; as well as relevant legislation; NPS plans (such as general management plans [GMPs]); or other NPS standards and guidelines. Project objectives should be broad enough to allow for a reasonable range of alternatives without narrowing the focus or intentionally excluding an alternative. The following project objectives have been identified:

- Manage natural and cultural resources to support their protection, restoration, and preservation.
- Manage wilderness and potential wilderness areas to preserve the character and qualities for which they were designated.
- Provide opportunities for visitor use and enjoyment of park resources.

DBOC GOALS

On July 6, 2010, DBOC submitted a request for the issuance of a new SUP upon expiration of the existing permit. Specifically, DBOC seeks to “occupy and utilize the buildings and lands on the shores of Drakes Estero” (Latham & Watkins, LLP 2010). DBOC requested that the EIS consider DBOC’s needs and goals, as the project applicant. DBOC requested that its objective of “operating an environmentally-friendly and sustainable oyster farm for a renewable 10-year period under a Service-issued SUP” be included both during scoping as well as during public review of the Draft EIS (DBOC 2010n, 2011i). DBOC also requested that the purpose and need be modified “to reference DBOC’s request that the renewed SUP be issued under [the] same terms and conditions present in the RUO/SUP, for permission to complete work authorized under the 1998 Environmental Assessment, and for permission to make select physical improvements.” DBOC suggested that language regarding discussion of mitigation measures and historical context be added to the purpose and need, as well (DBOC 2011i).

The goals provided by DBOC are included here as background information. DBOC’s goals have not been added to the NPS purpose, need, and objectives because doing so would limit the range of reasonable alternatives to only those that further DBOC’s goals, which may not reflect the broader public interest, and would be inconsistent with the Secretary’s discretion under section 124.

Specifically, DBOC’s goal that NPS issue a “renewable” SUP is not consistent with section 124, which authorizes only one, 10-year permit term. Similarly, DBOC’s goal that the new permit be limited to its onshore operations only is inconsistent with section 124, which specifies that a new permit must mirror the terms of the existing permit. DBOC’s existing SUP authorizes onshore and offshore operations, consistent with NPS’s jurisdiction over Drakes Estero. A new permit issued under section 124 would therefore authorize both onshore and offshore operations.

BACKGROUND

The original Drakes Bay Oyster Company (no relation to the present day DBOC) operated on the banks of Drakes Estero near the head of Schooner Bay, from 1938 to 1945 (Caywood and Hagen 2011). In 1946, the Drakes Estero oyster allotment was transferred to Larry Jensen (Caywood and Hagen 2011). During the Jensen tenure, the ownership of the 5-acre parcel containing the processing plant was integrated with the state water allotment lease in Drakes Estero. In April 1954, Larry Jensen entered into an “agreement of sale” with Van Camp Seafood for his oysters, state oyster allotments, and the 5 acres of upland real property that accompanied the state water bottom leases. In turn, it was quickly transferred to the Coast Oyster Company (Caywood and Hagen 2011; CDFG 1954, 1955). In 1958, Charles W. Johnson took over the oyster operation in Drakes Estero and soon founded the Johnson Oyster Company (JOC). Mr. Johnson cultivated shellfish (mostly oysters) in Drakes Estero and operated onshore processing facilities from 1961 through 2003. Mr. Johnson purchased 5 acres of onshore land where the existing processing facilities were located in 1961. He and his wife moved to the oyster plant at Creamery Bay.

Although the Seashore was established in 1962, NPS did not acquire ownership of all lands and waters within the Seashore’s boundary immediately. In 1965, the state-held water bottoms of Drakes Estero were conveyed to NPS by the State of California. In 1972, NPS purchased fee title to the 5-acre upland parcel where the oyster processing facilities were located from Mr. Johnson. As part of the purchase agreement, Mr. Johnson elected to

retain a 40-year RUO over 1.5 acres of the 5-acre parcel. The RUO allowed for “processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public and residential purposes reasonably incidental thereto” (NPS 1072a).

In December 2004, DBOC purchased the assets of JOC, assuming the remaining seven years of the RUO and SUP that NPS had issued to JOC for the well and septic leach field (DBOC 2011f⁴). There were no changes to the terms of the RUO or to its expiration date. In April 2008, DBOC and NPS signed a SUP (NPS Permit No. MISC-8530-6000-8002) that would allow the commercial shellfish operation in Drakes Estero to remain, with provisions, until November 30, 2012, when it expires concurrently with the RUO.

DESCRIPTION OF THE PROJECT AREA

The Seashore is located in western Marin County in central California, approximately 30 miles northwest of San Francisco and within 50 miles of the nine-county San Francisco Bay Area, the fifth largest metropolitan area in the United States. The Seashore is bounded to the north, west, and southwest by the Pacific Ocean and to the east by the residential communities of Inverness, Inverness Park, Point Reyes Station, Olema, and Dogtown. Western Marin County is primarily rural, with scattered, small, unincorporated towns that serve tourism, agriculture, and local residents. In addition, the Seashore administers the Northern District of the Golden Gate National Recreation Area, adjacent to the Seashore, for a combined management area and legislated boundary of approximately 94,000 acres (figure ES-1).

Drakes Estero is a system of five branching bays encompassing approximately 2,500 acres. The branching bays are stretched to the north and separated by low converging ridges. From west to east, they are: Barries Bay, Creamery Bay, Schooner Bay, Home Bay, and Estero de Limantour (see figures ES-1 and ES-2). Nearly half of the Estero’s surface area consists of mud and sand flats that are exposed at low tide (Press 2005). Because of the shallow character of the bay, and its tendency to flush completely within a normal tidal cycle, currents in the main stem and secondary channels are relatively strong.

The Drakes Estero watershed covers approximately 31 square miles, including Drakes Estero itself (Baltan 2006). The Seashore leases most of the lands surrounding Drakes Estero for cattle grazing (approximately 14 square miles within the watershed). Areas draining to and surrounding the Estero de Limantour are primarily within congressionally designated wilderness (approximately 8 square miles within the watershed).

This EIS examines DBOC operations and facilities in and adjacent to Drakes Estero. The project area is roughly 1,700 acres and includes DBOC structures, facilities, and operations in much of the congressionally designated potential wilderness (1,363 acres), 2.6 acres of onshore property, and 2 acres incorporating the well and septic areas, as delineated in the RUO and SUP (see figures 1-3 and 1-4). In order to provide a comprehensive analysis of potential impacts of the alternatives presented in this EIS, the project area also includes the kayak launch parking area and the access road leading from Sir Francis Drake Boulevard. All land and water portions of the project area are owned by NPS. Resources outside the project area may be described if they are subject to impacts resulting from any of the proposed alternatives. The project area as a whole is depicted on figure ES-2, with figures ES-3 and ES-4 showing the detailed location of the onshore operations.

EXISTING DBOC OPERATIONS

DBOC's operations occur on uplands adjacent to Drakes Estero and on tide and submerged lands within the Estero. All of the upland, tidal, and submerged lands on which DBOC conducts its operations are located within the Seashore and are owned in fee by the United States. Pursuant to 36 CFR 1.2, activities occurring on lands and waters under the jurisdiction of NPS are subject to applicable NPS laws and regulations.

DBOC currently grows two species of shellfish: Pacific oyster and manila clam. The 2008 SUP authorized DBOC to generally operate within the same offshore boundaries as contained in Lease M-438-01 (1,049 acres)² and Lease M-438-02 (1 acre). Within the offshore lease boundaries, DBOC maintains 142 acres of shellfish growing areas. Shellfish growing areas are otherwise known as "culture beds" or simply "beds" and can include any of the shellfish cultivation methods. The 142 acres comprise 42 numbered culture beds (see figure ES-2). DBOC cultivates shellfish using three primary methods: hanging culture, floating culture, and bottom culture. Oysters are grown using all three methods. Manila clams are grown using bottom bag culture. DBOC maintains 95 wooden racks for cultivation, which total approximately 5 miles when laid end-to-end (also expressed as 7 acres), within Drakes Estero. Currently, six of these racks fall outside the permit boundaries. Additional detail about DBOC's offshore facilities are described in chapter 2 of the EIS.

DBOC onshore facilities support the processing, sale, and initial stages of shellfish culture (see figure ES-3). For the most part, these facilities are located within the 1.5 acres of the original RUO, the additional 1.1 acres established with the issuance of the 2008 SUP, and 2.0 acres encompassing the well and septic areas (shown on figure ES-4). DBOC packages its shellfish on site and operates the only on-site shellfish cannery in California. DBOC facilities currently outside the authorized area include unused setting tanks and may also include portions of the oyster shell storage mounds. See chapter 2 of the EIS for additional detail related to DBOC's onshore facilities.

ISSUES AND IMPACT TOPICS

Many resources and activities have the potential to be affected by either issuing or not issuing a SUP for continued commercial shellfish operations within the Seashore. These resources were initially identified by NPS staff during internal scoping and were further refined through the public and agency scoping process. Some impact topics were considered but dismissed from further analysis because either (a) the resources do not exist in the project area or would not be impacted by the project or (b) impacts would be less than minor³. The tables below outline the issues and impact topics retained for further analysis (table ES-1) and those that were considered but dismissed (table ES-2), and the rationale for doing so. Impact topics retained for detailed analysis within the EIS include wetlands and other waters of the U.S., eelgrass, wildlife and wildlife habitat, special-status species - California coast Coho salmon

² Since the consolidation of several allotments into Lease M-438-01 in 1979, the lease language has specified that the lease area is made up of two parcels totaling approximately 1,059 acres; however, the geographic information system (GIS) data provided by CDFG in 2011 for this lease area measures 1,049 acres. For the purposes of this EIS, all area calculations are based on GIS data. Therefore, the latter measurement is used to represent existing conditions throughout this EIS.

³ Minor impacts are generally defined as being slight but detectable, typically short-term and localized.

(*Oncorhynchus kisutch*) and central California coast steelhead (*O. mykiss*), coastal flood zones, water quality, soundscapes, wilderness, visitor experience and recreation, socioeconomic resources, and NPS operations. Dismissed topics include vegetation, special-status species – silverspot butterfly (*Speyeria zerene myrtleae*), California red-legged frog (*Rana aurora draytonii*), leatherback sea turtle (*Dermochelys coriacea*), western snowy plover (*Charadrius alexandrinus nivosus*), and California least tern (*Sternula antillarum browni*), water quantity, lightscapes, air quality, climate change and greenhouse gas emissions (carbon footprint), local food, geological resources, paleontological resources, cultural resources, and environmental justice.

TABLE ES-1. ISSUES AND IMPACT TOPICS RETAINED FOR FURTHER ANALYSIS

Issue/Impact Topic	Rationale for Retention
Wetlands and Other Waters of the U.S.	<p>The identification of wetlands within the project area is necessary to ensure their protection in accordance with federal laws (section 404 of the Clean Water Act [CWA] and the Rivers and Harbors Act of 1899) and state laws (e.g., the California Coastal Act of 1976). NPS <i>Management Policies 2006</i> states that NPS will implement a “no net loss of wetlands” policy and will (1) provide leadership and take action to prevent the destruction, loss, or degradation of wetlands; (2) preserve and enhance the natural and beneficial values of wetlands; and (3) avoid direct and indirect support of new construction in wetlands unless there are no practicable alternatives and the proposed action includes all practicable measures to minimize harm to wetlands (NPS 2006d). Guidance related to the management of wetlands is further clarified by Director’s Order 77-1: <i>Wetland Protection</i> (DO-77-1) (NPS 2002a). As defined by the U.S. Army Corps of Engineers (USACE) and the U.S. Fish and Wildlife Service (USFWS), wetland areas and other waters of the U.S. exist in the project area, both within Drakes Estero and along the shoreline where natural conditions persist. DBOC operations may have the potential to impact these wetlands through placement of materials (such as bags and trays) directly in wetlands, trampling of vegetated wetlands, and shading associated with racks, as well as people walking across mudflats, and propellers and boat hulls scraping the mud bottom. The impact topic of wetlands and other waters of the U.S. is retained for detailed analysis in this EIS.</p>
Eelgrass	<p>In Drakes Estero, eelgrass (<i>Zostera marina</i>) is the dominant form of submerged aquatic vegetation and is present throughout Drakes Estero in dense beds. Eelgrass beds provide important foraging and feeding ground for many aquatic organisms, they serve as the base of the food web in many coastal habitats, and they perform important environmental functions, such as trapping sediment, taking up excess nutrients, and protecting shorelines from erosion. Eelgrass beds are classified as a type of “special aquatic site,” a category of “Waters of the United States” afforded additional consideration under the Clean Water Act section 404 (b)(1) guidelines developed by the Environmental Protection Agency (EPA). Special aquatic sites possess characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These sites are recognized as significantly influencing or positively contributing to the overall environmental health or vitality of the entire ecosystem of a region. DBOC operations in Drakes Estero and the eelgrass beds interact “via changes each makes to the immediate environment like altering water flow, sediment structure, light penetration, and nutrient supply. Other environmental changes arising from mariculture come from the addition of structures (e.g., bags, racks, and lines) and disturbances of transportation and culture operations” (NAS 2009). The termination or continuation of these activities related to DBOC operations could beneficially or adversely impact eelgrass. Therefore, the impact topic of eelgrass is retained for detailed analysis in this EIS.</p>

ENVIRONMENTAL CONSEQUENCES

Impacts of the alternatives were assessed in accordance with NPS Director's Order 12 and Handbook: *Conservation Planning, Environmental Impact Analysis and Decision-Making* (NPS 2001b). The summary of environmental consequences considers the actions being proposed and relevant cumulative impacts. The potential environmental consequences of the actions are addressed for wetlands and other waters of the U.S., eelgrass, wildlife and wildlife habitat (benthic fauna, fish, harbor seals, and birds), special-status species, coastal flood zones, water quality, soundscapes, wilderness, visitor experience and recreation, socioeconomic resources, and NPS operations.

For each impact topic, methods were identified to measure the change in the Seashore's resources that would occur with implementation of each of the action alternatives. Intensity definitions are derived from relevant standards based on law, policy, regulations, NPS *Management Policies 2006*, scientific literature and research, or best professional judgment. Intensity definitions may vary by impact topic; therefore, they are provided separately for each impact topic analyzed in the Final EIS. Intensity definitions are provided throughout the analysis for negligible, minor, moderate, and major adverse impacts. The CEQ regulations advise (40 CFR 1500.2), and NPS *Management Policies 2006* require, that managers minimize and avoid adverse impacts on park resources. Standard NPS NEPA practice, as reflected in the Director's Order 12 Handbook and elsewhere, thus focuses on mainly such adverse effects. Beneficial effects are discussed and analyzed, wherever present, but generally only in a qualitative manner.

The "Environmental Consequences" chapter of the Final EIS uses the best available scientific literature applicable to the region and setting to predict the expected impacts of each alternative, including the no-action alternative, using the existing condition (baseline) described in "Chapter 3: Affected Environment" as the starting point for the analysis. As noted by Bass, Herson and Bogdan, "[i]t is easy to confuse the baseline with the no-action alternative" (2001). They go on to explain "[t]he baseline is essentially a description of the affected environment at a fixed point in time, whereas the no-action alternative assumes that other things will happen to the affected environment even if the proposed action does not occur" (2001). The environmental consequences associated with each alternative, discussed according to impact topic, are summarized in table ES-4 below, and are detailed in chapter 4 of the EIS.

A main resource used in development of this EIS was the NAS report, *Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California* (NAS 2009). The report provides an intensive review of pertinent scientific literature on this subject. Although an exhaustive review of additional references took place during the drafting on this Final EIS, there remains much overlap between the literature cited in that document and the references used to support this EIS.

A number of guiding assumptions were made to provide context for the impact analysis based on the NAS (2009) report and the descriptions of the alternatives summarized in table 2-5 above.

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
Wetlands and Other Waters of the U.S.			
<p>Overall, alternative A would result in long-term beneficial impacts on wetlands and other waters of the U.S., in the project area. Structures, processes, and functions of the wetlands and other waters of the U.S. would not be permanently affected as a result of actions from alternative A. However, climate change over the long term may result in sea level rise and the year-round inundation of current intertidal marsh. Vegetated wetlands in Drakes Estero occupy available habitat in the upper bays, and while tidal vegetation has the ability to shift with sea level rise, there is little room for vegetation to shift landward along much of the Drakes Estero shoreline due to the steep sideslopes of the surrounding terrain. The removal of personal property would increase the potential that approximately 3.8 acres of the project area could be converted back to historical wetland habitat at the onshore facilities. The removal of approximately 7 acres of racks and up to 88 acres of bags from nonvegetated sandbars and mudflats in Drakes Estero would allow benthic organisms and eelgrass in Drakes Estero to recolonize the space previously occupied by the commercial shellfish operation infrastructure (see "Impacts on Eelgrass" and "Impacts on Wildlife and Wildlife Habitat: Benthic Fauna" sections). Additionally, erosive forces on sediments caused by tidal water flowing across and around bags would be eliminated, restoring natural hydrodynamics in up to 88 acres of sandbars and mudflats currently available for use by DBOC. The reduction of propeller-caused turbidity in the water column also would result in increased sunlight penetration and therefore increased primary production.</p>	<p>During the life of the 10-year permit, impacts on wetlands and other waters of the U.S. under alternative B would be short-term, minor, and adverse and long-term, moderate, and adverse. In the 138 acres of documented culture beds, bottom bags with anchors and floating lines on up to 84 acres of tidal mudflats/sandbars and 5 miles (7 acres) of racks with floating bags/trays and anchors in subaquatic habitats would continue to occupy estuarine subtidal/intertidal aquatic bed/rooted vascular (E1/2AB3), estuarine intertidal unconsolidated shore-mud (E2US3), and estuarine intertidal unconsolidated shore-cobble-gravel-sand (E2US1/2) systems. Impacts associated with these offshore structures would include intermittent disturbances to mudflats and sandbars from the placement and rotation of bags/trays, lines and anchors, DBOC staff walking across the mudflats/sandbars, and boat propellers and hulls scraping the bottom sediment. The impacts associated with these actions would be slightly greater than alternative C but less than those described under alternative D. Onshore operations may cause a minimal decrease in wetland functions and values if refuse and runoff along the shoreline is not collected and hauled off site. No wetlands or other waters of the U.S. would be permanently converted to uplands under this alternative; however, impacts would be readily apparent and would affect the structure, processes, or functions of the wetlands and other waters of the U.S. for an additional 10 years. Temporary impacts would be associated with dredging under the new dock. Dredging would occur in a 30-by 60-foot area at the dock. Approximately 1,700 to 2,500 2-inch by 6-inch posts would be installed outside harbor seal pupping season during 2013, and</p>	<p>During the life of the 10-year permit, impacts on wetlands and other waters of the U.S. under alternative C would be short-term, minor, and adverse and long-term, moderate, and adverse. Actions associated with the placement of bottom bags on up to 84 acres of tidal mudflats/sandbars and 7 acres of subaquatic habitat for the racks would continue to disturb estuarine subtidal/intertidal aquatic bed/rooted vascular (E1/2AB3), estuarine intertidal unconsolidated shore-mud (E2US3), and estuarine intertidal unconsolidated shore-cobble-gravel-sand (E2US1/2) systems. Racks would be replaced on a schedule of 50 racks in year 2013 and 25 racks in year 2014. The replacements would occur over a few months in each year. Floating culture would likely continue, either attached to racks or using concrete anchors adjacent to racks, but at a reduced level compared to existing operations. Therefore, impacts to wetlands and other waters of the U.S. would be slightly reduced compared to alternative B. Of the 138 acres available for use, bottom bags have been placed on a rotational basis in approximately 22 acres of mudflats/sandbars each of the past two years and could be placed in up to 84 acres in Drakes Estero. Other than the physical presence of structures in wetlands and other waters of the U.S., additional impacts would include intermittent disturbances to mudflats/sandbars from the placement and rotation of bags/trays, DBOC staff walking across the mudflats/sandbars, and boat propellers and hulls scraping the bottom sediment. As under alternative B, onshore operations may cause a minimal decrease in wetland functions and values if refuse and runoff along the shoreline is not collected and hauled off site. No wetlands or other waters of the U.S.</p>	<p>During the life of the 10-year permit, impacts on wetlands and other waters of the U.S. under alternative D would be short-term, minor, and adverse and long-term, moderate, and adverse. Actions associated with the placement of bottom bags on up to 84 acres of tidal mudflats/sandbars would continue under alternative D. Of the 138 acres available for use, bottom bags have been placed in approximately 22 acres of mudflats/sandbars each of the past two years and could be placed in up to 84 acres in Drakes Estero. Racks would be replaced or repaired, and the use of floating culture would continue adjacent to racks resulting in the use of concrete anchors. In addition to the physical objects placed in wetlands and other waters of the U.S., other impacts would include intermittent disturbances to mudflats/sandbars from the placement and rotation of bags/trays, DBOC staff walking across the mudflats/sandbars, and boat propellers and hulls scraping the mud bottom. Because of the potential for higher production under this alternative (approximately 40 percent greater than alternative B and 70 percent greater than alternative C), the impacts associated with these actions would likely be greater than those under alternatives B and C but are still expected to be at a moderate level. As under alternatives B and C, onshore operations may cause a minimal decrease in wetland functions and values if refuse and runoff along the shoreline is not collected and hauled off site. No wetlands or other waters of the U.S. would be permanently converted to uplands under this alternative; however, impacts would be readily apparent and would affect the structure, processes, and/or functions of the wetlands and other waters of the U.S. in the project area for an additional 10 years.</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>The removal of racks, including approximately 4,700 posts (2-inch by 6-inch boards), and the removal of bags from up to 88 acres of mud flats would result in short-term minor adverse impacts on wetlands and other waters of the U.S. because of temporary bottom disturbances. Standard BMPs would be used during the removal of racks to minimize sediment disturbances and water turbidity. The increase in turbidity would be highly localized and would occur over a two to three month period. Governmental permit authorization from the USACE would not likely be required. The cumulative impact would be long-term and beneficial, and alternative A would contribute an appreciable beneficial increment to the cumulative impact.</p> <p>With respect to wetlands and other waters of the U.S., alternative A would be consistent with relevant law and policy. The natural recovery of wetlands would be consistent with NPS <i>Management Policies 2006</i> and DO-77-1, which sets a goal of a "net gain" of wetlands (NPS 2006d, 2002a). USACE would be consulted to determine whether the removal of commercial shellfish infrastructure would require permitting.</p>	<p>approximately 380 to 750 posts would be installed outside the harbor seal pupping season in 2014. Dredging and rack installation and repair would adversely impact the silted bottom of Drakes Estero. The post installation and rack repair would be conducted over a few months in each year, and impacts from dredging and post installation and rack repair would be expected to last one week (from disturbance) due to a localized increase in suspended sediments. The cumulative impact would be long-term, moderate, and adverse, and alternative B would contribute an appreciable adverse increment to the cumulative impact.</p> <p>Prior to undertaking any new or replacement activities under this alternative, DBOC would be responsible for obtaining all applicable permits, and complying with all permit conditions. By obtaining state and federal permits and complying with their conditions, DBOC would ensure that alternative B is consistent with relevant law and policy related to management of wetlands and other waters of the U.S. DBOC's commercial shellfish operations and any dredge or fill activities in the waters of the U.S. (including Drakes Estero and the pond behind the mobile homes) are subject to permitting by USACE, San Francisco Bay Regional Water Quality Control Board, CCC, and NMFS. DBOC has received written confirmation that shellfish operations fall within USACE jurisdiction and a permit application is required to ensure that DBOC activities comply with USACE regulations. The letter goes on to note that, if an individual permit is required, DBOC will need to "demonstrate to the USACE that any proposed fill is necessary because there are no practicable alternatives, as outlined in the EPA's section 404(b)(1) Guidelines" (USACE 2010).</p>	<p>would be permanently converted to uplands under this alternative; however, impacts would be readily apparent and would affect the structure, processes, and/or functions of the wetlands and other waters of the U.S. in the project area for an additional 10 years. Temporary impacts would be associated with dredging under the new dock in a 30- by 60-foot area where the old dock is located and the installation/replacement of new rack infrastructure, including between 1,700 and 2,500 2-inch by 6-inch posts in 2012 and 380 to 750 posts in 2014. These actions would adversely impact the silted bottom of Drakes Estero due to a localized increase in sedimentation during the period of construction. The cumulative impact would be long-term, moderate, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>Prior to undertaking any new or replacement activities under this alternative, DBOC would be responsible for obtaining all applicable permits and complying with all permit conditions. By obtaining the relevant state and federal permits and complying with their conditions, DBOC would ensure that alternative C is consistent with relevant law and policy related to the management of wetlands and other waters of the U.S. DBOC's commercial shellfish operations and any dredge or fill activities in the waters of the U.S. (including Drakes Estero and the pond behind the mobile homes) are subject to permitting by USACE, San Francisco Bay Regional Water Quality Control Board, CCC, and NMFS. For the reasons described under alternative B, dredging the area around the dock and installation of a new dock would not qualify for the NWP 48, and would require a separate USACE permit.</p>	<p>Temporary impacts include dredging under the new dock (in a 30-by 60-foot area) at the onshore facilities and the installation/replacement of new rack infrastructure including between 1,700 and 2,500 2-inch by 6-inch posts in 2013 and 380 to 750 posts in 2014. DBOC would also place a new 1,050-foot water collection pipeline along the bottom of Drakes Estero using concrete anchors. The construction of a new processing facility would occur on existing uplands. These actions are expected to result in minimal short-term, adverse impacts due to an increase in local turbidity levels. The cumulative impact would be long-term, moderate, and adverse, and alternative D would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>Prior to undertaking any new or replacement activities under this alternative, DBOC would be responsible for obtaining all applicable permits and complying with all permit conditions. By obtaining relevant state and federal permits and complying with their conditions, DBOC would ensure that alternative D is consistent with relevant law and policy related to management of wetlands and other waters of the U.S. DBOC's commercial shellfish operations and any dredge or fill activities in the waters of the U.S. (including Drakes Estero and the pond behind the mobile homes) are subject to permitting by USACE, San Francisco Bay Regional Water Quality Control Board, CCC, and NMFS. Installation of the intake pipe, installation of a new dock, and dredging the area around the dock would require USACE permit authorization. NWP 48 (Commercial Shellfish Aquaculture Activities) was issued on February 21, 2012 with modifications. This permit authorizes "discharges of dredged or fill material in waters of the United States or structures or</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>NWP 48, described under "Laws and Policies" in this section, authorizes "discharges of dredged or fill material in waters of the U.S. or structures or work in navigable waters of the U.S. necessary for commercial shellfish aquaculture operations in authorized areas" (33CFR 330[B][48]), provided notification is submitted to the USACE and includes a compensatory mitigation plan, habitat assessment, and assessment of impacts to eelgrass. Dredging the area around the dock and installing a new dock would not qualify for the NWP 48, and would require a separate USACE permit.</p> <p>Lastly, any future actions would be reviewed by NPS under DO-77-1; however, minor water-dependent actions (such as the installation of the new dock) are likely to be excepted from a statement of findings (per section 4.2.1 of NPS Procedural Manual 77-1; NPS 2002a).</p>	<p>USACE has provided written notification to DBOC that the commercial shellfish activities in waters of the U.S. are regulated by USACE and has advised DBOC to submit an application to ensure that its activities comply with USACE regulations. The letter goes on to note that, if an individual permit is required, DBOC will need to "demonstrate to the Corps that any proposed fill is necessary because there are no practicable alternatives, as outlined in the U.S. Environmental Protection Agency's Section 404(b)(1) Guidelines" (USACE 2010).</p> <p>Lastly, any future actions would be reviewed by the NPS under DO-77-1; however, minor water-dependent actions (such as the installation of the new dock) are likely to be excepted from a statement of findings (per section 4.2.1 of NPS Procedural Manual 77-1; NPS 2002a).</p>	<p>work in navigable waters of the United States necessary for commercial shellfish aquaculture operations in authorized areas" (33CFR 330[B][48]). Dredging the area around the dock and installing a new dock would not qualify for NWP 48, and would require a separate USACE permit. USACE has provided written notification to DBOC that the activities are within USACE jurisdiction and has advised DBOC to submit a permit application to ensure that DBOC activities comply with USACE regulations. The letter goes on to note that, if an individual permit is required, DBOC will need to "demonstrate to the Corps that any proposed fill is necessary because there are no practicable alternatives, as outlined in the U.S. Environmental Protection Agency' Section 404(b)(1) Guidelines" (USACE 2010).</p> <p>Lastly, any future actions would be reviewed by the NPS under DO-77-1; however, minor water-dependent actions (such as the installation of the new dock and placement of the water intake line) are likely to be excepted from a statement of findings (per section 4.2.1 of NPS Procedural Manual 77-1; NPS 2002a).</p>
Eelgrass			
<p>Overall, alternative A would result in long-term beneficial impacts on eelgrass habitat due to the termination of DBOC operations in Drakes Estero, the removal of scarring with discontinued use of motorboats in Drakes Estero, and the removal of structures that currently inhibit eelgrass abundance and serve as potential points of colonization and added substrate for the expansion of invasive species (e.g., tunicates) and macroalgae. There may be some highly localized adverse impacts on eelgrass associated with the removal of the commercially grown</p>	<p>Overall, alternative B would result in long-term moderate adverse impacts on eelgrass in Drakes Estero due to the operation of DBOC boats for another 10 years and the continued presence of commercial shellfish infrastructure in Drakes Estero. DBOC activities in Drakes Estero under alternative B would allow the continuation of actions associated with commercial shellfish operations that could result in damage to eelgrass habitat, such as propeller scarring (estimated at 8.5 miles based on 2010 aerial photography), potential boat wake erosion, and potential</p>	<p>Overall, alternative C would result in long-term moderate adverse impacts on eelgrass in Drakes Estero due to the operation of DBOC boats for an additional 10 years and the continued presence of shellfish infrastructure in Drakes Estero. DBOC activities in Drakes Estero under alternative C would allow the continuation of actions associated with commercial shellfish operations that could result in damage to eelgrass habitat, such as propeller scarring (estimated at 8.5 miles based on 2010 aerial photography), boat wake erosion, and temporary increases in turbidity from</p>	<p>Overall, alternative D would result in long-term moderate adverse impacts on eelgrass in Drakes Estero due to an additional 10 years of DBOC operations. DBOC activities in Drakes Estero under alternative D would allow the continuation of and potential increase in actions associated with commercial shellfish operations that result in damage to eelgrass habitat, such as propeller scarring (estimated at 8.5 miles based on 2010 aerial photography), boat wake erosion, and temporary increases in turbidity from sediment resuspension. It is anticipated that due to the</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>shellfish because they provide some benefits associated with nutrient cycling and water filtration; however, the overall long-term impacts of alternative A on eelgrass would be beneficial. Alternative A also would result in short-term minor adverse impacts on eelgrass because removing infrastructure related to commercial shellfish operations would result in localized, slightly detectable increases in sedimentation that would last two to three months, reducing the amount of sunlight available for photosynthesis during that time. BMPs would be used to reduce turbidity effects from temporary resuspension of sediment during removal activities, and the overall impact would result in limited change to eelgrass meadows or natural processes. The cumulative impact would be long-term and beneficial, and alternative A would contribute an appreciable beneficial increment to the overall cumulative impact.</p> <p>With respect to eelgrass, alternative A is consistent with relevant law and policy because it would preserve and enhance (1) a special aquatic site, a category of waters of the U.S. afforded additional consideration under the CWA; (2) essential fish habitat (habitat of particular concern) under the Groundfish Plan; and (3) native species and natural processes encouraged by NPS <i>Management Policies 2006</i>.</p>	<p>temporary increases in turbidity from sediment resuspension given the area of boat operations in Drakes Estero. It is anticipated that the amount of scarring under alternative B would remain similar to that observed in the 2010 aerial photographs. Maintenance of offshore infrastructure would continue to preclude eelgrass colonization underneath the beds and approximately 7 acres of racks. Further, the continuation of DBOC activities and the presence of structures would increase the potential for colonization and expansion of nonnative species (e.g., colonial tunicates) and macroalgae, the latter of which can compete with seagrasses for important resources like light. These effects would have a long-term moderate adverse impact on eelgrass, which would be readily apparent and would affect eelgrass meadows and natural processes (such as eelgrass colonization and regeneration) through the continued effects of boat disturbance, shellfish infrastructure, and nonnative species. Rack repair and replacement would result in short-term minor adverse impacts on eelgrass because these activities would result in localized, slightly detectable increases in sedimentation, reducing the amount of sunlight available for photosynthesis. Mitigation for impacts to eelgrass would be required pursuant to California policy. Beneficial ecosystem effects typically attributed to bivalves, such as nutrient cycling and water clarity, would continue. These beneficial impacts would be expected to be localized around shellfish operation sites. In general, impacts would be clearly detectable and could appreciably affect individuals or groups of species, communities, or natural processes. The NAS concluded that commercial shellfish operations in Drakes Estero result in impacts on eelgrass from the presence of racks and from boat propeller scars, but that these impacts are somewhat offset</p>	<p>sediment resuspension given the area of boat operations in Drakes Estero. It is anticipated that because the level of boat use would remain similar to existing conditions, the amount of scarring under alternative C would remain similar to that observed in the 2010 aerial photographs. Maintenance of offshore infrastructure would continue to preclude eelgrass colonization underneath the beds and approximately 7 acres of racks. Further, the continuation of DBOC activities would increase the potential for colonization and expansion of nonnative species (e.g., colonial tunicates) and macroalgae, as described above. However, DBOC would be responsible for modifying current harvest and distribution practices to minimize potential for <i>Didemnum</i> to spread to other areas in the Estero through fragmentation. Rack repair and replacement would result in short-term minor adverse impacts on eelgrass because these activities would result in localized, slightly detectable increases in sedimentation, reducing the amount of sunlight available for photosynthesis. Beneficial ecosystem effects typically attributed to bivalves, such as nutrient cycling and water clarity, would continue. These beneficial impacts would be expected to be localized around structures in Drakes Estero associated with commercial shellfish operations.</p> <p>In general, impacts would be readily apparent and would affect eelgrass meadows or natural processes through the continued effects of boat disturbance, shellfish infrastructure, and nonnative species. The NAS concluded that shellfish operations in Drakes Estero result in impacts on eelgrass from the presence of racks and from boat propeller scars, but that these impacts are somewhat offset by the "rapid regeneration capacity" for eelgrass and "that</p>	<p>likely increase in boat traffic and area of vessel operations that the potential for scarring may be increased from the levels observed in the 2010 aerial photography. Maintenance of offshore infrastructure would continue to preclude eelgrass colonization underneath the beds and racks. Further, the continuation of DBOC activities would increase the potential for colonization and expansion of nonnative species (e.g., colonial tunicates) and macroalgae, as described above. These adverse impacts would be of greater magnitude than those associated with alternatives B and C due to the likely increase in boat traffic in Drakes Estero associated with the increased level of production (approximately 40 percent greater than alternative B and 70 percent greater than alternative C), and the increased use of bags and racks in shellfish operations, but are still expected to be of a moderate intensity. Impacts would be readily apparent and would affect eelgrass meadows or natural processes (such as eelgrass colonization and regeneration). Rack repair and replacement would result in short-term minor adverse impacts on eelgrass because these activities would result in localized, slightly detectable increases in sedimentation, reducing the amount of sunlight available for photosynthesis. Beneficial ecosystem effects typically attributed to bivalves, such as nutrient cycling and water clarity, would continue. These beneficial impacts would be expected to be localized around shellfish operation-related structures. The cumulative impact would be long-term, moderate, and adverse, and alternative D would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>With respect to eelgrass, alternative D would not further the goals set forth in existing law and policy because it would allow ongoing adverse</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>by the “rapid regeneration capacity” for eelgrass and that “eelgrass productivity can be locally enhanced by the cultured oysters through a reduction in turbidity and fertilization via nutrient regeneration” (NAS 2009). Although there are some highly localized beneficial impacts on eelgrass associated with commercial shellfish operations, the overall impact of alternative B on eelgrass would be moderate and adverse. The cumulative impact would be long-term, moderate, and adverse, and alternative B would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>With respect to eelgrass, alternative B would not further the goals set forth in existing law and policy because it would allow ongoing adverse impacts on (1) a special aquatic site, a category of waters of the U.S. afforded additional consideration under the CWA; (2) essential fish habitat (habitat of particular concern) under the Groundfish Plan; and (3) native species and natural processes (including native species management) under NPS <i>Management Policies 2006</i>.</p>	<p>eelgrass productivity can be locally enhanced by the cultured oysters through a reduction in turbidity and fertilization via nutrient regeneration” (NAS 2009). Although there would be some highly localized beneficial impacts on eelgrass associated with shellfish operations, the impact of alternative C on eelgrass would be moderate and adverse. The cumulative impact would be long-term, moderate, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>With respect to eelgrass, alternative C would not further the goals set forth in existing law and policy because it would allow ongoing adverse impacts on (1) a special aquatic site, a category of waters of the U.S. afforded additional consideration under the CWA; (2) essential fish habitat (habitat of particular concern) under the Groundfish Plan; and (3) native species and natural processes (including native species management) under NPS <i>Management Policies 2006</i>.</p>	<p>impacts on (1) a special aquatic site, a category of waters of the U.S. afforded additional consideration under the CWA; (2) essential fish habitat (habitat of particular concern) under the Groundfish Plan; and (3) native species and natural processes (including native species management) under NPS <i>Management Policies 2006</i>.</p>
Wildlife and Wildlife Habitat: Benthic Fauna			
<p>Overall, alternative A would result in long-term beneficial impacts on native benthic fauna because the termination of DBOC operations and associated shellfish operations in Drakes Estero would remove shellfish operations from Drakes Estero and, therefore, reduce the risk for the spread of nonnative and invasive species in the future. Alternative A would result in the removal of structures related to shellfish operations in Drakes Estero. Some sediment re-suspension would be anticipated during the removal of the 7 acres of racks; however, any sedimentation resulting from</p>	<p>Overall, alternative B would result in long-term moderate adverse impacts on native benthic fauna for an additional 10 years due to the continuation of DBOC operations and associated human activities in Drakes Estero, as well as the potential for such activities to introduce and/or facilitate the colonization of nonnative and invasive species. Specifically, the cultivation of nonnative species in Drakes Estero for an additional 10 years at production levels of 600,000 pounds of shellfish annually would result in the continued addition and subsequent harvest</p>	<p>Overall, alternative C would result in long-term moderate adverse impacts on benthic fauna due to an additional 10 years of commercial shellfish operations and associated human activities in Drakes Estero and the potential for such activities to introduce nonnative species and to facilitate the colonization and expansion of invasive species. Although Manila clams would no longer be cultivated under this alternative, the cultivation of Pacific oyster in Drakes Estero would have readily apparent effects on the communities of natural benthic organisms, including increasing the risk of</p>	<p>Overall, alternative D would result in long-term moderate adverse impacts on native benthic fauna due to an additional 10 years of DBOC operations and associated human activities in Drakes Estero. This would increase the potential for shellfish operations to introduce nonnative species to Drakes Estero and facilitate the colonization and expansion of invasive species. Specifically, the increase in shellfish production levels to 850,000 pounds shucked weight (approximately 10 million individual organisms harvested annually) represents a marked</p>

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Point Reyes National Seashore

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>this activity would be short-lived and would be reduced to the extent practicable using BMPs, making the impact undetectable in the benthic community and therefore negligible. Although artificial habitat for certain benthic species would be removed when DBOC's offshore infrastructure is removed, alternative natural habitats (e.g., eelgrass beds) would be expected to replace these structures. Further, the removal of structures under alternative A would remove substrates that support invasive tunicates and other fouling species. Native benthic species would benefit from the removal of offshore infrastructure, particularly from the approximately 88 acres of mudflats and sandbars where bottom bags can be placed (22 acres have been planted with bottom bags each of the past two years). Native benthic species are adapted to the soft-bottom habitat and eelgrass that would likely replace the structures related to shellfish operations once they are removed. The cumulative impact would be beneficial, and alternative A would contribute an appreciable beneficial increment to the beneficial cumulative impact.</p> <p>Alternative A would be consistent with the guidance set forth in NPS <i>Management Policies 2006</i> for the maintenance and restoration of natural native ecosystems, including the eradication of nonnative species where these species interfere with natural processes and habitat (NPS 2006d). Alternative A would also be consistent with Executive Order 13112 regarding invasive species management. Finally, alternative A would be consistent with the California MLPA, regarding protection of marine life and habitats, marine ecosystems, and marine natural heritage, and improvements to recreational, educational, and study opportunities provided by marine ecosystems subject to minimal human disturbance.</p>	<p>of approximately 7.06 million individual shellfish from Drakes Estero on an annual basis. Based on DBOC proof-of-use reports, the acreage of sandbars and mudflats occupied at this level of production would be 50 percent greater than that reported for 2008 in the 2009 NAS report. The effects on the natural benthic community from this would be readily apparent, including the continued use by nonnative species of resources that would otherwise be available to native species of bivalves and other benthic organisms, the introduction of molluscan diseases, and other harmful nonnative species being imported unintentionally (such as the invasive tunicate <i>Didemnum</i>). The use of both bottom bags and racks has been implicated in detectable changes in benthic communities. The continued maintenance and use of DBOC offshore infrastructure would result in a slight decrease in the abundance of certain benthic invertebrate species where the racks are currently located, while the continuation of bag cultivation in Drakes Estero would maintain artificial structured habitat for some benthic invertebrates. Rack repair and replacement would result in short-term negligible adverse impacts to benthic fauna, because the effects from these activities would not be detectable or measurable. Activities such as continued maintenance and harvesting would allow for incidental mortality to continue, as described above, which would have an adverse impact on native bivalves. Further, the continued use of offshore infrastructure would maintain the potential for <i>Didemnum</i> expansion, and associated shellfish operations (such as continued infrastructure maintenance, vessel traffic, and harvesting) would pose a risk for further dispersal of this nonnative invasive tunicate via colonial fragments. The potential for increase in overall coverage of <i>Didemnum</i> would</p>	<p>introduction of molluscan diseases and expansion of other nonnative species (such as the invasive tunicate <i>Didemnum</i>). As discussed under alternative B, DBOC's use of diploid stock rather than sterile triploid stock increases the risk of naturalization by cultivated species (NAS 2004), although the potential risk under alternative C would be incrementally less than under alternative B. DBOC would be responsible for modifying current harvest and distribution practices to minimize potential for <i>Didemnum</i> to spread to other areas in Drakes Estero through fragmentation. The use of both bottom bags and racks has contributed to detectable changes in benthic communities. Because shellfish production limits would be less under alternative C compared to alternatives B and D, the level of impact on benthic fauna would be incrementally less; however, the impacts would still be readily apparent and would affect benthic populations, natural processes, and/or habitat in the project area. Activities related to rack repair and/or replacement would be temporary in nature and subject to BMP requirements; therefore, impacts on benthic fauna from rack repair and/or replacement would be negligible (i.e., not detectable or measurable). Cumulative impacts would be long term, moderate, and adverse, and alternative C would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>The continued introduction and maintenance of nonnative species in Drakes Estero would not be consistent with NPS <i>Management Policies 2006</i> in that it would not further the goal of the policies, which, in this case, would be to minimize the impacts of human activities on native benthic fauna populations. All species that could be cultivated are nonnative with the exception of the</p>	<p>increase over alternatives B and C (approximately 40 percent greater than alternative B and 70 percent greater than alternative C); therefore, it is assumed alternative D would result in the greatest level of impact on native benthic fauna among all alternatives. The cultivation of nonnative species in Drakes Estero would be readily apparent and would affect populations, natural processes, and/or the habitat of natural benthic organisms, including increasing the risk of introduction of molluscan diseases and expansion of other nonnative species (such as the invasive tunicate <i>Didemnum</i>). While certain species introduced under alternative D are native to the region (i.e., purple-hinged rock scallops and Olympia oysters), they are not abundant in Drakes Estero in adult form. The use of both bottom bags and racks has contributed to detectable changes in benthic communities. These impacts would continue to be readily apparent, affecting benthic populations, natural processes, and/or habitat in the project area. Activities related to rack repair and/or replacement would be temporary in nature and subject to BMP requirements; therefore, impacts on benthic fauna from rack repair and/or replacement would be negligible. Cumulative impacts would be long term, moderate, and adverse, and alternative D would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>The continued introduction and maintenance of nonnative species in Drakes Estero would not be consistent with NPS <i>Management Policies 2006</i> in that it would not further the goal of these policies, which, in this case, would be to minimize the impacts of human activities on native benthic fauna populations. The species that could be cultivated are nonnative with the exception of the purple-hinged rock scallop, which is native to the</p>

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TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>have an adverse impact on species diversity. Lastly, the nonnative Manila clam and Pacific oyster would continue to be produced under this alternative, increasing their chance for naturalization (NAS 2004, 2009; Grosholz 2011b). DBOC's use of diploid stock rather than sterile triploid stock further increases the risk of naturalization by cultivated species (NAS 2004). These impacts would be readily apparent on the populations, natural processes, and/or habitat of benthic organisms in the project area. The cumulative impact would be long term, moderate, and adverse, and alternative B would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>The continued introduction and maintenance of nonnative species in Drakes Estero would not be consistent with NPS <i>Management Policies 2006</i> in that it would not further the goal of policies, which, in this case, would be to minimize the impacts of human activities on native benthic fauna populations. The shellfish species that could be cultivated under this alternative are nonnative, with the exception of the purple-hinged rock scallop, which is native to the rocky California coast but is not likely to be found in abundance in Drakes Estero due to the low availability of hard substrate for attachment. Further, alternative B would not be consistent with Executive Order 13112 regarding invasive species management.</p>	<p>purple-hinged rock scallop, which is native to the rocky California coast but is not likely to be found in abundance in Drakes Estero due to the low availability of hard substrate for attachment. Further, alternative C would not be consistent with Executive Order 13112 regarding invasive species management.</p>	<p>rocky California coast but is not likely to be found in abundance in Drakes Estero, and the Olympia oyster, which also prefers a hard substrate and is not abundant in adult form in Drakes Estero. Additionally, DBOC's proposal to collect native shellfish larvae in Drakes Estero would not be consistent with the NPS mission, per <i>Management Policies 2006</i> (NPS 2006d) or regulations. Further, alternative D would not be consistent with Executive Order 13112 regarding invasive species management.</p>
Wildlife and Wildlife Habitat: Fish			
<p>Overall, alternative A would result in long-term beneficial impacts on fish due to the restoration of natural fish habitat, including the restoration of natural eelgrass beds that serve as essential fish habitat for a variety of Pacific groundfish identified</p>	<p>Overall, alternative B would result in long-term minor adverse impacts on fish because, as discussed above, impacts on fish would be slightly detectable and would only affect a small segment of the population, their natural</p>	<p>Overall, alternative C would result in long-term minor adverse impacts on fish because, although the natural species composition would remain altered due to the presence of nonnatural structured habitat, impacts would be relatively</p>	<p>Overall, alternative D would result in long-term minor adverse impacts on fish because, although the natural species composition would remain altered due to the presence of nonnatural structured habitat, impacts would be relatively</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>in the Groundfish Plan (PFMC 2008). Alternative A would result in a more natural species composition and spatial distribution of fish in the project area, which would likely result in minor adverse impacts on fish due to slightly detectable decreases in the abundance of structure-oriented fish species and their prey. Alternative A would also result in short-term minor adverse impacts on fish species because the disruption of fish during rack removal from Drakes Estero would be slightly detectable and would affect only a small portion of the population and/or habitat in the project area. Combined with the removal of a source of marine debris, changes resulting from this alternative would return the Drakes Estero ecosystem to a more natural state for the overall fish community. The cumulative impact for alternative A would be beneficial and would contribute a noticeable beneficial increment to the overall cumulative impact.</p> <p>Alternative A would be consistent with the guidance set forth in NPS <i>Management Policies 2006</i> for the maintenance and restoration of natural native ecosystems, including the restoration of native fish communities (NPS 2006d). Additionally, this alternative would be consistent with the goals set forth in the Magnuson-Stevens Fishery Conservation and Management Act because the essential fish habitat (habitat of particular concern) designated in the Pacific Fishery Management Council's Groundfish Plan would be maintained and improved.</p>	<p>processes, and/or their habitat within the project area. While the natural species composition would remain altered due to the presence of nonnatural structured habitat, these alterations would be relatively localized and confined to the 7 acres of racks and would not affect the overall structure of any natural community. Additionally, eelgrass habitat fragmentation caused by 8.5 miles of DBOC motorboat propeller scars and 7 acres of oyster racks would have the potential to create a nonnatural spatial redistribution of fish that could locally influence the functionality of the fish habitat. The continued maintenance of shellfish racks would continue to displace approximately 7 acres of eelgrass habitat, which is essential fish habitat for Pacific groundfish identified in the Groundfish Plan (PFMC 2008). Shellfish rack repair and replacement would have the potential to degrade fish habitat by affecting water quality, but impacts would be short term due to a slightly detectable disruption of fish near racks. Assuming that fish would have a limited exposure to commercial shellfish operation debris pollution, adverse impacts on fish from the ingestion of small fragments or entrapment in PVC debris would be slightly detectable and would affect only a small segment of the population or their natural processes and/or habitat in the project area. The cumulative impact would be long term and beneficial, and alternative B would contribute a noticeable adverse increment to the overall beneficial cumulative impact.</p> <p>With regard to fish, the continued operation of DBOC for 10 additional years would not be consistent with relevant law and policy. The continued maintenance of a nonnatural community in Drakes Estero would not further the goal of NPS <i>Management Policies 2006</i> to</p>	<p>localized and confined to the 7 acres of racks and would not affect the overall structure of any natural community. Eelgrass habitat fragmentation caused by 8.5 miles of DBOC motorboat propeller scars and 7 acres of oyster racks would have the potential to create a nonnatural spatial redistribution of fish that could locally influence the functionality of the fish habitat. The maintenance of shellfish racks would continue to displace approximately 7 acres of eelgrass habitat, which is identified as essential fish habitat for Pacific groundfish in the Groundfish Plan (PFMC 2008). The wide-scale repair and maintenance of shellfish racks would continue to have the potential to degrade water quality and affect the fish community, but impacts would be short term, minor, and adverse due to a slightly detectable disruption of fish near racks. Assuming that fish would have a limited exposure to commercial shellfish operation debris pollution, adverse impacts on fish from the ingestion of small fragments or entrapment in PVC debris would be slightly detectable and would affect only a small segment of the fish population or their natural processes and/or habitat in the project area. The cumulative impact would be long term and beneficial, and alternative C would contribute a noticeable adverse increment to the overall beneficial cumulative impact.</p> <p>With regard to fish, the continued operation of DBOC for 10 additional years would not be consistent with relevant law and policy. The continued maintenance of a nonnatural community in Drakes Estero would not further the goal of NPS <i>Management Policies 2006</i> to preserve and restore natural communities and ecosystems. The perpetuation of nonnatural habitat would continue to attract fish communities that would not naturally be found in Drakes</p>	<p>localized and confined to the 7 acres of racks and would not affect the overall structure of any natural community. Eelgrass habitat fragmentation caused by 8.5 miles of DBOC motorboat propeller scars and 7 acres of oyster racks would have the potential to create a nonnatural spatial redistribution of fish that could locally influence the functionality of the fish habitat. The maintenance of shellfish racks would continue to displace approximately 7 acres of eelgrass habitat, which is essential fish habitat for Pacific groundfish in the Groundfish Plan (PFMC 2008). The wide-scale repair and maintenance of shellfish racks would continue to have the potential to degrade water quality and affect the fish community, but impacts would be short term, minor, and adverse due to a slightly detectable disruption of fish near racks. Assuming that fish would have a limited exposure to commercial shellfish operation debris pollution, adverse impacts on fish from the ingestion of small fragments or entrapment in PVC debris would be slightly detectable and would affect only a small segment of the fish population or their natural processes and/or habitat in the project area. The cumulative impact would be long term and beneficial, and alternative D would contribute a noticeable adverse increment to the beneficial cumulative impact.</p> <p>With regard to fish, the continued operation of DBOC for 10 additional years would not be consistent with relevant law and policy. The continued maintenance of a nonnatural community in Drakes Estero would not further the goal of NPS <i>Management Policies 2006</i> to preserve and restore natural communities and ecosystems. The perpetuation of nonnatural habitat would continue to attract fish communities that would not naturally be found in Drakes</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>preserve and restore natural communities and ecosystems. The perpetuation of nonnatural habitat would continue to attract fish communities that would not naturally be found in Drakes Estero. Additionally, this alternative would not be consistent with the goals set forth in the Magnuson-Stevens Fishery Conservation and Management Act because damage to eelgrass, which is designated as essential fish habitat (habitat of particular concern) in the Pacific Fishery Management Council's Groundfish Management Plan, would continue.</p>	<p>Estero. Additionally, this alternative would not be consistent with the goals set forth in the Magnuson-Stevens Fishery Conservation and Management Act because damage to eelgrass, which is designated as essential fish habitat (habitat of particular concern) in the Pacific Fishery Management Council's Groundfish Management Plan, would continue.</p>	<p>Estero. Additionally, this alternative would not be consistent with the goals set forth in the Magnuson-Stevens Fishery Conservation and Management Act because damage to eelgrass, which is designated as essential fish habitat (habitat of particular concern) within the Pacific Fishery Management Council's Groundfish Management Plan, would continue.</p>
Wildlife and Wildlife Habitat: Harbor Seals			
<p>Overall, alternative A would result in long-term beneficial impacts on harbor seals due to the termination of DBOC operations and associated human activities in Drakes Estero. Disturbance to harbor seals would be limited to recreational kayakers (outside of the harbor seal pupping season), hikers on the adjacent landscape and shoreline, and aircraft. Further, the termination of shellfish operations in Drakes Estero could benefit the distribution and abundance of the native harbor seal population, and could result in expansion of available habitat for harbor seals.</p> <p>Alternative A could also result in short-term minor adverse impacts associated with rack removal, which would be localized and slightly detectable but would not affect the overall structure of the natural community (i.e., would affect only a small segment of the harbor seal population, natural processes, or habitat in the project area). These activities would be conducted outside the harbor seal pupping season to minimize adverse impacts. The cumulative impact would be long term and beneficial, including the removal of marine debris from Drakes Estero, and alternative</p>	<p>Overall, alternative B would result in long-term moderate adverse impacts on harbor seals due to the continuation of commercial shellfish operations in Drakes Estero year-round for another 10 years, and the associated use of motorboats and bottom bag cultivation on sandbars and mudflats adjacent to the designated harbor seal protection areas. This would result in continued human presence and potential disturbance of harbor seals throughout the year. Although the mandatory buffer of 100 yards from hauled-out harbor seals (year-round) and other restrictions during the harbor seal pupping season would be retained as part of the new SUP issued to DBOC, alternative B would result in moderate adverse impacts on harbor seals due to the potential for displacement and continued disturbances that are known to be correlated with harbor seal behavior. These impacts would be readily apparent and would affect populations, natural processes, and/or habitat of harbor seals in the project area. Impacts related to rack repair and replacement activities in 2013 and 2014 would be slightly detectable and therefore short term, minor, and adverse. The potential for the continued introduction of marine debris into the</p>	<p>Overall, alternative C would result in long-term moderate adverse impacts on harbor seals due to the continuation of commercial shellfish operations in Drakes Estero year-round for another 10 years, and the associated use of motorboats and bottom bag cultivation on sandbars and mudflats adjacent to the designated harbor seal protection areas. This would result in continued human presence and potential disturbance of harbor seals throughout the year. Although the mandatory buffer of 100 yards from hauled-out harbor seals (year-round) and other restrictions during the harbor seal pupping season would be retained in the new SUP issued to DBOC, alternative C would result in moderate adverse impacts on harbor seals due to the potential for displacement and continued disturbances that are known to be correlated with harbor seal behavior. These impacts would be readily apparent and would affect populations, natural processes, and/or habitat of harbor seals in the project area. Impacts related to rack repair and replacement activities in 2013 and 2014 would be slightly detectable and therefore short term, minor, and adverse. The potential for the continued introduction of debris from the</p>	<p>Overall, alternative D would result in long-term moderate adverse impacts on harbor seals due to the continuation of commercial shellfish operations in Drakes Estero year-round for another 10 years, and the associated use of motorboats and bottom bag cultivation on mudflats adjacent to the designated harbor seal protection areas. This would result in continued human presence and potential disturbance of harbor seals throughout the year. Although the mandatory buffer of 100 yards from hauled-out harbor seals (year-round) and other restrictions during the harbor seal pupping season would be retained in the new SUP issued to DBOC, alternative D would result in moderate adverse impacts on harbor seals due to the potential for displacement and continued disturbances that are known to be correlated with harbor seal behavior. These impacts would be readily apparent and would affect populations, natural processes, and/or habitat of harbor seals in the project area. Impacts related to rack repair and replacement activities in 2013 and 2014 would be slightly detectable and therefore short term, minor, and adverse. The potential for the continued introduction of debris from the commercial</p>

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Point Reyes National Seashore

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>A would contribute an appreciable beneficial increment to the overall cumulative impact.</p> <p>With respect to harbor seals, alternative A would be consistent with NPS policy because the removal of DBOC operations from Drakes Estero would remove an unnatural stimulus that is correlated with changes in harbor seal behavior. Similarly, the decrease in potential disturbance of this species would be consistent with MMPA (16 USC 1361 et seq., 1401–1407, 1538, 4107) by avoiding any potential take (as described above) of marine mammals and by maintaining the health and stability of the marine ecosystem.</p>	<p>environment would have adverse impacts on harbor seals due to the potential for ingestion. The cumulative impact would be long term, moderate, and adverse, and alternative B would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>With respect to harbor seals, alternative B would not further the goals of relevant law and policy because continued DBOC operations in Drakes Estero would maintain an unnatural stimulus that has the potential to affect harbor seal behavior. NPS <i>Management Policies 2006</i> specifies that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” (NPS 2006d). Additionally, the continued disturbance to this species would be subject to regulation by the MMPA (16 USC 1361 et seq., 1401–1407, 1538, 4107). The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens, and the importation of marine mammals and marine mammal products into the United States. Under the MMPA, “take” is defined as “harass, hunt, capture, kill or collect, or attempt to harass, hunt, capture, kill or collect.” “Harassment” is defined as “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild, or has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” Under the MMPA, if an activity is defined as harassment under the above criteria, a specific permit called an Incidental Harassment Authorization may be required.</p>	<p>commercial shellfish operation into the environment would have adverse impacts on harbor seals due to the potential for ingestion. The cumulative impact would be long term, moderate, and adverse, and alternative C would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>With respect to harbor seals, alternative C would not further the goals of relevant law and policy because continued DBOC operations in Drakes Estero would maintain an unnatural stimulus that is negatively correlated with harbor seal use of haul-out sites. NPS <i>Management Policies 2006</i> specify that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” (NPS 2006d). Additionally, the continued disturbance to this species would be subject to regulation by the MMPA (16 USC 1361 et seq., 1401–1407, 1538, 4107). The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens, and the importation of marine mammals and marine mammal products into the United States. Under the MMPA, “take” is defined as “harass, hunt, capture, kill or collect, or attempt to harass, hunt, capture, kill or collect.” “Harassment” is defined as “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild, or has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” Under the MMPA, if an activity is defined as harassment under the above criteria, a specific permit called an Incidental Harassment Authorization may be required.</p>	<p>shellfish operation into the environment would have adverse impacts on harbor seals due to the potential for ingestion. The adverse impacts associated with alternative D would be of greater magnitude than those associated with alternatives B and C due to the likely increase in boat traffic in Drakes Estero associated with increased production levels (approximately 40 percent greater than alternative B and 70 percent greater than alternative C); however, these impacts are still expected to be moderate in intensity. The cumulative impact would be long term, moderate, and adverse, and alternative D would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>With respect to harbor seals, alternative D would not further the goals of relevant law and policy because continued DBOC operations in Drakes Estero would maintain an unnatural stimulus that has the potential to affect harbor seal behavior. NPS <i>Management Policies 2006</i> specify that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” (NPS 2006d). Additionally, the continued disturbance to this species would be subject to regulation by the MMPA (16 USC 1361 et seq., 1401–1407, 1538, 4107). The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens, and the importation of marine mammals and marine mammal products into the United States. Under the MMPA, “take” is defined as “harass, hunt, capture, kill or collect, or attempt to harass, hunt, capture, kill or collect.” “Harassment” is defined as “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild, or has the potential to disturb a marine mammal in the wild</p>

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TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
			by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." Under the MMPA, if an activity is defined as harassment under the above criteria, a specific permit called an Incidental Harassment Authorization may be required.
Wildlife and Wildlife Habitat: Birds			
<p>Overall, alternative A would result in long-term beneficial impacts on birds due to the removal of the commercial shellfish operation in Drakes Estero and its associated human activities. The removal of DBOC motorboats and related activities would minimize the disruption of biological activities such as foraging and resting for various types of birds that use Drakes Estero. Intertidal areas previously used by DBOC for the bottom bag cultivation in commercial operations would result in up to 88 additional acres of foraging, roosting, and resting habitat for resident and migratory birds. This increase in bird habitat would have greater importance for spring migrating birds, like the Pacific black brant, and natural processes would be enhanced due to the closure of Drakes Estero to all recreational boat access during the seal pupping season (March 1 – June 30). Alternative A may result in adverse impacts on birds from rack removal, due to the removal of food sources and resting habitat associated with the racks. However, these adverse impacts would be expected to be short term and minor because they would affect a small segment of bird populations, their natural processes, and habitat in the project area. Further, the removal of shellfish racks would eliminate unnatural habitat features and restore natural bird habitats in Drakes Estero. Under this alternative, birds would benefit from the removal of all racks and bags, thereby eliminating the</p>	<p>Alternative B would result in long-term moderate adverse impacts on birds and bird habitat due to the continuation of commercial shellfish operations and the associated human activities in Drakes Estero for an additional 10 years. As described above, the impacts of alternative B on birds would result in readily apparent effects on bird populations, natural processes, and habitat within the project area. Because of Drakes Estero's importance to regional shorebird and Pacific black brant conservation, the failure to protect these species from disturbances related to shellfish operations, especially during spring migration, could result in long-term adverse impacts. Shellfish racks would remain as artificial features in Drakes Estero, and could continue to provide food sources and resting structure for some bird species. Assuming that birds would have a limited exposure to commercial shellfish operation-related debris pollution, adverse impacts on birds from the ingestion of small debris fragments would be minimal because the impacts would be slightly detectable and would affect only a small segment of the populations, their natural processes, or habitat in the project area. The continued use of motorboats and other noise-producing equipment, as well as the continued maintenance of shellfish growing structures in Drakes Estero, would continue to disrupt biological activities of birds, such as foraging and resting behavior, potentially leading to a reduction</p>	<p>Alternative C would result in long-term moderate adverse impacts on birds and bird habitat due to the continuation of commercial shellfish operations and associated human activities in Drakes Estero for an additional 10 years. The impacts of alternative C on birds would result in readily apparent effects on bird populations, natural processes, and habitat in the project area. Because of Drakes Estero's importance to regional shorebird and Pacific black brant conservation, the failure to protect these species from disturbances related to shellfish operations, especially during spring migration, could result in long-term adverse impacts. Shellfish racks would remain as artificial features in Drakes Estero and could continue to provide food sources and resting structure for some bird species. Assuming that birds would have a limited exposure to commercial shellfish operation-related debris pollution, adverse impacts on birds from the ingestion of small debris fragments would be minor because the impacts would be slightly detectable and would affect only a small segment of the populations, their natural processes, or habitat in the project area. The continued use of motorboats and other noise-producing equipment, as well as the continued maintenance of shellfish growing structures, in Drakes Estero would continue to disrupt biological activities of birds, such as foraging and resting behavior, potentially leading to a reduction in fitness and reproductive</p>	<p>Alternative D would result in long-term moderate adverse impacts on birds and bird habitat due to the continuation of commercial shellfish operations and the associated human activities in Drakes Estero for an additional 10 years. The adverse impacts could be incrementally greater under this alternative than under alternatives B and C due to the potential for increased motorboat activities. Because of Drakes Estero's importance to regional shorebird and Pacific black brant conservation, the failure to protect these species from disturbances related to shellfish operations, especially during spring migration, could result in long-term adverse impacts. Shellfish racks would remain as artificial features in Drakes Estero, and could continue to provide food sources and resting structure for some bird species. Assuming that birds would have a limited exposure to commercial shellfish operation-related debris pollution, adverse impacts on birds from the ingestion of small debris fragments would be minor because the impacts would be slightly detectable and would affect only a small segment of the populations, their natural processes, or habitat in the project area. The continued use of motorboats and other noise-producing equipment, as well as the continued maintenance of shellfish growing structures, in Drakes Estero would continue to disrupt biological activities of birds, such as foraging and resting behavior, potentially leading to a reduction in</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>potential for ingestion of debris from the commercial shellfish operation. Cumulative impacts would be long term and beneficial, and alternative A would contribute an appreciable beneficial increment to the overall cumulative impacts.</p> <p>Alternative A would be consistent with the goals set forth in both NPS <i>Management Policies 2006</i> and the MBTA. NPS <i>Management Policies 2006</i> specifies that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” and “participate in local and regional scientific and planning efforts, identify ranges of populations of native plants and animals, and develop cooperative strategies for maintaining or restoring these populations in the parks” (NPS 2006d). The MBTA (16 USC 703–712, as amended) makes it illegal for people to “take” migratory birds, or their eggs, feathers, or nests. Additionally, alternative A would be consistent with Executive Order 13186 and the NPS MOU with USFWS, which directs agencies to avoid or minimize, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions (NPS and USFWS 2010).</p> <p>As described in Hickey et al. (2003) and other bird conservation plans, because of restrictions on human activity (including kayaking and shellfish operations during the March 1 – June 30 seal pupping closure) and further alteration of tidal habitat, alternative A would be expected to support the recommended habitat goal of increasing the extent and quality of tidal flats for shorebirds (Hickey et al. 2003). Alternative A would also be expected to support the primary</p>	<p>in fitness and reproductive success. Noise disturbance from DBOC operations would also alter other biological activities of birds using Drakes Estero, such as predator avoidance. This would include additional short-term minor adverse impacts on birds associated with shellfish rack repairs outside the harbor seal pupping season in 2013 and 2014. The cumulative impact would be long term, moderate, and adverse, and alternative B would contribute an appreciable adverse increment to the overall impact.</p> <p>With respect to birds, alternative B would not be consistent with the goals set forth in the NPS <i>Management Policies 2006</i>, which specifies that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” and “participate in local and regional scientific and planning efforts, identify ranges of populations of native plants and animals, and develop cooperative strategies for maintaining or restoring these populations in the parks” (NPS 2006d). Alternative B would not be consistent with NPS policies to preserve and restore natural abundances, dynamics, distributions, habitats, and behaviors of native bird populations, and to participate in regional protection. Specifically, NPS would not be meeting its responsibilities to the Pacific Flyway Management Plan for Brant or the Southern Pacific Shorebird Conservation Plan. Alternative B would not be consistent with the NPS commitment to Executive Order 13186 which directs agencies to avoid or minimize, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions. Further, alternative B would also not be consistent with the NPS MOU with USFWS, according to which the NPS must incorporate bird conservation</p>	<p>success. Noise disturbance from DBOC operations would also alter other biological activities of birds using Drakes Estero, such as predator avoidance. This would include additional short-term minor adverse impacts on birds associated with shellfish rack repairs outside the harbor seal pupping season in 2013 and 2014. The cumulative impact would be long term, moderate, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>With respect to birds, alternative C would not be consistent with the goals set forth in the NPS <i>Management Policies 2006</i>, which specifies that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” and “participate in local and regional scientific and planning efforts, identify ranges of populations of native plants and animals, and develop cooperative strategies for maintaining or restoring these populations in the parks” (NPS 2006d). Alternative C would not be consistent with NPS policies to preserve and restore natural abundances, dynamics, distributions, habitats, and behaviors of native bird populations, and to participate in regional protection. Specifically, NPS would not be meeting its responsibilities to the Pacific Flyway Management Plan for Brant or the Southern Pacific Shorebird Conservation Plan. Alternative C would not be consistent with the NPS commitment to Executive Order 13186, which directs agencies to avoid or minimize, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions. Further, alternative C would also not be consistent with the NPS MOU with USFWS, according to which the NPS must incorporate bird conservation</p>	<p>fitness and reproductive success. Noise disturbance from DBOC operations would also alter other biological activities of birds using Drakes Estero, such as predator avoidance. This would include additional short-term minor adverse impacts on birds associated with shellfish rack repairs outside the harbor seal pupping season in 2013 and 2014. The impacts of alternative D on bird populations, natural processes, and habitat within the project area. The cumulative impact would be long-term moderate adverse, and alternative D would contribute an appreciable adverse increment to the overall impact.</p> <p>With respect to birds, alternative D would not be consistent with the goals set forth in the NPS <i>Management Policies 2006</i>, which specifies that NPS managers should strive to preserve and restore “behaviors of native plant and animal populations and the communities and ecosystems in which they occur” and “participate in local and regional scientific and planning efforts, identify ranges of populations of native plants and animals, and develop cooperative strategies for maintaining or restoring these populations in the parks” (NPS 2006d). Alternative D would not be consistent with NPS policies to preserve and restore natural abundances, dynamics, distributions, habitats, and behaviors of native bird populations, and to participate in regional protection. Specifically, NPS would not be meeting its responsibilities to the Pacific Flyway Management Plan for Brant or the Southern Pacific Shorebird Conservation Plan. Alternative D would not be consistent with the NPS commitment to Executive Order 13186, which directs agencies to avoid or minimize, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions.</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>regional conservation goal of the U.S. Shorebird Conservation Plan to maintain the quality and quantity of habitat at local levels in order to support birds that breed, winter in, and migrate through each region (Brown et al. 2001). As such, the removal of DBOC shellfish operations would be expected to positively influence birds and bird habitat by supporting conservation strategies outlined in bird conservation plans.</p>	<p>measures into agency actions and planning processes. Actions under alternative B would be consistent with the MBTA (16 USC 703–712, as amended), which makes it illegal to “take” migratory birds or their eggs, feathers, or nests.</p> <p>As described in Hickey et al. (2003) and other bird conservation plans, because of allowing human activity (including kayaking and shellfish operations) and continuing alteration of tidal habitat, alternative B would not be expected to support the recommended habitat goal of increasing the extent and quality of tidal flats for shorebirds (Hickey et al. 2003). Alternative B would not be expected to support the primary regional conservation goal of the U.S. Shorebird Conservation Plan to maintain the quality and quantity of habitat at local levels in order to support birds that breed, winter in, and migrate through each region (Brown et al. 2001). As such, DBOC shellfish operations under alternative B would be expected to adversely affect birds and bird habitat by not adhering to conservation strategies outlined in bird conservation plans.</p>	<p>measures into agency actions and planning processes. Actions under alternative C would be consistent with the MBTA (16 USC 703–712, as amended), which makes it illegal to “take” migratory birds or their eggs, feathers, or nests.</p> <p>As described in Hickey et al. (2003) and other bird conservation plans, because of allowing human activity (including kayaking and shellfish operations) and continued alteration of tidal habitat, alternative C would not be expected to support the recommended habitat goal of increasing the extent and quality of tidal flats for shorebirds (Hickey et al. 2003). Alternative C would not be expected to support the primary regional conservation goal of the U.S. Shorebird Conservation Plan to maintain the quality and quantity of habitat at local levels in order to support birds that breed, winter in, and migrate through each region (Brown et al. 2001). As such, DBOC shellfish operations under alternative C would be expected to adversely affect birds and bird habitat by not adhering to conservation strategies outlined in bird conservation plans.</p>	<p>Further, alternative D would also not be consistent with the NPS MOU with USFWS, according to which the NPS must incorporate bird conservation measures into agency actions and planning processes. Actions under alternative D are consistent with the MBTA (16 U.S.C. 703–712, as amended), which makes it illegal to “take” migratory birds or their eggs, feathers, or nests.</p> <p>As described in Hickey et al. (2003) and other bird conservation plans, by allowing human activity (including kayaking and shellfish operations) and continued alteration of tidal habitat, alternative D would not be expected to support the recommended habitat goal of increasing the extent and quality of tidal flats for shorebirds (Hickey et al. 2003). Alternative D would not be expected to support the primary regional conservation goal of the U.S. Shorebird Conservation Plan to maintain the quality and quantity of habitat at local levels in order to support birds that breed, winter in, and migrate through each region (Brown et al. 2001). As such, DBOC shellfish operations under alternative D would be expected to adversely affect birds and bird habitat by not adhering to conservation strategies outlined in bird conservation plans.</p>
Special-Status Species			
<p>Overall, alternative A would result in a long-term beneficial impact on central California Coho salmon critical habitat and the central California steelhead. Alternative A could also result in short-term minor adverse impacts on these federally protected resources during the removal of DBOC facilities and personal property because these activities could disturb individuals or cause temporary sedimentation in designated critical habitat. The short-term impacts related to removal</p>	<p>Overall, alternative B would result in continued long-term minor adverse impacts on central California Coho salmon critical habitat and the central California steelhead for an additional 10 years because impacts from ongoing DBOC operations would be slightly detectable and localized, and could disrupt a small proportion of the individuals and/or designated critical habitat in the project area. Damage to eelgrass habitat and changes in water quality have the potential to</p>	<p>Overall, alternative C would result in continued long-term minor adverse impacts on central California Coho salmon critical habitat and the central California steelhead for an additional 10 years because impacts from ongoing DBOC operations would be slightly detectable and localized, and could disrupt individuals and/or designated critical habitat within the project area. Damage to eelgrass habitat and changes in water quality have the potential to cause localized and</p>	<p>Overall, alternative D would result in long-term minor adverse impacts on designated central California Coho salmon critical habitat and the central California steelhead for an additional 10 years because impacts from ongoing DBOC operations would be slightly detectable and localized (affecting a small proportion of the designated Coho salmon critical habitat and steelhead within the project area). Damage to eelgrass habitat and reduction in water quality</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>would be highly localized and would last for a period of two to three months. The cumulative impact would be long term and beneficial, and alternative A would contribute a noticeable beneficial increment to the overall cumulative impact.</p> <p>For central California Coho salmon critical habitat and the central California steelhead, alternative A would be consistent with relevant law and policy. Alternative A would forward the goal set forth in <i>NPS Management Policies 2006</i>, which states that the NPS will “survey for, protect, and strive to recover all species native to national park service units that are listed under the Endangered Species Act” (NPS 2006d). Alternative A would also fulfill the federal mandate set forth by the ESA to conserve listed species and to ensure that the proposed actions do not jeopardize the continued existence of the listed species.</p>	<p>cause localized and slightly detectable adverse impacts on Coho salmon critical habitat by reducing the quality of some required habitat elements, such as food and cover requirements. The displacement of eelgrass from propeller scars and oyster racks, as well as the nonnatural changes to habitat condition from oyster racks, could cause a nonnatural redistribution of steelhead prey species that would be expected to have slightly detectable adverse impacts on the natural foraging behavior and habitat of central California steelhead. Alternative B would also result in short-term minor adverse impacts because activities associated with the repair and replacement of racks in 2013 and 2014 could cause localized sedimentation for a few months each year (outside of the seal pupping season) that would cause slightly detectable impacts to federally listed individuals or populations and critical habitat within the project area. The extent of these impacts on water quality would be minimized by using standard sediment control BMPs and an approved coated lumber, which would further decrease the impacts to federally listed individuals, populations, and critical habitat. Assuming that commercial shellfish operation-related debris pollution would be limited in Drakes Estero, adverse impacts to central California Coho salmon critical habitat and the central California steelhead from this debris would not affect the overall structure of any natural community. Cumulative impacts would be long term and beneficial, and alternative B would contribute a noticeable adverse increment to the overall cumulative impact.</p> <p>For central California Coho salmon critical habitat and the central California steelhead, alternative B would be consistent with relevant law and policy. However, alternative B would not fulfill the goals</p>	<p>slightly detectable adverse impacts to Coho salmon critical habitat by reducing the quality of some required habitat elements, such as food and cover requirements. The displacement of eelgrass from propeller scars and oyster racks, as well as the nonnatural changes to habitat condition from oyster racks, could cause a nonnatural redistribution of steelhead prey species that would be expected to have slightly detectable adverse impacts on the natural foraging behavior and habitat of central California steelhead. Alternative C would also result in short-term minor adverse impacts because activities associated with the repair and replacement of racks in 2013 and 2014 could cause localized sedimentation for a period of two to three months per year that would be slightly detectable within the project area. The extent of these impacts on water quality would be minimized by using standard sediment control BMPs and an approved coated lumber, which would further decrease the impacts to federally listed individuals, populations, and critical habitat. Assuming that commercial shellfish operation-related debris pollution is limited in Drakes Estero, adverse impacts to central California Coho salmon critical habitat and the central California steelhead from this debris would not affect the overall structure of any natural community. Cumulative impacts would be long term and beneficial, and alternative C would contribute a noticeable adverse increment to the overall cumulative impact.</p> <p>For central California Coho salmon critical habitat and the central California steelhead, alternative C would be consistent with relevant law and policy. However, alternative C would not fulfill the goals articulated in <i>NPS Management Policies 2006</i> as well as alternative A would. <i>NPS Management Policies 2006</i> states that the NPS will “survey for,</p>	<p>have the potential to cause localized and slightly detectable adverse impacts to Coho salmon critical habitat by reducing the quality of some required habitat elements. The displacement of eelgrass from propeller scars and oyster racks, as well as the nonnatural changes to habitat condition from oyster racks, could cause a nonnatural redistribution of steelhead prey species that would be expected to have slightly detectable adverse impacts on the natural foraging behavior and habitat of central California steelhead. Alternative D would also result in short-term minor adverse impacts because activities associated with the repair and replacement of racks could cause localized sedimentation for a few months each year during 2013 and 2014 (outside of the seal pupping season) that would be slightly detectable within the project area. The extent of these impacts on water quality would be minimized by using standard sediment control BMPs and an approved coated lumber, which would further decrease the impacts to federally listed individuals, populations, and critical habitat. Assuming that commercial shellfish operation debris pollution would be limited in Drakes Estero, adverse impacts to central California Coho salmon critical habitat and the central California steelhead from commercial shellfish operation debris would not affect the overall structure of any natural community. The cumulative impact would be long term and beneficial, and alternative D would contribute a noticeable adverse increment to the overall cumulative impact.</p> <p>For central California Coho salmon critical habitat and the central California steelhead, alternative D would be consistent with relevant law and policy. However, alternative D would not fulfill the goals articulated in <i>NPS Management Policies 2006</i> as well as alternative A would. <i>NPS Management</i></p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>articulated in NPS <i>Management Policies 2006</i> as well as alternative A would. NPS <i>Management Policies 2006</i> states that the NPS will “survey for, protect, and strive to recover all species native to national park service units that are listed under the Endangered Species Act” (NPS 2006d). USFWS and NMFS are given the authority under the ESA to determine whether or not actions jeopardize the continued existence of listed species. NPS would complete consultation with USFWS and/or NMFS to ensure that the action would not jeopardize the species’ continued existence or result in destruction or adverse modification of critical habitat.</p>	<p>protect, and strive to recover all species native to national park service units that are listed under the Endangered Species Act” (NPS 2006d). USFWS and NMFS are given the authority under the ESA to determine whether or not actions jeopardize the continued existence of listed species. NPS would complete consultation with USFWS and/or NMFS to ensure that the action would not jeopardize the species’ continued existence or result in destruction or adverse modification of critical habitat.</p>	<p><i>Policies 2006</i> states that the NPS will “survey for, protect, and strive to recover all species native to national park service units that are listed under the Endangered Species Act” (NPS 2006d). USFWS and NMFS are given the authority under the ESA to determine whether or not actions jeopardize the continued existence of listed species. NPS would complete consultation with USFWS and/or NMFS to ensure that the action would not jeopardize the species’ continued existence or result in destruction or adverse modification of critical habitat.</p>
Coastal Flood Zones			
<p>Overall, alternative A would result in long-term beneficial impacts on the coastal flood zone due to an increase in the flood storage capacity of the onshore area and the removal of structures and materials that have the potential to become dislodged and spread into habitat buffer areas, such as tidal vegetated wetlands and shorelines, during a flood event. The cumulative impact would be long term and beneficial, and alternative A would contribute a noticeable beneficial increment to the cumulative impacts.</p> <p>With respect to coastal flood zones, alternative A would be consistent with relevant law and policy. The removal of structures and residences in the flood zone would fulfill the goals set forth by Executive Order 11988, “Floodplain Management” and the subsequent NPS DO 77-2 and <i>Procedural Manual 77-2: Floodplain Management</i>, which are intended to properly conserve, manage, and protect flood zones on NPS lands to protect human health and the environment and prevent damage to property in the event of a flood event.</p>	<p>Overall, alternative B would result in long-term minor adverse impacts on the coastal flood zone within the project area for an additional 10 years because continued DBOC operations would take place within the flood zone and would result in continued potential for flood damage to property and/or environmental contamination at the project site. However, these activities, and the associated infrastructure would have a minimal impact on the ability of the coastal flood zone to absorb and store floodwater or storm surge, and would not increase the potential for flood damage. Offshore structures and materials could be damaged and/or dislodged during a flood event, potentially causing damage to resources within Drakes Estero. Onshore, it is anticipated that the punching shed, shop, processing plant, and stringing shed would be inundated during a 100-year flood event, potentially causing damage to the structures and contents as well as causing local contamination. Shell piles would reduce flood storage capacity in the area, whereas proposed dredging in the vicinity of the dock would offset these impacts to some extent.</p>	<p>Overall, alternative C would result in long-term minor adverse impacts on the coastal flood zone within the project area for an additional 10 years because continued DBOC operations would take place within the flood zone and would result in continued potential for flood damage to property and/or environmental contamination at the project site. However, these activities and the associated infrastructure would have a minimal impact on the ability of the coastal flood zone to absorb and store floodwater or storm surge, and would not increase the potential for flood damage. Offshore structures and materials could be damaged and/or dislodged during a flood event, potentially causing damage to resources within Drakes Estero. At the onshore facility, it is anticipated that the punching shed, shop, processing plant, and stringing shed would be inundated during a 100-year flood event, potentially causing damage to the structures and contents as well as causing local contamination. Shell piles would reduce flood storage capacity in the area, whereas proposed dredging in the vicinity of the dock would offset these impacts to some extent.</p>	<p>Overall, alternative D would result in long-term minor to moderate adverse impacts on the coastal flood zone due to continued shellfish operations. Structures would remain within the flood zone, which could result in an increased potential for flood damage to property or environmental contamination at the project site. Alternative D impacts on the ability of the coastal flood zone to absorb and store floodwaters or storm surges would be readily apparent. The additional infrastructure proposed under this alternative at the onshore facilities could result in the increased potential for flood damage within the project area compared to other alternatives. However, this could be mitigated by following guidelines set forth in NPS Procedural Manual 77-2, complying with Marin County building codes and FEMA recommendations for structures in the flood zone, and implementing architectural design elements specific to minimizing flood damage. Compared to alternatives B and C, alternative D would result in a slight increase of flood zone impacts from the offshore facilities due to additional racks and bottom bags to accommodate the higher shellfish</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>Wastewater collection tanks would also be inundated during a 100-year flood event, potentially causing untreated wastewater to enter Drakes Estero. The cumulative impact would be long term, minor, and adverse, and alternative B would contribute an appreciable adverse increment to the overall cumulative impact.</p> <p>NPS guidelines require that new actions within the flood zone comply with <i>Procedural Manual 77-2: Floodplain Management</i>. This alternative would allow the continued use of nonconforming structures and the replacement of storm damaged structures (dock and washing station) in the coastal flood zone. However, existing structures are grandfathered, and do not have to comply with <i>Procedural Manual 77-2</i> guidelines. No new structures would be constructed under alternative B. As such, this alternative would comply with existing NPS guidelines and procedures.</p>	<p>Wastewater collection tanks would also be inundated during a 100-year flood event, potentially causing untreated wastewater to enter Drakes Estero. The cumulative impact would be long term, minor, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>NPS guidelines require that new actions within the flood zone comply with <i>NPS Procedural Manual 77-2: Floodplain Management</i>. This alternative would allow the continued use of nonconforming structures and the replacement of storm damaged structures (dock and washing station) in the coastal flood zone. However, existing structures are grandfathered, and do not have to comply with <i>Procedural Manual 77-2</i> guidelines. No new structures would be constructed under alternative C. As such, this alternative would comply with existing NPS guidelines and procedures.</p>	<p>production level. The construction of new facilities may take place in the flood zone if alternative site locations outside the flood zone but within the SUP area were determined to be infeasible through a subsequent planning process. If located within the flood zone, the new facility would result in continued potential for flood damage to property and/or environmental contamination at the project site. Wastewater collection systems would remain as described in alternatives B and C, and flood zone impacts from other structures (punching shed, stringing shed, dock, washing station, and mobile homes) would be the same as those under alternatives B and C. An increase in production would likely result in additional shell being added to the shell piles located within the flood zone, resulting in a reduction of flood storage capacity. The cumulative impact would be long term minor to moderate, and adverse, and alternative D would contribute an appreciable adverse increment to the cumulative impact.</p> <p>Alternative D would include new onshore development, which is a Class I Action as specified in the <i>NPS Procedural Manual 77-2: Floodplain Management</i>. As such, the new structure would require a SOF if alternative site locations outside the coastal flood zone, but within the SUP area, were determined to be infeasible. The SOF process would ensure that the structure is properly designed and constructed in a way that minimizes impacts to the flood zone. However, any remaining structures are grandfathered, and do not have to comply with these guidelines.</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
Water Quality			
<p>Drakes Estero is not a highly turbid coastal embayment (NAS 2009), and based on west coast research (Dumbauld, Ruesink, and Rumrill 2009), the beneficial biochemical effects typically attributed to bivalves, such as nutrient cycling and water clarity, are expected to be highly localized in Drakes Estero. This is because the nutrient dynamics in these systems are driven by coastal upwelling and a strong tidal cycle rather than by bioprocesses from shellfish. However, bivalves remove particulates in the water column that may influence eelgrass productivity near beds and racks (see discussion under alternative B).</p> <p>Overall, alternative A would result in long-term beneficial impacts on water quality as a result of reduced non-point-source runoff and the elimination of future disturbances to the Drakes Estero bottom from boats and offshore structures. No releases of toxic levels of copper from wood preservatives would be expected under this alternative. The removal of the racks and bags would cause a short-term minor adverse impact on water quality due to the sediment disturbances from personnel removing the offshore structures. These adverse impacts would be temporary and localized. The cumulative impact would be long term and beneficial, and alternative A would contribute a noticeable beneficial increment to the cumulative impact.</p> <p>With regard to water quality, alternative A would satisfy the goals and objectives of NPS <i>Management Policies 2006</i> (NPS 2006d) and</p>	<p>Overall, this alternative would result in short-term minor adverse as well as long-term minor adverse impacts on water quality for another 10 years. Alternative B would include activities causing intermittent disturbances to water quality that would result in recurring but not long-lasting effects on water quality. These temporary, localized impacts on water quality would be slightly detectable (affecting areas adjacent to culture beds) and would not alter natural water quality conditions in the project area. Cultivated shellfish as filter feeders would remain in Drakes Estero under this alternative, offering localized long-term beneficial impacts on water quality by removing suspended solids, nutrients, and phytoplankton from the water column. Sediment disturbances from offshore shellfish operations (bags/trays, boats, wading DBOC employees) would be locally temporary (pulsing) and would dissipate after each tide cycle, resulting in short-term minor adverse impacts on water quality. Dredging around the floating dock would be expected to create temporary disturbances to the water column from increased turbidity that would be mitigated by a floating silt screen. This alternative would include the replacement of between 1,700 and 2,500 posts in 2013 and between 380 and 750 posts in 2014 which also result in short-term adverse impacts on water quality as the sediment is disturbed. The use of pressure treated lumber to repair existing offshore racks and to construct a new dock is not expected to introduce wood preservatives containing copper into the water because it is assumed that mitigating conditions such as the use of sealants</p>	<p>Overall, alternative C would result in short-term minor adverse as well as long-term minor adverse impacts on water quality for another 10 years. Alternative C would include activities causing intermittent disturbances to water quality that would result in recurring but not long-lasting effects on water quality. These temporary, localized impacts on water quality would be slightly detectable (affecting areas adjacent to culture beds) but would not alter natural water quality conditions in the project area. Alternative C would have recurring but not long-lasting effects on water quality. Cultivated shellfish would remain in Drakes Estero for another 10 years under this alternative, offering localized beneficial water filtering functions from the removal of suspended solids, nutrients, and phytoplankton from the water column. Impacts on water quality would include those described under alternative B. In particular, sediment disturbances from offshore shellfish operations (bags/trays, boats, wading DBOC employees) would be locally temporary (pulsing) and would dissipate after each tide cycle, resulting in short-term minor adverse impacts on water quality. This alternative would include the replacement of between 1,700 and 2,500 posts in year 2013 and between 380 and 750 posts in 2014, which would also result in short-term adverse impacts on water quality due to sediment disturbance. The use of pressure-treated lumber to repair existing offshore racks and to construct a new dock is not expected to introduce wood preservatives containing copper into the water because it is assumed that mitigating conditions such as the use of sealants</p>	<p>Overall, alternative D would have short-term minor adverse as well long-term minor adverse impacts on water quality for 10 more years due to offshore and onshore activities associated with commercial shellfish operations in Drakes Estero. Alternative D would not be expected to exceed water quality standards, have long-lasting effects on water quality or impede the goals and objectives of NPS policies on water quality. These temporary, localized impacts on water quality would be slightly detectable (affecting areas adjacent to culture beds) and would not alter natural water quality conditions in the project area. Alternative D would have the highest population of cultivated shellfish occupying Drakes Estero. As a result, the localized water quality benefits from filter feeding bivalves would be greater compared to the other alternatives. The impacts associated with alternative D would be similar to those described under alternatives B and C. However, this alternative may cause slightly higher rates of sediment disturbance in Drakes Estero compared to alternatives B and C due to more frequent boat trips and bag/tray management. The use of pressure-treated lumber to repair existing offshore racks and to construct a new dock is not expected to introduce wood preservatives containing copper into the water because it is assumed that mitigating conditions such as the use of sealants would be employed as part of regulatory permit conditions. Dredging around the floating dock would be expected to create temporary disturbances to the water column from increased turbidity, resulting in short-term minor adverse impacts on water quality.</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
<p>Action/Impact</p> <p>would be consistent with the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."</p>	<p>Action/Impact</p> <p>would be employed as part of regulatory permit conditions. The point-source discharges (washing station and setting tanks) under this alternative would continue, but no new point-source outputs would be introduced. Point-source discharges would include water from the washing station after sediments and fouling organisms are filtered from the sediment basin resulting in beneficial impacts; no chemical contaminants would be discharged into Drakes Estero under this alternative. The amount of non-point-source pollution from runoff associated with the onshore facilities is currently very small (less than 3 acres of impervious surface in a watershed of several square miles). The cumulative impact would be long term, minor, and adverse, and alternative B would contribute a noticeable adverse increment to the cumulative impact.</p> <p>With regard to water quality, alternative B would satisfy the goals and objectives of NPS <i>Management Policies 2006</i> (NPS 2006d) and would be consistent with the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."</p>	<p>Action/Impact</p> <p>would be employed as part of regulatory permit conditions. Dredging around the floating dock would be expected to create temporary disturbances to the water column from increased turbidity, resulting in short-term adverse impacts on water quality. Standard BMPs would be employed during dredging such as the use of a floating silt screen. Point-source discharges would include discharging water from the washing station after marine sediments and fouling organisms are filtered and removed from the new sediment basin; no chemical contaminants would be discharged into Drakes Estero under this alternative. The amount of non-point source pollution from runoff at the onshore facility is currently very small (less than 3 acres of impervious surface in a watershed of several square miles). The cumulative impact would be long term, minor, and adverse, and alternative C would contribute a noticeable adverse increment to the overall cumulative impacts.</p> <p>With regard to water quality, alternative C would satisfy the goals and objectives of NPS <i>Management Policies 2006</i> (NPS 2006d) and would be consistent with the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."</p>	<p>Action/Impact</p> <p>Standard BMPs, such as the use of a floating silt screen, would be employed during dredging. Onshore discharge into Drakes Estero of pumped water serving the washing station and setting tanks would be filtered using the new sediment basin, resulting in beneficial impacts on water quality. In addition, onshore sediment may enter waters due to the construction of new facilities, although this action could be mitigated through a site-specific construction plan and the use of standard BMPs. Alternative D also would result in short-term minor adverse impacts on water quality during the construction of new DBOC facilities because impacts would include temporary (lasting less than a year), localized impacts that would not have long-lasting effects on water quality. The cumulative impact would be long term, minor, and adverse, and alternative D would contribute a noticeable adverse increment to the cumulative impact.</p> <p>With regard to water quality, alternative D would satisfy the goals and objectives of NPS <i>Management Policies 2006</i> (NPS 2006d) and would be consistent with the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."</p>
<p>Soundscapes</p>			
<p>Alternative A would result in long-term beneficial impacts due to the elimination of human-caused noise levels associated with the commercial shellfish operation. The noise associated with the use of heavy machinery and motorized boats to remove DBOC structures and property would be at a level that would cause vocal communication to be difficult at a distance of less than 16 feet.</p>	<p>Overall, alternative B would result in long-term major adverse impacts on the natural soundscape from continued DBOC operations because human-caused noise would be at a level (greater than 41 dBA) that requires elevated vocal effort for communication between people separated by 16 feet, and the natural soundscape would be interfered with more than 10 percent of the time.</p>	<p>Overall, issuance of a 10-year SUP under alternative C would result in long-term major adverse impacts on soundscapes for the additional 10 years of operations, because human-caused noise would be at a level (greater than 41 dBA) that requires elevated vocal effort for communication between people separated by 16 feet, and the natural soundscape is interfered</p>	<p>Overall, issuance of a 10-year SUP under alternative D would result in long-term major adverse impacts on soundscapes for the additional 10 years of operations, because human-caused noise would be at a level (greater than 41 dBA) that requires elevated vocal effort for communication between people separated by 16 feet, and the natural soundscape is interfered</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>However, this impact would interfere with the natural soundscape for less than 5 percent of one year; therefore, alternative A would result in short-term minor adverse impacts on soundscapes. The cumulative impact would be long-term and beneficial, and alternative A would contribute an appreciable beneficial increment to the cumulative impact.</p> <p>With regard to soundscapes, alternative A would further the goals for soundscape management as set forth in relevant law and policy. NPS <i>Management Policies 2006</i> and <i>Director's Order 47: Soundscape Preservation and Noise Management</i> direct NPS managers to preserve and restore the natural soundscape, where possible.</p>	<p>Additionally, the soundscape would be impacted temporarily by demolition and reconstruction of the dock facilities as well as the repair and replacement of racks in Drakes Estero. The noise associated with the use of heavy machinery and motorized boats to demolish and reconstruct the dock facilities and replace and repair the racks would be at a level that would cause vocal communication to be difficult at a distance of less than 16 feet. However, the impacts associated with these activities would interfere with the natural soundscape for less than 10 percent of each year; therefore, alternative B would result in short-term minor to moderate adverse impacts on soundscapes. The cumulative impact would be long term, major, and adverse, and alternative B would contribute an appreciable adverse increment to the cumulative impact.</p> <p>With regard to soundscapes, alternative B would not further the goals for soundscape management as set forth in relevant law and policy. For instance, NPS <i>Management Policies 2006</i> (NPS 2006d) directs park managers to take steps to restore and maintain natural soundscapes, whereas alternative B would include continued impacts on the natural soundscape from DBOC activities. This aspect of Alternative B would also be inconsistent with 36 CFR 2.12 because it would allow DBOC to continue to use several mechanical tools that emit noise far in excess of 60 dBA at 50 feet. In addition to DBOC trucks and processing station equipment, DBOC would continue to operate its motorboats in potential wilderness, where motorboats are not allowed (except for rare use by NPS for administration of the wilderness in accordance with a minimum requirements analysis). Contributions of human-caused noise to the natural soundscape are also a detriment to wilderness values, as described in more detail under "Impacts on Wilderness."</p>	<p>with more than 10 percent of the 10-year permit. Additionally, the soundscape would be impacted temporarily by demolition and reconstruction of the dock facilities as well as the repair and replacement of the racks in Drakes Estero. The noise associated with the use of heavy machinery and motorized boats to demolish and reconstruct the dock facilities and replace and repair the racks would be at a level that would cause vocal communication to be difficult at a distance of less than 16 feet. However, the impacts associated with these activities would interfere with the natural soundscape for less than 10 percent of each year; therefore, alternative C would result in short-term minor to moderate adverse impacts on soundscapes. The cumulative impact would be long term, major, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>With regard to soundscapes, alternative C would not further the goals for soundscape management as set forth in relevant law and policy. For instance, NPS <i>Management Policies 2006</i> (NPS 2006d) directs park managers to take steps to restore and maintain natural soundscapes, whereas alternative C would include continued impacts on the natural soundscape from DBOC activities. This aspect of alternative C would also be inconsistent with 36 CFR 2.12 because it would allow DBOC to continue to use several mechanical tools that emit noise substantially in excess of 60 dBA at 50 feet. In addition to the DBOC trucks, pneumatic drill, and oyster tumbler operating onshore, DBOC would continue to operate its motorboats in potential wilderness, where motorboats are not allowed (except for those used occasionally by NPS for administration of the wilderness in accordance with a minimum requirements analysis).</p>	<p>with more than 10 percent of the time. Additionally, the soundscape would be impacted temporarily by demolition and reconstruction of onshore facilities as well as the repair and replacement of racks in Drakes Estero. Alternative D would also result in short-term major adverse impacts on the natural soundscape due to the use of heavy machinery during development of additional onshore facilities because human-caused noise would be at a level (greater than 41 dBA) that requires elevated vocal effort for communication between people separated by 16 feet, and the natural soundscape would be interfered with more than 10 percent of the year during which onshore construction would take place. The cumulative impact would be long term, major, and adverse, and alternative D would contribute an appreciable adverse increment to the cumulative impact.</p> <p>With regard to soundscapes, alternative D would not further the goals for soundscape management as set forth in relevant law and policy. For instance, NPS <i>Management Policies 2006</i> (NPS 2006d) directs park managers to take steps to restore and maintain natural soundscapes, whereas alternative D would include continued impacts on the natural soundscape from DBOC activities. This aspect of alternative D would also be inconsistent with 36 CFR 2.12 because it would allow DBOC to continue to use several mechanical tools that emit noise substantially in excess of 60 dBA at 50 feet. In addition to the DBOC trucks, pneumatic drill, and oyster tumbler operating onshore, DBOC would continue to operate its motorboats in potential wilderness, where motorboats are not allowed (except for those used occasionally by NPS for administration of the wilderness in accordance with a minimum requirements analysis).</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
		Contributions of human-caused noise to the natural soundscape are also a detriment to wilderness values, as described in more detail under "Impacts on Wilderness."	Contributions of human-caused noise to the natural soundscape are also a detriment to wilderness values, as described in more detail under "Impacts on Wilderness."
Wilderness			
<p>Overall, alternative A would result in long-term beneficial impacts on wilderness because the cessation of DBOC operations and removal of DBOC facilities would result in a readily apparent, widespread enhancement of wilderness character. The enhancement of wilderness character would be due to the removal of a commercial shellfish operation that detracts from wilderness character, including:</p> <ul style="list-style-type: none"> ▪ removal of nonnative shellfish cultivation (approximately 585,000 pounds in 2010); this equates to approximately 6 million oysters ▪ removal of human-made infrastructure associated with commercial shellfish operations, including 5 miles (7 acres) of racks and up to 88 acres of bottom bags in up to 142 acres of Drakes Estero ▪ discontinuation of motorboat operations, including use of 2-3 motorboats intermittently 8 hours per day, 6 days per week, covering approximately 740 acres of Drakes Estero; and discontinuation of ongoing eelgrass impacts similar to the 8.5 miles of linear propeller scarring as documented in the "Impacts on Eelgrass" section ▪ discontinuation of noise sources associated with commercial operation affecting wilderness 	<p>Overall, alternative B would result in long-term major adverse impacts on wilderness for an additional 10 years because it would result in a readily apparent, widespread, adverse impact on wilderness character and would prevent the conversion of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness. The elements of DBOC's commercial shellfish operation that detract from wilderness character include</p> <ul style="list-style-type: none"> ▪ continued cultivation of nonnative shellfish (up to 600,000 pounds per year, otherwise expressed as approximately 7.06 million oysters annually) ▪ continued maintenance of human-made infrastructure associated with commercial shellfish operations, including 5 miles of racks and up to 84 acres of bottom bags in up to 138 acres of Drakes Estero ▪ continued operation of 2-3 motorboats intermittently 8 hours per day, 6 days per week, covering approximately 740 acres of Drakes Estero; ongoing eelgrass impacts similar to the 8.5 miles of linear propeller scarring documented in "Impacts on Eelgrass" ▪ continued generation of noise sources associated with commercial shellfish operations affecting wilderness (emanating from both inside and outside wilderness) 	<p>Overall, alternative C would result in long-term major adverse impacts on wilderness for an additional 10 years because it would result in a readily apparent, widespread, adverse impact on wilderness character and would prevent the conversion of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness. The elements of DBOC's commercial shellfish operation that detract from wilderness character include</p> <ul style="list-style-type: none"> ▪ continued cultivation of nonnative shellfish (up to 500,000 pounds per year, otherwise expressed as approximately 5.88 million oysters annually) ▪ continued maintenance of human-made infrastructure associated with commercial shellfish operations, including 7 miles of racks and up to 84 acres of bottom bags in up to 138 acres of Drakes Estero ▪ continued operation of 2-3 motorboats intermittently 8 hours per day, 6 days per week, covering approximately 740 acres of Drakes Estero; ongoing eelgrass impacts similar to the 8.5 miles of linear propeller scarring documented in "Impacts on Eelgrass" ▪ continued generation of noise sources associated with commercial shellfish operations affecting wilderness (emanating from both inside and outside wilderness) 	<p>Overall, alternative D would result in long-term major adverse impacts on wilderness for an additional 10 years because it would result in a readily apparent, widespread, adverse impact on wilderness character and would prevent the conversion of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness. The elements of DBOC's commercial shellfish operation that detract from wilderness character include</p> <ul style="list-style-type: none"> ▪ continued cultivation of nonnative shellfish (up to 850,000 pounds per year, otherwise expressed as approximately 10 million oysters annually) ▪ continued maintenance of human-made infrastructure associated with commercial shellfish operations, including 7 miles of racks and up to 84 acres of bottom bags in up to 138 acres of Drakes Estero ▪ continued operation of 2-3 motorboats intermittently 8 hours per day, 6 days per week, covering approximately 740 acres of Drakes Estero; ongoing eelgrass impacts similar to the 8.5 miles of linear propeller scarring documented in "Impacts on Eelgrass" ▪ continued generation of noise sources associated with commercial shellfish operations affecting wilderness (emanating from both inside and outside wilderness)

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>Alternative A would also result in short-term minor adverse impacts on wilderness because activities related to the removal of racks would detract from offering outstanding opportunities for solitude in highly localized areas of the congressionally designated wilderness in Drakes Estero. The cumulative impact would be long term and beneficial, and alternative A would contribute an appreciable beneficial increment to the cumulative impact.</p> <p>Alternative A would enable NPS to fulfill its obligations under the acts designating wilderness in the Seashore (PL 94-544 and PL 94-567) and NPS <i>Management Policies 2006</i> to actively seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation (NPS 2006d).</p>	<p>The cumulative impact would be long term, major, and adverse, and alternative B would contribute an appreciable adverse increment to the cumulative impact.</p> <p>Alternative B would prevent NPS from fulfilling its obligations under the acts designating wilderness in the Seashore (PL 94-544 and PL 94-567) and NPS <i>Management Policies 2006</i> to actively seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation. However, section 124 of PL 111-88 allows the Secretary to issue a permit to DBOC notwithstanding any other law, including the 1976 wilderness legislation. During the term of the new permit, NPS would continue to manage Drakes Estero in accordance with the Wilderness Act and complementary NPS policy to the extent possible. However, motorboats and in-water infrastructure are necessary to support the shellfish operation. The use of motorboats six days per week, the presence of infrastructure related to the existing commercial shellfish operations, and the presence of a commercial enterprise in Drakes Estero would substantially detract from the wilderness characteristics of Drakes Estero for an additional 10 years.</p>	<p>The cumulative impact would be long term, major, and adverse, and alternative C would contribute an appreciable adverse increment to the cumulative impact.</p> <p>Alternative C would prevent NPS from fulfilling its obligations under the acts designating wilderness in Point Reyes National Seashore (PL 94-544 and PL 94-567) and NPS <i>Management Policies 2006</i> to actively seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation (NPS 2006d). However, section 124 of PL 111-88 allows the Secretary to issue a permit to DBOC notwithstanding any other law, including the 1976 wilderness legislation. During the term of the new permit, NPS would continue to manage Drakes Estero in accordance with the Wilderness Act and complementary NPS policy to the extent possible. However, motorboats and in-water infrastructure are necessary to support the shellfish operation. The use of motorboats six days per week, the presence of infrastructure related to commercial shellfish operations, and the presence of a commercial enterprise in Drakes Estero would substantially detract from the wilderness characteristics of Drakes Estero for an additional 10 years.</p>	<p>The cumulative impact on wilderness would be long term, major, and adverse, and alternative D would contribute an appreciable adverse increment to the cumulative impacts.</p> <p>Alternative D would prevent NPS from fulfilling its obligations under the acts designating wilderness in Point Reyes National Seashore (PL 94-544 and PL 94-567) and NPS <i>Management Policies 2006</i> to actively seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation (NPS 2006d). However, section 124 of PL 111-88 allows the Secretary to issue a permit to DBOC notwithstanding any other law, including the 1976 wilderness legislation. During the term of the new permit, NPS would continue to manage Drakes Estero in accordance with the Wilderness Act and complementary NPS policy to the extent possible. However, motorboats and in-water infrastructure are necessary to support the shellfish operation. The use of motorboats six days per week, the presence of infrastructure related to commercial shellfish operations, and the presence of a commercial enterprise in Drakes Estero would substantially detract from the wilderness characteristics of Drakes Estero for an additional 10 years. Collection of larvae is considered and analyzed as part of this alternative; however, DBOC's proposal to collect native shellfish larvae in Drakes Estero would not be consistent with the NPS mission, per <i>Management Policies 2006</i> (NPS 2006d), or regulations.</p>
Visitor Experience and Recreation			
<p>Overall, alternative A would result in a long-term beneficial or long-term minor adverse impact on visitor experience and recreation, depending on the interests of the visitor. From the perspective of</p>	<p>Overall, alternative B would result in short-term minor adverse impacts as well as long-term minor adverse or long-term beneficial impacts on visitor experience and recreation in the project area for</p>	<p>Overall, alternative C would result in short-term minor adverse and long-term minor adverse or long-term beneficial impact on visitor experience and recreation in the project area for an additional</p>	<p>As described above, alternative D would result in short-term moderate adverse as well as long-term minor adverse or long-term beneficial impacts on visitor experience and recreation in the project</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>visitors seeking a natural park experience in Drakes Estero, alternative A would be beneficial because it would increase these opportunities. Alternative A would maintain visitor access to Drakes Estero, limiting access to recreational boaters only during the annual seal pupping season (March 1 to June 30). As described above, those looking to experience an active commercial shellfish operation would be adversely impacted by alternative A because they would no longer have this opportunity in the Seashore. The latter group of visitors composes up to 2.5 percent of the total visitors to the Seashore. Therefore, at a Seashore-wide scale, the adverse impacts associated with this alternative would affect a small portion of Seashore visitors. The cumulative impact would be long term and beneficial or long term, minor, and adverse, and alternative A would contribute an appreciable beneficial or noticeable adverse increment to the overall cumulative impacts.</p> <p>With respect to visitor experience and recreation, alternative A would be consistent with relevant law and policy because the removal of DBOC would not represent the loss of a visitor service. Visitor services are defined by law as public accommodations, facilities, and services that are necessary and appropriate for public use and enjoyment of the Seashore (36 CFR 51.3).</p>	<p>an additional 10 years, depending on the interests of the visitor. Impacts from continued commercial shellfish operations in Drakes Estero (the primary resource area) would be detectable and would affect a small portion of visitors to the Seashore. In particular, from the perspective of those seeking a natural park experience in Drakes Estero, including those interested in experiencing solitude and a primitive, unconfined type of recreation, the impacts would somewhat inhibit visitor enjoyment of marine wilderness resources. Visual and sound disturbances associated with commercial shellfish operations would continue in the project area and would be particularly adverse for visitors looking to enjoy solitude and a primitive or unconfined type of recreation in wilderness. Onshore and offshore structures and associated debris related to shellfish operations could detract from the views of Drakes Estero, especially during low tide when offshore equipment such as racks and bags are visible. Motorized boats also would continue to operate in Drakes Estero, and DBOC staff would continue to operate radios to listen to music while working, both of which would detract from the natural soundscapes of the Seashore. The smell of motorized boats and routine shellfish processing operations would also detract from the natural environment. Visitors to the Seashore who are interested in experiencing an active commercial shellfish operation would consider alternative B to have a beneficial impact because DBOC would continue to offer experiences such as educational tours and services and fresh oysters to visitors. The cumulative impact would be long term, minor, and adverse or long-term and beneficial, and alternative B would contribute a noticeable adverse or appreciable beneficial increment to the cumulative impact. In the short term, the repair and replacement of 50 racks in 2013 and another</p>	<p>10 years, depending on the interests of the particular visitor. Continued commercial shellfish operations in Drakes Estero (the primary resource area) would be detectable at the Seashore scale and would affect a small portion of visitors to the Seashore. Specifically, from the perspective of those seeking a natural park experience in Drakes Estero, including those looking to experience solitude and a primitive, unconfined type of recreation, the impacts would somewhat inhibit visitor enjoyment of the resources for which the Seashore was established. DBOC operations would be generally unchanged under alternative C for an additional 10 years despite some modifications proposed to the existing facilities and production levels. The visitor experience and recreational opportunities at the site would be similar to current conditions, except that the existing, unpermitted picnic area, located adjacent to the retail area and away from the shoreline, would be removed and would be replaced by NPS with another picnic area nearby. Visual and sound disturbances associated with commercial shellfish operations would be apparent in the project area, although the associated impacts would be mostly limited to those visitors looking to enjoy a natural park experience in Drakes Estero. Onshore and offshore structures and associated debris related to shellfish operations could detract from the views of Drakes Estero, especially during low tide when offshore equipment such as racks and bags are visible. This debris also would continue to wash up on surrounding shorelines and beaches. In addition, motorized boats would continue to operate in Drakes Estero, and DBOC staff would continue to operate radios to listen to music, both of which would detract from the natural soundscapes of the Seashore. The smell of motorized boats and routine shellfish processing operations also would detract from the</p>	<p>area for an additional 10 years, depending on the interests of the particular visitor. Continued commercial shellfish operations in Drakes Estero (the primary resource area) would be detectable at the Seashore scale and would affect a small portion of visitors to the Seashore. In particular, from the perspective of those seeking a natural park experience, the impacts would somewhat inhibit visitor enjoyment of marine wilderness resources. Similar to alternatives B and C, visual and sound disturbances associated with commercial shellfish operations could be readily apparent in the project area, and this impact would be particularly adverse for visitors seeking a natural park experience in Drakes Estero. Visual and sound disturbances associated with commercial shellfish operations would continue in the project area, and would be particularly adverse for visitors looking to enjoy solitude and a primitive or unconfined type of recreation in wilderness. Onshore and offshore structures and associated debris related to shellfish operations could detract from the views of Drakes Estero, especially during low tide when offshore equipment such as racks and bags are visible. Motorized boats also would continue to operate in Drakes Estero, and DBOC staff would continue to use radios to listen to music, both of which would detract from the natural soundscapes of the Seashore. The smell of motorized boats and routine shellfish processing operations also would detract from the natural environment. These adverse impacts would be greater than under alternatives B and C due to the increased production limits (approximately 40 percent greater than alternative B and 70 percent greater than alternative C), which would likely increase motorized boat activity and the quantity of bags and other items associated with shellfish operations in Drakes Estero. Visitors to the</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
	<p>25 racks in 2014, followed by regular maintenance, would temporarily increase disruptions to the visitor experience in Drakes Estero, both for visitors to the Seashore and DBOC visitors.</p> <p>With respect to visitor experience and recreation, this alternative would not further the goals of relevant law and policy. Visitor services must be consistent, to the highest practicable degree, with the preservation and conservation of the resources and values of the Seashore (16 USC 5951[b]; 16 USC 5952; 36 CFR 51.3 [definition of "visitor service"]). The primary focus of DBOC is the commercial operation for the sale of shellfish to restaurants and the wholesale shellfish market outside the Seashore. These are not commercial services being offered to the visiting public to further the public's use and enjoyment of the Seashore. Therefore, DBOC's operations would not be consistent with the values for which Drakes Estero was congressionally designated as wilderness.</p>	<p>natural environment. Visitors to the Seashore who are interested in experiencing an active commercial shellfish operation would consider alternative C to have a beneficial impact because DBOC would continue to offer visitor experiences such as educational tours and services and fresh oysters. The cumulative impact would be long term, minor, and adverse or long-term and beneficial, and alternative C would contribute a noticeable adverse or appreciable beneficial increment to the cumulative impact.</p> <p>In the short term, the repair and replacement of 50 racks in 2013 and another 25 racks in 2014, followed by regular maintenance, would temporarily increase disruptions to the visitor experience in Drakes Estero, both for visitors to the Seashore and DBOC visitors.</p> <p>With respect to visitor experience and recreation, alternative C would not further the goals of relevant law and policy. Visitor services must be consistent, to the highest practicable degree, with the preservation and conservation of the resources and values of the Seashore (16 USC 5951[b]; 16 USC 5952; 36 CFR 51.3 [definition of "visitor service"]). The primary focus of DBOC is the commercial operation for the sale of shellfish to restaurants and the wholesale shellfish market outside the Seashore. These are not commercial services being offered to the visiting public to further the public's use and enjoyment of the Seashore. Therefore, DBOC's operations would not be consistent with the values for which Drakes Estero was congressionally designated as wilderness.</p>	<p>Seashore who are interested in experiencing an active shellfish operation may consider alternative D to have a greater beneficial impact on visitor experience and recreation than the other alternatives because under this alternative the new facilities would enhance interpretation and educational opportunities at DBOC. However, in the short term, construction activities associated with alternative D could result in adverse impacts on visitor experience and recreation in Drakes Estero for both types of visitors. In particular, such activities could further disturb soundscapes and views in Drakes Estero and could temporarily limit interpretive and educational experiences at DBOC. In addition, the repair and replacement of 50 racks in 2013 and another 25 racks in 2014, followed by regular maintenance, also would temporarily increase disruptions to the visitor experience in Drakes Estero, both for visitors to the Seashore and DBOC visitors. The cumulative impact on visitor experience and recreation would be long term, minor, and adverse or long term and beneficial, and alternative D would contribute a noticeable adverse and appreciable beneficial increment to the cumulative impact.</p> <p>With respect to visitor experience and recreation, alternative D would not further the goals of relevant law and policy. Visitor services must be consistent, to the highest practicable degree, with the preservation and conservation of the resources and values of the Seashore (16 USC 5951[b]; 16 USC 5952; 36 CFR 51.3 [definition of "visitor service"]). The primary focus of DBOC is the commercial operation for the sale of shellfish to restaurants and the wholesale shellfish market outside the Seashore. These are not commercial services being offered to the visiting public to further the public's use and enjoyment of the Seashore. Therefore, DBOC's operations would</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
			not be consistent with the values for which Drakes Estero was congressionally designated as wilderness.
Socioeconomic Resources			
<p>Overall, alternative A would result in long-term minor adverse impacts on local and regional socioeconomic resources. DBOC staff and their families would experience a direct adverse impact under alternative A due to the loss of jobs and housing. However, from a regional socioeconomic perspective, these impacts would be minimal and would not affect the overall regional economy. Based on employment, payroll, and revenue, DBOC accounts for 0.006 percent of the total value added in Marin County. DBOC staff composes 0.01 percent of the Marin County population and 2.1 percent of the Inverness population (U.S. Census Bureau 2010). Jobs lost in connection with the closure of DBOC make up only a small percentage of the total labor force for Marin and Sonoma counties and Inverness CDP, and even with the added job loss, assuming these jobs are not replaced by expanded shellfish operations elsewhere, unemployment rates in Marin County and Inverness CDP would be well below statewide averages of 12.4 percent (U.S. Department of Labor 2011). In addition, the relocated households encompass a small percentage of the total households in the surrounding communities (less than 0.01 percent of the housing in Marin County and 0.5 percent of the homes in Inverness CDP) (U.S. Census Bureau 2010). Therefore, even if all former staff relocates to another community and/or county, the impact on the regional economy would be minimal. Additionally, it is assumed that the Seashore, as a whole, would continue to contribute to the regional economy at current</p>	<p>Overall, alternative B would result in long-term beneficial impacts on local, regional, and statewide socioeconomic resources due to the continued operation of a commercial shellfish facility in Drakes Estero for another 10 years. DBOC would continue to provide employment and housing to DBOC staff and their families. DBOC's contribution to the regional economy would not change substantially from current levels, and DBOC would continue to provide a local food source for the region for an additional 10 years in quantities similar to current distribution. Additionally, it is assumed that visitor spending at the Seashore would continue at current levels. The cumulative impact on both the local and regional economy and statewide shellfish production would be long term and beneficial, and alternative B would contribute a noticeable beneficial increment to the cumulative impact.</p>	<p>Overall, alternative C would result in long-term beneficial impacts on local, regional, and statewide socioeconomic resources due to the continued operation of a commercial shellfish facility in Drakes Estero for another 10 years. DBOC would continue to provide employment and housing to DBOC staff and their families. DBOC's contribution to the regional economy would not change substantially, and DBOC would provide a local food source for the region for an additional 10 years in quantities similar to current distribution. Additionally, it is assumed that visitor spending at the Seashore would continue at current levels. The cumulative impact on both the local and regional economy and statewide shellfish production would be long term and beneficial, and alternative C would contribute a noticeable beneficial increment to the cumulative impact.</p>	<p>Overall, alternative D would result in long-term beneficial impacts on local and regional socioeconomic resources. Option 1 of alternative D would not change the availability of housing for DBOC staff and their families. In contrast, Option 2 of alternative D, which would include the elimination of four on-site housing units, would have an adverse direct impact on DBOC staff and the families that live on site.</p> <p>Under both options, DBOC would maintain its contributions to the regional economy in a manner similar to current conditions for an additional 10 years, with some exceptions; however, due to expanded opportunities for product diversification, these contributions could be slightly increased.</p> <p>The potential for increased shellfish production under alternative D could result in an increase in DBOC staff, providing additional jobs for local workers. Although the new facilities at DBOC could minimally increase visitation to the commercial shellfish operation, it is assumed that visitor spending associated with the Seashore as a whole would continue at current levels.</p> <p>The relocated households proposed under Option 2 represent a very small percentage of the total households in the surrounding communities (less than 0.01 percent of the housing in Marin County and 0.4 percent of the homes in Inverness CDP) (U.S. Census Bureau 2005-2009). Therefore, even if all DBOC staff who currently reside in on-</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>levels through local spending (approximately \$85 million in 2010) and by supporting jobs (resulted in \$12 million in added value to the region in 2010) (NPS 2011d). The cumulative impact on the local and regional economy would be long term, minor, and adverse, and alternative A would contribute a noticeable adverse increment to the cumulative impact.</p> <p>Alternative A could result in long-term major adverse impacts on California's shellfish market because DBOC produces 16 to 35 percent of the oysters harvested in California and 13 to 33 percent of the total shellfish grown in the state. The cessation of commercial shellfish operations in Drakes Estero would be readily apparent and could substantially influence the production of shellfish in California. The cumulative impact on the California shellfish market would be long term, minor, and adverse, and alternative A would contribute a noticeable adverse increment to the cumulative impact.</p>			<p>site housing move to another community and/or county, the impact on the local and regional economy would be minimal. Additionally, some short-term jobs would be created once new onshore facilities are approved by the NPS and developed by DBOC. The cumulative impact on the regional economy would be long term and beneficial, and alternative D would contribute a noticeable beneficial increment to the cumulative impact.</p> <p>Both Option 1 and Option 2 of alternative D would result in long-term beneficial impacts on shellfish production in California because DBOC would continue to contribute to the statewide shellfish market for an additional 10 years. Additionally, the increased production limits proposed under this alternative would allow DBOC to cultivate more diverse and larger quantities of shellfish, including the purple-hinged rock scallop and the Olympia oyster, which are not currently produced at DBOC. These increased production limits could result in DBOC increasing its contribution to the California shellfish market. The cumulative impact on statewide shellfish production would be long term and beneficial, and alternative D would contribute a noticeable beneficial increment to the cumulative impact.</p>
NPS Operations			
<p>Overall, alternative A would result in long-term minor adverse impacts on NPS operations because impacts would be slightly detectable but would not hinder the overall ability of the NPS to provide services, manage resources, or operate the Seashore. While existing NPS staff would be required for monitoring and enforcement during the Drakes Estero boat closure period, the installation of an access gate would increase</p>	<p>Overall, alternative B would result in long-term minor adverse impacts on NPS operations because this alternative would require the establishment of one FTE position to manage and oversee all aspects of the SUP. In addition, two half-time (seasonal) positions would conduct monitoring and management of invasive species and other resources of concern in the Drakes Estero portion of the Phillip Burton Wilderness.</p>	<p>Overall, alternative C would result in a long-term minor adverse impact on NPS operations because this alternative would require the establishment of one FTE position to manage and oversee all aspects of the SUP and two part-time (seasonal) staff who would assess, monitor, and manage invasive species and other resources of concern in the Drakes Estero portion of the Phillip Burton Wilderness. These impacts would be</p>	<p>Overall, alternative D would result in long-term minor adverse impacts on NPS operations because this alternative would require the establishment of one dedicated FTE position to coordinate Seashore oversight and enforcement of all aspects of the SUP. The NPS would oversee and enforce all aspects of the operation in the permit area. Construction on new onshore facilities also would require one 2-year planning</p>

TABLE ES-4. SUMMARY OF ENVIRONMENTAL CONSEQUENCES (CONTINUED)

Alternative A	Alternative B	Alternative C	Alternative D
Action/Impact	Action/Impact	Action/Impact	Action/Impact
<p>effectiveness of the closure and further protect harbor seal pupping habitat. Two new part-time (seasonal) positions also would be required to assess and monitor invasive species and other resources of concern in the Drakes Estero portion of the Phillip Burton Wilderness. These efforts would not hinder the overall ability of NPS to provide services, manage resources, or operate the Seashore. The cumulative impact would be long term, minor, and adverse, and alternative A would contribute a noticeable adverse increment to the overall cumulative impact.</p>	<p>These impacts would be slightly detectable but would not hinder the overall ability of NPS to provide services, manage resources, or operate the Seashore. The cumulative impact would be long term, minor, and adverse, and alternative B would contribute a noticeable adverse increment to the overall cumulative impact.</p>	<p>slightly detectable but would not hinder the overall ability of NPS to provide services, manage resources, or operate the Seashore. The cumulative impact would be long term, minor, and adverse, and alternative C would contribute a noticeable adverse increment to the overall cumulative impact.</p>	<p>position to oversee additional planning and compliance associated with the proposed onshore development evaluated at the conceptual level in alternative D. The staff increase under alternative D also would include two half-time FTEs who would conduct assessment, monitoring, and management of invasive species and other resources of concern in the Drakes Estero portion of the Phillip Burton Wilderness. These impacts would be slightly detectable but would not hinder the overall ability of NPS to provide services, manage resources, or operate the Seashore. The cumulative impact on NPS operations would be long term, minor, and adverse, and alternative D would contribute a noticeable adverse increment to the cumulative impact.</p>

CONSULTATION AND COORDINATION

A combination of activities, including public scoping, formal public meetings, internal workshops, and agency briefings, has helped to guide NPS in developing the EIS.

SCOPING PROCESS AND PUBLIC PARTICIPATION

Scoping is a process that allows the agency to discuss the proposed action with stakeholders, interested and affected parties, and the public, as well as internally with agency personnel. To determine the scope of issues to be analyzed in depth in this EIS, internal meetings were conducted with Seashore staff, three public scoping meetings were held at different locations in the vicinity of the Seashore during the public scoping period, and relevant agency consultations were initiated.

Internal Scoping

An internal scoping meeting was held in September 2010 to initiate the EIS process and to define the initial scope of the EIS. Attendees included Seashore officials, DOI Solicitor's Office, representatives from NPS Pacific West Region, NPS Environmental Quality Division (EQD), and their contractors. Following the public and agency scoping period described below, the interdisciplinary planning team considered public comments for use in the development and refinement of project purpose and need, issues, impact topics, alternatives, and impact analysis for the EIS.

Public Scoping and Outreach

The public scoping period was open for a total of 50 days between October 8, 2010, and November 26, 2010. An NPS press release was published by Bay Area news outlets on October 5, 2010, announcing the dates, times, and places of the public scoping meetings. On October 8, 2010, NPS sent a scoping letter to more than 500 interested individuals and organizations notifying them of the opportunity to comment, and the NPS Planning, Environment, and Public Comment (PEPC) web-site was activated as a vehicle for the public to submit comments. The Federal Register published a Notice of Intent (NOI) to prepare an EIS on October 22, 2010 (NPS 2010d). The public comment period officially closed on November 26, 2010. More than 4,000 comment letters were submitted to NPS during the public comment period. On January 31, 2011, NPS posted the Public Comment Analysis Report and all public correspondence on-line at http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_scoping_comments.htm. Comments received during the public scoping process helped to inform the range of alternatives, as well as the impact topics to be addressed by the EIS. "Chapter 5: Consultation and Coordination" of this EIS provides more details about the public scoping activities, which were an integral part of the planning process for this EIS.

In April 2008, in conjunction with the SUP, DBOC and NPS agreed to a statement of principles (appendix C of the EIS) that outlined procedures to be followed in the event that a NEPA document need to be prepared for proposed activities associated with the remaining four-year term of the RUO. The statement of principles was executed prior to the enactment of section 124 and prior to the Secretary's decision to use the NEPA process to inform the decision on the possible issuance of a permit under section 124. NPS and DBOC have agreed to apply the statement of principles to this EIS to the extent that

it is applicable. In keeping with the statement of principles, NPS met with DBOC prior to the scoping process to discuss DBOC's interest in obtaining a permit under section 124 and to inform DBOC that NPS is initiating an EIS process and would be covering the cost for this new process. As indicated by the statement of principles, DBOC was to prepare a "description of their operations for NEPA evaluation" and that NPS would consider this description in developing the purpose and need for the NEPA document and alternatives to be considered. DBOC submitted scoping comments and other information regarding its operation during the initial scoping period and in subsequent requests through March 15, 2011. NPS fully considered DBOC's interests in developing the range of alternatives and impact topics that are addressed in this EIS.

The Draft EIS was made available for public review and comment beginning on September 23, 2011 and ending December 9, 2011. The document was made available for review electronically on the NPS PEPC web-site (www.parkplanning.gov/PORE) and in hard copy at park headquarters, local libraries, and at the public meetings. Hard copies or CDs also could be obtained by contacting the Seashore Superintendent. Three public meetings were held on October 18, 2011 (Point Reyes Station), October 19, 2011 (San Francisco), and October 20, 2011 (Mill Valley). During the 2011 public meetings, several informational posters were displayed to depict the project area, project purpose/need/objectives, the alternatives under consideration, and the resources potentially impacted by the alternatives. Attendees provided written comments during the meeting or had their comments transcribed onto flipcharts. Upon conclusion of the public comment period, all of the comments received at the meetings, entered directly into PEPC, provided via mail, or provided in person at the Seashore headquarters were entered and analyzed in PEPC. During the comment period, 52,473 pieces of correspondence were received, of which 50,040 were form letters (based on 24 distinct master form letters). A summary of public comments received and associated NPS responses are included in appendix F of the EIS.

Agency Scoping and Consultation

In addition to collecting comments from the public, NPS also initiated scoping with relevant agencies. Letters were sent out to notify the agencies of the intent to begin preparation of the EIS and to solicit agency comments and suggestions regarding the proposed project and its potential environmental effects on resources under their respective jurisdictions (appendix D). The agencies were asked to identify issues that should be analyzed in the EIS, determine the appropriate scope of the environmental analysis, identify potential management actions to be taken should the project commence, and determine whether agency permits or approvals would be required. Agency consultation is ongoing under the following laws and policies:

- Section 7 of the Endangered Species Act
- Magnuson-Stevens Act (essential fish habitat)
- Marine Mammal Protection Act
- Coastal Zone Management Act
- Section 106 of the National Historic Preservation Act
- Clean Water Act
- Rivers and Harbors Act
- Clean Air Act

- State Clearinghouse
- Tribal Consultation

Four agencies have entered into an agreement with NPS to be cooperating agencies in the development of the EIS: CDFG, USACE, NMFS, and the U.S. Environmental Protection Agency (EPA). Each of these cooperating agencies has special technical expertise related to the issues under consideration in the EIS. The cooperating agencies; tribal government; and several other federal, state, and local agencies were notified of the Draft EIS availability (see the complete “List of Recipients” in chapter 5 of the EIS).

In accordance with NEPA and section 309 of the Clean Air Act, the EPA reviewed the Draft EIS. In their response letter dated December 7, 2011, EPA rated the Draft EIS as “Lack of Objections (LO).” Formal comments on the Draft EIS also were received from NMFS (letter dated November 17, 2011, with clarification on December 9, 2011), USACE (letter dated December 8, 2011), CDFG (letter dated December 20, 2011), USCG (letter dated December 7, 2011), and CCC (letter dated December 12, 2011). Additional detail on agency scoping and consultation is included in chapter 5 of the EIS.

1

PURPOSE OF AND NEED FOR ACTION

INTRODUCTION

This “Purpose of and Need for Action” chapter explains the intent of the Environmental Impact Statement (EIS) for the Drakes Bay Oyster Company (DBOC) Special Use Permit (SUP). DBOC currently conducts a commercial shellfish operation¹ in Drakes Estero, which is part of the Point Reyes National Seashore (the Seashore), located in Marin County, California (figures 1-1 and 1-2). DBOC operates within the Seashore pursuant to a reservation of use and occupancy (RUO) and a SUP. Both of these authorizations expire on November 30, 2012. The RUO and the SUP are included as appendix A of this EIS.

This EIS presents four alternatives. The no-action alternative considers expiration of existing authorizations and subsequent conversion of the area to congressionally designated wilderness. Three action alternatives consider the issuance of a new SUP to DBOC for a period of 10 years with differing levels of onshore facilities and infrastructure and offshore operations. Beneficial and adverse impacts are assessed for all four alternatives evaluated in this EIS. Existing authorizations for DBOC to operate expire November 30, 2012. The National Environmental Policy Act of 1969 (NEPA), as amended, process is being used to inform the decision of whether a new SUP should be issued. If a new SUP is issued, it would authorize DBOC to operate its onshore and offshore² operations until November 30, 2022. In the event that a new SUP is issued, it would incorporate all of DBOC’s National Park Service (NPS) authorized onshore and offshore operational requirements. There is no authority to issue or extend an RUO.

The authority for NPS to issue a new permit to DBOC came about as a result of congressional action. On October 30, 2009, Congress enacted section 124 of Public Law (PL) 111-88, which was part of the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010 (appendix B). Section 124 states:

Prior to the expiration on November 30, 2012, of the Drake’s Bay Oyster Company’s Reservation of Use and Occupancy and associated special use permit (“existing authorization”) within Drakes Estero at Point Reyes National Seashore, notwithstanding

¹ Throughout this document, the terms “commercial shellfish operations,” “mariculture operations,” and “aquaculture operations” are used interchangeably.

² In this document, the term offshore is used to refer to operations and facilities in Drakes Estero, including waters, tide and submerged lands, and intertidal areas such as the shoreline and mudflats.

any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. (Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, section 124, 123 Stat. 2904, 2932 [2009])

Section 124, as it will be referred to in this EIS, provides to the Secretary of the Interior (Secretary) the discretionary authority to issue a new SUP to DBOC for a period of 10 years. Congress granted the Secretary the discretionary authority contained in section 124 in response to NPS's determination that it lacked authority to allow DBOC to operate after November 30, 2012. PL 94-544 and PL 94-567 of 1976 designated Drakes Estero as potential wilderness. House Report 94-1680, which accompanied the public law, provided that, "it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." The commercial shellfish operation in Drakes Estero, now operated by DBOC, is the only nonconforming use that prevents conversion of the waters of Drakes Estero from congressionally designated potential wilderness to congressionally designated wilderness (appendix B). The discretionary authority contained in section 124 now allows the Secretary to permit DBOC's operations for a new 10 year term, until November 30, 2022.

Although the Secretary's authority under section 124 is "notwithstanding any other provision of law," the Department has determined that it is helpful to generally follow the procedures of NEPA. The EIS provides decision-makers with sufficient information on potential environmental impacts, within the context of law and policy, to make an informed decision on whether or not to issue a new SUP. In addition, the EIS process provides the public with an opportunity to provide input to the decision-makers on the topics covered by this document. The EIS examines four alternatives, described in "Chapter 2: Alternatives," which include both broad-scale and site-specific elements. In some instances, sufficient detail is available to analyze site-specific impacts without additional compliance evaluation under NEPA. In other cases, information is not available, or plans are insufficiently developed to allow detailed analysis. In the latter case, a conceptual level of analysis has been conducted. Those elements that would require further NEPA compliance are identified in "Chapter 2: Alternatives," within the detailed descriptions of each alternative (no-action and action alternatives).



- Point Reyes National Seashore
- Other Park Lands
- County Boundaries
- City/Town Boundaries
- Hydrologic Features
- Roads

North

0 10 Miles

Source: ESRI Data & Maps (CD-ROM v. 9.3-2008) and Cal-Atlas Geospatial Clearinghouse Data

Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement

National Park Service
U.S. Department of the Interior

Point Reyes National Seashore

**FIGURE 1-1
Project Vicinity Map**



Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement

FIGURE 1-2
Project Location Map



National Park Service
U.S. Department of the Interior

Point Reyes National Seashore

PURPOSE OF AND NEED FOR ACTION

DOI NEPA regulations, found at 43 CFR Part 46, address the formulation of purpose and need statements in NEPA documents that are prepared in response to permit applications. DOI NEPA regulations state that

When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau's purpose and need for action. It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision. (43 CFR section 46.420)

PURPOSE AND NEED

Action is needed at this time because pursuant to section 124 of Public Law 111-88, the Secretary has the discretionary authority to issue a SUP for a period of 10 years to DBOC for its shellfish operation, which consists of commercial production, harvesting, processing, and sale of shellfish at Point Reyes National Seashore. The existing RUO and SUP held by DBOC will expire on November 30, 2012. DBOC has submitted a request for the issuance of a new permit upon expiration of the existing authorizations. Consistent with DOI NEPA regulations (43 CFR section 46.30), the proposed action for this EIS is the Secretary's decision whether to issue a permit under section 124.

The purpose of the document is to use the NEPA process to engage the public and evaluate the effects of issuing a SUP for the commercial shellfish operation. The NEPA process will be used to inform the decision of whether a new SUP should be issued to DBOC for a period of 10 years.

PROJECT OBJECTIVES

Project objectives build from the project purpose and identify those goals that are "critical to meet if NPS is to consider the proposal successful" (NPS 2001b). Project objectives should be grounded in the park's enabling legislation, purpose, significance, and mission goals; as well as relevant legislation; NPS plans (such as general management plans [GMPs]); or other NPS standards and guidelines. Project objectives should be broad enough to allow for a reasonable range of alternatives without narrowing the focus or intentionally excluding an alternative. The following project objectives have been identified:

- Manage natural and cultural resources to support their protection, restoration, and preservation.
- Manage wilderness and potential wilderness areas to preserve the character and qualities for which they were designated.
- Provide opportunities for visitor use and enjoyment of park resources.

DBOC GOALS

On July 6, 2010, DBOC submitted a request for the issuance of a new SUP upon expiration of the existing permit. Specifically, DBOC seeks to “occupy and utilize the buildings and lands on the shores of Drakes Estero” (Latham & Watkins, LLP 2010). DBOC requested that the EIS consider DBOC’s needs and goals, as the project applicant. DBOC requested that its objective of “operating an environmentally-friendly and sustainable oyster farm for a renewable 10-year period under a Service-issued SUP” be included both during scoping as well as during public review of the Draft EIS (DBOC 2010n, 2011i). DBOC also requested that the purpose and need be modified “to reference DBOC’s request that the renewed SUP be issued under [the] same terms and conditions present in the RUO/SUP, for permission to complete work authorized under the 1998 Environmental Assessment, and for permission to make select physical improvements.” DBOC suggested that language regarding discussion of mitigation measures and historical context be added to the purpose and need, as well (DBOC 2011i).

The goals provided by DBOC are included here as background information. DBOC’s goals have not been added to the NPS purpose, need, and objectives because doing so would limit the range of reasonable alternatives to only those that further DBOC’s goals, which may not reflect the broader public interest, and would be inconsistent with the Secretary’s discretion under section 124.

Specifically, DBOC’s goal that NPS issue a “renewable” SUP is not consistent with section 124, which authorizes only one, 10-year permit term. Similarly, DBOC’s goal that the new permit be limited to its onshore operations only is inconsistent with section 124, which specifies that a new permit must mirror the terms of the existing permit. DBOC’s existing SUP authorizes onshore and offshore operations, consistent with NPS’s jurisdiction over Drakes Estero. A new permit issued under section 124 would therefore authorize both onshore and offshore operations.

AUTHORITY OVER DRAKES ESTERO AND ADJACENT LANDS

A number of federal and state agencies have jurisdiction over activities taking place within the waters of Drakes Estero and on the uplands where the oyster processing facilities are located.

NPS JURISDICTION

DBOC’s operations occur on uplands adjacent to Drakes Estero and on tide and submerged lands within the Estero. All of the upland, tidal, and submerged lands on which DBOC conducts its operations are located within the Seashore and are owned in fee by the United States. The tide and submerged lands in Drakes Estero were conveyed by statute from the State of California to the United States in 1965. (Additional information about this conveyance is provided below.) In 1972, NPS purchased a five-acre upland tract from Johnson Oyster Company (JOC). JOC reserved a 40-year reservation of use and occupancy on 1.5 acres of the tract “for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto” (NPS 1972a). Pursuant to 36 CFR section 1.2, activities occurring on lands and waters under the jurisdiction of NPS are subject to applicable NPS laws and regulations.

In April 2008, DBOC and NPS signed a SUP (NPS Permit No. MISC-8530-6000-8002) that covered all offshore areas and the remaining onshore areas of operation outside of the 1.5-acre RUO. DBOC's operations in the Seashore are governed by the terms and conditions of the RUO and the SUP. Both the RUO and SUP require DBOC to comply with applicable NPS laws, regulations, and policies. The RUO requires the holder of the RUO to “abide by all rules and regulations pertaining to National Park System areas” (NPS 1972a). The SUP, which applies to all offshore areas and all upland areas outside of the RUO area, expressly states that DBOC operations are subject to NPS regulation. The RUO and SUP are provided in appendix A.

As stated above, the state conveyed the tide and submerged lands in Drakes Estero to NPS in 1965. The statutory language provided that the State of California granted, “Subject to limitations that are described in Section 2, all of the right, title, and interest of the State of California . . . in and to all of the tide and submerged lands or other lands beneath navigable waters situated within the boundaries of the Point Reyes National Seashore” (chapter 983, section 1, Statutes of California, July 9, 1965). Under section 2 of the grant, the state reserved all rights to oil, gas, and other hydrocarbons with the further provision that no well or drilling operations were to be conducted on the surface (chapter 983, section 2, Statutes of California, July 9, 1965). In accordance with article 1, section 25 of the California Constitution, the statutory conveyance reserved “to the people of the state the right to fish in the waters underlying the lands [conveyed]” (chapter 983, section 3, Statutes of California, July 9, 1965). Upon review of the land conveyances made by the Office of the Surveyor General and the Legislature, the California State Lands Commission (CSLC) determined that the State had conveyed out all of the State’s real property interest except the mineral estate, leaving the CSLC with no jurisdiction over the bed of Drakes Estero (CSLC 2007ⁱ).

The NPS’s jurisdiction over DBOC’s aquaculture operation is not limited by the rights the state retained when it conveyed the tide and submerged lands in Drakes Estero to the United States. The California Department of Fish and Game (CDFG) and CSLC have concluded, and NPS agrees, that the “right to fish,” as retained by the state, does not extend to aquaculture, such as DBOC’s commercial operation (CDFG 2007bⁱⁱ; CSLC 2007ⁱⁱⁱ; DOI 2012a^{iv}). In official communications shortly after DBOC’s state water bottom lease was renewed, CDFG explained that “*fishing* involves take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property” (emphasis in original) (CDFG 2007b). Because the right to fish does not extend to aquaculture, CDFG concluded that NPS has primary management authority over DBOC operations (CDFG 2007b^v, 2008a^{vi}).

The basis for the CDFG opinion is confirmed by the California Fish and Game Code. The California Fish and Game Code distinguishes aquaculture and its products from public trust resources, such as wild fish, which are held in trust by the state and which do not belong to private individuals. The California Fish and Game Code defines “fish” as “*wild* fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof” (emphasis added) (California Fish and Game Code section 45). In contrast to the “wild” organisms included in the definition of “fish,” the California Fish and Game Code establishes that the products of an aquaculture operation are the private property of the operator of that facility. Under the California Fish and Game Code provisions on aquaculture, “the cultured progeny of wild plants and animals . . . are the exclusive property of that person who cultured them or that person’s successor in interest” (California Fish and Game Code section 15001). Further, “any person who takes aquaculture products without lawful entitlement is subject to prosecution for theft” (California Fish

and Game Code section 15002). Aquaculture products are private property and therefore cannot be part of a public fishery. Because the tide and submerged lands in Drakes Estero were conveyed to the United States without limitations as to the aquaculture operations, NPS laws, regulations, and policies apply to DBOC's operations on tide and submerged lands within Drakes Estero.

STATE MANAGEMENT OF AQUACULTURE OPERATIONS

State regulation of aquaculture operations by CDFG are addressed in Division 12 of the Fish and Game Code. Under these code provisions, CDFG regulates the stocking of aquatic organisms, brood stock acquisition, disease control, the importation of aquatic organisms into the state, and the transfer of organisms between water bodies. There are approximately 30 marine aquaculture operations within the state (CDFG [Ramey], pers. comm., 2011d). Some are located on state-owned tide and submerged lands while others are located on tide and submerged lands under the jurisdiction of other governmental entities or private parties. State management by CDFG of these operations differs based on the operation's location (e.g., granted tidelands, private tidelands, or state tidelands).

Under the Fish and Game Code, the State of California, through the Fish and Game Commission (CFGC), issues state water bottom leases for aquaculture operations that are located on state-owned tidelands. CDFG manages 16 shellfish leases held by 8 such operators (this does not include two leases to DBOC issued over granted tidelands in Drakes Estero) (CDFG 2011f^{vii}). Through these leases, CDFG collects payments from aquaculture operators. These payments include an annual lease fee based on the number of acres included in the lease and privilege use taxes, which are based on the gallons of oysters produced as reported by monthly statements. CDFG also has authority to regulate other aspects of these operations, including the stocking of aquatic organisms, brood stock acquisition, disease control, the importation of aquatic animals, and the transfer of organisms between water bodies. As discussed below, this authority pertains to all importers regardless of whether their operation is located on state-owned tidelands or on tidelands owned by other governmental entities or private parties.

There are approximately 19 other aquaculture operations (this does not include DBOC) in the state. Nine of these operations are on granted or private tidelands and the remaining 10 are land-based facilities (CDFG 2011f^{viii}). With the exception of Drakes Estero, the CFGC does not issue state water-bottom leases for aquaculture operations located on granted or private tidelands, and CDFG does not collect lease fees or privilege use taxes from these operators. Rather, these operators make payments to the entity that holds title to the tide and submerged lands on which they operate.

One example of the type of regulatory oversight that exists for aquaculture operations on granted tidelands is found with the Humboldt Bay Harbor, Recreation, and Conservation District (Harbor District), which was established in 1973 under the Humboldt Bay Harbor, Recreation and Conservation Act of 1970. Subsequently, the state of California granted all its tidelands and submerged lands to the Harbor District, reserving to the state "the right to fish in the waters on said lands with the right of convenient access to said water over said lands for said purpose." The Harbor District owns the tidelands upon which operations take place and the District, not CDFG, issues leases to the aquaculture businesses. The Harbor District collects lease payments (typically per acre) and a per gallon tax similar to the use tax collected by CDFG for CDFG-managed leases.

In the case of Drakes Estero, CFGC has issued, and CDFG administers, state water bottom leases to DBOC despite the fact that the underlying tidelands and submerged lands have been owned by the United States since 1965. CFGC issued the most recent lease in 2004. It is currently set to expire in 2029. The state water bottom lease is “contingent on a concurrent Federal Reservation of Use and Occupancy” (CDFG 2004d, 2004e). Even though the state lease explains that it is contingent on the RUO, the overlay of a state water-bottom lease on the federally owned tidelands and submerged lands in Drakes Estero has caused confusion, as evidenced by comments received during the public scoping process that sought clarification on the roles and responsibilities of NPS, the CFGC, and CDFG with respect to DBOC’s operation.

To address this confusion, NPS has consulted with CDFG, which is a cooperating agency for this EIS, throughout the process of preparing this EIS. NPS and CDFG agree that the right to fish does not authorize the state to issue water-bottom leases for aquaculture (CDFG 2007b^{ix}, 2008a^x; DOI 2012a^{xi}). Moreover, the 1965 conveyance divested the state of any real property interest in the tide and submerged lands in Drakes Estero except for certain mineral interests. The state therefore does not retain real property interest in the Estero sufficient for it to issue state water-bottom leases for aquaculture (CSLC 2007^{xii}; DOI 2012a^{xiii}). As a result, NPS, not CFGC, has the legal authority to determine whether DBOC may occupy water bottoms in Drakes Estero for its operation.

NPS and CDFG agree that should the Secretary issue a permit to DBOC under section 124, as a condition of receiving that permit, DBOC would be required to surrender its state water bottom lease to the CFGC prior to issuance of a new SUP by NPS. DBOC would thereafter operate under the terms of the NPS permit. NPS would include certain provisions from the state water bottom lease in the new SUP, such as that relating to the “Escrow Account for Cleanup of Aquaculture Leases.” This will ensure that certain provisions relating to DBOC operations that are currently incorporated into the SUP by reference remain in force. While it would no longer administer a state water bottom lease, CDFG would continue to exercise regulatory authority over DBOC. Thus, CDFG would regulate DBOC’s operation with respect to the stocking of aquatic organisms, brood stock acquisition, disease control, importation of aquatic organisms into the state, and the transfer of organisms between water bodies.

Under section 124, if the Secretary decides to issue a new 10-year permit to DBOC, DBOC must pay the United States the fair market value of the federal property permitted to DBOC. A permit under section 124 would encompass the federally owned onshore and offshore areas used by DBOC. By terminating the state water bottom lease, DBOC would avoid any obligation to make lease payments to the state.

OTHER JURISDICTIONS

Several other agencies have jurisdiction over activities taking place within the waters of Drakes Estero and on the uplands where the oyster processing facilities are located, including the California Coastal Commission (CCC); the San Francisco Bay Regional Water Quality Control Board; the California Department of Public Health (CDPH); the U.S. National Marine Fisheries Service (NMFS) Division of the National Oceanic and Atmospheric Administration (NOAA); the U.S. Army Corps of Engineers (USACE); and the U.S. Fish and Wildlife Service (USFWS). Specific agency jurisdictions and their applicability to this project are described in more detail in the “Related Laws, Policies, Plans, and Constraints” section of this chapter.

PROJECT AREA AND VICINITY

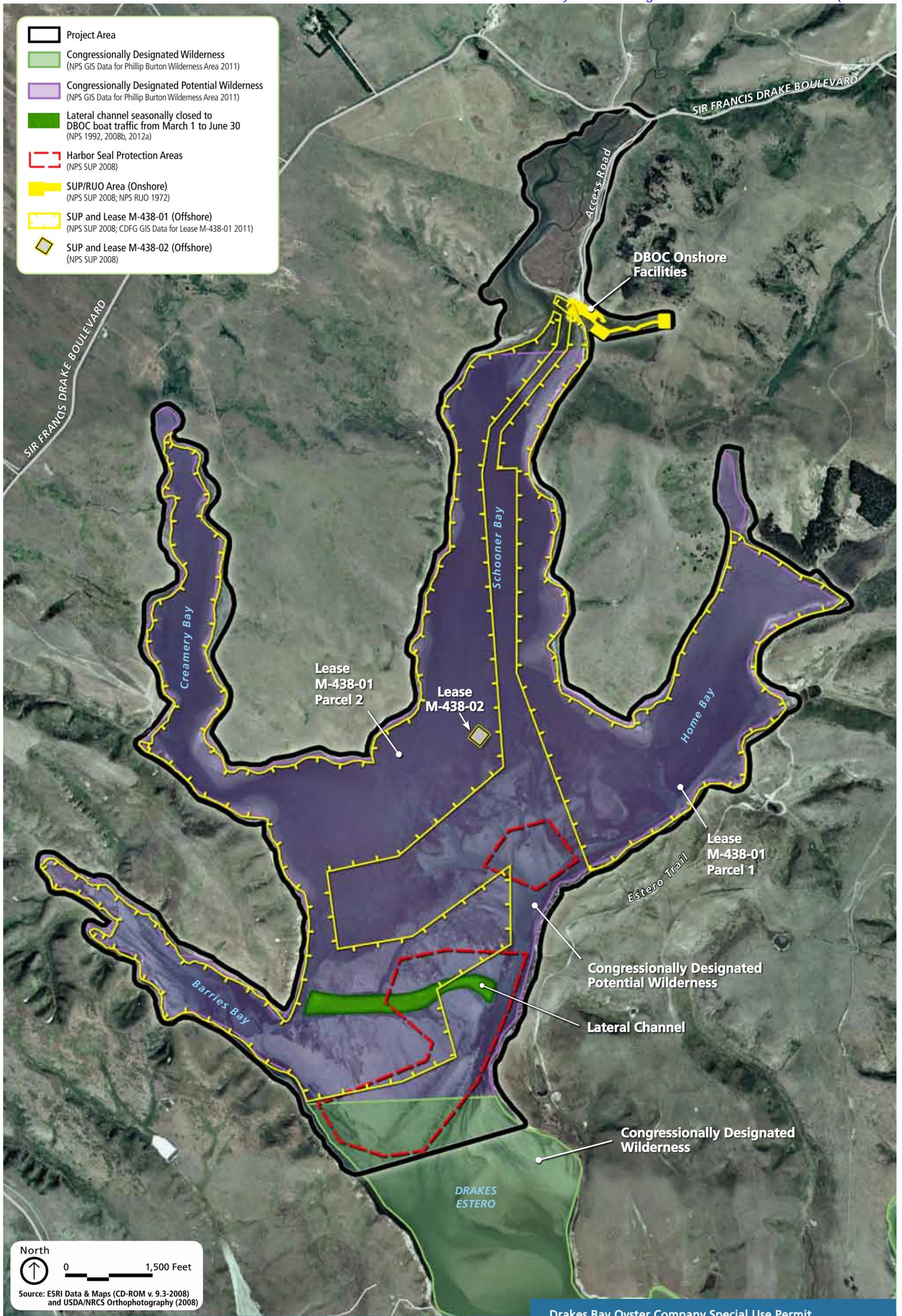
Point Reyes National Seashore, a landscape ranging from dramatic headlands and expansive sand beaches to open grasslands, brushy hillsides, and forested ridges, is located in western Marin County in central California, approximately 30 miles northwest of San Francisco. The Seashore is situated within 50 miles of the nine-county San Francisco Bay Area, the fifth largest metropolitan area in the United States (see figure 1-1). Western Marin County is primarily rural, with scattered, small, unincorporated towns that serve tourism, agriculture, and local residents. In addition, the Seashore also administers the Northern District of the Golden Gate National Recreation Area, adjacent to the Seashore, for a combined management area and legislated boundary of approximately 94,000 acres (see figure 1-2).

The Seashore is bounded to the north, west, and southwest by the Pacific Ocean and to the east by the residential communities of Inverness, Inverness Park, Point Reyes Station, Olema, and Dogtown. The town of Bolinas is south of the Seashore at the southern tip of the peninsula. The Seashore's boundary extends a quarter of a mile from the mean high tide (both in the Pacific Ocean and Tomales Bay), and includes the tidelands and submerged lands in this zone. The coastal resources within this marine habitat contribute to the biological diversity of the Seashore.

Drakes Estero is a system of five branching bays encompassing approximately 2,500 acres. The branching bays are stretched to the north and separated by low converging ridges. From west to east, they are: Barries Bay, Creamery Bay, Schooner Bay, Home Bay, and Estero de Limantour (see figures 1-2 and 1-3). Nearly half of the Estero's surface area consists of mud and sand flats that are exposed at low tide (Press 2005). Because of the shallow character of the bay, and its tendency to flush completely within a normal tidal cycle, currents in the main stem and secondary channels are relatively strong.

The Drakes Estero watershed covers approximately 31 square miles, including Drakes Estero itself (Baltan 2006). The Seashore leases most of the lands surrounding Drakes Estero for cattle grazing (approximately 14 square miles within the watershed). Areas draining to and surrounding the Estero de Limantour are primarily within congressionally designated wilderness (approximately 8 square miles within the watershed).

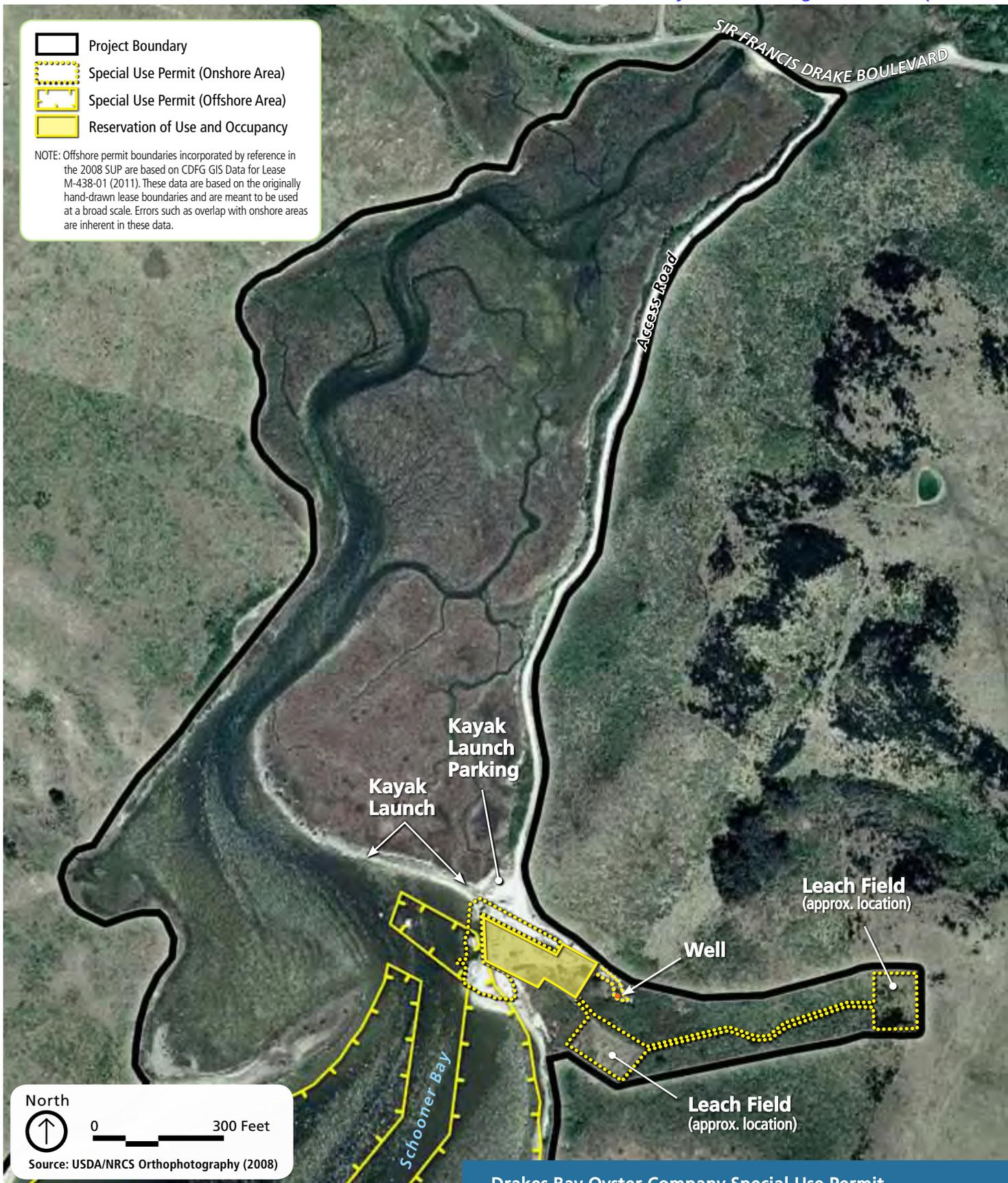
This EIS examines DBOC operations and facilities in and adjacent to Drakes Estero. The project area is roughly 1,700 acres and includes DBOC structures, facilities, and operations in much of the congressionally designated potential wilderness (1,363 acres), 2.6 acres of onshore property, and 2 acres incorporating the well and septic areas, as delineated in the RUO and SUP (see figures 1-3 and 1-4). In order to provide a comprehensive analysis of potential impacts of the alternatives presented in this EIS, the project area also includes the kayak launch parking area and the access road leading from Sir Francis Drake Boulevard. All land and water portions of the project area are owned by NPS. Resources outside the project area may be described if they are subject to impacts resulting from any of the proposed alternatives. The project area as a whole is depicted on figure 1-3, with figure 1-4 showing the detailed location of the onshore operations.



North
 0 1,500 Feet
 Source: ESRI Data & Maps (CD-ROM v. 9.3-2008) and USDA/NRCS Orthophotography (2008)

Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement

FIGURE 1-3
 Project Area Boundary



Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement

PURPOSE AND SIGNIFICANCE OF POINT REYES NATIONAL SEASHORE

The Seashore is located at a rich, complex convergence of land and sea, culture and nature, urban and rural. This is where continental and oceanic plates of the Earth's crust collide, creating the unique geological formations above (or atop) the San Andreas Fault. The Seashore's dynamic geologic foundations produce extraordinary biodiversity, where the rivers of the coastal range meet the sea, and where marine, estuarine, freshwater, and terrestrial ecosystems overlap. Human communities overlap here too: This is where European voyagers and the indigenous peoples of America's Pacific Coast are believed to have first encountered each other (Sadin 2007).

The Seashore lies within an area recognized locally, nationally, and globally as a center of biodiversity. The Seashore hosts more than 800 native plant species, over 490 resident and migratory bird species, anadromous fish, rare and elusive amphibians, and a unique assemblage of mammals such as bobcat (*Felis rufus*), elephant seal (*Mirounga angustirostris*), harbor seal (*Phoca vitulina*), mountain lion (*Puma concolor*), Point Reyes mountain beaver (*Aplodontia rufa*), and tule elk (*Cervus canadensis*). Drakes Estero is an exceptional nursery that provides abundant food, resting habitat, and shelter for a wide array of marine organisms and migratory waterbirds, including brant and North American species of pelicans. The northern California coast, including the Seashore, is part of one of the few major coastal upwelling regions in the world (Hill et al. 1998). The Seashore is one of the best locations on the West Coast to watch the migration of the Pacific gray whale and to observe other animals that live their lives in the open-ocean such as albatrosses, dolphins, and humpback whales.

Marine and land boundaries are shared with the Gulf of the Farallones National Marine Sanctuary, Golden Gate National Recreation Area, and Tomales Bay State Park. In 1988, the United Nations Educational, Scientific, and Cultural Organization Man in the Biosphere program designated the Central California Coast Biosphere Reserve (CCCBR) under the International Biosphere Program; CCCBR includes the entire Seashore, the Golden Gate National Recreation Area, and other public lands in the region. Four state designated "Areas of Special Biological Significance" are located within the Seashore: Bird Rock, Point Reyes Headlands, Double Point, and Duxbury Reef. In addition, the Phillip Burton Wilderness Area is unique in that it is the only wilderness area between Canada and Mexico that includes marine waters (wilderness.net 2011).

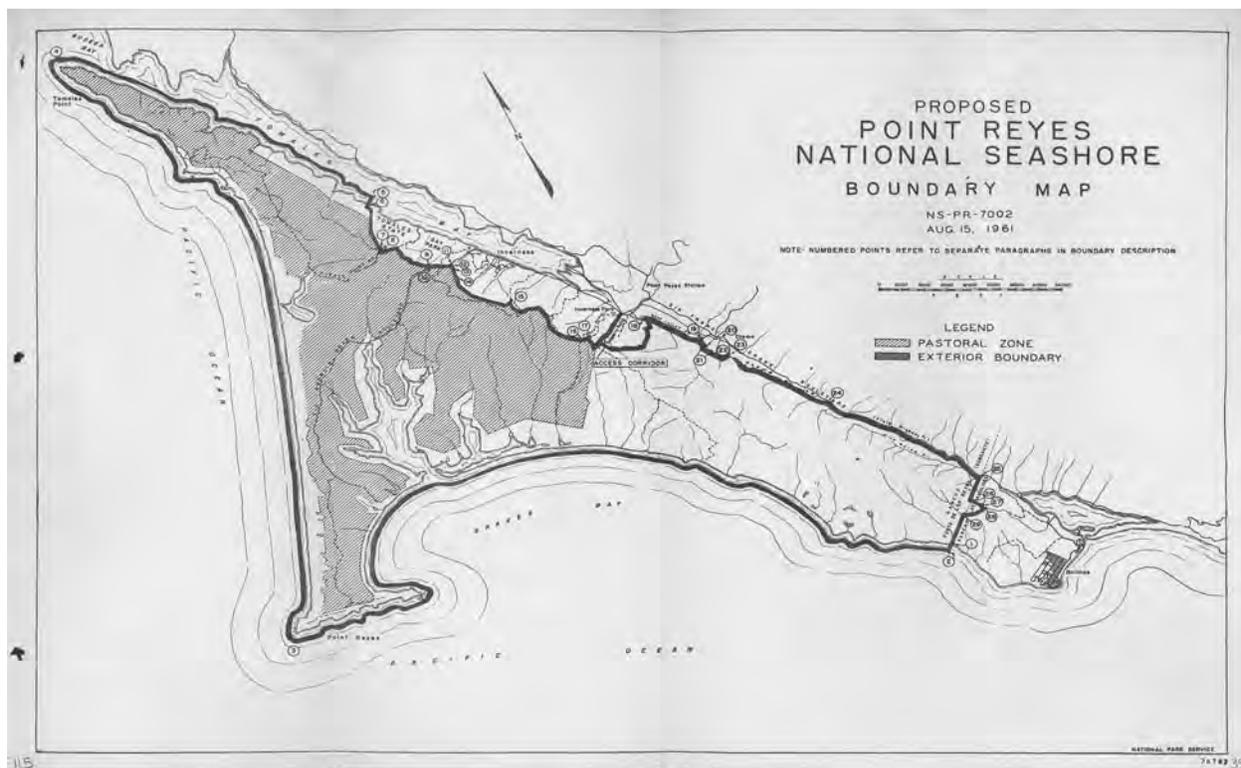
As set forth in the NPS Organic Act, the fundamental purpose of units of the national park system is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (U.S.C. title 16, section 1 [16 U.S.C. 1]). Units of the national park system also generally have their own specific purposes set out in their legislation. In 1962, Congress established Point Reyes National Seashore "to save and preserve for the purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped" (PL 87-657, section 1, September 13, 1962, 76 Stat. 538, codified at 16 U.S.C. 459c). President John F. Kennedy signed the Point Reyes Act (PL 87-657) into law on September 13, 1962 (appendix B).

With strong support and collective efforts from leaders working at the regional and national levels, as well as citizen activists, two bills were introduced to Congress in 1959 to seek authorization of a national

seashore on Point Reyes Peninsula. These bills, as constructed, did not advance fully, as local governments were concerned with issues such as loss of county tax revenue and infringement on the property rights of the ranchers and other landowners. As environmentalists, local managers, and ranchers began to realize that creation of the Seashore was the way to preserve and protect the conditions and livelihoods on the Point Reyes Peninsula from the forceful push of commercial land development, partnering began. In enacting the law establishing the Seashore, Congress considered both the cost of land acquisition and the fate of the existing dairy farms and cattle ranches within the potential boundaries. The enabling legislation specifically recognized the dairying and ranching operations by limiting the use of eminent domain within an area known as the “pastoral zone.” The pastoral zone was depicted on map number NS-PR-7002, dated August 15, 1961 (shown below).

Congress ratified this map by specifically referring to it in section 4 of the legislation, which states the following:

No parcel of more than five hundred acres within the zone of approximately twenty-six thousand acres depicted on map number NS-PR-7002, dated August 15, 1961 . . . shall be acquired without the consent of the owner so long as it remains in its natural state, or is used exclusively for ranching and dairying purposes including housing directly incident thereto. (PL 87-657, section 4, September 13, 1962, 76 Stat. 538)



Map NS-PR-7002, showing the pastoral zone of Point Reyes National Seashore. (Image courtesy of NPS.)

The section additionally defined “ranching and dairying purposes” as “such ranching and dairying, primarily for the production of food, as is presently practiced in the area” (PL 87-657, section 4, September 13, 1962, 76 Stat. 538). The administrative history of the Seashore identifies several rationales

behind the creation of the pastoral zone and the special treatment of ranching and dairying operations within the zone: responding to the concerns of ranchers, lessening the cost of initial land acquisitions, stabilizing the county's property tax base, and preventing commercial development within the area.

Despite the presence of JOC at the time of the deliberations, Drakes Estero and an upland buffer including the oyster operation were not identified as part of the pastoral zone depicted on map number NS-PR-7002. Thus, section 4 of the enabling legislation did not apply to the mariculture operations in and around Drakes Estero.

Although the enabling legislation did not specifically address the oyster operation, oyster operations were discussed in the 1962 legislative history. The House Report accompanying the legislation in 1962 mentions "small organizations engaged in oyster farming and fishing operations on Drakes Estero, Tomales Bay, and Point Reyes" (H. Rep. No. 87-1628, reprinted in 1962 U.S.C.C.A.N. 2500, 2504).

The report further notes that the committee had been advised that "none of these activities, as presently conducted, is incompatible with the plans of the National Park Service" and that there was an understanding with the owners of these properties that the government would have the first right to acquire the properties in the event the owners wished to dispose of them (H. Rep. No. 87-1628, reprinted in 1962 U.S.C.C.A.N. 2500, 2504).

In 1970, Congress removed section 4 from the legislation to address concerns around the eminent domain clause, through subsection 2b of the act of April 3, 1970 (PL 91-223, April 3, 1970, 84 Stat. 90), and in 1978 Congress added language authorizing the leasing of federally owned land that was agricultural land prior to its acquisition. Section 318(b) of PL 95-625 (1978) states the following:

Where appropriate in the discretion of the Secretary, he or she may lease federally owned land (or any interest therein) which has been acquired by the Secretary under this Act, and which was agricultural land prior to its acquisition. Such lease shall be subject to such restrictive covenants as may be necessary to carry out the purposes of this Act. Any land to be leased by the Secretary under this section shall be offered first for such lease to the person who owned such land or was a leaseholder thereon immediately before its acquisition by the United States. (PL 95-625, title III, section 318[b], November 10, 1978, 92 Stat. 3467, 3487, codified at 16 U.S.C. 459c-5[a])

Section 318(c) also defined "agricultural property" to mean "lands which were in regular use for, or were being converted to agricultural, ranching, or dairying purposes as of May 1, 1978, together with the residential and other structures related to the above uses of the property" (PL 95-625, title III, section 318[c], 92 Stat. 3487, codified as amended at 16 U.S.C. 459c-5[b]).

ESTABLISHMENT OF WILDERNESS AT POINT REYES NATIONAL SEASHORE

The National Wilderness Preservation System was established by Congress in 1964 to ensure that some lands of the United States would be preserved and protected in their natural condition for the permanent good of the people. Such federally owned areas are designated by Congress as "wilderness areas." An

area of wilderness is further defined as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation which is protected and managed so as to preserve its natural conditions” (16 U.S.C. 1132).

During the 1970s, NPS studied the Seashore, as directed by the Wilderness Act of 1964, to determine the suitability of designating areas of the Seashore as wilderness. In 1972, the Seashore published its initial recommendation for an area of about 5,150 acres for the purpose of preservation of wilderness areas (NPS 1972b). Recognizing the uniqueness of the resources on the Point Reyes Peninsula and the threats that ensuing commercial and land development posed to other surrounding lands, NPS recommended 10,600 acres be designated as wilderness (NPS 1974). Congress ultimately decided in 1976 to designate more than 33,000 acres as wilderness or potential wilderness, including 25,370 acres as wilderness and another 8,003 acres of land and water as potential wilderness (PL 94-544, October 18, 1976, 90 Stat. 2515 and PL 94-567, October 20, 1976, 90 Stat. 2695). While the legislative language clearly articulates acreage in section 1, the map filed with the committee, as required under section 2 of the legislation, calculated that the actual acreage of those lands and waters is 24,200 acres of wilderness and 8,530 acres of potential wilderness. The waters of Drakes Estero were included in the potential wilderness designations, but the upland areas used for shellfish processing operations were not. Potential wilderness additions are defined as lands that do not qualify for immediate designation as wilderness “due to temporary nonconforming or incompatible conditions” (NPS 2006d, section 6.2.2.1). The House Committee Report accompanying the wilderness bill states the following about the potential wilderness additions:

As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status. (H. Rep. No. 94-1680, September 24, 1976)

PL 94-567 also provided an administrative mechanism for the conversion of potential wilderness to full wilderness once “all uses thereon prohibited by the Wilderness Act have ceased” (PL 94-567, section 3, October 20, 1976). In order for potential wilderness to be converted, NPS must publish a notice in the Federal Register that all nonconforming uses within the potential wilderness have ceased. Upon such publication, the congressionally designated potential wilderness gains congressionally designated wilderness status.

In addition to the wilderness provisions contained in PL 94-544 and 94-567, Congress amended the provisions of the Seashore enabling legislation by adding language elaborating on the original purposes of the Seashore. Rather than focusing on recreational or other aspects of the Seashore, Congress directed that the Seashore be administered “without impairment of its natural values, in a manner which provides for such recreational, educational, historic preservation, interpretation, and scientific research opportunities as are consistent with, based upon, and supportive of the maximum protection, restoration, and preservation of the natural environment within the area” (PL 94-544, section 4, October 18, 1976, 90 Stat. 2515, codified at 16 U.S.C. 459c-6; and PL 94-567, section 7, October 20, 1976, 90 Stat. 2695, codified at 16 U.S.C. 459c-6).

In February of 2004, the Department of the Interior, Office of the Solicitor issued a legal opinion regarding the meaning of the 1976 legislation designating Drakes Estero as potential wilderness. Based on

the language of the law and its legislative history, the opinion concluded that NPS was mandated to convert the potential wilderness in Drakes Estero to full wilderness as soon as the nonconforming use could be eliminated (DOI 2004). The oyster operation in Drakes Estero was dependent on the 40-year RUO that Charles Johnson had retained when he sold his 5-acre parcel to NPS in 1972. The RUO expires on November 30, 2012, making this date the earliest date on which the obstacle to full wilderness designation would cease. In October 2009, section 124 of PL 111-88 provided the Secretary discretionary authority to issue a new SUP for a period of 10 years notwithstanding the intent of the 1976 wilderness legislation.

COMMERCIAL SHELLFISH OPERATIONS IN DRAKES ESTERO

OVERVIEW FROM 1930 TO 2004

Mariculture developers first planted oyster beds in the Tomales Bay area around the turn of the 20th century. Throughout the 1930s, CDFG conducted successful experimentation with nonnative species to create commercial shellfish aquaculture in the state. In a 1935 survey to assess the suitability of California bays and inlets for commercial shellfish aquaculture, Bonnot stated regarding Drakes Estero: “No oysters were found growing there. Several small plants of Japanese seed oysters were made in 1932. The oysters grew remarkably well and in five months were about two-thirds market size. A project of an experimental nature on a much larger scale is now being promoted...” (Bonnot 1935). In a later report on the California oyster industry, Bonnot noted that Humboldt Bay began to establish artificial culture of the native oyster (*Ostrea lurida*), using the already existing natural beds. Research was conducted to determine the necessary biological conditions for this success of the native oyster in California (Bonnot 1937). Oyster growers, in an attempt to produce a faster- and larger-growing product, introduced nonnative species of oyster to several water bodies in California, including Drakes Estero. The success of the nonnative Pacific oyster (*Crassostrea gigas*) in Tomales Bay and Drakes Estero contributed to the establishment of new companies and the retooling of existing oyster businesses. In 1938, the original Drakes Bay Oyster Company (no relation to the present-day DBOC) built a small “opening” plant on the banks of Drakes Estero near the head of Creamery Bay, selling its freshly shucked oysters in San Francisco. The plant operated within Drakes Estero until 1945. The 5-acre plant property was not owned by the oyster company but was part of a larger estate (Caywood and Hagen 2011).

Due to World War II, Pacific oyster seed shipments ceased and oyster operations declined. This interruption, coupled with other factors, caused some oyster operations in the area to dissolve. In 1946, the Drakes Estero oyster allotment was transferred to Larry Jensen (Caywood and Hagen 2011). During the Jensen tenure, the ownership of the 5-acre parcel containing the processing plant was integrated with the state water allotment lease in Drakes Estero. In 1951 and 1952, both the nonnative Pacific and eastern oysters (*Ostrea virginica*) were grown within Drakes Estero by the original Drakes Bay Oyster Company (CDFG 2011c). In April 1954, Larry Jensen entered into an “agreement of sale” with Van Camp Seafood for his oysters, state oyster allotments, and the 5 acres of upland real property that accompanied the state water bottom leases. In turn, it was quickly transferred to the Coast Oyster Company (Caywood and Hagen 2011; CDFG 1954, 1955).

In 1958, Charles W. Johnson, a seed buyer for the Coast Oyster Company, settled in California and took over the oyster operation in Drakes Estero. He soon founded JOC. Charles Johnson cultured oysters in Drakes Estero and operated onshore processing facilities from 1961 through 2003. Johnson purchased 5 acres of onshore land where the existing processing facilities were located in 1961. He and his wife improved upon an L-shaped processing plant. A frame building used for opening oysters, a dock, and five small cottages or cabins were preexisting. By 1963, the Johnsons had built two additions to the processing plant, one serving as a sorting room and the other for restrooms, and expanded one of the cabins for their residence (Caywood and Hagen 2011).

Although the Seashore was established in 1962, NPS did not acquire ownership of all lands and waters within the Seashore's boundary immediately. In 1965, the state-held water bottoms of Drakes Estero were conveyed to NPS by the State of California. As of 1965, however, NPS did not own the upland areas where the oyster processing facilities were located. NPS purchased fee title to the 5-acre upland parcel from Johnson in 1972. As part of the purchase agreement, Johnson elected to retain a 40-year RUO over 1.5 acres of the 5-acre parcel. The RUO allowed for "processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public and residential purposes reasonably incidental thereto" (NPS 1972a).

Even though the water bottoms in Drakes Estero were conveyed to the United States in 1965, the state has continued to issue state water bottom leases for shellfish cultivation in Drakes Estero. The continued issuance of state water bottom leases has created confusion and is inconsistent with the NPS's ownership and jurisdiction over Drakes Estero. Should the Secretary issue a new permit to DBOC under section 124, as a condition of receiving that permit, DBOC would be required to surrender its state water bottom lease to the CFGC prior to issuance of a new SUP by NPS.

In 1979, the state consolidated Oyster Allotment Nos. 2 and 72 into one Mariculture Lease (M-438-01)³ in conformance with a new standard numbering system. Lease M-438-01 was described as two parcels (see figure 1-3): Parcel 1 contains 343 acres on the east side of Drakes Estero and Parcel 2 contains approximately 706 acres on the west side of Drakes Estero. A 1-acre parcel designated as Mariculture Lease M-438-02⁴ lies within Parcel 2. Parcels 1 and 2 contain approximately 1,049 acres⁵ and together compose Lease M-438-01 (see figure 1-3).

In 1979, Lease M-438-01 was allotted for the purpose of culturing Pacific oysters and European flat oysters (*Ostrea edulis*). The authorized methods of oyster cultivation in 1979 included bottom, rack, and stake cultures (CDFG 1979a). The 1-acre Lease M-438-02 was allotted for the sole purpose of culturing purple-hinged rock scallops (*Hinnites multirugosus*) (scallops) in accordance with provisions of section 6400 of the California Fish and Game Code. As permitted, scallops were to be confined and cultivated on racks and in trays. No other mode of operation or culture was authorized at the time (CDFG 1979b).

³ Referred to as Lease M-438-01 in remainder of document.

⁴ Referred to as Lease M-438-02 in remainder of document.

⁵ Since the consolidation of several allotments into Lease M-438-01 in 1979, the lease language has specified that the lease area is made up of two parcels totaling approximately 1,059 acres; however, the geographic information system (GIS) data provided by CDFG in 2011 for this lease area measures 1,049 acres. For the purposes of this EIS, all area calculations are based on GIS data. Therefore, the latter measurement is used to represent existing conditions throughout this EIS.

In August 1993, JOC made a request to CDFG to begin the culture of Manila clams (*Venerupis philippinarum*, also known as *Tapes japonica* and *Venerupis japonica*) in Lease M-438-01 (Studdert 1993^{xiv}). In an October 7, 1993, meeting, CFGC authorized JOC to cultivate Manila clams in an amendment to Lease M-438-02. The CFGC meeting minutes documenting the approval of the request state “Lease M-438-02 is a small, 1-acre lease which has been previously used by the JOC in experimental culture of species other than oysters. Johnson Oyster Company would now like to investigate if conditions in Drakes Estero are suitable for culture of Manila clams” (CFGC 1993). CDFG sent a letter to JOC confirming that Manila clams had been added to Lease M-438-02, and JOC signed the lease amendment.

In November 1989, the Marin County Planning Department contacted Charles Johnson regarding violations involving the enlargement of the processing plant and installation of mobile homes without appropriate permits. These activities were also inconsistent with the terms of the RUO. Failure to obtain a coastal development permit also placed JOC in violation of California Coastal Act provisions. However, to bring JOC into compliance with federal, state, and local codes and regulations, a number of facility replacements and best practices were still needed, including an upgrade to the septic system (Caywood and Hagen 2011). The expanded septic system plans were eventually submitted to NPS by JOC and evaluated for compliance as part of the 1998 Environmental Assessment (EA) which included several other activities, including removal of unpermitted mobile homes and construction of new facilities (NPS 1998a, 1998b). The EA and the executed finding of no significant impact (FONSI) included the existing building removal and new construction of a 900-square-foot garage, a 2,625-square-foot seed plant, a 500-square-foot stringing plant, and a 7,600-square-foot processing plant, along with a new septic system that would include a new leach field and rehabilitation of the existing leach field. The FONSI also included an annual processing/production limit of 700,000 pounds (oyster weight) to ensure that the new facilities would not create additional growth (and any new negative impacts) in overall oyster production in the estuary (NPS 1998b). The only actions that JOC completed were removal of some mobile homes from the site and installation of a single leach field, which corrected the unpermitted discharge.

While some progress was made by JOC in bringing facilities into compliance, there were still numerous California Coastal Act, county building code, and NPS permit violations left unresolved (Caywood and Hagen 2011). In 2003, CCC issued a Cease and Desist Order (CDO) (No. CCC-03-CD-12) to JOC that required the removal of some unpermitted development from the property (the shucking room and the retail counter, two houses, and two of the four mobile homes), improvement of the wastewater system (which was draining into Drakes Estero), remediation related to the storage of oyster cultivation equipment and disposal of refuse in Drakes Estero and along the shore, and the submittal of a coastal development permit application for after-the-fact authorization for other unpermitted development that included construction of several commercial buildings and a horse paddock; additions to pre-Coastal Act buildings; and permanent placement of a mobile home, three metal storage/refrigeration containers, and an aboveground diesel fuel tank and concrete containment structure (CCC 2003). In September 2003, due to the various unresolved violations, NPS revoked authority for the construction and replacement activities that had been authorized by the 1998 EA and FONSI (NPS 2003c^{xv}).

Prior to expiration of its 1979 leases, JOC requested lease extensions for a period of 25 years. In February 2004, a CDFG letter to JOC indicated that “the Department would require that a federal/National Park Service (NPS) lease be in effect concurrently with the state water bottom lease” (CDFG 2004a^{xvi}). On March 15, 2004, NPS conveyed legal opinions from the Solicitor’s Office regarding the JOC RUO and

relationship to wilderness to the CDFG Director (NPS 2004c^{xvii}). On June 14, 2004, CDFG provided their recommendation to the CFGC stating “The Department recommends approval of the requested lease renewals for a period of twenty-five years, contingent on there being a Federal Reservation for the land use within the Point Reyes National Seashore” (CDFG 2004b^{xviii}). On June 18, 2004, NPS sent a letter to CDFG reiterating that “The NPS still believes that any activity in the Estero must also be permitted by the NPS” (NPS 2004d^{xix}).

CFGC approved lease renewals to JOC on June 25, 2004, for both Lease M-438-01 and Lease M-438-02, for a 25-year period. This approval was contingent on a concurrent federal RUO for land in the Seashore. These renewals were for the express purpose of cultivating the Pacific and European flat oysters in the previously designated Lease M-438-01 and purple-hinged rock scallops and Manila clams in Lease M-438-02. A series of operational conditions accompany CDFG leases, including methods of cultivation, record keeping, requirements for requesting additional species, and requirements for providing a financial guarantee for cleanup (CDFG 2004d).

DRAKES BAY OYSTER COMPANY: 2005 TO PRESENT

In December 2004, DBOC purchased the assets of JOC, assuming the remaining seven years of the RUO and SUP that NPS had issued to JOC for the well and septic leach field (DBOC 2011f^{xx}). There were no changes to the terms of the RUO or to its expiration date. On March 18, 2005, CDFG authorized the transfer of Leases M-438-01 and M-438-02 from JOC to DBOC, which is owned and operated by Kevin and Nancy Lunny (CDFG 2005a, 2005b). The acreages and the shellfish culturing provisions of the leases remained the same. Lease M-438-01, for approximately 1,049 acres of water bottoms within Drakes Estero, allowed for the cultivation of Pacific oysters and European flat oysters, with minimum production limits placed on the oyster harvesting (CDFG 2005a). Lease M-438-02, which is the 1-acre parcel on the west side of Drakes Estero inside the boundary of Lease M-438-01, allowed for the cultivation of purple-hinged rock scallops and Manila clams (CDFG 2005b).

When DBOC purchased the assets of JOC, it also assumed the compliance obligations arising from the CCC Consent Cease and Desist Order issued to JOC (CCC 2003). DBOC has worked with CCC staff to remove some of the unpermitted developments, including the removal of the western portion and the second-floor addition to the processing plant and retail facility, two storage containers, a refrigerated trailer, the seed setting area, the western portion of the storage facility, and a mobile home. However, not all of the unpermitted development had been removed when DBOC completed additional development without a coastal development permit or approval from NPS, including placement of two large containers for shucking/packing/storage and a temporary construction trailer, construction of a processing facility and second leach field, grading and paving within the onshore portions, and placement of oyster culture apparatus in Drakes Estero (CCC 2007b). DBOC also established unauthorized practices on the property (e.g., boat transit outside established channels). CCC and NPS alerted DBOC to the violations, and DBOC agreed to submit a coastal development permit application for all “onshore and offshore” development on the property that required a permit. A second Consent Cease and Desist Order (No. CCC-07-CD-11/CCC-07-CD-04) was issued as a short-term order to allow DBOC operations to continue while DBOC met the remaining requirements for documented violations. The 2007 Cease and Desist Order set time frames for submittal of the coastal development permit application, established agreed-upon conditions of the operations, and identified activities to be avoided until CCC received and approved the

application. The consent order furthermore directed DBOC to take actions and implement protective measures to ensure protection of coastal resources. On November 29, 2007, DBOC signed the consent order to work with CCC and NPS to resolve the violations (CCC 2007b). Even though the 2007 Cease and Desist Order was issued as a short-term order, it currently remains in effect.

In April 2008, DBOC and NPS signed a SUP (NPS Permit No. MISC-8530-6000-8002) that would allow the commercial shellfish operation in Drakes Estero to remain, with provisions, until November 30, 2012, when it expires concurrently with the RUO. The SUP outlines the terms and conditions that apply to DBOC operations, including limits on the amount of shellfish that may be cultivated, limits on the types of facilities that may be constructed, and various measures designed to protect Seashore resources, modeled after mitigation measures defined in CCC Consent Cease and Desist Order (CCC 2007b). The SUP area includes the 1.1 acres of lands and improvements adjacent to the RUO (see figure 1-4) and the waters corresponding to Leases M-438-01 and M-438-02 (see figure 1-3). Additionally, the existing well site and septic field that support the onshore oyster operations were included in the permit. Consistent with the RUO, the SUP was issued to allow for the cultivating, processing, and selling of oysters, as well as the interpretation of oyster cultivation. The conditions and special terms of both the RUO and the SUP can be viewed in appendix A. The issuance of the 2008 SUP did not result in the retroactive approval of facilities and operations that had not been previously approved by NPS, as the 2008 SUP cover page indicates that NEPA compliance was “pending.” NPS and DBOC agreed, through the signing of the SUP, that NPS would prepare a NEPA analysis presenting alternative operating scenarios for DBOC’s operations through November 30, 2012. Before NPS could fully initiate the NEPA document for the 2008 SUP, Congress enacted section 124. Therefore, this EIS is now the vehicle in which NPS is considering different operating scenarios for DBOC.

CDFG leases transferred to DBOC following its purchase of JOC, allowed cultivation of the Pacific oyster, European flat oyster, purple-hinged rock scallop, and Manila clam. The purple-hinged rock scallop and Manila clam were listed as approved species on Lease M-438-02 (CDFG 2005b). Although not approved, JOC also had Kumamoto oysters (*Crassostrea sikamea*) under cultivation. JOC did not report Kumamoto or European flat oysters separately, so the bulk of the reported harvest levels were recorded as the Pacific oyster. While included in Lease M-438-01, there is no record that DBOC has ever produced European flat oysters. DBOC identified and removed the Kumamoto oysters under direct CDFG supervision (DBOC 2008c^{xxi}; CDFG 2008b^{xxii}). Small numbers of scallops were harvested by the Johnsons in Lease M-438-02. Tax reports do not indicate harvesting of any scallops to date by DBOC.

While CFGC authorized Manila clams within Lease M-438-02 beginning in 1993, there is no record in the annual Proof of Use Reports of tax records of Manila clam harvest. The cultivation of Manila clams within Lease M-438-01 has not been approved by NPS as required by section 4(b)(vi) of the 2008 SUP (NPS 2008b). In spring 2009, DBOC advised CDFG that it believed the 1993 CFGC decision to add Manila clams to Lease M-438-02 was a clerical error, and DBOC requested that Manila clams be added to its Lease M-438-01. In a letter dated December 8, 2009, NPS expressed concerns to the CFGC regarding the expansion of Manila clams within the Seashore’s boundary. Specifically, NPS was concerned about the size of the expansion and lack of environmental review or analysis of risk, the potential for establishment of a nonnative species, and the potential to add substrate for the highly invasive nonnative tunicate, *Didemnum vexillum* (NPS 2009d^{xxiii}). On December 10, 2009, CFGC authorized amendment of Lease M-438-01 to include the cultivation of Manila clams, calling it a clerical error (CFGC 2009^{xxiv}). In a letter on December 22, 2009, NPS advised DBOC that additional information was required before NPS

could determine whether to give final approval under the SUP, and that cultivation of clams on the larger lease could only occur subsequent to such approval (NPS 2009e^{xxv}). DBOC declined to offer any additional information in its response to NPS (DBOC 2009c^{xxvi}). The addition of Manila clam cultivation to the area of Lease M-438-01 and outside the boundaries of Lease M-438-02 is not authorized under the NPS SUP.

During the time CDFG and CFGC were reviewing the request for Manila clams in Lease M-438-01, CCC issued DBOC an enforcement notice on September 16, 2009, stating that DBOC was out of compliance with the 2007 Consent Cease and Desist Order because Manila clams were located outside Lease M-438-02 (CCC 2009b^{xxvii}). In response to the CCC notice, DBOC agreed to move the Manila clams from Lease M-438-01 to Lease M-438-02. In early December 2009, NPS and CCC issued letters of violation to DBOC for placement of Manila clam bags within one of the harbor seal exclusion areas (NPS 2009c^{xxviii}; CCC 2009a^{xxix}). In response, DBOC stated that clam bags had been placed within a harbor seal protection area because its global positioning system (GPS) coordinates were misread and the misplaced clams would be immediately removed (DBOC 2009a^{xxx}).

From 2009 to 2011, DBOC submitted several requests to CCC, CDFG, and/or NPS for improvements and alterations to the commercial shellfish operation (DBOC 2009b^{xxxi}, 2010f^{xxxii}, 2010m^{xxxiii}, 2010n^{xxxiv}, 2011c^{xxxv}, 2011e^{xxxvi}, 2011g^{xxxvii}). On March 30, 2010, CCC forwarded the DBOC proposals to NPS and requested a review of the list of proposed actions that were currently authorized under the DBOC SUP (CCC 2010a^{xxxviii}). Although some of the actions proposed in the development plans were authorized by the existing SUP, NPS was not able to fully evaluate the proposed development actions because supporting information such as design plans and other relevant data was not submitted. Several site drawings and development costs have been subsequently provided by DBOC, including an emergency storm damage replacement request in March 2011 (DBOC 2011a^{xxxix}, 2011b^{xl}). These, along with recent requests for a lease boundary adjustment and an updated site plan, are considered as requests under article 6 of the SUP (NPS 2008b). NPS has reviewed these requests, and many of the requests are considered as elements of alternatives presented in this EIS (see “Chapter 2: Alternatives”).

On September 29, 2011, CCC notified DBOC regarding potential noncompliance with several of the stipulations in the 2007 Consent Cease and Desist Order: “1) marine debris in Drakes Estero and on nearby coastal beaches, especially from abandoned, discarded, or fugitive plastic aquaculture materials; and 2) motorized vessel transit in the lateral sandbar channel near the mouth of the Estero during the seasonal restriction period established for harbor seal pupping sites in this area” (CCC 2011). CCC reaffirmed these continued violations and requested additional information from and meetings with DBOC in a subsequent letter on February 1, 2012 (CCC 2012a^{xli}).

On February 17, 2012, DBOC submitted an updated coastal development permit application to CCC for review and approval (DBOC 2012a^{xliii}). CCC informed DBOC on March 16, 2012 that this coastal development permit application was “incomplete because there is no evidence of landowner approval of the proposed work, a portion of the permit fee has not been submitted, and you [DBOC] have not provided sufficient detail regarding the additional work” (CCC 2012d). DBOC informed NPS in a letter dated May 7, 2012 that it would limit its current coastal development permit application to existing activities and would apply to CCC for a coastal development permit amendment in the future prior to future development (DBOC 2012c^{xliiii}). On June 5, 2012, DBOC responded to the NPS’s previous request

for additional information related to consistency with the SUP and provided an updated project description (DBOC 2012b^{xliiv}).

In a letter dated July 30, 2012, CCC informed DBOC of its continued noncompliance with several of the stipulations in the 2007 Consent Cease and Desist Order, including unauthorized boat use of the lateral channel during the seasonal closure for harbor seal pupping, unauthorized boat use of the lateral channel to obtain water sampling data, the collection and disposal of marine debris as a result of JOC and DBOC operations, and development within the coastal zone without an approved coastal development permit. CCC noted that DBOC's May 7, 2012 letter to NPS, "discusses development activities that DBOC has pursued without benefit of a CDP" and; therefore, CCC reiterated that "any development in the coastal zone portion of Point Reyes National Seashore requires a CDP from the Commission unless otherwise exempt from permit requirements" (CCC 2012b^{xlv}). CCC also notified DBOC that a new Cease and Desist Order is being considered, "Considering the current uncertainty of a new lease and SUP permit being granted to DBOC, the delays in the various proceedings, your [DBOC] apparent confusion over certain terms of the Order, and the continuing difficulties in bringing DBOC operations into compliance with the Coastal Act" (CCC 2012b). On October 24, 2012, CCC notified DBOC that CCC was commencing proceedings for issuance of cease and desist and restoration orders (CCC 2012e^{xlvi}). The letter summarized the violation as follows:

Unpermitted development including but not limited to: operation of offshore aquaculture facilities; construction/installation of structures and the performance of ongoing harvesting, processing, sales, and other operations; and violations of Consent Cease and Desist Order No. CCC-07-CD-11 (Drakes Bay Oyster Company) including installation of additional unpermitted development, boat traffic in the lateral sand bar channel near the mouth of the Estero during a seasonal restriction established for harbor seal pupping sites, and discharge of marine debris in the form of abandoned, discarded, or fugitive aquaculture materials. (CCC 2012e)

THE NEPA PROCESS

NEPA was passed by Congress in 1969 to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that could significantly affect it. Environmental reviews under NEPA involve integration of social, environmental, and economic factors within the framework of existing laws, regulations, policies, and agency guidance for project decisions. Although the Secretary's authority under section 124 is "notwithstanding any other provisions of law," the Department has determined that it is helpful to generally follow the procedures of NEPA. The requirements of NEPA as implemented by the Council on Environmental Quality (CEQ), as well as NPS regulations and guidance for NEPA implementation and decision-making (Director's Order 12 and Handbook: *Conservation Planning, Environmental Impact Analysis, and Decision-making* [DO-12]) (NPS 2001b), will therefore guide this environmental review process.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 2

Excerpts from National Park Service Management Policies (2006)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

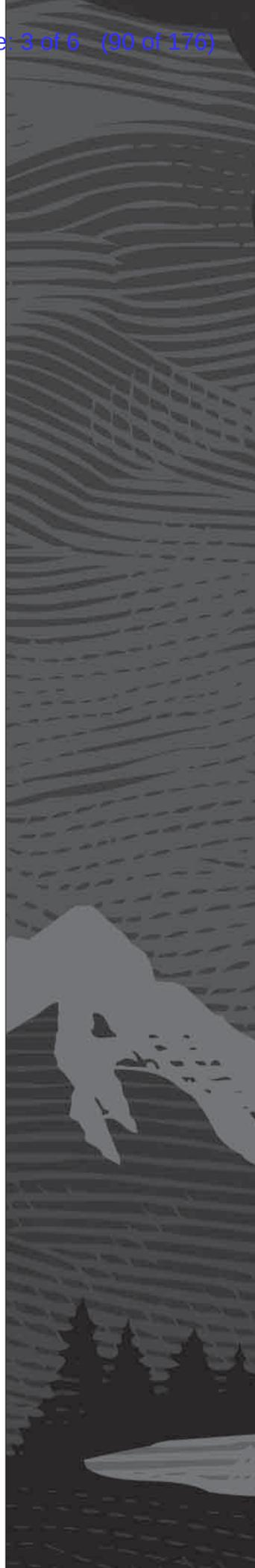
DRAKES BAY OYSTER COMPANY, ET AL.,)
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Exhibit 12

Office of the Inspector General, U.S. Department of the Interior
Investigative Report of Drakes Bay Oyster
Company Environmental Impact Statement
February 7, 2013 (excerpt)

Management Policies 2006



Wilderness Preservation and Management

All NPS lands will be evaluated for their eligibility for inclusion within the national wilderness preservation system. For those lands that possess wilderness characteristics, no action that would diminish their wilderness eligibility will be taken until after Congress and the President have taken final action. The superintendent of each park containing wilderness will develop and maintain a wilderness management plan or equivalent document. Wilderness considerations will be integrated into all planning documents to guide the preservation, management, and use of the park's wilderness area and ensure that wilderness is unimpaired for future use and enjoyment as wilderness.

A wilderness is an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.



track the status of the wilderness designation process in Congress.

6.2.4 Designated Wilderness

After the President’s wilderness recommendation is formally sent to and considered by Congress, Congress may subsequently enact the legislation needed to include the area within the national wilderness preservation system as “designated” and/or “potential” wilderness. The National Park Service will assist the department and Congress in this process as requested. Lands released by Congress from further wilderness consideration will be managed in accordance with the NPS Organic Act and all other laws, executive orders, regulations, and policies applicable to nonwilderness areas of the national park system.

6.3 Wilderness Resource Management

6.3.1 General Policy

For the purposes of applying these policies, the term “wilderness” will include the categories of eligible, study, proposed, recommended, and designated wilderness. Potential wilderness may be a subset of any of these five categories. The policies apply regardless of category except as otherwise provided herein.

In addition to managing these areas for the preservation of the physical wilderness resources, planning for these areas must ensure that the wilderness character is likewise preserved. This policy will be applied to all planning documents affecting wilderness.

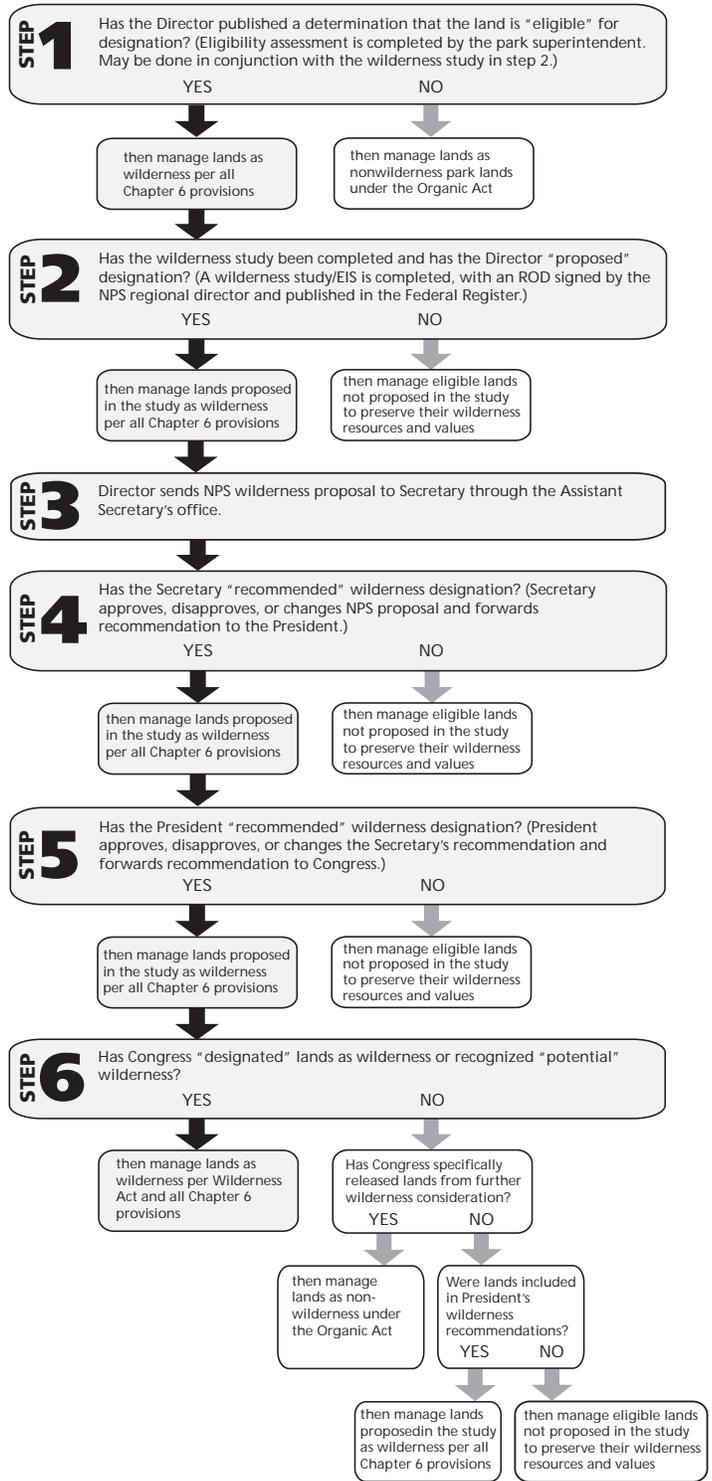
The National Park Service will take no action that would diminish the wilderness eligibility of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed. Until that time, management decisions will be made in expectation of eventual wilderness designation. This policy also applies to potential wilderness, requiring it to be managed as wilderness to the extent that existing nonconforming conditions allow. The National Park Service will apply the principles of civic engagement and cooperative conservation as it determines the most appropriate means of removing the temporary, nonconforming conditions that preclude wilderness designation from potential wilderness. All management decisions affecting wilderness will further apply the concept of “minimum requirement” for the administration of the area regardless of wilderness category. The only exception is for areas that have been found eligible, but for which, after completion of a wilderness study, the Service has not proposed wilderness designation. However, those lands will still be managed to preserve their eligibility for designation.

(See *Minimum Requirement* 6.3.5)

6.3.2 Responsibility

NPS responsibility for carrying out wilderness preservation mandates will be shared by the Director, regional directors, and superintendents of parks with eligible, study area,

WILDERNESS REVIEW AND MANAGEMENT PROCESS



proposed, recommended, and designated wilderness. Interagency cooperation and coordination and training responsibilities will also be carried out at the Washington, D.C., region, and park levels. Specific wilderness management responsibilities will be assigned at each of these administrative levels to carry out these responsibilities effectively and to facilitate efforts for establishing agency and interagency consistency in wilderness management techniques.

Superintendents will provide the information needed to prepare an annual wilderness report to Congress and to report to the Director on the status of wilderness management in the national park system. Based on this information, the Associate Director for Visitor and Resource Protection will provide the Directorate with recommendations and advice to permanently establish a system of accountability, consistency, and continuity for NPS wilderness management.

6.3.3 Consistency

The National Park Service will seek to achieve consistency in wilderness management objectives, techniques, and practices on both an agency and an interagency basis. Accordingly, the National Park Service will seek to maintain effective intra-agency and interagency communications, and will encourage, sponsor, and participate in intra-agency and interagency training and workshops designed to promote the sharing of ideas, concerns, and techniques related to wilderness management. However, the need for interagency consistency will in no way diminish any established NPS wilderness standards and values.

6.3.4 Wilderness-related Planning and Environmental Compliance

Policies on wilderness planning and compliance include the following.

6.3.4.1 Zoning for Wilderness

When necessary, all categories of wilderness may be zoned for visitor experiences and resource conditions consistent with their wilderness values within the established management zoning system for each park. However, management zoning or other land use classifications cannot and will not diminish or reduce the maximum protection to be afforded lands with wilderness values. Transition zones adjacent to wilderness may be identified to help protect wilderness values, but no transitional or “buffer” zones are appropriate within wilderness boundaries.

6.3.4.2 Wilderness Management Planning

The superintendent of each park containing wilderness resources will develop and maintain a wilderness management plan or equivalent planning document to guide the preservation, management, and use of these resources. The wilderness management plan will identify desired future conditions, as well as establish indicators, standards, conditions, and thresholds beyond which management actions will be taken to reduce human impacts on wilderness resources.

The park’s wilderness management plan may be developed as a separate document or as an action component of another planning document. Whether prepared as a stand-alone plan or as part of another planning document, all wilderness management plans must meet the same standards for process and content as specified in this section 6.3.4. Wilderness management plans will be supported by appropriate documentation of compliance with the National Environmental Policy Act and the National Historic Preservation Act. The plan will be developed with

public involvement and will contain specific, measurable management objectives that address the preservation and management of natural and cultural resources within wilderness as appropriate to achieve the purposes of the Wilderness Act and other legislative requirements.

(See *Visitor Carrying Capacity* 8.2.1)

6.3.4.3 Environmental Compliance

Proposals having the potential to impact wilderness resources will be evaluated in accordance with NPS procedures for implementing the National Environmental Policy Act. Those procedures include the use of categorical exclusions, environmental assessments (EAs), or environmental impact statements (EISs). Administrative actions impacting wilderness must be addressed in either the environmental assessment or environmental impact statement accompanying the approved wilderness management plan or as a separate environmental compliance document.

Managers contemplating the use of aircraft or other motorized equipment or mechanical transportation within wilderness must consider impacts to the character, esthetics, and traditions of wilderness before considering the costs and efficiency of the equipment.

In evaluating environmental impacts, the National Park Service will take into account (1) wilderness characteristics and values, including the primeval character and influence of the wilderness; (2) the preservation of natural conditions (including the lack of man-made noise); and (3) assurances that there will be outstanding opportunities for solitude, that the public will be provided with a primitive and unconfined type of recreational experience, and that wilderness will be preserved and used in an unimpaired condition. Managers will be expected to appropriately address cultural resources management considerations in the development and review of environmental compliance documents impacting wilderness resources.

(Also see *Director’s Order #12: Conservation Planning, Environmental Impact Analysis, and Decision-making*)

6.3.5 Minimum Requirement

All management decisions affecting wilderness must be consistent with the minimum requirement concept. This concept is a documented process used to determine if administrative actions, projects, or programs undertaken by the Service or its agents and affecting wilderness character, resources, or the visitor experience are necessary, and if so how to minimize impacts. The minimum requirement concept will be applied as a two-step process that determines

- ◆ whether the proposed management action is appropriate or necessary for administration of the area as wilderness and does not cause a significant impact to wilderness resources and character, in accordance with the Wilderness Act; and

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**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 3

District court Docket # 72-9
National Park Service letter of January 25, 2005 (with attached Department of the
Interior memorandum of Feb. 26, 2004)

L1425
Tract 02-106 PORE

January 25, 2005

Mr. Kevin Lunny
17300 Sir Francis Drake
Inverness, CA 94937

Dear Kevin:

We are in receipt of the California Coastal Commission letter dated January 7, 2005. We concur with the proposed demolition described in your Removal and Restoration Plan dated January 6, 2005. We also agree with the extension of the removal date to February 15, 2005.

As we discussed in our meeting last week, other aspects of the removal and restoration plan such as processing on-site will have to be discussed further. As we have discussed, there is the issue of the potential wilderness designation. As we could not recall whether you received a copy of the enclosed document at our last meeting we've enclosed the Solicitor's memorandum for your reference. Before you closed escrow on the purchase, we wanted to make sure you had a copy for review.

Finally, after review of the lease agreement this week with Johnson Oyster Company, we did notice that the NPS retains the right of refusal regarding the reservation of use and occupancy. We are not sure if that may complicate the transfer, but wanted to discuss it with you.

Sincerely,



Don L. Neubacher
Superintendent

Enclosures

cc w/c encs:
Nicole Walthall, NPS Field Solicitors Office
Sheila Ryan, California Coastal Commission

DLNeubacher:an 01/25/05



IN REPLY REFER TO

United States Department of the Interior

OFFICE OF THE SOLICITOR

San Francisco Field Office
1111 Jackson Street, Suite 735
Oakland, California 94607

RECEIVED
Point Reyes
National Seashore

MAR 5 '04

<input type="checkbox"/>	ASST. SOLIC.
<input type="checkbox"/>	SPEC. PK. DIV.
<input type="checkbox"/>	LAW ENFORC.
<input type="checkbox"/>	RES./SCIENCE
<input type="checkbox"/>	RANGE CORN.
<input type="checkbox"/>	FIRE MGT.
<input type="checkbox"/>	INTERP.
<input type="checkbox"/>	CULT. RES.
<input type="checkbox"/>	MANE.
<input type="checkbox"/>	CONTRACTS
<input type="checkbox"/>	PERMITS
<input type="checkbox"/>	PLANNING
<input checked="" type="checkbox"/>	ADMIN.

February 26, 2004

To: Superintendent
Point Reyes National Seashore

From: Field Solicitor
San Francisco Field Office

Re: Point Reyes Wilderness Act

As requested, this memorandum opinion reviews the Point Reyes wilderness situation as it related to the Johnson Oyster Company 40-year Reservation of Use and Occupancy which expires in 2011, or might be terminated sooner for cause or other processes. The Wilderness Act of 1964, and the Point Reyes Wilderness Act of 1976, provide the guidance for implementation of wilderness within the Seashore and are the basis for NPS's obligations to manage the subject land and waters toward conversion of the potential wilderness areas to wilderness status.

In conjunction with the Seashore authorization Act of 1962, the State of California, by 1965 legislation (copy attached), conveyed to the United States all of the right, title and interest of the State in lands one-quarter mile seaward of the mean high tide. More precisely the State granted "all the tide and submerged lands or other lands beneath navigable waters situated within the boundaries of the Point Reyes National Seashore . . ." to the United States. Excepted from this grant and reserved to the State were the "right to fish upon, and all oil, gas and other hydrocarbons in the lands . . . together with the right to explore or prospect . . ." within the tidal and submerged lands. However, these reserved rights were not to be "exercised in such manner as to cause . . . unnecessary pollution of the coastal waters", and no "well or drilling operations of any kind shall be conducted upon the surface of such lands."

On October 18, 1976, the Point Reyes Wilderness Act designated 25,370 acres as wilderness, and 8003 acres as potential wilderness. Public Law 94-544, Oct. 18, 1976. The area designated as potential wilderness (2811 acres) for area 2 of three areas

included the waters of the Drakes Estero and the adjoining inter-tidal land and upon which Johnson Oyster Farm operates a commercial oyster business.¹ (map attached)

This Congressional designation of the wilderness and potential wilderness (see the House and Senate discussions of the legislation in the Congressional Record -copy attached) was made notwithstanding a September 8, 1976 letter written by John Kyl, Assistant Secretary of the Interior, to James A. Haley, Chairman of the Committee on Interior and Insular Affairs wherein he stated the Department's position on the Point Reyes Wilderness Act. While DOI was largely supportive of the Act, Mr. Kyl's letter said that the Department did not recommend the inclusion of the tidelands extending one-quarter mile offshore within the boundaries of Point Reyes, as granted by the State of California as potential wilderness. According to the Kyl's letter, the State's retention of mineral and fishing rights rendered this area "inconsistent with wilderness." This letter is the only record in the legislative history that raises this point in the area's wilderness and potential wilderness designation. After review of the 1965 State Act, the Wilderness Act, Point Reyes Wilderness Act, case law and present day NPS Directors' orders and Management Policies, it is the view of this office that the remarks in the Kyl letter are not only inaccurate but overridden by the Congressional action, as explained below.

The 1965 State Act is very limited in its two reservations of rights, i.e., public right to fish and severely restricted mineral exploration access, i.e., no surface disturbance of any kind. Both reservations would not conflict with the Secretary converting the potential water area and shore land wilderness acres into designated wilderness. Further, notwithstanding the Departments' letter, the Congress ultimately designated 25,370 wilderness and 8000 potential wilderness acres which exceeded the acreage recommended by the Administration. This reflects that Congress did not heed Mr. Kyl's recommendation and conclusions and enacted its preferred wilderness act.

Addressing the potential wilderness lands and water, the House Report 94-1680, accompanying the eventually enacted Bill (HR 8002) states that it was its intent that there be "efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." (copy attached) The designations are implemented by the Park Service's 2001 Management Policies on wilderness which state that "[I]n the process of determining suitability, lands will not be excluded solely because of existing rights or privileges (e.g., mineral exploration and development, *commercial*

1. It is noted that the State continues to issue to Johnson Oyster Company commercial allotments in Drakes Estero which seem to be in conflict with the 1965 State legislative grant and 1976 Congressional mandate to convert the bays of the Estero into wilderness status. On the other hand, the continued public fishing in the Estero is consistent with the State legislative grant and the conversion to wilderness status.

Further, since the United States owns the tide and submerged lands in Drakes Estero, it clearly follows that permission of NPS is appropriate for commercial activities taking place on those granted lands.

operations...”² Further, the Park Service’s Management Policies clearly state that the Park Service must make decisions regarding the management of potential wilderness even though some activities may temporarily detract from its wilderness character. The Park Service is to manage potential wilderness as wilderness to the extent that existing non-conforming conditions allow. The Park Service is also required to actively seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation. 6.3.1. Wilderness Resource Management, General Policy. (selected excerpts attached)

Hence, the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e., the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non conforming use can be eliminated.³



Ralph G. Mihan

2. See the District Court ruling that past commercial activities, in this case timber harvesting, do not preclude an area’s wilderness designation. Minnesota Public Interest Research Group v. Butz, 401 F. Supp. 1276, 1329 (1975)

3. The status of the Johnson Oyster Company will be addressed in a separate document.

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**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
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INJUNCTION PENDING APPEAL**

Exhibit 4

District court Docket # 72-10
National Park Service letter of March 28, 2005

L1425
Tract 02-106 PORE

March 28, 2005

Mr. Kevin Lunny
17300 Sir Francis Drake
Inverness, CA 94937

Dear Kevin:

Based on several phone calls we have received this week, we want to reiterate our guidance to you regarding the transfer of the Johnson Oyster Company site to your family. We are sending you this letter to ensure clarity and to avoid any misunderstanding.

1. Demolition and clean-up of the site was authorized in our January 25, 2005 letter. We appreciate your effort to eliminate the accumulated debris along the shoreline.
2. Before any permit may be issued regarding the shoreline access parcel, we require a site plan to review with Marin County and the Coastal Commission. As you know, we have requested this site plan several times in the past month. A site plan with annotation of the building upgrades needed will be used to develop conditions of the permit agreement. At present, without the map, we are unable to determine permit boundaries. Once we have determined permit boundaries, the Park Service will contract an appraiser to determine a fair market rental fee for the use of parklands. Fair market value fees are required by law and policy.
3. Once the site plan is received, park staff will prepare a preliminary environmental screening form required by the National Environmental Policy Act. If no measurable impacts are anticipated, a categorical exclusion from any further compliance will be issued. However, if moderate impacts are anticipated an environmental assessment may be required. At present, we do not believe additional compliance will be necessary.
4. Regarding the septic system, we require verification of approval by the County of Marin that the processing plant wastewater is approved for use. No processing may be conducted onsite until a sewage system is approved by the County of Marin for processing and the building is certified and approved by the State Department of Food and Agriculture.

5. Regarding the transfer of the Reservation and Use Agreement for 1.43 acres of land until 2012, we have reviewed the agreement and the transfer does not require our concurrence. However, we would appreciate a letter that indicates the date when you have accepted the legal responsibility for the Use Agreement.
6. As we have discussed with you, any building upgrades will require standard building construction documents and our approval before the work may be implemented. We do not anticipate any problems if your rehabilitation is within existing building footprints as you've indicated.
7. Regarding the 2012 expiration date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date.
8. The transfer of the water and septic leach field permits were sent to you last week and will be complete when the copies with your signatures are returned to our office.

Most of the above points were covered during my meeting last week with your consultant, Lisa Bush, the Coastal Commission, and Marin County staff. We do not anticipate any major problems, but all of the above are standard requirements that would be required in a similar situation.

We appreciate the work you have done at the site and look forward to working with you in the future.

Sincerely,

A handwritten signature in blue ink, appearing to be 'DLS' with a stylized flourish.

Don L. Neubacher
Superintendent

cc:

Sheila Ryan, California Coastal Commission
Curtis Havel, Marin County Community Development Agency

DLNeubacher:an 03/28/05

IN THE UNITED STATES COURT OF APPEALS
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**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
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INJUNCTION PENDING APPEAL**

Exhibit 5

District court Docket # 42-1 (excerpt)
Latham & Watkins letter of March 28, 2005 on behalf of DBOC

505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
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www.lw.com

LATHAM & WATKINS LLP

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July 6, 2010

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

File No. 502976-0000

Re: Special Use Permit for Drakes Bay Oyster Company

Dear Secretary Salazar:

I am writing to you on behalf of Kevin and Nancy Lunny (“the Lunnys”), owners of the Drakes Bay Oyster Company (“DBOC”), to request that you enable DBOC to continue to occupy and utilize the buildings and lands on the shores of Drakes Estero, located within Point Reyes National Seashore (“PRNS”), a unit of the National Park Service (“NPS”).

DBOC is a family business operated by the Lunny family, fourth and fifth generation farmers and long-term Point Reyes residents who have lived at the historic “G” Ranch, overlooking Drakes Estero. Since acquiring the business in 2004, the Lunnys have been operating a sustainable, environmentally-friendly local business that provides jobs for the community and gives visitors to PRNS a valuable cultural and historic experience.

We were encouraged to hear of your recent statement at the Great Outdoors Conference that DBOC would continue to operate within PRNS. As you acknowledged, the oyster farm has existed in PRNS for many years. In fact, commercial oyster production has taken place within Drakes Estero for over seventy years—since the early 1930s, approximately three decades before Congress established PRNS in 1962. DBOC now produces both oysters and clams as part of its operations and is the last operating oyster cannery in the State of California.

As background, and as discussed in more detail below, DBOC operates under both State and Federal permits. With respect to the former, DBOC cultivates shellfish on the bottomlands in Drakes Estero pursuant to leases from the California Department of Fish and Game, which were renewed for 25 years in 2004, and thus expire in 2029. As to the latter, DBOC operates under a Reservation of Use and Occupancy (“RUO”) executed in 1972 between NPS and the previous owners of the oyster farm and under several ancillary special use permits issued by NPS. The RUO and the other permits expire in 2012; however, the RUO contains a renewal

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clause, which provides for the issuance of a special use permit that would “run concurrently with and...terminate upon expiration of the State water bottom allotments....”

Questions have been raised regarding the legal authority of NPS to issue a special use permit that would allow DBOC to continue operating past 2012, given that Drakes Estero was designated “potential wilderness” in 1976, pursuant to the Point Reyes Wilderness Act, Public Law 95-544. Notably though, the designation of Drakes Estero as “potential wilderness” was never meant to preclude the continued operations of DBOC. As is evident from relevant legislative history and environmental reviews, Drakes Estero was designated as “potential wilderness” rather than wilderness because of the understanding that oyster cultivation would continue, in light of California’s retained interest in leasing the bottomlands for shellfish cultivation.

Moreover, and importantly, in October of 2009 Congress expressly authorized the Department of the Interior to issue DBOC a special use permit to continue its operations past 2012. As this letter describes, and given Congress’s recent directive, there are multiple important reasons to issue such a permit, including the rich history of oyster farming in Drakes Estero and the myriad cultural, recreational, educational and ecological benefits DBOC provides.

I. RICH HISTORY OF MARICULTURAL OPERATIONS IN DRAKES ESTERO

Oyster farming has enjoyed a long history in Drakes Estero. The Miwok Indians were the original “oyster-farm operators,” with their harvesting of native shellfish beginning thousands of years ago. In fact, their ancient oyster middens are still present in the estero. Commercial oyster farming began in the estero in the 1930s, with the original allotment recorded in the name of David C. Drier on January 18, 1934 for the purpose of growing oysters.¹ Although several transfers occurred during those early years, for most of its commercial history, the estero was farmed by Johnson’s Oyster Company. In 2004, the Lunny family purchased the farm from Johnson’s Oyster Company and have sought to adopt many of the same sustainable practices used by the Miwoks in order to conserve the important natural resources of the area.

This long history of maricultural operations has been routinely recognized as a valid and important use of Drakes Estero. The legislative history of the Point Reyes National Seashore Act, for example, is replete with references to both the history and legacy of oyster farming and the important benefits it provides to PRNS. For instance, during congressional hearings on the establishment of PRNS, former NPS Director Conrad Wirth explained that the “[e]xisting commercial oyster beds and an oyster cannery at Drakes Estero...should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.”² Comments made during the Senate hearings

¹ See NPS, Environmental Assessment/Initial Study Joint Document, Johnson Oyster Company, Marin County, Point Reyes National Seashore, at 8 (May 1998).

² NPS, Conrad L. Wirth, Director, Report on the Economic Feasibility of the Proposed Point Reyes National Seashore at 20 (1961), included in the Hearings Before the Subcommittee on Public Lands of the Committee on

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on the proposed PRNS legislation echoed this view: “[t]his proposed legislation provides a balanced use between the public and private interests concerned [because] the oyster and commercial fisheries would be able to continue operation and provide both recreation and economic value to the seashore.”³

In the early 1970s, when Congress began considering designating wilderness areas within PRNS, the importance of the oyster operations was affirmed. Senator John Tunney, who introduced the PRNS wilderness legislation, reiterated that “[e]stablished private rights of landowners and leaseholders will continue to be respected and protected. The existing agriculture and aquaculture uses can continue.”⁴ Similarly, Representative John Burton underscored that the legislation’s intent was to “preserve the present diverse uses of the Seashore,” including the commercial oyster operations in Drakes Estero.⁵ The Department of Interior itself recommended that an express wilderness designation would be inappropriate: “Commercial oyster farming operations take place in this estuary and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness.”⁶

Until very recently, NPS consistently agreed with these conclusions and appeared supportive of the continued use of Drakes Estero for maricultural operations. The RUO itself, for example, contains a renewal clause, which provides that “[u]pon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property....”⁷

Additionally, in the Final Environmental Impact Statement prepared by NPS evaluating the potential impacts associated with designating certain PRNS lands as wilderness, NPS discussed the “oyster-farm operation” and noted that while removing the oyster farm might remove human activities from the estero, there would be a “loss of some compensating values. Besides its economic benefits to the community, the farm has decided interpretive importance as a popular ‘living exhibit,’ where visitors have the unique opportunity to observe the operation

Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S.486, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes (Mar. 28, 29, and 31, 1961).

³ Hearings Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S.476, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes at 17 (Mar. 28, 29, and 31, 1961).

⁴ Hearings on S.1093 and S.2472 Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, 94th Cong. 271 (1976).

⁵ *Id.* at 272-73.

⁶ Letter dated September 8, 1976, from John Kyl, Assistant Secretary of the Interior, to U.S. Representative James A. Haley, Chairman, Committee on Interior and Insular Affairs, House of Representatives, U.S. House Report No. 94-1680, 94 U.S. Code and Congressional News 5593.

⁷ JOC Grant Deed to the United States, Exh. C, § 11 (Nov. 9, 1972). The clause, in fact, only requires that the special use permit “run concurrently with and will terminate upon the expiration of the State water bottom allotments....” Those “State water bottom allotments” refer to a renewable lease issued by the California Department of Fish and Game, which has granted DBOC the right to cultivate oysters in Drakes Estero through 2029. California Department of Fish & Game Amendment No. 2 to Indenture of Lease, M-438-01 (Dec. 2, 2005). Accordingly, issuance of a SUP that would “run concurrently with” the State water bottom allotments would be consistent with the state authorizations and would allow the oyster farm to continue operating through 2029.

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and to purchase freshly grown oysters. These are appropriate purposes at Point Reyes, a recreational-category park.”⁸

NPS continued to recognize the value of the oyster operations in its 1980 PRNS General Management Plan (still in effect), which includes the following management objectives: “[t]o monitor and improve maricultural operations, in particular the oyster farm operation in Drakes Estero,” and “[t]o monitor and support productive land uses and activities [including maricultural activities] which are consistent with historic patterns.”⁹ As recently as 1998, NPS conducted an environmental assessment pursuant to the National Environmental Policy Act (“NEPA”) of the potential impacts of improving and substantially expanding the oyster farm operations. Although the planned expansion did not take place because of funding shortfalls, NPS’ support of the project demonstrates the agency’s recognition that oyster farm operations are a valid use of PRNS land.¹⁰

II. DBOC IS A BENEFICIAL USE OF PRNS

Recently, some questions have been raised regarding the types of environmental impacts oyster farming may be having on Drakes Estero. In 2006 and 2007, for example, PRNS staff prepared and released several versions of a report entitled *Drakes Estero: A Sheltered Wilderness Estuary* that purported to evaluate the impacts of DBOC on Drakes Estero and erroneously concluded that oyster farming is having an adverse ecological impact on PRNS resources. This effort to portray DBOC as having detrimental impacts appeared to be part of an attempt to “eliminate” DBOC as a “non conforming use” so that Drakes Estero and the surrounding tract of land could be converted to wilderness status. Indeed, PRNS staff took the position that they were legally precluded from issuing a special use permit to DBOC to extend operations past 2012 because of the “potential wilderness” designation.¹¹ However, there is no such restriction on NPS’ authority.¹² Moreover, NPS has allowed non conforming uses in other potential wilderness areas.¹³

⁸ See NPS, Final Environmental Statement FES 74-18, Proposed Wilderness: Point Reyes National Seashore, California, at 56 (Apr. 23, 1974).

⁹ NPS, General Management Plan: Point Reyes National Seashore, at 2-3 (Sept. 1980).

¹⁰ See, e.g., Letter from Don Neubacher, Superintendent, PRNS, to Bank of Oakland (Nov. 22, 1996) (explaining the relationship between the oyster farm and NPS and noting that NPS is “genuinely excited about the planned changes” to the oyster farm and “pledge[s] to work with the Johnsons and the Bank of Oakland to make the project successful”); see also Thomas Yeatts, Point Reyes Light, *Park Planned Big New Oyster Plant* (Aug. 2, 2008) (documents obtained by the newspaper indicate that, beginning in 1996, “Point Reyes National Seashore (PRNS) staff developed a plan to renovate the Johnson Oyster Company’s rickety buildings and septic system, and proposed new two-story development”).

¹¹ See, e.g., Field Solicitor Opinion Re: Point Reyes Wilderness Act (Feb. 26, 2004) (concluding that the Wilderness Act, the Point Reyes Wilderness Act, and NPS Management Policies mandate that NPS convert potential wilderness, such as Drakes Estero, to wilderness status “as soon as the non conforming use can be eliminated”).

¹² For clarification, we disagree with NPS’ legal interpretation that any law precludes the agency from allowing DBOC to continue operating past 2012. There is no mandate found in any applicable law or guidance that

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From the outset it should be noted that since purchasing the farm in 2004, the Lunnys have dedicated significant time and resources to cleaning up the oyster farm and resolving past violations of law that had occurred during their predecessor's operations. *See, e.g.*, Peter Jamison, Point Reyes Light, *Park Service to Close Historic Oyster Farm* (June 15, 2007) (discussing DBOC's cleanup and quoting PRNS spokesman John Dell'Osso, "Kevin [Lunny] has done a fantastic job of cleaning up. Everything we've asked him to do, he's done."). The Lunnys remain committed to continuing those cleanup efforts and ensuring that DBOC is operated in a sustainable, environmentally-friendly manner.¹⁴ As such, the family—along with their many supporters in western Marin County environmental and agricultural circles—was disheartened by the NPS report, which appeared to, among other things, overlook the many beneficial effects of oyster culture operations on the environment.¹⁵

In order to help resolve the debate regarding the scope of impacts of DBOC and the availability of scientific analysis, the National Academy of Sciences ("NAS") agreed to help clarify the scientific issues regarding maricultural activities and produced two reports. The first report, which was released in May of 2009, assessed the adequacy of the claimed scientific bases for NPS staff's preliminary conclusions in their Drakes Estero reports, and evaluated the

would require NPS to convert "potential wilderness" to wilderness on a particular timetable. The Wilderness Act, for example, does not use the phrase "potential wilderness," much less define when "potential wilderness" must become actual wilderness, if ever. NPS management policies, director's orders, and reference manuals are all silent with respect to a specific timetable for conversion and only provide that, once "non conforming uses" have ceased, NPS will publish a Federal Register notice to change the designation from potential wilderness to wilderness. *See* NPS Reference Manual #41 at Appendix H, *Wilderness Preservation and Management* (1999). There is no requirement, however, mandating that NPS ensure that such operations cease by a certain date, and there has been no environmental review of the impact of removing the oyster cultivation operation in Drakes Estero.

¹³ Examples of non conforming uses that NPS has allowed in other potential wilderness areas include: i) operation of motorized boats in potential wilderness areas of Grand Canyon National Park; ii) public use of Five High Sierra camps and the Ostrander ski hut in potential wilderness areas of Yosemite Valley; iii) operation by Southern California Edison of hydroelectric dams in potential wilderness areas of Sequoia-Kings Canyon National Park; and iv) use of roads in Cumberland National Seashore located in potential wilderness. As discussed below, the oyster farm provides greater cultural, recreational, educational and ecological benefits than these examples of non conforming uses.

¹⁴ Prior to the Lunny family's ownership, the oyster farm had suffered from a degree of deterioration that led to a number of violations of law, including the Coastal Development Act, and enforcement actions by the California Coastal Commission ("CCC"). The Lunnys are working with the CCC to resolve those violations and ensure that DBOC's operations fully comply with all applicable local, state, and federal regulations. Additionally, an incident recently occurred at the farm in which clam-growing equipment was inadvertently placed into a Harbor Seal Protection Area. The Lunnys immediately took steps to rectify this mistake and are implementing processes to ensure that such mistakes do not occur in the future. Moreover, many of NPS' allegations that the oyster farm adversely impacts harbor seals have since been retracted at very recent Marine Mammal Commission ("MMC") hearings. Like the NAS, the MMC has become involved specifically to resolve the debate surrounding the oyster farm's impact on harbor seals. The MMC has held a series of panel hearings, and is working on a report that is due out in the near future.

¹⁵ The Department of Interior's Inspector General investigated the various versions of the NPS Report and found that scientific inaccuracies undermined NPS' conclusions regarding the oyster farm's ecological impact on Drakes Estero.

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available data specifically regarding the impact of DBOC's maricultural activities.¹⁶ The second report, which was released in February of 2010, broadly addresses best management practices and performance standards to enhance the overall benefits of shellfish mariculture and minimize any negative ecological effects.¹⁷

The first NAS report reasonably concluded that "there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current (2008-2009) levels of production and under current (2008-2009) operational practices, including compliance with restrictions to protect eelgrass, seals, water-birds, and other natural resources." NAS 2009 Report at 6. The report goes on to discuss some of the over-looked beneficial effects that DBOC is having on the estero, including: (i) the potential that oyster culture in Drakes Estero is replacing the important "filtering capacity and biogeochemical processing that was lost in the mid-19th century and subsequent decades with the overharvest and functional elimination of the native *Olympia* oyster" (*id.* at 68); (ii) the possible beneficial effects on eelgrass in the area, given that eelgrass has approximately doubled in Drakes Estero from 1991 to 2007 (*id.*); (iii) the positive economic impact for the region—including employment, tax revenue, and local food production (*id.* at 64); and (iv) the positive visitor experience, given that DBOC "preserves a piece of local and regional culture and history" (*id.* at 65).

As noted above, the oyster farm provides significant ecological benefits to Drakes Estero. DBOC's oysters are helping to "restor[e] an historic baseline ecosystem" by acting as a proxy for native oysters. *Id.* at 22; *see also* NAS 2010 Report at 13-14. The oysters are also known as "ecosystem engineers" and "foundation species" (NAS 2009 Report at 18) that bolster the ecosystem's resilience against abnormal events like phytoplankton blooms or sedimentation from storm water run-off (*id.* at 22, 23).¹⁸

In addition to the work done by the oysters, the Lunnys themselves are committed to conserving and protecting PRNS. For example, DBOC is the only oyster farm in California to produce and hatch its own seeds on site, greatly reducing the risk of introducing contaminants and invasive species. And it employs an environmentally-friendly off-bottom "hanging culture" method, used by less than 5% of U.S. oyster farmers due to the labor-intensive hand harvesting required. The Lunnys are also dedicated to educating others about conservation and the environment. The oyster farm offers free tours to the public to inform them about the history of oyster farming in PRNS, oysters' value as a beneficial source of protein, coastal ecosystems, and the nature and efficacy of organic sustainable farming. Similarly, the oyster farm offers its

¹⁶ See National Academy of Sciences, National Research Council, Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California (2009) ("NAS 2009 Report").

¹⁷ See National Academy of Sciences, National Research Council, Ecosystem Concepts for Sustainable Bivalve Mariculture (2010) ("NAS 2010 Report").

¹⁸ The second NAS report provides further detailed discussion of the general ecosystem services that bivalves perform. NAS 2010 Report at 10-11. In fact, these ecosystem services are so significant that the report recommends quantifying their economic value, as well as developing policies to encourage restoration of bivalves in more ecosystems so they can improve and benefit from these services. *See id.*

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facilities to researchers and participates in research on native oysters, estuarine biodiversity, and human health protection.

For all these reasons, many of PRNS' 2.5 million annual visitors flock to DBOC, which carries on the long-standing tradition of oyster farming in Drakes Estero and remains as the last operating oyster cannery in the State. With its cultural, recreational, educational and ecological benefits, the oyster farm undoubtedly "enhances visitors' experience in the estero." *Id.* at 65.

By contrast, should the oyster farm be shut down, the community would be adversely impacted in significant ways. Not only would PRNS lose the numerous visitors for whom DBOC is a destination, but the oyster farm employees who have specialized skills would lose their livelihood, and the low-income housing that DBOC provides for their employees would be demolished. This in turn would effect the local ranches, where many of DBOC's employees' family members work. Furthermore, removing the oysters could have an adverse effect on the Drakes Estero ecology, including its water quality.

Both NAS reports ultimately affirm that there is no ecological justification to deny DBOC a special use permit. And given that Congress has expressly authorized NPS to issue a special use permit, there is no legal justification either. NPS should issue DBOC a special use permit to continue its operations past 2012.¹⁹

III. NPS AUTHORITY TO ISSUE A SPECIAL USE PERMIT FOR CONTINUED OPERATIONS PAST 2012

In October of 2009, Congress provided a definitive answer to the legal question of whether NPS has the authority to issue a special use permit to DBOC to continue operating past 2012. The answer was a resounding yes.

Specifically, Congress directed that:

Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ('existing authorization') within Drake's Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior *is authorized to issue a special use permit with the same terms and conditions as the existing authorization*, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take

¹⁹ As you know, Senator Dianne Feinstein contacted you when the first NAS report was issued and expressed her concern that NPS had "exaggerated the effects of the oyster population on the Estero's ecosystem" and appeared to be continuing to ignore the potential beneficial impacts of maricultural operations. *See* Letter from Dianne Feinstein to the Honorable Ken Salazar (May 5, 2009). We agree with Sen. Feinstein's conclusion that the NAS report "does not present any compelling ecological reason for refusing to renew the Drakes Bay Oyster Company lease in 2012."

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into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization.

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88 § 124 (2009) (emphasis added).

As such, now that the second NAS report has been issued, DBOC respectfully requests that NPS provide a proposed special use permit to DBOC incorporating the same terms and conditions under which DBOC currently operates, including an appropriate annual fee.

Thank you very much for your attention to this matter. We understand that Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks, recently visited DBOC on February 4, 2010. The Lunnys would be happy to host you, Secretary Salazar, and any other interested Department of Interior officials on a tour of the oyster farm, and/or provide any follow-up information requested. We look forward to meeting with you and your staff to discuss this matter in further detail, and will be in touch to set this up. If you have any questions or would like additional information, please do not hesitate to reach me at (415) 395-8136.

Best regards,



M.B.

Karl S. Lytz
of LATHAM & WATKINS LLP

cc: The Honorable Dianne Feinstein
Will Shafroth, Deputy Assistant Secretary for Fish, Wildlife and Parks
Jonathan Jarvis, Director, National Park Service
George Turnbull, Acting Regional Director, Pacific West Region, National Park Service
Cicely Muldoon, Superintendent, Point Reyes National Seashore

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 6

District court Docket # 65-1
Secretary of the Interior Decision Memorandum of November 29, 2012



THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 29 2012

To: Director, National Park Service

Through: Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

From: Secretary *Ken Salazar*

Subject: Point Reyes National Seashore – Drakes Bay Oyster Company

After giving due consideration to the request of the Drakes Bay Oyster Company (“DBOC”) to conduct commercial operations within Point Reyes National Seashore in the State of California (“Point Reyes”), I have directed the National Park Service (NPS) to allow the permit to expire at the end of its current term. This decision is based on matters of law and policy including:

- 1) The explicit terms of the 1972 conveyance from the Johnson Oyster Company to the United States of America. The Johnson Oyster Company received \$79,200 for the property. The Johnson Oyster Company also reserved a 40 year right of use and occupancy expiring November 30, 2012. Under these terms and consideration paid, the United States purchased all the fee interest that housed the oyster operation. In 2004, DBOC acquired the business from Johnson Oyster Company, including the remaining term of the reservation of use and occupancy and was explicitly informed “no new permit will be issued” after the 2012 expiration date.
- 2) The continuation of the DBOC operation would violate the policies of NPS concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore.

The area within Point Reyes that Congress identified as potential wilderness includes a biologically rich estuary known as Drakes Estero, consisting of several tidal inlets tributary to Drakes Bay, on the southern side of the Point Reyes peninsula. Drakes Estero encompasses approximately 2,500 acres of tidelands and submerged lands and is home to one of the largest harbor seal populations in California. In 1999 the eastern portion of Drakes Estero, known as the Estero de Limantour, was converted from potential to designated wilderness, becoming the first (and still the only) marine wilderness on the Pacific coast of the United States outside of Alaska. DBOC’s commercial mariculture operation is the only use in the remaining portion of Drakes Estero preventing its conversion from potential to designated wilderness.

Therefore, I direct you to:

- 1) Notify DBOC that both the Reservation of Use and Occupancy (“RUO”) and the Special Use Permit (“SUP”) held by DBOC expire according to their terms on November 30, 2012.

- 2) Allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.
- 3) Effectuate the conversion of Drakes Estero from potential to designated wilderness.

Because of the importance of sustainable agriculture on the pastoral lands within Point Reyes, I direct that you pursue extending permits for the ranchers within those pastoral lands to 20-year terms.

Finally, I direct you to use all existing legal authorizations at your disposal to help DBOC workers who might be affected by this decision, including assisting with relocation, employment opportunities, and training.

I have taken this matter very seriously. I have personally traveled to Point Reyes National Seashore, visited DBOC, met with a wide variety of interested parties on all sides of this issue, and considered many letters, scientific reports, and other documents. The purpose of this memorandum is to document the reasons for my decision and to direct you to take all necessary and appropriate steps to implement it.

I. Factual and Legal Background

A. Point Reyes National Seashore

Congress authorized the establishment of Point Reyes National Seashore in the Act of September 13, 1962, Pub. L. No. 87-657, 76 Stat. 538, codified as amended at 16 U.S.C. §§ 459c through 459c-7 (2012). The NPS subsequently began to acquire privately owned lands within Point Reyes's legislated boundaries. In 1965 the State of California granted the United States all of the State's right, title, and interest to the tide and submerged lands within the national seashore except for certain mineral rights. On October 20, 1972, the national seashore was formally established by publication of the required notice in the Federal Register. 37 Fed. Reg. 23,366 (1972). The legislation does authorize the Secretary of the Interior to lease agricultural ranch and dairy lands within Point Reyes' pastoral zone in keeping with the historic use of that land. The enabling legislation does not authorize mariculture.

Point Reyes comprises approximately 71,067 acres, of which approximately 65,090 are federally owned. The National Seashore, located about an hour's drive north of San Francisco, currently attracts more than two million visitors per year. In 1976, Congress designated 25,370 acres of land within Point Reyes as wilderness and identified an additional 8,003 acres of land and water as potential wilderness. Act of October 18, 1976, Pub. L. No. 95-544, 90 Stat. 2515, and § 1(k)

of the Act of October 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692, 2693.¹ With respect to the area identified as potential wilderness, Congress provided, “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” *Id.* § 3.² The House of Representatives committee report accompanying the October 18, 1976, act states, “As is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.” H.R. REP. NO. 94-1680 at 3 (1976).³ Sections 4(c) and 4(d)(5) of the Wilderness Act prohibit commercial activities such as mariculture in designated wilderness. 16 U.S.C. §§ 1133(c) and 1133(d)(5).

B. Commercial Mariculture Operations within Point Reyes National Seashore

Since the 1930s commercial oyster operations have been conducted on lands and waters now included within Point Reyes. In 1958 Charles W. Johnson assumed control over state-issued water-bottom leases in Drakes Estero, and in 1961 he purchased five acres of uplands near the estero and expanded an existing oyster processing facility on it. In 1972 Mr. Johnson, dba Johnson Oyster Company (JOC), conveyed fee title to his property to the United States, reserving in the deed a 40-year right to use and occupy 1.5 acres of land, including the processing facility, “for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary [*sic*; probably should read “complementary”] food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incident thereto.” The reservation indicated that possibility of a new permit after the RUO’s expiration but in no way suggested that one would definitely be issued. The United States paid JOC fair market value for the interest the United States acquired, taking into consideration the value of the 40-year reserved use and occupancy. The deed of conveyance refers to the reservation as “a terminable right to use and occupy.”

In 2004 DBOC purchased the assets of Johnson’s Oyster Company, including the remaining term of the RUO, with full knowledge that the reserved use and occupancy would expire in 2012.

On March 28, 2005, then Superintendent of Point Reyes, Don Neubacher, sent a letter to DBOC “to ensure clarity and avoid any misunderstanding...[r]egarding the 2012 expiration date and the potential wilderness designation, based on our legal review, no new permits will be issued after that date.”

¹ The official map referenced in both pieces of legislation indicated that Congress actually designated approximately 24,200 acres of land as wilderness and identified approximately 8,530 acres of additional land as potential wilderness.

² It is worth noting that under the statute’s clear terms the conversion from potential to designated wilderness occurs automatically by operation of law when the required Federal Register notice is published.

³ In 1999 approximately 1,752 acres of uplands, tidelands, and submerged lands within Point Reyes were converted from potential to designated wilderness. 64 Fed. Reg. 63,057 (1999).

The DBOC subsequently applied for, and was issued, an NPS special use permit authorizing it to use approximately 1,050 acres offshore and 3.1 additional acres onshore for its operations. Both authorizations—the RUO and the SUP— expire by their own terms on November 30, 2012.

C. SEC. 124

In 2009 Congress enacted SEC. 124 of the Act of October 30, 2009, Pub. L. No. 111-88, 123 Stat. 2932, which provides in its entirety as follows:

SEC. 124. Prior to the expiration on November 30, 2012, of the Drakes Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drake's (sic) Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

D. Preparation of Draft and Final Environmental Impact Statements

After SEC. 124 was enacted in 2009, the NPS initiated the process of preparing a draft environmental impact statement (DEIS) to analyze the environmental impacts associated with various alternatives related to a decision to permit or not to permit DBOC's continued commercial operations in Drakes Estero and to obtain robust public input into this matter. The NPS issued a scoping notice, hosted public scoping meetings, produced and released to the public a thousand-page-long DEIS, and invited and accepted public comments on the DEIS. As a result of that public process, the NPS prepared a final environmental impact statement (FEIS), which includes responses to public comments on the DEIS. The NPS released the FEIS to the public earlier this month.

SEC. 124 does not require me (or the NPS) to prepare a DEIS or an FEIS or otherwise to comply with the National Environmental Policy Act of 1969 (NEPA) or any other law. The "notwithstanding any other provision of law" language in SEC. 124 expressly exempts my decision from any substantive or procedural legal requirements. Nothing in the DEIS or FEIS that the NPS released to the public suggests otherwise. As the FEIS explained:

Although the Secretary's authority under Section 124 is 'notwithstanding any other provision of law,' the Department has determined that it is helpful to

generally follow the procedures of NEPA. The EIS provides decision-makers with sufficient information on potential environmental impacts, within the context of law and policy, to make an informed decision on whether or not to issue a new SUP. In addition, the EIS process provides the public with an opportunity to provide input to the decision-makers on the topics covered by this document.

FEIS at 2. The FEIS also stated, “The NEPA process will be used to inform the decision of whether a new [special use permit] should be issued to DBOC for a period of 10 years.” *Id.* at 5. The NEPA process, like SEC. 124 itself, does not dictate a result or constrain my discretion in this matter.

II. Discussion

I understand and appreciate that the scientific methodology employed by the NPS in preparing the DEIS and FEIS and the scientific conclusions contained in those documents have generated much controversy and have been the subject of several reports. Collectively, those reports indicate that there is a level of debate with respect to the scientific analyses of the impacts of DBOC’s commercial mariculture operations on the natural environment within Drakes Estero.

Although there is scientific uncertainty and a lack of consensus in the record regarding the precise nature and scope of the impacts that DBOC’s operations have on wilderness resources, visitor experience and recreation, socioeconomic resources and NPS operations, the DEIS and FEIS support the proposition that the removal of DBOC’s commercial operations in the estero would result in long-term beneficial impacts to the estero’s natural environment.⁴ Thus while the DEIS and FEIS do not resolve all the uncertainty surrounding the impacts of the mariculture operations on Drakes Estero, and while they are not material to the legal and policy factors that provide the central basis for my decision, they have informed me with respect to the complexities, subtleties, and uncertainties of this matter and have been helpful to me in making my decision.⁵

SEC. 124 grants me the authority and discretion to issue DBOC a new special use permit, but it does not direct me to do so. SEC. 124 also does not prescribe the factors on which I must base my decision. In addition to considering the documents described above, I gave great weight to matters of public policy, particularly the public policy inherent in the 1976 act of Congress that identified Drakes Estero as potential wilderness.

In enacting that provision, Congress clearly expressed its view that, but for the nonconforming uses, the estero possessed wilderness characteristics and was worthy of wilderness designation.

⁴ While NEPA review was not legally required, NEPA as a general matter does not require absolute scientific certainty or the full resolution of any uncertainty regarding the impacts of the federal action. *See League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060 (9th Cir. 2012) and *Lands Council v. McNair*, 537 F.3d 981,988 (9th Cir 2008) (*en banc*) (overruled in part on other grounds by *Winter v. Natural Res. Def. Council*,, 555 U.S. 7 (2008).

⁵ In a letter to me dated November 27, 2012, counsel for DBOC has asserted that the FEIS is “fatally flawed” and I should avoid any consideration “of the FEIS in its entirety.” My decision today is based on the incompatibility of commercial activities in wilderness and not on the data that was asserted to be flawed.

Congress also clearly expressed its intention that the estero become designated wilderness by operation of law when “all uses thereon prohibited by the Wilderness Act have ceased.” The DBOC’s commercial operations currently are the only use of the estero prohibited by the Wilderness Act. Therefore, DBOC’s commercial operations are the only use preventing the conversion of Drakes Estero to designated wilderness. Since the RUO and SUP allowing DBOC’s commercial operations in the estero will expire by their own terms, after November 30, 2012, DBOC no longer will have legal authorization to conduct those operations, and approximately 1,363 acres can become designated wilderness.

Although SEC. 124 grants me the authority to issue a new SUP and provides that such a decision would not be considered to establish any national precedent with respect to wilderness, it in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero. With that in mind, my decision effectuates that Congressional intent.

III. Implementation

Based on the foregoing, I hereby direct that you expeditiously take all necessary and appropriate steps to implement my decision. My decision means that, after November 30, 2012, DBOC no longer will be legally authorized to conduct commercial operations within Point Reyes. Accordingly, I direct that the NPS publish in the Federal Register the notice announcing the conversion of Drakes Estero from potential to designated wilderness. I direct that the NPS allow DBOC a period of 90 days after November 30, 2012, to remove its personal property, including shellfish and racks, from the lands and waters covered by the RUO and SUP in order for DBOC to minimize the loss of its personal property and to meet its obligations to vacate and restore all areas covered by the RUO and SUP. No commercial activities may take place in the waters of Drakes Estero after November 30, 2012. During this 90 day period, DBOC may conduct limited commercial activities onshore to the extent authorized in writing by NPS.

I am aware that allowing DBOC’s existing authorizations to expire by their terms will result in dislocation of DBOC’s business and may result in the loss of jobs for the approximately 30 people currently employed by DBOC. I therefore direct that you use existing legal authorities to ameliorate to the extent possible the economic and other impacts on DBOC’s employees, including providing information and other assistance to those employees to the full extent authorized under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, codified as amended at 42 U.S.C. §§ 4601-4655. Additionally, I direct you to develop a plan for training and to work with the local community to identify job opportunities for DBOC employees..

Finally, the Department of the Interior and the NPS support the continued presence of dairy and beef ranching operations in Point Reyes’ pastoral zone. I recognize that ranching has a long and important history on the Point Reyes peninsula, which began after centuries old Coast Miwok traditions were replaced by Spanish mission culture at the beginning of the 19th century. Long-term preservation of ranching was a central concern of local interests and members of Congress as they considered legislation to establish the Point Reyes National Seashore in the late 1950s and early 1960s. In establishing the pastoral zone (Point Reyes enabling legislation PL 87-657, Section 4) Congress limited the Government’s power of eminent domain and recognized “the

value to the Government and the public of continuation of ranching activities, as presently practiced, in preserving the beauty of the area.” (House Report No. 1628 at pages 2503-04). Congress amended the Point Reyes enabling legislation in 1978 to authorize the NPS to lease agricultural property that had been used for ranching or dairying purposes. (Section 318, Public Law 95-625, 92 Stat. 3487, 1978). The House Report explained that the “use of agricultural lease-backs is encouraged to maintain this compatible activity, and the Secretary is encouraged to utilize this authority to the fullest extent possible.” (House Report 95-1165, page 344).

Accordingly, I direct that the Superintendent work with the operators of the cattle and dairy ranches within the pastoral zone to reaffirm my intention that, consistent with applicable laws and planning processes, recognition of the role of ranching be maintained and to pursue extending permits to 20-year terms for the dairy and cattle ranches within that pastoral zone. In addition, the values of multi-generational ranching and farming at Point Reyes should be fully considered in future planning efforts. These working ranches are a vibrant and compatible part of Point Reyes National Seashore, and both now and in the future represent an important contribution to the Point Reyes’ superlative natural and cultural resources.

IV. Conclusion

My decision honors Congress’s direction to “steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status” and thus ensures that these precious resources are preserved for the enjoyment of future generations of the American public, for whom Point Reyes National Seashore was created. As President Lyndon Johnson said on signing the Wilderness Act in 1964, “If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it.”

cc: Regional Director, Pacific West Region, NPS
Superintendent, Point Reyes National Seashore

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 7

District court Docket # 64-1
Declaration of Cicely Muldoon

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

DRAKES BAY OYSTER COMPANY, *et al.*)
)
Plaintiffs,)
)
v.)
)
KENNETH L. SALAZAR, in his official)
capacity as Secretary, U.S. Department of)
the Interior, *et al.*,)
)
Defendants.)

Case No. 4:12-cv-06134-YGR

**DECLARATION OF
CICELY MULDOON IN SUPPORT
OF FEDERAL DEFENDANTS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Date: January 25, 2013
Time: 2:00 p.m.
Location: Courtroom 5

1 I, Cicely Muldoon, declare as follows:

2 1. I am the Superintendent of Point Reyes National Seashore (“Seashore”) and have
3 held this position since May 2010. I have been employed with the National Park Service
4 (“NPS”) since 1985 and have worked in the following locations: Sitka National Historical Park
5 (Alaska), Buffalo National River (Arkansas), Golden Gate National Recreation Area
6 (California), Office of the Director, NPS (Washington D.C.), Presidio of San Francisco
7 (California), San Juan Island National Historical Park (Washington), Pinnacles National
8 Monument (California), Pacific West Regional Office, NPS (California), and Point Reyes
9 National Seashore. I have served as Superintendent at San Juan Island National Historical Park,
10 Pinnacles National Monument, and now at the Seashore. I am responsible for all aspects of park
11 management and operations, including the management and oversight of Drakes Bay Oyster
12 Company’s (“DBOC”) commercial operation.

13 2. I have read the Memorandum of Points and Authorities in Support of Plaintiffs’
14 Motion for a Preliminary Injunction, as well as the supporting declarations that Plaintiffs filed
15 with their motion and the Declaration of Barbara Goodyear filed concurrently herewith. I
16 provide this declaration to respond to the Declarations of Kevin Lunny and William T. Bagley in
17 Support of Motion for Preliminary Injunction. I have personal knowledge of the matters set forth
18 in my declaration, and would and could competently testify concerning them if called as a
19 witness.

20 **I. STAYING THE FEDERAL REGISTER NOTICE DECLARING DRAKES**
21 **ESTERO TO BE WILDERNESS WILL HARM THE PUBLIC INTEREST**

22 3. The Secretary’s November 29, 2012 Memorandum cited his desire to honor
23 Congress’s direction for the Estero, which provided that the NPS should “steadily continue to
24 remove all obstacles to the eventual conversion of these [potential wilderness] lands and waters
25 to wilderness status.” Declaration of Barbara Goodyear (“Goodyear Decl.”) Ex. 1 at 7. His
26 Memorandum further explained that issuance of a new SUP to DBOC would have violated NPS
27 policies relating to commercial uses in national parks and non-conforming uses in potential

1 wilderness or designated wilderness. *Id.* at 1. As explained in the Final Environmental Impact
2 Statement (“FEIS”), under the *NPS Management Policies 2006*, the NPS is required to manage
3 potential wilderness as wilderness to the extent that existing non-conforming uses allow. In
4 addition, the *NPS Management Policies* state that the NPS will engage the public as it determines
5 the most appropriate means of removing nonconforming uses that delay wilderness designation.
6 Goodyear Decl. Ex. 3 at 56 and 462.

7 4. Congress enacted the Wilderness Act in 1964 to ensure for present and future
8 generations of Americans an “enduring resource of wilderness.” Now that Drakes Estero has
9 attained full wilderness status, the American public now can enjoy the only marine wilderness on
10 the West Coast outside of Alaska.

11 5. The wilderness of Drakes Estero is unique because it is easily accessible to the
12 millions of people who call the Bay Area home and to the millions of visitors who come to the
13 Bay Area every year. Having a readily accessible and tangible example of the “enduring
14 resource of wilderness” that Congress envisioned is a priceless treasure that the NPS is honored
15 to protect.

16 6. Designated wilderness is the highest level of conservation protection for federal
17 lands. As a wilderness unit within a national park, Drakes Estero will now be managed to the
18 highest conservation standards. It will be managed to preserve its wilderness character and
19 wilderness resources in an unimpaired condition. In accordance with the Wilderness Act, it will
20 be devoted to the public purposes of recreational, scenic, scientific, educational, conservation,
21 and historical use. Goodyear Decl. Ex. 35 at 78.

22 7. In their brief, plaintiffs imply that most of the lands within the Seashore should be
23 dedicated to “perpetual use ... for agriculture.” Plaintiffs’ Memorandum at 19, line 12. This
24 statement reveals a fundamental misunderstanding of the reasons that led Congress to create and
25 then expand the Seashore.

26 8. Areas that make up the national park system such as Point Reyes National
27 Seashore are cumulative expressions of a single national heritage. Each park unit tells multiple
28

1 stories about our nation’s heritage. As described below in paragraphs 11-14, the NPS interprets
 2 the Seashore’s rich cultural history and its superlative natural features. The lands and resources
 3 preserved by Congress on the Point Reyes peninsula are not dedicated to one single purpose.
 4 Rather, Congress directed that these lands be “administered ... without impairment of [their]
 5 natural features, in a manner which provides for such recreational, educational, historic
 6 preservation, interpretation, and scientific research opportunities as are consistent with, based
 7 upon, and supportive of the maximum protection, restoration and preservation of the natural
 8 environment.” Goodyear Decl. Ex. 10. (Act of October 18, 1976, Pub. L. No. 94-544, 90 Stat.
 9 2515 (1976)). Wilderness in Drakes Estero tells part of the Point Reyes story, just as the ranches
 10 within the pastoral zone tell a different part of that story. In the same way, visitors to the
 11 Seashore can experience the proud history of northern California’s dairy industry and the
 12 untrammeled and natural qualities that made Drakes Estero worthy of wilderness designation.
 13 The interests of the whole of the American public can only be realized at Point Reyes if the NPS
 14 is allowed to implement all of the objectives set forth by Congress.

15 **II. ONGOING NPS INTERPRETIVE PROGRAMS AT THE SEASHORE SERVE**
 16 **THOUSANDS OF VISITORS AND STUDENTS EACH YEAR**

17 9. In his declaration, Mr. Lunny claims that DBOC conducts tours free of charge for
 18 school groups (over 40 in 2012), local non-profit organizations, private organizations, and
 19 government agencies, and that the termination of DBOC’s operation will harm the public interest
 20 in interpretive programs and education at the Seashore. Lunny Decl. ¶ 81.

21 10. The NPS has a professionally staffed and multi-faceted interpretive program that
 22 serves all sectors of the visiting public at many different locations within the Seashore. In 2012,
 23 the three park visitor centers provided information, exhibits, audio visual programs and park
 24 orientation to more than 273,000 visitors at the Bear Valley Visitor Center, more than 116,000
 25 visitors at the Lighthouse Visitor Center, and more than 37,000 visitors at the Kenneth C Patrick
 26 Visitor Center.

1 **III. RELOCATION ASSISTANCE AND HOUSING SUPPORT SERVICES WILL BE**
2 **AVAILABLE TO DBOC EMPLOYEES WHO LIVE ONSITE**

3 15. In paragraphs 72-74 of his declaration, Mr. Lunny states that the fifteen people
4 (DBOC employees and their families) who live on site will be forced to move, pay more for
5 housing, and will be forced to live in a more dangerous community.

6 16. The DBOC employees and families who live onsite have been invited to apply for
7 federal relocation assistance under the Uniform Relocation Assistance and Real Property
8 Acquisition Policies Act of 1970 ("Relocation Act"). For qualified tenants, the Act authorizes
9 the NPS to pay moving expenses and provide replacement housing assistance either in the form
10 of up to 42 months of rental differential assistance or mortgage payment assistance. This is a
11 significant federal benefit that greatly reduces the long-term costs associated with new housing.

12 17. The Relocation Act further requires the NPS to locate "decent, safe and sanitary
13 housing" in an area of each tenant's choosing. This requirement ensures that tenants will not be
14 relocated into substandard housing. The NPS is in the process of working with tenants to
15 complete the application process.

16 18. There are five residences onsite, two owned by the United States and three mobile
17 homes owned by DBOC. Pursuant to the Stipulation Re: Briefing Schedule, filed December 14,
18 2012 (Doc. #29), NPS has agreed take on responsibility for removal of the three mobile homes
19 that are DBOC's personal property. Because DBOC will not be required to remove these mobile
20 homes at the close of the 90 day period, existing tenants who qualify for relocation benefits will
21 be able to continue to occupy these residences until decent, safe and sanitary housing is found.

22 19. Likewise, workers who occupy the two residences owned by the United States
23 and who qualify for relocation benefits will be permitted to remain on site until suitable
24 relocation housing is found.

25 20. In Mr. Lunny's Declaration at Paragraphs 24 and 70 he states that DBOC will be
26 forced to lay off thirty-one full time employees. However, based on information provided to me
27 by Counsel to DBOC on December 4, 2012, DBOC has only identified twenty-two employees.

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IV. THE CESSATION OF DBOC’S OPERATION WILL NOT HARM HISTORIC RESOURCES

21. In Mr. Lunny’s Declaration at Paragraph 80 he asserts that DBOC is a local landmark and that the loss of DBOC will deprive the public of the opportunity to learn about the long history of aquaculture in Drakes Estero. The NPS determined that DBOC’s facilities do not qualify as historic resources under the National Historic Preservation Act. Goodyear Decl. Ex. 3, App. 3 at D-39. The California State Historic Preservation Officer (SHPO) concurred with this determination. *Id.* at D-40.

V. THE CESSATION OF DBOC’S OPERATION WILL NOT HARM THE LOCAL ECONOMY

22. In Mr. Lunny’s Declaration, he asserts that DBOC is one of the most visited places in the Seashore, with more than 50,000 visits. Lunny Decl. ¶¶ 80-83.

23. Point Reyes National Seashore receives more than 2 million visitors annually. For 2012, more than 2.2 million people visited the Seashore. Multiple locations within the park have documented visitation that exceeds 50,000 people annually including Bear Valley, Limantour, McClures Beach, Pierce Point Ranch, Mount Vision, South Beach, North Beach, Tomales Bay, Drakes Beach, Abbotts Lagoon, Headlands, Kehoe Beach, Lighthouse, and Palomarin. These extensive public visitation opportunities will continue unabated.

24. In paragraph 87 of his declaration, Mr. Lunny claims that terminating DBOC’s business will harm the local economy by removing income that otherwise would be generated by DBOC visitors.

25. As reported in the FEIS, Point Reyes National Seashore is a large contributor to the economy of Marin County. Goodyear Decl. Ex. 3 at 273-74. For example, in 2005, the Seashore generated \$5.3 million in tax revenue for Marin and Sonoma counties and \$2.9 million in tax revenue for the State of California. In 2010, the approximately 2 million recreational visitors to the Seashore contributed nearly \$85 million in local spending, approximately \$77 million of which was spent by non-local visitors. The non-local spending supported 981 jobs,

1 approximately \$41.2 million in labor income, and nearly \$68 million in total value added for the
2 local region (within 60 miles of the Seashore). NPS payroll at the Seashore supported a total of
3 153 private sector and NPS jobs in 2010. Maintaining these jobs resulted in approximately \$10
4 million in labor income and approximately \$12 million in value added for the region. This results
5 in a total impact of approximately \$51 million in labor income and \$80 million in value added,
6 approximately 0.5 percent of the county's total value added.

7 **VI. DBOC'S NONCOMPLIANCE WITH THE CALIFORNIA COASTAL ACT AND**
8 **OTHER PERMITTING REQUIREMENTS**

9 26. As part of my involvement in the oversight and management of DBOC's
10 operations, I have become familiar with the various enforcement orders that the California
11 Coastal Commission ("CCC") has issued to DBOC. These orders include a 2007 Cease and
12 Desist Order and a Notice of Intent to Commence Cease and Desist and Restoration Order
13 Proceedings, dated October 24, 2012.

14 27. The 2007 Cease and Desist Order cited DBOC for unpermitted development
15 consisting of offshore aquaculture operations, onshore processing and retail facilities, and related
16 residential use. Goodyear Decl. Ex. 36 . DBOC has not yet complied with the 2007 Cease and
17 Desist Order.

18 28. The CCC recently informed DBOC that it would be issuing a new Cease and
19 Desist Order and a Restoration Order because of DBOC's failure to comply with the 2007 Cease
20 and Desist Order and because of additional unpermitted development and activities consisting of
21 the following: operating boats in the lateral channel in Drakes Estero during harbor seal breeding
22 season; unpermitted discharge of marine debris; unpermitted backfilling of a long trench;
23 placement of clam bags in protected harbor seal areas; and placement of concrete planters, picnic
24 tables and refrigeration units in the coastal zone. Goodyear Decl. Ex. 34 at 1-2. Some of these
25 same instances, including the placement of manila clams, constitute a violation of the NPS
26 Special Use Permit ("SUP"). NPS sent a notice of this violation to DBOC on December 4, 2009.

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1 within this designated area could continue. The pastoral zone was depicted on map number NS-
2 PR-7002, dated August 15, 1961. Goodyear Decl. Ex.38, also depicted on FEIS at 15. Congress
3 ratified this map by specifically referring to it in section 4 of the 1962 legislation. Section 4 read
4 as follows:

5 No parcel of more than five hundred acres within the zone of approximately twenty-six
6 thousand acres depicted on map number NS-PR-7002, dated August 15, 1961 . . . shall be
7 acquired without the consent of the owner so long as it remains in its natural state, or is
8 used exclusively for ranching and dairying purposes including housing directly incident
9 thereto. The term 'ranching and dairying purposes', as used herein, means such ranching
10 and dairying, primarily for the production of food, as is presently practiced in the area.

11 Goodyear Decl. Ex. 9. (Act of September 13, 1962, Pub. L. No. 87-657, section 4, 76 Stat. 538
12 (1962).)

13 33. Map NS-PR-7002 shows that the pastoral zone includes most of the northern and
14 western portions of the Point Reyes peninsula. The pastoral zone forms the core of where dairy
15 and cattle ranching continue today. The map clearly shows that neither Drakes Estero nor the
16 upland areas where DBOC's onshore facilities are located were included within the designated
17 pastoral zone.

18 34. In 1970, Congress repealed section 4 of the 1962 Act through section 2b of the act
19 of April 3, 1970. Goodyear Decl. Ex. 39. (Act of April 3, 1970, Pub. L. No. 91-223, Section
20 2(b), 84 Stat. 90 (1970).) Section 4 of the 1962 enabling legislation had prohibited the use of
21 eminent domain within the pastoral zone and only allowed the NPS to acquire ranch lands from
22 willing sellers. Between 1962 and 1970, several ranchers in the pastoral zone sold their land to
23 developers, and the NPS was powerless to stop these sales. The remaining ranchers were
24 concerned that continuing land escalation prices and the high costs of ranching would lead to
25 more ranchers selling their land to developers, rather than keeping it pastoral in character. See
26 Goodyear Decl. Ex. 40 (Congressional Record – Senate, March 17, 1970.). With the repeal of
27 Section 4, Congress enabled the NPS to prevent further subdivision of the Point Reyes peninsula.
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1 35. In 1978, Congress added language authorizing the leasing of federally owned land
2 that was agricultural land prior to its acquisition. Section 318(b) of Public Law 95-625 (1978)
3 states the following:

4 Where appropriate in the discretion of the Secretary, he or she may lease federally owned
5 land (or any interest therein) which has been acquired by the Secretary under this Act,
6 and which was agricultural land prior to its acquisition. Such lease shall be subject to
7 such restrictive covenants as may be necessary to carry out the purposes of this Act. Any
8 land to be leased by the Secretary under this section shall be offered first for such lease to
9 the person who owned such land or was a leaseholder thereon immediately before its
10 acquisition by the United States.

11 Goodyear Decl. Ex.16. (Act of November 10, 1978, Pub. L. No. 95-625, title III, section 318[b],
12 92 Stat. 3467, 3487, codified at 16 U.S.C. 459c-5(a).) Section 318(c) also defined “agricultural
13 property” to mean “lands which were in regular use for, or were being converted to agricultural,
14 ranching, or dairying purposes as of May 1, 1978, together with the residential and other
15 structures related to the above uses of the property.” *Id.* (Act of November 10, 1978, Pub. L.
16 No. 95-625, title III, section 318[c], 92 Stat. 3487, codified as amended at 16 U.S.C. 459c-5(b).)

17 36. The NPS has never interpreted the 1978 Act as an authorization to “lease” Drakes
18 Estero or the adjacent uplands to Johnson or to DBOC. As a starting point, the uplands were
19 already subject to the terms of the 1972 Reservation of Use and Occupancy, reserved by Johnson
20 Oyster Company (“JOC”) when it sold its property to the United States, when the 1978 Act was
21 enacted. In addition, the submerged lands within the Estero had been designated potential
22 wilderness by Congress in 1976. As discussed in paragraphs 41-42 below, Congress directed
23 that the Estero be converted to full wilderness status as soon as the nonconforming uses had
24 ceased. Further, the 1978 Act only authorized the leasing of “lands,” not submerged lands or
25 waters. It would therefore have been inconsistent with Congressional direction to lease the
26 submerged lands within the Estero for continued aquaculture operations.

27 **VIII. THE PROCESS FOR WILDERNESS DESIGNATION AT THE SEASHORE**

28 37. In the early 1970s, the NPS began the process of evaluating which lands within
the Seashore might qualify for wilderness designation. The NPS published a Final

1 Environmental Statement, Proposed Wilderness Point Reyes National Seashore, in which the
2 NPS recommended that the Estero not be designated as wilderness. (Excerpts attached to Bagley
3 Declaration as Exhibit 8.)

4 38. The NPS's wilderness recommendation was forwarded by the Department of the
5 Interior to Congress. Goodyear Decl. Ex. 13 (H.R. Rep. No. 94-1680, at 2, (September 24,
6 1976)). During 1975 and 1976, there were several bills circulating in Congress regarding the
7 establishment of wilderness at the Seashore. On September 8, 1976, the Department of the
8 Interior recommended that Congress enact H.R. 7198 which would have designated 24,730 acres
9 within the Seashore as wilderness and 770 acres as potential wilderness. *Id.* at 5. Congress did
10 not enact H.R. 7198.

11 39. In 1975, Senators Tunney and Cranston of California and Representative Burton
12 of California introduced companion wilderness bills in the Senate and House. Goodyear Decl.
13 Ex. 41 at 269, 271. (Excerpts of Wilderness Additions – National Park System, Hearings before
14 the Subcommittee on Parks and Recreation, 94th Congress, February 5, 19 and March 2, 1976.)
15 As originally introduced, these bills (designated H.R. 8002 and S. 2472) would have created
16 three distinct wilderness units at Point Reyes totaling 38,700 acres. *Id.* at 250-253.
17 Congressman Burton explained that S. 2472 would designate Drakes Estero as wilderness (not
18 potential wilderness) because the “commercial oyster farm” would be classified as a “prior non-
19 conforming use.” *Id.* at page 273. Had this bill become law, the commercial aquaculture
20 operation would have been grandfathered into wilderness and would have been allowed to
21 continue for the long term. S. 2472 was never enacted.

22 40. Congress subsequently enacted a completely revised version of H.R. 8002 which
23 designated 25,370 acres as wilderness and 8,003 acres of land and water as potential wilderness.
24 The map accompanying the bill clearly depicted Drakes Estero as *potential* wilderness.
25 Goodyear Decl. Ex. 12. The President signed H.R. 8002 into law on October 18, 1976.
26 Goodyear Decl. Ex. 10. (Act of October 18, 1976, Pub. L. No. 94-544, 90 Stat. 2515 (1976).)
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1 41. The House Committee Report accompanying the final version of H.R. 8002 states
2 the following about the potential wilderness additions at Point Reyes:

3 As is well established, it is the intention that those lands and waters designated as
4 potential wilderness additions will be essentially managed as wilderness, to the extent
5 possible, with efforts to steadily continue to remove all obstacles to the eventual
6 conversion of these lands and waters to wilderness status.

6 Goodyear Decl. Ex. 13. (H.R. Rep. No. 94-1680, at 3, September 24, 1976.)

7 42. While H.R. 8002 was making its way through the legislative process, Congress
8 was also considering a bill, H.R. 13160, to establish wilderness at other national park units.
9 Although Point Reyes wilderness was not initially included in H.R. 13160, the Senate voted to
10 include Point Reyes wilderness designations in the bill in late September, 1976. Goodyear Decl.
11 Ex. 15. (Senate Report No. 94-1357, September 29, 1976.) The wilderness designations in
12 H.R. 13160 mirrored those in H.R. 8002, designating 25,370 acres of the Seashore as wilderness
13 and 8,003 acres as potential wilderness. H.R. 13160 contained an additional provision regarding
14 the mechanism for converting potential wilderness to designated wilderness. Section 3 of the bill
15 provided that “[a]ll lands which represent potential wilderness additions, upon publication in the
16 Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the
17 Wilderness Act have ceased, shall thereby be designated wilderness.” Goodyear Decl. Ex. 11.
18 (Act of October 20, 1976, Pub. L. No. 94-567, section 3, 90 Stat. 2692 (1970).) The Senate
19 Report explains the reason for this provision:

20 National Park Service wilderness proposals have embodied the concept of ‘potential
21 wilderness addition’ as a category of lands which are essentially of wilderness character,
22 but retain sufficient non-conforming structures, activities, uses or private rights so as to
23 preclude immediate wilderness classification. It is intended that such lands will
24 automatically be designated as wilderness by the Secretary by the publication of notice in
the Federal Register when the non-conforming structures, activities, uses or private rights
are terminated.”

25 Goodyear Decl. Ex. 15. (Senate Report No. 94-1357, September 29, 1976, at page 3.)

26 43. On December 4, 2012, the Department of the Interior published a Federal Register
27 notice informing the public that all uses prohibited by the Wilderness Act had ceased in Drakes
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1 Estero as of November 30, 2012 and that the area had converted to wilderness status. Goodyear
2 Decl. Ex. 29. The Department had used this same procedure before to notify the public about the
3 conversion of potential wilderness to designated wilderness. On November 18, 1999, the
4 Department published a Federal Register notice advising the public that uses prohibited by the
5 Wilderness Act had ceased on 1,752 acres of land located elsewhere within Point Reyes. Like
6 the Estero, these areas had also been designated as potential wilderness by Congress in 1976. (64
7 Fed. Reg. 63057 (November 18, 1999).)

8 **IX. THE “RIGHT TO FISH” RETAINED BY THE STATE IN THE 1965**
9 **SUBMERGED LAND CONVEYANCE ACT DOES NOT GIVE THE STATE**
10 **LEASING AUTHORITY OVER DBOC’S OFFSHORE OPERATIONS**

11 44. Mr. Lunny claims that the two leases issued by the California Fish and Game
12 Commission for his operation are “valid” and give him the “right to conduct oyster cultivation
13 operations” in the Estero. Lunny Decl. ¶¶ 5-8 and ¶¶ 77-79. Mr. Bagley’s Declaration claims
14 that correspondence from the California Fish and Game Commission (“CFG”) and the
15 California Department of Fish and Game (“CDFG”) confirm that the state retains leasing
16 authority over DBOC’s offshore operations.

17 45. The leases that DBOC claims are “valid” are lease numbers M-438-01 an M-438-
18 02. As described below, the leases were issued to JOC by the CFGC on June 25, 2004 over the
19 objection of the NPS.

20 46. Early in 2004, the park communicated its objections to CDFG regarding a 25 year
21 lease renewal. CDFG thereafter transmitted a letter to JOC indicating that “the Department [of
22 Fish and Game] would require that a federal/National Park Service (NPS) lease be in effect
23 concurrently with the state water bottom lease.” Goodyear Decl. Ex. 42 at 2. On March 15,
24 2004, NPS sent CDFG copies of legal opinions from the Department of the Interior Solicitor’s
25 Office which concluded that the NPS was obligated to convert the Estero to wilderness at the end
26 of 2012 when the existing Reservation of Use and Occupancy expired. Goodyear Decl. Ex. 43.

1 47. On June 14, 2004, CDFG recommended approval of the lease renewals to the
2 CFGC “for a period of twenty-five years, contingent on there being a Federal Reservation for the
3 land use within the Point Reyes National Seashore.” Goodyear Decl. Ex. 44.

4 48. On June 18, 2004, the NPS wrote a letter to the CFGC explaining that the
5 submerged leased lands proposed for renewal were ceded to the federal government by the state,
6 that Drakes Estero is a major natural resource of the Seashore, and that the “Estero is also
7 Congressionally-designated potential Wilderness and will convert to full Wilderness status in
8 2012.” Goodyear Decl. Ex. 45.

9 49. Although the CFGC issued the leases to Johnson, it included a provision in each
10 lease stating that the lease was “contingent on a concurrent federal Reservation of Use and
11 Occupancy for fee land in the Point Reyes National Seashore.” Goodyear Decl. Ex. 19 and Ex.
12 20. The Commission approved the transfer of the two state water bottom leases to DBOC on
13 March 18, 2005. Goodyear Decl. Ex. 21 and Ex. 22.

14 50. Since 2010, I have had several conversations and exchanged letters with the
15 Director of the CDFG and the Executive Director of the CFGC regarding the division of
16 responsibility between the state and the United States over DBOC’s operations. In relation to
17 these communications, I have reviewed and discussed the past correspondence from the CFGC
18 and CDFG to the NPS regarding jurisdiction over JOC’s and now DBOC’s operations. In
19 particular, I am familiar with the correspondence concerning whether the “right to fish” as
20 retained by the State of California in the 1965 Conveyance Act gives the state authority to issue
21 state water bottom leases for DBOC’s mariculture operation.

22 51. The most detailed letters on the “right to fish” issue were issued by the CDFG
23 Director in 2007 and 2008. On May 15, 2007, CDFG wrote to the Seashore and explained “that
24 the mariculture operation in question is properly within the primary management authority of the
25 [Seashore], not the Department.” CDFG’s letter analyzes the 1965 Conveyance Act’s
26 reservation of the “right to fish” as follows:
27
28

1 Consistent with Article 1, Section 25 of the California Constitution, this conveyance
2 carried a reservation of the right to fish in the waters overlying these lands. Although the
3 right to fish extends to both commercial and sport fishing, it does not extend to
4 aquaculture operations. Regardless of whether its purpose is commercial or recreational,
5 *fishing* involves the take of public trust resources and is therefore distinct from
6 aquaculture, which is an agricultural activity involving the cultivation and harvest of
7 private property.

8 Goodyear Decl. Ex. 7. On March 25, 2008, CDFG wrote to the California Assemblyman Jared
9 Huffman about this issue. CDFG reaffirmed the conclusion reached in its 2007 letter and
10 provided more in depth analysis for the Assemblyman:

11 Three considerations are evident here. First, the Fish and Game Code expressly
12 designates aquaculture as a form of agriculture and distinguishes it from commercial
13 fishing. Such a distinction is apparent in statutes predating the 1965 grant [referring to
14 the 1965 statute that conveyed the submerged lands in Drakes Estero to the United
15 States]. Further, aquaculture involves the culture and harvesting of animals that are
16 private property while fishing involves the permitted take of fish that are part of the
17 public trust. A corollary to this second consideration is that “the right to fish” over
18 tidelands is a *public right* and cannot be exclusive. By contrast, a state water bottom
19 lease confers on a person the *private right* to exclusively cultivate and harvest aquatic
20 organisms in the leased area. While the Fish and Game Code guarantees the right of
21 public access over the leased area for reasonable public trust uses, including fishing, we
22 do not believe aquaculturists would agree that “the right to fish” authorizes the public to
23 take their cultivated products. Finally, while “the right to fish” secures public access to
24 state lands that are compatible with fishing, *it does not authorize fishing* on those lands
25 and confers on the public no right they did not already have. The provision is properly
26 read in connection with (now) article 4, section 20 of the California Constitution, which
27 allows the Legislature to delegate to the Commission such powers relating to the
28 protection and propagation of fish and game as it sees fit. It is this provision, not ‘the
29 public right to fish,’ which authorizes the leasing of state water bottoms for aquaculture.

30 Goodyear Decl. Ex. 6 (emphasis in original; internal footnotes omitted). Footnote 2 of this letter
31 also discusses some of the early correspondence, stating: “Much has been made of
32 correspondence in 1965 and 1966 by then-Department Director W.T. Shannon, stating that the
33 oyster farm is covered by ‘the right to fish’ reservation. The two letters are brief, general, and
34 conclusory.” *Id.*

35 52. Mr. Bagley places great weight on this early correspondence and on a 1965
36 Opinion by the Attorney General of California. Bagley Decl. ¶ 9. The 1965 Opinion fails to

1 make mention an important point: that the state’s definition of the term “fish” in the Fish and
2 Game Code applies only to “wild” fish, not the private products of an aquaculture operation. Cal.
3 F&G Code § 45.

4 53. CDFG reviewed and provided input on the FEIS’s discussion of jurisdiction over
5 the Estero and the “right to fish” issue. On the basis of that input, the FEIS explained as follows
6 that the California Fish and Game Code defines “fish” as “*wild* fish, mollusks, crustaceans,
7 invertebrates, or amphibians, including any part, spawn or ova thereof.” Goodyear Decl. Ex. 3 at
8 7 (citing Cal. F&G Code § 45 (emphasis added)). In contrast to the “wild” organisms included
9 in the definition of “fish,” the California Fish and Game Code establishes that the products of an
10 aquaculture operation are the private property of the operator of that facility. Under the
11 California Fish and Game Code provisions on aquaculture, “the cultured progeny of wild plants
12 and animals . . . are the exclusive property of that person who cultured them or that person’s
13 successor in interest” (California Fish and Game Code section 15001). *Id.*

14 54. The California State Lands Commission (“CSLC”) agrees with CDFG’s opinion
15 that the right to fish does not encompass aquaculture. In addition, the CSLC’s letter also explains
16 that the state does not have leasing authority to issue aquaculture leases for the submerged lands
17 in the Estero. Goodyear Decl. Ex. 5.

18 55. DBOC has made two recent attempts to petition the California Fish and Game
19 Commission to take action to assert state jurisdiction over the Estero. The CFGC rejected both
20 of these requests.

21 56. At the CFGC hearing in April 12, 2012, DBOC’s lawyers along with former
22 Assemblyman Bagley urged the CFGC to adopt a resolution declaring that the “right to fish” as
23 retained by the state in the 1965 Conveyance Act meant that the state, not the NPS, had authority
24 over DBOC’s in-water operations. The CFGC refused to take the action requested by DBOC.

25 57. Several months later, on July 11, 2012, I received a letter from the CFGC wherein
26 the Commission stated that it had issued state water bottom leases to DBOC in the “proper
27 exercise of its jurisdiction.” The Commission then requested that the NPS issue DBOC a permit
28

1 for continued use of upland areas within Point Reyes. This letter must be looked at in the context
2 of the CFGC's action at its most recent hearing. Goodyear Decl. Ex. 46.

3 58. After the Secretary advised DBOC that its existing authorizations would be
4 allowed to expire, DBOC, at the CFGC's December 12, 2012 hearing, requested the removal of
5 the "contingency" clauses described above from its state water bottom leases. The CFGC,
6 knowing that the Secretary had declined to issue a 10 year SUP to DBOC, refused to take the
7 action requested by DBOC.

8 I declare under penalty of perjury that the foregoing is true and correct.

9 Signed January 9, 2013 in POINT REYES, California.



Cicely Muldoon

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 8

District court Docket # 63-1 (excerpt)
Stoel Rives LLP letter of November 1, 2012 on behalf of DBOC



12255 El Camino Real, Suite 100
San Diego, California 92130
main 858.794.4100
fax 858.794.4101
www.stoel.com

November 1, 2012

RYAN R. WATERMAN
Direct (858) 794-4114
rrwaterman@stoel.com

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)?



Hon. Secretary Ken Salazar
November 1, 2012
Page 2

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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November 1, 2012
Page 3

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.



Hon. Secretary Ken Salazar
November 1, 2012
Page 4

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

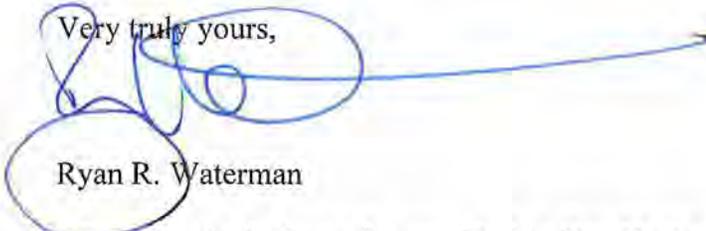
NPS's struggle to prepare a legally adequate FEIS for your consideration has been overtaken by the passage of time.

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



Hon. Secretary Ken Salazar
November 1, 2012
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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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 9

District court Docket # 64-2
Declaration of Brannon Ketcham

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DRAKES BAY OYSTER COMPANY, *et al.*)
)
Plaintiffs,)
)
v.)
)
KENNETH L. SALAZAR, in his official)
capacity as Secretary, U.S. Department of)
the Interior, *et al.*,)
)
Defendants.)

Case No. 4:12-cv-06134-YGR

**DECLARATION OF
BRANNON KETCHAM IN
SUPPORT OF FEDERAL
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013
Time: 2:00 p.m.
Location: Courtroom 5

1
2 I, Brannon Ketcham, declare as follows:

3 1. I have worked at Point Reyes National Seashore (“Seashore”) for more than 15 years
4 in various Resource Management positions including hydrologic technician and park hydrologist.
5 Since January 2010, I have been the Acting Management Assistant. As Management Assistant, my
6 responsibilities include oversight of the lands program, and coordination and oversight of parkwide
7 outreach and planning efforts. Prior to taking on the Management Assistant duties, I was the
8 Seashore hydrologist and was responsible for the fisheries, wetland and water quality restoration and
9 monitoring programs. I have overseen planning and compliance, contracting and implementation of
10 various large-scale ecological restoration projects including the 550-acre Giacomini Tidal wetland
11 restoration, the Coastal Watershed Restoration Project, and the Glenbrook Dam Removal Project
12 among others. I have a Master’s in Environmental Management with a focus on Water Resources
13 from the Nicholas School of the Environment at Duke University, and a Bachelor of Arts in Geology
14 from Pomona College.
15

16
17 2. Since fall 2010, I have been the project lead for the Seashore on the Draft and Final
18 Environmental Impact Statement (“EIS”) for the Drakes Bay Oyster Company (“DBOC”) Special
19 Use Permit. I am very familiar with DBOC’s operations, the correspondence between DBOC and the
20 Seashore, and the Seashore’s correspondence with DBOC’s predecessor the Johnson Oyster
21 Company. I am also familiar with correspondence from regulatory agencies regarding DBOC’s
22 operations. I have worked with federal, state and local regulatory agencies on various permitting and
23 jurisdictional issues related to DBOC’s operation, including the California Coastal Commission, the
24 U.S. Army Corps of Engineers, the Department of Fish and Game, the San Francisco Bay Regional
25 Water Quality Control Board and the National Marine Fisheries Service.
26
27
28

1 3. I have reviewed DBOC's Motion for a Preliminary Injunction, supporting
2 memorandum of points and authorities, and the declarations of Kevin Lunny, Robert Abbott, Richard
3 Steffel, Scott Luchessa and Laura Moran. I have personal knowledge of the matters set forth in this
4 declaration, and could and would testify thereto if called as a witness.
5

6 **I. REMOVAL OF DBOC'S OPERATIONS WILL NOT HARM WATER QUALITY**

7 4. Drakes Estero is a system of five branching bays, from west to east: Barries Bay,
8 Creamery Bay, Schooner Bay, Home Bay, and Estero de Limantour. The Mediterranean climate
9 supports dry conditions and limited freshwater input to the Estero in the summer months with most
10 rainfall occurring between November and March annually. Drakes Estero is characterized as a
11 shallow, open embayment, with an average subtidal depth of around 6.5 feet (CCC 2007). The
12 deepest measurements of Drakes Estero occur near the mouth (23 to 26 feet) (CCC 2007). Much of
13 Drakes Estero is flushed by a semidiurnal (twice-daily) tidal cycle with a tidal range of around 6 feet,
14 with seawater approaching coastal Pacific salinities (around 34 parts per thousand) (NOAA 2010).
15 Currents in the mainstem and secondary channels are relatively strong and extensive areas of sand bar
16 and mud flat (including most bottom-bag areas used for shellfish cultivation by DBOC) are exposed
17 on a daily basis.
18

19 5. Drakes Estero is not listed as impaired or limited by sediment, nutrients or pathogens
20 by any state or federal agency, indicating that upland pollutant sources are not perceived as a problem
21 within the watershed. The high flushing rates have even allowed the California Department of Public
22 Health ("CDPH") to characterize some growing areas in Drakes Estero as fully approved (not subject
23 to regular rainfall closure) (CDPH 2012).
24

25 6. Conditions necessary to support the cultural eutrophication hypothesis presented by
26 Mr. Luchessa (Luchessa Decl. ¶ 9-11, 13, 16-19.) include long water residence time and warm water
27
28

1 temperature. There are numerous conditions within Drakes Estero that make the potential for cultural
2 eutrophication highly unlikely, including strong tidal currents and tidal exchange, small watershed to
3 estuary area, low ocean temperatures, shallow depth and generally windy, cold and foggy summer
4 conditions. These conditions are described in more detail in the Final EIS (“FEIS”). Declaration of
5 Barbara Goodyear (“Goodyear Decl.”) Ex. 3 at 424-425. Furthermore, there are no known
6 eutrophication problems within the Estero de Limantour (the eastern-most portion of Drakes Estero),
7 where no shellfish culture is practiced. Many of the sources and correlates identified in the Luchessa
8 Declaration come from large east coast estuaries including the Chesapeake Bay and Long Island
9 Sound (Luchessa Decl. ¶ 17) which are characterized by excessive levels of municipal development
10 and point source and nonpoint source water quality impacts, warm water and long water residence
11 times. Drakes Estero cannot readily be compared to these eastern water bodies. Overall, the small
12 degree of human-caused alterations (Baltan 2006) in the Drakes Estero watershed, coupled with
13 Drakes Estero’s short tidal flushing cycle (residence period) and the tidal flushing with upwelled
14 oceanic water (NAS 2009) are the primary reasons for the high water quality in Drakes Estero.
15
16

17
18 7. Mr. Luchessa states that the primary impact of shellfish aquaculture removal will be
19 on nutrient loading from existing nonpoint sources of pollution (Luchessa Decl. ¶ 7) and that removal
20 of the services allegedly provided by DBOC’s shellfish will result in continued and exacerbated
21 cultural eutrophication and associated water quality impacts to eelgrass and other conditions within
22 Drakes Estero (Luchessa Decl. ¶ 9-11, 13, 16-19.). These conclusions assume (1) that the Drakes
23 Estero system is heavily influenced by upland runoff, (2) that the shellfish growing practices of
24 DBOC are intended to maximize water filtration in the areas where upland inflows are most
25 concentrated, and (3) that the water residence time within Drakes Estero is generally uniform and
26 long in duration. None of these assumptions is supported. As NAS 2009 reports, citing Anima
27
28

1 (1990, 1991), research on nutrient inputs from the watershed above Drakes Estero suggests that
2 excess nutrient loading from upland sources is not likely to occur in Drakes Estero due to the high
3 rate of tidal flushing relative to stream inputs. Dumbauld, Ruesink, and Rumrill (2009) report that
4 nutrients provided by coastal upwelling control summer productivity in smaller west coast estuaries,
5 and therefore limit the influence of filter feeding bivalves on water quality within Drakes Estero.
6
7 Goodyear Decl. Ex. 3 at 212. While most lands directly surrounding Drakes Estero are permitted for
8 cattle grazing operations, direct access to the Estero by cattle is limited by 20-40 foot cliff bluffs.
9
10 There are no dairy operations within the Drakes Estero watershed. As documented in the FEIS the
11 number of cattle permitted for grazing in the adjacent upland areas has decreased from 1,185 to 700.
12
13 In addition, the NPS has worked with ranchers to reduce direct cattle access to the shoreline or
14 watershed riparian areas through fencing and other best management practices, and replaced septic
15 systems within the ranch complexes of M-Ranch and Home Ranch within the past 6 years. Goodyear
16 Decl. Ex. 3 at 249. These efforts have reduced the influx of nonpoint source pollutants into the
17 Estero.

18 8. The premise for reporting the benefits of bioextraction rates of nitrogen and
19 phosphorous (Luchessa Dec ¶ 7) based on annual oyster harvest is that excess nutrients are removed
20 as an “ecosystem service” by DBOC’s shellfish. But Luchessa makes no attempt to account for what
21 portion of the nitrogen and phosphorus removed from the water originates from upland (nonpoint)
22 pollution sources, as opposed to the natural marine environment (i.e., nutrients brought in with the
23 tides). Based on the general function of the Estero, it is my opinion that a high proportion of those
24 nutrients are naturally marine-derived, and not primarily from cattle operations or other sources
25 outside the natural system. As a result, it is highly unlikely that removal of DBOC’s shellfish would
26 lead to cultural eutrophication of the Estero.
27
28

1 **II. DBOC'S AQUACULTURE PRACTICES DO NOT MAXIMIZE WATER**
2 **QUALITY BENEFITS**

3 9. The FEIS acknowledges that while commercially grown bivalves provide some water
4 quality benefits, such as filtration of nutrients, the shallow conditions in Drakes Estero and its
5 extensive tidal flushing limit the filtering effects to localized areas adjacent to the shellfish beds and
6 structures. Goodyear Decl. Ex. 3 at 212. Any water quality benefit from shellfish depends on
7 shellfish growing practices within the Estero. A review of the rack conditions indicates that fewer
8 than half of the racks (representing approximately 47% of total length) are currently in use by DBOC
9 for hanging culture. Thus, the heightened filtering capacity of shellfish hanging culture as discussed
10 in the Luchessa Declaration (Luchessa Dec ¶7) is limited to only 47% of the racks. Additionally,
11 growing practices by DBOC do not maximize water quality conditions. Because of space limitations
12 on active racks, larger oysters are rotated out for beach hardening for up to 9 months (rather than the
13 typical 2-3) which reduces their ability to improve water quality.
14

15
16 10. Mr. Lunny states (Lunny Decl. ¶ 58) that there are 95 racks each 300 feet long and 12
17 feet in width within Drakes Estero. As part of their submittals to the NPS during the EIS process on
18 November 15, 2010, DBOC provided NPS with a spreadsheet documenting (Goodyear Decl. Ex. 47)
19 the location, length, number of bents, and condition of each rack within the Estero. This submittal
20 documented rack lengths ranging from 120 feet to 732 feet with a total rack length of 25,668 feet
21 (average of 270 feet per rack). In this submittal, DBOC indicated that of the 95 racks, only 45 racks
22 (totaling 12,060 feet in length) were identified as "Good Condition Active." A total of 50 racks
23 (13,608 feet in length) were classified as "Need Repair Inactive."
24

25
26 11. Based on review of the DBOC growing practices as presented in FEIS (Goodyear
27 Decl. Ex. 3 at 65-103) and statements identified below, DBOC's current shellfish growing practices
28 are not conducted in a manner that appears to consider or maximize water quality conditions. The

1 statements in the Luchessa Declaration at ¶ 8-11, 13, 16-19, assume that the location and use of
2 hanging culture on all 95 racks provide three-dimensional water quality filtration throughout Drakes
3 Estero and that the DBOC shellfish growing practices maximize potential filtration of water by the
4 Pacific oysters. This is not the case. Only 47% of the racks are in active use. Moreover, DBOC has
5 advised that half of its oysters begin their grow-out as hanging culture and the other half begin as
6 floating culture. Goodyear Decl. Ex. 48. While floating culture may be practiced on these
7 dilapidated racks (Goodyear Decl. Ex. 3 at 93) the nature of floating culture (bags of shellfish that
8 float on the surface) does not provide the three-dimensional structure that Luchessa describes.
9 (Luchessa Decl. ¶ 8). Floating bags do not hang down in the water column and therefore do not
10 provide the type of three dimensional structure that hanging shellfish provide.
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13 12. The location and age of oysters are important factors in estimating actual filtration
14 capacity. Correspondence from DBOC indicates that DBOC primarily uses the racks for younger,
15 smaller oysters which have a more limited filtration capacity. The larger oysters spend the final third
16 of the growing cycle (up to 9 months)—when they are at their largest size, with greatest filtration
17 capacity—in what are called “bottom bags.” DBOC places bottom bags on the tidally exposed sand
18 bars, most of which are in the southern portion of the Estero where the water residence time is less
19 than one day. Goodyear Decl. Ex.48.
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21 13. Smaller oysters filter substantially less water than larger ones. NAS 2012 used Powell
22 et. al. 1992 to calculate filtration rates of oysters. As noted in the FEIS, the model that most
23 accurately estimates oyster filtration rates, according to the Powell et al. 1992, shows that an oyster
24 must be over 4 inches long to filter 20 gallons of water per day. Goodyear Decl. Ex 3 at 427. The
25 relationship of filtration capacity is not linear. For example, as compared to 4-inch oysters, Powell
26 et. al. 1992 shows that the estimated filtration rate for a 2-inch oyster is 6.3 gallons per day.
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14. The largest concentration of bottom bag beds in Drakes Estero is located on sandbars in the southern-most portions of the growing areas where tidal exchange is daily. Beds 14, 15, 16, 17, 20 and 42 make up more than half of the bottom bed growing areas. Goodyear Decl. Ex. 3 at Figure 2-1. Because filtration capacity is dependent on size and immersion in water, the placement of larger older oysters on sandbars in areas where they are exposed to the air for 25 to 30% of the time and the tidal exchange is daily, indicates that DBOC operations are not maximizing water filtration. Further, when the oysters have the greatest filtration capacity, they are located in areas where their potential water quality effect is most limited.

III. DBOC'S PLANTING OF NONNATIVE SPECIES AND MAINTENANCE OF ARTIFICIAL STRUCTURES INCREASES RISK OF ESTABLISHMENT BY INVASIVE SPECIES

15. In addition to the nonnative cultured Pacific oyster and Manila clam, the FEIS discusses other nonnative species present in Drakes Estero, including *Didemnum vexillum* (a fouling organism commonly referred to as *Didemnum*) and mudsnail *Batillaria attramentaria*¹. Goodyear Decl. Ex. 3 at 230. NAS 2009 (p 52) states that aquaculture operations in Drakes Estero provide hard substrate in the form of racks and shells that are points of colonization for the invasive colonial tunicate *Didemnum*. NAS 2012 (p. 24) notes that "augmenting the abundance of nonindigenous fouling organisms on hard surfaces of mariculture structure could in principle spillover to increase their abundance nearby (e.g. Bulleri and Chapman, 2010)" and that maintenance of Manila clam and oyster racks in Drakes Estero represents an ongoing risk for further establishment of these nonnative invasive species.

¹ Mr. Luchessa (Luchessa Decl. ¶ 18.) states that the removal of cultured oysters and clams could lead to expansion of the nonnative mud snail *Batillaria attramentaria* if eutrophication occurs. However, as discussed in detail in ¶ 6-9 above, there is no evidence that Drakes Estero will become eutrophic.

1 16. The Manila clam is a recent introduction into DBOC's shellfish cultivation stock in
2 Drakes Estero. Such introductions have the potential to develop naturally breeding populations in
3 Drakes Estero (NAS 2004, 2009). The FEIS reported that both the Pacific oyster and Manila clam
4 have been observed growing independent of culture stock in Drakes Estero (Grosholz 2011). In other
5 words, some oysters and clams are now growing on their own in the Estero independent of
6 aquacultural operations. Goodyear Decl. Ex. 3 at 348. The FEIS also discussed, based on NAS
7 2004, that DBOC's use of diploid (sexually reproductive) Pacific oyster and Manila clam stock rather
8 than triploid stock (sterile) increases the risk of naturalization by these cultivated species. Goodyear
9 Decl. Ex 3. At 351.

11 17. DBOC typically plants Manila clam seed in mesh bags, and claims to prevent their
12 escape by planting only seed larger than the holes in the mesh bag. Goodyear Decl. Ex. 48. This
13 method does not assure clam seed will not escape. In fact, DBOC reported that the bags used in their
14 2009 Manila clam planting were heavily damaged by crabs. Bags are subject to damage and failure
15 by crabs, allowing for potential risk of escape and growth independent of culture stock by nonnative
16 DBOC clams.

19 18. NAS states that it is well accepted principle that increasing the abundance of
20 nonnative bivalves such as Pacific oyster and Manila clam can result in an increased risk of
21 establishment (Lockwood et. al. 2005). The maintenance of unnatural hard structures including bags,
22 racks and oyster shell provide primary habitat which increases the potential of invasive colonial
23 tunicates (such as *Didemnum*) to smother eelgrass and inhibit normal biological functions of
24 benthic fauna. Goodyear Decl. Ex. 3 at 344. The FEIS concludes that ongoing aquaculture operations
25 including the continued planting and cultivation of diploid (sexually reproductive) Pacific oysters and
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1 Manila clam increases the risk of establishment by these species would result in long-term moderate
2 impacts. Goodyear Decl. Ex. 3 at 351-352.

3 **IV. DBOC OVERESTIMATES THE DURATION AND IMPACTS OF ONSHORE**
4 **PERSONAL PROPERTY REMOVAL**

5 19. The NPS has evaluated Mr. Lunny's (Lunny Decl. ¶ 46-48.) description of the
6 removal activities associated with DBOC's onshore personal property and as described in the
7 declarations of Luchessa (at ¶ 4), Moran (at ¶ 2), Abbott (at ¶ 3), and Steffel (at ¶ 3.). By stipulation,
8 the NPS extended the onshore closeout period until March 15, 2013 and has agreed that the three
9 mobile residences may remain. Stipulation Re: Briefing Schedule, filed December 14, 2012 (Doc #
10 29). Therefore, DBOC's estimates for removing these structures are not relevant. In addition, in
11 paragraph 47 of his declaration, Mr. Lunny identifies the septic systems and water well as DBOC
12 personal property. The well and septic system service the two NPS residential structures and three
13 mobile residential units. In order to accommodate the employee housing relocation process, the NPS
14 will allow these systems to be left in place by DBOC. Rather than full abandonment of the septic
15 tanks and well system, NPS will only require that DBOC pump out of the septic tanks and conduct an
16 inspection of the septic system and well with the NPS prior to closeout. Because DBOC will not
17 need to remove these utilities, none of the costs or time delays discussed in Mr. Lunny's or the other
18 supporting declarations are relevant.
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22 20. The remaining facilities that DBOC would have to remove are temporary in nature.
23 For example, the cannery and storage unit are 8 foot x 40 foot shipping containers and thus can be
24 moved easily with properly sized equipment. The office trailer is a construction trailer and is easily
25 movable. Removal of other associated aquaculture equipment, including the open-sided shed (only
26 four light metal posts going into the ground) and 12 picnic tables should not require equipment
27 beyond that already operating onsite. Figure 3-2 of the FEIS does not indicate the presence of any
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1 mapped wetlands around the DBOC personal property. Because DBOC will not be required to
2 remove the septic and well facilities, the remaining facilities could easily be removed in less than one
3 week with minimal permitting requirements.

4
5 **V. DBOC OVERESTIMATES THE DURATION AND IMPACTS OF OFFSHORE
6 PERSONAL PROPERTY REMOVAL**

7 21. The NPS has evaluated Mr. Lunny's description (Lunny Decl. ¶ 50-67) of anticipated
8 offshore removal activities and the description of these activities as presented in the declarations of
9 Luchessa (at ¶ 5), Moran (at ¶ 3), Abbott (at ¶ 4) and Steffel (at ¶ 5). A second proposed action
10 titled "Heavy Equipment for Oyster Rack Removal" described in the declaration by Dr. Abbott
11 (Abbott Decl. ¶ 9) identifies but does not specify a shorter time period for rack removal.

12 22. In his declaration, Mr. Lunny (Lunny Decl. ¶ 51, 61.) describes an anticipated duration
13 of 220 days to remove all oysters and clams, and 285 work days over 665 calendar days to remove all
14 rack infrastructure using DBOC equipment. These timelines are much longer than necessary. The
15 FEIS concluded that this equipment could be removed in a 2-3 month period. Goodyear Decl. Ex 3
16 at 111. Also, the DBOC approach does not include the use of standard Best Management Practices
17 (BMPs) to reduce potential impacts, and it assumes that all racks are in good condition which they
18 are not. (See ¶ 10 above.) The absence of standard BMPs from DBOC's proposed removal protocol
19 would needlessly result in increased impacts to the environment and undermines its viability. The
20 removal of structures from Drakes Estero was discussed in the FEIS. Goodyear Decl. Ex 3 at 111.
21 Impacts of rack removal activities on the environment were described for each of the impact topics.
22 Overall, the FEIS concluded rack removal activities would result in short-term, minor adverse
23 impacts. Goodyear Decl. Ex 3 at 316, 332, 374, 388, 430, 447.
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1 23. Mr. Lunny (Lunny Decl. ¶ 59) states that it is only possible to dismantle oyster racks
2 at low tide and that DBOC would only be able to work on the rack removal 2-3 days per week. Many
3 of the racks are exposed at mid-tides allowing DBOC to remove hanging or floating culture as well as
4 rack materials not embedded in the sediment, from the structures during a much wider range of tides
5 and more than 2-3 days per week.

6 24. Further, the 22-month removal estimate by Mr. Lunny (Lunny Decl. ¶ 57) is based on
7 the faulty assumption that he can only use a single work team. Use of multiple (three to four) teams,
8 and additional boats and barges is an option available to Mr. Lunny. The November 29, 2012
9 Limited Authorization allows DBOC to request the use of additional boats in the Estero. Goodyear
10 Decl. Ex. 2 at 1. (“No other use of motorized vessels is allowed without the express, prior written
11 approval of the NPS.”) Rather than seeking to expedite the removal process and pay for more crews
12 over far fewer work days (2-3 months as compared to nearly 2 years), DBOC has simply sought to
13 string out the removal process as long as possible.

14 25. The rack removal methods presented in the Lunny declaration (Lunny Decl. ¶ 50-67)
15 do not identify any specific BMPs and therefore overestimate the impacts associated with removal
16 activities. The FEIS identifies the need to use standard BMPs “for sediment control and habitat
17 protection, such as the use of silt curtains.” The FEIS also notes that divers would be used to remove,
18 by hand, any chunks of shell or other debris remaining below the racks. Goodyear Decl. Ex. 3 at 111.
19 Other BMPs could include the use of hydraulic cutters rather than an underwater chainsaw to
20 minimize the generation of wood chips associated with the rack removal activities. BMPs such as
21 these would easily minimize the duration and magnitude of impacts to soundscapes and water quality
22 associated with rack removal; yet they are completely absent from the proposal set forth in the Lunny
23 Declaration.

1 26. Mr. Luchessa describes direct impacts to eelgrass and water quality associated with
2 rack removal (Luchessa Decl. ¶ 6) extending over a 22 month period. As documented in the FEIS,
3 NPS anticipated use of standard BMPs including silt curtains to minimize disturbance during removal
4 activities. Goodyear Decl. Ex 3 at 111. The FEIS presents impacts to eelgrass and water quality
5 associated with the removal of infrastructure from Drakes Estero. The FEIS found that the impacts to
6 eelgrass from infrastructure removal would be short-term minor adverse and that impacts to water
7 quality from infrastructure removal would be short-term minor adverse. Goodyear Decl. Ex. 3 at
8 332, and 430.
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10 27. In his declaration Mr. Luchessa contends that eelgrass has proliferated in Drakes
11 Estero because of aquaculture activities (Luchessa Decl. ¶ 12). The information presented in his
12 Declaration was presented and considered by the NAS as part of their process leading to their 2009
13 report. In that report, the NAS acknowledges that between 1991 and 2007 the areal cover of eelgrass
14 doubled, stating that this is a trend seen in other west coast estuaries. However, NAS 2009 (p. 33)
15 states that “While bivalves have been shown in other systems to enhance eelgrass production via
16 secondary mechanisms such as water clarification and fertilization of the sediments (Peterson and
17 Heck, 2001; Newell and Koch 2004), the relatively small culture footprint in Drakes Estero suggests
18 that these effects would be localized.” Other agencies have also weighed in on this topic. In a letter
19 to the NPS on December 8, 2011 NMFS provided “points of clarification regarding our previous
20 comment letter [November 17, 2011]” on the Draft EIS. NMFS clarified “NMFS does not have
21 information indicating that water quality effects from the DBOC operations benefit the overall health
22 of eelgrass in Drakes Estero. Similarly, NMFS does not have information suggesting that eelgrass
23 would be harmed should DBOC operations cease.” (Goodyear Decl. Ex. 3 at D-68-D-69),
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1 28. The declarations submitted on behalf of DBOC neglect to mention that there would be
2 long-term beneficial impacts associated with shellfish infrastructure removal. Goodyear Decl. Ex. 3
3 at 315, 332, 374, 388, 430, 447. As summarized in the FEIS, both NAS 2009 and NAS 2012
4 conclude that the racks and propeller scarring from normal DBOC boat operations represent a direct,
5 adverse impact on eelgrass, including the 7 acres beneath rack structures. NAS 2009 concludes that
6 recovery of eelgrass from areas disturbed by mariculture can be fairly rapid, either by rhizome spread
7 or from seed dispersal.

9 29. The declarations by Abbott (Abbott Decl. ¶ 4, 13) and Moran (Moran Decl. ¶ 9)
10 reference work window restrictions Table 1 (Exhibit 2 in Moran Dec and Exhibit 3 in Steffel Decl.).
11 Based on review of this table, the December 1 – February 28 period authorized by the 90-day Limited
12 Authorization best avoids potential impacts to all species listed. Dr. Abbott (¶ 13) does not
13 acknowledge that the FEIS clearly articulated that rack removal activities should be completed prior
14 to the harbor seal pupping season (March 1) to avoid impacts to that resource. Goodyear Decl. Ex. 3
15 at 111.

17 30. Further, regarding the discussion of the Migratory Bird Treaty Act (“MBTA”) (Moran
18 Decl. ¶ 4), the MBTA makes it unlawful to take, possess or sell protected species or any parts thereof
19 (eggs, nests, feathers, plumes etc.). The MBTA does not address impacts to habitat or disturbance
20 unless it is directly related to take of birds, nests, etc. The activities associated with rack removal
21 activities would not affect any bird nests as all racks are flooded completely on a daily basis.
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23 31. Similarly, the “Heavy Equipment for Oyster Rack Removal” Alternative (Abbott
24 Decl. ¶ 9) including the use of a barge that requires “spuds to be pushed deep in the sediment”, a 100-
25 200 ton excavator, and the use of diesel push boats (essentially small tug boats), is likely far larger
26 than necessary to accomplish the work and could result in substantial damage to sensitive eelgrass
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1 resources within Drakes Estero. Based on NPS's evaluation of various removal methods, the scale of
2 this equipment is far larger than would be necessary and would unnecessarily result in far more direct
3 impacts to eelgrass and other resources in the Estero. As a result, this proposal is not viable and its
4 impacts are not relevant.

5 32. Ms. Moran states that DBOC's current permits do not cover removal of infrastructure,
6 and suggests potential regulatory permitting and coordination associated with removal will be
7 burdensome (Moran Decl. ¶ 4, 5-17). As part of the EIS process, the NPS identified a number of
8 agencies with technical expertise or regulatory authority associated with Drakes Estero and consulted
9 many of these agencies on environmental impact and permitting issues. The California Department
10 of Fish and Game (CDFG), National Marine Fisheries Service, U.S. Army Corps of Engineers, and
11 U.S. Environmental Protection Agency were all cooperating agencies listed in the FEIS. Goodyear
12 Decl. Ex. 3 at 529-530. These agencies are aware that removal activities are imminent and should be
13 prepared to address any related permitting issues. However, Ms. Moran's declaration does not
14 describe any effort by DBOC to apply for permits prior to the RUO's expiration date of November
15 30, 2012. Under the terms of the RUO, if DBOC is unable to remove its racks and other personal
16 property within the 90-day wind down period because it has failed to obtain the necessary permits,
17 NPS may remove the structures after that period and seek to recover the costs of removal. Goodyear
18 Decl. Ex. 8 at 19, Ex. 2 at 2.

19 33. Ms. Moran (Moran Decl. ¶ 9) lists 17 species that may occur in the vicinity of DBOC.
20 The FEIS concludes that the majority of species identified by Moran would not be affected by
21 shellfish infrastructure removal activities and that the remainder would only experience minor or less
22 than minor effects. The FEIS summarizes potential impacts to five species (Myrtle's silverspot
23 butterfly, California red-legged frog, leatherback sea turtle, western snowy plover, and California
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1 least tern) and found that impacts to these species would be less than minor. Goodyear Decl. Ex. 3 at
 2 38-40. Two ESA protected resources, central California coast Coho salmon (*Oncorhynchus kisutch*)
 3 Critical Habitat and central California coast steelhead (*O. mykiss*), were identified as potentially
 4 affected by removal activities and were analyzed in the FEIS. The FEIS concluded that impacts to
 5 these two species from removal activities would be short-term minor adverse. Goodyear Decl. Ex. 3
 6 at 404.

8 34. Ms. Moran asserts that the dismantling of shellfish racks would potentially result in
 9 extensive eelgrass disturbance. (Moran Decl. ¶ 14.). As discussed above (see ¶ 26), impacts of a
 10 properly scaled and timed removal protocol would only result in short-term minor adverse impacts to
 11 eelgrass. Further, the FEIS concludes there would be long term beneficial impacts to eelgrass from
 12 the removal of DBOC's racks from the Estero. These long term impacts would outweigh the short
 13 term impacts associated with rack removal. Goodyear Decl. Ex. 3 at 332.

15 **VI. DBOC'S ALLEGED FINANCIAL HARM FROM REMOVAL ACTIVITIES**
 16 **EXCEEDS PRIOR ESTIMATES**

17 35. Mr. Lunny claims that removal of the oysters, racks and other aquaculture
 18 infrastructure from Drakes Estero would result in significant expense to DBOC. (Lunny Decl. ¶ 48,
 19 56, 67.) Mr. Lunny fails to note that he has had other opportunities to identify removal costs.

21 36. DBOC's state lease requires a \$10,000 escrow account to cover the expenses of
 22 removing the aquaculture infrastructure from Drakes Estero. Goodyear Decl. Ex.19. Johnson Oyster
 23 Company paid the initial \$7,500 into this account in 2004. Based on an NPS inquiry to CDFG in
 24 2011, the remaining \$2,500 that was due in 2005 has still not been paid. Goodyear Decl. Ex. 3 at 114.

25 37. Clause D of DBOC's state lease provides that the escrow amount shall be increased if
 26 CDFG determines that the aquaculture operation is likely to be more expensive to remove, and
 27 further requires the lessor to annually "advise the Commission of its best estimate of the probable
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1 cost of removal [sic] the lease operation.” Goodyear Decl. Ex. 19. To my knowledge, DBOC has
2 never recommended an increase in the amount held in escrow to cover removal operations.

3 **VII. THE SOUNDSCAPE THRESHOLD USED IN THE FEIS IS APPROPRIATE**

4 38. As documented in the final EIS (Goodyear Decl. Ex. 3 at 441), natural soundscape is
5 considered a park resource, important of the natural communities that the NPS is directed to preserve
6 as part of the National Park System. As such, soundscape was evaluated as part of the EIS process.
7 In the November 27, 2012 letter to Secretary Salazar, plaintiffs’ attorney Ryan Waterman included
8 attachments from Richard Steffel and Dr. Corey Goodman criticizing the soundscape analysis in the
9 Final EIS. On page 2 of his memorandum regarding soundscape impacts documented in the FEIS,
10 Dr. Goodman states that “In summary, to find a major adverse impact of noise requires a finding that
11 DBOC boats and equipment would be expected to cause significant noise at any one location for 10
12 percent of the time on a 24 hour basis over the next 10 years.” The underlying premise of Dr.
13 Goodman’s analysis -- that sounds must be heard at “any one location” for 10 percent of the time – is
14 wrong. The methodology section of the FEIS explains that, like other resource impact topics,
15 impacts on soundscape were analyzed at the project area scale. Goodyear Decl. Ex. 3 at p. 295. Thus,
16 the FEIS considered sound impacts to be “major” if the sounds from DBOC’s operations would have
17 been greater than 41 dBA for more than 10 percent of the time anywhere within the project area.
18 Goodyear Decl. Ex. 3 at p. 445. The methodology did not require that a particular sound be heard
19 from a fixed point for more than 10 percent of the time, as Dr. Goodman contends. Using this
20 methodology, the FEIS correctly determined that there would be major impacts to soundscapes if
21 DBOC’s operation was permitted for an additional ten years.
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1 Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is
2 true and correct.

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4 Signed January 9, 2013 in Point Reyes Station, California.

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6 
7 Brannon Ketcham

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 10

District court Docket # 64-3
Declaration of Kurt Fristrup

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DRAKES BAY OYSTER COMPANY, *et al.*)
)
Plaintiffs,)
)
v.)
)
KENNETH L. SALAZAR, in his official)
capacity as Secretary, U.S. Department of)
the Interior, *et al.*,)
)
Defendants.)

Case No. 4:12-cv-06134-YGR

**DECLARATION OF
DR. KURT M. FRISTRUP IN
SUPPORT OF FEDERAL
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: January 25, 2013
Time: 2:00 p.m.
Courtroom: 5

1 I, Kurt M. Fristrup, declare as follows:

2
3 1. I have been chief scientist of the Natural Sounds and Night Skies Division of the
4 Natural Resource Stewardship and Science Directorate of the National Park Service (“NPS”) for the
5 past seven years. I have a BA in Biomedical Engineering from the University of California San
6 Diego, and a PhD in Organismal and Evolutionary Biology from Harvard. My professional
7 experience includes ten years with the Ocean Engineering and Biology Departments at Woods Hole
8 Oceanographic Institution and ten years as the Assistant Director of the Bioacoustics Research
9 Program at Cornell University. I have published more than 30 scientific papers encompassing
10 acoustics, electronic engineering, ecology, and evolution. I chair the American National Standards
11 Institute and Acoustical Society of America accredited standards working group S3/SC1/WG04:
12 “Description and Measurement of the Ambient Sound in Parks, Wilderness Areas, and Other Quiet
13 and/or Pristine Areas.” My CV is attached.

14 2. I provided scientific support for the Point Reyes National Seashore Drakes Bay Oyster
15 Company Special Use Permit Environmental Impact Statement (“FEIS”). This support included
16 recommendations regarding appropriate reference materials for specifying the noise levels of Drakes
17 Bay Oyster Company (“DBOC”) equipment, noise propagation modeling, and analyses of acoustical
18 data provided by the Volpe National Transportation Center. I have also evaluated materials provided
19 by DBOC, Dr. Corey Goodman, and ENVIRON during the EIS process. I have reviewed the
20 declarations of Richard Steffel, Robert Abbott, and Corey Goodman submitted by plaintiffs in
21 support of their motion for preliminary injunction. I provide the following response to those
22 declarations based on my personal knowledge and professional expertise, and can and would testify
23 competently regarding the matters set forth herein if called upon to do so.

24 3. Steffel and Abbott submitted declarations claiming that there is a substantial risk of
25 injury to marine animals due to underwater noise. This is unlikely. Using the information from
26 Abbott’s paragraph 10, we can extrapolate how far a seal or a fish would need to be from the barge
27 for the noise level to drop below the 183 decibel (“dB”) injury threshold suggested by WSDOT for
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1 small fish. For a barge radiating 184 dB re 1 μ Pa at 1 meter¹, the fish would have to be within 1.1
 2 meters to risk injury. For the 192 dB re 1 μ Pa at 1 meter source level, the fish would have to be
 3 within 2.8 meters to risk injury. Harbor seals could not be injured by the 184 dB source, and they
 4 would have to be within 1.3 meters of the 192 dB source to risk injury. These small distances
 5 overstate the spatial volume of the danger zone, because the noise is actually radiated at lower levels
 6 across the large surfaces of the tugboat and the barge, not concentrated at the high level from a point
 7 source as assumed by the one meter source level specification and my simple calculation. In
 8 addition, risk of injury requires extended exposure to noise at these levels, on the order of 30 minutes
 9 of continuous exposure. Fish and seals are likely to move away from the equipment when it is
 10 operating and utilize other areas in Drakes Estero.

11 4. Steffel and Abbott assert that the underwater noise generated during removal of
 12 DBOC facilities will be higher than noise generated by normal DBOC operations. I agree that the
 13 accelerated removal scenario involving heavy equipment (linked steel barges, crawler crane, etc) will
 14 generate higher noise levels, levels that will plausibly, but temporarily, change the distribution and
 15 behavior of animals in Drakes Estero. The extended removal scenario will generate noise levels
 16 similar to normal DBOC operations, but the noise will be present more often. Southall *et al.* (2007)²
 17 presented a comprehensive summary of marine mammal responses to noise that can be used to
 18 estimate the area affected by removal of DBOC structures. Southall *et al.* suggests that harbor seal
 19 behavioral responses at received levels below 140 dB would be on the order of: moderate changes in
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21 ¹ Underwater noise sources are characterized by their sound pressure level – relative to the reference
 22 sound pressure level of 1 microPascal – at a standard distance – 1 meter. Measurements of noise
 23 sources are usually made at greater distances much greater than 1 meter, and the reported value at 1
 24 meter corrects for the effects of the more distant measurement location assuming the noise is
 radiating from a point source.

25 ² Southall, B. L., Bowles, A. E., Ellison, W. T., Finneran, J. J., Gentry, R. L., Greene,
 26 Charles R. Jr., Kastak, D., Ketten, D. R., Miller, J. H., Nachtigall, P. E., Richardson,
 27 W. J., Thomas, J. A., and Tyack, P. L. 2007. Marine Mammal Noise Exposure Criteria: Initial
 28 Scientific Recommendations. *Aquatic Mammals* 33(4): 411:522.

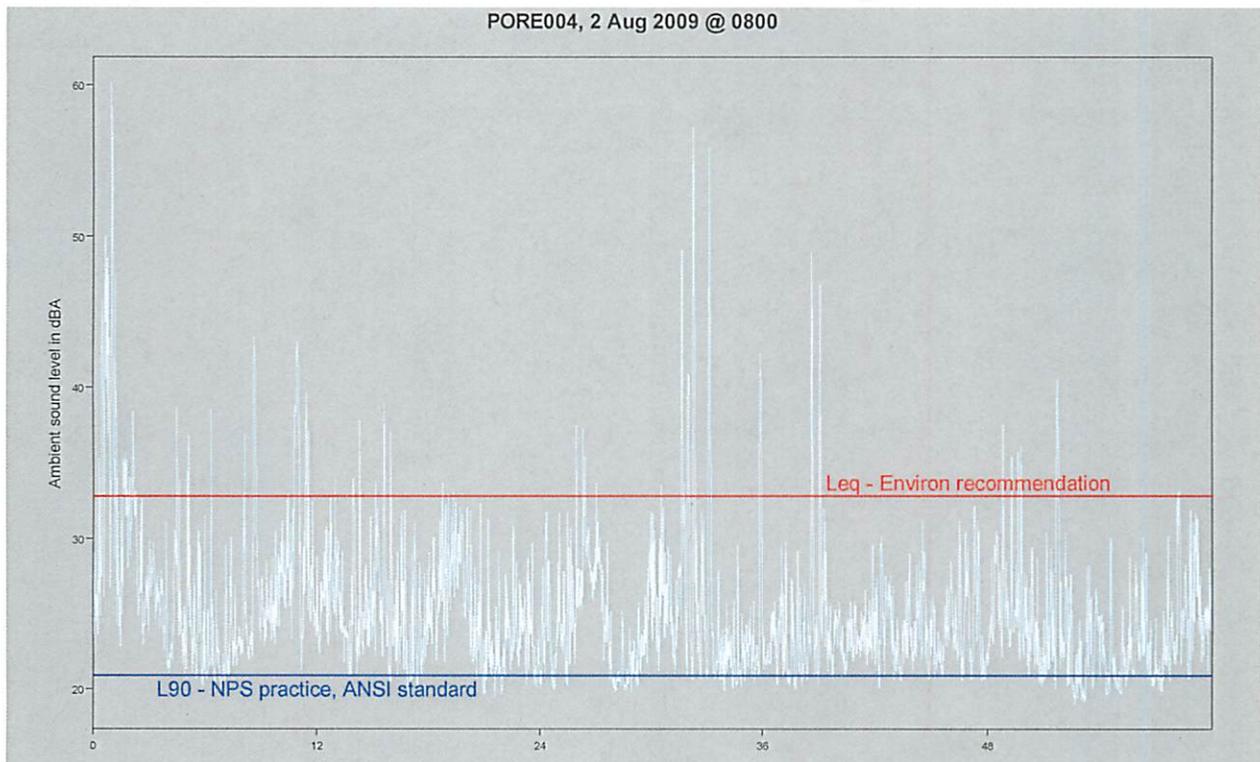
1 locomotion speed, direction, and/or dive profile but no avoidance of sound source, brief, minor shift
2 in group distribution, moderate cessation or modification of vocal behavior (while the noise is
3 present). For the tugboat and barge scenario (180 dB source level) presented in Abbott paragraph 10,
4 these behavioral responses would be expected within 500 meters. The vast majority of harbor seals in
5 Drakes Estero haul out in areas that are more than 500 meters from the oyster racks. For the extended
6 removal scenario, these behavioral responses would be expected within 14 meters of the motorboats
7 (152 dB source level). As the FEIS analysis emphasized, these adverse behavioral effects are
8 temporary. Declaration of Barbara Goodyear (“Goodyear Decl.”) Ex. 3, at 446. I find it improbable
9 that marine mammals or fishes would abandon Drakes Estero while the DBOC structures are
10 removed. Even if abandonment occurs, a National Research Council report that was cited in the
11 FEIS found that marine mammals have been shown to recolonize suitable habitat when prior
12 anthropogenic activity forced total abandonment. (See NRC 2003, cited at FEIS page REF-37.)
13 Shipping and dredging in Guerrero Negro Lagoon (Baja California) caused grey whales to abandon
14 an important breeding area. When this industrial activity ceased, the whales rapidly repopulated the
15 lagoon. In another example, Orcas abandoned the Broughton Archipelago (British Columbia) in
16 response to noise, but they repopulated the habitat within six months when the noise ceased.

17 5. Steffel and Goodman criticized NPS for overestimating the noise generated by DBOC
18 equipment. The ENVIRON report³ provided during the DEIS comment period offered much lower
19 noise measurements for DBOC equipment. However, ENVIRON did not adequately describe the
20 measurement conditions or the operating status of the DBOC equipment to comply with common
21 engineering practice and the requirements of relevant national and international standards.
22 Furthermore, the levels ENVIRON reported were substantially lower than levels reported by other
23 authoritative reports. Lastly, NPS was able to extract estimates of the noise generated by DBOC
24 motorboats. Goodyear Decl. Ex. 3 at 258-59. These estimates were inconsistent with the ENVIRON
25 measurement, and consistent with the measurements reported elsewhere. Nonetheless, NPS retained
26

27
28 ³ Comments on Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement
Point Reyes National Seashore, ENVIRON International Corp., Dec 9, 2011.

1 the ENVIRON values for the FEIS analysis to reveal the range of spatial impacts that would occur
 2 under different assumptions for equipment noise levels.

3 6. The ENVIRON report and Steffel's letter (beginning on page 11 of the Declaration of
 4 Ryan Waterman) claim that NPS misrepresents ambient sound levels in Drakes Estero. NPS used
 5 L_{90} ⁴ to estimate the residual or background sound level against which DBOC noise would be
 6 perceived. Goodyear Decl., Ex. 3 at 254. This conforms to a practice suggested by American
 7 National Standards Institute S12.9 Part 1. Steffel recommends using L_{eq} . L_{eq} has been widely used
 8 to evaluate the impacts of noise in residential neighborhoods, and one of its features in the
 9 neighborhood context is the disproportionate effect that the loudest noise events have on the
 10 "average" value that L_{eq} provides. NPS policy focuses on the sustained capacity of the environment
 11 to mask sounds. The sensitivity of L_{eq} to the loudest sound levels is inappropriate for this purpose, as
 12 illustrated by the graph, which shows one hour of one-second A-weighted sound level measurements



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⁴ L_{90} is the sound level that is exceeded 90 percent of the time. Acoustical data collected at Point Reyes measured sound levels every second.

1 sounds. The blue line seeks to depict the background sound level against which all sound events –
2 the spikes in the sound level – are perceived. Alternatively, one could say that the blue line indicates
3 the environment’s capacity to reliably mask incoming noise. The orange line depicts the L_{eq} value
4 for this hour, and it plainly overstates the background against which noise is perceived. Steffel’s
5 argument would imply that bird song and insect sounds inhibit our capacity to hear industrial noise,
6 an assertion proved false by everyday experience.

7 7. Although the noise analysis in the FEIS contains considerable detail, its findings are
8 fairly simple to express. DBOC airborne noise sources range from 60-80 dBA, loud enough to
9 interfere with conversation more than 50 feet from the noise source. Background sound levels in
10 Drakes Estero are about 26 dBA, nearly an order of magnitude lower than the quiet background
11 recommended for primary school classrooms or bedrooms (35 dBA). Industrial noise sources – like
12 DBOC equipment – have huge spatial footprints in quiet natural environments.

13 I declare under penalty of perjury that the foregoing is true and correct.

14 Executed on January 9th, 2013, at Washington, D.C.

15 *Kurt Fristrup*
16

17 _____
18 Dr. Kurt Fristrup
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 11

Updated agenda of California Coastal Commission
meeting of February 6, 2013

available at: <http://www.coastal.ca.gov/meetings/mtg-mm-13-2.html>



CALIFORNIA
COASTAL
COMMISSION

FEBRUARY 2013 AGENDA

CITY OF REDONDO BEACH
REDONDO BEACH CIVIC CENTER
415 DIAMOND STREET
REDONDO BEACH, CA 90277
(415) 407-3211

Phone number will only be in service when the meeting is in session.

This has been updated at 9:30 p.m., Thursday, February 7, 2013

Please note: agenda items are subject to change.

8:30 A.M.

WEDNESDAY, FEBRUARY 6, 2013

1. CALL TO ORDER.

2. ROLL CALL.

3. AGENDA CHANGES.

4. **GENERAL PUBLIC COMMENT.** Public comments will be heard at 8:30 am for items not on the agenda, for no more than 30 minutes. For those unable to attend the early comment period, there will be additional comment time available later in the day.

STATEWIDE

5. **ELECTION OF REPRESENTATIVE.** Commission consideration and possible vote on the election of representatives to the Santa Monica Mountains Conservancy. **[Brian Brennan elected as representative]**

SOUTH COAST DISTRICT (ORANGE COUNTY)

6. **ADMINISTRATIVE CALENDAR.** See [AGENDA CATEGORIES](#).

a. [Application No. 5-12-266 \(OC Public Works, Dana Point\)](#) Application of OC Public Works for repair to 3 concrete piers/bents of the Island Way Bridge located within Dana Point Harbor. Removal and replacement of corroded steel reinforcing bars and installation of cathodic protection system. Removal of deteriorated asphalt pavement and placement of new asphalt pavement on Island Way Bridge, at Dana Point Harbor (Island Way Bridge in Dana Point Harbor.), Dana Point, Orange County. (FSY-LB) **[APPROVED]**

SAN DIEGO DISTRICT

7. **CONSENT CALENDAR.** See [AGENDA CATEGORIES](#).

a. [Application No. 6-12-082 \(Mah, San Diego\)](#) Application of Robert Mah to demolish one story, single-family home and construct new 1,464 sq.ft., 3-story, 30 ft. high, single-family home with attached 369 sq. ft. 2-car garage and roof deck on a 1,334 sq. ft. lot, at 712 Seagirt Court, Mission Beach, San Diego, San Diego County. (AL-SD)**[APPROVED WITH CONDITIONS]**

b. [Application No. 6-12-086 \(California Deptment of Parks and Recreation, San Diego Co.\)](#) Application of CA Dept. of Parks & Recreation to regrade and place roadbase at 8 existing individual campsites and 1 group campsite for ADA

4.5. **COMMISSION FIELD TRIP**. The Commission will take a field trip, leaving the Redondo Beach City Hall at approximately 9:00 am on Thursday, February 7, to visit the Airport Dunes restoration area at LAX Airport and the Ballona Wetlands. The Commission will return at approximately 1:00 pm to complete its remaining agenda. The public is invited to attend by following the Commission vehicle(s) in their own private vehicles and joining the Commission at designated stops. Private vehicles are not permitted on Airport property. The Airport will provide a bus for both the Commission and the public to tour the restoration area. However, space on the bus for members of the public will be limited. A more [detailed itinerary](#) is now available. For more information, please contact the Commission's South Coast District office in Long Beach at (562) 590-5071.

NORTH COAST DISTRICT

5. **DEPUTY DIRECTOR'S REPORT**. Report by Deputy Director on permit waivers, emergency permits, immaterial amendments & extensions, LCP matters not requiring public hearings, and on comments from the public. For specific information contact the Commission's Eureka office at (707) 445-7833. **[APPROVED]**

ENERGY, OCEAN RESOURCES AND FEDERAL CONSISTENCY

6. **ENERGY, OCEAN RESOURCES and FEDERAL CONSISTENCY**. Report by the Deputy Director on permit waivers, emergency permits, immaterial amendments & extensions, negative determinations, matters not requiring public hearings, and status report on offshore oil & gas exploration & development. For specific information contact the Commission's Energy, Ocean Resources, and Federal Consistency Division office at (415) 904-5240. **[APPROVED]**

7. **CONSENT CALENDAR (removed from Regular Calendar)**. See [AGENDA CATEGORIES](#). **[APPROVED WITH CONDITIONS]**

8. **FEDERAL CONSISTENCY**. See [AGENDA CATEGORIES](#).

a. **CD-031-12 (Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, Mendocino Co.)** Consistency determination by Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, on behalf of U.S. Dept. of Housing and Urban Development (HUD), for 12 units of senior housing and associated improvements, at Windy Hollow Road and Mamie Laiwa Road on Manchester-Point Arena Rancheria, south of Garcia River, north of Point Arena, Mendocino County. (JM-SF) **[APPROVED]**

b. **CC-048-12 (San Diego Association of Governments (SANDAG), San Diego Co.)** Consistency certification by SANDAG for construction of 1.8 miles of second main track between San Onofre and Las Pulgas, Marine Corps Base Camp Pendleton, San Diego County. (JM-SF) **[Moved to Consent Calendar, APPROVED WITH CONDITIONS]**

SOUTH CENTRAL COAST DISTRICT

9. **DEPUTY DIRECTOR'S REPORT**. Report by Deputy Director on permit waivers, emergency permits, immaterial amendments & extensions, LCP matters not requiring public hearings, and on comments from the public. For specific information contact the Commission's Ventura office at (805) 585-1800. **[APPROVED]**

a. **County of Ventura LCP Amendment No. VNT-MAJ-2-12 (Phase I Update) Certification Review**. Concurrence with Executive Director's determination that action by the County of Ventura, acknowledging receipt, acceptance, and agreement with the Commission's certification with suggested modifications, is legally adequate. (SLG-V) **[APPROVED]**

10. **LOCAL COASTAL PROGRAMS (LCPs)** See [AGENDA CATEGORIES](#).

a. **City of Malibu LCP Amendment No. MAJ-2-11 Part A**. Public hearing and action on request by City of Malibu to amend the Land Use Plan (LUP) and Local Implementation Plan (LIP) portions of its certified Local Coastal Program (LCP) to amend the Institutional Zone District's development standards, permitted and conditionally permitted used, and related provisions, City of Malibu, Los Angeles County. (DV-V) **[APPROVED WITH MODIFICATIONS]**

ENFORCEMENT

11. **ENFORCEMENT REPORT**. Report by Chief of Enforcement on Statewide Enforcement Program. (LAH-SF)

[Items 11.1 and 11.2 below share a single, combined staff report.]

[Addenda and [additional correspondence](#) for items 11.1 and 11.2 below have been appended to the combined staff report on February 6.]

[\[Additional correspondence\]](#) have been appended to the combined staff report on February 7.]

11.1. [Cease and Desist Order No. CCC-13-CD-01 \(Drakes Bay Oyster Company, Point Reyes National Seashore, Marin Co.\)](#) Public hearing and Commission action on proposed Cease and Desist Order to address unpermitted development related to offshore aquaculture operations and actions taken inconsistent with Consent Cease and Desist Order No. CCC-07-CD-11, on property located at 17171 Sir Francis Drake Blvd, Marin County, identified by the Marin County Assessor's Office as Assessor Parcel Number 109-13-017, and in the adjacent waters of Drakes Estero. The proposed Cease and Desist Order authorizes and requires Drakes Bay Oyster Company: (1) to cease and desist from conducting or maintaining unpermitted development; (2) to remove onshore unpermitted development; (3) to remove and/or cease unpermitted development, including discharge of invasive *Didemnum* sp., Manila clams, and marine debris from Drakes Estero and beyond; and (4) to follow requirements to seek Coastal Act authorization for specified unpermitted development, and (5) to limit any interim operations and conduct them pursuant to a set of guidelines designed to protect the environment, including by controlling the invasive *Didemnum* sp. (HJ-SF) **[APPROVED]**

11.2. [Restoration Order No. CCC-13-RO-01 \(Drakes Bay Oyster Company, Point Reyes National Seashore, Marin Co.\)](#) Public hearing and Commission action on proposed Restoration Order authorizing and directing Drakes Bay Oyster Company to address unpermitted development related to offshore aquaculture operations and actions taken inconsistent with Consent Cease and Desist Order No. CCC-07-CD-11, on property located at 17171 Sir Francis Drake Blvd, Marin County, identified by the Marin County Assessor's Office as Assessor Parcel Number 109-13-017, and in the adjacent waters of Drakes Estero. Actions required by the proposed Restoration Order to address unpermitted development on the property include: (1) cessation of certain unpermitted practices and development; and (2) restoration of those areas, both onshore and within Drakes Estero, impacted by unpermitted development. (HJ-SF) **[APPROVED]**

SOUTH COAST DISTRICT (LOS ANGELES COUNTY)

12. [DEPUTY DIRECTOR'S REPORT FOR LOS ANGELES COUNTY](#). Report by Deputy Director on permit waivers, emergency permits, immaterial amendments & extensions, LCP matters not requiring public hearings, and on comments from the public. For specific information contact the Commission's Long Beach office at (562) 590-5071. **[APPROVED]**

13. **CONSENT CALENDAR (removed from Regular Calendar)**. See [AGENDA CATEGORIES](#).

14. **COASTAL PERMIT APPLICATIONS**. See [AGENDA CATEGORIES](#). **Attention:** Items appearing in this section of the agenda may be moved to the Consent Calendar for this area by the Executive Director when, prior to taking up the Consent Calendar, staff and the applicant are in agreement on the staff recommendation. If an item is moved to the Consent Calendar it will be processed in the same manner as other Consent Calendar items (See [AGENDA CATEGORIES](#)) except that if that item is subsequently removed from the Consent Calendar by a vote of three or more commissioners, the item will be acted upon at the meeting in the order in which it originally appears on this Meeting Notice and in the manner Coastal Permit Applications are processed. The purpose of this procedural change is to expedite the Commission's coastal development permit process.

a. [Application No. 5-12-095 \(Fuchs, Pacific Palisades\)](#) Application of Anna Fuchs to construct retaining walls and regrade slope for slope stability, replace driveway retaining wall and repair existing deck on bluff-top lot improved with 9,445 sq.ft. single-family home, at 17948 Porto Marina Dr., Pacific Palisades, Los Angeles County. (AP-LB) **[APPROVED WITH CONDITIONS]**

b. [Application No. 5-12-176 \(City of Los Angeles Zip Line Attraction, Venice, Los Angeles\)](#) Application of City of Los Angeles to install zip line attraction in Venice Beach Recreation area (seaward of boardwalk, between Horizon Ave. and 17th Ave.) for a three month pilot program for spring/summer 2013. The 750-ft. long zip lines (up to 4 multiple lines) would run above the park between 44-ft. high take-off platform and 24-ft. high landing platform, at 1500-1600 Ocean Front Walk, Venice, City of Los Angeles, Los Angeles County. (CP-LB) **[APPROVED WITH CONDITIONS]**

Future Meetings: The next meetings of the Coastal Commission are March 6-8, in San Diego and April 10-12, in Santa Barbara.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,)
Plaintiffs-Appellants,)
)
v.) No. 13-15227
)
KENNETH L. SALAZAR, ET AL.,)
Defendants-Appellees.)
_____)

**DEPARTMENT OF THE INTERIOR'S OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

Exhibit 12

Office of the Inspector General, U.S. Department of the Interior
Investigative Report of Drakes Bay Oyster
Company Environmental Impact Statement
February 7, 2013 (excerpt)



Investigative Report of Drakes Bay Oyster Company Environmental Impact Statement

Report Date: February 7, 2013

This is a version of the report prepared for public release.

SYNOPSIS

On May 2, 2012, the Office of Inspector General (OIG) initiated an investigation based on allegations against unnamed employees from the National Park Service (NPS) and NPS contractor Vanasse Hangen Brustlin (VHB) of misconduct, scientific misconduct, and fraud, waste, and abuse. The complainant, an elected member of the National Academy of Sciences (NAS) and adjunct professor at a California university, alleged that either NPS or VHB altered, concealed, or unfavorably misrepresented soundscape data in a draft environmental impact statement (DEIS) that was prepared jointly by NPS and VHB to address environmental impacts for the potential issuance of a special use permit (SUP) to Drakes Bay Oyster Company (the Company). The data in question led to the assessment of the Company's oyster farming equipment as having a "major" impact on the soundscape within the Point Reyes National Seashore.

Included in the allegations of misrepresented data were claims that NPS and VHB failed to use the "best science available" when selecting proxy data to represent the Company's equipment and how NPS was required to collect actual noise emissions from Company equipment. The complainant claimed draft edits and revisions were performed with the intent to deceive the public, peer reviewers, and decisionmakers. The complainant also alleged that NPS and VHB staff engaged in misconduct and/or scientific misconduct. Specifically, the complainant alleged that NPS influenced decisions over where to place ambient sound level collection devices in Drakes Bay, influenced VHB to report unfavorable findings, and deviated from soundscape management regulations and policies. In addition, he alleged NPS and VHB staff failed to recuse themselves from the DEIS project, despite the appearance of conflicts of interest. Finally, the complainant alleged the deceptive information in the DEIS constituted fraud; the complainant, as well as the Company's owner, also claimed the institution of the EIS process in order to issue an SUP was unwarranted and therefore wasted taxpayer funds.

We found no evidence, documents, DEIS revisions, or witnesses that supported the complainant's allegations.

The results of this investigation were reported to the NPS Director.

BACKGROUND

Point Reyes National Seashore

The Point Reyes National Seashore (Point Reyes) Act was signed into law by President John F. Kennedy on September 13, 1962, making Point Reyes the third of 14 National seashores eventually added to the National Park System.¹ The intent of Congress in the passage of the Act was to preserve the diminishing coastal shoreline. As a National seashore, Point Reyes is managed by NPS and is considered to be one of the most geologically and ecologically diverse National parks in the NPS system.

¹ "Final Environmental Statement, Proposed Wilderness Point Reyes National Seashore," prepared by the Department of Interior, National Park Service, Western Regional Office, April 23, 1974.