

Drakes Bay Oyster Company

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November 24, 2010

DBOC SUP EIS
c/o Superintendent Cicely Muldoon
Point Reyes National Seashore
1 Bear Valley Road
Point Reyes Station, CA 94956

Re: Drakes Bay Oyster Company Comments on National Park Service Scoping Letter for Special Use Permit Environmental Impact Statement

Dear Superintendent Muldoon:

Drakes Bay Oyster Company (“DBOC” or “the farm”) appreciates the opportunity to comment on the October 8, 2010, National Park Service (“NPS” or “Service”) scoping letter during environmental review by the NPS of DBOC’s request for issuance of a Special Use Permit to enable DBOC to continue to use the land and facilities within the Point Reyes National Seashore (“PRNS” or the “Seashore”) subject to the 1972 Reservation of Use and Occupancy (“RUO”).

I. INTRODUCTION

The Drakes Bay Oyster Company houses the only remaining oyster cannery still in operation in the State of California. It is located within what is now the Point Reyes National Seashore, located thirty miles northwest of San Francisco, where oyster farming has taken place for nearly a century. The farm’s onshore facilities subject to the RUO are located on about 2.5 acres of land adjoining Drakes Estero, in which oysters are cultivated. The farm is currently operating under a 2008 Special Use Permit (“2008 SUP”) that consolidates previous SUPs issued by NPS for the purpose of supplying water for the oyster farm and using and maintaining the sewage pipeline and leachfield associated with the RUO itself (hereinafter, the “RUO and associated permits”). For the first time, the 2008 SUP attempted to exert authority over DBOC’s operations in the waters of Drakes Estero. However, the oyster farm cultivates shellfish in Drakes Estero pursuant to two leases from the California Department of Fish and Game (CDFG).

As explained in the July 6, 2010 letter requesting the SUP, the CDFG has been leasing the bottomlands in Drakes Estero for shellfish cultivation since the early 1930’s. As required by the California Constitution, the California Legislature retained fishing rights in the tidelands, as well as mineral rights, when it otherwise transferred ownership of the tidelands to the United States in 1965. The State’s right to issue leases for shellfish cultivation in these waters is a property right long managed through leases authorized by the State Legislature and the

California Fish and Game Commission. In 2004, DBOC's two leases were renewed for 25 years, through 2029. Therefore, DBOC is not seeking a permit from the NPS to cultivate oysters in Drakes Estero. Instead, DBOC is seeking a SUP consistent with the terms found in Article 11 of the RUO, which states: "Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property for the herein described purposes, provided however, that such permit will run concurrently with and will terminate upon the expiration of the state water bottom allotments assigned to the vendor. Any permit for continued use will be issued in accordance with National Park Service regulations in effect at the time the reservation expires."

The oyster farm provides a number of important environmental and economic benefits to the area.¹ DBOC goes to great lengths to use environmentally-friendly and sustainable culturing and harvesting techniques. For example, DBOC is the only oyster farm in California that produces and hatches most of its own seed on-site, which reduces the risk of introducing diseases or invasive species. DBOC also uses an off-bottom hanging oyster culture method that is environmentally-sustainable yet labor-intensive and, as a result, employed by less than 5% of U.S. oyster farmers. In addition to processing all its products on-site, DBOC also markets 100% of its products to Marin County and the San Francisco Bay Area in order to reduce its carbon footprint. As discussed below, in addition to the sustainable work we perform, the oysters we grow also play a critical role in the ecosystem. Together, the humans and bivalves of DBOC are working towards a sustainable way to protect and conserve Drakes Estero for future generations.

DBOC is also passionate about public education on issues related to conservation, the environment and the history of shellfish in the area. We provide almost daily tours at no cost to the public consistent with the RUO and SUP issued by the NPS. As the State's last operating oyster cannery and the region's only oyster seed-setting hatchery, DBOC has become an important educational resource. We open our farm to educational institutions of all levels, from pre-school through graduate school. The farm also supports scientific research to learn more about native oysters, estuarine biodiversity, and human health protection. The public has recognized our oyster farm's unique value, making it a beloved and popular visitor destination.

DBOC will participate in this NEPA process for the issuance of the new SUP, for the use of the onshore facilities as described in the RUO that the SUP replaces, and commends NPS' plan and commitment to complete the EIS in the timeframe identified in the Notice of Intent. Adhering to this timeline will be critical to ensure that the Service complies with Public Law 111-88, Section 124. DBOC is committed to working with the Service and the public during the EIS process. To that end, DBOC offers the following comments as part of the scoping process.

¹ NPS recognizes the general benefits of shellfish aquaculture: "The aquaculture industry is important to coastal communities and nearby national parks. It creates employment and business opportunities at the same time maintaining healthy and productive marine populations, species and ecosystems." NPS, "A Growing Relationship: Parks and Aquaculture" webinar (Mar. 30, 2010).

II. THE PURPOSE, NEED, AND OBJECTIVES SHOULD BE MODIFIED.

Drakes Bay Oyster Company currently holds a Reservation of Use and Occupancy and associated permits, all of which will expire on November 30, 2012. Pursuant to Section 124 of Public Law 111-88,² Congress authorized the Secretary of the Interior to issue a special use permit for a period of ten years to DBOC to continue its existing shellfish operations at the Seashore.³ On July 6, 2010, DBOC requested the issuance of a new SUP upon expiration of the existing permit. Attachment A, Letter from Karl S. Lytz, on behalf of Drakes Bay Oyster Company, to the Honorable Ken Salazar (July 6, 2010) (hereinafter “DBOC Application”); Attachment B, Proposed Project Description for DBOC Special Use Permit.

There are significant deficiencies in the NPS’ Purpose, Need, and Project Objectives for the project. Without a clear and complete statement, NPS resources will be committed in violation of the Council on Environmental Quality (“CEQ”) NEPA Regulations. *See* 40 C.F.R. § 1502.2(f) (“Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.”). DBOC respectfully asserts that the Purpose, Need, and Project Objectives for the EIS should be defined more clearly and completely than they have been in the Service’s October 8, 2010, Scoping Letter.

The NPS’ Purpose and Need statement is as follows:

² “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 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.” Department of Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88 § 124 (2009).

³ Contrary to the Public Scoping Meeting Handout, which states “[b]efore [Section 124 of Public Law 111-88]...NPS did not have the authority to extend the permit beyond 2012,” it should be recognized that NPS can also issue a special use permit to DBOC for continued operations after the 2012 expiration date pursuant to other authorities. NPS specifically contemplated allowing the oyster farm to continue operating beyond the 40-year term of the RUO, which provides that upon its expiration, NPS may subsequently issue a special use permit. *See* Johnson Oyster Company Grant Deed to the United States, Exh. C § 11 (Nov. 9, 1972). Furthermore, NPS management of commercial operations is consistent with the Service’s broader policies. NPS Director’s Order #53 also provides the Service the discretion to issue a special use permit upon the expiration of the existing Reservation of Use and Occupancy. NPS, Director’s Order #53, Special Park Uses (2000).

Pursuant to Section 124 of Public Law 111-88, the Secretary of the Interior has the discretionary authority to issue a Special Use Permit for a period of 10 years to Drakes Bay Oyster Company (DBOC) for commercial harvesting and processing of shellfish at Point Reyes National Seashore. The existing Reservation of Use and Occupancy and associated Special Use Permit held by DBOC expire on November 30, 2012. DBOC has submitted a request for the issuance of a new permit upon expiration of the existing permit.

On behalf of the Secretary, the NPS will use the NEPA process to engage the public and evaluate the effects of continuing the commercial operation within the national park. The results of 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.

NPS, Scoping Letter at 1 (Oct. 8, 2010). In addition, the Project Objectives statement is as follows:

- Manage natural and cultural resources to support their maximum protection, restoration, and preservation.
- Manage wilderness and potential wilderness areas to preserve the character and qualities for which they were designated.
- Engage a broad spectrum of the public and relevant agencies in the NEPA process.

This statement of the Purpose, Need, and Project Objectives for the project fails to even minimally describe the oyster farm, as required by NEPA and NPS policy. Further, on the NPS scoping meeting informational posters and in NPS materials distributed, the word “wilderness” showed up twenty-one times, yet there was no description whatsoever of the farm.

When performing NEPA analysis, the Purpose should state the “goals and objectives that NPS intends to fulfill by taking action.” NPS, Director’s Order #12, Conservation Planning, Environmental Impact Analysis, and Decision-making, at 16 (2001) (hereinafter “NPS DO #12”). These goals and objectives can come from specific legislation, such as Section 124 of Public Law 111-88, the management objectives of a General Management Plan (“GMP”), and NPS guidelines for a particular management zone. *See id.* The Need is a “discussion of project ‘background.’” *Id.* The EIS should be guided by these NPS policies and define the Purpose, Need, and Project Objectives more clearly by taking the following into consideration.

Additionally, as part of the Purpose and Need, NPS must also consider the project applicant DBOC’s needs and goals, in addition to the Service’s. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“When an agency is asked to sanction a specific plan, *see* 40 C.F.R. § 1508.18(b)(4), the agency should take into account *the*

needs and goals of the parties involved in the application.”) (emphasis added). Accordingly, the statement of the Purpose, Need, and Objectives in the EIS should also reflect DBOC’s objectives of operating an environmentally-friendly and sustainable oyster farm for a renewable ten-year period under a Service-issued SUP.

DBOC agrees with the Service that the Purpose and Need for the EIS is to consider DBOC’s request to NPS for the issuance of a new SUP for its land operations upon expiration of the existing NPS authorizations, pursuant either to the renewal provision in the RUO or Section 124 of Public Law 111-88, but believes it should clarify that DBOC needs no other authorizations from the NPS besides a SUP to extend DBOC’s use and occupancy of the land and buildings which are the subject of the RUO and associated permits in order to continue its land operations past 2012.

DBOC already has the appropriate and necessary approvals from the California Department of Fish and Game (“CDFG”) for its operations in the waters of Drakes Estero. CDFG has historically leased water bottoms in Drakes Estero for oyster cultivation since at least the 1930s. When the State transferred title of the submerged lands to the federal government in 1965, the State retained the right to fish, and thus its jurisdiction to regulate mariculture operations. As such, CDFG continued to lease water bottoms in Drakes Estero for oyster cultivation as it always had and still does.⁴ Exercising the State’s reserved fishing rights, in 2004, CDFG renewed the oyster farm’s water bottom leases in Drakes Estero through 2029. Accordingly, the oyster farm already has the authorizations needed to continue its operations in the water past 2012. DBOC will also seek approvals from other federal and state agencies and requests that the Service invite the agency noted in Section VI as a cooperating agency that meets both tests of “...jurisdiction by law and special expertise.” A Citizen’s Guide to the NEPA: Having Your Voice Heard. All DBOC requires from NPS, however, is the SUP for its land operations for the purposes authorized by the existing RUO: “processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation for the visiting public, and residential purposes reasonably incidental thereto.” Johnson Oyster Company Grant Deed to the United States, Exh. C. at 1 (Nov. 9, 1972). The current SUP authorizes DBOC to use the land for the same purposes.⁵

As stated above, the Purpose and Need should also be based on the management objectives stated in the 1980 PRNS General Management Plan. General Management Plans

⁴ The State’s jurisdiction over DBOC’s operations in Drakes Estero remains unaffected by the May 15, 2007, letter from CDFG to PRNS purporting to confirm that the Seashore has “primary management authority.”

⁵ The current SUP also consolidates previous SUPs issued by NPS that authorize the additional purposes of supplying water for the oyster farm, and using and maintaining the sewage pipeline and leachfield. Additionally, the current SUP attempted for the first time to exert authority over DBOC’s operations in the waters of Drakes Estero, which CDFG had always controlled and still does through the two leases that have been renewed through 2029. As discussed above, because CDFG has jurisdiction over DBOC’s operations in the waters of Drakes Estero and already authorized the continued operations past 2012, the SUP issued by NPS will only cover DBOC’s land operations.

inform site-specific projects because the decision to designate a certain area for a specific use has already been made in the GMP. NPS DO #12 at 85, 86, 88. Here—as it was in the 1998 Environmental Assessment NPS conducted for certain improvements to the oyster farm when it was operated by Johnson Oyster Company—the operative document is the 1980 PRNS GMP. The Purpose and Need should include the GMP’s statements about the Seashore’s management objectives for the oyster farm, including: i) “to manage seashore activities in the...estuarine areas in a manner compatible with resource carrying capacity;” ii) “to monitor and improve maricultural operations, in particular the oyster farm operation in Drakes Estero, in cooperation with the California Department of Fish and Game;” iii) “to monitor and support productive land uses and activities which are consistent with historical patterns;” and iv) “to ensure that...mariculture activities are consistent with the historical evolution of land and water use at Point Reyes.” 1980 GMP at 2-3.

In defining the Purpose and Need, and in describing the Objectives of this EIS, DBOC believes it is imperative to present the full context of the oyster farm’s operations. From an historical perspective, the EIS should provide sufficient information about the tradition of shellfish harvesting and the role that the oyster farm has played in Drakes Estero and, more recently, within the PRNS. From a management perspective, the EIS should discuss Congressional recognition of the oyster farm’s history and multiple educational, scientific and historical benefits, as well as Congressional support of the oyster farm’s continuation within the Seashore, from the creation of the Seashore up to present day with the passage of Public Law 111-88.

The EIS should similarly address the Service’s own long history of supporting the oyster farm;⁶ describe how the 1980 PRNS GMP supports the project; and disclose the Service’s prior 1998 NEPA analysis conducted for the oyster farm, when it was operated by Johnson Oyster Company, including the Finding of No Significant Impact (“FONSI”) under NEPA. For example, the 1980 GMP specifically highlighted the oyster farm, as well as the surrounding ranches, a visitor center, a hostel, and a horse outfitter, as “major features of the National Seashore.” 1980 GMP at 7-8. It should also be disclosed within the EIS that there are currently numerous commercial operations and working cattle and dairy ranches within PRNS. Furthermore, the ranches all previously operated under RUOs like the one under which DBOC is currently operating, and since the expiration of these RUOs, the ranches now continue operating pursuant to SUPs like the one requested by DBOC.

Importantly, NPS should acknowledge the explicit Congressional mandate per Section 124 of Public Law 111-88 directing the Service to issue a SUP “notwithstanding any other provision of law.” This plain language directs the Service not to consider other laws that conflict with its consideration of DBOC’s SUP application, including wilderness laws and coastal management laws.⁷ Nevertheless, because NPS emphasized wilderness issues during scoping, DBOC believes that it is important that the EIS contain a thorough analysis of the 1976 designation of Drakes Estero as a potential wilderness area and the Service’s obligation to

⁶ See *infra* at n.10.

⁷ See *infra* at Sections IV and VI.

manage wilderness and potential wilderness areas. As discussed in Section IV, however, the EIS should explain that these obligations do not mean that NPS is prohibited from issuing the SUP for the continued operations of the farm past 2012. The fact that the oyster farm was to stay was clearly restated, just four years after the Wilderness Act, in the 1980 PRNS GMP.

Section 124 of Public Law 111-88 also requires NPS to consider the National Academy of Sciences report, “Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California” (2009) (hereinafter “2009 NAS Report”). This report, which is discussed in more detail in Section V below, analyzed the ecological effects of DBOC on Drakes Estero. Ultimately, the report concluded that “there is a lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero.” *Id.* at 6. With respect to the scope and objectives of the EIS, it is imperative that the EIS address all potential impacts, both beneficial and adverse, of DBOC activities on NPS-managed lands.

III. THE APPROPRIATE ENVIRONMENTAL BASELINE IS THE FARM’S EXISTING OPERATIONS.

NPS has indicated that it plans to use the No Action Alternative as the environmental baseline against which the project will be evaluated. Under this scenario, NPS’ baseline would assume that the oyster farm’s operations have ceased in Drakes Estero, based on the hypothetical scenario that NPS will not issue a SUP for post-2012 operations.⁸ Although the No Action Alternative typically serves as the germane environmental baseline for a proposed project against which to evaluate environmental impacts of various alternatives, here it would be inappropriate and impractical for NPS to use a hypothetical projected baseline based on the oyster farm’s possible future termination.⁹ Instead, NEPA requires that NPS use the existing farm’s operations as the environmental baseline.

The essential distinction between a No Action Alternative and the environmental baseline when the project already exists was recognized by the Ninth Circuit in *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186 (9th Cir. 1999). There, an environmental group challenged FERC’s use of the existing conditions of a project that had existed for 50 years as the baseline for the environmental impact analysis. The group argued that the appropriate baseline should instead be the environment as if the existing project had never

⁸ Of note, NPS historically believed that “there is no foreseeable termination of the oyster farm. NPS, Final Environmental Statement FES 74-18, Proposed Wilderness: Point Reyes National Seashore, California, at 56 (Apr. 23, 1974). Similarly, in the Environmental Assessment prepared for the Johnson Oyster Company’s proposed improvements, NPS considered but rejected the alternative of removing the oyster farm, noting that “[t]he existing GMP (NPS 1980) calls for the continuation of an oyster operation within the park.” NPS, Environmental Assessment / Initial Study Joint Document, Johnson Oyster Company, Point Reyes National Seashore, Marin County, California, at 7 (May 1998). The 1980 General Management Plan is still currently in effect.

⁹ Not only would a hypothetical projected baseline be inappropriate and impractical here, but it may violate Section 1506.1(a)(2) of the CEQ NEPA Regulations: “Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would . . . limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a)(2).

been built. *Id.* at 1195. The court described such a baseline as “a theoretical reconstruction of what the McKenzie River basin would be like today had the Leaburg and Walterville projects not been in place for the greater part of this century.” *Id.* The Ninth Circuit rejected this “theoretical reconstruction,” however, and concluded that the *existing conditions* were in fact the proper environmental baseline. *Id.* at 1199. In so holding, the court stated, “It defies common sense and notions of pragmatism to require the Commission or license applicants to gather information to recreate a 50-year-old environmental base upon which to make present day development decisions.” *Id.* at 1197 (internal quotation marks omitted).

Here, as in *American Rivers*, NPS must use the existing conditions—not the No Action Alternative—as the environmental baseline. Like *American Rivers*, in which the project had existed for “the greater part of a century,” an oyster farm has existed at Drakes Estero for nearly a century. And analogous to *American Rivers*, in which it was inappropriate to attempt to recreate a decades-old environmental baseline, here it would be inappropriate to project a hypothetical baseline of an unknown future without the oyster farm in order to make a present-day decision. *See id.* at 1197. The baseline serves as a *practical* requirement to identify environmental consequences of a proposed action. *Id.* at 1195 n.15. The appropriate environmental baseline should therefore consist of the current conditions at Drakes Estero—not some imagined pristine state that does not currently exist, and has not existed for nearly 100 years.

In fact, NPS has previously recognized and applied the proper environmental baseline in prior NEPA review. In 1998, NPS conducted an Environmental Assessment for Johnson Oyster Company (“JOC”), the predecessor to DBOC. NPS, Environmental Assessment / Initial Study Joint Document, Johnson Oyster Company, Point Reyes National Seashore, Marin County, California, at 7 (May 1998) (hereinafter “1998 EA”). As explained in the 1998 EA’s detailed purpose and need section, because JOC’s current operations at that time had various health and safety code issues, the proposed project of rehabilitating existing buildings and constructing a new facility was intended to bring JOC into compliance with these regulations. *Id.* at 3. Without the proposed improvements, NPS and other agencies would have been forced to issue cease and desist orders to JOC and eventually shut the farm down. *See id.* Instead, under the same current GMP and with the same Wilderness designation, NPS chose to collaborate and support the ongoing oyster operations including the construction of permanent buildings to promote long-term processing and interpretation.

Despite the possibility of shutting down JOC, the Service did not use this scenario to create a hypothetical environmental baseline without the oyster farm. Instead, NPS properly used JOC’s current operations as the environmental baseline against which to compare the alternatives. The No Action Alternative was to allow JOC to continue operating in violation of health and safety codes. *Id.* at 6, 11. As such, the already existing impacts would continue so that there would be “no new impacts”, *id.* at 11-12, except that “negative economic effects would occur because JOC would eventually be closed due to noncompliance with federal, state, and local codes and regulations,” *id.* at 13. Similarly, the impacts of Alternative B (the proposed project and preferred alternative) and Alternative C (a variation of the proposed building improvements) were compared against the current environmental baseline of JOC’s existing noncompliance. For example, regarding impacts on human health and safety from both

Alternatives B and C, the 1998 EA concluded, “Code compliance upgrades will have a positive effect on human health and safety. Once the buildings and septic system meet current codes, they will no longer be a health and safety risk to park visitors and JOC staff. In addition, once hazardous material is properly stored and disposed of, potential impacts to visitors and JOC staff will be minimal and not significant.” *Id.* at 18, 23.

Given that the appropriate environmental baseline for this proposed project should be the existing conditions at Drakes Estero, the EIS must consider both the beneficial and adverse impacts of the oyster farm’s continued operation compared to the present impacts. Additionally, to the extent that NPS considers the possible future termination of the oyster farm in its No Action Alternative, the EIS must also address both the beneficial and adverse impacts to the Drakes Estero environment and ecology related to the removal of the farm.

IV. THE DESIGNATION OF DRAKES ESTERO AS POTENTIAL WILDERNESS DOES NOT PRECLUDE THE ISSUANCE OF A SUP TO DBOC.

As discussed above in Section II, Congress directed the Service to issue the SUP for DBOC’s continued operations “notwithstanding any other provision of law,” including, among other things, wilderness laws.¹⁰ NPS has emphasized wilderness issues during scoping to the exclusion of virtually every other issue. The EIS should disclose clearly that the potential wilderness designation of Drakes Estero does not prohibit the issuance of the SUP subsequent to 2012. Issuance of the SUP would not diminish or otherwise affect the existing potential wilderness designation for Drakes Estero or NPS’ current management of the potential wilderness area. Not only would the potential wilderness designation remain intact, but there is no mandated timeframe for conversion of potential wilderness areas to wilderness.

The oyster farm has existed since at least the 1930s, before the Point Reyes National Seashore was created in 1962 and before the PRNS Wilderness Act was passed in 1976. When PRNS was created in 1962 from individual landowners’ and farmers’ properties, Congress envisioned a higher level of recreational use by the public of the Seashore, and provided that the preexisting ranches and oyster farm should continue operating. The legislative history of the PRNS Enabling Legislation shows the specific Congressional intent for the oyster operation to continue after the establishment of the Seashore. *See* Attachment A, DBOC Application.

Pursuant to the 1976 PRNS Wilderness Act, Congress designated certain wilderness areas and potential wilderness areas within PRNS. Drakes Estero was designated as “potential wilderness” due to the long-standing existence of the oyster farm,¹¹ as well as the State’s

¹⁰ *See* Wilderness Act, 16 U.S.C. § 1131 *et seq.* (Sept. 3, 1964); Point Reyes National Seashore Wilderness Act, Public Law 94-544, 90 Stat. 2515 (1976); An Act To Designate Certain Lands Within Units of the National Park System as Wilderness, Public Law 94-567, 90 Stat. 2692 (1976); An Act to Designate Wilderness in the Point Reyes National Seashore in California as the Phillip Burton Wilderness, Public Law 99-68, 99 Stat. 166 (1985).

¹¹ For example, California Representative John Burton explained that the legislation “is intended to preserve the present diverse uses of the Seashore, but to protect the area from possible future,

retained rights over this area.¹² Notably, wilderness laws do not prohibit all commercial operations in wilderness areas. In fact, NPS policies require the Service to manage the potential wilderness as wilderness *to the extent allowed by the existing nonconforming conditions*, such as the oyster farm. NPS Management Policies, § 6.3.1 (2006) (emphasis added). As discussed above in Section II, NPS continued to support the oyster farm’s operations after this designation. For example, one objective of the operative 1980 GMP is the monitoring and improvement of the oyster farm. And in 1998, NPS conducted an environmental assessment for improving the oyster farm that resulted in a FONSI under NEPA.

The issuance of a SUP for continued operations past 2012 would not change NPS’ historical management of Drakes Estero or the oyster farm, or prevent a future conversion from potential wilderness to wilderness. Congress has not prescribed a timetable for elimination of the oyster farm as a non-conforming use, nor for the conversion of Drakes Estero from potential wilderness to wilderness. It is not unusual for non-conforming uses in wilderness areas to be authorized. *See* Attachment A, DBOC Application. The EIS should clearly provide this background, and the Service should consider the oyster farm’s nearly century-long operations in Drakes Estero, which was designated as potential wilderness only a few decades ago. The EIS should also clarify that Public Law 111-88 specifically stipulates that any decision as related to DBOC will not set a precedent for management of potential wilderness areas outside PRNS.

V. IMPACT TOPICS THAT SHOULD BE ADDRESSED BY THE EIS.

It is crucial that the EIS provide an objective, fair, and thorough analysis of the positive effects of the oyster farm on the environment, including the many environmental, ecological, economic, cultural, educational, scientific, and human health and safety benefits that it provides. The EIS should also consider how the termination of the oyster farm would result in the loss of these critical benefits.

Importantly, the CEQ NEPA Regulations direct that “environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g). We have repeatedly expressed our concerns about the Service’s recent history relating to assessing the oyster farm’s impacts on the environment. For example, various authorities, such as the Department of Interior’s Inspector General and the National Academy of Sciences, have criticized the science

incompatible development.” Wilderness Additions—National Park System: Hearings Before The Subcommittee On Parks and Recreation of the Committee on Interior and Insular Affairs, 94th Cong. 2 (February 5, 19 and March 2, 1976), pg. 272. The oyster farm was one of the preexisting diverse uses meant to be preserved: “There are two areas proposed for wilderness which may be included as wilderness with ‘prior, non-conforming use’ provisions. One is Drakes Estero where there is a commercial oyster farm.” *Id.* at 273.

¹² Just four years after Congress’ wilderness and potential wilderness designations in PRNS, the 1980 GMP affirmed that “the designated potential wilderness [in the Seashore] consists of most of the quarter-mile offshore strip and other wetlands over which the state of California has retained some rights....” 1980 GMP at 9.

and data that NPS has relied on and/or collected. We have tried to work with the Service to clarify these points.¹³

More recently, NPS assigned certain PRNS staff to the NEPA team for this EIS, despite their public statements that the oyster farm adversely impacts the environment and should be terminated.¹⁴ These staffing choices contradict NPS' stated intent to ensure that NPS staff assigned to the EIS not have a pre-existing bias against the farm. We attempted to discuss this with the Service, as well. We believe all of this should be disclosed and addressed so that the EIS does not appear to justify decisions that the Service has already made, and thus avoid violating 40 C.F.R. § 1502.2(g).

In an attempt to balance the EIS process, we offer the following comments on impact topics, which must be "accurate." NPS DO #12 at 54. This is so vital that NPS Policies state, "Although alternatives are important, they are useless unless you clearly and correctly assess their impacts in an EIS . . . if the data are wrong or mislead the reader, it wastes the reader's time and the park's money." *Id.* We value the public's resources, and want to ensure they are used properly.

A. Environmental and Ecological Benefits

It is vital that the EIS analyze the ecological role of oysters in the ecosystem. According to the National Academy of Sciences, oysters are known as "foundation species" because of the critical role they play in the ecosystem. 2009 NAS Report at 21. As recognized by the 2009 NAS Report, oysters are filter feeders that clarify and improve water quality so that the water is cleaned of excess nutrients, sediments and phytoplankton. *Id.* at 68. As a result, more sunlight penetrates the water, enhancing sub-aquatic vegetation growth. In fact, eelgrass in Drakes Estero doubled between 1991-2007, during a period of time when there was uninterrupted oyster farming and harvest levels were at their highest. *Id.* Since the functional elimination of native oysters in Drakes Estero, the oysters grown by DBOC and its predecessors have likely replaced the ecological role that native oysters once played. *Id.* The NAS Report emphasized the significance of this benefit, and concluded that DBOC's oysters are helping to "restor[e] an historic baseline ecosystem" by acting as a proxy for the native oysters that once existed. *Id.* at 22.

To this end, we believe that the EIS must analyze the beneficial and adverse impacts of the ecological role of oysters in its evaluation of the Proposed Action, No Action Alternative,

¹³ For example, we sent a letter dated May 11, 2009, to then-Regional Director Jon Jarvis about this, but never received a response.

¹⁴ We have specifically expressed our concerns to the Service about Natalie Gates, PRNS Staff Biologist and the Service's designated Point of Contact in this EIS process. For instance, in a television news report, Ms. Gates made specific statements about the farm's alleged adverse impacts to various species, and concluded that the Service's research demonstrates that DBOC should be terminated. *See* ABC-KGO, "Local Oyster Cannery May Need New Home" (May 21, 2007), available at http://abclocal.go.com/kgo/story?section=news/assignment_7&id=5326358 (last visited November 16, 2010).

and any other Alternatives considered or rejected. The EIS should analyze the environmental and ecological impacts of the presence of oysters from Drakes Estero, including:

- Oysters are the keystone species in the estero ecosystem, and the EIS should consider the role that DBOC's oysters play. In addition, the EIS must study the resultant impact of the removal of the oyster farm on water quality in the Estero due to runoff from the ranchers and ranchlands in the Pastoral Zone surrounding Drakes Estero. The No Action Alternative and other Alternatives should evaluate the adverse impacts associated with the removal of the oysters, including the long-term loss of ecosystem services they provide.
- The oysters and related equipment currently provide complex, three-dimensional habitat for special status species of fish, birds, and others, and the EIS should consider the benefits of this habitat. There are limited alternative habitats for many of these species, and some of these alternative habitats lack the three-dimensional structure provided by DBOC's aquaculture apparatus. Rockfish, sharks, perch and other species benefit from the structures provided by the oysters and associated aquaculture apparatus, which they use as refuge, rearing and spawning habitat. Several species of surfperch (the population of which has recently declined in California) benefit from the habitat complexity of the racks. Rockfish are another species of declining fish that benefit from the habitat. For example, rockfish are generally structure-oriented in their habitat preferences, and some species use the lagoon as a nursery area and aggregate near the racks. Birds also use the shellfish racks and other shellfish gear as habitat. There is substantial evidence that shellfish, whether cultured or wild, form an important source of food for a wide variety of marine shorebirds. The role of shellfish aquaculture as a disturbance factor to birds must be placed in context with the recognized ecological functions that it has been documented to provide for a wide variety of shorebirds and waterfowl. In analyzing the No Action Alternative and other Alternatives, impacts to these species from the loss of habitat, as well as the lost ecological value of biodiversity facilitated by the aquaculture structures, should be assessed.
- Filtration functions and biodeposition provided by the oysters facilitates and supports eelgrass growth, and the EIS should consider such benefits. Eelgrass and other submerged aquatic vegetation can be coincident with shellfish culture operations, and thus, it is appropriate to consider how shellfish practices at DBOC may directly and/or indirectly affect this priority habitat. Optimal habitats for eelgrass (*Z. marina*) growth along the U.S. West Coast include the low intertidal to shallow subtidal zone in moderately stable, non-bioturbated, fine to medium grain sediments, and moderate amounts of surface roughness and shellfish macrofauna. Eelgrass coverage and density fluctuate widely by season and year. Recruitment into new habitats depends on a combination of suitable physical, chemical, and biological conditions. The analysis of the effects of the oyster farm on Drakes Estero eelgrass abundance and distribution should take place in context by comparing eelgrass status and trends in adjacent embayments where no culture is practiced. The relative ecological value and functions of relatively monotypic meadows of eelgrass should be compared to an oyster eelgrass habitat mosaic that is provided from the oyster farm in the analysis of the baseline conditions. Where available, aerial documentation of eelgrass proliferation in Drakes

Estero should be compared to other embayments where oyster culturing is practiced. In analyzing the No Action Alternative and other Alternatives, impacts to the eelgrass in the absence of the oyster farming, such as how the loss of the filter feeding biomass affect water clarity and photosynthetically active radiation, should be assessed.

- The EIS should consider the ecological services provided by the oysters to the estuarine ecosystem, including filter feeding, which cleans the water of excess nutrients, sediments and phytoplankton. The result is improved water quality accomplished by reduced turbidity that allows more sunlight to penetrate and enhance sub-aquatic vegetation growth. Another benefit of the filter feeders is that these excess nutrients (“otherwise contaminants”) that are not converted to body protein are converted into useable forms, packaged, and made available to sub-aquatic vegetation as a form of fertilizer, also enhancing growth, thus providing additional habitat for other species. The three dimensional shapes of the oyster shells also become important habitat for other species. This is especially true for one particular method of hanging, off-bottom culture used by DBOC in Drakes Estero. All of these basin-wide benefits must be considered to provide the complete context for any localized impacts of the farm’s operations to eelgrass, such as shading under racks or propeller clipping, as well as for the shellfish culture’s effects on benthic pelagic coupling and sediment enrichment from biodeposition and sedimentation. The analysis of the latter should be reflective of similar culture operations under similar tidal exchange, culture densities and, ideally but not necessarily exclusively, for the same species cultured.
- The EIS should also analyze the positive impacts that the oyster farm’s operations have on the protection of harbor seals. The farm’s presence discourages recreational kayakers and other recreationalists from disturbing the seals. In 1992, the NPS, NOAA, and CDFG recognized that kayak and oyster boat use in Drakes Estero during harbor seal pupping season could harm the harbor seal population due to disturbances. Since 1992, Drakes Estero has been closed from March 1 to June 30 to kayak and canoe use, and oyster boats have been restricted to certain areas during that period. DBOC not only adheres to this protocol, but also encourages others to do the same. Many well meaning, yet uninformed, kayakers attempt to use Drakes Estero during the annual closure. As the Drakes Estero kayak launch site is located at the oyster farm, DBOC staff regularly stop would-be kayakers during pupping season, educate them about the closure and why it exists, and suggest alternative kayak locations. This EIS must consider the adverse effects to harbor seals if the oyster farm is removed. Additionally, the 2009 NAS Report found that no causal link between seal disturbances and oyster farming could be concluded from the data and studies that NPS relied upon. *See* 2009 NAS Report at 41, 43, 44. The NPS seal monitoring program’s volunteers made recording errors and omissions; these observations therefore have “limited utility.” *Id.* at 44. The one modeling study for potential maricultural impacts to the harbor seals was also compromised, and thus, does not demonstrate any “causal link.” *Id.* at 43. This EIS must acknowledge the inconclusive data and should consider all best available science, including any pending or future data, reports or other science—including the PRNS camera program—that directly pertain to DBOC’s impacts or lack thereof on seals in Drakes Estero.

- The EIS should analyze invasive species in the appropriate and full context. Although the Pacific oyster is not native to the West Coast of the U.S., it is the mainstay of the industry from Mexico to British Columbia. It has not been documented as an invasive species in the Estero or Point Reyes region. Past statements regarding the oyster farm's operational impacts on fostering invasive species spread and/or establishment need to be placed into context. For example, current seed import policies and procedures have been in place for decades that greatly minimize the potential for the introduction of invasive species or pathogens. Shellstock is no longer imported from abroad, and oyster culture practices (while a recognized source for the introduction of some non-native invasive species in the early part of the last century (e.g., *Spartina* in WA)) are not the source of ballast water and/or hull fouling introductions implicated through references sometimes cited. Current practices, which have been in place now for many years, greatly minimize the potential for introductions. Substrate for currently recognized invasive species (e.g., *Didemnum*) provided by oyster culture operations could be provided by other structure in the absence of the oyster racks, etc. The operation's role in the spread of *Didemnum* or other invasive species must be evaluated based on best available science, not speculation.
- DBOC's energy usage, climate change impacts, and chemical usage should also be analyzed in the EIS. DBOC uses very little energy to grow shellfish. The farm uses no feeds, no fertilizers, no chemicals, and requires no cultivation. The landing and processing site is directly adjacent to the growing area, which means little fossil fuel energy is required for planting and harvesting. The farm can harvest up to 25,000 oysters on one trip into the Estero using approximately one gallon of gasoline.
- Oyster shell is in high demand for many habitat enhancement projects, but importing oyster shell from out of state requires costly transportation and extensive pathological analyses to address non-native invasive species introduction. DBOC operates the last oyster cannery in California, making it the only significant, continuous, and renewable source of oyster shell in the state. In analyzing the No Action Alternative and other Alternatives, the EIS must study the potential adverse effects of the loss of this local shell resource on regional habitat enhancement projects, specifically the loss of benefits to the species and ecosystems targeted. DBOC regularly contributes this shell for the purposes of Endangered Species Act habitat restoration and habitat enhancement, including the San Francisco Bay Native Oyster Restoration Project and the San Francisco Bay Bird Observatory Snowy Plover Habitat Enhancement Project, as well as other projects with other non-profits and government agencies.

B. Socioeconomic Benefits

The EIS should consider DBOC's socio-economic impacts and the resulting loss to the local and state economy, should the farm be shut down under the No Action Alternative and other Alternatives.

The DBOC oyster farm represents 85% of the shellfish growing area in Marin County and the San Francisco Bay Area. It produces nearly 40% of California's grown oysters and, as the last operating cannery in the State, 100% of shucked and packed oysters. DBOC's unique importance to the local and state economy and shellfish industry is further magnified by the fact

that it is the only fully approved growing area, meaning that it is the only farm authorized to harvest oysters year-round. DBOC provides jobs to thirty-five employees, as well as housing for many of these employees and their families. Employees' family members generally work in the area or attend schools in Marin County. As already discussed, DBOC also is a popular visitor attraction, bringing approximately 50,000 people each year to West Marin, which increases the demand for goods and services in the area.

The EIS should consider the following socioeconomic issues:

- Jobs provided by DBOC, and taxes paid by DBOC and its employees.
- Ancillary businesses supported by DBOC as a tourist location.
- Ancillary businesses supported by DBOC as purchaser of equipment.
- Proportion of oyster production provided by the DBOC, relative to local and state production.

The EIS should also consider the socioeconomic value of lost environmental services that would result from the oyster farm's termination:

- Loss of the oysters' nitrogen fixation and removal that currently counter, for example, nitrogen contributions from the cattle ranches surrounding Drakes Estero.
- Loss of carbon sequestration.
- Loss of habitat diversity and functions to many species.
- Loss of quenching phytoplankton blooms.

C. Cultural Benefits

The EIS should fully evaluate the cultural resource value of the oyster farm as the only oyster farm within the Seashore and as one of the most visited destinations in the Seashore. As discussed above, DBOC continues a well-established "cultural history of oyster farming" that long antedates the creation of PRNS. 2009 NAS Report at 1. Additionally, it is the last operating oyster cannery in California. Given its cultural and historical significance, DBOC has a positive effect on the Seashore, "enhanc[ing] visitors' experience." *Id.* at 48-49. Furthermore, DBOC provides accessibility as called for in the GMP. DBOC is highly-popular with cultures that value fresh seafood in their diets, across the range of socioeconomic backgrounds. In addition, DBOC is accessible to disabled visitors to the PRNS.

D. Educational Benefits

The EIS should analyze the educational benefits provided by DBOC. DBOC plays an essential role in educating the public on 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. It provides almost daily tours, at no cost, for the public and students from elementary through graduate school.

E. Scientific Benefits

The EIS should consider the positive scientific benefits provided by the continued operation of the farm. DBOC contributes to science and research related to native oysters, estuarine biodiversity, and human health protection. It is the only oyster farm in the state with an on-site hatchery, lab, and biologists on staff. DBOC also presciently recognized the importance of native oyster restoration projects, and donated \$10,000 worth of oyster shells to the largest such project in California. DBOC, through its donation of oyster shell to the San Francisco Bay Bird Observatory, has actually enabled increased hatching and fledgling rates for an endangered species, the Western Snowy Plover.

F. Human Health and Safety

The following benefits to human health and safety should be considered in the EIS. As the last operating cannery in the state, DBOC produces 100% of shucked and packed oysters in California. The fact that it processes its oysters on-site greatly increases seafood safety. DBOC can harvest, shuck, pack, and deliver its oysters to San Francisco Bay Area markets within 24 hours, thereby providing healthy, locally-grown food to meet local demand.

DBOC is also the largest marine biotoxin sampler in California. It cooperates, at its own expense, with the California Department of Public Health in order to ensure the safety of the shellfish harvested from Drakes Estero, and to help guide the California Department of Public Health and the California Department of Fish and Game in decision-making regarding sport fishing quarantines and closures.

VI. COOPERATING AGENCIES

As early as possible in the EIS process, NPS should involve other federal agencies that have “jurisdiction by law,” or “special expertise with respect to environmental issue[s].” 40 C.F.R. §§ 1501.6, 1508.15, 1508.26. Non-federal agencies should also be involved “no later than the scoping process,” where they have “jurisdiction by law and special expertise with respect to reasonable alternatives or significant environmental, social or economic impacts associate[ed] with a proposed action that requires the preparation of an environmental impact statement.” CEQ Memorandum for Heads of Federal Agencies in Implementing the Procedural Requirements of NEPA, July 28, 1999; CEQ Memorandum for Heads of Federal Agencies in Implementing the Procedural Requirements of NEPA, Jan. 30, 2002. The series of CEQ Memoranda released on this subject convey the importance of involving other federal, state, and local agencies in the NEPA EIS process, and the many benefits to be gained from such cooperation. *Id.*

For the purposes of increasing the efficiency and effectiveness of the EIS process, we request that the Service invite the California Department of Fish and Game (“CDFG”) as a cooperating agency per 40 C.F.R. § 1501.6 and The Council on Environmental Quality Guidance Regarding Non-Federal Cooperating Agencies (September 25, 2000). CDFG possesses special expertise with respect to the oyster farm because it is the state agency responsible for issuing

water bottoms leases for the purposes of aquaculture, and furthering the purposes of the state Aquaculture Development Act. *See* Cal. Fish & Game Code §§ 15000 *et seq.*; Cal. Pub. Res. Code §§ 825-830.

The California Coastal Commission (“CCC”), however, should not be invited to act as a cooperating agency. As discussed above in Section II, Section 124 of Public Law 111-88 removes the CCC’s jurisdiction as it relates to the Service’s issuance of the SUP through the plain language of the “notwithstanding any other provision of law” provision. Moreover, the CCC’s expertise in coastal matters in this context is duplicative of, and less helpful than, the CDFG’s aquaculture experience. Furthermore, CDFG is also empowered to comply with the provisions of the Coastal Act and, in so doing, protect coastal zone resources. *See* Cal. Pub. Res. Code §§ 30003, 30007.5.

VII. PENDING INVESTIGATIONS

As you are aware, investigations concerning the scientific validity of prior work in Drakes Estero and concerning the farm are proceeding before the Marine Mammal Commission and with the Department of Interior. We expect that these proceedings will produce documents relevant to the topics described herein and to the SUP EIS. In addition, we ask that you incorporate the approximately 250,000 NPS photographs of DBOC operations into the list of primary documents, and exclude the work of Dr. Benjamin Becker et al., as further explained under the “References of Uncertain Relevancy to the EIS” section in the November 21, 2010, submittal from our consultants Dr. Jeffrey Fisher and Dr. Robert Abbott of Environ.

Thank you for the opportunity to submit these comments. We look forward to working with you throughout the NEPA process, including providing additional information on our operations, reviewing the draft EIS and submitting further comments on the same. Please contact us if you have any questions.

Sincerely,

Kevin and Nancy Lunny
Owners of Drakes Bay Oyster Company

Attachments

ATTACHMENT A

Drakes Bay Oyster Company Special Use Permit Application

Letter from Karl S. Lytz, on behalf of Drakes Bay Oyster Company, to the Honorable Ken Salazar (July 6, 2010)

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File No. 502976-0000

July 6, 2010

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

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

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

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.

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

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.

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.*

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

ATTACHMENT B

Proposed Project Description Drakes Bay Oyster Company Special Use Permit

Proposed Project Description

Drakes Bay Oyster Company Special Use Permit

DBOC requests that the EIS consider a SUP that permits the following activities:

1. Operation and maintenance of the farm under the same terms and conditions, with a reasonable annual fee, as the existing Reservation of Use and Occupancy and associated permits, including the possibility of renewal commensurate with DBOC's bottomland leases from CDFG in Drakes Estero.
2. Completion of activities evaluated and found to have no significant impact on the environment in the 1998 NPS Environmental Assessment and FONSI for Replacement and Rehabilitation of Facilities ("1998 EA"). The 1998 EA authorized several building replacement and rehabilitation projects, of which some have not yet been completed. *See* Table 1.

TABLE 1: Status of Activities Studied in 1998 EA

| Activity Permitted By 1998 EA | Status / Permitting Authority |
|---|--------------------------------------|
| New septic systems | Completed pursuant to 1998 EA |
| Debris removal | Completed pursuant to 1998 EA |
| Demolition of 6,590 sf building space | Completed pursuant to 1998 EA |
| Demolition of 2,600 sf building space | To be completed pursuant to 2012 SUP |
| Build new garage [900 square feet (sf)] | To be completed pursuant to 2012 SUP |
| Build new seed plant (hatchery) [2,625 sf] | To be completed pursuant to 2012 SUP |
| Rehabilitate stringing plant [500 sf] | To be completed pursuant to 2012 SUP |
| Build two-story Processing Plant / Interpretive Center [7,600 sf] | To be completed pursuant to 2012 SUP |
| Build new fencing to screen residential use area | To be completed pursuant to 2012 SUP |
| Replace piers and docks | To be completed pursuant to 2012 SUP |

3. Provide for future consideration of renewable energy investments, including installation of solar panels.
4. Extension of the existing seawater intake pipeline to improve public health and hatchery efficiency, pursuant to plans previously provided to NPS. This extension will be 1,050 feet across the bottom of Drakes Estero, alongside the boat channel, for access to deeper, cleaner water. The pipeline will be anchored to the substrate and the screened end will be two meters, at a minimum, above the estero bottom. Plans for this pipeline have been delivered to CCC and the NPS.
5. Relocation of existing outdoor live-holding system used for seed storage and wet storage of retail shellfish.
6. Build cover over oyster washing pier per CDPH and FDA requirements to keep oysters out of direct sunlight after harvest.
7. Install outdoor display aquarium for interpretive purposes.