



November 22, 2010

By U.S. Priority Mail

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

Re: Scoping Comments on Drakes Bay Oyster Company Special Use Permit EIS

Dear Superintendent Muldoon:

The National Wildlife Federation appreciates the opportunity to submit these scoping comments on the Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement (the "EIS").

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization. NWF has more than 4 million members and supporters, including 120,000 members in California, and conservation affiliate organizations in forty-seven states and territories. NWF has a long history of working to protect the nation's coastal and inland waters and the fish and wildlife that depend on those vital resources.

Introduction

Drakes Estero, a 5,000-acre shallow tidal estuary located in the heart of the Point Reyes National Seashore, is an ecological treasure. The Estero is designated as an Area of Special Biological Significance by the State of California, a site of regional importance by the Western Hemisphere Shorebird Reserve Network, and Essential Fish Habitat and a Habitat Area of Particular Concern under the Magnuson-Stevens Fishery Conservation and Management Act. In 1974, the Park Service concluded that:

"In terms of preserving and protecting marine life systems, Drakes Estero and Limantour Estero could well be considered the most significant ecological units within the National Seashore."

National Park Service, *Final Environmental Impact Statement on Proposed Wilderness in Point Reyes National Seashore*, 1974.

Drakes Estero is home to 20 percent of the mainland breeding population of harbor seals in California, is a primary seal puping site, and is used by at least 18 at-risk wildlife species. Thousands of shorebirds and waterfowl are regularly present in the Estero with those numbers skyrocketing in the winter to 20,000 individuals. More than 100 species of birds have been identified at Drakes Estero during winter surveys, including several listed species or species of special concern such as Osprey, White Pelican, Brown Pelican, Snowy Plover, Peregrine Falcon, Black Brant, and Marbled Murrelet. The estuary is extremely important to wintering Black Brant, which only migrate to a few places along the Pacific Flyway.

Drakes Estero also supports at least seven percent of the State of California's eelgrass habitat, which provides important habitat for fish and other species. Thirty-five species of fish have been observed within eelgrass beds in either Drakes Estero or in nearby Estero de Limantour. Eelgrass provides important nursery habitat and foraging habitat for many species of birds, including Black Brant. Eelgrass also plays an important role in stabilizing the substrate and in nutrient cycling.

In 1976, Drakes Estero was designated as "potential wilderness" within the Phillip Burton Wilderness Area. The Point Reyes Wilderness Act of 1976, Pub. Law 94-567 and 94-544. Like all designated potential wilderness in Point Reyes National Seashore, Drakes Estero will revert to wilderness as soon as the nonconforming uses cease and notice of the same is published in the Federal Register. *Id.* The legislative history for the Point Reyes Wilderness Act makes it clear that Congress intended that the Estero be managed as wilderness to the extent possible and that all efforts should be made to remove obstacles to the eventual conversion of the Estero to wilderness status. House Interior Committee Report, House Report 94-1680 (1976).

In 2005, the Drakes Bay Oyster Company (DBOC) bought out the Johnson Oyster Company's lease even though only seven years remained on the Reservation of Use. At the time, DBOC assured the Park Service and others that DBOC fully understood that its right to operate would end in 2012 and that it could make back its investment by that time. The activities of DBOC are the only nonconforming uses in Drakes Estero and the only barrier to full wilderness designation.

Issuance of a new Special Use Permit would have numerous, significant adverse implications:

- (1) A new Special Use Permit would prevent the designation of Drakes Estero as wilderness, ignoring longstanding Congressional direction and the value of wilderness to the public. Issuance of a new Special Use Permit would also set a dangerous and inappropriate precedent for re-opening wilderness designations across the country.
- (2) A New Special Use Permit would cause significant adverse impacts to the biological heart of Point Reyes National Seashore. These adverse impacts include significant disturbances to foraging birds and harbor seals, including when pups are present; loss of habitat and creation of barriers to haul out sites on intertidal flats; creation of hard substrates that are deleterious to the health of the resource;

loss of eelgrass; increases in the numbers of invasive species; and reductions in water quality.

- (3) A new Special Use Permit would undermine the ability of the species that rely on Drakes Estero to thrive in the face of climate change. To help increase the resiliency of these species to climate change, the Park Service should act to remove existing stressors – and prevent the creation of new stressors – in Drakes Estero by denying the requested new Special Use Permit.
- (4) A new Special Use Permit would ignore and undermine clear legal directives and management policies applicable to Point Reyes National Seashore. Congress has made it clear that Point Reyes National Seashore is to be managed for the maximum protection, restoration, and preservation of the natural environment. Congress has also made it clear that Drakes Estero should revert to wilderness. Section 124 of Public Law 111-88 does not overturn, and does not preclude the Park Service from considering, these longstanding requirements.
- (5) Issuance of a new Special Use Permit would place the commercial profits of one private company over the needs of the Park and the interests of the public.

The National Wildlife Federation strongly supports the reversion of Drakes Estero to full wilderness in 2010 when the current DBOC Special Use Permit and Reservation of Use end. NWF urges the Park Service to make final wilderness designation, and the vital protections that such designation provides for the multitude of species that rely on the Estero, the top priority in its decision-making process. Protection of this ecological treasure must trump the desire of one company to use – and at times abuse – the resources of Point Reyes National Seashore for private gain.

The Park Service should manage Drakes Estero as Congress intended; for the maximum protection, restoration, and preservation of the natural environment.

Detailed Scoping Recommendations

A. The EIS Must Properly Define the Statement of Project Purpose and Need

The National Wildlife Federation believes that the purpose and need statement for this project fails to accurately describe the potential lease extension and fails to identify key objectives that should be met through the project, including particularly the importance of complying with the legislation and management policies applicable to Point Reyes National Seashore. NWF urges the Park Service to revise the purpose and need statement as follows (recommended additions to the purpose and need statement at http://www.nps.gov/pore/parkmgmt/planning_dboc_sup.htm are underlined; recommended deletions are ~~stricken~~):

“Pursuant to Section 124 of Public Law 111-88, the Secretary of the Interior has the discretionary authority to issue a new Special Use Permit for a period of 10 years to

Drakes Bay Oyster Company (DBOC) for the commercial production, harvesting, and processing of oysters shellfish at Point Reyes National Seashore. The existing Reservation of Use and Occupancy and associated Special Use Permit held by DBOC expires 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 issuing a new Special Use Permit for the commercial production, harvesting, and processing of oysters continuing the commercial operation within the national park, and to evaluate such effects on a designated wilderness area and national park purposes and/or legislative obligations. The results of the NEPA process will be used to inform how best to ensure that the use of Drakes Estero is consistent with Point Reyes National Seashore's purpose, policies, mission, and legislative obligations; and to inform the decision of whether a new Special Use Permit should be issued to DBOC for a period of 10 years.

PROJECT OBJECTIVES

- Manage natural ~~and cultural~~ resources to support their maximum protection, restoration, and preservation.
- Manage wilderness and potential wilderness areas to preserve and enhance the character and qualities for which they were designated.
- Manage cultural resources as appropriate to achieve the purposes of the Wilderness Act.
- Meet the obligations of the laws and policies that govern Point Reyes National Seashore, including the legislation establishing the Point Reyes National Seashore and establishing the standards for administration of the seashore, the Wilderness Act of 1964, the Point Reyes Wilderness Act of 1976, and the management policies of the National Park Service.
- Engage a broad spectrum of the public and relevant agencies in the NEPA process.”

B. The EIS Must Properly Define the No Action Alternative

Among other things, the National Environmental Policy Act (NEPA) requires an analysis of: (a) the no action alternative; and (b) a comparison of the environmental effects of the no action alternative as compared to the effects of other proposed alternatives. 40 C.F.R. § 1502.14(d); *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 3*, 46 Fed. Reg. 18026 (1981). Where the no action alternative would “result in predictable actions by others,” the impacts of these actions must also be included in the evaluation of the no action alternative. *Forty NEPA Questions, Question 3; National Park Service DO-12 Handbook* at 21-22.

It is essential that the Park Service properly define the no action alternative for Drakes Estero for at least the following reasons. First, as the Park Service has recognized, the no action alternative

“is almost always a viable choice in the range of reasonable alternatives.” *National Park Service DO-12* at 21-22. Second, the no action alternative “establishes the standard by which the reader may compare the other alternatives’ beneficial and adverse impacts related to the applicant doing nothing.” *Kilroy v. Ruckleshaus*, 738 F.2d 1448, 1453 (9th Cir. 1984) (citation omitted). The no action alternative “sets a baseline of existing impact continued into the future against which to compare impacts of action alternatives” and helps “decision-makers understand the comparative impacts of proposals, as well as the absolute impact.” *National Park Service DO-12 Handbook* at 21-22.

Where, as here, the proposed action is to extend a lease that is set to expire, the no action alternative is one where “the proposed activity would not take place.” *Forty NEPA Questions, Question 3*. As the U.S. Court of Appeals for the Ninth Circuit has made clear, a decision to extend a lease that is set to expire does not simply preserve the status quo, and cannot be evaluated as doing so. To the contrary, such a lease extension creates new rights and potentially new impacts that must be analyzed. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006) (BLM’s decision to extend a lease for geothermal exploration did not merely preserve the status quo but instead gave the permittee new rights to develop the land and a possibility of obtaining additional future lease extensions); *Confederated Tribes and Bands v. F.E.R.C.*, 746 F.2d 466 (9th Cir. 1984) (a decision to renew a hydropower license is a new action and not simply a phase in an essentially continuous activity as the renewal process gives FERC considerable discretion to deny or change the terms of the permit); see *Forty NEPA Questions, Question 3* (the no action alternative for a new project cannot be defined as “no change” from the status quo or current management regime).

In the case of Drakes Estero, the no action alternative must be defined as “no action on the requested lease extension such that the current Special Use Permit and Reservation of Use would expire, allowing the area to revert to wilderness.” This no action alternative would also result in predictable actions by others that include, compliance with the legal requirements resulting from expiration of the current lease. These legal requirements include: (a) DBOC’s full compliance with the lease termination requirements in the Special Use Permit and the Reservation of Use; (b) DBOC’s full compliance with the termination provisions of the California Fish and Game leases M-438-01 and M-438-01-02; and (c) reversion of the leased area to wilderness pursuant to the Point Reyes Wilderness Act of 1976 (Public Law 94-544), the Act’s legislative history, and the management policies of the National Park Service.

The no action alternative would produce the following conditions that should be analyzed as part of the no action alternative:

- (1) No oyster or other mariculture activities, and no other commercial activities within Drakes Estero or the onshore land leased to DBOC;

- (2) All personal property, including all furniture, fixtures, equipment, appliances, apparatus, trailers, modular units, and/or temporary structures removed pursuant to the terms of the Special Use Permit;¹
- (3) All structures and improvements placed upon the premises during the period of the reservation of use removed pursuant to the terms of the Reservation of Use;²
- (4) All growing structures removed from the Estero pursuant to the terms of the California Department of Fish and Game leases;³
- (5) Wilderness designation and protections in place, pursuant to the Point Reyes Wilderness Act of 1976, Public Law 94-544; the Act's legislative history; and the management policies of the National Park Service.

NWF also urges the Park Service to evaluate the no action alternative as the environmentally preferred alternative. At a minimum, all the elements of the no action alternative described above should be included in the environmentally preferred alternative. Additional elements that should be considered for the environmentally preferred alternative would include restoration of areas or resources damaged by the long history of the Reservation of Use and Special Use Permit.

As compared to any alternative that issues a New Special Use Permit, the no action alternative is clearly the “alternative that causes the least damage to the biological and physical environment” and the “alternative which best protects, preserves, and enhances historic, cultural, and natural resources” *Forty NEPA Questions, Question 6a; National Park Service DO-12 Handbook at 22-23*. The no action alternative will ensure cessation of all commercial activities in Drakes Estero and removal of all structures; ensure that Drakes Estero reverts to wilderness and benefits from

¹ The Special Use Permit states that “[a]t the conclusion of Permittee’s authorization to use the Premises for the Permitted Uses, Permittee shall surrender and vacate the Premises, remove Permittee’s Personal Property therefrom, and repair any damage resulting from such removal. Subject to the approval of the Permitter, Permittee shall also return the Premises to as good order and condition (subject to ordinary wear and tear and damage that is not caused directly or indirectly by Permittee) as that existing upon the Effective Date.” The Special Use Permit defines “personal property” as “all furniture, fixtures, equipment, appliances and apparatus placed on the Premises that neither are attached to nor from a part of the Premises. Personal Property also includes any trailers, modular units, and/or temporary structures owned by Permittee.”

² The Special Use Permit requires the Permittee to comply with all applicable laws, including the Reservation of Use. The Reservation of Use states that “[u]pon expiration of Vendor’s reservation, or the extended use period by permit, it shall remove all structures and improvements placed upon the premises during its period of reservation. Any such property not removed from the reserved premises within 90 days after expiration of Vendor’s reservation shall be presumed to be abandoned and shall be presumed to have been abandoned and shall become the property of the United States of America, but this shall in no way relieve Vendor of liability for the cost of removal of such property from the reserved premises.”

³ The California Department of Fish and Game leases M-438-01 and M-438-01-02, which were issued on June 25th 2004, require that DBOC remove all growing structures from the Estero “in the event the lease is abandoned or otherwise terminated.” Because these Fish and Game leases are “contingent on a concurrent federal Reservation of Use and Occupancy for fee land in the Point Reyes National Seashore” they will expire in November 2012.

all the protections applicable to designated wilderness; and will increase resiliency to climate change impacts. The no action alternative would also meet all of the goals and objectives of NEPA, the Point Reyes Wilderness Act, and the laws and policies applicable to the establishment and management of Point Reyes National Seashore (see discussion below).

C. The EIS Must Evaluate the Extent to Which Alternatives Will Achieve the Requirements of the Environmental Laws and Policies Applicable to Point Reyes National Seashore

“The primary purpose of an environmental impact statement is to serve as an action-forcing device” to insure that the policies and goals of the National Environmental Policy Act (NEPA) are infused into the decision making process. 40 C.F.R. § 1502.1. The EIS must “state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of [NEPA] and **other environmental laws and policies.**” 40 C.F.R. § 1502.2(d) (emphasis added).

The legal and policy requirements that must be evaluated and addressed in the evaluation of alternatives, and that must be met by the recommended alternative, include:

- (1) **The National Environmental Policy Act:** The policy goals established by NEPA include a continuing responsibility on the part of the federal government to use all practicable means to:
 - “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;”
 - “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; [and]”
 - “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b).

- (2) **The Point Reyes National Seashore authorizing legislation, as amended:** Point Reyes National Seashore was established on September 13, 1962 to “save and preserve for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped.” 16 U.S.C. § 459. The Secretary “shall” administer Point Reyes National Seashore “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” 16 U.S.C. § 459c-6.

- (3) **The Wilderness Act of 1964:** The Wilderness Act of 1964 defines wilderness as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”
- (4) **The Point Reyes Wilderness Act of 1976:** Public Laws 94-567 and 94-544 designate more than 25,000 acres within Point Reyes National Seashore as wilderness and more than 8,000 acres as potential wilderness and direct that those lands are to be administered in accordance with the Wilderness Act. Section 3 of Public Law 94-567 also states that areas designated as potential wilderness “shall” be designated as wilderness once all uses prohibited by the Wilderness Act, like the DBOC Special Use Permit and Reservation of Use, have ceased and the Secretary of the Interior has published a notice of the same in the Federal Register.

The legislative history of Public Law 94-544 (House Report 94-1680) provides a clear statement of Congressional intent regarding those lands designated as potential wilderness: “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.”

- (5) **National Park Service Policies:**
Point Reyes General Management Plan (1980): The zoning for Drakes Estero under the Point Reyes General Management Plan calls for the Estero’s conversion to wilderness where no mechanized equipment or development is to occur.

National Park Service Management Policies 2006: Section 6.3.1 (Wilderness Resource Management, General Policy) of the National Park Service Management Policies states that the Park Service will manage wilderness, including potential wilderness, “for the preservation of the physical wilderness resources” and that “planning for these areas must ensure that the wilderness character is likewise preserved.” This policy further states that potential wilderness shall “be managed as wilderness to the extent that existing nonconforming conditions allow” and that the Park Service shall determine “the most appropriate means of removing the temporary, nonconforming conditions that preclude wilderness designation from potential wilderness.”

Section 6.3.4.3 (Wilderness Resource Management, Environmental Compliance) states that in evaluating the environmental impacts of proposals that may impact wilderness resources, the 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.”

National Park Service Climate Change Response Strategy (September 2010): The National Park Service Climate Change Response Strategy “recognizes the risks of a changing climate” and commits the Park Service “to implementing a response initiative that will guide management actions and collaboration at national, regional, and park levels.” *Climate Change Response Strategy* at 6. Pursuant to that strategy, the Park Service is to “incorporate climate change considerations and responses in all levels of NPS planning” and “implement adaptation strategies that promote ecosystem resilience and enhance restoration, conservation, and preservation of park resources.” *Id.* at 14- 15. The strategy recognizes that “increasing the resilience of systems and supporting the ability of natural systems and species to adapt to change” is an important approach to reducing the risk of adverse impacts due to climate change. *Id.* at 15.

D. The EIS Must Fully Analyze Direct, Indirect, and Cumulative Impacts

In comparing and analyzing potential alternatives, the EIS must examine, among other things, the direct, indirect, and cumulative environmental impacts of alternatives, the conservation potential of those alternatives, and the means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16. This assessment is essential for determining whether less environmentally damaging alternatives are available.

The Draft EIS must provide “quantified or detailed information” on the impacts, including the cumulative impacts, so that the courts and the public can be assured that the Park Service has taken the mandated hard look at the environmental consequences of the Project. *Neighbors of Cuddy Mountain v. U. S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975). If information that is essential for making a reasoned choice among alternatives is not available, the Park Service must obtain that information unless the costs of doing so would be “exorbitant.” 40 C.F.R. § 1502.22. The Park Service should utilize the best available, peer reviewed science in evaluating the impacts of issuing a new Special Use Permit.

Direct impacts are caused by the action and occur at the same time and place as the action. Indirect impacts are also caused by the action, but are later in time or farther removed from the location of the action. 40 C.F.R. § 1508.8. Cumulative impacts are:

“the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

40 C.F.R. § 1508.7. A cumulative impact analysis ensures that the agency will not “treat the identified environmental concern in a vacuum.” *Grand Canyon Trust v. FAA*, 290 F.3d 339, 346

(D.C. Cir. 2002). As discussed below, a meaningful analysis of cumulative impacts must include, among other things, an assessment of whether the impacts of climate change could exacerbate the impacts of issuing a new Special Use Permit to DBOC and whether other alternatives, including the no action alternative, would increase the resiliency to climate change of the species that rely on Drakes Estero.

In addition to the list of topics already identified by the Park Service, NWF believes it is critical to analyze the direct, indirect, and cumulative impacts described below.

1. The EIS Must Evaluate Climate Change Impacts and Assess Whether Those Impacts Could Exacerbate the Impacts of Issuing a New Special Use Permit

The effects of global warming on Drakes Estero and the many species that rely on the Estero are potentially quite significant, and the EIS must carefully consider whether the impacts of climate change could exacerbate the impacts of issuing a new Special Use Permit to DBOC. *See Center for Biological Diversity v. Nat'l Hwy Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008) (holding that analyzing the impacts of climate change is “precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct” and that NEPA requires analysis of the cumulative impact of greenhouse gas emissions when deciding not to set certain CAFE standards); *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009) (NEPA analysis properly included analysis of the effects of climate change on polar bears, including “increased use of coastal environments, increased bear/human encounters, changes in polar bear body condition, decline in cub survival, and increased potential for stress and mortality, and energetic needs in hunting for seals, as well as traveling and swimming to denning sites and feeding areas.”).

The significance of climate change and climate changed induced impacts are well recognized. For example, in 2007, the U.S. Supreme Court acknowledged the reality of global climate change and the “enormity of the potential consequences associated with manmade climate change.” *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 525 (2007) (holding that EPA has the authority to regulate greenhouse gas emissions from new motor vehicles if EPA forms a “judgment” that such emissions contribute to climate change). As the Supreme Court noted:

“The harms associated with climate change are serious and well recognized. Indeed, [the National Research Council report relied on as objective and independent by the Environmental Protection Agency] identifies a number of environmental changes that have already inflicted significant harms, including ‘the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years’”

549 U.S. at 591 (*quoting* National Research Council Report, *Climate Change Science: An Analysis of Some Key Questions* (2001) at 16).

In December 2009, the U.S. Environmental Protection Agency filed a formal finding that climate change poses serious adverse impacts to public health and the environment. 74 Fed. Reg. 66495-66546 (Dec. 15, 2009). As noted above, just last month the Park Service issued a Climate Change Response Strategy that “recognizes the risks of a changing climate” and commits the Park Service “to implementing a response initiative that will guide management actions and collaboration at national, regional, and park levels.” *National Park Service Climate Change Response Strategy* (September 2010) at 6.

As CEQ recently advised the Federal agencies, the magnifying and additive effects of global warming must be evaluated when examining the direct, indirect, and cumulative impacts of a proposed action:⁴

“Climate change can increase the vulnerability of a resource, ecosystem, or human community, causing a proposed action to result in consequences that are more damaging than prior experience with environmental impacts analysis might indicate . . . [and] climate change can magnify the damaging strength of certain effects of a proposed action.”

* * *

“Agencies should consider the specific effects of the proposed action (including the proposed action’s effect on the vulnerability of affected ecosystems), the nexus of those effects with projected climate change effects on the same aspects of our environment, and the implications for the environment to adapt to the projected effects of climate change.”

Council on Environmental Quality, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (February 18, 2010).

“Rising sea levels will be among the most significant impacts of climate change to California.”⁵ California Climate Change Center, *The Impacts Of Sea-Level Rise On The California Coast*, CEC-500-2009-024-F (May 2009) at 87. Mean sea level along the California coast is “projected to rise from 1.0 to 1.4 meters (m) by the year 2100” under medium to medium high greenhouse gas emissions scenarios. *Id.* at 2. These “very substantial increases” will add to the nearly eight inches of sea level rise that has already occurred along the California coast over the past century. *Id.* at 2.

⁴ The CEQ guidance makes it clear that analyzing the impacts of climate change is not restricted to evaluating whether a project could itself exacerbate global warming. The magnifying and additive effects of global warming also must be evaluated. Council on Environmental Quality, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (February 18, 2010).

⁵ “Sea level will rise as a result of thermal expansion of the oceans and an increase in ocean volume as land ice melts and runs off.” California Climate Change Center, *The Impacts Of Sea-Level Rise On The California Coast*, CEC-500-2009-024-F (May 2009) at 87

As a shallow tidal habitat, Drakes Estero — and the many species that rely on it — are on the front lines of sea level rise and other climate change induced impacts. The climate change impacts may be even greater for the many migratory species that utilize Drakes Estero.

As recognized by the United Nations Environment Program and the Convention on the Conservation of Migratory Species of Wild Animals:

“As a group, migratory wildlife appears to be particularly vulnerable to the impacts of Climate Change because it uses multiple habitats and sites and use a wide range of resources at different points of their migratory cycle. They are also subject to a wide range of physical conditions and often rely on predictable weather patterns, such as winds and ocean currents, which might change under the influence of Climate Change. Finally, they face a wide range of biological influences, such as predators, competitors and diseases that could be affected by Climate Change. While some of this is also true for more sedentary species, migrants have the potential to be affected by Climate Change not only on their breeding and non-breeding grounds but also while on migration.”

“Apart from such direct impacts, factors that affect the migratory journey itself may affect other parts of a species’ life cycle. Changes in the timing of migration may affect breeding or hibernation, for example if a species has to take longer than normal on migration, due to changes in conditions *en route*, then it may arrive late, obtain poorer quality breeding resources (such as territory) and be less productive as a result. If migration consumes more resources than normal, then individuals may have fewer resources to put into breeding”

* * *

“Key factors that are likely to affect all species, regardless of migratory tendency, are changes in prey distributions and changes or loss of habitat. Changes in prey may occur in terms of their distributions or in timing. The latter may occur through differential changes in developmental rates and can lead to a mismatch in timing between predators and prey (“phenological disjunction”). Changes in habitat quality (leading ultimately to habitat loss) may be important for migratory species that need a coherent network of sites to facilitate their migratory journeys. Habitat quality is especially important on staging or stop-over sites, as individuals need to consume large amounts of resource rapidly to continue their onward journey. Such high quality sites may [be] crucial to allow migrants to cross large ecological barriers, such as oceans or deserts.”

UNEP/CMS Secretariat, Bonn, Germany, *Migratory Species and Climate Change: Impacts of a Changing Environment on Wild Animals* (2006) at 40-41 (available at http://www.cms.int/publications/pdf/CMS_CimateChange.pdf).

Migratory seals and birds are at particular risk from climate change. The climate change impacts on seal populations include changes in the distribution, abundance, and community composition of their food supply; impacts of warmer waters on reproduction; and “loss of undisturbed haul-out sites, due to sea-level rise, which are used for breeding, nurseries and resting.” *Id.* at 42. Migratory birds are affected by changes in water regime, mismatches with food supply, sea level rise, and habitat shifts, changes in prey range, and increased storm frequency. *Id.* at 42-43.

In addition to evaluating the additive and magnifying effects of these climate change impacts, the EIS should carefully evaluate alternatives that will increase the resiliency of the Estero and the rich array of wildlife that rely on this critical habitat by removing as many existing stressors as possible. Implementing “adaptation strategies that promote ecosystem resilience and enhance restoration, conservation, and preservation of park resources” is a key goal of the Park Services’ Climate Change Response Strategy. *National Park Service Climate Change Response Strategy* at 14- 15. That strategy recognizes that:

Many best-management practices for conventional ecosystem stressors also reduce the tendency of these stressors to intensify climate change effects. Therefore, one approach to adaptation is to reduce the risk of adverse outcomes by increasing the resilience of systems and supporting the ability of natural systems and species to adapt to change.”

Id. at 15.

2. The EIS Must Assess the Risks and Impacts of Non-Compliance with Conditions Established by a New Special Use Permit to Protect the Environment

Issuance of a new Special Use Permit to DBOC includes a significant risk that DBOC will violate conditions attached to the permit designed to protect the environment, and other applicable regulations. The EIS must consider the impacts of the likely failure to comply with conditions placed on the Special Use Permit on the ecological health of Drakes Estero and the many sensitive species that utilize the Estero.

DBOC has a long history of violating the conditions of its Special Use Permit and the Reservation of Use. DBOC’s predecessor, the Johnson Oyster Company, similarly had a long history of environmentally destructive violations. These violations have been documented by the California Coastal Commission and others. Regardless of whether these violations have been deliberate or the result of human error, they have resulted in significant adverse – and unnecessary – impacts to Drakes Estero and the species that utilize the Estero. The EIS should analyze the history of non-compliance by DBOC and its predecessor and use that analysis to inform the decision maker and the public about the true risks and potential adverse impacts associated with issuance of a new Special Use Permit.

Given the long history of non-compliance with permit conditions and terms, any analysis of impacts based on the assumption that the conditions attached to a new Special Use Permit would be strictly complied with would present a false picture of the impacts of issuing a new Special Use Permit.

3. The EIS Must Properly Assess the Impacts on Wilderness

The EIS must properly assess the impacts of a new Special Use Permit in light of both the impacts to an area that has been set to revert to wilderness since 1976, and on the precedential implications of issuing a new commercial use permit in a wilderness area and national park.

As discussed above, Drakes Estero is set to revert to designated wilderness upon the expiration of the existing Special Use Permit and Reservation of Use. As a result, a new Special Use Permit would allow commercial activities, and result in adverse impacts, in what would otherwise be a designated wilderness area. Even small impacts of commercial development and use in a wilderness area or national park will substantially affect the area's character as wilderness or national park land, and the EIS must fully assess and account for the significance of such impacts in its evaluation of alternatives.

In addition, granting a new Special Use Permit to DBOC would represent a radical departure from historical implementation of the statutes authorizing the establishment and management of Point Reyes National Seashore and the Point Reyes Wilderness. As discussed above, Point Reyes National Seashore was established on September 13, 1962 to "save and preserve for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped." 16 U.S.C. § 459. The Secretary is required to administer Point Reyes National Seashore "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" 16 U.S.C. § 459c-6. The Point Reyes Wilderness Act of 1976 and the National Park Service Management Policies further require the Park Service to remove all non-conforming uses in areas designated as potential wilderness as soon as possible, and to manage wilderness, including potential wilderness, to preserve the wilderness resource and character. Issuance of a new Special Use Permit for DBOC is wholly inconsistent with these mandates.

Granting a new Special Use Permit to DBOC would also represent a radical departure from historical implementation of the statutes authorizing the use and management of national parks and wilderness areas across the country. Indeed, the National Wildlife Federation is unaware of the issuance of any Special Use Permit to allow commercial activities in any wilderness area within a national park. Private, commercial use of the national parks is antithetical to the purposes for which parkland and protected areas are designated and set aside. As a result, the granting of a new Special Use Permit would set an inappropriate and dangerous precedent for both wilderness areas and the national park system throughout the country. The potential impacts of a new Special Use Permit thus go far beyond the boundaries of Point Reyes National Seashore, and the impacts should be evaluated in that light.

4. The EIS Must Assess the Impacts on the Full Array of Species that Utilize the Estero and on Key Habitat Types

The EIS must carefully assess the impacts of the various alternatives on the full array of species – including the multitude of marine mammals, birds, and fish – that utilize the Estero. Given the realities of oyster operations, particular emphasis should be placed on assessing the likely disturbances to seals and shore birds, and on the cumulative impacts of climate change on migratory species impacted by a new Special Use Permit. Adverse impacts of particular concern include significant disturbances to foraging birds and harbor seals, including when pups are present.

It is also important to assess the impacts on critical habitat types within the Estero, including eelgrass beds, tidal flats, haul out sites, wetlands, and coastal stream habitat. As discussed above, the eelgrass beds in Drakes Estero are particularly important and constitute a significant portion of California's entire eelgrass habitat. Oyster operation structures directly impair eelgrass habitat by reducing the quantity of light necessary for eelgrass growth. Oyster operation motorboat propellers also chop up eelgrass foliage. The National Park Service has already documented approximately 50 acres of eelgrass in Drakes Estero that has been adversely affected by boat propellers. Additional adverse impacts of particular concern include creation of barriers to haul out sites on intertidal flats; loss of habitat; and creation of hard substrates that are deleterious to the health of the resource.

Special attention should also be given to evaluating the effects of a new Special Use permit on water quality and on increasing invasive species.

As noted above, impacts to species and critical habitat must be assessed with a recognition that permit conditions designed to protect these resources are unlikely to be strictly complied with.

Thank you for the opportunity to provide these comments. Please do not hesitate to me at 415-762-8264 or sametm@nwf.org if I can provide any additional information.

Sincerely,



Melissa Samet
Senior Water Resources Counsel