

Will the Wilderness Act Be Diluted in Drakes Estero?

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INTRODUCTION AND BACKGROUND

Drakes Bay Oyster Company (DBOC)¹ runs a commercial shellfish farming operation in Drakes Estero, a 2,500-acre network of five finger-like bays that extend into the Point Reyes Peninsula, north of San Francisco, California.² In 1976, Congress designated more than 25,000 acres of wilderness and 8,003 acres (including the Estero) of potential wilderness within the Point Reyes National Seashore.³ This marked the first time Congress used the “potential wilderness” designation, creating a new category for areas that would become full wilderness without further legislative action once temporary uses inconsistent with wilderness values ceased.⁴ Since that time,

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1. *See* DRAKES BAY OYSTER COMPANY, <http://drakesbayoyster.com/> (last visited Feb. 21, 2012).

2. *See* NAT'L PARK SERV., DRAKES BAY OYSTER COMPANY SPECIAL USE PERMIT DRAFT EIS iv–v (2011) [hereinafter *DEIS*].

3. *See* An Act to Designate Certain Lands in the Point Reyes National Seashore, California, as Wilderness, Amending the Act of September 13, 1962 (76 Stat. 538), as Amended (16 U.S.C. 459c–6a), and for Other Purposes, Pub. L. No. 94–544, § 1, 90 Stat. 2515 (1976).

4. *See infra* Appendix A, at 66–94 (listing all potential wilderness areas designated by Congress by year of designation and public law number and noting that the 8,003 acres at Point Reyes is associated with the Phillip Burton Wilderness, designated initially as the Point Reyes Wilderness); *see also infra* notes 61–63 and accompanying text (discussing the conversion process from CDPWA to full wilderness).

Congress has designated more than 250,000 acres of potential wilderness—referred to in this Article as “congressionally designated potential wilderness areas” (CDPWAs)—associated with twenty-nine different wildernesses in thirteen states.⁵ DBOC’s aquaculture business remains the sole nonconforming use preventing Drakes Estero from converting to full wilderness.⁶ Its authorization to operate is set to expire before the end of 2012.⁷

Commercial shellfish farming began at Point Reyes in the early 1900s.⁸ A 1935 survey found no oysters in Drakes Estero, but by 1938, nonnative Pacific oysters had been introduced into the Estero and were supporting a small processing plant at the northern end of Creamery Bay.⁹ Ownership of the Drakes Estero state water bottom leases that allowed shellfish farming changed hands several times during the 1940s and 50s, and in 1961, Johnson Oyster Company (JOC), which had taken over the leases, bought a five-acre parcel near the head of Schooner Bay and began operations.¹⁰

The following year, Congress established Point Reyes National Seashore.¹¹ In 1965, the National Park Service (NPS) acquired the land beneath Drakes Estero from the state of California.¹² Then, in 1972, the agency purchased JOC’s five upland acres in an agreement that allowed the company to keep a forty-year reservation of use and occupancy (RUO) over 1.5 acres, so it could continue to process and sell “wholesale and retail oysters, seafood[,] and complimentary food items, [provide] interpretation of oyster cultivation to the visiting public, and [use the property for] residential purposes reasonably incidental thereto.”¹³ Four years later, Congress designated Drakes Estero as potential wilderness.¹⁴ JOC ended operations in 2003, following “numerous California Coastal Act, county building code, and NPS approval violations.”¹⁵

5. See *infra* Table 2; Appendix A, at 66–94.

6. See *DEIS*, *supra* note 2, at iv. Almost all of DBOC’s offshore activity takes place within the CDPWA. Its onshore facilities lie near, but outside the CDPWA, which encompasses the entirety of four of the fingerlike bays of Drakes Estero, excepting the head of Schooner Bay. See *id.* at vii, fig.ES-2, 9, fig.1-3. The southern portion of the Estero, including the fifth bay (Estero de Limantour), is designated wilderness. See *id.* at vi, fig.ES-1.

7. See *id.* at 19.

8. See *id.* at iv, 16 (explaining that “[m]ariculture entrepreneurs first planted oyster beds in the Tomales Bay area around the turn of the 20th century”).

9. See *id.* For a detailed history of mariculture in Drakes Estero, see *id.* at 16–21.

10. See *id.* at iv, 16–17.

11. *Id.* at iv; see also Point Reyes National Seashore Act, Pub. L. No. 87-657, 76 Stat. 538 (1962) (codified as amended at 16 U.S.C. §§ 459c–459c-7 (2006)).

12. *DEIS*, *supra* note 2, at iv. In the *DEIS*, NPS notes that, [although] the water bottoms in Drakes Estero were conveyed to the United States in 1965, the state has continued to issue state water bottom leases for shellfish cultivation in Drakes Estero. The continued issuance of state water bottom leases has created confusion and is inconsistent with the NPS’s ownership and jurisdiction over Drakes Estero. *Id.* at 17.

13. *DEIS*, *supra* note 2, at iv–v.

14. See *supra* note 3 and accompanying text.

15. *DEIS*, *supra* note 2, at 18–19.

When DBOC purchased JOC's assets in late 2004, it assumed the remainder of the forty-year onshore RUO as well as a special use permit (SUP) for a septic leach field and well on adjacent property.¹⁶ At the time, DBOC reportedly understood that its right to operate in Drakes Estero would end in 2012.¹⁷ The current SUP, signed in 2008, allows DBOC to conditionally continue operations until the RUO's November 30, 2012 expiration date.¹⁸ The SUP authorizes the company to operate onshore and within 1,050 acres of Drakes Estero, where it uses motorboats to maintain 142 acres of shellfish culture beds.¹⁹

In 2009, after years of lobbying by DBOC,²⁰ U.S. Senator Dianne Feinstein successfully placed a rider²¹ on the Senate appropriations bill for the Department of the Interior, authorizing Secretary of the Interior Kenneth Salazar (Secretary)—through delegation to NPS—to extend DBOC's SUP for another ten years, through November 2022.²² The rider represented a controversial step in the ongoing conflict regarding the shellfish farm, which has included allegations of scientific misconduct by NPS officials and political maneuvering by DBOC's current owners.²³

In response to the rider, NPS initiated environmental review under the National Environmental Policy Act (NEPA),²⁴ publishing a Notice of Intent

16. *See id.* at 19; *see also id.* at 77–78, figs.2-3–2-4.

17. *See* ENVTL. ACTION COMM. OF WEST MARIN, HEART OF THE PARK: DRAKE'S ESTERO WILDERNESS AT POINT REYES NATIONAL SEASHORE 2 (2011), *available at* http://www.savedrakesbay.org/uploads/Heart_of_the_Park_report_EAC_SCMG.pdf.

18. *See DEIS*, *supra* note 2, at 19.

19. *See id.* at 67, 72. This includes six racks outside the permitted area. *See id.* at 67. Boats sometimes travel outside the permitted area, where they may damage eelgrass beds or disturb harbor seals. *See id.* at 75. DBOC cultivates Pacific oysters (using both rack and bag culture) and Manila clams (using bag culture only). *See id.* at 61, 67. DBOC's onshore operations include facilities that "support the processing, sale, and initial stages of shellfish culture." *Id.* at 76. The company maintains a number of unauthorized land-based facilities, including storage, setting tanks, and picnic tables, both within and outside the boundaries of the SUP and RUO. *See id.* at 76, 77 fig.2-3. For more about DBOC's activities, *see generally id.* at 60–82.

20. *See* Ian Fein, *Reassessing the Role of the National Research Council: Peer Review, Political Tool, or Science Court?*, 99 CAL. L. REV. 465, 496, 497 (2011); Greg Cahill, *Putting the Oysters to Bed*, PAC. SUN, (July 14, 2006), http://www.pacificsun.com/story_archives/oysters.html.

21. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 124, 123 Stat. 2932 (2009).

22. *See* Fein, *supra* note 20, at 502–04 (describing the history of the rider).

23. *See id.* at 496–504 and references therein (recounting allegations that an NPS scientist's report finding negative impacts from DBOC's activities "fabricat[ed] environmental problems to justify removing the Oyster Company in 2012"); *see also* Peter Fimrite, *Dispute over Oysters in Drakes Bay Pits Harvester Against Park Service*, S.F. CHRON., Dec. 28, 2007, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/27/BA24U0MDM.DTL> (reporting that some "believe the accusations are a ploy by Lunny to turn people against the park service and win support for his plan to continue harvesting oysters past 2012" and "Lunny . . . plans to lobby Congress to pass legislation to allow him to do that").

24. NEPA requires preparation of an EIS to help inform major federal actions that may have a significant impact on "the quality of the human environment." 42 U.S.C. § 4332 (2006). For a description of NEPA and NEPA process, *see National Environmental Policy Act (NEPA)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/basics/nepa.html> (last visited Apr. 20, 2012).

(NOI) to prepare an Environmental Impact Statement (EIS) to help it decide whether or not to issue a new SUP.²⁵ The NOI initiated a scoping period for public comment on what specific issues the EIS should address in order to adequately evaluate the effects of permitting DBOC to continue its operations within the CDPWA for ten more years.²⁶ After the scoping period concluded, NPS developed a Draft Environmental Impact Statement (DEIS) and sought public feedback during a sixty-day public comment period.²⁷

The DEIS analyzed four alternative scenarios: a no-action alternative and three action alternatives.²⁸ Consistent with its stated purpose of “engag[ing] the public” to help inform its decision, NPS did not identify a preferred alternative.²⁹ Under Alternative A, the no-action alternative, NPS would allow DBOC’s existing authorizations to expire on November 30, 2012, thereby ending the nonconforming use and allowing Drakes Estero to convert to full wilderness.³⁰ Under the remaining three action alternatives, NPS would issue a new ten-year SUP, with varying “levels of onshore facilities and infrastructure and offshore operations.”³¹ Alternative B considered “a level of use consistent with conditions that were present in fall 2010”: the SUP would cover 1,083 acres and cap production at 600,000 pounds of shellfish per year.³² Alternative C considered a level of use “consistent with the conditions and operations that existed . . . in April 2008,” when the current SUP was signed, and the SUP covered 901 acres, capping production at 500,000 pounds per year.³³ Alternative D considered “expansion of operations and development of new

25. See Notice of Intent to Prepare an Environmental Impact Statement for the Drakes Bay Oyster Company Special Use Permit, Point Reyes National Seashore, 75 Fed. Reg. 65373 (Oct. 22, 2010) [hereinafter *NOI*]. NPS solicited EIS scoping comments at public meetings and by mail. The NOI, scoping letter sent to interested parties, public scoping posters, and public scoping meeting handout are available at <http://parkplanning.nps.gov/document.cfm?parkID=333&projectID=33043&documentID=36704> (last visited Feb. 10, 2012).

26. See *NOI*, *supra* note 25; *Drakes Bay Oyster Company Special Use Permit Environmental Impact Statement Initial Public Scoping*, NAT’L PARK SERV., http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_scoping.htm (last visited Apr. 20, 2012) (explaining that, through the NOI, the NPS “encouraged comments on the draft purpose and need, and requested that the public identify topics and concerns that should be addressed in the . . . EIS”).

27. See Notice of Availability of Drakes Bay Oyster Company Special-Use Permit, Draft Environmental Impact Statement, Point Reyes National Seashore, CA, 76 Fed. Reg. 59423–24 (Sept. 26, 2011). NPS subsequently extended the comment period to allow commenters to take into account the findings of the Marine Mammal Commission’s harbor seal report, released in November. See Press Release, Nat’l Park Serv., Deadline for Public Comment on the Draft Environmental Impact Statement for Drakes Bay Oyster Company Special Use Permit Extended to December 9, 2011 (Nov. 17, 2011), available at http://www.nps.gov/pore/parknews/newsreleases_20111117_dboc_sup_deis_comment_period_extension.htm.

28. See *DEIS*, *supra* note 2, at xxxv–xxxviii, tbl.2-5 (summarizing the alternatives).

29. *Drakes Bay Oyster Company Special Use Permit Draft Environmental Impact Statement Information*, NAT’L PARK SERV., http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_deis.htm (last visited Mar. 11, 2012).

30. See *DEIS*, *supra* note 2, at 1.

31. *Id.*

32. *Id.* at 58.

33. *Id.* at 59.

infrastructure as requested by DBOC,” so that the SUP would cover 1,087 acres and shellfish production would be limited to 850,000 pounds per year (reflecting DBOC’s maximum projected production).³⁴

A group of seven members of the University of California, Berkeley, School of Law Environmental Law Society (ELS)³⁵ prepared and collectively submitted comments on the DEIS. In order to provide useful, previously unaddressed context for the DEIS to assist NPS in assessing the potential effects of issuing a new SUP on both local wilderness values and the integrity of the Wilderness Act in general, we attempted to conduct a comprehensive survey of nonconforming uses in all CDPWAs in the National Wilderness Preservation System.³⁶ This involved cataloging the nature of nonconforming uses in each CDPWA, time limits placed on these uses, if any, and their history since designation. Additionally, part of the group analyzed the limitations of the scientific evidence cited by the DEIS.

Through our research, we sought to address three main questions:

- What implications would granting a new SUP (Alternatives B–D) have for local wilderness values and for wilderness more generally? (Addressed in Part I and Appendix A.)
- What are the likely environmental implications of granting a new SUP? (Addressed in Part II and Appendix B.)
- Based on these analyses, should the Secretary select the no-action alternative (A), or should he authorize one of the action alternatives (B–D) and issue a new ten-year SUP? (Addressed in Parts I–III.)

I. THE WILDERNESS IMPLICATIONS OF GRANTING A NEW SPECIAL USE PERMIT

Without contextualizing a potential SUP extension, it is impossible to adequately assess the effects of the DEIS’s four alternatives on wilderness values at Point Reyes, the administration of CDPWAs around the nation, and the integrity of the Wilderness Act. Therefore, it is important to consider a new SUP in the broader context of the National Wilderness Preservation System. For example, in the event that DBOC’s current and proposed activities are representative of nonconforming uses in other CDPWAs—and there is already administrative precedent for extending or expanding these uses—then, arguably, selection of an action alternative might only minimally affect national CDPWA administration. However, if granting a new SUP would set new administrative precedent for extending (and, possibly, expanding)

34. *Id.* at 60.

35. *See supra* note *. Members of the group traveled to Drakes Estero to visit the estuary and DBOC’s land-based facilities on October 15, 2011 and attended the October 20, 2011, public hearing held in Mill Valley, California.

36. The National Wilderness Preservation System comprises federally designated wilderness and potential wilderness areas managed by four agencies: the Forest Service, the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service. *See* 16 U.S.C. § 1131 (2006); *The National Wilderness Preservation System*, NAT’L ATLAS, www.nationalatlas.gov/articles/boundaries/a_nwps.html (last visited Mar. 11, 2012).

nonconforming uses, it could have significant impacts on national CDPWA administration going forward.

Therefore, to determine how DBOC's current and proposed mariculture operations fit within the overall context of National Wilderness Preservation System management, we analyzed prohibited and allowed uses of full wilderness areas under the Wilderness Act and cataloged nonconforming uses present in CDPWAs across the nation.

A. Prohibited and Allowed Uses Under the Wilderness Act

Through the Wilderness Act,³⁷ Congress sought to preserve and protect certain federally owned lands "in their natural condition" for the long-term "use and enjoyment of the American people."³⁸ To achieve this goal, the Act bars commercial enterprise, permanent or temporary roads, and motorized vehicles or equipment in designated wilderness areas³⁹ and withdraws wilderness areas from mineral appropriation and leasing.⁴⁰ "[S]ubject to existing private rights" and other limited exceptions enumerated in the Wilderness Act, Congress requires administering agencies to preserve the wilderness character of designated land, which must "be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."⁴¹

Most exceptions to these prohibitions are permissive (meaning the administering agency has authority to allow the exceptions, but is not required to do so); however, those allowing exercise of existing private rights are mandatory.⁴² For example, if temporary roads and motorized equipment are essential for meeting Congress's minimum requirements for wilderness administration or to control insects, diseases, or fire, the administering agency *may* use them, but only so far as *necessary*.⁴³ Similarly, agencies *may* permit certain established uses of aircraft or motorboats⁴⁴ and *may* allow commercial services necessary to valid wilderness pursuits.⁴⁵ On the other hand, state or private owners of inholdings that are surrounded by wilderness areas *must* be allowed access to their properties,⁴⁶ and holders of valid mining claims, grazing permits, or other valid occupancy rights *must* be allowed to exercise those rights.⁴⁷

37. Wilderness Act of 1964, Pub. L. No. 88-577, §§ 1-7, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (2006)).

38. *Id.* § 2(a).

39. *Id.* § 4(c).

40. *Id.* § 4(d)(3).

41. *Id.* §§ 4(b), (c).

42. *See infra* Table 1 (summarizing exceptions to prohibited uses in designated wilderness areas as defined in the Wilderness Act).

43. *See id.* § 4(d)(1).

44. *See id.*

45. *See id.* § 4(d)(6).

46. *See id.* § 5(a).

47. *See id.* § 5(b).

§	Exception for	Further Description	Agency Discretion?	Subject to
4(c)	<i>Minimum requirements for wilderness administration</i>	Temporary roads and motorized vehicles or equipment may be used "as necessary to meet minimum requirements for the administration of the area" as Wilderness.	Permissive	Necessity requirement.
4(d) (1)	<i>Measures necessary for fire, insect, and disease control</i>	The administering agency may authorize measures necessary to control "fire, insects, and diseases" that would otherwise be prohibited under the Wilderness Act.	Permissive	Necessity requirement + restrictions agency "deems desirable."
4(d) (1)	<i>Established use of aircraft or motorboats</i>	The administering agency (via delegation from the Secretary) may permit continuation of previously established uses of aircraft and motorboats in a Wilderness area.	Permissive	Previous establishment + restrictions agency "deems desirable."
4(d) (3)	<i>Exploitation of valid mining claims</i>	Allows, "where essential[,] the use of mechanized ground or air equipment "; necessary " transmission lines, waterlines, telephone lines, or facilities "; and cutting timber on the claim if "not otherwise reasonably available" and if "needed in the extraction, removal, and beneficiation of the mineral deposits."	Mandatory	Essentiality requirement + "reasonable stipulations" to protect "the wilderness character of the land consistent with . . . the purposes for which . . . leased, permitted, or licensed"; "reasonable regulations governing ingress and egress"; rules and regulations for forest management.
4(d) (4)(1)	<i>Water and hydroelectric projects in the public interest</i>	If the President (not the agency) determines that allowing water prospecting, construction and maintenance of dams and reservoirs, hydroelectric projects, and power lines in a particular wilderness will better serve the U.S. public interest than denying them, he may authorize these activities.	Permissive	Presidential determination of public interest.
4(d) (4)(2)	<i>Established grazing</i>	Grazing established before wilderness designation "shall be permitted to continue."	Mandatory	Previous establishment + "reasonable regulations as are deemed necessary."
4(d) (6)	<i>Commercial services</i>	" Commercial services may be performed within [] wilderness areas . . . to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas."	Permissive	Necessary and proper requirement.
5(a)	<i>Access to state or private inholdings</i>	Owners of inholdings within designated wilderness "shall be given such rights as may be necessary to assure adequate access . . . by [the] State or private owner and their successors in interest." Alternatively, a land exchange can be arranged.	Mandatory	Necessity requirement.
5(b)	<i>Access to valid mining claims or other valid occupancies</i>	"[W]here valid mining claims or other valid occupancies are wholly within a designated . . . wilderness area, the Secretary of Agriculture shall . . . permit ingress and egress . . . by means which have been or are being customarily enjoyed with respect to other such areas similarly situated."	Mandatory	"[R]easonable regulations consistent with the preservation of the area as wilderness."

Table 1. Exceptions to prohibited uses in designated wilderness areas, as defined in sections 4 and 5 of the Wilderness Act (emphasis added).

Prior statutory exceptions in wilderness designation legislation evinced a logical connection to nonconforming uses explicitly authorized by the text of the Wilderness Act. For example, legislation has permitted the continuance of motorized vehicle use,⁴⁸ aircraft access,⁴⁹ and cultural activities⁵⁰ in specific designated wilderness areas, along with other limited exceptions (such as insect and disease control and access to inholdings).⁵¹ Each of these statutory exceptions extends or echoes an exception made within the Wilderness Act.

The only additional⁵² commercial activity exception we identified was a timber harvesting exception, included in the original Wilderness Act, specific to the Boundary Waters Canoe Area (BWCA).⁵³ The BWCA received this special provision because past timber harvesting in the area technically disqualified it from designation under the proposed statutory definition of wilderness, which Congress did not want to weaken.⁵⁴ Following a subsequently overturned district court opinion banning logging in the area's virgin forests,⁵⁵ however, Congress directed the Secretary to end logging in the BWCA and cancel all timber sale contracts in the wilderness within one year, consequently resolving the inconsistency.⁵⁶

A commercial shellfish farming operation like DBOC, then, does not resonate with any of the established exceptions for nonconforming uses in wilderness areas. However, our inquiry does not end here. Since CDPWAs have yet to achieve full wilderness status, the agencies that administer them

48. See, e.g., Pub. L. No. 95-495, § 4(c)–(e), 92 Stat. 1649 (1978) (permitting indefinite continuation of motorboat use on nearly twenty lakes and one river within the Boundary Waters Canoe Area Wilderness, allowing mechanized portage, and permitting use of snowmobiles within certain areas in the wilderness); Pub. L. No. 108-447, § 140(d)(2), 118 Stat. 2809 (2004) (allowing continued snowmobile and motorboat usage on Lake Superior and maintenance and expansion of docks within the Gaylor A. Nelson Apostle Islands National Lakeshore Wilderness).

49. See, e.g., Pub. L. No. 110-229, § 101(b)(3), 122 Stat. 758 (2008) (authorizing helicopter access to construct and maintain a telecommunications site; § 101(b)(4), authorizing continued use of floatplanes on a lake within the wilderness area). Statutorily designated access for emergencies and maintenance is common. See ROSS W. GORTE, CONG. RESEARCH SERV., WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES 10, 19 (2011) [hereinafter WILDERNESS LAWS].

50. See Pub. L. No. 97-384, 96 Stat. 1942 (1982), and Pub. L. No. 101-633, 104 Stat. 4577 (1990) (providing access to cemeteries located within wilderness); Pub. L. No. 107-282, § 206, 116 Stat. 2004 (2002), Pub. L. No. 108-424, § 207, 118 Stat. 2411 (2004), Pub. L. No. 109-432, 120 Stat. 2958 (2006) and Pub. L. No. 111-11, § 851(d)(6), 123 Stat. 1066 (2009) (providing access to wilderness areas for Native American tribes).

51. See WILDERNESS LAWS, *supra* note 49, at 19–20.

52. In other words, not related to the generally permitted nonconforming economic uses enumerated in the Wilderness Act: grazing, water/power developments in the public interest, mining, and recreation-related commercial activities.

53. Pub. L. No. 88-577, § 4(d)(5), 78 Stat. 891 (1964). See also *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1297 (8th Cir. 1976) (stating “[i]t is undisputed that some commercial logging in the BWCA was contemplated by Congress”).

54. *Minnesota Public Interest Research Group v. Butz*, 401 F. Supp. 1276, 1328 (D. Minn. 1975), *rev'd*, 541 F.2d 1292.

55. See *id.*

56. See Pub. L. No. 95-495, § 6(a), 92 Stat. 1649 (1978).

might have developed administrative precedent (whether justified by the text of the Wilderness Act or not) for allowing long-term maintenance or even expansion of nonconforming commercial uses within their borders under certain circumstances. Our research suggests this is not the case.

B. The Difference Between CDPWAs and Undesignated Potential Wilderness

Potential wilderness areas, by definition, contain uses that are not compatible with full wilderness designation. They encompass:

lands that are surrounded by or adjacent to lands proposed for wilderness designation but that do not themselves qualify for immediate designation due to *temporary* nonconforming or incompatible conditions. . . . [W]ilderness recommendation[s] forwarded to the Congress by the President may identify these lands . . . for future designation as wilderness when the nonconforming use has been removed or eliminated.⁵⁷

Although the Wilderness Act contains no reference to “potential wilderness,” Congress officially codified the category when it first designated “potential wilderness additions” at Point Reyes in 1976.⁵⁸ Federal land management agencies frequently use the “potential wilderness” label when evaluating wilderness suitability and when making recommendations to Congress; however, only Congress can take the final step of actually designating wilderness or CDPWAs.⁵⁹

Undesignated and designated potential wilderness share similarities (namely, the presence of temporary nonconforming uses). However, they are quite different in the eyes of the law. NPS management policies require potential wilderness, both before and after designation, “to be managed as wilderness to the extent that existing nonconforming conditions allow.”⁶⁰ But, whereas an agency-proposed potential wilderness has not yet been evaluated and decided upon by Congress, CDPWAs are designated by statute and will automatically convert to full wilderness upon agency publication of a Federal Register notice that all nonconforming uses have ceased.⁶¹ After designation, nonconforming uses of NPS-administered CDPWAs must “be eliminated as soon as practicable,” with progress checked on a five-year inventory cycle and

57. NAT'L PARK SERV., MANAGEMENT POLICIES, 6.2.2.1 (2006), available at <http://www.nps.gov/policy/mp2006.pdf> (6.2.2.1 Potential Wilderness) (emphasis added) [hereinafter MANAGEMENT POLICIES].

58. An Act to Designate Certain Lands in the Point Reyes National Seashore, California, as Wilderness, Amending the Act of September 13, 1962 (76 Stat. 538), as Amended (16 U.S.C. 459c–6a), and for Other Purposes, Pub. L. No. 94–544, § 1, 90 Stat. 2515 (1976).

59. See Wilderness Act of 1964, Pub. L. No. 88–577, §§ 2(a), 3, 78 Stat. 890; *e.g., id.* § 3(c) (explaining that “[a] recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress”).

60. See MANAGEMENT POLICIES, *supra* note 57, at 6.3.1.

61. See, *e.g.*, National Parks and Recreation Act of 1978, Pub. L. No. 95–625, § 403, 92 Stat. 3467 (stating that “[a]ny lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness”).

publication of notice of conversion to full wilderness required within one year of the time nonconforming uses cease.⁶²

Therefore, consistent with the purpose of the Wilderness Act, CDPWA management guidance reflects that these areas are on a one-way journey to becoming full wilderness. While no standard timeline exists, nonconforming uses must be phased out when practicable, rather than extended or expanded. As the Park Service notes in its Reference Manual, “[p]otential wilderness is not intended to be a permanent land status” but is instead “a ‘half-way house’ for lands that otherwise merit full wilderness designation except for *temporary*, nonconforming conditions.”⁶³

How has this guidance played out in practice? Table 2 summarizes nonconforming uses in CDPWAs, changes in use since designation, and approximate time frames expected for conversion to full wilderness. Appendix A describes these results in greater detail and provides additional information for each CDPWA, citing references for all material.

By far the most common nonconforming use in CDPWAs is more accurately described as a nonconforming condition: non-federal ownership of lands surrounded by or adjacent to designated wilderness.⁶⁴ Although administering agencies can pursue land purchases and exchanges, because they may not always find willing negotiating partners or may lack funds for acquisition, the time at which conversion becomes “practicable” is only partly under agency control. Private or state owners (and their successors in interest) could hold out indefinitely, all the while receiving the access guaranteed them by section 5(a) of the Wilderness Act.⁶⁵ On the other hand, removal of some nonconforming uses, such as federally owned structures, may be directly within agency discretion and control (although Congress must appropriate funds for removal and, potentially, for ecological restoration activities). The right-most column in Table 2 emphasizes CDPWAs in which the administering agency likely has considerable power to influence the timing for conversion to full wilderness (tan shading). An intermediate category of nonconforming uses—for example, life leases—are necessarily time-limited but lack precise end dates.

62. Nat'l Park Serv., Director's Order 41: Wilderness Preservation and Management, at B(3)(d)(vi) (1999), available at <http://www.nps.gov/refdesk/DOrders/DOrder41.html>.

63. Nat'l Park Serv., Reference Manual RM 41: Wilderness Preservation and Management, at 74 (1999) (emphasis added), available at http://rffw.org/sites/default/files/documents/NPS_Reference_Manual_RM41_Wilderness_Preservation_and_Management.pdf.

64. Past federal land disposal policies contributed to an unwieldy patchwork of federal, state, and private ownership in many parts of the West. See, e.g., Angela Ballard, *Closing the Checkerboard*, LAND & PEOPLE, May 1, 2005, available at <http://www.tpl.org/publications/land-and-people-magazine/archive/landpeople-spring-2005/closing-the-checkerboard.html>; see also *supra* Table 2.

65. See *supra* Part I.A and Table 1.

Wilderness Area	Agency	State	Year	Designating Public Law	Initial Size (acres)	Current Size (acres)	Initial Non-Conforming Use(s)	Remaining Non-Conforming Use(s)	Time Frame for Conversion to Full Wilderness
Buffalo National River Wilderness	NPS	AR	1978	95-625, § 401(1)	25,471	1,007	Non-federal ownership, motorized boat access	Non-federal ownership	Upon acquisition
Carlsbad Caverns Wilderness	NPS	NM	1978	95-625, § 401(2)	320	same (?)	Non-federal ownership	Non-federal ownership	Upon acquisition
Chiricahua National Monument Wilderness	NPS	AZ	1976	94-567, § 1(c)	2	same (?)	Lead mining claim	Lead mining claim	Upon acquisition
Chumash Wilderness	FS	CA	1992	102-301, § 2(5)	50	same (?)	Road corridor with ORV traffic	Road corridor with ORV traffic	When agency constructs alternate route
Congaree National Park Wilderness	NPS	SC	1988	100-524	6,840	same (?)	Non-federal ownership, road	Non-federal ownership, road	Upon acquisition, road removal
Cumberland Island Wilderness	NPS	GA	1982 2004	97-250, § 2(a); 108-447, § 145(a)	(44,748) 10,500	same (?)	Non-federal ownership	Non-federal ownership	Upon acquisition
Death Valley Wilderness	NPS	CA	1994	103-433, § 601(b)	6,848	same (?)	Power line corridor	Power line corridor	Upon cessation of power line use
Elkhorn Ridge Wilderness	BLM	CA	2006	109-362, § 6(a)	11,271	0	Ecological degradation from logging		
Great Sand Dunes Wilderness	NPS	CO	1976 1979	94-567, § 1(d); 96-87, § 401	670 + 1,900	65 (?)	Non-federal ownership, access, and improvements	Non-federal ownership, access, and improvements	Upon acquisition
Gulf Islands Wilderness	NPS	FL	1978	95-625, § 401(5)	2,800	520	Non-federal ownership	Non-federal ownership	Upon acquisition
Haleakala Wilderness	NPS	HI	1976	94-567, § 1(e)	5,500	51	Non-federal ownership	Non-federal ownership	Upon acquisition
Hawaii Volcanoes Wilderness	NPS	HI	1978	95-625, § 401(6)	7,850	same (?)	Non-federal ownership	Non-federal ownership	Upon acquisition
Isle Royale Wilderness	NPS	MI	1976	94-567, § 1(f)	231	93	Trailside shelters, 4 commercial fishing bases, Coast Guard boathouse, power line, ranger station facilities, 11 life leases	Trailside shelters, Coast Guard boathouse/ trail, ranger station facilities, SUPs extending life leases to children, volunteer-in-park agreements, researcher/NPS housing, Artist in Residence cabin	When life leases are up and other non-conforming uses cease
John Krebs Wilderness	NPS	CA	2009	111-11, § 1902(1)(A)	130	same (?)	Check dams and water impoundments	Check dams and water impoundments	Upon cessation of hydroelectric operations
Joshua Tree Wilderness	NPS	CA	1976 2009	94-567, § 1(g); 111-11, § 1851(c)(1)	30,740 + 43,300	62,138 to 62,238	Non-federal ownership	Non-federal ownership	Upon acquisition
Kimberling Creek Wilderness	FS	VA	2009	111-11, § 1103(c)(1)	349	same (?)	Extensive former road network	Extensive former road network	Upon notice of wilderness compatibility or after 5 years
Marjory Stoneman Douglas Wilderness	NPS	FL	1978	95-625, § 401(3)	81,900	same	Non-federal ownership, mineral rights, power line	Non-federal ownership, mineral rights, power line	Upon acquisition; burial of power line
Olympic Wilderness	NPS	WA	1988	100-688, § 101(a)(1)	378	same (?)	Non-federal ownership	Non-federal ownership	Upon acquisition
Oregon Badlands Wilderness	BLM	OR	2009	111-11, § 1702(a), (c)(1)	25 ft.-wide "corridor"	same (?)	Motorized sled dog training by visually impaired musher	Motorized sled dog training by visually impaired musher	Upon termination of training
Organ Pipe Cactus Wilderness	NPS	AZ	1978	95-625, § 401(7)	1,240	same (?)	Overhead power line (?)	Overhead power line (?)	Upon burial or relocation of power line
Olis Pike Fire Island High Dune Wilderness	NPS	NY	1980	96-585, § a	18	1	Non-federal ownership, structures, access roads	Boardwalk nature trail, boardwalk, dune crossing, and bathhouse	Upon removal of structures
Phillip Burton Wilderness (Point Reyes Wilderness)	NPS	CA	1976	94-544, § 1; 94-567, § 1(k)	8,003	6,251	Commercial oyster farming operation, road, power/phone lines	Commercial oyster farming operation	When non-conforming uses cease (after efforts to steadily remove all obstacles to conversion)
Pinnacles Wilderness	NPS	CA	1976	94-567, § 1(i)	990	same (?)	Non-federal ownership	Non-federal ownership	Upon acquisition
Roaring River Wilderness	FS	OR	2009	111-11, § 1202(c)(1)(A)	900	same (?)	Human alteration related to timber harvest	Human alteration related to timber harvest	Upon notice of wilderness compatibility
Rocky Mountain National Park Wilderness	NPS	CO	2009	111-11, § 1952(a),(c)	5,169 (?)	same (?)	Non-federal ownership, life tenancy	Non-federal ownership, life tenancy	Upon acquisition, expiration of life tenancy
Sequoia-Kings Canyon National Parks Wilderness	NPS	CA	1984	98-425, § 106(2)	100	same (?)	Visitor use developments	Visitor use developments	Upon showing of adverse impact and removal (?)
Shenandoah Wilderness	NPS	VA	1976	94-567, § 1(m)	560	0	Fire tower, power line, fire road, SUPs		
Stephen Mather Wilderness	NPS	WA	1988	100-688, § 201(a)(1)	5,226	same (?)	Patented mining claims, planned flooding, road, structures(?)	Patented mining claims, planned flooding, road, structures(?)	Upon acquisition
Yosemite National Park Wilderness	NPS	CA	1984	98-425, § 106(1)	3,550	same (?)	Non-federal ownership, power line corridor, Hetch Hetchy dam, other(?)	Non-federal ownership, power line corridor, Hetch Hetchy dam, other(?)	Upon acquisition; power line burial or relocation; dam removal

Table 2. Summary of nonconforming uses in congressionally designated potential wilderness areas (*see infra* Appendix A for details). Question marks (?) after values for “Current Size” denote assumed values based on the lack of Federal Register notices stating otherwise. **Red text/pink shading** = commercial use; **brown text** = road/motorized vehicle access; **dark blue text** = mining claim/mineral rights; **gray-blue text** = water storage/transmission lines; **gray text** = non-federal ownership; **green text** = degradation from former use; tan shading = removal of nonconforming use involves agency discretion/control (separate from acquisition).

DBOC's existing RUO and SUP have a known, finite expiration date: November 30, 2012.⁶⁶ Later this year, then, the primary obstacle to Drakes Estero achieving full wilderness status will evaporate—unless the Secretary uses his discretion to grant DBOC an extension and, potentially, (under Alternative D) an expansion. A decision that would result in cessation of DBOC operations and removal of DBOC facilities upon expiration of the RUO and SUP would align with NPS's best management practices and the specific stated intent of Congress that the “land and waters designated as potential wilderness additions [at Point Reyes] . . . 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.”⁶⁷

C. Extension or Expansion of a Non-Recreation-Focused Commercial Enterprise in a CDPWA Appears to Be Unprecedented

Our findings suggest that granting a new SUP for DBOC's shellfish farming business would represent a significant departure from accepted wilderness and CDPW management practices. Once Congress designates an area as potential wilderness, nonconforming uses that cannot be characterized as “valid existing rights” are generally phased out, not expanded or extended.⁶⁸

Our survey of CDPWAs indicates that DBOC's operations constitute a highly unusual nonconforming use.⁶⁹ While other CDPWAs contain documented nonconforming uses related to commercial activity, these are generally substantively related to one or more of the explicit exceptions in the Wilderness Act.⁷⁰ Examples include established cattle grazing in the Joshua Tree potential wilderness,⁷¹ patented mining claims in the Stephen Mather potential wilderness,⁷² and Southern California Edison's operation and maintenance of hydroelectric dams in the John Krebs potential wilderness.⁷³

66. See *supra* text accompanying note 18.

67. H.R. REP. NO. 94-1680, at 3 (1976) (emphasis added).

68. One of the few pieces of evidence for extension is a generic reference to SUPs coupled with a specific reference to SUPs “extending life lease use rights” to the children of leaseholders in Isle Royale potential wilderness. See NAT'L PARK SERV., WILDERNESS AND BACKCOUNTRY MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, ISLE ROYALE NATIONAL PARK 24 (2005) [hereinafter ISLE ROYALE EIS]; see also *supra* Table 2; *infra* Appendix A, at 70. However, it is unclear whether these permits were issued prior to or after designation, or what the permits entail.

69. See *supra* Table 2; *infra* Appendix A, at 66–94.

70. See *supra* notes 42–47 and accompanying text.

71. See Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1851(d)(5), 123 Stat. 991; see also *supra* Table 2; *infra* Appendix A, at 72.

72. See NAT'L PARK SERV., STATE OF THE STEPHEN MATHER WILDERNESS 1-1 (1994), available at http://wilderness.nps.gov/document/stephen_mather.pdf; see also *supra* Table 2; *infra* Appendix A, at 86.

73. See *Current National Parks Legislation: Hearing Before the Subcomm. on Nat'l Parks of the S. Comm. on Energy and Natural Resources*, 110th Cong., at 12–24 (2008) (statement of Karen Taylor-Goodrich, Associate Director, Visitor and Resource Protection, National Park Service); see also *supra* Table 2; *infra* Appendix A, at 90.

By contrast, DBOC's mariculture business is a facially commercial production, harvesting, and retail operation without obvious ties to any Wilderness Act exceptions. Its closest analog is a set of four commercial fishing bases in the Isle Royale potential wilderness; however, all four of those bases ceased operations prior to 2005.⁷⁴

Furthermore, while the Act permits the Secretary to authorize park staff to operate motor vehicles in CDPWAs as necessary to complete essential wilderness management tasks,⁷⁵ allowing a purely commercial operator to do so on a near-daily basis⁷⁶ appears to be unique and without precedent.⁷⁷ Although some established use of motorboats by private parties may be permitted to continue after wilderness designation, this exception appears limited to longstanding recreational and administrative uses of watercraft (as in the Boundary Waters Canoe Area Wilderness⁷⁸). Even well established and widespread recreational motorboat use has now been completely phased out within Buffalo National River potential wilderness.⁷⁹

Finally, aside from section 124 of Public Law 111-88,⁸⁰ our research found no other instances of congressional action to authorize extension of a nonconforming commercial use not previously contemplated by one of the established exceptions to Wilderness Act prohibitions.

Accordingly, our research suggests that granting DBOC a new SUP would be an unprecedented act.⁸¹

II. ENVIRONMENTAL IMPLICATIONS OF GRANTING A NEW SPECIAL USE PERMIT TO DBOC

The DEIS indicates that granting a new SUP would have significant negative impacts on environmental resources in Drakes Estero. These include "long-term major adverse impacts" to soundscapes and wilderness;⁸² "long-term moderate adverse impacts" to wetlands, eelgrass, benthic fauna, harbor

74. See ISLE ROYALE EIS, *supra* note 68, at 24; see also *supra* Table 2; *infra* Appendix A, at 70.

75. See, e.g., Haleakala Wilderness in Hawaii, where Congress affirmed the use of helicopters, if necessary, "for fence maintenance to control destructive invasive alien plants and non-native animals." Notice of Conversion of Potential Wilderness as Designated Wilderness, Haleakala National Park, 67 Fed. Reg. 6944 (Feb. 14, 2002); *infra* Appendix A, at 69. Another example is Virginia's Kimberling Creek Wilderness, where Congress allowed "motorized equipment and mechanized transport" to be used if "necessary to restore the natural ecosystems." Pub. L. No. 111-11, § 1103(c)(1); *infra* Appendix A, at 91.

76. See DEIS, *supra* note 2, at 72 (explaining that "boats operate up to 8 hours per day, 6 days per week, making approximately 12 round trips per day").

77. See *supra* Table 2; *infra* Appendix A, at 66-94.

78. See *supra* note 48 and accompanying text.

79. See *supra* Table 2; *infra* Appendix A, at 76.

80. See *supra* note 21 and accompanying text.

81. Some might argue that the uniqueness of DBOC's nonconforming use cabins the potential effect of granting an extension because this management change is not readily transferable to other CDPWAs. However, this oversimplification ignores the probable precedential effect of granting an unnecessary extension/expansion on an especially nonconforming category of use.

82. DEIS, *supra* note 2, at lii, liv (2011).

seals, birds, coastal flood zones, and visitor experience and recreation;⁸³ and “long-term minor adverse impacts” to fish, special-status species, water quality, and NPS operations.⁸⁴ In fact, according to the DEIS, only one category analyzed—socioeconomic resources—would experience “long-term beneficial impacts” from a new SUP.⁸⁵ The no-action alternative, however, is projected to have “long term beneficial impacts” for all resources except socioeconomic resources (projected to experience “long-term minor adverse impacts”) and NPS operations (for which all alternatives are projected to have “long-term minor adverse impacts”).⁸⁶

The likely negative impacts of extending or expanding DBOC’s operations in Drakes Estero raise concerns about the wisdom of discretionarily permitting continued disturbance to this unique estuarine system. Even highly regulated bivalve mariculture exposes an ecosystem to a number of risks, including greater susceptibility to disease and the proliferation “of non-native epibiotic organisms in soft-sediment environments” (like the Estero) when farmers use hard artificial substrates (like the racks used in the Estero).⁸⁷

It is important to note that in addition to officially permitted activities, unforeseen and unpermitted activities may have significant impacts on Drakes Estero. For example, DBOC has violated the terms of its RUO and SUP on a number of occasions by engaging in unpermitted septic discharges into the Estero, erecting unpermitted structures, and operating motorboats in off-limit areas protected for harbor seal breeding.⁸⁸ Most recently, in late 2011 and early 2012, the California Coastal Commission sent DBOC letters of noncompliance with the California Coastal Act and a 2007 Consent Cease and Desist Order.⁸⁹ The letters focused primarily on “marine debris in Drakes Estero and on nearby coastal beaches, [] from abandoned, discarded, or fugitive plastic aquaculture materials” and motorboat “transit in the lateral sandbar channel near the mouth

83. *Id.* at xl, xlii, xlv, xlvi, xviii, l, lv.

84. *Id.* at xlv, xlix, li, lviii.

85. *Id.* at lvii (explaining that continuing DBOC operations would “provide employment and housing to DBOC staff and their families . . . contribut[e] to the regional tax base . . . [and] provide a local food source for the region”).

86. *See* sources cited *supra* notes 82–85.

87. *See* COMM. ON BEST PRACTICES FOR SHELLFISH MARICULTURE AND THE EFFECTS OF COMMERCIAL ACTIVITIES IN DRAKE’S ESTERO, NAT’L RESEARCH COUNCIL, ECOSYSTEM CONCEPTS FOR SUSTAINABLE BIVALVE MARICULTURE 3–8 (2010), *available at* http://www.nap.edu/catalog.php?record_id=12802 (explaining that “from organism to ecosystem, there is no free lunch” so that “all impacts need to be considered in a policy context that appropriately weighs the values of seafood production and of changing ecosystem state so that the costs and benefits of choices about mariculture can be compared”). The Draft EIS also mentions these impacts. *See, e.g., DEIS, supra* note 2, at xlv.

88. *See, e.g., DEIS, supra* note 2, at 46.

89. *See* Letter from Jo Ginsberg, Enforcement Analyst, Cal. Coastal Comm’n, to Kevin Lunny, Drakes Bay Oyster Co. (Sept. 29, 2011), *available at* <http://www.savepointreyeswilderness.org/wp-content/uploads/2011/10/CCC-9-29-11-ltr-to-DBOC.pdf> [hereinafter *CCC Letter 1*]; Letter from Jo Ginsberg, Enforcement Analyst, Cal. Coastal Comm’n to Kevin Lunny, Drakes Bay Oyster Co. (Feb. 1, 2012), *available at* <http://www.savepointreyeswilderness.org/wp-content/uploads/2012/02/CCC-ltr-to-DBOC-re-noncompliance-Feb-1-2012.pdf> [hereinafter *CCC Letter 2*].

of the Estero during the seasonal restriction period established for harbor seal pupping sites.”⁹⁰ While the extent of harm resulting from these violations may be difficult to quantify, they suggest the possibility of long-term cumulative impacts not fully assessed in the DEIS.

Furthermore, recent reports by the National Research Council (NRC) and Marine Mammal Commission (Commission), among others, concluded that the scientific record of DBOC’s environmental impacts suffers from substantial data gaps.⁹¹ These gaps contribute to uncertainty about the magnitude of DBOC’s impacts and call into question the strength of the evidence for causal links between specific DBOC activities and particular environmental changes in the estuary. Some of these outstanding questions are highlighted in Table 3 and discussed in Appendix B.

A 2009 NRC report found that “onsite investigations of potential impacts of DBOC operations on the Drakes Estero ecosystem . . . could be fairly characterized as preliminary results that would require additional focused research to allow definitive conclusions to be reached about the presence, absence, or magnitude of any ecological impacts.”⁹² The report noted that while studies of impacts in other locations “may help support results from initial studies in Drakes Estero, the comparability is not always sufficient to reach confident conclusions on the most important issues of relevance to management decisions.”⁹³

Similarly, a 2011 Commission report⁹⁴ pointed out the many limitations of data linking changes in harbor seal population and distribution to a variety of influences, including DBOC’s activities in the estuary. The Commission found that:

- Although “the number of seals using [the oyster bar haulout] site declined substantially in 2007 . . . existing information is [not] sufficient to determine the factor(s) that caused the change.”
- “[D]ata . . . are not sufficient to support firm conclusions regarding the rate and significance of [] disturbance” by mariculture activities.

90. *CCC Letter 1*, *supra* note 89, at 1; *see also CCC Letter 2*, *supra* note 89, at 1 (expressing concern over continuation of the same offences described in the September 29, 2011, letter and explaining that “complete and consistent adherence to [required] measures is crucially important as they were not designed to provide a level of protection that would be considered adequate with only partial compliance”).

91. *See* COMM. ON BEST PRACTICES FOR SHELLFISH MARICULTURE AND THE EFFECTS OF COMMERCIAL ACTIVITIES IN DRAKES ESTERO, NAT’L RESEARCH COUNCIL, SHELLFISH MARICULTURE IN DRAKES ESTERO, POINT REYES NATIONAL SEASHORE, CALIFORNIA 13 (2009), *available at* http://www.nap.edu/catalog.php?record_id=12667 [hereinafter NRC REPORT]; MARINE MAMMAL COMM’N, MARICULTURE AND HARBOR SEALS IN DRAKES ESTERO, CALIFORNIA i–iii (2011), *available at* http://mmc.gov/drakes_estero/pdfs/drakes_estero_report.pdf [hereinafter MARINE MAMMAL COMM’N].

92. NRC REPORT, *supra* note 91, at 67.

93. *Id.*

94. MARINE MAMMAL COMM’N, *supra* note 91.

- “[D]ata supporting the [statistical] analyses are scant and have been stretched to their limit. Nevertheless, . . . [they] provide some support for the conclusion that harbor seal habitat-use patterns and mariculture activities in Drakes Estero are at least correlated . . . [but] are not sufficient to demonstrate a causal relationship. Additional, carefully guided study would be required to determine if the apparent relationship is one of cause and effect.”
- “Improvements are needed in the procedures used to collect disturbance data and to characterize mariculture activities and effort in the upper estuary. Photographs taken between 2007 and 2010 warrant further review to assess their usefulness for characterizing the rates and consequences of disturbance. Also, studies are needed to characterize harbor seal haulout patterns in the absence of disturbance, and to assess the biological significance of disturbance when it occurs.”⁹⁵

Question	What we know	What we don't know	Conclusion?
What is the impact of DBOC's Pacific oyster mariculture on native Olympia oyster recovery in Drakes Estero?	Species can compete directly for resources.	Population of Olympia oysters in Drakes Estero.	Pacific oyster most likely has a negative impact on the potential for Olympia oyster rehabilitation in Drakes Estero. However, Estero-specific research is needed to give a better idea of the likely magnitude of the impact, e.g., researching factors relevant to Pacific oyster's potential to go feral in the area.
	Pacific oyster beds act as "recruitment sink" for Olympia oyster.	Detailed differences between the physical, chemical, and biological environment of Drakes Estero and areas where Pacific oyster has become independently invasive, like San Francisco Bay.	
	Pacific oyster has become self-established in San Francisco Bay.	Detailed differences between Drakes Estero ecosystems and physical/chemical environment and those of localities where studies are done, and how/if this effects the Pacific oyster's impacts.	
What is the impact of DBOC's mariculture activities on fish in Drakes Estero?	In Humboldt Bay, California, oyster longlines were found to harbor more fish than eelgrass.	Similarities/differences between longlines used in Humboldt Bay and oyster racks used in Drakes Estero.	More research is needed in Drakes Estero to determine if oyster mariculture apparatus affects fish densities and varieties.
	North Carolina study showed equal fish density over plastic bottom netting (used to cover cultured clams) and in eelgrass beds.	Differences in fish species, other factors that differentiate Drakes Estero from the two study areas.	The assumption that the increase in fish populations represents a net benefit to the ecosystem should be analyzed critically.
What is the impact of DBOC's mariculture activities on harbor seals in Drakes Estero?	Data from population studies.	Effects of disturbances on seals during breeding season.	More research needed to determine specific impacts of mariculture on harbor seals (including causal relationships).
	Statistical analysis.	Relationship between mariculture activities and seal behavior at haul-out sites.	Disturbances from mariculture should be precautionarily reduced.
	Mariculture activities, in particular motor boat use, can disrupt seals in breeding grounds.	Effect on seals in water (as opposed to hauled-out).	Requires long term monitoring
What is the impact of DBOC's mariculture activities on water quality in Drakes Estero?	Oyster waste can cause sedimentary anoxia.	Extent to which oysters vs. tidal flux influence water quality in Drake's Bay	Use of term "benefits" to describe ecosystem changes should be closely assessed.
	Oyster pseudo-feces can fertilize benthic macro- and microalgae, increasing benthic primary production.		Pacific oyster may cause sedimentary anoxia or improve water quality, but both effects may be made largely irrelevant by strong tidal flow.
	Oyster mariculture has been shown to improve overall water quality in some areas.		Therefore, using these as arguments for/against continuation of oyster mariculture may not be meaningful.

Table 3. Some relevant questions relating to DBOC's impacts that have not yet been satisfactorily answered (*see infra* Appendix B, at 95–99, for references).

95. *Id.* at i–iii.

Without more complete data, the potential environmental repercussions of the Secretary's decision remain unclear. The Commission notes that "whether and to what extent the above shortcomings are addressed will depend, in part, on the decision by the Secretary of the Interior."⁹⁶ However, turning the estuary into wilderness does not eliminate the need for more (and better) information: the Commission notes that "[i]f the Secretary determines that the estuary should be converted to full wilderness status, then the Park Service should continue to study the seals to determine if and how they may change in abundance or alter their habitat-use patterns."⁹⁷ On the other hand, if the Secretary selects one of the action alternatives and grants a new SUP, it will be crucial for the NPS to "address the various weaknesses and gaps in the available data" with a well-thought-out, long-term monitoring and adaptive management plan.⁹⁸ The Commission gives detailed suggestions for such a plan.⁹⁹ It cautions that:

[i]mplementing an adaptive management approach is not a simple or trivial matter. To be successful, . . . [it] would have to be well conceived, adequately supported, and responsibly implemented by all parties involved. Most importantly, it would have to be based on getting at the truth, rather than having those with conflicting viewpoints seeking simply to win the debate.¹⁰⁰

Due to NPS's limited budget and the tight time constraints for preparing the final EIS, it is unlikely that sufficient data to adequately evaluate the potential impacts of DBOC's proposed future activities will become available within the timeframe of NEPA review.¹⁰¹ Furthermore, adaptive management, which would be required for any of the three action alternatives, is expensive and labor-intensive. Selecting Alternative A would obviate the need for such a strategy.

When facing scientific ambiguity, some policymakers adopt the precautionary principle,¹⁰² placing the burden on the party proposing an action to affirmatively show a lack of negative impact on the environment. Given the uniqueness of Drakes Estero and our incomplete knowledge of the relationship

96. *Id.* at iii.

97. *Id.*

98. *Id.*

99. *See id.* at 59–60 (including twenty elements the Commission sees as essential to successful adaptive management).

100. *Id.* at 59.

101. *See supra* note 24 and accompanying text. The handout provided at EIS public scoping meetings shows that NPS anticipated the entire process—from scoping through final decisionmaking—would take less than two years (fall 2010 to summer 2012). *See You Are Invited to Participate*, NAT'L PARK SERV. (Oct. 2011), available at <http://www.nps.gov/pore/parkmgmt/loader.cfm?csModule=security/getfile&PageID=391729>. This window has almost expired.

102. *See, e.g., Communication from the Commission on the Precautionary Principle*, at 3–4 COM (2000) 1 final (Feb. 2, 2000), available at http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf (stating that the precautionary principle should be invoked when a "phenomenon, product or process" may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation "does not allow the risk to be determined with sufficient certainty").

between its complex ecology and DBOC's activities, we would counsel the Secretary to adopt a precautionary approach in his decisionmaking and select the no-action alternative.

III. ADHERENCE TO THE PURPOSE AND SUBSTANCE OF THE WILDERNESS ACT
AND THE PRECAUTIONARY PRINCIPLE COMPEL THE SECRETARY
TO SELECT THE NO-ACTION ALTERNATIVE

While section 124 of Public Law 111-88 authorizes the Secretary to grant a ten-year extension of DBOC operations, it does not mandate such an extension.¹⁰³ The Secretary has discretion to grant or deny a new SUP on the basis of his expert opinion after reasoned analysis of all factors.

Our research demonstrates that approving a new SUP would result in significant negative impacts to wilderness values and uncertain—although likely negative—impacts to the Drakes Estero ecosystem. First, granting an extension or expansion of a non-recreation-focused commercial enterprise in a CDPWA appears to lack precedent and would contravene the designating legislation's intent, the Wilderness Act's purpose and substance, and NPS's own management guidance. Second, even divorced from Drakes Estero's wilderness context, existing scientific data fails to demonstrate that mariculture activities in Drakes Estero pose little risk of environmental harm. The lack of robust, relevant, temporally and spatially extensive scientific data bearing on the magnitude and extent of DBOC's impacts demonstrates that the Secretary does not have the information necessary to make an informed decision about discretionarily extending (and, possibly, expanding) the sole nonconforming use in this CDPWA.

Considerations of fairness to DBOC do not weigh against this outcome. DBOC took over JOC's RUO and SUP in 2005 with full knowledge that the authorization for its nonconforming use would soon come to an end. While the 1972 RUO contains a renewal clause,¹⁰⁴ it is not mandatory and predates the designation of Drakes Estero as potential wilderness. Therefore, it is unrealistic to think that, absent the 2009 rider providing congressional authorization to do so, the Secretary would have entertained the possibility of renewal.

Additionally, granting a new SUP could have long-term repercussions for CDPWAs around the country and, more generally, for maintaining our nation's commitment to wilderness preservation. Although the 2009 rider denies that it will serve as precedent for administrative actions elsewhere within the National

103. See Pub. L. No. 111-88, § 124, 123 Stat. 2932 (2009) (providing that “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” (emphasis added)).

104. See Johnson Oyster Company Grant Deed to the United States, Exhibit C, § 11 Reservation of Use and Occupancy (Nov. 9, 1972) (providing that “[u]pon expiration of the reserved term, a special use permit *may* be issued for the continued occupancy of the property” and that “[a]ny permit for continued use will be issued in accordance with National Park Service *regulations in effect at the time the Reservation expires*” (emphasis added)) (available in Appendix A to the DEIS, at A-45).

Wilderness Preservation System,¹⁰⁵ this is a false promise. The explicit scope of section 124 limits its direct effects to Point Reyes National Seashore, but this language does nothing to limit potential indirect impacts in the event the Secretary chooses to approve a new SUP. The disclaimer does not preclude other members of Congress—noting the Secretary’s willingness to sacrifice wilderness values under political pressure—from seeking legislative (or legislatively authorized consideration of) extensions or expansions of nonconforming activities in CDPWAs in their own states.

This is precisely the type of intervention that Arthur Wright, President of The Wilderness Society, warned of at a U.S. Senate hearing in 1976—the year Congress began designating lands as potential wilderness. Wright explained that:

[w]e do not believe the legislative history of the [Wilderness Act] or the act itself is favorable to [the] idea of Congress delegating authority to make wilderness judgments [by designating potential wilderness and leaving the timing of its conversion to full wilderness up to an executive agency]. Moreover, we have a concern that something could happen to potential wilderness additions if they receive bad handling by the Department of the Interior or there are administrative or legal loopholes involved in potential additions and I think with strong economic pressures, somehow, someday, potential wilderness additions could find themselves in deep trouble, and not make this wilderness system as intended by the Congress.¹⁰⁶

Unlike many CDPWAs, which must wait an unknown length of time for an agency to acquire non-federal interests before conversion to full wilderness,¹⁰⁷ Drakes Estero’s potential wilderness status had a known expiration date for the past thirty-five years. That date is at risk of being pushed, perhaps indefinitely, into the future because Congress has granted the Secretary new discretion. Whereas agency control over the time frame for ending nonconforming uses would normally expedite their removal (and, therefore, CDPW conversion to full wilderness), here, it could have the opposite effect.

If the Secretary grants DBOC a ten-year extension, what will change from one decade to the next? As 2022 draws near, DBOC will be at liberty to seek, and Congress to grant, authorization for another ten-year reprieve. In this circumstance, would the Secretary approve a second extension? If not, by what logic?¹⁰⁸ From a big-picture perspective, a twenty-year delay in the conversion

105. See Pub. L. No. 111-88, § 124 (stating that “[n]othing 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”).

106. *Wilderness Additions—National Park System: Hearings Before the Subcomm. on Parks and Recreation of the S. Comm. on Interior and Insular Affairs*, 94th Cong. 150 (1976) (emphasis added, original punctuation and spelling preserved).

107. See *supra* Table 1.

108. While we argue against it on multiple bases, if the Secretary selects an action alternative, we strongly recommend that he include explicit provisions to cure the information gaps currently plaguing analysis of DBOC’s impacts on the Drakes Estero ecosystem. This would require extensive, ongoing

of CDPW to full wilderness does not seem so different from a ten-year delay. However, this brand of rationalization could earn Drakes Estero permanent status as a potential wilderness. This outcome, and its likely repetition across the country, would both harm local wilderness values and chip away at the integrity of the Wilderness Act itself.

In sum, to protect wilderness values at Point Reyes and the integrity of the National Wilderness Preservation System—and to avoid unnecessary risk to local ecosystems—we urge the Secretary to select Alternative A, the no-action alternative.¹⁰⁹

monitoring as part of a well-thought-out adaptive management system. Additionally, instead of expanding DBOC's operations, the Secretary should demand a stepped phase-out of its "temporary nonconforming or incompatible conditions" over the next ten years. These include both DBOC's direct activities (for example, the near-daily use of motorboats over a large portion of the estuary; the periodic import of out-of-state oyster seed potentially containing additional invasive species like the introduced tunicate *Didemnum vexillum*; and the maintenance of hard, benthic substrates in a traditionally mud and sand-dominated estuary) and its indirect impacts (for example, environmental loading of mariculture-associated viruses, parasites, and epibionts; competitive depletion of plankton and organic particulate matter; shifts in the overall nutrient cycling of the estuary; and unknown impacts on the recovery or persistence of native species in the estuary, like native oysters harbor seals). An adaptive, research-oriented approach to a DBOC extension would at least ensure that we know more about its impacts in ten years than we do today.

109. We are not alone. Ninety-two percent (48,396 of 52,473) of the comments submitted during the DEIS public comment period supported Alternative A. See Nat'l Park Serv., *Preliminary Content Analysis Report* (Feb. 26, 2012), available at http://www.nps.gov/pore/parkmgmt/upload/planning_dboc_sup_deis_public_comments_content_analysis_report_preliminary_120226.pdf. Individual public comments are accessible from *DBOC SUP DEIS Public Comments*, NAT'L PARK SERV., http://www.nps.gov/pore/parkmgmt/planning_dboc_sup_deis_public_comments.htm (last visited Mar. 12, 2012).

APPENDIX A.
CONGRESSIONALLY DESIGNATED POTENTIAL WILDERNESS AREAS
AS OF 11/2011

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Potential Wilderness Areas Designated in 1976

Pub. L. No. 94-544

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Pub. L. No. 94-567

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| 6. Phillip Burton Wilderness (Point Reyes Wilderness) | CA |
| 7. Pinnacles Wilderness | CA |
| 8. Shenandoah Wilderness | VA |

1. Chiricahua National Monument Wilderness — 1976 Arizona

Responsible Agency: National Park Service
Initial Size (1976): 2 acres (Pub. L. No. 94-567, § 1(c))
Current Size: 2 acres (?)

Reasons for “potential” wilderness status:

- Lead Mining Claim: “The two-acre potential wilderness on the northeast corner of the monument is part of a valid lead mining claim. When the two acres are acquired, they will become wilderness.” *Walker Statement* at 88.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94-567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.

Sources (ordered by date):

- i. *Designation of Wilderness Areas Part IV: Hearing on H.R. 13562 and H.R. 13563 Before the Subcomm. on National Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 93rd Cong. 10-43, 87-115 (1974) (statement of Ronald Walker, Director, Nat’l Park Serv.) [hereinafter *Walker Statement*]
- ii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94-567, 90 Stat. 2692 (1976)

2. Great Sand Dunes Wilderness — 1976 + 1979 Colorado

Responsible Agency: National Park Service
Initial Size (1976): **670** (Pub. L. No. 94-567, § 1(d)) + **1,900** (Pub. L. No. 96-87, § 401; *see also* 74 Fed. Reg. 16005)

Current Size: 65 acres (?) (see 74 Fed. Reg. 16006 (announcing conversion of 2,505 acres to full wilderness in 2009))

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Access, and Improvements: “This potential wilderness consists of private inholdings and some Federal land utilized for access to one of them.” *Walker Statement* at 25. “There are no manmade structures . . . and we have no plans to put anything there, possibly except a primitive camp here in San Creek [indicating] and one here on Little Medano Creek.” *Id.* at 26. “At the time of the establishment of the wilderness area two of the potential wilderness units had been purchased by the government but had non-conforming uses One was occupied by the previous owner under a “Life Estate Agreement” while the other was occupied under a “Use and Occupancy” agreement. The former expired upon the death of the occupant in 1995 while the latter’s term expired in 1999. . . . Additionally, improvements existing on one of the units were removed and the area restored to a natural state.” 74 Fed. Reg. 16005–16006. The government purchased two other private units, which had previously been “accessible by motor vehicle,” in 2000 and 2004. *Id.* at 16006.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94–567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; see also *id.* § 6.
- Motorized Vehicles for Fence Maintenance: “The Committee recognized the possible need . . . to utilize motorized vehicles along certain parts of the monument boundary to maintain fencing for protection . . . from trespass of domestic livestock” and “that this necessary management activity may continue pursuant to Sec. 4 (a)(3) of the Wilderness Act.” S. REP. NO. 94-1357 at 4–5.

Sources (ordered by date):

- i. *Designation of Wilderness Areas Part IV: Hearing on H.R. 13562 and H.R. 13563 Before the Subcomm. on National Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 93rd Cong. 10–43, 87–115 (1974) (statement of Ronald Walker, Director, Nat’l Park Serv.) [hereinafter *Walker Statement*]
- ii. S. REP. NO. 94-1357 (1976)
- iii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94–567, 90 Stat. 2692 (1976)
- iv. An Act to Authorize the Secretary of the Interior to Provide for the Commemoration of the Efforts of Goodloe Byron to Protect the

Appalachian Trail, and for Other Purposes, 1979, Pub. L. No. 96–87, § 401, 93 Stat. 664 (1979)

- v. Notice of Designation of Potential Wilderness as Wilderness, Great Sand Dunes National Park and Preserve, CO, 74 Fed. Reg. 16005–16006 (Apr. 8, 2009)

3. Haleakala Wilderness — 1976

Hawaii

Responsible Agency: National Park Service
Initial Size (1976): **5,500** acres (Pub. L. No. 94-567, § 1(e))
Current Size: **51** acres (67 Fed. Reg. 6944 (explaining that East Maui Irrigation Inc. owns the remaining acreage in 2002))

Reasons for “potential” wilderness status:

- Non-Federal Ownership: The potential wilderness “consists of 5,310 acres of State land and 190 acres of privately owned land” that will become wilderness “upon their acquisition by the Federal Government.” *Walker Statement* at 91.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94–567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.
- Exclusion Fence Construction and Maintenance: “It is noted that construction of fences to exclude feral animals and access via helicopter for fence maintenance to control destructive invasive alien plants and non-native animals” allowed if “necessary to preserve wilderness resources and ecosystem processes.” 67 Fed. Reg. 6944.

Sources (ordered by date):

- i. *Designation of Wilderness Areas Part IV: Hearing on H.R. 13562 and H.R. 13563 Before the Subcomm. on National Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 93rd Cong. 10–43, 87–115 (1974) (statement of Ronald Walker, Director, Nat’l Park Serv.) [hereinafter *Walker Statement*]
- ii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94–567, 90 Stat. 2692 (1976)
- iii. Notice of Conversion of Potential Wilderness as Designated Wilderness, Haleakala National Park, 67 Fed. Reg. 6944 (Feb. 14, 2002)

4. Isle Royale Wilderness — 1976

Michigan

Responsible Agency: National Park Service
Initial Size (1976): **231** acres (Pub. L. No. 94-567, § 1(f))
Current Size: **93** acres (*see* 48 Fed. Reg. 12842 (announcing conversion of 138 acres consisting of two power line

corridors where the line “was abandoned . . . dismantled and removed” to full wilderness in 1983))

Reasons for “potential” wilderness status:

- Structures, Power Line, Special Use Permits, Commercial Fishing Bases, Life Leases, etc.: “There are approximately 20 existing trailside shelters . . . included in areas of potential wilderness addition, and these areas shall become wilderness when the shelters are no longer needed.” S. REP. NO. 94-1357, at 5. “[N]o acreage is provided, but as these shelters are eliminated, the area upon which they stand will likewise become wilderness.” H.R. REP. NO. 93-1636, at 5. Other nonconforming uses consisted of: 4 commercial fishing bases, U.S. Coast Guard boathouse, a power line, ranger station facilities, and 11 life leases. *See id.*
 - In 2005, remaining non-conforming uses included: 3 “Volunteer in Park agreement[s] allowing residence,” 2 Special Use Permits, “NPS and researcher housing,” 2 “Special Use Permit[s] extending life lease use rights,” ranger station with fuel storage, 2 “NPS residence[s],” 4 life leases, “[b]oat house and trail to light house for past Coast Guard use,” and an “Artist in Residence Program cabin.” ISLE ROYALE EIS, at 24.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94-567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.
- Boat Dock Maintenance, Power Line, Prescribed Burning: “The Committee understands that no significant expansion of boat docks numbers is anticipated, but that continued maintenance of these facilities is essential to the continued ease of access as well as the health and safety of the visitors. The continued operation of a power line to Mt. Ojibway, and the use of prescribed burning are both management decisions which lie with the National Park Service pursuant to Sec. 4(a)(3) of the Wilderness Act. The Committee assumes these activities will continue with reference to testimony received from the” NPS. S. REP. NO. 94-1357, at 5.

Sources (ordered by date):

- i. H.R. REP. NO. 93-1636 (1974)
- ii. S. REP. NO. 94-1357 (1976)
- iii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94-567, 90 Stat. 2692 (1976)
- iv. Designation of Wilderness; Isle Royale National Park, 48 Fed. Reg. 12842 (Mar. 28, 1983)

- v. NATIONAL PARK SERVICE, WILDERNESS AND BACKCOUNTRY MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, ISLE ROYALE NATIONAL PARK (2005) [hereinafter ISLE ROYALE EIS].

5. Joshua Tree Wilderness — 1976 + 2009

California

Responsible Agency: National Park Service

Initial Size (1976): **30,740** acres (initially thought to be 37,550 due to miscalculation) (Pub. L. No. 94-567, § 1(g); 62 Fed. Reg. 28729) + **43,300** acres (Pub. L. No. 111-11, § 1851(c)(1) (2009))

Current Size: **62,138 to 62,238** acres (62 Fed. Reg. 28729–28730 (announcing conversion of 3,502.20 acres to full wilderness in 1997); *Daly Statement* at 24 (describing the intent in 2007 to incorporate “about 8,400 acres” designated as potential wilderness in 1976 due to private ownership “or use[] for non-wilderness purposes” as part of 36,800 acres of wilderness); *see also* Pub. L. No. 111-11 § 1851(b)(1)(F) (designating 36,700 acres as wilderness in 2009, presumably including 8,300 to 8,400 acres of 1976 potential wilderness))

Reasons for “potential” wilderness status:

- Non-Federal Ownership:
 - Potential wilderness designated in 1976 included private and state lands the Park Service was attempting to exchange or purchase, including 10,500 acres owned by the Southern Pacific Railroad Company arrayed in a “checkerboard pattern” with federal land. *Walker Statement*, at 97–98. “With the recent land acquisition progress exhibited here, it is anticipated that a significant amount of the potential wilderness addition acreage will soon be acquired and will then convert to wilderness status.” S. REP. NO. 94-1357, at 5–6.
 - Potential wilderness designated in 2009 included non-federally owned inholdings. Pub. L. No. 111-11 § 1851(c)(2)(B); *see also Daly Statement*, at 24 (explaining that “[a]bout one-third of the acreage is in private ownership” and “the park already is managing this area as wilderness”).

Achievement of wilderness designation / administration:

- Potential Wilderness Designated in 1976:
 - Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94–567, § 3.
 - General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.
 - Wildlife Watering Devices: “Special management language . . . was deleted. It authorized the Secretary to construct and maintain wildlife watering devices and to use necessary manipulative

techniques to perpetuate natural ecological conditions. While recognizing the necessity of this authority, . . . explanation of specific management functions are [sic] not appropriate in this legislation in light of Sec. 4(a)(3) of the Wilderness Act.” S. REP. NO. 94-1357, at 6.

- Potential Wilderness Designated in 2009:
 - Conversion to Full Wilderness: “The land designated potential wilderness . . . shall be designated as wilderness . . . effective upon publication by the Secretary of the Interior in the Federal Register of a notice that—(A) all uses of the land within the potential wilderness prohibited by the Wilderness Act . . . have ceased; and (B) sufficient inholdings within the boundaries of the potential wilderness have been acquired to establish a manageable wilderness unit.” Pub. L. No. 111-11 § 1851(c)(2).
 - General Administration: “[D]esignated potential wilderness . . . shall be managed by the Secretary of the Interior insofar as practicable as wilderness until such time as the land is designated as wilderness.” *Id.* § 1851(c)(1). “Subject to valid existing rights, the land designated as wilderness or as a [potential] wilderness addition by this section shall be administered by the Secretary in accordance with the Wilderness Act.” *Id.* § 1851(d)(1).
 - Fire, Insect, and Disease Control: “The Secretary may take such measures in a wilderness area or wilderness addition designated by this section as are necessary for the control of fire, insects, and diseases in accordance with section 4(d)(1) of the Wilderness Act (16 U.S.C. 1133(d)(1)) and House Report 98-40 of the 98th Congress.” *Id.* § 1851(d)(4)(A).
 - Grazing: “Grazing of livestock in a wilderness area or wilderness addition designated by this section shall be administered in accordance with the provisions of section 4(d)(4) of the Wilderness Act (16 U.S.C. 1133(d)(4)) and the guidelines set forth in House Report 96-617 to accompany H.R. 5487 of the 96th Congress.” *Id.* § 1851(d)(5).
 - Military Airspace Use: “Nothing in this section precludes—(A) low-level overflights of military aircraft over the wilderness areas or wilderness additions designated by this section; (B) the designation of new units of special airspace over the wilderness areas or wilderness additions designated by this section; or (C) the use or establishment of military flight training routes over wilderness areas or wilderness additions designated by this section.” *Id.* § 1851(d)(7).

Sources (ordered by date):

- i. *Designation of Wilderness Areas Part IV: Hearing on H.R. 13562 and H.R. 13563 Before the Subcomm. on National Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 93rd Cong. 10-43, 87-115 (1974) (statement of Ronald Walker, Director, Nat’l Park Serv.) [hereinafter *Walker Statement*]
- ii. S. REP. NO. 94-1357 (1976)

- iii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94-567, 90 Stat. 2692 (1976)
- iv. Notice of Designation of Potential Wilderness, Joshua Tree National Park, 62 Fed. Reg. 28729-28730 (May 27, 1997)
- v. *Hearing on H.R. 2334, H.R. 2632, H.R. 3287, H.R. 3513, and H.R. 3682 Before the Subcomm. on National Parks, Forests and Public Lands of the H. Comm. on Natural Resources*, 110th Cong. 21-41 (2007) (statement of Elena Daly, Director, National Landscape Conservation System, Bureau of Land Management) [hereinafter *Daly Statement*]
- vi. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

6. Phillip Burton Wilderness — 1976 (x 2) *California*

<i>Previous Name:</i>	Point Reyes Wilderness (changed by Pub. L. No. 99-68, 99 Stat. 166 (1985))
<i>Responsible Agency:</i>	National Park Service
<i>Initial Size (1976):</i>	8,003 acres (Pub. L. No. 94-544, § 1; Pub. L. No. 94-567, § 1(k))
<i>Current Size:</i>	6,251 acres (64 Fed. Reg. 63057 (announcing conversion of 1,752 acres in “Muddy Hollow, Abotts Lagoon, and Limantour Area . . . [now] entirely in Federal ownership” to full wilderness in 1999))

Reasons for “potential” wilderness status:

- Non-Federal Title, Structures, Commercial Oyster Farming: “[P]otential wilderness . . . will automatically gain wilderness status when the Federal government gains full title to these lands, and when certain non-conforming uses and/or structures are eliminated.” S. REP. NO. 94-1357, at 7. “Limantour Estero . . . and Abotts lagoon . . . are subject to mineral and fishing rights owned by the State.” H.R. REP. NO. 94-1680, at 5. “Commercial oyster farming operations [in Drakes Estero] . . . and the reserved rights by the State on tidelands in this area make this acreage inconsistent with wilderness.” *Id.* at 6. Additionally, the “Muddy Hollow Road corridor . . . consists of a road and overhead electric power and telephone lines.” *Id.*

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94-567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6. “[T]he following lands . . . are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act: those lands comprising twenty-five thousand three hundred and seventy acres, and potential wilderness additions comprising eight thousand and three acres.”

Pub. L. No. 94-544 § 1; *see also id.* § 3. “As is well established, it is the intention that those lands and waters designated as **potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.**” H.R. REP. NO. 94-1680, at 3 (emphasis added).

- Fire Trail Maintenance, Emergencies: “[M]echanized equipment may be necessary to maintain passable fire trails” and NPS does not have to “cope with an emergency, such as an oil spill, or the health and safety of park visitors, without the use of mechanized equipment” S. REP. NO. 94-1357, at 7.

Sources (ordered by date):

- i. *Designation of Wilderness Areas Part IV: Hearing on H.R. 13562 and H.R. 13563 Before the Subcomm. on National Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 93rd Cong. 10-43, 87-115 (1974) (statement of Ronald Walker, Director, Nat'l Park Serv.) [hereinafter *Walker Statement*]
- ii. An Act to Designate Certain Lands in the Point Reyes National Seashore, California, as Wilderness, Amending the Act of September 13, 1962 (76 Stat. 538), as Amended (16 U.S.C. 459c-6a), and for Other Purposes, Pub. L. No. 94-544, 90 Stat. 2515 (1976)
- iii. H.R. REP. NO. 94-1680 (1976)
- iv. S. REP. NO. 94-1357 (1976)
- v. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94-567, 90 Stat. 2692 (1976)
- vi. Notice of Designation of Potential Wilderness, Point Reyes National Seashore, 64 Fed. Reg. 63057 (Nov. 18, 1999)

7. Pinnacles Wilderness — 1976

California

Responsible Agency: National Park Service
Initial Size (1976): 990 acres (Pub. L. No. 94-567, § 1(i))
Current Size: 990 acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership. *See Talcott Statement* at 303.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94-567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.

Sources (ordered by date):

- i. *Wilderness Additions—National Park System: Hearing on S. 885 and S. 1096, S. 1085 and S. 1675, S. 731 and S. 1069, S. 1068, S. 72 and S. 1092,*

*S. 1093, S. 2472, and S. 97 and S. 1099 Before the S. Subcomm. on Parks and Recreation of the Comm. on Interior and Insular Affairs, 94th Cong. 300–305 (statement of Rep. Burt Talcott) [hereinafter *Talcott Statement*]*

- ii. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94–567, 90 Stat. 2692 (1976)

8. Shenandoah Wilderness — 1976

Virginia

Responsible Agency: National Park Service

Initial Size (1976): **560** acres (Pub. L. No. 94-567, § 1(m))

Current Size: **0** acres (43 Fed. Reg. 39188 (announcing conversion of all 560 acres of potential wilderness to full wilderness in 1978 after removal of power line and fire tower and transfer of special use permits “to a nonwilderness park road for the remaining lifetime of the current permittees” and permanent closure and blockage of potential wilderness road to “prevent further motorized use”))

Reasons for “potential” wilderness status:

- Fire Tower, Power Line, Fire Road, Special Use Permits: “[A]bandoned . . . fire tower, and an unused overhead powerline and a fire road that lead to the tower from opposite directions”; “fire road, upon which special use permits had been issued to stockmen of record at the time of the purchase of the park to permit the continuation of their traditional hauling of cattle from one side of the park to the other.” 43 Fed. Reg. 39188.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 94–567, § 3.
- General Administration: “[T]he following lands are hereby designated as wilderness, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act.” *Id.* § 1; *see also id.* § 6.

Sources (ordered by date):

- i. An Act to Designate Certain Lands Within Units of the National Park System as Wilderness; to Revise the Boundaries of Certain of Those Units; and for Other Purposes, Pub. L. No. 94–567, 90 Stat. 2692 (1976)
- ii. Shenandoah National Park, VA, 43 Fed. Reg. 39188 (Sept. 1, 1978)

Potential Wilderness Areas Designated in 1978

Pub. L. No. 95-625

- | | |
|--------------------------------------|----|
| 9. Buffalo National River Wilderness | AR |
| 10. Carlsbad Caverns Wilderness | NM |
| 11. Gulf Islands Wilderness | FL |

- | | |
|---|----|
| 12. Hawaii Volcanoes Wilderness | HI |
| 13. Marjory Stoneman Douglas Wilderness (Everglades Wilderness) | FL |
| 14. Organ Pipe Cactus Wilderness | AZ |

9. Buffalo National River Wilderness — 1978 *Arkansas*

Responsible Agency: National Park Service
Initial Size (1978): **25,471** acres (Pub. L. No. 95-625, § 401(1))
Current Size: **1,007** acres (58 Fed. Reg. 53746 (announcing conversion of all but 1,007 acres of potential wilderness to full wilderness in 1993, after “all non-Federal interests and uses prohibited by the Wilderness Act” were eliminated))

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Motorized Boat Access: Non-conforming uses included “non-Federal interests and uses prohibited by the Wilderness Act.” 58 Fed. Reg. 53746. “Traditionally, Johnboats with motors have been used on the lower portion of the Buffalo River and it is felt that use of motors is a convenience to those who desire motorized access for fishing, but is not necessary for public enjoyment of the proposed wilderness.” INTERIOR STATEMENT at 85.
 - The remaining 1,007 acres “are divided between nine separate parcels in the three units of the BNR Wilderness Area,” mostly “use and occupancy reservations which will expire by the year 2004.” BNR PLAN, at 20.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*

Sources (ordered by date):

- i. SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- ii. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467
- iii. Buffalo National River, AR, 58 Fed. Reg. 53746 (Oct. 18, 1993)
- iv. NAT’L PARK SERV., BUFFALO NATIONAL RIVER WILDERNESS AND BACKCOUNTRY MANAGEMENT PLAN, ARKANSAS (1994?), *available at* <http://wilderness.nps.gov/document/buffalo.pdf> [hereinafter BNR PLAN]

10. Carlsbad Caverns Wilderness — 1978 *New Mexico*

Responsible Agency: National Park Service
Initial Size (1978): 320 acres (Pub. L. No. 95-625, § 401(2))
Current Size: 320 acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership: “The potential wilderness consists of private lands at the western end of the park.” INTERIOR STATEMENT at 87.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*

Sources (ordered by date):

- i. SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- ii. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467

11. Gulf Islands Wilderness — 1978 *Florida*

Responsible Agency: National Park Service
Initial Size (1978): 2,800 acres (Pub. L. No. 95-625, § 401(5))
Current Size: 520 acres (45 Fed. Reg. 46211 (announcing acquisition and conversion of 1,402.88 acres to full wilderness in 1980); 59 Fed. Reg. 18154 (announcing acquisition and conversion of 877.27 acres to full wilderness in 1994))

Reasons for “potential” wilderness status:

- Non-Federal Ownership: “The potential wilderness additions consists [sic] of outstanding private rights.” INTERIOR STATEMENT, at 95; *see also* 45 Fed. Reg. 46211; 59 Fed. Reg. 18154.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*
- Dock, Vault Toilets, Coast Guard Maintenance, Beach Clean-Up and Patrol: “The recommendation includes proposed special provisions for an

administrative dock, use of vault toilets in primitive campsites, Coast Guard maintenance of navigation structures, and the use of small motor vehicles for beach clean-up and patrol in time of storms.” INTERIOR STATEMENT at 95. “In keeping with the committee’s position for beach and tidelands cleanup policy for Point Reyes National Seashore Wilderness, routine administrative use of motorized equipment shall not be permitted, and may occur only in emergency or very unusual situations.” H.R. REP. NO. 95-1165, at 74. “While it might not be practical or possible to remove such existing devices and facilities [including vault toilets, boat docks, wildlife watering devices, underground transmission lines, etc.], the addition of more of these incompatible items should not be permitted, and every effort should be made to eliminate those items now existing. *Id.* at 75.

- Navigational and Maritime Safety: “Nothing in this title shall be construed to diminish the authority of the Coast Guard . . . or the Federal Aviation Administration to use the areas designated wilderness by this Act within . . . the Gulf Islands National Seashore, Florida and Mississippi, for navigational and maritime safety purposes.” Pub. L. No. 95-625, § 405.

Sources (ordered by date):

- H.R. REP. NO. 95-1165 (1978)
- SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467
- Gulf Islands National Seashore; Designation of Wilderness, 45 Fed. Reg. 46211 (Jul. 9, 1980)
- Designation of Wilderness, Gulf Islands National Seashore, MS, 59 Fed. Reg. 18154 (Apr. 15, 1994)

12. Hawaii Volcanoes Wilderness — 1978

Hawaii

Responsible Agency: National Park Service
Initial Size (1978): 7,850 acres (Pub. L. No. 95-625, § 401(6))
Current Size: 7,850 acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership: Potential wilderness consists of “privately owned lands within the park that possess wilderness qualities.” INTERIOR STATEMENT at 96.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*

- Shelter Maintenance, Feral Animal Control, Volcanic Research: “The draft legislation [] includes special provisions to maintain shelters within the wilderness, and to permit the use of motorized vehicles and special equipment for controlling feral animals and conducting volcanic research.” INTERIOR STATEMENT at 96.

Sources (ordered by date):

- SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467

13. Marjory Stoneman Douglas Wilderness — 1978 *Florida*

<i>Previous Name:</i>	Everglades Wilderness (changed by Pub. L. No. 105-82, § 3, 111 Stat. 1541 (1997))
<i>Responsible Agency:</i>	National Park Service
<i>Initial Size (1978):</i>	81,900 acres (Pub. L. No. 95-625, § 401(3))
<i>Current Size:</i>	81,900 acres (<i>see Everglades Park Statistics</i>)

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Mineral Rights, Isolated Federal Lands, Power Line: “The potential additions consist of private lands or areas with mineral rights, small areas of federal lands isolated by private holdings, and a powerline to be placed underground.” INTERIOR STATEMENT at 92.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*
- Motorboat Access: “The wilderness recommendation includes most of the submerged lands within the park to offer the highest protection to this significant ecosystem. Motorboating would continue as before in the waters over the submerged wilderness.” INTERIOR STATEMENT at 92. “The Secretary should give prompt consideration to the regulation of such use to minimize its adverse influence on the wildlife, and should further consider the advisability of permanently closing some of these routes by their later designation as wilderness.” H.R. REP. NO. 95-1165, at 73.
- Elimination of Non-Conforming Uses: “While it might not be practical or possible to remove [] existing devices and facilities [including boat docks, underground transmission lines, etc.], the addition of more of these incompatible items should not be permitted, and every effort should be made to eliminate those items now existing. *Id.* at 75.

- Navigational and Maritime Safety: “Nothing in this title shall be construed to diminish the authority of the Coast Guard . . . or the Federal Aviation Administration to use the areas designated wilderness by this Act within the Everglades National Park, Florida . . . navigational and maritime safety purposes.” Pub. L. No. 95-625, § 405.

Sources (ordered by date):

- H.R. REP. NO. 95-1165 (1978)
- SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467
- Everglades Park Statistics*, NATIONAL PARK SERVICE, <http://www.nps.gov/ever/parknews/parkstatistics.htm> (last visited Nov. 26, 2011)

14. Organ Pipe Cactus Wilderness — 1978

Arizona

Responsible Agency: National Park Service
Initial Size (1978): **1,240** acres (Pub. L. No. 95-625, § 401(7))
Current Size: **1,240** acres (?)

Reasons for “potential” wilderness status:

- Overhead Power Line: “The potential wilderness additions contain an overhead powerline. The area could qualify as wilderness when the powerline is placed underground or relocated.” INTERIOR STATEMENT at 99 (discussing an earlier proposal including 9,000 acres of potential wilderness).

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands which represent potential wilderness additions in this title, upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 95-625, § 403.
- General Administration: “Lands designated as potential wilderness additions shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated wilderness.” *Id.*

Sources (ordered by date):

- SUBCOMM. ON NATIONAL PARKS AND INSULAR AFFAIRS OF THE H. COMM. ON INTERIOR AND INSULAR AFFAIRS, LEGIS. HISTORY OF THE NATIONAL PARKS AND RECREATION ACT OF 1978, at 9–113 (1978) (statement of witness for the Department of the Interior) [hereinafter INTERIOR STATEMENT]
- National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467

Potential Wilderness Areas Designated in 1979

Pub. L. No. 96-87

Great Sand Dunes Wilderness, see #2

CO

Potential Wilderness Areas Designated in 1980

Pub. L. No. 96-585

15. Otis Pike Fire Island High Dune Wilderness

NY

15. Otis Pike Fire Island High Dune Wilderness — 1980 *New York*

Responsible Agency: National Park Service

Initial Size (1980): 18 acres (Pub. L. No. 96-585, § a)

Current Size: 1 acre (64 Fed. Reg. 55308 (announcing conversion of 17 acres to full wilderness in 1999 after elimination of all non-federal ownership and non-conforming uses except the “Smith Point boardwalk nature trail” and “boardwalk, dune crossing and bathhouse at Old Inlet”))

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Structures, Access Roads: Potential wilderness includes 21 “sites of [] residential structures and their associated access roads,” “vehicle cuts . . . [and] sand roads leading from them to the access roads to the [] residences . . . and the access road to Watch Hill,” “[t]he sites of the [] Watch Hill horse stable and maintenance yard, and the access roads leading to them” and access roads, “[t]he [] Long Cove boardwalk nature trail,” and “the boardwalk nature trail at Smith point and the boardwalk, dune crossing and bathhouse at Old Inlet.” 64 Fed. Reg. 55308

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses prohibited thereon by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 96-585, § c.
- General Administration: “Pending such designation, the Secretary shall administer such lands in such manner as to preserve, insofar as is possible, their wilderness or potential wilderness character.” *Id.*
- Repair of Breaches: “Wilderness designation shall not preclude the repair of breaches that occur in the wilderness area, in order to prevent loss of life, flooding, and other severe economic and physical damage to the Great South Bay and surrounding areas.” *Id.* § d.

Sources (ordered by date):

- An Act to Designate Certain Lands of the Fire Island National Seashore as the “Otis Pike Fire Island High Dune Wilderness”, and for Other Purposes, Pub. L. No. 96-585, 94 Stat. 3379 (1980)
- Notice of Designation of Potential Wilderness as Wilderness, Fire Island National Seashore, 64 Fed. Reg. 55308 (Oct. 12, 1999)

Potential Wilderness Areas Designated in 1982

Pub. L. No. 97-250

16. Cumberland Island Wilderness

GA

16. Cumberland Island Wilderness — 1982 + 2004*Georgia**Responsible Agency:* National Park Service*Initial Size (1982):* **10,500** acres (Pub. L. No. 97-250, § 2(a)(4), (c)(2) (as amended by Pub. L. No. 108-447, § 145(a) in 2004)*Current Size:* **10,500** acres (?)*Reasons for “potential” wilderness status:*

- Non-Federal Ownership: “Most of the potential wilderness is intertidal area owned by the State of Georgia.” S. REP. NO. 97-531, at 3.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “[T]he Secretary shall . . . on acquisition of the approximately 231 acres of land identified on the map as ‘Areas Become Designated Wilderness upon Acquisition by the NPS’; and . . . on publication in the Federal Register of a notice that all uses of the approximately 10,500 acres of land depicted on the map as ‘Potential Wilderness’ that are prohibited under the Wilderness Act . . . have ceased, adjust the boundary of the Wilderness to include the land.” Pub. L. No. 97-250, § 2(c)(2) (as amended by Pub. L. No. 108-447 § 145(a)).
- General Administration: “Subject to valid existing rights, the Wilderness shall be administered by the Secretary, in accordance with the applicable provisions of the Wilderness Act . . . governing areas designated by that Act as wilderness areas.” Pub. L. No. 97-250, § 2(e) (as amended by Pub. L. No. 108-447 § 145(a)).
- Utility Service: “Any person with a right to utility service on Cumberland Island on the date of enactment of this subsection shall continue to have the right to utility service in the Wilderness after the date of enactment of this subsection.” Pub. L. No. 97-250, § 2(f) (as amended by Pub. L. No. 108-447 § 145(a)).
- Roads: “[P]ortions of the island’s existing primitive roads are included within the designated wilderness and potential wilderness areas.” S. Rep. No. 97-531, at 3. “The 25-foot wide roadways depicted on the map as the ‘Main Road’, ‘Plum Orchard’, and the ‘North Cut Road’ shall not be included in the Wilderness and shall be maintained by the Secretary for continued vehicle use.” Pub. L. No. 97-250, § 2(b)(2) (as amended by Pub. L. No. 108-447 § 145(a)). “[T]he Secretary shall complete a management plan to ensure that not more than 8 and not less than 5 round trips are made available daily on the Main Road north of the Plum Orchard Spur and the North Cut Road by the National Park Service or a concessionaire for the purpose of transporting visitors to and from the historic sites located adjacent to Wilderness.” Pub. L. No. 97-250, § 2(g) (as amended by Pub. L. No. 108-447 § 145(a)).

Sources (ordered by date):

- i. S. REP. NO. 97-531 (1982)
- ii. An Act to Correct the Boundary of Crater Lake National Park in the State of Oregon and for Other Purposes, Pub. L. No. 97-250, § 2, 96 Stat. 709 (1982) (as amended 2004 by sec. 145(a) of Pub. L. No. 108-447)
- iii. H.R. REP. NO. 108-738 (2004)

- iv. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 145(a), 118 Stat. 2809 (2004) (amending Pub. L. No. 97-250 by striking and replacing sec. 2)

Potential Wilderness Areas Designated in 1984

Pub. L. No. 98-425

- | | |
|--|----|
| 17. Sequoia-Kings Canyon National Parks Wilderness | CA |
| 18. Yosemite National Park Wilderness | CA |

17. Sequoia-Kings Canyon National Parks Wilderness — 1984 *California*

Responsible Agency: National Park Service
Initial Size (1984): 100 acres (Pub. L. No. 98-425, § 106(2))
Current Size: 100 acres (?)

Reasons for “potential” wilderness status:

- Visitor Use Developments, Other: “[V]isitor use developments at Bearpaw Meadow and Pear Lake . . . are designated as 30 acre enclaves of potential wilderness addition, in the identical manner and with the identical treatment as is given the ‘high sierra camps’ in Yosemite. If and when . . . [their] continued operation . . . at the then current acceptable operational standard results in an increased adverse impact on the adjacent wilderness environment [and the enclaves themselves, operation] . . . shall be promptly terminated, the facilities removed, the sites naturalized, and . . . the areas promptly designated as wilderness.” H.R. REP. NO. 96-1223, at 46.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands (in section 106 of this title) which represent potential wilderness additions upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 98-425, § 108.
- General Administration: “Lands designated as potential wilderness additions shall be managed . . . insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.*
- Hydrometeorological Devices, Helicopter Use: Hydrometeorological devices “serve a critically essential purpose for many interests. Modifications, relocations, adjustments and maintenance of these devices are therefore acceptable, but it should remain an objective to minimize any adverse impact of these devices upon wilderness resources where possible.” H.R. REP. NO. 96-1223, at 47. “Helicopter use for routine nonemergency purposes associated with visitor use is a questionable activity in national park system wilderness areas and should be eliminated.” *Id.*

Sources (ordered by date):

- i. H.R. REP. NO. 96-1223 (1980)
- ii. California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619

18. Yosemite National Park Wilderness — 1984*California*

Responsible Agency: National Park Service
Initial Size (1984): 3,550 acres (Pub. L. No. 98-425, § 106(1))
Current Size: 3,550 acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Power Line Corridor, Hetch Hetchy, Other(?): 50-acre power line corridor. H.R. REP. NO. 96-1223, at 45. “It is intended that the [Hetch Hetchy] dam be set aside in wilderness reserve until such time as the dam is removed. Lake Eleanor is included in the wilderness, but the Committee may wish to put this dam in wilderness reserve, too.” *Cranston Statement*, at 269. A “121-acre potential wilderness addition is a tract . . . granted to . . . San Francisco . . . [that] has not been utilized for the [Hetch Hetchy] project and is in a wilderness condition.” *Everhardt Statement*, at 313. Other (?). See *supra* #17 (mentioning Yosemite’s “high sierra camps”); H.R. REP. NO. 96-1223, at 46.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands (in section 106 of this title) which represent potential wilderness additions upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.” Pub. L. No. 98-425, § 108.
- General Administration: “Lands designated as potential wilderness additions shall be managed . . . insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.*
- Hydrometeorological Devices, Helicopter Use: Hydrometeorological devices “serve a critically essential purpose for many interests. Modifications, relocations, adjustments and maintenance of these devices are therefore acceptable, but it should remain an objective to minimize any adverse impact of these devices upon wilderness resources where possible.” H.R. REP. NO. 96-1223, at 47. “Helicopter use for routine nonemergency purposes associated with visitor use is a questionable activity in national park system wilderness areas and should be eliminated.” *Id.*

Sources (ordered by date):

- i. *Wilderness Additions—National Park System: Hearing on S. 885 and S. 1096, S. 1085 and S. 1675, S. 731 and S. 1069, S. 1068, S. 72 and S. 1092, S. 1093, S. 2472, and S. 97 and S. 1099 Before the S. Subcomm. on Parks and Recreation of the Comm. on Interior and Insular Affairs, 94th Cong. 264–273 (statement of Sen. Alan Cranston) [hereinafter *Cranston Statement*]*
- ii. *Wilderness Additions—National Park System: Hearing on S. 885 and S. 1096, S. 1085 and S. 1675, S. 731 and S. 1069, S. 1068, S. 72 and S. 1092, S. 1093, S. 2472, and S. 97 and S. 1099 Before the S. Subcomm. on Parks and Recreation of the Comm. on Interior and Insular Affairs, 94th Cong. 306–324 (statement of Gary Everhardt, Director, Nat’l Park Serv.) [hereinafter *Everhardt Statement*]*
- iii. H.R. REP. NO. 96-1223 (1980)
- iv. California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619

Potential Wilderness Areas Designated in 1988

Pub. L. No. 100-524

19. Congaree National Park Wilderness SC

Pub. L. No. 100-688

20. Olympic Wilderness WA

21. Stephen Mather Wilderness WA

19. Congaree National Park Wilderness — 1988 *South Carolina*

Previous Name: Congaree Swamp National Monument Wilderness
(changed by Pub. L. No. 108-199, § 139(b), 118 Stat. 3
(2004))

Responsible Agency: National Park Service

Initial Size (1988): **6,840** acres (Pub. L. No. 100-524 § 2(b))

Current Size: **6,840** acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership, Road: “[P]otential wilderness areas would be designated as wilderness at such time as they are acquired by the Park Service and uses incompatible with wilderness designation are terminated or phased out.” S. REP. NO. 100-449, at 3. Road. *Id.* at 5.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands designated as potential wilderness additions shall, upon acquisition of any non-Federal interests in land and publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, thereby be designated wilderness . . . and shall be managed in accordance with the Wilderness Act.” Pub. L. No. 100-524 § 2(b).
- General Administration: Potential wilderness “shall be managed by the Secretary Interior . . . insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.*
- Valid Existing Rights: “Subject to valid existing rights, the lands designated as wilderness pursuant to this Act shall be administered by the Secretary in accordance with the applicable provisions of the Wilderness Act governing areas designated by that Act as wilderness.” *Id.* § 4.
- Road Access: “Under the potential wilderness designation [of the road west of Weston Lake identified as potential wilderness], only minimal motor vehicle access by the state agency should be permitted for [the] purpose [of servicing and maintaining an air quality monitoring station] and for eventual relocation of the monitoring station.” S. REP. NO. 100-449, at 5.

Sources (ordered by date):

- i. S. REP. NO. 100-449 (1988)
- ii. Congaree Swamp National Monument Expansion and Wilderness Act, Pub. L. No. 100-524, 102 Stat. 2606 (1988)

20. Olympic Wilderness — 1988*Washington*

Responsible Agency: National Park Service
Initial Size (1988): 378 acres (Pub. L. No. 100-688, § 101(a)(1))
Current Size: 378 acres (?)

Reasons for “potential” wilderness status:

- Non-Federal Ownership: “If and when the National Park Service acquires the rights to these lands, they would become wilderness as well.” H.R. REP. NO. 100-961, at 7.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands designated as potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon that are inconsistent with the Wilderness Act have ceased or that non-Federal interests in land have been acquired, shall thereby be designated as wilderness and managed accordingly.” Pub. L. No. 100-688, § 401(a)(2).
- General Administration: “Lands designated as potential wilderness additions shall be administered by the Secretary of the Interior insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.* “Subject to valid existing rights, the wilderness areas designated under titles I, II, and III of this Act shall be administered by the Secretary of the Interior in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness.” *Id.* § 401(a)(1).
- Power Line: “The Secretary is authorized to upgrade, maintain and replace, as necessary, the Wolf Creek underground powerline to Hurricane Ridge: Provided, that to the extent practicable, such maintenance and operation shall be conducted in such a manner as to remain consistent with wilderness management.” *Id.* § § 102.

Sources (ordered by date):

- i. H.R. REP. NO. 100-961 (1988)
- ii. Washington Park Wilderness Act of 1988, Pub. L. No. 100-688, 102 Stat. 3961

21. Stephen Mather Wilderness — 1988*Washington*

Responsible Agency: National Park Service
Initial Size (1988): 5,226 acres (Pub. L. No. 100-688, § 201(a)(1))
Current Size: 5,226 acres (?)

Reasons for “potential” wilderness status:

- Patented Mining Claims, Planned Flooding, Road, Structures(?): 5,000 acres in the Lake Chelan National Recreational Area and 226 acres in North Cascades National Park. STATE OF THE STEPHEN MATHER WILDERNESS, at 1-1. “These lands possess wilderness character but are prevented from wilderness designation by encumbrances including patented mining claims, potential plans for flooding due to the construction of the High Ross Dam, and the existence of a road.” *Id.* Additionally, nineteen “historic structures are located within wilderness and potential wilderness,” but these do not seem to bear on full wilderness status. *Id.* at 4-15.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Any lands designated as potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon that are inconsistent with the Wilderness Act have ceased or that non-Federal interests in land have been acquired, shall thereby be designated as wilderness and managed accordingly.” Pub. L. No. 100-688, § 401(a)(2).
- General Administration: “Lands designated as potential wilderness additions shall be administered by the Secretary of the Interior insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.* “Subject to valid existing rights, the wilderness areas designated under titles I, II, and III of this Act shall be administered by the Secretary of the Interior in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness.” *Id.* § 401(a)(1).

Sources (ordered by date):

- H.R. REP. NO. 100-961 (1988)
- Washington Park Wilderness Act of 1988, Pub. L. No. 100-688, 102 Stat. 3961
- NAT’L PARK SERV., STATE OF THE STEPHEN MATHER WILDERNESS (1994), available at http://wilderness.nps.gov/document/stephen_mather.pdf

Potential Wilderness Areas Designated in 1992**Pub. L. No. 102-301**

22. Chumash Wilderness

CA

22. Chumash Wilderness — 1992*California*

Responsible Agency: Forest Service
Initial Size (1992): 50 acres (Pub. L. No. 102-301, § 2(5))
Current Size: 50 acres (?)

Reasons for “potential” wilderness status:

- Road Corridor with ORV Traffic: “The [50-acre] Toad Springs road corridor delineated as potential wilderness shall remain open to off road vehicle traffic until construction of an alternate route which bypasses this area is completed.” Pub. L. No. 102-301 § 2(5); H.R. REP. 102-290, at 5.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “These potential wilderness lands shall be automatically incorporated in and managed as part of the Chumash Wilderness upon publication of a notice [that an alternate route has been constructed] in the Federal Register.” Pub. L. No. 102-301 § 2(5).
- General Administration: “Subject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act.” *Id.* § 3(a).
- Fire Prevention and Watershed Protection: “In order to guarantee the continued viability of the watersheds of the wilderness areas designated by this Act and to ensure the continued health and safety of the communities

serviced by such watersheds, the Secretary of Agriculture may take such measures as are necessary for fire prevention and watershed protection including, but not limited to, acceptable fire presuppression and fire suppression measures and techniques.” *Id.* § 3(b).

- Wildlife Management: “In furtherance of the purposes and principles of the Wilderness Act, management activities to maintain or restore fish and wildlife populations, including the California condor, and the habitats to support such populations may be carried out within wilderness areas designated by this Act where consistent with the relevant wilderness management plans in accordance with appropriate policies and guidelines such as those set forth in Policies and guidelines for Fish and Wildlife Management in National Forests and Bureau of Land Management Wilderness, dated August 25, 1986.” *Id.* § 3(c).

Sources (ordered by date):

- H.R. REP. 102-290 (1991)
- Los Padres Condor Range and River Protection Act, Pub. L. No. 102-301, 106 Stat. 242 (1992)

Potential Wilderness Areas Designated in 1994

Pub. L. No. 103-433

23. Death Valley Wilderness

CA

23. Death Valley Wilderness — 1994

California

Responsible Agency: National Park Service
Initial Size (1994): 6,848 acres (Pub. L. No. 103-433, § 601(b))
Current Size: 6,848 acres (?)

Reasons for “potential” wilderness status:

- Power Line Corridor: “The California Desert Protection Act . . . provides for the potential automatic creation of another 6,840 acres of wilderness along a powerline corridor from Furnace Creek to Stovepipe Wells upon cessation of powerline use.” GMP, at 63.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “Upon cessation of all uses prohibited by the Wilderness Act and publication by the Secretary in the Federal Register of notice of such cessation, potential wilderness . . . shall be deemed to be a part of the Death Valley Wilderness.” Pub. L. No. 103-433 § 601(b).
- General Administration: “Lands identified . . . as potential wilderness shall be managed by the Secretary insofar as practicable as wilderness until such time as said lands are designated as wilderness.” *Id.* § 601(b). “Any lands within the boundaries of a wilderness area designated under this Act which are acquired by the Federal Government, shall become part of the wilderness area within which they are located and shall be managed in accordance with all the provisions of this Act and other laws applicable to such wilderness area.” *Id.* § 704.
- Access to Private Property, Roads, Military Overflights: “The Secretary shall provide adequate access to nonfederally owned land or interests in land

within the boundaries of the conservation units and wilderness areas designated by this Act which will provide the owner of such land or interest the reasonable use and enjoyment thereof.” *Id.* § 708. “Although over 95% of Death Valley is designated as wilderness, about 700 miles of roads (paved and dirt) remain open within this Park.” GMP, at 64. Military Overflights. Pub. L. No. 103-433, § 801.

Sources (ordered by date):

- i. California Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471
- ii. NATIONAL PARK SERVICE, DEATH VALLEY NATIONAL PARK GENERAL MANAGEMENT PLAN (2002), *available at* http://www.nps.gov/deva/parkmgmt/upload/GMP_001.pdf [hereinafter GMP]

Potential Wilderness Areas Designated in 2004

Pub. L. No. 108-447

Cumberland Island Wilderness, see #16

GA

Potential Wilderness Areas Designated in 2006

Pub. L. No. 109-362

24. Elkhorn Ridge Wilderness

CA

24. Elkhorn Ridge Wilderness — 2006

California

<i>Responsible Agency:</i>	Bureau of Land Management
<i>Initial Size (2006):</i>	11,271 acres (Pub. L. No. 109-362, § 6(a))
<i>Current Size:</i>	0 acres (76 Fed. Reg. 2411 (announcing conversion to full wilderness of all potential wilderness in 2011, because “impacts from past activities are successfully recovering through natural rehabilitation and are compatible with . . . wilderness designation”))

Reasons for “potential” wilderness status:

- Ecological Degradation from Logging: “The Elkhorn Ridge area’s designation as a potential wilderness was intended to provide the Secretary of the Interior, through the BLM, time to assess and, if necessary, restore 1,565 acres of previously logged private in-holdings acquired shortly before the Act’s passage.” 76 Fed. Reg. 2411.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “The potential wilderness area shall be designated as wilderness and as a component of the National Wilderness Preservation System on the earlier of—(1) the date on which the Secretary publishes in the Federal Register notice that the conditions in the potential wilderness area that are incompatible with the Wilderness Act . . . have been removed; or (2) the date that is 5 years after the date of enactment of this Act.” Pub. L. No. 109-362, § 6(d).
- General Administration: “Except as provided in subsection (c) and subject to valid existing rights, the Secretary shall manage the potential wilderness

area as wilderness until the potential wilderness area is designated as wilderness.” *Id.* § 6(b).

- Ecological Restoration: “For purposes of ecological restoration (including the elimination of non-native species, removal of illegal, unused, or decommissioned roads, repair of skid tracks, and any other activities necessary to restore the natural ecosystems in the potential wilderness area), the Secretary may use motorized equipment and mechanized transport in the potential wilderness area until the potential wilderness area is designated as wilderness.” *Id.* § 6(c)(1). “To the maximum extent practicable, the Secretary shall use the minimum tool or administrative practice necessary to accomplish ecological restoration with the least amount of adverse impact on wilderness character and resources.” *Id.* § 6(c)(2).

Sources (ordered by date):

- i. Northern California Coastal Wild Heritage Wilderness Act, Pub. L. No. 109-362, 120 Stat. 2064 (2006)
- ii. Notice of Designation of Elkhorn Ridge Wilderness, California, 76 Fed. Reg. 2411 (Jan. 13, 2011)

Potential Wilderness Areas Designated in 2009

Pub. L. No. 111-11

25.	John Krebs Wilderness	CA
	Joshua Tree Wilderness, see #5	CA
26.	Kimberling Creek Wilderness	VA
27.	Oregon Badlands Wilderness	OR
28.	Roaring River Wilderness	OR
29.	Rocky Mountain National Park Wilderness	CO

25. John Krebs Wilderness — 2009

California

Responsible Agency: National Park Service

Initial Size (2009): 130 acres (Pub. L. No. 111-11, § 1902(1)(A))

Current Size: 130 acres (?)

Reasons for “potential” wilderness status:

- Dams and Impoundments: “The designation of the potential wilderness additions . . . shall not prohibit the operation, maintenance, and repair of the small check dams and water impoundments on Lower Franklin Lake, Crystal Lake, Upper Monarch Lake, and Eagle Lake. The Secretary is authorized to allow the use of helicopters for the operation, maintenance, and repair.” Pub. L. No. 111-11, § 1902(1)(C). “Designation as potential wilderness additions would allow Southern California Edison . . . to continue its hydroelectric power operation as long as it wants. However, in the event that the operator . . . ceases to operate them in the future, the National Park Service would have the option to convert the area to wilderness through administrative action.” *Taylor-Goodrich Statement*, at 15.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: The potential wilderness additions shall be designated as wilderness and incorporated into the John Krebs Wilderness

established by this section upon termination of the non-conforming uses.”
Pub. L. No. 111-11, § 1902(1)(C).

Sources (ordered by date):

- i. *Current National Parks Legislation: Hearing Before the Subcomm. on National Parks of the S. Comm. on Energy and Natural Resources*, 110th Cong., at 12–24 (2008) (statement of Karen Taylor-Goodrich, Associate Director, Visitor and Resource Protection, National Park Service) [hereinafter *Taylor-Goodrich Statement*]
- ii. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

26. Kimberling Creek Wilderness — 2009

Virginia

Responsible Agency: Forest Service
Initial Size (2009): 349 acres (Pub. L. No. 111-11, § 1103(a))
Current Size: 349 acres (?)

Reasons for “potential” wilderness status:

- Extensive Road Network: “The Kimberling Creek addition was recently acquired as NFS land and in its current condition does not contain the basic natural characteristics that make it suitable for wilderness due to an extensive road network.” *Holtrop Statement*, at 3

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “The potential wilderness area shall be designated as wilderness and incorporated in the Kimberling Creek Wilderness on the earlier of—(1) the date on which the Secretary publishes in the Federal Register notice that the conditions in the potential wilderness area that are incompatible with the Wilderness Act . . . have been removed; or (2) the date that is 5 years after the date of enactment of this Act.” Pub. L. No. 111-11, § 1103(c)(2)(d).
- General Administration: “Except as provided in subsection (c) and subject to valid existing rights, the Secretary shall manage the potential wilderness area in accordance with the Wilderness Act.” *Id.* § 1103(b).
- Ecological Restoration: “For purposes of ecological restoration (including the elimination of nonnative species, removal of illegal, unused, or decommissioned roads, and any other activity necessary to restore the natural ecosystems in the potential wilderness area), the Secretary may use motorized equipment and mechanized transport in the potential wilderness area until the date on which the potential wilderness area is incorporated into the Kimberling Creek Wilderness.” *Id.* § 1103(c)(1). “To the maximum extent practicable, the Secretary shall use the minimum tool or administrative practice necessary to accomplish ecological restoration with the least amount of adverse impact on wilderness character and resources.” *Id.* § 1103(c)(2).

Sources (ordered by date):

- i. *Hearing on H.R. 1011 Before the Subcomm. on National Parks, Forests & Public Lands of the H. Comm. on Natural Resources*, 110th Cong. (2007) (statement of Joel Holtrop, Deputy Chief, Forest Service), available at <http://naturalresources.house.gov/uploadedfiles/holtroptestimony05.10.07.pdf> [hereinafter *Holtrop Statement*].

- ii. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

27. Oregon Badlands Wilderness — 2009

Oregon

<i>Responsible Agency:</i>	Bureau of Land Management
<i>Initial Size (2009):</i>	25-foot-wide road corridor (Pub. L. No. 111-11, § 1702(c)(1))
<i>Current Size:</i>	25-foot-wide corridor (?)

Reasons for “potential” wilderness status:

- Road Corridor for Sled Dog Training: “In furtherance of the purposes of the Wilderness Act (16 U.S.C. 1131 et seq.), a corridor of certain Federal land managed by the Bureau of Land Management with a width of 25 feet, as generally depicted on the wilderness map as ‘Potential Wilderness’, is designated as potential wilderness.” Pub. L. No. 111-11, § 1702(c)(1). The corridor “accommodate[s] the existing use of the route for purposes relating to the training of sled dogs by Rachael Scdoris . . . a visually-impaired sled dog musher living outside of Bend, Oregon It is our understanding that the techniques she uses to train her dogs involve both motorized and mechanized transport.” *Nedd Statement*.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “On the date on which the Secretary publishes in the Federal Register notice that any nonconforming uses in the potential wilderness designated by paragraph (1) that are permitted under paragraph (2) have terminated, the potential wilderness shall be—(A) designated as wilderness and as a component of the National Wilderness Preservation System; and (B) incorporated into the Oregon Badlands Wilderness.” Pub. L. No. 111-11, § 1702(c)(3).
- General Administration: “The potential wilderness . . . shall be managed in accordance with the Wilderness Act . . . , except that the Secretary may allow nonconforming uses that are authorized and in existence on the date of enactment of this Act to continue in the potential wilderness.” *Id.* § 1702(c)(2). “Subject to valid existing rights, the Oregon Badlands Wilderness shall be administered by the Secretary in accordance with the Wilderness Act.” *Id.* § 1702(b)(1).
- Incorporation of Acquired Land and Interests: “Any land or interest in land within the boundary of the Oregon Badlands Wilderness that is acquired by the United States shall— (A) become part of the Oregon Badlands Wilderness; and (B) be managed in accordance with this subtitle, the Wilderness Act . . . , and any other applicable law.” *Id.* § 1702(b)(2).
- Grazing: “The grazing of livestock . . . , if established before the date of enactment of this Act, shall be permitted to continue subject to such reasonable regulations as are considered necessary by the Secretary in accordance with—(A) section 4(d)(4) of the Wilderness Act . . . and (B) the guidelines set forth in Appendix A of the report of the Committee on Interior and Insular Affairs of the House of Representatives accompanying H.R. 2570 of the 101st Congress (H. Rept. 101-405).” *Id.* § 1702(b)(3).
- Access to Private Property: “In accordance with section 5(a) of the Wilderness Act . . . , the Secretary shall provide any owner of private

property within the boundary of the Oregon Badlands Wilderness adequate access to the property.” *Id.* § 1702(b)(4).

Sources (ordered by date):

- i. *Hearing on S. 3088 Before the Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Resources*, 110th Cong. (2008) (statement of Michael Nedd, Assistant Director, Minerals and Realty Management, Bureau of Land Management), available at http://www.doi.gov/oc/2006/S3088andS3089_070908.htm [hereinafter *Nedd Statement*]
- ii. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

28. Roaring River Wilderness — 2009

Oregon

Responsible Agency: Forest Service
Initial Size (2009): 900 acres (Pub. L. No. 111-11, § 1202(c)(1)(A))
Current Size: 900 acres (?)

Reasons for “potential” wilderness status:

- The “potential wilderness area . . . has been altered by human influences relating to timber harvests.” S. REP. NO. 110-172, at 16.

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “On the date on which the Secretary publishes in the Federal Register notice that the conditions in the potential wilderness area designated by subparagraph (A) are compatible with the Wilderness Act . . . , the potential wilderness shall be— (i) designated as wilderness and as a component of the National Wilderness Preservation System; and (ii) incorporated into the Roaring River Wilderness designated by subsection (a)(6).” Pub. L. No. 111-11, § 1202(c)(1)(C).
- General Administration: “The potential wilderness area designated by subparagraph (A) shall be managed in accordance with section 4 of the Wilderness Act.” *Id.* § 1202(c)(1)(B). “Subject to valid existing rights, each area designated as wilderness by this section shall be administered by the Secretary that has jurisdiction over the land within the wilderness, in accordance with the Wilderness Act.” *Id.* § 1202(e)(1).
- Incorporation of Acquired Land and Interests: “Any land within the boundary of a wilderness area designated by this section that is acquired by the United States shall— (A) become part of the wilderness area in which the land is located; and (B) be managed in accordance with this section, the Wilderness Act . . . , and any other applicable law. *Id.* § 1202(e)(2).
- State Wildlife Jurisdiction and Responsibility: “Nothing in this section affects the jurisdiction or responsibilities of the State with respect to fish and wildlife.” *Id.* § 1202(g).
- Fire, Insect, Disease Control: “As provided in section 4(d)(1) of the Wilderness Act . . . , within the wilderness areas designated by this section, the Secretary . . . may take such measures as are necessary to control fire, insects, and diseases, subject to such terms and conditions as the Secretary determines to be desirable and appropriate.” *Id.* § 1202(h).

Sources (ordered by date):

- i. S. REP. NO. 110-172 (2007)
- ii. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

29. Rocky Mountain National Park Wilderness — 2009 *Colorado**Responsible Agency:* National Park Service*Initial Size (2009):* **5,169** acres (?) (*see* Pub. L. No. 111-11, § 1952(c) (omitting acreage or other description); *but see* S. REP. NO. 110-358, at 6 (explaining that “[s]ubsection (c) designates approximately 5,169 acres of lands within the park as potential wilderness”))*Current Size:* **5,169** acres (?)*Reasons for “potential” wilderness status:*

- Non-Federal Ownership, Life Tenancy, Other(?): “The areas recommended as potential wilderness additions include . . . Federal land with life tenancy and . . . [land] in private ownership.” *1974 Correction*. Other (?).

Achievement of wilderness designation / administration:

- Conversion to Full Wilderness: “On publication in the Federal Register of a notice by the Secretary that all uses inconsistent with the Wilderness Act . . . have ceased on the land identified on the map as a “Potential Wilderness Area”, the land shall be—(A) included in the Wilderness; and (B) administered in accordance with subsection (e).” Pub. L. No. 111-11, § 1952(c)(1).
- General Administration: “Subject to valid existing rights, any land designated as wilderness under this section or added to the Wilderness after the date of enactment of this Act under subsection (c) shall be administered by the Secretary in accordance with this subtitle and the Wilderness Act.” *Id.* § 1952(e).
- Fire, Insect, Disease Control: “The Secretary may take such measures in the Wilderness as are necessary to control fire, insects, and diseases, as are provided for in accordance with—(1) the laws applicable to the Park; and (2) the Wilderness Act.” *Id.* § 1952(g).

Sources (ordered by date):

- i. Correction to Wilderness Report for Rocky Mountain National Park, Colorado (1974), *available at* <http://wilderness.nps.gov/document/II-17.pdf>, at 4 [hereinafter *1974 Correction*]
- ii. S. REP. NO. 110-358 (2008)
- iii. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991

APPENDIX B.

REVIEW OF SCIENTIFIC EVIDENCE OF DBOC ENVIRONMENTAL IMPACTS

1. Mariculture Impacts on the Spread of Invasive Species

Based on available research, one significant environmental threat to Drakes Estero from oyster mariculture is the introduction of the invasive tunicate *Didemnum vexillum*. *D. vexillum* is a nonnative tunicate with worldwide impact, having “spread to Europe, New Zealand, and both coasts of North America.”¹¹⁰ *D. vexillum* propagates rapidly, can reproduce sexually or asexually, and currently has no known predators.¹¹¹ It is capable of accommodating a wide range of temperature, salinity, and water quality conditions.¹¹² *D. vexillum* is considered an “ecosystem engineer” because it has the capacity to “drastically adversely modify the habitats it invades.”¹¹³ According to the NRC REPORT, *D. vexillum* covered approximately half of the sub-tidal surfaces of cultivated oysters’ shells and oyster mariculture apparatus in Drakes Estero during its September 2008 visit.¹¹⁴

In addition to introducing the tunicate in the first place, the ongoing presence of oyster mariculture encourages the persistence and propagation of *D. vexillum* in Drakes Estero. The species depends heavily on hard substrates and is unlikely to “flourish []or persist [in Drakes Estero] in the absence of the hard surfaces provided by oysters and oyster racks.”¹¹⁵ Furthermore, there is an added risk from oyster processing: workers might break off pieces of the tunicate, facilitating asexual reproduction.¹¹⁶ Therefore, removing oyster mariculture from Drakes Estero could potentially halt the spread, if not the continuation, of *D. vexillum* in Drakes Estero.¹¹⁷ Given the tunicate’s ability to spread rapidly and its already expansive invasion of Drakes Estero, waiting ten more years (or longer) before removing exacerbating mariculture operations from the area could be detrimental for Estero ecosystems.

One of the risks presented by allowing *D. vexillum* to flourish is the danger it may pose to native eelgrass ecosystems. A study performed in a Massachusetts lake (published in 2010) purportedly recorded the first observation of *D. vexillum* attached to eelgrass.¹¹⁸ However, “*D. vexillum* has recently been reported colonizing eelgrass blades at presently low levels in Tomales [Bay].”¹¹⁹ Although more scientific study is needed to draw more definite conclusions about the result of *D. vexillum*’s use of eelgrass as a

110. Leif-Matthias Herborg, Patrick O’Hara & Thomas W. Therriault, *Forecasting the Potential Distribution of the Invasive Tunicate Didemnum vexillum*, 46 J. APPLIED ECOLOGY 64, 65 (2009) (internal citations removed).

111. See Mary R. Carman & David W. Grunden, *First Occurrence of the Invasive Tunicate Didemnum vexillum in Eelgrass Habitat*, 5 AQUATIC INVASIONS 23, 27 (2010).

112. See Herborg, O’Hara & Therriault, *supra* note 110, at 65.

113. Gretchen Lambert, *Adventures of a sea squirt sleuth: Unraveling the identity of Didemnum vexillum, a global ascidian invader*, 4 Aquatic Invasions 5, 24 (2009).

114. NRC REPORT, *supra* note 91, at 52.

115. *Id.* at 52, 55–56.

116. See *id.* at 56.

117. See *id.*

118. See Carman & Grunden, *supra* note 111, at 23.

119. NRC REPORT, *supra* note 91, at 55–56.

substrate, it is reasonable to predict that when attached to Eelgrass, the tunicate may block the plants' basic processes, including "photosynthesis, release of seed, and natural defoliation."¹²⁰

In light of the points discussed above, we find it likely that the invasive tunicate *D. vexillum*, whose propagation is augmented by the presence of oyster mariculture, gear, and processing, could have a negative effect on the natural ecology of the area. For example, it may overburden or decrease the amount of native eelgrass habitat in the Estero. We should take heed that while "[t]he ecological effects of invasive tunicates introduced to seagrass...remain [largely] unassessed, . . . introduced epibionts [generally] have negative effects on marine flora,"¹²¹ and *D. vexillum*, in particular, may pose "an ecological threat to many native and nonnative invertebrate taxa."¹²²

2. Mariculture Impacts on the Potential Comeback of the Native Oyster

Another potentially harmful impact of oyster mariculture in Drakes Estero is that the presence of the farmed Pacific oyster, *Crassostrea gigas*, may repress the rehabilitation of the native Olympia oyster, *Ostrea lurida*.¹²³ A study conducted by Trimble et al. showed that *C. gigas* acts as a "recruitment sink" for *O. lurida* because the native species preferentially attaches to *C. gigas* shells even under conditions unfavorable to its survival, so that individuals attached in unfavorable conditions generally die before reaching maturation.¹²⁴ In addition, *C. gigas* competes with *O. lurida* directly for food and space.¹²⁵

Considering the negative impact that *C. gigas* has on the growth of *O. lurida*, the possibility that *C. gigas* could grow independent of mariculture care and invade other areas should be carefully examined. According to the NRC, there is a risk that the nonnative oysters cultured in Drakes Estero might establish "self-sustaining populations."¹²⁶ The seriousness of this potential problem is reflected in the Coastal Conservancy's attempts to eradicate *C. gigas* in San Francisco Bay related to its efforts to "restore native oysters" there.¹²⁷ According to the Conservancy, which was willing to provide up to \$225,000 to the San Francisco Estuary Institute for nonnative oyster eradication in the bay, "[t]he establishment and spread of the exotic oyster *C. gigas* could threaten species that are critical to these restoration efforts and to achieving sub-tidal goals by potentially...competing with native oysters."¹²⁸ In 2006 "*C. gigas* were not present in great densities, and there [we]re no ports, marinas or natural hard substrate in the main areas where they were found," but

120. See Carman & Grunden, *supra* note 111, at 27.

121. See Carman & Grunden, *supra* note 111, at 27.

122. NRC REPORT, *supra* note 91, at 56.

123. See Alan C. Trimble, Jennifer L. Ruesink & Brett R. Dumbauld, *Factors Preventing the Recovery of a Historically Overexploited Shellfish Species, Ostrea lurida Carpenter 1864*, 28 J. Shellfish Res. 97, 105 (2009).

124. *Id.*

125. See *id.*

126. NRC REPORT, *supra* note 91, at 5.

127. California Coastal Conservancy, Staff Recommendation: San Francisco Bay Non-Native Oyster Eradication Project, File No. 06-093-02, at 2, June 5, 2008.

128. *Id.*

an “advisory panel concluded that there [wa]s a real and immediate risk of permanent establishment with potential large-scale impacts in the Bay.”¹²⁹ By 2008, the “broader distribution [of *C. gigas*] in the Bay require[d] a larger and wider-ranging [removal] effort than was initially mounted.”¹³⁰

Because the invasive spread of *C. gigas* is viewed as a serious problem in San Francisco Bay, research should be conducted to show whether or not there are enough similarities between San Francisco Bay and Drakes Estero to warrant a similar conclusion, focusing particularly on the presence of hard substrates and *C. gigas*' ability to survive without large areas of these hard substrates. Bay floor composition, tidal strength, bathymetry, and other characteristics of San Francisco Bay and Drakes Estero that would indicate whether or not the environment of Drakes Estero would be conducive to the rapid spread of feral *C. gigas* should be researched thoroughly to allow for more concrete conclusions. However, in the absence of more data, it is reasonable to conclude that *C. gigas* likely has some potential to become independent in Drakes Estero, and that this possibility should be considered a threat to the potential future rehabilitation of *O. lurida* in the area.

3. Mariculture Impacts on Fish

Oyster mariculture's impact on fish is also a matter that should be considered carefully. While the only study examining fish populations and oyster mariculture in Drakes Estero did not have statistically significant results,¹³¹ studies elsewhere have suggested that oyster mariculture increases the fish population size and lacks a significant effect on species distribution. For example, a study performed in Humboldt Bay, California, compared fish densities and Simpson's Diversity Index for populations of fish living in eelgrass, on open mudflats, and in the vicinity of oyster culture.¹³² The study concluded that more fish were harbored by oyster long-lines than by eelgrass, and that the oyster mariculture did not appear to have a negative impact on fish diversity.¹³³ A second study, conducted in North Carolina, showed that densities of fish were as high over plastic bottom netting used to cover infaunal cultured clams as in eelgrass beds.¹³⁴ It concluded that “[u]tilization by juvenile fishes was 3 times greater in seagrass and 3 to 7 times greater in epibiota on mesh in clam leases than on sandflat habitat.”¹³⁵ Based on this evidence, it seems unlikely that oyster mariculture in Drakes Estero will decrease fish densities; however, research should be conducted to show

129. *Id.* at 3–4.

130. *Id.* at 3.

131. See JESSE FREEMAN WECHSLER, ASSESSING THE RELATIONSHIP BETWEEN THE ICHTHYOFAUNA AND OYSTER MARICULTURE IN A SHALLOW EMBAYMENT, DRAKES ESTERO, POINT REYES NATIONAL SEASHORE iii (2004) (U.C. Davis Master's Thesis).

132. See WILLIAM PINNIX, ET AL., U.S. FISH & WILDLIFE SERV., FISH COMMUNITIES IN EELGRASS, OYSTER CULTURE, AND MUDFLAT HABITATS OF NORTH HUMBOLDT BAY, CALIFORNIA, FINAL REPORT 1 (2005).

133. See *id.*

134. See Monica J. Powers, et al. *Macroalgal Growth on Bivalve Aquaculture Netting Enhances Nursery Habitat for Mobile Invertebrates and Juvenile Fishes*, 339 MARINE ECOLOGY PROGRESS SERIES 109 (2007).

135. *Id.*

whether or not specific species of fish are negatively impacted by the increase in numbers of fish potentially harbored by oyster culturing apparatus.

4. Mariculture Impacts on Water Quality

Another matter of concern is the nature of the water quality impacts of oyster mariculture in Drakes Estero. Oysters feed by filtering particulates from the water column, so high oyster density, such as in an oyster mariculture area, can depress turbidity and decrease algal blooms.¹³⁶ Oysters may serve as buffers against influxes of suspended particulate matter and nutrients caused by run-off, thus enhancing and sustaining water clarity.¹³⁷ Indeed, oyster mariculture has been shown to increase water clarity by aiding in the transfer of suspended particulate matter from the water column into sediments.¹³⁸

However, while high oyster populations have been shown to improve water clarity (generally assumed to coincide with water quality), the extent and actual impact of this alteration in the context of Drakes Estero must be considered. According to a study performed in the Estero, the risk of eutrophication is naturally very low due to the high rate of tidal flushing,¹³⁹ meaning that oyster mariculture is likely not providing an essential ecosystem service, and oyster removal would be unlikely to result in decreased water quality. While this may not be enough evidence to entirely dismiss oyster mariculture's potential utility to buffer against a sudden influx of suspended sediment during storm water run-off,¹⁴⁰ it definitely calls the perceived necessity of maintaining oyster mariculture in the Estero into question. More research is needed to establish whether the "benefits" traditionally associated with oyster mariculture actually play out there. In addition, more research should be directed at determining the consequences of these impacts. Although improved water clarity sounds inherently good, any alteration to an ecosystem may have unintended ramifications that may be difficult to diagnose or retract.

5. Mariculture Impacts on Harbor Seals

One subject area in which the National Park Service has collected more Estero-specific data is harbor seal population and distribution. However, seal monitoring and data collection also leave much to be desired. For example, pictures, which could have been very useful in determining how mariculture has affected seals, were not relied on in the DEIS because collection "was not based on documented protocols and procedures."¹⁴¹ Additionally, the NRC REPORT points out that none of the seal research done in Drakes Estero during the past 30 years has been directed specifically at elucidating the relationship between oyster mariculture and seal populations.¹⁴² The report notes that the effects of mariculture-related disturbances on seal behavior during the breeding

136. See NRC REPORT, *supra* note 91, at 28.

137. See *id.*

138. See *id.* at 27.

139. See *id.*

140. See *id.*

141. DEIS, *supra* note 2, at 181.

142. See NRC REPORT, *supra* note 91, at 41.

season would only be evident with detailed, sustained, long-term monitoring.¹⁴³

The DEIS mentions the Marine Mammal Commission's review of the effects of human activities on harbor seals in Drake's Estero, noting that it will be taken into consideration when released.¹⁴⁴ The Commission recently released that review,¹⁴⁵ and we summarize its conclusions in Part II of this Article.

143. *See id.*

144. *See DEIS, supra* note 2, at 181.

145. *See* MARINE MAMMAL COMM'N, *supra* note 91, at i-iii.