

Since EAC's first Letter to the Editor on Drakes Estero in May 2007, we have expressed our strong opposition to any effort to overturn its wilderness designation. More specifically, we stand by our assertions that (1) allowing Drakes Bay Oyster Company (DBOC) to stay past 2012 would require overturning existing federal legislation and (2) DBOC's Reservation of Use and Occupancy (RUO) couldn't be renewed. In an effort to base this debate on the facts, I have written the following to better explain the legal foundations of our assertions.

In 1976 Congress enacted the Point Reyes Wilderness Act, designating certain areas in the Park, including Drakes Estero, as wilderness. As a part of its wilderness designation, Drakes Estero was given "potential wilderness addition" status to indicate that a private, non-conforming right temporarily pertained to the site, which precluded the wilderness designation from taking immediate effect. With a few exceptions not applicable here, private commercial enterprises are not permitted in designated wilderness.

To prevent ambiguity as to the 1976 Act's intent, both the U.S. House and Senate Committees that led the effort, provided clear direction:

"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*" (House. Report. No. 94-1680, at 3 (1976) [*emphasis added*]).

"It is intended that such lands *will automatically be designated as wilderness* by the Secretary by publication of notice to that effect in the Federal Register when the non-conforming structures, activities, uses or private rights are terminated" (Senate Committee Report on H.R. 13160 at 3).

NPS Management Policies (2006) also clearly direct park managers to remove from potential wilderness areas all non-conforming, temporary "conditions" that preclude wilderness designation (NPS Section 6.3.1 Wilderness Resource Management; www.doi.gov/initiatives/npsmanagement.html).

In the case of Drake's Estero, the private right—or non-conforming activity -- that delayed its status as fully protected wilderness in 1976 was a 40-year Reservation of Use and Occupancy (RUO) signed by Johnson's Oyster Company in 1972. The RUO, which expires in 2012, was sold to DBOC in 2005, subject to all the laws and policies explained above. Thus, in accordance with these provisions, once the RUO expires, the non-conforming activities will be discontinued, and Drake's Estero's wilderness designation will take full effect.

It is true that the RUO (executed before enactment of the Point Reyes wilderness legislation) includes a renewal clause, but the clause states, "Any permit for continued use will be issued in accordance with National Park Service regulations at the time the Reservation expires". Any such permit would, however, conflict with the intervening Wilderness Act and related NPS regulations and therefore cannot be issued under this renewal clause.

This view was supported by the Department of the Interior's Office of the Solicitor, which issued a legal opinion in February 2004, prior to Drakes bay Oyster Company's purchase:

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

In conclusion, new federal legislation would be required in order for the oyster company to stay past 2012. If Drakes Estero's wilderness designation were somehow to be reversed through federal legislation, it would be the first time of which we are aware that Congress overturned a designated wilderness for commercial profit in a national park. This precedent-setting act would embolden private industry to challenge wilderness protection in other protected areas of California and throughout the country. We are prepared to vigorously oppose any attempts to introduce new legislation or attach a rider onto unrelated legislation, which would threaten the protections afforded to Drakes Estero and wilderness areas across the nation.

When Drakes Bay Oyster Company acquired the Reservation of Use and Occupancy in 2005, it entered into a binding legal agreement with the federal government, had full knowledge of the Estero's wilderness designation in 2012 and the impending expiration of its Reservation of Use and Occupancy. We will oppose any effort to reverse wilderness protection for Drakes Estero and, in doing so, threaten other wild and vital places, so important for wildlife habitat and personal renewal.

May Drakes Estero and the national wilderness system persevere.

Frederick Smith
Executive Director
Environmental Action Committee of West Marin

Note: Please visit the Save Drakes Bay Coalition website at www.savedrakesbay.org to read a more thorough legal analysis.