



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 120809321-4999-03]

RIN 0648-BC26

Gulf of the Farallones and Monterey Bay National Marine Sanctuaries Regulations on Introduced Species

AGENCY: Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: On March 18, 2013, NOAA proposed to prohibit the introduction of introduced species into the state waters of Gulf of the Farallones and Monterey Bay national marine sanctuaries (GFNMS and MBNMS, respectively). The proposed prohibition included exceptions for the catch and release of striped bass and for introduced species of shellfish as part of commercial aquaculture activities in the Tomales Bay region of GFNMS (the only geographic area within sanctuaries offshore of California where aquaculture occurs). On March 27, 2014, NOAA amended the proposal to allow GFNMS and MBNMS to consider authorizing the introduction of certain introduced species of shellfish, those considered to be non-invasive, from commercial aquaculture culture projects in all state waters of the sanctuaries. NOAA's final

action allows MBNMS to authorize state of California permits or leases for commercial aquaculture projects in state waters involving introduced species of shellfish that a) the state management agencies and NOAA have determined to be non-invasive, and b) will not have significant adverse impacts to sanctuary resources or qualities. For GFNMS, NOAA will not adopt authorization authority for similar projects in state waters at this time and will revert to the proposal from March 2013, which prohibits introduction of introduced species, exempts state permitted commercial shellfish aquaculture activities within Tomales Bay only, and provides an exception for the catch and release of striped bass.

DATES: Effective Date: Pursuant to section 304(b) of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1434(b)), the revised designation and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. NOAA will publish an announcement of the effective date of the final regulations in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Dave Lott, Regional Operations Coordinator, West Coast Region, Office of National Marine Sanctuaries, 99 Pacific Street, STE 100F, Monterey, CA 93940. (831) 647-1920.

SUPPLEMENTARY INFORMATION:

I. Background

On November 20, 2008, NOAA issued a final rule associated with the Joint Management Plan Review (JMPR) of GFNMS, MBNMS, and Cordell Bank National Marine Sanctuary (73 FR 70488). Among other things, the rule prohibited the introduction of introduced species within or into both the federal and state waters of GFNMS and MBNMS, except for the catch and release of striped bass in both sanctuaries and from existing commercial aquaculture activities within the Tomales Bay region of GFNMS. In December 2008, the Governor of California, acting pursuant to the National Marine Sanctuaries Act (16 U.S.C. 1434(b)(1)), certified that certain changes to each sanctuary's terms of designation for regulating the introduction of introduced species were unacceptable for the state waters portions of GFNMS and MBNMS. As a result of that determination, NOAA's prohibitions on introduced species currently apply only in the federal waters of MBNMS and GFNMS.

On March 18, 2013, following discussions with the state of California, NOAA re-proposed the prohibition on the introduction of introduced species within or into the state waters of GFNMS and MBNMS to provide regulatory consistency in all waters of those two sanctuaries and across the four national marine sanctuaries along the California coast (78 FR 16622). The proposal would have expanded into state waters the exception for the catch and release of striped bass and would have exempted state-permitted mariculture activities in Tomales Bay. A 60-day comment period on the proposed rule closed on May 17, 2013. (Note: MBNMS regulations use the term "aquaculture" and GFNMS regulations use the term

“mariculture” to refer to the same activity; accordingly, both of these terms are used in this final rulemaking.)

NOAA received approximately 14 comments from the public and the MBNMS and GFNMS Sanctuary Advisory Councils in support of the March 2013 draft proposal. NOAA also received comments from both the California Department of Fish and Wildlife (CDFW) and aquaculture industry raising concerns that ONMS’s broad definition of “introduced species” did not recognize that a number of introduced species of shellfish have been cultivated for over 100 years in Tomales Bay, within GFNMS, without significant adverse impacts to native resources. The Final Environmental Impact Statement for the 2008 Joint Management Plan Review recognized that non-native oyster species cultivated in Tomales Bay had not spread outside the aquaculture areas. Both the CDFW and aquaculture industry also commented that the proposed regulation did not allow NOAA to consider potential future permit requests from the industry for cultivation of such species. The state believed that if NOAA exercised the authority to permit such operations, in close cooperation and collaboration with state resource management entities – CDFW, California Fish and Game Commission (CFGC), and California Coastal Commission (CCC) – this would offer an opportunity for aquaculture operators and the state to demonstrate that expanding existing or developing new shellfish aquaculture operations involving introduced species of shellfish that are non-invasive would not harm sanctuary resources. Both CDFW and the aquaculture industry also expressed the view that this approach would be more consistent with Executive Order 13112 on the management of introduced species.

In response to these concerns, on March 27, 2014, NOAA amended its proposal to provide MBNMS and GFNMS the regulatory authority to authorize state permits or leases for commercial aquaculture projects in state waters involving introduced species of shellfish that the state management agencies and NOAA have determined to be non-invasive and thus would not have significant adverse impacts to sanctuary resources or qualities (79 FR 17073).

Representatives from state agencies agreed with NOAA that introduced species should be managed uniformly throughout all state waters of the two sanctuaries.

NOAA received 16 comments on this revised proposal, virtually all in opposition to granting GFNMS the regulatory authority to authorize state permits for such aquaculture projects. There were no comments received objecting to this authority for MBNMS.

NOAA and the state of California have both expressed interest in entering into a Memorandum of Agreement (MOA) to define the roles of various state agencies (CDFW, CFGC, and CCC) and ONMS in a prescribed, collaborative process to determine whether an introduced species of shellfish could be considered non-invasive and potentially approved for cultivation within the state waters of either national marine sanctuary. The MOA would not supersede the legal authority of any participating agency; rather it would guide the collaborative interagency process and decision making timelines. The MOA would be necessary in response to the process outlined in NOAA's proposed rule published on March 2013 (78 FR 16622) regarding consultations for aquaculture projects in Tomales Bay, or for the process described in the March 2014 proposed rule (79 FR 17073) regarding the permit authorization process for the two national marine sanctuaries.

II. Summary of the Revisions to GFNMS Terms of Designation and Regulations

NOAA received few comments on the March 2013 proposed rulemaking regarding the introduced species regulation related to GFNMS. Both the GFNMS Advisory Council and several members of the public commented in strong support of the proposed rule and complimented the state agencies for recognizing the value in collaborating with NOAA to ensure state waters had additional protection from introduced species. However, the subsequent March 2014 proposed rule received considerable criticism from the public due to the proposal to allow GFNMS to authorize other agency permits, leases or licenses for new or expanded commercial shellfish aquaculture projects involving non-invasive introduced species. GFNMS does not presently have this permit authority and many commenters objected to providing that authority and increasing the risk of an invasion by an introduced shellfish species in state waters of GFNMS. In a separate rulemaking to expand GFNMS boundaries (79 FR 20981), the state of California also requested that NOAA not provide GFNMS authorization authority at this time and that NOAA conduct a separate process to allow time for local input and education regarding such a regulatory change.

As a result, NOAA will move forward with the regulatory proposals for GFNMS that were described in the March 2013 proposed rule. Specifically for GFNMS, this final rule extends the introduced species prohibition to all of GFNMS state waters, but exempts catch and release of striped bass and any existing or future commercial aquaculture project involving introduced species approved by the state of California in sanctuary waters of Tomales Bay after consulting GFNMS. NOAA's final rule is responsive to public support; eliminates the authorization authority for GFNMS that had generated considerable public concern; is consistent with the state of California's request to consider authorization authority for GFNMS in a separate process; and

allows existing aquaculture projects to continue in Tomales Bay, the only area of either sanctuary where such activity presently occurs.

Presently 23.6 percent of GFNMS - all of the state waters in sanctuary (301.5 square statute miles) - is at risk from the introduction of introduced species. With this action, the vast majority of the sanctuary would be protected from such introductions of introduced species, except for less than 1 percent (10.3 square statute miles) in sanctuary waters of Tomales Bay, where commercial aquaculture of introduced species of shellfish approved by the state after consulting with NOAA, would be allowed. All other vectors of introduction of introduced species are prohibited in Tomales Bay.

Accordingly, NOAA is amending the GFNMS terms of designation to ensure that the introduction or release of an introduced species applies to the state waters of the sanctuary regardless of the means of introduction. The revised terms of designation under Article IV Scope of Regulations, Section 1 Activities Subject to Regulation, Activity (e) will read as follows (new text in quotes and deleted text in brackets and italics):

Article IV. Scope of Regulations

Section 1. Activities Subject to Regulation

(e) Introducing or otherwise releasing from within or into [the federal waters of] the Sanctuary an introduced species

NOAA is also changing the second sentence of Article V in the terms of designation to ensure that the intent NOAA has consistently described – to regulate introduced species consistently across all four national marine sanctuaries along the coast California, in both state and federal waters – is achieved. Additionally, NOAA’s final rule removes the time limitation

needed to grandfather existing state-approved mariculture projects in Tomales Bay. Therefore, Article V. Relation to Other Regulatory Programs, Section 1, will read as follows (new text in quotes and deleted text in brackets and italics):

Article V. Relation to Other Regulatory Programs

Section 1. Fishing and Waterfowl Hunting

The regulation of fishing, including fishing for shellfish and invertebrates, and waterfowl hunting, is not authorized under Article IV. However, fishing vessels may be regulated with respect to vessel operations in accordance with Article IV, section 1, paragraphs (b) and (h), and mariculture activities involving alterations of or construction on the seabed, or “introduction or” release of introduced species by mariculture activities [not covered by a valid lease from the State of California and in effect on the effective date of the final regulation], can be regulated in accordance with Article IV, section 1, paragraph (c) and (e). All regulatory programs pertaining to fishing, and to waterfowl hunting, including regulations promulgated under the California Fish and Game Code and Fishery Management Plans promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq., will remain in effect, and all permits, licenses, and other authorizations issued pursuant thereto will be valid within the Sanctuary unless authorizing any activity prohibited by any regulation implementing Article IV. The term “fishing” as used in this Article includes mariculture.

In addition, for the purpose of this regulation NOAA is codifying the northern geographical extent of Tomales Bay via the same demarcation line that is already used in the International Regulations for Preventing Collision at Sea 1972 (COLREGS): the line runs from Avalis Beach east to Sand Point. These geographic coordinates have been added as Appendix D to Subpart H of Part 922. Parts of the western and southern shoreline of Tomales Bay solely within Point Reyes National Seashore are not subject to this regulation.

Last, as described in new § 922.85, NOAA intends to enter into a Memorandum of Agreement (MOA) with the state of California to implement the Department of Fish and Wildlife's commitment to consult with NOAA whenever a future commercial shellfish aquaculture project permit application within Tomales Bay is received and being considered by the state.

III. Summary of the Revisions to MBNMS Terms of Designation and Regulations

NOAA received few comments on the March 2013 proposed rulemaking regarding the introduced species regulation related to MBNMS. The MBNMS Advisory Council and several members of the public commented in strong support of the proposed rule. The comments received for the March 2014 proposed rule generally focused on the GFNMS regulations, however the aquaculture industry commented in support of allowing MBNMS (as well as GFNMS) to consider a permit authorization for future commercial shellfish aquaculture projects involving non-invasive introduced species.

NOAA is implementing the regulatory proposals for MBNMS that were described in the March 2014 proposed rule. As with GFNMS, NOAA believes there is urgency and need to extend from federal waters into state waters the full protection of sanctuary regulations

prohibiting the introduction or release of introduced species. Accordingly, NOAA is modifying the MBNMS terms of designation and regulations to prohibit the introduction or other release of introduced species from within or into the state waters of the sanctuary. The revised terms of designation under Article IV Scope of Regulations, Section 1 Activities Subject to Regulation, Activity (l) will read as follows (deleted text in brackets and italics):

Article IV. Scope of Regulations

Section 1. Activities Subject to Regulation

(l) Introducing or otherwise releasing from within or into [the federal waters of] the Sanctuary an introduced species.

This final rule also provides MBNMS with the authority to authorize a valid permit, license or other authorization issued by the state of California for commercial shellfish aquaculture activities conducted in state waters of MBNMS involving introduced species of shellfish that NOAA and the state have determined are non-invasive and that will not cause significant adverse effects to sanctuary resources or qualities. MBNMS regulations already allow the ONMS Director the ability to authorize state of California (or other agency) permits for certain activities that are otherwise prohibited in the sanctuary. This authority is delegated from the ONMS Director to the sanctuary Superintendent.

NOAA intends to enter into an MOA with the state of California to describe how NOAA and the state agencies – CFGC, CDFW and CCC – will coordinate on any future proposal to develop any commercial shellfish aquaculture project in state waters of MBNMS involving a non-invasive introduced species. Similar to other MOAs with state agencies, this MOA requirement will be reflected in MBNMS regulations (see § 922.134(a)).

IV. Response to Comments

NOAA conducted two comment periods on separate proposed rules between March 2013 and March 2014 and received a total of 29 comments from 33 groups, agencies or individuals. The comments and responses have been segregated below to reflect the two different proposed rules.

Comments and Responses Submitted on the March 2013 Proposed Rule

General Support for the Proposed Rule

1. **Comment:** Commenters generally supported the 2013 proposal, noting the cooperation of NOAA and the state agencies in coming to terms that would protect the national marine sanctuaries from the threat of introduced species.

Response: NOAA agrees there was ongoing need to address the unresolved issue of leaving the state waters portions of the two national marine sanctuaries vulnerable to introduction of introduced species. This final rule incorporates aspects of both the 2013 and 2014 proposed rules, and relies on increased collaboration among the state of California agencies and NOAA. The final rule specifically includes the ability for aquaculture operators to seek a permit from the state (within Tomales Bay in GFNMS) and from the state and NOAA (within MBNMS).

The Proposed Rule Does Not Recognize that Some Introduced Species are Non-Invasive

2. **Comment:** NOAA should revise the proposed rule to recognize that some introduced species are not a threat to sanctuary resources because they do not reproduce or otherwise affect the natural ecosystem of the sanctuary if released. NOAA should consider provisions for allowing culturing of introduced shellfish species approved by the state of California and proven to pose no significant threat to native ecological processes within the sanctuaries.

Response: National marine sanctuaries are designated, in part, to maintain "natural biological communities. . . and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes" (16 USC 1431(b)(3)). In short, national marine sanctuaries are mandated by law to preserve the natural character of national marine sanctuary ecosystems, similar to the manner that terrestrial ecosystems have been preserved and protected by the national parks system. Any proposed alteration of the natural biological community (e.g. introduction of a foreign species) is contrary to the purpose of sanctuary designation. Therefore, the proposed introduction of species not native to a national marine sanctuary places the burden of proof on the project sponsor to demonstrate to NOAA and state management agencies that no significant harm will result from any such proposal. NOAA acknowledges that there have been some introduced species of shellfish cultivated in GFNMS which have not, to date, had significant adverse effects on sanctuary resources. In discussions with the three state management entities with regulatory control over aquaculture projects in state waters - the Department of Fish and Wildlife, the Fish and Game Commission and the California Coastal Commission – it is clear to NOAA that state management entities are also concerned about the impact

invasive, introduced species can have on an ecosystem. These agencies have taken steps to eliminate, or at least greatly reduce the risk of an invasion from such species grown in aquaculture projects.

Based on these comments and further analysis, NOAA issued a revised proposed rule in March 2014 which proposed to allow the ONMS Director to consider authorization of state permits or leases for a very limited scope of aquaculture projects –state-approved aquaculture in state waters of GFNMS (including Tomales Bay) or MBNMS involving an introduced species of shellfish that the state and NOAA determined would not be invasive or otherwise damage sanctuary resources (authority to issue an authorization is delegated from the ONMS director to a sanctuary superintendent). NOAA proposed to develop an MOA with the state agencies to lay out how such joint review would take place for any future aquaculture project. MBNMS already has authorization authority, but cannot issue a permit for an introduced species projects. GFNMS does not have authorization authority, so this would have been new authority for GFNMS.

The final rule expands MBNMS’s existing authorization authority to include this limited scope of regulatory action – the potential authorization of state permits or leases that would allow development of new aquaculture projects in state waters involving introduced shellfish species the state and NOAA have determined are non-invasive and will not harm sanctuary resources or qualities. For GFNMS, NOAA has adjusted the final rule to conform to a request from the state of California as part of a separate rulemaking on boundary expansion of that sanctuary to not include authorization authority in

GFNMS at this time. NOAA intends to begin implementing a separate public process, including consultation with affected agencies, on the topic of authorization after the finalization of the sanctuary expansion action.

Future Growth of Shellfish Industry

3. **Comment:** The proposed rule eliminates sites for future growth of the shellfish industry in California, conflicts with other federal policies and goals, and should be withdrawn for further consideration and revision.

Response: NOAA disagrees. The final rule does not prohibit aquaculture. It prohibits the introduction of introduced species within or into nationally protected marine ecosystems. The final rule now allows the consideration of non-invasive introduced species as part of a commercial shellfish aquaculture operation in state waters of MBNMS, provided that both the state and NOAA determine cultivation of the species would have no significant adverse effects to sanctuary resources or qualities. Furthermore, the final rule includes no regulatory restrictions by GFNMS for any new or expanded aquaculture project cultivating introduced species in Tomales Bay, the only area of either sanctuary where such activity is currently conducted. Expansion would be possible in Tomales Bay, provided applicants received appropriate state permits or leases. The final rule specifically includes the ability for aquaculture operators to seek a permit from the state (within Tomales Bay in GFNMS) and from the state and NOAA (within MBNMS).

Exempting Tomales Bay Increases Permitting Burden

4. **Comment:** The proposed exemption of Tomales Bay from ONMS regulations would cause undue and additional regulatory burden on aquaculture operators seeking new permits from the state. The proposed Memorandum of Agreement between NOAA and the state agencies would cause undue delay.

Response: NOAA disagrees. The exemption to the introduced species regulation for mariculture in Tomales Bay will not cause a burden on an operator proposing a new or expanded aquaculture project. The MOA will outline and clarify agency roles and anticipated timelines in the consultation process that state agencies would normally conduct with other agencies, in this case GFNMS.

Proposed Rule Eliminates Jobs

5. **Comment:** The proposed rule will result in elimination of green jobs and sustainable small businesses associated with shellfish aquaculture, and create a greater seafood trade imbalance.

Response: The final rule will not eliminate any existing aquaculture operation or associated green jobs in GFNMS, and exempts from sanctuary regulation the only area in that sanctuary where aquaculture presently occurs. For MBNMS, the final rule allows the sanctuary superintendent to consider authorization of a state permit or lease for a future commercial shellfish aquaculture project in state waters cultivating an introduced species that NOAA and the state determine is non-invasive and will not adversely affect sanctuary resources or qualities. Presently there are no such introduced species aquaculture projects in MBNMS and hence no jobs that could be lost due to the final rule.

Proposed Action is More Consistent With Coastal Act

6. **Comment:** The proposed rule is more consistent with the past decision by the California Coastal Commission regarding the final rule NOAA submitted to the state in 2008. (The current status is inconsistent with that decision, with the state waters completely unprotected from introduction of introduced species.)

Response: NOAA agrees.

Effect of Regulation on Research on Introduced Species

7. **Comment:** Clarify how the proposed regulation affects research on introduced species.

Response: The final rule applies to state waters of both GFNMS and MBNMS and would make the restrictions on introduction of introduced species consistent within state and federal waters of those sanctuaries. Specifically, sanctuary regulations will prohibit introducing or otherwise releasing an introduced species into the sanctuary, and thus any research that includes or results in the release or other introduction of an introduced species would not be allowed. Regulations for both sites would not allow a superintendent to issue a permit for such research. Research on introduced species already existing within the sanctuary would not generally be prohibited unless such research involved relocation, moving, or otherwise distributing individuals or propagules of the existing introduced species.

Memorandum of Agreement

8. **Comment:** The MOA between NOAA and the state of California regarding introduced species aquaculture should be circulated for public comment so the public can be assured that the MOA's design adequately satisfies the intent of the proposed rule.

Response: Interagency MOA are not generally circulated for public review before they are signed. The MOA will establish procedures for the agencies to work collaboratively pursuant to and consistent with the respective legal authorities of each participating agency. In no case will the MOA supersede NOAA's regulatory authority. The final, signed agreement will be available to the public.

Comments and Responses Submitted for Second Proposed Rule, March 2014

No Introduced Species Should be Allowed

9. **Comment:** Introduced species pose a threat to native species diversity and endangered species, ecosystem integrity, and the composition and resilience of natural biological communities as well as the commercial and recreational uses that depend on these resources. GFNMS and MBNMS should revise sanctuary regulations to consistently protect all sanctuary and associated state marine waters and habitats from negative ecological and socio-economic impacts caused by the introduction of introduced species.

Response: NOAA agrees. The introduction of introduced species to marine waters can disrupt native ecological processes, resulting in altered trophic relationships and habitat modification. Introduced species can spread unabated in areas where no natural predators exist, and eradication of these species may become impossible once they disperse.

Propagation of invasive introduced species can lead to socio-economic impacts, such as changes in fisheries, fouling of infrastructure and seawater intakes, and aesthetic changes that impact tourism. The final rule prohibits all forms of introducing or releasing an introduced species into state waters of both sanctuaries, with three exceptions: (1) within both sanctuaries, catch and release of an introduced species, striped bass, already established in marine waters and part of an active recreational fishery. State-imposed size limits could result in striped bass being caught and released while fishing in either sanctuary; (2) within GFNMS, existing commercial shellfish aquaculture operations in Tomales Bay permitted by the state that cultivate introduced species which have not, to date, invaded native ecosystems and caused significant adverse harm to sanctuary resources and qualities; and, (3) within MBNMS, introduction of introduced species from commercial shellfish aquaculture projects in state waters that NOAA and the state have determined are non-invasive and will not cause adverse harm to sanctuary resources and qualities. NOAA will work very closely with the state resource management entities to ensure any new, expanded or future aquaculture project will not result in a release of an invasive species that will cause harm to sanctuary, and state, resources. All other forms of introduction or release of an introduced species will be strictly prohibited.

Catch and Release of State Approved Non-native Species

10. **Comment:** Regulation of introduced species by MBNMS and GFNMS should include provisions for continued catch and release of striped bass (*Marone saxatilis*), a fish stock historically managed by the California Department of Fish and Wildlife (CDFW).

Response: As in the original final rule issued on November 20, 2008, catch and release of striped bass (*Marone saxatilis*) in both state and federal waters of GFNMS and MBNMS is exempt from this regulation (73 FR 70488).

General Opposition to the Amended Rule

11. **Comment:** The proposal to allow authorization of state-permitted commercial shellfish aquaculture operations in GFNMS would give deference to the aquaculture industry over the national marine sanctuaries' resource protection mandate.

Response: As a result of the Governor's objection in 2008, there are currently no sanctuary regulations protecting state waters of these two national marine sanctuaries from the introduction of introduced species. This final rule closes that regulatory gap and prohibits the introduction of introduced species in the state waters of the sanctuaries from all other pathways of introductions except for the three exceptions described in response to comment 9 above. For GFNMS, the final rule does not add authorization authority to that sanctuary's regulations. However, any expanded or new aquaculture operation within Tomales Bay in GFNMS would have to be permitted by several state resource management agencies, who would consult with GFNMS before issuing any permit. In addition, the authority to authorize another agency's permit, which MBNMS could exercise through this final rule, gives complete discretion to the MBNMS superintendent to approve with conditions or deny a potential future aquaculture project in state waters of MBNMS cultivating introduced shellfish species that NOAA and the state have found to be non-invasive and to not adversely affect sanctuary resources and qualities.

Authorization Authorities

12. **Comment:** NOAA should not adopt the proposed authorization authority because it provides essentially a rubber stamp approval to future activities involving introduced species.

Response: NOAA disagrees. The final regulation allows MBNMS to consider the authorization of aquaculture operations within very narrow parameters (to approve, condition, or deny state issued permits for commercial shellfish aquaculture in state waters of MBNMS determined by NOAA and state management agencies to be not invasive and not cause significant adverse effects to sanctuary resources or qualities). Authorization authority has existed in MBNMS and five other national marine sanctuaries for many years and has been used successfully and consistent with the purposes and policies of the NMSA.

13. **Comment:** The authority to authorize other agencies' permits found in 15 CFR 922.49 is deficient in that it lacks administrative procedure for public oversight and comment, and for public appeals, and it is not directly connected to the conditions for sanctuary permits found in 15 CFR 922.83 and 15 CFR 922.133

Response: The final rule does not add permit authorization authority to GFNMS regulations at this time. For MBNMS, which has had authorization authority since 1992, the issues of public review have not arisen in large part because projects MBNMS has considered for authorization have had extensive public review by another local, state or federal agencies.

14. **Comment:** NOAA should not adopt authorization authority because this adds another layer of bureaucracy to an already-complicated, multi-state agency review process, impeding future growth of the industry.

Response: NOAA disagrees that the authorization process adds another layer of bureaucracy. The authorization process is intended to improve administrative efficiency by allowing NOAA to review and approve, deny or condition other agencies' permits. This simplifies the application process for a permit applicant and promotes cooperative efforts among NOAA and other regulatory agencies.

Grandfathering Existing State Leases

15. **Comment:** NOAA should not “grandfather” existing or heretofore undisclosed leases, permits, and pending modifications of existing activities within Tomales Bay. NOAA should obtain full and complete copies of those leases before the effective date of the regulation, and they should be identified in the Federal Register announcement at the time the final rule is published.

Response: The grandfathering of existing aquaculture leases has been removed from the final rule and will not occur within GFNMS. Instead, NOAA is exempting from regulation the sanctuary waters of Tomales Bay, where existing aquaculture projects occur, as described in the 2013 proposed rule. In MBNMS there are no existing aquaculture operations, thus there are no undisclosed leases or permits and no projects will be grandfathered. The existing state review process continues in these areas and any major state action on an aquaculture operation in Tomales Bay will proceed consistent

with existing public review processes, including public hearings before the California Fish and Game Commission or the California Coastal Commission.

Memorandum of Agreement

16. **Comment:** The MOA between NOAA and the state of California, and NOAA's authorization authority regarding introduced species aquaculture, should in no way expand from bivalve mariculture to finfish aquaculture.

Response: NOAA agrees. The authorization authority for MBNMS is narrowly defined to only allow MBNMS to consider authorizing state of California permits or leases for commercial shellfish aquaculture projects in state waters involving introduced species of shellfish that the state management agencies and NOAA have determined will not have significant adverse impacts to sanctuary resources or qualities. For Tomales Bay, the state will continue to have primary jurisdictional authority for aquaculture, consulting with GFNMS before issuing any new permits or leases. All other introductions of introduced species in state and federal waters of GFNMS and MBNMS, except for the catch and release of striped bass, are prohibited. Furthermore, the state of California has a current legislative prohibition on non-native finfish aquaculture in state waters.

Collaboration Between State and Federal Agencies

17. **Comment:** Too much of the proposal is predicated on promises of future collaborations and agreements. Recent history suggests that the state is incapable of shared jurisdictional authority when managing aquaculture.

Response: NOAA believes the collaborative process developed for both GFNMS and MBNMS will allow the state and NOAA to work cooperatively to prevent the introduction of introduced species into state waters of the sanctuaries. The state will consult with GFNMS prior to issuing any new permits in Tomales Bay. However, in all other state waters of GFNMS, introduced species aquaculture will not be allowed. In MBNMS, the state and NOAA will each have jurisdiction over commercial aquaculture projects in state waters involving introduced species of shellfish.

Scientific Data

18. **Comment:** NOAA should not adopt the proposed rule (March 2014) to consider permitting aquaculture projects in GFNMS with non-invasive, introduced species because lack of scientific data on the significant impacts of invasive species, a lack of data on native and non-native species abundance and condition, and on cross-vector influences.

Response: NOAA agrees that impacts from introduced species can pose a major threat to sanctuary resources and qualities. However, in Tomales Bay, the only location in sanctuaries offshore of California where commercial cultivation of introduced species currently occurs, state management agencies have regulated these types of aquaculture operations for many years. In this final rule, NOAA is not expanding the ability to develop new introduced species aquaculture projects in GFNMS beyond Tomales Bay and will defer to state management agencies for aquaculture projects within Tomales Bay.

NEPA Compliance

19. **Comment:** NOAA has not adequately complied with the National Environmental Policy Act for proposed rule because it relied on analysis from 2008, and did not conduct a new environmental review.

Response: NOAA is relying on the FEIS as prepared for the 2008 JMPR because the baseline conditions have not changed. That is, there has been no change in the number of mariculture operations or leases in Tomales Bay and NOAA is unaware of any change in the environmental effects of those species in Tomales Bay. With this rule, the introduction of introduced species, including the use of non-native shellfish in commercial aquaculture operations, is being prohibited in state waters of both sanctuaries, with the exception of Tomales Bay. The 2008 FEIS specifically identified that the prohibition of the introduction of introduced species would lead to beneficial impacts to Biological Resources and Water Quality Resources and would not cause any adverse impacts to existing shellfish aquaculture operations.

The final rule adopts a regulatory regime slightly different from that reviewed in 2008 because it will allow commercial shellfish aquaculture to continue using introduced species in Tomales Bay that have been shown to be non-invasive and will allow the State of California to demonstrate on a case-by-case basis with NOAA concurrence that commercial shellfish operations using certain non-invasive shellfish species may be safely established in state waters of MBNMS. NOAA believes this action is within the range of alternatives considered in 2008 and will result in nearly the same level of beneficial impacts that were identified in 2008. Further, NOAA is adopting final

regulations that would not affect existing aquaculture projects in Tomales Bay that are conducted pursuant to a valid lease, permit, license or other authorization issued by the state of California.

NOAA has added authorization authority for MBNMS to consider authorizing state of California permits or leases for commercial aquaculture projects in state waters involving introduced species of shellfish that the state management agencies and NOAA have determined will not have significant adverse impacts to sanctuary resources or qualities. This process will require additional NEPA and California Environmental Quality Act (CEQA) review to be triggered on a case by case basis if new aquaculture projects were to be proposed in the state waters of MBNMS. NOAA has complied with NEPA for this action.

Species May Become Invasive Over Time Due to Climate Change

20. **Comment:** Some commenters expressed concerns that cultivated species currently not considered by the state of California to be invasive, such as Pacific oysters (*Crassostrea gigas*), have the potential to be invasive in other environments and situations, and may become invasive in California under global climate change scenarios where warmer waters allow unassisted reproduction.

Response: NOAA is also concerned about how climate change will impact introduced species aquaculture. In this action, NOAA is implementing a final rule which does not allow introduced species aquaculture in state waters of GFNMS except in Tomales Bay and only with a state lease or permit. Aquaculture operators will be required to follow the

state's public process through the CA Fish and Game Commission and the CA Coastal Commission. The results of studies in the United States and elsewhere as to how species may become invasive will be considered by the state and NOAA in making any future determinations.

Parasites and Other Impacts

21. **Comment:** NOAA's final action needs to account for the likelihood that these shellfish species would themselves attract or carry other exotic species, thereby causing environmentally detrimental impacts.

Response: In GFNMS, only those aquaculture operations in Tomales Bay with a valid lease or permit from the state of California would be exempt. If a commercial shellfish aquaculture project involving introduced species is proposed in MBNMS, as part of the permit authorization state management agencies and NOAA must determine the project will not have significant adverse impacts to sanctuary resources or qualities. In this review process, NOAA and state management agencies will consider not only the proposed introduced species themselves, but also the threats from parasites, project siting, the financial capability of the applicant, among other factors.

Monitoring and Management

22. **Comment:** NOAA should clarify how it or the state will monitor and prevent accidental introductions of diseases, parasites and hitch-hikers on aquaculture species within sanctuary waters. No protocol for monitoring or management of new or expanded aquaculture operations is referenced in the proposed regulation amendment.

Response: For Tomales Bay in GFNMS, commercial shellfish aquaculture will remain under the primary management authority of state management agencies and their public processes at this time. The MOA will outline how GFNMS can raise concerns to the state and seek their inclusion of permit conditions that ensure adequate enforcement and monitoring. For state waters of MBNMS, ONMS may condition or deny a potential permit authorization request if NOAA finds the applicant and the state management agencies do not adequately monitor and manage a proposed commercial shellfish aquaculture project involving introduced species. Monitoring and enforcement protocols could be added to permit conditions as part of an authorization, and would ideally be discussed, reviewed, and planned for on a case by case basis, and considered during the NEPA and CEQA process.

Other Federal Jurisdictions

23. **Comment:** NOAA's proposed rule does not recognize the regulatory role of the National Park Service (NPS). NPS national policy prohibits introductions of non-native species in NPS waters, including waters which overlap with national marine sanctuaries, the introduction of non-native species within national parks is inconsistent with the NPS Organic Act of 1916 (as amended and supplemented).

Response: NOAA and NPS have some jurisdictional overlap in GFNMS. Where there is jurisdictional overlap, NOAA's final regulations in this action do not usurp other federal regulations, including those of the National Park Service. As discussed in the preamble to this rule above, due to the previous Governor's objection in December 2008, there are currently no sanctuary regulations regarding introduced species in state waters of

GFNMS and MBNMS (including waters adjacent to national parks). NOAA believes this final action will close that regulatory gap by prohibiting virtually all of the mechanisms that could result in the introduction of an introduced species. The final rule will only allow introduced species shellfish aquaculture within sanctuary waters of Tomales Bay operating with a valid permit of lease from the state. This final action will support the goals of the National Park Service to prevent the introduction of introduced species.

Weakens ONMS Authority

24. **Comment:** NOAA's proposed action weakens the authority of the national marine sanctuaries to control invasive non-native species that potentially may be introduced by new aquaculture operations. In so doing, NOAA delegates to the state the authority to define invasive species and bypasses a process for environmental review and compliance, including the participation of other potentially impacted federal agencies, such as national parks as well as the public.

Response: NOAA disagrees. Currently, there are no introduced species regulations in state waters of GFNMS or MBNMS and this final rule provides that regulatory protection by prohibiting the introduction of introduced species in all state waters of MBNMS and nearly all state waters of GFNMS. Any state review of an existing, expanded or new aquaculture project in Tomales Bay in GFNMS will include compliance with CEQA, consultation with affected agencies, and public review, including hearings, as prescribed by agency procedures when issuing leases and permits. Any new project in MBNMS will also require compliance with NEPA. While the final rule exempts the need for a permit authorization from GFNMS in Tomales Bay it includes extensive consultation with

GFNMS prior to the state's issuing permits or leases as outlined in the MOA. Therefore, additional public review consistent with state and federal law and procedures will be provided and comments considered on any such action in either sanctuary, if proposed in the future.

Existing Operations

25. **Comment:** NOAA should require ONMS review for any change to an existing lease where the grower proposes to cultivate new non-native shellfish species on their farm.

Response: The grandfathering option for GFNMS discussed in the March 2013 proposal was adopted by NOAA and will exempt existing and future commercial shellfish aquaculture operations in Tomales Bay with a valid state of California permit or lease. The MOA will outline how the state will consult with GFNMS on expansion of existing leases or future proposals to cultivate new species.

Extending the Public Comment Period

26. **Comment:** NOAA should extend the short comment period of the amended proposed rule. The release of the Federal Register notice reopening this issue, and the subsequent comment deadline for this reversal by the agency was conducted in such manner as to preclude the public from having timely access to the necessary information and supporting documents, and the necessary time for review.

Response: The comment period for the March 2013 proposed rule was 60 days and generated very few public comments. The comments received in 2013 were mostly in support - including those received from the GFNMS and MBNMS Sanctuary Advisory

Councils - of NOAA's proposed action which is being implemented for GFNMS in this final rule. Based on this information, NOAA did not anticipate receiving many public comments for the March 27, 2014 amended proposed rule, and therefore NOAA established a 15 day comment period. Upon receiving a request for an extension, NOAA re-opened the comment period for an additional 24 days until May 5, 2017. Based on the comments received during these two comment periods, NOAA believes this final rule-making has provided the public with timely involvement and the opportunity to review and comment on this action.

Programmatic Environmental Impact Report (pEIR)

27. **Comment:** The rule is premature because this current NOAA comment period predates a pending state of California Programmatic Environmental Impact Report (pEIR) on aquaculture issues expected to be inclusive of many of the same types of invasive species questions brought forward by expanded aquaculture proposals in state waters.

Response: This comment is beyond the scope of this rulemaking. The state's programmatic environmental impact report being prepared pursuant to CEQA is unrelated to this final action promulgated by NOAA. This regulation has a long history, and is designed to extend existing sanctuary introduced species prohibitions from federal waters into state waters of GFNMS and MBNMS. Future state action may further assist the state and federal regulatory agencies in protecting coastal waters from the invasive impacts of introduced species.

GFNMS Boundary Expansion

28. **Comment:** NOAA should not take any action on the introduced species rule until the public hearings and written comments on the draft environmental impact Statement (DEIS) and accompanying regulations for boundary expansion for GFNMS has been subjected to sufficient public review.

Response: This comment is beyond the scope of this rulemaking. However, we note the proposed rule for GFNMS expansion recognizes that there is a separate rulemaking process the introduced species. The rules will be codified accordingly, in the order they are finalized.

Oil Drilling

29. **Comment:** NOAA should specifically exclude oil drilling from the list of otherwise prohibited activities that could be authorized by NOAA (922.132(1)) within GFNMS.

Response: This comment is beyond the scope of this rulemaking. Nevertheless, as noted previously, the Final Rule does not add authorization authority to GFNMS regulations.

V. Miscellaneous Rulemaking Requirements

A. National Marine Sanctuaries Act

Section 301 of the NMSA (16 U.S.C. 1434) provides authority for comprehensive and coordinated conservation and management of national marine sanctuaries in coordination with other resource management authorities. When changing a term of designation of a National Marine Sanctuary, section 304 of the NMSA requires the preparation of a draft environmental impact statement (DEIS), as provided by the National Environmental Policy Act of 1969 (42

U.S.C. 4321 et seq.) and that the DEIS be made available to the public. NOAA prepared a draft and final management plan and a draft and final EIS on the initial proposal and final rule for the Joint Management Plan Review (JMPR). Copies are available at the address and website listed in the Address section of this proposed rule. Responses to comments received on March 18, 2013 proposed rule and on the March 27, 2014 proposed revision to the regulations have been analyzed and published in the preamble to this final rule and discussed in the record of decision. NOAA has made available the 2008 final environmental impact statement (FEIS) for the JMPR that was previously available to the public, and which analyzes the environmental effects of the introduced species regulations as they are now finalized by this action. (For a copy of the FEIS, please visit www.sanctuaries.noaa.gov/jointplan.)

B. National Environmental Policy Act

In the 2008 FEIS for the JMPR, NOAA identified a preferred action which was to modify the terms of designation and regulations for GFNMS and MBNMS to, among other things, prohibit the introduction of introduced species (with limited exceptions) throughout the sanctuaries, and NOAA endorses that action as re-proposed and as amended in the notices of proposed rulemaking associated with this final rule. The 2008 FEIS specifically identified that the prohibition of the introduction of introduced species would lead to beneficial impacts to Biological Resources and Water Quality Resources and would not cause any adverse impacts to existing shellfish aquaculture operations. The final rule adopts a regulatory regime slightly different from that reviewed in 2008, however, this action is within the range of alternatives considered in 2008 and will result in nearly the same level of beneficial impacts that were identified in 2008. Further, NOAA is adopting final regulations that would not affect existing

aquaculture projects in Tomales Bay that are conducted pursuant to a valid lease, permit, license or other authorization issued by the state of California. NOAA further believes there has not been a significant change to the environmental conditions or the potential environmental effects of the preferred alternative. NOAA has determined that a supplement to the FEIS is not required for this final action.

Pursuant to a MOA that would be executed, the state would consult with NOAA prior to any new or amended state-issued lease and permits. In addition, through this action NOAA would exercise limited authorization authority with respect to commercial shellfish aquaculture activities in state waters of MBNMS involving cultivation of introduced species of shellfish that NOAA and the State have determined are non-invasive and would not cause significant adverse effects. Any future proposal or amendments to existing state leases for an aquaculture project involving cultivation of introduced shellfish species would undergo environmental review pursuant to the California Environmental Quality Act (CEQA) and NEPA for MBNMS and CEQA for GFNMS on a case-by-case basis to consider project-specific effects of that action. NOAA may refuse to authorize a project in MBNMS that would not comply with terms or conditions required by NOAA. 15 CFR 922.49(a).

Copies of the FEIS, the record of decision and other related materials that are specific to this action are available at <http://sanctuaries.noaa.gov/jointplan/feis/feis.html>, or by contacting NOAA at the address listed in the For Further Information section of this final rule. Comments regarding the introduction of introduced species portion of the original FEIS are analyzed and responded to above, in the Response to Comments section.

C. Executive Order 12866: Regulatory Impact

This rule has been determined to be not significant for purposes of Executive Order 12866.

D. Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action falls within the definition of “policies that have federalism implications” within the meaning of Executive Order 13132. NOAA’s previous proposed rule and subsequent amended proposed rule were conducted in cooperation with the State of California, and pursuant to Section 304(b) of the NMSA. Since the proposed rule was issued on March 18, 2013, further consultations have occurred with the State of California, and the proposed changes contained in the March 27, 2014 notice reflect cooperative negotiations reached in those consultations. It is NOAA’s view that, due to these negotiations, the state will not object to the amended regulations finalized in this action. In keeping with the intent of the Executive Order, NOAA consulted with a number of entities within the state which participated in development of the initial rule, including but not limited to, the California Coastal Commission, the California Department of Fish and Wildlife, and the California Natural Resources Agency.

E. Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was discussed in the proposed rule issued on March 18, 2013,

and the March 27, 2014 amended proposal, where the conclusion remained the same. No comments were received on that certification. No other law requires a regulatory flexibility analysis so none is required and none has been prepared.

F. Paperwork Reduction Act

This final rule does not contain information collections that are subject to the requirements of the Paperwork Reduction Act. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Aquaculture, Catch and release, Environmental protection, Fish, Harbors, Introduced species, Mariculture, Marine pollution, Marine resources, Natural resources, Non-invasive, Penalties, Recreation and recreation areas, Research, Water pollution control, Water resources, Wildlife.

W. Russell Callender, Ph.D.

Acting Assistant Administrator, National Ocean Service

National Oceanic and Atmospheric Administration

Accordingly, for the reasons set forth above, 15 CFR part 922 is amended as follows:

PART 922 — [AMENDED]

1. The authority citation for Part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 et seq.

2. In § 922.82, revise paragraph (a)(10) to read as follows:

§ 922.82 Prohibited or otherwise regulated activities.

(a) * * *

(10) Introducing or otherwise releasing from within or into the Sanctuary an introduced species, except:

(i) Striped bass (*Morone saxatilis*) released during catch and release fishing activity; or

(ii) Species cultivated by commercial shellfish mariculture activities in Tomales Bay pursuant to a valid lease, permit, license or other authorization issued by the state of California. Tomales Bay is defined in § 922.80. The coordinates for the northern terminus of Tomales Bay are listed in appendix D to this subpart.

* * * * *

3. Add new § 922.85 to read as follows:

§ 922.85 Review of State permits and leases for certain mariculture projects.

NOAA has described in a Memorandum of Agreement (MOA) with the State of California how the State will consult and coordinate with NOAA to review any new, amended or expanded lease or permit application for mariculture projects in Tomales Bay involving introduced species.

4. Add Appendix D to subpart H of part 922, to read as follows:

Appendix D to Subpart H of Part 922—Northern Extent of Tomales Bay

For the purpose of § 922.82(a)(10)(ii), NOAA is codifying the northern geographical extent of Tomales Bay via a line running from Avalis Beach (Point 1) east to Sand Point (Point 2). Coordinates listed in this Appendix are unprojected (geographic) and based on the North American Datum of 1983.

Point ID No. Tomales Bay Boundary	Latitude	Longitude
1	38.23165	-122.98148
2	38.23165	-122.96955

5. Revise § 922.132, paragraph (e) to read as follows:

§ 922.132 Prohibited or otherwise regulated activities.

* * * * *

(e) The prohibitions in paragraphs (a)(2) through (a)(8) of this section, and (a)(12) of this section regarding any introduced species of shellfish that NOAA and the State of California have determined is non-invasive and will not cause significant adverse effects to sanctuary resources or qualities, and that is cultivated in state waters as part of commercial shellfish aquaculture activities, do not apply to any activity authorized by any lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary designation (January 1, 1993) and issued by any Federal, State, or local authority of competent jurisdiction, provided that the applicant complies with 15 CFR 922.49, the Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities. Amendments, renewals, and extensions of authorizations in existence on the effective

date of designation constitute authorizations issued after the effective date of Sanctuary designation.

* * * * *

6. In § 922.134, revise the section heading and add new paragraph (a) to read as follows:

§ 922.134 Review of certain State permits and leases

(a)(1) NOAA has described in a Memorandum of Agreement (MOA) with the State of California how NOAA will coordinate review of any introduction of non-invasive introduced species from a proposed shellfish aquaculture project when considering an authorization under § 922.132(e).

(2) The MOA specifies how the process of 15 CFR 922.49 will be administered within State waters within the sanctuary in coordination with State permit and lease programs as administered by the California Fish and Game Commission, the Department of Fish and Wildlife and the California Coastal Commission.

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