



**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**15 CFR Part 922**

**Docket No. 120809321-3716-02**

**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:** Amendment to proposed rule; request for comments.

**SUMMARY:**

On March 18, 2013 (78 FR 16622), 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 as part of mariculture activities in the Tomales Bay region of GFNMS (the only geographic area within sanctuaries offshore of California where mariculture occurs). NOAA is now amending the March 2013 proposed rule to allow GFNMS and MBNMS to authorize certain introduced species of shellfish from commercial mariculture projects in all state waters of the sanctuaries.

**DATES:** Comments on this proposed rule will be accepted on or before *[INSERT 15 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** You may submit comments on this document, identified by **NOAA-NOS-2012-0113**, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NOS-2012-0113](http://www.regulations.gov/#!docketDetail;D=NOAA-NOS-2012-0113), click the “Comment Now!” icon, complete the required fields and enter or attach your comments.
- Mail: Dave Lott, Regional Operations Coordinator, West Coast Region, Office of National Marine Sanctuaries, 99 Pacific Street, STE100F, Monterey, CA 93940.

Instructions: This is a re-opening of the comment period for this docket. Comments must be submitted by one of the above methods to ensure that comments are received, documented, and considered by ONMS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. ONMS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

You may obtain copies of the original final environmental impact statement, record of decision, or other related documents through the following website:

<http://sanctuaries.noaa.gov/jointplan>.

## **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 NMS (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 mariculture activities within the Tomales Bay region of GFNMS. In December 2008, the then-Governor of California, acting pursuant to the National Marine Sanctuaries Act, objected to these introduced species regulations for the state waters portions of GFNMS and MBNMS. As a result of that objection, NOAA's prohibitions on introduced species are limited to 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 across the four national marine sanctuaries offshore California (78 FR 16622). The proposal would maintain exceptions for the catch and release of striped bass and for state-permitted commercial 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 notice of amended proposed rulemaking.)

NOAA 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” does not recognize that a number of introduced species of shellfish have been cultivated for over 100 years within sanctuary waters of Tomales Bay without 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 mariculture 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 agencies – CDFW, California Fish and Game Commission (CFGC), and California Coastal Commission (CCC) – this would allow 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.

Through this amended notice of proposed rulemaking, NOAA is proposing to allow MBNMS and GFNMS to authorize state permits or leases for commercial mariculture projects in state waters involving introduced species of shellfish that the state management agencies and

NOAA have determined are non-invasive and would not have significant adverse impacts to sanctuary resources or qualities. State agencies agree with NOAA that introduced species should be managed uniformly throughout the two sanctuaries.

Currently, the introduction of introduced species is prohibited in the federal waters of GFNMS. As amended, this proposed rule would extend the prohibition into the state waters of the sanctuary, including Tomales Bay. However, existing State-permitted commercial mariculture operations in Tomales Bay would not be subject to this regulation unless they seek a modification (e.g., changes to the species of cultivated shellfish or new areas for cultivation). For a new introduced species aquaculture operation, any such proposal after the effective date of these regulations would require a sanctuary authorization. Therefore, all existing commercial mariculture operations in Tomales Bay that have a valid lease or permit from the State as of May 1, 2014, would remain exempt from the prohibition on the introduction of introduced species and would not require a sanctuary authorization. However, a state permit, license or other authorization issued after May 1, 2014, to expand or otherwise modify an existing operation in Tomales Bay would need to be authorized by NOAA.

The Final EIS for the 2008 JMPPR analyzed the effects of prohibiting the introduction of introduced species in the sanctuaries, including exempting the twelve state leases for commercial mariculture activities in Tomales Bay that were active at that time. The FEIS further stated that renewals of the state leases that did not increase the types of introduced species being cultivated or expand the area under cultivation would remain exempt. However, any new lease agreements would be subject to the prohibition. Therefore, the changes in this amended proposed rule do not change the environmental impact analysis as was described in the Final EIS – no increase in the

environmental impact from introduced shellfish species under cultivation. Requests for authorizations from NOAA to modify existing operations would be reviewed for environmental impacts on a case-by-case basis. The regulations defining the ONMS authorization authority are found at 15 CFR 922.49.

NOAA would enter into a MOA with the State of California to define the role of various state agencies – CDFW, CFGC, CCC – working in collaboration with ONMS to consider whether an introduced species of shellfish could be considered non-invasive and possibly allowed to be cultivated in the sanctuary via an ONMS authorization of a state lease. State agencies would take the lead in determining whether an introduced species of shellfish is non-invasive but would consult with NOAA early in the process to ultimately reach a joint decision.

This proposed, limited authorization authority for commercial, shellfish mariculture activities occurring in state waters of GFNMS, in combination with the MOA with the State of California, would formalize the consultation requirements for any new or amended permit decision in state waters of GFNMS. This would provide significant protection to GFNMS from introduced species of shellfish while minimizing economic impacts to local mariculture businesses.

NOAA's proposed rule as published on March 18, 2013 (78 FR 16622), would have exempted all mariculture projects in Tomales Bay, yet would have involved extensive consultation between state agencies and NOAA through the MOA to address new or expanded projects in Tomales Bay. As now proposed here, NOAA authorizations would also include the same consultative process, and would impose little to no additional permitting delays following State action to approve leases and permits. ONMS regulations, along with the MOA, would describe a process for administrative appeals of any ONMS permit decision.

#### **IV. Summary of the Revisions to GFNMS Regulations**

This rule would provide GFNMS the ability to consider and authorize new or amended existing operations of commercial mariculture activities in state waters involving certain introduced species of shellfish that are determined to be non-invasive, including in Tomales Bay. Existing regulations regarding sanctuary authorization authority at § 922.49 would be modified to include subpart H for GFNMS-specific regulations. NOAA would also modify the exemption at § 922.82 to specify that commercial cultivation of introduced species of shellfish in Tomales Bay conducted pursuant to state leases in effect on May 1, 2014, would remain exempt from the prohibition. In § 922.82, NOAA would also add a subparagraph (d) that specifies that GFNMS could authorize the introduction of introduced species of shellfish that have been determined by the State of California and NOAA to be non-invasive and would not cause significant adverse effects on sanctuary resources or qualities. NOAA is seeking comment on whether such authority should be included in GFNMS regulations should an acceptable project in state waters be proposed in the future involving commercial aquaculture of introduced shellfish species that are non-invasive.

#### **V. Summary of the Revisions to MBNMS Regulations**

For the same reasons, MBNMS regulations would be modified to allow authorization of 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 to be non-invasive and would not cause significant adverse effects on sanctuary resources or qualities. MBNMS regulations already allow State of California permits to be authorized for certain activities that are otherwise prohibited in the sanctuary. This proposed rule would allow the Director to authorize state

permits involving the introduction of an introduced species as described above. NOAA is specifically seeking comment on whether such authority should be included in MBNMS regulations if a commercial aquaculture project is proposed in state waters of the sanctuary involving introduced shellfish species that are non-invasive.

## **VI. 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 this proposed revision to the regulations will be published in the preamble to the 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 proposed in this action.

### **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 this notice of proposed rulemaking. NOAA continues to propose regulations that would not affect existing mariculture projects in Tomales Bay that are conducted pursuant to a valid lease, permit, license or other authorization issued by the State of California as of May 1, 2014. Pursuant to a memorandum of agreement 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 mariculture activities in state waters of the sanctuary involving cultivation of introduced species of shellfish that NOAA and the State have determined are non-invasive and would not cause significant adverse effects. NOAA believes this is within the range of alternatives considered in the FEIS, and because 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 proposed action. Finally, any future proposal or amendments to existing state leases for a mariculture project involving cultivation of non-invasive introduced shellfish species would undergo environmental review pursuant to NEPA on a case-by-case basis to consider project-specific effects of that action. NOAA may refuse to authorize a project that would not comply with terms or conditions required by NOAA. 15 C.F.R. 922.49(a).

Copies of the FEIS 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 Addresses section of this proposed rule. Comments regarding the introduction of introduced species portion of the original FEIS are reopened for comment.

### 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 withdrawal 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 this 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 changes 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 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 while the proposal has changed, the conclusion remains the same (78 FR 16622). The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is as follows:

Using the SBA's Small Business Size Standards, NOAA determined that the small business concerns operating within both of the sanctuaries include: Commercial fishermen who vary in number seasonally and annually from approximately 300 to 500 boats; twelve mariculture leaseholders in Tomales Bay (in GFNMS); approximately 25 recreational charter fishing businesses; and approximately seven recreational charter businesses engaged in wildlife viewing. The small organizations, as defined under 5 U.S.C. 601(4), that would be impacted by this rule include approximately three small organizations operating within the waters of GFNMS, which include nongovernmental organizations (NGOs) or non-profit organizations (NPOs) dedicated to environmental education, research, restoration, and conservation concerning marine and maritime heritage resources. The small governmental jurisdictions, as defined under 5 U.S.C. 601(5), that would be impacted by this rule are the Tomales Bay settlements that are directly adjacent to GFNMS.

The prohibition on releasing or otherwise introducing from within or into GFNMS and MBNMS an introduced species is not expected to significantly adversely impact small entities because this activity is generally not part of their business or operational practices. As NOAA analyzed in more detail in 2008, small entities whose operational practices may include catch and release of striped bass (*Morone saxatilis*) (i.e., consumptive recreational charter businesses), would not be affected because the prohibition would not apply to the catch and release of this fish species already present in the sanctuaries. In fact, the prohibition against introduced species may result in indirect benefits for certain small entities since their activities could potentially be negatively impacted by the spread of introduced species, which can severely affect populations of endangered species, native species diversity, and the composition and resilience of natural biological communities. Introduced species pose a major economic and environmental threat to

the living resources and habitats of a sanctuary as well as the commercial and recreational uses that depend on these resources. Preventing their introduction will therefore help small entities by preventing such detrimental impacts.

The proposed prohibition will not impact aquaculture leaseholders located adjacent to GFNMS. Existing leaseholders operating in Tomales Bay are excepted from the introduced species prohibition if they have active lease agreements from the State of California for commercial cultivation of introduced species of shellfish in Tomales Bay and in effect as of May 1, 2014. Under the revisions as described in this proposed rule, additional permits could be authorized for the introduction of introduced species of shellfish that have been determined by the State of California and NOAA to be non-invasive and that would not cause significant adverse effects on sanctuary resources or qualities. Pursuant to a memorandum of agreement, the State of California would consult with NOAA prior to issuing any new leases or permits for commercial cultivation of introduced species of shellfish in Tomales Bay. This prohibition would not put any current operations out of business, because they would not need to change anything about their current procedures to continue in their operations, if their leases are in effect on May 1, 2014.

Comments received on the economic impacts of this proposed rule will be summarized and responded to in the final rule. As a result of this assessment, a regulatory flexibility analysis was not required and none was prepared.

#### F. Paperwork Reduction Act

This proposed 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.

## **VII. Request for Comments**

NOAA requests comments on this proposed rule, which amends the currently pending proposed rule published on March 18, 2013 (78 FR 16622). NOAA re-opens the docket NOAA-NOS-2012-0113 for comment for fifteen (15) days after publication of this notice.

### **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.

Date: March 19, 2014.

Holly A. Bamford, Ph.D.

Assistant Administrator, National Ocean Service

National Oceanic and Atmospheric Administration

Accordingly, for the reasons set forth above, 15 CFR part 922 is proposed to be 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 § 922.49, revise the introductory text of paragraph (a), and paragraphs (b) and (c) to read as follows:

**§ 922.49 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity.**

(a) A person may conduct an activity prohibited by: subpart H; subparts L through P; or subpart R, if such activity is specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary designation, or in the case of the Florida Keys National Marine Sanctuary after the effective date of the regulations in subpart P, provided that:

\* \* \* \* \*

(b) Any potential applicant for an authorization described in paragraph (a) of this section may request the Director to issue a finding as to whether the activity for which an application is intended to be made is prohibited by subpart H as appropriate, or subparts L through P, or subpart R, as appropriate.

(c) Notification of filings of applications should be sent to the Director, Office of National Marine Sanctuaries at the address specified in subpart H as appropriate, or subparts L through P, or subpart R, as appropriate. A copy of the application must accompany the notification.

\* \* \* \* \*

3. In § 922.50, revise paragraph (a)(1) to read as follows:

**§922.50 Appeals of administrative action.**

(a)(1) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a National Marine Sanctuary

permit; an applicant for, or a holder of, a Special Use permit issued pursuant to section 310 of the Act; a person requesting certification of an existing lease, permit, license or right of subsistence use or access under §922.47; or, for those Sanctuaries described in subpart H, subparts L through P, and subpart R, an applicant for a lease, permit, license or other authorization issued by any Federal, State, or local authority of competent jurisdiction (hereinafter appellant) may appeal to the Assistant Administrator.

\* \* \* \* \*

3. 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) Introduced species of shellfish cultivated by commercial mariculture activities in Tomales Bay pursuant to a valid lease, permit, license or other authorization in effect on May 1, 2014 issued by the State of California.

\* \* \* \* \*

4. In § 922.82 add paragraph (d) to read as follows:

**§922.82 Prohibited or otherwise regulated activities.**

\* \* \* \* \*

(d) The prohibition in paragraph (a)(10) of this section does not apply to the introduction of any introduced species of shellfish that does not cause significant adverse effects to sanctuary resources or qualities and is non-invasive as determined by NOAA and the State of California,

and is cultivated in state waters as part of commercial shellfish mariculture activities conducted pursuant to a valid lease, permit, license or other authorization issued by the State of California 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 State leases or permits in existence on May 1, 2014 require an authorization that must comply with this paragraph.

\* \* \* \* \*

5. Revise paragraph (e) of § 922.132 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 does not cause significant adverse effects to sanctuary resources or qualities and is non-invasive as determined by NOAA and the State of California, 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.

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