

CALENDAR ITEM

C38

A 2, 10, 19, 22, 24, 29, 30

04/05/16

W 26958

S 2, 8, 11, 13, 17

A. Franzoia

CONSIDER AUTHORIZING THE EXECUTIVE OFFICER OR HER DESIGNEE TO SIGN A MEMORANDUM OF AGREEMENT AMONG THE U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL OCEAN SERVICE, OFFICE OF NATIONAL MARINE SANCTUARIES AND THE STATE OF CALIFORNIA NATURAL RESOURCES AGENCY, OCEAN PROTECTION COUNCIL, CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, CALIFORNIA FISH AND GAME COMMISSION, CALIFORNIA COASTAL COMMISSION, AND THE CALIFORNIA STATE LANDS COMMISSION, TO DESCRIBE THE CONSULTATION PROCESS FOR THE OFFICE OF NATIONAL MARINE SANCTUARIES AUTHORIZATION OF COMMERCIAL SHELLFISH AQUACULTURE PROJECTS WITHIN GULF OF THE FARALLONES AND MONTEREY BAY NATIONAL MARINE SANCTUARIES

BACKGROUND:

Pursuant to the National Marine Sanctuaries Act (NMSA)(16 U.S.C. § 1431 et seq.), the Office of National Marine Sanctuaries (ONMS), within the National Oceanic and Atmospheric Administration (NOAA), is responsible for managing a network of 14 nationally significant marine areas encompassing more than 170,000 square miles of marine and great lakes waters from Washington state to the Florida Keys and Lake Huron to American Samoa. The Gulf of the Farallones National Marine Sanctuary (GFNMS) was designated by NOAA as a national marine sanctuary in 1980. The Monterey Bay National Marine Sanctuary (MBNMS) was designated by NOAA as a national marine sanctuary in 1992. Under the NMSA, the ONMS manages the sanctuaries to protect, maintain, enhance, and restore biological communities, natural habitats, populations, and ecological processes, and facilitate compatible, non-prohibited public and private uses of the marine resources in sanctuaries. The NMSA also allows the Secretary of Commerce to enter into agreements with states to carry out the purposes and policies of the NMSA, including development and implementation of coordinated plans for the protection and management of sanctuary areas.

As part of its efforts to protect and manage the MBNMS and GFNMS, ONMS is proposing regulations that would prohibit the introduction of introduced species into state waters of the MBNMS and GFNMS. However, both the State, through leases issued by the California Fish and Game Commission, and the ONMS oversee commercial shellfish aquaculture activity in state waters within the two sanctuaries. As a result, the parties recognize the need to describe, through the proposed memorandum of agreement (MOA), the meaning of “non-invasive introduced species” for purposes of shellfish cultivation, as well as a collaborative

CALENDAR ITEM NO. **C38** (CONT'D)

review process for lease and permit applications to reduce delays and ensure resource protection. As defined in the MOA, “non-invasive introduced species” means “an introduced species whose introduction will not cause significant adverse effects to sanctuary resources or qualities.” Under the terms of the MOA, this definition would apply whether a project proposes introduction of a species already being cultivated in the sanctuary or introduction of an entirely new species.

The MOA would provide a framework for the Commission’s participation in collaborating, cooperating, and sharing information among ONMS and the State parties to the MOA for: (1) State actions to consider commercial shellfish aquaculture activities in any portion of Tomales Bay within the GFNMS, and (2) ONMS authorization of permits or leases issued by the State for commercial shellfish aquaculture within State Waters in the MBNMS. As part of the MOA, the Commission would agree to cooperatively undertake implementation efforts and share information and expertise where relevant or necessary for that effort to be successful.

PUBLIC TRUST ANALYSIS AND RECOMMENDATION:

Statutory Authority:

Public Resources Code sections 6005, 6216, and 6301; California Code of Regulations, Title 2, section 2000, subdivision (b).

Public Trust and State’s Best Interests Analysis:

Preservation of commercial shellfish aquaculture habitat is water-dependent and is generally consistent with the common law public trust doctrine. California courts have observed that that preservation of fisheries and habitat are authorized uses of public trust lands. (See, for example, *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.)

The proposed MOA is designed to implement a collaborative multi-agency approach to share information and expertise where relevant or necessary for the protection of the natural environment and fisheries. The proposed MOA is consistent with the public trust doctrine because fisheries and the preservation of public trust lands are recognized public trust uses. Additionally, the MOA will help ensure that commercial shellfish aquaculture uses do not conflict with other public trust uses by facilitating federal and state coordination to assure that assessments of aquaculture projects are consistent with the best available information and methodologies. Commercial shellfish aquaculture benefits the public statewide through food production, revenue generation, and promotion of commerce. Based on the above analysis, staff believes authorization of the MOA is consistent with the common law public trust doctrine and in the best interests of the state.

CALENDAR ITEM NO. **C38** (CONT'D)

OTHER PERTINENT INFORMATION:

1. Participation in the MOA is consistent with Strategy 3.2 of the Commission's Strategic Plan - Commit to early and meaningful coordination and collaboration with local, state, and federal agencies, and implements Key Action 3.2.1, Continue to devote staff resources to interagency and intergovernmental policy development and implementation.

2. The authorization to enter into a Memorandum of Agreement is not a project as defined by the California Environmental Quality Act (CEQA) because it is an administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, Title 14, section 15378, subdivision (b)(5).

EXHIBIT:

- A. Memorandum of Agreement

RECOMMENDED ACTION:

It is recommended that the Commission:

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that the proposed MOA is consistent with the common law public trust doctrine and is in the best interests of the State.

AUTHORIZATION:

Authorize the Executive Officer or her designee to execute a Memorandum of Agreement, substantially in the form of Exhibit A, among the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Office of National Marine Sanctuaries through Gulf of the Farallones National Marine Sanctuary, Monterey Bay National Marine Sanctuary, the California Natural Resources Agency, Ocean Protection Council, California Department of Fish and Wildlife, California Fish and Game Commission, California Coastal Commission, and California State Lands Commission, to describe the consultation process for the Office of National Marine Sanctuaries authorization of commercial shellfish aquaculture projects within Gulf of the Farallones and Monterey Bay National Marine Sanctuaries.

MEMORANDUM OF AGREEMENT

**PURSUANT TO THE
NATIONAL MARINE SANCTUARIES ACT
16 U.S.C. 1442(a)**

AND THE

**CALIFORNIA FISH AND GAME CODE
SECTION 703.5 AND 15200**

AND THE

CALIFORNIA COASTAL ACT PUBLIC RESOURCES CODE SECTION 30000 ET. SEQ.

AND THE

**PUBLIC RESOURCES CODE
SECTIONS 35615 AND 35621**

AMONG THE

**U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL OCEAN SERVICE
OFFICE OF NATIONAL MARINE SANCTUARIES**

AND THE

**STATE OF CALIFORNIA
NATURAL RESOURCES AGENCY**

OCEAN PROTECTION COUNCIL

CALIFORNIA FISH AND GAME COMMISSION

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

CALIFORNIA COASTAL COMMISSION

CALIFORNIA STATE LANDS COMMISSION

FOR THE PURPOSE OF

**DESCRIBING THE CONSULTATION PROCESS FOR ONMS'S AUTHORIZATION OF COMMERCIAL
SHELLFISH AQUACULTURE PROJECTS APPROVED THROUGH CALIFORNIA PERMITS AND
LEASES FOR NON-INVASIVE INTRODUCED SPECIES WITHIN GULF OF THE FARALLONES AND
MONTEREY BAY NATIONAL MARINE SANCTUARIES**

NOS Agreement Code: MOA-2015-064/9176

I. PARTIES AND PURPOSE

- A. This Memorandum of Agreement (Agreement) is among the U.S. Department of Commerce (DOC), National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), Office of National Marine Sanctuaries (ONMS), through Gulf of the Farallones National Marine Sanctuary (GFNMS), Monterey Bay National Marine Sanctuary (MBNMS), the California Natural Resources Agency (Resources Agency), the Ocean Protection Council (OPC), the California Department of Fish and Wildlife (CDFW), California Fish and Game Commission (CFGC), California Coastal Commission (CCC), and California State Lands Commission (CSLC). The Resources Agency, OPC, CDFW, CFGC, CCC, and CSLC are collectively referenced as the State Parties.
- B. The purpose of this Agreement is to develop a process whereby State Parties will coordinate and consult with ONMS when they process permit or lease applications for commercial shellfish aquaculture projects in Tomales Bay in GFNMS. Such process is intended to ensure State Parties have full knowledge of and opportunity to address any concerns ONMS has with proposed state actions regarding commercial shellfish aquaculture projects in Tomales Bay.
- C. The further purpose of this Agreement is to develop a process whereby ONMS coordinates and consults with the State Parties when it processes an authorization for commercial shellfish aquaculture projects in State Waters of MBNMS. Such process is intended to ensure that ONMS's and State Parties' assessments of such projects rely on and are consistent with the best available information and methodologies.

II. BACKGROUND

- A. The ONMS is responsible for managing a network of 14 nationally significant marine areas encompassing more than 170,000 square miles of marine and great lakes waters from Washington state to the Florida Keys and Lake Huron to American Samoa. The network includes a system of 13 national marine sanctuaries and a marine national monument. GFNMS was designated by NOAA as a national marine sanctuary in 1980. MBNMS was designated by NOAA as a national marine sanctuary in 1992.
- B. The Resources Agency is a cabinet level entity whose mission is to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science.

collaboration and respect for all the communities and interests involved. All of the state Departments, Commissions and Councils represented as State Parties to this Agreement are within the umbrella of the Resources Agency.

- C. The OPC is responsible for adopting policy recommendations that will ensure that California maintains healthy, resilient, and productive ocean and coastal ecosystems for the benefit of current and future generations.
- D. The CFGC is the agency that regulates the sport take and possession of birds, mammals, fish, amphibians, and reptiles. The CFGC regulates certain aspects of commercial fishing including: fish reduction; shellfish cultivation; take of herring, lobster, sea urchins and abalone; kelp leases; lease of state water bottoms for oyster allotments; aquaculture operations; and other activities. The CFGC oversees the establishment of wildlife areas and ecological reserves and regulates their use. It also prescribes the terms and conditions under which permits or licenses may be issued by the CDFW and considers the revocation or suspension of commercial and sport licenses and permits of individuals convicted of violating Fish and Game laws and regulations.
- E. The CDFW is the public trustee agency that maintains the Aquaculture Coordinator; maintains aquaculturist registrations; prohibits aquaculture operations at any location where it is determined it would be detrimental to adjacent native wildlife; issues stocking permits; sells wild aquatic plants or animals for aquaculture use; approves the collection of aquatic plants and animals by registered aquaculturists; designates public areas for digging clams; processes water bottom lease applications; conducts activities relating to aquaculture disease detection, control, and eradication; appoints an Aquaculture Disease Committee and an Aquaculture Development Committee; establishes disease quarantines and takes related actions regarding control and eradication; and approves the importation of live aquatic plants and animals.
- F. The CCC is a state agency established under Division 20 of the Public Resources Code (Section 30000, et. seq.) that is charged with implementing the California Coastal Act ("Coastal Act"), the California Environmental Quality Act, and the federal Coastal Zone Management Act throughout California's coastal zone.
- G. The CSLC is an independent, quasi-legislative state agency that has exclusive control, jurisdiction and administration authority over all ungranted tide and submerged lands and the reversionary and residual interest of the State as to public trust lands legislatively granted to local governments. The CSLC serves the people of California by providing stewardship of the lands, waterways, and resources entrusted to its care through economic development, protection,

preservation, and restoration. Its members include the Lieutenant Governor, the State Controller and the Governor appointed State Director of Finance.

III. AUTHORITIES

- A. The legal and programmatic authority for the ONMS to enter into this Agreement is the National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1442(a), which allows the Secretary of Commerce, whenever appropriate, to enter into an agreement with a State to carry out purposes and polices of the NMSA, including subparagraphs 1, 2, 3, 6, and 7 of 16 U.S.C 1431(b)):
- a. (1) to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System;
 - b. (2) to provide authority for the comprehensive and coordinated conservation and management of these marine areas, and the activities affecting them, in a manner which complements existing regulatory authorities;
 - c. (3) to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes;
 - d. (6) to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities;
 - e. (7) to develop and implement coordinated plans for the protection and management of these areas with appropriate agencies, organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas.
- B. The Resources Agency is authorized by Government Code section 12805.2 to advise and assist the Governor in establishing major policies relative to marine resources where such policies may be implemented or undertaken by a department, office, or other unit within the Resources Agency designated with the protection and stewardship of such resources. This includes recommendation as to

whether the Governor should object to changes in terms of sanctuary designation in state waters pursuant to 16 U.S.C. 1434 (b)(1), as well as policies on the management and protection of state coastal resources.

- C. The OPC is authorized by Public Resources Code sections 35615 and 35621 to coordinate activities of state agencies that are related to the protection and conservation of coastal waters and ocean eco-systems to improve the effectiveness of state efforts to protect ocean resources and to share and exchange relevant scientific data that can further enhance and promote the public trust. The Council is comprised of two cabinet level secretaries, the Lieutenant Governor, two public members, and two legislative members all with the independent authority to direct and shape policy within their various spheres of influence.

- D. CDFW is authorized by California Fish and Game Code section 703.5 to enter into this Agreement, which provides:
 - (a) That the department and the commission seek to create, foster, and actively participate in effective partnerships and collaborations with other agencies and stakeholders to achieve shared goals and to better integrate fish and wildlife resource conservation and management with the natural resource management responsibilities of other agencies.
 - (b) That the department and commission participate in interagency coordination processes that facilitate consistency and efficiency in review of projects requiring multiple permits, including, but not necessarily limited to, joint state, federal, and local permit review teams that enable early consultation with project applicants, and provide improved sharing of data, information, tools, and science to achieve better alignment of planning, policies, and regulations across agencies.
 - (c) California Fish and Game Code section 1802 also provides that:
The department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The department, as trustee for fish and wildlife resources, shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used in the California Environmental Protection Act and section 15200, which requires the CFGC to regulate and the Department therefore to manage aquaculture lease practices.

- E. The legal authority for the CFGC to enter into this Agreement is the California Fish and Game Code sections 703.5 as cited above, and 15200, which provides that “the Commission may regulate the placing of aquatic plants and animals in

waters of the state.”

- F. The legal authority for the CCC to enter into this Agreement is Public Resources Code sections 30006.5, 30335.5, 30337 and 30339, which together require the CCC to seek expert scientific recommendations regarding matters before it and to coordinate with and provide recommendations to other agencies. Public Resources Code section 30003 requires all state agencies to comply with the Coastal Act, and section 30334 empowers the CCC to enter into contracts.

- G. The CSLC has jurisdiction and authority over all ungranted tidelands, submerged lands, and the beds of navigable rivers, sloughs, and lakes. Uses and restrictions of these lands are governed by Article X, Sections 3 and 4, of the California Constitution, the common law Public Trust doctrine, and the Public Resources Code sections 6000 et seq. The CSLC has an oversight responsibility for tide and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code § 6301). All tide and submerged lands, granted or ungranted, as well as navigable rivers, sloughs, and lakes, are subject to the Public Trust. Additionally, the CSLC is the state entity responsible for locating the offshore federal-state boundary. The Public Trust is a sovereign public property right held by the State or its delegated trustee for the benefit of all the people. This right limits the uses of these lands to waterborne commerce, navigation, fisheries, open space, recreation, or other recognized Public Trust purposes. In some cases, other uses not inconsistent with the Public Trust may be authorized. A lease from the CSLC is required for any portion of a project extending onto state-owned sovereign lands, which are under its exclusive jurisdiction; use of lands under the jurisdiction of legislative grantees requires permission from that grantee/trustee of sovereign public trust lands.

IV. SCOPE

This Agreement will apply to:

- A. State actions to consider amendments, renewals, or expansions of existing leases or permits, or any new lease or permit for a commercial shellfish aquaculture project in any portion of Tomales Bay within GFNMS.

- B. ONMS’s authorization of an aquaculture permit or lease issued for commercial shellfish aquaculture operations by any State entity in waters partially or wholly within California’s seaward boundary in MBNMS, provided those waters are regulated by 15 C.F.R. § 922 (herein referred to as “State Waters” or “Waters of

the State,” interchangeably). For purposes of this Agreement, “aquaculture” or “aquaculture activity” includes any commercial shellfish aquaculture activity in State Waters within MBNMS.

V. TERMS AND CONDITIONS

A. INTENT OF THE PARTIES

1. The Parties agree that while it is necessary to describe the process steps in V(B) in detail, the ultimate goals of this Agreement are collaboration, cooperation and sharing of information among ONMS and the State Parties in reviewing commercial shellfish aquaculture lease or permit applications. The Agreement helps achieve these ultimate goals with a collaborative review process for such lease and permit applications as the best way to avoid unnecessary delays in making decisions on permit applications and to ensure resource protection.
2. ONMS is proposing to adopt concurrently with or subsequent to the execution of this Agreement regulations that would prohibit introduction of introduced species into State Water of GFNMS and MBNMS.
3. For the purposes of this Agreement, the phrase “non-invasive introduced species” means “an introduced species whose introduction will not cause significant adverse effects to sanctuary resources or qualities”. This definition is intended to apply to any state authorization of a lease or permit for commercial shellfish aquaculture, whether the project proposes introduction of a species that is already being cultivated in Tomales Bay within GFNMS or MBNMS or if the project proposes introduction of an entirely new species (i.e. if significant adverse effects are demonstrated for a species already under cultivation, ONMS could deny the new authorization if the species did not meet this definition). The term “introduction” includes placing a species in GFNMS or MBNMS for the purpose of cultivation.
4. ONMS has the authority to allow the introduction of non-invasive introduced species as part of a commercial shellfish aquaculture project into State Waters of MBNMS consistent with the process for collaboration, assessment and appeal identified in this Agreement and CFR § 922.49. ONMS does not have the authority to prohibit or otherwise regulate the introduction of an introduced species as part of a commercial shellfish aquaculture project in portions of Tomales Bay within GFNMS.

5. The Parties further agree that assessment by ONMS whether an introduced species is not likely to cause significant adverse effects to sanctuary resources or qualities shall be conducted consistent with the terms and conditions in this Agreement, to the extent it is consistent with all applicable laws.

B. THE PARTIES AGREE TO THE FOLLOWING ROLES AND RESPONSIBILITIES:

1. Consultation and Coordination:

- a. **Initial Receipt and Notice to other Parties of Proposed Aquaculture Project:** Whenever a permit, permit amendment, lease, or lease amendment is sought for aquaculture activities or development in either Tomales Bay in GFNMS or in State waters of MBNMS, the receiving Party will immediately, but no later than 7 calendar days from the date of receipt of an initial application or request (regardless of its level of completeness), notify all signatories to this Agreement consistent with the Contact and Notice provision in section VII of this Agreement. This Initial Notice shall include a copy of the pending request for approval or application and any other supporting documentation received appended to it, and shall be distributed to all other Parties under this Agreement. Within 20 calendar days of receipt of the Initial Notice, ONMS may request the State Party or Parties providing the notice to obtain additional information from the applicant germane to its review. If a permit, lease or other approval is sought from a State Party or Parties for activities within the Scope of this Agreement, ONMS agrees such applications or other requests for approval, once completed, can be sent to GFNMS and/or MBNMS, and that no additional applications will be required by ONMS. GFNMS or MBNMS may request additional information regarding the applications.
- b. **Initial Consultation:** Within 7 days of a State Party determining that an application or request is complete, it shall notify all signatories to this Agreement. No later than 30 days from the date the completeness notification is sent to the Parties, the Parties will agree upon and coordinate on assembling a scientific review team comprising at least one scientific reviewer and one staff-level

policy or permit analyst from each Party (the scientific reviewer and permit analyst may be the same person representing any one Party), and which may include any other relevant governmental permitting agency or agencies also reviewing the proposed activity, such as the U.S. Army Corps of Engineers, National Marine Fisheries Service, and California Department of Public Health. The team will engage in an initial environmental review and risk assessment consistent with existing laws and obligations for developing permits, leases or other approvals, sharing any pertinent or relevant information or concerns already made apparent through the application for lease or permit processes. At this Initial Consultation the Parties will establish a schedule for sharing information and discussing possible concerns or data relevant to the application, as well as a timeline for ONMS to submit final comments to the State Parties regarding the proposed project.

- c. **Scoping and Comments:** At the Initial Consultation described in provision (V)(B)(1)(b) of this Agreement, or at a date determined appropriate by the Parties present at that meeting, but not more than 60 days after the date of the Initial Consultation, CDFW and CFGC will provide all parties with their assessment whether or not the proposed shellfish aquaculture species is likely to cause significant adverse impacts to sanctuary resources or qualities. Within 30 days of receipt of the CDFW and CFGC assessment, ONMS will provide Parties with written comments that explain whether it concurs with the CDFW and GFGC assessment. If ONMS believes that the proposed project would include cultivation of a species that does not meet the definition of non-invasive introduced species in section (V)(A)(4) of this Agreement, ONMS's assessment must describe the significant adverse effect(s) to sanctuary resources or qualities that it believes could result from the cultivation of such species and identify ways to eliminate those effects, or if they cannot be eliminated, to mitigate them such that cultivation of the species will not cause significant adverse effects to sanctuary resources or qualities. Each State Party will include and analyze these written comments from ONMS in its environmental analysis. A final determination as to whether an introduced shellfish species will not cause significant adverse impacts to sanctuary resources or qualities may require completion of a final environmental review document consistent

with the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA).

- d. **Collaborate to Resolve Conflicts:** The Parties will work to resolve conflicts through inter-agency consultation and discussion prior to the publication of staff reports or draft permits, or, if necessary, during the scheduled public comment period regarding lease or permit terms and conditions. For each comment or concern provided to the State Parties by ONMS, the appropriate State Party or Parties will, consistent with existing law, either modify its staff recommendation regarding the proposed lease agreement or permit accordingly, or will respond to ONMS in writing about each comment not so accommodated.
- e. **Timing of ONMS's Authorization:** Consistent with existing law, ONMS will not authorize an aquaculture project in the State Waters of MBNMS until all required State-level permits, licenses, leases or other approval documents have been issued. Except as provided in the Dispute Resolution and Appeals sections of this Agreement or as required by applicable law, ONMS will make its determination whether to authorize an aquaculture project in MBNMS within 30 days of the final State-level decision.
- f. **Review of Existing State Leases and Permits:** ONMS will not independently review for significant adverse effects from introduced shellfish species grown in existing aquaculture projects in Tomales Bay that were permitted prior to execution of this Agreement independent of an amended or new lease or permit application. Starting on October 1, 2015 and every year thereafter, the State Parties will provide ONMS with a list of leases and permits set for expiration and a timeline for review of those that have sought or are likely to seek renewal. The State Parties will also provide a list of any operations, leases, or permits it will be reviewing independently for consistency with its public trust obligations, should it deem this necessary.
- g. **State Coordination:** For aquaculture projects in State waters of GFNMS and MBNMS, the State Parties will coordinate a concurrent process of review consistent with existing State law.

2. **Assessment of Harm:**

- a. **Standard of Review:** The determination of significant adverse effects to sanctuary resources or qualities could include both spatial considerations (i.e., the percent of an area or habitat affected by the introduced species) or temporal (i.e., the amount of time an area or habitat would be affected), or both. Economic costs to human infrastructure or activities could also be considered. Examples of how an introduced species could cause significant adverse effects include reproduction of the species that allows it to become established in a portion of the sanctuary, harm to the natural ecosystem caused by predation on or predation by the organism, displacement of native organisms due to competition or alteration of habitat, or transmission of a parasite or disease vector that harms native organisms.
- b. **ONMS's Administrative Record:** Where the State has complied with the early consultation and coordination provisions in section (V)(B)(1) of the Agreement, the ONMS final review and determination shall be based on the administrative record(s) presented to the State Parties during their various administrative approval and review processes unless any of the following conditions is met: (1) information that is not in the State administrative record is available and would require consideration by ONMS consistent with the Information Quality Act and related regulations and policies; (2) new information which was not known or could not have been known is discovered by ONMS after the State Parties have made their decisions, and which may establish that the project under review will have an adverse effect not considered by the State Parties on resources of the sanctuary, (3) that a significant adverse effect already identified will be substantially more severe than previously understood by a State Party at the time of its approval, or (4) mitigation measures or alternatives previously found to be infeasible would in fact be feasible, and would substantially reduce one or more significant effects of the project that was not fully mitigated through other means.
- c. Such record shall include the work of the scientific review team, any and all information that ONMS itself provided to the State Parties during the coordination and consultation process described

in this Agreement, and comments made during applicable comment periods, as directed by this Agreement or permitted by existing law.

3. Procedures for Dispute Resolution and Appeal

- a. **Incorporation of ONMS's Recommended Mitigation:** In most cases, the concerns of the ONMS and the State Parties will be addressed at the staff level during the Initial Consultation and subsequent review by the scientific review team.
 1. **For Projects within State Waters of MBNMS:** Consistent with 15 C.F.R. § 922 for projects within State waters of MBNMS, ONMS has the authority to authorize or conditionally authorize commercial shellfish aquaculture projects involving non-invasive introduced species that have been approved through valid State leases or permits. If ONMS determines that all of its comments have not been addressed in State leases or permits, it may initiate the Dispute Resolution Process or Procedures for Appeal, as described in Sections (V)(B)(3)(b) and (c) of this Agreement, before determining whether to authorize, conditionally authorize or deny a proposed aquaculture project, consistent with 15 C.F.R. § 922. ONMS must initiate the Dispute Resolution Process within 30 days of approval of the final State-required permit or lease.
 2. **For Projects within Tomales Bay in GFNMS:** If ONMS determines that all of its comments have not been addressed in consultations in advance of issuance of State leases or permits, it may initiate the Dispute Resolution Process or Procedures for Appeal, as described in Sections (V)(B)(3)(b) and (c) of this Agreement. ONMS must initiate the Dispute Resolution Process or Procedures for Appeal within 15 days of approval of the final State required permit or lease.
 3. **For All Projects Approved by State Parties:** State Parties shall include a condition on any new or amended lease or permit that allows the State to re-open and amend the lease or permit should ONMS initiate this Dispute Resolution Process or Procedures for Appeal, as described in Sections (V)(B)(3)(b) and (c) of this Agreement.

- b. **Dispute Resolution Process:** In accordance with all applicable State and Federal laws, policies, and procedures, the State Parties and ONMS will coordinate and consult closely with each other prior to issuing any State permits or leases, or for projects within State Waters of MBNMS, prior to ONMS conditionally authorizing or denying approval of a State approved lease or permit. In the event of disagreement between ONMS and the State Parties, ONMS or the State may trigger this Dispute Resolution Process. ONMS shall not be obligated to take action on a proposed aquaculture project in MBNMS if ONMS has initiated this Dispute Resolution Process.
1. The Parties agree that all reasonable attempts will be made to resolve the disagreement as part of this Dispute Resolution Process. Depending on the nature of the disagreement and the persons involved, the superintendents of GFNMS or MBNMS, the Manager of the CDFW Marine Region, the State Aquaculture Coordinator, and the Executive Directors for the CFGC, CCC, and CSLC may attempt resolution. Where necessary to the efficient scheduling of meetings to resolve a dispute, the Parties involved in the Dispute Resolution Process will make every effort to facilitate discussions within 15 days of the initiating Party's request, but no later than 30 days from its request.
 2. In the event the Parties involved in the first round of dispute resolution are unable to resolve the disagreement, the matter shall be elevated to the ONMS West Coast Regional Director and include among the existing Parties the CDFW Director.
- c. **Appeal:** If this initial Dispute Resolution Process has been exhausted, and ONMS still believes any State permit or lease does not adequately reduce or eliminate significant adverse effects to sanctuary resources or qualities, or one or more State Parties disagree with a term of an ONMS conditional approval or an ONMS denial of an aquaculture project, ONMS or the State may file an appeal with the Joint Review Board (JRB) within 30 days of completion of the Dispute Resolution Process described in Section V(B)(3)(b). The JRB shall consist of the Administrator of NOAA

(or designee), and the Secretary of California Natural Resources Agency (or designee), on behalf of the involved State Parties.

- d. **JRB Review on Appeal:** The JRB shall review the State and ONMS administrative records, and any information (including new information) that meets the standard in section (V)(B)(2)(a) of this Agreement, as well as the appealing party's written statement, along with any relevant rebuttals. The JRB may seek the views from any other party or person. The JRB's review may also include whether any or both Parties failed to comply with the review processes in this Agreement.
 - 1. **For Projects within State Waters of MBNMS:** After considering the record before it, the JRB will recommend either ONMS authorize, conditionally authorize, or deny a proposed aquaculture project, or the appropriate State Party amend or deny an approved permit or lease. The JRB will make such recommendation within 30 days of receipt of the appeal.
 - 2. **For Projects within Tomales Bay within GFNMS:** After considering the record before it, if the JRB determines the State lease(s) or permit(s) should be amended or denied, it will recommend that the appropriate State Party re-open the permit or lease to amend or deny it in response to the concerns raised in the ONMS appeal.
- e. **Response to JRB Recommendation:** For projects within the State Waters of MBNMS, within 15 days of receipt of the JRB decision, ONMS or the appropriate State Party will determine how it may adopt any recommendations or actions issued by the JRB consistent with existing law. This paragraph shall not apply if such action is prohibited by law.
 - 1. For projects within Tomales Bay, State Parties may adopt any recommendations or actions issued by the JRB consistent with permit or lease conditions and existing law. This paragraph shall not apply if such action is prohibited by law.
- f. These procedures do not modify the limitations period for ONMS or the State to challenge a determination made by the other party.

VI. FUNDING, PROGRAMMING, PAYMENT, AND REIMBURSEMENT ARRANGEMENTS

This Agreement is not a fiscal or funds obligation document. Any activities involving reimbursement or transfer of funds among the Parties to this Agreement will be handled in accordance with applicable laws, regulations, and procedures. Such activities will be documented in a separate legal instrument.

VII. CONTACTS

- A. All notices or other correspondence required by this Agreement will be issued by certified U.S. mail unless the Parties agree that electronic communication is preferred. The points of contact for activities under this Agreement are:

GFNMS
Maria Brown
Superintendent
991 Marine Drive, The Presidio
San Francisco, CA 94129
(415) 561-6622
maria.brown@noaa.gov

MBNMS
Paul Michel
Superintendent
99 Pacific Street, STE 455A
Monterey, CA 93940
(831) 647-4258
paul.michel@noaa.gov

CA Resources Agency/OPC
Cat Kuhlman, Deputy Secretary
OPC Executive Director
1416 Ninth Street Suite 1311
Sacramento, CA, 95814
(916) 653-8152
Cat.Kuhlman@resources.ca.gov

CA Department of Fish and Wildlife
Randy Lovell
State Aquaculture Coordinator
1416 Ninth Street
Sacramento, CA 95814
(916) 445-2008
randy.lovell@wildlife.ca.gov

CA Fish and Game Commission
Sonke Mastrup, Executive Director
1416 Ninth Street, Room 1320
Sacramento, CA 95814
(916) 653-4899
sonke.mastrup@fgc.ca.gov

California Coastal Commission
Alison Dettmer, Deputy Director
45 Fremont St., Suite 2000
San Francisco, CA 94105
(415) 904-5200
alison.dettmer@coastal.ca.gov

State Lands Commission
Nicholas Lavoie, Public Land Manager
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825-8202
(916) 574-1900
nicholas.lavoie@slc.ca.gov

- B. The Parties agree that if there is a change regarding the information in this section, the Party making the change will notify the other Party in writing of such change. A change to this section will not require an amendment.

VIII. RESERVATION OF RIGHTS

The Parties each retain full authority and reserve all rights to take whatever actions deemed necessary to pursue, preserve, and protect any legal right, interest, or remedy. Nothing in this Agreement is intended nor shall be construed to waive or foreclose any such authority, right, interest, or remedy.

IX. DURATION OF AGREEMENT, AMENDMENTS OR TERMINATION


- A. This Agreement shall become effective on the date of the last signature of the Parties and will expire on May 1, 2020 unless terminated by mutual consent, one Party's written notice six months in advance, or completion of the terms of the Agreement.
- B. The Parties agree to review this Agreement every three years to determine whether it should be revised.
- C. This Agreement may be amended within its scope and prior to its expiration by the written mutual consent of the Parties, including extending the duration of the agreement for another five year period

X. OTHER PROVISIONS

Nothing in this Agreement is intended to conflict with current State or Federal laws, policies, regulations, or directives. If any of the terms and conditions of this Agreement is deemed inconsistent with existing Federal or State laws, policies, regulations, or directives, then those portions of this Agreement determined to be inconsistent, shall be invalid. The remaining terms and conditions of this Agreement that are not affected by the inconsistency shall remain in full force and effect. At the first opportunity for review of this Agreement, all necessary changes will be accomplished by either an amendment to this Agreement or by entering into a new agreement or some other arrangement.

APPROVALS

ACCEPTED AND APPROVED FOR THE
U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL OCEAN SERVICE

BY: 
John Armor
Acting Director
Office of National Marine Sanctuaries

DATE: 12/17/2015

ACCEPTED AND APPROVED FOR THE
STATE OF CALIFORNIA NATURAL
RESOURCES AGENCY

BY: _____
John Laird
Secretary
California Natural Resources Agency

DATE: _____

ACCEPTED AND APPROVED FOR THE
CA DEPARTMENT OF FISH & WILDLIFE

BY: _____
Charlton Bonham
Director
CA Department of Fish and Wildlife

DATE: _____

ACCEPTED AND APPROVED FOR THE
CALIFORNIA FISH & GAME COMMISSION

BY: _____
Sonke Mastrup
Executive Director
California Fish & Game Commission

DATE: _____

ACCEPTED AND APPROVED FOR THE
CALIFORNIA COASTAL COMMISSION

BY: _____
Charles Lester
Executive Director
California Coastal Commission

DATE: _____

ACCEPTED AND APPROVED FOR THE
CA STATE LANDS COMMISSION

BY: _____
Jennifer Lucchesi
Executive Officer
California State Lands Commission

DATE: _____

ACCEPTED AND APPROVED FOR THE
CALIFORNIA OCEAN PROTECTION COUNCIL

BY: _____
Catherine Kuhlman
Executive Director
California Ocean Protection Council

DATE: _____