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Agenda Item F14a-d

Environmental Action Committee of West Marin

February 1, 2019

California Coastal Commissioners
Jack Ainsworth, Executive Director

California Coastal Commission
45 Fremont Street, Suite 2000

San Francisco, CA 94105

Via Electronic Mail: EORFC@coastal.ca.gov

Re: Comments re: Agenda Items F14a-d, Permit Amendments (Hog Island Oyster Company, Marin Co.)

Dear Mr. Ainsworth and Commissioners,

The Environmental Action Committee of West Marin (EAC) was established in 1971 to protect and sustain the unique lands, waters, and biodiversity of West Marin. EAC has a long history of advocating for the protection of Tomales Bay and the irreplaceable coastal resources of Marin County.

Thank you for the opportunity to submit comments concerning agenda items F14a-d, permit amendments by Hog Island Oyster Company (Hog Island).

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EAC is thankful for the diligent efforts by the California Coastal Commission (Commission) staff to bring California's aquaculture operators into Coastal Development Permit (CDP) compliance and looks forward to improved transparency and environmentally protective CDP conditions for aquaculture permitting. In addition, EAC recognizes that Hog Island strives to achieve environmentally protective measures in their operational practices to reduce environmental harm.

Although, EAC is supportive of many of the Special Conditions in the CDP amendments; we are extremely concerned that the Staff Report allows after-the-fact permitting for development that is located within eelgrass (*Zostera marina*) habitat, which is considered a species of special biological significance as outlined in Section 30230 of the Coastal Act.

Significance of Tomales Bay Habitat:

Tomales Bay is a long narrow inlet of the Pacific Ocean approximately 15 miles long and averages nearly one mile wide, which effectively separates the Point Reyes Peninsula from Marin County's mainland. The bay forms the eastern boundary of Point Reyes National Seashore, and provides vital habitat for wildlife, supports six shellfish operations, recreational and commercial fishing, and provides a variety of recreational opportunities like swimming and boating. The Bay is also recognized for protection by the California Bays and Estuaries Policy, part of the Greater Farallones National Marine Sanctuary (Sanctuary), and a RAMSAR site, as its wetlands are considered internationally significant. Tomales Bay is also listed as an impaired water body by the San Francisco Regional Water Quality Control Board.

It is essential that the unique and vulnerable coastal resources supported by the waters of Tomales Bay are protected, preserved, and when possible, enhanced. In the face of changing climate conditions, alleged past permit violations by Hog Island and others, marine and legacy debris, and other environmental threats, we must be especially protective of sensitive eelgrass habitats in Tomales Bay when considering current, continued, and future aquaculture operations and practices.

Areas of Special Biological Significance:

As stated in the Staff Report, Section 30230 of the Coastal Act provides explicit protection for species such as eelgrass, which "is a species of special biological or economic significance":

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Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.¹

According to the National Oceanic and Atmospheric Administration (NOAA) West Coast Region, eelgrass is designated as Essential Fish Habitat (EFH) and a Habitat of Particular Concern under the Magnuson-Stevens Fishery Conservation and Management Act in 1996.² Eelgrass beds are internationally recognized as a rare and critically important marine habitat. The Staff Report states that bottom bags can cause smothering and disturbance to benthic habitat.³ The report also indicates that routine operations, even if intended to minimize damage, can cause impacts to eelgrass and benthic habitat through navigation, harvesting, etc. Damage to eelgrass and the benthic environment from commercial activity conflicts with Section 30230 of the Coastal Act, which requires sustaining the “biological productivity of coastal waters that will maintain healthy populations of all species of marine organisms...” While we acknowledge that some impacts to sensitive eelgrass and benthic habitat are inevitable, these impacts must be reduced to the greatest extent possible and especially when considering not-permitted or new development.

While we acknowledge that Coastal Act 30230 must also protect areas of special economic significance, this is not explicitly discussed in the Staff Report. The total area of the not-permitted development proposed to be retained in an area of special biological significance (0.32 acres) is minor in comparison to the total proposed permitted acreage of the applicant (56 acres), so we will assume that this small area is not economically significant in comparison to their total operations.

The eelgrass habitat in Tomales Bay is also likely an ‘environmentally sensitive area’ under Coastal Act Section 30107.5, described as “...any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an

¹ See C. Teufel, Coastal Commission Staff Report: Regular Calendar (“Staff Report”), January 24, 2019, pages 41, 43 and Coastal Act Section 30230.

² NOAA Fisheries, West Coast Region, *The Importance of Eelgrass*, Fall 2014 available at: https://www.westcoast.fisheries.noaa.gov/stories/2014/04_11072014_eelgrass_mitigation.html

³ Staff Report pages 48-49.

ecosystem and which could be easily disturbed or degraded by human activities and developments.”

According to the Staff Report for the Coast Seafoods Permit, “[e]elgrass... provides a variety of essential ecosystem functions, including primary production, predation refuge, nursery functions, physical structure, nutrient cycling, and forage.”⁴ In other words, eelgrass provides habitat for many species of fish including Pacific herring, provides a habitat for fish spawning, as well as serving as an integral part of shorebird interactions.

While typically applied to land resources, Coastal Act Section 30240 provides specific protection for environmentally sensitive habitat areas (ESHA), which may apply to Tomales Bay’s eelgrass beds. Section 30240(a) states that ESHA “shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas”, and (b) states that “[d]evelopment in areas adjacent to [ESHA] ...shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat...areas.”

With no proposed habitat-related mitigation in the CDP amendments, it is critical that harm to eelgrass habitat is limited to the greatest extent possible through the use of special conditions. As acknowledged in the Staff Report, Hog Island has been active in staff trainings, clean ups, and other marine debris reduction activities in which EAC has partnered. However, neither this mitigation nor the removal of legacy debris is habitat-specific.

EAC’s Concerns with the Staff Report:

1. Opposition to After-the-Fact Permit Approval of Aquaculture Gear in Areas with Species of Special Biological Significance

EAC strongly opposes after-the-fact permit approval of aquaculture gear in areas with species of special biological significance. The proposed permit amendments would allow after-the-fact permitting of development where eelgrass may be present based on the Sanctuary’s 2017 LIDAR eelgrass mapping.

⁴ Coastal Commission, *STAFF REPORT: REGULAR CALENDAR*, Coast Seafoods Company, August 25, 2017, page 50.

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The Staff Report further explains the significance and abundance of eelgrass in Tomales Bay, “[b]ased on the results of the Sanctuary’s 2017 eelgrass survey, eelgrass beds cover a substantial portion of all four of [Hog Island’s] leases, ranging from roughly 25% to 60% of each lease.”⁵

The Staff Report refers to after-the-fact permit authorization on approximately 17 acres (or 66%) of the approximately 25 acres of the existing operation acreage.⁶ Of the 17 acres of not-permitted cultivation development, 1.26 acres are potentially located in an area with species of special biological significance.⁷

The Staff Report specifies removal of not-permitted development for two permits where species of special biological significance are present:

- Special Condition 7 specifies the removal of the not-permitted Stanway Structures from 0.04 acres that may be located in an area with species of special biological significance for CDP No. 2-84-2-A1 (Lease No. M-430-11). However, the bottom bags that may be located in areas of species of special biological significance on this lease would remain.
- Special Condition 8 specifies the removal of the not-permitted overlapping racks and floating culture from approximately 0.34 acres and replace with new development that would be permitted for CDP No. 2-84-10-A1 (Lease No. M-430-12).

Unfortunately, this leaves a remaining 0.32 acres of not-permitted development (bottom bags and basket/tipping lines) that will allow after-the-fact permitting in areas containing species of special biological significance (eelgrass habitat) for CDP No. 2-81-40-A1 (Lease No. M-430-10) and CDP No. 2-84-2-A1 (Lease No. M-430-11).

The Staff Report Appendix B, Hog Island Oyster Company Project Description, Table 2 estimates the proposed amount of each cultivation type and density. This table allows one to estimate the amount of development for each CDP and the locations, as we have done below.

Examples of not permitted development in areas where species of special biological significance may be located and are being considered for after-the-fact approval.

⁵ Staff Report, page 43.

⁶ Staff Report, Table 1 and 2 page 17; and Table 8 page 42.

⁷ Staff Report, page 46.

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- 0.2 acres or 622 bottom bags (estimating 3,111 bags per 1 acre) for CDP No. 2-81-40-A1 (Lease No. M-430-10). Considered for after-the-fact approval and would remain.
- 0.08 acres or 249 bottom bags (estimating 3,111 bags per 1 acre) for CDP No. 2-84-2-A1 (Lease No. M-430-11). Considered for after-the-fact approval and would remain.
- 0.34 acres or 404 overlapped racks (estimating 1,190 racks per 1 acre) for CDP 2-84-10-A1 (Lease No. M-430-12). Considered for after-the-fact approval with removal and possible replacement in the expansion project.
- 0.56 acres or 6 lines from floating culture (estimating 10 lines per 1 acre of floating culture) for CDP 2-84-10-A1 (Lease No. M-430-12). Considered for after-the-fact approval with removal and replacement in the expansion project.
- 0.4 acres of tipping baskets and lines for CDP 1-94-55-A1 (Lease No. M-430-15). Considered for after-the-fact approval and would remain.

The not-permitted cultivation development located in areas with species of special biological significance is approximately 5% of the total acreage in use by Hog Island and may not be economically meaningful when compared to the damage to coastal resources and the public trust.

While the Commission's review of the state's CDP leases is still underway, Marin Oyster Company's CDP⁸ (another aquaculture operator in Tomales Bay) was already reviewed and renewed by the Commission, and as part of that process, the Company removed some not-permitted development that was located in an area containing species of special biological significance (eelgrass) in 2018.

To ensure consistency and prevent setting a bad precedent that could irreversibly harm future eelgrass habitat by rewarding operators who do not obtain a coastal permit for their development, all not-permitted cultivation development considered for after-the-fact approval in areas with species of special biological significance must be removed.

⁸ Application Number 9-18-0002-A1, Agenda Item W13a, April 26, 2018

2. After-the-Fact Permits Should be Considered New Development

While Hog Island had CDPs for all of their leases⁹, the permit conditions (or absence thereof) do not line up with their current operations in many cases. Specifically, of the 25 acres of existing operations (which is proposed to increase to approximately 54.37 acres), staff reports that “at least 14 [the Staff Report also states 17 acres] acres [66% of their current operation] of it are focused on shellfish species and/or the use of cultivation methods...that were not considered or approved in its CDPs.”¹⁰

Based on this conclusion, aspects of Hog Island’s operations are not permitted, including the use of bottom bags on CDP No. 2-81-40-A1 (Lease No. M-430-10) and CDP No. 2-84-2-A1 (Lease No. M-430-11). In addition, the racks on 1.34 acres for CDP 2-84-10-A1 (Lease No. M-430-12) are also not-permitted, but would be approved after-the-fact and new development allowed.

While we understand the intent of this permit amendment process is to bring the operations into compliance with the permits, the standard of review for not-permitted operations should be as if the operations are new development. This standard of review is referenced in several Commission staff reports. For instance, in the staff report regarding the West Cliff Drive Parking Restrictions, there was an

appeal filed on the City’s after-the-fact approval of a [CDP] application for such development. Although such development is currently in place, it is not the baseline for this appeal because it has yet to be permitted. As a result, current baseline for purposes of this CDP appeal review...is that existing prior to the implementation of the parking program.¹¹

⁹ However, some of these permits were never formally transferred to Hog Island but were held in the names of past entities. Staff Report pages 14-15.

¹⁰ Staff Report page 15.

¹¹ Coastal Commission, *A-3-STC-07-057, West Cliff Drive Parking Restrictions, Staff Report TH12b*, March 6, 2008, page 6, fn. 1, *available at*:

<https://documents.coastal.ca.gov/reports/2008/3/th12b-3-2008.pdf>; *see also A-3-SCO-18-0004 Staff Report: De Novo Hearing, TH14d*, July 12, 2018, *available at*:

<https://documents.coastal.ca.gov/reports/2018/7/th14d/th14d-7-2018-report.pdf>.

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In another appeal dealing with unpermitted development in monarch habitat, the Commission found that after-the-fact permit approval of a structure “must include an analysis of the impacts to ESHA that occurred at the time of construction.”¹²

While the Hog Island permit amendments are not an appeal, this same standard of review likely applies to the not-permitted activity being considering in the CDP amendment at hand.

Therefore, Special Condition 2 (Pre-Installation Eelgrass Survey) should explicitly apply to the bottom bag operations on CDP No. 2-81-40-A1 (Lease No. M-430-10) and CDP No. 2-84-2-A1 (Lease No. M-430-11) and the overlapping racks and floating culture on CDP No. 2-84-10-A1 (Lease No. M-430-12). In other words, a pre-installation survey must take place showing that “no shellfish cultivation equipment, anchors, or other structures, gear or equipment [is]... installed or placed on, in, over, or directly adjacent to areas in which eelgrass is growing.”¹³ If eelgrass is present in the existing bottom bag areas at the time of survey, then all cultivation gear in those areas must be removed.

While we understand the eelgrass may not have been present when the cultivation gear was installed, this is irrelevant if the cultivation development was not permitted. Under these circumstances, the permit is evaluated as new development at the time of permit application.

3. Confirmation of Eelgrass Mapping

EAC understands that the Sanctuary 2017 LIDAR mapping data used in the Staff Report may be out of date. There are questions whether the presence of eelgrass is still in the areas where after-the-fact permits are being requested, and the 2017 data may not reflect current conditions. Therefore, it seems reasonable that an independent third-party should conduct a survey of the area within a reasonable timeframe that the Commission determines to validate the maps and provide safeguards for eelgrass habitat (a species of special biological significance).

Consequently, we suggest that a new condition is drafted to address our three aforementioned concerns:

4. EAC Suggested Language for the Addition of a New Special Condition:

¹² A-4-STB-07-112, *STAFF REPORT: APPEAL W8a SUBSTANTIAL ISSUE*, October 10, 2007, available at: <https://documents.coastal.ca.gov/reports/2007/10/W8a-10-2007.pdf>

¹³ See Staff Report, page 7.

Removal of Not-Permitted Cultivation Gear in Eelgrass

For areas where development (aquaculture operations) was not permitted at the time of permit application (September 19, 2018 per the Staff Report), i.e. bottom bags on leases 10 and 11, an eelgrass survey must be conducted by a qualified independent, third party between May through September. The survey shall be carried out consistent with the methodology and protocols established in the National Marine Fisheries Service's California Eelgrass Mitigation Policy. The results of the eelgrass survey shall be provided to the Executive Director for review and approval along with a map or diagram showing the footprint and location of current cultivation structures and equipment relative to nearby eelgrass beds and demonstrating that the shellfish cultivation equipment, anchors, or other structures, gear or equipment ("cultivation gear") are not in, over, or directly adjacent to eelgrass beds (a species of special biological significance). **In areas where eelgrass is in, over, or directly adjacent to cultivation gear, all cultivation gear shall be removed from these lease areas.** Special Condition 2 (*which exists in the Staff Report currently*) will apply to any future CDP amendments requesting that gear be put back or installed in a new area on the lease.

To clarify, not-permitted and/or new shellfish cultivation gear is prohibited within eelgrass, however if eelgrass beds move or expand into areas with existing cultivation gear, Hog Island may continue to maintain and use these areas for shellfish cultivation.

5. Additional Concerns and Suggested Revisions to the Staff Report

We suggest the following revisions to the Staff Report:

1) The removal of overlapping racks on lease 12 should be made a Special Condition, like Condition 7. The Staff Report discusses the harms to the benthic environment associated with this type of gear, as well as the gear's presence in an eelgrass area.¹⁴ In particular the 1.34 acres of rebar and PVC racks are located in shallow intertidal habitat, which appears contrary to the existing special condition (in CDP No. 2-84-10) that "rack culture will not be used in waters less than 3 feet deep."¹⁵ Page 21 of the Staff Report indicates that this method will be phased out at that location, but it would be helpful if this reference was incorporated into a condition.

¹⁴ See Staff Report page 37.

¹⁵ Staff Report pages 6 and 19.

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- 2) Regarding clam rolls, the phase out timing is unclear. Special Condition 6 lists “18 months of permit issuance”, while Table 8** states approximately two years.
- 3) In the interests of transparency and compliance, we suggest that documents submitted by Hog Island to the Commission Executive Director are also publicly available upon request.
- 4) Regarding Condition 11.D, the weight of shellfish gear collected would also be a helpful metric to collect where possible. This is consistent with Coastal Clean Up Day data collection methods.
- 5) The proposed total acreage (including the proposed expansion) is referenced on page 22 of the Staff Report as 56 acres and in other places as 54.37. This discrepancy should be corrected.
- 6) There is also a discrepancy in the total not-permitted acreage, which is referenced as 14 acres as well as 17 acres when calculated.

Conclusion

To close with our main point, it is critical that sensitive eelgrass habitat areas are provided the highest level of protection when considering new or not-permitted development. Given the relatively small size of the not-permitted activity (0.32 acres) in eelgrass habitat and its seemingly low economic value, all not-permitted cultivation gear in eelgrass must be removed.

We thank the Coastal Commission staff and Hog Island for their hard work to come to this point, and we hope that you will carefully consider our comments ensure the strongest protections for species of special biological significance and sensitive habitat areas like the eelgrass beds in Tomales Bay.

Sincerely,



Morgan Patton
Executive Director



Ashley Eagle-Gibbs
Conservation Director