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Via Electronic Mail Only

California Fish and Game Commission
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Re: Proposed San Andreas Shellfish Company Aquaculture Lease

Dear Ms. Rogers:

Shute, Mihaly, & Weinberger, LLP has been retained by the Public Lands Conservancy and the Environmental Action Committee of West Marin for matters related to the proposed San Andreas Shellfish Company (SASC) aquaculture lease in Tomales Bay (the Project). We have reviewed the rough project description and other materials provided at the November 7th, 2024 Marine Resources Committee meeting and the December 11, 2024 Fish and Game Commission meeting, as well as the numerous concerns raised and evidence presented at these meetings regarding the Project's potentially significant adverse environmental impacts.

We are writing to urge the Commission to study the Project's impacts through preparation and circulation of an Environmental Impact Report (EIR), as required under the California Environmental Quality Act (CEQA) and to begin consultation with federal fish and wildlife agencies on preparation of a joint Environmental Impact Statement (EIS), as required under the National Environmental Policy Act (NEPA). In addition, staff must reevaluate its initial determination that the lease application meets legal requirements under existing laws. This determination is incorrect, given that the proposed lease is located in areas used by the public for clamming.

I. An EIR is Required Under CEQA

Given the sensitive habitats, special status species, and other biological and aquatic resources present in and immediately adjacent to the proposed lease area, and the Project's wide-ranging construction and operational activities, it is not possible to mitigate all of the Project's potentially significant impacts to a less than significant level. Accordingly, the Project's environmental impacts must be fully analyzed, and Project alternatives and mitigation measures assessed, in an EIR prepared and circulated for comment pursuant to CEQA, Public Resources Code § 21000 *et seq.*, and the CEQA "Guidelines," California Code of Regulations, title 14, § 15000 *et seq.*

We understand that SASC is currently developing draft CEQA documents for the Project. We urge the Commission to subject all materials prepared by others to independent review and analysis in accordance with CEQA Guidelines section 15084, including peer reviews of all technical analyses. Any CEQA document circulated for public review must reflect the independent judgment of the Commission. In particular, the Commission should reject any effort to conduct environmental review absent a full EIR.

II. Consultation with Federal Agencies and Preparation of an EIS Under NEPA is Required

We are concerned that public discussions of the Project have not yet included preparation of an EIS under NEPA, 42 U.S.C. §§ 4321 *et seq.* Several threatened or endangered species under the federal Endangered Species Act (such as steelhead trout, coho salmon, and western snowy plovers) are in the vicinity of the lease area and will be adversely affected by operations. A Section 7 consultation under the federal Endangered Species Act is thus required. *See, e.g.*, 33 C.F.R. § 330.4(f).

In addition, Project activities are immediately adjacent to and will adversely affect eelgrass, which is designated as Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation Management Act. For this reason and others, SASC cannot rely on Nationwide Permit 48 for permitting under section 404 of the federal Clean Water Act or under section 10 of the Rivers and Harbors Act, and must instead obtain an individual permit and conduct environmental review under NEPA. *See*, Final 2021 Nationwide Permit (NWP) Regional Conditions for the State of California (Feb. 25, 2022); USACE, 2021 Nationwide Permit Summary, 48(C).

III. Fish and Game Code Section 15401 Prohibits Approval of the Proposed Lease

Under California Fish and Game Code section 15401, “[a]reas used by the public for digging clams shall not be leased. The department shall designate those areas.” The Fish and Game Commission’s framework for evaluating water bottom leases references this statutory requirement by asking whether a proposed lease area “avoids areas used by the public for digging clams, as designated by CDFW.” Fish & Game Com., Criteria and Framework for Evaluating if a New State Water Bottom Lease is in the Public Interest, p. 3. In reviewing SASC’s proposed lease, Commission staff concluded that approval would be legal because “the proposed lease area avoids designated clamming areas.” Fish & Game Com., Staff Evaluation of Aquaculture Lease, p. 2. This conclusion is flawed for several reasons.

To begin, state statutes specify that clamming is allowed in Tomales Bay. *See* Fish & Game Code §§ 8340, 8341 (designating areas and seasons for clamming); *see also*, <https://wildlife.ca.gov/Fishing/Ocean/Regulations/Fishing-Map/San-Francisco> (indicating that it is currently open fishing season for clams in the San Francisco Region, including the proposed lease area).

Moreover, CDFW itself recognizes that Tomales Bay is a popular area used by the public for digging clams. *See* Dept. of Fish & Wildlife, Status of the Fisheries Reports, <https://wildlife.ca.gov/Conservation/Marine/Status> (noting that Tomales Bay is a common clamming destination for the Pacific gaper clam, fat gaper clam, Pacific geoduck clam, Washington clam, and butter clam). Indeed, given extensive Marine Protected Areas and water quality issues in the region, Tomales Bay is the only significant remaining clamming option. Brazil Beach in particular has long been an area used by the public for digging clams. Yet SASC proposes to lease intertidal lands right at Brazil Beach. Even SASC’s own presentation shows that the proposed lease area overlaps with recreational clam fishery areas, based on Department of Fish and Wildlife data. San Andreas Shellfish Farm, Presentation to CFGC Marine Resources Committee (Nov. 7, 2024), p. 3.

In determining that the proposed lease is legal under existing laws, staff suggests that the lease complies with Fish and Game Code section 15401 because CDFW has not officially “designated” the lease area as an area used by the public for digging clams. Yet, CDFW has not officially designated *any* areas as areas used by the public for digging clams. The state cannot avoid section 15401’s prohibition on leasing areas used by the public for clamming by violating its statutory duty to designate those areas.

Accordingly, whether CDFW has officially designated this area or not, the proposed lease would violate the law because it includes “[a]reas used by the public for digging clams,” which “*shall not be leased*” under Fish and Game Code section 15401.

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We appreciate your consideration of these issues. We have signed up for the Marine Resources Committee and Aquaculture listserves and look forward to receiving updates on review of the Project application through those emails. In addition, pursuant to Public Resources Code section 21092.2, please provide us with the Notice of Preparation for an EIR. (If you are not the designated person to receive this request please forward it to the clerk of the Board). We also request copies of all other CEQA notices and other notices related to the Project.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



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