



Pacific Fishery Management Council

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October 10, 2006

Mr. Chris Mobley, CINMS Superintendent
NOAA, National Marine Sanctuary Program
113 Harbor Way, Suite 150
Santa Barbara, California 93109

RE: Proposed Marine Reserves in the Channel Islands National Marine Sanctuary.

Dear Mr. Mobley,

Thank you for the opportunity to review and comment on the draft environmental impact statement (DEIS) and proposed rule for the consideration of marine reserves and marine conservation areas within the Channel Islands National Marine Sanctuary (CINMS). The Pacific Fishery Management Council (Pacific Council) reviewed the DEIS and the *Federal Register (FR)* notice of the proposed rule at the September 10-15, 2006, Pacific Council meeting, where they took input from its advisory bodies and the public. The Pacific Council tasked me with providing this response, which is based on the results of the September 2006 Pacific Council meeting and the administrative record of Pacific Council meetings since 2001, when this matter was first brought before the Pacific Council.

It is important to note that the continuing premise of the Pacific Council is that fishing regulation is properly done in the Pacific Council forum, in a holistic manner that takes into consideration the full range and ecosystem of the fish stocks involved. The position that fishing regulation in the CINMS should be done in the Pacific Council forum under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is consistent with original justification of the CINMS and terms of its Designation Document.¹ It is also consistent with advisory letters from Undersecretary of Commerce for Oceans and Atmosphere VADM Conrad Lautenbacher on behalf of the National Oceanic and Atmospheric Administration (NOAA).² Lastly, it is consistent with verbal testimony from National Ocean Service (NOS) and CINMS representatives over the course of Pacific Council meetings considering this matter, who have repeatedly stated that the CINMS does not have an *a priori* intent to regulate fishing, and is only in a position to propose doing so in this narrow situation as a result of advice that the past record of the Pacific Council is currently insufficient to enact fishery restrictions in the water column of the areas in question.

¹ Article 5, Section 1 of the CINMS Designation document, as currently in place unchanged from 45 FR 65200, October 2, 1980, states, "The regulation of fishing is not authorized under Article 4." (Article 4 is the *Scope of Regulation*).

² Letters date October 19, 2005 and December 30, 2005, from the latter, "While NOAA plans to move forward with the NMSA process, and has concluded the section 304(a)(5) process, we encourage you to continue your efforts to address fishing activities in the water column under various other Fishery Management Plan authorities."

The proposed regulations and changes to the Designation Document do not specifically allude to only regulating fishing in the water column. However, we also note that the objectives and goals of the CINMS leading to the establishment of a network of marine protected areas in Federal waters have already been accomplished under the MSA with regard to the regulation of fishing associated with the sea floor.³ We presume that the choice of fishery regulation language in the proposed rule, which does not specifically mention the regulation of fishing only in the water column, serves the purpose of including non-fishing use effects on the benthos as opposed to any intent to reserve the authority for further regulation of benthic fishing.

In general, the Pacific Council remains supportive of achieving the goals and objectives of the State of California and the CINMS with regard to establishing a network of marine protected areas in the CINMS. Again however, the Pacific Council feels strongly this should be accomplished under the authorities of the MSA and State jurisdiction and not by initiating new fishing regulation authority for the CINMS. Should fishery regulations be promulgated under the National Marine Sanctuaries Act (NMSA), the Pacific Council wishes to contribute its expertise to ensure that any Federal fishery regulations are enforceable, are clearly understood by the public, and meet the goals and objectives of the Pacific Council and the CINMS.

This letter provides notice of the Pacific Council intent to move forward with achieving the remaining necessary fishery regulations and protective measures in these areas through the existing authorities of West Coast States and the MSA. However, if the CINMS Designation Document modifications providing authority over fishing activities and accompanying NMSA fishing regulations are determined to be necessary, this letter also: 1) conveys the Pacific Council recommendation that the duration of any fishing regulations brought about by action under the NMSA, and changes to the Designation Document as they pertain to the regulation of fishing, automatically sunset at the time regulations are promulgated under MSA; 2) conveys the Pacific Council recommendation that the scope of the proposed authority to regulate fishing, as described in the DEIS, is too broad; and 3) conveys specific comments on the documents in support of the proposed action, i.e., the DEIS, the FR notice, and the proposed rule.

PACIFIC COUNCIL INTENT TO ESTABLISH PROPOSED RESERVES AND PROTECTED AREAS VIA THE MSA

The Pacific Council understands that past action under the MSA has achieved the desired fishing regulation necessary to accomplish the stated goals and objectives of the CINMS, with the exception of fishery regulation in the water column. Accordingly, the Pacific Council has scheduled further process to adopt fishery regulations in these areas. At the upcoming November 12-17, 2006 Pacific Council meeting in Del Mar, California, the Pacific Council will explore several potential avenues for such action under the authority of the MSA. Therefore, the Pacific Council continues to recommend the CINMS Designation Document not be changed regarding the authority to regulate fisheries.

³ 50 CFR 660.306(h)(9)

THE DURATION OF PROPOSED FISHERY REGULATIONS AND AUTHORITY TO REGULATE FISHING

If the CINMS Designation Document is modified to provide authority over fishing activities and the proposed NMSA fishing regulations are implemented, the Pacific Council provides both comment and a recommendation on the duration of such changes to regulate fishing in the water column of proposed marine protected areas. First, it appears the use of an “effective date” provision in the proposed regulation is unclear, burdensome, and inconsistent with the model language previously presented to the Pacific Council by NOS for inclusion under the NMSA 304(a)(5) process, and therefore should not be used. The Pacific Council recommends the duration of both the fishing regulations promulgated under the proposed action and the authority of the CINMS to regulate fishing should automatically sunset when fishery regulation action under MSA is taken.

Under Section 922.73 of the proposed rule, fishery prohibitions would be promulgated under NMSA authority unless those prohibitions were enacted under MSA regulations as of an inserted effective date in the NMSA final rule; sections 922.73(a) and 922.73(b) of the proposed rule state “Unless prohibited by 50 CFR Part 660 (Fisheries off West Coast States) as of [effective date of final rule], the following activities are prohibited....” This approach is unclear as to what happens if MSA regulations are promulgated after the inserted effective date. Although the preamble to the proposed rule attempts to clarify NOAA’s intent to pursue rulemaking activities to reduce the scope of NMSA fishing regulations when MSA regulations can be promulgated, there is nothing in the proposed regulatory language to ensure it will happen. The approach is burdensome in that it requires a proposed and final rulemaking process under the NMSA to execute the transition to MSA authority. The approach is also inconsistent with regard to the model language presented to the Pacific Council in November 2005 by the CINMS for inclusion under the 304(a)(5) process. This model language included no date after which NMFS regulations under 50 CFR Part 660 are not considered without additional NMSA rulemaking.

If CINMS Designation Document modifications providing authority over fishing activities and accompanying NMSA fishing regulations are determined to be necessary, the Pacific Council recommends that a direct approach be used for sunseting the NMSA regulations and Designation Document changes automatically at the time fishing regulations are promulgated under the MSA. For the proposed rule, it is recommended that the sentences in the first paragraphs of Sections 922.73(a) and 922.73(b) of the proposed rule beginning “Unless prohibited by 50 CFR Part 660 (Fisheries off West Coast States) as of [effective date of final rule], the following activities are prohibited....” be changed to direct language dictating the NMSA regulations be automatically sunset, such as “The following activities are prohibited until such date as regulations are adopted under 50 CFR Part 660. At that time, regulations promulgated under this rulemaking are rescinded and shall not be in effect.” Similarly, it is recommended that a provision be included in any Designation Document changes to mandate automatic sunseting of any fishery regulation authority of the CINMS. This would be accomplished by adding a new Article 7 to the CINMS Designation Document, such as: “Article 7. Automatic Sunseting of Fishery Regulation Authority. At the time fishery regulations are promulgated under 50 CFR Part 660 that achieve the goals and objectives of the marine reserves, marine parks, or marine conservation areas established under [insert reference to regulations implemented in the NMSA final rule], all revisions in the Designation Document made under [insert reference to and date of FR

notification of CINMS Designation Document changes] sunset and are rescinded and shall not be a functional part of the CINMS Designation Document from that date forward.”

THE SCOPE OF PROPOSED AUTHORITY TO REGULATE FISHING

Regarding fishery regulatory authorities proposed for Articles 4 and 5 of the CINMS Designation Document, the Pacific Council found the language regarding the scope of such authority to be vague and unnecessarily broad. The Pacific Council understands the intent of the proposed Designation Document change is to limit CINMS authority to the present action of establishing specific marine reserves and marine conservation areas. The FR notice and the DEIS propose to limit the authority to regulate fishing “within the scope of the State of California’s Final Environmental Document ‘Marine Protected Areas in NOAA’s Channel Islands National Marine Sanctuary’ (California Department of Fish and Game, October 2002), certified by the California Fish and Game Commission.” The Pacific Council notes that the scope of the referenced CDFG document includes a suite of action alternatives relative to establishing marine protected areas ranging from status quo, under which no new fishing regulations are implemented but can be changed at any time, to action alternatives covering larger areas than those in the current preferred alternative (DEIS Alternative 1a).

Testimony at Pacific Council meetings from NOS and CINMS representatives has indicated that the proposed fishing regulation rules and Designation Document changes would be limited just to the narrow scope of 1) the fishing regulations not currently accomplishable under the MSA and 2) only in the areas finally adopted to match marine protected areas created by State of California action in 2002. Towards that end, the Pacific Council recommends that should the CINMS Designation Document be modified to provide authority over fishing activities, the scope of such authority be limited to the areas and regulations in the preferred action alternative rather than the broad suite of alternatives contained in the “Marine Protected Areas in NOAA’s Channel Islands National Marine Sanctuary” document as currently proposed.

SPECIFIC COMMENTS ON SUPPORT DOCUMENTS

DEIS Socioeconomic Analyses

The Pacific Council recommends improvements to the socioeconomic analyses presented in the DEIS. The Pacific Council notes that the economic data used in many of the analyses are dated and reports from both Pacific Council members and the Pacific Council’s Groundfish Advisory Subpanel indicate estimates of lost revenue and maximum potential loss are lower than data from more recent fishing seasons.

Clarification on DEIS Language Regarding the Cowcod Conservation Area

The Pacific Council notes that language in the first full paragraph of page 80 of the DEIS refers to implementation of the Cowcod Conservation Area by the California Department of Fish and Game. As a point of clarification, these area closures were first implemented in Federal waters by the Pacific Council and NMFS and were followed by California State action in State-managed nearshore areas.

Changes to the Proposed Regulatory Language

The Pacific Council and its advisory bodies spent a great deal of time with CINMS staff during the NMSA 304(a)(5) process to cooperatively develop effective and enforceable fishing regulations that the fishing community could understand and comply with. The Pacific Council's Enforcement Consultant group reviewed the proposed regulations presented in the proposed rule at the September Pacific Council meeting. The Pacific Council recommends the proposed definition of "stowed gear" and the possession regulations with a marine conservation area be modified as follows.

Replace the current definition of "*Stowed and not available for immediate use*" in Section 922.71 with the following list of stowed gear definitions developed by the Enforcement Consultants:

922.71 Definitions.

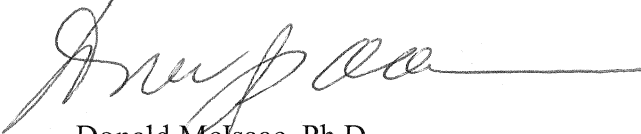
Stowed Gear Definition. For the purposes of this regulation,

- (a) *Stowed recreational hook and line fishing gear* is defined as hook and line gear with all line reeled to the reel or rod tip with hooks secured to the rod and not actively fishing.
- (b) *Stowed recreational lobster fishing gear* is defined as un-baited hoop-net gear with all lines detached from the net.
- (c) *Stowed spear guns*: unloaded, or partially disassembled (such as spear shafts being kept separate from spear gun).
- (d) *Stowed Trawl gear* must be stowed either below deck, or if the gear cannot readily be moved, in a secured and covered manner, detached from all towing lines, so that it is rendered unusable for fishing; or remain on deck uncovered if the trawl doors are hung from their stations and the net is disconnected from the doors.
- (e) *Stowed Commercial lobster fishing gear* is defined as an un-baited trap placed on or below a vessel surface and tied to such surface in a manner that would not allow immediate deployment.

Regarding the regulations limiting possession of legally harvested fish in a marine conservation area, Section 922.73(b)(3) prohibits "Possessing any living or dead organism, historical resource, or other Sanctuary resource, except legally harvested fish on board a vessel at anchor or in transit." The Pacific Council does not feel this is the intent of the regulation and recommends the phrase "at anchor or in transit" be removed because limited fishing opportunities are proposed for marine conservation areas with the expectation that fisherman would also possess legally harvested fish while continuing to fish, not only when anchored or in transit.

In conclusion, the Pacific Council looks forward to working with CINMS staff to achieve the goals and objectives of CINMS through the Pacific Council process and MSA and state authorities. If you or your staff have any questions regarding this letter, please contact me or Mr. Mike Burner, the lead Staff Officer on this matter at 503-820-2280.

Sincerely,



Donald McIsaac, Ph.D.
Executive Director

MDB:ckc

c:

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