



May 21, 2005

Mr. Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220-1384

Dear Chairman Hansen:

On behalf of The Ocean Conservancy and the Natural Resources Defense Council (NRDC), and our more than one million members and activists, we are writing to request timely action by the Council to draft the fishing regulations necessary to complete the designation of marine protected areas at the Channel Islands National Marine Sanctuary (CINMS). As you know, our organizations have supported the creation of marine protected areas (MPAs) at the Channel Islands since the beginning of the joint state/federal designation process in 1999. Completion of this project is long overdue.

This joint federal/state process has involved the Council from the beginning. NMFS staff served on the Marine Reserve Working Group from the beginning of the process and the Council and its advisory bodies have heard repeated presentations on the process, beginning in April 2001. The Council established an ad hoc review committee specifically to address the Channel Islands and the California Fish and Game Commission delayed consideration of the final preferred alternative in order to receive Council comments. The Council and its advisory bodies reviewed the extensive CEQA document for the proposal ultimately adopted by the state in 2003. The CINMS then took the extraordinary step of releasing to your Council an initial analysis in May 2004 called the "Staff Preliminary Working Draft Document" to further elicit feedback from the Council. Throughout this process, the National Marine Sanctuary Program collaborated with the Council, with respect to how fishery management might meet the goals of the Sanctuary in its Draft Environmental Impact Report. The Council has had extensive opportunities to comment on MPA designation in the Channel Islands and should be exceedingly familiar with the particulars of the draft proposals at this point in time. The next step in the regulatory process is the production of the DEIS for a formal comment period.

However, the Council is impeding completion of the DEIS under the National Marine Sanctuaries Act (NMSA). Section 304(a)(5) of NMSA provides the Council with "an opportunity" to draft fishing regulations to implement the marine reserve alternatives

analyzed in the DEIS. Instead, the Council has requested that CINMS draft an alternative to implement marine reserves under the Magnuson-Stevens Act. Moreover, the Council has stated that it does not support the promulgation of fishing regulations necessary to designate marine reserves under the Sanctuaries Act. We believe that the Sanctuaries Act requires that a DEIS for any proposed marine reserves must include and analyze the proposed draft fishing regulations to implement those reserves. The Pacific Council has the opportunity to recommend the proposed regulations (for inclusion in the DEIS). If the Council does not choose to provide those draft regulations the Sanctuary program must provide them in the DEIS. We see no justification for the Council to ask the Sanctuary to analyze an alternative legal authority to designate reserves under the Magnuson-Stevens Act, which the Council claims to have but chooses not to explain itself.

The Council has stated its belief that the Magnuson-Stevens Act has the authority and “specific potential to achieve the stated Sanctuary goals” in its April 15, 2005 letter to Mr. Daniel Basta. It has provided no analysis to support this position, and in fact, has asked the Sanctuaries Program to prepare the analysis. Our review of the statutes, published literature, and existing Council regulations does not support the Council’s position on issuing the fishing regulations for the Channel Islands marine reserves for a number of reasons.

The primary focus of the NMSA is broad resource protection, which is consistent with the goals of the MPA network designed for the Channel Islands. Section 301(b)(2) of the Sanctuaries Act states that one purpose and policy, which any Sanctuary designation must meet is “to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes.” The standards set by the language of the NMSA create a comprehensive framework that supports the designation of MPAs, particularly no-take marine reserves, for purposes broader than fisheries management alone. Since the goals and objectives for the MPA network at the CINMS include the protection of “ecosystem biodiversity” and “natural and cultural heritage” we believe the NMSA is the appropriate statute for federal designation.

Council regulation of fishing activities under fishery management plans (FMPs) do not provide for comprehensive resource protection. The Magnuson Stevens Act does not provide for comprehensive resource protection as provided under the NMSA. Councils are tasked with the management of fisheries through the adoption of FMPs and as such they may only regulate fishing and certain fishing-related impacts. The Pacific Council’s existing FMPs do not cover all species or all gears. Even combining a series of gear prohibitions and species area take restrictions would provide inadequate authority to create no-take areas at the Channel Islands. For example, many of the fisheries currently prosecuted in the area are managed by the state, such as the white seabass and halibut/angel shark gillnet fisheries. No Pacific Council FMP actively manages bonito, yellowtail, wahoo, or provides a way to manage dive fisheries.

The Council would have to amend its FMPs to include either the other target species or the specific gears themselves and then set a prohibition. If a species is added to the list of management unit species, then a whole suite of FMP requirements apply, such as the

setting of maximum sustainable yield and a definition of overfishing. It is unlikely that a broad suite of FMP amendments could be completed in a timely matter. It is also the case that fishing occurs for species covered under neither State nor NOAA regulations. Finally, no amount of amendments to existing FMPs can offer full protection at the Channel Islands because they cannot anticipate the moves of emerging fisheries. Short of developing an FMP that lists and prohibits the take of every species that resides in or transits the Sanctuary, the Council is unable to act quickly enough to deal with developing fisheries and gears.

Essential Fish Habitat (EFH) designation does not prohibit destructive activities.

The Pacific Council is in the process of identifying EFH under its Groundfish FMP. The Magnuson-Stevens Act defines EFH as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.”¹ FMPs must “minimize to the extent practicable adverse effects on such habitats caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.”² But the Council cannot prohibit non-fishing activities, such as bio-prospecting or the laying of fiber optic cables. Other federal agencies must consult with the Secretary with respect to federal actions that may adversely affect EFH, and the Councils may provide comments on such actions to the Secretary³, but the Secretary can only *recommend* measures to conserve EFH to the acting agency.⁴ By contrast, the NMSA provides strong language prohibiting the destruction, loss or “injury” of any managed Sanctuary resource and would therefore better protect any designated reserves.⁵

It is time for the DEIS to be published under the Sanctuaries Act. The Council’s actions are delaying production of that DEIS, and preventing the public from reviewing the full analysis of alternatives for the Channel Islands. We urge the Council to let the regulatory process move forward.

Thank you very much for your consideration of these comments.

Kate Wing
NRDC

Gregory Helms
The Ocean Conservancy

¹ 16 USC §1802(10)

² 16 USC §1853(a)(7)

³ 16 USC 1855(b)(2)

⁴ 16 USC 1855(b)(4)(B)

⁵ NMSA Sec. 306 (1)