

DRAFT
**ACTION TO CLOSE WATER COLUMN TO FISHING ABOVE HABITAT AREAS OF
PARTICULAR CONCERN AT CHANNEL ISLANDS NATIONAL MARINE
SANCTUARY USING THE MAGNUSON-STEVENSON CONSERVATION AND
MANAGEMENT ACT**

1.0 Proposed Action

The State of California's California Department of Fish and Game (CDFG) and NOAA's National Marine Sanctuary Program (NMSP) began a process in 1999 to identify sites as potential marine protected areas (MPAs¹) within the Channel Islands National Marine Sanctuary (Sanctuary). The identification of these locations was primarily provided by representatives of the local community that used their extensive knowledge and experience gathered from utilizing the fishery resources of the Sanctuary for both commercial and recreational purposes. The community acknowledged these areas to be highly productive locations embedded within the boundaries of the Sanctuary.

The CDFG and NMSP used the information to subsequently propose a management action to close these areas to all or limited forms of consumptive uses (i.e., fishing) so that non-consumptive benefits could be realized (i.e., enhanced ecosystem biodiversity; ecotourism, research education, etc.). The proposal amounted to closing approximately 25 percent of the area within the Sanctuary's boundaries including both State of California waters (e.g., shoreline to three miles) and Federal waters (i.e., three to six miles). The State of California closed the sites within its jurisdictional waters in 2003 by prohibiting or limiting commercial and recreational fishing in 10 State marine reserves and two State marine conservation zones. The State made its decision in designating these MPA sites with the expectation that the complementary sites in Federal waters would similarly be set aside from fishing in due time.

Actions to implement MPAs in the Federal waters portion of Sanctuary were not addressed until the Pacific Fishery Management Council (Council) took action in June 2005. The Council recommended identifying the sites as Pacific groundfish essential fish habitat (EFH) and also distinguishing the sites as habitat areas of particular concern² (HAPC) under the EFH provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In addition, the Council recommended complete fishing closures (i.e., water surface to seafloor) in these areas. However, as determined by NOAA's General Counsel, the Council's recommendation could only apply to the bottom habitat of these areas under the Pacific groundfish EFH provisions. The NMSP has published a proposed rule under the NMSA authority to complete the action in Federal waters begun by the Council (Federal Register 71: 46134). The rule would prohibit

¹ Marine protected areas are geographically discrete areas where special restrictions are applied included no fishing (i.e., marine reserves) or partial fishing (i.e., conservation zones).

² HAPCs are a subset of areas identified as EFH because they are recognized as areas of special importance that may require additional protection from adverse effects. In this particular case, the HAPC designation for Pacific groundfish extends from the sea surface to the seafloor

fishing in the water column areas directly above the Council's HAPC sites closed earlier to bottom fishing under MSA authority.

Under the proposed action described within, the Council proposes that fishery management in the Sanctuary MPA sites (i.e., water column areas above HAPC zones) be managed in accordance with MSA rather than NMSA authority. The Council argues that while the objectives of creating a network of marine reserves by the NMSP are directed at biodiversity and ecosystem protection, the means necessary to achieve these objectives requires managing fishermen's behavior. Consequently, the creation of marine reserves is a fishery management action because access rights to fishery resources are allocated and therefore the action should be accomplished under MSA.

The Council has expressed interest in and support for keeping fishery management and associated regulatory recommendations under the purview of the MSA for the final marine reserve phase at the Sanctuary. The Council's proposal will insure that Federal fishery management on the west coast remains intact under one authority and operates within its co-management process. Fisheries co-management is a partnership arrangement using the capacities and interests of the fishermen and community, complemented by the ability of the government to provide enabling regulations, enforcement and conflict resolution. The Council does not believe that this same regulatory process and transparency would be met under NMSA authorities.

2.0 Purpose and Need

Fishermen participating in west coast Federally managed fisheries under the Pacific Groundfish, Pacific Salmon, Highly Migratory Species, and Coastal Pelagic Species Fishery Management Plans (FMPs) are regulated by a series of complex and interwoven management regulations. These regulations are complicated by annual and in-season management measures that introduce spatial and temporal modifications as well as other measures such as trip limits, size restrictions etc. taken as precautions to minimize potential ecosystem impacts. The proposal by the NMSP to use the NMSA for achieving water column closures brings another layer of fishery management authority to an already intricate management regime. The Council is concerned that managers and fishermen will be subjected to another layer of bureaucracy that goes beyond the guidance of the Council and the existing fishery management agencies: CDFG and NOAA's National Marine Fisheries Service. Both of these agencies actively participate in the Council process and deliberate on all Council actions.

The Council is also concerned that displaced fishermen may move to adjacent open areas within the boundaries of Sanctuary and place more directed impacts on Federally managed fishery resources and habitats in those areas. If the NMSA authority is used to prohibit fishing in the water column at these MPA sites, Sanctuary managers will be unable to manage potential fishery impacts in the adjacent areas and will need to approach the Council. This will require additional management coordination between the Sanctuary and the Council and thereby create an additional step in an already complicated and burdensome fishery management system.

Inherent in the Council's objective to minimize the creation of a patchwork of overlapping fishery management authorities, is the Council's acknowledgement that its proposed action would also maximize areas closed to fishing for potential fisheries research. The Council recognizes that fishery managers must have access to the best available technical information to guide them in making informative management decisions. While marine reserves demonstrably conserve and enhance fish populations within their borders by providing a number of ecosystem benefits, they also provide undisturbed, reference sites against which fishery scientists can evaluate the effects of fishing and other human activities on marine ecosystems. Sites free of harvesting can provide fishery scientists with a valuable tool to separate the effects of fishing from those caused by natural changes in the environment. Data from unfished reference sites also could be used to improve estimates of population parameters for harvested species, thereby directly improving the management of fisheries.

The Council recognizes that if the types of fishery management research listed above are to materialize, then a fundamental first step is to establish these undisturbed sites by completing the final action needed to accomplish this by closing the water column above the EFH sites. The Council has contended that the creation of heritage and research reserves can serve this purpose. As stated earlier, the Council prefers this be done using MSA authority so that all fishery management actions remain under Council purview.

2.1 Council and State of California Record on Regulating Fishing at Channel Islands National Marine Sanctuary Under MSA

Council: The Council has discussed the issue of assisting the Sanctuary in achieving its MPA objectives at several of its meetings. A log of these activities is attached (Appendix A). In addition, there have been specific discussions at Council meetings where the Council's position that the administration of fishing regulations at the Sanctuary be conducted under MSA authority has been affirmed. An abbreviated record of these discussions is provided below:

March 2006: The Council scheduled further development of alternatives for implementing fishing regulations under the MSA to create the proposed no-take and limited take areas within the CINMS to meet sanctuary goals and objectives. Specifically, the Council will pursue further consideration of existing MSA provisions for extending state fishery regulations into federal waters, and directed Council staff to work with NMFS Southwest Region and National Oceanic and Atmospheric Administration (NOAA) General Counsel to provide further detail on the functional necessities of this mechanism. Additionally, Council staff was directed to research the existing administrative record on this matter for relevant content for an update at the April Council meeting.

November, 2005: The Council elected to not forward any proposed fishing regulations for the CINMS under the regulatory authority of the National Marine Sanctuaries Act. Instead, the Council passed a motion to develop regulations that achieve the stated goals and objectives of the CINMS under the aggregate of the various Council FMP authorities and complimentary State laws. A progress report is scheduled for the March 2006 Council meeting in Seattle, Washington.

September 2005: The Council discussed potential responses to a Channel Islands National Marine Sanctuary request for draft fishing regulations to be implemented under the National Marine Sanctuaries Act (NMSA) for the federal waters portion of the sanctuary. The Council adopted three alternatives for public review, including (1) no proposed regulations under the NMSA; (2) regulations reflecting closures adopted by the Council at the June 2005 meeting to protect groundfish essential fish habitat under the MSA; and (3) regulations reflecting larger marine protected areas than alternative (2) above. The range of options will be included in the November 2005 briefing book for public review and final Council action at the November 2005 meeting.

State of California: The State of California has also made it clear that establishing marine reserves at the Sanctuary and regulating fishing be undertaken through MSA authority.

In a letter written by Mr. Michael Chrisman, California's Secretary of Resources, to Mr. Dan Basta, NOAA's NMSP Director, dated April 18, 2005, Mr. Chrisman mentioned the State could not support changes in the Sanctuary' designation document

“...that allows for what appears to be an open-ended and duplicative promulgation of fishing regulations.”

Because the Sanctuary' current designation document does not authorize the regulation of fishing, Mr. Chrisman was referring to the Sanctuary' intent to change this document to allow Sanctuary the ability to regulate fisheries within its boundaries. In regard to establishing the marine reserves in the Federal waters of Sanctuary, he provided the following bullets:

- *“The Sanctuary should work with the NMFS and the Pacific Fishery Management Council to determine once and for all what it would take to establish these MPAs using existing statutory provisions,*
- *If a process can be identified under existing law that is timely, efficient, and sustainable, then we would support that course of action,*
- *If it is determined that these MPAs cannot be established in a reasonable amount of time using existing statutory provisions, then the state would consider a change in the Sanctuary designation document to establish specifically identified and designated MPAs with no conveyance of any additional fishery management authority.”*

2.2 Council Record on Marine Reserves as a Tool for Fishery Management

In 1999, the Council began a two-stage process to consider marine reserves as a tool for managing groundfish. The first part was a “conceptual evaluation” and the second part was to develop alternatives for consideration. The second phase was to be started only if there was a positive result from the conceptual evaluation.

The first phase (Phase 1 Technical Analysis) ran from the spring of 1999 through September 2000. During this phase, a technical analysis³ of marine reserves was prepared and an Ad-Hoc Marine Reserve Committee met to develop recommendations for the Council. Following these efforts, the Council adopted marine reserves as a tool for managing the groundfish fishery.

As part of the first phase, the technical analysis was designed to assist the Council in the conceptual evaluation of the role of marine reserves as a management tool. Four options were developed in considering the implementation of marine reserves. One option was the creation of “*heritage and research reserves*” which this proposed action supports. The analysis concluded that these “heritage and research” types of marine reserves should be viewed as a supplementary management tool that

“...should be essentially no-take areas, allowing research and monitoring by permit only.”

The types of research included evaluating the impacts of fishing on marine ecosystems relative to effects caused by natural changes and improving estimates of population parameters for harvested species, thereby directly improving management of the fisheries.

The analysis also noted that in the siting of heritage and research reserves, consideration should also be given to integrating or co-locating

“...these reserves with potential natural refugia and existing protected areas under other management jurisdictions.”

This recommendation comports with the proposed action to extend protection into the water column above the sites just closed for EFH protections and adjacent to the State’s MPA established in 2003.

The analysis also noted that these types of small reserves may play a valuable role in fisheries management by serving as “*reference or benchmark sites*” which would provide necessary controls for monitoring local trends in populations and ecosystem processes and would be particularly effective as controls for evaluating the effects of fishing activities in nearby unprotected areas. Specifically, the analysis summarizes the utility of such small reserves as:

“...undisturbed reference sites against which we can evaluate the effects of fishing and other human activities on marine ecosystems. These unharvested sites could provide researchers with a valuable means to separate the effects of fishing from those caused by natural changes in the environment. Data from unfished reference sites also could be used to improve estimates of population parameters for harvested species, thereby directly improving management of the fisheries.”

³ Pacific Fishery Management Council. 2001. Marine reserves to supplement management of west coast groundfish resources. Phase I Technical Analysis. Prepared by R. Parrish, J. Seger, and M. Yoklavich. 62 pp. Portland, Oregon.

The second phase involved developing options for the design and location of marine reserves. Since other west coast states are also considering marine reserves, this phase requires that the Council coordinate with state, tribal, and local agencies. A Council ad hoc committee met and developed a budget for considering a coastwide network of marine reserves. The budget proposal was put forward for Congressional funding in fiscal years 2002 and 2003, but was not funded. Without additional funding, it was recognized there was insufficient financial resources or staff time to fully implement this phase. However, the Council was prepared to respond to initiatives developed at the state and local levels as these responses fit in with other Council priorities by preparing a white paper designed to facilitate the deliberations on marine reserve proposals submitted to the Council.⁴

In addition, the Council updates its research and data needs on a biennial cycle. The update presents a compilation of high priority research and data needs categorized by fishery management plan plus economic needs and needs related to marine reserves. The last compilation was completed in 2002⁵. The Council is currently revising its research and data needs plan.

3.0 Alternatives for Implementing the Proposed Action

There are two approaches available for implementing water column closures at the Sanctuary above the HAPC sites. One approach is to utilize the provisions of the NMSA and the other is to use the MSA.

3.1 National Marine Sanctuaries Act

Under the NMSA, as amended, the Secretary of Commerce is authorized to designate discrete areas of the marine environment as National Marine Sanctuaries to protect distinctive natural and cultural resources whose protection and beneficial use requires comprehensive planning and management.

Under the NMSA, regulation of fishing by a particular sanctuary is allowed only if that sanctuary's designation document allows regulation of fishing. The Sanctuary does not currently have authority to regulate fishing, and is considering changes to its designation document to allow such authority (Federal Register 71: 46134).

The NMSA defines the terms of designation of a sanctuary as the geographic area of the sanctuary; the characteristics of the areas that give its conservation, recreational, ecological, historical, research, education, or esthetic value; and, the types of activities that will be subject to regulation to protect those characteristics.

When changing a term of designation, NOAA follows the NMSA procedures in Sections 303 and 304 of the Act. Key steps in this process include:

⁴ Pacific Fishery Management Council. 2004. Marine Reserves: Objectives, rationales, fishery management implications, and regulatory requirements. Scientific and Statistical Committee. 58 pp. Portland, Oregon.

⁵ Pacific Fishery Management Council. 2000. Research and data needs. 40 pp. Portland, Oregon.

1) Making required determinations and considering factors, as listed in the NMSA

- Conducting required consultations with Congress, Federal, State, and local agencies, the appropriate Fishery Management Council, and other interested persons
- Preparing appropriate designation documents which include an environmental impacts statement (EIS), resources assessments, maps, revised draft management plan with the proposed changes to the term(s) of designation, basis of determinations, and any proposed regulations
- Providing public notice and opportunity to comment of the proposed designation documents, including holding at least one public hearing
- Proving the public notice and the proposed designation documents to Congress and the Governor of an State in which the Sanctuary is located
- Publishing notice of the final designation documents and providing notice to Congress and the Governor

2) If the changes to the term(s) of designation involve fishing, the appropriate Council shall be provided the opportunity to prepare draft sanctuary fishing regulations within the EEZ to implement the proposed change. This opportunity was provided to the Council and they declined to provide draft regulations.

3) Final changes to a term(s) of designation, and implementing regulations, shall take effect and become final after the close of a review period of 45 days of a continuous session of Congress.

Administrative Considerations

In terms of timelines for preparing the necessary documentation for the Sanctuary management plan and changing their designation document, this alternative is close to completion, as Sanctuary has recently noticed the necessary documentation for public review. From a procedural perspective, this approach may seem simple and straightforward under the NMSA, however, the proposed change to its designation document to prohibit fishing will not be well received by the fishing community. While it appears that members of the fishing community have accepted the fact that a water column closure would be implemented, they have expressed in public testimony to the Council that any closures should come under the purview of the MSA.

Regulatory Considerations

Many MPA proponents do not view or consider closing areas to fishing as a form of fisheries management because the objectives and expected outcomes are different. However, regardless of the outcome, the means to achieve the objective is the same, that is, time/area closures for prohibiting fishing is a form of effort control which is an aspect of fishery management. Consequently, this alternative would create another authority with Federal fishery management responsibilities. This may be perceived by some as NOAA duplicating management authorities rather than relying on its existing fishery expertise located within NMFS. In addition, involving another agency lacking a track record in fishery management may complicate or confuse the coordination existing authorities responsible for management of the fisheries.

Fishery Management Considerations

This alternative would prohibit fishing activity only to the specified area in which it is intended. Consequently, use of this alternative would mean that displaced fishermen may move to adjacent open areas in the Sanctuary with the possibility of placing directed, more focused impacts on fishery resources and habitats in those areas. If NOAA does prohibit fishing in the MPA sites using the NMSA, the Sanctuary will be unable to manage potential and unforeseen fishery impacts in the adjacent areas. This will require additional management coordination between the State of California and/or the Council that does not currently exist and will increase the amount of agency overlap in management.

3.2 Magnuson-Stevens Act

Several provisions exist with the MSA that could be used by the Council for attaining fishing closures in the water column portion of its proposed HAPC sites identified within Sanctuary. The most reasonable is the discretionary provision that provides the legal authority to the Council to incorporate relevant state management actions (16 U.S.C. §1853 (b)(5)). This section states, in pertinent part:

“Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may.....incorporate, consistent with the national standards, the other provisions of this Act, and any other applicable law the relevant fishery conservation and management measures of the coastal States nearest to the fishery...”.

This provision may grant the Council the authority to extend the fishing prohibitions implemented by the State in its jurisdictional waters in 2003 to achieve the proposed action. Several advantages and disadvantages exist with this approach.

Administrative Considerations

Use of this approach would require the Council to prepare a plan or regulatory amendment to one of its FMPs. This necessity puts this approach further behind than the NMSA route in terms of document preparation. Because the action would incorporate the State’s regulations to prohibit all fishing, any or all of the Council’s FMPs could be used although the Groundfish FMP may be more practical as the area . For practical purposes, only one plan would need to be amended and the workload to prepare an environmental analysis would need to be established.

Regulatory Considerations

The current regulatory framework would not change. All fishery management actions occurring in Federal waters would still operate through the Council process of both which NMFS and the State of California actively participate. This alternative would support the requests by the State of California.

Fishery Management Considerations

This alternative would rely on existing Federal fishery management authority and thereby avoid the complications of adding another regulatory layer. This would include managing fishing activities both inside the MPA sites as well as adjoining areas outside where displaced fishermen may fish instead. The alternative also insures that the fishery management actions within the

MPAs for both water column and bottom closures are also considered by the Council within the broader context of its coastwide fishery management actions. In addition, all the scientific expertise needed for stock assessment, fishery research, fishery economics, and data collection pertaining to fisheries all resides within the authorities of the existing regulatory framework.

The alternative also supports arguments stated in the Council's Phase 1 Technical Analysis for the creation of heritage and research reserves that can serve as "reference or benchmark sites" which would provide necessary controls for monitoring local trends in populations for harvested species and thereby directly improve the management of fisheries. Further, the creation of these reserves would provide undisturbed control sites for evaluating the effects of fishing activities in nearby unprotected areas.

Lastly, the alternative supports the recommendation of the Technical Analysis which suggested that the siting of heritage and research reserves consider integrating or co-locating such reserves with existing protected areas under other management jurisdictions. In this case, the State of California's marine reserves located shoreward of the Sanctuary's proposed sites (with the exception of the "Footprint" site) serve as the co-located sites and the extension of the State's management measures into these water column of these proposed sites would be the regulatory action necessary to achieve full closure.

Appendix A

Table 1. Draft Record of Pacific Fishery Management Council Actions Relative to Marine Protected Areas in Federal Waters within the Channel Islands National Marine Sanctuary.

Date	Location	Agenda Item Title	Council Task
April 3, 2001	Sacramento, California	Channel Island National Marine Sanctuary Program (CINMSP)	Provide comment to the CINMSP proposed marine reserve alternatives prior to development of a consensus recommendation by the Sanctuary Advisory Council
June 12, 2001	Burlingame, California	Marine Reserves in the Channel Islands National Marine Sanctuary (CINMS)	1) Provide guidance to Council staff and advisory bodies in light of the response to the Council letter and the update provided at this meeting 2) Consider any recommendations made by the source agencies (CDFG and CINMS)
Sept. 11, 2001	Portland, Oregon	Marine Reserve Proposals for Channel Islands National Marine Sanctuary	Consider any recommendations made by the source agencies (CDFG and CINMS)
Oct. 31, 2001	Millbrae, California	Status of Marine Reserves Proposals for Channel Island National Marine Sanctuary	1) Consider the Scientific and Statistical Committee (SSC) report and provide guidance, if needed 2) Decide on a response to the California Fish and Game Commission re: Marine Reserve Alternatives 3) Respond to the CINMS staff report on procedures for federal consideration of marine reserves in the CINMS, if appropriate
March 13, 2002	Sacramento, California	Status of National Marine Sanctuary Processes Pertaining to Marine Reserves	Review and discuss status of state and federal processes for establishing marine reserves within CINMS
April 9, 2002	Portland, Oregon	Review Process for Channel Islands National Marine Sanctuary and Update on Other Marine Reserves Processes	Provide Direction for Review of State Proposal for Marine Reserves in CINMS
June 20, 2002	Foster City, California	Review of Proposal for Marine Reserves in State Waters of the Channel Islands National Marine Sanctuary	Develop a Response to the California Fish and Game Commission (CFGC)

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Sept. 11, 2002	Portland, Oregon	Marine Reserve Proposals for Channel Island National Marine Sanctuary	1) Review the SSC response to Leeworthy and Wiley letter and determine whether or not to include it as an attachment to the draft letter to CFGC 2) Finalize the draft letter to CFGC with recommendations on marine reserves for the CINMS
March 12, 2003	Sacramento, California	Planning for Federal Waters Portion of the Channel Islands National Marine Sanctuary	If Appropriate, Adopt Process for Consideration of Marine Reserves in Federal Waters in or near the CINMS
June 19, 2003	Foster City, California	Planning for Federal Waters Portion of the Channel Islands National Marine Sanctuary	Consider and Comment on CINMS Proposals, including commenting on changes to the designation document and the environmental review process
Sept. 10, 2003	Seattle, Washington	Marine Reserves in the Federal Waters Portion of the Channel Islands National Marine Sanctuary	Receive an update on the CINMS environmental review process
Nov.4, 2003	San Diego, California	Jurisdiction and Authority Issues for Marine Protected Areas	Council Discussion, Including Questions to Presenters from National Marine Fisheries Service and National Ocean Service
Nov. 4, 2003	San Diego, California	Update on West Coast Marine Protected Areas Issues including Channel Islands National Marine Sanctuary	Council Discussion, including an update from CINMS staff on progress of developing the preliminary draft environmental document and summary of scoping comments
March 11, 2004	Tacoma, Washington	Update on West Coast Marine Protected Areas Issues including Channel Islands National Marine Sanctuary	Council Discussion, including review of process and schedule for Draft Environmental Impact Statement preparation
June 17, 2004	Foster City, California	Federal Waters Portion of the Channel Islands National Marine Sanctuary Schedule Update	Council Discussion and Guidance on CINMS Schedule

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Date	Location	Agenda Item Title	Council Task
Nov. 5, 2004	Portland, Oregon	Federal Waters Portion of the Channel Islands National Marine Sanctuary	Recommend a Range of Draft Environmental Impact Statement Alternatives for Marine Reserves and Conservation Zones within the Sanctuary
March 10, 2005	Sacramento, California	Federal Waters Portion of the Channel Islands National Marine Sanctuary	Review the CINMS Designation Document consultation letter and consider a response within the 60 day comment period
April 7, 2005	Tacoma, Washington	Channel Islands National Marine Sanctuary	Review the range of Council responses to the CINMS Designation Document consultation letter and consider adopting a response
June 2005	Foster City, California	No Council Agenda Item	CINMS present a letter and supporting document initiating the National Marine Sanctuaries Act (NMSA) 304(a)(5) process requesting Council draft regulations to be promulgated under the NMSA
Sept. 22, 2005	Portland, Oregon	Channel Islands National Marine Sanctuary	Consider draft fishing regulations under to the NMSA for public review for the potential establishment of marine protected areas in federal waters of the CINMS
Nov. 1, 2005	San Diego, California	Channel Islands National Marine Sanctuary	Adopt Final Recommendations for Proposed Fishing Regulations under National Marine Sanctuaries Act Authority for the potential establishment of marine protected areas in federal waters of the CINMS
March, 10, 2006	Seattle, Washington	Fishery Regulation in Marine Protected Areas within the Channel Islands National Marine Sanctuary through Magnuson-Stevens Act and State Management Authority	Provide guidance on a course of action regarding Magnuson-Stevens Fishery Conservation and Management Act regulations within the CINMS

Appendix B

Review of Fishery Research and Monitoring Activities within Sanctuary MPAs (To Be Completed)