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May 8, 2008

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Pacific Fisheries Management Council
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Portland, OR 97220-1384

Mr. Daniel J. Basta, Director
National Marine Sanctuary Program
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

Re: *Decision by Paul Michel, Superintendent of the Monterey Bay Marine Sanctuary
Regarding Need for Marine Protected Areas in Federal Waters; February 15 and
April 15, 2008 Letters to Sanctuary Advisory Council Members*

Dear Vice-Admiral Lautenbacher, Dr. Balsiger, Mr. Basta, Mr. Hansen and Mr. McIsaac:

Our firm represents the Alliance of Communities for Sustainable Fisheries (“ACSF”), an organization dedicated to representing the interests of recreational and commercial fishing industries in the geographic region from Point San Luis (Avila Beach) to Pillar Point in San Mateo County, in the State of California, and is comprised of local associations and communities. ACSF has been particularly active with respect to the programs of the Monterey Bay National Marine Sanctuary (“Monterey Sanctuary”). At the inception of the Monterey Sanctuary, representatives of the local California coastal fishing community supported the effort to create the special management program plan outlined in the 1992 Final Environmental Impact

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Statement/Management Plan issued by the National Oceanic and Atmospheric Administration (“NOAA”). The 1992 agency action approved the designation of the Sanctuary and approved its “Final Management Plan.” As you know, the Sanctuary’s Designation Document does not authorize the regulation of fishing, except for “aquaculture and kelp harvesting within the Sanctuary.” Regulations implemented for the Sanctuary are found at 15 C.F.R. § 922.130 to 922.134.

Recently, due to an unusual amount of interest and strong political pressure from certain environmental interest groups and others, the Monterey Sanctuary has been considering whether the Sanctuary should “move forward with Marine Protected Areas” (referred to herein as “MPAs”). It appears that the Sanctuary has created an MPA Working Group, which has been charged with developing a “plan for evaluating the utility and potential siting of MPAs” within the Sanctuary Boundaries. On February 15, 2008, the Superintendent of the Sanctuary, Mr. Paul Michel, announced his decision to “mov[e] forward with MPAs in the federal waters of the Sanctuary.” It would appear, however, based on Mr. Michel’s announcement and related background documents, that the regulatory action that would underpin these MPAs would be a total, or near total, ban on any harvest of fishery resources within MPA boundaries. In effect, the proposed MPAs would manage harvest fisheries by banning fishing, an action that can only be characterized as the “regulation of fishing.” No other activity would be restricted in the proposed MPAs, just the taking of fishery resources within Sanctuary boundaries outside three miles from shore. It appears that Mr. Michel predicates his decision on the following conclusion:

However, while the existing spatial management measures in state and federal waters of the Sanctuary provide valuable protections from fishing impacts in certain habitats. [sic]¹ Those habitats further offshore are either not adequately represented in existing MPAs, or not fully protected by the gear based restrictions associated with EFH [essential fish habitat] or the temporary RCAs [Rockfish Conservation Areas].

On April 15, 2008, Mr. Michel sent another letter seeking to “provide additional information and rational on this decision and clarif[y] the role of the National Marine Sanctuaries Act (NMSA) in managing the national marine sanctuaries from an ecosystem-based approach.”

We are writing to express to you, on behalf of ACSF, our concern that the Monterey Sanctuary efforts regarding the creation of MPAs is not authorized by its Designation Document. We seriously question whether federal law allows the Monterey Sanctuary to move forward unless and until its Designation Document is amended pursuant to the NMSA, 16 U.S.C. § 1434. The Monterey Sanctuary is not authorized to regulate fishing in any fashion, including banning

¹ This sentence is incomplete in the original, containing only a dependent clause before the period.

fishing to create a so-called MPA. Mr. Michel has failed, in his recent correspondence, to point out this important legal restriction on the Sanctuary's regulatory authority. This legal restriction is very much a part of the history of the creation of this Sanctuary, and binding on the agency. The amendment of the Designation Document must precede any effort to create an MPA that regulates fishing in any manner.

Moreover, no such regulatory action regarding fishing, whether it involves a ban or any other restriction, can be undertaken without full compliance with Congress' recent amendment to the Magnuson-Stevens Act that expanded the authority of Regional Fishery Management Councils, in their discretion, to "designate zones where, and periods when, fishing may be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessel or with specified types and quantities of fishing gear." 16 U.S.C. § 1853(b)(2)(A). This recent specific Congressional authorization trumps the more general authority provided under the NMSA. See *Santiago Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2004) (it is an elementary tenet of statutory construction that where there is no indication otherwise, a specific statute will control a general one). The general authority given to NOAA in the NMSA for creation of marine sanctuaries does not contain any special authority to create MPAs. No MPA that bans or restricts fishing can be instituted without following the procedures and standards set forth in the Magnuson-Stevens Act, as well as the requirements of the NMSA.

What Are MPAs Anyway?

A "marine protected area" or MPA is not defined in any federal statute.² On May 26, 2000, President Clinton issued Executive Order 13158 on Marine Protected Areas, defining an MPA as follows:

"Marine Protected Area" means any area of the marine environment that has been reserved by the Federal, State, territorial, tribal or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein. [Sec. 2.a]³

Yet this Executive Order did not contain new legal authority or change in any way existing legal authority with respect to the marine environment, such as laws that regulate vessel transit and pollution control, endangered and threatened species, water pollution, coastal zone management, fishery management, or any other specific statute enacted by Congress that implicates management of the marine environment.

² In fact, the only reference in federal statutes to "marine protected areas" is found in the Coral Reef Conservation Act, 16 U.S.C. §§ 6402(b)(8) and 6409(2), but the term not defined.

³ The same definition is found in the Report of the Marine Protected Areas Federal Advisory Committee on Establishing and Managing a National System of Marine Protected Areas, NOAA (June 2005), at 2.

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Some have referred to the recently created Northwestern Hawaiian Islands Marine National Monument as an MPA. President Bush proclaimed 1,200 nautical miles of coral islands, banks and shoals as a National Monument on June 15, 2006, relying on the authority given him under section 2 of the Act of June 8, 1906, commonly referred to as the "Antiquities Act." 16 U.S.C. § 431. All fishing activities in the National Monument will be prohibited on June 16, 2011. Therefore, while the NOAA Marine Sanctuary Program manages this unique National Monument in the ocean, the Monument was not created under authority of the NMSA.

Most notably, Congress has never amended the NMSA to provide specific authority to create MPAs. See William J. Chandler and Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 E.L.R. 10505-10565 (2004). Some have asserted that the purpose of the NMSA is to provide authority to control all threats to the entire marine ecosystem within a sanctuary. However, the legislative history of that law evinces a far more limited intent by Congress, as do myriad other special purpose laws enacted to prevent air pollution, water pollution, endangered species, marine mammals, and, of course, marine fisheries. In his April 15 letter, Mr. Michel implies that the findings and purposes and policy sections of the NMSA can be read broadly, but ignores the clearly stated restraint on such a reading in Section 301(b)(2) which mandates that any actions under the NMSA must be implemented in a manner "which complements existing regulatory authorities." The NMSA cannot be read to supplant other regulatory authorities.

The conclusion that the Superintendent of a marine sanctuary can widely regulate or control every possible human-induced environmental impact within the limited boundaries of that sanctuary, in order to truly preserve the area in its natural state, is simply not legally viable. As the Supreme Court recently stated when interpreting authority given under a statute: "Congress does not hide elephants in mouseholes." *Whitman v. American Trucking Assn, Inc.*, 531 U.S. 457, 468 (2001). Congress never gave the Marine Sanctuary Program such sweeping authority in the NMSA.

Even assuming that the Congress intended to give such broad authority (which we do not), we find it highly questionable that Congress, therefore, intended the Marine Sanctuary Program to create an MPA that only regulates or bans a single activity, i.e. fishing, in order to "restore and maintain" the entire ecosystem structure and function in a marine sanctuary and to preserve that ecosystem in its natural state.⁴ No one can reasonably believe that current fishing activity, subject to the existing strict restrictions and limits, is the only issue to be addressed in seeking to restore ecosystem structure and function in the Monterey Sanctuary, if indeed the best scientific information available shows fundamental problems in the ecosystem caused by

⁴ We are certain that all of you are aware of the likely widely differing scientific opinions as to what might be the "natural state" of this discrete portion of the dynamic ocean environment along the California coast.

fishing.⁵ Indeed, such an irrational conclusion suggests a political effort to subvert the procedures and standards created by the Magnuson-Stevens Act, not a meaningful effort to create real protections for the entire ecosystem within the Monterey Sanctuary. For example, should all shipping and boating, with the attendant air and water pollution, oil spill risk, marine mammal strike danger, and other potential environmental impacts be banned? What about water pollution and debris that enter the Sanctuary from land-based sources?

What Can be Regulated As an MPA Created under the NMSA?

Consequently, it is quite unclear as to the legal authority that would guide the creation of MPAs in the context of the NOAA Marine Sanctuary Program, in general, and the Monterey Sanctuary, in particular. Our view of the law is that any such MPA cannot include any restrictions on fishing within the Monterey Sanctuary, unless and until its Designation Document is properly amended in accordance with NMSA. If and when the Designation Document is amended, then any fishery management regulations must go through the process set forth in subsection 304(a)(5) of the NMSA. 16 U.S.C. § 1434(a)(5). The Designation process is central to the operative provisions of the NMSA. It seems highly inappropriate for Mr. Michel to draw his conclusions without following the Designation process set forth in the Act, including consultations with the appropriate Committees of the Congress. Mr. Michel's recent correspondence avoids any mention of this fundamental legal issue.

With respect to any ban or restriction on fishing, the specific terms of the Magnuson-Stevens Act would control, both as to procedure and standards for consideration, not the NMSA. Therefore, only the regional councils appear to have the discretion to recommend such restrictions on fishing, including within any so-called MPA, not the Marine Sanctuary Program. Moreover, by its recent action with respect to this year salmon fishing season, the Pacific Fishery Management Council has demonstrated its ability to make tough conservation decisions based on the best available scientific information. In contrast to the extensive experience and history of management of marine fisheries under the Magnuson-Stevens Act, the Marine Sanctuary Program has no proven track record, or even any technical fishery ecosystem capability, with respect to the "regulation of fishing." Mr. Michel's attempt to say that "establishment of MPAs for [Monterey Sanctuary] objectives" is "not a tool for fishery management" is specious. Banning fishing is, in fact, the "regulation of fishing" regardless of the objective. We know that some scientists have argued that an MPA that bans fishing is a fishery management tool that would build up stocks within the MPA and greater catches would be available just outside its boundaries. If Mr. Michel's characterization were correct, he will then argue that any MPA that

⁵ Moreover, it is not clear there is any convincing scientific evidence that fishing activities can be singled-out and blamed as the major negative causative factor with respect to the current ecological condition of the Monterey Sanctuary area. Using MPAs as a laboratory experiment, to see whether this theory is right or wrong, in this limited part of the dynamic ocean environment, truly puts the cart before the horse.



bans fishing for sanctuary purposes would not have to go through the review process for fishing regulations Congress created in Section 304(a)(5) of the NMSA, because it is not fishery management. 16 U.S.C. § 1434(a)(5). Such an argument is patently wrong.

Summary of Important Points

We offer the following summary comments on these issues, for your consideration, on behalf of ACSF:

1. The principal operative provision in the NMSA is the creation and approval of a sanctuary's Designation Document. Section 303; 16 U.S.C. § 1433 (Sanctuary Designation Standards; and Section 304; 16 U.S.C. § 1434 (Procedures for Designation and Implementation). Restrictive regulations for each sanctuary are predicated on the Designation Document and its contents, particularly the management plan for the sanctuary.
2. The Monterey Sanctuary's Designation Document expressly excluded the regulation of fishing, except for aquaculture (which is really not fishing) and kelp harvesting. As such, as a matter of law, there is no authority in the Designation Document and the existing management plan for the Sanctuary to regulate fishing, for whatever reason. It does not matter that the regulation of fishing is given the name "Marine Protected Area."
3. The NMSA makes clear that the regulatory powers of NOAA under that Act are limited to carrying out the purposes, goals and objectives as spelled out in the Designation Document. Therefore, no regulations that would "regulate fishing" may be adopted for the Monterey Sanctuary, unless and until the Sanctuary's Designation Document is amended in accordance with the standards and procedures of the NMSA.
4. The special fishing regulation provision in the NMSA (Section 304(a)(5); 16 U.S.C. § 1434) only applies where a Designation Document, or a proposed amendment to a Designation Document, specifies that a particular sanctuary intends to regulate fishing. Where, as here, the Designation Document expressly excludes the regulation of fishing, the Marine Sanctuary Program has no standing to use that special provision or ask a Regional Fishery Management Council to follow the procedures of Section 304(a)(5) with respect to fishing regulations in the Monterey Sanctuary.
5. The Regional Fishery Management Council may not even consider Mr. Michel's proposal because the Monterey Sanctuary lacks the legal authority to implement fishing bans or restrictions, given its Designation Document. Our federal government, by definition, is one of limited powers and certain laws, such as the Anti-Deficiency Act,⁶ are intended to limit government expenditures to those authorized by law and appropriated by Congress. While we do not necessarily suggest a violation here, the issue should be carefully scrutinized.

⁶ 31 U.S.C. § 1341(a)(1)(A) and (a)(1)(B).



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6. If the Monterey Sanctuary's Designation Document were in fact amended, then the special fishing regulation provision in Section 304(a)(5) would come into play.

7. Any fishing regulation that would designate zones where, and periods when, fishing may be limited, or shall not be permitted, must be issued in accordance with the Magnuson-Stevens Act, given Congress' express directive on such actions. The rationale behind this is quite clear. Restrictions and bans on fishing will impact overall fishery management goals and plans and, unless integrated using the best available scientific information, serious conflicts could occur. One obvious negative impact would be to force harvesting from certain areas to other areas, causing local over-harvesting or disruption to carefully balanced allocation rules that were made with local fishing communities in mind. Some Regional Fishery Management Councils have instituted trawling bans in sensitive ocean habitats already. Therefore, with respect to a fishing regulation that would ban or restrict fishing within the Exclusive Economic Zone between 3 and 200 miles, the Magnuson-Stevens Act fishery management process appears to take precedence over the fishing regulation process set forth in Section 304(a)(5) of the NMSA.

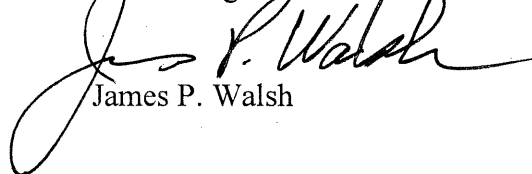
Congressional Guidance May Be Necessary

Before the Monterey Sanctuary moves forward with MPAs, given its questionable legal authority, it may be appropriate for NOAA to ask Congress to consider and, if necessary, enact new legislation on MPAs, before any large expenditure of time and expense is invested in Mr. Michel's proposal under the vague and conflicting authority of the NMSA. For certain, Congress must be involved in amending the Designation Document of the Monterey Sanctuary to allow for "regulation of fishing" before any such regulations should be considered by NOAA or the Pacific Fishery Management Council under the NMSA or the Magnuson-Stevens Act.

ACSF offers these comments in order to contribute to the continuing debate over MPAs. We hope that you will give them serious consideration. We ask that you make this letter a part of any administrative record being developed with respect to Mr. Michel's proposal or with respect to MPAs on the California coast.

Very truly yours,

Davis Wright Tremaine LLP



James P. Walsh



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cc: The Honorable Barbara Boxer
The Honorable Dianne Feinstein
The Honorable Lois Capps
The Honorable Anna Eshoo
The Honorable Sam Farr
The Honorable Jackie Spier
The Honorable Lynn Woolsey
Association of Monterey Bay Area Governments (AMBAG)
City of Monterey
City of Morro Bay