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July 1, 2005

Mr. Daniel J. Basta, Director
National Ocean Service
National Marine Sanctuary Program, N/ORM-6
1305 East-West Highway,
Silver Spring, MD 20910-3281

Re: Marine Protected Areas in Federal Waters of the Channel Islands National Marine Sanctuary

Dear Mr. Basta:

Thank you for the letter we received May 25, 2005 providing the opportunity to prepare draft fishing regulations for the federal waters portion of the Channel Islands National Marine Sanctuary (CINMS) under 304 (a)(5) of the National Marine Sanctuaries Act (NMSA). The letter and supporting materials were included in the advance briefing book for the Pacific Fishery Management Council (Council) June 12-17, 2005 Council meeting in Foster City, California and the Council discussed them on Monday, June 13, 2005. The Council also considered area protection in federal waters of the CINMS on Wednesday, June 15, 2005 under the groundfish essential fish habitat (EFH) agendum. The Council tasked me with conveying initial comments of the Council on your NMSA section 304(a)(5) notification letter and informing you of their action on groundfish EFH relative to the CINMS.

NMSA Section 304(a)(5) Letter

In discussing the referenced materials, the Council expressed concern about a change in the collaborative process by which final Council action is taken on the opportunity to draft proposed fishing regulations under the NMSA. The Council also had some questions about the content of the letter and some requests relative to the logistics of the 120-day response period. Lastly, the Council scheduled consideration of proposed fishing regulations under the NMSA for a two-meeting process at the upcoming September and November Council meetings in Portland, Oregon and San Diego, California respectively.

The Council expressed concern with what appears to be a change in the process by which final Council action is taken on the opportunity to draft proposed fishing regulations under the NMSA. Up until this point, the Council was under the impression that it would see essentially a full draft of the analysis of a draft environmental impact statement (DEIS) prior to developing a recommendation

on proposed fishing regulations. This would allow the Council to consider essentially the same facts and analysis that the CINMS, National Marine Sanctuary Program, the National Ocean Service, and the Secretary of Commerce would all see prior to their decision making on this matter. A process whereby all parties consider the same information would seem to promote consistency in the federal decision-making process. Conversely, if the sequence of those individually considering recommendations, or in the case of the Secretary, a final decision, was made on the basis of different facts and analysis, lack of consistency in decision making would seem a higher probability. This change in process is a disappointment, given the benefits and expectations of the public relative to transparency and consistent use of common information by parties charged with decision making on this issue. It is unclear at this point what differences there will be between the summary analyses in the May 25 correspondence and the DEIS.

The Council also had questions about both the content of the May 25 correspondence and matters that were not included in the correspondence. On content, there is a question of whether the NMSP accurately perceives the Council position on the combined use of the existing Magnuson-Stevens Fishery Conservation and Management Act (MSA) and California State landing and possession authorities to achieve CINMS goals without proceeding under the NMSA process, including amending the CINMS Designation Document. The May 25 letter first correctly describes the Council recommendation to not change the Designation Document at this time, pending an evaluation of the combination of MSA and state authorities as a possible avenue to reach the CINMS' stated objectives. However, the next five times this jurisdictional matter is described in the letter, the concept is characterized as a mechanism under MSA authority without mention of the additive component of the landing and possession authority of California State law in fully protecting CINMS living resources from the effects of fishing. To be clear, the basis of the Council position on the Designation Document change and the Council request for an additional jurisdictional alternative in the DEIS was the concept that the combination of legal authority under the MSA and California State fish and game laws, including and particularly landing and possession regulations, may be an adequate substitute for the NMSA process with regard to regulating fishing to achieve the CINMS stated goals and objectives. You have indicated the analysis of this question will be forthcoming by July 18, 2005; the Council asks that opinion provide analysis of the concept as described in this letter and not just the alternative of singular MSA authority.

The Council has an additional question regarding alternatives not included in the May 25 correspondence. In the Council's December 8, 2004 letter responding to the CINMS request for input on development of the DEIS, particularly the request of input on the adequacy of the range of alternatives, three additional alternatives were recommended for further analysis: the jurisdictional alternative discussed above, an alternative described as the "Miller/Hoeflinger alternative" (referred to in the Council forum as the "fishing industry alternative"), and a subset of alternatives analyzing the designated areas as conservation areas in comparison to no-take marine reserves. The May 25 correspondence supporting materials that contain descriptions and summary analyses of the alternatives does not appear to contain any reference to the Miller/Hoeflinger or conservation area comparison alternatives, nor mention why they were considered and rejected. Noting that a DEIS would typically contain information about alternatives considered and rejected, the Council would appreciate such analysis prior to the onset of the upcoming two-meeting process to consider draft fishing regulations under the NMSA.

The Council also has two requests relative to logistics of the 120-day notification. The May 25 letter indicates that 120-day period would extend for 120 days beyond July 18, the date the NOAA analysis of jurisdictional alternatives is expected. Noting the July 18 deadline was not a Council request, and there may be unforeseen circumstances that prevent delivery of a useable analysis on July 18, we ask that (1) if the referenced analysis is received by July 18, we be provided until November 23 to accommodate full Council member review of the response language in the 12 working days subsequent to the November Council meeting, and (2) in the event the opinion is not available on July 18, the 120-day notification period begin when it is made available. We understand the NMSP is concerned about being as expeditious as possible in the ongoing NMSA process. In the event we can provide the formal Council response earlier than November 23, we will do our utmost to do so.

Lastly, we want to inform you that the Council has scheduled consideration of proposed fishing regulations under the NMSA for a two-meeting process at the upcoming September and November Council meetings in Portland, Oregon and San Diego, California respectively. It will be helpful if the information requested in this letter can be provided by late August for distribution in the advance briefing book for the September Council meeting. Also, noting that the analysis of the two jurisdictional alternatives currently in play has yet to be presented (the NMSA alternative and the MSA/state authorities alternative), this two-meeting schedule presumes it will be appropriate to proceed under the NMSA alternative.

Council Action Under Groundfish EFH Protection

The Council's April 15, 2005 letter regarding potential amendments to the CINM's Designation Document stated the belief that, pending the jurisdictional analysis requested in our December 8, 2004 letter, the combination of existing MSA and state authority can achieve CINMS goals in designating marine protected areas. At the recent June meeting, the Council took action to initiate such designation by identifying groundfish EFH, habitat areas of particular concern (HAPC), and adopting mitigative measures to minimize adverse impacts to EFH in federal waters of the CINMS. The Council designated the federal water areas identified under Alternative 2 of your March 25, 2005 supporting documentation as HAPC and identified these areas as "no-take" areas as a means of minimizing adverse impacts to EFH (with the exception of the western Anacapa Island area which will be closed to specific gear types). The Council anticipates completing the Groundfish Fishery Management Plan amendment and regulations on this matter in the fall of 2005 for full federal implementation by May 2006. Additionally, the California State government seat at the Council table announced the intent to proceed with any state landing and possession regulation enactments that may be necessary to achieve effective no-take marine reserves with regard to fishing in these federal water areas of the CINMS.

The Council would consider additional regulations under the other Council FMPs for coastal pelagic species, salmon, and highly migratory species if that were to be necessary for protection in these CINMS areas. At this time, initial advice from NOAA General Counsel is that, depending on the record, the prohibitions on fishing gear that may impact groundfish EFH could be sufficient to achieve no-take marine reserve status. In the event that the record for the groundfish action does not support no-take marine reserves and additional Council action is necessary, the Council would consider additional action under its MSA authority.

The Council looks forward to working with the CINMS staff towards a decision by the Council on proposed fishing regulations under the NMSA this fall and would appreciate a response to the comments expressed at the June Council meeting as conveyed above. If you or your staff has any questions about this letter, please don't hesitate to contact me or Mr. Mike Burner, the lead Staff Officer on this matter at 503-820-2280.

Sincerely,

D. O. McIsaac, Ph.D.
Executive Director

MDB:kla

c: Council Members
Dr. William Hogarth
Dr. Rebecca Lent
Mr. Christopher Mobley
Mr. Sean Hastings
Dr. John Coon
Mr. Mike Burner