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December 29, 2006

Mr. Brady Phillips
JMPR Management Plan Coordinator
NOAA Marine Sanctuary Program
1305 East-West Highway, N/ORM-6
Silver Spring, MD 20910

RE: Comments on Proposed Rule for Regulation of Certain Activities in the Monterey Bay National Marine Sanctuary; 71 Fed. Reg. 59050-59066 (Oct. 6, 2006); Draft Management Plan (Oct. 2006)

Dear Mr. Phillips:

The Alliance of Communities for Sustainable Fisheries (the "Alliance") is submitting these comments on the proposed regulations and management plan revisions that would comprise changes to the formative legal documents for the Monterey Bay National Marine Sanctuary (the "Monterey Sanctuary"), as proposed in the Federal Register of Oct. 6, 2006. The Alliance is a group of various organizations and individuals dedicated to preserving sustainable fisheries for coastal communities on the central California coast. Many of our members have long been active on fishery related matters, at both the state and federal levels of government, and were involved in the process that led to creation of the Monterey Sanctuary.1[1] We ask that these comments be considered by NOAA during deliberations that will lead to final regulations for the Sanctuary and that they be made a part of the administrative record in this matter.

1. Management of Marine Fisheries Within the Boundaries of the Sanctuary.

We believe that marine fisheries should be managed primarily, if not exclusively, by state and federal agencies pursuant to legislation and regulations that have been enacted for that specific purpose. On the federal side, the principal governing legislation is the Magnuson-Stevens Fishery Conservation and Management Act, which was recently amended by the United States Congress.2[2] The primacy of the Magnuson-Stevens Act is also spelled out in the National Marine Sanctuaries Act, in particular Section 304(a)(5) [16 U.S.C. § 1434(a)(5)]. In its original designation document, the Monterey Sanctuary had no authority to regulate fishing activity, except for "aquaculture or kelp harvesting within the Sanctuary." The Alliance believes it would be duplicative of the programs being administered by the Pacific Fishery Management Council and NOAA-Fisheries to provide broad regulatory authority over fisheries to a Sanctuary manager, either directly or indirectly. The NOAA Marine Sanctuaries Program lacks the breadth of scientific experience and knowledge possessed by the Council and NOAA-Fisheries on fisheries questions. And the Magnuson-Stevens Act is implemented in a much more open and transparent fashion than the Sanctuaries Program. Congress' recent reaffirmation of the Council process, after reviewing suggested changes in that process during reauthorization, confirmed

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1 [1] See generally, Chandler and Gillelan, "The History and Evolution of the National Marine Sanctuaries Act," 3 Environmental Law Reporter 10505-1056 (June 2004).

national policy on the question of primary of national fishery management under the Magnuson-Stevens Act.

Principles of good and efficient government militate against creating competitive regulatory programs that breed conflict and stalemate. This kind of conflict is one of the weaknesses of the existing statutory language in the Sanctuaries Act relating to fishery management. We consider it unfortunate if the NOAA Marine Sanctuaries Program expands its bureaucratic "turf" with respect to fishing issues. For example, the Pacific Council has taken steps to restrict trawling activities in environmentally sensitive areas along the West Coast. In this regard, it is noted that in H.R. 5946 Congress added new discretionary authority to the Councils to protect deep sea corals and create closed fishing areas (sometimes referred to as "marine protected areas") as part of the Magnuson-Stevens fishery management process. This new discretion must be exercised on the basis of several factors, including use of the best scientific information available and an assessment of the costs and benefits of any area closure to fishing. No comparable amendments have been made to the National Marine Sanctuaries Act. Thus, Congress has provided primary responsibility for marine protected areas, as they might relate to marine fisheries, to the Councils and NOAA-Fisheries, not the NOAA Marine Sanctuaries Program. We hope that this recent legislation will eliminate any unnecessary conflicts within NOAA between NOAA Fisheries and the NOAA Marine Sanctuaries Program.

For the past 30 years, the Pacific Council has been developing and refining fishery management regulations that conserve local fishery resources for the long term. Many fisheries are under very tight regulation because of reductions in the size of certain stocks. Further restrictions are incorporated from other federal environmental statutes--such as the Endangered Species Act, the Marine Mammal Protection Act, and many others—during the development of fishery management regulations. We believe these actions are adequate to protect the fishery resources found within the Monterey Sanctuary. Moreover, we note that efforts are underway to strengthen the communications between the Pacific Council and those responsible for managing the various marine sanctuaries along the West Coast, and we support these discussions.

The Magnuson-Stevens Act now clearly (since 1996) provides to the councils the authority to protect habitats and to manage on an ecosystem-wide basis. The Sanctuary has asserted that they are concerned with ecosystems, not just with individual species, and that only they are concerned with habitats; however, that's no longer true. It was true to some degree when the MBNMS was designated in 1992, but not now, and the PFMC has taken concrete actions to protect habitats and ecosystems (i.e., the huge Essential Fish Habitat area.)

We therefore ask that the adoption of the final regulations for the Monterey Sanctuary reflect that marine fisheries within the Sanctuary are to be regulated pursuant to the Magnuson-Stevens Act consistently with existing law and the new amendments to the Magnuson-Stevens Act. We support continuation of the language in the designation document (Article 4, Section 1) that limits the regulatory authority of the Monterey Sanctuary to "aquaculture or kelp harvesting within the Sanctuary."

2. <u>The Davidson Seamount Question</u>.

The Alliance does not oppose expansion of the boundaries of the Monterey Sanctuary to include the area around the Davidson Seamount. However, the regime for regulation of fishing in the ocean area to be so included must not be any different from that just discussed above for fishing generally in the Monterey Sanctuary.

3. <u>Authority of the Monterey Sanctuary to Create Marine Protected Areas</u>.

Considerable discussion has been given to the concept of marine protected areas in the State of California and elsewhere in the United States. We do not believe that the authority recently given to the Regional Councils in the amended Magnuson-Stevens Act allows the NOAA Marine Sanctuaries Program to create marine protected areas within marine sanctuaries in order to restrict fishing, either directly or indirectly. We note that the draft management plan for the Monterey Sanctuary contains an element for addressing "bottom trawling effects on benthic habitats." We question, given recent Congressional action, whether this should be part of any sanctuary management plan, and suggest it be dropped. This is exactly the kind of overlapping effort that should not be pursued by the NOAA Marine Sanctuaries Program.

We have no objection to any activity that evaluates the use of the concept of "marine protected areas" so long as fishing is not regulated except in accordance with current law or is excluded from marine protected area regulations entirely.

The use of an MPA workgroup would be appropriate to evaluate the utility of MPAs if the workgroup process was fairly constituted and science-based. Any recommendations that came out of the workgroup would be forwarded to the Pacific Council for their consideration. However, it is the perception of the fishing community that the MBNMS current workgroup is seriously flawed as a public/science- based process.

4. Dredging Action Plan.

Maintenance of existing harbor areas is an important program for our coastal communities, and not just for fishing vessels. We do not believe that the NOAA Sanctuary Program should have regulatory authority over dredge permits, but should only provide comment on permits filed with the U.S. Army Corps of Engineers. This issue should be addressed and the position taken that NOAA cannot prevent a dredging permit from being issued on the basis of marine sanctuary considerations.

5. Introduced Species Action Plan.

The Alliance is concerned that the broad nature of this action plan may result in controls on the fishing fleet that would require all vessels to be inspected (and perhaps cleaned) before every trip into Sanctuary waters. Commercial fishing vessels routinely leave the Sanctuary area to fish elsewhere and vessels based elsewhere enter the Sanctuary to fish. We are aware of no scientific evidence that this activity has created any environmental problem with respect to non-resident species. We hope this issue can be clarified to ensure that additional regulations, without any basis and without any evaluation of the pros and cons, are not adopted.

6. Marine Sanitation Devices.

Here again, the intent of the management plan is not entirely clear. The proposal to lock all sanitation devices on small vessels in sanctuary waters lacks neither a factual basis nor extensive analysis. We are not sure whether any new regulation is required to address this issue.

7. Deserted Vessels.

The proposal for a regulation with respect to deserted vessels appears to lack clear standards. Certainly the Coast Guard should be consulted on this question. The standard for issuing a civil penalty of any size should be spelled out and should only issued for a condition that everyone agrees is grossly negligent and imminently dangerous.

8. Submarine Cables.

Finally, the Alliance agrees that special regulations should apply to the siting of submarine cables with the boundaries of a sanctuary. However, we strongly believe that the NOAA Sanctuary Program has been wrong in distinguishing between submarine cables that are installed for "scientific purposes" and those installed for "commercial" purposes. Both have nearly identical environmental impacts and pose a conflict for other lawful users of a sanctuary. Although NOAA's special use permit policy on submarine cables does not distinguish among the reasons for "the maintenance of submarine cables beneath or below the seabed,"3[3] the Monterey Sanctuary recently issued a permit for a research cable that was not subject to the special use permit restrictions in the National Marine Sanctuaries Act.

In 2000, Congress added language that would waive "fees for any special use permit" for an activity that is non-profit but did not authorize waiving the special use permit itself. We submit that this issue must be clarified in a manner confirming that any submarine cable operator must first obtain a special use permit and file an appropriate bond to protect other users of a marine sanctuary.

We thank you for the opportunity to provide our comments to the agency.

Sincerely,

Kathy Fosmark
Co-Chair, ACSF

Frank Emerson
Co-Chair, ACSF

Supporting Associations & Organizations

Pacific Coast Federation of Fishermen's Association
Port San Luis Commercial Fishermen's Association
Morro Bay Commercial Fishermen's Association
Monterey Commercial Fishermen's Association
Fishermen's Association of Moss Landing
Santa Cruz Commercial Fishermen's Marketing Association
Half Moon Bay Fishermen's Marketing Association
Fishermen's Alliance
Western Fishboat Owners Association
Ventura County Commercial Fishermen's Association
Federation of Independent Seafood Harvesters
Golden Gate Fishermen's Association
Port San Luis Harbor District
City of Morro Bay Harbor
City of Monterey Harbor
Moss Landing Harbor District
Santa Cruz Port District
Pillar Pt. Harbor, San Mateo County Harbor District