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SAN FRANCISCO OFFICE

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT COMMUNICATION

TO: Alliance of Communities for Sustainable Fisheries

FROM: Bud Walsh

DATE: October 10, 2007

RE: Consideration of Marine Protected Areas by the Monterey Bay National Marine Sanctuary: Can Fishing Activity be Regulated by the Sanctuary And, If So, How?

I. Introduction and Summary

You have asked for legal guidance with respect to activities being undertaken by the Monterey Bay National Marine Sanctuary Program ("Monterey Sanctuary") to examine the creation of "marine protected areas" within the boundaries of the Sanctuary outside three nautical miles. The activities of the Monterey Sanctuary are governed by the National Marine Sanctuaries Act, 16 U.S.C. § 1431 et seq.

One of the purposes of the National Marine Sanctuaries Act ("NMSA") is to establish areas to be managed that will improve the conservation, understanding, management, and wise and sustainable use of marine resources and maintain for future generations the habitat and ecological services of the natural assemblage of living resources that inhabit these areas. Any such activities undertaken in a marine sanctuary for these purposes must "complement existing regulatory authorities." The NMSA also states that all public and private uses are to be facilitated, to the extent compatible with the primary objective of "resource protection," a term that is not defined.

We understand that the Monterey Sanctuary is considering creating marine protected areas within the borders of the Sanctuary that would restrict and/or limit fishing activity, thereby possibly overriding existing federal fishery management regulations within the affected geographic area. It is stated that the purpose is to "protect" resources within the Sanctuary by limiting extraction activities from fishing. Presumably, the scientific argument is that "protection" of certain resources can only be achieved by completely banning fishing in a particular area.

A "marine protected area" or MPA is not defined in any Federal statute.[1] On May 26, 2000, President Clinton issued Executive Order 13158 on Marine Protected Areas. In that Order, he defined MPAs 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]

However, this Executive Order did not create new legal authority or change in any way any existing legal authority with regard to the management of the marine environment. Any effort by the Secretary of Commerce to implement the Order must proceed in a manner consistent with all applicable law, including the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), which applies to any act of "fishing" in any area subject to a marine sanctuary within the U.S. 200-mile exclusive economic zone ("EEZ"), and the NMSA, 16 U.S.C. § 1434(5) (fishing regulation within marine sanctuaries).

Fishing, under the Magnuson-Stevens Act, is defined as—

> (A) the catching, taking, or harvesting of fish;
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> (B) the attempted catching, taking, or harvesting of fish;
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> (C) any other activity which can be reasonably be expected to result in the catching, taking, or harvesting of fish; or
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> (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

It is my conclusion that the Monterey Sanctuary does not have legal authority to consider any MPA that would regulate fishing, directly or indirectly, as that term is defined in the Magnuson-Stevens Act.

The primary reason is that its Designation Document does not authorize that Sanctuary to regulate fishing activity, except for "aquaculture and kelp harvesting within the Sanctuary." Lacking such authority, it is questionable that it may expend federal funds that would primarily be aimed at regulating fishing activity or ask the Secretary to issue regulations that would regulate fishing activity. Of course, the Sanctuary may go forward with an MPA that would restrict any other ocean activity for which it does have clear authority to regulate. Until the Sanctuary is given authority to regulate fishing in the manner prescribed in the NMSA, it has no authority to restrict fishing, including by creating an MPA that would do just that.

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[1] 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, 6409, but the term is not defined.

II. What if the Monterey Sanctuary's Designation Document is amended?

If the Monterey Sanctuary's Designation Document is amended, to include the regulation of fishing, the question becomes how to interpret the competing provisions in the NMSA and the Magnuson-Stevens Act with respect to creation of an MPA that would restrict or prohibit fishing. As a general rule, each provision in each statute that is administered by the Secretary of Commerce must be given effect. *Traynor v. Turnage*, 485 U.S. 535, 548 (1988). The NMSA and the Magnuson-Stevens Act create concomitant duties and obligations for the Secretary of Commerce[2] to regulate fishing within a marine sanctuary. A proposed MPA that would restrict or prohibit fishing would fall within the definition of "fishing" used in the two Acts. Therefore, both statutes, to the extent possible, must be given effect.

First, the NMSA is written in a broad general fashion and does not focus simply on the fishing aspects of a marine sanctuary. And Congress authorized the Secretary of Commerce in that Act to adopt fishing regulations in a sanctuary if they "complement" existing fishery management regulations and are compatible with the primary objective of resource protection. The relevant fishing regulation portion of that Act reads as follows:

> The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement to the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, make a determination that is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations. The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.

The meaning of this provision has never been the subject of judicial review and may be susceptible to varying interpretations. Several questions arise in considering the meaning of this provision: (1) Did Congress intend only to apply the national standards of the Magnuson-Stevens Act to sanctuary fishing regulations? (2) Does this provision only apply to the original "proposed" designation of a marine sanctuary and not to any later amendments to the

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[2] The duties of the Secretary for both statutes have been delegated to the Administrator of NOAA. Thus, "Secretary" means the NOAA Administrator.

Designation Document? (3) Is the Secretary bound by the entire Magnuson-Stevens Act when taking action, in lieu of the Council acting, to implement fishing regulations in a sanctuary given the general nature of the NMSA and the duty to "complement" existing fishing regulations? (4) What is the meaning of the language requiring uses to be "compatible" with the primary objective of "resource protection?" The uncertainty of the answers to these questions is a qualifying factor with regard to the views expressed in this memorandum.

Second, Congress recently amended the Magnuson-Stevens Act to authorize the Regional Fishery Management Councils and the Secretary of Commerce 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). The specificity of this provision leads to the conclusion that its terms, rather than any other more general regulatory authority governing fishing (directly or indirectly), or MPAs that restrict or prohibit fishing, would control the manner of regulating fishing in an MPA, such as the general authorities under the NMSA.[3] Congress expressed no intent, direct or indirect, that either law was to preempt or override the other. Both laws must be given effect, if at all possible. Thus, the MPA standards in the amended Magnuson-Stevens Act can be met by the Secretary in issuing any sanctuary fishing regulations by simply using the conditions specified in the relevant provisions when developing sanctuary fishing regulations.

Third, Congress made clear in the amended Magnuson-Stevens Act that, should there be any area in which all fishing is prohibited, any such closure of fishing must comply with the following standards: (1) be based on the best scientific information available; (2) include criteria to assess the conservation benefit of the closure; (3) establish a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and (4) be based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to users of the area, overall fishing activity, fishery science, and fishery conservation and management.

Thus, it would be contrary to Congressional intent if the NOAA Marine Sanctuary Program ignored these detailed directives in the Magnuson-Stevens Act and sought to issue a regulation creating an MPA that restricted fishing activity, in whole or in part, directly or indirectly without complying with the stated specific directives in the amended Magnuson-Stevens Act.

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[3] This may be referred to as "back-door regulation." In California, even though the creation of new MPAs only regulated fishing activity, the Department of Fish and Game claimed the purpose was protecting other natural and cultural resources and, therefore, MPAs were not fishery management regulations. As a consequence, the agency refused to ensure that these MPAs were consistent with existing California fishery management regulations and plans. Federal law does not allow this kind of regulatory slight of hand.

III. The Sanctuary's Investigation of MPAs

We do not conclude that the Monterey Sanctuary may not investigate the possible benefits of MPAs within the sanctuary boundaries. However, such investigation must be a neutral undertaking, based on available science, which does not target fishing activity. Nor can the Sanctuary claim, contrary to logic, that protection of the natural and cultural resources of the Sanctuary authorizes the regulation of fishing activity. In statutory interpretation, general authority may not override specific authority. *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). Any MPA proposal by the Sanctuary must be based on a clearly established scientific need to "provide lasting protection of all or part of the natural and cultural resources therein" and must be limited to regulating those ocean uses within its legal sphere of authority, and no others.

IV. Conclusion

The Monterey Marine Sanctuary currently has no authority to create an MPA that would restrict or prohibit fishing, except for aquaculture and kelp harvesting. All regulations issued under the Magnuson-Stevens Act as fishing regulations take precedence within the EEZ areas that fall within the boundaries of that Sanctuary.

If the Monterey Sanctuary's Designation Document is amended to include the regulation of fishing generally, then the Sanctuary could create an MPA that restricts or prohibits fishing within its boundaries. However, before any such regulations are adopted, the Secretary of Commerce would, in addition to following the requirements in the NMSA in adopting fishing regulations, have to satisfy the conditions for instituting areas closures set forth in the amended Magnuson-Stevens Act, including basing the MPA restrictions on the best available scientific information, using criteria to assess the conservation benefit of the closure, instituting a timetable for reviewing the performance of the closure, and conducting an assessment of the benefits and impacts of the closure.