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Follow-up Witness Questions
House Subcommittee on Fisheries, Wildlife and Oceans
October 24, 2007

Legislative Hearing on H.R. 1187, the Gulf of the Farallones and Cordell Bank National Marine Sanctuaries Boundary Modification and Protection Act; H.R. 1907, the Coastal and Estuarine Land Protection Act; and H.R. 3352, the Hydrographic Services Improvement Act Amendments of 2007

Follow-up Questions for Ms. Fosmark

Questions from Mr. Brown (R-SC)

1. Since the legislation contains provisions regarding prohibited activities and allowable activities, should the authorization for commercial and recreational fishing be spelled out in the legislation to remove any confusion? Why are you not comfortable leaving this authorization in the regulations rather than statute if this legislation were to become law?

We believe that the authorization should be spelled out in legislation, just as it was when the sanctuaries were created. Regulations can be changed too easily, as we have seen with the Channel Islands NMS where the “promise to fishermen” was broken.

2. The Magnuson-Stevens Fishery Conservation and Management Act states in National Standard #3 that “to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.” The Act also gives this management authority to the regional fishery management councils. Do you believe this language gives the councils priority to manage fisheries, even in sanctuaries unless specifically exempted? Are you aware of any attempts by sanctuary managers to develop fishery management regimes different than those passed by one of the councils or without council input?

While we believe that the Councils should – and do – have priority, apparently neither NOAA nor its National Ocean Service (NOS) agree. Testimony presented to the Pacific Fishery Management Council by NOS attorneys made clear their belief that a simple change in the designation document can clarify their authority over fisheries management. While they profess willingness to come to the Council first and give the

Council an opportunity to recommend regulations, those recommendations will only be followed if the Council does what the sanctuary asks for.

Further, in a letter to the Pacific Council from VADM Lautenbacher in regard to Council actions to restrict fishing in the Channel Islands NMS (as requested by the sanctuary), it was made clear that NOAA interprets the law as giving the Council no authority over the water column (only over the bottom and over specific fishing activities) and thus the Council could not simply establish regulations under its various fishery management plans to accomplish the Sanctuary's objectives.

We also believe that the Secretary has an obligation to comply with the amended section 303(b)(2) of the Magnuson-Stevens Act, which stipulates criteria for closures of areas to fishing, and that these criteria must be met before any additional marine reserves are established in National Marine Sanctuaries.

3. The Councils are required to follow the Science and Statistical Committees' - which are made up of fishery scientists - advice on fishery management decisions. In addition, councils are bound by the 10 National Standards. Do sanctuary managers have either of these requirements under the National Marine Sanctuaries Act?

No. Neither does the National Marine Sanctuaries Act provide the extensive peer review, public review, and public comment process used by the Councils under the Magnuson-Stevens Act.

4. There is currently a public review process for changing the management of the three National Marine Sanctuaries off the coast of California. Are all of the issues addressed in H.R. 1187 also addressed in this public process? Since the public process has almost been completed, isn't it unnecessary to enact legislation at this time?

HR 1187 provides for expansion of the two sanctuaries referenced in the bill, while the regulatory process does not. HR 1187 also does not address all of the issues - including expansion - that are being considered by the Monterey Bay National Marine Sanctuary. Regardless, we are unaware of any need for a fast track approach through legislation. However, we have no objection to such an approach as long as the concerns expressed in my testimony are answered.

5. While the regulations governing the allowable activities within the sanctuaries can be changed through an open, public process, if this legislation were to be enacted, all changes to the statute would have to be made by Congress. Is this a process that we should consider?

With all due respect to the Congress, experience in natural resource management throughout history - especially in regard to dynamic resources such as fish stocks - has shown that regionalized control provides better results. Like the Sanctuaries, the

Congress has no Scientific and Statistical Committee and no body of managers and advisors with the local knowledge necessary to properly establish regulations that balance the need for resource conservation and the need for economic protection of local coastal communities.

We note that several Sanctuaries around the nation have gone through a Congressional creation process. Generally, that process provides for creation of the Sanctuary, some stipulations on very specific issues (such as the fisheries management issue on the west coast), and then gives flexibility to the Secretary to promulgate regulations. If the legislation becomes too specific on too many issues, that ability to adapt to local and regional conditions is lost.

6. You raised concerns in your testimony that the language in the bill extending the Sanctuary jurisdiction to the mean high tide in combination with the proposed prohibition on dredging and discharge would prevent the dredging of navigation channels. What impact would this have on any ports, marinas, or other local and State activities that provide shelter or moorage for commercial and recreational fishing vessels or any other type of recreational vessel? How many ports are you aware of that are either within the boundaries of the Sanctuaries or that would be affected by this expansion of the Sanctuaries' boundaries?

There are five ports / harbors that are affected by the expansion of the Sanctuary boundaries and the discharge prohibitions in the bill. All of these are active harbors that are home to both sport and commercial fishing vessels and which also service transient vessels (both sport and commercial) during the summer fishing seasons. Without the ability to dredge – and discharge dredged material – these harbors will cease to be functional. Along with the loss of economic activity for our coastal communities if the harbors close, there is also a major safety hazard. Weather and wind conditions on the west coast can change quickly; if fewer ports are available, smaller commercial and sport vessels of the type common to our area will have less opportunity to get shelter from adverse conditions.

7. H.R. 1187 appears to add new prohibitions on the discharge of anything that might harm a sanctuary resource. With the expansion of the boundary up to the mean high tide level, do you believe this prohibition will affect currently-allowable activities in state waters and could these prohibitions now affect on-land activities (that might be viewed as affecting sanctuary resources)? Does the scope of this provision concern you?

We do have some concerns about this blanket prohibition, although generally our experience with the Monterey Bay NMS (MBNMS) has been good. That Sanctuary has a Water Quality Protection Program that has worked cooperatively with our agriculture community, other local businesses, and local government, to educate those entities and to develop specific plans to minimize polluted urban and agricultural runoff from going in to the sanctuary. This effort has been a success because the Sanctuary has worked cooperatively with business and local government, and has not tried to become another

regulatory agency. Fishermen are very concerned that good water quality exist, so we have a real interest in the Sanctuary's successes is in this area.

A significant exception to this approach is in regards to the disposal of clean dredged material from our harbors. For this activity, the MBNMS, which is currently the only sanctuary that comes right to shore and borders harbors, has exerted regulatory control over dredging superior even to the U.S. Army Corps of Engineers, the Environmental Protection Agency, and the State's Coastal Commission and Regional Water Quality Control Boards. Those agencies cannot release their permits unless the MBNMS "authorizes" them to do so. The NMSA does not define "harmful", and the Sanctuaries are not held to any science standard by the Act. This is very different from the EPA and the Regional water boards, who have science-based standards for discharges, including dredged material. The Sanctuary's role permitting dredging activities including material disposal is redundant at best, and is often a waste of time and taxpayer's money.

This situation has cost MBNMS-area harbors time and thousands of dollars. As fishermen, we keep our boats in these harbors, and we must have access to the sea. When costs go up for a harbor, it is the users (us!) who pay in the end.

Regarding the specific expansions in HR 1187, Bodega Bay does contain a harbor which needs to be dredged regularly, and that material is deposited offshore into what would become a NMS. I recommend that specific language be added to HR 1187 that would exempt that harbor from any regulatory control by the sanctuary for all of its dredging activities, including material disposal. Please remember that there is still a very high level of testing and control over these activities by other federal and State agencies.

One other aspect of discharges involves those from small vessels. If the Sanctuaries are allowed to require small commercial fishing boats to have waste holding tanks or other expensive treatment systems to stop discharges of sewage from these vessels when they are over three miles from shore, they will impose a significant expense that will directly affect the small, family run commercial fishing businesses that make up the vast majority of the California fleet.

There is no scientific basis to say that these very small discharges so far from shore could ever be a problem for sanctuary resources. In fact, these discharges are utterly dwarfed by "discharges" from the very large marine mammal population.

8. In your testimony, you mention that the "promise" to fishermen was broken. Can you elaborate on what the "promise" was and when you believe it was broken? Because you feel the "promise" not to affect commercial fishing in the Sanctuaries has been broken before, do you believe it is that much more important to protect commercial fishing opportunities in this legislation?

When the MBNMS was being proposed in 1991 and 1992, fishermen were clearly promised by both elected officials and representatives from NOAA that the new

Sanctuary would not create regulations that would affect them or their fishing activities. This promise is reflected in a 2003 quote by then-Congressman Leon Panetta, who said

"I think the reason we were able to get such a large consensus (for sanctuary designation) was that I made it clear the sanctuary was not going to represent a whole new bureaucracy imposing regulations on fishermen."

Similar promises were made in conjunction with the establishment of the Gulf of Farallones and Cordell Bank Sanctuaries. The "promise" is reflected in the designation document for the MBNMS, which does not list fishing as an activity subject to future regulation; however, the designation document can be changed to give Sanctuary officials the authority to create fishing regulations under the authority of the National Marine Sanctuaries Act.

With the exception of the Channel Islands NMS, none of the Sanctuaries have yet made an effort to change their designation documents, but fishermen are very concerned that they will do so to give them the ability to create marine protected areas, even if the Pacific Fishery Management Council and its Scientific and Statistical Committee do not find a biological need for them. This is evidenced by the MBNMS' MPA action plan, that specifically identifies changing the designation document as an option, no matter what fishermen might think.

Fishermen also feel that the MBNMS has violated the spirit of the "promise" by Sanctuary officials using the authority of the NMS Program to strongly advocate for fishing closures in some of the best, most continually productive fishing areas in the Central Coast of California during a State regulatory process. Because of this and other actions, there is very little trust in the Sanctuary program. It is too easy for Sanctuary officials to change the designation document, which is why we requested that language be added to HR 1187 that will make it clear that the Sanctuaries will not create fishing regulations and that any such regulations or zones will be the responsibility of the Pacific Fishery Management Council or the State of California.

9. One of the other witnesses at the hearing testified that the area included in the expanded boundary area would protect a unique upwelling area – one of only four in the United States. Can you comment on this? Is this a unique area? The witness also testified that this is an important area for commercial fishing. Can you comment on this as well?

Upwelling occurs along the entire west coast and is an important part of productivity for all forms of marine life. In El Nino years when upwelling is reduced because of warmer sea surface temperatures and less wind, our fish stocks generally suffer. Designation of an area as a Sanctuary does nothing to change this natural process.

There are several areas within and around the Sanctuaries that are important fishing areas; that is precisely the reason we want the people with fisheries expertise to be in charge of management.

10. How much research has been done or is currently on-going in the Sanctuaries? More specifically, are you aware of any research being funded by the sanctuary program on fisheries or fisheries habitat in either of the two sanctuaries affected by this legislation? Is there available funding for new research projects? Are any research projects being done in conjunction with the Pacific Fishery Management Council?

I am not aware of any research projects being conducted by the Sanctuaries on fisheries or fish habitat, especially in conjunction with the Council. The Council publishes a research plan and I don't recall any comments on that plan being provided by any of the Sanctuaries.