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Paul Michel

October 25, 2023

Regional Policy Coordinator

Sent via *Federal e-Rulemaking Portal*: <https://www.regulations.gov>, docket NOAA-NOS-2021-0080.

RE: Comments on the proposed Chumash Heritage National Marine Sanctuary (CHNMS) Draft Management Plan and Environmental Documents

Dear Mr. Michel,

Please accept the following comments on the Draft Management Plan (DMP) and environmental documents for the proposed CHNMS from the Alliance of Communities for Sustainable Fisheries (ACSF) and Commercial Fishermen of Santa Barbara (CFSB):

- 1) **The CHNMS draft designation documents must be paused for a substantive re-write and submitted again for public comment.** It is clear from public testimony that there is dissention centering around who is authentically positioned to represent tribal interests and goals. The ONMS must pause the designation process to resolve this dissention. Afterall, it is being promoted as a “tribal led” nomination, with “tribal co-management”. If it doesn’t, the CHNMS and the ONMS will likely be doomed to years of disputes. The ACSF notes that the original nomination, submitted by Fred Collins, has been questioned for many years as possibly not coming from an authentic indigenous tribe. The CHNMS designation process, draft management plan and other environmental documents suffer, therefore, from substantial uncertainty. It is not for the ACSF to suggest how this dispute must be resolved, but rather we strongly suggest that it must be resolved before actual designation as a NMS.

As an example of this persistent dispute, quoting from an October 14, 2023 letter from Professor of Anthropology Brian D. Haley to Paul Michel, Office of National Marine Sanctuaries:

*“Throughout its documents for this project, NOAA has misrepresented as “Chumash” and “tribes” organizations formed by and representing neo-Chumash. These are the Northern Chumash Tribal Council, Coastal Band of the Chumash Nation,*

*and Wishtoyo Chumash Foundation. The Northern Chumash Bear Clan has a long affiliation with the Quabajai Coastal Chumash and Coastal Band of the Chumash Nation. Like those, it lacks the Chumash ancestry it claims, but it does have well documented Salinan ancestry and historical affiliation.”*

ACSF members from the Central Coast understand that ONMS officials were put on notice about these tribal disputes as early as 2015, yet it has moved forward with the designation process without resolving the issue. This is a profound mistake.

In another dispute over designation, the ONMS's disregard of information that might interfere with the expansion ambitions of the ONMS is also represented in the dismissal of diverse and widespread **opposition** to the CHNMS. The ACSF has documented, in previous comments on the CHNMS nomination, on the scope of this opposition from local governments, chambers of commerce, current and former elected leaders, and many and diverse stakeholder organizations.

This failure to acknowledge the large opposition is, in the ACSF's opinion, a violation of the ONMS's own, standards (adopted June, 2014) for accepting NMS nominations and designation decisions. This constitutes a fatal flaw in the CHNMS designation process, eroding public confidence in the ONMS.

**The ONMS must adopt the NO PROJECT alternative, or at minimum, pause the designation process to work with the indigenous community and public officials and stakeholders, to assure the possibility of a future sanctuary is well-grounded. Merely editing the draft Management Plan and Environmental documents will not suffice.**

- 2) In the unfortunate event that the ONMS continues to push the CHNMS forward, The ACSF offers the following comments on the Draft Management Plan and Environmental Impact Statement:

- Threats to resources.

The EIS claims the following “threats” to the ocean resources of the region:

*“...due to the myriad ongoing and emerging threats to the area from consumptive and non-consumptive human uses and climate change, additional protections are needed. Threats facing these increasingly vulnerable coastal and offshore ecosystems specifically include direct and indirect impacts from offshore energy development, pollution from offshore and onshore sources, increased vessel traffic and transportation, increased coastal development, and other stressors to the ecosystem that compromise its resiliency, especially acute and cumulative impacts from climate change.”*

The DEIS fails to distinguish what additional protection or even management a NMS designation will bring that is not already provided by numerous, strong, enforced, local, state and federal laws. These laws include, but are not limited to: the Clean Water Act, the Marine Mammal Protection Act, the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Migratory Birds Treaty Act, and California's Coastal Act, to name a few. The fact is, NMS designation brings very little to the region as enhanced, protective management. The one area where a CHNMS designation COULD HAVE provided needed protection is in offshore wind ocean industrialization. Instead, the ONMS moved proposed boundaries and made other accommodations to allow for this industrialization.

The ONMS claims that NMS designation and management will somehow mitigate the effects of climate change. There is no scientific evidence that this is so. This cartoon, published by the National Marine Sanctuary Foundation (October, 2023), speaks to the false narrative created that if you don't have a NMS, the ocean is not protected:



- Fisheries.

The EIS section that describes the CHNMS's role in fisheries is not reassuring for fishermen. Quoting at length from the Pacific Fishery Management Council's Groundfish Advisory Panel report on the CHNMS proposal (September, 2023):

"The Groundfish Advisory Subpanel (GAP) reviewed the proposed Chumash Heritage National Marine Sanctuary Designation documents and while there are no proposed direct fishing regulations at this time, ancillary regulations may affect current fishing activities. In addition, the GAP remains concerned about potential efforts to introduce fishing restrictions or regulations in the future. As noted in the Santa Ynez Band of Chumash Indians (SYBCI) letter to the National Oceanic and Atmospheric Administration (NOAA) Office of National Marine Sanctuaries (ONMS) requesting government- to-government consultation under Executive Order (E.O.) 13175 in December 2021:

*'We recommend a careful review of the role of these [Marine Protected Areas] in supporting the priority management goals of the [National Marine Sanctuaries Act], and whether additional protective measures and/or marine zoning strategies (such as no-take MPAs) and tools should be considered under a co-management strategic framework that combines the Chumash, California, the NMSP and other relevant federal agencies. External reviews of the NMSP note that a clear legal authority should be considered for the designation document that will allow the establishment of no-take marine zones (National Academy of Public Administration 2021: 51), and the development of marine zoning strategies to offset impacts to marine life from climate disturbance (emphasis added).'*

Therefore, until the ONMS has demonstrated an actual hands-off policy with respect to fisheries, the fishing community cannot support additional Sanctuary designations. The GAP notes that ONMS has demonstrated a hands-off approach with respect to proposed industrial wind energy projects, and the difference in the treatment of fisheries and offshore wind is troubling... the GAP does not support expanding the scope of Sanctuary management on the West Coast.

Early established Sanctuaries like the Channel Islands National Marine Sanctuary (CINMS) promised not to manage fisheries and to leave fisheries management to the existing state and Federal authorities, such as Federal Magnuson-Stevens Fishery Conservation and Management Act and appropriate state regulations. This promise was expressly included in their Designation Document. The fishing community endorsed designation, which promised to defend traditional uses from industrial development then impacting and threatening to further detract from public access for fishing. However, over time not only did CINMS spearhead the establishment of no-fishing areas, but sanctuary managers would eventually remove that promise not to regulate fishing and establish its own authority to do so. In addition, GAP members note other regulations common throughout the West Coast sanctuary system have constructively limited the public's use of Sanctuary waters. For example, these include discharge regulations that apply to even the smallest of craft and minimal negative impacts. Enforcement of these are commonly so impractical the expectation is they will not be enforced. Establishing rules putting people on the wrong side of the law, that are not expected to be enforced, is simply bad public policy. It puts people at risk of being cited on the basis of their appearance or any other subjective quality."

Please also see **Bait and Switch? Fishermen's Difficult Relationship with the Monterey Sanctuary, Tom Roff**. The late Tom Roff spent considerable

time documenting why regional commercial fishermen have such distrust in the ONMS, and the MBNMS management in particular.

**The CHNMS Management Plan and supporting documents must make clear that the sanctuary will not create fishing regulations, including closures, nor shall it use its agency stature and authority to promote the creation of regulations or closures by other agencies.**

- Discharges.

The proposed CHNMS regulations prohibit discharge, providing an exemption for U.S. Coast Guard (USCG) vessels but not for vessels engaged in lawful fishing activities. Therefore, the ACSF recommends providing an exemption for small craft similar to what is provided to the USCG in the proposed CHNMS. Other regulations duplicate existing ones, adding the prospect of civil penalties to punishments under existing law that would impose criminal penalties. These were cast as “tools in the tool chest,” not intended to be enforced in conjunction with the criminal, but instead, chosen between.

- Sanctuary Advisory Council’s (SAC).

The ACSF feels the need to explain in detail why the current structure and operations of SAC’s are so lacking for real public representation. The ONMS has veered from the intent of congress in authorizing the use of SACs, changing public representation to essentially “Sanctuary Auxiliaries” —designed to support what Sanctuary managers want to do. Our comments below stem from long experience with the Monterey Bay National Marine Sanctuary and its Advisory Council.

SACs are the primary conduit for public input into management decisions. Indeed, sanctuaries may accept formal advice only from their SACs. Per the National Marine Sanctuary Act (NMSA) a Sanctuary may establish one or more Advisory Councils, each with members appointed from the following groups: natural resource management experts from Federal or State agencies; Regional Fishery Management Council (RFMC) members; local user groups; and scientific, educational, conservation or other public interest groups. Meetings are open to the public (16 U.S.C. §1445a). The language of the NMSA is neutral in soliciting advice from the public on designations and management; the SAC is to advise the Secretary regarding the best course of action.

A distinction is needed between "public participation" and the public's role as SAC members providing formal advice on management. For Sanctuary managers, public participation means all the ways that the public can assist in realizing the Sanctuary's goals by helping in specific Sanctuary programs. Sanctuaries are very good at offering the public ways in which they can support its mission and goals, and public participation is high. Involving the public in these ways is clearly one of the NMS Program's strengths, and accounts for much of the reason some support expanded or new NMS's.

As members of a SAC, the public is not merely implementing the Program's goals, it is helping, within limits, to shape those goals and management actions. A large exception is that SACs are told to never provide advice or opinions on Sanctuary budget priorities. According to the ONMS, the establishment of SACs brought about "a radical increase in community involvement in all aspects of sanctuary management and protection" (NOAA ONMS 2013b). It is important to recognize that SACs provide only advice to the NMS Superintendent, who may choose to follow that advice, or not.

To understand community involvement, consider how SAC members are selected, how the SAC agenda is set, and to whom the SAC communicates.

The ONMS provides and requires the use of a model SAC Charter and Protocols (C&P), which is used for all sites, with a few alterations permitted at each site (MBNMS 2014b). This model Charter places full control of SAC activities, including agenda, membership and correspondence, in the hands of Sanctuary management. To understand the ONMS deviation from the intent of Congress, one must look closely to what Congress actually says, as well as the C&P.

The NMSA authorizes the Secretary of Commerce to establish advisory councils. Congress, in the NMSA (16 U.S.C. § 1445a), says this about SACs:

*"The Secretary may establish one or more advisory councils (in this section referred to as an "Advisory Council") to advise and make recommendations to the Secretary regarding the designation and management of national marine sanctuaries. The Advisory Councils shall be exempt from the Federal Advisory Committee Act."*

The NMSA continues by describing the types of representatives that may be appointed, and that SACs should operate with public notice and transparency.

However, quoting from the C&P<sup>1</sup>:

*“The ONMS regards the involvement of communities and the development of a stewardship ethic as vitally important to successfully protect sanctuary resources. One key way to achieve this involvement is the formation of sanctuary advisory councils. Sanctuary advisory councils bring members of a diverse community together to provide advice to the sanctuary superintendent, as designated by the ONMS Director, on the management of the sanctuary, or to assist the ONMS in guiding a proposed site through the designation process.”*

This wording reflects a shift from providing neutral advice about sanctuary designations to one of *assisting* in the designation process, presuming that SAC members are expected to support new designations.

From the C&P:

*“The council may serve as a forum for consultation and deliberation among its members and as a source of advice and recommendations to the sanctuary superintendent. Such advice shall fairly represent the collective and individual views of the council members. In formulating such advice, the council members shall recall that the primary objective of the sanctuary and the NMSA is resource protection.”*

In this wording, the facilitation of multiple use opportunities and conservation, are not stressed, but the *protection of resources* is the role emphasized.

*“The council is established to provide advice and recommendations to the sanctuary superintendent regarding the management of MBNMS. Nothing in this charter constitutes authority to perform operational or management functions, or to make decisions on behalf of the sanctuary, NOAA or the Department of Commerce.”*

Thus, the SAC is not the decision maker nor the manager – this is an advisory role. SACs are discouraged from discussing site budgets or spending priorities. Most will agree that an organization’s priorities are well represented in spending, therefore it is perplexing that the sanctuary’s management would not want to hear such advice. The ACSF also notes that the proposed Intergovernmental

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<sup>1</sup> <https://montereybay.noaa.gov/sac/chartprot.html>

Policy Council does give that council the ability to comment on budget and priorities. This should be the same for the SAC.

The subtle shift from unfettered advice to one geared toward the protection and program expansion, rather than the original focus on designation and management, can be found throughout the C&P, which contains 21 references to protection, 2 references to conservation, and 7 references to resource use (MBNMS 2014b). There is the further presumption that SAC members will support the designation of new proposed Sanctuaries.

The fact that the ONMS-provided C&P stresses protection of resources, combined with sanctuary management's ability to select stakeholder representatives, explains why SACs tend to provide the kind of advice sanctuary managers want to hear, and why many SAC members believe they are, in focusing on resource protection, doing what they are supposed to do. Thus, most SAC members are operating in good will, as instructed. Many individuals offer their time and energy in good faith to serve on the SAC, and many have faithfully and steadfastly represented their constituents' views. However, there are multiple examples of MBNMS management cherry-picking stakeholder representatives, including for the commercial fishing seat.

Amid concerns about transparency, citizen participation, and the role of the SAC, a longtime member of Congress wrote to the MBNMS at the start of its 2001 management plan review. Congressman Sam Farr (D-CA), who represented the Monterey Bay region for 20 years, asked that the Sanctuary and citizens find a solution to the SAC control issues in the revised Management Plan, suggesting that the SAC be treated as a trusted advisor and independent mechanism for community input (Farr 2002). He then asked sanctuary management to engage in a dialogue with current and past SAC members, as well as members of the community, to consider how to strengthen the SAC to effectively maintain the confidence of its constituency.

The MBNMS did not act on the Congressman's concerns and recommendations

The Sanctuaries' inclination toward resource preservation rather than conservation is evident in reviewing the selection process for stakeholder representatives on the SAC. In the case of the MBNMS, community leaders have expressed concern numerous times over many years that industry representatives are selected based on their perceived personal values, rather than authentic representation of an industry. As part of the scoping process for



the 2016 MBNMS Management Plan Review, the City of Monterey, the Association of Monterey Bay Area Governments (elected officials), and the Monterey Peninsula Chamber of Commerce all requested that the SAC operations be independent of NOAA, recommending:

*“Consider separation between MBNMS management and the operations of the Sanctuary Advisory Council (SAC), and,*

*Explore establishing the SAC under a local joint-powers authority, with the ability to select representatives, determine agendas and communicate all vested locally and not under MBNMS management.”*

The MBNMS disregarded these recommendations from local elected leaders.

For the CHNMS, lessons learned from MBNMS experiences must be incorporated, that a new SAC should be organized under local jurisdictions, objectively and independently from NMS management. The NMS should formally accept advice from such an independent council of local community stakeholders. In the event that such a locally organized SAC can't be legally recognized, then the SAC charter, which governs SAC representation, agendas, and communication, should be created by consensus among local jurisdictions and stakeholders, not by the NMS program.

It is important to point out that tribal representation on the Intergovernmental Policy Council will apparently be limited to the sole federally-recognized tribe as a government-to-government relationship. However, the Indigenous Cultures Advisory Panel will likely be fraught with the same Sanctuary-management control issues as the SAC, including the selection of tribal representative.

However the SAC is developed, the council should have at least 50% of the voting members made up of local resource-dependent stakeholders, including commercial and recreational fishermen, harbor managers, resource-dependent tribal interests, recreational users, farmers, and ranchers. In this way the intent found in the National Marine Sanctuaries Act, of balancing multiple use opportunities with protections when scientifically justified, will be manifest.

All SAC agendas, meetings, and policy decisions should be transparent and open for public comment and review. Agendas and all supporting materials should be publicly available at least five days in advance of any meeting.

- Offshore Wind Energy

The ACSF, and many citizens, wonder, if a national marine sanctuary doesn't protect against large industrial development of the ocean, what good is it?

The draft Management Plan states:

*"Offshore Energy Action Plan Goal: Aid long-term management of sanctuary resources, ecosystem services, and cultural heritage by responsibly managing offshore energy activities, conducting necessary research and monitoring, and coordinating with other agencies and affected stakeholders."*

What is remarkable about this goal is that it does not make the unequivocal statement that OSW industrial development is inherently incompatible with NMS designation, as has been done with oil and gas development and mineral extraction. The ACSF believes that the reason is clear and simple: Consideration of OSW development is not a resource protection issue, it is a political issue. Political leaders want OSW no matter what. The ONMS's brave solution to OSW as a threat appears to be to remove the wind farm location and cable routes from inside the proposed CHNMS boundary.

The ACSF requests that the Management Plan and environmental documents make clear that OSW development is incompatible with sanctuary designation and specifically address the latent Diablo Canyon Call-Area and the proposed CADEMO project off Vandenberg SFB from being developed as OSW energy projects.

- Indigenous Cultural Heritage Action Plan, Advisory Panel, and Intergovernmental Policy Council.

In the context of the need to resolve the tribal representation disputes describe above, the ACSF draws attention to the recommendations of Dr. Brian Haley:

*"NOAA's misrepresentation of its current and anticipated partners in the proposed marine sanctuary risks defrauding the American public and hastening the appropriation of legitimate Chumash communities' indigenous identity and control of their heritage. NOAA has featured the goals of "commitment to honoring Tribal Nations, respecting Indigenous knowledge, and advancing co-stewardship" (project homepage). If NOAA proceeds as planned with the partners it lists, it will not achieve its stated goals and will cause lasting harm to indigenous communities. To avoid this catastrophe, NOAA must modify its proposal, DEIS, and plans in the following ways:*

*a. NOAA must cease engaging with or promoting the Northern Chumash Tribal Council, Coastal Band of the Chumash Nation, and Wishtoyo Chumash Foundation as "Chumash," "Tribes," or "tribal organizations," and remove the*

*names of those organizations and members from its listings of local indigenous entities. It must not replace them with other neo-Chumash entities or individuals.*

*b. NOAA must notify the Secretary of Commerce, the California Governor, the White House, and the public that the proposed marine sanctuary was not “indigenous proposed,” as has publicly been stated. NOAA may claim to have been duped, but NOAA must accept responsibility for not being better informed. (ACSF note: it is clear that ONMS officials new early on that these neo-Chumash organizations were not actually Native American and did not represent the interests of authentic regional indigenous tribes.)*

*c. NOAA may continue to consult with the neo-Chumash organizations and individuals as it would any other interested members of the public. But it must not do so in any capacity or context specially reserved for indigenous communities.*

*d. If references to neo-Chumash organizations or individuals must be retained in the documents and statements to the public and press, they should not be referred to without accurate qualifiers such as “neo-” or “self-identifying” before “Chumash.”*

*e. NOAA must revise who can participate in the Indigenous Cultural Engagement Action Plan planning units it envisions: the Sanctuary Advisory Council and Indigenous Cultures Advisory Panel. It must be made clear that the Northern Chumash Tribal Council, Coastal Band of the Chumash Nation, Wishtoyo Chumash Association members, and those of other neo-Chumash organizations are not eligible because they are not indigenous organizations.*

*f. The DEIS’s sections on Chumash history and heritage must be rewritten by a qualified professional using the extensive available scholarship and sources with a valid connection to the actual Chumash communities.”*

In addition to Dr. Haley’s recommendations, the ACSF has other concerns and questions.

As noted above, one tribe is asking for authority to create new marine protected areas that would exclude fishing. The ONMS must clarify that this is not an action it will support, and to do so would be contrary to other sections of the designation proposal that state “no fishing regulations are proposed”. Nor should the new sanctuary use its stature to advocate to other agencies, such as the Department of Fish and Wildlife and/or the Fish and Game Commission, to enact fishing restrictions.

Also of concern is the question of how the new indigenous advisory group and council will interact with the SAC. How will disagreements be resolved?

- Boundaries

One ACSF recommendation is the NO PROJECT ALTERNATIVE, which means no boundaries.

Should the ONMS march forward, the ACSF proposes a new alternative which is the shoreline boundary of Alternative 4, but only extending seaward to the 20 fathom line. Such a boundary (Alternative 6?) would capture most surviving submerged ancient indigenous villages.

Should the ONMS reject Alternative 6, the ACSF recommends Alternative 4, but not sub-alternatives 5a and 5b.

- Fiber-Optic Cables

The ACSF recommends that fiber-optic cables be exempted from CHNMS management and permitting. The installation, maintenance, and replacement are already reviewed and managed through Coastal Zone Management Act consistency review by the California Coastal Commission and further by the State Lands Commission.

- Dredging and material disposal

Maintenance of the two harbors is highly important to the ACSF. Harbor dredging and dredge material disposal are already heavily regulated by the US Army Corps of Engineers, the EPA, and the Coastal Commission, among other agencies. There is no need for sanctuaries to have any management role in permitting or authorizing dredging or dredged material disposal.

Thank you for considering comments from the Alliance of Communities for Sustainable Fisheries.



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