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Dear Holly and SMPA Workgroup Members,

During the December 13, 2004 Special Marine Protected Area Workgroup (SMPA) meeting, there occurred a conversation about the meaning of the words “protection” and “resources” as found in the National Marine Sanctuary Act (NMSA). Distinctions between “cultural” and “biological” qualities or resources of the Sanctuary were discussed as the workgroup tried to develop its conservation goal statement.

Most of our discussions centered around the last goal statement, derived from the NMSA, which is:

“To facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.”

Standing alone, it would seem that there is a hierarchy of protection over use in the National Marine Sanctuary Act. But, does the rest of the law bear this out?

The concept of protection is nowhere defined in the National Marine Sanctuary Act. Because of this, I decided to investigate the legislative intent behind the concept. “Protection” also relates to the concept of “multiple use” found in many places in the NMSA. Although each reauthorization of the NMSA apparently has a legislative report to serve as guidance, I found that much of this research has already been done by the Environmental Law Institute of Washington, D.C. Their paper, released in June of 2004, is entitled “The History and Evolution of the National Marine Sanctuaries Act.” The web site to view this paper can be found at: http://www.mcabi.org/marineprotected/NMSA_Leg_History.pdf

Preservation vs. Multiple Use

This paper is written from a conservationist/environmentalist legal viewpoint. From best I can tell, it accurately portrays the evolution of the Act. It does editorialize about some Congressional actions, stating that some actions, or failures to act, are in the problem box; certainly not all readers (nor would, apparently, most members of Congress) agree with the authors. The paper tracks what is called the “Preservation versus Multiple Use focus.” To quote from the Executive Summary of this paper:

“...the Sanctuaries Program did not follow the model of the National Wilderness Preserve System, and proved to be highly unstable. For much of its history, the MPRSA has been a work in progress. A fundamental reason for the law’s plasticity has been the ambiguity surrounding the Act’s intent. Is the overriding purpose of the Act the preservation and protection of marine areas, or is it the creation of multiple use management areas in which preservation use has to contend with every other use, even exploitive ones like oil and gas extraction?”

Congress failed to clearly and definitively answer this question at the outset, and in fact gave conflicting signals...This ambiguity produced confusion and led

to implementation difficulties, which in turn triggered periodic efforts by NOAA and Congress to clarify the Act's purposes and provisions.

Over time, Congress confirmed multiple use as a significant purpose of the Act and diminished the Act's preservation mission. Although amended numerous times over 30 years, the statute remains incongruous, calling for both preservation and multiple use."

I also quote from this paper's conclusions:

"The Act is now so constrained by its own architecture that it stands little chance of ever producing the comprehensive system of marine preservation areas envisioned by early visionaries, who hoped to create a system of marine wilderness preserves analogous to the terrestrial wilderness system. The blueprint of a permanent marine sanctuary system with the singular purpose of preservation was rejected in favor of a law that required preservation to be balanced with other uses within a sanctuary..."

In order to be capable of establishing a system of marine preservation areas that only allows uses that are truly compatible with preservation, the Sanctuaries Act would have to undergo substantial amendment."

This paper, by quoting individual members of Congress over a 35 year period, outlines the intent of Congress for each reauthorization of the National Marine Sanctuary Act since its precursor bill was first proposed in 1966. What can be seen clearly is Congress' intent that the preservation or protections afforded by the Act to biological resources and habitats be balanced by the preservation of multiple use opportunities, including extractive measures. Neither trumps the other. There must be a balance. The authors of the paper, who are environmental attorneys, are obviously not happy with the intent of Congress, but it is what it is. What I heard from some in the Workgroup was that protection trumps multiple use; however, this does not seem to be borne out by the history of Congressional intent.

What are the Resources the Act protects?

Also discussed in the workgroup were questions as to whether "historical", "recreational", and "cultural" resources and qualities were on an equal footing with biological resources and qualities. Again, what was heard in the workgroup from some is that clearly there is a hierarchy of importance in protecting biological resources, qualities, and habitats.

This does not seem to be borne out by the exact language of the Act. Numerous sections of the National Marine Sanctuary Act speak to this issue. Title 16, chapter 32, section 1431, the Findings of the Act, says:

"Certain areas of the marine environment possess conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, or aesthetic qualities which give them special national, and in some cases, international significance."

Please note all of these items listed are on the same footing.

Continuing:

"A Federal program which establishes areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archaeological, scientific, educational, or aesthetic qualities as national marine sanctuaries... will improve the conservation, understanding, management, and wise and sustainable use of marine resources."

Again, there is no distinction or hierarchy made between these resources. Wise and sustainable use of marine resources is on the same footing as conservation.

Continuing:

“Maintain for future generations the habitat and ecological services, of a natural assemblage of living resources that inhabit these areas.”

This section is interesting because there is no distinction made about what type of life inhabits or provides ecological services to these areas. There is also no distinction between humans and any other form of life that comprise “the natural assemblage of living resources.”

In fact, section 1432 of the NMSA contains the following definition of “sanctuary resource”:

“any living or non-living resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archaeological, scientific or aesthetic value of the sanctuary”

Again, there is nothing to indicate in this definition that humans and human activity are not part of the definition of “sanctuary resource.” Indeed, what other living organism “contributes to the conservation...value of the sanctuary?” It is humans who do this.

Section 1431 continues with its purposes and policies, listing nine items. Section 4 reads:

“to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment and the natural, historical, cultural, and archaeological resources of the national marine sanctuary system”

Again, all of these items, including the words “natural” and “cultural” are given equal footing.

Number 6 of this section begins:

“Facilitate to the extent compatible with the primary objective of resource protection...”

This section, which is the first part of the goal statement that caused our discussion, has been to some degree dealt with in the above discussion regarding multiple use versus protection and preservation. Still, the term “resource” is in question. The definition of “sanctuary resource” found in the Act and cited above indicates that it includes human activities, qualities, and values. A SMPA member pointed out that, if human uses are resources to be protected, this would amount to circular logic. That is true. The Act is circular.

Further, section 1433, which talks about the sanctuary designation standards, makes the following distinction between:

“(B) “the communities of living marine resources it harbors; or
(C) its resource or human values”

It is interesting to note that “communities of living marine resources” is set apart from “resource or human values.” This suggests that the word “resource” is not synonymous in the National Marine Sanctuary Act with “living marine resources.”

Section 1433 continues by describing things that the Secretary must consider in the designation of a sanctuary. These include:

“(b) the area’s historical, cultural, archaeological, or paleontological significance.”

Again, there is no order of importance or hierarchy given to any other type of quality or resource in this section. In fact, Section (I) also lists the fact that the Secretary must consider “the socioeconomic effect of sanctuary designation.” There are a number of other sections in the Act which suggest that the protections of the Act apply equally to cultural, historic, etc., resources.

There are other areas of the Sanctuary Act, however, that muddy the water as to what is meant by a sanctuary resource. Section 1433 reads that:

“The Secretary will consider for a sanctuary designation...”

- (C) The present and potential uses of the area that depend on maintenance of that area's resources, including commercial and recreational fishing..." and
- (K) The feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses; and the value of the area as an addition to the system."

These two sections suggest that there is a distinction made between sanctuary resources and compatible uses. This being said, it appears that the argument that historical, cultural, and recreational qualities or values should be included in the meaning of the term "sanctuary resources" is strong. It's harder to make a case, within the full context of the National Marine Sanctuary Act, and regulations, including looking to legislative intent, that they are not to be included.

National Marine Sanctuary Program Regulations

15CFR922.3, the National Marine Sanctuary Program Regulations, also contain policy guidance. "Cultural Resources" are defined as:

"any historical or cultural feature, including archaeological sites, historical structures, shipwrecks, and artifacts."

The term "feature" is not defined further, and might suggest only a static object, except for the further guidance found as the regulation continues, defining "Historical Resource" as:

"Any resource possessing historical, cultural, archaeological, or paleontological significance, including sites, contextual information, structures, districts, and objects significantly associated with or representation of earlier people, cultures, maritime heritage, and human activities and events. Historical resources include "submerged cultural resources", and also include "historical properties," as defined in the National Historic Preservation Act, as amended, and its implementing regulations, as amended."

The National Historic Act, cited above, includes the concepts of cultural dynamics, and history, as resources.

Section 922.2 of the Sanctuary Regulations speaks to the treatment of historical resources:

"...The same degree of regulatory protection and preservation planning policy extended to historical resources on land shall be extended to, to the extent practical, to historical resources in the marine environment within the boundaries of the designated National Marine Sanctuaries..."

As a related footnote, on January 4, 2005, the City of Monterey was honored when Mrs. Laura Bush designated it among the Nation's newest *Preserve America* communities. The goals of the *Preserve America* Initiative include: a greater shared knowledge about the Nation's past; strengthened regional identities and local pride; increased local participation in preserving the country's cultural and natural heritage assets; and, support for the economic vitality of our communities. I don't think anyone could argue that the history and culture of Monterey as a fishing community is not worthy of acknowledgement and protection.

The 1992 MBNMS Designation Document

As we well know, each sanctuary has its set of founding documents that set forth its purpose. In our case, the Monterey Sanctuary's Designation Document proclaims its purposes in protecting and managing its resources, as follows:

"Under the authority of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (the "Act"), 16 U.S.C. sections 1431 et seq., Monterey Bay and its surrounding waters offshore central California, and the submerged lands under Monterey Bay and its surrounding waters, as described in Article II, are hereby designated as the Monterey Bay National

Marine Sanctuary for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area.”

As you can see, all of these resources are once again on an equal footing for protection. An argument could be put forth, that says that the MBNMS protects historical, or cultural resources, through other sanctuary programs than the MPA program. However, that argument has no weight when set alongside the Sanctuary’s "ecosystem based management" mandate.

NOAA’s Ecosystem Approach

If this were not enough to prove both the legal meaning and legislative intent, I also draw your attention to the document entitled “New Priorities for the 21st Century – NOAA’s Strategic Plan – Updated for FY 2005-2010.” This document was prepared at the direction of the Undersecretary for Oceans and Atmosphere, Conrad C. Lautenbacher, Jr. To quote from the Strategic Plan (page 4):

“NOAA’s Ecosystem Approach to Management

- An **ecosystem** is a geographically specified system of organisms, the environment, and the processes that control its dynamics. Humans are an integral part of an ecosystem.
- The **environment** is the biological, chemical, physical, and social conditions that surround organisms.
- An **ecosystem approach to management** is management that is adaptive, specified geographically, takes into account ecosystem knowledge and uncertainties, considers multiple external influences, and strives to balance diverse social objectives.”

Conclusion

What does this mean for the SMPA workgroup? I believe that it means that in drafting our conservation goals statement and for our entire consideration of the subject of MPAs and marine reserves within the Sanctuary, that we must conserve and protect cultural, historical and recreational resources, qualities, and values to the same degree that we attempt to protect biological resources and habitats. There can be no doubt but that in this area, one of the greatest cultural and historic qualities that this area possesses is its heritage of fishing activities. We can’t do harm to that. It also means that the social and economic science of the consequences of any MPA plan we develop must be as thorough, and weighted equally with, the consequences to marine life and habitats.

This balance is hard to articulate and hard to achieve, but a worthy goal, in my opinion. I would appreciate it if you would distribute this letter to all SMPA Workgroup members, and to the SAC.

Sincerely,

Stephen B. Scheiblaue
MBNMS SMPA Workgroup Member
Monterey Harbormaster

SBS/mv

C: Alliance of Communities for Sustainable Fisheries