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"Sanctuary Enhancement Act of 2008"

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Subcommittee on Fisheries, Wildlife, and Oceans
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Introduction
Madame Chair Bordallo, Ranking Member Brown and distinguished members of the Subcommittee, I appreciate the opportunity to speak with you today about the "Sanctuary Enhancement Act of 2008", H.R.6537.

I am Rick Marks, a principal at Hoffman, Silver, Gilman & Blasco PC.(HSGB). We are the oldest operating law firm in the State of Alaska formerly known as "Robertson, Monagle & Eastaugh". We have offices throughout Alaska and Northern Virginia and our clients operate in various marine environments around the nation.

Prior to joining HSGB, I was appointed by the Secretary of Commerce to serve on the Mid-Atlantic Fishery Management Council and worked as a lead marine fishery biologist for the State of North Carolina. I worked for NOAA/NMFS twice - once as a Fishery Reporting Specialist and once as a benthic laboratory and field technician. I participated in the *USS Monitor* artifact negotiations, and the WWII Mark IV Enigma coding machine ownership negotiations with the Federal Republic of Germany. I served as the East Coast representative for the National Fisheries Institute and worked for two seasons as a mate on charter fishing vessels. I hold a Masters Degree in Marine Environmental Science with emphasis in Fish Ecology from Stony Brook University as well as a Bachelor of Science in Biology from Lynchburg College. I currently serve at the pleasure of the NMFS Assistant Administrator on four Federal Marine Mammal Protection Act-mandated "Take Reduction Teams" (TRTs).

Since we had just five working days to organize our testimony on H.R. 6537, all of our clients did not have time to formally approve this final version. Therefore, for the record my comments here today are solely my own. However, please note my testimony reflects issues critical to many of my clients and associates around the country including several

that operate in or near seven existing national marine sanctuaries – Olympic Coast, Monterey, Channel Islands, Cordell Banks, Gulf of Farallones, Florida Keys and Stellwagon Bank. Recently, you were kind enough to receive oversight testimony directly from one of my current clients - Chairman Micah McCarty of the Makah Tribe. Where appropriate, my comments will expand on those provided by Chairman McCarty.

Today I will deal with the substantive issues of H.R.6537. I intend to discuss three topics: (1) positive aspects of this legislation; (2) areas of concern; and (3) fisheries regulations. I will also include recommendations along the way that are intended to improve the legislation.

Strengths of H.R. 6537

Regarding Section 301(b) I appreciate your efforts to retain some of the core purposes and policies of the National Marine Sanctuary Act (NMSA) including the assurance that we look at areas of the marine environment that are of special national significance. The importance of this underlying concept must not be underestimated. We should heed this requirement and choose sites wisely or else the program may suffer the same problem that initially plagued the Magnuson-Stevens Act (MSA) essential fish habitat designation process -- "if everything is essential then nothing is."

Further along in Section 301(b) I also support the clarification allowing for regulated public and private uses of sanctuary resources. While we may not agree on exactly what those uses are and the degree to which they may be exercised, it is nonetheless important to our clients that we see this recognition in the policy section and we thank you for that addition.

We support the Resource Classification, Identification and Inventory specified in Section 303 and in particular, the provision at 303(d)(1) which specifies that "discrete" areas of the marine environment be considered for potential designation as a sanctuary. This provision maintains consistency with the purposes and policies section in 301(b). We recommend a formal, independent peer review be conducted of the final site selection list to ensure that areas prioritized for designation are unique, discrete marine areas of special national significance.

We very much appreciate your effort to resolve the fishing regulation conflict in Sections 304 and 308 and to have the Regional Councils clearly involved in the process. While we have not reached a resolution with this version of H.R.6537 I want to express sincere thanks to you and your staff for focusing on this issue. I will circle back to this discussion in the part of my testimony addressing fishing regulations.

In Section 308(b)(5) we recognize and appreciate the cooperation and consultation provision, especially for Federally-recognized Indian Tribes. It is critical these interests be afforded the proper government-to-government recognition specified by their treaties, embodied in Executive Orders 13158 and 13175, and further clarified in case law.

As noted by Chairman Micah McCarty of the Makah Tribe at your NMSA oversight hearing on June 18th, it is important to recognize that the Olympic Coast National Marine Sanctuary (OCNMS) is a special case due to the fact that it is the only sanctuary within the combined U&A Areas of four Treaty Tribes. I am disheartened that a tribal consultation provision specific to the OCNMS is not contained in H.R. 6537. I do hope you and your staff will work cooperatively with the Makah Tribe and other Northwest Treaty Tribes to provide specific statutory authorization for the existing IPC, moving from an MOA to a binding legal arrangement which specifies co-management opportunities, ensures federal treaty trust responsibility, and clarifies a government-to-government consultation process.

I also support conceptually the idea of special use permits in Section 310. While I retain some concerns about practical implementation and utility, this provision does maintain consistency with allowing for regulated public and private use of sanctuary resources. We recommend the sanctuary program be required to use the best available science in decision making regarding issuance of special use permits.

Finally, I support your overall program authorization levels for additional appropriations in Section 313 provided those appropriations do not negatively impact funding levels for our ongoing fisheries research and management programs which you well know are woefully under-funded.

Areas of Concern

Section 301(a)(4) indicates that scientific research has confirmed that protected areas do a number of wonderful things both inside and outside of the protected zones including repopulating adjacent areas. I would be remiss in my scientific duties if I did not point out that there remains significant controversy about these benefits and should be viewed on a sanctuary-specific, case by case basis. Some leading scientists (Hilborn and Walters, 2008) suggest that in certain instances, benefits of protected areas may not be either extensive or net positive.

Indeed, the value of MPAs has been shown in tropical areas with more sedentary or habitat-specific species, but not in areas with dynamic ocean conditions such as the West Coast. It also has not been demonstrated for species that are migratory such as whiting, Dover sole, sablefish, Atlantic bluefish, various squids and Atlantic mackerel. For other benthic species such as lingcod, time/area closures may work equally well in protecting stocks during sensitive spawning or rearing times.

Dynamic marine environments experience constant input/output of biological, physical and chemical components. Being able to maintain total “ecosystem” protection is a fairly broad claim, especially when talking about perceived threats such as global climate change. For example, the buildup of atmospheric CO_2 has been linked to ocean acidification and simply putting areas off-limits to fishing will do nothing to address other impacts.

Citing these uncertainties I also note that the NMSA, even with the proposed changes, would still lack a specific requirement that decisions be based on the best scientific information with provisions crafted to implement such standards. Currently, it is my sense the sanctuary process often times appears to be more "policy" driven than anything else. As a starting point I recommend that clear scientific integrity be required of NMSA decisions using the same standards that apply to MSA actions.

In Section 301(c)(1)(B) of H.R.6537, Congress would bring marine national monuments under the jurisdiction of the NMSA. This presents a double-edged sword for resource use constituencies. Certainly, once an area is designated pursuant to the "Antiquities Act" ("The Act", Chpt.3060; 16 U.S.C. 431) there should be some applicable management and regulatory regime by which the public can gain benefit and access to the area. It would appear that the NMSA is the most appropriate statute.

However, designations pursuant to the Antiquities Act are arguably not achieved by way of a scientifically-defensible, public process. If we proactively envelop monuments into the NMSA as is proposed here, do we encourage future designations to be done separate from the public process? I believe we may do just that.

As a justification for my concerns we can look to the much-rumored example of the "Islands in the Stream" initiative being supposedly developed by among others, the Council on Environmental Quality (CEQ) and the National Ocean Service (NOS). If the rumors are true about linking the Flower Garden Banks across the Pinnacles to the Florida Keys Sanctuary via monument authority then it is being discussed with little or no public process. By proactively allowing the addition of future monument designations to the NMSA we are facilitating the very activities that are anathema to what we should be trying to achieve with a transparent, science-driven, fiscally-responsible designation process.

H.R.6537 contains new requirements to identify and protect maritime heritage resources (See Sections 301, 302, 303, 306, and 310). The term is defined at 302(a)(14) but then quickly morphs into "maritime heritage resources *areas*" at 303(c)(3)(A)(ii) and (C) and (d)(1)(B) without any explanation what the new term means or what the implications are for area management. Having worked for years in and around the Graveyard of the Atlantic I have a special appreciation for preserving maritime heritage resources but expanding this to an undefined area concept with resource use implications is serious cause for concern and not just for fishermen along North Carolina's Outer Banks.

A "System Expansion Goal" provision is incorporated into Section 6 of H.R.6537 specifying the Secretary should strive to add the number of sites necessary to incorporate a full range of ecoregions and rare and unique habitats and maritime heritage resource *areas* before 2030. My concern here is that numerical goals could drive what should be a deliberative, scientific, and fiscally-responsible designation process. It may make more sense to remove the numerical target and endeavor to add those areas that truly qualify as discrete areas of national significance that we can manage effectively.

Section 7 (Sec. 304) revises the designation procedures and management plan review process. Here, H.R. 6537 reduces (by 6 mos.) the time to publish a notice of designation but increases the period of management plan review from 5 to 7 years. Furthermore, subsequent management plan reviews are pushed back from once every 5 years to only once every 10 years. These changes are counterintuitive for managing dynamic marine systems – on the one hand we increase the speed to designate but on the other we delay a review of what we have done. This will effectively reduce government oversight, slow the system's reaction time to make substantive changes, and possibly dull the effectiveness of the advisory panels.

Furthermore, the management plan review section appears to require a specific review of the impacts of fishing regulations within the sanctuary but would not require the same level of review for any other activity. This is also counterintuitive since there are numerous other activities that may impact sanctuary resources. It is unclear how controlling fishing activities will protect the health of the entire ecosystem while whale watching, boating, water pollution, air pollution, non-point source discharge, marine mammal predation, vessel strikes, ocean acidification, etc… are not the subject of similar scrutiny or control.

H.R.6537 repeals the limitation on new sanctuary designations and the associated findings requirement. My primary concern here, in addition to the fiscal burden of new designations on previously designated sanctuaries, is the willing removal of the checks and balances inherent in the current findings at 16 U.S.C. 1434(f)(1). Currently, before he can add a new designation the Secretary must ensure that a new designation will not have a negative impact on the system, that he has sufficient resources available in the fiscal year, that he can effectively implement a sanctuary management, and that he can complete an inventory within 10 years at the current funding level.

The existing designation language provides some fiscal responsibility on whether the Secretary has adequate funds to administer existing sanctuaries before creating new ones. This is analogous to the situation we face in our National Parks, where new parks are created while existing ones are falling apart due to the lack of operational capital. My recommendation is to retain the designation limitations until such time that we can change the budgetary constraints on the NMSP.

Section 306 revises the prohibited activities provisions by striking the phrase "knowingly and willfully" on paragraph (3)(C) regarding submission of false information to the Secretary or any authorized officer. This change lowers the legal standard to the point that a person could be prosecuted under the full extent of the penalty schedule for making a simple mistake. By all means I support the law being applied to the fullest extent possible for determined criminal activity but this new standard seems rather excessive for an honest mistake.

Similarly, increasing the maximum prison sentence (from 6 months to 2 years) and increasing the maximum fine (from $100,000 to $250,000) for violations of the Act seem relatively harsh. Changes in the penalty schedule could be warranted should the number

and scope of NMSA violations be of such serious concern but there is no indication from NOS that this is the case.

Section 309 is amended here to permit the Secretary to withhold certain public information to protect sanctuary resources. Subpart (ii) allows the Secretary to further determine who may have access to these data but provides no standard by which the Secretary shall make that determination. Active withholding of such information in the context of artifacts discovered within the Olympic Coast Sanctuary is inconsistent with the Federal treaty trust responsibilities afforded the four Treaty Tribes of Washington State (i.e. Makah, Ho, Quinault, Quileute). The OCNMS is located entirely within the combined Usual & Accustomed Area of these four federally-recognized Tribes and any discoveries of cultural artifacts should be shared with them immediately.

New Section 310 allows the Secretary to issue permits for bottom trawling in some cases but then goes on to require conditions and restrictions that make it impossible for an individual fisherman to actually get a permit. Also unclear is whether any fisherman – commercial or recreational – would be required to have a permit issued under this section. There should be an explicit statement that fishing allowed by regulation would not require a separate Sanctuary permit. I note here that that applicable language is found in subsection (g) of the existing NMSA but was omitted in H.R.6537.

Finally, there is a fundamental change to the provision clarifying how the Act relates to other existing federal laws in Section 301(b)(2). The original NMSA authority complimented existing regulatory authority while the new language appears to make existing authority comply with the mission of the sanctuary system. It would be helpful if a provision could be added explaining that the Act is not intended to override other federal laws dealing with the marine environment but is intended to compliment them.

Fisheries Regulations
Turning to fishery resource management, the proposed NMSA "mission" statement specified at 301(c)(2) is well crafted but does not include any real use of sanctuary resources. Clearly, the system is being redesigned to protect resources (including fish), not utilize them. I note this here because it forms a critical philosophical component in the debate over fishing regulations in sanctuaries.

This new mission statement represents a major fundamental change in the purpose of the Sanctuary system, a change which – had it been in effect prior to the designation of existing sanctuaries – would have resulted in different views on establishing them in the first place. For example, on the West Coast, sanctuaries were established primarily over concerns about oil exploration and development. The *USS Monitor* was protected off the coast of North Carolina for its maritime heritage value.

Ocean resource users such as commercial and recreational fishermen and tribes generally supported establishment of sanctuaries because they were led to believe that fishing opportunities and access would be protected. Changing policies for existing sanctuaries is

the equivalent of re-zoning property for non-commercial use after the owner has already made investments on that property.

A perfect example of this bait and switch can be seen in the "Fishing Activities" portion of the Monterey Bay NMS Final EIS (See NOAA, Vol. II, Part IX, Section F; Response to Comments on Draft EIS, Issue 13 – Regulation of Fishing, pgs. F-41 to F-43, 1992). Regarding the question concerning the prohibition and management of fishing within the sanctuary NOAA responded with the following

> Existing fisheries are not being regulated as part of the Sanctuary regime and fishing is not included in the Designation Document as an activity subject to future regulation. Fisheries Management will remain under the existing jurisdiction of the state of California, NMFS and PFMC.

Similarly, Congressman Sam Farr (D-17th), a well-respected coastal legislator and current co-sponsor of H.R.6537 submitted clarifying correspondence to Mr. William Douros, Superintendent of the Monterey Bay NMS (See Farr, 2002) elucidating a position similar to NOAA's on fishing regulations in the sanctuary. Representative Farr's letter contains a section titled "The Role of the Sanctuary in Regulating Fisheries" from which the following quote is taken

> In the process of building support for the designation of the sanctuary, a clear commitment was made to the fishing community that the sanctuary would not impose any regulations directed at fishing activities or fishing vessels. This agreement is based on the understanding that the fisheries within the sanctuary are already being regulated and that there is neither the necessity nor the resources for the National Marine Sanctuary Program to take on this responsibility….The regulation of fishing in the sanctuary should remain under the jurisdiction of the California Department of Fish and Game and the Pacific Fisheries Management Council. Any future reexamination of this relationship should be conducted directly with representatives of the fishing and these agencies.

Despite these prior promises, designation documents that do not allow the regulation of fishing activities or fishing vessels, and despite a lack of consensus with the regulated community – approximately 64% of the Monterey Bay NMS is off limits to fishing (Hilborn and Walters, 2008). This year, the sanctuary superintendent announced (as of February 15, 2008) that NOS will proceed with the implementation of MPAs in the federal waters of the Monterey Bay NMS. It is our understanding that the proposed MPAs would only ban fishing while no other activity would be impacted.

In the nearby Channel Islands, the role of the sanctuary in fishing regulations is also being painfully felt by the regulated community. In the document titled "Our National Marine Sanctuaries 2007 Accomplishments Report (NOAA/NOS/NMSP 2007) the single "*Featured 2007 Accomplishment"* listed for the entire National Marine Sanctuary Program is described as follows

> Marine conservation in U.S. waters increased in July when NOAA expanded protected areas within the Channel Islands National Marine Sanctuary. The move permanently bans fishing from nearly 111 square miles around the Channel Islands, extending a network of marine reserves that now make up the largest area of no-fishing zones in the continental United States.

Clearly, the Sanctuary mission has evolved over time by shifting away from protecting discrete marine areas to one geared toward closing large areas to fishing under the guise of "ecosystem management" with little in the way of standards, scientific peer review, and transparent public processes. Unfortunately, rather than rectify the fishing regulation problem and address the conflict between the M-SA and the NMSA, H.R.6537 appears to make matters worse.

Perhaps most shocking in all of H.R. 6537 is Section 306(a)(5) which specifies an outright ban on "bottom trawling" for any sanctuary designated before January 1, 2009 unless expressly approved by the Secretary consistent with the sanctuary mission, and a full ban with no exception for any sanctuary designated on or after that same date. This amounts to legislating pre-determined management decisions for sanctuaries and monuments thereby circumventing the entire public and advisory processes.

Should the trawl ban provision be retained and implemented absent a scientific determination process, what would prevent the sanctuary program from prohibiting all fishing gear that touches bottom including gear that has even the potential to touch the sea floor under the new mission to protect all sanctuary resources? This is a very serious issue for all marine fishing constituencies.

The ban on trawling is particularly galling to the regulated community if you consider its application along with the "System Expansion Goal" specified at Section 6 and the addition of numerous but undetermined ecoregions and maritime heritage *areas*. I believe the opposition from every region to such a provision cannot be overstated. In the case of the OCNMS the proposed trawl ban would effectively abrogate the Tribes' fishing rights to continue their well-managed, adaptive bottom trawl fishery which is the result of transparent co-management efforts between the Tribes and the Pacific Council.

The proposed changes to Section 304 and 308 still require that fishing regulations be compatible with the purposes and mission of the sanctuary. Since the new proposed mission of the sanctuary is protection (and not use) of living and non-living resources, and based on the evidence of management activities in several sanctuaries that suggest a proactive ratcheting down of fishing activities, it remains unclear how *any* fishing in a sanctuary is safe under H.R.6537.

Furthermore, the new section 308 could put the Regional Councils even further behind the process. First, the new section adds timelines that heretofore did not exist, effectively forcing the Councils to examine NMSA issues as a priority – possibly at the expense of other more crucial conservation and management issues. If it cannot meet the deadlines the Councils lose their ability to managing fisheries throughout their range, a requirement

of the MSA. Typically, amendments to fishery management plans take up to two years to complete even when the Council has made specific allowances in its strategic planning for that activity.

I my opinion, the Secretary already has the authority under the MSA to issue regulations consistent with the MSA to close certain areas to fishing if it is deemed necessary to protect the ecosystem. However, there is still a need to clarify the existing relationship between the NMSA and MSA.

In 2005 and again in 2008 the Regional Fishery Management Council Chairmen adopted unanimous positions to amend the NMSA to specifically exclude fishery resources as sanctuary resources and to achieve jurisdictional clarity by vesting federal fisheries management within the MSA. The House Natural Resources Committee attempted to address this very issue during the 2006 MSA reauthorization but Members deferred the debate to the NMSA reauthorization.

I agree with the position of the Regional Council Chairmen for a number of reasons. First, this approach ensures that fishery resources are managed to achieve the greatest benefit the nation, consistently throughout their range, and with the best scientific information available. Second, the MSA has very specific National Standards, guidelines, scientific & economic considerations, a complete fishery-specific committee structure, and clear requirements for public input that include but extend beyond National Environmental Policy Act (NEPA) considerations. And third, the Councils are mandated to minimize the impacts of fishing gear on fish habitat as a component of FMPs and were provided with authority to employ ecosystem-based tools to implement area management such as marine protected areas and special limited fishing zones to protect resources (See 16 U.S.C. 303(a)(7) and 303(b).

The Regional Councils are already incorporating these EFH and ecosystem-based concepts into their management plans which would be consistent with the intent of the NMSA. There are many examples of this from every region, here are just a few - the North Pacific Council operates a full retention trawl program and has set aside an expansive deepwater coral protection area. The Pacific Council, through its EFH process, has already established discrete areas where bottom contact gear of any kind (not just trawls) is prohibited. The Rockfish and Cowcod Conservation Areas put thousands of square nautical miles off-limits to fishing. This Council has gone one step further and established a committee designed to modify those areas based on new information. The Mid-Atlantic Council has implemented trawl Gear Restricted Areas and the New England Council closed the heads of several marine canyons to trawling for purposes of managing Atlantic monkfish.

Simply put, the NMFS and the Regional Council system are designed and well-equipped to manage and protect fishery and ecosystem resources using all the tools at their disposal (incl. area management concepts) while the NMS system is not, nor was it ever intended to handle such a comprehensive task. Fisheries management is standard operating procedure for NMFS and the Councils using their resources of fishery science and

statistical committees and support staff, economists, periodic fishery surveys, program monitoring, cooperative research programs, a fleet of federal research vessels, specific data reporting requirements, vessel trip and dealer reporting, permits and licensing activities, specific limited access and allocation methodologies, constituent services and outreach, and other pending programmatic changes to overfishing and rebuilding requirements resulting from the 2006 MSA reauthorization.

In sum, the U.S. Congress and this Subcommittee just invested years of hard work to substantially improve the MSA by separating politics from quota setting, ending overfishing, providing for enhanced habitat management, adding tighter controls on catch limits and accountability, and by specifying clear roles for advice from Science and Statistical Committees. In other words, the Councils operate under a very comprehensive, conservation-oriented set of requirements pursuant to the MSA. They have consistently proven the ability to deal with area management concepts to protect living marine resources in a transparent and science-based manner. There is simply no valid reason why this system should not be the primary tool used to manage fishery resources in sanctuaries.

Madame Chair, I thank you and Mr. Brown and the Subcommittee members for allowing me to speak with you today regarding the details of H.R. 6537. I hope to continue our work with you and your staff during this reauthorization process.

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