



April 9, 2017

Mid-Atlantic Fishery Management Council  
800 North State Street – Suite 201  
Dover DE 19901

Attention: Chris Moore, Executive Director

Re: Marine Sanctuary proposal for Hudson Canyon

Dear Chris,

The American Bluefin Tuna Association (<http://www.theabta.com>) represents U.S. East Coast handgear fishermen who fish for Atlantic *bluefin*, *bigeye*, *yellowfin*, *skipjack* and *albacore* tunas. In addition, ABTA is concerned with other pelagic species targeted by our fishermen including *swordfish*, *wahoo* and *dolphinfish*. In 2016, 2,919 vessels were issued Federal commercial tunas fishing permits, 3,594 vessels were issued charter/headboat tunas permits and 20,020 vessels were issued recreational tunas permits. ABTA represents all these participants and is active in the domestic and international management of the aforementioned fish stocks.

All of our fish stocks are highly migratory pelagic species and, with the exception of Dolphinfish and Wahoo, are controlled by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and managed by the Highly Migratory Species Management Division of the National Oceanic and Atmospheric Administration (NOAA).

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## Summary

Why is it important for the MAFMC to look closely at the proposal to confer marine sanctuary status to Hudson Canyon? The importance of Hudson Canyon to recreational and commercial fishermen cannot be overstated and there are important potential implications for fishery management under Marine Sanctuary law. Further, the arguments in favor of marine sanctuary status for Hudson Canyon put forth by the proponents in their proposal are, in our view, weak. Also, it is important to acknowledge that there is a proposal, already drafted and presently held in abeyance, for conferring marine sanctuary status to Baltimore Canyon and there is discussion regarding potential proposals for Norfolk and Wilmington Canyons, as well.

### Who is proposing a marine sanctuary for Hudson Canyon?

The Wildlife Conservation Society (WCS) are the authors of the proposal. This organization owns and operates the New York Aquarium. According to their literature, in fiscal year 2016, WCS had assets in excess of \$1 billion, net assets of \$787 million and general operating revenues of \$247.6 million.

The New York Aquarium, located in Coney Island, is largely an outdoor facility. However, a new 57,000 square foot indoor exhibition space is under construction and is intended to “showcase” the Hudson Canyon, among other uses.

### What are the chief problems with this proposal?

The problems can be divided into two categories:

1. Marine Sanctuary Law
2. The arguments in support of the proposal that has been tendered to NOAA.

### What are the problems with Marine Sanctuary law?

1. Marine Sanctuary law has ultimate statutory authority over fishing:

Marine Sanctuaries Act, §304 [16 U.S.C. 1434] (a) (5) Fishing Regulations, states that in preparing draft regulations, the National Standards of the

Magnuson-Steven Act (MSA) shall be used as guidance but only *“to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation.”*

Therefore, when the goals and objectives of a marine sanctuary *are found to be inconsistent, incompatible or at variance with the National Standards of MSA*, Marine Sanctuary law will take precedence over MSA and its National Standards.

2. Marine Sanctuaries Act, § 306 [16 U.S.C. 1436] Prohibited Activities, confers wide authority over just about any activity, as follows:

*It is unlawful for any person to –*

- (1) destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary;*
- (2) Possess, sell, offer for sale, purchase, import, export, deliver, carry, transport, or ship by any means any sanctuary resource taken in violation of this section;*

This section includes language that could apply to just about any activity including, for example, such innocuous activities as recreational catch and release fishing.

3. The “definition” section of the Act, § 302(8), states, *“sanctuary resource means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational ecological, historical, educational, cultural, archaeological, scientific, or aesthetic value of the sanctuary;”*

The foregoing can apply to virtually anything found in a marine sanctuary.

4. § 311 (b) and (c) state, as follows:

*(b) Authorization to solicit donations – The Secretary (of Commerce) may enter into such agreements with any nonprofit organization authorizing the organization to solicit private donations to carry out the purposes and policies of this chapter.*

*(c) Donations – The Secretary may accept donations of funds, property, and services for use in designating and administering national marine sanctuaries under this chapter.*

This section demonstrates that private and nonprofit organizations can be a major source of funding for the operation of marine sanctuaries and can therefore have tremendous influence upon sanctuary management and policy.

### The proposal

*Background:* This proposal was tendered to NOAA approximately one week after the 2016 presidential election. NOAA’s decision to accept this proposal into Marine Sanctuary “inventory”, pursuant to their detailed review of the proposal, was made on February 23, 2017.

*Summary:* We believe that WCS’s arguments in support of sanctuary designation for Hudson Canyon are weak (as discussed in detail below). It is our opinion that sanctuary designation represents essentially a “trophy” for the New York Aquarium, providing a tie-in with the Hudson Canyon display intended for a new building, presently under construction.

*What does the proposal have to say about fishing?* The proposal states, “We therefore recommend that fishing should continue in this economically valuable area.” Elsewhere in the proposal is found the statement, “Fishing – *if not well managed* – probably represents the most immediate and direct threat to the living resources and habitats in submarine canyons including Hudson, particularly as demand increases, access to and abundance of coastal resources decline, and deepwater fishing technologies advance.” This latter statement begs the question: who would determine if our fish stocks are well managed? Will it be our fishery managers, the MAFMC, ICCAT or the marine sanctuary?

### What are the arguments used in the proposal to support marine sanctuary designation?

The main arguments are as follows:

- The claim of “broad community support” for the proposal

- Sanctuary status can confer a prohibition on oil and gas exploration in Hudson Canyon
- Sanctuary status will enhance protection of deep sea coral found in Hudson Canyon
- Sanctuary status will facilitate scientific research
- Sanctuary status will enable a ban on mineral extraction
- Sanctuary status will facilitate public access to Hudson Canyon
- Sanctuary status will enhance protection of marine species
- Sanctuary status will protect Essential Fish Habitat
- Sanctuary status will facilitate access to shipwrecks
- Sanctuary status may be able to address the existence of “unexploded ordinance” in Hudson Canyon

We will elaborate on each of the foregoing.

### The claim of broad community support for the proposal

Literature from NOAA Marine Sanctuaries states that sanctuary nominations must demonstrate support for the national marine sanctuary concept “from a breadth of community interests”. It further states that organizations or industries that depend on the resources in a nominated area should also be represented within the nomination.

Fishermen are the primary stakeholders and users of Hudson Canyon. However, no effort was made by WCS to engage any fisherman organizations or to engage the Highly Migratory Species Management Division of NOAA in this proposal. In actual fact, ABTA only became aware of the proposal through the media. Consequently, we believe that WCS has failed to address the mandate for support of the proposal “from a breadth of community interests” and their proposal should have been rejected by NOAA Marine Sanctuaries for this reason.

### Sanctuary status can confer a prohibition on oil and gas exploration in Hudson Canyon

WCS’s argument in favor of establishing a marine sanctuary in Hudson Canyon holds that sanctuary status could facilitate a permanent prohibition on oil and gas exploration in this canyon, and that this prohibition would be desirable.

We are mindful that this proposal was tendered to NOAA in November 2016. However, on December 19, 2016, the Obama Administration, under the Outer Continental Shelf Lands Act, has permanently prohibited oil and gas exploration in the Canyons Region from offshore Virginia to offshore Massachusetts, protecting nearly 4 million acres, in perpetuity. This action includes protections for Hudson Canyon.

This Act has been used to safeguard Alaska's Bristol Bay in 2014 and again in 2015 to protect part of Alaska's Arctic coast. A fact sheet issued by the White House stated that the Obama Administration, under this Act, has protected 125 million acres during this period.

Consequently, the Obama Administration has effectively taken the issue of oil and gas exploration in Hudson Canyon "off the table". Therefore, the sanctuary proposal is no longer validated by the need for these protections.

### Sanctuary status will enhance protection of deep sea coral found in Hudson Canyon

It is difficult to imagine what sanctuary status can do for protection of deep sea coral that has not already been achieved in the establishment of protections under the Atlantic Mackerel, Squid and Butterfish FMP and under the establishment of the Frank R. Lautenberg Deep Sea Coral Protection Area. However, WCS, in its proposal, gives equal weight to the need for protecting these ecological attributes as they have with the need for a prohibition on oil and gas exploration and claims that sanctuary status will facilitate enhanced protections for deep sea coral. WCS suggests that sanctuary status will facilitate identifying new areas where deep sea coral is found but they have chosen not to elaborate upon this statement.

The proposal neglects to take into account that the Council and NMFS have already addressed the possibility that any new data regarding the location of deep sea coral or new data indicating the absence of deep sea coral in an area formerly believed to contain coral in Hudson Canyon will require further modifications to protections. The protections established have been further enhanced by the inclusion of special "framework provisions" for ease of potential future modifications to deep sea coral protection measures. These "framework

provisions” are therefore an important part of the overall plan in that they provide a fast track for specific modifications to the FMP, as compared with “regulatory provisions”, which necessitate a process that can take much longer. In real terms, this provision means that if new data is introduced that identifies not previously known areas where deep sea coral exists or has been found to not exist, the Council and NMFS can act swiftly to establish necessary protections or modify existing protections. This type of modification has already been done to protections for deep sea coral established in the South Atlantic by the South Atlantic Fishery Management Council.

As a result of the aforementioned measures and the extensive protections already established, we see no useful purpose in creating a marine sanctuary in Hudson Canyon for the purpose of protecting deep sea coral.

### Sanctuary status will facilitate scientific research

WCS claims that “a marine sanctuary designation for Hudson Canyon will increase federal investment and leverage state, local and private investment in science research, monitoring, and exploration”, yet they chose not to elaborate on how that can be achieved.

WCS further states that, “To date, there has been relatively little exploration of coral presence in Hudson Canyon.” This is inconsistent with the fact that NOAA’s Okeanos Explorer extensively surveyed deep sea coral in the Hudson Canyon in 2013-2014.

The proponents have linked future marine science research in Hudson Canyon with their desire to establish a marine sanctuary in Hudson Canyon. The implication is that establishing a marine sanctuary in Hudson Canyon will facilitate further research but they do not provide a persuasive argument that convincingly demonstrates that future scientific research is *significantly dependent* upon establishing this marine sanctuary. There are presently no known impediments to conducting scientific research in Hudson Canyon and there are no identified attributes in the marine sanctuary concept that would facilitate or ensure future scientific research.

In summary, future scientific research is not conditional upon sanctuary status for Hudson Canyon.

### Sanctuary status will enable a ban on mineral extraction

The proposal mentions that marine sanctuary status for Hudson Canyon will facilitate a ban on mineral extraction. However, this issue is not further developed in the proposal. Elsewhere in the proposal, “mineral extraction” appears to be linked to sand and gravel extraction. While sand and gravel aren’t minerals, we assume that mention of mineral extraction may pertain to sand and gravel extraction. Our fishermen would be the first to oppose sand and gravel mining in Hudson Canyon but, due to its great distance from the shoreline and, equally, due to the tremendous depths in Hudson Canyon, we consider this activity to be economically and logistically unfeasible.

In the extremely unlikely event that sand and gravel mining or mineral extraction should become an issue in Hudson Canyon at some indeterminate point in the future, there is a detailed procedure in place, managed by NOAA which intends to determine if this activity is appropriate for Hudson Canyon.

### Sanctuary status facilitates public access to Hudson Canyon

The proposal states, “A National Marine Sanctuary designation of the Hudson Canyon will provide many rich educational opportunities for diverse audiences to enhance their understanding and appreciation..” It goes on to say, “..designating the Hudson Canyon as a Sanctuary would bolster these efforts and help build a local marine ethic.” However, WCS neglects to explain what a “local marine ethic” is or how marine sanctuary status for Hudson Canyon will facilitate the building of a local marine ethic.

The head of Hudson Canyon is 90nm from the Verrazano Bridge at the entrance to New York Harbor and 80 nm from Point Pleasant NJ. Therefore, the potential for the public to have access to Hudson Canyon is extremely limited and creating a marine sanctuary in Hudson Canyon has not been demonstrated by WCS to improve public access.



Further, the proposal states, “Given its distance from shore, most local residents are unaware and/or unable to experience first-hand the astounding biodiversity of the Canyon and surrounding waters in the New York Bight.” WCS has not demonstrated how sanctuary status will shorten the distance to Hudson Canyon or otherwise facilitate enhanced public access to it.

Due to its distance from the shoreline and due to the fact that it exists in open ocean, we would not want any entity to encourage the public (boat owners, etc.) to travel to Hudson Canyon unless they are experienced mariners with vessels suitable for this purpose. This is a critically important safety concern.

An increase in public awareness of the ecological attributes of Hudson Canyon is certainly desirable but it is not dependent upon the establishment of a marine sanctuary in Hudson Canyon.

#### Sanctuary status will enhance protection for marine species

The proposal states, “The Sanctuary could help inform and protect habitat for about 50 federally managed species whose EFH designations overlap the Hudson Canyon.” However, they do not specify how sanctuary status would improve upon already highly-developed and successful fishery management plans for these species.

In the proposal, the proponents are advocating for a second or additional layer of management of certain attributes of this canyon beyond that which is already in place. As an example, the proposal envisions a role for sanctuary management in managing the protection of deep sea coral, although adequate protections and enforcement are already in place and managed by NMFS and the MAFMC. In this particular instance, the proposal is advocating for a role in managing 50 marine species. Yet, the proposal does not detail deficiencies in the present management of these marine species and does not discuss the bona fides WCS possesses that will enhance the existing management of these fisheries.

#### Sanctuary status can protect Essential Fish Habitat

There is much discussion regarding the designation, “Essential Fish Habitat” (EFH) in the proposal. The implication is that Hudson Canyon is an essential fish habitat

of greater value to the life cycle of the species that from time to time inhabit this canyon as compared with other canyons in the Canyons Range or other locations in the U.S. EEZ. This would be incorrect.

The discussion regarding EFH would suggest that the authors are perhaps confusing an EFH that is connected to a regulatory process resulting in the establishment of certain protections, such as fishing prohibitions, as compared with an EFH that is used purely for statistical purposes by NOAA's Office of Habitat Conservation.

EFH data is regularly updated by NOAA for use by other agencies and by the public. For example, the Bureau of Ocean Energy Management uses EFH data when evaluating a proposal for an offshore wind farm. In such case, EFH designation tells us where a particular marine species may be found within the U.S. Exclusive Economic Zone (EEZ). In the case of highly migratory pelagic species, an EFH designation for a particular species only tells us where a species is known from time to time to exist when it is swimming in U.S. waters. As of today, the EFH designations for the marine species found in Hudson Canyon do not include "findings of significant impact" to the "feeding, breeding, spawning or growth to maturity" of any of these species.

In summary, there is no special significance to be attached to the fact that Hudson Canyon is an EFH for the species under discussion. Consequently, protections for essential fish habitat beyond that which is already in place are not necessary. A role for sanctuary managers in "protecting essential fish habitat" raises the question of their bona fides and proposes a problematic additional layer of management of these fish stocks.

### Sanctuary status can provide access to shipwrecks

There are many shipwrecks outside of Hudson Canyon, on the Continental Shelf. These shipwrecks are already explored by divers. However, shipwrecks, if they are found within Hudson Canyon, would not be accessible by divers due to the great depth. Hudson Canyon has a depth range of approximately 350 to more than 3,000 ft. Due to these depths, diving is precluded as a means for exploring Hudson Canyon. According to the Professional Association of Diving Instructors (PADI), recreational diving depth is limited to 18 meters (59 ft.) for divers with

open water certification. The depth limit for divers breathing air is 50 meters (160 ft.).

### Sanctuary status may be able to address the existence of “unexploded ordinance” in Hudson Canyon

Mention is made in the proposal of the existence of “unexploded ordinance” in Hudson Canyon and the potential dangers this ordinance may represent. This issue is expressed as problem that is specific to Hudson Canyon. However, as any mariner on the U.S. East Coast will attest, unexploded ordinance sites are ubiquitous, found in myriad locations throughout the U.S. EEZ, as indicated on nautical charts.

This proposal, under the heading, “National Security”, states, “The Sanctuary can play a role in raising awareness about these explosives, both for the safety of fishermen and to protect local wildlife.” However, in addition to cartographic data used by every fisherman/vessel which indicates the location of unexploded ordinance throughout the U.S. EEZ, NOAA has undertaken to periodically issue advisories and safe handling practices to fishermen. Therefore, sanctuary status is not validated or enhanced by the foregoing.

### Conclusion

Due to its great distance from the coast, Hudson Canyon is not accessible to most citizens. The benefits to be derived from sanctuary status, as argued in the proposal, are weak. Those stated benefits which may have value can be achieved without establishing a sanctuary in Hudson Canyon. The main arguments in support of this designation – the issue of a prohibition on oil and gas exploration and enhanced protections for marine species and deep sea coral – are not important considerations as they have been adequately addressed by separate regulatory actions and by fishery management plans that have been developed over many years. Indeed, one of the more problematic aspects of the proposal is the fact that it proposes an additional layer of management of fish stocks, deep sea coral and other attributes which we consider unnecessary and undesirable.

The fact that Marine Sanctuary Law assumes ultimate statutory authority over fishing is deeply problematic. However, we are doubtful that there is a place in

the regulatory process for conferring sanctuary status to Hudson Canyon for the purpose of debating the troubling aspects of Marine Sanctuary Law referenced in this letter. We are referring here specifically to the fact that Marine Sanctuary law has ultimate statutory authority over fishing. However, we should not be swayed by any claims made by the proponents to the effect that they fully support fishing in Hudson Canyon. Such statements mean nothing as they have no impact upon how Marine Sanctuary Law has been written.

Cordially,

David Schalit, Vice President  
American Bluefin Tuna Association