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May 20, 2005

By Facsimile; Original by Mail

Mr. Stephen W. Pearson
Noland Hamerly Etienne & Hoss
333 Salinas Street
P.O. Box 2510
Salinas, CA 93902-2510

Re: Fisherman's Agreement; MARS Cable Project

Dear Mr. Pearson:

The Board of the Alliance of Communities for Sustainable Fisheries ("ACSF") has reviewed your letter of April 21, 2005. The Board wishes to continue discussions toward development of a Fisherman's Agreement that will deal with the conflicts between fishing activity and the installation and operation of a partially exposed submarine cable in Monterey Bay. To that end, his letter offers several comments as to (1) what we see as the necessary procedure for final development of such an Agreement; and (2) the essential elements of that Agreement. We hope that we can develop an appropriate Agreement sometime in the near future. Until such an Agreement is developed, ACSF reserves all its rights under state and federal law with respect to the proposed project.

Procedure

The Board does not believe that our discussions will be effective until their concerns about the conflict of interest of MBARI are addressed. Ms. McNutt's response to our DEIR/EIS comments was not convincing as to the non-influence of the Monterey Aquarium, and the Foundation that created and runs it, in your clients' dealings with the fishermen in this matter. We are very certain that a bias exists and others we are sure perceive it as well. Moreover, this bias was evident in the provision in your letter restricting any meeting between representatives of the fishing industry and MBARI to no more than once annually, and then for not more than two



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hours. Given that this is a public-funded project that is attempting to resolve impending conflict with other legitimate public uses of the coastal environment, the attitude behind meeting restrictions will not foster good relations or encourage the participation of those who need to be involved in dealing with all the practical problems that will arise in this matter. Good communication is essential to resolving the conflict and in addressing these practical problems.

We recommend that a face-to-face meeting be arranged that would include the following persons: (1) representatives of ACSF, in particular those who fish in the area; (2) representatives of MBARI, in particular those who might be responsible for dealing with the fishing conflict issue at the program level on an on-going basis, not just those who exercise policy; (3) a representative of the State Lands Commission, given that agency's role as the lessor of the State's submerged land; and (4) a representative of the NOAA-Fisheries, Southwest Region. The goal is to stimulate a practical, business-like discussion of the conflict issues and ways to avoid them on a containing basis. Our clients also do not want this issue resolved solely through negotiations between lawyers. The parties themselves must work together to solve the obvious conflicts that arise in this situation and will need to do so after the lawyers finish working on the text of any written Agreement.

Therefore, we are providing a copy of this letter to the representative of the State Lands Commission responsible for the DEIR/EIS and to Rod McInnis, the NOAA-Fisheries Regional Administrator, for consideration of our request.

Content of the Agreement

The meeting should begin the process of filing in the details of the written Agreement that both parties agree is appropriate here. We seem to be in general agreement about several of the key provisions, but others need to be fleshed out further. We have already set out a number of points in our letter on the DEIR/EIS. The points below correspond to the points in your letter. These should be read to be consistent with our previous general comments. For ease of review, I am numbering the paragraphs (or bullet points in your letter) that are related to your points.

1. We agree that MBARI should be responsible for providing accurate information about the location of the cable, with regard to both the covered and uncovered portions.
2. The second point with regard to what the fishermen would provide, seems incomplete, and probably requires greater discussion about what should be provided at the time of a claim. We know that other cable committees have considerable experience on these matters and we should seek some guidance from them on exactly what is required and when.
3. The points about the times for suggested meetings is unacceptable, primarily because it puts artificial limits on a process that is yet to be fully understood. However, regular meetings should be held to give and receive information that will help avoid any cable snag. This would include better data gathering about the number and types of vessels that might be

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involved, projected into the future. Meetings in Moss Landing would be appropriate. Please remember that vessels from other areas in California and from other states may fish in the Bay. We will need to discuss how to include any such vessels in the program. In addition, we believe that those who attend the meetings on a regular basis representing the fishermen should be paid the same compensation and expenses as available to members of Fishery Management Councils. See 16 U.S.C. § 1852(d). Such payments will ensure participation in the program. These amounts are probably consistent with compensation paid to those who review grants and participate in review procedures sponsored by the National Science Foundation.

4. We do not understand your reference to MBARI's existing hotline. Is this a phone line or radio connection? Again, these details need to be worked out in a face-to-face meeting with the fishermen themselves.

5. In principle, we agree that a possible snag should cause the fisherman to drop his gear and avoid any tension on an obstruction.

6. With respect to compensation, we do not think it appropriate that MBARI be the sole judge of whether a claim could be paid, because of the concern about bias. A process should be established that reviews any information provided to be sure that the claim is fair and appropriate, but it may involve subcontracting with someone who works with other cable committees. We understand that, on such committees, the majority vote is held by fishermen, not by the cable operator. We also need to discuss the amount of compensation further. If the gear is underwater, a fisherman cannot know how much fish is in the net. In other cable committees, payment is not for the fish, but for lost fishing time, which is based on previous fishing records, in addition to payment for lost gear.

7. Releases, upon payment of compensation, would be appropriate and the terms subject to negotiation and agreement in advance. We will need written confirmation from the National Science Foundation, or other Federal entity, to establish that MBARI is in fact the owner of the cable and the sole party to bring claims against others for negligently snagging the cable. The release must apply to all mutual claims between the parties.

8. We do not believe that "mandatory mediation" is necessary, if good, on-going communication is established. A mandatory mediation process also favors MBARI because of its financial resources relative to the ordinary fishermen.

9. It is not clear what you mean by "other usual and customary general commercial provisions" that would also be included. Attorneys' fees, for example, are not usual and customary in many commercial agreements.

We also wish to offer the services of a number of fishermen in the cable laying process to ensure that no other vessels approach the operation. A number of vessels could be paid a charter fee to assist in this manner.



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I am sure that there are other particulars that will arise and need to be addressed if our suggestion for a face-to-face meeting is held in the near future. Please let me know whether our procedural proposal is acceptable to your client.

Very truly yours,

DAVIS WRIGHT TREMAINE LLP

A large, stylized handwritten signature in dark ink, appearing to read 'J. P. Walsh'. The signature is fluid and cursive, with a large loop at the beginning and end.

James P. Walsh

cc: Kathy Fosmark
Mike Stiller
Deidre Hall, Monterey Bay National Marine Sanctuary
Michelle Brown, California State Lands Commission
Rod McInnis, NOAA Fisheries, Southwest Region