

**Marine Life Protection Act Initiative
Public Comments Submitted
through January 19, 2011**

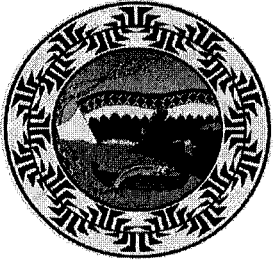
From: Loretta Vanzetti
Sent: Thursday, January 13, 2011 8:53 AM
To: MLPACComments
Subject:
Importance: High

Please see attached letter from John Corbett, Senior Attorney.
Thank you.

Loretta Vanzetti
Legal Secretary

Yurok Tribe
Office of the Tribal Attorney

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YUROK TRIBE

190 Klamath Boulevard • Post Office Box 1027 • Klamath, CA 95548

January 12, 2011

Marine Line Protection Act Initiative
Science Advisory Team
c/o California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: SAT Chair Letter of September 27, 2010

Dear Science Team:

Thank you again for your service. Many of you have other full time jobs of great responsibility and your participation on the Science Advisory Team (SAT) must have been a huge burden of your time and effort. We further appreciate that you took the time you did to make a detailed response to our letter of August 24, 2010 (copy enclosed). The Yurok Tribe regrets that it feels obligated to trouble you with a response. I hope you realize that a whole way of life is at stake.

The SAT letter was a reasonable guess as to what we were going to present to the SAT panel and was based upon our letter of August 24, 2010 to Ken Wiseman. Our subsequent request to the SAT, dated September 9, 2010, was to make a presentation on the Levels of Protection (LOP). As the Yurok Tribe noted in our August 24, 2010 letter, we only learned in May that the LOP was a constraint on finding an interim political solution of avoidance. Ever since the Tribe has been reviewing and studying the LOP. By the time of our September 9, 2010 request to the SAT to make a presentation on the Levels of Protection (LOP) the presentation covered a considerably broader range of issues. Your methodology was flawed in that you did not cover the full scope of issues that we were going to present. This is because no one asked the Tribe on what and whom would be presenting on the LOP.

There have been rumored reasons for denying the Yurok presentation. The first is that the consideration of avoidance by the Blue Ribbon Task Force (BRTF) is outside the scope of the SAT science charter. Answer: A review of the SAT charter shows to the contrary that while the SAT has a clear duty to prepare the Master Plan, it also has a similar duty to provide input to the BRTF and this covers avoidance issues (see SAT Charter, Charge (2)). The second rumored concern was the relevancy of the request

considerations. It was common knowledge that the BRTF and the BRTF itself indicated to the SAT that it was considering avoidance solutions. Ironically, many of the issues the Yurok wanted to present to the SAT, were presented by the SAT to the BRTF at the very next meeting. Findings presented by a BRTF member, Meg Caldwell, covered rough seas and other issues subject to scientific measurement. Lastly, concerns were expressed about the anecdotal nature of the Yurok information. The Yurok presentation would have involved many studies, over significant periods of time, of approximately 83 miles of Yurok ancestral territory or 7.5 percent of the entire California Coast. The information would be for a much greater length of coast line and for a longer period of time than the MLPA reserve studies to show the success or failure that the reserves will have. In conclusion, the rumored reasons for not letting the Yurok Tribe present to the SAT are simply not valid.

We were first going to have our consultant present test results from other Marine preserves regarding mussels. The data would have shown there was not a statistically significant difference in the diversity of species from the harvested and un-harvested areas. The presentation would also have encompassed the work of Smith, J. R. Gong and R.F. Ambrose, 2008, "The Impacts of Human Visitation on Mussel Bed Communities along the California Coast: Are Regulatory Marine Reserves Effective in Protecting these communities". There already has been testimony that Native Americans are harvesting in their traditional subsistence fashion without benefit of a State of California license both within and outside of the proposed MLPA areas. We also had testimony as to illegal harvesting by other ethnic groups within the designated arrays. This is similar to the Gong and Ambrose Santa Barbara Study. A key Yurok hypothesis is that multiple access issues will limit mussel harvest more than the designation of an area as a MLPA.

Presentation by one of our paid consultants, Hans Voight, would have included the following for mussels: disturbance as a main force in driving intertidal community structure; removal of biogenic habitat does not necessarily reduce biodiversity versus an un-harvested area; and here is an inherent background variability of age/size structure between mussel beds in both harvested and un-harvested areas. In addition, there is Dr. Jeanine M. Pfeiffer's "Yurok Native Science, Harvesting, and Conservation".

Communications from MLPA staff indicate that it is too late for the SAT to take up this issue. In the alternative, the Tribe is proposing to work informally with the California Department of Fish and Game and MLPA Scientific staff. It will be to the great benefit of the Tribe and to the SAT if these discussions are successful.

A primary concern we have with the LOP is that there is no circumstance allowed where Native Americans can maintain their right to subsistence harvest. Even in the circumstance where Native Americans show no harm to the marine resources since time immemorial from subsistence harvesting, that is rejected. Even where the Yurok Tribe

can show no harm from recreational harvesting, that is still similarly insufficient. This is because of the following provision within the LOP.

Question: Would the SAT assign a high level of protection to traditional tribal uses?

Answer: In applying the conceptual model for assigning levels of protection, the SAT makes three important assumptions: Any extractive activity can occur locally to the maximum¹ extent allowable under current state and federal regulations.

The above assumption creates a basic take formula of multiplying all recreational use permits in the State of California (1,179,373) times the take limit times the shorter of either the season or 365 days. This simply put is an impossible standard to meet. Under the circumstances the Yurok Tribe and presumably other Native peoples have no choice but to challenge the LOP which *a priori* completely eliminates all subsistence Native shoreline harvesting within 0-3 and 0-30 meters.

This situation creates quite a dilemma for the State of California and the SAT. This is the twenty-first century and it seems doubtful that any model that *a priori* takes away the rights to harvest of Indigenous peoples will be sustainable in California. It will certainly be rejected by the other States and may well be unacceptable internationally.

A second major criticism of the LOP is that there is no provision to include Native American harvesting in the natural baseline despite use since time immemorial, nor was there any consideration of Dr. Pfeiffer's study.

The LOP does not allow quantifiable data that the SAT will accept to prove or disprove the LOP assumptions. You have disapproved the submittal of species abundance data, of species diversity data, existing or past take data. You have also adopted prospective assumptions that preclude the use of scientific data in the future to review the LOP. Your assumptions include compliance with the law within future MLPA. This means even if Native Americans continue to harvest within the MLPA and you find no harm or affect it is not acceptable as data for review of the LOP as you have already assumed it away. You also have adopted as a proposed evaluation of the MLPA "no take" reserves which directs the evaluation away from take areas necessary to review the LOP. The LOP as now constructed is completely safe from any data driven quantifiable science process. We have repetitively asked and have yet to receive an answer for a science pathway to review the LOP. Scientific protocols and the Scientific Method require that a hypothesis be subject to being disproved. The LOP and LOP process does not meet basic scientific standards.

¹ The Tribe fully understands the MLPA legal contention that recreational and Tribal uses have to be combined in any avoidance. That is a far different matter than the assumed maximum use.

There are many “red flags” concerning the LOP assumptions. The purpose of the Marine Sanctuaries is to maintain and restore, (increase) marine life. While the LOP does not directly consider abundance it is being used as a planning tool to achieve that abundance and diversity (see MLPA Act purposes). Ironically, there is a reverse correlation between the SAT conceptual model and reality. That is to say Coho, Spring Run Chinook, Eulachon, eel, clams and other species are given a rating suggesting no future protection is needed. All of these species are currently very impacted requiring extensive ocean regulation and in some cases are considered endangered species. A traditional Native American harvesting marine animal like mussels is in robust abundance in every marine survey taken but is considered under the SAT to require the highest levels of marine protection. By contrast many other sources have reached very different risk assessment conclusions. The California Fish and Game Commission regulates the take of species in the State of California. The Commission has regulated take for many years and is charged with protecting the fish and wildlife resources of the State of California. The Commission exercises a wide variety of regulations ranging from no take, to every other year take, to reporting requirements, gear restrictions, hook restrictions, size requirements and catch numbers. A review of the regulations is reflective of the Commission’s experience in determining a species risk. Two examples will demonstrate the disconnect with the LOP, the LOP risk assessment, and LOP assumptions.

The Fish and Game Commission recreational regulations regarding mussels are 10 pounds wet, may be harvested at a time and all time of the year. There are approximately 17 mussels per pound or 170 mussels can be harvested. This is a very high catch number and very open season compared to other species. The Commission has obviously determined that mussel harvesting has not caused problems and is at a low level of risk compared to more highly regulated species. In contrast, the LOP places mussel harvesting at the lowest level of protection and hence at the very highest level of risk.

The LOP placed little value on the protection of non-foundational species, (the basis of not allowing the Yurok to present species abundance data), and a high value on mobility. On this basis the LOP concludes the COHO taken in a marine reserve will not likely change the community structure substantially and hence no special protection is needed. By contrast, after much study, the California Fish and Game Commission under the California Endangered Species Act, has determined that no ocean take of Coho should not be allowed. “The retention of Coho Salmon is prohibited in all California ocean fisheries.” The U.S. Fish and Wildlife Service concurs under the Federal Endangered Species Act that there should be no take. The Tribe objects to the failure to adhere to the minimum protections of the Federal and State Endangered Species Acts.

The LOP focus on ecological and not individual species is well illustrated by the disparate treatment between mussels and sandy beach clams. There historically has been a need to regulate the harvest of clams. The California Fish and Game Commission had

to regulate sandy beach Razor Back clams by prohibiting harvest every other year on Clam Beach. Clams do not form the huge population clusters of mussels and hence are far more vulnerable. Yet, clams are rated moderate to high level of harvest in the LOP while mussels are rated the lowest. This reflects the high ecological assessment of the LOP for mussels that does not apply to clams on sandy beach. See also the conclusions of the LOP for deep water pelagic fish endangered species.

Every study of recreational ocean use and harvesting in California has shown that the most harvesting occurs near major population centers, served by vehicles, calmer seas, and good ambient weather in Southern California. The SAT recreational take model concludes differently. Every species survey shows a high abundance of mussels and species diversity in the North Coast. This includes Native American harvest since time immemorial and Indo-European-California recreational harvest levels. The SAT recreational take risk assessment model concludes a high risk of a major change to that harvesting demographic.

Surveys show a high abundance of mussels and species diversity in the North Coast. This includes Native American harvest since time immemorial and the Indo-European-California recreational harvest levels.

When the SAT approach has been tried in other Marine Sanctuaries it has not worked as predicted for mussels. By and large there has been no statistical difference between marine reserve no take and take areas, see the South African studies and the Gong and Ambrose Santa Barbara study.

The LOP ratings are different than past history, prior scientific findings and or risk assessments of other knowledgeable marine scientists and other marine sanctuaries. That so many others have been wrong is highly unlikely. This suggests that a careful review needs to be made of LOP assumptions and a data driven scientific approaches be adopted. The Yurok Tribe regrets it was not allowed to present such data to the SAT.

There is more than a little irony that Marine Reserves and the California Marine Preservation Act were based on the assumption that a sanctuary for fishing and harvesting was necessary and a good thing. The SAT LOP finding that for fin Pelagic fish such a sanctuary use is not needed as they are so highly protected. This negates the value of Marine sanctuaries in the deep ocean waters and concentrates the benefit in the intertidal area. Such a conceptual model suggests that the Federal Marine Sanctuary program which would establish additional Marine Sanctuaries in deep ocean waters is not needed. The SAT chose not to answer questions from the Yurok Tribe about reconciling the state and federal marine sanctuary programs.

The Yurok Tribe is a Salmon fishing tribe and believes salmon are important to preserve. The Tribe further believes that State Marine preserves are one out of many

needed tools to protect salmon. The Tribe further believes that in order to establish a more expansive Federal Sanctuary for salmon the LOP model must be modified. The Marine Sanctuary approach is necessary to protect salmon. In conclusion, the LOP does not adequately protect salmon.

The implied LOP assumption that bivalves and pelagic fish life cycles and reproductive strategies are similar and therefore the lack of mobility places mussels at a harvest risk disadvantage is incorrect. It denies the open access by fisherman in the open ocean. It neglects to consider the schooling of fish and need to limit harvest in some areas. For example the California Fish and Game Commission limits the harvest of salmon in a one mile square area at the mouth of the Klamath River. Bi-valve species originated in the pre-Cambrian to Cambrian and have developed extremely effective survival strategies over the last 500 million plus years. Many varieties of fin pelagic fish have gone extinct during that same biological time. Bivalve mussel sexual maturity is achieved quickly, mussels are widely dispersed, and mussels are known as a broadcast spawner producing up to 100 million eggs per mussel. Juvenile mussels have considerable ability to migrate. They survive by literally flooding the ocean with larvae with the largest limitation being the availability of habit to attach to. Such a survival relationship allows a rapid colonization. That is why after a boat hull is scraped completely clear of mussels they quickly re-colonize. This serves to limit the harvest damage the LOP assumes.

By comparison Chinook produce 2,000 to 17,000 eggs and Coho *Oncorhynchus kisutch* produce between 1500 to 5,700 eggs. (See the U.S. Fish and Wildlife cyber hotline). The taking of a single adult salmon clearly has a greater impact on spawning than the harvesting of a single mussel. This serves to increase the potential harvest damage in the open ocean.

Risk Assessment: The Yurok Tribe cannot find an adequate record to review the risk assessment model and procedures by which the SAT came up with assumptions that predict the likelihood of potential future recreational take. There is no probability theory, rationale valuations and what applied statistical methods were used. We can suggest that all other risk assessment models we are aware of always start with historical data. We are puzzled that there neither seems to be such data nor any interest in allowing the Yurok Tribe to present such data. The risk assessment does not consider species abundance and species diversity. The Yurok Tribe is puzzled by the complete refusal of the SAT to consider existing abundance and species diversity data. The purpose of the MLPA is to maintain and restore marine populations. This requires the consideration of abundance data. The SAT recommends collecting abundance data to evaluate MLPA's but not in the creation of MLPA's or to evaluate their LOP risk assessment.

The LOP analytical model confuses habitat, ecological value and risk. The Yurok view is the removal of the intertidal habitat would greatly damage the ecology.

Fortunately, the intertidal flat rocks and real estate are remarkably stable and immune from human influences. Many intertidal species such as barnacles and mussels have incredible survival strategies to find and occupy the inter-tidal rock habitat. This however does not necessarily create risk. In fact the majority of the data clearly shows there is no such risk. As a consequence, a hyper inflation of the take risk is needed to make the LOP analysis work. This comes in the form of the recreational take predictive assumption which creates a completely unrealistic take rate which in turn creates a sufficient exaggerated artificial risk. Worse the standard is inconsistently applied.

The number of recreational licenses in the State of California is at least 1,179,373 licenses. This is multiplied by the take amount which in turn is multiplied by either the 365 days a year or a shorter season if one is established. Native Americans can show their traditional subsistence harvesting is not causing harm. They can also show that their harvesting and recreational harvesting is not causing harm. It is impossible to show that the predicted recreational harvest is not harmful. For example 10 crabs of either sex may be recreationally harvested for each licensee. Crabs of legal size average over one pound each but for illustrative purposes only one pound will be used. This means 11,793,730 pounds of recreational crab are considered harvested **each day**. By contrast, the entire **annual** commercial catch for Humboldt, Mendocino and Del Norte County is only 9,366,979.

Mussels have a recreational rate of 10 pounds per day. That comes to 170 mussels per person per day. $170 \text{ mussels} \times 1,179,373 \text{ recreational permits} = 200,493,410$ mussels harvested a day. These numbers are absurd. With such rates of harvest there would be no mussels or Dungeness crabs on the North Coast at all.

This recreational take model overestimates the Northern harvest. The model is much more predictive of Southern California area marine harvesting. The higher recreational use of Marine Resources in Southern California is confirmed by every survey the California Fish and Game Department has compiled.

The recreational take assumption is an extreme over simplification of human behavior that leads to misleading results in the North Coast Region. For example the Yurok Tribe has the hypothesis that recreational users are more motivated by personal safety than the optimum harvest amounts allowed under state and federal law. This is representative of Abraham Maslow's "A Theory of Human Motivation: and his famous pyramid chart showing a hierarchy of needs where protection from physical threats including illness comes long before legal obligations. We present three quick examples: In order to avoid paralytic shell fish poisoning harvesting the California Department of Public Health recommends against harvesting shellfish from October 1st to March 31st for

six months of the year.² This factor alone makes the recreational take estimate to overstate by 50% the take. The remaining winter months are rough sea months that endanger anyone harvesting.³ High waves above six feet are per se too dangerous to harvest in. A third example is where access is limited by high cliffs or other topographic features.⁴

Lastly, the process started with science. The Legislature lowered the MLPA standard to Best Available Science. The LOP went to no science. The risk assessment then lowered the standard (if it is possible). The Yurok Tribe if allowed to present can meet the almost impossible burden of showing that the recreational take estimate is impossible. This impossibility can be shown to be a grossly high margin of error. We have a chart of the twenty-four hours. There is sleeping, eating, working, traveling, and harvesting mussels every single day. The chart shows that in fact the risk assumption is not possible, and is in fact impossible. The large number of recreational users in the Southern areas of the State simply cannot travel north each day to harvest at the projected rates.

The SAT LOP process which professes to use a single objective standard in fact is replete with unexplained changes of methodologies for different species and types of species such as crab. In fact the LOP is so riddled with such inconsistencies that it is constantly comparing different circumstances to determine the LOP. There is a pattern of a harsh methodology or bias for Native Americans and a more benign methodology for popular species. For example, Dungeness Crabs were carefully reviewed by the SAT. It was determined that only male crabs were harvested and that the few male crabs left were sufficient to fertilize enough female crabs to keep a stable population. It was noted that the recreational catch was only 1%. This is amazing as numbers, abundance and only a commercial catch number was used. This is exactly the types of data the Yurok wanted to introduce for mussels and other crabs. This contrasts to the Native American harvest of mussels where no abundance data is allowed and the commercial catch cannot be used.

² The six month ban of harvesting from October 1 through March 31st is the public health standard for 2009 and 2010. In some years, 2009, the paralytic shell fish ban was extended another two weeks for Del Norte County, quote from Cal Fish and Game.

³ See Humboldt County Report to the BRTF rough seas. See also an analysis by Hans Voight. "Lack of MLPA Plausibility". Note also the winter months have very short day light hour periods with some low tides occurring during darkness thereby preventing harvesting.

⁴ There is no evidence of any harvesting occurring by the high cliffs of Patrick's Point State Beach Park between mussel rock and agate beach. Very simply, recreational harvesters want to live. The LOP assumes they harvest into serious injury and death. The Tribe could have presented expert psychological testimony that the LOP assumed recreational user motivation is incorrect.

Other crabs harvested by Native Americans were required to use the recreational take standard.

The LOP conceptual model is a creative assessment procedure of ecological value in marine reserves. However, to reach the level of a science guideline or having reasonable assumptions will require considerably more work. The use of the LOP, in its current state, to institute the largest attempt to terminate Native American marine subsistence gathering in California's history is unwarranted.

The Yurok Tribe feels an opportunity was lost to work collaboratively to come up with an improved LOP conceptual model. Although the time is past with the SAT, we will continue to work with the California Fish and Game Commission and the California Department of Fish and Game.

We appreciate that the MLPA process and SAT responded to the Yurok request to apply for institutional review board permits for human research on Native Americans.

The effort was appreciated even though our research of the papers suggests Federal research law was still not complied with.

Sincerely,



John W. Corbett
Senior Attorney

JWC:lv

Enclosures

cc SAT
Stakeholders Group
Blue Ribbon Task Force

From: Hawk Rosales
Sent: Saturday, January 15, 2011 9:13 PM
To: MLPAComments
Cc: Ken Wiseman; Kelly Sayce
Subject: 1/13/11 Statement to SAT

Dear MLPA Initiative:

Please include the attached statement by Priscilla Hunter in the official record for the North Coast Region Study Area.

Priscilla read this statement via teleconference at the 1/13/11 Science Advisory Team meeting.

Sincerely,
Hawk Rosales, Executive Director
InterTribal Sinkyone Wilderness Council
Ukiah, CA 95482

**Statement of Priscilla Hunter
Chairwoman
InterTribal Sinkyone Wilderness Council**

Submitted to the MLPA Initiative Science Advisory Team

January 13, 2011

Good morning. My name is Priscilla Hunter. I am the Chairwoman of the InterTribal Sinkyone Wilderness Council. The Regional Stakeholder Group and the Blue Ribbon Task Force have completed their work. The Fish and Game Commission will soon be considering the recommendations of the Blue Ribbon Task Force.

We continue to be concerned that the Science Advisory Team has not evaluated the likely impacts of Tribal uses on the North Coast marine ecosystem. The uniqueness of Tribal uses is that they are neither recreational nor commercial in nature. The on-going assumption that any Tribal use would result in a designation of low Level of Protection for an MPA is simply wrong and not supported by fact or by law. There is wide consensus that the Tribes' traditional, non-commercial use of marine resources is extremely low-impact. To quote a September 8, 2010 article from the *Redwood Times* about the August 30 Regional Stakeholder meeting: "There is general consensus that tribal uses do not have the impact that general recreational and commercial uses have on the environment."

The SAT has completed evaluations for impacts of recreational and commercial user groups, but thus far has failed to evaluate the potential impacts of traditional Tribal uses, which cannot be characterized as either recreational or commercial. At its November meeting, the SAT postponed answering the question of how to evaluate the potential impacts of exclusive Tribal uses on the Levels of Protection assigned to MPAs. The Commission's consideration of the Tribal use recommendation of the Blue Ribbon Task Force will suffer if the SAT has not evaluated this question. This evaluation should have been finished before the Blue Ribbon Task Force completed its work, but there is still time for the SAT to complete this work.

It is crucial that the Tribes be able to continue their traditional, non-commercial use of marine resources. We ask that you immediately evaluate the effects of Tribal gathering and harvesting activities on the North Coast marine ecosystem. The evaluation should be conducted in collaboration with California Indian Tribes and the Tribes' scientists.