August 7, 2022

LeAnn Hogan
National Oceanic and Atmospheric Administration
1305 East-West Highway
Silver Spring MD 20910

RE: NOAA-NOS-2022-0053

Dear Ms. Hogan,

The American Bluefin Tuna Association (http://www.theabta.com) appreciates the opportunity to provide scoping comment on the proposal to establish a marine sanctuary in Hudson Canyon.

ABTA represents U.S. Atlantic and Gulf of Mexico commercial handgear fishermen who fish for Atlantic *bluefin*, *bigeye*, *yellowfin*, *skipjack* and *albacore* tunas. In 2021, 2,767 vessels were issued Federal commercial "General Category" tunas fishing permits. In the same year, 4,055 Federal Charter/Headboat permits were issued with approximately 1/3rd possessing a "Commercial Endorsement" connected to those permits, enabling those permits with endorsements to fish under General Category regulations. Therefore, the universe of permitted U.S. commercial handgear participants in 2021 was approximately 4,118 permits in 2021. ABTA represents these fishermen at all domestic and international fora.

The U.S. Highly Migratory Species General Category fishery is an artisanal fishery as defined by the UNFAO and by the International Commission for the Conservation of Atlantic Tunas (ICCAT). Fish are caught by hand, one at a time and the fishing gear used is surface and sub-surface gear. In the Canyons Region, General Category fishing gear is never in contact with the seabottom.

A Proposal to Establish a Marine Sanctuary in Hudson Canyon

A proposal was tendered to NOAA Marine Sanctuaries in November 2016 to establish a marine

sanctuary in Hudson Canyon**.** The project was entered into NOAA Marine Sanctuaries' inventory a few months later.

Legal Issues

NMSA §304 [16 U.S.C. 1434] (a) (5), Fishing Regulations, states that in preparing draft regulations, the National Standards of the Magnuson-Stevens Fishery Conservation and Management 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*. Implicit in this statement is the notion that NMSA law takes precedence over MSA and its National Standards. However, MSA contains clear and unambiguous language which establishes its primacy over fishing activity in U.S. Federal waters. Therefore, there is a conflict of authority between NMSA and MSA and its National Standards which must be resolved.

§303 and 304 of NMSA specify criteria and procedures for designating a sanctuary. The criteria includes resource values in the area, adequacy of existing regulatory regimes to protect those resources and the amenability of the area to coordinated and comprehensive conservation and management. Section 303(b)(1) sets forth a list of factors the Secretary must consider in reaching a designation, requiring consideration of a range of resource values and also, importantly, requiring consideration of the socioeconomic effects of designation.

All the aforementioned excerpts from the NMSA law assume *a priori* that NOAA Marine Sanctuaries possesses the bona fides for assessing the adequacy of existing HMS fishery regulatory regimes as well as the socioeconomic effects of designation.

We question NOAA Marine Sanctuaries' bona fides in this regard. The highly migratory species found in Hudson Canyon have been managed since the 1970s by ICCAT and the science used to inform ICCAT and NOAA management of fish stock status is the exclusive purview of the Standing Committee on Research and Statistics (SCRS), the scientific arm of ICCAT. The Highly Migratory Species Management Division of NOAA manages these species within the U.S. EEZ in accordance with ICCAT and MSA directives.

§304 [16 U.S.C. 1434] (a) (5) of NMSA results in a serious conflict with MSA. NMSA, by any measure, provides no guidance for evaluating or managing fisheries. This conflict should be resolved by Congress before contemplating any further designation, including the designation of Hudson Canyon.

§303 (b)(2) requires the Secretary to consult with the relevant House and Senate Committees, the Secretaries of State, Interior, Transportation and Defense, any other interested federal agency, with state and local agency heads, "the appropriate officials of any Regional Fishery Management Council" and "other interested persons" in its deliberations. However, NMSA ultimately leaves the management of the Sanctuary and the fish or fisheries found in a sanctuary to the sanctuary managers, rendering the role envisioned for fishery management councils and others mentioned as gratuitous at best. Further, a role for the HMS Management Division is poorly defined as it is clear that the authors of the NMSA did not contemplate the

need for addressing HMS in this context. Given that HMS are not managed by Regional Fishery Management Councils, this is a glaring omission.

A further example of unusually broad provisions can be found in NMSA, §306 [16 U.S.C. 1436] Prohibited Activities, in which it is stated:

*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.

We refer to the "definition" section of the Act, §302(8), in which it is stated, *"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;"*

This can apply to virtually anything found in a marine sanctuary.

These measures and the authority assumed by the NMSA are far too broad. To maintain these tenets of the NMSA without establishing detailed guidelines and definitions is to establish a mandate without defining it or describing how it is supposed to function. The problem is that §303 and 304 of the NMSA fail to spell out the precise conditions that have to be fulfilled to validate sweeping aside decades of development of MSA and its National Standards. The overall concept is ambiguous and wholly arbitrary and has the potential to do great harm.

<u>Oil and Gas Exploration</u>

The proponents' main argument in favor of establishing a marine sanctuary in Hudson Canyon holds that sanctuary status would facilitate a permanent prohibition on oil and gas exploration in this canyon. In fact, the chief and perhaps most popular attribute of many sanctuary designations has for many years been a prohibition on oil and gas exploration. This is particularly true along the California coast. NOAA Marine Sanctuaries may be surprised to find that many fishermen, having witnessed the damage to the marine ecosystem from Deepwater Horizon, may look favorably upon a proposal to prohibit oil and gas exploration in Hudson Canyon. However, there are highly problematic legal aspects of the NMSA which constrains fisherman from providing support for this designation.

The original vision for the Marine Sanctuary Program has resulted in a difficult history. Political circumstances, primarily varying degrees of sensitivity by successive Administrations to the energy lobby, has played an outsized role in determining the implementation of the NMSA. For

example, during the Trump Administration, NOAA Marine Sanctuaries went into "hibernation"; projects were put on hold or withdrawn.

Sanctuary Funding

Nothing in the NMSA guarantees NOAA funding increases following designations. Instead, NOAA could only hope that Congress would respond to designations with greater funding. However, the persistent inadequacy of Congressional allocations has made such hopes unfounded. For NOAA, designations thus mean more work without any guarantee of greater funding.

NOAA Marine Sanctuaries is severely weakened by this lack of funding. Nothing in NMSA guarantees that funding would increase as the number of designations increase. This has resulted in NOAA Marine Sanctuaries' developing an unhealthy dependence on funding from the private sector. NMSA therefore assumes the risk of becoming an instrument not for the benefit of the nation but for the benefit of those providing the funding.

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

*(b) Authorization to solicit donations – The Secretary 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 have tremendous influence upon sanctuary management and policy.

Budget constraints can be expected to have an ongoing negative effect on sanctuary management in the context of an ever increasing dependency upon private funding. This is not a coherent formula for public trust. Efforts to impose a bias upon sanctuary policy from private funding entities run a high risk of inevitably becoming a Trojan Horse for ideological crusades.

Protection of deep sea coral

Protection for deep sea coral is mandated by MSA. This mandate has been in existence for several years.

In the proposal, the proponents have given equal weight to the need for protecting these ecological attributes in Hudson Canyon as they have with the need for a prohibition on oil and gas exploration. However, it is difficult or impossible to imagine that proposed sanctuary management of Hudson Canyon would have the resources and expertise to improve upon existing measures. Therefore, the need for protections of deep sea coral and other marine biota and seabottom attributes is not a significant reason for establishing a sanctuary in Hudson Canyon.

Forward movement on establishing protections for deep sea coral had to wait for NOAA to perform a survey of deep sea coral covering the entire Canyons Region. NOAA has only one vessel designed for deep water exploration, the Okeanos Explorer. In 2013 and 2014, the Okeanos Explorer conducted surveys of deep sea coral throughout the Canyons Region, including an extensive survey of Hudson Canyon. The primary intention was to determine precisely where and at what depths deep sea coral is found. The data collected by the Okeanos Explorer made it possible for the Mid Atlantic Fishery Management Council (MAFMC) to commence a lengthy regulatory process that has resulted in establishing protections for these important sea bottom attributes, in accordance with MSA. This highly detailed work was accomplished through an unprecedented and close collaboration between scientists, NMFS staff, fishermen and the Council. "Discrete" and "broad" protection zones were determined for all the canyons in the southern half of the Canyons Range, including Hudson Canyon, and included identifying specific areas to be protected from potential damage by "mobile tending bottom gear". Protections for 38,000 square miles of the Canyons Region were thus established and this action received accolades from such ENGOs as the Pew Charitable Trust.

On December 15, 2016, approximately one month after the Hudson Canyon sanctuary proposal was tendered to NOAA, the Secretary of Commerce's signature concluded the regulatory process for what is now named the Frank R. Lautenberg Deep Sea Coral Protection Area.

The protections established in this rulemaking process have become a part of the Atlantic Mackerel, Squid and Butterfish Fishery Management Plan (FMP).

Importantly, these protections for deep sea coral have been further enhanced by the inclusion of special "framework provisions" to facilitate potential future modifications to deep sea coral protection measures. These "framework provisions" are therefore an important part of the overall plan for protection of deep sea coral in that "frameworkable" provisions provide a "fast track" for specific modifications to the protections for deep sea coral, as compared with "regulatory provisions", which necessitate a process that can take two years or more. In real terms, this provision means that if new data is introduced that identifies not previously known areas where deep sea coral exists, the Council and NMFS can act swiftly to establish necessary protections.

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

<u>Scientific research</u>

NOAA Marine Sanctuaries suggests 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." This statement is unsupported.

They further state that, “To date, there has been relatively little exploration of coral presence in Hudson Canyon.” This is patently untrue given the surveys conducted in the last decade by NOAA.

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 which convincingly demonstrates that future scientific research is 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, ensure or bloster future scientific research. In summary, future scientific research is not conditional upon sanctuary status for Hudson Canyon.

Mineral extraction

The statement is made that marine sanctuary status for Hudson Canyon will facilitate a ban on mineral extraction. However, this issue is not further developed. Elsewhere, “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 unfeasible and therefore not worthy of consideration in this proposed designation.

However, 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, that must be followed which intends to determine if this activity is appropriate for Hudson Canyon.

Public access

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.”

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.”

The head of Hudson Canyon is 90nm from the Verrazano Bridge at the entrance to New York Harbor. If this measurement includes the full length of Hudson Canyon, the distance is approximately 110 miles. The potential for the public to have access to Hudson Canyon,

therefore, is severely limited due to its great distance from shore and creating a marine sanctuary in Hudson Canyon has not been demonstrated to shorten that distance.

Encouraging smaller craft to access Hudson Canyon would be poor policy. Nearly all coastwise craft do not possess marine insurance that would provide coverage for a distance of more than 50 miles from the coast nor do they possess sufficient fuel capacity to undertake such a voyage.

Transit time is a very important factor. At 10 knots, a vessel requires 9 hours from the Verrazano Bridge to the head of Hudson Canyon, in good weather conditions. At 20 knots, a vessel will require 4.5 hours and will incur the additional expense of significantly greater fuel consumption.

Due to the great distance between Hudson Canyon and New York City, New Jersey and Long Island, the potential for tourism such as bird or whale watch vessels is extremely limited. There are no regulations that presently constrain this activity. In actual fact, the ability to watch whales is far greater in inshore areas where most whales are foraging.

The Continental Shelf directly adjacent to Hudson Canyon has a depth range of 250-350 ft. and Hudson Canyon itself has a depth range of approximately 350-4,000 ft. Due to these depths, diving is precluded as a means for exploring Hudson Canyon. According to 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.).

Consequently, 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.

Protecting Essential Fish Habitat

There is much discussion regarding the designation, “Essential Fish Habitat” (EFH). There seems to be some confusion as to the true meaning of EFH. 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, indeed, elsewhere in the U.S. EEZ. This would be incorrect.

EFH is known to be used in two contexts. 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 at any time of year 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 to exist or, more precisely, where it has been caught by U.S. fishermen. The word, "essential" (syn.: crucial, imperative, obligatory, vital or indispensible) in the term EFH may create an undesirable emphasis in this context. No portion of an essential fish habitat for these pelagic species has been given more weight in terms of its importance to the life cycle of that species than any other. In actual fact, in the case of highly migratory pelagic species, it is likely that much of its annual cycle is spent outside of the U.S. EEZ and/or in the EEZ of other nations; hence, the rationale for managing most of these species by international treaty.

There is a commonly held misconception regarding highly migratory pelagic species that must be addressed: Too often, these species are incorrectly assumed to have lifecycle attributes normally associated with most other demersal or benthic species with which we are familiar. They are typically given the attributes of demersal perciformes that inhabit a particular region for their entire lifecycle. Common examples of such species would be sea bass, red snapper, bluefish, halibut, yellowtail snapper, etc. These are "coastal species" or species that are associated with particular bathymetric attributes such as reefs or other oceanic or inshore structure and with limited migratory range. These species are associated with the sea bottom, whereas highly migratory pelagic species inhabit the water column. Highly migratory pelagic and epipelagic species inhabit the entire pelagic ecosystem of the temperate, sub-tropical and tropical Atlantic Ocean and its adjacent seas. The foregoing must be taken into account in any discussion regarding EFH for these species.

An example of an EFH that contains protections would be the EFH that has been established in Norfolk, Lydonia and Oceanographer Canyons in 2009 to protect golden tilefish habitat. Golden tilefish in the U.S. Northeast is a healthy fish stock and are, in fact, found in the area of Hudson Canyon. This demersal species lives in pueblos (warrens) that it creates in the mud and rock on the sea bottom at depths of approximately 500-900 ft. Norfolk, Lydonia and Oceanographer Canyons have been identified as having a particularly high density of pueblos. As a consequence, a separate rulemaking process was undertaken to prohibit "mobile tending bottom trawl" fishing gear from fishing within these canyons.

An example of an EFH that does not contain any prohibitions and is used for statistical purposes would be the EFH designations developed and updated every 5 years for each of the pelagic species found in Hudson Canyon and throughout the Canyons Region. As of today, these EFH designations do not include "findings of significant impact" to the "feeding, breeding, spawning or growth to maturity" of any of these species. An evaluation of fishing or non-fishing impacts for an EFH is conducted every 5 years, when an EFH is reviewed. To date, no regulatory processes have been undertaken that would establish prohibitions or protections for these pelagic species pursuant to an EFH.

A GIS file is used to record the habitat of a species, and this is expressed using geolocation data on a chart of the region. These files are updated every 5 years. For example, the EFH for adult bigeye tuna covers the entire Canyons Range (in some areas, to seaward as far as the EEZ), a large offshore area off FL, GA and SC and a large area in the Gulf of Mexico. The EFH for juvenile yellowfin tuna covers an even larger area. The EFH for adult bluefin tuna covers an

area that is similar in size to that of adult bigeye tuna, in this case extending to the Canadian border. Therefore, no single area or canyon within the EFH for any of the species targeted by our fishermen in Hudson Canyon carries any more importance – stated or implied - to the life cycle of these species than any other area within the EFH.

Bluefin, yellowfin, albacore and skipjack tuna as well as swordfish, dolphinfish and wahoo, the pelagic species that are targeted by our fishermen in Hudson Canyon, are all highly migratory species and some of them are trans-Atlantic migrants. Science indicates that certain tropical tunas found in Hudson Canyon most likely originate in the Gulf of Guinea, in West Africa. Recent electronic tagging conducted by ICCAT on bigeye and yellowfin tuna suggest an annual migration from spawning areas in West Africa to areas in the North Atlantic including the Canyons Region. Therefore, the U.S East Coast is not their "home" and their annual life cycle is not spent inhabiting this region.
In summary, there is no special significance to be attached to the fact that Hudson Canyon is an EFH for the species under discussion.

<u>Fishing in the proposed marine sanctuary in Hudson Canyon</u>

The original proposal states, *"We therefore recommend that fishing should continue in this economically valuable area."*

Elsewhere, the proposal states, *"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 statement begs the question: who would determine if our fish stocks are well managed? NOAA Marine Sanctuaries? We maintain that fishing in a proposed marine sanctuary must remain the responsibility of U.S. fishery managers and of ICCAT.

<u>Summary</u>

For the reasons stated herein, ABTA opposes a sanctuary designation for Hudson Canyon.

Cordially,

David Schalit, President
American Bluefin Tuna Association

cc: ABTA Board