

# ELR

## NEWS & ANALYSIS

### The History and Evolution of the National Marine Sanctuaries Act

by William J. Chandler and Hannah Gillelan

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## Executive Summary

Coastal and ocean degradation caused by pollution, industrial and commercial development, and ocean dumping became major environmental issues in the 1960s and early

1970s. Public awareness of ocean problems was heightened by oil spills, "dead seas" created by the dumping of dredge spoil and sewage sludge, and numerous scientific reports detailing the environmental decline of coastal areas. In response, the U.S. Congress considered and approved a number of remedial measures to protect coasts and estuaries including federal assistance to states to develop coastal zone management plans, new water pollution and ocean dumping controls, and the creation of programs to establish estuarine and marine sanctuaries.

The Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972<sup>1</sup> authorized a trio of programs to protect and restore ocean ecosystems. The Act regulated the dumping of wastes in ocean waters, launched a study of the long-term impacts of humans on marine ecosystems, and created a Marine Sanctuaries Program for the "purpose of preserving or restoring [marine] areas for their conservation, recreational, ecological, or esthetic values."<sup>2</sup> Early proponents of marine sanctuaries envisioned a system of protected ocean areas analogous to those established for national parks and wilderness areas.

The concept of a marine wilderness preservation system was raised in 1966 in *Effective Use of the Sea*, a report prepared by President Lyndon Johnson's Science Advisory Committee.<sup>3</sup> The Advisory Committee recommended a permanent system of marine preserves similar in purpose and design to that established for terrestrial wilderness areas under the Wilderness Act. Like wilderness areas, marine preserves were to be areas managed for the purpose of maintaining the oceans' natural characteristics and values, and human uses that were deemed compatible with this standard would be allowed.

Unfortunately, the Sanctuaries Program did not follow the model of the National Wilderness Preserve System, and proved to be highly unstable. For much of its history, the MPRSA has been a work in progress. A fundamental reason for the law's plasticity has been the ambiguity surrounding the Act's intent. Is the overriding purpose of the Act the preservation and protection of marine areas, or is it the creation of multiple use management areas in which preservation use has to contend with every other use, even exploitive ones like oil and gas extraction?

Congress failed to clearly and definitively answer this question at the outset, and in fact gave conflicting signals. The original law and accompanying legislative history were incongruous in that the law directed the Secretary of Commerce, acting through the National Oceanographic and Atmospheric Administration (NOAA), to establish sanctuaries for preservation and restoration purposes, but the U.S. House of Representatives' legislative history encouraged both preservation and extractive uses in sanctuaries. This ambiguity produced confusion and led to implementation difficulties, which in turn triggered periodic efforts by NOAA and Congress to clarify the Act's purposes and provisions.

Over time, Congress confirmed multiple use as a significant purpose of the Act and diminished the Act's preserva-

1. Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052 (1972).

2. *Id.* §302.

3. PANEL ON OCEANOGRAPHY, PRESIDENT'S SCIENCE ADVISORY COMMITTEE, *EFFECTIVE USE OF THE SEA* (1966) [hereinafter PRESIDENT'S SCIENCE ADVISORY COMMITTEE].

tion mission. Although amended numerous times over 30 years, the statute remains incongruous, calling for both preservation and multiple use. Although some key areas of the oceans and Great Lakes have been protected in varying degrees in the 13 sanctuaries established since 1972, the Sanctuaries Program has yet to produce a comprehensive national network of marine conservation areas that restores and protects the full range of the nation's marine biodiversity, nor does it have a credible strategy to do so.

### *Early Sanctuary Bills*

In 1967, several members of Congress, including Reps. Hastings Keith (R-Mass.), Phil Burton (D-Cal.), and George E. Brown Jr. (D-Cal.), introduced bills to direct the Secretary of the Interior to study the feasibility of a national system of marine sanctuaries patterned after the wilderness preservation system.<sup>4</sup> A principal factor prompting this legislation was the desire to protect special marine places from harmful industrial development, especially oil and gas development. At the time, the hydrocarbon industry was rapidly expanding its operations offshore.

Sanctuary study bills received a hearing in 1968 by the House Merchant Marine and Fisheries Committee (House MMFC), but were opposed by the U.S. Department of the Interior (DOI) on grounds that existing law permitted the DOI to manage the ocean for multiple uses, including environmental protection, and that sanctuaries might restrict offshore energy development. Nevertheless, several members of the House continued to promote study legislation in the next two congresses.

A second strategy for protecting ocean places was concurrently advanced by members of the California delegation who proposed to designate areas on the Outer Continental Shelf (OCS) of California where oil drilling would be prohibited. In 1968, bills were introduced in the House and the U.S. Senate to ban drilling in a section of waters near Santa Barbara. Following the massive oil spill from a ruptured well in the Santa Barbara Channel in 1969, Sen. Alan Cranston (D-Cal.) became the most vocal advocate of prohibiting drilling at a number of places along the California coast. The DOI opposed these bills as well, claiming that new drilling guidelines and procedures implemented after the Santa Barbara accident would be sufficient to prevent future spills. The Senate and House Interior and Insular Affairs Committees, which had authority over the OCS minerals leasing program, were sympathetic to the DOI's concerns and declined to set aside no-drilling areas.

A third approach for protecting ocean areas was spawned by concern about the impacts of waste dumping in the ocean, which at the time was virtually unregulated. Oil-covered beaches, closed shellfish beds, and "dead seas" around ocean dump sites prompted the introduction of bills in 1969 and 1970 to regulate ocean dumping comprehensively. A 1970 report of the Council on Environmental Quality called for comprehensive legislation to regulate ocean dumping,<sup>5</sup> but was silent on the need for a marine sanctuary system.

Given the DOI's position on offshore oil development, this was not surprising.

Despite the Nixon Administration's opposition to marine sanctuaries, the House MMFC was determined to act. As it turned out, the ocean dumping crisis gave the committee the opening it needed. As the 91st Congress drew to a close, momentum for an ocean dumping law had become unstoppable.

### *1972 Act*

In June 1972, the House MMFC unanimously reported an ocean dumping bill, the MPRSA, which contained titles on ocean dumping, marine research, and sanctuaries. The sanctuaries title (Title III) was an amalgam of concepts from various bills pending before the committee and new ones forged in executive session. Although the sanctuary title proposed to preserve and restore ocean areas, *it did not mirror the Wilderness Act*, as had been recommended by the President's Science Advisory Committee. Furthermore, *it lacked any prohibitions on industrial development, including energy development, within designated sanctuaries*, one of the principal goals originally sought by Representative Keith and others.

The House MMFC bill provided the Secretary of Commerce with broad discretionary authority to designate marine sanctuaries in coastal, ocean, and Great Lakes waters for the purposes of preserving and restoring an area's conservation, recreational, ecological, or esthetic values. The Secretary was given two years to make the first designations, and was to make others periodically thereafter. The Secretary also was given broad and complete power to regulate uses within sanctuaries and to ensure they were consistent with the sanctuary's purposes; no uses were specifically prohibited. The Sanctuaries Program was authorized for three years and given annual budget authority of up to \$10 million.

The ocean dumping bill passed the House by a vote of 300 to 4 on September 9, 1971, with the sanctuaries title intact, despite continued opposition of the Nixon Administration. The Senate Commerce Committee was not supportive of marine sanctuaries and deleted the program from its version of the ocean dumping bill. Nevertheless, the House-Senate conference committee on the dumping bill ultimately agreed to accept the House sanctuary title, with only minor changes. President Richard Nixon signed the measure on October 23, 1972.

### *The Rise of Multiple Use*

During floor debate on the 1972 law, members of the House MMFC went to great lengths to explain that the Act was not purely a preservation statute and that multiple use of sanctuaries was expected. Even extractive activities like oil and gas development were seen as potentially compatible with the statute's preservation and restoration purposes. Taking the cue, NOAA moved the program in the direction of multiple use in the first regulations issued in 1974. Between 1972 and 1979, little money was spent to develop the program. Two small, noncontroversial national marine sanctuaries (NMS) were designated in 1975, the USS Monitor, off North Carolina, and Key Largo, in Florida. Once implementation began in earnest under the Carter Administration,

4. See, e.g., H.R. 11584, 90th Cong. (1967); S. 2415, 90th Cong. (1967).

5. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY ON OCEAN DUMPING, H.R. DOC. NO. 91-399 (1970).



controversies erupted over the scope, requirements, and impact of the program as NOAA attempted to designate larger areas such as Flower Garden Banks, Channel Islands, Georges Bank, and Farallon Islands. The Carter Administration was ultimately successful in the designation of four sanctuaries (Channel Islands, Gulf of the Farallones, Gray's Reef, and Looe Key).

Oil and commercial fishing industries in particular developed a growing antipathy toward the Act because of its potential to infringe upon their activities. The oil industry sought to have oil development routinely allowed in sanctuaries as an acceptable multiple use; the fishing industry sought to prevent sanctuaries from restricting their access to fishing grounds. From roughly 1977 to 1986, commercial fishing and oil interests and their congressional allies led a counterattack against the program that challenged the sanctuaries law's very existence. Battles over individual sanctuary proposals fueled the broader attack against the Act. Barring repeal of the Act, the oil and fishing industries wanted to limit its application and water down its preservation purpose. In this they were largely successful. By 1984, NOAA and Congress had made a series of regulatory and legislative decisions that emphasized balancing preservation with other human uses of sanctuaries. In short, multiple use became the preferred management goal for sanctuaries. As applied by NOAA, the multiple use doctrine has made it extremely difficult to establish use-specific zones for such activities as preservation, recreational fishing, diving, etc.

### *Reemphasizing Preservation*

The Sanctuaries Program suffered greatly during President Ronald Reagan's term:

Beset with the active opposition from the administration, the existing programs suffered. Staff positions went unfilled, and critics charged that management programs at existing sanctuaries languished. Funding levels stabilized at the beginning of the Reagan era but then actually declined during his second term. The levels of funding requested by the administration were even lower; Congress repeatedly allocated more money than the administration estimated was necessary. Most discouragingly for program advocates, NOAA designated no new sites other than Fagatele Bay, allowed the designation process for others to stagnate, and even removed Monterey Bay from the list of proposed sites.<sup>6</sup>

Meanwhile, a series of marine pollution events continued to highlight the broad need for marine protection. These included algal blooms, mass dolphin deaths, medical waste that washed up on the Atlantic Coast, and the crash of an ore carrier and a car carrier, which resulted in a spill of copper ore and bunker fuel oil adjacent to the Channel Islands NMS.

Of the 29 candidate sites NOAA had identified in 1983, only the tiny Fagatele Bay off American Samoa had been designated as of 1988. Congressional frustration over the lack of designations led to a new phase of the program, in which Congress played an active role promoting new designations. The first congressional designation, Florida Keys NMS (1990), was followed by three designations in 1992: the Hawaiian Islands Humpback Whale Sanctuary, the

Monterey Bay NMS, and the Stellwagen Bank NMS. Ironically, Congress had to bypass the Act in order to legislatively designate the Florida Keys and Monterey Bay sanctuaries, in which oil extraction was prohibited. Congress also legislatively prohibited oil extraction at NOAA-designated sanctuaries: the Cordell Bank NMS (1989) and the Olympic Coast NMS (1992).

Congress amended the Act in 1988, 1992, 1996, and 2000 with the intent of strengthening the Act's preservation mission. However, because Congress failed to revise other provisions of the law that emphasize multiple use, the impact of these changes has been modest. More recently, with the 2000 Amendments, Congress authorized a temporary moratorium on designation of new sanctuaries until existing ones are better managed and studied. This has thrown a blanket of uncertainty over the system's growth.

### *Unfilled Mandate*

Having precipitated numerous sanctuary designation battles, suffered stop-and-go implementation, and been the subject of repeated regulatory and legislative amendments over three decades, how effective has the Act been in achieving its preservation purpose?

The MPRSA has been used to set aside a number of key places, and to protect them from oil development and certain other harmful activities. Although sanctuaries are managed for multiple use, some preservation zones have been established in a limited number of sanctuaries, e.g., Florida Keys, Fagatele Bay, and Channel Islands. Sanctuaries have also served as focal points for educating the public about marine conservation, and as platforms for further protection initiatives.

Nevertheless, there are still large swaths of the nation's oceans that have no sanctuaries. A look at a map will show blank spaces off many coastal states. No sanctuaries have been designated in the Caribbean or in the North Pacific. There are just three sanctuaries along the entire Atlantic seaboard, one in South Florida, and one in the Gulf of Mexico. On the West Coast, California has four sanctuaries and Washington one, but Oregon and Alaska have none. Even Georges Bank, the area Representative Keith set out to protect when he introduced sanctuary legislation in 1967, is missing from the system.

Lacking the singular preservation focus of the Wilderness Act, the MPRSA has proved to be an unreliable vehicle for inventorying, identifying, and preserving the full array of the nation's marine resources and special places in a comprehensive national system. After 32 years, the 13 sanctuaries comprise not even 0.4% of U.S. oceans. Moreover, some of these areas are inadequately protected from degrading or destructive uses such as overfishing, bottom habitat destruction, and pollution.<sup>7</sup>

### *Conclusion*

While it is technically possible that the MPRSA could be employed to designate sanctuaries that are preservationist in nature, in reality the Act's conflicting goals of preservation and multiple use, its discretionary and open-ended nature, its lack of clear definitions and protection standards, and its

6. Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 728 (2003).

7. See Table 1 for more information on the size of each sanctuary and the size of the entire system.

multiple intervention points for stakeholders collectively burdened the program with enormous implementation difficulties and inefficiencies.

At present, the MPRSA is so constrained by its own architecture that it stands little chance of creating the comprehensive system of marine preservation areas envisioned by its earliest proponents, who hoped to create a system of marine wilderness preserves analogous to the National Wilderness Preservation System. Meanwhile, most of the nation's ocean waters have been left open to extractive and commercial uses of all kinds. As a result, progress toward protecting and preserving America's ocean resources and ecosystems has been nowhere near what was needed during the last 30 years to prevent the serious degradation and destruction of marine species and ecosystems.

In order to be effective in facilitating the establishment of a comprehensive national system of marine preservation areas, the MPRSA would have to undergo substantial amendment. Alternatively, Congress could provide separate authority for an exclusive system of marine preservation areas to encompass any area of ocean that meets the new system's preservation and protection criteria. This was precisely the approach taken by the Wilderness Act, which superimposed a wilderness overlay on existing parks, refuges, forests, and public lands to identify qualified wilderness areas. Whichever approach is chosen, a bold, vigorous, and systematic effort will be needed during the next 10 years to identify and preserve America's significant marine ecosystems and features before they are irretrievably degraded or lost.

## Introduction

In 1971, in testimony before the Senate Subcommittee on Oceanography, Jacques Cousteau warned Congress that the world faced the destruction of the oceans from pollution, overfishing, extermination of species, and other causes. Cousteau called for immediate action on several fronts to reverse the situation. Cousteau was one of several well-known scientists that helped birth the environmental movement, but as the voice of the ocean, he was without peer. Cousteau's testimony made an indelible impression on many members of Congress and confirmed the need for ocean protection legislation already under consideration; time after time his views would be mentioned in congressional speeches, testimony, reports, and debate.

The following year, the floodgates of environmental legislation opened. Congress passed a number of environmental laws, among them the MPRSA. The Act regulated the dumping of wastes in ocean waters, launched a study of the long-term impacts of humans on marine ecosystems, and created a Marine Sanctuaries Program for the "purpose of preserving or restoring [marine] areas for their conservation, recreational, ecological, or esthetic values."<sup>8</sup>

The original MPRSA and its accompanying legislative history were incongruous in that the law directed the Secretary of Commerce, acting through NOAA, to establish sanctuaries *for preservation and restoration purposes*, but the House's legislative history encouraged both preservation and extractive uses in sanctuaries. Later amendments codified multiple use as a major purpose of the Act, notwithstanding language citing "resource protection" as the Act's

"primary objective." This ambiguity produced confusion and led to enormous implementation difficulties, as ocean users, especially the oil and commercial fishing industries, battled conservationists over candidate sanctuaries, the terms of individual designations, and revisions to management plans.

Not surprisingly under these circumstances, the Sanctuaries Program has failed to achieve a comprehensive national network of marine preservation areas that restores and protects the full range of the nation's marine resources. While 13 valuable sanctuaries have been established in 30 years, they cover less than 0.4% of U.S. waters. It is well known that many significant marine areas and resources are missing from the sanctuary system.<sup>9</sup>

Meanwhile, the degradation of the oceans that Cousteau warned of and that Congress sought to prevent when it passed the MPRSA and other marine conservation laws is rapidly coming to pass. Although progress has been made on some fronts, such as bans on the dumping of toxic wastes in the oceans and better protection for marine mammals, other problems have worsened. Some examples:

Thirty percent of U.S. fish populations that have been assessed are considered overfished or are being fished unsustainably;

New England cod, haddock, and yellowtail flounder populations had reached historic lows by 1989;

More than 175 alien marine species have invaded San Francisco Bay;

Deep sea corals and sponges are being pulverized by bottom trawls;

Many thousands of farmed fish escape from their pens annually, competing with wild fish for food and interbreeding with wild stocks;

Cruise ships are dumping millions of gallons of sewage, ballast water, and other pollution into the oceans annually;

Anoxic dead zones have been created in a number of coastal areas;

Smalltooth sawfish were the first species listed as an endangered marine fish species; and

Various species of seabirds, sea turtles, and marine mammals have severely depleted populations due to their being caught as bycatch in commercial fisheries.<sup>10</sup>

Although the MPRSA was passed with the intent of preserving places in the sea from destruction, the Act's multiple use provisions have made it difficult to create inviolate sanctuaries where no extraction of living or nonliving resources is allowed. Scientific thinking about conserving ocean ecosystems was in its infancy at the time the MPRSA was passed, but has evolved substantially since. Today, scientists around the world are calling for the establishment of networks of marine reserves—areas exempt from all extractive or other harmful activities, including commercial and recreational fishing—as a necessary tool for conserving ma-

8. MPRSA, §302.

9. See, e.g., Owen, *supra* note 6, at 745-47.

10. P.K. DAYTON ET AL., PEW OCEANS COMMISSION, *ECOLOGICAL EFFECTS OF FISHING IN MARINE ECOSYSTEMS OF THE UNITED STATES* (2002); PEW OCEANS COMMISSION, *AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE* (2003).

rine biodiversity, restoring, and preserving the integrity of marine ecosystems, and maintaining sustainable fisheries.<sup>11</sup> Increasingly, nations are heeding this advice.

Given the law's multiple use mandate, NOAA has moved cautiously to create fully protected marine reserves in sanctuaries. Prior to 1992, only small areas within a few uncontroversial sanctuaries were protected from all extractive uses. When it established the Florida Keys NMS in 1990, Congress directed NOAA to consider zoning of the sanctuary as a method for creating "no-take" reserves.<sup>12</sup> Although NOAA's reserve initiative in the Florida Keys drew vociferous opposition from some commercial and recreational fishing interests, agreement was eventually reached to establish 24 reserves covering less than 1% of the sanctuary. A more recent attempt by NOAA in partnership with the state of California to establish no-take reserves comprising 26% of the Channel Islands NMS is still in progress. Marine reserve initiatives at other sanctuaries have not been launched due to hostile political forces and lack of countervailing conservation advocacy.

Today, the MPRSA is again buffeted by the winds of change. As concern about the state of the world's oceans builds once again, two national commissions, one private and one governmental, have been launched to recommend corrective action. The Pew Oceans Commission, established by the Pew Charitable Trust, issued its report in June 2003.<sup>13</sup> Among other things, the report called for national legislation to create a system of fully protected marine reserves. The National Commission on Ocean Policy's report is expected to be released in April 2004. In the ensuing debate over the reports' recommendations, questions invariably will be asked about the role of marine reserves as an ocean conservation strategy. Questions also will be raised about the MPRSA. Should the United States establish a system of fully protected marine reserves? What kinds of uses of the reserves should be allowed? How can this be accomplished? Does the MPRSA provide sufficient authority for marine reserves or preventing conflicting uses? How could the MPRSA be changed or supplemented to meet current conservation needs?

Answering these questions requires an understanding of the history and evolution of the MPRSA. This understanding is not easily obtained. In its relatively short life of 32 years, the Act has been substantively amended six times, changing from a 2-page law to one over 30 pages in length. Successive committee staffs have left an ever-growing body of legislative material to digest. Although many articles and reports have been written about the Sanctuaries Program, none have focused in detail on the Act's legislative history and evolution.

The purposes of this Article are to provide a broad overview of the MPRSA's history and preservation provisions, and to hazard an explanation of how and why the MPRSA has fallen short as a preservation measure. We do not attempt an exhaustive explanation of every provision of the Act. Rather, our central focus is on the preservation intent of the law and how it has been advanced or hindered by events and successive amendments.

This Article is based principally on written sources, which reveal the key stepping stones of the Act's evolution. Explanations of why particular regulations or legislative actions were taken are harder to come by. Written explanations were often vague, incomplete, or absent. Deciphering the motivation and intent of every person that ever "touched" the Act was not attempted. In cases where we were able to query some of the principals, faded memories were a problem.

Part I discusses the emergence of marine sanctuaries legislation in the late 1960s as a vehicle for preserving special marine areas and resources by protecting them from degradation and destruction from industrial uses. Part II traces how the early legislative concepts were blended and reshaped by the House MMFC to produce the law enacted in 1972. Parts III and IV trace the law's evolution during the last 32 years, and discusses the significance of these changes to the statute's preservation purpose. Part V draws some conclusions about the value of the MPRSA today, and what it has achieved. Part VI sums up our findings.

## I. Early Sanctuary Legislation

### A. Background

Throughout the 1960s and 1970s, there was growing public concern in the United States and the world about humanity's impact on the environment. Virtually every human effect came under examination, including extinction of species, air and water pollution, and ocean degradation. Fueled by media coverage of polluted water bodies, toxic threats to humans, and the disruption of the natural ecology, public concern was galvanized in 1970 by Earth Day, the birthday of the modern environmental movement. In the United States, the executive and legislative branches responded by enacting a number of laws that ushered in a new era of environmental protection.

The flowering of environmental legislation in the 1970s was partly an outgrowth of earlier congressional concerns and partly the product of new knowledge and understanding. As early as the mid-1960s, congressional committees had acted on a number of fronts to develop new conservation and environmental protection policies. In the terrestrial domain, laws were enacted to conserve America's diminishing wildlife and outdoor recreation lands and wild areas. These included the Endangered Species Act (ESA), the Land and Water Conservation Fund Act, and the Wilderness Act.<sup>14</sup>

In the marine realm, Congress was especially concerned about the degradation of America's estuaries from pollution, dredging, and shoreline development. Oil spills and the ocean dumping of dredge spoil and other wastes captured attention due to a number of well-publicized pollution incidents. Industrial development in coastal and offshore waters also became an issue as the oil industry sought to expand offshore, seabed-mining schemes were discussed, and deepwater ports proposed. In totality, pollution and coastal development were recognized as a significant threat to tradi-

11. See, e.g., *The Science of Marine Reserves*, ECOLOGICAL APPLICATIONS, Feb. 2003.

12. Pub. L. No. 101-605 §7(a)(2) (1990).

13. PEW OCEANS COMMISSION, *supra* note 10.

14. Endangered Species Act of 1973, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18; Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§4601-4 to 4601-11 (1964, as amended); Wilderness Act of 1964, 16 U.S.C. §§1121 (note), 1131-36.



tional uses of the oceans, such as fishing and recreation, as well as to the overall health of the marine environment.

The threat of coastal and ocean degradation helped precipitate several pieces of study legislation. The Clean Water Restoration Act of 1966, whose purpose was to improve the nation's water pollution control program, mandated a study of estuarine pollution and executive branch recommendations for an "effective national estuarine management program."<sup>15</sup> As the estuarine pollution study was being conducted, the House Subcommittee on Fisheries and Wildlife Conservation, chaired by Rep. John Dingell (D-Mich.), considered the need for a national system of estuaries similar to those that protected other national resources like parks and refuges. In 1968, Congress passed the Estuary Protection Act, which required the Secretary of the Interior to study and inventory the nation's estuaries and to submit recommendations "on the feasibility and desirability of establishing a nationwide system of estuarine areas, the terms . . . to govern such system, and the designation and acquisition of any specific estuarine areas of national significance which he believes should be acquired by the United States."<sup>16</sup>

A parallel congressional interest of the time was oceanographic research. Commencing in the 1950s, a small group of scientists and policymakers in Congress and the executive branch began working to strengthen the nation's oceanographic research program. Spurred by defense concerns, national pride, and recognition that the ocean was a relatively unexplored and untapped resource of immense potential, the oceanographic community engaged in a decade-long debate about how to improve oceanographic research. The major focus of debate was exploration and exploitation of ocean resources, not environmental conservation. However, as public concern about the environment grew, the oceanographic issue expanded to incorporate coastal conservation as a major theme.

The oceanography debate culminated in the enactment of the Marine Resources and Engineering Development Act of 1966.<sup>17</sup> The Act declared a new policy "to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine sciences."<sup>18</sup> The Act established a Commission on Marine Sciences, Engineering, and Resources (also referred to as the Stratton Commission after its chairman, Julius Stratton) to conduct a study and recommend a plan for a "national oceanographic program that will meet the present and future national needs."<sup>19</sup> The Act created a temporary National Council on Marine Resources and Engineering Development to advise and assist the president in day-to-day marine policy and program coordination.<sup>20</sup> In its 1969 report, the Stratton Commission recommended establishment of a new oceans agency, which was fulfilled with the creation of NOAA in 1970, and creation of a national coastal zone management program, which was realized with passage of the Coastal Zone Management Act (CZMA) of 1972.<sup>21</sup>

### B. The Sanctuary Idea

A variety of studies and reports, one of which played a seminal role in the development of marine sanctuary legislation, punctuated the long-running oceanography debate. Contemporaneous with congressional consideration of the Marine Resources and Engineering Development Act, the President's Science Advisory Committee formed a Panel on Oceanography to prepare an assessment of marine science and technology needs. The panel's report, *Effective Use of the Sea*, was released in June 1966 by President Johnson.<sup>22</sup> The report called for establishment of a national ocean program, the objective of which was "effective use of the sea by man for all purposes currently considered for the terrestrial environment: commerce; industry; recreation and settlement; as well as knowledge and understanding."<sup>23</sup>

Although much of the Science Advisory Committee's report focused on exploring, developing, and understanding the oceans, the committee presciently recognized the growing threat of what it called "environmental modification," and particularly the need to preserve the near-shore environment:

Continuing population growth combined with increased dependence on the sea for food and recreation means that modification of marine environments will not only continue, but will drastically increase . . . . We are far from understanding most short-range and all long-range biological consequences of environmental modification.

These considerations suggest that we now need to preserve the quality of as much of the unmodified or useful marine environment as we can and to restore the quality of as much of the damaged environment as possible. Delay will only increase the cost in money, time, manpower, resources, and missed opportunities.<sup>24</sup>

The most pervasive inadvertent modification, the panel concluded, is pollution in all its forms. We have learned from our experience with river and lake pollution, said the panel, that we "should not make similar mistakes as we inhabit and exploit the oceans."<sup>25</sup>

The report identified habitat destruction as a major issue: "Habitat destruction by improper fishing techniques have [sic] affected our biological resources."<sup>26</sup> It also recognized the serious problems caused by channel dredging, shoreline modification, and the filling in of marshes. "These modifications are occurring in estuaries which are important natural resources for recreation and food production. These areas are nursery grounds for many marine organisms. How severely these and other environmental alterations affect the biota is unknown."<sup>27</sup>

In sum, the Panel on Oceanography identified two issues that would grow in importance in following years, and have yet to be adequately resolved: the protection and restoration of estuaries and coastal waters to preserve their natural values, and control of water pollution. The panel

15. Clean Water Restoration Act, 89 Pub. L. No. 753 (1966).

16. Estuary Protection Act, 16 U.S.C. §§1221-1226 (1968).

17. Marine Resources and Engineering Development Act of 1966, 33 U.S.C. §§1101-1108.

18. *Id.* §1101.

19. *Id.* §§1104, 1105.

20. *Id.* §§1102, 1104.

21. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, *OUR NATION AND THE SEA: A PLAN FOR NATIONAL AC-*

*TION* (1969); Coastal Zone Management Act of 1972, 16 U.S.C. §§1451-1465, ELR STAT. CZMA §§302-319.

22. PRESIDENT'S SCIENCE ADVISORY COMMITTEE, *supra* note 3.

23. *Id.* at viii.

24. *Id.* at 16.

25. *Id.* at 17.

26. *Id.* at 17.

27. *Id.* at 17-18.

recommended five broad “courses of action” by the federal government, two of which were relevant to subsequent marine sanctuary legislation:

(1) Establish a system of marine wilderness preserves as an extension to marine environments of the basic principle established in the Wilderness Act of 1964 . . . that “it is the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.” In the present context, specific reasons for such preserves include:

(a) Provision of ecological baselines against which to compare modified areas.

(b) Preservation of major types of unmodified habitats for research and education in marine sciences.

(c) Provision of continuing opportunities for marine wilderness recreation.

(2) Undertake large-scale efforts to maintain and restore the quality of marine environments. Goals of these efforts should include increasing food production and recreational opportunities and furthering research and education in marine sciences. A multiple-use concept should be evolved for marine environments analogous to that used for many [f]ederal land areas . . . . It should be emphasized that this concept includes the recognition that for some areas, such as wilderness, only one use is possible.<sup>28</sup>

In referencing the Wilderness Act, the panel explicitly endorsed the preservation of marine areas and resources in their natural condition as a legitimate goal. The Wilderness Act, enacted in 1964, established a National Wilderness Preserve System to be composed of federally owned areas designated by Congress as “wilderness.”<sup>29</sup> Wilderness areas are “administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . . .”<sup>30</sup> The Act defines a wilderness area as a place

where the earth and its community of life are untrammelled by man, where man is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped [f]ederal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions . . . .<sup>31</sup>

The Wilderness Act prohibits commercial uses of wilderness, but some preexisting commercial uses may be allowed to continue in certain areas.<sup>32</sup> Recreational uses of wilderness deemed compatible with maintaining its primeval character are allowed, including recreational hunting and fishing.<sup>33</sup>

The President’s Science Advisory Committee clearly viewed marine wilderness as a distinct type of ocean use within a broader multiple use framework. Although the report was silent on how the recommended marine multiple use management system should work, the concepts of marine wilderness preserve and multiple use management

would play significant roles in shaping the debate on marine sanctuaries legislation.

### *C. Sanctuaries Legislation in the 90th Congress, 1967-1968*

#### 1. Overview

Concurrent with congressional activity on estuaries and marine science issues, several members of the House introduced bills in 1967 to establish marine sanctuaries as a means of protecting their states’ coastal and ocean resources from oil and gas development activities on the OCS. In July, Representatives Burton and Brown proposed identical bills to authorize a feasibility study of a Santa Barbara Channel marine sanctuary to be completed within two years. Their legislation established a moratorium on *all* “industrial development” in the channel until the study was completed.<sup>34</sup>

The citizens of Santa Barbara long had been concerned about the effects on Santa Barbara County’s scenic beauty and tourism economy of offshore oil drilling in the channel. The state of California had banned minerals extraction in state waters off Santa Barbara in 1955 by creating a so-called oil sanctuary where drilling is forbidden.<sup>35</sup> The federal government began selling mineral leases in federal waters in the channel in 1967. In recognition of the coast’s environmental values, the federal government established a no-drilling buffer zone that extended two miles seaward from the Santa Barbara oil sanctuary, but proceeded to offer leases outside the zone. By early 1968, 72 federal leases had been sold for in excess of \$600 million.<sup>36</sup> The Burton-Brown bills were clearly an attempt to forestall oil development in federal waters off Santa Barbara.

A few days after the Burton and Brown bills were filed, Representative Keith introduced a bill to authorize a study of the desirability and feasibility of establishing a national system of marine sanctuaries, including a study of Georges Bank as a candidate site.<sup>37</sup> The Keith bill provided for a moratorium on new minerals exploration and development on the OCS in all study areas, and called for voluntary agreements between governmental bodies to prevent “industrial development” while studies were being conducted.<sup>38</sup> Keith became interested in protecting Georges Bank after a seismic explosion detonated in the course of oil exploration caused a large fish kill in September 1966.<sup>39</sup> Keith represented the coastal area of Cape Cod and was particularly concerned about protecting the Georges Bank fishery from energy development. As a member of the House MMFC, he was well positioned to play an active role in shaping sanctuaries legislation.

34. H.R. 11460, 90th Cong. (1967); H.R. 11469, 90th Cong. (1967).

35. Cunningham-Shell Tidelands Act, 1955 Cal. Stat. ch. 1724.

36. *Santa Barbara Oil Spill: Hearings on S. 1219 Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs*, 91st Cong. 47 (statement of Hollis Dole, Assistant Secretary of the Interior for Mineral Resources) (1969) [hereinafter *Hearings* 1969].

37. H.R. 11584.

38. *Id.* §4(a), (b).

39. *Oceanography Legislation: Hearings on H.R. 11460, 11469, 11584, 11769, 11812, 11868, 11984, 11987, 11988, 12007, and 13150 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 90th Cong. 43 (1968) [hereinafter *House Hearings* 1968].

28. *Id.* at 18.

29. 16 U.S.C. §1121.

30. *Id.* §1131(a).

31. *Id.* §1131(c).

32. *Id.* §1133.

33. *Id.* §1131(a).



Eight more sanctuary study bills were introduced in 1967 by House members from the East and West Coasts.<sup>40</sup> Some of the bills were identical to the Keith and Burton-Brown measures; others differed slightly, specifying different areas for sanctuary study, such as Plum Island, New Hampshire, and Point Lobos and Pfeiffer-Big Sur, Monterey County, California. In the Senate, Sen. Edward Brooke (R-Mass.) introduced a measure identical to Keith's.<sup>41</sup>

The 11 House bills were referred to the House MMFC, which became the driving force for marine sanctuaries legislation. The Oceanography Subcommittee, chaired by Rep. Alton Lennon (D-N.C.), held three days of hearings on the study bills in April 1968.<sup>42</sup> Representatives Keith, Brown, and 10 other members of Congress testified in support of sanctuary legislation, as did nonprofit conservation organizations, the Massachusetts fishing industry, the state of Massachusetts, and several scientific organizations.

Although the DOI and other executive agencies said they favored the objectives of the bills, they opposed enactment on several grounds.<sup>43</sup> The DOI's most telling objection to the bill, and one that would continue to dog sanctuary legislation, was opposition to restrictions on offshore energy development. The DOI said the moratorium on offshore minerals extraction in sanctuary study areas would deny the government revenue from oil and gas lease sales and the public an energy supply.<sup>44</sup> Furthermore, the DOI claimed the bill was not needed because it already had general authority under existing wildlife laws to conduct resource studies like those called for by the sanctuaries bills, and that under the Outer Continental Shelf Lands Act (OCSLA) it had the authority to achieve multiple use management of the OCS.<sup>45</sup>

Because of the administration's opposition to sanctuary legislation, and the desire of the chairman of the Oceanography Subcommittee to get the views of the Stratton Commission and the National Council on Marine Resources, Representative Lennon's subcommittee took no further action in 1968. In the Senate, there was no action on Senator Brooke's bill.

## 2. Detailed Provisions of Early Bills

### a. The Problem

The intent of Representative Keith and other sanctuary bill sponsors was to preserve portions of the tidelands and ocean waters for their natural values and to protect these areas from incompatible commercial and industrial uses, particularly oil development. In the statement accompanying his 1967 legislation, Keith said the purpose of his bill was to "save distinctive offshore areas of the United States," and that as "exploitation of the ocean's riches progresses, it is essential to give some enduring protection to sections of the offshore marine environment in a natural or near-natural

condition."<sup>46</sup> Over the next several years, Keith would repeatedly refer to the need to protect valuable fisheries from the effects of oil and gas development. For example, at the 1968 House hearings, Keith noted that oil drilling "could have a tremendously disruptive effect on the ecology and the present resource use of a vast stretch of ocean."<sup>47</sup>

Similarly, Representative Brown testified:

We recognize that the quality of our ocean environment can be seriously impaired by unplanned industrial development offshore, and the pollution it creates. It follows that we must dedicate a system of ocean sanctuaries that can preserve a [broad] variety of marine plant and animal communities.<sup>48</sup>

Rep. Burt Talcott (R-Cal.), who had introduced one of the study bills, said: "We must set aside some of our abundant marine areas before they are wasted or exploited."<sup>49</sup> In short, marine sanctuaries were needed as an antidote to unrestrained coastal development.

### b. Policy Response

To secure the protection they sought for local places, sanctuary sponsors envisioned a national system of sanctuaries set aside for uses they considered compatible with preservation of the natural environment. The Burton-Brown bill directed the Secretary to discuss the applicability of the Santa Barbara sanctuary feasibility study "to other areas along the coastal waters of the United States with similar values and the feasible and desirable means of creating a marine wilderness system as an extension to marine environments of the basic principles established in the Wilderness Act," language that directly reflected the recommendation of the President's Science Advisory Committee.<sup>50</sup>

Keith's bill declared that

it is the policy of the Congress, through a system of marine sanctuaries, to preserve, protect, encourage balanced use, and where possible, restore, and make accessible for the benefit of all the people, selected parts of the [n]ation's natural tidelands, [OCS], seaward areas, and land and waters of the Great Lakes, which are valuable for sport and commercial fishing, wildlife conservation, outdoor recreation, and scenic beauty.<sup>51</sup>

In his bill introduction statement, Representative Keith referred to the system as a "national system of marine wilderness preserves."<sup>52</sup> But instead of establishing a national marine wilderness preserve system outright (as the Wilderness Act did for terrestrial areas), and immediately designating certain areas such as Georges Bank, Keith sought the Secretary of the Interior's opinion on the most desirable and feasible means of establishing a national sanctuary system.<sup>53</sup> In sum, both the Keith and Burton-Brown study bills represented a preliminary step toward the creation of a marine analog to the wilderness system, and the lineage of their bills

40. H.R. 11769, 90th Cong. (1967); H.R. 11812, 90th Cong. (1967); H.R. 11868, 90th Cong. (1967); H.R. 11984, 90th Cong. (1967); H.R. 11987, 90th Cong. (1967); H.R. 11988, 90th Cong. (1967); H.R. 12007, 90th Cong. (1967); H.R. 13150, 90th Cong. (1967).

41. S. 2415.

42. House Hearings 1968, *supra* note 39.

43. *See, e.g., id.* at 89, 129.

44. *Id.* at 131.

45. *Id.* at 34 (correspondence from Stanley Cain).

46. 113 CONG. REC. 19481 (daily ed. July 19, 1967) (statement of Rep. Keith).

47. House Hearings 1968, *supra* note 39, at 43.

48. *Id.* at 73.

49. *Id.* at 78.

50. H.R. 11460, §2(d); H.R. 11469, §2(d).

51. H.R. 11584, §2.

52. 113 CONG. REC. 19481 (1967).

53. H.R. 11584.

may be traced directly to the President's Science Advisory Committee's recommendation.

### c. Management of Sanctuaries

Given the study approach taken by the sponsors, it is not surprising that none of the bills specified exactly how sanctuary areas were to be established and managed to preserve desired values. These details were to be studied and decided later. However, to preserve future options, the Keith bill mandated a moratorium on new minerals exploration and development activities in sanctuary study areas until the Secretary submitted the report.<sup>54</sup> A similar development moratorium was specified in the Burton-Brown bill, but it applied only to the Santa Barbara area.<sup>55</sup>

Under the philosophy of the time, it was assumed that the ocean should be managed for multiple uses. Because there was no overarching legal authority or central agency to regulate or zone competing uses within the ocean, it was recognized by sanctuary bill sponsors that industrial and commercial uses would continue to degrade and destroy natural values and resources with impunity and increasing frequency unless action was taken.

None of the sanctuary bills of the 90th Congress explicitly mentioned multiple use as a *purpose* of sanctuaries. The Keith and Burton-Brown bills directly specified or indirectly implied that in identifying sanctuaries for potential designation, the Secretary should consider the values and alternative uses of an area before deciding which sites should be designated.<sup>56</sup> Keith's bill declared it the policy of Congress to "preserve, protect, encourage balanced use, and where possible, restore and make accessible" sanctuaries that are "valuable for *sport and commercial fishing, wildlife conservation, outdoor recreation, and scenic beauty*."<sup>57</sup> The Burton-Brown bill sought to protect similar values in the Santa Barbara Channel.<sup>58</sup> There was no mention in either bill of industrial or commercial uses being allowed in sanctuaries, except for commercial fishing. Furthermore, the idea that commercial fishing might sooner or later pose a threat to sanctuary resources or conflict with uses like wildlife conservation was not considered.

Keith explained he was not interested in blocking industrial development everywhere in the ocean, noting that "industrial and commercial development can go hand in hand with fishing, recreational, conservation, and scientific uses of the seas—if we are wise enough to see that these uses are made compatible with each other."<sup>59</sup> In other words, Keith was for rational planned use of the ocean that would avoid some of the mistakes of development on land. Given his expressed desire to protect areas of the ocean from "damage or destruction by industrial exploitation," Keith seemed to mean that oil development could occur in some areas of the ocean while others—sanctuaries—would be protected from oil.<sup>60</sup>

At the House hearing, Keith characterized his bill as a balanced approach to resource management. The bill

... seeks to encourage balanced, compatible uses of our offshore waters—first by identifying alternative uses, and then by ensuring compatibility among these competing values and resources . . . .

The study called for in the bill would determine the likely impact of new industrial activities on the other natural resources and values of certain marine environments. It would determine whether some kind of "ocean zoning" is necessary to make these various uses compatible, and whether certain portions of our offshore environments should be sanctuary areas, closed to new industrial activities . . . .<sup>61</sup>

However, other statements made by Representative Keith could be interpreted to support multiple use sanctuaries. Noting that his bill did not define the term marine sanctuary, Keith testified:

A marine sanctuary area would be an ocean area which is especially distinctive for its commercial fishing uses, and for its scenic, recreation, and wildlife conservation values. In such an area, the Secretary of the Interior would be authorized to *restrict, prohibit, or prescribe the conditions under which industrials [sic] activities could be carried on, including the mining of gas or oil deposits*.<sup>62</sup>

The idea that mineral extraction *might occur* in sanctuaries was inconsistent with the overall thrust of Keith's introductory statement, and with his bill, which was silent on the issue. Furthermore, Keith's proposed definition never was included in any of his subsequent bills, and he continued to argue for the protection of the Georges Bank fishery from oil development. Why he offered the definition is not known; it may have been an attempt to dampen DOI opposition by giving agency officials broader discretion to manage a sanctuary, all the while assuming that there was little chance that oil development would be found compatible with valuable fisheries. Alternatively, it may reflect Keith's thinking at that moment. Regardless of Keith's reasons, the idea that sanctuaries *might include industrial activities within their borders* was on the table. Eventually, it would weigh heavily in the shaping of the 1972 law.

### d. Relation to Other Laws—Consultation

The argument advanced by the DOI that its existing legal authorities for management of wildlife and the OCS were sufficient to protect the marine environment obviously was not convincing to representatives who already had determined that new preservation authority was needed. The DOI claimed that it could protect marine ecology and develop oil using a multiple use approach to resource management, and that the OCSLA enabled it to do both.<sup>63</sup> At the hearing on the sanctuary bills, Keith specifically noted that existing laws had been considered in the development of his legislation, and that his bill filled a gap.<sup>64</sup> Although sanctuary bill sponsors did not believe the DOI would protect special places from oil development, they did recognize the importance of

54. *Id.* §4(a).

55. H.R. 11460, §1(d); H.R. 11469, §1(d).

56. H.R. 11460, §2; H.R. 11469, §2; H.R. 11584, §5.

57. H.R. 11584, §2 (emphasis added).

58. H.R. 11460, §2; H.R. 11469, §2.

59. 113 CONG. REC. 19481.

60. *Id.*

61. House Hearings 1968, *supra* note 39, at 43.

62. *Id.* at 43 (emphasis added).

63. *Id.* at 131-32.

64. *Id.* at 135-37.

consulting with the DOI, other agencies, and the public on the design of the Sanctuaries Program, and included consultation and public hearings provisions in their bills.<sup>65</sup>

### 3. An Alternative Ocean Protection Strategy

While the Oceanography Subcommittee was considering sanctuary proposals, several members of Congress proposed to protect marine areas from oil development on a site-by-site basis. In April 1968, Sen. Thomas Kuchel (R-Cal.) and Rep. Charles Teague (R-Cal.) introduced identical measures to prohibit mineral exploration and development in the federal no-leasing buffer zone that lay adjacent to the state's Santa Barbara oil sanctuary.<sup>66</sup> In the statement accompanying his bill, Kuchel said his purpose was to make the administratively established federal buffer zone "semi-permanent," to protect the scenic values of the coast from the unsightly oil-drilling structures.<sup>67</sup> (Curiously, Kuchel made no mention of the potential for oil pollution from oil wells located outside the buffer zone.) The fact that California legislators saw fit to introduce bills to ban oil development in federal waters off Santa Barbara was further evidence of the lack of confidence in the DOI's ability to protect the environment under existing laws.

The Kuchel and Teague bills were referred to the DOI and Insular Affairs committees of the Senate and House which had jurisdiction over the OCS minerals program. No hearings were held on either bill in 1968. Similar oil development prohibition bills would be introduced in subsequent congresses, but ultimately, this line of attack reached a dead end because neither the House nor Senate Interior committees were willing to close portions of the OCS to mineral leasing.

### 4. Conclusion/Significance

At the close of the 90th Congress, two strategies had been proposed to protect special marine places from development. One was to have the Secretary of the Interior study the feasibility of a national system of sanctuaries and identify for further consideration by Congress places that merited protection. The other was to ban oil development on the OCS on a site-by-site basis. The intent of the Keith and Burton-Brown study bills was to eventually establish a marine analog to the National Wilderness Preserve System, as had been recommended by the President's Science Advisory Committee. Perhaps because they were treading on new and unfamiliar territory, the sponsors moved cautiously, seeking a study of the feasibility and desirability of their idea, rather than establishing a permanent national system outright as Congress did under the Wilderness Act.

By creating sanctuaries, the sponsors sought to prevent industrial development from harming resources and conflicting with uses of the sea they deemed acceptable. The uses the sponsors wished to protect included sport and commercial fishing, wildlife conservation, recreation, maintenance of scenic beauty, and ecological research. For the most part, these uses were the same kinds of uses allowed in

terrestrial wilderness areas, the exception being commercial fishing. Importantly, sanctuary proponents did not view commercial fishing as a threat to the other values they sought to protect.

In contrast, the intent of Kuchel and Teague was more limited in scope. They sought only to protect Santa Barbara from the negative effects of offshore oil development by restricting new oil activity. Both strategies, however, posed a direct challenge to the offshore oil development program, and as such, drew strong opposition from the oil industry, congressional committees with authority over OCS leasing, and the DOI, which managed the offshore minerals program. Until this opposition could be dealt with, there would be no marine sanctuaries bill.

### D. Legislation in the 91st Congress, 1969-1970

#### 1. Overview

Interest in ocean protection and marine sanctuaries legislation grew substantially in the 91st Congress as a large oil spill off Santa Barbara and other pollution incidents heightened the need for action. Also, three reports on coastal and marine management were issued during this period, and ocean dumping became a major issue. At least 21 bills dealing with marine sanctuaries to some degree were introduced in the 91st Congress, 18 in the House and 3 in the Senate. As more legislators took up the issue, so too did the number of approaches and combinations of approaches for protecting ocean places. In addition to sanctuary study bills, measures were introduced to ban oil development in *all* federal waters off Santa Barbara and other places along the California coast, and to establish areas in the ocean where ocean dumping would be prohibited for the protection of marine ecology.

#### 2. Impetus for Action—Santa Barbara Oil Spill

On January 28, 1969, an oil well on a federal lease site in the Santa Barbara Channel ruptured, eventually spilling 3.3 million gallons of oil, and polluting miles of California shoreline. It took months to bring the leak under control. The event received heavy media coverage and brought home the vulnerability of the U.S. coastline to massive oil spills such as had occurred in 1967 when the oil tanker *Torrey Canyon* ran aground on England's southern coast. In addition to supervising the Santa Barbara cleanup, the DOI revised its well operation guidelines in an attempt to prevent future spills. On March 3, 1969, Secretary of the Interior Walter Hickel converted the 21,000-acre federal no-lease buffer zone in the channel into a permanent Santa Barbara Ecological Preserve.<sup>68</sup> Hickel withdrew from leasing another 34,000 acres in the channel as an additional buffer zone between the coast and federal lease sites.<sup>69</sup>

Nevertheless, the Santa Barbara spill's impact continued to reverberate in Congress as an event not to be repeated. Subsequent oil spills in San Francisco Bay, Long Island Sound, the Gulf of Mexico, and elsewhere reinforced the peril of oil. In 1968 alone, the U.S. Coast Guard reported 714 cases of oil pollution, and the Federal Water

65. See, e.g., H.R. 11460; H.R. 11469; H.R. 11584.

66. H.R. 16421, 90th Cong. (1968); S. 3267, 90th Cong. (1968).

67. 114 CONG. REC. 8528 (1968) (statement of Sen. Kuchel on introduction of S. 3267).

68. Senate Hearings 1969, *supra* note 36, at 47.

69. *Id.*



Pollution Control Administration identified 180 significant oil spills.<sup>70</sup>

In addition to oil pollution, degradation of the ocean from the unregulated dumping of sewage, dredge spoils, and toxic and radioactive wastes gained major attention during the late 1960s and 1970s. At the time, the ocean served as a cost-free dumping zone for government and industry. In story after story, the media catalogued a host of pollution incidents and impacts, such as the “dead sea” off New York and New Jersey created by waste dumping, mercury contamination in fish and related poisoning of humans, the closure of ocean beaches and shellfish beds because of bacterial contamination, diseased estuaries, thermal pollution of Biscayne Bay, and the dumping of nerve gas and oil wastes off Florida. “The oceans are in danger of dying,” Cousteau told *Time* magazine.<sup>71</sup> The following year, Cousteau testified before the Senate that “we are facing the destruction of the ocean by pollution and by other causes.”<sup>72</sup>

### 3. Coastal Management Reports

The startling and graphic nature of environmental catastrophes during the period underscored the conclusions of several reports that Congress had commissioned on marine sciences and resources. In January 1969, the Stratton Commission released *Our Nation and the Sea*.<sup>73</sup> The report focused on the wise and orderly use of the oceans, but also recognized growing environmental problems. The commission recommended the consolidation of federal ocean activities in a new agency, NOAA, whose mission would be to coordinate and implement a national oceans program.<sup>74</sup> The report also recommended creation of a new system for protecting and managing the coastal zone with states having lead responsibility.<sup>75</sup> “The guiding principles” for coastal zone management, said the report, “should include the concept of fostering the widest possible variety of beneficial uses so as to maximize net social return.”<sup>76</sup>

There was no mention of marine sanctuaries in the Stratton Commission’s report, but as part of the new coastal management system, the commission recommended that the DOI, through the two estuary studies then in progress, “identify areas to be set aside as sanctuaries to provide natural laboratories for ecological investigations.”<sup>77</sup> Spurring this recommendation was recognition of the “diminishing number of relatively unaltered areas where natural processes can be observed.”<sup>78</sup> Thus, the commission envisioned estuarine sanctuaries as research sites “for conduct of studies necessary to establish a proper base from which the effects of man’s activities can be determined and ultimately predicted.”<sup>79</sup>

In November 1969, the DOI submitted the *National Estuarine Pollution Study* to Congress.<sup>80</sup> The report concluded that the nation’s estuaries were being degraded and destroyed because of institutional failures and society’s inability to recognize the noncommercial values of estuaries such as fish and wildlife habitat, recreation, and esthetics.<sup>81</sup> The DOI recommended new legislation to promulgate a national policy and program to deal with the situation, again with states in the lead.<sup>82</sup> The DOI recommended

. . . achievement of the best use of the values of the estuarine and coastal zones through a balance between: (a) multi-purpose development; (b) conservation; and (c) preservation over the short and long-range. Priority consideration should be given to those resources and uses which are estuarine-dependent.<sup>83</sup>

Noting the failure of governments to achieve “a proper balance” between development and preservation and conservation of estuary resources, the DOI concluded that

[t]he principle goal of the national program is the use of the estuarine and coastal zone for as many beneficial purposes as possible, and where some uses are precluded, to achieve that mix of uses which society . . . deems most beneficial.<sup>84</sup>

The report also called for

. . . maximum multiple use of the estuarine resource. The primary objective of technical management is to achieve the best combination of uses to serve the needs of society while protecting, preserving, and enhancing the biophysical environment for the continuing benefit of present and future generations.<sup>85</sup>

Although the report highlighted the need to “reduce to an acceptable minimum the adverse effect of man’s use of the estuaries and coastal areas” and cited the need to “accept preservation” as one means to that end, there was no mention of either estuarine or marine sanctuaries as desirable preservation tools.<sup>86</sup> Nor did the report identify particular estuaries that should be set aside for research purposes as the Stratton Commission had recommended.

The DOI’s second report, the *National Estuary Study* was released in January 1970.<sup>87</sup> Prepared by the U.S. Fish and Wildlife Service, the report recommended that the DOI “should initiate a program designed expressly to provide for the protection and restoration of the natural values of estuaries . . . . We should proceed now to halt and reverse the grim trend of estuary degradation.”<sup>88</sup> The “principal thrust of the report” was to “focus attention on the urgent need to preserve and restore” the natural values of estuaries. The report endorsed the DOI’s earlier conclusion that states should be primarily responsible for establishing coastal zone manage-

70. *Spilled Oil: Growing Hazard to Coasts*, U.S. NEWS & WORLD REP., Mar. 16, 1970, at 11.

71. *The Dying Oceans*, TIME, Sept. 28, 1970, at 64.

72. *Hearings Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong. 3 (1971).

73. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, *supra* note 21.

74. *Id.* at 230.

75. *Id.* at 57.

76. *Id.*

77. *Id.* at 65.

78. *Id.* at 10.

79. *Id.*

80. FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, NATIONAL ESTUARINE POLLUTION STUDY: VOLUME I-III (1969).

81. *Id.*

82. *Id.* at III-3.

83. *Id.* at III-6.

84. *Id.* at III-7.

85. *Id.* at II-62.

86. *Id.* at III-7.

87. BUREAU OF SPORT FISHERIES AND WILDLIFE AND BUREAU OF COMMERCIAL FISHERIES, NATIONAL ESTUARY STUDY: VOLUME I (1970).

88. *Id.* at 2.

ment programs, but did not make specific recommendations for federal actions to help states establish protective programs for estuarine resources.<sup>89</sup>

In response to its statutory mandate to provide Congress with recommendations on a national estuary system, possibly to include federally acquired sites, the DOI dodged, saying that it needed more time to develop suggestions.<sup>90</sup> It also declined to identify “significant” estuaries, arguing instead that all estuaries were important for one or more reasons and deserved better management and protection.<sup>91</sup> The DOI did not identify estuarine sanctuaries for research purposes, nor did it address the concept of marine sanctuaries in its summary volume of the report.

Collectively, the three studies served to justify the need for a new system of coastal management in which states would be the lead actors. All three reports recommended a policy of balanced multiple use of the coastal zone, but recognized that establishment of preservation areas was part of the multiple use approach. Congress responded by passing the Coastal Zone Management Act of 1972, authorizing federal assistance to states for managing their coasts.<sup>92</sup> However, the House MMFC did not see state coastal zone management plans as sufficient in themselves to preserve ocean places. Thus, despite the Nixon Administration’s lack of interest, consideration of marine sanctuaries legislation continued on a parallel track with the CZMA.

#### 4. Sanctuary Bill—Approaches

##### a. Study Bills and Designation Bills—House

Several days after the Santa Barbara well rupture in 1969, Representative Keith reintroduced his marine sanctuary study bill, noting that had his legislation been enacted in the 90th Congress, the spill might have been prevented.<sup>93</sup> Also reintroduced was Representative Brown’s bill to study a sanctuary in the Santa Barbara Channel, and a Representative Talcott measure to study other coastal areas in California for possible designation.<sup>94</sup>

The national focus on oil spills prompted a tactical maneuver by Representative Keith. On Feb. 20, 1969, a few days before the House MMFC was to conduct hearings on oil pollution, Keith introduced a bill to control oil pollution from vessels which included his sanctuary study proposal as a separate title.<sup>95</sup> At the hearings, Keith again noted that the Santa Barbara spill might have been prevented had the Santa Barbara area been studied and set aside “for a higher purpose than oil exploration and the operation of oil wells.”<sup>96</sup> Keith emphasized the need to protect the Georges Bank fishery, already depleted by Russian fishing, from further harm by oil pollution.<sup>97</sup> He

also made clear that his study bill called for cessation of new oil activities in sanctuary study areas, but left it up to Congress to decide which areas to protect permanently and how to protect them. In response to Secretary Hickel’s decision to create a no-drilling ecological reserve off Santa Barbara, Keith suggested to the Secretary that other coastlines of the country comparable to Santa Barbara’s in value also might deserve sanctuary status to protect established uses such as fisheries and recreation.<sup>98</sup>

Keith’s idea of attaching the sanctuary study to oil pollution control legislation went nowhere. Furthermore, no House hearings were held on any sanctuary study bills during the 91st Congress. A major reason for the lack of action was the continuing opposition by the DOI and the oil industry. The DOI counseled delay on the bills until various reports on marine and estuary issues were received, including a study on ocean dumping that the Nixon Administration had initiated.<sup>99</sup>

Undeterred, Keith came up with yet another proposal. In October 1970, during the waning months of the 91st Congress, Keith introduced a bill to congressionally designate a Cape Cod National Marine Sanctuary in waters adjacent to the Cape Cod National Seashore.<sup>100</sup> Keith’s bill came down solidly against oil development. It prohibited mineral extraction and the erection of any structure within the sanctuary.<sup>101</sup> It also prohibited “any . . . activity which would seriously alter or endanger the ecology or the appearance of the ocean, or of the land beneath the water.”<sup>102</sup> The bill allowed commercial fishing and sport and recreational activities within the sanctuary “as long as they are carried on in accordance with sound conservation practices” as determined by the Secretary of the Interior.<sup>103</sup> No hearings occurred on the bill.

##### b. Study Bills and Designation Bills—Senate

Sanctuary study legislation drew little interest in the Senate. Senator Brooke had again introduced the Keith measure early in the session.<sup>104</sup> In June 1969, Sen. Edward Muskie (D-Me.), chairman of the Subcommittee on Air and Water Pollution, after being contacted by Keith, introduced a modified version of the Keith bill.<sup>105</sup> Muskie’s bill, The Marine Resources Preservation Act, called for the study of sites as potential “marine preserves.”<sup>106</sup> The Muskie bill differed from Keith’s in that it did not prohibit oil exploration and development in study areas, but did *prohibit minerals exploration and development in preserves subsequently designated by Congress*.<sup>107</sup>

In the spring of 1970, the Senate Subcommittee on Oceanography, chaired by Sen. Ernest Hollings (D-S.C.), held hearings on several coastal zone management bills and

89. *Id.*

90. *Id.* at 2.

91. *Id.* at 4.

92. CZMA, 16 U.S.C. §§1451-1465.

93. 115 CONG. REC. 2441 (daily ed. Feb. 3, 1969) (statement of Rep. Keith).

94. H.R. 5956, 91st Cong. (1969); H.R. 8033, 91st Cong. (1969).

95. H.R. 7325, 91st Cong. §201 (1969).

96. *Hearings Before the House Comm. on Merchant Marine and Fisheries*, 91st Cong. 30 (1970).

97. *Id.* at 30-31.

98. *Id.* at 188.

99. 117 CONG. REC. 31134-35 (1971).

100. H.R. 19636, 91st Cong. (1970).

101. *Id.* §3(1)-(3).

102. *Id.* §3(4).

103. *Id.* §3.

104. S. 1592, 91st Cong. (1969).

105. S. 2393, 91st Cong. (1969).

106. *Id.*

107. *Id.* §4.

the Muskie bill.<sup>108</sup> However, the hearings focused on the creation of a grant program for states to better manage their coastal zones, as recommended by the Stratton Commission, and paid scant attention to the Muskie legislation. Senator Brooke's sanctuary study bill, which had been referred to the Senate Commerce Committee, was not considered at the hearing.

### c. Sanctuaries From Oil Drilling

With the need for action heightened by the Santa Barbara oil spill, members of the California delegation continued to refine their strategy of protecting ocean places by prohibiting oil and gas development on the OCS. Senator Cranston, who replaced Kuchel, became the lead champion for stopping federal oil and gas leasing along the California coast. One month after the Santa Barbara spill, Cranston introduced legislation to terminate drilling for oil and gas on all federally leased areas in the Santa Barbara Channel, and to suspend drilling on all other leased areas off California pending completion of a study "to determine methods of drilling for, producing, and transporting oil . . . which will remove the threat of pollution and other damage to the environment and the ecological community."<sup>109</sup> Sen. George Murphy (R-Cal.) and Representative Teague also introduced lease prohibition bills.<sup>110</sup>

On May 19, 1969, the Senate Subcommittee on Minerals initiated what would turn into a series of hearings on the Cranston bill and similar legislation.<sup>111</sup> Calling the Santa Barbara blowout an example of a general and growing threat of pollution, Cranston said he sought to preserve the unique beauty of the Santa Barbara coastline and to prevent further repetitions of the Santa Barbara disaster by banning further offshore oil development.<sup>112</sup> Besides, he noted, if a national emergency arose in the future, the channel's oil could be tapped, hopefully with greatly improved technology.<sup>113</sup>

Like the sanctuary bills, Cranston's measure was opposed by the DOI as "unnecessary."<sup>114</sup> Secretary Hickel already had created a permanent ecological preserve and a new buffer zone of some 34,000 acres, and was taking steps to prevent future incidents.<sup>115</sup> DOI officials also expressed concerns about compensation costs for terminated leases and the loss of an energy supply at a time of shortage.<sup>116</sup> Testifying for the Administration, Assistant Secretary of the Interior Hollis Dole noted that the DOI had an obligation to develop the mineral resources of the nation and to consider "environmental factors . . . . The balance of national needs guides all of our decisions," testified Dole.<sup>117</sup>

In October 1969, Cranston took another tack, introducing the California Marine Sanctuaries Act.<sup>118</sup> The measure, co-sponsored by Senators Murphy, Muskie, and Sen. Gaylord Nelson (D-Wis.), declared it the policy of Congress to preserve, protect, and restore portions of the California shoreline and coastal waters.<sup>119</sup> The bill directed the Secretary of the Interior to suspend further minerals leasing in federal waters adjacent to any area of state territorial waters where California had by law prohibited exploration and extraction of oil, gas or any other mineral.<sup>120</sup> Representatives Teague, Talcott, Burton, Rep. Charles Gubser (R-Cal.), and Rep. Paul "Pete" McCloskey (R-Cal.) introduced identical companion measures in the House.<sup>121</sup>

In his statement accompanying the bill, Cranston argued that federal law should be at least as stringent as local laws designed to protect the environment, "for without federal conformity, [s]tate laws may be useless . . ." <sup>122</sup> As California already had set aside seven so-called oil sanctuaries in state waters in which oil drilling was prohibited, he argued, the federal government should respect these actions and not undercut them by leasing the OCS areas contiguous to the state sanctuaries.<sup>123</sup> Federal leasing could still occur along other portions of the California coastline.

Yet another approach for protecting Santa Barbara was offered by Senator Muskie. In February 1970, Muskie introduced legislation to terminate oil production in the Santa Barbara Channel, establish an ecological reserve for "scientific, recreational, fish and wildlife conservation, and other similar uses," and to withdraw all other OCS lands in the channel from minerals production, holding them in reserve until Congress decided otherwise.<sup>124</sup>

The Senate Subcommittee on Minerals held more hearings on the various Santa Barbara protection bills on March 13 and 14, 1970, in Santa Barbara, and again on July 21 and 22 in Washington, D.C.<sup>125</sup> Sen. Frank Moss (D-Utah), the subcommittee chairman, playing, he said, the Devil's Advocate, expressed three concerns about stopping oil production off California: (1) the dilemma of balancing demands on natural resources with environmental preservation, and more specifically the nation's need for energy supplies; (2) loss of revenue to the federal Treasury; and (3) the large number of existing laws that control offshore oil and gas exploration and whether additional place-specific authority was really needed.<sup>126</sup> By and large, witnesses from the state,

118. S. 3093, 91st Cong. (1969).

119. *Id.* §2.

120. *Id.* §3.

121. H.R. 14618; H.R. 14666, 91st Cong. (1969); H.R. 14754, 91st Cong. (1969); H.R. 14787, 91st Cong. (1969); H.R. 15139, 91st Cong. (1969).

122. 115 CONG. REC. 32143 (1969).

123. *Id.*

124. S. 3516, 91st Cong. (1970).

125. *Santa Barbara Oil Pollution: Hearings on S. 1219, 2516, 3351, and 3516 Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs*, 91st Cong. (1970) [hereinafter *Senate Hearings March 1970 on Santa Barbara Oil Pollution*]; *Santa Barbara Oil Pollution: Hearings on S. 1219, 2516, 3351, 3516, 4017, and 3093 Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs*, 91st Cong. (1970) [hereinafter *Senate Hearings July 1970 on Santa Barbara Oil Pollution*].

126. *Senate Hearings March 1970 on Santa Barbara Oil Pollution*, *supra* note 125, at 10-11.

108. *Hearings on S. 2802, 2393, 3118, 3183, and 3460 Before the Subcomm. on Oceanography of the Senate Comm. on Commerce*, 91st Cong. (1970).

109. S. 1219, 91st Cong. (1969).

110. H.R. 14618, 91st Cong. (1969); H.R. 7074, 91st Cong. (1969); S. 2516, 91st Cong. (1969).

111. Senate Hearings 1969, *supra* note 36.

112. *Id.* at 8-15.

113. *Id.* at 15.

114. *Id.* at 44.

115. *Id.* at 47.

116. *Id.* at 47-48.

117. *Id.* at 44.



local governments, environmental organizations, and private citizens supported the Cranston measures.

By the July hearing, the Nixon Administration had developed a compromise proposal. Introduced by Senator Murphy, the bill established a national energy reserve of approximately 198,000 acres in the federal portion of the OCS and terminated 20 existing leases. Drilling in the reserve could only be authorized by the president.<sup>127</sup> The Union Oil Company, one of the leaseholders and operator of the ruptured well, opposed all bills.<sup>128</sup> Ultimately, no action was taken on Cranston's or Murphy's bills by the Senate. As Senator Moss had hinted, the Senate Interior Committee was simply not willing to prohibit offshore oil development and pay compensation for terminated leases.

In the House, hearings were held in September 1970 on the Administration's bill and on related measures, including a Teague bill.<sup>129</sup> But the House Interior Committee was no more inclined to act than the Senate committee, and the measures died.

#### d. Ocean Dumping Bills

A third ocean protection strategy that emerged during the 91st Congress was to designate areas where ocean dumping is prohibited in order to protect ocean wildlife and ecology. Ocean dumping, which was basically unregulated, had become a high priority issue for the Nixon Administration and the Congress, along with other forms of pollution. In his environmental message of April 15, 1970, President Nixon directed the Council on Environmental Quality (CEQ) to prepare a study of the dumping issue.<sup>130</sup>

While the study was being prepared, the House MMFC considered a variety of ocean dumping measures, some of which incorporated the sanctuary concept. In March 1970, Rep. John Murphy (D-N.Y.), a member of the committee, introduced a bill to require the Secretary of the Interior to establish "marine sanctuaries" in areas "which he determines should be preserved and protected as necessary to a balanced marine ecology and in particular those waters and submerged lands areas necessary in connection with the mating and spawning of species of fish, shellfish, and marine animal and plant life."<sup>131</sup> Waste discharges of all kinds would be prohibited in the designated sanctuaries.<sup>132</sup>

Later that year, Murphy introduced another bill to amend the Fish and Wildlife Coordination Act to require the Secretary of the Interior to conduct a two-year study to identify areas in navigable, coastal, and offshore waters where wastes could be "safely discharged."<sup>133</sup> Dumping would be prohibited outside the discharge areas. In determining which areas to designate as safe discharge sites, the Secretary was to "consider all ecological and environmental factors, includ-

ing . . . the effect of such discharging on the marine and wildlife ecology." Other members introduced measures to ban all dumping in the New York Bight and to establish national standards for the dumping of ocean wastes that might be harmful to wildlife or the ecology of coastal waters.<sup>134</sup>

Hearings were held by the House Subcommittee on Fisheries and Wildlife Conservation, chaired by Representative Dingell, on July 27-28 and September 30, 1970, on Murphy's safe discharge bill and other measures to protect ocean wildlife.<sup>135</sup> Although the subcommittee did not review sanctuary study bills, the hearings highlighted that there are places in the sea worth protecting for their ecological values. Concurrent with the hearings, Rep. Paul Rogers (D-Fla.), another member of the House MMFC, introduced legislation to require the Secretary of the Interior to designate areas of waters and submerged lands where, because of ecological considerations, waste materials "cannot be safely discharged," the mirror opposite of Murphy's approach.<sup>136</sup>

#### e. CEQ Report

On October 7, 1970, President Nixon forwarded the CEQ's report, *Ocean Dumping, A National Policy*, to Congress.<sup>137</sup> In his accompanying message, President Nixon wrote: "Pollution is now visible on the high seas—long believed beyond the reach of man's harmful influence. In recent months, worldwide concern has been expressed about the dangers of dumping toxic wastes in the ocean."<sup>138</sup> President Nixon promised to submit legislation to the 92d Congress "to ban the unregulated dumping of all materials in the oceans and to prevent or rigorously limit the dumping of harmful materials."<sup>139</sup> This legislation was seen as complementary to other administration legislation submitted in November 1969 "to provide comprehensive management by the states of their coastal zone land and waters."<sup>140</sup>

The CEQ's report identified 246 disposal sites in the ocean, of which 50% were in the Atlantic, 28% in the Pacific, and 22% in the Gulf of Mexico.<sup>141</sup> The CEQ recommended that the U.S. Environmental Protection Agency (EPA) be given authority to set up a permit process for the transportation and dumping of wastes, ban the dumping of certain materials and designate safe dumping sites, and establish penalties for violators. The report did not discuss marine sanctuaries, but it did recommend that EPA protect biologically valuable areas in the process of regulating dumping: "High priority should be given to protecting those portions of the marine environment which are biologically most active, namely the estuaries and the shallow nearshore areas in which many marine organisms breed or

127. Senate Hearings July 1970 on Santa Barbara Oil Pollution, *supra* note 125, at 370-71.

128. *Id.* at 341-43.

129. *Hearings on H.R. 18159 and Related Bills Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 91st Cong. (1970); H.R. 4047, 91st Cong. (1970).

130. PRESIDENT RICHARD NIXON, DIRECT CEQ TO PREPARE A STUDY OF THE DUMPING ISSUE, ENVIRONMENTAL MESSAGE (1970).

131. H.R. 16427, 91st Cong. (1970).

132. H.R. 16427, §2.

133. H.R. 17603, 91st Cong. (1970); H.R. 17843, 91st Cong. (1970); H.R. 17879, 91st Cong. (1970).

134. H.R. 18454, 91st Cong. (1970); H.R. 18592, 91st Cong. (1970); H.R. 18593, 91st Cong. (1970); H.R. 18621, 91st Cong. (1970); H.R. 18641, 91st Cong. (1970); H.R. 18796, 91st Cong. (1970).

135. *Dumping of Waste Material: Hearings on H.R. 15827, 15828, 15829, 16229, 17603, 17843, 17879, 18043, 18454, 18592, 18593, 18621, 18641, and 18796 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong. (1970).

136. H.R. 19359, 91st Cong. (1970).

137. H.R. Doc. No. 91-399.

138. *Id.* at i.

139. *Id.*

140. *Id.*

141. *Id.* at 1.

spawn. These biologically critical areas should be delimited and protected."<sup>142</sup>

In discussing research needs, the CEQ recommended that "marine research preserves should be established to protect representative marine ecosystems for research and to serve as ecological reference points—baselines by which man-induced changes may be evaluated."<sup>143</sup> This echoed the Stratton Commission's call for the establishment of "representative coastal and estuarine sites . . . as natural preserves for conduct of studies necessary to establish a proper base from which the effects of man's activities can be determined and ultimately regulated."<sup>144</sup>

#### f. Combination Bills

With so many ocean protection strategies on the table, it was only a matter of time until they began to be combined and blended. Shortly after the release of the CEQ's report, Rep. Louis Frey (R-Fla.) introduced legislation to regulate ocean dumping, prohibit oil development, and establish a "system of marine sanctuaries."<sup>145</sup> Frey's bill declared that "many estuaries of the [n]ation are being subjected to severe ecological degradation through unregulated dumping," and that portions of the tidelands and ocean waters "should be preserved as marine sanctuaries where *industry development and extraction of the nonliving resources of the seabed and subsoil thereof and dumping of any kind should be prohibited*."<sup>146</sup> The Frey bill directed the Secretary of Commerce to "designate as marine sanctuaries those areas . . . which the Secretary determines should be preserved or restored for their recreation, conservation, ecologic, or esthetic values," and to make initial designations within two years and periodically thereafter.<sup>147</sup>

Frey explained his bill as follows:

Most dredge spoil is dumped relatively inshore, where it may contaminate valuable breeding grounds for shellfish and fish species generally. In view of this, it seems entirely logical to relate the problem of ocean-dumping to the broader problem of preserving certain eco-systems within the coastal zone areas . . . . While a number of bills currently being considered . . . provide for the designation of safe areas where dumping may be conducted, it seems to me more reasonable to concentrate on determining which areas of our marine environment are most valuable and setting them aside as sanctuaries. This approach is somewhat analogous to the wilderness system, which attempts to preserve in their natural state the most valuable of our remaining untouched land areas.<sup>148</sup>

As if to underscore Frey's point, on December 2, 1970, a large quantity of oil sludge was dumped 50 miles off Florida's Atlantic Coast by the U.S. Navy, occasioning yet another congressional hearing, this one in the Senate.<sup>149</sup>

142. *Id.* at vi.

143. *Id.* at vii.

144. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, *supra* note 21, at 10.

145. H.R. 19763, 91st Cong. (1970).

146. *Id.* §1 (emphasis added).

147. *Id.* §9.

148. 116 CONG. REC. 37137-38 (1970) (statement of Rep. Frey on introduction of H.R. 19763).

149. *Oil Sludge Dumping Off the Florida Coast: Hearings Before the Subcomm. on Air and Water Pollution of the House Comm. on Public Works*, 91st Cong. (1970).

## 5. Conclusion

At the close of the 91st Congress, multiple approaches for protecting the oceans lay on the table. The sanctuary study bills proposed by Representatives Brown and Keith to save ocean places from industrial development and manage them for compatible uses had not advanced. The Senate Committee on Commerce had shown little interest in sanctuary legislation. Its efforts were focused on coastal zone management legislation, which included a modest program to create estuarine sanctuaries where research would be conducted in support of coastal management needs.

Following the Santa Barbara oil spill, the drive to ban oil development along parts of California's coast had grown in intensity, but to the frustration of Senator Cranston and others, hearings had not resulted in action by either the Senate or House Interior committees.

Intensifying concern about ocean pollution generated yet another rationale for conserving ocean places: protecting ecologically important areas and their wildlife from waste dumping. It was probably inevitable that the various strategies to protect ocean places would be combined, as they were in Representative Frey's bill.

Regardless of approach, the basic intent of sanctuary proponents was essentially the same: to preserve the natural values (and related compatible uses) of special marine places by protecting them from industrial development and pollution. In particular, the bills sought to protect cherished areas like George's Bank and Santa Barbara for their scenic, wildlife, fishery, ecological, scientific research, and recreational values. Representatives Keith, Brown, Frey, and others envisioned a marine sanctuary system analogous to that established for terrestrial wilderness areas by the Wilderness Act. Without a marine preservation system, proponents feared the destruction of unique ocean resources as had occurred to America's forest and prairies.

However, the analogy between sanctuaries and wilderness areas was not a perfect one. Whereas the Wilderness Act generally prohibits commercial activities in wilderness areas, marine sanctuary study bills treated commercial fishing as a compatible use that should be allowed in sanctuaries. There was little, if any, recognition that overfishing was or might become a threat to sanctuary resources or could conflict with other uses.

The major obstacles to sanctuary legislation continued to be the DOI and the oil industry, both of whom opposed restrictions on offshore oil development. Although the Santa Barbara blowout and other oil spills had drawn attention to the dangers of offshore energy development, there was no consensus on remedies. A strong countervailing concern at the time was the need to develop more domestic energy supplies. Other factors contributing to the lack of action included the referral of sanctuary legislation to two different committees in each congressional body, always a recipe for delay; the sheer volume of marine studies and recommendations that had emerged at roughly the same time and that had to be digested and harmonized; and the flowering of other environmental issues that demanded congressional attention.

Although the Nixon Administration continued to oppose marine sanctuaries, many House members, including some on the House MMFC, were determined to act. As it turned out, the ocean dumping crisis gave them the opportunity

they needed. As the 91st Congress drew to a close, ocean dumping legislation moved to center stage.

## II. The MPRSA of 1972

### A. Background

With the release of the CEQ report on ocean dumping, momentum for an ocean dumping law became unstoppable. On the first day of the 92d Congress, 17 bills to regulate ocean dumping were introduced in the House.<sup>150</sup> President Nixon's draft ocean dumping bill, an outgrowth of the CEQ's report, was forwarded to Congress on February 8 and introduced in both houses.<sup>151</sup>

Meanwhile, sanctuary proponents continued to act on several fronts. Early in the session, Representative Keith introduced his sanctuary study bill (unchanged from previous versions) and his Cape Cod sanctuary designation measure.<sup>152</sup> Representatives Murphy and Rogers reintroduced bills to protect marine ecology from waste dumping.<sup>153</sup> And Representative Frey introduced a new version of his bill to regulate dumping and establish marine sanctuaries.<sup>154</sup>

In the Senate, Senator Cranston continued his campaign to ban oil and gas development in the Santa Barbara Channel and other areas along the California coast. On January 27, 1971, he introduced legislation to terminate oil leases in the Santa Barbara Channel and to establish a permanent Federal Ecological Preserve.<sup>155</sup> In April, he introduced a series of bills to establish "marine sanctuaries from leasing" in federal waters at six other areas along the California coast.<sup>156</sup> All of Cranston's bills were referred to the Senate Interior Committee, which dutifully gave him a hearing, but took no action.<sup>157</sup>

### B. House Action

The House MMFC held hearings on ocean dumping bills in early April 1971.<sup>158</sup> Although the principal focus of the

hearings was the regulation of ocean dumping, the Murphy, Rogers, and Frey bills were formally considered. Representative Keith did not testify, but did ask a few questions about sanctuaries, as did other committee members.

The Administration's witnesses urged passage of the president's ocean dumping bill, which aimed to put EPA in charge of issuing permits for the dumping of certain wastes. Russell Train, chairman of the CEQ, told the panel that the Administration's bill gave the EPA Administrator authority to identify areas where dumping would not be permitted, implying this achieved the same objective as sanctuaries.<sup>159</sup> He also noted that the sanctuary concept involved more than just dumping considerations, and urged that sanctuaries be considered in separate legislation.<sup>160</sup> William Ruckelshaus, the EPA Administrator, testified that EPA was in complete accord that certain critical marine areas should be protected from dumping.<sup>161</sup>

The DOI did not raise concerns about sanctuaries in its submitted written views, but other agencies did.<sup>162</sup> The U.S. Department of State expressed concern about the designation of sanctuaries in international waters, and the Navy over conflicts sanctuaries might pose for military activities.<sup>163</sup> In general, however, the Administration raised no concerted defense against sanctuaries, a position that would change as sanctuary legislation progressed.

Shortly after the hearings ended, the House MMFC commenced a series of executive sessions to develop a final ocean dumping bill. It was during the course of these deliberations that a marine sanctuaries provision was added. A preview of the sanctuary title came on June 17, when Representative Lennon, chairman of the Oceanography Subcommittee, introduced a measure to establish a National Coastal and Estuarine Zone Management Program and a Marine Sanctuaries Program; Representative Keith cosponsored the Lennon measure.<sup>164</sup> The sanctuaries provision of Lennon bill's was almost identical to that included in Title III of the committee's ocean dumping bill, H.R. 9727, which was introduced a few days later on July 13 by Rep. Leonard Garmatz (D-Md.), chairman of the House MMFC.<sup>165</sup>

The Garmatz bill, entitled the Marine Protection, Research, and Sanctuaries Act, was a three-part measure that established a regulatory scheme for ocean dumping, a comprehensive research program to investigate the short- and long-term effects of pollution on the ocean, and a marine sanctuaries program.<sup>166</sup> The committee viewed the three titles as complementary.<sup>167</sup>

The sanctuaries title (Title III) was an amalgam of old and new concepts. Title III provided the Secretary of Commerce with broad discretionary authority to designate in coastal, ocean, and Great Lakes waters those marine sanctuaries he determined were necessary for the purposes of preserving

150. H.R. 285, 92d Cong. (1971); H.R. 336, 92d Cong. (1971); H.R. 337, 92d Cong. (1971); H.R. 548, 92d Cong. (1971); H.R. 549, 92d Cong. (1971); H.R. 805, 92d Cong. (1971); H.R. 807, 92d Cong. (1971); H.R. 808, 92d Cong. (1971); H.R. 983, 92d Cong. (1971); H.R. 1085, 92d Cong. (1971); H.R. 1095, 92d Cong. (1971); H.R. 1329, 92d Cong. (1971); H.R. 1381, 92d Cong. (1971); H.R. 1382, 92d Cong. (1971); H.R. 1383, 92d Cong. (1971); H.R. 1661, 92d Cong. (1971); H.R. 1674, 92d Cong. (1971).
151. H.R. 4247, 92d Cong. (1971); H.R. 4723, 92d Cong. (1971); H.R. 5239, 92d Cong. (1971); H.R. 5268, 92d Cong. (1971); H.R. 5477, 92d Cong. (1971); H.R. 6771, 92d Cong. (1971); S. 1238, 92d Cong. (1971).
152. H.R. 4568, 92d Cong. (1971); H.R. 4567, 92d Cong. (1971).
153. H.R. 285; H.R. 1095.
154. H.R. 4359, 92d Cong. (1971); H.R. 4360, 92d Cong. (1971); H.R. 4361, 92d Cong. (1971).
155. S. 373, 92d Cong. (1971).
156. S. 1446, 92d Cong. (1971); S. 1447, 92d Cong. (1971); S. 1448, 92d Cong. (1971); S. 1449, 92d Cong. (1971); S. 1450, 92d Cong. (1971); S. 1451, 92d Cong. (1971); S. 1452, 92d Cong. (1971).
157. *Bills to Create Marine Sanctuaries From Leasing Pursuant to the Outer Continental Shelf Lands Act in Areas Off the Coast of California Adjacent to State-Owned Submerged Lands in Which Such State Has Suspended Leasing for Mineral Purposes: Hearings Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs*, 92d Cong. (1971).
158. *Hearings Before the Subcomm. on Fisheries and Wildlife and on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 92d Cong. (1971) [hereinafter House Hearings 1971].

159. *Id.* at 164, 167-68.

160. *Id.* at 164, 169-70.

161. *Id.* at 95, 99.

162. *Id.* at 107-09.

163. *Id.* at 111-13.

164. H.R. 9229, 92d Cong. (1971).

165. H.R. 9727, 92d Cong. (1971).

166. *Id.*

167. TO REGULATE THE DUMPING OF MATERIAL IN THE OCEANS, COASTAL, AND OTHER WATERS, AND FOR OTHER PURPOSES, H.R. REP. NO. 92-361, at 15 (1971) (on H.R. 9727).



and restoring an area's conservation, recreational, ecological, or esthetic values. The Secretary was given two years to make the first designations, and was to make others periodically thereafter. In established sanctuaries, the Secretary had broad and complete power to regulate uses and ensure they were consistent with the sanctuary's purposes. The Sanctuaries Program was authorized for three years and given annual budget authority of up to \$10 million.

Title III was a decided shift away from earlier sanctuary concepts. The committee bill *did not mirror the Wilderness Act by establishing a marine wilderness preserve system*, as had been recommended by the President's Science Advisory Committee. Perhaps more striking, *it lacked any prohibitions on industrial development, including oil development, in sanctuaries*, one of the principal goals of Representatives Keith, Frey, and others.

The committee unanimously reported H.R. 9727 on July 17. House floor debate began September 8, and the bill passed the House by a vote of 300 to 4 on September 9. Members unhappy with the way the sanctuaries title treated offshore oil raised two significant challenges to the bill on the floor. One group, led by Rep. Norman Lent (R-N.Y.) and Representative Teague, objected to the absence of prohibitions on oil development, while the other, led by DOI Committee chairman, Rep. Wayne Aspinall (D-Colo.), and supported by the Nixon Administration, feared the bill would restrict offshore energy development, even though it contained no prohibitions on oil drilling.<sup>168</sup> Aspinall also claimed the bill infringed upon his committee's jurisdiction because it affected the OCS leasing program. A Lent-Teague Amendment to expressly prohibit oil drilling in sanctuary study areas and designated sanctuaries was defeated.<sup>169</sup> Aspinall's attempt to delete the entire sanctuaries title also failed.<sup>170</sup>

### C. Action in Senate

The Senate Commerce Committee, which had shown little interest in marine sanctuaries legislation prior to the 92d Congress, remained unengaged. The committee's top ocean priorities in the 92d Congress were research, control of ocean pollution, and coastal zone management. In March and April 1971, the Senate Subcommittee on Oceans and Atmosphere, chaired by Senator Hollings, held hearings on the Administration's ocean dumping bill and a Hollings measure to foster oceanic research and development programs.<sup>171</sup> The Hollings bill included a provision to authorize grants to coastal states for acquisition, development, and operation of estuarine sanctuaries for research purposes as had been recommended by the Stratton Commission.<sup>172</sup> Marine sanctuaries were not considered at the hearing.

The House-passed ocean dumping bill was received in the Senate on September 10 and referred jointly to the Committees on Commerce and Public Works, both of which claimed jurisdiction over water pollution in the oceans.<sup>173</sup>

Commencing September 15, and continuing into October, the Senate Commerce Committee marked up its version of the bill and engaged in discussions with the Public Works Committee to harmonize the bill's content with other pollution laws.

The sanctuaries title was deleted at the outset of the Commerce Committee's mark-up process. The Commerce Committee's version of the ocean dumping bill was reported with the concurrence of Public Works Committee on November 12.<sup>174</sup>

In its report on the bill, the Commerce Committee acknowledged the value of marine sanctuaries for certain purposes:

The [c]ommittee believes that the establishment of marine sanctuaries is appropriate where it is desirable to set aside areas of the seabed and the superjacent waters for scientific study, to preserve unique, rare, or characteristic features of the oceans, coastal, and other waters, and their total ecosystems. In this we agree with the [m]embers of the House of Representatives. Particularly with respect to scientific investigation, marine sanctuaries would permit baseline ecological studies that would yield greater knowledge of these preserved areas both in their natural state and in their altered state as natural and manmade phenomena effected change.<sup>175</sup>

However, the committee explained it had deleted the sanctuaries title because "the principal purposes for which marine sanctuaries should be established would not be accomplished by the proposed [House] legislation."<sup>176</sup> The committee rejected the bill because: (1) the United States did not have authority under international law to establish sanctuaries beyond its territorial limits; (2) marine sanctuaries in international waters would be ineffective as the United States could not control the actions of foreign nationals on the high seas portion of a sanctuary; (3) new authority was not needed to regulate the exploitation of seabed resources because OCSLA already provided this authority; and (4) assertion of authority over portions of the high seas for sanctuaries undermined the nation's self-interest in maintaining narrow geographical claims over the world's oceans as a tenant of its foreign policy.<sup>177</sup>

The Senate's ocean dumping bill passed on November 24 by a vote of 73 to 0, but not without controversy over its lack of a marine sanctuaries title.<sup>178</sup> Senator Nelson offered an amendment to restore the House sanctuary language<sup>179</sup> and to invoke a moratorium on oil and gas leases off the East Coast until the Secretary of the Interior made his first sanctuary designations.<sup>180</sup> Nelson wished to avoid Santa Barbara-like disasters from harming the East Coast.<sup>181</sup>

Both the Nixon Administration and the Senate Commerce Committee opposed Nelson's Amendment to restore the sanctuaries title, using many of the same arguments the DOI and other agencies had raised against the House bill.<sup>182</sup> Senator Hollings reiterated the committee's concerns about

168. 117 CONG. REC. 30853, 31137-38, 31144, 31147 (1971).

169. *Id.*

170. *Id.* at 31144.

171. *Ocean Waste Disposal: Hearings on S. 307, 1082, 1238, and 1286 Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 92d Cong.* (1971).

172. S. 307, 92d Cong., §410 (1971).

173. H.R. 9727.

174. S. REP. NO. 92-451 (1971) (on H.R. 9727).

175. *Id.*

176. *Id.* at 15.

177. *Id.*

178. 117 CONG. REC. 43078 (1971).

179. *Id.* at 43056-57.

180. *Id.* at 43217-19.

181. *Id.* at 43218.

182. *Id.* at 43061-62.

marine sanctuaries, particularly the extension of U.S. jurisdiction into international waters.<sup>183</sup> That, he said, was the Nelson Amendment's "fatal flaw."<sup>184</sup>

Hollings bolstered his opposition with another argument: The amendment was not needed because the Commerce Committee already had acted to establish *estuarine sanctuaries* when it approved legislation to create a Coastal Zone Management program.<sup>185</sup> Estuarine sanctuaries complied with international law in that they were only to be established within the three-mile territorial limit of the United States. Estuarine sanctuaries were needed, said Hollings, to provide a "rational basis for intelligent management of coastal and estuarine areas."<sup>186</sup> The Commerce Committee, explained Hollings, envisioned "such sanctuaries as natural areas set aside primarily to provide scientists with the opportunity to make baseline ecological measurements . . . Such sanctuaries should not be chosen at random, but should reflect regional differentiation and a variety of ecosystems so as to cover all significant natural variations."<sup>187</sup> This view echoed the Stratton Commission and the CEQ's recommendations for a system of marine research reserves.

Sen. Gordon Allott (R-Colo.), the ranking minority member of the DOI Committee, supported the Commerce Committee and administration views that ample authority existed under the OCSLA to regulate minerals leasing on the OCS.<sup>188</sup> Furthermore, he argued that giving the Secretary of Commerce the authority to lock up offshore energy resources in sanctuaries before the DOI Committee's pending national energy study was completed, said Allott, was premature.<sup>189</sup>

Nelson withdrew his amendment after considering the objections of the Commerce Committee and receiving assurances from the chairmen of the Commerce Committee, the DOI, and Public Works Committees that a joint committee hearing would be held on the subject the following year.<sup>190</sup> Shortly before the Congress adjourned, Nelson introduced his withdrawn amendment as a separate bill, but the promised hearings were never held.<sup>191</sup> Nelson also introduced another bill that provided for a two-year study of the probable effects of new or additional mineral leasing and development in the OCS and Great Lakes on the "ecological, esthetics, recreation, resource, and scientific values of and related to such areas."<sup>192</sup> Until the report was submitted, the bill would prevent minerals leases from being issued in the OCS.<sup>193</sup>

## 1. Conference Committee

The Conference Committee named to resolve differences between the House and Senate ocean dumping bills immediately hit a snag that tied up action for almost a year. The issue

183. *Id.* at 43057-58.

184. *Id.*

185. *Id.*

186. *Id.* at 43057.

187. *Id.*

188. *Id.* at 43058-59.

189. *Id.*

190. *Id.* at 43057-58.

191. S. 2971, 92d Cong. (1971).

192. S. 2973, 92d Cong. (1971).

193. *Id.*

in disagreement concerned which agency would regulate dredge spoil dumping, EPA or the U.S. Army Corps of Engineers (Corps).<sup>194</sup> It took until late 1972 to resolve the issue and issue the conference report.<sup>195</sup> The compromise bill that finally emerged included Title III as passed by the House with a few changes. Among other things, these included an expansion of the waters subject to sanctuary designation and changes in the enforcement provisions. The conference report was approved October 13 by both the Senate and the House.<sup>196</sup> The MPRSA of 1972 was signed by President Nixon on October 23, 1972, despite the Administration's unhappiness with the sanctuaries title.

## D. Provisions of the Sanctuary Title

The sanctuaries title that ultimately passed the Congress was a hybrid of various legislative concepts that preceded it and compromises forged in the committee's executive sessions. Title III did not fully implement the recommendation of the President's Science Advisory Committee for a national marine wilderness preserve system modeled after the standards and principles of the Wilderness Act. For example, the Act did not formally establish a national sanctuary system or designate the first set of sanctuaries, as did the Wilderness Act for terrestrial wilderness areas.

Furthermore, the Act did not define what a marine sanctuary is, provide specific guidance on how the system was to be developed or how big it should be, or specify the uses that would be allowed or prohibited. Rather, Title III gave the Secretary of Commerce broad *discretionary authority* to preserve ocean places on a case-by-case basis if the Secretary determined sanctuary designations were "necessary for the purpose of preserving or restoring" marine areas for their "conservation, recreational, ecological, or esthetic values." The Secretary was directed to make the first designations within two years and periodically thereafter, and to manage sanctuaries consistent with their designated purposes.

At least some members considered the program experimental. Representative Dingell, one of the bill's floor managers, said that the program may be extended after its three-year authorization period, "depending upon how effectively it has been carried out."<sup>197</sup> The life of the program was limited to two fiscal years (FYs) after the FY in which it was enacted, meaning the program would require periodic reauthorization.<sup>198</sup> In contrast, the Wilderness Act had permanent authority.

## 1. Problem Addressed

The problem Title III attempted to address was fundamentally the same as that identified in the earliest sanctuary bills—the need to preserve places in the ocean with special values from industrial development. In its report on the bill, the committee stated:

Title III deals with an issue which has been of great concern to the [c]ommittee for many years: the need to cre-

194. 118 CONG. REC. 13401 (1972).

195. H.R. CONF. REP. NO. 92-1546 (1972).

196. 118 CONG. REC. 35842, 36045 (1972).

197. *Id.*

198. *Id.* at 31132, §304.

ate a mechanism for protecting certain important areas of the coastal zone from intrusive activities by man. This need may stem from the desire to protect scenic resources, natural resources or living organisms; but it is not met by any legislation now on the books . . . . The pressures for development of marine resources are already great and increasing. It is never easy to resist these pressures and yet all recognize that there are times when we may risk sacrificing long-term values for short-term gains. The marine sanctuaries authorized by this bill would provide the means whereby important areas may be set aside for protection and may thus be insulated from the various types of "development" which can destroy them.<sup>199</sup>

Representative Dingell referred to Title III as a "badly needed" tool "with which we may begin to repair some of the damage that has been done to the oceans in the past, and can protect important areas from further impairment."<sup>200</sup> In short, preservation and restoration was professed to be the Act's primary goal.

## 2. Purpose and Policy, Goals and Deadlines

Consistent with the committee's preservation intent, Title III authorized the Secretary of Commerce, after consulting with other federal agencies, to "designate as marine sanctuaries those areas . . . which he determines necessary for the purpose of *preserving or restoring such areas for their conservation, recreational, ecological or esthetic values.*"<sup>201</sup> Sanctuaries could be designated within ocean, coastal, and other waters "as far seaward as the outer edge of the Continental Shelf . . . other coastal waters where the tide ebbs and flows," and the Great Lakes and their connecting waters.<sup>202</sup>

No specific marine areas were identified for designation or inventory, as had occurred for wilderness areas under the Wilderness Act, and no size limits were specified. Although the Secretary could designate as many or as few sanctuaries as he or she saw fit, Congress clearly expected the Secretary to execute the program with dispatch because it directed him to make his initial designations within two years and periodically thereafter. According to the committee:

The reasons for designating a marine sanctuary may involve conservation of resources, protection of recreational interests, the preservation or restoration of ecological values, the protection of esthetic values, or a combination of any or all of them. It is particularly important therefore that the designation clearly states the purpose of the sanctuary and that the regulations in implementation be directed to the accomplishment of the stated purpose.<sup>203</sup>

The bill's preservation purpose was not as strongly reflected in the Act's policy and provisions as it could have been. For example, unlike earlier sanctuary bills, the Act did not expressly prohibit oil drilling, pollution discharges or other development uses within sanctuary study areas or designated sanctuaries. Neither was there any language specifying the particular uses to be allowed in sanctuaries once established. Instead of precise guidance, the Act gave the Sec-

retary broad discretionary authority to decide exactly what kind of preservation was to be afforded each area (see following discussion on management). To a large degree, the committee intended the Secretary to resolve existing or potential use conflicts through required consultations with federal agencies prior to a sanctuary's designation. "In any case where there is no way to reconcile competing uses, it is expected that the ultimate decision [to designate a sanctuary or not] will be made at a higher level in the [e]xecutive branch."<sup>204</sup>

More significantly, during House floor debate, committee members described the Act as giving dual or balanced emphasis to preservation and multiple use of sanctuaries, *including exploitative uses*, even though *the Act was silent on multiple use.*<sup>205</sup> But if sanctuaries were to be multiple use areas, preservation and restoration could hardly be the Act's singular goal. Thus, from the start, the Act's preservation purpose was muddled by the House's interpretive guidance. Because of its long-term importance to the evolution of the Act, the preservation versus multiple use debate is dealt with extensively here.

## 3. Preservation Versus Multiple Use Focus

In explaining the bill and opposing the amendments offered by Representatives Lent and Aspinall, the House bill's floor managers and other committee members made extensive remarks about the bill's purpose and management provisions. The debate was confusing. Statements were made that were incomplete, ambiguous, internally contradictory, contradictory of other statements, and at times at odds with the plain meaning of the statute and committee report. The overall thrust of the argument put forth by the bill's managers was that although Title III intended to protect special places in the ocean to preserve long-term values, the Secretary was to pursue this goal with a balanced approach, meaning that both preservation and development uses could occur within the same sanctuary if the Secretary decided they should.

Especially important are the statements made by the bill's floor managers: Representatives Dingell and Lennon on the Democratic side and Representative Pelly and Rep. Charles Mosher (R-Ohio) for the Republicans. Representative Dingell spoke first. Citing the Santa Barbara spill, Dingell noted the human propensity to "sacrifice long-term values for short-term gain."<sup>206</sup> Representative Dingell called Title III "an expeditious means of protecting important values . . . . In Title III we do no more than provide the tools with which to preserve important assets for generations yet unborn."<sup>207</sup> Representative Lennon, the chairman of the Oceanography Subcommittee, which helped shape the bill, said that Title III "provides a scheme whereby areas may be preserved or restored in order to insure their maximum overall potential, and would in effect provide for rational decisions on competing uses in the offshore waters."<sup>208</sup>

Representative Mosher, the floor manager for the Republicans, addressed the multiple use issue head on. Mosher said

204. *Id.*

205. *See, e.g.*, 117 CONG. REC. 30853, 30855 (statement of Rep. Mosher), 30858 (statement of Rep. Keith).

206. *Id.*

207. *Id.*

208. *Id.* at 30857 (statement of Rep. Lennon).

199. H.R. REP. NO. 92-361, at 15.

200. 117 CONG. REC. 30853.

201. *Id.* at 31132 (emphasis added).

202. *Id.*

203. H.R. REP. NO. 92-361, at 27.



that the purpose of Title III “is to insure the highest and best use of this national asset [the oceans].”<sup>209</sup> Mosher assured his colleagues that he was not against using the sea’s resources, living or mineral, but that “development must be conducted with an understanding and awareness of its consequences.”<sup>210</sup> He went on to say:

These various uses of the oceans, the water column, and the seabed can exist in harmony. They are not mutually exclusive nor [sic] incompatible. Experience with offshore platforms in the Gulf of Mexico has proven, for example, that a net increase in the fish population generally results.

...  
The report of your committee makes it abundantly clear that the designation of a marine sanctuary is not intended to rule out multiple use of the sea surface, water column or seabed. Any proposed activity must, however, be consistent with the overall purpose of this title. An inconsistent use, in my opinion, would be one which negates the fundamental purpose for which a specific sanctuary may be established.

This title . . . is intended to insure that our coastal ocean waters are utilized to meet our total needs from the sea. Those needs include recreation, resource exploitation, the advancement of knowledge of the earth, and the preservation of unique areas. All are important.

This title is not designed to terminate the use of our coastal waters to meet any of these needs.<sup>211</sup>

Representative Keith, who had sought to protect Georges Bank from oil development since 1967, explained that “the original marine sanctuaries concept [which he had championed] has been changed from one which would have called for a complete oil drilling moratorium to one which would permit drilling within the purposes of this title.”<sup>212</sup> Elaborating further on multiple use, Keith argued that preservation and development uses should be “balanced”:

Certainly we do not intend, here, to punish consumers by denying them the necessary food and energy of the sea and seabed. Neither do we intend to be so responsive to the mineral interests that we adversely affect the essential protein resources of the sea.

I certainly believe in the dual usage concept for our coastal ocean waters. But I also believe such dual usage must be balanced. Neither usage should be permitted to destroy the other. In short, we need the oil and gas and we need the fish. Our bill recognizes this key fact. And it provides the proper safeguards to preserve that balanced basis.

I must admit that the word, “sanctuaries,” carries a misleading connotation. It implies a restriction and a permanency not provided in the title itself.

Title III simply provides for an orderly review of the activities on our Continental Shelf. Its purpose is to assure the preservation of our coastal areas and fisheries, and at the same time assuring such industrial and commercial development as may be necessary in the national interest . . .

It provides for multiple usage of the designated areas. It provides a balanced, even-handed means of prohibiting the resolution of one problem at the expense of the

other. It guards against “ecology of the sake of ecology.” It also guards against the cynical philosophy that the need for oil is so compelling that it justifies the destruction of the environment.<sup>213</sup>

In sum, Keith explained the Act as one providing for multiple uses within sanctuaries, including oil development, but with “proper safeguards,” referring presumably to the Act’s provision that requires the Secretary to regulate sanctuary uses and to certify that uses authorized under other laws are consistent with the purposes of the title and with individual sanctuary regulations.<sup>214</sup>

In responding to Representative Aspinall’s fears that Title III would lock up the oceans from oil and gas development, Representative Pelly backed Mosher’s and Keith’s claims that the Act was not intended to be used to block oil development.

Let me reemphasize the fact that marine sanctuaries . . . are not intended to prevent legitimate uses of the sea. They are intended to protect unique areas of the ocean bordering our country. How many such marine sanctuaries should be established remains to be determined. It is likely that most of them will protect sections of our national seashores. A sanctuary is not meant to be a marine wilderness where man will not enter. Its designation will insure very simply a balance between uses.<sup>215</sup>

Pelly went on to argue that mere designation of a sanctuary did not prohibit current or prospective oil development. While oil and gas activities could conceivably be banned under the provision allowing the Secretary to regulate uses inconsistent with sanctuary purposes, Pelly did not envision that this would “frequently be the case.”<sup>216</sup>

Later in the debate, an amendment was offered by Representatives Lent and Teague to prohibit new oil and gas exploration and development activities in areas being studied for sanctuary status and all energy development in designated sanctuaries.<sup>217</sup> Lent argued that Title III was only a partial solution to coastal degradation because it did not specifically deal with offshore oil development, the biggest threat to the coastal areas and values the bill sought to protect. “If there is any activity that can be judged more totally incompatible with the concept of marine sanctuaries . . . it must be the offshore drilling of oil,” argued Lent.<sup>218</sup> In response, Pelly said:

Your committee considered this most carefully and rejected the concept [of proscribing oil development]. We are, as I have indicated, in favor of a balanced and rational use of the oceans, not an exclusive use for any one industry or group.

...  
Offshore oil can be produced safely, and it is needed to meet our growing energy requirements. It is not a sacred cow, however, and is subject to the National Environmental Policy Act.

Moratoriums are not the answer. We cannot bury our heads in the sand.<sup>219</sup>

209. *Id.* at 30855.

210. *Id.*

211. *Id.*

212. *Id.* at 30858.

213. *Id.*

214. *Id.*

215. *Id.* at 31136.

216. *Id.*

217. *Id.* at 31138.

218. *Id.*

219. *Id.* at 31143.

Representative Keith explained that although his constituents were adamantly opposed to further oil and gas activities off the Massachusetts coast, he could not support the Lent-Teague Amendment, which was similar to one he had advanced in his own bills, because the president would veto the Act if it restricted oil development.<sup>220</sup> Lennon also spoke against the Lent-Teague Amendment, saying that the Secretary should not be constrained from deciding that oil drilling is “consistent with sanctuary designation.”<sup>221</sup> Toward the end of the debate, Lennon submitted for the record a list of committee-prepared questions and answers to “clarify certain points on the bill.”<sup>222</sup> These represent perhaps the most carefully crafted expression of the House MMFC’s legislative intent:

(1) Title III was included to extend “protections to specific areas which need preservation or restoration by providing a process through which rational choices as to competing uses of those areas may be made.”

(2) The committee opposed prohibitions on oil and gas development in study areas because studies could take a long time and might not result in a designation; thus restriction on industrial development or oil exploration would be “undesirable.”

(3) Oil development in sanctuaries should not be prohibited by the Act. The Secretary of Commerce should have the flexibility to certify oil development as consistent with the sanctuary’s purpose:

While in most cases oil exploitation activities would probably be inconsistent with the purpose of a sanctuary and, therefore, could not be certified under present language as consistent, there might be some instances where this would not necessarily be the case . . . . Therefore, to automatically forbid oil exploration in any sanctuary no matter whether it really violated the purposes of the sanctuary, would be inconsistent with the purposes of the Act and would remove from the Secretary the desirable flexibility now provided.<sup>223</sup>

In sum, during floor debate, members of the House MMFC infused a sparsely drawn Act with added meaning beyond its plain meaning. Despite the statute’s clear preservation and restoration purpose, and the “safeguard” provision enabling the Secretary to prohibit uses inconsistent with these purposes, the Act was explained on the House floor as one intended to encourage or even actively promote multiple use of sanctuaries for both preservation and *resource exploitation purposes*.

#### 4. Designation Process

In contrast to the Wilderness Act, which provides explicit guidance on the survey, identification, nomination, and designation by Congress of wilderness areas, the MPRSA delegated most of these details to the executive branch. The committee report stated that the Secretary may develop “preliminary information” on potential sanctuaries “in any manner he sees fit; however a scheme for processing preliminary information is considered necessary if the process is to

be responsive to the public interest and need, and the Secretary is expected to publish such a scheme.”<sup>224</sup>

Whereas the Wilderness Act requires wilderness areas to be designated by Congress, the sanctuaries law gives that power to the Secretary. There is no discussion in the record of why Congress delegated the power to designate to the Secretary. However, creating a program whose implementation rested heavily with the executive branch put the program’s fate in the hands of the power that opposed the program, and was thus most likely to go slowly. Another factor may have been that the House MMFC gave the designation authority to the executive branch because this followed the model of how national wildlife refuges were created.<sup>225</sup>

The Sanctuaries Act required the Secretary to consult with federal agencies and allow them to comment on proposed designations, and to hold public hearings to solicit the views of interested parties before making a designation.<sup>226</sup> In the case of sanctuary proposals that encompass state territorial waters, the Secretary was to consult with state officials.<sup>227</sup> Governors had the power to veto inclusion of any portion or all of state waters within a sanctuary within 60 days of its designation.<sup>228</sup> For sanctuaries that included extraterritorial waters (waters outside three miles) the Secretary of State was directed to enter into negotiations with foreign governments to conclude protection agreements and “promote the purposes” for which the sanctuary was established.<sup>229</sup>

The sanctuary designation process would prove to be a problem once implementation got underway. Congress later would spend a good deal of time providing further guidance and clarifying its own role in the process.

#### 5. Management and Protection Standards

The Act gave the Secretary broad regulatory power for the management and protection of designated sanctuaries:

[T]he Secretary . . . shall issue necessary and reasonable regulations to control any activities permitted within the designated marine sanctuary, and no permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary shall certify that the permitted activity is consistent with the purposes of this title and can be carried out within the regulations promulgated under this section.<sup>230</sup>

In other words, under the plain meaning of the statute, the Secretary had clear authority to establish sanctuaries that preserved resources for specified preservation and restoration purposes, and regulate or ban uses that were inconsistent with the Act’s purposes.<sup>231</sup>

Although the Secretary of Commerce’s powers were broadly cast and clearly preservationist in intent, the Secretary’s potential to block development uses of the ocean, such as offshore oil development, helped generate opposition to

220. *Id.* at 31144.

221. *Id.* at 31143-44.

222. *Id.* at 31157.

223. *Id.*

224. H.R. REP. NO. 92-361, at 28.

225. Interview with Daniel Ashe, National Marine Sanctuaries Program History (June 13, 2003).

226. 117 CONG. REC. 31132.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

the Act by the Nixon Administration and members of Congress who supported the offshore oil development program. In the floor debate on multiple use, House MMFC members frankly acknowledged the provision to certify uses as a “safeguard,” but simultaneously undermined its future use by advising executive branch implementers of the law to focus on creating sanctuaries where preservation and development uses were balanced; hence, no conflicts would theoretically exist and the provision would not need to be applied. Even so, the floor guidance was insufficient to save the Act from controversy. The safeguard provision would be one of the first provisions of the law to be changed.

## 6. Relation to Other Laws

Title III contained no specific provisions regarding its relationship to other federal laws. Despite the objection of the DOI that it had authority under the National Environmental Policy Act and OCSLA to protect the environmental values of the ocean that were to be protected under Title III, the committee clearly believed the sanctuaries title filled a gap in ocean protection. Noting that the House MMFC had considered sanctuary bills for several years, Dingell said: “The Congress has been continually impressed with the fact that we have had no policy for the protection of these areas in the offshore lands which have significant ecological, environmental, and biological values.”<sup>232</sup>

In terms of the Act’s effects on existing federal programs, the committee assumed that the required consultation among federal agencies and states would resolve any conflicts and provide coordination:

The consultation process is designed to coordinate the interests of various Federal departments and agencies, including the management of fisheries resources, the protection of national security and transportation interests, and the recognition of responsibility for the exploration and exploitation of mineral resources. It is expected that all interests will be considered, and that no sanctuary will be designated without complete coordination in this regard.<sup>233</sup>

In response to charges by the DOI and members of the DOI Committee that Title III would interfere with energy production under the OCSLA and lock up offshore oil deposits, Dingell disagreed, saying it “is not the intent of the [House MMFC] to halt drilling or other mineral exploration.”<sup>234</sup> Several other House members made the same point during discussion of multiple use.<sup>235</sup> Although the DOI and the Nixon Administration were unable to derail passage of the Act, the issue of the law’s relationship to the offshore leasing program would arise over and over again.

### E. Conclusion

As enacted, the sanctuaries law only partially achieved the preservation intent of its original legislative champions. Representatives Keith, Brown, and others initially envisioned a system of marine wilderness preserves analogous to that of the National Wilderness Preservation System.

232. *Id.* at 31146.

233. H.R. REP. NO. 92-361, at 27.

234. 117 CONG. REC. 31146.

235. *See, e.g., id.* at 31140.

Sanctuaries were proposed as a tool for preserving the environmental integrity of special marine areas and managing them for human uses deemed compatible with the natural environment, such as wildlife conservation and commercial and sport fishing. Industrial and commercial development that conflicted with the preservation purposes and desired uses of sanctuaries would be precluded.

But the analogy was not a perfect one. Whereas the Wilderness Act allowed only recreational hunting and fishing in wilderness areas, sanctuary proponents saw no problem with allowing commercial fishing in sanctuaries even though it potentially posed a significant threat to sanctuary resources and might conflict with other uses. Preservation of fishery resources was one intended outcome of the Act, and the potential for conflict was simply never raised.

The Sanctuaries Act that passed in 1972 represented a significant modification of the original vision. Although drafted as a preservation and restoration measure, the House floor debate signaled that sanctuaries were to be multiple use areas in which all uses could be considered, even industrial ones, as part of the designation process. Furthermore, rather than establish a national sanctuary system outright with attendant guidance on how the system was to be built, Congress instead created a three-year program under which the Secretary of Commerce had discretion to designate as few or as many sanctuaries as he or she saw fit. In short, the Act gave enormous power to the executive branch to invent a place-based ocean conservation program underpinned by congressional guidance that was both ambiguous and sketchy.

What constitutes a marine sanctuary? What specific resources or places does the Act attempt to preserve? How would they be identified? What exactly does multiple use mean? Can any uses be excluded from a sanctuary? These and other questions would arise again and again as the law evolved over the next 30 years and as interest groups jostled with conservationists over virtually every major sanctuary proposal.

## III. The Rise of Multiple Use 1973-1986

### A. Background

Implementation of the National Marine Sanctuaries Act (NMSA), as Title III of the MPRSA came to be known, was slow to gain momentum. NOAA, the agency in the U.S. Department of Commerce (DOC) to which the program was delegated, was scarcely two years old and still getting its sea legs when the Sanctuaries Act was passed. The Nixon Administration’s opposition to the Act was still warm, particularly at the DOI. Equally problematic was the lack of clear and specific guidance from Congress on key points such as designation priorities and which uses to allow in sanctuaries. The inherent difficulty of getting a new, unwanted program off the ground was compounded by a statute that emphasized preservation, but whose legislative history stressed multiple use of sanctuaries. In which direction was NOAA supposed to lean, and how far?

In its first program regulations, issued in 1974, NOAA signaled its intent to follow the House’s lead and move the program in the direction of multiple use sanctuaries. Initially, designations were few, as little money was spent to develop the program. Once implementation be-



gan in earnest under the Carter Administration, controversies erupted over the scope, requirements and impact of the program as NOAA attempted to designate areas such as Flower Garden Banks, Channel Islands, Georges Bank, and Farallon Islands.

Some observers and members of Congress became frustrated in general with the workability of the regulations. Oil and commercial fishing industries in particular developed a growing antipathy toward the Act because of its potential to infringe upon their activities. The oil industry sought to have oil development allowed in sanctuaries as an acceptable multiple use and the fishing industry did not want sanctuaries to restrict their customary practices. From roughly 1977 to 1986, these industries and their congressional allies led a counterattack against the program that challenged the law's very existence. Barring repeal of the Act, the oil and fishing industries sought to limit the law's application by watering down its preservation purpose. In this they were largely successful. By 1984, NOAA and Congress had made a series of decisions that essentially refocused the Act's purpose from preserving and protecting places for their distinctive natural values to balancing preservation with other human uses. In short, multiple use sanctuaries became the defining paradigm of the program.

### B. First Regulations—1974

As a new agency cobbled together with units from other departments, NOAA had little experience managing ocean places for preservation purposes. In late 1973, NOAA hosted a national workshop to obtain advice on how to implement both the Marine Sanctuaries Program and the estuarine sanctuaries program, which had been authorized by the CZMA.<sup>236</sup> The workshop brought together members of state and federal agencies, conservation organizations, and industry/user groups. Participants generally felt that the marine sanctuary legislation provided less guidance and focus of purpose than the more narrow and specific estuarine sanctuary provisions of the CZMA. Among other things, the workshop explored the need for different kinds of marine sanctuaries, including a multiple use class; the desirability of frequent review of each sanctuary to determine if the purposes for which it was designated were still valid; and the need for regulated activities to be declared prior to designation so that cooperating states would understand what they were agreeing to.

Building off of the workshop's results, regulations for the Marine Sanctuaries Program were issued in June 1974.<sup>237</sup> The regulations established the policy and objectives of the program, the kinds of areas that could be designated, a designation process, and procedures to enforce sanctuary regulations.

#### 1. Program Purpose and Multiple Use

The regulations reaffirmed the 1972 Act's clearly stated purpose of preserving or restoring certain areas for their

conservation, recreational, ecological, or esthetic values.<sup>238</sup> The regulations identified five types of sanctuaries: habitat areas, species areas, research areas, recreational and esthetic areas, and areas with "unique or nearly one of a kind geological, oceanographic, or living resource feature[s]."<sup>239</sup> This provision appears to have originated in the 1973 workshop, which had suggested that NOAA create a range of sanctuary types.<sup>240</sup>

NOAA's regulations did not elaborate on the Act's restoration purpose. Under what circumstances and how would degraded marine areas be restored and to what condition? The failure to address restoration was a curious omission, given the fact that restoring coastal and ocean areas was a major theme of congressional discussions of the period, as well as a specific purpose of the Act. The restoration purpose was never seriously addressed by NOAA before being repealed by Congress in 1984.

Instead of establishing a sanctuary category for multiple use, as had been discussed in the workshop, the 1974 regulations specified that "multiple use of marine sanctuaries . . . will be permitted [in all sanctuary types] to the extent the uses are compatible with the primary purposes of the sanctuary."<sup>241</sup> Multiple use was defined to mean

the contemporaneous utilization of an area or reserve for a variety of compatible purposes to the primary purpose so as to provide more than one benefit. The term implies the long-term, continued uses of such resources in such a fashion that one will not interfere with, diminish, or prevent other permitted uses.<sup>242</sup>

In responding to public comments about the multiple use provisions, NOAA explained:

The question of multiple use will need to be examined on a case-by-case basis. The legislative history of the Title clearly indicates that *multiple use of each area should be maximized consistent with the primary purpose*. Additionally, the statute clearly indicates, as a safeguard that "no permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary (Administrator) shall certify that the permitted activity is consistent with the purposes of this title and can be carried out within the regulations promulgated."<sup>243</sup>

There are two points to be drawn. First, while several statements made on the House floor clearly pushed implementation in the direction of multiple use, nowhere does the record show that multiple use was to be *maximized consistent with the Act's stated purposes*. Rather, the maximization emphasis was NOAA's interpretation of how it was supposed to implement the Act. One of the early managers of the Sanctuaries Program, Robert Kifer, summarized his understanding of Congress' concept of sanctuaries as follows:

There are areas of the ocean that should be preserved for various purposes and once a purpose has been identified for a given sanctuary, the ensuing regulations should not reach beyond controlling those activities that will inter-

238. 39 Fed. Reg. at 23254.

239. *Id.* at 23256.

240. LYNCH ET AL., *supra* note 236, at 39.

241. 39 Fed. Reg. at 23255.

242. *Id.* at 23256.

243. *Id.* at 23255 (emphasis added).

236. MARINE AND ESTUARINE SANCTUARIES, PROCEEDINGS OF THE NATIONAL WORKSHOP ON SANCTUARIES (M.P. Lynch et al. eds., 1974) [hereinafter LYNCH ET AL.].

237. 39 Fed. Reg. 23254 (1974); Robert R. Kifer, *Comments: NOAA's Marine Sanctuary Program*, 2 COASTAL ZONE MGMT. J. 177, 179 (1975).

ferre or destroy the values of the primary purpose. *Thus, multiple compatible use should be encouraged.*<sup>244</sup>

Kifer's use of "encouraging" rather than "maximizing" multiple use is a subtle but significant difference of emphasis. Encouragement implies support or stimulation of compatible uses, whereas maximization connotes that the agency would permit uses to their fullest extent and assign them the "highest possible importance."<sup>245</sup> Even within NOAA, therefore, there can be seen disagreement about what the Act intended regarding multiple use. An alternative interpretation of the House debate record is that while multiple use *could* be allowed, it was not mandated or required to be "maximized," and therefore was not intended to trump or diminish the Act's preservation and restoration purposes.

Second, NOAA acknowledged that multiple use was constrained by the so-called safeguard provision of the Act which specified that the Secretary had the power to regulate any activities in sanctuaries and that *all uses authorized under other authorities were considered invalid* unless the Secretary took reasoned action to certify them as "consistent" with the purposes of the Act and sanctuary regulations. This default provision on other uses, when combined with the Secretary's broad regulatory authority over sanctuaries, gave the Secretary complete authority to decide sanctuary uses. As it turned out, the 1974 regulations represented the high watermark of the Secretary's preservation and protection powers under the Act. Proposals to reduce these powers began appearing as early as 1978 (see below).

As David Tarnas notes: "The conflicts between the agency's multiple-use management approach and the program's goal of preservation" raised "an important controversial issue for the program," one that remains to this day.<sup>246</sup> NOAA's regulations clearly reflected Congress' own ambiguity about the program, but leaned toward embedding multiple use. The Act's preservation and restoration purposes were now deemed "primary" by NOAA. Multiple uses were to be maximized consistent with the primary purposes, subject only to the Secretary's power to restrict inconsistent uses. In short, multiple use had been subtly upgraded to being a purpose of the program, albeit a secondary one.

## 2. Nomination and Designation Process

The 1972 Act directed the DOC to develop guidelines for designating sanctuaries, but was silent on the number and location of sanctuaries and other details. One of the few clues given about the scope of the program was Representative Pelly's remark that sanctuaries are "intended to protect unique areas of the ocean bordering our country," and that most sanctuaries would likely "protect sections of our national seashores."<sup>247</sup> The lack of definitive congressional guidelines for the program proved to be a significant problem for NOAA, which struggled to invent a coherent and efficient designation process that could survive local pressure from economic interest groups.

NOAA established a loose system whereby nominations could be made by any member of the public or government official.<sup>248</sup> Only the barest of information on an area was required and there were no specific standards a nomination had to meet. A nomination was subject to preliminary review by interested agencies to determine *feasibility*, but again no criteria were provided. No mention was made of justifying the need for a designation or showing that it would achieve stated purposes. If a nomination were deemed feasible, a more in-depth study would be made. Among other things, the in-depth study was to include an analysis of "how the sanctuary will impact on the present and potential uses, and how these uses will impact on the primary purpose for which the sanctuary is being considered." If the study were favorable, a draft environmental impact statement (DEIS) and proposed regulations would be prepared, a public hearing held, and a consultation undertaken with other federal agencies before designation. Finally, the Secretary would designate the area with a clear statement of the sanctuary's purpose, and issue regulations and guidelines for its management. A "revision" of a sanctuary could only be made by the same procedure as the nomination.

The open-ended nature of the nomination process fueled early concern by industry that "overly large areas of the coastal waters" might become marine sanctuaries.<sup>249</sup> In responding to this concern, NOAA stated: "It is not expected . . . that large areas of the oceans and coastal waters will be designated as marine sanctuaries, and all activity prohibited or drastically reduced. It is expected that sanctuaries will be only large enough to permit accomplishment of the purposes specified in the Act."<sup>250</sup> Nevertheless, concern about the number and size of marine sanctuaries would soon intensify.

### C. Designation of USS Monitor and Key Largo NMS

With regulations in place, nominations began to trickle in. Two small sanctuaries were designated by the Ford Administration in 1975, an area one mile in diameter surrounding the wreck of the USS Monitor off North Carolina, on January 30, and about 75 square nautical miles of threatened coral reefs off Key Largo, Florida, on December 18. Neither of these sites had a major impact on ocean users; hence they drew no significant opposition.<sup>251</sup>

The Monitor designation prohibited activities likely to damage the wreck, such as anchoring, salvage, diving, seabed drilling, trawling, or discharging of waste.<sup>252</sup> The regulations for the Key Largo sanctuary controlled or prohibited uses within the following categories: removal or destruction of natural features and marine life; dredging, filling, excavating, and building activities; discharge of refuse and polluting substances; archaeological and historic substances; damage to markers and other signs; fishing; scuba diving, and skin diving; operation of watercraft; photography; ad-

244. Kifer, *supra* note 237, at 178 (emphasis added).

245. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

246. David A. Tarnas, *The U.S. National Marine Sanctuary Program: An Analysis of the Program's Implementation and Current Issues*, 16 COASTAL MGMT. 275, 277 (1988).

247. 117 CONG. REC. 31136.

248. 39 Fed. Reg. at 23256-57.

249. *Id.*

250. *Id.*

251. H.R. REP. NO. 95-325, pt. 1, at 11 (1977) (on H.R. 4297).

252. Monitor Marine Sanctuary Final Regulations, 40 Fed. Reg. 21706, 21707 (May 19, 1975).

vertising, or publicity; and explosives and dangerous weapons.<sup>253</sup> Within the category of fishing, hook and line fishing and some trap fishing was allowed, while poisons, electric charges, and similar methods were prohibited. Additionally, the regulations stated that no more than 20% of the sanctuary would be completely closed to fishing or “set aside as control areas for research.”<sup>254</sup>

#### D. President Jimmy Carter’s Sanctuary Initiative

Although NOAA had begun review of a few additional sites, the program was largely dormant until President Carter took office. Congress had authorized appropriations of \$10 million per FY for the program, but the funds were neither requested by the Secretary of Commerce nor appropriated. After seven years of minimal funding from other NOAA sources, the program finally received a line-item appropriation of \$0.5 million in 1979.<sup>255</sup>

Shortly after taking office, President Carter significantly raised the program’s profile. In his 1977 Message to Congress on the Environment, President Carter instructed the Secretary of Commerce “to identify possible sanctuaries in areas where development appears imminent, and to begin collecting the data necessary to designate them.”<sup>256</sup> He also directed the Secretary of the Interior to cooperate with the Secretary of Commerce’s effort in areas where offshore “leasing appears imminent.”<sup>257</sup>

During President Carter’s tenure, the nation was faced with an energy shortage and dwindling commercial fish stocks. Both situations prompted increased congressional concern for the needs of the oil and fishing industries. The 1973 oil embargo and the 1979 Iran hostage crisis and oil cutoff resulted in significant fuel shortages, which in turn led to a national push for self-sufficiency in oil production. The number of offshore oil and gas leases on the OCS more than doubled between 1972 and 1978.<sup>258</sup> In 1978, Congress amended the OCSLA to authorize preparation and implementation of a five-year plan for oil and gas leasing, putting the oil industry on a collision course with the fledgling Sanctuaries Program.<sup>259</sup>

The U.S. commercial fishing industry was in crisis due to obsolete technology and the overfishing of stocks. For example, “by 1975, all the major commercial species of the Bering Sea region were considered fully exploited or over-exploited, including the two most abundant species—pollock and yellowfin sole—as well as King crab and shrimp.”<sup>260</sup>

New England catches also were in decline. The Magnuson Fishery Conservation and Management Act was passed in 1976 to address fish population declines caused in large part by fishing by foreign fishing fleets in U.S. waters. The goals of the Magnuson Act included the phaseout of foreign fishing, expansion of U.S. fleet capacity, and improved management of fish populations under the leadership of newly created regional fishery management councils composed of industry and government representatives. Although the Sanctuaries Act had originally had been advanced by Representative Keith and others as a mechanism for protecting fisheries, fishing interests soon determined that the Act could be a double-edged sword capable of reducing their fishing, as well as protecting fishing grounds from harmful industrial development.

Meanwhile, several marine pollution events continued to highlight the need to protect ocean and estuarine areas. These included kepone contamination of Chesapeake Bay, dolphin die-offs along the New Jersey coast, and sewage washing up on Long Island beaches. There were also two oil tanker spills, one in the Gulf of Mexico and one off of France, which reconfirmed the threat offshore oil operations and tanker traffic posed to the marine environment.<sup>261</sup>

NOAA reorganized in 1977 and transferred the Sanctuaries Program from the Office of Coastal Zone Management to a newly created Office of Ocean Management, whose sole purpose was managing the program.<sup>262</sup> In the wake of President Carter’s message, NOAA issued a *Plan to Implement the President’s Mandate to Protect Ocean Areas From the Effects of Development*, solicited sanctuary recommendations, and issued draft site selection criteria by which the nominations would be judged.<sup>263</sup> By February 1, 1978, 169 nominations had been received, including those for Monterey Bay, Channel Islands, and Point Reyes-Farallon Islands.<sup>264</sup> Forty-five of the nominations were for sites in Alaska, none of which were smaller than 7,550 square nautical miles in size. An additional 100 nominations were submitted by various Regional Fishery Management Councils, but were withdrawn because two councils opposed the action.<sup>265</sup>

#### E. The 1978 Reauthorization

The gush of nominations and NOAA’s renewed vigor in proposing candidate sanctuaries brought the program under scrutiny from the public at large, ocean industries, and Congress. Depending on the area involved, commercial fishing interests or the oil industry viewed the program as a serious threat, and began agitating to limit its scope. Both the House and Senate conducted hearings in 1978 on the program’s reauthorization and reported amendments to the Act, which, though not enacted, set the stage for changes in NOAA’s regulations in 1979 and congressional amendments in 1980. Among the issues considered during the 1978 hearings were: the role of public apathy in the dormancy of the program, multiple use, the effects of designa-

253. Key Largo Coral Reef Marine Sanctuary Interim Regulations, 41 Fed. Reg. 2378 (Jan. 16, 1976).

254. *Id.*

255. H.R. REP. NO. 96-894, pts. 1 & 2, at 8 (1980) (on H.R. 6616).

256. PRESIDENT CARTER’S MESSAGE TO CONGRESS, reprinted in 7 ELR 50057, 50063 (May 1977).

257. *Id.* at 50061.

258. Michael C. Blumm & Joel G. Blumstein, *The Marine Sanctuaries Program: A Framework for Critical Areas Management in the Sea*, 8 ELR 50016, 50016-17 (Mar. 1978) (reprinted in full in Senate Hearing No. 95-65).

259. Susan Harvey, *Title III of the Marine Protection, Research, and Sanctuaries Act: Issues in Program Implementation*, 11 COASTAL MGMT. 169 (1983); The Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§1331 et seq. (1953).

260. DAVE BAIKER & KEN STUMP, SINKING FAST: HOW FACTORY TRAWLERS ARE DESTROYING U.S. FISHERIES AND MARINE ECOSYSTEMS, A GREENPEACE REPORT ch. 2 n.22 (1996).

261. *Authorizations for the Marine Protection, Research, and Sanctuaries Act of 1972: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. 1 (statement of Sen. Hollings) (1978) [hereinafter Senate Hearings 1978].

262. *Id.* at 17.

263. *Id.* at 18; Blumm & Blumstein, *supra* note 258, at 50025.

264. S. REP. NO. 95-886, at 3 (1978).

265. *Id.*



tions on extractive industries, who should designate sanctuaries, and the consultative role of the Regional Fishery Management Councils.

### 1. Public Involvement

Influencing the reauthorization debate was an article by two attorneys with the Center for Natural Areas summarizing the history of the program and analyzing its strengths and weaknesses. The article gained currency on Capitol Hill and was reprinted in full in the Senate Commerce Committee's 1978 reauthorization hearing.<sup>266</sup> Attorneys Michael Blumm and Joel Blumstein concluded that one of the reasons for the program's dormancy in its first five years was lack of significant public involvement, which in turn was in part due to a lack of clear prescribed standards for assessing whether nominated sites were worthy of designation.<sup>267</sup> They argued that the lack of standards meant that the public had been disinterested in submitting nominations and distrustful of the designation process.

Attempts by NOAA to regulate current and future uses of particular areas naturally generated both concern and interest among affected agencies and user groups. To deal with concerns that the designation process was flawed because other agencies and parties were not being consulted on the final draft of the designation document, from which they could ascertain its actual effects, the House and Senate reauthorization bills<sup>268</sup> required the Secretary to identify in the designation document: the geographic area to be included, the characteristics of the area that give it special value, and the types of activities that would be subject to regulation.<sup>269</sup> These provisions, explained a House committee report, will

provide for the [p]resident, other [f]ederal agencies, and the [g]overnor of an effected [sic] State a specific indication of the purposes of a marine sanctuary and the nature of the regulations which will be adopted by the Secretary of Commerce, including all activities which necessarily will be regulated within the marine sanctuary, prior to the designation.<sup>270</sup>

### 2. Multiple Use

Blumm and Blumstein applauded the June 1974 regulations' choice of the term "compatible use," opining that it "not only serves to carry out the congressional intent, as expressed in the legislative history of Title III, it also serves to mitigate the concerns of development interests and others for whom the term 'sanctuary' connotes the restriction of all uses."<sup>271</sup>

Contrary to the Blumm and Blumstein conclusion that the multiple use debate was totally settled, Senator Hollings, chairman of the Senate Committee on Commerce, Science, and Transportation, engaged Samuel Bleicher, the director

of NOAA's Office of Ocean Management, in a strongly worded debate on the role of multiple use. Bleicher testified that the goal of the office was:

to help assure that ocean resources are used for the maximum public benefit with minimum conflict among resource uses or environmental damage . . . . Nor are marine sanctuaries pristine areas where human uses are severely restricted or excluded. This inference has often been drawn from the term "sanctuary," although the law itself contains no such limitations . . . . Inevitably [there will be] multiple use [sic] areas where even hard mining, and oil and gas development may be allowed in varying degrees.<sup>272</sup>

Hollings, who had been a member of the congressional conference committee that approved the House version of the 1972 Act, vehemently argued against comprehensive or multiple use activity in sanctuaries, going so far as to say, "we used the word 'sanctuary' and we did not intend it to mean multiple use, or oil and gas development. If we weren't going to protect the environment and its distinctive nature, there wasn't any need to have the sanctuaries."<sup>273</sup> Nevertheless, no formal clarification of the Act's purposes or the role of multiple use management emerged from the Senate.

### 3. Safeguard Provision

Also considered during the deliberations of 1978 was the Act's so-called safeguard provision, which enabled the Secretary to regulate uses in sanctuaries permitted under other authorities by treating these uses as *invalid* until the Secretary declared them consistent with sanctuary purposes. No congressional guidance was given in 1972 on the way this power was to be exercised. Did it, for example, mean that upon designation all uses had to cease until ruled on by the Secretary?

Both the House and Senate bills reversed the safeguard provision by providing that "all permits, licenses, and other authorizations issued pursuant to any other authority shall be *valid* unless such [designation] regulations otherwise provide."<sup>274</sup> While in theory the new language still allowed the Secretary to invalidate any permits he chose at the time he designated a sanctuary, the burden of proof had shifted. The Secretary would have to demonstrate why a permit or other authorization was invalid and should be disallowed, rather than which permits were consistent with the sanctuary's purpose and therefore valid.<sup>275</sup> The possibility was therefore greater that harmful uses could slip through the cracks and be allowed because the Secretary was underfunded, overworked, or had misjudged the impacts of uses. The precautionary principle, based on taking no action unless it is determined the action would cause minimal or no harm, was therefore reversed.

The Senate Commerce Committee explained its action as follows:

[O]ne problem with the original [T]itle III is that in designating a sanctuary the Secretary of Commerce automatically and perhaps inadvertently may assume author-

266. Senate Hearings 1978, *supra* note 261, at 45-63; Blumm & Blumstein, *supra* note 258, at 50016.

267. Senate Hearings 1978, *supra* note 261, at 47; Blumm & Blumstein, *supra* note 258, at 50018.

268. H.R. 10661, 95th Cong. (1978).

269. H.R. REP. NO. 95-1145, pt. 2 (1978).

270. *Id.* at 8.

271. Senate Hearings 1978, *supra* note 261, at 50-51; Blumm & Blumstein, *supra* note 258, at 50021-22.

272. Senate Hearings 1978, *supra* note 261, at 17.

273. *Id.* at 22.

274. H.R. 10661 §4 (emphasis added); S. 2767, 95th Cong. (emphasis added) (1978).

275. H.R. REP. NO. 95-1145, pt. 2.

ity to regulate all activities within a sanctuary: all other statutes may be superseded within the designated site. While the committee believes the Secretary should have the authority necessary to regulate activities within a marine sanctuary, it also believes the Secretary should have discretion to select which activities to propose regulating under title III and which one [sic] to propose exempting from this regulation.<sup>276</sup>

This comment seems to highlight a two-fold committee concern: that the Secretary had been given authority over all uses and would have to make decisions to return that authority to the pertinent agencies; and that the Secretary had been given power over numerous other authorities, which was viewed as excessive control over other programs. The proposed reversal of the safeguard provision was heavily influenced by concerns that sanctuaries might adversely affect commercial fishermen. Sen. Warren Magnuson (D-Wash.) went so far as to suggest eliminating altogether the Secretary's power over commercial fishing in sanctuaries.<sup>277</sup> However, Sen. Ted Stevens (R-Alaska), who also sought to protect commercial fishing, acknowledged that there are places where fishermen should be "shut out," such as areas of tropical coral where boat anchors could cause damage, and that the Sanctuaries Program should therefore retain some power to regulate fishing.<sup>278</sup> Under the new Senate proposal, the Secretary could only regulate activities that he declared he needed to regulate at the time a sanctuary was designated.

#### 4. Power to Designate

An issue addressed by the Senate, but not the House, was whether the Secretary of Commerce, as provided in the Act, or Congress should formally designate marine sanctuaries. There had been little recorded discussion of why Congress did not retain the designation power for itself when the Act was passed in 1972, as it did for national parks and terrestrial wilderness areas. As the potential scope and impact of the program became known, some members of Congress became alarmed. Program Director Bleicher testified that he hoped the Marine Sanctuaries Program would designate 5 sanctuaries during 1978 and a total of 25 to 30 sanctuaries by 1983.<sup>279</sup> Many of these intended sanctuaries were in oil and gas rich areas, such as the Gulf of Mexico and off California and Alaska, or encompassed significant fishing grounds.

The Senate-reported bill would have required all designations larger than 1,000 square nautical miles to be authorized by Congress because large designations involve "major policy issues with wide-ranging environmental and economic implications."<sup>280</sup> Senator Stevens was the proponent for this change, modeling the Senate's provision after the Wilderness Act, which requires Congress to designate all wilderness areas.<sup>281</sup> At a May 1978 hearing that preceded the reauthorization hearing, Senator Stevens said he was

"disturbed about the size" of many of the nominations, including the 17,000 square nautical miles on George's Bank, 4,530 square nautical miles around the Channel Islands, and 5,588 square nautical miles off San Diego, all of which paled in comparison to Alaska nominations, which ranged from 7,550 to over 75,000 square nautical miles.<sup>282</sup> Senator Stevens feared that human uses, particularly commercial fishing, would be prohibited in the sanctuaries even when they were compatible with the purposes for which a sanctuary was designated.<sup>283</sup> Sen. Harrison Schmitt (R-N.M.) noted that such large sanctuaries also could shut out oil development.<sup>284</sup> Senator Magnuson offered another solution to reign in the Secretary which, though not adopted, ultimately won out in the next Congress.<sup>285</sup> Senator Magnuson suggested that Congress do "what we have been doing on a lot of the bills, that the Secretary shall report to the Congress [on his intent to designate a sanctuary], and if either House doesn't disapprove, within a 60-day period, it becomes effective."<sup>286</sup>

#### 5. Consultation by the Regional Fishery Management Councils

A final provision of the Senate bill required NOAA to consult with the Regional Fisheries Management Councils concerning proposed designations.<sup>287</sup> The councils, almost completely composed of government officials and fishermen, were charged under the Magnuson Fishery Management and Conservation Act with conserving and managing federal fisheries. Stevens raised an amendment to include consultation with the councils after hearing that the Act "require[ed] consultation with the Secretaries of Transportation, the DOI and other agencies," including the Secretary of Commerce.<sup>288</sup> There was no discussion of Stevens' proposal, and it was approved by the committee without objection.

#### 6. Conclusion

The 1978 reauthorization bills failed to be enacted "for reasons beyond the control of either authorizing committee."<sup>289</sup> Many of the ideas developed during hearings, however, remained influential. The problems and ideas raised during the 1978 discussion signaled congressional discontent with the direction of the program. As the program picked up interest and momentum, Congress began backpedaling from the preservation purposes they had approved in 1972. NOAA, sensing that the tide had turned, continued to do what it could through the regulatory process to deal with the issues raised in the reauthorization process and implement changes that tracked Congress' desires.

276. S. REP. NO. 95-886, at 5.

277. Senate Comm. on Commerce, Science, and Transportation, Executive Session No. 42, 95th Cong. 69 (1978) [hereinafter Unpublished Senate Hearings 1978].

278. *Id.* at 62-63.

279. Senate Hearings 1978, *supra* note 261, at 18-19.

280. S. REP. NO. 95-886, at 4.

281. Unpublished Senate Hearings 1978, *supra* note 277, at 61-62.

282. *Id.* at 61.

283. *Id.* at 61-62.

284. *Id.* at 70.

285. *Id.* at 69.

286. *Id.* at 70.

287. *Id.* at 72.

288. *Id.* at 71-72.

289. 126 CONG. REC. 10772 (1980) (statements of Reps. Murphy and Studds on H.R. 6616).

### F. Flower Garden Banks Controversy

While the 1979 regulations were in the public comment phase, NOAA published proposed regulations and a draft environmental impact statement for the Flower Garden Banks marine sanctuary, a 0.6-square-nautical-mile area of coral reefs about 100 miles off the coasts of Texas and Louisiana.<sup>290</sup> The NOAA proposal included a moratorium on new oil and gas development for five years within the sanctuary, an idea that was vigorously argued against by both industry and the DOI. In response, Rep. John Breau (D-La.), a member of the House MMFC, introduced a bill to repeal the Marine Sanctuaries Program title of the MPRSA, citing NOAA's handling of Flower Garden Banks as an example of why the Act should be repealed.<sup>291</sup> NOAA's proposed oil and gas moratorium was seen by Representative Breau as "inconsistent with a well-conceived program for increased domestic hydrocarbon development."<sup>292</sup> Breau asserted that the DOC had failed to look at relevant, authoritative studies about the effects of oil exploration and development, and had instead relied on personal communications and unpublished documents in reaching its decision.<sup>293</sup> Breau's opposition to the Flower Garden Banks sanctuary led to the stagnation of its designation, until it was removed in 1982 from the list of areas under consideration.

Breau also criticized the program because of what he saw as: its redundancy with other authorities "such as that provided by the [OCSLA], the Clean Water Act [(CWA)], and the Fishery Conservation and Management Act (FCMA), among many others"; its failure to provide additional protections to those already available under other laws; its overly broad language that accomplished no goal other than duplicative effort and regulation; and the lack of congressional guidance to lead the program in a clear direction.<sup>294</sup> Although Breau's bill to shut down the entire program went nowhere, it signaled his role in coming years as one of the most vocal and influential opponents of the program.

### G. 1979 Regulations

NOAA finalized its new program regulations in July 1979. The regulations were a significant departure both from the 1974 regulations and from the language and intent of the 1972 Act, in that they gave those with an economic stake in use of sanctuaries' resources significant leverage. As implemented by the 1979 regulations, the Act was no longer viewed as a preservation statute, but rather as a statute that *balanced preservation and human uses* in sanctuaries. Among other things, the regulations reformulated NOAA's approach to uses of sanctuaries; altered the way the Act's safeguard provision was applied; revised the site selection criteria proposed in 1977 to screen nominations; and created

a list of recommended areas (LRAs) from which to select candidate sanctuaries.<sup>295</sup>

#### 1. Program Purposes and Multiple Use

The program purposes set forth in the 1979 regulations were not all that different from those in the 1974 regulations. NOAA stated that "protection of natural and biological resources" was the primary emphasis of the program.<sup>296</sup> Although the definition of multiple use was dropped, the concept was very much alive in another guise:

Human activities will be allowed within a designated sanctuary to the extent that such activities are *compatible* with the purposes for which the sanctuary was established, based on an evaluation of whether the *individual or cumulative impacts of such activities may have a significant adverse effect* on the resource value of the sanctuary.<sup>297</sup>

This language was broad and vague enough to support an array of interpretations as it was applied, but clear enough that in order to exclude uses, NOAA would have to prove likely adverse effects. A big difference between the new compatibility standard and the 1974 definition was that the new standard only restricted uses that may have a "significant adverse" impact, whereas the 1974 multiple use definition called for "long-term, continued uses of . . . resources in such a fashion that one will not interfere with, diminish, or prevent other permitted uses."<sup>298</sup> Whereas the 1974 definition merely required NOAA to show *some level* of interference with, or diminution of, another use in order to disallow a proposed use, the 1979 standard required proof of a *significant, adverse* impact. Under this narrower definition, more uses could be allowed.

The issues of the Act's redundancy and the appropriateness of oil and gas development within sanctuaries continued to simmer. Industry opposition to NOAA's proposed blanket bans on oil and gas development at several candidate sites (including Channel Islands, Flower Garden Banks, and Georges Bank) in the late 1970s was so intense that a 1983 article by a NOAA employee in *Coastal Zone Management Journal* suggested that "the controversy provoked by the original proposal [to ban oil and gas in the Channel Islands sanctuary] may effectively ward against future regulatory proposals which impose a blanket prohibition on an individual activity."<sup>299</sup>

Facilitation of multiple use in sanctuaries also was enhanced by NOAA's interpretation of the Act's provision concerning what uses the Secretary could regulate. The 1979 regulations adopted the language of the un-enacted 1978 House and Senate bills, which limited the Secretary's power of regulation to those activities specifically included in the terms of the designation document.<sup>300</sup> While this technically left intact the Secretary's ability to regulate or pro-

290. Flower Garden Banks Proposed Regulations, 44 Fed. Reg. 22081 (Apr. 13, 1979).

291. H.R. 5018, 96th Cong. (1979).

292. 125 CONG. REC. 21665 (1979) (statement of Rep. Breau).

293. *Id.*

294. *Id.* Despite these vehement objections to the entire program, Breau was a cosponsor of H.R. 10661 in 1978 and H.R. 2519 in 1979, and voted for H.R. 6616, which contained identical language to H.R. 10661 and H.R. 2519, and whose language was substituted into the Senate bill (S. 1140), which eventually was enacted as the 1980 NMSA Amendments.

295. Announcement of Initial List of Recommended Areas, 44 Fed. Reg. 62552 (Oct. 31, 1979).

296. Designation and Management of Marine Sanctuaries, 44 Fed. Reg. 44831, 44837 (July 31, 1979).

297. *Id.* (emphasis added).

298. Marine Sanctuaries Regulations, 39 Fed. Reg. 23254, 23256 (June 27, 1974).

299. Harvey, *supra* note 259, at 179.

300. 44 Fed. Reg. at 44831, §922.26; H.R. 10661; S. 2767.



hibit any or all uses when a sanctuary was designated, it opened the door to the future erosion of the safeguard by requiring the Secretary to name upfront all activities that he wished to regulate. A lack of foresight on the part of the Secretary as to what uses might need regulation or prohibition could lead to damaging delays in protection, because the 1979 regulations specified that the entire time-intensive designation process needed to be repeated in order to amend any of the sanctuary's terms of designation.

NOAA explained that the new language "clearly provides that compatible activities may take place in a sanctuary [NOAA] does not agree . . . that no human activities should be allowed. NOAA's interpretation is supported by the legislative history of the Act."<sup>301</sup> NOAA further explained that it saw the change as advantageous "in terms of providing clarity to potential users and, generally, of reduced bureaucracy, in not [restricting uses] unless necessary."<sup>302</sup>

## 2. Site Selection Criteria and the LRAs

Another major change in the 1979 regulations was a new set of criteria and procedures for the nomination and designation of sanctuaries. In response to calls for clear standards and more public notification and input, NOAA created an LRA to catalog nominated sites that had been selected by NOAA for potential further study.<sup>303</sup> As before, anyone could nominate an area for sanctuary status. NOAA would then screen the nomination and include it on the LRA only if it contained one or more of the following:

- (1) Important habitat;
- (2) A marine ecosystem of exceptional productivity;
- (3) An area of exceptional recreational opportunity relating to its distinctive marine characteristics;
- (4) Historic or cultural remains of widespread public interest; or
- (5) Distinctive or fragile ecological or geologic features of exceptional scientific research or educational value.<sup>304</sup>

The listing of a site on the LRA was a prerequisite to further consideration but not a guarantee it would be designated. While the factors for selecting valid nominations were based on resource protection and preservation, the process of naming areas as "active candidates" was far less singular in purpose. Active candidates were to be chosen based on a number of factors, including:

1. The significance of the site's resources;
2. *The extent to which the means are available to conduct the required Public Workshop(s) within six months of selection as an Active Candidate;*
3. *Severity and imminence of existing or potential threats to the resources including cumulative effect of various human activities that individually may be insignificant;*
4. *The ability of existing regulatory mechanisms to protect the values of the site;*

5. The significance of the area to research opportunities;

6. The value of the area in complementing other areas of significance to public or private programs with similar objectives, such as the coastal zone management programs;

7. The esthetic qualities of the area;

8. *The type and estimated economic value of the natural resources and human uses within the area which may be foregone as a result of marine sanctuary designation, taking into account the economic significance to the nation of such resources and uses and the probable impact on them of regulations designed to achieve the purposes of sanctuary designation; and*

9. The economic benefits to be derived from protecting or enhancing the resources within the sanctuary.<sup>305</sup>

These requirements undercut the program's preservation purpose in several ways. Even if a site's resources were judged significant, NOAA could avoid responsibility for protecting the area by claiming lack of budget (factor 2) or determining that the area or its resources were able to be protected by other agencies (factor 4), as they did in 1981 with Georges Bank (see below) and subsequently with Norfolk Canyon, Ten Fathom Ledge/Big Rock, and Flower Garden Banks, among others. The 1979 regulations also threatened to turn the designation process into a cost-benefit analysis (factor 8) that explicitly allowed negative economic impacts of a designation potentially to trump the need for protection. While the Act gave broad discretion to the Secretary to determine whether to designate a sanctuary and how to do it, the Act itself made no mention of balancing economic use with preservation or prohibiting the designation of areas that would negatively impact economic uses or benefits. Both the legislative history and the VIMS workshop had raised the balancing concept in the context of multiple use. NOAA's 1979 regulations were the first to implement the concept.

## H. Controversy Over the Act's Purpose and Scope

Concerns raised during the 1978 reauthorization debate about the Sanctuaries Program's purpose and scope continued to percolate. The first LRA was published in October 1979. Although NOAA had reduced the number of recommended sites to 69 from the more than 170 nominations, industry saw the LRA as a threatening blueprint for the Sanctuaries Program, and there was concern that some sites had been nominated solely to stop potential or planned oil and gas development.<sup>306</sup> Additionally, seven sites were identified as active candidates: Flower Garden Banks, Channel Islands and Santa Barbara Island, Monterey Bay, Point Reyes/Farallon Islands, Looe Key, St. Thomas, and Gray's Reef.<sup>307</sup>

The very end of Carter's presidency saw publication of proposed rules for a 1,258-square-nautical-mile Channel Islands sanctuary,<sup>308</sup> Point Reyes/Farallon Islands sanctuary

301. 44 Fed. Reg. at 44833.

302. *Id.* at 44838.

303. *Id.* at 44836.

304. *Id.* at 44838.

305. *Id.* at 44838-39 (emphasis added).

306. Tarnas, *supra* note 246, at 282.

307. 44 Fed. Reg. 62552 (1979).

308. Channel Islands Proposed Regulations, 44 Fed. Reg. 69970 (Dec. 5, 1979).

(later renamed the Gulf of the Farallones),<sup>309</sup> Looe Key sanctuary,<sup>310</sup> and Gray's Reef sanctuary,<sup>311</sup> and the proposed designation of a St. Thomas sanctuary.<sup>312</sup> Fishing was regulated in Looe Key, where fish traps, spearguns and poisons were banned and regulations were placed on lobster traps in one area of the sanctuary,<sup>313</sup> and in Gray's Reef, which required sanctuary permits in order to trawl, use wire fish traps, or explosives.<sup>314</sup> The proposed Channel Islands regulations prohibited exploration or development on *new* oil and gas leases, and those for the Farallones prohibited *all* oil and gas activity.<sup>315</sup> NOAA's proposed moratorium on new oil and gas exploration in the proposed Flower Garden Banks site also remained unresolved.<sup>316</sup>

Between September 1980 and January 1981, when he left office, President Carter designated four sanctuaries: Channel Islands NMS (1,258 square nautical miles) on September 22, 1980, Gulf of the Farallones NMS (948 square nautical miles), Gray's Reef NMS (17 square nautical miles), and Looe Key NMS (5.32 square nautical miles, which is now part of the Florida Keys NMS) all on January 16, 1981. Industry uproar led to the new Reagan Administration requiring a regulatory impact analysis before the oil ban provisions of the proposed regulations could become effective. Finally, in March 1982, the final regulations for both Channel Islands and Farallon Islands were issued with the oil and gas prohibitions intact.<sup>317</sup>

At about the same time, NOAA removed Georges Bank from active status. Georges Bank had been elevated to active candidacy a mere two months prior to it being removed. The 15,100-square-nautical-mile site had been nominated by the Conservation Law Foundation and a number of fishing organizations in response to the offering for the sale of an OCS lease on the bank by the DOI. NOAA worked out a deal with DOI and EPA that "added a variety of environmental safeguards to protect the [b]ank."<sup>318</sup> The safeguards, however, were far less than the protections that NOAA had been touting as necessary.<sup>319</sup> The stated reason given by NOAA for removing the site from active status was that existing management programs were adequately protecting the site's resources. Thus, Georges Bank became the first casualty of the 1979 site selection criteria, particularly the site selection factor concerning the "ability of the existing regu-

latory framework to protect the resources" and the provision requiring consultation with other agencies.<sup>320</sup> There also is some evidence that the site was removed from active candidacy because President Reagan had indicated that he would not approve the designation.<sup>321</sup> Although temporarily sidetracked, Georges Bank would reemerge as an active candidate a few years later.

The battles over Georges Bank, Channel Islands, Flower Garden Banks, and Farallon Islands demonstrate how controversial the issues of oil and gas development within marine sanctuaries were, the success of NOAA in influencing policies of other agencies, and the role of multiple use within sanctuaries. The battles also show how the new regulatory designation procedures could be used to excuse inaction by the agency under certain circumstances. Finally, these cases demonstrated the varied power of conservation coalitions. At Channel Islands and Farallon Islands, they defeated the oil industry, but could not keep oil development completely out of Flower Gardens.

### I. 1980 Amendments

With the start of the 96th Congress, and as controversies over sanctuary proposals raged, Congress renewed its attempt to amend the Act. According to Rep. Gerry Studds (D-Mass.), the "agency has amended its regulations to implement the intended changes [of the failed 1978 bills] as much as possible under existing law, while the Congress has not yet completed amending the law to require the new regulations."<sup>322</sup> Studds' goal was to reconcile the two. The 1978 House bill, as amended by Studds, was the basis for a Senate bill introduced by Sen. Howard Cannon (D-Nev.) in late 1979 and for Studds' new bill, introduced in early 1980. A final version of the two bills was enacted in August 1980.<sup>323</sup>

The 1980 Amendments complemented NOAA's actions to facilitate multiple uses of sanctuaries and codified several of NOAA's 1979 regulations. Among other things, the amendments altered the designation process to require that more and earlier information be given about the area under consideration, including the reason for designation, and the types of activities subject to regulation; required any changes to the terms of a designation to go through the lengthy designation process anew; reversed the safeguard provision, making all sanctuary uses authorized under other laws valid unless the Secretary enacted regulations to restrict or prohibit them; and gave Congress the power to formally disapprove of designations.<sup>324</sup>

#### 1. Terms of Designation

The 1980 Amendments required any revision of a sanctuary's designation terms to follow the same process as a new designation. While there was no recorded discussion of the provision by Congress, it seems to address concerns about informing the public, other agencies, and state governors

309. Point Reyes-Farallon Islands Proposed Regulations, 45 Fed. Reg. 20907 (Mar. 31, 1980).

310. Looe Key Proposed Regulations, 45 Fed. Reg. 33645 (May 20, 1980).

311. Gray's Reef Proposed Regulations, 45 Fed. Reg. 39507 (June 11, 1980).

312. St. Thomas Sanctuary Proposed Regulations, 46 Fed. Reg. 33530 (June 30, 1981).

313. Looe Key Sanctuary Final Regulations, 46 Fed. Reg. 7946, 7950 (Jan. 26, 1981).

314. Gray's Reef Sanctuary Final Regulations, 46 Fed. Reg. 7942, 7946 (Jan. 26, 1981).

315. Channel Islands National Marine Sanctuary Final Regulations, 45 Fed. Reg. 65198, 65204 (Oct. 2, 1980); 46 Fed. Reg. at 7940.

316. Flower Garden Banks Marine Sanctuary Proposed Rule, 45 Fed. Reg. 43205 (June 26, 1980).

317. 47 Fed. Reg. 18588 (Apr. 30, 1982).

318. Reevaluation of Elevating Georges Bank to Active Candidate Status, 46 Fed. Reg. 58136 (Nov. 30, 1981).

319. Daniel P. Finn, *Interagency Relationships in Marine Resource Conflicts: Some Lessons From OCS Oil and Gas Leasing*, 4 HARV. ENVTL. L.J. 359, 370 (1980).

320. *Id.*; Harvey, *supra* note 259; 46 Fed. Reg. at 58136.

321. Finn, *supra* note 319, at 378.

322. 126 CONG. REC. 10772.

323. S. 1140, 96th Cong. (1979); H.R. 6616, 96th Cong. (1980); Pub. L. No. 96-332, 94 Stat. 1057 (1980) [hereinafter 1980 NMSA Amendments].

324. 1980 NMSA Amendments, *supra* note 323.

about what a sanctuary would mean to them.<sup>325</sup> Without this requirement, there was a lack of assurance to a party that designation negotiations and compromises would not be disregarded at the last instant by NOAA. The 1980 Amendments, therefore, ensured the continued participation of those consulted for the original designation proposal and helped to increase accountability and accurate expectations. However, by requiring changes to go through the entire process rather than a simplified, shortened version, the provision has been a significant deterrent to changing the terms of designation. The provision has increased public “buy-in” of the Sanctuaries Program, but has also created a disincentive for NOAA to promptly address changes in circumstances or knowledge, because of the expensive and time-consuming process required for any changes to a sanctuary’s designation terms.

## 2. Multiple Use and the Safeguard Provision

As the authorizing committees had debated but failed to achieve in 1978, the 1980 Amendments reversed the “safeguard provision” over multiple use, giving other agencies a greater sense of security that their programs would not necessarily be affected by the Secretary of Commerce’s designation of sanctuaries. The provision now read:

The Secretary, after consultation with other interested Federal and State agencies, shall issue necessary and reasonable regulations to implement the terms of the designation and control the activities described in it, *except that all permits, licenses, and other authorizations issued pursuant to any other authority shall be valid unless such regulations otherwise provide.*<sup>326</sup>

The House Report on the bill from which the 1980 Amendments were derived emphasized the appropriateness of multiple use, as opposed to more restrictive management methods such as “total management,” and the need to inform people in advance of designation about which uses would be regulated.<sup>327</sup> The committee also expressed the intent that the Secretary, in carrying out the program

avoid duplicative regulatory authority and additional layers of bureaucracy where existing law and regulations provide sufficient protection . . . . While current law requires the Secretary to assume authority for total management of marine sanctuaries, the amendment provides for more sophisticated techniques, including multiple-use management, dominant-use management, and partial management.<sup>328</sup>

Although the committee did not define the various management techniques mentioned, it seems to have meant that, whereas the safeguard provision of the 1972 Act had placed all authority on the Secretary unless he renounced it (total management), the revised safeguard provision allowed him to choose which uses to regulate without having to act to renounce those he wanted to ignore. There were intense inter-agency fights occurring during this time period, e.g., with regard to anchoring and oil development in the Flower Garden Banks and oil and gas development in Georges Bank.

The reversal of the safeguard provision seems to have been viewed as a means of reducing secretarial involvement in other agencies’ decisionmaking, unless warranted by the needs of a particular sanctuary. By reducing the Secretary’s involvement, the committee seemed to view the new provision as reducing the layers of bureaucratic control over marine resources.

## 3. Congressional Power of Disapproval

The debate over whether Congress should designate sanctuaries was addressed in 1980 when Congress gave itself the express power to formally object to a designation, as Senator Magnuson had suggested in 1978.<sup>329</sup> If Congress disagreed with a designation, it could pass a joint resolution of disapproval within 60 days of the designation’s publication in the *Federal Register*.<sup>330</sup> The resolution, however, was still subject to the approval of the president.<sup>331</sup> This power went unused, and was dropped from the Act in 1992. Apparently, by then, a resolution of disapproval was seen as redundant to Congress’ ability to disapprove or amend sanctuary designations and management plans through traditional legislative procedures.<sup>332</sup>

## 4. Conclusion

Once NOAA got down to implementing the 1972 Act, the difficulty of protecting ocean places and regulating conflicting uses became apparent. NOAA proposals to prohibit new oil development in several sanctuaries generated intense controversies on the East, Gulf, and West Coasts. Fishermen also quickly came to see the Act as a threat after numerous large areas were nominated. Instead of defending the Act’s preservation mandate and clarifying the program’s scope and objectives, Congress facilitated multiple uses of sanctuaries and increased oversight of the program to achieve greater acceptance by users, the public, the states, and other agencies. This process of accommodation would continue until the late 1980s.

### *J. 1982-1983 Further Program Revisions: The Program Development Plan (PDP)*

The 1979 regulations and the LRA, in combination with the 1980 Amendments, failed to quiet controversy. NOAA therefore undertook yet another overhaul of the designation process in an attempt to gain more support for the program. In January 1982, NOAA completed a PDP for sanctuaries. “In many ways, the sanctuary program’s PDP and emphasis on representative sites, for instance, reflected the most progressive thinking among marine protected area scientists at the time.” The PDP, according to another observer, represented “a shift in emphasis from curtailment of activities within a sanctuary by regulation to promotion of sanctuary resources via comprehensive management. The concept of management has been broadened to include research activi-

325. *Id.* §2(2).

326. *Id.* (emphasis added).

327. H.R. REP. NO. 96-894, pts. 1 and 2, at 12.

328. *Id.* at 12.

329. Unpublished Senate Hearings 1978, *supra* note 277, at 70.

330. This was changed from a concurrent resolution in 1984 to address constitutional issues.

331. 1980 NMSA Amendments, *supra* note 323, §2(3); 1984 NMSA Amendments, §304(b)(A).

332. H.R. REP. NO. 102-565 (1992) (on H.R. 4310).



ties, public access, and interpretive programs within sanctuary boundaries.”<sup>333</sup> With small modifications, the process set up by the PDP is still in use today.

## 1. Program Goals

The PDP declared four goals which “expand on the [program’s] mission by establishing specific designation purposes”:

- (1) enhancement of resource protection through the implementation of a comprehensive, long-term multiple use management plan tailored to the specific resources;
- (2) promotion and coordination of research;
- (3) enhancement of public awareness, understanding, and wise use of the marine environment; and
- (4) provision for multiple compatible public and private uses of special marine areas.<sup>334</sup>

While resource protection “is primary and will be the principle focus in each designated sanctuary,” the other goals would not all be emphasized at every site, with a sanctuary perhaps only responding to one or two of the goals.<sup>335</sup>

## 2. Designation

In a further attempt to tighten the nomination process, the PDP replaced the LRA with a site evaluation list (SEL).<sup>336</sup> Under the SEL process, NOAA assigned eight regional resource evaluation teams, one to each fishery management region, “to assist in the identification, evaluation, and recommendation of suitable sites for inclusion.”<sup>337</sup> After further review, the Secretary would determine which sites to add to the list and publish them in the *Federal Register*.<sup>338</sup> Active candidates could only be drawn from the published list.<sup>339</sup> New sites may be added only at periodic reviews or if new information comes to light about why a site should be included on the SEL.<sup>340</sup>

Each regional team was to recommend three to five sites per region from those nominated by the public or identified by the teams “which represent the most significant marine resource areas in the region.”<sup>341</sup> More specifically, the teams were:

- (1) to identify significant marine and coastal ecological processes or features which are characteristic of the region;
- (2) to delineate discrete sites in which these major systems, processes, or features occur; and

(3) to describe these areas in terms of resource and human use value and potential user impacts.<sup>342</sup>

There is no mention of the teams considering either imminent threats to an area or an area’s importance to particular species or an entire ecosystem. The 1979 regulations had considered the value of a site’s resources, regardless of how representative it was to the biogeographical region of which the site was a part. The PDP, on the other hand, required areas to be identified based on the inclusion of regional characteristic features and processes. While important to ensure coverage of as many regional characteristics as possible in the program, this meant that sites with resources already represented in other sanctuaries might be disregarded as duplicative.

Site identification criteria employed by the teams to make their recommendations included four categories: (1) natural resource values; (2) human use values; (3) potential activity impacts; and (4) management concerns.<sup>343</sup> In considering “management concerns” (criterion 4), the teams were required, “in cases where certain economic values are reduced or foregone,” to weigh the negative economic impact of designation “against the long-term benefits to society.”<sup>344</sup> While it was consistent with the original preservation intent of the Act to consider the long-term benefits to be conveyed by a sanctuary designation, the PDP’s emphases on considering and weighing economic impacts, which were acknowledged to be difficult to quantify and estimate, was a far cry from the intent of the 1972 Act’s preservation and restoration purposes. Additionally, “several factors . . . complicate the ability to make a concise determination between costs and benefits,” including long-term time scales, a black and white “either/or” dichotomy that made it difficult to assess the benefits to some uses of restricting others, and the high potential for incorrect assumptions that led to incorrect economic conclusions.<sup>345</sup>

Sites on the SEL must undergo additional scrutiny during an active candidate stage prior to designation. The priority in which they are “selected as active candidates and evaluated by NOAA for possible sanctuary designation . . . involves not only the initial site evaluation [results], but also a balancing of relevant policy considerations including: ecological factors; immediacy of need; timing and practicality; and public comment.”<sup>346</sup> The open-ended nature of selection, combined with a lack of deadlines, made the process highly susceptible to special interest influence and delay. It was entirely possible that a recommended site might never be studied.

As part of its “ecological factors” analysis to choose active candidates,

NOAA considers a site’s contribution to the overall system of national marine sanctuaries. Consideration of representation ensures that the system not only includes sites which adequately represent the diverse coastal, marine, and Great Lakes ecosystems in the United States, but also contains the “best” examples among representative sites. A consideration of diversity ensures that the system is illustrative of a variety of ecosystem types. . . .

333. Harvey, *supra* note 259, at 187-88.

334. OFFICE OF COASTAL ZONE MANAGEMENT, NATIONAL MARINE SANCTUARY PROGRAM: PROGRAM DEVELOPMENT PLAN 13 (1982) [hereinafter PROGRAM DEVELOPMENT PLAN]; Marine Sanctuary Program Regulations, 48 Fed. Reg. 24296 (May 31, 1983).

335. PROGRAM DEVELOPMENT PLAN, *supra* note 334, at 13.

336. *Id.*

337. *Id.* at 21.

338. *Id.* at 28.

339. *Id.* at 28-29.

340. *Id.* at 28.

341. *Id.*

342. *Id.* at 24.

343. *Id.*

344. *Id.* app. C-8.

345. Harvey, *supra* note 259, at 188.

346. PROGRAM DEVELOPMENT PLAN, *supra* note 334, at 30.

Although areas that duplicate existing sanctuaries may be given lower priorities than areas not yet represented, Ray (1975b) notes that "(r)edundancy of sites is important in the establishment of a reserve system and is essential from the genetic and ecological points of view . . . to circumvent loss from natural catastrophes or the inadvertent activities of man."<sup>347</sup>

Consideration of a site's *representativeness* marked the first time that this factor was included in the designation process.

The intent of the SEL was to "resolve weaknesses in the use of the existing LRA," which received recommendations that "are accompanied by limited information on the site and may or may not represent the 'best' candidate for sanctuary consideration."<sup>348</sup> The SEL specified clear site identification and evaluation criteria, public participation in the pre-designation process, and identification of "significant marine and coastal ecological processes or features which are characteristic of the region."<sup>349</sup>

The theory behind the SEL was that it would include the sites with the most important resources, and those in most need of protection, and would provide scientific support for candidate sites. The restrictions on the number of sites that each team could suggest meant that some sites that perhaps should have been included had to be left off the list. Additionally, sites have repeatedly been dropped from the list for financial rather than ecological reasons. Despite intentions in 1989 to update the list, no sites have been added to the SEL since its creation.<sup>350</sup>

The consultation requirements and the detailed list of factors to consider were drafted to ensure that positive and negative impacts of setting an area aside were considered prior to a designation. Required consideration of the factors also resulted in an administrative record to clarify what information NOAA used or why it disregarded or overrode other information while making its decision. These amendments were therefore partly intended to increase the transparency of designation decisionmaking and to ensure that impacts to communities or industries would be considered, though not necessarily directive. It was hoped that such consideration and delineation of basic qualifications would increase public trust in the program by offering better explanations, e.g., for why oil and gas development were prohibited in some sanctuaries and not others. A hostile administration could also easily use the provisions to hold up designations. This is in fact what happened to the program.

### K. Implementing the SEL

The changes in the designation process created by the PDP were formalized in new regulations that were made final in May 1983, two months after the first proposed SEL was published in the *Federal Register* and just as Congress was gearing up for another round of amendments to the NMSA.<sup>351</sup> The regulations formalized the new program goals and the SEL process, including the economic requirements, but dropped reference to weighing impacts of designation against the long-term benefits. The failure to formal-

ize this weighting provision meant that the emphasis on cost-benefit analysis was reduced from what it might have been. This was a minor boost for the preservation purpose of the Act.

While the old designation process had not been popular, the new process garnered vehement opposition in Alaska, particularly from commercial fishermen, when it was learned the evaluation team was thinking of recommending 10 of the 18 sites that had been nominated for the SEL in Alaska, far more than the three to five sites other teams had recommended.<sup>352</sup> Further exacerbating tensions was the fact that in 1980, 104 million acres of federal land had been set aside for parks, wilderness and other conservation uses under the Alaska National Interest Lands Conservation Act. The prospect of a perceived "federal takeover" of large areas of ocean waters, too, was enough to make fishermen fight any nominations.<sup>353</sup>

The fact that the ocean waters past three miles from shore already were federally "owned" was no consolation to fishermen accustomed to enjoying unrestricted access to valuable free resources. The fear that national marine sanctuaries would mean the end of commercial fishing in designated areas had been fed by a mistake on the part of the company hired by NOAA to conduct the regional review: notice to the public asking for nominations and other input to assist the team went out in the middle of fishing season when most fishermen were far out to sea.<sup>354</sup> Alarm also was expressed by Senator Stevens<sup>355</sup> about "the uncanny similarity between the proposed marine sanctuary sites and the [sites on the] five-year OCS lease schedule . . . It's apparent that the contract review group felt that only areas with strong oil and gas potential were worth consideration as marine sanctuaries."<sup>356</sup> On October 29, 1982, in response to pressure from members of Congress from Alaska, NOAA decided to exclude all Alaskan sites from the SEL development process.<sup>357</sup> The effect of that decision has been, in essence, to exempt Alaska from the Marine Sanctuaries Program on a semi-permanent basis.

Monterey Bay was removed from consideration as an active candidate on December 20, 1983. The area had been nominated by the state of California in 1977 and had been the subject of public meetings and agency studies for six

352. *Reauthorization and Oversight of Title III: Hearings Before the Subcomm. on Oceanography and Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., at 23 (1983) [hereinafter *House Hearings 1983*].

353. *Id.* at 36 (statement of Rep. Young).

354. EUGENE H. BUCK & GEORGE H. SIEHL, CONGRESSIONAL RESEARCH SERVICE, NATIONAL MARINE SANCTUARY PROGRAM: REGIONAL SITE SELECTION 25-26 (1983).

355. What is left out of Senator Stevens' analysis was that the push for sites in areas up for federal OCS leasing came from the Alaskan state government liaison to the resource evaluation team.

Officials of the State of Alaska's Department of Fish and Game who served as liaison with NOAA/SPD may not have foreseen what would occur if they were intent on determining how the NMSA might be helpful in gaining additional leverage for the State over Federal OCS oil and gas development.

*Id.* at 28.

356. *Id.* app. C (correspondence from Senator Stevens to Secretary of Commerce, Oct. 1, 1982).

357. *Id.* at 28 n.17 (citing an Oct. 29, 1982 letter from Acting Assistant Administrator William Matuszeski, to Alaska Gov. Jay S. Hammond).

347. *Id.* at 30-31.

348. *Id.* at 19.

349. *Id.* at 24.

350. Decision to Consider New Sites for Addition to the SEL, 54 Fed. Reg. 53432 (Dec. 28, 1989).

351. 48 Fed. Reg. at 24296.

years. NOAA “acknowledge[d] that the Monterey site does have outstanding marine resources” but removed it from further consideration for three reasons: (1) “two other [NMS] in California (Channel Islands and Point Reyes-Farallon Islands) which protect similar marine resources and the [p]rogram’s policy established in 1980 to consider a diverse array of similar marine resources”; (2) “the proposed area’s relatively large size and the surveillance and enforcement burdens this would impose on NOAA”; and (3) “the wealth of existing marine conservation programs already in place in the [proposed] sanctuary area.”<sup>358</sup> NOAA took the position that this rejection of the Monterey site meant that it would not be *re*considered until all other sites on the SEL had been considered.<sup>359</sup>

#### *L. 1983-1984: Renewed Congressional Attacks*

Continued controversy over the program’s scope and site designation terms at places like Flower Garden Banks provided the backdrop for a further dilution of the Act’s preservation purpose in the 1984 reauthorization process. As a result of the receptivity of some Congressmen to the fears of the oil and gas and fishery industries, the opponents of the program had significantly more power than they had wielded during previous reauthorizations. This was all the more true because Representative Breaux, who had previously introduced bills to abolish the NMSA, had become chairman in 1979 of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, which shared jurisdiction over sanctuaries with the Oceanography Subcommittee.

That the Act was in for more change was foreshadowed by the introduction in early 1983 by Rep. Don Young (R-Alaska) of a bill to delete Title III of the MPRSA in its entirety.<sup>360</sup> Young stated that the Sanctuaries Program was “showing signs of turning into a monster,” and focused on the potential of the NMSA to “disrupt all maritime activities in the [Exclusive Economic Zone (EEZ)].”<sup>361</sup> He also said that, contrary to the congressional intent of the original bill for “a small system of marine sanctuaries,” numerous areas around the country had been proposed, including 18 sites in Alaska that “would have nearly surrounded Alaska’s coast,” and that “designation of significant numbers of marine sanctuaries, as proposed in the past, could seriously disrupt the continued development of the U.S. fishing industry.”<sup>362</sup>

The arguments raised by Representatives Breaux and Young could be summarized as: (1) existing laws can provide sufficient protection for the marine environment, therefore the Act is redundant; and (2) the law is so broad and lacking in clear standards and legislative history that it runs the risk of becoming a behemoth, withdrawing large parts of marine territory from oil and gas development or commercial fishing.

#### 1. The Charge of Redundancy

Breaux, as chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, had commissioned the U.S. Government Accounting Office (GAO) in 1979 to investigate the Act’s redundancy.<sup>363</sup> Ironically, the results of the GAO report were completely contrary to the arguments that Breaux, Young, and others had voiced.

The GAO report, issued in March 1981, concluded that the NMSA

fills “gaps” in [f]ederal regulatory authority affecting the protection of marine resources; that is, it can offer benefits not available under other [f]ederal laws [including the OCSLA, the Antiquities Act, the Magnuson-Stevens FCMA, the CWA, the ESA, and the Marine Mammal Protection Act]. These include:

—Protecting shipwrecks, marine artifacts, and underwater historical landmarks beyond the territorial sea . . .

—Protecting coral and coral resources from damage or disturbance (such as might be caused by recreational vessels anchoring on coral reefs).

—Protecting marine life or habitat not protected under wildlife protection laws but [which], because of their unique characteristics or locations, may be deemed worthy of special treatment.

—Protecting ocean waters beyond the territorial sea from the dumping of common trash and other substances not regulated under other laws.<sup>364</sup>

In addition to providing protection not afforded by other laws, the GAO cited the importance of the NMSA to “comprehensive area management” and in providing for “evaluation of overall impact from all activities in a particular area.”<sup>365</sup> A similar conclusion had been reached by the U.S. Court of Appeals for the First Circuit, in a decision involving the proposed Georges Bank sanctuary:

While under the Marine Sanctuaries Act the land use options of the Secretary of Commerce are much the same as those of the Secretary of the Interior under the [OCSLA], the management objectives are different. It is thus possible that different environmental hazards would result depending on which program was invoked. Under the latter Act, the emphasis is upon exploitation of oil, gas, and other minerals, with, to be sure, all necessary protective controls. Under the Sanctuaries Act, the prime management objectives are conservation, recreation, or ecological or esthetic values. Drilling and mining may be allowed, but the primary emphasis remains upon the other objects. 16 U.S.C. §1432. The marked differences in priorities could lead to different administrative decisions as to whether particular parcels are suitable for oil and gas operations.<sup>366</sup>

The differences between the OCSLA and the Sanctuaries Act highlighted by the court are applicable between the NMSA and other laws that tend to focus on a particular resource or use:

358. Removal of Monterey Bay From Active Candidate Status, 48 Fed. Reg. 56252 (Dec. 20, 1983).

359. 132 CONG. REC. 31136 (1986) (POM-856 from California Legislature).

360. H.R. 1229, 98th Cong. (1983).

361. 129 CONG. REC. 1496 (1983) (statement of Rep. Young).

362. National Marine Sanctuaries, H.R. REP. NO. 98-187, pt. 1 (dissenting view of Rep. Young).

363. U.S. GAO, MARINE SANCTUARIES PROGRAM OFFERS ENVIRONMENTAL PROTECTION AND BENEFITS OTHER LAWS DO NOT (1981).

364. *Id.* at 7.

365. *Id.*

366. *Massachusetts v. Andrus*, 594 F.2d 872, 9 ELR 20169 (1st Cir. 1979).



Title III authorizes the only [f]ederal program to comprehensively manage and protect marine areas as units . . . . Only under [T]itle III may an area of the ocean or other coastal waters be set aside for preservation and the activities in the area be limited to those that are consistent with and compatible to the basic preservation purpose.<sup>367</sup>

## 2. Scope of the Program

The second argument for the abolition of the NMSA, that it risks becoming an unwieldy “monster,” was driven by reactions to the LRA and the SEL, which some saw as blueprints for prohibiting uses of vast areas of the ocean.<sup>368</sup> Representative Young, in introducing his bill to repeal the Act, referred to the danger evidenced by

. . . a private contractor working for [NOAA who] proposed establishing 18 marine sanctuaries off Alaska that would have nearly surrounded Alaska’s coast. Although the Alaska proposal was dropped temporarily, NOAA is continuing to work on numerous sanctuaries throughout the rest of the country. Obviously, instead of looking at discrete areas that might merit some protection, NOAA is interested in creating a huge new [f]ederal enclave, complete with attendant bureaucracy.<sup>369</sup>

That fear has never become a reality. In the over 30 years of the program, only 13 sanctuaries have been designated, covering about 0.4% of the U.S. EEZ, and the restrictions on uses in these sanctuaries are, on the whole, minimal.

### M. 1984 Amendments

Regardless of the questionable validity of the arguments to abolish the program, Representative Breaux’s new position of power and a Reagan Administration that would later be described by many, including Reps. Leon Panetta (D-Cal.) and Dennis Hertel (D-Mich.), as unsupportive of or hostile, led to more amendments.<sup>370</sup> Representative Young’s repeal effort did not carry the day, but did influence the ultimate result. The House MMFC had to resolve divergent bills introduced by Representatives Young, Breaux, and Rep. Norman D’Amours (D-N.H.).<sup>371</sup> The Senate bill, which was modeled after the D’Amours bill, was introduced by Sen. Robert Packwood (R-Or.) and the bill was ultimately enacted in October 1984.<sup>372</sup>

The 1984 Amendments to the MPRSA significantly rewrote the law, changing it from an Act focused on preservation and restoration into one arguably equally interested in weighing “resource protection” with human uses.<sup>373</sup> The continued backslide with regard to the Act’s preservation

purpose was due in part to significant concessions won by commercial fishermen and the oil and gas industry: NOAA was limited by the amendments in its ability to regulate these industries’ activities. Among the most significant changes, the amendments altered the program’s purpose from preservation and restoration to five newly stated purposes; abolished the “safeguard provision” over multiple use by removing the Secretary’s power to prohibit uses previously authorized under other laws; made the SEL the required designation process, with four standards that must be met and nine factors that must be considered prior to designation; required earlier and more thorough notification to the public and Congress of impending designations; gave the Regional Fishery Management Councils the power of drafting fishery regulations for sanctuaries; and enhanced enforcement authorities.

In addition, Congress again considered giving itself the power to designate sanctuaries, but ultimately rejected the idea. Given the intensity of dislike for the NMSA by some of Congress’ leaders, the fact that the Act was not further eroded or terminated can only be credited to the hard work of many members of Congress and the advocacy of the Center for Environmental Education and Defenders of Wildlife.<sup>374</sup> Passage of the amendments appears to have been facilitated by language that was ambiguous enough to be considered a gain both by those who supported the Sanctuaries Program’s attempt to protect natural marine resources and by those who were pushing for minimally restricted or outright appeal of industrial, commercial, and recreational uses of the sanctuaries. Arguably the program’s supporters could not have done better during these most difficult of years for the Act, and should be credited with keeping the program functioning. Nevertheless, the 1984 Amendments weakened several key areas of the NMSA.

### 1. Program Purposes

The 1984 Amendments mimicked the program’s purposes and policies as stated in the “goals” section of NOAA’s 1983 regulations. The new purposes and policies were:

- (1) to identify areas of the marine environment of special national significance due to their resource or human use values;
- (2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities;
- (3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas;
- (4) to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and
- (5) to facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.<sup>375</sup>

367. U.S. GAO, *supra* note 363, at 12.

368. 129 CONG. REC. 1496 (1984).

369. *Id.*

370. 138 CONG. REC. 20904 (1992) (statements of Reps. Studts, Young, Rahall, Davis, Jones, Panetta, Hughes, Mink, and Lancaster); *The Current Status and Future Needs of the National Oceanic and Atmospheric Administration’s National Marine Sanctuary Program: Hearings Before the Subcomm. on Oceanography, Great Lakes, and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong. 2 (Rep. Hertel), 97 (reprinting in full the Marine Sanctuaries Review Team report) (1991).

371. H.R. 1229; H.R. 1633, 98th Cong. (1983); H.R. 2062, 98th Cong. (1983).

372. S. 1102, 98th Cong. (1983).

373. 1984 NMSA Amendments, *supra* note 331.

374. Telephone Interview with Michael L. Weber, National Marine Sanctuaries Program History (Mar. 11, 2004) [hereinafter Weber Telephone Interview].

375. 1984 NMSA Amendments, *supra* note 331, §301(b) (emphasis added).

All but the first of the new purposes were influenced by NOAA regulations, and the final new purpose was lifted verbatim from Breaux's bill.<sup>376</sup>

Taken together, the new purposes are very weak: none specify that the primary purpose of the program is to preserve special marine areas. Preservation is left out entirely, replaced by the fifth purpose's "primary objective of resource protection."<sup>377</sup> While the preservation goal was sidelined, multiple use was raised to the forefront with the clear mandate to facilitate all public and private compatible uses.

## 2. Abolishment of the Safeguard Provision Over Multiple Use

The reauthorization hearings and committee reports gave extensive treatment to the role of multiple use in the Sanctuaries Program. The result was that the 1984 Amendments abolished the safeguard provision over multiple use. Whereas the 1980 Amendments had reversed the safeguard, meaning that all previous authorizations were valid unless the Secretary chose to regulate or prohibit them, the 1984 Amendments no longer allowed the Secretary to prohibit previously authorized uses at all.<sup>378</sup> While the Secretary could *regulate* such uses even if not mentioned in the designation terms, he *could no longer completely protect a sanctuary* from a particular use even if the use was known to be generally detrimental to achieving the purposes for which a sanctuary was designated, unless the designation terms gave him control over the use. The provision provided some assurance to oil and gas leaseholders and fishing permit holders that they would be able to pursue their extractive industries unmolested.

President Carter's designation of the Channel Islands sanctuary, with a prohibition on new oil activity, and the Gulf of the Farallones sanctuary, which prohibited all oil activity, was a loss for the oil and gas industry, which had been defeated by local alliances of conservation groups and fishing interests.<sup>379</sup> When President Reagan took office in January 1982, he appointed a new head of the agency in which the Sanctuaries Program resided, choosing Peter Tweedt, an official from the DOI's offshore oil drilling office in southern California. At one point, Tweedt confessed to conservationists that his mission was to terminate the Sanctuaries Program.<sup>380</sup> Industry now felt comfortable making such statements as the following one it gave in a Senate hearing:

Our association believes it is a splendid idea to preserve the conservational, recreational, ecological, and aesthetic values for which the act was intended. In fact, the evolution of our society, I think, requires consideration of these values. At the same time, we believe it is an equally splendid idea to seek to find new accumulations of oil and gas . . . as a means of sustaining our economy . . . and further, to guarantee our national security . . . we

believe we can operate in the marine environment safely without damage to environmental values.<sup>381</sup>

In view of fierce pressure against the Act, conservation groups sought to keep the Sanctuaries Program alive and to maintain to the extent feasible its preservation objective. Conservationists also had to oppose efforts that would have completely turned the program into an ocean area multiple use program, as the testimony of Michael Weber, representing the Center for Environmental Education, shows:

Regarding the multiple use of sanctuary areas, the oil and gas industry, for instance, has consistently maintained that the program has impeded its ability to explore and develop petroleum reserves on the outer continental shelf. Yet what I said to these subcommittees two years ago still holds true. Oil drilling prohibitions resulting from national marine sanctuary designation affect less than one-tenth of one percent of the outer continental shelf. The industry has been very successful in having its concerns addressed in this program. They successfully halted consideration of sanctuary nominations for the Georges Bank, Flower Garden Banks, and the Beaufort Sea. In concert with the DOI, they also succeeded in suspending the oil drilling prohibitions at the two California sanctuaries in a legally questionable manner (CRS) and subjected these prohibitions to a lengthy and expensive regulatory impact analysis. Therefore, we submit that there is very little, if any, actual effect upon the offshore oil and gas industry from the marine sanctuaries program.

The fishing community has also expressed concerns that the designation of a marine sanctuary will preclude them from important fishing areas. Currently only the Looe Key sanctuary regulates commercial fishing to any extent . . . . To our knowledge, this prohibition . . . has not proved to be burdensome . . . . Similar concerns were expressed by California fishermen when the proposal for two California sanctuaries first surfaced. As they have gained greater experience with the program, these fishermen have become supporters of the program and have recognized it as a means of providing protection of habitat critical to commercial fisheries.<sup>382</sup>

In discussing the purpose of the Sanctuaries Program, House and Senate floor and committee debates fairly consistently stated that the primary goal of sanctuaries is conservation and management of resources to be achieved by *controlling the allowed mix of uses*, despite little congressional consensus or clear direction regarding what uses were compatible. Rep. John McKernan (R-Me.) agreed with Representative Breaux that "[w]e have not created another wilderness area system in which man's activities are to be uniformly excluded. Instead, man's activities are to be permitted, and in some cases, encouraged in marine sanctuaries to the extent that such activities do not detract from the integrity of the sanctuary."<sup>383</sup> Other members of Congress argued that the overriding objective is resource protection

376. H.R. 1633.

377. 1984 NMSA Amendments, *supra* note 331, §301(b).

378. 1980 NMSA Amendments, *supra* note 323, §2(2); 1984 NMSA Amendments, *supra* note 331, §304.

379. Telephone Interview with Michael L. Weber, National Marine Sanctuaries Program History (Oct. 1, 2003).

380. Weber Telephone Interview, *supra* note 374.

381. *NOAA Ocean and Coastal Programs: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong. 42-43 (1983) [hereinafter Senate Hearings 1983].

382. *Id.* at 75-77 (prepared statement of Michael Weber, Marine Habitat Director, Center for Environmental Education).

383. 130 CONG. REC. 25427-46 (1984) (statements of Reps. Breaux, Molinari, Jones, D'Amours, Carper, and Boxer); House Hearings 1983, *supra* note 352.

and that management should be conducted through multiple use.<sup>384</sup>

Representative Young said that the idea that nothing in the NMSA guarantees the continuation of commercial fishing in a sanctuary—a position expressed by the Secretary—would be seriously disruptive to the continued development of the U.S. fishing industry if, as proposed in the past, significant numbers of sanctuaries were designated.<sup>385</sup> Rep. Barbara Boxer (D-Cal.) noted that only a minuscule fraction of the OCS had been designated and that she continued to support the “historical emphasis on resource protection by excluding disruptive activities such as oil and gas development.”<sup>386</sup> Senator Packwood opined that the interests of a particular user group must never come above conservation of special areas, and that the Secretary must only listen to, but in no way give assurances to, user groups.<sup>387</sup>

In addition to Young and Stevens, the fishing community, outraged over the attempted implementation of the SEL in Alaska, also had a champion in Representative McKernan. McKernan joined the fight over the program when fishermen in his state became angered by NOAA’s consideration of the Frenchman’s Bay area. “The downeast fishermen believe that a marine sanctuary means another layer of fisheries management. I am convinced that their beliefs are justified because of some loose language that is contained within Title 3.”<sup>388</sup> It was this “loose language” and the avoidance of “disrupting on-going programs” with which the 1984 Amendments sought to deal.<sup>389</sup>

In line with its emphasis on multiple use of sanctuaries, Congress wanted to make sure that existing leases, permits, licenses, rights of subsistence use, and rights of access were respected “in recognition of the variety of uses within marine areas.”<sup>390</sup> As of the 1984 Amendments, the Secretary had the authority to regulate uses authorized by other authorities prior to the date of a sanctuary’s designation, but could not prohibit them.<sup>391</sup> The impact of the provision was to grandfather in certain uses even if they conflicted with resource protection. Again, the focus of the 1984 Amendments was on facilitating uses rather than preserving natural resources and ecosystems.

### 3. Changes to the Designation Process

The 1984 Amendments substantially broadened the Act’s guidance on the designation process. The SEL designation process was codified with minor changes in the 1984 Amendments, and is the process followed today. Congress added four standards that the Secretary must apply to proceed with the designation process, nine factors to consider, and explained that the required consultations with “interested parties” meant that the Regional Fishery Management

Councils must be included.<sup>392</sup> The factors and consultations, like NEPA analyses, only require consideration of the listed elements or stated views/concerns of those consulted with, and do not mandate a particular conclusion.

In order to proceed with a designation, the Secretary was required to determine that “the designation will fulfill the purposes and policies” of the Act by finding that

“the area is of special national significance due to its resource or human use values”;

“existing [s]tate and [f]ederal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education”;

“designation of the area as a national marine sanctuary will facilitate the objectives” in (3); and

“the area is of a size and nature that will permit comprehensive and coordinated conservation and management.”<sup>393</sup>

The nine factors required by the amendments to be considered by the Secretary in determining if a site met the above standards were:

the area’s natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecologically or commercially important or threatened species or species assemblages, and the biogeographic representation of the site;

the area’s historical, cultural, archaeological, or paleontological significance;

the present and potential uses of the area that depend on maintenance of the area’s resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

the present and potential activities that may adversely affect the factors identified in subparagraphs [(1), (2), and (3)];

the existing state and federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this title;

the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development; and

the socioeconomic effects of sanctuary designation.<sup>394</sup>

As Senator Packwood noted, citing the Senate report on the bill, “the factors . . . are not themselves standards which must be met, but are only guidelines for the Secretary’s consideration.”<sup>395</sup> The factors were intended to be considered in combination to help in determining whether the standards are met, and whether the Secretary could therefore make the determination that the designation would accomplish the program’s goals. While these standards and factors pro-

384. 130 CONG. REC. at 25441-42 (statement of Rep. Jones); 127 CONG. REC. 15532 (1981) (statements of Reps. D’Amours and Pritchard on H.R. 2449).

385. H.R. REP. NO. 98-187, pt. 1 (dissenting view of Rep. Young).

386. 130 CONG. REC. at 25444-45 (statement of Rep. Boxer).

387. *Id.* at 28202-07 (statements of Reps. Stevens and Packwood).

388. House Hearings 1983, *supra* note 352, at 4 (statement of Rep. McKernan).

389. 130 CONG. REC. at 25427-28 (statement of Rep. Young).

390. S. REP. NO. 98-280, at 7 (1983) (on S. 1102).

391. 1984 NMSA Amendments, *supra* note 331, §304(c).

392. *Id.* §303.

393. *Id.* §303(a).

394. *Id.* §303(b).

395. 130 CONG. REC. 28202, 28206 (1984) (statement of Sen. Packwood).



vided more guidance than had previously existed on what types of areas Congress considered appropriate for designation, their layered structure, additional undefined terms, and many focuses further entangled the designation process.

#### 4. Resource Assessment Report

As part of the designation process, the Secretary was required to submit to relevant House and Senate Committees draft regulations and an environmental impact statement, including a resource assessment report “documenting present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial or recreational uses.”<sup>396</sup> This description of the new reporting requirement was the first time that Congress mentioned energy activities in the Act. While the description did not say that present or potential uses were appropriate in marine sanctuaries, this provision furthered the weighing of resource protection versus resource extraction by ensuring that an area’s use for oil and gas were considered prior to designation.

#### 5. Size of Sanctuaries

The debate on the appropriate size of a sanctuary, which had waged for years, finally received some direction in the 1984 Amendments. NOAA’s PDP stated and Representatives Young and Breaux agreed, that the upper size limit should approximate that of the 1,258-square-nautical-mile Channel Islands NMS.<sup>397</sup> The 1984 Amendments, however, left out such explicit language and merely required designations to be “discrete,” and that the Secretary consider the “manageability of the area.”<sup>398</sup> Representative Young in particular was concerned about size limits because one site that had been considered for the SEL was an almost 81,000-square-nautical-mile area in the Bering Straits. The Senate Committee on Resources “viewed [this] as an unrealistic size for effective conservation and management.”<sup>399</sup>

Rep. Walter Jones (D-N.C.), chairman of the House MMFC,<sup>400</sup> tried to bring reality back into the discussion by emphasizing that “while the broad mandate has led to certain misunderstandings, it has not led, as some have suggested, to widespread misuse. In the program’s 10-year history, only six sites have been designated, encompassing 1.5 million acres, or 0.15% of the entire [OCS].”<sup>401</sup> Representative Jones also reminded his colleagues that “[w]hile an area may be too large for comprehensive management, it is also possible that an area may be too small, and therefore, insufficient to control activities affecting sanctuary resources.”<sup>402</sup> According to Representative Jones, “discrete” did not refer to size. Instead, Jones argued that the plain meaning of the word, “constituting a separate entity or individually distinct,” was intended. He also stated that the term

referred to “ecological considerations and to the stated preference that the sanctuary constitute an ecological unit with clearly definable boundaries.”<sup>403</sup> The Act itself remained silent on what was meant by the term.

#### 6. Consultations Prior to Designation

The 1984 Amendments clarified that consultations with agencies and other “interested parties” must occur *prior* to a decision to designate. Additionally, the amendments expanded the consultation requirement to include House and Senate committees of jurisdiction and appropriate state and local government entities, Regional Fishery Management Councils, and other interested persons.<sup>404</sup> The 1984 Amendments further involved the Secretary of the Interior in drafting the resource assessment section of the resource assessment report, garnering input on “any commercial or recreational resource uses in the area under consideration that are subject to the primary jurisdiction of the [DOI].”<sup>405</sup> In reality, these consultations have meant that the designation process has been held up in negotiations as powerful agencies such as EPA and the DOI try to convince NOAA to do their bidding.

#### 7. Regional Fishery Management Council Drafting of Fishery Regulations

In a move to mollify the concerns of the fishing industry over the impacts of sanctuaries on their freedom to fish where they pleased, the 1984 Amendments required that the Regional Fishery Management Councils have the opportunity to prepare draft fishing regulations for the sanctuaries.<sup>406</sup> The industry had sought to exempt fishing entirely from regulation within sanctuaries but were held in check by conservation groups and their Capitol Hill allies.<sup>407</sup> The regulations “shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the council’s action fails to fulfill the purposes and policies of this title and the goals and objectives of the proposed designation.”<sup>408</sup> The councils’ role had been raised in Sen. Stevens’ concerns about the 1978 Senate bill.<sup>409</sup> The heated Alaskan emotions resulting from the SEL debacle apparently led to the return of this provision, which had failed to gain traction during the 1980 Amendments. The fishing industry was the only user group to receive such preferred consultative treatment.

#### 8. Enhancement of Enforcement Authority and Capability

The 1984 Amendments expanded the enforcement authorities of the Secretary.<sup>410</sup> The amendments allowed the Secretary to make agreements with other federal departments, agencies, and instrumentalities to assist in enforcement of marine sanctuary regulations, on a reimbursable basis. The

396. 1984 NMSA Amendments, *supra* note 331, §303(b)(3).

397. Program Development Plan, *supra* note 334, at 35; 48 Fed. Reg. 24301 (May 31, 1983).

398. 1984 NMSA Amendments, *supra* note 331, §§102, 303(a), (b).

399. S. REP. NO. 98-280.

400. Walter B. Jones Sr. served as chairman of the House Committee on Merchant Marine and Fisheries from 1981 until 1992.

401. 130 CONG. REC. at 25427 (statement of Rep. Jones).

402. *Id.* at 25442.

403. *Id.* at 25441-42.

404. 1984 NMSA Amendments, *supra* note 331, §303(b)(2).

405. *Id.* §303(b)(3).

406. *Id.* §304(a)(5).

407. See, e.g., Weber Telephone Interview, *supra* note 374.

408. 1984 NMSA Amendments, *supra* note 331, §304(a)(5).

409. S. 2767; Unpublished Senate Hearings 1978, *supra* note 277, at 71.

410. 1984 NMSA Amendments, *supra* note 331, §307.

amendments also established set civil penalties of up to \$50,000 for violating regulations, and allowed vessels used in the violation to be held *in rem*, and sold to help pay any penalty assessed. These provisions replaced the Act's previously vague enforcement authorizations, enhanced the capacity of the Secretary to ensure that law enforcement vessels were enforcing the regulations, and provided a strong financial incentive not to violate the regulations.

## 9. Congressional Designation

The one significant provision of Representative Breaux's bill that was not enacted by the 1984 Amendments would have required Congress, rather than the president, to designate sites based on the Secretary's recommendations.<sup>411</sup> The reasons given for congressional designation were that all terrestrial special areas are designated by Congress, Congress would be better able to ensure public participation by holding hearings, and the administration had been stepping away from Congress' intent by looking at potential sites that were too numerous and too large.<sup>412</sup> Representatives Boxer and D'Amours were the only people to give any recorded response to this provision of the bill. They expressed concern about politicizing the process with greater involvement of Congress, lengthening the designation process by an additional few years, and not adding any new power, given that Congress already had a veto power.<sup>413</sup> In any event, the power of designation remained with NOAA.

## 10. Conclusion

Program supporters in Congress and the conservation community were successful in preventing the program's demise with the 1984 Amendments, which were the last push by the program's critics to abolish it. In summary, the 1984 Amendments focused on expanding the input and consideration of industrial and commercial uses of sanctuaries, while diminishing the preservation purpose to one of "resource protection," and completely dropping reference to restoration. The purpose/policy to facilitate all compatible uses, the abolishment of the safeguard provision by restricting the Secretary's power to prohibit activities, and the required study of the socioeconomic impacts that a designation would cause, all led to a further dilution of the preservation goal.<sup>414</sup> The focus of the program was now linked to a cost-benefit analysis focused on human use and benefit rather than to a precautionary approach of preservation of important areas for their environmental values and characteristics.

### *N. Program Results From 1984-1986*

In keeping with the Reagan Administration's desire to scuttle the program, NOAA's designation efforts were slow and often redundant. The only sanctuary designated during President Reagan's eight years was the tiny Fagatele Bay off American Samoa in 1986.<sup>415</sup> The final regulations for the

sanctuary prohibited several types of recreational fishing methods and all commercial fishing.<sup>416</sup>

While there was action taken to study sites such as Ten Fathom Ledge/Big Rock, North Carolina, and Norfolk Canyon, Virginia, results were minimal. In 1986, Norfolk Canyon, which had been studied for designation for years, joined Flower Garden Banks in the Gulf of Mexico (first considered for designation in April 1979) and Cordell Bank, California (declared an active candidate on June 30, 1983) as an active candidate, where it languished until finally withdrawn in 1997 due to financial constraints on the program.<sup>417</sup> Ten Fathom Ledge/Big Rock was studied for active candidacy in 1985, but in 1986 was put back on the SEL waiting list due to a lack of staff time and resources to deal with it.<sup>418</sup>

### *O. Conclusion*

If there had ever been any doubt about congressional intent on multiple use under the MPRSA, it was laid to rest during the 15-year period following enactment. Working in tandem, Congress and NOAA changed the direction of the program by adding new goals and purposes that muddled the new primary purpose of protection, without providing clear requirements on how to assure that protection was actually achieved. The focus on multiple use, discussed by Congress prior to passage in 1972 but first included in implementation by NOAA in the 1974 regulations, enhanced the confusion over the program's direction. The Act was significantly weakened, but kept from total abolishment, in 1984, when the safeguard over multiple use was all but destroyed by removing the power of the Secretary to terminate existing rights; by granting the fishery management councils unprecedented power through the ability to draft fishing regulations for sanctuaries; by the inclusion of a purpose requiring facilitation of compatible public and private uses; and by the consideration of economic impacts in the decision about whether to designate an area.

Additionally, the provision requiring any changes to the original terms of designation to go through the entire consultation and public input process has acted as a serious deterrent to addressing new problems in the sanctuaries. After the 1984 Amendments, the terms of designation were required to list all uses that might be regulated within the sanctuary. The combination of these two provisions means that sanctuaries are virtually unable to manage uses that the Secretary had not foreseen would be a problem at the time of designation. For example, commercial fishing was often exempted from sanctuary regulation. As more information has become available about the destruction done to seafloor habitats by fishing methods such as bottom trawling, sanctuaries are unable to protect their resources because they are unable to regulate fishing. An attempt to change the terms of designation to allow such regulation would be very time- and money-consuming, in a program already tight on both.

411. H.R. 1633 §302(a).

412. House Hearings 1983, *supra* note 352, at 5-7.

413. *Id.* at 38-40.

414. 1984 NMSA Amendments, *supra* note 331, §301(b)(5).

415. Fagatele Bay Designation, 51 Fed. Reg. 15878 (Apr. 29, 1986).

416. *Id.*

417. Norfolk Canyon Active Candidacy and Suspension of Ten Fathom Ledge/Big Rock From Consideration as a Sanctuary, 51 Fed. Reg. 7097 (Feb. 28, 1986); Withdrawal of Norfolk Canyon as an Active Candidate, 62 Fed. Reg. 45233 (Aug. 26, 1997); 44 Fed. Reg. 22081; 48 Fed. Reg. 30178 (June 30, 1983).

418. 51 Fed. Reg. 7097 (Feb. 28, 1986).

The result has been a reluctance to change the terms of designation once they have been finalized.

As noted in the Congressional Research Service report:

The [NMSP] has undergone a complex evolution of both [c]ongressional intent (evidenced in the original Act and subsequent reauthorization and amendment) and [a]dministrative conduct (evidenced in the variety of statements of goals, purposes, mission, and philosophy of this program). Confusion between Congress and the Administration over the operation of the NMSP often is spawned by this complexity. There even appears to be some [a]dministrative confusion over what goals and/or purposes best serve to guide this program.<sup>419</sup>

#### IV. Reemphasis on Preservation, 1987-2000

##### A. Background

President Reagan's terms of office, according to David Owen,

may have been the program's nadir. Beset with the active opposition from the administration, the existing programs suffered. Staff positions went unfilled, and critics charged that management programs at existing sanctuaries languished. Funding levels stabilized at the beginning of the Reagan era but then actually declined during his second term. The levels of funding requested by the administration were even lower; Congress repeatedly allocated more money than the administration estimated was necessary. Most discouragingly for program advocates, NOAA designated no new sites other than Fagatele Bay, allowed the designation process for others to stagnate, and even removed Monterey Bay from the list of proposed sites.<sup>420</sup>

Meanwhile, a series of marine pollution events continued to highlight the need for marine protection. These included algal blooms, mass dolphin deaths, medical waste that washed up on the Atlantic Coast, and the crash of an ore carrier and a car carrier, which resulted in a spill of copper ore and bunker fuel oil adjacent to the Channel Islands NMS.

Of the 29 sites placed on the SEL in 1983, the *only* site that had been designated by 1988 was the tiny Fagatele Bay, a record which Congress called "unacceptable."<sup>421</sup> Congressional frustration over the lack of designations led to a new phase of the program, one in which Congress played an active role in deciding which sites would be designated and under what conditions. Congress even resorted to bypassing the process it had created in order to designate four sanctuaries between 1990 and 1992. Congress amended the Act in 1988, 1992, 1996, and 2000 with the ostensible objective of strengthening the Act's preservation mission. However, in so doing, it failed to revise the law's multiple use objectives; thus the impact of the changes has been minimal. Furthermore, with the 2000 Amendments, Congress authorized a temporary moratorium on designation of new sanctuaries until existing ones are better managed and studied, throwing a blanket of uncertainty over the program.

419. BUCK & SIEHL, *supra* note 354, at 34.

420. Owen, *supra* note 6, at 728 (footnotes omitted).

421. H.R. REP. NO. 100-739, at 13, 14 (1988) (on H.R. 4208).

##### B. The 1988 Amendments

The 1988 reauthorization process clearly reflected the frustration of Congress with the inaction of the Reagan Administration. While the 1988 Amendments did not go so far as to remove any of the troublesome provisions of earlier amendments, they reflected Congress' reascent interest in the preservation mission of the program and gave it a needed jump start.<sup>422</sup> In addition to a number of changes to the management and enforcement provisions of the Act, the 1988 Amendments required the Administration to designate four sites, and issue prospectuses and studies on six more according to a set timetable.<sup>423</sup>

A number of bills dealing with various aspects of the Marine Sanctuaries Program were introduced in 1986 and 1987 in both House and Senate. In September 1986 and again in January 1987, Representative Panetta introduced bills to designate Monterey Bay as an NMS.<sup>424</sup> In his introductory statement in 1986, Panetta said that the "decision [in 1983] to remove the bay from the list of active candidate sites was at best arbitrary, and at worst misguided. The reasons given by NOAA at the time bore little relationship to the facts involved."<sup>425</sup> Panetta listed and rebutted each argument that NOAA had advanced in 1983 as to why Monterey Bay was not suitable for designation: "It should be noted that nowhere in the Marine Sanctuaries Act is it contemplated that geographical distribution would be decisive in determining protection or that a coastline as extensive and varies as California's would be limited to the number of potential sanctuaries."<sup>426</sup> Panetta also argued that the two existing sanctuaries in California did *not* protect similar resources, as NOAA had claimed; that the exact size would not be determined until designation but would "certainly be smaller than the Channel Islands [s]anctuary"; and that the resources of Monterey Bay faced increasing threats from coastal pollution.<sup>427</sup> Panetta's bill marked the first time in years that Congress expressed an interest in using its powers to designate areas on its own, bypassing the designation process it had fought so hard to perfect.

In addition to Panetta's bills, there was a concerted effort by the California state legislature and congressional representatives to restrict oil and gas development off the northern California coast. Concerns about oil development off of California and Massachusetts had helped stimulate the passage of the original Act, yet protections from oil development had only been achieved in the Channel Islands and Gulf of the Farallones sanctuaries; Georges Bank was still entirely unprotected. In 1985, Senator Cranston introduced legislation to impose an oil and gas leasing moratorium along parts of the California and Massachusetts coast.<sup>428</sup>

In September 1986, the California Legislature laid before the Senate a petition that the northern California coast be "set aside as a marine sanctuary, where extraction of fossil fuels, minerals, and other nonrenewable materials, and the

422. Pub. L. No. 100-627, 102 Stat. 3213 (1988) [hereinafter 1988 NMSA Amendments].

423. *Id.*

424. H.R. 5489, 99th Cong. (1986); H.R. 734, 100th Cong. (1987).

425. 132 CONG. REC. 22356-57 (1986).

426. *Id.*

427. *Id.*; H.R. 5489 §2(2).

428. S. 734, 99th Cong. (1985); 131 CONG. REC. 6178-79 (1985) (statement of Sen. Cranston).



dumping or burning of toxic wastes, are forbidden and the protection of the marine environment and the needs of the commercial and sports fisheries are assured forever.”<sup>429</sup> Rep. Robert Lagomarsino (R-Cal.) followed up on this proposal in early 1987 by introducing a bill, to “disallow the Secretary of the Interior from issuing oil and gas leases with respect to a geographical area located in the Pacific Ocean off the coastline of the State of California,” and in late 1987 with the Santa Barbara Channel Protection Act.<sup>430</sup> The Santa Barbara Channel Protection Act would have established an “environmental protection zone” in which the Secretary of Transportation would establish standards for all vessels, including oil tankers, passing through the area. The bill would also have amended the NMSA to incorporate language similar to that proposed by Representative Studts in a 1987 bill “to authorize the Secretary of Commerce to recover damages for the injury to or destruction of national marine sanctuary resources” and earmark the recovered damages for sanctuary protection programs.<sup>431</sup> The impetus for the damages provision had been the 1984 groundings of the *Wellwood* in the Key Largo NMS and the *Puerto Rican* very near the Gulf of the Farallones NMS.<sup>432</sup> In both cases, legal settlements of \$22 million and \$1.7 million respectively were unavailable to reimburse the Sanctuaries Program for its extensive restoration or response costs, because the monies were required to go into the general U.S. Treasury coffers.<sup>433</sup>

Legislation sponsored by Rep. Mike Lowry (D-Wash.) and Senator Hollings formed the basis for the program’s reauthorization in 1988.<sup>434</sup> The resulting amendments set a time-deadline for NOAA review of candidate sites, created a permit program to regulate special uses of sanctuaries, and mandated designation of four sites and prospectuses or studies of six more areas.<sup>435</sup>

Members of the House and Senate voiced extreme criticism of the Reagan Administration’s management of the program.

Testimony . . . has demonstrated that program implementation has been unacceptably slow. . . . only one new site covering 163 acres has been designated. Other sites are languishing within NOAA, with no clear indication when critical decisions will be made. . . . A glance at NOAA’s [SEL] provides further evidence of programmatic atrophy. Of the 29 sites placed on the SEL in 1983, NOAA has not completed consideration of a single site. . . . The [c]ommittee considers the Administration’s record of considering and designating new sites over the past four years unacceptable. . . . there has been an evident lack of administrative will.<sup>436</sup>

My friend from Washington [Representative Lowry] deserves high praise for recognizing the need to override the intransigence of the NOAA officials who have for

too long sough to tear down and destroy the program they were charged with nurturing.<sup>437</sup>

I believe this legislation is necessary to provide a renewed sense of direction to our National Marine Sanctuaries Program, particularly with respect to the long-term goal of establishing consistent authority in the conservation and protection of our nationally significant marine resources.<sup>438</sup>

### 1. Thirty-Month Deadline

In an attempt to speed up the seemingly interminable studies of candidate sites, Congress required the Secretary either to issue a notice of designation for a proposed site within 30 months of publishing the notice declaring the site an active candidate, or to publish a notice in the *Federal Register* explaining why no designation notice has been issued.<sup>439</sup> This requirement to act was spurred by the plight of sites such as Cordell bank, Monterey Bay, Georges Bank, and the many others that had been floating in and out of active candidacy for years, often with no notice given as to why they were not designated.

### 2. Special Use Permits

While multiple use compatible with resource protection had been declared as a purpose of the Act in 1984, “nonetheless, questions of when, to what extent, and under what conditions, public and private uses of sanctuary resources are appropriate have presented a continually difficult issue for sanctuary managers.”<sup>440</sup> The 1988 Amendments established a system of special use permits to regulate access to and use of sanctuary resources. The need for these permits was raised by the increased interest in commercial use of sanctuaries, e.g., recreational diving, whale watching, boat tours, and the failure of NOAA to issue final regulations implementing the 1984 Amendments. Existing regulations only authorized permits for research, education, and salvage activities and left the agency with no clear means of controlling new concessions and other uses not contemplated at the time of designation.<sup>441</sup>

### 3. Mandated Designations

Perhaps the most significant provisions of the 1988 Amendments, in terms of the precedent they set, were provisions requiring the Secretary to issue notices of designation, submit prospectuses, and conduct studies of particular sites. The amendments required designation by set dates for Cordell Bank, the Flower Garden Banks, Monterey Bay, and the western Washington Outer Coast.<sup>442</sup> The Secretary also was required to submit a prospectus to Congress on Stellwagen Bank and the northern Puget Sound, and to conduct studies on the appropriateness for designation of the American Shoal, Sombrero Key, and Alligator Reef within the Florida Keys, and with regard to Santa Monica Bay, California.<sup>443</sup>

429. See *supra* note 359.

430. H.R. 3772, 100th Cong. (1987).

431. *Id.*

432. H.R. REP. NO. 100-739.

433. *Id.*

434. H.R. 4208, 100th Cong. (1988); H.R. 4210, 100th Cong. (1988); S. 2767, 100th Cong. (1988).

435. 1988 NMSA Amendments, *supra* note 422.

436. H.R. REP. NO. 100-739, at 13-14 (the committee neglected to note that Fagatele Bay had been one of the 29 sites on the SEL and was designated as a sanctuary by NOAA on April 29, 1986, see 51 Fed. Reg. 15878 (1986)).

437. 134 CONG. REC. 18857 (1988) (statement of Rep. Studts).

438. *Id.* at 22872-75 (statement of Rep. Hollings).

439. 1988 NMSA Amendments, *supra* note 422, §§201-202.

440. H.R. REP. NO. 100-739, at 16-17.

441. *Id.*

442. 1988 NMSA Amendments, *supra* note 422, §205.

443. *Id.* §206.

Finally, a provision was inserted to require the Secretary to complete a report jointly with the Secretary of Transportation on safety in the Channel Islands NMS, including proposals to prevent and respond to future oil pollution incidents in or affecting the sanctuary.<sup>444</sup> “While I feel that it is unfortunate that we, in Congress, must legislate these designations, it is the only way I know that we can move the program along,” said Senator Hollings.<sup>445</sup>

The California sites had been considered for years, and were highlighted for action in part on Sen. Pete Wilson’s (R-Cal.) suggestion.<sup>446</sup> Wilson had identified the three sites as “some of the most critical and important marine habitat off all of California.”<sup>447</sup> Two of the three had also had long, fruitless experiences mired in the designation process. Monterey Bay, “despite strong public and State governmental support . . . was suspended [as an active candidate] by NOAA in December 1983, without any opportunity for public comment.”<sup>448</sup> Cordell Bank had been nominated in 1981, made an active candidate in 1983, and been formally proposed for designation in 1987. During the year between its proposal and the enactment of the 1988 Amendments, however, no further action had been taken on the site’s designation. According to Senator Cranston, the requirement for study of Santa Monica Bay was made due to its extreme popularity as a recreation site and its need for preservation.<sup>449</sup> “The intent of Congress has been made clear—sensitive marine habitat such as can be found off the coast of California should be protected as a marine sanctuary. If the administration won’t take the initiative, then this responsibility falls to Congress.”<sup>450</sup>

The other sites mentioned by the amendments had all experienced similar inaction. Flower Garden Banks had not been reconsidered as an active candidate since 1983, despite the fact that the Gulf of Mexico Fishery Management Council and the State Department had reversed their earlier objections to designation.<sup>451</sup> Stellwagen Bank, the western Washington Outer Coast, and northern Puget Sound had languished on the SEL since 1983, with no sign of action being taken by NOAA.<sup>452</sup> It was hoped that the 1988 Amendments would counter the “programmatically atrophy” of the 1980s.<sup>453</sup>

The House MMFC concluded among other things that the lack of designations had resulted because “the [p]resident has not recommended and Congress has not provided adequate funding to support the necessary research, surveys, and staffing levels” and “there has been an evident lack of administrative will within NOAA to complete the designation process.”<sup>454</sup> So, in addition to mandating more sites for study, Congress increased funding authorizations and required that annual budget submissions be divided into

program functions, so that Congress would have a better handle on whether requests were for designation, management, or enforcement.<sup>455</sup>

#### 4. Meeting Designation Deadlines

Regardless of its new deadlines, the Reagan Administration failed to meet the congressional mandate and continued to drag its feet on several of the sites. In May 1989, five months after the deadline set by the 1988 Amendments, President George H.W. Bush designated Cordell Bank, where oil development was a major issue.<sup>456</sup> Despite the House MMFC having heard testimony in 1988 that urged it “to establish a ban on oil and gas development within Cordell Bank, the committee initially deferred this issue to NOAA.”<sup>457</sup> The terms of designation, however, only prohibited oil and gas leasing within 13.7 square nautical miles of the 300-square-nautical-mile sanctuary.<sup>458</sup> The DEIS had inexplicably not even considered banning oil and gas development within the entire sanctuary. The final environmental impact statement (FEIS) had found that “hydrocarbon exploration, development, and production activities could threaten Sanctuary resources (impacts from seismic exploration, oil discharges from accidental spills including well blow-outs, and on-site discharges of drill cuttings and drilling muds),” but opined that it was not necessary to ban oil and gas in the entire sanctuary at that time.<sup>459</sup>

In response to the FEIS, public comments and a letter from the EPA were submitted “stating that, based on information in the FEIS, a [s]anctuary-wide ban on hydrocarbon development appeared to be the environmentally preferable alternative.”<sup>460</sup> Pressure from conservation organizations and the public and EPA’s contradiction of NOAA’s findings led NOAA to issue a proposed rule to ban oil and gas activities within the rest of the sanctuary, at the same time that it designated the sanctuary with a limited ban.<sup>461</sup>

Congress, unhappy with the additional delays and uncertainty in achieving a complete ban on hydrocarbon development, stepped in again and by statute prohibited exploration, development, or production of oil, natural gas, or minerals in the entire Cordell Bank NMS.<sup>462</sup> As the House MMFC said in its report on the issue:

In a nation which leads the world in energy consumption and relies on imported oil for nearly one-half of its supplies, and off the coast of a State that is a leading energy consumer, such decisions cannot be made lightly. However, in the case of Cordell Bank, the [c]ommittee has decided it is prudent to “Just Say No.” . . . The [c]ommittee believes that leaving the question of oil and gas regulation open-ended sends ambiguous signals to the oil and gas industry.<sup>463</sup>

444. H.R. REP. NO. 100-739, at 18; 1988 NMSA Amendments, *supra* note 422, §209.

445. 134 CONG. REC. 22872.

446. S. 2737, 100th Cong. (1988).

447. 134 CONG. REC. 21922-23 (1988) (statement of Rep. Wilson).

448. H.R. REP. NO. 100-739, at 14.

449. 134 CONG. REC. 29942-44 (1988) (statements of Sens. Byrd and Cranston).

450. *Id.* at 21922.

451. H.R. REP. NO. 100-739, at 13-14.

452. *Id.* at 14.

453. *Id.*

454. *Id.*

455. *Id.* at 14-15; 1988 NMSA Amendments, *supra* note 422, §§205, 206, 209.

456. 1988 NMSA Amendments, *supra* note 422, §205(a)(1); 54 Fed. Reg. 22413 (1989).

457. H.R. REP. NO. 101-110, pt. 1, at 5 (1989) (on H.J. Res. 281).

458. 54 Fed. Reg. at 22417.

459. H.R. REP. NO. 101-110, pt. 1, at 5; 54 Fed. Reg. at 22417.

460. 54 Fed. Reg. at 22413.

461. *Id.*

462. Pub. L. No. 101-74, 103 Stat. 554 (1989).

463. H.R. REP. NO. 101-110, pt. 1, at 6-7.

Of the other required designations, Flower Garden Banks was to have been designated by NOAA by March 31, 1989, yet designation did not occur by NOAA until December 5, 1991.<sup>464</sup> The moratorium on oil and gas that had been proposed in 1979 was nowhere to be seen in the final designation, which allowed leasing and exploration to continue in some areas of the sanctuary. Monterey Bay was to have been designated by December 31, 1989, but did not see protection until Congress gave up on NOAA and designated it in 1992.<sup>465</sup> The western Washington Outer Coast, which was to have been designated no later than June 30, 1990, was not designated until 1994 as the Olympic Coast NMS.<sup>466</sup> Congress' attempts to guide the administration proved to be a dismal failure, with NOAA ignoring specific timetables.

### 5. Florida Keys NMS Designation by Congress

The years leading up to the Florida Keys designation had shown the need for urgent action to stem vessel groundings, of which there had been three significant and recent ones, and declines in water quality. Bills to designate the Keys were introduced in November 1989 by Rep. Dante Fascell (D-Fla.) and Representative Jones, and by Sen. Bob Graham (D-Fla.) in March 1990.<sup>467</sup> According to Senator Graham, there was "broad support for this legislation from both commercial users, recreational users, and environmentalists."<sup>468</sup> After discussion and amendment, these bills led the way to another Fascell-sponsored measure, which was enacted less than a month later, on November 16, 1990.<sup>469</sup>

Among its extensive area, the sanctuary incorporated the already existent Key Largo and Looe Key sanctuaries, along with Alligator and Sombrero Reefs, and American Shoal, which Congress had told NOAA to study for designation back in 1988.<sup>470</sup> The law also:

codified a Coast Guard "area to be avoided," directing commercial vessels around rather than over the reef;

prohibited all mineral and hydrocarbon leasing, exploration, development, and production;

ordered the Secretary of Commerce to prepare a comprehensive management plan within 30 months, in consultation with appropriate federal, state, and local government authorities, and with the Advisory Council established by the Act;

established an Advisory Council to assist the Secretary in the development and implementation of the sanctuary's comprehensive management plan, including conclusions on zoning; and

required the Administrator of EPA and the governor of Florida to develop a comprehensive water

quality protection program in consultation with the Secretary of Commerce.<sup>471</sup>

The goals of the comprehensive management plan were to:

1. facilitate all public and private uses of the sanctuary consistent with the primary objective of sanctuary resource protection;

2. consider temporal and geographic zoning, to ensure protection of sanctuary resources;

3. incorporate regulations necessary to enforce the elements of the comprehensive water quality program . . . ;

4. identify needs for research and establish a long-term ecological monitoring program;

5. identify alternative sources of funding needed to fully implement the plan's provisions and supplement appropriations . . . ;

6. ensure coordination and cooperation between sanctuary managers and other federal, state, and local authorities with jurisdiction within or adjacent to the sanctuary; and

7. promote education, among users of the sanctuary, about coral reef conservation and navigational safety.<sup>472</sup>

The emphasis on the protection of sanctuary resources and the provisions on zoning and long-term ecological monitoring served to focus sanctuary management on preservation rather than multiple uses. As the Wilderness Society said in their letter of support to Senator Graham: "This legislation charts a course toward real protection for the Florida Keys coral reef resource . . . your legislation may well become a model for future marine designations elsewhere in the United States."<sup>473</sup> Although Congress had included several innovative provisions, such as the water quality protection program, the Advisory Council, and the concept of zoning, these provisions were specific to the Florida Keys sanctuary. It remained to be seen whether Congress would apply them to the entire program.<sup>474</sup>

### C. The 1992 Amendments

By 1992, public support for the Sanctuaries Program had increased. This was in part because of campaigns by conservation groups to highlight the sanctuaries as part of the solution to preventing a repeat of the recent events such as the devastating *Exxon Valdez* oil spill, freighter groundings in the Florida Keys, and two major oil spills on the Olympic Coast.<sup>475</sup> Additionally, biodiversity conservation was a

471. See Florida Keys National Marine Sanctuary Act.

472. *Id.* §7(a).

473. 136 CONG. REC. at 3776.

474. See, e.g., 136 CONG. REC. 18706 (1990) (statement of Rep. Arlan Strangeland).

475. *The Current Status and Future Needs of the National Oceanic and Atmospheric Administration's National Marine Sanctuary Program: Hearings Before the Subcomm. on Oceanography, Great Lakes, and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong. 92 (1991) (reprinting in full the Potter and Rays' reports) [hereinafter House Hearings 1991]; *Current Status and Future Needs of the National Oceanic and Atmospheric Administration's National Marine Sanctuary Program: Hearings Before the Subcomm. on Oceanography, Great Lakes, and the Outer Continental Shelf and Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and*

464. Flower Garden Banks Sanctuary Designation and Regulations, 56 Fed. Reg. 63634 (Dec. 5, 1991).

465. Pub. L. No. 102-587, 106 Stat. 5039 §2203 (1992) [hereinafter 1992 NMSA Amendments].

466. Designation of Olympic Coast Sanctuary, 59 Fed. Reg. 24586 (May 11, 1994).

467. H.R. 3719, 101st Cong. (1990); S. 2247, 101st Cong. (1990).

468. 136 CONG. REC. 3774 (1990) (statement of Sen. Graham).

469. Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990) [hereinafter Florida Keys National Marine Sanctuary Act].

470. 1988 NMSA Amendments, *supra* note 422, §206.



topic of increasing international attention. Stellwagen Bank was threatened by proposals for a floating casino, sand and gravel mining, and an EPA proposal for a disposal site only 12 miles west of the proposed sanctuary borders.<sup>476</sup>

Also generating interest were two reports on the program released prior to the start of the 1992 reauthorization process; both called for substantial change and lauded the program as necessary and effective at protection.<sup>477</sup> The report by G. Carleton Ray and M.G. McCormick-Ray, *A Future for Marine Sanctuaries*, provided fodder for further discussions on the program's scope and goals. The Rays found that the program suffered from a "lack of sufficient leadership, support, personnel, expertise, and influence, to carry out even its existing statutory mission. That is, the Congress has placed demands on the program greater than the institution designated to carry them out."<sup>478</sup> The report also suggested that an emphasis be placed on defining and creating a "'nationally significant' sanctuary system."<sup>479</sup>

On the heels of the Rays' report, NOAA's Assistant Administrator formed the Marine Sanctuaries Review Team to make recommendations on ways to improve the program. The review team issued its report in February 1991.

In general, the panel has concluded that this program affords this Administration a rare opportunity to take important and bold steps to protect and enhance these important parts of our heritage, and in the process, to create a model for the rest of the world of how to respond to this challenge . . . .

In the past, NOAA's administration of the Marine Sanctuaries Program has lacked leadership, focus, resources and visibility, and the program has suffered for it. It has generally been treated as the runt of the NOAA litter, receiving only occasional pats on the head as executive and legislative attention was focused on its larger and better endowed siblings.<sup>480</sup>

The review team suggested a \$30 million budget, shortening the designation process, creating a clear vision statement, securing representation of all 12 marine biogeographical provinces, implementing comprehensive and coordinated interagency management by zoning and other methods, and creating user fees similar to the National Park Service's "Golden Eagle Passport" to help support the program.<sup>481</sup> The report rejected calls to change the name of the program, arguing that no clear and compelling reason existed, and that such a change would cause additional public confusion.<sup>482</sup>

With substantial guidance and interest, the authorizing committees substantially rewrote the Act. Representatives Hertel and Studds and Sen. John Kerry (D-Mass.) each introduced sanctuary bills that were relatively similar.<sup>483</sup> The

*Fisheries*, 102d Cong. 20, 84, 145 (testimony of Andrew Palmer, AOC, and letter by Gov. Booth Gardner of Washington to Secretary of Commerce, Dec. 31, 1991, re: formal comments on the DEIS for the Olympic Coast NMS) (1992) [hereinafter House Hearings 1992]; S. REP. No. 102-411, at 2 (1992) (on S. 2788).

476. House Hearings 1992, *supra* note 475, at 30; House Hearings 1991, *supra* note 475, at 25.

477. House Hearings 1991, *supra* note 475, at 87, 146.

478. *Id.* at 156.

479. *Id.* at 158.

480. *Id.* at 99.

481. *Id.* at 87.

482. *Id.* at 120.

483. H.R. 5617, 102d Cong. (1992); H.R. 4310, 102d Cong. (1992); H.R. 4409, 102d Cong. (1992); S. 2788, 102d Cong. (1992).

final language of the public law drew from all of them, but predominantly from the House bills.<sup>484</sup> Among other changes, the 1992 Amendments:

Added four new program purposes to the five that already existed;

Allowed for designations to be made when existing state and federal authorities needed to be *supplemented*, not just when they are *inadequate*;

Required a site's contribution to "maintenance of critical habitat of endangered species" to be one of the factors considered in the study process;

Required interagency cooperation on activities either within or outside sanctuaries that "are likely to destroy, cause the loss of, or injure any sanctuary resource";

Required management plan reviews for each sanctuary every five years;

Granted NOAA authority to create Sanctuary Advisory Councils to assist in the management of the sanctuaries, based on the success of the Florida Keys Council; and

Designated the Hawaiian Islands Humpback Whale, Monterey Bay, and Stellwagen Bank National Marine Sanctuaries.<sup>485</sup>

The overall direction of the 1992 Amendments can be characterized as a move towards preservation, but again, Congress failed to remove multiple use and other conflicting provisions.

## 1. Program Purposes

Reflecting a diversity of views in Congress on the purpose of the program, the amendments revised the 1984 purposes and added four more purposes in an attempt to clarify the intent of the Act.<sup>486</sup> Congress stated that the purpose of the program is to identify *and designate* areas of special *national significance* (rather than just identifying special areas).<sup>487</sup> While the purposes of enhancing public awareness and the facilitation of all public and private uses were left intact and unchanged, the four new purposes were to: (1) "develop and implement coordinated plans for protection and management of these areas" with appropriate agencies, governments, organizations, and other interests "concerned with the continuing health and resilience of these marine areas"; (2) "create models of, and incentives for, ways to conserve and manage these areas"; (3) "cooperate with global programs encouraging conservation of marine resources"; and (4) "maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate."<sup>488</sup>

The second of the new purposes was a lofty goal that conceivably could allow the Sanctuaries Program to become a guiding light for management of protected marine areas. The inclusion of a provision that authorized the Secretary to create Sanctuary Advisory Councils patterned after the suc-

484. 1992 NMSA Amendments, *supra* note 465.

485. *Id.*

486. *Id.* §2101(b).

487. *Id.* §2101(b).

488. *Id.* §2101(b)(6)-(9).

cess of the Florida Keys Council is an example of the beneficial way the program can be used to test innovative management techniques.

The fourth purpose emphasized protection of species' habitats because "protection of these special areas can contribute to maintaining a natural assemblage of living resources for future generations," and because the areas may possess qualities which give them international significance in addition to national significance.<sup>489</sup> This provision opened the door (again) to wildlife sanctuaries. NOAA itself had envisioned wildlife-oriented sanctuaries in its 1974 regulations, but this concept had disappeared in the interim.

## 2. Expansion of Consulted Parties and NOAA Influence on Other Agencies' Actions

To ensure implementation of coordinated plans, the amendments included several new consultation requirements. The involvement of the Secretary of the Interior in the drafting of the resource assessment report during the consideration for designation was broadened, to include consultation with the Secretaries of Defense and Energy and the Administrator of EPA on "any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary."<sup>490</sup> The requirement to allow the federal Regional Fishery Management Councils to draft fishing regulations was also broadened, requiring cooperation with other appropriate fishery management authorities such as state and local managers.<sup>491</sup>

The amendments also made *any federal agency action* subject to consultation with the Secretary of Commerce, *even if it occurs outside of a sanctuary*, if the action is likely to "destroy, cause the loss of, or injure any sanctuary resource."<sup>492</sup> As part of this consultation, the acting agency must provide the Secretary of Commerce with a written statement describing the action and its potential effects on sanctuary resources and must consider the Secretary of Commerce's recommended alternatives. If the acting agency decides not to adhere to the Secretary's recommendations, it must provide a written statement giving reasons for acting otherwise.<sup>493</sup>

The House report added further clarity to the consultation provision, specifying that the term "agency action" is intended to be broadly applied to direct actions, and licenses, permits, and other authorizations issued by federal agencies to third parties. The committee intended "that agency actions encompass all actions that are reasonably likely to affect sanctuary resources while those resources are within sanctuary boundaries, including the cumulative and secondary effects of such actions."<sup>494</sup>

The committee noted that some sanctuary "resources, such as fish, move in and out of a sanctuary, and thus, may be physically injured or destroyed by lawful activities outside the boundaries of that sanctuary. The [c]ommittee intends that" the prohibition on damaging sanctuary resources "apply to: (1) activities inside sanctuary boundaries affecting

sanctuary resources that occur within the boundaries of a sanctuary; and (2) activities outside sanctuary boundaries that affect sanctuary resources while those resources are within the sanctuary."<sup>495</sup> Representative Young explained that "we are not attempting to prohibit activities such as commercial fishing that occur outside of a sanctuary, even though those same fish may be found in the sanctuary."<sup>496</sup> While only a power of consultation and not a mandate that any particular action be taken, the review provision was the first time that sanctuaries were given any influence over activities outside their borders.

The 1992 Amendments about interagency consultation and review of agency actions reflected a growing interest in protecting sanctuary resources. Interagency cooperation was raised at this point in time in part because Representative Studds, who was chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, was personally engaged in the debate over designating Stellwagen Bank. NOAA had been able to wield little power in fighting a proposed sewage outfall which would discharge only 12 miles west of the proposed Stellwagen Bank sanctuary boundary, or in blocking a potential sand and gravel mining operation within the proposed sanctuary. Another problem was the disposal near Stellwagen Bank of contaminated dredge spoils from the Boston harbor area.<sup>497</sup> Led by Studds, Congress cited Stellwagen as an example of why NOAA needed a clarified role and more influence in other agencies' actions that might affect sanctuaries.<sup>498</sup>

## 3. Multiple Use

The Marine Sanctuaries Review Team argued that multiple use, while raised during early NMSA debate, was never adequately explained, "nor were the ambiguities in the concept ever discussed, still less resolved."<sup>499</sup> Instead of applying an ill-defined multiple use approach, the report suggested using zones to separate areas of strict preservation from areas where various uses can be accommodated.<sup>500</sup> The Rays argued, similarly, that the sanctuaries can be a model for greater ocean management by providing "replenishment areas" for fisheries, where no fishing is allowed.<sup>501</sup>

Congressional views on what uses should be allowed in sanctuaries seem to depend primarily on the particular issues affecting a congressperson's local sanctuary rather than on a coherent national vision for the entire sanctuary system. For example, Representative Studds was one of the most vocal, frustrated by what he saw as delay tactics to prevent designation of Stellwagen and protect certain private user interests. He was outraged that sand and gravel mining would even be considered in Stellwagen Bank, as habitat protection was part of the very reason for establishing the sanctuary.<sup>502</sup> Representatives Panetta, Fascell, and Hertel were also frustrated by the Administration's delays and its

495. *Id.* at 14.

496. 138 CONG. REC. 20904 (1992).

497. 138 CONG. REC. 12550 (1992); House Hearings 1991, *supra* note 475, at 3, 25 (statements of Reps. Studds and DeConti).

498. House Hearings 1992, *supra* note 475; 138 CONG. REC. 12550 (1992).

499. House Hearings 1991, *supra* note 475, at 97.

500. *Id.* at 120-21.

501. *Id.* at 147.

502. House Hearings 1992, *supra* note 475, at 30.

489. *Id.* §2101(a)(1), (4).

490. *Id.* §2103(b)(2)(B).

491. *Id.* §2104(a)(3)(B).

492. *Id.* §2104(d) (emphasis added).

493. *Id.* §2104(d).

494. H.R. REP. NO. 102-565, at 12.

consideration of oil and gas activities in Monterey Bay.<sup>503</sup> Representative Panetta went so far as to say that he thought oil and gas drilling and sanctuaries were “diametrically opposed to each other.”<sup>504</sup>

The general sense from statements by congressmen during this time is that there are some uses that are unacceptable in sanctuaries because they risk damaging the resources that were at the heart of designations. While this would be the logical meaning of the Act’s purpose of facilitating all *compatible* uses, NOAA had routinely considered allowing potentially damaging uses in sanctuaries during the designation process, e.g., the consideration of sand and gravel mining in Stellwagen and of oil and gas development in Monterey Bay. Despite the numerous pro-protection statements made on the House and Senate floor and in committee reports and hearings, no changes were made to guide NOAA in what uses to allow in sanctuaries. Multiple use remained undefined in the Act and the purpose of facilitating compatible uses remained unchanged. So, too, did the provision allowing Regional Fishery Management Councils to propose draft fishing regulations in sanctuaries.

#### 4. Management Plan Reviews

Without recorded discussion, Congress included a provision to require sanctuary management plans to be reviewed every five years:

Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this title.<sup>505</sup>

The importance of this provision is that it mandates occasional review and updates, but some have questioned the frequency of the reviews:

The requirement for management plan reviews provides flexibility to account for new scientific understandings and management. But, the five year review cycle called for in the Sanctuaries Act means that protections within [s]anctuaries are not necessarily long-lasting. In contrast, the Wilderness Act allows for review but does not require it. Similarly, Congress has required that the management plans for [n]ational [f]orests undergo review only once every 10 to 15 years. This builds in a degree of stability to the management plan. It allows enough time for ecosystems to begin showing some response to protections before such protections are reviewed.<sup>506</sup>

In addition, if a review determines that large changes need to occur, such as to regulate fishing when such power had not been reserved in the designation terms, then the entire process of public review, agency consultation, and develop-

ment of an environmental impact statement has to be gone through again to implement the change. This suggests that the real problem may be with the Act’s provision requiring changes to the designation terms to undergo lengthy review, rather than with the five-year review. However, requiring a review every five years is probably unrealistic given that the time it takes to conduct a review is so lengthy.

#### 5. Sanctuary Advisory Councils

The 1992 Amendments made Sanctuary Advisory Councils optional for all sanctuaries.<sup>507</sup> The Sanctuary Advisory Councils were intended to “provide assistance to the Secretary regarding the designation and management of national marine sanctuaries.”<sup>508</sup> In designating the Florida Keys NMS, Congress had mandated the Secretary to create such a council with 15 members from various interest and conservation groups, to assist in development and implementation of the sanctuary’s management plan.<sup>509</sup> The 1992 Amendments, however, gave the Secretary complete discretion as to how many members came from which agency or interest group, with no requirement for representation for a particular group.<sup>510</sup> Additionally, the councils were removed from the purview of the Federal Advisory Committee Act (FACA) in the hopes of streamlining their appointment, which had been time-consuming in the Florida Keys.<sup>511</sup> While exempting the councils from FACA, provisions for “good government,” such as a requirement for public participation, were included in the MPRSA.<sup>512</sup>

#### 6. Funding for the Program

The reports and testimony before Congress of both the NOAA Marine Sanctuaries Review Team and the Rays highlighted the tremendous problem of the program’s inadequate funding.<sup>513</sup> As time went on, it became all too apparent that designation and management costs were far greater than those anticipated in 1984. It was not until 1994 that the program’s authorizations for appropriations again topped \$10 million.<sup>514</sup> By then, however, there were 12 sanctuaries requiring management, education, and enforcement. The program was estimated to need over \$30 million just to deal with current sanctuaries, let alone take on the expense of new designations.<sup>515</sup> These budgetary constraints had meant that places deemed to be valid “special places” had gone unprotected because of the program’s budget woes. The removal from active candidacy of Norfolk Canyon in 1997, Ten Fathom/Big Rock in 1986 and Monterey Bay in 1983 were all attributed by NOAA to a lack of adequate funding.<sup>516</sup>

507. 1992 NMSA Amendments, *supra* note 465, §2112.

508. *Id.* §2112.

509. *Id.* §9.

510. *Id.* §2212 (§315(b)).

511. *Id.* §2212 (§315(a)).

512. H.R. REP. NO. 102-565, at 17; 1992 NMSA Amendments, *supra* note 465, §2212 (§315(e)).

513. House Hearings 1991, *supra* note 475, at 104, 158; House Hearings 1992, *supra* note 475, at 102-06.

514. 1992 NMSA Amendments, *supra* note 465, §313.

515. House Hearings 1991, *supra* note 475, at 104.

516. 51 Fed. Reg. 7097 (1986); 62 Fed. Reg. 45233 (1997); 48 Fed. Reg. 56252 (1983).

503. 138 CONG. REC. 14701, 14702 (1992) (statement of Rep. Leon Panetta on H.R. 4310); House Hearings 1991, *supra* note 475, at 1-2, 5-8.

504. House Hearings 1991, *supra* note 475, at 10.

505. 1992 NMSA Amendments, *supra* note 465, §2104(d).

506. The Turnstone Group, An Assessment of the Adequacy of the Authority of the National Marine Sanctuaries Act to Establish a Network of Fully Protected Areas (2003) (unpublished manuscript, on file with the Marine Conservation Biology Institute).



By 1992, Congress was ready to adequately fund the program. The solution proposed by Senator Stevens and incorporated into the 1992 Amendments was to increase authorizations and to require the program's budget requests to be broken down by category, so that Congress could better track where the money was going.<sup>517</sup> Whereas Congress had authorized \$5.95 million for the program in FY 1992 (down \$60,000 from the previous year), the amendments authorized \$8 million for FY 1993, \$12.5 million for FY 1994, \$15 million for FY 1995, and \$20 million for FY 1996.<sup>518</sup>

## 7. Additional Provisions of the Amendments

The 1992 Amendments also addressed enforcement and alternate funding sources for the program.<sup>519</sup> Liability for damage to sanctuaries was declared to be without a cap limiting it to a certain amount.<sup>520</sup> Liability also was expanded to include interest on response costs and damages, and to allow vessels to be seized to help pay any fines levied against an offender.<sup>521</sup> To assist with funding the program, Congress created a two-year pilot project to enhance funding for designation and management by creating an official NMS symbol and selling the rights to the symbol to sponsors.<sup>522</sup> The section on cooperative agreements was also expanded to include more types of agreements with additional parties, broadening the ability of the program to receive outside support.<sup>523</sup>

## 8. New Sanctuaries Designated by Congress in 1992

Perhaps the most important provisions of the 1992 Amendments were those legislatively designating Monterey Bay NMS, the Hawaiian Islands Humpback Whale Sanctuary, and Stellwagen Bank NMS.<sup>524</sup> With these congressional designations and NOAA's designation of Flower Garden Banks by NOAA in January 1992 (in response to a congressional mandate), the area under the control of the program was *doubled* in size. The new sanctuaries represented resources not previously included in the program, including humpback and other whales and a submarine canyon, but added only one previously unrepresented biogeographic region.<sup>525</sup>

As Representative Hertel noted, Congress intervened in these designations because they were interested in "finalizing the lengthy and tedious designation process where the merits of specific sites are clear and where these sites re-

quire immediate management consideration."<sup>526</sup> Before Congress stepped in, the Administration had been mired in debate over whether to allow sand and gravel mining in Stellwagen Bank, whether to designate Monterey Bay or once again remove it from active candidacy, and whether to side with NOAA or the U.S. Department of Defense (DOD) on allowing the continued use of the Hawaiian Islands for military training.

Congress protected Stellwagen Bank and Monterey Bay by excluding some of the most pernicious threats. Representative Studds found that the fact that the DOI

would even consider the possibility of sand and gravel mining in a highly productive marine ecosystem is nothing short of ludicrous. Stellwagen Bank is sand and gravel—mine it, and you destroy the very reason for establishing this sanctuary in the first place . . . This ridiculous debate must be stopped here and now. Government by special interest does not fly in the Commonwealth of Massachusetts—government by the people does.<sup>527</sup>

Congress, distrusting the administration's resolution of mining in Stellwagen Bank, therefore legislatively prohibited sand and gravel mining in the sanctuary, and gave NOAA consultation rights in other agency decisions that *may* (as opposed to the stricter standard of "likely to" provided in the new requirement for interagency consultation) affect sanctuary resources.<sup>528</sup> Congress also protected Monterey Bay from oil and gas extraction, and mandated cooperative work toward safer vessel transportation in the sanctuary.<sup>529</sup> However, neither the Monterey Bay nor Stellwagen Bank congressional designations required for regulation of commercial fishing, testimony to the power of local fishing constituencies. Thus, it was left up to NOAA to decide whether to regulate fishing in the Monterey Bay designation document and the Stellwagen Bank management plan. In the final designation document for Monterey Bay, NOAA explicitly chose not to regulate fishing, using this logic:

Fishing is not being regulated as part of the sanctuary regime and 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. Sanctuary prohibitions that may indirectly affect fishing activities have been written to explicitly exempt aquaculture, kelp harvesting, and traditional fishing activities.

Existing fishery management agencies are primarily concerned with the regulation and management of fish stocks for a healthy fishery. In contrast, the sanctuary program as a different and broader mandate under the MPRSA to protect all sanctuary resources on an ecosystem wide basis. Thus, while fishery agencies may be concerned about certain fishing efforts and techniques in relation to fish stock abundance and distribution the Sanctuary program is also concerned about the potential incidental impacts of specific fishery technique on all sanctuary resources including benthic habitats or marine mammals as well as the role the target species plays in the health of the ecosystem. In the case of the Monterey

517. S. 2770, 102d Cong. (1992); 1992 NMSA Amendments, *supra* note 465.

518. 1992 NMSA Amendments, *supra* note 465, §2111.

519. *Id.* §§2107, 2109, 2110, 2204.

520. *Id.* §2110(c).

521. *Id.* §2110(a), (b).

522. *Id.* §2204.

523. *Id.* §2109.

524. *Id.* §§2202, 2203, 2301-2307.

525. The Oregonian region to which Monterey Bay belongs was already represented in the program by Cordell Bank and Gulf of the Farallones National Marine Sanctuaries. The Indo-Pacific region to which the Hawaiian Islands belong was already represented by the Fagatele Bay National Marine Sanctuary. Stellwagen Bank, of the Acadian region, was the only one of the 1992 congressional designations to add representation of a new biogeographic region to the program. See Table 2.

526. 138 CONG. REC. 20911, 20912 (1992) (statement of Rep. Hertel).

527. *Id.* at 20909, 20910 (statement of Rep. Studds).

528. 1992 NMSA Amendments, *supra* note 465, §2202(d), (e).

529. *Id.* §2203. See also 138 CONG. REC. 14701 (1992).

Bay area fish resources are already extensively managed by existing authorities.<sup>530</sup>

NOAA came to a different conclusion about the program's role in regulating fishing at Stellwagen Bank. Stellwagen Bank's designation document included activities, e.g., discharge of any matter within the sanctuary, operation of any vessel within the sanctuary, and altering the sanctuary's seafloor, within the "scope of regulation" which could be used to restrict fishing.<sup>531</sup>

In its consideration of the Stellwagen Bank proposal, NOAA has identified threats to the Bank environment against which there currently is either insufficient protection or no protection. For example, while NMFS and the New England Fishery Management Council attempt to address concerns of overfishing, the Sanctuary program can play an important supplementary role of protecting habitat and systems upon which fish species rely, without interfering with other regulatory regimes. A primary intent of a national marine sanctuary designation is to fill such existing regulatory gaps, and to enhance the existing regulatory authorities of other agencies.

...

NOAA/NOS has determined that while the regulatory structure for management of fisheries is adequate, current implementation of that structure is not fully attaining the objectives mandated under MFCMA. The NEFMC and NMFS are currently responding to a Court order to revise the FMP's for groundfish species, so as to design a rebuilding program for those stocks. NOAA/NOS believes this is an appropriate mechanism to address the current problems related to groundfish stocks. In addition, Congress is developing legislation to address this problem. Therefore, NOAA/NOS is neither regulating fishing nor listing fishing as an activity subject to a Sanctuary regulation. NOAA/NOS intends to work as closely with the NEFMC and NMFS to establish, via the Sanctuary, a broad forum representing multiple sources of possible assistance to the NEFMC and NMFS in the attainment of mutual objectives; and will also work with those entities on the impacts of fishing upon other Sanctuary resources and other Sanctuary users.<sup>532</sup>

The final management plan for Stellwagen Bank excluded traditional fishing from regulation.<sup>533</sup> By leaving fishing subject to regulation in the designation document, however, NOAA allowed for regulation of fishing to occur merely by amendment of the management plan.

Sen. Daniel Inouye (D-Haw.) introduced a bill that would have stepped into the interagency turf wars between NOAA and the DOD. The bill would have allowed the DOD to continue ongoing activities *as long as* actions were taken to minimize any impact on the whales and would have allowed new DOD activities *only* if there was no potential for significant adverse impact on humpback whales and their habitat *or* if the Secretary of Commerce exempted such new activities based on consideration of the national interest and the purposes of the sanctuary.<sup>534</sup> However, Congress did not

adopt the Inouye language, designating the sanctuary but leaving the development of a comprehensive management plan up to the Secretary of Commerce.<sup>535</sup>

What is most clear from the congressional designations of 1992 is that Congress felt that NOAA had failed to properly interpret and implement the Act. All three of the designated sanctuaries were chosen at large sizes, and two were protected from some industrial uses. In designating the largest of the size alternatives for Monterey Bay NMS, Congress essentially disregarded the size issue.<sup>536</sup> At 4,023 square nautical miles, Monterey Bay was significantly larger than the 1,258-square-nautical-mile Channel Islands designation, which some in Congress had previously proposed as an upper size limit.

Also evident was the influence of new scientific conclusions on protection of the oceans, and the power of public support for the program. Rep. Neil Abercrombie (D-Haw.) received over 5,200 constituent comments in support of the Humpback Whale Sanctuary, and public awareness of the devastation caused by oil spills and freighter groundings led to the change in congressional attitude.<sup>537</sup> The Rays' report had concluded that sanctuary size should "reflect ecosystem properties and the degree of human threat" and that there can be no criteria for an "ultimate size" for the program but that the program must be left flexible or it will be "self-limiting."<sup>538</sup> This increased public support and scientific backing contributed to the newfound congressional *disinterest* in size limits. Congress was focused on protecting areas from oil spills, freighter groundings, and other threats that had shown how destructive they could be.

## 9. Natural Diversity

As the amendments to and discussions of the bills leading up to the 1992 Amendments demonstrate, the importance of natural diversity was considered and ultimately rejected for inclusion in the final 1992 Amendments. Representative Studds' bill, as introduced, would have added "natural diversity" to the NMSA in the findings, twice in the purposes and policies, and in the factors to be considered for sanctuary designation.<sup>539</sup> All uses of the term were toned down before the bill was passed by the House, and further trimmed by the time it was incorporated into Hertel's bill. In the end, Studds' proposed finding was watered down to: "protection of these special areas can contribute to maintaining a *natural assemblage* of living resources for future generations."<sup>540</sup> Despite alleged agreement in the committee, all other references to diversity or biogeographic representation were deleted in the final amendments.<sup>541</sup>

535. 1992 NMSA Amendments, *supra* note 465, §2306.

536. 138 CONG. REC. 14701 (1992).

537. House Hearings 1992, *supra* note 475, at 136, 138 (written testimony of Harold Masumoto, Office of State Planning, Office of the Governor, state of Hawaii).

538. House Hearings 1991, *supra* note 475, at 154 (reprinting Rays' report, at 9).

539. H.R. 4310.

540. 1992 NMSA Amendments, *supra* note 465, §2101(4) (emphasis added).

541. Representative Hertel, in expressing his opinions in the report on the Studds bill, said that "[w]hile there was agreement that the criteria for designation of marine sanctuaries did not require that every biogeographic region be represented by the national program, a full

530. 57 Fed. Reg. 43310 (Sept. 18, 1992).

531. 58 Fed. Reg. 53865, 53875 (Oct. 19, 1993).

532. *Id.* at 53866, 53871.

533. *Id.* at 53878-79.

534. S. 2786, 102d Cong. (1992).

## 10. Conclusion

In the 1992 Amendments, Congress sought to guide NOAA toward preservation by introducing more terms and more purposes connected with biodiversity and ecosystem health. However, by adding yet more purposes and duties and by leaving in the language about facilitation of all compatible public and private uses, the end result was an Act of greater complexity and diffuse mandates. The fact that Congress found it necessary to designate several sanctuaries and restrict uses that NOAA was unwilling to, was an indicator that the Act was bogged down by contradiction and its multitude of mandates.

### D. 1994: *The Designation of the Olympic Coast NMS*

The debate over the preservation versus multiple use continued with the considerations of the Northwest Straits and the addition of Stetson Bank to the Flower Garden Banks NMS. On May 11, 1994, NOAA designated the Olympic Coast NMS off of Washington State and abutting Olympic National Park.<sup>542</sup> NOAA had placed the site, also known as the western Washington Outer Coast, on the SEL in 1983.<sup>543</sup> In 1988, Congress mandated that the sanctuary be designated by June 30, 1990.<sup>544</sup> NOAA began public hearings in April 1989. Meanwhile, in 1992, Congress passed the Oceans Act, one provision of which prohibited oil and gas development once the western Washington site was designated.<sup>545</sup> While the record is silent on the oil and gas prohibition, it is most likely that Congress did not trust NOAA to arrive at a prohibition on its own. When finally designated in 1994 as the Olympic Coast NMS, NOAA's regulations prohibited numerous activities, including hydrocarbon or mineral exploration or development; some types of discharging (but deposit of dredge spoils related to harbor maintenance was allowed); altering the seabed (though damage by uses such as traditional fishing methods was exempted); and airplane overflights below specified altitudes.<sup>546</sup> In accordance with the 1984 Amendments, existing activities were allowed to continue if permits allowing them were issued prior to the date of the sanctuary's designation.

### E. *The 1996 Amendments*

In 1996, the Act was amended again. The changes to the Act's provisions were minor,<sup>547</sup> but the amendments also expanded two sanctuaries and prohibited designation of a

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array of representative ecosystems should be a long-term goal." H.R. REP. NO. 102-565, at 37.

542. 59 Fed. Reg. 24586 (1994).

543. Final Site Evaluation List, 48 Fed. Reg. 35568 (Aug. 4, 1983).

544. 1992 NMSA Amendments, *supra* note 465, §205(a)(4).

545. 54 Fed. Reg. 10398 (Mar. 13, 1989); 1992 NMSA Amendments, *supra* note 465, §2207.

546. 59 Fed. Reg. at 24586, §925.5.

547. The amendments also made permanent the pilot study of the NMS official symbol effective way to increase funding, exempted Sanctuary Advisory Council meetings from the requirement to publish notice in the *Federal Register* to "streamline the public notification process," and required the Secretary to submit a long-range, comprehensive plan for management, stabilization, preservation, and recovery of artifacts and materials of the USS Monitor. Pub. L. No. 104-283, 110 Stat. 3363 (1996) [hereinafter 1996 NMSA Amendments]; H.R. Rep. No. 104-717, at 9 (1996) (on H.R. 3487).

third unless Congress expressly allowed it. The amendments expanded the Flower Garden Banks NMS to include Stetson Bank and allowed for expansion of the Hawaiian Islands Humpback Whale Sanctuary to include Kahoolawe Island. Designation of a Northwest Straits (Puget Sound) NMS was prohibited unless Congress passed a law specifically allowing the area to become a sanctuary.<sup>548</sup> Rep. Solomon Ortiz (D-Tex.), Rep. Jack Metcalf (R-Wash.), Representative Abercrombie, and Sen. Patty Murray (D-Wash.) supported these changes in their respective states in response to constituent desires.

The provision prohibiting a Northwest Straits sanctuary was the result of failure of the local jurisdictions in the Puget Sound area to buy-in to the sanctuary process during the eight years that the area had been under consideration as an active candidate. Unlike most of the other marine sanctuaries, the Northwest Straits site is located predominately in state waters. Without local support, the governor might exercise his power under the Act to veto the portion in state waters, thus negating the purpose of designation. The sense in the community and the local government was that local people and institutions were capable of managing the area, and that a sanctuary would only add an extra layer of tension and federal bureaucracy without providing additional benefits. As Brian Calvert, Port Commissioner for the Friday Harbor Port District in San Juan County, testified,

[a]ctive citizens working with local and state governments are the best and more efficient way of managing this resource. The further decisions, rule making and management gets from the place being managed, the less effective it will be and the less involvement you will find from people like me . . . . The [f]ederal [g]overnment is too blunt an instrument to manage the many sensitive issues needed to maintain water quality, the unique quality of human life, the quality of our economy, the quality of marine habitat and the myriad of other issues which require balance and consideration.<sup>549</sup>

Senator Murray echoed these sentiments:

I was concerned that the creation of a NOAA-controlled advisory committee would undermine the very intent of bringing local community members together to consider the resource protection needs of the Northwest Straits in an objective and open forum. Many members of the local communities have serious concerns about the performance of NOAA over the last several years with regard to the proposed sanctuary.<sup>550</sup>

Apparently, just four years after enacting a Sanctuary Advisory Council provision, Congress was beginning to have second thoughts. The Sanctuary Advisory Councils had been created to address the very type of concerns expressed by San Juan residents, Senator Murray and Representative Metcalf. However, the idea of creating a SAC to assist NOAA with designation and management was now seen as counterproductive, at least in the Northwest Straits, because of public distrust in federal (NOAA) oversight of their local

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548. 1996 NMSA Amendments, *supra* note 547, §10.

549. *Oversight Hearings on the National Marine Sanctuaries Act: Hearings Before the House Comm. on Resources (testimony of Brian Calvert, Port Commissioner for Friday Harbor Port District)* (1996), reprinted at <http://resourcescommittee.house.gov/104cong/fishery/mar-21.96/calvert.htm> (last visited Dec. 31, 2003).

550. 142 CONG. REC. 26532-33 (1996) (statements of Sens. Kerry and Murray).



waters. By the amendment, Congress once again was declaring that the NMSA was ineffective at achieving its purpose. As the Northwest Straits decision shows, the presence or absence of local public support can sway a decision about a candidate site.

During House debate on the 1996 Amendments, Rep. Jim Saxton (R-N.J.) iterated the program's purpose as protecting resources "while ensuring the continuation of all compatible public and private uses," and drew a comparison to national parks.<sup>551</sup> Rep. Sam Farr (D-Cal.) expanded this, saying that sanctuaries "are not just about conserving resources. They are also about protecting coastal economies, such as our billion dollar tourism industry."<sup>552</sup> This economic emphasis was echoed a week after Farr's statement by Jeffrey R. Benoit, the Director of the Office of Ocean and Coastal Resource Management, who testified that the accommodation of multiple uses in sanctuaries encourages recreational use and fosters economic growth and success.<sup>553</sup> These statements reflect what appears to be another shift in thinking about the Marine Sanctuaries Program: whereas the 1992 Amendments had focused on designating areas that Congress deemed worthy for resource protection, by 1996 a swing back towards the multiple use sensibilities of the 1980s had begun.

#### F. The 2000 Amendments

In 1997, the National Research Council concluded in a report, *Striking a Balance: Improving Stewardship of Marine Areas*, that there is need for a comprehensive regulatory or management framework for current or future activities in federal and state waters or on or under the seabed of the United States.<sup>554</sup> Public polls showed high awareness of the worsening conditions of our coasts, particularly with respect to pollution and overfishing.<sup>555</sup> The 1998 International Year of the Ocean heightened this public awareness, capped off by a National Ocean Conference in Monterey, California, which was attended by President William J. Clinton, Vice President Albert Gore, several cabinet members and members of Congress, and more than 500 ocean experts.<sup>556</sup> Shortly thereafter, President Clinton issued an executive memorandum which included prohibitions on oil and gas exploration or development in any of our NMS.<sup>557</sup>

I . . . withdraw from disposition by leasing for a time period without specific expiration those areas of the [OCS] currently designated Marine Sanctuaries under the [MPSA]. Nothing in this withdrawal affects the rights under existing leases in these areas. Each of these withdrawals is subject to revocation by the [p]resident in the interest of national security.<sup>558</sup>

551. *Id.* at 25767 (statement of Rep. Saxton).

552. *Id.* at 11581 (statement of Rep. Farr).

553. H.R. REP. NO. 104-717, at 7.

554. COMMITTEE ON MARINE AREA GOVERNANCE AND MANAGEMENT, NATIONAL RESEARCH COUNCIL, *STRIKING A BALANCE: IMPROVING STEWARDSHIP OF MARINE AREAS* (1997).

555. 145 CONG. REC. H2282-89 (daily ed. Apr. 22, 1999) (statements of Reps. Farr and Rohrabacher).

556. 144 CONG. REC. 11659-60 (1998) (statement of Rep. Capps).

557. 25 WKLY. COMP. PRES. DOC. 1111 (June 19, 1998) (Clinton, Arb.)

558. *Id.*

In one brief act, Clinton accomplished what Congress and NOAA had been haggling over for more than 25 years. The memorandum did not, however, cover existing leases in the Channel Islands or Flower Garden Banks sanctuaries or those in close proximity to sanctuaries that could have impacts on sanctuary resources.

In 2000, President Clinton issued an executive order to establish a northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.<sup>559</sup> Additionally, the Thunder Bay NMS, primarily known for its historic shipwrecks, was designated by NOAA in 2000 as the 13th sanctuary.<sup>560</sup>

The 2000 Amendments to the Act, led predominately by Representative Saxton and Sens. John McCain (R-Ariz.) and Olympia Snowe (R-Me.), included significant changes to all aspects of the Act.<sup>561</sup> Representative Farr noted that public interest in the oceans remained an important political force, with several polls showing that "more than [one-]half of Americans have observed that the conditions of our coasts are worsening, especially due to pollution and overfishing, and they want us, [m]embers of Congress, to do something about it."<sup>562</sup> The 2000 Amendments were Congress' answer.

Specifically, the 2000 Amendments:

- added a finding on the benefits of sanctuaries to scientific, cultural, and archaeological resources;

- added a ninth purpose "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes";

- formally established a "system" to encompass all sanctuaries;

- added three new factors to be considered in making new designations: biodiversity, ecological importance, and archaeological, cultural, and historical importance;

- clarified and streamlined designation procedures;
- prohibited new designations unless the program is determined to have met financial goals;

- enhanced enforcement provisions;

- placed emphasis on the need for long-term monitoring (as opposed to just monitoring) and wise and sustainable use of marine resources; and

- made permanent the trial Marine Sanctuaries Program logo from the 1996 Amendments.<sup>563</sup>

The amendments also made two exceptions to the new provision that limited designations for financial reasons, authorizing designation of Thunder Bay and the northwestern Hawaiian Islands NMS.<sup>564</sup> Finally, the amendments required the Secretary to establish a Dr. Nancy Foster Scholarship

559. Exec. Order No. 13178, 65 Fed. Reg. 76903 (2000), as amended by Exec. Order No. 13196, 66 Fed. Reg. 7395 (2001) (declaring the establishment of the reserve complete and ordering the Secretary to "initiate the process to designate the Reserve as a National Marine Sanctuary").

560. 65 Fed. Reg. 39042 (2000).

561. Pub. L. No. 106-513, 114 Stat. 2381 (2000) [hereinafter 2000 NMSA Amendments].

562. 145 CONG. REC. H2282 (2000).

563. 2000 NMSA Amendments, *supra* note 561.

564. *Id.* §6(f), (g).

Program to “award graduate education scholarships in oceanography, marine biology or maritime archeology.”<sup>565</sup>

### 1. Sanctuaries as a System

In 1991, NOAA’s Marine Sanctuaries Review Team had set a vision that

by the year 2000, the National Marine Sanctuaries Program will manage a comprehensive and integrated system of the nation’s most significant marine areas, managed on the basis of ecologically sound, well-researched principles of resource protection and sustainable use and will focus as well on improving public understanding of the nation’s marine heritage and in extending sound marine resource management principles to areas beyond sanctuary boundaries.<sup>566</sup>

Twenty-eight years after the Sanctuaries Program was created, Congress declared that the marine sanctuaries constituted components of a system. The findings stated that management of sanctuaries as an NMS system will:

- (A) improve the conservation, understanding, management, and wise and sustainable use of marine resources;
- (B) enhance public awareness, understanding, and appreciation of the marine environment; and
- (C) maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas.<sup>567</sup>

The new focus on the “system” of NMS has thus far been in name only. “System” implies clear definitions of what a marine sanctuary is, and clear, uniform guidelines about how sanctuaries are supposed to be selected and managed. However, the NMS system remains a group of disparately managed parts rather than a cohesive program with a unified vision. Nevertheless, the system concept is important because it heightens the value of individual sanctuaries and points toward a desired future state.

### 2. Reemphasis on the Program’s Primary Mandate

Drawing on the 1992 consideration of “natural diversity,” the 2000 Amendments added a new purpose “to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, *restore* and enhance natural habitats, populations, and ecological processes,” partially redirecting the Act to its original roots of preservation and restoration.<sup>568</sup> The 2000 Amendments also added more factors to those the Secretary must consider in making future designations. These include: the area’s scientific and monitoring value, the feasibility of employing innovative management approaches, and the value of the area as an addition to the system.<sup>569</sup> NOAA claimed the provisions “clarify that resource protection includes maintaining the entire ecosystem, including the structure of natural biodiversity and species assemblages and ecological processes.”<sup>570</sup> The impact of this reemphasis, however, was se-

verely tempered by the failure to simplify the program’s purposes or to reduce the emphasis on facilitation of compatible uses. In fact, individual members of Congress and committee reports all made comments that appear to strengthen the place of multiple use in the program, rather than to diminish it.<sup>571</sup>

The Senate Committee on Commerce, Science, and Technology emphasized that the primary purpose is resource protection “while” facilitating all multiple uses, and said that “as a general rule, activities like drilling, mining, dredging, commercial fishing, sport fishing, boating, scuba diving, and marine tourism are generally allowed where practicable.”<sup>572</sup> In other words, while the primary purpose of a sanctuary is protection, no use is outright prohibited and all may be allowed if they are “practicable” or “compatible.” Senators McCain and Snowe declared that they saw the strength of the program to be its emphasis on a “responsible balance” between conservation and compatible multiple uses.<sup>573</sup> It is unclear why a responsible balance between conservation and compatible multiple uses would be needed if the multiple uses are actually compatible with conservation. These comments highlight one of the greatest weaknesses of the Act: the lack of any definition of what constitutes a “compatible” activity such as that found in the Refuge Administration Act.<sup>574</sup>

The 2000 Amendments also reflected a division between Congress and the Administration. Whereas President Clinton had banned all new oil and gas development in marine sanctuaries as of 1998, congressional statements made during the 2000 reauthorization and amendment process made it clear that many in Congress still felt that use of sanctuaries for oil and gas may be appropriate in some cases.<sup>575</sup> The 2000 Amendments would have been the appropriate place to finally enact a clear legislated prohibition on oil and gas development in marine sanctuaries, given President Clinton’s stance and the various moratoria then in effect on OCS leasing in significant portions of U.S. coastal waters. Instead, Congress ignored the issue.

### 3. Funding Constraints on New Sanctuaries

On Earth Day 1999, Representative Farr said that “[w]e have created [NMS], which are essentially national parks in the ocean. We have 12 of those, yet with less than 1% of the funding that we give to our national parks. We have 378 national parks, 155 national forests, but only 12 national marine sanctuaries.”<sup>576</sup> Addressing the lack of funding, Congress that year nearly doubled the program’s budget from roughly \$14 million in FY 1996 to \$26 million in FY 2000, still falling short of the \$30 million identified as necessary in 1991 by the NOAA Review Team and Rays’ reports. Ironically, Representative Farr said this only a year-and-

565. *Id.* §18.

566. House Hearings 1991, *supra* note 475, at 101.

567. 2000 NMSA Amendments, *supra* note 561, §301(b)(3).

568. *Id.* §3(c)(4) (emphasis added).

569. *Id.* §5(b).

570. NOAA, FACT SHEET: NATIONAL MARINE SANCTUARIES ACT: ADMINISTRATION REAUTHORIZATION BILL (2000).

571. *See, e.g.*, 146 CONG. REC. S10628-42 (daily ed. October 17, 2000) (statements of Sens. McCain, Hollings, and Inouye); 145 CONG. REC. H8410-16 (daily ed. Sept. 21, 1999) (statements of Rep. Saxton); S. REP. NO. 106-353, at 2.

572. S. REP. NO. 106-353, at 2 (2000) (on S. 1482).

573. 145 CONG. REC. S10440 (daily ed. Aug. 5, 1999) (statement of Sen. McCain on introduction of S. 1482).

574. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§668dd-668ee (1966).

575. S. REP. NO. 106-353, at 2.

576. 145 CONG. REC. H2282 (1999).

one-half prior to the 2000 Amendments that essentially banned new sanctuaries for financial reasons.

The 2000 Amendments prevented the designation of new sanctuaries by the Secretary unless he finds that

(A) the addition of a new sanctuary will not have a negative impact on the System; and

(B) sufficient resources were available in the [FY] in which the finding is made to—

i. effectively implement sanctuary management plans for each sanctuary in the System; and

ii. complete site characterization studies and inventory known sanctuary resources, including cultural resources, for each sanctuary in the System within 10 years after the date that the finding is made if the resources available for those activities are maintained at the same level for each [FY] in that 10-year period.<sup>577</sup>

Although the 2000 Amendments were portrayed as a conservation-minded advance to the NMSA, the moratorium was not desired by most conservation groups involved in the process or by NOAA.<sup>578</sup> The moratorium was opposed by the conservation community because it implements a standard that is nearly impossible to meet. The provisions of the moratorium require the Secretary to undertake new burdens, without any new funding, in a program that already stretches its appropriations further than any other resource preservation program.

The concept of focusing the program on improving management of existing sanctuaries, rather than continuing to designate additional sanctuaries, had been raised by the review team in its 1991 report. By 2000, the idea had gained wide support on the authorizing committees, and was confirmed by a National Academy of Public Administration (NAPA) report, which concluded that

[t]his is probably not the right time to create more sanctuaries. Perhaps if Congress were to increase the budget and the clout of the program dramatically, the program could handle additional sites, but no one is talking about such a step now. Eventually, the program could grow to include more sites. There are only a few small sites along the Atlantic Coast and in the Gulf of Mexico now, and none in Alaska. However, at this point, the program cannot afford to spend its resources on a long, expensive process to add more sites.<sup>579</sup>

Senator McCain voiced his approval for the restriction by arguing that “by prioritizing our actions over the next few years on making the existing sanctuaries fully operational with education and research programs, a full complement of staff, active public outreach programs, and enforcement we will strengthen the system and help it to reach its full potential.”<sup>580</sup>

Representative Saxton stated similar sentiments: the “biggest hurdle is inadequate funding for basic management and outreach activities.”<sup>581</sup> Representative Saxton contended that NOAA’s concerns about the moratorium were address-

ed by the provisions that allow new designations if they will not negatively impact management of existing sanctuaries or interfere with the sanctuary resource surveys.<sup>582</sup>

#### 4. Conclusion

The addition of a new purpose of restoring and maintaining natural ecosystems and processes, and several other preservation-oriented provisions in the 2000 Amendments was important in highlighting the Act’s preservation goal, but in reality was not much of an advance because of the remaining and numerous nonresource factors and standards that promote multiple use. In addition, the moratorium on growth, other than the approved northwestern Hawaiian Islands sanctuary, means that the sanctuaries-creation process, imperfect though it is, has ground to a halt until Congress chooses to restart it.

### V. The Unfilled Preservation Mandate

#### A. Background

The NMSA has experienced a complex and turbulent evolution. Having precipitated numerous sanctuary designation battles, suffered stop and go implementation, and been the subject of repeated regulatory and legislative amendments over three decades, how effective has the Act been in achieving its preservation purpose?

Some observers have rightly extolled the successes and potential of the Sanctuaries Program under difficult circumstances.<sup>583</sup> Owen notes the program has

functioned as a popular and effective limit on oil and gas drilling, particularly along the California coast. It has been similarly effective in protecting other limited areas from selected threats; Stellwagen Bank is intact, unmined and without floating casinos, and the reefs in the Florida Keys are better protected from shipping traffic. All of this protection, moreover, grew out of an uncommon level of bipartisan support and cooperation. The program also offers states a source of pride and communities a potentially defining connection to their surrounding environment. Finally, it has provided a platform for the potential development of future protection schemes.<sup>584</sup>

Although existing sanctuaries encompass a variety of qualities that make them nationally or internationally significant, they fail to add up to a complete marine preservation system. Moreover, given past experience with the Act’s conflicting and numerous mandates, there is little likelihood that a sanctuary system that preserves the full array of the nation’s unique and representative marine features and resources will be realized under the current law.

#### B. Limited Scope of the Sanctuary System

The scientific consensus is very strong: many of the ocean ecosystems of the United States are in dire and worsening condition. At the same time, public support for ocean protection is growing. Is the Sanctuaries Program capa-

577. 2000 NMSA Amendments, *supra* note 561, §6(f).

578. Telephone Interview with Amy Mathews-Amos, National Marine Sanctuaries Act History (Oct. 20, 2003).

579. CENTER FOR THE ECONOMY AND THE ENVIRONMENT, PROTECTING OUR NATIONAL MARINE SANCTUARIES 34 (2000).

580. 145 CONG. REC. at S10636.

581. *Id.* at H8413.

582. *Id.*

583. CENTER FOR THE ECONOMY AND THE ENVIRONMENT, *supra* note 579.

584. Owen, *supra* note 6, at 746.



ble of preserving and restoring ocean ecosystems in a timely fashion?

In the 32 years since the Act's passage, 13 sanctuaries have been established that cover approximately 14,065 square nautical miles, as noted in Table 1. This area equals 0.4% of the nation's EEZ. The sanctuaries range in size from less than 1 square nautical mile (Monitor) to 4,023 square nautical miles (Monterey Bay). Most sanctuaries are relatively small, with eight under 1,000 square nautical miles. Five sanctuaries are between 1,000 and 4,100 square nautical miles in size. The authorized addition of a northwestern Hawaiian Islands Sanctuary of more than 99,500 square nautical miles will increase the size of the current system by sevenfold. But even with this addition, the system would encompass only 3.38% of the U.S. oceans.

Congress has never specified what constitutes an ideal sanctuary system, only that the Act intends to protect special areas that possess national significance. Although NOAA's regional survey teams identified a number of candidate sites in the early 1980s, NOAA has never undertaken a rigorous survey of U.S. ocean waters, similar to the comprehensive wilderness inventories and studies mandated by the Wilderness Act, to determine what marine resource types and areas are adequately protected and which ones merit protection.

### 1. Resources Missing

Many desirable resources and areas are missing from the system. There are large swaths of the nation's oceans that have no sanctuaries. A look at a map will show blank spaces off many coastal states. No sanctuaries have been designated in the Caribbean or in the North Pacific. There are just three sanctuaries along the entire Atlantic seaboard, one in South Florida, and one in the Gulf of Mexico. On the West Coast, California has four sanctuaries, and Washington one, but Oregon and Alaska have none. Ironically, even Georges Bank, the area Representative Keith set out to protect when he introduced sanctuary legislation in 1967, is missing from the system. Furthermore, only one-half of the 12 marine biotic regions identified by the Rays are represented in existing sanctuaries, as noted in Table 2.

Another example of the system's incompleteness is its inadequate coverage of both endangered and commercially valuable species. In its 1974 regulations, NOAA identified preserving genetic resources, including spawning and nursery grounds and migratory pathways, as one purpose of a sanctuary designation NOAA reconfirmed this in 1988.<sup>585</sup> Congress agreed with NOAA, and in 1992 added as a purpose of the Act: "to maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate."<sup>586</sup> In the 2000 Amendments, Congress declared that one of the purposes of the Act is "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes."<sup>587</sup> The Act further specifies that among the factors to be considered in creating a sanctuary are "maintenance of ecologically or commer-

cially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site."<sup>588</sup>

There are currently 21 domestic marine species listed as endangered and 13 as threatened, as listed in Table 3. There has been no comprehensive assessment by NOAA of what or how many endangered marine species and critical habitats are encompassed in sanctuaries, or what additional sanctuaries are needed to help conserve these species. Regarding commercial species, although the Act has been used to protect ocean areas from oil development and pollution, it has not been used to protect fisheries stocks from overfishing or uniformly applied to protect sanctuary bottom habitats from destruction by commercial fishermen. For example, bottom trawling, the most environmentally destructive method of commercial fishing,<sup>589</sup> is allowed in Stellwagen Bank and Monterey Bay sanctuaries, but banned in other sanctuaries.

### 2. What Does Protection Mean?

The Turnstone Group notes that no sanctuary has been set aside as a "fully protected area."<sup>590</sup> As defined by the Turnstone Group, a fully protected area means an area designated based on its "importance to ecosystem structure, function or process or their esthetic or other values," and in which all extractive or potentially disruptive activities are prohibited, resource protection is the singular goal, and protection is permanent.<sup>591</sup> Fully protected zones or sub-areas have been created in two sanctuaries: Florida Keys, Fagatele Bay and proposed in a third, the Channel Islands.<sup>592</sup> All or large portions of the northwestern Hawaiian Islands also will qualify as fully protected zones when the designation process is complete.<sup>593</sup> While it is conceivable the Act could be used to establish sanctuaries whose sole purpose is full protection, the Act has never been used this way.

The Act's purpose of facilitating all uses means that resource conflicts within sanctuaries are common. Generally, it is against the law to "destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations."<sup>594</sup> However, the prohibition on destruction of managed resources applies only to resources identified in individual sanctuary designation documents as the subject of protection. In addition, the designation document, as implemented by the management plan, determines which uses or activities shall be subject to regulations. Uses not listed are not subject to regulation. For example, NOAA's management plan for Stellwagen expressly excludes fishing as subject to the regulation that prohibits altering the sanctuary seabed,<sup>595</sup> despite research that NAPA says "has documented how bottom-trawling has leveled the seabed at

585. 39 Fed. Reg. at 23255, §922.10(a); Marine Sanctuary Program Final Regulations, 53 Fed. Reg. 43802, §922.1(c)(1) (Oct. 28, 1988).

586. 2000 NMSA Amendments, *supra* note 561, §2101(b).

587. *Id.* §3(c)(4).

588. National Marine Sanctuaries Act, 16 U.S.C. §§1431 et seq. (2002).

589. See, e.g., LANCE E. MORGAN & RATANA CHUENPAGDEE, *SHIFTING GEARS: ADDRESSING THE COLLATERAL IMPACTS OF FISHING METHODS IN U.S. WATERS* (2003).

590. The Turnstone Group, *supra* note 506.

591. *Id.* at 3-4.

592. *Id.* at 11-12.

593. *Id.* at 12.

594. National Marine Sanctuaries Act, §1436(1).

595. 2000 NMSA Amendments, *supra* note 561, §2202; Marine Sanctuary Program Regulations, 15 C.F.R. §922.142 (2002).

Stellwagen and stripped vegetation.”<sup>596</sup> The Hawaiian Islands Humpback Whale Sanctuary, established primarily for research and education about humpback whales, does not regulate fishing in the sanctuary, even though “overfishing of bottom fish . . . and live capture of reef fish for the pet trade have depleted stocks sharply.”<sup>597</sup> Flower Garden Banks, a relatively small sanctuary set in an oil producing area, prohibits oil and gas development in some areas of the sanctuary but not others.<sup>598</sup>

According to the Turnstone Group,

Even when a sanctuary does prohibit activities in general, there are often exceptions for specific and often significant exceptions.

Some of these exceptions are minor but others substantially weaken protection. For instance, most sanctuaries prohibit discharge or deposit of materials in sanctuary waters, but include exceptions for minor activities such as discharge of deck washdown water. However, Monterey Bay and Gulf of the Farallones . . . include exceptions for disposing of dredge material and the Farallones provides an exception for the discharge of sewage. The Flower Garden Banks prohibits the use of explosives but then gives an exception to the use of explosives for oil and gas exploration.<sup>599</sup>

While one may determine what resources are being protected at each sanctuary by consulting the designation document or the current *Code of Federal Regulations*, it is more difficult to determine the status and trend of any particular resource because NOAA has not developed baseline information or effective monitoring programs.<sup>600</sup> Today, few sanctuaries can report with much specificity how their resources are faring based on objective measures.

### 3. Oil Development and Commercial Fishing

Two of the biggest threats to sanctuary resources, oil development and commercial fishing, have proved flashpoints in sanctuary designations throughout the Act’s history. As things have turned out, new oil development has been prohibited in the sanctuaries system, at least for the moment. Although there were assertions when the Act passed and afterwards that oil development could be a compatible use of a sanctuary, a number of sanctuaries specifically prohibited new oil and gas development at the time they were designated by NOAA, e.g., Channel Islands, Gulf of the Farallones, or by Congress, e.g., Monterey Bay, Cordell Banks. In fact, it was the desire of local citizens to exclude oil from their shores that impelled the creation of sanctuaries such as Monterey Bay and Channel Islands.

More recently, President Clinton issued an executive memorandum to the Secretary of the Interior in 1998 that extended until June 30, 2012 the prohibition on the granting of new oil and gas leases in all sanctuaries, but the issue of oil development is by no means settled.<sup>601</sup> The Clinton memo-

randum can be rescinded by a succeeding president. Congress can also intervene, as it did in 2003, when a provision was included in the energy bill to allow exploration for oil throughout the entire OCS, including in marine sanctuaries.<sup>602</sup> The measure was passed by the Senate, but rejected by the House due to heavy opposition by members of Congress from coastal states. Energy development on the OCS remains an issue of public debate as it has from the time the Sanctuaries Act was passed.

Since 1972, commercial overfishing has caused severe population declines of many commercial fish species. Depleted populations include New England cod, snapper-grouper reef fish in the South Atlantic and Gulf of Mexico, various species of rockfish and the nearly extinct white abalone along the Pacific Coast, and rock lobster in Hawaii. According to NOAA, 86 populations in the United States are classified as overfished.<sup>603</sup> Populations of depleted stocks are found in many sanctuaries, but most sanctuaries do not prevent or regulate the taking of fish commercially or recreationally except in a few closed areas. Furthermore, seven sanctuaries allow fishing by bottom trawl in all or a portion of their waters. Bottom trawling is known to cause extensive damage to structurally complex seafloor habitats, thereby reducing habitat complexity and “potentially altering the productivity of fish communities that depend on seafloor habitats for food and refuge.”<sup>604</sup> Clearly, commercial fishing has had and continues to have significant negative impacts on sanctuary environments, as well as detracting other uses such as recreational fishing and diving.

Sanctuary staff of the National Ocean Service, the NOAA bureau with responsibility for management of the Sanctuaries Program, candidly admit, “We don’t do fish,” meaning that they leave commercial and recreational fisheries management in federal waters to their sister bureau, the National Marine Fisheries Service (NMFS), and the Regional Fishery Management Councils.<sup>605</sup> This attitude is derived from the Act’s provision requiring the Secretary to give the appropriate council “the opportunity to prepare draft regulations for fishing within the [EEZ] as the [c]ouncil may deem necessary to implement the proposed designation.”<sup>606</sup> The draft regulations must be guided by the national standards that implement the Magnuson-Stevens Act, the law under which federal fisheries are managed primarily for exploitation.<sup>607</sup> The Secretary must accept council recommendations unless the council action “fails to fulfill the purpose and polices [of the Act] and the goals and objectives of the proposed designation.”<sup>608</sup> If the Secretary rejects the council-proposed regulations or the council fails to submit regulations or to submit them in a timely manner, the Secretary

596. CENTER FOR THE ECONOMY AND THE ENVIRONMENT, *supra* note 579, at 27.

597. *Id.* at 92.

598. 15 C.F.R. §922.122.

599. The Turnstone Group, *supra* note 506, at 11.

600. Weber Telephone Interview, *supra* note 374.

601. Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf From Leasing Disposition, 34 WKLY. COMP. PRES. DOC. 1111 (June 12, 1998).

602. S. 14, 108th Cong., §105 (2003).

603. U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE, ANNUAL REPORT TO CONGRESS ON THE STATUS OF U.S. FISHERIES—2002 (2003).

604. COMMITTEE ON ECOSYSTEM EFFECTS OF FISHING, NATIONAL RESEARCH COUNCIL, EFFECTS OF TRAWLING AND DREDGING ON SEAFLOOR HABITAT 2 (2002); Les Watling & Elliott A. Norse, *Disturbance of the Seabed by Mobile Fishing Gear: A Comparison to Forest Clearcutting*, 12 CONSERVATION BIOLOGY 1180 (1998).

605. Weber Telephone Interview, *supra* note 374.

606. National Marine Sanctuaries Act, §1434(a)(5).

607. *Id.*

608. *Id.*

must prepare the regulations.<sup>609</sup> Although the Sanctuaries Act technically gives the Secretary the power to object to a council recommendation that would harm sanctuary resources, the Act, notes the Turnstone Group,

[p]uts the burden on the Secretary to show why the regulations from [c]ouncils (that are generally less protective and more interested in resource exploitation) are incompatible with the goals and objectives of a sanctuaries designation. Given the multiple-use standard in the Sanctuaries Act, this finding is a difficult one to make. To our knowledge, this provision has never been used [by the Secretary] to protect [s]anctuary resources from the effects of fishing.<sup>610</sup>

In addition, secretarial action to protect fish in sanctuaries is constrained by the Secretary's conflicting responsibilities. Sanctuaries are managed by the National Ocean Service, and fisheries by the NMFS, both bureaus within the DOC. According to the Turnstone Group, conflicts between the two bureaus typically "get resolved in favor of [the fisheries service] at low levels before ever reaching the level of the Secretary."<sup>611</sup>

Reluctance on the Secretary's part to challenge council-drafted fishery rules for sanctuaries has been further reinforced by Congress' own failure to address head-on the negative impacts of fishing on sanctuaries. For example, the legislative designations of Monterey Bay and Stellwagen Bank were silent on commercial fisheries regulation, leaving it to NOAA to decide whether to include these activities in the list of what would be regulated or prohibited.<sup>612</sup> As a result, neither sanctuary has played a significant role in stopping the drastic decline of certain fish populations in their respective regions. These declines of fish populations and structural habitat impacted by some commercial fishing areas have also affected recreational fishing opportunities.

Clearly, the Sanctuaries Act has been interpreted to give deference to the Regional Fishery Management Councils regarding how to best manage commercial and recreational fishing in sanctuaries. This deference is at odds with the law's purpose of providing for "comprehensive and coordinated conservation and management" of special ocean areas.<sup>613</sup> How can sanctuaries management be comprehensive if sanctuary managers do not have controlling authority over fish or fish habitat within a sanctuary?

#### 4. Moratorium on New Sanctuaries

While the Sanctuaries Program has clearly failed to identify, inventory, and protect the full array of marine resources and places meriting preservation, efforts to designate additional sanctuaries had come to a halt by the mid-1990s, by which time NOAA had inactivated the SEL on the ground that it was to be revised.<sup>614</sup> Before the revisions occurred, new designations were foreclosed by the moratorium mandated by

Congress in the 2000 Amendments.<sup>615</sup> The lifting of the moratorium is contingent upon the Secretary publishing a "finding" that the "addition of a new sanctuary will not have a negative impact on the system," and that the DOC budget has sufficient resources in the year of any new designation to inventory known sanctuary resources and complete site characterization studies for all sanctuaries within 10 years, if current funding levels are maintained.<sup>616</sup>

The moratorium is a signal that additions to the sanctuary system are not a high priority for the program's congressional authorizing committees until such time as NOAA proposes an adequate plan and budget for managing existing sanctuaries, and Congress itself provides the appropriations. While the moratorium has had one positive consequence—forcing NOAA to develop a management program for congressional review—it throws a pall of uncertainty over the program because there is no set date for the moratorium's expiration. It is hard to imagine a similar no-growth injunction being placed on the national park or wildlife refuge systems.

#### C. Structural Flaws of the Sanctuaries Act

##### 1. Lack of Preservation Focus

The Turnstone Group calls the NMSA a paradox because "it provides authority for meaningful protection on the one hand, and then substantially undermines it with the other. The effect on the water is few real protections in marine sanctuaries."<sup>617</sup> Among other things,

the Act "makes it difficult to prohibit activities"; fisheries management [in sanctuaries] is essentially controlled by the NMFS;

the Act's multiple use mandate "makes it difficult to implement regulations that are contentious or that significantly impact politically well-connected user groups";

the requirement to review sanctuary management plans every five years undermines long-term protection; and

the Act's multiple use mandate and exhaustive consultation requirements make it "fundamentally different" from laws governing other protected systems like parks and wilderness areas which have an overarching conservation frame work.<sup>618</sup>

While we agree the law is riddled with incongruities, in our view, the fundamental flaw of the Sanctuaries Act is its *lack of a singular focus on preservation*. This conclusion is all the more obvious when the Sanctuaries Act is compared to the Wilderness Act, which was enacted just eight years earlier.

The Wilderness Act provides a valuable comparison for the Sanctuaries Program for two reasons. First, the singular objective of the Wilderness Act is preservation of "untrammelled" wilderness. Second, while implementation of the Wilderness Act has not been trouble-free by any means, it has produced very successful outcomes.

609. *Id.*

610. The Turnstone Group, *supra* note 506, at 7.

611. *Id.*

612. 2000 NMSA Amendments, *supra* note 561, §§2202, 2203.

613. National Marine Sanctuaries Act, §1431(b)(2).

614. Marine Sanctuary Program Regulations, 60 Fed. Reg. 66875 (Dec. 27, 1995).

615. 2000 NMSA Amendments, *supra* note 561, §6(f).

616. *Id.*

617. The Turnstone Group, *supra* note 506, at 5.

618. *Id.* at 5-8.



## 2. Wilderness Act Model

In his short history of the Wilderness Act, Douglas Scott identifies the features of that Act that have made it such an effective conservation tool.<sup>619</sup> The Wilderness Act:

“established a clear unambiguous national policy to preserve wilderness, recognizing wilderness itself as a resource of value”;

provided a specific definition of wilderness which could be applied practically in the field;

established a permanent wilderness preservation system, described its extent and designated the first 9.1 million acres of wilderness (equivalent to 10,740 square nautical miles of water);

“set out a single, consistent management directive” that applied to all wilderness areas which, among other things, clearly specified allowed and prohibited uses;

mandated a clearly specified wilderness review process,” which included an inventory of all federal roadless areas 5,000 acres and larger, and required the executive branch to recommend all suitable wilderness areas to Congress within 10 years;

“asserted the exclusive power of the Congress to designate wilderness areas” and to maintain them as wilderness until Congress decided otherwise; and

“constituted the best, most practical mechanism to actually preserve wilderness *in perpetuity*.”<sup>620</sup>

In short, the Wilderness Act established a comprehensive, well-defined program with the *singular purpose of conserving America’s remaining wilderness in perpetuity*. The Wilderness Act has led to the designation of wilderness in 46 states.<sup>621</sup> While there have been many political battles over whether particular areas were suitable for or should be designated as wilderness, once designated, wilderness areas must be managed in accordance with uniform preservation standards prescribed in the law. Furthermore, once established, wilderness areas are not subject to change in boundaries or degrees of protection, except by further act of Congress.

In contrast, the Sanctuaries Act has produced just 13 sanctuaries, which constitute less than 0.4% of U.S. waters. Although amended many times since 1972, the Sanctuaries Act still lacks a singular focus on preservation and a rigorous process to achieve it. Moreover, the Secretary of Commerce is not required to establish any particular sanctuary or number of sanctuaries or even to comprehensively inventory the nation’s waters for candidate areas. The Sanctuaries Act’s conflicting goals of preservation and multiple use, its discretionary and open ended nature, its lack of clear definitions and protection standards, and the multiple intervention points it provides for stakeholders and Congress have burdened the program with enormous implementation difficulties and inefficiencies. The Act’s results speak for themselves.

619. DOUGLAS W. SCOTT, CAMPAIGN FOR AMERICA’S WILDERNESS, A WILDERNESS-FOREVER FUTURE: A SHORT HISTORY OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM (2001).

620. *Id.* at 15.

621. *See supra* note 7.

## 3. Preservation and Multiple Use

Several observers have argued that the primary or central mission of the NMSA has always been protection or preservation, and that NOAA has simply failed to aggressively pursue this mission.<sup>622</sup> We believe the reality is more complex. While it is true that preservation (or protection) always has been a purpose of the Act, it is not the Act’s *singular purpose*. More than anything, it is the multiple use provision (and related provisions) that has prevented the development of a marine sanctuary system that lives up to its name.

Even though the Act states that “protection” is the primary objective, by also mandating the facilitation of all public and private uses, the legislation

gives standing to resource users who can challenge the Secretary’s decision to prohibit certain activities, and creates the expectation among resource users that their use will be facilitated. The Secretary must then defend his or her regulatory decisions by demonstrating that such activities are not “compatible” with resource protection. This fact raises the bar for determining whether an activity should be allowed and fundamentally changes the question the Secretary must answer before regulating an activity. Instead of the precautionary question “might this activity harm the resource?” the test is more complex. The Secretary must in effect, answer the question: “Does this activity harm the resource enough in comparison to the benefits people get from that activity to justify regulating it?”<sup>623</sup>

Tarnas found the pursuit of multiple use in sanctuaries “unworkable” because both the meaning of the term and its practical application are unclear.<sup>624</sup> If preservation is the primary purpose of sanctuaries, at what point do multiple uses compromise resource protection? Furthermore, says Tarnas, according to some observers, application of multiple use management is “ineffective.” What ocean users “call multiple use appears to amount to a policy of non-exclusion of their favored uses.”<sup>625</sup>

Multiple use management would only make sense, says Tarnas, if it were applied comprehensively to the entire ocean to “balance the whole range of marine uses.”<sup>626</sup>

Conflicting activities could be separated, complementary activities allowed together. Designated areas would have different levels of use restrictions to achieve different purposes. For example, a marine protected area, being part of a larger interactive marine ecosystem, would restrict those consumptive uses that conflict with the primary purpose of resource protection.<sup>627</sup>

The Marine Sanctuaries Program, observes Tarnas, has “assumed the task of trying to provide both the overall multiple use management of large ocean areas, and the specialized protective management of smaller areas. Doing both has been difficult and has possibly weakened the program.”<sup>628</sup>

622. *See, e.g.*, Tarnas, *supra* note 246; Weber Telephone Interview, *supra* note 374; CENTER FOR THE ECONOMY AND THE ENVIRONMENT, *supra* note 579.

623. The Turnstone Group, *supra* note 506, at 6.

624. Tarnas, *supra* note 246, at 278.

625. *Id.* at 279 (quoting Finn, *supra* note 319, at 91).

626. *Id.*

627. *Id.* at 279-80.

628. *Id.* at 280.

Tarnas concludes:

Sanctuaries fit into an overall multiple-use strategy for the larger marine ecosystem as one type of specialized marine management. Sanctuaries are marine protected areas with varying levels of protection not afforded by multiple use management. Thus, sanctuaries would operate most effectively within the context of a larger national ocean resource management policy using this multiple use approach. Yet this country has no comprehensive or integrated national ocean policy.<sup>629</sup>

Tarnas' observations ring true. If most of the ocean is generally open to all uses, then the most direct and effective way to *preserve* ocean places is to set some of them aside for the singular purpose of preservation just as national parks and wilderness areas have been created on land. Only truly compatible uses of sanctuaries, such as education, science, and low-impact recreation would be allowed. A comprehensive ocean zoning policy, if we had one, would divide the ocean into a number of a number of different use zones, including preservation zones. This was the strategy recommended by the President's Science Advisory Committee in its 1966 call for a marine wilderness preservation system.

## VI. Conclusion

Lacking as it does the singular preservation focus of the Wilderness Act, the Sanctuaries Act has proved to be an unreliable vehicle for the timely preservation of the full array of the nation's marine resources and special places in a comprehensive national system.

That the Sanctuaries Act is ineffective as a reliable preservation statute is reflected in the Act's implementation history. Because of its incongruous and conflicting mandates, lack of strategic implementation guidelines, and failure to prohibit incompatible uses, or define uniform protection standards, the Act proved baffling to NOAA and a continuing frustration to its authorizing committees. Furthermore, the Act's frequent reinvention by Congress and NOAA, though well-intentioned, has not really gotten at the root of the Act's problems.

With the purposes and uses of each sanctuary up for grabs during the designation process, highly contentious and lengthy battles have been waged between conservationists and user groups over a number of candidate sites. Indeed, this contention is almost guaranteed by the Act's elaborate designation process.

When NOAA became bogged down in designation battles in the 1980s, a protection-leaning Congress first was

forced to mandate deadlines for NOAA to designate certain sanctuaries, then had to bypass a dysfunctional process to designate Florida Keys, the Hawaiian Islands Humpback Whale, Monterey Bay, and Stellwagen Bank marine sanctuaries. In addition, when Congress found itself unhappy with NOAA's protection strategies for certain candidate sanctuaries, it intervened legislatively to prohibit new oil and gas leases at Cordell Bank and Olympic Coast, included an oil development ban in its legislative designation of Monterey Bay, and prohibited sand and gravel mining (but not oil development) at Stellwagen.

At other times, Congress has been more charitable toward certain user groups or local constituencies. For example, Congress specifically prohibited the designation of a Northwest Straits sanctuary by NOAA because local users feared that federal oversight would result in greater use restrictions without a corresponding increase in protection to the area's resources. Congress also created sanctuaries, e.g., Monterey Bay, in which commercial fishing activities were not subject to regulation under the terms of the legislative designation, despite recognition that fish stocks in those areas were in decline.

The Act is now so constrained by its own architecture that that it stands little chance of ever producing the comprehensive system of marine preservation areas envisioned by early visionaries, who hoped to create a system of marine wilderness preserves analogous to the terrestrial wilderness system. The blueprint of a permanent marine sanctuary system with the singular purpose of preservation was rejected in favor of a law that required preservation to be balanced with other uses within a sanctuary. As a result, progress toward protecting America's ocean resources has been nowhere near that needed to achieve the national network of marine conservation areas scientists say are needed to protect and restore ocean life.

In order to be capable of establishing a system of marine preservation areas that only allows uses that are truly compatible with preservation, the Sanctuaries Act would have to undergo substantial amendment. Alternatively, Congress could authorize a separate system whose components could include any areas of the ocean, including presently managed or protected areas, which met the new law's preservation and protection criteria. This was precisely the approach taken by the Wilderness Act, which provided a wilderness-overlay on existing parks, refuges, forests, and public lands, and allowed compatible uses as defined by the law. Whichever approach is taken, a bold, vigorous, and systematic effort will be needed to identify, protect, and preserve the full array of marine habitats and features during the next 10 years before they are irretrievably degraded or lost. Current trends do not bode well for conservation.

629. *Id.* at 294.

**Table 1: Sanctuary Information**

<b>Sanctuary Name</b>	<b>Designation Date</b>	<b>Square Nautical Miles</b>	<b>New Oil/Gas Leases</b>	<b>Bottom Trawling</b>
USS Monitor	1/30/75	0.75	Prohibited	Prohibited
Channel Islands	9/22/80	1,258	Prohibited	Restricted to Certain Areas
Gulf of the Farallones	1/16/81	948	Prohibited	Allowed
Gray's Reef	1/16/81	17	Prohibited	Prohibited
Fagatele Bay	4/29/86	0.19	Prohibited	Prohibited
Cordell Bank <sup>3</sup>	5/24/89	397	Prohibited <sup>2</sup>	Allowed
Florida Keys	11/16/90	2,870	Prohibited	Restricted to Certain Areas
Flower Garden Banks <sup>3,4</sup>	1/17/92	42	Prohibited	Prohibited
Monterey Bay <sup>2</sup>	9/18/92	4,023	Prohibited <sup>2</sup>	Restricted to Certain Areas
Stellwagen Bank <sup>2</sup>	11/4/92	636	Prohibited	Restricted to Certain Areas
Hawaiian Islands	11/4/92	1,035	Prohibited	Prohibited
Humpback Whale <sup>2</sup>				
Olympic Coast <sup>3</sup>	7/16/94	2,500	Prohibited <sup>2</sup>	Allowed
Thunder Bay	10/7/00	338	Prohibited	N/A
<b>Total System</b>		<b>14,065</b>		
NWHI Coral Reef Ecosystem Reserve <sup>5</sup>	12/4/00	99,500	Prohibited	

<sup>1</sup> Florida Keys NMS was designated on 11/16/90 and subsumed Key Largo (designated in 1975) and Looe Key (designated in 1981).

<sup>2</sup> Designated by Congress.

<sup>3</sup> Designation required by Congress.

<sup>4</sup> Congress added Stetson Bank to the Flower Garden Banks NMS in 1996.

<sup>5</sup> NWHI is listed as an Active Candidate for sanctuary designation.



**Table 2: Sanctuary Representation of Biogeographical Regions**

Sanctuary Name	Acadian	Virginian	Carolinian	West Indian	Louisianian	Veracruzian	Californian	Oregonian	Sitkan	Aleutian	Arctic	Indo-Pacific
USS Monitor			X									
Channel Islands							X					
Gulf of the Farallones								X				
Gray's Reef			X									
Fagatele Bay												X
Cordell Bank								X				
Florida Keys											X	
Flower Garden Banks											X	
Monterey Bay								X				
Stellwagen Bank												
Hawaiian Islands Humpback Whale												X
Olympic Coast								X				

Source: updated from House Hearing 1991, *supra* note 475, at 160.

**Table 3: Endangered and Threatened Marine Species****Endangered Marine Species**

<b>Species</b>	<b>Populations Protected</b>	<b>Year Designated</b>
Atlantic salmon	NY to Maine	2000
Blue whale	All populations	1973
Bowhead whale	All populations (occur off N. AK)	1973
Caribbean monk seal	All populations (thought to be extinct)	1979
Chinook salmon	2 populations in CA and WA	1994, 1999
Fin whale	All populations (occur in Mid- and N. Atlantic)	1970
Green sea turtle	Breeding populations off FL and the Pacific Coast of Mexico	1978
Hawaiian monk seal	All populations (occur around HI)	1976
Hawksbill sea turtle	All populations	1970
Humpback whale	All populations	1973
Kemp's ridley sea turtle	All populations	1970
Leatherback sea turtle	All populations	1970
Northern right whale	All populations (occur in N. Atlantic)	1070
Olive ridley sea turtle	Mexican nesting population	1978
Sei whale	All populations	1973
Shortnose sturgeon	All populations (only occur along E. Coast of U.S.)	1967
Smalltooth sawfish	All populations (only occur along E. Coast of U.S.)	2003
Sockeye salmon	Snake River	1991
Sperm whale	All populations (occur in N. Atlantic)	1973
Steelhead trout	2 populations off CA, WA	1997
West Indian Manatee	FL and Antillean (occurring off Puerto Rico) stocks	1967
White abalone	All populations (occurs only from S. CA to Mexico)	2001

Source: NMFS, Office of Protected Species.

**Threatened Marine Species**

<b>Species</b>	<b>Populations Protected</b>	<b>Year Designated</b>
Chinook salmon	7 populations	1992, 1999
Chum salmon	2 populations off OR, WA	1999
Coho salmon	3 populations off CA, OR	1996, 1997, 1998
Green sea turtle	All populations not listed as endangered	1978
Guadalupe fur seal	All populations (occur off S. CA)	1985
Gulf sturgeon	All populations (predominate in Gulf of Mexico)	1991
Johnson's sea grass	All populations (occurs only along E. Coast of FL)	1998
Loggerhead sea turtle	All populations	1978
Olive ridley sea turtle	All populations not listed as endangered	1978
Sockeye salmon	Ozette Lake, WA	1999
Southern sea otter	CA stock	1977
Steelhead trout	8 populations off CA, OR, WA	1997, 1998, 1999, 2000
Steller sea lion	All populations (occur off W. Coast of U.S.)	1990

Source: NMFS, Office of Protected Species.