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The National Marine Sanctuary Designation Process and its Impact on Naval Operations

by

Gregory E. Bolan

A paper submitted in partial fulfillment of the requirements for the degree of

Master of Marine Affairs

University of Rhode Island

1995

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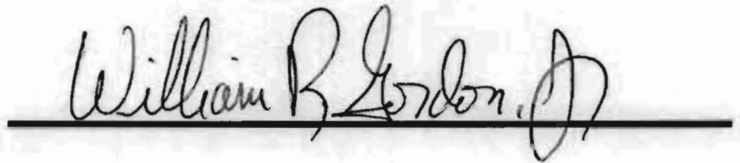
Major Paper Committee

Major Professor: 

University of Rhode Island

1995

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Disclaimer

The views expressed in this paper are those of the author and do not reflect the official policies or positions of the Department of Defense, the U.S. Government or the University of Rhode Island.

I. Introduction

The importance of environmental accountability was recognized nationwide by the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C.A. 4321- 4370d). NEPA established a procedural requirement for all federal agencies to examine the consequences of federal programs and projects (42 U.S.C.A. 4332c(i)). Although reluctant at first, the federal government has generally complied with the broad mandate represented in this legislation. Even within the Department of Defense (DOD), the environment has been raised to a national security level. Former Secretary of Defense Les Aspin created the Deputy Under Secretary of Defense for Environmental Security position in early 1993 (Boston Globe, 29 April 1994). Each of the armed services created similar billets within their respective organizations.

The establishment of these positions represented a fundamental shift in DOD philosophy. For years, DOD had sought exemption from the provisions of NEPA. This strategy of avoidance was accomplished by using guidelines promulgated by the Council on Environmental Quality (CEQ) under the provisions for national policy and defense (40 CFR 1505.2(b), 1506.11). Understandably, not all DOD actions fall within national security provisions.

Yet, as DOD adapted to a new environmental awareness and responsibility, there are ever-increasing circumstances where DOD operating activities have been constrained or encroached upon by the activities of other federal agencies.

Under a different mandate, the National Oceanic and Atmospheric Administration (NOAA), within the Department of Commerce, has the responsibility to implement the National Marine Sanctuary Program, as established by the Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972 (33 U.S.C.A. 1401-1445). The goal of this program has been to identify and protect selected coastal resources and ecosystems along the extensive U.S. shoreline. NEPA and the Sanctuaries Program both stress interagency cooperation and encourage active public participation.

One of the requirements of NEPA is for federal agencies to engage in an assessment of all major and significant federal actions (42 U.S.C.A. 4332c(i)). In order to accommodate this requirement, federal agencies perform an Environmental Assessment which examines the consequences of a proposed activity to determine if an Environmental Impact Statement (EIS) is necessary or if there is a finding of no significant impact (FONSI). If an EIS is required, agencies will focus on significant environmental issues and a

range of alternative actions (CFR 1501.4a(2)). The EIS, as an action-forcing device to ensure that NEPA policies and goals are infused into federal agencies programs and actions, is executed in response to major and significant activity under consideration. EISs can be implemented to examine the implications of either a federal project or program (project or programmatic EIS). The EIS must be used as a means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made. Under the provisions of NEPA, "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter" (42 U.S.C.A. 4332). Essentially, the implementation of other federal laws, such as the MPRSA, may be accomplished by also implementing the standards of NEPA, i.e., an EIS will be required when nominating national marine sanctuaries.

The local nomination and federal approval of a coastal area for sanctuary designation represents a major and significant federal action. Within NOAA, the Office of Coastal Resource Management's (OCRM) National Marine Sanctuary Division will respond with the drafting of an EIS on the proposed sanctuary area, as required under NEPA. The development

of an EIS is bound by requirements of full disclosure (40 CFR 1500.1(b)), and by standards that encourage and facilitate public participation (40 CFR 1500.2(d)). Therefore, the substantive and procedural content of any EIS is subject to the review and comments of all affected parties (40 CFR CH. V, 1503.1).

A. Problem Statement

This paper addresses the basis of potential and real conflicts derived by the NEPA process, as identified within and between NOAA and the United States Navy. This conflict is often exacerbated due to either a lack of communication, coordination, or both. A recent proliferation of proposed and designated marine sanctuaries in traditional Naval operating areas has complicated or hindered Naval operations (or will) to a degree where EIS derived restrictions negatively impact the Naval operations, based on (1) response readiness, and (2) increased cost of operations.

Two specific conflicts are examined in a case study approach in this paper; they include the Hawaiian Island Humpback Whale National Marine Sanctuary and Olympic Coast National Marine Sanctuary, established respectively 1992 and 1994. Some detail in the designation process is presented so that inconsistencies in policy and implementation will be evident as the case studies proceed. The trend towards increasingly restrictive language by OCRM in addressing DOD activities within sanctuary EIS's is addressed. A general discussion of the sanctuary designations made during the last eleven years is also presented. As the divergent interests of these federal players continues to build in a major conflict of policy, this paper will

seek to identify the basis for environmental mediation between OCRM and the Navy, as well as to delineate those conditions where it is likely that the Navy will employ national defense provisions to negate OCRM management efforts.

Current OCRM rulemaking (15 CFR Sec. 925.5e) requires DOD activities to avoid, to the maximum extent practicable, any adverse impacts on resources or qualities within the sanctuary, with specific exceptions based on consultation between the Department of Commerce and DOD. If these consultations conclude that endangered or threatened species are present, the Endangered Species Act (16 U.S.C.A. 1531 to 1544) requires that a biological assessment be undertaken, as well as consultations with the National Marine Fisheries Service (NMFS) to determine if any species are likely to be adversely impacted by Naval operations. This consultation can take anywhere from 30 days to a year to complete, during which time operations would be suspended. Grassroots Congressional pressure to expand sanctuary designations and aggressive high visibility actions by special interest groups have or will result in a constraint on Naval operations in each of the existing or proposed sanctuaries. As a consequence, the Navy must operate within a time-constraining and costly process.

The nature of the Navy's mission inextricably links its operations to coastal settings. The downsizing of the Navy, its closures of bases and the realignments and consolidation of Naval operations to other base locations has resulted in a concentration of Naval assets in major ports such as San Diego, California and Norfolk, Virginia. Potential sanctuary designation in these areas could dramatically impact Naval operations as witnessed by the current impact of Naval activities off Washington and Hawaii. The National Marine Sanctuary Program (NMSP) is a beneficial process which helps to preserve valuable ecosystems and mitigate preventable actions which impact coastal environments.

The broader issue, beyond the scope of this research is whether sanctuary designations are reasonable in certain locations given the traditional and historic uses of these marine locations. Should sanctuaries be designated based upon the pristine nature of an area or by the desire to attain a former level of environmental quality; in other words, should sanctuaries conserve or restore, or undertake a combination of both strategies?

Figure I Sanctuary Designations

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

II. National Marine Sanctuary Program - Background

Not long after its creation in April of 1970, the Council on Environmental Quality (CEQ) was directed by President Nixon to make a study on the ocean disposal of land generated wastes (U.S. Congress, House Report 1971). In October of that year, the CEQ forwarded its report to the President, entitled "Ocean Dumping - A National Policy" (Ibid). This report formed the basis for the Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, highlighting the immediacy and severity of coastal and marine environmental conditions and the critical need to establish a national policy on ocean dumping (33 U.S.C.A. 1401-1445).

In response to the CEQ report, the President transmitted to Congress on February 10, 1971, legislation to implement the CEQ ocean dumping recommendations. Congressman Garmatz (D - Md) introduced this executive communication as H.R. 4723, the Marine Protection Act of 1971. More than forty other similar bills were introduced on this subject, varying in provisions and areas, but essentially focused on ocean dumping. These bills concentrated on questions of "who could dump", "what could be dumped", and in broad terms, "where it could be dumped" (U.S. Congress, House 1971).

One specific proposal though, H.R. 1095, would have required the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service, to designate those portions of the navigable waters of the United States and those portions of the waters above the Outer Continental Shelf where sewage, sludge, spoil, landfill, heated effluents, or other wastes or substance ***could not*** be discharged safely; to be designated as "marine sanctuaries" (Ibid).

Joint hearings were held on the legislation by the Subcommittee on Oceanography and Subcommittee on Fisheries and Wildlife Conservation on April 5-7, 1971. After these hearings and extensive executive sessions, the Subcommittees unanimously reported to the full Committee with H.R. 9727, which was in essence an improved version of H.R. 4723, with amendments. However, H.R. 9727 contained two new titles: Title II would provide authority for short-range research by the Secretary of Commerce on the environmental effects of ocean dumping, and Title III would authorize the Secretary of Commerce to establish marine sanctuaries in cooperation with affected States and, where necessary, with governments of other countries. H.R. 9727 was reported by the Committee unanimously by voice vote, with a quorum present and was enacted on 23 October, 1972. It is interesting to observe that within the Finding, Policy and Purpose section of the Marine

Protection, Research, and Sanctuaries Act of 1972 (MPRSA), there is absolutely no mention of marine sanctuaries; the Title III revision in PL 98-498, October 19, 1984 corrected this omission. Title III is often referred to as the National Marine Sanctuary Act (NMSA), while MPRSA is commonly referred to as the Ocean Dumping Act.

The National Marine Sanctuary Program was established to protect unique and outstanding marine areas as part of a broader effort to use and conserve the nation's oceans (the Great Lakes were later included). The programs' mission is to "comprehensively conserve and protect the ocean ecosystems for present and future generations. ... to develop innovative management strategies to address demands placed on our coastal and marine waters by an ever-increasing population and to protect and insulate from inevitable miscalculations created by an imperfect understanding of the marine environment" (Cava 1993, 2).

III. The Process of Designating Marine Sanctuaries

The first sanctuary established was at the site of the USS Monitor in 1975, to protect the area of the wreck off the North Carolina coast. (Table I and Figure 1 reflect the current sanctuaries and active candidates on the site evaluation list -SEL). The next four sanctuaries were established at the end of the Carter Administration. They included: (1) Channel Islands in 1980, (2) Gray's Reef in 1981, (3) Looe Key in 1981 and (4) the Gulf of the Farallones in 1981. The Reagan Administration maintained a posture that opposed the Sanctuary program and stalled NOAA's efforts to adhere to their mandate. During these years, NOAA and some members of Congress worked hard to maintain and promote the program. During the Reagan era, Key Largo in Florida was designated in 1983 and the diminutive site, Fagatele Bay in American Samoa, was designated in 1986 (Studds 1993, 17).

Reauthorizations of the Act played a key function in the survival and expansion of the program. The 1984 Reauthorization became a referendum on the sanctuary program's survival; and although it survived, the program atrophied during the remainder of the Reagan Administration. Amendments in 1984 (U.S. Congress, House 1988, 77) improved the designation process

Table 1 Sanctuary Program Sites

Designated Sanctuaries

- Stellwagen Bank, MA
- USS Monitor, NC
- Gray's Reef, GA
- Florida Keys, FL
  - Key Largo
  - Looe Key
- Flower Garden Banks, TX/LA
- Channel Islands, CA
- Monterey Bay, CA
- Gulf of the Farallones, CA
- Cordell Bank, CA
- Hawaiian Islands Humpback Whale
- Fagatele Bay, American Samoa
- Olympic Coast, WA

Active Candidates

- Thunder Bay, MI
- Norfolk Canyon, VA
- Northwest Straits, WA

Congressional Study Areas

- Kaho'olawe Island, Hawaii

SEL Sites

- Natural Resource Sites (1983)
- Green Bay (Lake Michigan), WI
- Apostle Islands/Isle Royale (Lake Superior), MI/WI
- Western Lake Erie Islands, OH
- Cape Vincent (Lake Ontario), NY
- Nantucket Sound, MA

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993.

Table 1 Sanctuary Program Sites (Con't)

Mid-Coastal Maine
Virginia/Assateague Island, VA/MD
Ten Fathom Ledge, Big Rock, NC
Port Royal Sound, SC
Florida Coral Grounds
Big Bend Seagrass Beds, FL
Eastern Chandeleur Sound, LA
Batfin Bay, TX
Corcillera Reefs, Puerto Rico
East End, St. Croix, Virgin Islands
Southeast St. Thomas, Virgin Islands
Cortes-Tanner Banks, CA
Morro Bay, CA
Heceta-Stonewall Banks, OR
Northern Mariana Islands, South Pacific
Southern Mariana Islands
Cocos Lagoon, Guam
Facpi Point, Guam
Papaloloa Point, American Samoa

Cultural Resource Sites (Proposed)

Manitou Passage (Lake Michigan), MI
Whitefish Point/Bay (Lake Superior), MI
Narragansett Bay, RI
Yorktown Fleet, York River, VA
Battle of the Atlantic/Cape Hatteras, NC
Douglas Beach, FL
Tampa Bay, FL
Apalachee Bay, FL
USS Tecumseh/Battle of Mobile Bay, AL
Westernmost Aleutians, Alaska

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993.

(to be addressed later) and added historical, cultural, research, and educational qualities to the evaluative criteria for sites on the site evaluation list (SEL). In 1988, a reauthorization brought forth the designation of six new sanctuaries (P.L. 100-627, Nov 7, 1988). This was the result of Congressional frustration over lack of progress by NOAA in designating national marine sanctuaries. To expedite future designations, Congress also established a time window of 30 months from site activation to formal notice of designation. There were no previous time constraints in sanctuaries legislation. The deadline provision was in response to the Flower Garden Banks site nomination which was proposed in 1977 and remained in process until 1991. In 1990, Congress enacted the Florida Keys National Marine Sanctuary and Protection Act (P.L. 101-605). This law combined two previously designated sanctuaries - Looe Key and Key Largo - into an extensive sanctuary covering more than 3700 square miles of coral reef and ecosystems.

The 1992 Reauthorization established the Hawaiian Islands Humpback Whale National Marine Sanctuary and extended program rulemaking authority to protect the sanctuaries from threatening activities outside its boundaries. (Table I summarizes designated sanctuaries through April 1995).

The following table summarizes the designation process:

Action	Notice
• Final Site Evaluation List (SEL)	• Federal Register (FR) Notice
• Site selected from SEL as active candidate	• FR Notice; Public Notice of Selection
• Development of Designation Material - Starts NEPA process	• Notice of Intent to prepare DEIS*
• Regional Scoping Meeting	• FR Notice; Public Notice
• Consultations with Congress, affected Regional Fishery Management Councils, states, Federal agencies, and other interested parties; prepare DEIS, Draft Management Plan, Proposed Regulations, and Resource Assessment Report.	
• Prospectus to Congress (includes DEIS, Draft Management Plan, Proposed Regulations)	• FR Notice; Public Notice
• Public Hearing	• FR Notice; Public Notice
• Prepare FEIS*/Management Plan	• Occurs within 30 months selection as Active Candidate
• If site meets criteria, Secretary designates the national marine sanctuary	• FR Notice (Designation, Final Regulations availability of FEIS Management Plan to Congress
• Designation effective after 45 - day period for Congressional and Gubernatorial Review under Sec 304(b) of the Act.	

Table 2 Sanctuary Designation Process

*DEIS - Draft Environmental Impact Statement, FEIS - Final Environmental Impact Statement (33 U.S.C.1401 et seq)

The following discussion reviews the background of the designation process , in brief fashion, which highlights the potential problems within the system. This begins with the framework and legal guidance behind the National Environmental Policy Act (NEPA).

A. Council on Environmental Quality (CEQ)

As noted, the National Environmental Policy Act of 1969 (42 U.S.C.A. 4321 to 4370b) represented a landmark effort to recognize and improve the environment we live in. Among other things, NEPA established the Council on Environmental Quality (CEQ) whose function is to provide rulemaking guidelines and procedural provisions to all Federal agencies to implement, except where compliance under those conditions would be inconsistent with other statutory or sovereign requirements, and to provide a referral process for conflicts between agencies concerning the implementation of NEPA (40 CFR 1500.5).

1. CEQ Guidance

The CEQ in 1977 established some key revisions to the NEPA process which included the key principles in the CEQ Purpose, Policy and Mandate. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. Information must be of high quality; accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA" (Ibid 1500.1.b). Many of these guidance policies are action-forcing, such that federal agencies shall to the fullest extent possible: interpret and administer the policies, regulations, and public laws of the US in accordance with the Act and these regulations (Ibid 1500.2.b).

2. Case Law

The courts have generally relied heavily on the CEQ interpretations of the law in reaching their decisions by looking to CEQ's position as the agency charged with overall responsibility for the EIS process.

While the Ninth Circuit stands alone in giving full regulatory force to the CEQ Guidelines (*Robinswood Country Club v. Volpe*, F.2d[6 ERC 1401]9th if. 1974; *Jicarilla Tribe of Indians v. Morton* [3 ERC 1919] D.

Ariz. 1972, aff'd 471 F.2d 1275 9th Cir. 1973; *Keith v. Volpe*, 352 F. Supp. 1324 C.D. Cal. 1972), several other circuits have specifically recognized that CEQ is the agency charged with the administration of NEPA and therefore have given the Guidelines "great weight" (U.S. Congress, Senate 1977, 82-84). Agency guidelines or specific agency actions have been overturned when not in compliance with CEQ Guidelines.

For example, the Fourth Circuit in the case of *Ely v. Velde* (451 F.2d 1130, 1135-6, Note 14 [3 ERC 1280] 4th Cir. 1972), recognized CEQ as the agency established to administer NEPA through its Guidelines. While not attributing full force of law to the Guidelines, *Ely* was a strong statement in support of obligatory agency deference to the Guidelines. Similarly, the Sixth Circuit, in the case of *Environmental Defense Fund v. TVA*, (468 G.2f 1164 [4 ERC 1850] 1973), explicitly stated that CEQ is the agency "charged" with implementing and administering NEPA, and their interpretation is entitled to great weight" (Ibid).

Other circuits have relied upon the Guidelines for guidance and authority for varying degrees. The District of Columbia Circuit, since the early days of NEPA implementation, determined the Guidelines as the authoritative source on issues of NEPA interpretation. In *SCRAP v. U.S.*,

(346 F. Supp. 189 [4 ERC 1313] 1972), Judge Wright stated that the Guidelines lacked "force of law" but indicated that the CEQ interpretation must be given serious consideration, and in this case, were determinative on the issue of the requirement for an EIS (Ibid). The Second Circuit established its position in *Greene County Planning Board v. FPC*, (455 F.2d 412 2nd Cir. 1972), stating that the Guidelines were "merely advisory", but still gave CEQ interpretation considerable deference (Ibid).

The Fifth Circuit took the same position of "merely advisory" in *Hiram Clarke Civic Club v. Lynn*, (476 F.2d 5th Cir. 1973), where substantial weight was given to the Guidelines(Ibid). More than a dozen court of appeals and district court cases have relied on CEQ's comments in reaching a decision on the need for the adequacy of an EIS. In *National Resources Defense Council v. Tennessee Valley Authority*, (367 F. Supp. 128 E. D. Tenn 1973 aff'd F.2d 6th Cir. 1974), the court's decision pivoted on a letter from the CEQ which supported the concept that a program impact statement is preferable in some situations to individual project impact statements (Ibid).

In the case of *Warm Springs Dam Task Force v. Gribble*, (471 U.S. 1301 1974), Justice Douglas reflected on the lineage of cases which dealt with CEQ's authority as administrator of the EIS process. He observed that

"CEQ is the Executive Office ultimately responsible for the administration of the National Environmental Policy Act and Environmental Impact Statements" (Ibid). The U.S. Supreme Court has stated that CEQ's procedures are "mandatory regulations applicable to all Federal agencies" in *Sierra Club v. Andrus*, 442 U.S. 347, 357 (1979). CEQ's regulatory authority and applicability are explicit within NEPA.

In summary, the courts have recognized CEQ's statutory administrative authority to review, oversee, coordinate and recommend to the President those issues concerning Federal agency compliance with NEPA. CEQ's Guidelines for EIS' do not have full force of formal regulations issued pursuant to statute, but have been given significant weight by the courts in cases interpreting NEPA (Ibid). The Council's lack of statutory authority to enforce the EIS requirement places responsibility on the Federal courts to resolve implementation issues. When combined with inconsistent review of CEQ's Guidelines, the courts have contributed further to these implementation problems.

B. Final Site Evaluation List (SEL)

The National Oceanic and Atmospheric Administration (NOAA) instituted a site evaluation process in 1982 to identify sites for future consideration as national marine sanctuaries. The SEL initially consisted of twenty-nine natural resource sites and were focused on locations with conservation, recreational, ecological, or esthetic qualities. As mentioned earlier, Amendments in 1984 added historical, research, and educational qualities to the SEL selection process. NOAA's use of the term "historical" encompasses cultural, archeological and paleontological elements.

It is worth noting here that in the Announcement of National Marine Sanctuary Program Final Site Evaluation List (FSEL)(48 FR 35568), NOAA addressed comments about the size of proposed sites with the following generic comments: (1) the site boundaries provided in the SEL are general study area boundaries and will be refined and in most cases reduced if a site is brought to active candidate status; (2) **Although no maximum or minimum size limits are established, the final National Marine Sanctuary Program Regulations provide that the Channel Islands and Point Reyes-Farallon Islands National Marine Sanctuaries, covering 1,252 and 948 square miles respectively, are likely to represent the upper**

end of the sanctuary size spectrum and that future sanctuaries will be no larger (15 CFR 922 IV(b)). It is interesting to note that the newest sanctuary which has been measured, the Olympic Coast NMS, covers an area of 2,500 square miles. It is likely that the Hawaiian Islands Humpback Whale NMS may be larger.

Selection of a site from the SEL by the Secretary of Commerce as an 'active candidate' is the second phase in evaluating a site for potential designation. This typically initiates the environmental impact statement process. The Notice of Selection as an active candidate and the intent to prepare a Draft Environmental Impact Statement (DEIS) is published in the Federal Register. A site can be eliminated from consideration at any time if it does not meet the standard and criteria set forth in the Sanctuaries Act. (Note: Monterey Bay was rejected from further consideration and removed from the SEL in 1983; U.S. Congress, House 1988, 26). According to the Final Rule, National Marine Sanctuary Program Regulations (15 CFR Sec. 922.21(c)), a rejected site can not be placed back on the SEL for consideration again. This did not deter Congress from doing so, as they did not agree with the reasoning behind NOAA dropping Monterey Bay. When a selection of an active candidate is made, a draft management plan with

accommodating regulations, is prepared along with the DEIS. After these are prepared, a notice of proposed designation is published in the Federal Register and with the media serving those affected communities. At the same time, a detailed prospectus on the designation proposal, which includes the DEIS and draft management plan, is forwarded to the House Resource (Fisheries, Wildlife and Oceans Subcommittee) and the Senate Commerce, Science and Transportation Committee for review for a forty-five day period of continuous session (15 CFR Part 922).

The DEIS is circulated amongst appropriate Federal agencies and the public for comments. From that, a FEIS is prepared along with a final management plan and regulations; the Secretary of Commerce must then determine whether to designate the area as a National Marine Sanctuary. Section 922.33(a) sets forth the criteria for consideration by the Secretary in making this determination. Besides fulfilling the purpose and policies of the Act, it must be determined that:

- the area is of special national significance due to its resource or human-use values;
- existing state and federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area;
- designation will ensure the above requirement is met;

- the area is of a size and nature that will permit conservation and management.

The Secretary must consider;

- the area's natural resource and ecological qualities, historical, cultural, archeological, or paleontological significance;

- 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, research and education;

- 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 the Act;

- 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;

- the socioeconomic effects of designation;

- the fiscal capability to manage the area as a National Marine Sanctuary.

The Secretary shall consider the views of interested persons, heads of interested federal agencies, responsible officials of appropriate state and local government entities, and any reports submitted by the House or Senate Committees. The designation is then published in the Federal Register and becomes final, unless disapproved by legislation or if the Governor of an affected state certifies that the terms are unacceptable (15 CFR 922.33). This guidance is clear and should be referred to throughout the designation process, yet inconsistencies are evident as this process is implemented.

C. Environmental Impact Statements (EIS)

The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the federal government (40 CFR Sec. 1502.1). This document should serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made (Ibid 1502.2g). The clarity of EIS documents is also a concern. CEQ guidance dictates that agencies shall reduce excessive paperwork by reducing the length of environmental impact statements (EIS) by establishing page limits of no more than 150 pages for normal applications

or 300 pages for unusual or complex situations (Ibid 1502.7). Statements should be analytical rather than encyclopedic and written in plain language (Ibid 1500.4). After preparing a draft environmental impact statement (DEIS) and before preparing a final environmental impact statement (FEIS), the lead agency shall obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards (Ibid 1503.1.a(1)). Any federal agency with the above jurisdiction shall comment on statements within their jurisdiction, expertise, or authority.

The lead agency, having the greatest interest in the federal action, shall assess and consider comments both individually and collectively, and shall respond in the FEIS in one of several ways. They can modify alternatives, develop and evaluate alternatives not previously considered, supplement, improve or modify analyses, make factual corrections, or explain why the comments do not warrant further agency response. In this case, the lead agency (NOAA in the case of the National Marine Sanctuaries) must cite the sources, authorities, or reasons which support its position. All substantive comments received on the DEIS (or summaries if the response was exceptionally voluminous) should be attached to the FEIS whether or not the

comment is thought to merit individual discussion in the text of the statement (Ibid 1503.1.a and b.). Finally, in making its recommendation to Congress, the lead agency shall identify and discuss all relevant factors including any essential considerations of national policy which were balanced in making its decision and how those considerations entered into its decision (Ibid 1502.2(b)). Of the nearly 20,000 environmental assessments prepared each year, only 300 or so draft environmental impact statements are initiated (U.S. Congress, House 1987, 13).

D. Designation of Sanctuaries: NOAA vs Congress

Often Congress passes a law directing statutory responsibilities to an agency, yet at some later date, if dissatisfied with the agencies progress, Congress will intervene with the process, often with confused and mis-guided results (Gordon 1984, 257-286). A classic example is the Congressional designation of the Hawaiian Island Humpback Whale National Marine Sanctuary in 1992, before a draft environmental impact statement was even completed. In a post-hoc rationalization, the DEIS was near completion during the writing of this major paper. The figure below highlights

Congressional directives to designate National Marine Sanctuaries before proper documentation and coordination had taken place:

The Reauthorization Act of 1988 (P.L. 100-627, Nov 7, 1988) directed designation of -

Directed designation	Actual designation
• Cordell Banks by 31 Dec 1988	- actual designation - 1989
• Flower Garden Banks by 31 Mar 1989	- actual designation - 1991
• Monterey Bay by 31 Dec 1989	- actual designation - 1992
• Western Washington Outer Coast (later the Olympic Coast) by 20 Jun 1990	- actual designation - 1992

Table 3 Reauthorization Act Summary

The Authorization Act also directed that the Secretary of Commerce submit a prospectus to the House Resources Committee and the Senate Commerce, Science, and Transportation Committee on:

Prospectus	Actual designation
• Stellwagen Bank by 30 Sept 1990	- actual designation - 1992
• Northern Puget Sound by 31 Mar 1991	- yet to be designated

Table 4 Prospectus Summary

The prospectus is submitted to the House and Senate the same day the Secretary issues a notice for the Federal Register proposing a sanctuary. It consists of the terms of designation, findings and assessments, proposed

regulatory mechanisms, estimated annual costs of the designation, the DEIS, and the proposed regulations (16 U.S.C. 304(a)(1)(C)). The Act further directed studies for designation or inclusion in designated sanctuaries on various parts of the Florida Keys and Santa Monica Bay; the Florida Keys National Marine Sanctuary and Protection Act of 1990 (P.L. 101-605) eventually incorporated the entire sweep of the Florida Keys.

More specific guidance followed in the Reauthorization Act of 1992 which actually designated the Hawaiian Island Humpback Whale National Marine Sanctuary and established an 18 month timeline for NOAA to produce a management plan. The Act designated the Stellwagen Banks National Marine Sanctuary and directed the designation of Monterey Bay National Marine Sanctuary within a month. In fact, the Congressional Record stated that if the Secretary of Commerce failed to designate Monterey Bay by September 18, 1992, then the area described as Alternative 5 in the FEIS would be designated as the Monterey Bay National Marine Sanctuary effective 18 September, 1992. This action was hidden in *Public Law 102-368,* entitled:

> *Dire Emergency Supplemental Appropriations Act, 1992, Including Disaster Assistance to Meet the Present Emergencies Arising From the Consequences of Hurricane Andrew, Typhoon Omar, Hurricane Iniki, and Other Natural Disasters, and Additional Assistance to Distressed Communities, dated 23 September 1992.*

This Sanctuary has a unique background in that it was an active candidate for designation from 1978 through 1983, when NOAA abruptly removed it from the active candidate list. NOAA then argued that the existence of two other sanctuaries in California already protected similar resources and largely duplicated the purpose of designating a new Federal Sanctuary. There was also concern that the size of the Monterey Bay Sanctuary would place a significant burden on NOAA's enforcement resources. There were already a number of state and federal conservation programs in place in the area (U.S. Congress, House 1988, 26). The majority of the Committee on Merchant Marine and Fisheries did not concur with these arguments, because Monterey Bay was unique with its submarine canyons and public access capacity. The actual size of the Sanctuary would be determined by an evaluation process, and that existing conservation measures may not be adequate to protect the area due to continuing threats on Monterey Bay by various pollutants.

Throughout this process there was a glaring lack of communication and coordination with all federal agencies as called for by NEPA and CEQ. Although these actions were well-intended, but the mandated process was all but ignored. Affected federal agencies were forced to respond with crisis management to Congressional declarations. As a result, NOAA was

compelled to take on a sanctuary designation program it was neither budgeted nor manned to perform.

Within the general process of federal administration, there appears to be several layers of potentially redundant bureaucracy, including: (1) the Endangered Species Act (ESA - 16 U.S.C. 1531-1544), (2) the Marine Mammal Protection Act (MMPA - 16 U.S.C. 1361 et seq), (3) the Fishery Conservation Management Act (Magnuson Act - 16 U.S.C. 1801-1822), and (4) the Coastal Zone Management Act (CZMA - 16 U.S.C, 1451 et seq), to name a few. These laws all address in detail the need to identify and handle threatened and endangered species, the creation of critical habitats and the "taking" of marine mammals. The term "taking" is broadly defined in MMPA Sec. 1372 to include the negligent or intentional operation of a ship or plane that disturbs or molests marine mammals. The final rules and regulations for the Olympic Coast NMS stated that the draft environmental impact statement (DEIS) and management plan (MP) conceded that the purpose of the proposed sanctuary regulations was not to protect particular species from extinction. The purpose of the prohibitions was to "extend protection for sanctuary resources on an environmentally holistic basis" (15 CFR 925 24600).

Economic impact is an important consideration when designating environmental management areas. Emphasis on this consideration varies in the legislation discussed above; for example, the designation of an area as a 'critical habitat' by the Environmental Protection Agency (EPA) places less significance on economic impact than the designation of a National Marine Sanctuary by NOAA. Additionally, the jurisdiction of these various management areas is divided amongst the Fish and Wildlife Service (FWS), NOAA, and the National Marine Fisheries Service (NMFS); any actions which might impact these designated areas require consultation with the Secretary and coordination amongst affected Federal agencies.

An informal observation suggests the tendency of government and citizen groups to over-control nature based on justifiable economic conditions. This trend included territorial waters, and has now spread to exclusive economic zones. The culmination is specific legislation controlling hundreds of marine species and the human actions perceived against them. Ironically in the case of most National Marine Sanctuaries, commercial and recreational fishing are exempt from the law. Oftentimes a fine line is established between stock management and a fisherman's livelihood.

IV. Designated Sanctuaries and Potential Constraints

A breakdown of designated sanctuaries and SEL sites is listed in Table I. Those sanctuaries which have the potential for significant constraints on future Navy operations include: (1) Channel Islands, (2) Monterey Bay, (3) Olympic Coast, (4) Florida Keys, (5) Hawaiian Island Humpback Whale, (6) Northwest Straits (proposed North Puget Sound), and (7) Norfolk Canyon (proposed). Constraints arise from several causes, discussed below; these are by no means inclusive.

(1) Shock Tests

Litigation forced on the Navy by environmental groups costs time and money. One recent example is the Navy's request for a marine mammal "incidental take" permit from the NMFS. The permit was approved February 1, 1994, which cleared the way for "ship shock" tests that rely on underwater explosions to determine the combat survivability of new classes of warships. At its closest point, the test range's boundary is six nautical miles from the Channel Islands National Marine Sanctuary.

In April 1994, various environmental groups filed a lawsuit to block the Navy from detonating underwater explosives, contending that the environmental assessment done by NMFS was inadequate and it relied on

aerial surveys to determine the presence of marine mammals. The NMFS maintained that it had the best marine mammal biologists working on the assessment, with 12-15 biologists monitoring the test. The Navy stressed that the tests were critical and gave the example of the USS Princeton hitting a mine during the Gulf War; according to naval architects, one of the reasons the ship survived and no lives were lost is that it went through 200 changes and alterations after it was subjected to shock tests. The Navy spent at least $1.8 million to survey the range for the tests. The tests can't be conducted further off the coast because the distances would be too great for the planes that conduct marine mammal surveys during the tests; it would also increase the risk for ship and crew should the ship be damaged (Martin 1994, 44). The costs in the several weeks delay for the Navy amounted to at least five million dollars, cumulating from day-to-day expenses of maintaining special crews and equipment ashore and at sea waiting to conduct the test.

(2) Unbudgeted expenses

Anytime the Navy is taken to court by an environmental group, the burden falls on the Navy to demonstrate appropriate response and represents unbudgeted expenses in time delays and associated costs. Another unbudgeted expense is the additional costs to reschedule and use other

facilities due to legal delays. An example was the loss of the bombing range off the Washington coast where the Olympic Coast National Marine Sanctuary has been established. It would take more time and money to fly further off the coast, with less time on station devoted to training (and greater response time for any search and rescue requirements), to accomplish the training. This can degrade military readiness.

(3) Vessel traffic management

NOAA did not originally intend to get into vessel traffic management when designating marine sanctuaries, but a couple of initiatives are discussed in the Final Rules and Regulations (15 CFR 925). One voluntary management regime addressed is a Western States Petroleum Association (WSPA) agreement to keep coast-wise tanker traffic more than 50 nautical miles offshore when not entering port. NOAA has also recommended to the U.S. Coast Guard and International Maritime Organization (IMO) that an area to be avoided (ATBA) be established within the sanctuary. The ATBA is designed to provide sufficient time to respond to a vessel that loses power off the Olympic peninsula (15 CFR 925 24587, 24595). Vessels transporting hazardous material in this area would be requested to remain at least 25 nautical miles offshore until making approaches to the Strait of Juan de Fuca,

using the established Cooperative Vessel Traffic Management Service (CVTMS) separation scheme. In some cases, this will relocate commercial traffic into designated military warning areas, presenting a potential conflict. Commercial shippers are not in favor of this increase in transit due to additional costs in fuel and time. Two sanctuary case studies, highlighting specific conflicts, are discussed below and begin with an overview of the sanctuary boundaries and regulations.

A. The Olympic Coast National Marine Sanctuary

In 1988, Congress directed the Secretary of Commerce to designate the Olympic Coast National Marine Sanctuary under the reauthorization of the Marine Protection, Research and Sanctuaries Act of 1988 (P.L. 100-627, November 7, 1988). It was designated on 11 May 1994 (59 FR 24586, May 11, 1994).

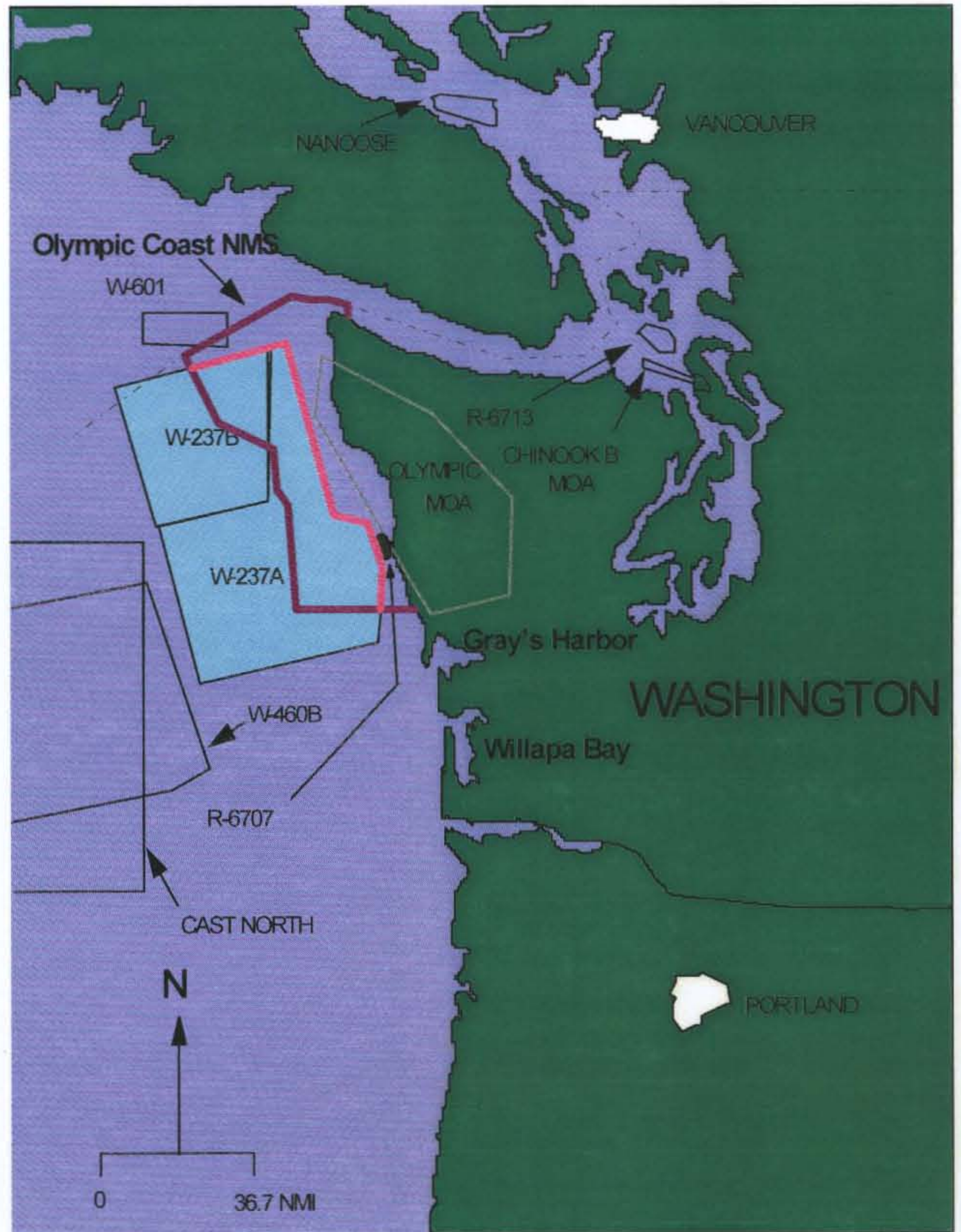
The Sanctuary encompasses 2,500 square nautical miles of coastal and ocean waters, and associated submerged lands, off Washington State's Olympic Peninsula, including the waters of the Strait of Juan de Fuca eastward to Koitlah Point. Boundaries are from the 100 fathom isobath to mean low tide and north to the international boundary, excluding harbors and

estuaries (reference Figure II). It is worth reiterating here that sanctuaries were not intended to exceed the size of the Channel Island NMS, at about 1250 square miles (15 CFR 922 IV(b)). The size of the Olympic Coast NMS exceeds the collective size of the first seven sanctuaries in the program and is two-thirds the size of the Florida Keys NMS. This represents an obvious conflict with the manageability and fiscal capability criteria previously legislated.

In report language accompanying the legislation, Congress noted that the Olympic Coast possessed a unique and nationally significant collection of flora and fauna, and that the combination of rocky stacks, sea birds, marine mammals, and its adjacency to the Olympic National Park merited designation of the area as a national marine sanctuary (U.S. Congress, House 1988, 26).

The Sanctuary is a highly productive, nearly pristine ocean and coastal environment making it one of the more dramatic natural resources of the coastal United States. The region's high biological productivity is seasonally enhanced by upwelling along the edge of the continental shelf, especially at submarine canyons during periods of high solar radiation. It provides an essential habitat for a wide variety of marine mammals and birds, and is of

Figure II Olympic Coast Map



Source: Compiled From U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

particular interest because of the presence of endangered and threatened species that live or migrate through the region. Also of particular interest are the migration routes of the endangered California gray whale, the threatened northern sea lion, the occasional presence of the endangered right, fin, sei, blue, humpback, and sperm whales. In addition, seabird colonies of Washington's outer coast are among the largest in the continental U. S. and include a number of endangered and threatened species (Tables 4, 5, 6).

The high biological productivity of the coastal and offshore waters in the Sanctuary support valuable fisheries which contribute significantly to the State and tribal economies. The region also encompasses significant historical resources including Indian village sites, ancient canoe runs, petroglyphs, Indian artifacts, and numerous shipwrecks (Ibid).

Table 5 Endangered and Threatened Species off Olympic Peninsula

Pursuant to Section 7 of the ESA, the USFWS of the Department of the Interior, and the NMFS of the Department of Commerce, were consulted in the performance of the biological assessment of possible impacts on threatened or endangered species that might result from the designation of a National Marine Sanctuary off the Olympic Peninsula. The consultations confirmed that some 14 Federal Endangered (FE) and six Federal Threatened (FT) species are known to occur in the area. In addition, one Washington State Endangered Species (SE) and one Washington State Threatened Species (ST) are known to inhabit the sanctuary ecosystem. Consultations determined that Sanctuary designation is not likely to adversely affect these species. The species identified are:

No.	Common name	Scientific name	Status
1.	Aleutian Canada Goose	Branta canadensis leucopareia	FE
2.	American peregrine falcon	Falco peregrinus anatum	FE
3.	Bald Eagle	Haliaeetus leucocephalus	FT
4.	Blue whale	Balaenoptera musculus	FE
5.	Brown Pelican	Pelicanus occidentalis	FE
6.	Fin whale	B. physalus	FE
7.	Gray whale	Eschrichtius robustus	FE
8.	Harbor Porpoise	Phocoena phocoena	ST
9.	Humpback whale	Megaptera novaeangliae	FE
10.	Steller Sea Lion	Eumetopias jubatus	FT
11.	Right whale	Eubalaena glacialis	FE
12.	Sei whale	B. borealis	FE
13.	Short-tailed albatross	Diomedea albatrus	FE
14.	Snowy Plover	Charadrius alexandrinus	SE
15.	Sperm whale	Physeter catodon	FE
16.	Leatherback Turtle	Dermochelys coriacea	FE
17	Loggerhead Turtle	Caretta caretta	FT
18.	Green Turtle	Chelonia mydas	FT
19.	Olive ridley	Lepidochelys olivacea	FT
20.	Sacramento River Winter-Run Chinook Salmon	O. tshawytscha	FT
21.	Snake River Sockeye Salmon	O. nerka	FE
22.	Snake River Fall Chinook Salmon	O. tshawytscha	FE

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

Common Name	Genus/Species
Loons	
Red-throated loon	*Gavia stellata*
Pacific loon	*Gavia pacifica*
Common loon	*Gavia immer*
Grebes	
Horned grebe	*Podiceps auritus*
Red-necked grebe	*Podiceps grisegena*
Western grebe	*Aechmophorus occidentalis*
Tube Noses	
Northern fulmar	*Fulmarus glacialis*
Sooty shearwater	*Puffinus griseus*
Storm-Petrels	
Fork-tailed storm-petrel	*Oceanodroma furcata*
Leach's storm-petrel	*Oceanodroma leucorhoa*
Pelicans	
Brown pelican	*Pelecanus occidentalis*
Cormorants	
Double-crested cormorant	*Phalacrocorax auritus*
Brandt's cormorant	*Phalacrocorax penicillatus*
Pelagic cormorant	*Phalacrocorax pelagicus*
Herons	
Great blue heron	*Ardea herodias*
Swans, Geese, Ducks	
Tundra swan	*Cygnus columbianus*
Greater white-fronted goose	*Anser albifrons*
Snow goose	*Chen caerulescens*
Brant	*Branta bernicla*
Canada goose	*Branta canadensis*
Green-winged teal	*Anas crecca*
Mallard	*Anas platyrhynchos*
Northern pintail	*Anas acuta*
Northern shoveler	*Anas clypeata*
American wigeon	*Anas americana*
Canvasback	*Aythya valisineria*
Scaup species	*Aythya species*
Harlequin duck	*Histrionicus histrionicus*
Black scoter	*Melanitta nigra*
Surf scoter	*Melanitta perspicillata*
White-winged scoter	*Melanitta fusca*
Common goldeneye	*Bucephala clangula*
Bufflehead	*Bucephala albeola*
Common merganser	*Mergus merganser*
Red-breasted merganser	*Mergus serrator*
Ruddy duck	*Oxyura jamaicensis*
Hawks and Eagles	
Osprey	*Pandion haliaetus*
Bald eagle	*Haliaeetus leucocephalus*
Falcons	
Merlin	*Falco columbarius*
Peregrine falcon	*Falco peregrinus*
Plovers	
Black-bellied plover	*Pluvialis squatarola*
Semipalmated plover	*Charadrius semipalmatus*
Oystercatchers	
American black oystercatcher	*Haematopus bachmani*
Shorebirds	
Wandering tattler	*Heteroscelus incanus*
Spotted sandpiper	*Actitis macularia*
Whimbrel	*Numenius phaeopus*
Long-billed curlew	*Numenius americannus*
Ruddy turnstone	*Arenaria interpres*
Black turnstone	*Arenaria melanocephala*
Surfbird	*Aphriza virgata*
Sanderlings	*Calidris alba*
Western sandpiper	*Calidris mauri*
Least sandpiper	*Calidris minutilla*
Rock sandpiper	*Calidris ptilocnemis*
Dunlin	*Calidrus alpina*
Red-necked phalarope	*Phalaropus lobatus*
Gulls and Terns	
Pomarine jaeger	*Stercorarius pomarinus*
Parasitic jaeger	*Stercorarius parasiticus*
Long-tailed jaeger	*Stercorarius longicaudus*
Bonaparte's gull	*Larus philadelphia*
Heerman's gull	*Larus heermanni*
Mew gull	*Larus canus*
Ring-billed gull	*Larus delawarensis*
California gull	*Larus californicus*
Herring gull	*Larus argentatus*
Thayer's gull	*Larus thayeri*
Western gull	*Larus occidentalis*
Glaucous-winged gull	*Larus glaucescens*
Black-legged kittiwake	*Rissa tridactyla*
Caspian tern	*Sterna caspia*
Arctic tern	*Sterna paradisaea*
Common tern	*Sterna hirundo*
Alcids	
Common murre	*Uria aalge*
Pigeon guillemot	*Cepphus columba*
Marbled murrelet	*Brachyramphus marmaratus*
Ancient murrelet	*Synthliboramphus antiquus*
Cassin's auklet	*Ptychoramphus aleuticus*
Rhinoceros auklet	*Cerorhinca monocerata*
Tufted puffin	*Fratercula cirrhata*
Swallows	
Northern rough-winged swallow	*Stelgidopteryx serripennis*
Barn swallow	*Hirundo rustica*
Crows and Jays	
Northwestern crow	*Corvus caurinus*
Common raven	*Corvus corax*
Starlings	
European starling	*Sturnus vulgaris*
Songbirds	
Savannah sparrow	*Passerculus sandwichensis*
Finches	
American goldfinch	*Carduelis tristis*

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

Table 6 Bird Species Observed in Sealion Rock Study Area

Table 7 Bird Species Additional to those Listed in Table 6 Occurring In or near Sanctuary Boundaries

Common Name
Genus/Species

Loons
Yellow-billed loon
 Gavia adamsii
Arctic loon
 Gavia immer

Tube Noses
Short-tailed albatross
 Diomedea albatrus
Laysan albatross
 Diomedea immutabilis
Black-footed albatross
 Diomedea nigripes
Buller's shearwater
 Puffinus bulleri
Flesh-footed shearwater
 Puffinus carneipes
Pink-footed shearwater
 Puffinus creatopus
Manx shearwater
 Puffinus puffinus
Short-tailed shearwater
 Puffinus tenuirostris

Storm-Petrels
Least storm-petrel
 Halocyptena microsoma
Wilson's storm-petrel
 Oceanites oceanicus
Ashy storm-petrel
 Oceanodroma homochroa
Mottled petrel
 Teredroma inexpectata
Solander's petrel
 Teredroma solandri
Murphy's petrel
 Teredroma ultima

Pelicans
American White Pelican
 Pelecanus erythrorhynchos

Cormorants
Red-faced cormorant
 Phalocrocorax urile

Swans, Geese, Ducks
Barrow's Goldeneye
 Bucephala clangula
Oldsquaw
 Clangula hyemalis

Shorebirds
Northern phalarope
 Lobipes lobatus

Gulls and Terns
South polar skua
 Catharacta skua
Laughing gull
 Larus atricille
Glaucous gull
 Larus hyperboreus
Slatey-backed gull
 Larus schistisagus
Ivory ull
 Pagophila eburnea
Red-legged kittiwake
 Rissa brevirostris
Ross's gull
 Rhodostethia rosea
Aleutian tern
 Sterna aleutica
Elegant tern
 Sterna elegans
Forster's tern
 Sterna forsteri
Sabine's gull
 Xema sabini

Alcids
Crested auklet
 Aethia cristatella
Least auklet
 Aethia pusilla
Whiskered auklet
 Aethia pygmaea
Kittlitz's murrelet
 Brachyramphus brevirostris
Black guillemot
 Cepphus grylle
Parakeet auklet
 Cyclorrhynchus psittacula
Xantus' murrelet
 Endomychura hypoleuca
Horned puffin
 Fraturcula corniculata
Thick-billed murre
 Uria lomvia

Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

1. Naval Operations Impact: Basis of Sanctuary Conflict

The following activities are prohibited in the Olympic Coast NMS by the Final Rules and Regulations (15 CFR 925):

- exploring for, developing or producing oil, gas or minerals within the Sanctuary;
- discharging or depositing from within the boundary of the Sanctuary, any material or other matter **except**; (1) fish, fish parts or bait used in or resulting from traditional fishing operations; (2) biodegradable effluent incidental to vessel use; (3) water generated by routine vessel operations excluding oily-wastes; (4) engine exhaust; and (5) dredge spoil in connection with beach nourishment projects related to harbor maintenance activities;
- depositing or discharging, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures Sanctuary resource or quality, except for five exclusions above;
- moving, removing or injuring or attempting to move, remove or injure a Sanctuary historical resource; does not apply when resulting incidentally from traditional fishing operations;
- drilling into, dredging or otherwise altering the seabed of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary except if any of the above results incidentally from - anchoring vessels, traditional fishing operations, installation of navigation aids, harbor maintenance associated with Federal projects in existence, construction/repair/replacement/enhancement or rehabilitation of boat launches, docks or piers, beach nourishment projects;
- taking (removing, moving, catching, collecting, harvesting, feeding, injuring, destroying or causing the loss of, or attempting to take, remove etc.) marine mammals, sea turtles or seabirds in

or above the Sanctuary, except as authorized by NMFS or USFWS;

- flying motorized aircraft at less than 2000 feet above the Sanctuary, except as necessary for valid law enforcement ... . This prohibition is designed to limit potential noise impacts, particularly those that might startle hauled-out seals and sea lions, and colonial seabirds along the shoreline margins of the Sanctuary;
- possessing within the Sanctuary any historical resource or marine mammal, sea turtle or seabird, regardless of where the resource was taken from;
- interfering with, obstructing, delaying or preventing investigations, searches, seizures or disposition of seized property in connection with enforcement of the Act; these last two prohibitions serve to facilitate enforcement actions for violations of Sanctuary regulations. The maximum statutory civil penalty for violating a regulation is $100,000; each day of a continuing violation constitutes a separate violation. A permit is required to conduct a prohibited activity; except for taking, the above prohibitions don't apply to activities necessary for valid law enforcement or emergencies threatening life, property or the environment (15 CFR Sec. 925.5).

The regulations further state that all Department of Defense (DOD) military activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. The prohibitions above do not apply to the following military activities performed by DOD in W-237A & B, and Military Operating Areas A & B in the Sanctuary :

- hull integrity tests and other deep water tests;
- live firing of guns, missiles, torpedoes, and chaff;

- activities associated with the Quinault Range including the in-water testing of non-explosive torpedoes;
- anti-submarine warfare (not defined)

New activities may be exempted from the prohibitions by the Director (of the Office of Ocean and Coastal Resource Management, NOAA) or designee after consultation between the Director or designee and DOD. The Department of Defense is prohibited from conducting bombing activities within the Sanctuary (15 CFR 925.5(e)(2)).

In a reply to comments addressing fishing regulations within the Sanctuary, which was published in the Federal Register announcing the final rules and regulations for the Sanctuary, the following response was made by NOAA:

"A blanket reduction of resource-use activities across the Sanctuary could not be imposed without credible evidence that each resource affected is threatened by population decrease or stock failure. Absent such evidence, the Act requires that existing uses be facilitated to the extent compatible with the primary objective of resource" (15 CFR Sec. 925 24598).

How then is a blanket prohibition on bombing different than one on fishing? While fishing management is pursued through other agencies, the principle remains that there is no more credible evidence of DOD activities impacting or threatening protected resources than commercial and recreational fishing activities having similar impacts. Interestingly, the final

regulation regarding DOD activities differed from the proposed regulation essentially by prohibiting all bombing activities within the Sanctuary. Naval Pacific Commands (and potentially only some of the critical parties concerned) were given little time to review the draft final EIS (DFEIS) and were not apprised of the rule changes. Review by all concerned parties, particularly the operators, was crucial in order to ensure that the proposed clause addressing DOD operations included all ongoing activities on the date of sanctuary designation. The DFEIS required documentation of all Navy operations to ensure these activities were grandfathered at the time of Sanctuary designation. Any undocumented activities would have to be handled under the rules an new activities, requiring consultation with the Director and application for a permit.

It is interesting to note that while bombing is prohibited, live firing of guns, missiles, torpedoes, chaff and anti-submarine operations are allowed, as well as hull integrity tests and other deep water tests (15 CFR Sec. 925.5d(i)). Was this a compromise, an oversight, or inconsistent treatment of activities which may pose a threat to marine resources; would these threats be more or less harmful than bombing? As hinted before and discussed later in the paper,

there are other regulations which must be complied with for many of these actions, eg., Endangered Species Act.

Prior to Sanctuary designation, it is probable that most of the public's attention was focused on Sea Lion Rock, although there was bombing in other areas of the sanctuary and beyond, in designated warning areas (reference Figure II). Sea Lion Rock is a eighty by thirty foot uninhabited volcanic rock, which is typically awash at high tide, and is located about 2.5 miles from the coastline. This site was used as an alternate practice bombing range by Navy A-6 aircraft from NAS Whidbey Island, by aircraft carriers operating in the area during exercises, and by other armed services. Only inert ordnance was dropped, in accordance with established flight procedures detailed in an approved Operations Plan. Appropriate clearing passes were made by aircraft prior to any bombing runs.

The Navy funded a study conducted by the Washington Department of Game during 1984-1985, to evaluate the impact of inert bombing activities on wildlife in the Sea Lion Rock study area, extending from Pt. Grenville north to Destruction Rock. As a result of the study, flight paths were altered to minimize noise levels reaching wildlife habitats on rocks 3.5 miles away. The study concluded that "A-6 activities conducted in accordance with the

operations plan result in minimal, and apparently insignificant, impacts on wildlife" (U.S. Department of Commerce 1993, II-139). This study was widely criticized for many reasons, including: (1) the study was conducted during an El Nino year, (2) more extensive studies should have been conducted longer on bird and mammal populations, (3) the study did not examine a no-use alternative which weakened a comparative analysis, and (4) methodology researchers were unaware of all military overflights in the area. The Navy had been given permission for indefinite use of Sea Lion Rock in 1949 by the Secretary of the Interior. In October 1992, several environmental groups filed suit against the Department of the Interior, the U.S. Fish and Wildlife Service (USFWS), and the Navy to cease bombing activity over Sea Lion Rock. At this time, the loss of Sea Lion Rock did not merit a lengthy and costly litigation effort by the Navy, since the rock wasn't absolutely critical to its mission. The Navy announced it would no longer use it, and the Secretary of the Interior rescinded the permit in August, 1993.

According to the Final EIS, the "bombing activities over Sea Lion Rock had the greatest impact on seabirds and marine mammals. They would exhibit startled reactions to the loud noise of the A-6 bomber. The seabirds flushing from their nests would often knock their chicks from the nests, leaving them vulnerable to prey by other birds. This reaction is extremely detrimental to seabird populations which are vulnerable to population impacts because they are colonial, mature late in their development, and produce only a few offspring at a time. Indicative of the serious decline due to a variety of factors are the common murres, whose population has plummeted from

approximately 30,000 in 1980 to about 3,000 in 1992. Marine mammals also react in a startle response, some by stampeding into the water often crushing the young in the process" (U.S. Department of Commerce 1993, III-47). How is the accuracy of this assessment measured?

The FEIS likely overstated its concerns. The intensity of use of this site suggests impacts are not so extensive. In a letter to NOAA from the Pacific Fleet Command, the Navy indicated that bombing practice was infrequent, averaging 24 sorties (or hours) per year for the last four years (Larson 1989). The FEIS indicated usage declined from 18 days to 5 days per year from 1986 to 1992. Hours also declined from 31.35 hours in 1986 to 9 hours in 1992 (U.S. Department of Commerce 1993, II-135). The NOAA data is most doubtful in its ability to support a significant risk to marine resources by Naval aircraft.

It is worth noting that in the FEIS, it was stated that "actions conducted in this training area were, until recently, considered vital to national defense. With the downsizing of the Navy, however, this training site is no longer considered as vital to Fleet readiness" (II-133). Several pages later, the EIS stated that the "Navy regards Pacific Fleet operations off the coast of Washington as essential to Fleet readiness" (II-140). Another inconsistency involved a letter from the Assistant Secretary of the Navy, Installations and Environment, to the U.S. Fish and Wildlife Service, *included in the FEIS*,

which stated that there was no specific evidence that Navy activities materially impaired the purpose of the refuge around Sea Lion Rock. It also stressed the importance of that area as a training asset for a back-up range and for carrier operations (Schafer 1992). Yet the FEIS stated that the loss of the bombing range could place an "operational inconvenience" on the Navy. A truer agenda suggested that the prohibition would provide a more positive experience for those individuals living on the Peninsula or visiting the National Park and Sanctuary (U.S. Department of Commerce 1993, III-49).

The recent Base Realignment and Closure (BRAC) process significantly changed the mission at NAS Whidbey Island by establishing it as a receiver site for U.S. Navy west coast maritime patrol aircraft (MPA) squadrons. There is also a carrier battle group (CVBG) assigned to Everett, Washington, with requirements for critical surface and air operations in the area. The MPA mission relies heavily upon the unrestricted use of off-shore warning areas in order to fulfill primary mission area requirements. Prohibiting or severely restricting military activities in those portions of the warning areas which overlie the Sanctuary would remove the purpose of the warning area, impacting training, operations and readiness.

Specific impacted readiness areas include anti-submarine warfare (ASW) activities. Related questions would include determining to what degree sonobuoys, smoke markers, and signaling devices can be used in the water? With the Navy's mission in littoral warfare becoming more prominent in our changing world, shallow water ASW tactical training and proficiency are critical. Additionally, MPA units provide important services to deploying submarines, often within the 100 fathom isobath. As noticed earlier, forcing bombing missions beyond the 100 fathom isobath would increase crew risks as Search and Rescue (SAR) response times could exceed aircrew water survival time. The greater distance would also mean less time on station due to longer transit times to arrive on scene. Again, this translates to increased cost in terms of aircrew risk and mission cost. Another question involves whether mines can be deployed within the 100 fathom isobath, consequently impacting scoring and mine recovery. The closest available place for similar training would be in Southern California where transit costs would be significant. Additional Naval economic concerns involve increased time requirements to support the planning and consultation process associated with new Naval operations. The essential point here is that while each individual interruption in mission operations may not be significant, collectively they can

represent a serious degradation in planning and executing operations which support of national readiness.

B. The Hawaiian Islands Humpback Whale National Marine Sanctuary

The Hawaiian Islands Humpback Whale National Marine Sanctuary was Congressionally designated in November, 1992 pursuant to the Oceans Act of 1992 (P.L. 102-587, Sec. 2301). The primary purposes of the sanctuary are to protect humpback whales and their breeding habitat and to provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the sanctuary. Other resources inhabiting the waters of the Sanctuary include; several additional cetacean species (sperm, pilot, false killer, pygmy, etc.), a majority of the Hawaiian population of juvenile and adult green sea turtles, the endangered leatherback and olive ridley sea turtles, and the highly endangered Hawaiian monk seal. There are a number of seabird colonies in the Sanctuary as well. The Sanctuary supports an extensive coral reef ecosystem and commercially valuable fisheries (U.S. Department of Commerce 1993, I-6).

The area described in the sanctuary include the warm, shallow, nearshore waters of the four-island area of Lanai, Maui, Molokai, and

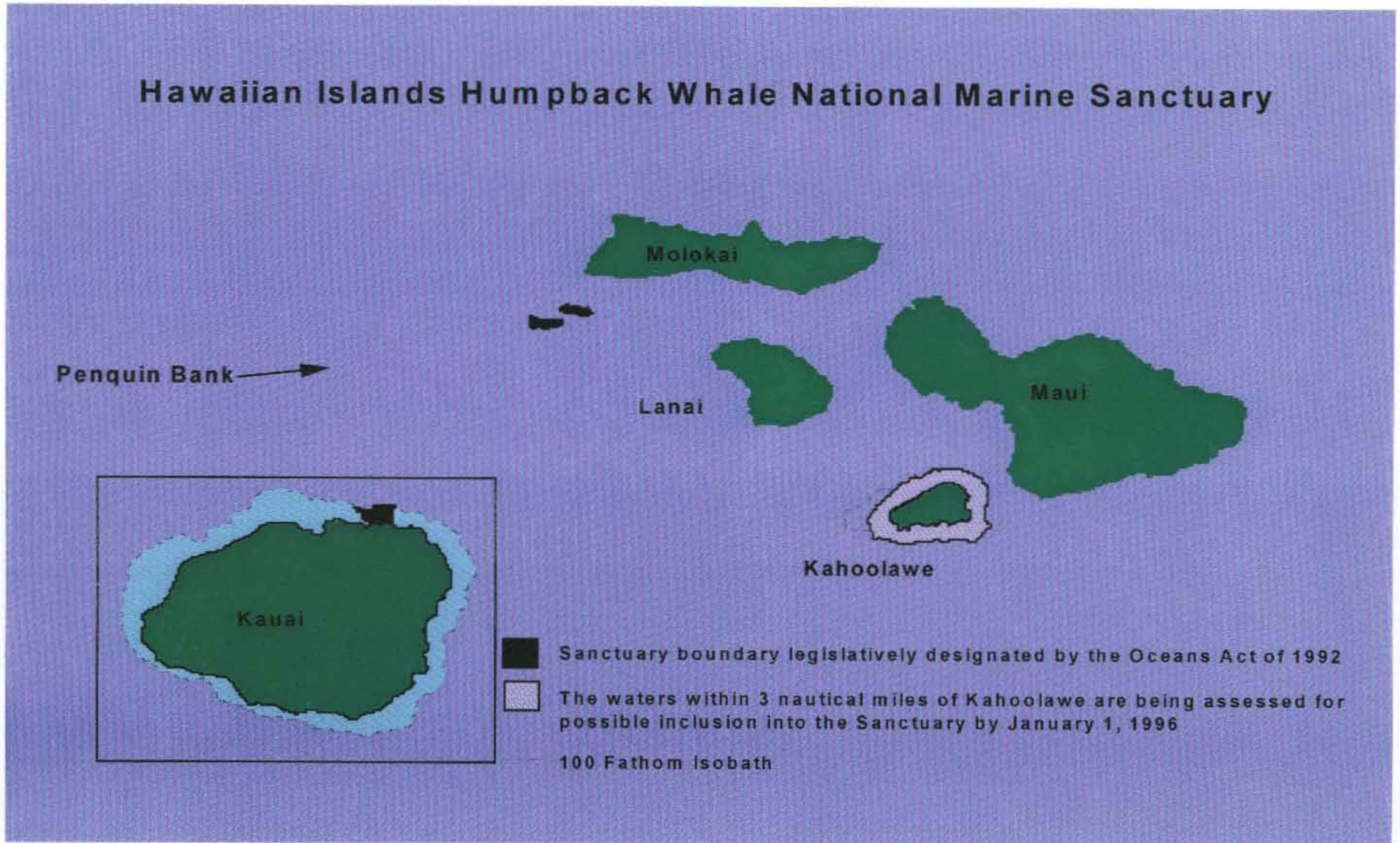
Kahoolawe, which are known to be important areas for humpback whale reproductive activities during their annual five to seven month visits to Hawaiian waters (NOAA 1994, 4). Currently, the technical boundaries are under review as part of the DEIS. These extend seaward of the mean high tide and associated swash to the one hundred fathom isobath adjoining Lanai, Maui, and Molokai, including Penguin Bank but excluding the area within 3 nautical miles of the swash zone of Kahoolawe Island (this will be included in the Sanctuary as of 1 January 1996 unless Commerce certifies to Congress that it is not suitable). Boundaries also extend to the deep water of Pailolo Channel from Cape Halawa, Molokai, to Nakalele Point, Maui, and southward, to the one hundred fathom isobath adjoining the Kilauea National Wildlife Refuge on the island of Kauai (Ibid). The boundaries for the current sanctuary and the proposed boundaries for the expanded sanctuary are depicted in Figures III and IV The purposes of the Sanctuary are:

(1) to protect humpback whales and their habitat in the area described;

(2) to educate and interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment;

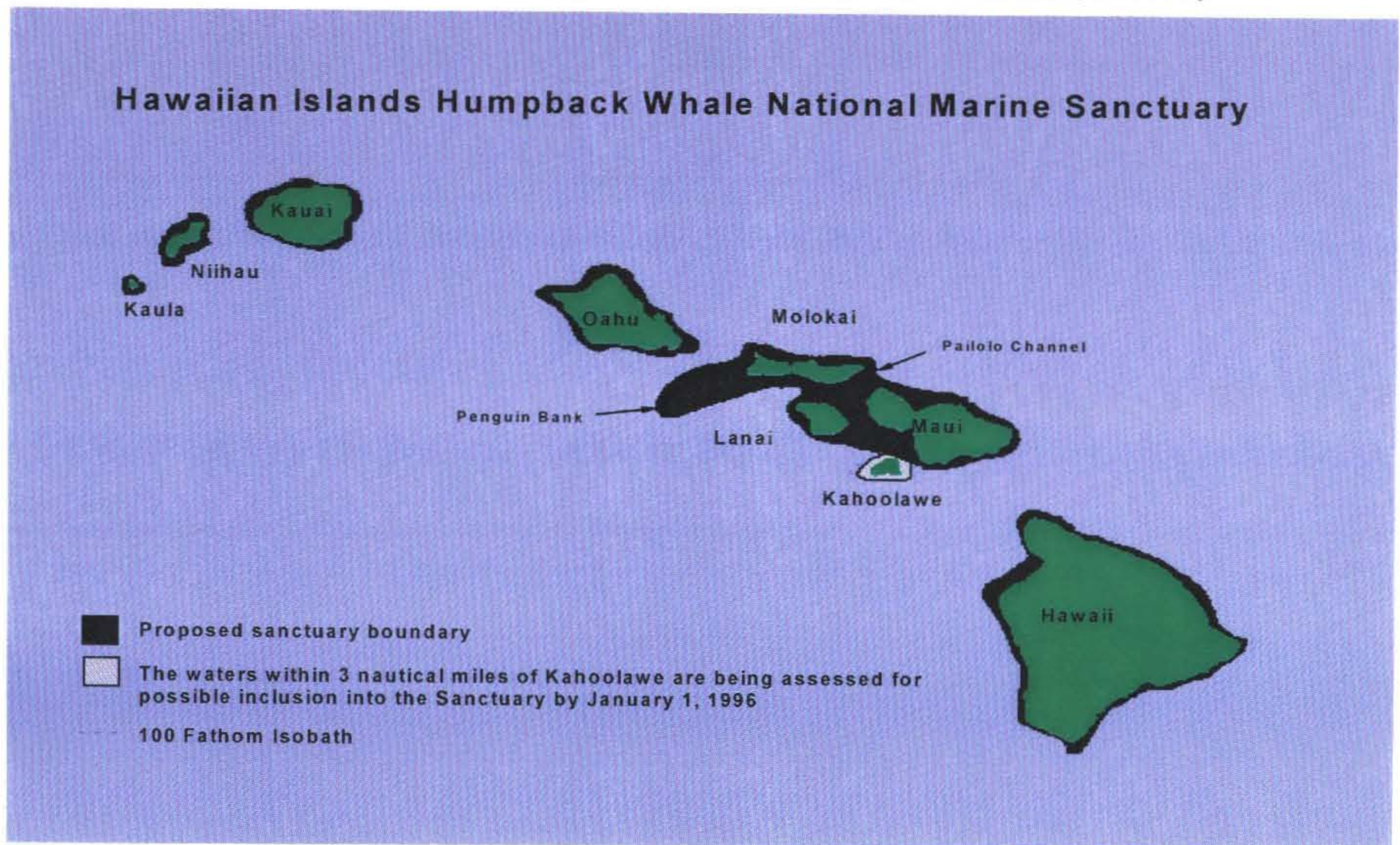
(3) to manage such human uses of the Sanctuary consistent with this subtitle and Title III of MPRSA as amended by this Act; and

Figure III Hawaiian Island Humpback Whale NMS Map - Sanctuary boundary



Source: U.S. NOAA and State of Hawaii Summary Draft EIS for Hawaii Humpback Whale NMS Jun 1994

Figure IV Hawaiian Island Humpback Whale NMS Map Proposed Sanctuary Boundary



Source: U.S. NOAA and State of Hawaii Summary Draft EIS for Hawaii Humpback Whale NMS Jun 1994

(4) to provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the sanctuary designated.

The definition of the humpback whale's habitat for this purpose is:

> "The coastal marine waters, including its separable and collective properties, that are considered essential to the conservation of the humpback whale. Such coastal marine waters should allow (1) space for individual and population growth and for normal behavior; (2) sites for breeding, reproduction, and rearing of offsprings; and generally (3) waters that are protected from disturbance and representative of the ecological distribution of the species. The properties of these waters may include, but are not necessarily limited to, temperature, salinity, depth profile, currents, turbidity, nutrients, and other natural qualities including *acoustic properties* of the water column, from the high water mark to the edge of the 100-fathom isobath, as well as the shallow water bathymetry and substrate. The sole exception is the deeper waters over the Pailolo Channel off the islands of Maui and Molokai as it provides an important linkage between preferred habitats" (NOAA 1994, 8).

This definition, while detailed, raises specific questions, particularly in establishing what a "disturbance" is. Is a disturbance any activity which impacts the water properties stated above? If that is the case, to what degree must the water be disturbed and what is the frequency of occurrence? Natural events such as storms can impact many properties, such as current, temperature, salinity and turbidity. It's worth noting that commercial and recreational fishing are exempt from prohibitions. There was strong political

pressure from the fishermen that their industry be exempt from sanctuary regulations.

The next section will address more specifics with regard to military operations in the Hawaiian Islands.

1. Naval Operations Impact: Basis of Sanctuary Conflict

In 1973, the North Pacific humpback whale was listed as endangered. Its numbers had diminished to about ten percent of the estimated 15,000 which existed prior to exploitation. Intensive commercial whaling removed more than 28,000 animals from the North Pacific during the 20th century, possibly reducing this population to as few as 1,000 before it was placed under international protection after the 1965 hunting season (Rice 1978). NOAA received a nomination for a humpback whale sanctuary in the Maui area in 1977 and the site was listed as an active candidate on the SEL in 1982. NOAA issued a DEIS in 1984, but the lack of state and public support at that time resulted in its withdrawal from consideration. The sanctuary proposal was revitalized in 1990 when Senator Akaka (D-HI) moved to stop the military use of Kahoolawe as a live ordnance range by introducing Senate Bill 3088, creating the Kahoolawe Island Conveyance Commission. During

this period, Representative Saiki (R-HI) succeeded in getting President Bush to issue a memo ceasing bombing on Kahoolawe in October 1990 (Branson, 8 November 1994).

The Kahoolawe Island Conveyance Commission was funded $1.5 million by the 1991 DOD Appropriations Act (P.L. 101-511), establishing it under the terms and conditions of Senate Bill 3088. At a public hearing in September 1991, NOAA indicated its intentions to nominate other waters for sanctuary inclusions. As indicated earlier, the Hawaiian Island Humpback Whale National Marine Sanctuary was Congressionally designated in 1992 as part of the 1992 Oceans Act (P.L. 102-587). Negotiations between the Navy and the Senator Inouye who's staff failed to yield acceptable boundaries and language. Penguin Bank, vital for submarine shallow testing (discussed later), was included over the Navy's objections, but the Navy's request for exemption in waters off Oahu and Kauai were honored. NOAA indicated that its regulations in work now will exempt all existing DOD activities from sanctuary restrictions; however, their draft language has yet to achieve that purpose. NOAA's initial proposal was to model it after Monterey Bay regulations; unfortunately, the Navy never accepted that language. The Monterey Bay NMS regulations basically stated that "all DOD activities shall

be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities"(U.S. Department of Commerce 1992). It excluded current DOD activities from most prohibitions; new activities required consultation between the Director (OCRM) and DOD.

Several issues are troublesome. There appears to be little consensus and documentation defining the environment required to provide the necessary habitat for the whales. Incorporating a whale habitat as a sanctuary resource results in restrictions on operations in waters, whether or not a whale is likely to be present at the time of the operation. Leaning to the side of conservatism, NOAA could limit operations which have no practical impact, on whales or their habitat. Second, the species involved appear to be recovering without the sanctuary, as their original problem stemmed from commercial whaling. There are already sufficient existing statutes (Endangered Species Act, Marine Mammal Protection Act, Coastal Zone Management Act) which offer specie protection by requiring the Navy's involvement with the National Marine Fisheries Services in the decision-making process. This consultative process can apply to any sanctuary. Since the live range at Kahoolawe has been used consistently since 1941, it is reasonable to expect less density of whales in that area than around the

islands of Maui, Molokai, and Lanai. In reality, there are more whales in the area, which suggests there may be no significant impact from Naval operations.

RIMPAC is a large Naval exercise run annually among the Hawaiian Islands. It involves several ally nations, including Australia, Japan, South Korea, Canada, and potentially Thailand and Chile in the future. Some of the invaluable joint training taking place within this sanctuary include: SEAL insertions, non-combatant evacuations, amphibious operations, landing raids, bottom mining, and anti-submarine sonar practice; essentially most of it involves beach operations. Basic training in the area includes ship maneuvering, SEAL swimmer delivery exercises with submarines and Explosive Ordnance Detachment (EOD) underwater explosive training. Depending on the final wording of the rules and regulations, much of these activities are at risk. Southern California is not a viable alternative for ally involvement or for the range of specific training activities.

The closure of the Kahoolawe live firing training range is an classic example of the impact of restricting Naval operations. All cruisers and destroyers homeported at Pearl Harbor must complete and maintain live-fire Naval Gunfire Support (NGFS) qualifications prior to deployment. In the

past, a ship could get underway from Pearl Harbor, conduct a seven hour transit to the range, devout half a day to qualifications and return to Pearl Harbor within a day. With the closure of Kahoolawe, the nearest NGFS range is off Southern California, requiring a five to six day transit each way. So training that could be done within a two day period now requires two weeks, significantly increasing fuel expense and time away from homeport. It would also devote two weeks to one of approximately 200 training events.

Penguin Bank is used for submarine post-repair testing prior to deep ocean submersion and is the only shallow water area in Hawaiian waters suitable for these required tests. Elimination of this area as a sea trial test site would result in a submarine conducting a 2,200 mile transit to California operating areas for testing; this is an impractical and potentially unsafe transit for an uncertified ship. Submarine mine warfare training and ASW exercises are also conducted in this shallow water area. If prohibited, they will also face a transit to California to complete training. The loss of the capability to validate repairs could undermine the necessity for the repair facility and jeopardize a significant number of native Hawaiian jobs. A plan to consolidate most of the Navy's attack submarines in Hawaii would be totally inappropriate if these prohibitions were to be implemented.

Each additional operational restriction placed on surface and sub-surface ships as a result of the sanctuary will make Pearl Harbor less viable as a homeport of the future. This may satisfy some environmentalists, but it could represent the loss of a strategic forward deployed base and impact the economy through the loss of thousands of jobs.

In terms of cost, fuel allocations limit the number of steaming days for all Navy ships. Atlantic and Pacific fleet ships are limited to an average of 28 days per quarter for underway time. As it stands now, those precious steaming days are extremely compressed for the ships to satisfy many rigorous inspections and training requirements. To have to expend that time for extensive transits would be cost prohibitive.

One viewpoint is that all current and future DOD operations should be exempted. To do otherwise allows NOAA interference with proposed tactics, exercises and testing within the Naval service.

C. Base Realignment and Closure (BRAC) and the Domino Effect

If the operational mission of a DOD facility is made to be too restrictive due to fiscal and regulatory constraints, then that facility should be a candidate for BRAC or DOD to close it in order to pursue efficient fiscal

responsibility. The Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA) stated that "the Secretary shall consider the *socioeconomic effects* of sanctuary designation" (P.L. 92-532, sec. 303(b)1(I)). There are also considerations for economic impact under Executive Order 12291 which will be covered later.

To oversimplify the two cases here, why have a Naval Air Station if the aircraft are restricted in performing their mission? Why have a Submarine Repair Facility if the submarines can not be tested for safe operations following repair work? Even if BRAC doesn't select these sites, they would remain at the top of the list for future negotiations in defense budget cuts.

BRAC also reduces the availability of alternatives for base homeporting and relocations: If specific units are moved due to environmental limitations, the ultimate cost could be the loss of the mission. The following section addresses the essentials of this issue, specifically what available data has substantiated this costly and restrictive rulemaking which places Navy operations and its related readiness at risk?

D. A Question of Data Substantiation

The research and data supporting the Final Environmental Impact Statement for the Olympic Coast NMS were phenomenal, particularly with respect to the level of detail on natural resources. Yet vague issues were unresolved, including: Where is the substantiated evidence that various coastal Naval operations in fact impact the survivability of our natural resources? In linking a growing threat to endangered and threatened species with Naval operations, what is the impact of unprohibited commercial and recreational fishing on these species, or resources in general?

While the Endangered Species Act (ESA)(16 USC Sec 1531-1543) and Marine Mammal Protection Act (MMPA)(16 USC Sec 1361 et. seq) are designed to provide a management framework to preserve specific species from being overfished, there is some redundancy of this action in Sanctuary regulation. Is it possible for these endangered and threatened species to adapt to a changing environment, and if so, at what point does the rapidity of change start taking a negative toll on these species? In other words, are species endangered or threatened because of Naval operations, or because there is no realistic or practicable means of enforcing ESA and MMPA regulations? If the Navy has been bombing the same area (Sea Lion Rock)

since 1944, have the area resources adjusted or avoided the area, or remain/return to sacrifice themselves each year?

There are several inconsistencies regarding the protection of marine resources in the final rules and regulations on the Olympic Coast NMS. In response to comments on fishing restrictions, NOAA stated that regulation of fishing was not within the scope of the Sanctuary designation process, that existing fishery management authorities were adequate to address fishery resource issues. There is a broader mandate under MRPSA to protect all resources on an ecosystem-wide basis (15 CFR Sec. 925, 24597). Yet in another area of comments and responses, the final rules and regulations state that MPRSA will provide a stronger deterrent with higher penalties for protection of endangered and threatened species than other legislation (Ibid 24599). In the FEIS, emphasis is placed on endangered and threatened species, particularly coho, chinook and sockeye salmon, both from a resource and economic standpoint (U.S. Department of Commerce 1993, I-14).

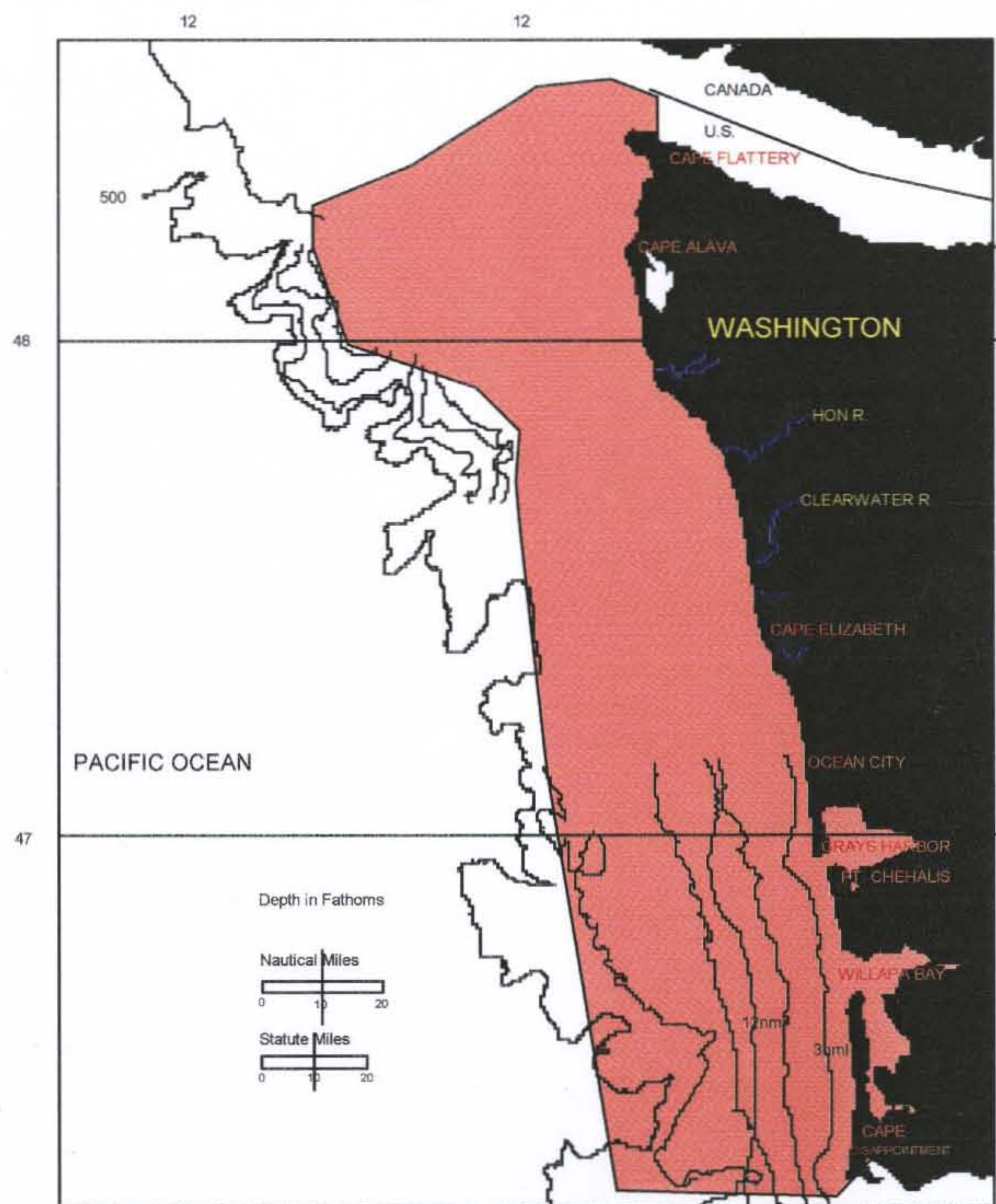
As of 1992, commercial and recreational fishing of salmonids were a billion-dollar-a-year business. In 1991, the sockeye salmon were listed as endangered species after only four returned to spawn at the Snake River - only one returned in 1994. There were various contributing factors. For

example, dams obstruct salmon runs and there are eight dams in the Snake River to be negotiated. Another is sediment run-off generated by clear-cutting areas which smothers salmon eggs. The creation of 250,000 miles of dirt logging roads has also contributed to the problem (Chadwick 1995, 30). There is concern over salmon routes within 50 nautical miles of the shoreline, which traverse a bombing areas outside the sanctuary; but it appears that fishing (stock management and harvest limits) and damaged spawning grounds are the principal means of decline requiring attention.

The FEIS addressed the southern part of the EIS study area, which was not included in the preferred alternative area ultimately designated a sanctuary (Figure V). Specifically, the coastal waters off Gray's Harbor and Willapa Bay are enriched with living resources, including oyster beds, clams, pink shrimp, Dungeness crab, Gray whale migration routes, and major sport salmon fishing areas. According to Chadwick (1995, 12), the California Gray whale has increased to about 24,000, sufficiently recovered to depart the endangered species list in June 1994.

- *The southern study area adds approximately 46% of the relative density of invertebrates harvested by commercial and recreational fishers <u>in the entire study area</u>* (FEIS IV-35).

Figure V Olympic Coast NMS Study Area



Source: U.S. Department of Commerce Olympic Coast NMS FEIS Nov 1993

NOAA considered that protection of these estuary areas was best achieved by inclusion in programs such as the National Estuarine Research Reserve System, the National Estuary Program, or the Coastal Zone Management Program (15 CFR Sec. 925 24587).

- This southern area is also significant in that *it represents approximately 43% of the relative abundance of fish species in the entire study area* (Ibid).

The seaward portion was valued as being significant for marine mammals because it is the migration corridor for the right, minke, and humpback whales. Interestingly, this area has already experienced heavy development and does not have the pristine qualities of the northern areas (U.S. Department of Commerce 1993, IV-36). There are several ways to interpret this, but none consistent with the overall view of preserving marine resources. While Gray's Harbor and Willapa Bay may be managed under an Estuary Program, their influence throughout the coastal area is significant. It would seem that this equally significant southern area would be a candidate for sanctuary protection to ensure conditions do not become worse.

E. Grandfather Clause Language

Each legislative action supporting a National Marine Sanctuary designation addresses both prohibited and authorized activities. DOD activities are specifically addressed within these rules and regulations (Appendix I), and vary to some extent in each sanctuary. Earlier clauses essentially waived or "grandfathered" prohibitions on DOD activities. The summary of prohibition language below indicates a more restrictive trend as newer sanctuaries are designated.

- The early clauses (Channel Islands, 1980) essentially waived prohibitions on current DOD activities in the interest of national defense. Additional activities having significant impact would require consultation with the Assistant Administrator (NOAA) for determination (15 CFR 935.7b).

- The Farralon Islands NMS (1981), the Looe Key NMS (1981) and the Gray's Reef NMS (1981) also followed this practice.

- In 1983 (Key Largo NMS), the language changed slightly to state that activities essential to national defense or an emergency would not be prohibited; consultations for new activities were not addressed (15 CFR 929.6c).
- The Fagatele Bay NMS clause was a little stricter, specifically listing prohibited activities unless permitted by the Assistant Administrator or as may be necessary for national defense (15 CFR 941).

- In the 1991 Flower Garden Banks DOD clause, the prohibitions were more conditional (see Appendix I).

- A new trend began in 1992 with the Stellwagen Bank NMS, stating "DOD activities shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on the resources or qualities of the Sanctuary. DOD military activities may be exempted from the prohibitions...by the Director or designee after consultation with the Director or designee and DOD. If it is determined that an activity may be carried out, such activity shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on resources or qualities of the Sanctuary" (15 CFR 940.5b).

There are several explanations for these clauses. They reflect a growing lack of communication and coordination from within and between federal agencies. In the case of the Olympic Coast NMS, there was a significant change between the proposed and final rules regarding Naval operations. The greatest surprise element was the "no bombing" clause. No preparations were implemented for the final rule and in fact, the Coast Guard message addressing the Sanctuary regulations did not raise any attention to the "no bombing" prohibition (CCGD Thirteen Seattle 081606Z Jul 94). The United States Coast Guard is the primary maritime enforcement agency for Sanctuary regulations in waters beyond State jurisdiction. NOAA administers the program and carries out enforcement actions through local sanctuary managers, the National Marine Fisheries Services (NMFS) and through cooperative partnerships with federal, state and local agencies. There was a failure to disseminate the notice on the bombing prohibition which became

evident when an Air Force OA-10 aircraft dropped live ordnance within the newly designated sanctuary on 11th of August and again in Warning Area W-237A on the 16th of August 1994. This is an area recognized locally to be part of the salmon migratory runs. This action generated much public interest among Congressional representatives, the media and Native Americans; all live ordnance drops were immediately suspended until a final review of the situation was completed (ComNavBase Seattle WA 172100Z Aug 94, ComNavSurfPac San Diego CA 291335Z Aug 94).

In the case of the Hawaiian Islands Humpback Whale NMS, the initial support by Senator Inouye was lost in final legislative form. This NMS was never intended to impact DOD operations, but altered and grew in complexity as NOAA developed it. Since this legislation was forced on both NOAA and DOD by Congress, with no EIS, management plan or rules developed, negotiations are currently underway to reach mutually agreeable verbage and rules. NOAA has proposed to extend the Sanctuary to shallow waters around all major islands; Pearl Harbor is excluded, but not Kaneohe Bay or Kailua Bay. The waters around Kahoolawe are not included now, but will probably be included in the future. Naval authorities view this as unworkable, not only from the viewpoint of significant operational impact and cost, but a precedent

which sets the stage for further public controversy with Naval activity near the Sanctuary. If an EIS has not been completed on this addition, the Navy should force it by filing a complaint with CEQ.

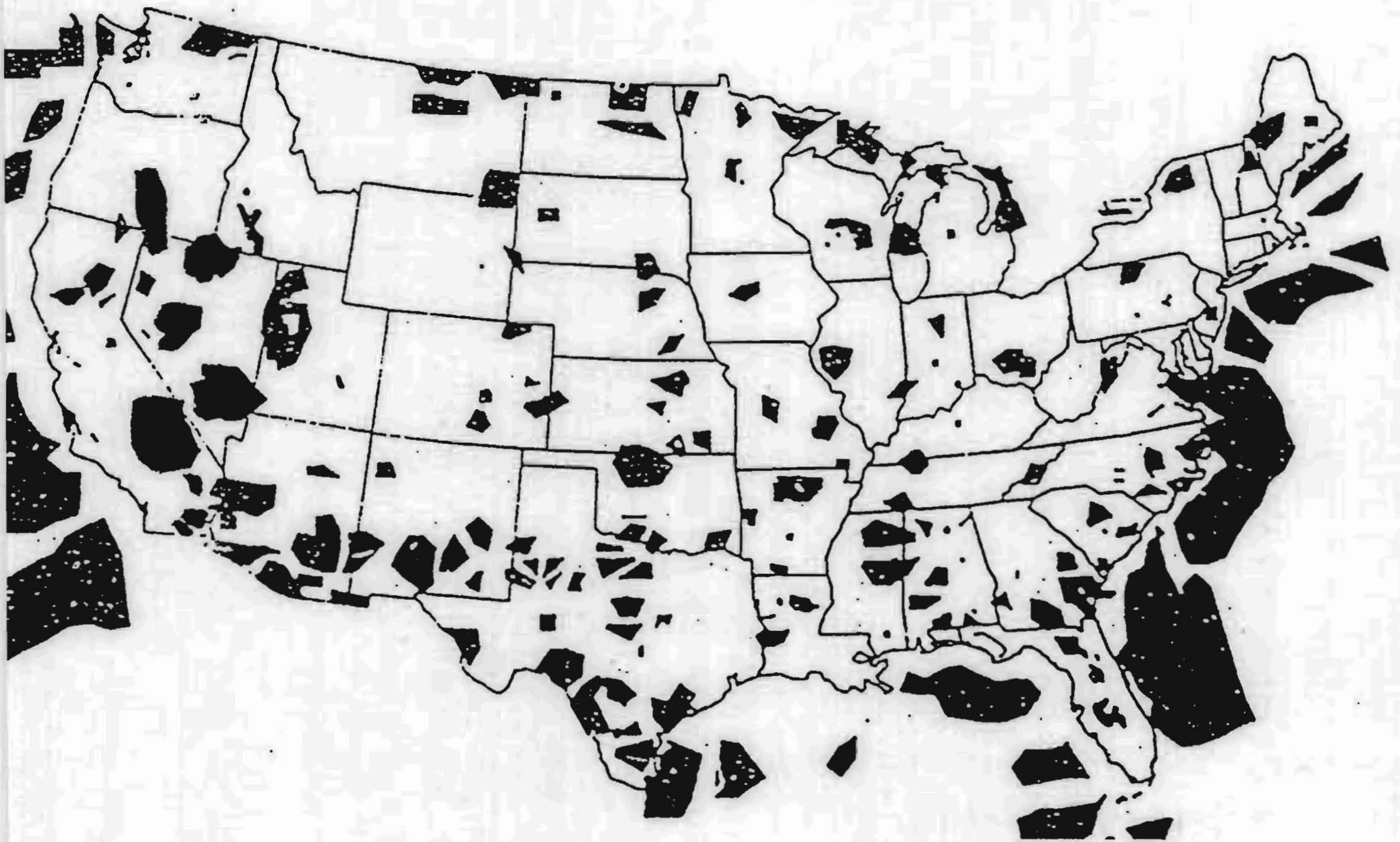
F. FAA Conflicts

Figure VI is a graphic representation of the special use airspace within the United States. Flights through any of these areas require coordination with the FAA and the authorities controlling the respective regions. The same rules should apply to the sanctuaries, and be reflected in aviation charts for flight planning purposes. Where there are special flight prohibitions which are not coordinated through the FAA, then it is difficult for pilots to plan accordingly.

There are overflight restrictions in several of the National Marine Sanctuaries, some of which may be viewed as an extension of National Wildlife Refuges ashore, or as minimum protection to limit potential noise impacts for species and nesting birds situated along the shoreline. In the case of the Olympic Coast NMS, the overflight restriction is 2000 feet; in the Hawaiian Islands Humpback Whale NMS, it is proposed to be at 200 feet; Monterey Bay NMS is 1000 feet. The FEIS stated that "NOAA recognized

MILITARY SPECIAL USE AIRSPACE

Figure VI Special Use Airspace



Special Use Airspace:

All Three Types - Restricted, Warning, and Military Operating Areas

Source: U.S. Congress, Senate. Committee on Environment and Public Works, Subcommittee on Hazardous Waste and Toxic Substance. Hearing on complying with NEPA and Authorization of appropriations for OEQ, 24 Nov 1987

that overflights are regulated under the Federal Aviation Regulations (FARs). Unlike the FARs, however, Sanctuary overflight regulations are intended to protect the living marine resources of the Sanctuary from disturbance by low-flying aircraft" (U.S. Department of Commerce 1992). Not only is the Federal Aviation Administration not listed as a recipient of the FEIS (within DOT, only the USCG received a copy), but there was no indication that any prior coordination took place at the regional or national level. NOAA's "management" of the National Airspace System appears to be contrary to the congressional mandates in the Federal Aviation Act of 1958.

There is little apparent documentation which substantiates that aircraft noise harms marine resources. Questions can be directed to the noise emitted by commercial and recreational watercraft, where sound introduced within the water medium travels further for potentially greater impact. What is the documentation on noise impact harm from the frequency of overflights, concurrent with the timely appearance of the beached seals, sea lions and colonial birds along the shoreline (15 CFR Sec. 925.5a(7)), particularly in relation to the tide?

G. Executive Order 12291. February 17, 1981

This Executive Order on Federal Regulation directs that regulatory action shall maximize the aggregate net benefits to society, setting regulatory priorities and ensuring potential benefits outweigh potential costs. It establishes a review process for every "major rule", requiring a Regulatory Flexibility Analysis. The Director of the Office of Management and Budget reviews the Analysis, resolves any issues raised or ensures they are presented to the President (Sec. 3(e)(1)). The Analysis or proposed rulemaking can not be published unless this approval process is complete. This Order is only intended to improve the internal management of the Federal government. A "major rule" means any regulation that is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

NOAA concluded in the Final Rule for the National Marine Sanctuary Program Regulations (15 CFR Part 922) that its regulations were not "major rules" because they would not result in the actions listed in the criteria listed above. In the case of the Olympic Coast NMS, the proposed rules reflected the Administrator's position that the rules would not likely meet the above

criteria (FR Vol. 56, No. 183, 47842); the Final Rule does not even make reference to it. However, this statement is found in the Final Environmental Impact Statements of other National Marine Sanctuaries (Monterey Bay, Key Largo, Olympic Coast). Again, the real and potential costs to the Navy have been pointed out in previous discussions.

H. Fiscal Capability within NOAA

Many of the problems identified with NOAA's implementing the Sanctuaries Act stem from inadequate funding. In a 1988 report by the Committee on Merchant Marine and Fisheries authorizing appropriations for the Sanctuary Act, this problem was recognized (U.S. Congress, House 1988, 22). Several different sources cite that the costs of performing an EIS range from a quarter of a million to one million dollars. If NOAA's budget is left at two-three $ million per annum, it's not hard to ascertain their difficulty in maintaining current sanctuaries, along with their efforts to establish more.

There have been other fiscal drains on NOAA's economic resources. One particular area was damage to sanctuary resources and the lack of statutory authority to demand reimbursement for NOAA costs. For example, in August 1984, the 400-foot freighter M/V *Wellwood* ran aground on

Molasses Reef in the Key Largo NMS. At the request of the Department of Commerce, the U.S. Justice Department filed a $22 million civil action against the owner and operator of the *Wellwood*, including $18.75 million for natural resource damages; $2.1 million in civil penalties; $650,000 for NOAA research and monitoring costs; and $500,000 for U.S. Coast Guard salvage costs. The suit was settled in January 1986 for $6.275 million, the disposition of which was the U.S. Coast Guard would be reimbursed and the remainder would go into the U.S. Treasury (U.S. Congress, House 1988, 15). This is not an isolated example. Amendments were made to H.R. 4208 under a new Section 313 in Title III, clarifying liability and giving authority to the Secretary to retain and expend awards for damages and response costs.

H.R. 4208 also reauthorized the National Marine Sanctuaries Program through 1992 at amounts escalating from $3 million in 1989 to $4.5 million in 1992 (Ibid). Two months earlier, Jack Archer, of the Marine Policy Center, Woods Hole Oceanographic Institute, demonstrated a grim analogy during hearings before the Subcommittee on Oceanography, while addressing funding for the sanctuary program: "The National Park Service spends more than $700 million in this fiscal year managing about 350 sites. The Sanctuaries Program is operating on $2.5 million to manage seven sites with

three more coming on line. These figures speak to a lack of commitment in protecting resources, or that the protection of land resources is more important than ocean resources"(U.S. Congress, House 1988, 26).

The Reauthorization of the Sanctuary Program, Title III Section 313, in 1992, appropriated $8 million for 1993, $12 million for 1994, $15 million for 1995, and $20 million for 1996 (P.L. 102-587, November 4, 1992). This was $3 to $5 million less per year than was proposed in H.R. 4310, the original reauthorization proposal by the Committee on Merchant Marine and Fisheries (U.S. Congress, House 1992, 35). Although the funding is becoming more realistic, the need exists to trim the bureaucracy.

V. Mediation of the Conflict within the Existing Regulatory Framework

Where does resource protection over rule Federal readiness? The framework exists within NEPA and the CEQ to derive the answer. A "reasonable person approach" to legislation and implementation of the various environmental laws would expedite compliance and reduce bureaucracy. Douglas H. Chadwick wrote an outstanding article in the March 1995 issue of National Geographic concerning the Endangered Species Act, upon which one can draw a parallel with the National Marine Sanctuary Program. In the United States, at least 500 species and subspecies of plants and animals have become extinct since the 1500's. Based on the assumptions that each lifeform may prove valuable in ways we cannot yet measure and that each is entitled to exist for its own sake as well, Congress enacted the Endangered Species Act in 1973 (Chadwick, 1995, 7). It provided the Federal Government with sweeping powers to protect recognized species of marine mammals, birds, and fish, and there habitat, in both state and federal waters, as determined by the U.S. Fish and Wildlife Service (FWS). The greatest form of protection is the prohibition on "taking." Defined broadly in this case to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," the FWS interprets harm to

modification or degradation and acts which may annoy species to the extent that essential behavior patterns are significantly disrupted (50 CFR 17.3). The endangered and threatened list had 109 species on it in 1973; it now exceeds 900 with another 3,700 waiting approval (Chadwick 1995, 9).

Funding is also a major problem in this area. This is where a parallel condition exists with the NMS program. What are the other costs to society, in terms of economic balance, nature's balance and property rights, as a result of legislation? For example, there is the grizzly bear who has forced sheep ranchers out of business in Montana. Another example is the Northern Spotted Owl in the Pacific Northwest which cost millions in sales and thousands in jobs (bearing in mind the positive aspect was the halting of logging which was quickly reducing the area's rich rain forest to stumps, with a side-effect of causing uncontrolled run-off which pollutes the salmon streams). The victims of the ESA view it as a law pushed beyond all common sense. The NMFS and FWS decisions to list species as endangered or threatened are based on questionable scientific data, without predictable end results, and without factoring in economic and political factors. Once listed, any potential for harm to a species requires consultation with NMFS or FWS.

The FEIS process in the sanctuary programs does consider economic and political factors. A potential conflict which exists there is that NOAA is the lead agent performing the environmental impact statement for NOAA's purpose of creating a sanctuary, with appreciable pressure coming from Congress and interest groups to justify its charter. As Chadwick pointed out, there are sound resource laws on the books, such as the National Environmental Policy Act, the Coastal Zone Management Act, the Clean Water Act, the Fishery Conservation Management Act (Magnuson Act), ESA, and the Marine Mammal Protection Act (MMPA). They are just not enforced!

The Magnuson Act provides for the conservation and management of all fishery resources in the zone between three and two hundred nautical miles offshore; it also applies to marine plant life (16 USC Sec. 1801 et seq). The MMPA is designed to protect all species of marine mammals, in both State and International Waters. Its primary management feature includes: (1) a moratorium on the "taking" of marine mammals; (2) the development of a management approach designed to achieve an "optimum sustainable population" for all species; and (3) protection of populations determined to be "depleted" (50 CFR 18.4). There appears to be a significant amount of

redundancy between ESA, the Magnuson Act, MMPA and the Sanctuary Act. Recalling from the primary criteria for National Marine Sanctuary designation; "it must be determined that existing State and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area; the area is of a size and nature that will permit conservation and management; and the fiscal capability to manage the area as a National Marine Sanctuary" (15 CFR 922.3). Is this criteria being adequately applied? All of this environmentally oriented legislation consumes resources in the form of money, personnel and time; some of it is more enforceable or better enforced, and all of it is well-intentioned. A fresh look at environmental legislation with a holistic understanding of the intended purposes, with a realistic and enforceable management plan, could consolidate this legislative approach into one of common sense.

When House hearings were taking place in 1988 for the Authorization of the National Marine Sanctuaries Program, the General Counsel of the Commerce Department, in a letter to the Merchant Marine and Fisheries Committee Chairman, objected to the 30 month time limit for the designation process. He stated that the average time to meet requirements of the MPRSA, NEPA, and the regulatory review process was four years (U.S.

Congress House 1988). The Reauthorization Act of 1992 designating the Hawaiian Islands Humpback Whale NMS allowed only 18 months for a comprehensive management plan. This plan was not completed at the time of this writing. The cost and time in this process must be reduced; it would be worth studying the value of establishing an independent organization to perform environmental impact statements to expedite objective conclusions in an efficient manner.

If at the outset of proposed environmental legislation affecting ocean areas, the Navy could delineate conditions under which they would have to employ national defense provisions, a plan could be developed which would avoid negating proposed management efforts. These conditions would have to be tied to training and readiness, since history supports that armed conflict in a part of the world which impacts our national security doesn't allow enough warning time to prepare properly from an inadequate position. It would greatly simplify matters if there was only one agency to consult with in the event of a potential taking of a specie due to required operations. Since the Coast Guard continues to be tasked with enforcing all legislation within territorial water, without receiving budget and personnel increases, possible assistance by the Navy in this area, in conjunction with normal underway

training, could balance the load and give the Navy an additional interest in supporting a reasonable management plan.

The Secretary of the Navy recently initiated a study to improve the Navy's process for implementing environmental statutes and policies in areas of acquisition, test and evaluation, and operational decisionmaking. The many complications of the law match the daily complexity of Naval operations. Individual command responsibility may be too decentralized and current specific operational guidance is lacking. Improved coordination and planning for weapons tests, ship shock tests, and other operations will allow sufficient time for environmental compliance and ultimately save time and money, improving military readiness and helping to preserve the environment.

VI. Conclusion

Worst case scenarios for Naval operations are easy to arrive at if the current trend of sanctuary designations occur with similar restrictions. There are numerous special use airspace areas, including warning, restricted and military operation areas (eg., San Clemente Island, San Nicolas Island, Tangier Island, etc.) off both coasts which are potential candidates for environmental isolation (Figure V). Some of these areas, particularly off the coast of Southern California, provide unique sites for training which can't be replaced or duplicated elsewhere. If environmentalists find cause to designate sanctuaries or legislate restrictions in these areas, the Navy would be at risk in not maintaining one or more areas of mission readiness, hence ensuring the probable loss of one or more mission capabilities.

The following points summarize the key conflict areas in this paper:

- Inappropriate Congressional intervention
- Naval Impacts and Costs
- Redundant or Overlapping Legislative Coverage
- Lack of Quantifiable Data to Verify Cause and Effects
- Better Agency Coordination

Inappropriate Congressional intervention. Congress acted out of frustration with NOAA's lack of progress in moving the designation process along by forcing action on NOAA without proper budget and staff support, and essentially violated their own laws (i.e., designating a sanctuary before the designation process was completed in accordance with MPRSA). With NOAA beginning to be properly budgeted and an eighteen month time limit placed on the process, Congress should stand back and allow NOAA to perform its function. If eighteen months is unrealistic, why is it and what can be done to correct it? Improvements in that process could be addressed by the CEQ.

Naval impact and costs. Transit and delay costs are easy to tally; it is difficult to put a dollar figure on readiness, but if it takes up to four times as long to accomplish it, then a significant impact on Fleet readiness will result. As mentioned earlier, limited steaming days are compressed enough; the current declining trend in DOD's budget makes longer transits unacceptable for satisfactory workups for mission readiness. International demand for Naval presence globally is growing with "operations other than war" developing in many third world regions. Responding to these crises is making it even more crucial to maintain high readiness since training time is

being eliminated. NOAA needs to establish a reasonable Grandfather Clause to allow military operations to continue in designated training areas with minimal delays for coordination until better data is available substantiating adverse impact on marine resources.

Redundant or overlapping legislative coverage. The plethora of environmental legislation has been addressed with some redundancy evident. Perhaps CEQ is in the best position, by virtue of its charter, to review the big picture in environmental legislation and present recommendations on NEPA reorganization and a streamlining of legislation which can be realistically enforced. A pro-active role needs to be pursued by CEQ, or another organization, to oversee coordination amongst agencies and provide guidance to Congress for the necessary legislation. Short of CEQ being properly supported to perform its designated role, a recommendation is to establish an independent agency to workup environmental impact statements to ensure an objective and efficient system in measuring and pursuing data. From the essence of total quality management (TQM), fix the process rather than trying to fix the product.

Lack of quantifiable data to verify cause and effect. This data, if it exists, isn't reflected in the EISs reviewed. Recognizing the difficulty in

measuring a "taking" stemming from specific Naval operations, a "reasonable person approach" is needed to ascertain what, where and when a predictable incident could take place; what environmental impact can be directly attributed to Naval activities, and what is the impact on a particular specie and/or in a specific operating area? Even if the entire West Coast, from 12 to 50 nautical miles out from the shoreline is a transit area for endangered and threatened species, it is not reasonable to restrict the whole area for occasional operations. The National Marine Sanctuary Program should be implemented in a responsible and accountable manner without unreasonably constraining the mission effectiveness of the U.S. Navy.

Better agency coordination. Human nature bears out any organization's tendency to focus on its specific mission, potentially at the cost of not supporting a larger effort to improve on a more complex problem. If all federal agencies considered the big picture in its actions, particularly with pro-active guidance from a central authority, there could be a more cohesive effort in improving given environmental conditions.

It is difficult to predict the future outcome of this conflict as it exists now. There appear to be three alternative options:

(1) A period of inactivity may exist within environmental regulation, specifically sanctuaries, not unlike the Reagan administration, but this time due to budget declines in pursuit of deficit reduction. This would be a temporary situation, with no winners, until some catastrophe sparks a reaction.

(2) The worst case is a continuation of sanctuary designation without improved coordination and with greater Congressional intervention. Implementation would be shallow, and the Navy would become bogged down by costs in delays and mitigation.

(3) The preferred alternative would be continued sanctuary designation, with greater coordination between NOAA and the Navy, in both site selection and rulemaking. Successful interagency cooperation along these lines might even convince Congress to refrain from intervention.

Appendix I Historical Representation of DOD Grandfather Clauses

The following is a summary of DOD grandfather clause language excerpted from final regulations where available. (Source: K. DePaul, DON -N44E, 1994)

NATIONAL MARINE SANCTUARY REGULATIONS
DOD GRANDFATHER AND INTERNATIONAL APPLICABILITY CLAUSES
(In order Sanctuary designation)

Monitor National Marine Sanctuary
Designated: 1975*
Location: Off North Carolina
Regulations: 15 CFR 924

DOD Grandfather Clause: None.

International Applicability Clause: None.

Channel Islands National Marine Sanctuary
Designated: 1980*
Location: Off Southern California
Regulations: 15 CFR 935

DOD Grandfather Clause:

> "All activities currently carried out by the Department of Defense within the Sanctuary are essential for the naval defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impact shall be determined in consultation between the Assistant Administrator and the Department of Defense." 15 CFR 935.7(b)

International Applicability Clause:

> "The prohibitions in this section are not based on any claim of territory and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is a signatory." 15 CFR 935.7(c).

Point Reyes/Farralon Islands National Marine Sanctuary
Designated: 1981*
Location: Off Central California
Regulations: 15 CFR 936

DOD Grandfather Clause:

> "All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense." 15 CFR 936.6(b).

International Applicability Clause:

> "The prohibition in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other

international agreements to which the United states is a signatory." 15 CFR 936.6(c).

Looe Key National Marine Sanctuary Regulations
Designated: January 1981*
Location: Lower Florida Keys
Regulations: 15 CFR 937

DOD Grandfather Clause:

"All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense." 15 CFR 937.6(a)(6)(ii).

International Applicability Clause:

"The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles on international law, including treaties, conventions and other international agreements to which the United States is a signatory." 15 CFR 937.6(a)(6)(iii).

Gray's Reef National Marine Sanctuary
Designated: January 1981*
Location : Off Georgia
Regulations: 15 CFR 938

DOD Grandfather Clause:

"All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense." 15 CFR 938.6(b).

International Applicability Clause:.

"The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States in a signatory." 15 CFR 938.6(c).

NATIONAL MARINE SANCTUARY REGULATIONS
DOD GRANDFATHER AND INTERNATIONAL APPLICABILITY CLAUSES
(In order Sanctuary designation)

Key Largo National Marine Sanctuary
Designated: 1983*
Location: Off Key Largo, Florida
Regulations: 15 CFR 929

DOD Grandfather Clause:
"The regulation of activities within the Sanctuary shall not prohibit any activity conducted by the Department of Defense that is essential for national defense or because of emergency. Such activities shall be conducted consistently with all regulations to the maximum extent possible." 15 CFR 929.6(c).

International Applicability Clause:
"The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is a signatory." 15 CFR 929.6(d).

Fagatele Bay National Marine Sanctuary
Designated: 1986
Location: American Samoa
Regulations: 15 CFR 941

DOD Grandfather Clause:
"Unless permitted by the Assistant Administrator...or as may be necessary for national defense...the following activities are prohibited..." 15 CFR 941.8(a)

International Applicability Clause:
"The prohibition in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is a signatory." 15 CFR 941.8(c).

Cordell Bank National Marine Sanctuary
Designated: 1989
Location: Off Central California
Regulations: 15 CFR 922

DOD Grandfather Clause:
"All activities being carried out by the Department of Defense (DOD) within the Sanctuary on the effective date of designation that are necessary for national defense are exempt from the prohibitions contained in these regulations.

Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted by the Assistant Administrator after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, are subject to all prohibitions contained in these regulations." 15 CFR 942.6(b).

International Applicability Clause:

"The prohibitions in this section are applicable to foreign persons and foreign flag vessels only to the extent consistent with generally recognized principles of international law, and in accordance with treaties, conventions, and other international agreements to which the United States is a party." 15 CFR 942.6(c).

<u>Flower Garden Banks National Marine Sanctuary</u>
Designated: 1991
Location: Gulf of Mexico
Regulations: 15 CFR 943

DOD Grandfather Clause:

"The prohibitions... of this section do not apply to activities being carried out by the Department of Defense as of the effective date of Sanctuary designation. Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities. The prohibitions ... do not apply to any new activities carried out by the Department of Defense that do not have the potential for any significant adverse impacts on Sanctuary resources or qualities. Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualifies (sic.) New activities with the potential for significant adverse impact on Sanctuary resources or qualities may be exempted from the prohibitions... by the Director of designee after consultation between the Director or designee and the Department of Defense. If it is determined that an activity may be carried out, such activity shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities." 15 CFR 943(e)(1).

International Applicability Clause:

"The regulations in this part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a

party." 15 CFR 343.5(b).

Stellwagen Bank National Marine Sanctuary
Designated: Congressionally designated 1992
Location: North of Cape Cod in Massachusetts Bay
Regulations: 15 CFR 940

DOD Grandfather clause:
"DOD activities shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on the resources or qualities of the Sanctuary. DOD military activities may be exempted from the prohibitions in paragraphs (a)(1), (2), and (4) through (8) of this section by the Director or designee after consultation with the Director or designee and Department of Defense. If it is determined that an activity may be carried out, such activity shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on resources or qualities of the Sanctuary." 15 CFR 940.5(b)

International Applicability Clause:
"The regulations in this part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a party." 15 CFR 940.5(d)(1).

Monterey Bay National Marine Sanctuary
Designated: 1992
Location: Off Monterey, California
Regulations: 15 CFR 944

DOD Grandfather Clause:
"All Department of Defense activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. the prohibitions ... do no apply to existing military activities carried out by the Department of Defense, as specifically identified in the Final Environmental Impact Statement and Management Plan for the Proposed Monterey Bay National Marine Sanctuary (NOAA 1992)... New activities may be exempted from the prohibitions ... by the Director or designee after consultations between the Director or designee and the Department of Defense." 15 CFR 944.5(d)(1).

"In the event of threatened or actual destruction of, loss of, or injury to a Sanctuary resource or quality resulting

from and untoward incident, including but not limited to spills and groundings caused by the Department of Defense, the cognizant component shall promptly coordinate with the Director or designee for the purpose of taking appropriate action to respond to and mitigate the harm and, if possible, restore or replace the Sanctuary resource or quality." 15 CFR 944.5(d)(2).

International Applicability Clause:

"The regulations in this part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a party." 15 CFR 944.5(b).

<u>Olympic Coast National Marine Sanctuary</u>

Designated: 1994
Location: Off the coast of northern Washington to the border with Canada
Regulations: 15 CFR 925 Final Rule issued 11 May 1994

DOD Grandfather clause:

"All DOD activities shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on the resources or qualities of the Sanctuary. Except as provided in paragraphs (e)(2) of 925.5, the prohibitions in paragraphs a(2) through (8) of this 925.5 do not apply to the following military activities performed by DOD in W-237A, W-237-B, and MOAs Olympic A and B in the Sanctuary:

(i) hull integrity tests and other deepwater tests
(ii) live firing of guns, missiles, torpedoes, and chaff
(iii) activities associated with the Quinault Range including in-water testing of non-explosive torpedoes, and
(iv) anti-submarine warfare operations

New activities may be exempted from the prohibitions in paragraphs a(2) through (8) of this 945.5 (sic) by the Director or designee after consultation with the Director or designee and DOD. If it is determined that an activity may be carried out, such activity shall be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on the resources or qualities of the Sanctuary." 15 CFR 925.5(e)(1)

"DOD is prohibited from conducting bombing activities within the Sanctuary." 15 CFR 925.5(e)(2)

NATIONAL MARINE SANCTUARY REGULATIONS
DOD GRANDFATHER AND INTERNATIONAL APPLICABILITY CLAUSES
(In order Sanctuary designation)

International Applicability Clause:
"The regulations in this part shall apply to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a party." 15 CFR 925.5(b).

Florida Keys National Marine Sanctuary
Designated: Congressionally designated 1990
Location: Off the Atlantic and Gulf of Mexico coasts of the Florida Keys
Regulations: Being drafted by NOAA; expect draft for review December, 1994; Navy will coordinate with NOAA to ensure appropriate waiver of ongoing military activities.

Hawaii Humpback Whale National Marine Sanctuary
Designated: Congressionally designated 1992
Location: Surrounds the southern Hawaiian Islands, including Maui, Hawaii, Lanai, and Molokai
Regulations: Being drafted by NOAA; expect draft for review July, 1994; Navy will coordinate with NOAA to ensure appropriate waiver of ongoing military activities.

Northwest Straits National Marine Sanctuary
Designated: Proposed for designation
Location: Puget Sound
Regulations: Expect to be drafted in FY 95; Navy will coordinate with NOAA to ensure appropriate waiver of ongoing military activities.

Thunder Bay National Marine Sanctuary
Designated: Proposed for designation
Location: Great Lakes (Lake Huron)
Regulations: No schedule for regulations or Environmental Impact Statement; Navy will continue to coordinate with NOAA to ensure appropriate waiver of ongoing military activities.

* Every five years NOAA is required by law to review and update, as necessary, the Management Plans of National Marine Sanctuaries. NOAA has not complied with this requirement due to resource restrictions.

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