

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

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

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

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

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

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

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

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

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

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

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

other. It guards against "ecology of the sake of ecology." It also guards against the cynical philosophy that the need for oil is so compelling that it justifies the destruction of the environment.²¹³

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

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

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

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

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

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

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

Moratoriums are not the answer. We cannot bury our heads in the sand.²¹⁹

213. *Id.*

214. *Id.*

215. *Id.* at 31136.

216. *Id.*

217. *Id.* at 31138.

218. *Id.*

219. *Id.* at 31143.

209. *Id.* at 30855.

210. *Id.*

211. *Id.*

212. *Id.* at 30858.

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

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

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

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

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

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

4. Designation Process

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

be responsive to the public interest and need, and the Secretary is expected to publish such a scheme."²²⁴

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

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

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

5. Management and Protection Standards

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

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

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

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

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

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

226. 117 CONG. REC. 31132.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

220. *Id.* at 31144.

221. *Id.* at 31143-44.

222. *Id.* at 31157.

223. *Id.*

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

6. Relation to Other Laws

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

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

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

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

E. Conclusion

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

232. *Id.* at 31146.

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

234. 117 CONG. REC. 31146.

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

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

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

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

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

III. The Rise of Multiple Use 1973-1986

A. Background

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

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

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

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

B. First Regulations—1974

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

Building off of the workshop's results, regulations for the Marine Sanctuaries Program were issued in June 1974.²³⁷ The regulations established the policy and objectives of the program, the kinds of areas that could be designated, a designation process, and procedures to enforce sanctuary regulations.

1. Program Purpose and Multiple Use

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

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

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

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

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

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

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

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

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

238. 39 Fed. Reg. at 23254.

239. *Id.* at 23256.

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

241. 39 Fed. Reg. at 23255.

242. *Id.* at 23256.

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

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

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

ferre or destroy the values of the primary purpose. Thus, multiple compatible use should be encouraged.²⁴⁴

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

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

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

2. Nomination and Designation Process

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

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

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

C. Designation of USS Monitor and Key Largo NMS

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

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

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

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

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

247. 117 CONG. REC. 31136.

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

249. *Id.*

250. *Id.*

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

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

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

D. President Jimmy Carter's Sanctuary Initiative

Although NOAA had begun review of a few additional sites, the program was largely dormant until President Carter took office. Congress had authorized appropriations of \$10 million per FY for the program, but the funds were neither requested by the Secretary of Commerce nor appropriated. After seven years of minimal funding from other NOAA sources, the program finally received a line-item appropriation of \$0.5 million in 1979.²⁵⁵

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

During President Carter's tenure, the nation was faced with an energy shortage and dwindling commercial fish stocks. Both situations prompted increased congressional concern for the needs of the oil and fishing industries. The 1973 oil embargo and the 1979 Iran hostage crisis and oil cutoff resulted in significant fuel shortages, which in turn led to a national push for self-sufficiency in oil production. The number of offshore oil and gas leases on the OCS more than doubled between 1972 and 1978.²⁵⁸ In 1978, Congress amended the OCSLA to authorize preparation and implementation of a five-year plan for oil and gas leasing, putting the oil industry on a collision course with the fledgling Sanctuaries Program.²⁵⁹

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

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

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

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

E. The 1978 Reauthorization

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

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

254. *Id.*

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

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

257. *Id.* at 50061.

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

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

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

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

262. *Id.* at 17.

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

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

265. *Id.*

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

1. Public Involvement

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

Attempts by NOAA to regulate current and future uses of particular areas naturally generated both concern and interest among affected agencies and user groups. To deal with concerns that the designation process was flawed because other agencies and parties were not being consulted on the final draft of the designation document, from which they could ascertain its actual effects, the House and Senate reauthorization bills²⁶⁸ required the Secretary to identify in the designation document: the geographic area to be included, the characteristics of the area that give it special value, and the types of activities that would be subject to regulation.²⁶⁹ These provisions, explained a House committee report, will

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

2. Multiple Use

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

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

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

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

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

3. Safeguard Provision

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

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

The Senate Commerce Committee explained its action as follows:

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

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

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

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

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

270. *Id.* at 8.

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

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

273. *Id.* at 22.

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

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

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

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

4. Power to Designate

An issue addressed by the Senate, but not the House, was whether the Secretary of Commerce, as provided in the Act, or Congress should formally designate marine sanctuaries. There had been little recorded discussion of why Congress did not retain the designation power for itself when the Act was passed in 1972, as it did for national parks and terrestrial wilderness areas. As the potential scope and impact of the program became known, some members of Congress became alarmed. Program Director Bleicher testified that he hoped the Marine Sanctuaries Program would designate 5 sanctuaries during 1978 and a total of 25 to 30 sanctuaries by 1983.²⁷⁹ Many of these intended sanctuaries were in oil and gas rich areas, such as the Gulf of Mexico and off California and Alaska, or encompassed significant fishing grounds.

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

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

5. Consultation by the Regional Fishery Management Councils

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

6. Conclusion

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

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

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

278. *Id.* at 62-63.

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

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

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

282. *Id.* at 61.

283. *Id.* at 61-62.

284. *Id.* at 70.

285. *Id.* at 69.

286. *Id.* at 70.

287. *Id.* at 72.

288. *Id.* at 71-72.

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

F. Flower Garden Banks Controversy

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

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

G. 1979 Regulations

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

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

I. Program Purposes and Multiple Use

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

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

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

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

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

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

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

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

293. *Id.*

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

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

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

297. *Id.* (emphasis added).

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

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

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

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

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

2. Site Selection Criteria and the LRAs

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

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

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

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

5. The significance of the area to research opportunities;

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

7. The esthetic qualities of the area;

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

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

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

H. Controversy Over the Act's Purpose and Scope

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

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

301. 44 Fed. Reg. at 44833.

302. *Id.* at 44838.

303. *Id.* at 44836.

304. *Id.* at 44838.

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

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

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

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

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

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

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

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

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

I. 1980 Amendments

With the start of the 96th Congress, and as controversies over sanctuary proposals raged, Congress renewed its attempt to amend the Act. According to Rep. Gerry Studds (D-Mass.), the "agency has amended its regulations to implement the intended changes [of the failed 1978 bills] as much as possible under existing law, while the Congress has not yet completed amending the law to require the new regulations."³²² Studds' goal was to reconcile the two. The 1978 House bill, as amended by Studds, was the basis for a Senate bill introduced by Sen. Howard Cannon (D-Nev.) in late 1979 and for Studds' new bill, introduced in early 1980. A final version of the two bills was enacted in August 1980.³²³

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

1. Terms of Designation

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

309. Point Reyes-Farallon Islands Proposed Regulations, 45 Fed. Reg. 20907 (Mar. 31, 1980).
310. Looe Key Proposed Regulations, 45 Fed. Reg. 33645 (May 20, 1980).
311. Gray's Reef Proposed Regulations, 45 Fed. Reg. 39507 (June 11, 1980).
312. St. Thomas Sanctuary Proposed Regulations, 46 Fed. Reg. 33530 (June 30, 1981).
313. Looe Key Sanctuary Final Regulations, 46 Fed. Reg. 7946, 7950 (Jan. 26, 1981).
314. Gray's Reef Sanctuary Final Regulations, 46 Fed. Reg. 7942, 7946 (Jan. 26, 1981).
315. Channel Islands National Marine Sanctuary Final Regulations, 45 Fed. Reg. 65198, 65204 (Oct. 2, 1980); 46 Fed. Reg. at 7940.
316. Flower Garden Banks Marine Sanctuary Proposed Rule, 45 Fed. Reg. 43205 (June 26, 1980).
317. 47 Fed. Reg. 18588 (Apr. 30, 1982).
318. Reevaluation of Elevating Georges Bank to Active Candidate Status, 46 Fed. Reg. 58136 (Nov. 30, 1981).
319. Daniel P. Finn, *Interagency Relationships in Marine Resource Conflicts: Some Lessons From OCS Oil and Gas Leasing*, 4 HARV. ENVTL. L.J. 359, 370 (1980).

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

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

322. 126 CONG. REC. 10772.

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

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

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

2. Multiple Use and the Safeguard Provision

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

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

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

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

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

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

3. Congressional Power of Disapproval

The debate over whether Congress should designate sanctuaries was addressed in 1980 when Congress gave itself the express power to formally object to a designation, as Senator Magnuson had suggested in 1978.³²⁹ If Congress disagreed with a designation, it could pass a joint resolution of disapproval within 60 days of the designation's publication in the *Federal Register*.³³⁰ The resolution, however, was still subject to the approval of the president.³³¹ This power went unused, and was dropped from the Act in 1992. Apparently, by then, a resolution of disapproval was seen as redundant to Congress' ability to disapprove or amend sanctuary designations and management plans through traditional legislative procedures.³³²

4. Conclusion

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

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

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

325. *Id.* §2(2).

326. *Id.* (emphasis added).

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

328. *Id.* at 12.

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

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

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

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

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

1. Program Goals

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

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

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

2. Designation

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

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

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

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

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

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

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

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

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

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

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

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

336. *Id.*

337. *Id.* at 21.

338. *Id.* at 28.

339. *Id.* at 28-29.

340. *Id.* at 28.

341. *Id.*

342. *Id.* at 24.

343. *Id.*

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

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

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

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

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

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

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

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

K. Implementing the SEL

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

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

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

The fact that the ocean waters past three miles from shore already were federally "owned" was no consolation to fishermen accustomed to enjoying unrestricted access to valuable free resources. The fear that national marine sanctuaries would mean the end of commercial fishing in designated areas had been fed by a mistake on the part of the company hired by NOAA to conduct the regional review: notice to the public asking for nominations and other input to assist the team went out in the middle of fishing season when most fishermen were far out to sea.³⁵⁴ Alarm also was expressed by Senator Stevens³⁵⁵ about "the uncanny similarity between the proposed marine sanctuary sites and the [sites on the] five-year OCS lease schedule It's apparent that the contract review group felt that only areas with strong oil and gas potential were worth consideration as marine sanctuaries."³⁵⁶ On October 29, 1982, in response to pressure from members of Congress from Alaska, NOAA decided to exclude all Alaskan sites from the SEL development process.³⁵⁷ The effect of that decision has been, in essence, to exempt Alaska from the Marine Sanctuaries Program on a semi-permanent basis.

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

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

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

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

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

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

Id. at 28.

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

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

347. *Id.* at 30-31.

348. *Id.* at 19.

349. *Id.* at 24.

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

351. 48 Fed. Reg. at 24296.

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

L. 1983-1984: Renewed Congressional Attacks

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

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

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

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

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

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

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

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

I. The Charge of Redundancy

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

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

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

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

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

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

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

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

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

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

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

364. *Id.* at 7.

365. *Id.*

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

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

2. Scope of the Program

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

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

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

M. 1984 Amendments

Regardless of the questionable validity of the arguments to abolish the program, Representative Breaux's new position of power and a Reagan Administration that would later be described by many, including Reps. Leon Panetta (D-Cal.) and Dennis Hertel (D-Mich.), as unsupportive of or hostile, led to more amendments.³⁷⁰ Representative Young's repeal effort did not carry the day, but did influence the ultimate result. The House MMFC had to resolve divergent bills introduced by Representatives Young, Breaux, and Rep. Norman D'Amours (D-N.H.).³⁷¹ The Senate bill, which was modeled after the D'Amours bill, was introduced by Sen. Robert Packwood (R-Or.) and the bill was ultimately enacted in October 1984.³⁷²

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

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

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

1. Program Purposes

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

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

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

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

369. *Id.*

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

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

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

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

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

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

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

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

2. Abolishment of the Safeguard Provision Over Multiple Use

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

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

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

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

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

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

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

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

376. H.R. 1633.

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

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

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

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

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

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

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

and that management should be conducted through multiple use.³⁸⁴

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

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

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

3. Changes to the Designation Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the socioeconomic effects of sanctuary designation.³⁹⁴

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

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

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

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

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

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

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

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

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

392. *Id.* §303.

393. *Id.* §303(a).

394. *Id.* §303(b).

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

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

4. Resource Assessment Report

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

5. Size of Sanctuaries

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

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

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

6. Consultations Prior to Designation

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

7. Regional Fishery Management Council Drafting of Fishery Regulations

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

8. Enhancement of Enforcement Authority and Capability

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

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

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

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

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

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

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

402. *Id.* at 25442.

403. *Id.* at 25441-42.

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

405. *Id.* §303(b)(3).

406. *Id.* §304(a)(5).

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

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

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

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

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

9. Congressional Designation

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

10. Conclusion

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

N. Program Results From 1984-1986

In keeping with the Reagan Administration's desire to scuttle the program, NOAA's designation efforts were slow and often redundant. The only sanctuary designated during President Reagan's eight years was the tiny Fagatele Bay off American Samoa in 1986.⁴¹⁵ The final regulations for the

sanctuary prohibited several types of recreational fishing methods and all commercial fishing.⁴¹⁶

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

O. Conclusion

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

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

411. H.R. 1633 §302(a).

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

413. *Id.* at 38-40.

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

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

416. *Id.*

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

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

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

As noted in the Congressional Research Service report:

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

IV. Reemphasis on Preservation, 1987-2000

A. Background

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

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

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

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

B. The 1988 Amendments

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

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

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

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

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

423. *Id.*

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

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

426. *Id.*

427. *Id.*; H.R. 5489 §2(2).

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

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

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

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

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

Legislation sponsored by Rep. Mike Lowry (D-Wash.) and Senator Hollings formed the basis for the program's reauthorization in 1988.⁴³⁴ The resulting amendments set a time-deadline for NOAA review of candidate sites, created a permit program to regulate special uses of sanctuaries, and mandated designation of four sites and prospectuses or studies of six more areas.⁴³⁵

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

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

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

too long sought to tear down and destroy the program they were charged with nurturing.⁴³⁷

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

1. Thirty-Month Deadline

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

2. Special Use Permits

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

3. Mandated Designations

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

429. See *supra* note 359.

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

431. *Id.*

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

433. *Id.*

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

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

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

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

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

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

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

441. *Id.*

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

443. *Id.* §206.