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

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

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

The House MMFC concluded among other things that the lack of designations had resulted because "the [p]resident has not recommended and Congress has not provided adequate funding to support the necessary research, surveys, and staffing levels" and "there has been an evident lack of administrative will within NOAA to complete the designation process."[454] So, in addition to mandating more sites for study, Congress increased funding authorizations and required that annual budget submissions be divided into program functions, so that Congress would have a better handle on whether requests were for designation, management, or enforcement.[455]

4. Meeting Designation Deadlines

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

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

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

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

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

445. 134 Cong. Rec. 22872.

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

447. 134 Cong. Rec. 21922-23 (1988) (statement of Rep. Wilson).

448. H.R. Rep. No. 100-739, at 14.

449. 134 Cong. Rec. 29942-44 (1988) (statements of Sens. Byrd and Cranston).

450. *Id.* at 21922.

451. H.R. Rep. No. 100-739, at 13-14.

452. *Id.* at 14.

453. *Id.*

454. *Id.*

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

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

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

458. 54 Fed. Reg. at 22417.

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

460. 54 Fed. Reg. at 22413.

461. *Id.*

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

463. H.R. Rep. No. 101-110, pt. 1, at 6-7.

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

5. Florida Keys NMS Designation by Congress

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

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

> codified a Coast Guard "area to be avoided," directing commercial vessels around rather than over the reef;
>
> prohibited all mineral and hydrocarbon leasing, exploration, development, and production;
>
> ordered the Secretary of Commerce to prepare a comprehensive management plan within 30 months, in consultation with appropriate federal, state, and local government authorities, and with the Advisory Council established by the Act;
>
> established an Advisory Council to assist the Secretary in the development and implementation of the sanctuary's comprehensive management plan, including conclusions on zoning; and
>
> required the Administrator of EPA and the governor of Florida to develop a comprehensive water quality protection program in consultation with the Secretary of Commerce.[471]

The goals of the comprehensive management plan were to:

> 1. facilitate all public and private uses of the sanctuary consistent with the primary objective of sanctuary resource protection;
> 2. consider temporal and geographic zoning, to ensure protection of sanctuary resources;
> 3. incorporate regulations necessary to enforce the elements of the comprehensive water quality program . . . ;
> 4. identify needs for research and establish a long-term ecological monitoring program;
> 5. identify alternative sources of funding needed to fully implement the plan's provisions and supplement appropriations . . . ;
> 6. ensure coordination and cooperation between sanctuary managers and other federal, state, and local authorities with jurisdiction within or adjacent to the sanctuary; and
> 7. promote education, among users of the sanctuary, about coral reef conservation and navigational safety.[472]

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

C. The 1992 Amendments

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

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

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

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

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

468. 136 Cong. Rec. 3774 (1990) (statement of Sen. Graham).

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

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

471. *See* Florida Keys National Marine Sanctuary Act.

472. *Id.* §7(a).

473. 136 Cong. Rec. at 3776.

474. *See, e.g.*, 136 Cong. Rec. 18706 (1990) (statement of Rep. Arlan Strangeland).

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

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

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

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

> In general, the panel has concluded that this program affords this Administration a rare opportunity to take important and bold steps to protect and enhance these important parts of our heritage, and in the process, to create a model for the rest of the world of how to respond to this challenge . . . .
>
> In the past, NOAA's administration of the Marine Sanctuaries Program has lacked leadership, focus, resources and visibility, and the program has suffered for it. It has generally been treated as the runt of the NOAA litter, receiving only occasional pats on the head as executive and legislative attention was focused on its larger and better endowed siblings.[480]

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

With substantial guidance and interest, the authorizing committees substantially rewrote the Act. Representatives Hertel and Studds and Sen. John Kerry (D-Mass.) each introduced sanctuary bills that were relatively similar.[483] The final language of the public law drew from all of them, but predominantly from the House bills.[484] Among other changes, the 1992 Amendments:

> Added four new program purposes to the five that already existed;
>
> Allowed for designations to be made when existing state and federal authorities needed to be *supplemented*, not just when they are *inadequate*;
>
> Required a site's contribution to "maintenance of critical habitat of endangered species" to be one of the factors considered in the study process;
>
> Required interagency cooperation on activities either within or outside sanctuaries that "are likely to destroy, cause the loss of, or injure any sanctuary resource";
>
> Required management plan reviews for each sanctuary every five years;
>
> Granted NOAA authority to create Sanctuary Advisory Councils to assist in the management of the sanctuaries, based on the success of the Florida Keys Council; and
>
> Designated the Hawaiian Islands Humpback Whale, Monterey Bay, and Stellwagen Bank National Marine Sanctuaries.[485]

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

1. Program Purposes

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

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

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

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

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

478. *Id.* at 156.

479. *Id.* at 158.

480. *Id.* at 99.

481. *Id.* at 87.

482. *Id.* at 120.

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

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

485. *Id.*

486. *Id.* §2101(b).

487. *Id.* §2101(b).

488. *Id.* §2101(b)(6)-(9).

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

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

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

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

The amendments also made *any federal agency action* subject to consultation with the Secretary of Commerce, *even if it occurs outside of a sanctuary*, if the action is likely to "destroy, cause the loss of, or injure any sanctuary resource."[492] As part of this consultation, the acting agency must provide the Secretary of Commerce with a written statement describing the action and its potential effects on sanctuary resources and must consider the Secretary of Commerce's recommended alternatives. If the acting agency decides not to adhere to the Secretary's recommendations, it must provide a written statement giving reasons for acting otherwise.[493]

The House report added further clarity to the consultation provision, specifying that the term "agency action" is intended to be broadly applied to direct actions, and licenses, permits, and other authorizations issued by federal agencies to third parties. The committee intended "that agency actions encompass all actions that are reasonably likely to affect sanctuary resources while those resources are within sanctuary boundaries, including the cumulative and secondary effects of such actions."[494]

The committee noted that some sanctuary "resources, such as fish, move in and out of a sanctuary, and thus, may be physically injured or destroyed by lawful activities outside the boundaries of that sanctuary. The [c]ommittee intends that" the prohibition on damaging sanctuary resources "apply to: (1) activities inside sanctuary boundaries affecting sanctuary resources that occur within the boundaries of a sanctuary; and (2) activities outside sanctuary boundaries that affect sanctuary resources while those resources are within the sanctuary."[495] Representative Young explained that "we are not attempting to prohibit activities such as commercial fishing that occur outside of a sanctuary, even though those same fish may be found in the sanctuary."[496] While only a power of consultation and not a mandate that any particular action be taken, the review provision was the first time that sanctuaries were given any influence over activities outside their borders.

The 1992 Amendments about interagency consultation and review of agency actions reflected a growing interest in protecting sanctuary resources. Interagency cooperation was raised at this point in time in part because Representative Studds, who was chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, was personally engaged in the debate over designating Stellwagen Bank. NOAA had been able to wield little power in fighting a proposed sewage outfall which would discharge only 12 miles west of the proposed Stellwagen Bank sanctuary boundary, or in blocking a potential sand and gravel mining operation within the proposed sanctuary. Another problem was the disposal near Stellwagen Bank of contaminated dredge spoils from the Boston harbor area.[497] Led by Studds, Congress cited Stellwagen as an example of why NOAA needed a clarified role and more influence in other agencies' actions that might affect sanctuaries.[498]

3. Multiple Use

The Marine Sanctuaries Review Team argued that multiple use, while raised during early NMSA debate, was never adequately explained, "nor were the ambiguities in the concept ever discussed, still less resolved."[499] Instead of applying an ill-defined multiple use approach, the report suggested using zones to separate areas of strict preservation from areas where various uses can be accommodated.[500] The Rays argued, similarly, that the sanctuaries can be a model for greater ocean management by providing "replenishment areas" for fisheries, where no fishing is allowed.[501]

Congressional views on what uses should be allowed in sanctuaries seem to depend primarily on the particular issues affecting a congressperson's local sanctuary rather than on a coherent national vision for the entire sanctuary system. For example, Representative Studds was one of the most vocal, frustrated by what he saw as delay tactics to prevent designation of Stellwagen and protect certain private user interests. He was outraged that sand and gravel mining would even be considered in Stellwagen Bank, as habitat protection was part of the very reason for establishing the sanctuary.[502] Representatives Panetta, Fascell, and Hertel were also frustrated by the Administration's delays and its

489. *Id.* §2101(a)(1), (4).

490. *Id.* §2103(b)(2)(B).

491. *Id.* §2104(a)(3)(B).

492. *Id.* §2104(d) (emphasis added).

493. *Id.* §2104(d).

494. H.R. Rep. No. 102-565, at 12.

495. *Id.* at 14.

496. 138 Cong. Rec. 20904 (1992).

497. 138 Cong. Rec. 12550 (1992); House Hearings 1991, *supra* note 475, at 3, 25 (statements of Reps. Studds and DeConti).

498. House Hearings 1992, *supra* note 475; 138 Cong. Rec. 12550 (1992).

499. House Hearings 1991, *supra* note 475, at 97.

500. *Id.* at 120-21.

501. *Id.* at 147.

502. House Hearings 1992, *supra* note 475, at 30.

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consideration of oil and gas activities in Monterey Bay.[503] Representative Panetta went so far as to say that he thought oil and gas drilling and sanctuaries were "diametrically opposed to each other."[504]

The general sense from statements by congressmen during this time is that there are some uses that are unacceptable in sanctuaries because they risk damaging the resources that were at the heart of designations. While this would be the logical meaning of the Act's purpose of facilitating all *compatible* uses, NOAA had routinely considered allowing potentially damaging uses in sanctuaries during the designation process, e.g., the consideration of sand and gravel mining in Stellwagen and of oil and gas development in Monterey Bay. Despite the numerous pro-protection statements made on the House and Senate floor and in committee reports and hearings, no changes were made to guide NOAA in what uses to allow in sanctuaries. Multiple use remained undefined in the Act and the purpose of facilitating compatible uses remained unchanged. So, too, did the provision allowing Regional Fishery Management Councils to propose draft fishing regulations in sanctuaries.

4. Management Plan Reviews

Without recorded discussion, Congress included a provision to require sanctuary management plans to be reviewed every five years:

> Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this title.[505]

The importance of this provision is that it mandates occasional review and updates, but some have questioned the frequency of the reviews:

> The requirement for management plan reviews provides flexibility to account for new scientific understandings and management. But, the five year review cycle called for in the Sanctuaries Act means that protections within [s]anctuaries are not necessarily long-lasting. In contrast, the Wilderness Act allows for review but does not require it. Similarly, Congress has required that the management plans for [n]ational [f]orests undergo review only once every 10 to 15 years. This builds in a degree of stability to the management plan. It allows enough time for ecosystems to begin showing some response to protections before such protections are reviewed.[506]

In addition, if a review determines that large changes need to occur, such as to regulate fishing when such power had not been reserved in the designation terms, then the entire process of public review, agency consultation, and development of an environmental impact statement has to be gone through again to implement the change. This suggests that the real problem may be with the Act's provision requiring changes to the designation terms to undergo lengthy review, rather than with the five-year review. However, requiring a review every five years is probably unrealistic given that the time it takes to conduct a review is so lengthy.

5. Sanctuary Advisory Councils

The 1992 Amendments made Sanctuary Advisory Councils optional for all sanctuaries.[507] The Sanctuary Advisory Councils were intended to "provide assistance to the Secretary regarding the designation and management of national marine sanctuaries."[508] In designating the Florida Keys NMS, Congress had mandated the Secretary to create such a council with 15 members from various interest and conservation groups, to assist in development and implementation of the sanctuary's management plan.[509] The 1992 Amendments, however, gave the Secretary complete discretion as to how many members came from which agency or interest group, with no requirement for representation for a particular group.[510] Additionally, the councils were removed from the purview of the Federal Advisory Committee Act (FACA) in the hopes of streamlining their appointment, which had been time-consuming in the Florida Keys.[511] While exempting the councils from FACA, provisions for "good government," such as a requirement for public participation, were included in the MPRSA.[512]

6. Funding for the Program

The reports and testimony before Congress of both the NOAA Marine Sanctuaries Review Team and the Rays highlighted the tremendous problem of the program's inadequate funding.[513] As time went on, it became all too apparent that designation and management costs were far greater than those anticipated in 1984. It was not until 1994 that the program's authorizations for appropriations again topped $10 million.[514] By then, however, there were 12 sanctuaries requiring management, education, and enforcement. The program was estimated to need over $30 million just to deal with current sanctuaries, let alone take on the expense of new designations.[515] These budgetary constraints had meant that places deemed to be valid "special places" had gone unprotected because of the program's budget woes. The removal from active candidacy of Norfolk Canyon in 1997, Ten Fathom/Big Rock in 1986 and Monterey Bay in 1983 were all attributed by NOAA to a lack of adequate funding.[516]

503. 138 Cong. Rec. 14701, 14702 (1992) (statement of Rep. Leon Panetta on H.R. 4310); House Hearings 1991, *supra* note 475, at 1-2, 5-8.

504. House Hearings 1991, *supra* note 475, at 10.

505. 1992 NMSA Amendments, *supra* note 465, §2104(d).

506. The Turnstone Group, An Assessment of the Adequacy of the Authority of the National Marine Sanctuaries Act to Establish a Network of Fully Protected Areas (2003) (unpublished manuscript, on file with the Marine Conservation Biology Institute).

507. 1992 NMSA Amendments, *supra* note 465, §2112.

508. *Id.* §2112.

509. *Id.* §9.

510. *Id.* §2212 (§315(b)).

511. *Id.* §2212 (§315(a)).

512. H.R. Rep. No. 102-565, at 17; 1992 NMSA Amendments, *supra* note 465, §2212 (§315(e)).

513. House Hearings 1991, *supra* note 475, at 104, 158; House Hearings 1992, *supra* note 475, at 102-06.

514. 1992 NMSA Amendments, *supra* note 465, §313.

515. House Hearings 1991, *supra* note 475, at 104.

516. 51 Fed. Reg. 7097 (1986); 62 Fed. Reg. 45233 (1997); 48 Fed. Reg. 56252 (1983).

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By 1992, Congress was ready to adequately fund the program. The solution proposed by Senator Stevens and incorporated into the 1992 Amendments was to increase authorizations and to require the program's budget requests to be broken down by category, so that Congress could better track where the money was going.[517] Whereas Congress had authorized $5.95 million for the program in FY 1992 (down $60,000 from the previous year), the amendments authorized $8 million for FY 1993, $12.5 million for FY 1994, $15 million for FY 1995, and $20 million for FY 1996.[518]

7. Additional Provisions of the Amendments

The 1992 Amendments also addressed enforcement and alternate funding sources for the program.[519] Liability for damage to sanctuaries was declared to be without a cap limiting it to a certain amount.[520] Liability also was expanded to include interest on response costs and damages, and to allow vessels to be seized to help pay any fines levied against an offender.[521] To assist with funding the program, Congress created a two-year pilot project to enhance funding for designation and management by creating an official NMS symbol and selling the rights to the symbol to sponsors.[522] The section on cooperative agreements was also expanded to include more types of agreements with additional parties, broadening the ability of the program to receive outside support.[523]

8. New Sanctuaries Designated by Congress in 1992

Perhaps the most important provisions of the 1992 Amendments were those legislatively designating Monterey Bay NMS, the Hawaiian Islands Humpback Whale Sanctuary, and Stellwagen Bank NMS.[524] With these congressional designations and NOAA's designation of Flower Garden Banks by NOAA in January 1992 (in response to a congressional mandate), the area under the control of the program was *doubled* in size. The new sanctuaries represented resources not previously included in the program, including humpback and other whales and a submarine canyon, but added only one previously unrepresented biogeographic region.[525]

As Representative Hertel noted, Congress intervened in these designations because they were interested in "finalizing the lengthy and tedious designation process where the merits of specific sites are clear and where these sites require immediate management consideration."[526] Before Congress stepped in, the Administration had been mired in debate over whether to allow sand and gravel mining in Stellwagen Bank, whether to designate Monterey Bay or once again remove it from active candidacy, and whether to side with NOAA or the U.S. Department of Defense (DOD) on allowing the continued use of the Hawaiian Islands for military training.

Congress protected Stellwagen Bank and Monterey Bay by excluding some of the most pernicious threats. Representative Studds found that the fact that the DOI

> would even consider the possibility of sand and gravel mining in a highly productive marine ecosystem is nothing short of ludicrous. Stellwagen Bank is sand and gravel—mine it, and you destroy the very reason for establishing this sanctuary in the first place . . . . This ridiculous debate must be stopped here and now. Government by special interest does not fly in the Commonwealth of Massachusetts—government by the people does.[527]

Congress, distrusting the administration's resolution of mining in Stellwagen Bank, therefore legislatively prohibited sand and gravel mining in the sanctuary, and gave NOAA consultation rights in other agency decisions that *may* (as opposed to the stricter standard of "likely to" provided in the new requirement for interagency consultation) affect sanctuary resources.[528] Congress also protected Monterey Bay from oil and gas extraction, and mandated cooperative work toward safer vessel transportation in the sanctuary.[529] However, neither the Monterey Bay nor Stellwagen Bank congressional designations required for regulation of commercial fishing, testimony to the power of local fishing constituencies. Thus, it was left up to NOAA to decide whether to regulate fishing in the Monterey Bay designation document and the Stellwagen Bank management plan. In the final designation document for Monterey Bay, NOAA explicitly chose not to regulate fishing, using this logic:

> Fishing is not being regulated as part of the sanctuary regime and is not included in the designation document as an activity subject to future regulation. Fisheries management will remain under the existing jurisdiction of the state of California, NMFS and PFMC. Sanctuary prohibitions that may indirectly affect fishing activities have been written to explicitly exempt aquaculture, kelp harvesting, and traditional fishing activities.
>
> Existing fishery management agencies are primarily concerned with the regulation and management of fish stocks for a healthy fishery. In contrast, the sanctuary program as a different and broader mandate under the MPRSA to protect all sanctuary resources on an ecosystem wide basis. Thus, while fishery agencies may be concerned about certain fishing efforts and techniques in relation to fish stock abundance and distribution the Sanctuary program is also concerned about the potential incidental impacts of specific fishery technique on all sanctuary resources including benthic habitats or marine mammals as well as the role the target species plays in the health of the ecosystem. In the case of the Monterey

517. S. 2770, 102d Cong. (1992); 1992 NMSA Amendments, *supra* note 465.

518. 1992 NMSA Amendments, *supra* note 465, §2111.

519. *Id.* §§2107, 2109, 2110, 2204.

520. *Id.* §2110(c).

521. *Id.* §2110(a), (b).

522. *Id.* §2204.

523. *Id.* §2109.

524. *Id.* §§2202, 2203, 2301-2307.

525. The Oregonian region to which Monterey Bay belongs was already represented in the program by Cordell Bank and Gulf of the Farallones National Marine Sanctuaries. The Indo-Pacific region to which the Hawaiian Islands belong was already represented by the Fagatele Bay National Marine Sanctuary. Stellwagen Bank, of the Acadian region, was the only one of the 1992 congressional designations to add representation of a new biogeographic region to the program. *See* Table 2.

526. 138 Cong. Rec. 20911, 20912 (1992) (statement of Rep. Hertel).

527. *Id.* at 20909, 20910 (statement of Rep. Studds).

528. 1992 NMSA Amendments, *supra* note 465, §2202(d), (e).

529. *Id.* §2203. *See also* 138 Cong. Rec. 14701 (1992).

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> Bay area fish resources are already extensively managed by existing authorities.[530]

NOAA came to a different conclusion about the program's role in regulating fishing at Stellwagen Bank. Stellwagen Bank's designation document included activities, e.g., discharge of any matter within the sanctuary, operation of any vessel within the sanctuary, and altering the sanctuary's seafloor, within the "scope of regulation" which could be used to restrict fishing.[531]

> In its consideration of the Stellwagen Bank proposal, NOAA has identified threats to the Bank environment against which there currently is either insufficient protection or no protection. For example, while NMFS and the New England Fishery Management Council attempt to address concerns of overfishing, the Sanctuary program can play an important supplementary role of protecting habitat and systems upon which fish species rely, without interfering with other regulatory regimes. A primary intent of a national marine sanctuary designation is to fill such existing regulatory gaps, and to enhance the existing regulatory authorities of other agencies.
>
> . . .
>
> NOAA/NOS has determined that while the regulatory structure for management of fisheries is adequate, current implementation of that structure is not fully attaining the objectives mandated under MFCMA. The NEFMC and NMFS are currently responding to a Court order to revise the FMP's for groundfish species, so as to design a rebuilding program for those stocks. NOAA/NOS believes this is an appropriate mechanism to address the current problems related to groundfish stocks. In addition, Congress is developing legislation to address this problem. Therefore, NOAA/NOS is neither regulating fishing nor listing fishing as an activity subject to a Sanctuary regulation. NOAA/NOS intends to work as closely with the NEFMC and NMFS to establish, via the Sanctuary, a broad forum representing multiple sources of possible assistance to the NEFMC and NMFS in the attainment of mutual objectives; and will also work with those entities on the impacts of fishing upon other Sanctuary resources and other Sanctuary users.[532]

The final management plan for Stellwagen Bank excluded traditional fishing from regulation.[533] By leaving fishing subject to regulation in the designation document, however, NOAA allowed for regulation of fishing to occur merely by amendment of the management plan.

Sen. Daniel Inouye (D-Haw.) introduced a bill that would have stepped into the interagency turf wars between NOAA and the DOD. The bill would have allowed the DOD to continue ongoing activities *as long as* actions were taken to minimize any impact on the whales and would have allowed new DOD activities *only* if there was no potential for significant adverse impact on humpback whales and their habitat *or* if the Secretary of Commerce exempted such new activities based on consideration of the national interest and the purposes of the sanctuary.[534] However, Congress did not adopt the Inouye language, designating the sanctuary but leaving the development of a comprehensive management plan up to the Secretary of Commerce.[535]

What is most clear from the congressional designations of 1992 is that Congress felt that NOAA had failed to properly interpret and implement the Act. All three of the designated sanctuaries were chosen at large sizes, and two were protected from some industrial uses. In designating the largest of the size alternatives for Monterey Bay NMS, Congress essentially disregarded the size issue.[536] At 4,023 square nautical miles, Monterey Bay was significantly larger than the 1,258-square-nautical-mile Channel Islands designation, which some in Congress had previously proposed as an upper size limit.

Also evident was the influence of new scientific conclusions on protection of the oceans, and the power of public support for the program. Rep. Neil Abercrombie (D-Haw.) received over 5,200 constituent comments in support of the Humpback Whale Sanctuary, and public awareness of the devastation caused by oil spills and freighter groundings led to the change in congressional attitude.[537] The Rays' report had concluded that sanctuary size should "reflect ecosystem properties and the degree of human threat" and that there can be no criteria for an "ultimate size" for the program but that the program must be left flexible or it will be "self-limiting."[538] This increased public support and scientific backing contributed to the newfound congressional *dis*interest in size limits. Congress was focused on protecting areas from oil spills, freighter groundings, and other threats that had shown how destructive they could be.

9. Natural Diversity

As the amendments to and discussions of the bills leading up to the 1992 Amendments demonstrate, the importance of natural diversity was considered and ultimately rejected for inclusion in the final 1992 Amendments. Representative Studds' bill, as introduced, would have added "natural diversity" to the NMSA in the findings, twice in the purposes and policies, and in the factors to be considered for sanctuary designation.[539] All uses of the term were toned down before the bill was passed by the House, and further trimmed by the time it was incorporated into Hertel's bill. In the end, Studds' proposed finding was watered down to: "protection of these special areas can contribute to maintaining a *natural assemblage* of living resources for future generations."[540] Despite alleged agreement in the committee, all other references to diversity or biogeographic representation were deleted in the final amendments.[541]

530. 57 Fed. Reg. 43310 (Sept. 18, 1992).

531. 58 Fed. Reg. 53865, 53875 (Oct. 19, 1993).

532. *Id.* at 53866, 53871.

533. *Id.* at 53878-79.

534. S. 2786, 102d Cong. (1992).

535. 1992 NMSA Amendments, *supra* note 465, §2306.

536. 138 Cong. Rec. 14701 (1992).

537. House Hearings 1992, *supra* note 475, at 136, 138 (written testimony of Harold Masumoto, Office of State Planning, Office of the Governor, state of Hawaii).

538. House Hearings 1991, *supra* note 475, at 154 (reprinting Rays' report, at 9).

539. H.R. 4310.

540. 1992 NMSA Amendments, *supra* note 465, §2101(4) (emphasis added).

541. Representative Hertel, in expressing his opinions in the report on the Studds bill, said that "[w]hile there was agreement that the criteria for designation of marine sanctuaries did not require that every biogeographic region be represented by the national program, a full

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10. Conclusion

In the 1992 Amendments, Congress sought to guide NOAA toward preservation by introducing more terms and more purposes connected with biodiversity and ecosystem health. However, by adding yet more purposes and duties and by leaving in the language about facilitation of all compatible public and private uses, the end result was an Act of greater complexity and diffuse mandates. The fact that Congress found it necessary to designate several sanctuaries and restrict uses that NOAA was unwilling to, was an indicator that the Act was bogged down by contradiction and its multitude of mandates.

D. 1994: The Designation of the Olympic Coast NMS

The debate over the preservation versus multiple use continued with the considerations of the Northwest Straits and the addition of Stetson Bank to the Flower Garden Banks NMS. On May 11, 1994, NOAA designated the Olympic Coast NMS off of Washington State and abutting Olympic National Park.[542] NOAA had placed the site, also known as the western Washington Outer Coast, on the SEL in 1983.[543] In 1988, Congress mandated that the sanctuary be designated by June 30, 1990.[544] NOAA began public hearings in April 1989. Meanwhile, in 1992, Congress passed the Oceans Act, one provision of which prohibited oil and gas development once the western Washington site was designated.[545] While the record is silent on the oil and gas prohibition, it is most likely that Congress did not trust NOAA to arrive at a prohibition on its own. When finally designated in 1994 as the Olympic Coast NMS, NOAA's regulations prohibited numerous activities, including hydrocarbon or mineral exploration or development; some types of discharging (but deposit of dredge spoils related to harbor maintenance was allowed); altering the seabed (though damage by uses such as traditional fishing methods was exempted); and airplane overflights below specified altitudes.[546] In accordance with the 1984 Amendments, existing activities were allowed to continue if permits allowing them were issued prior to the date of the sanctuary's designation.

E. The 1996 Amendments

In 1996, the Act was amended again. The changes to the Act's provisions were minor,[547] but the amendments also expanded two sanctuaries and prohibited designation of a third unless Congress expressly allowed it. The amendments expanded the Flower Garden Banks NMS to include Stetson Bank and allowed for expansion of the Hawaiian Islands Humpback Whale Sanctuary to include Kahoolawe Island. Designation of a Northwest Straits (Puget Sound) NMS was prohibited unless Congress passed a law specifically allowing the area to become a sanctuary.[548] Rep. Solomon Ortiz (D-Tex.), Rep. Jack Metcalf (R-Wash.), Representative Abercrombie, and Sen. Patty Murray (D-Wash.) supported these changes in their respective states in response to constituent desires.

The provision prohibiting a Northwest Straits sanctuary was the result of failure of the local jurisdictions in the Puget Sound area to buy-in to the sanctuary process during the eight years that the area had been under consideration as an active candidate. Unlike most of the other marine sanctuaries, the Northwest Straits site is located predominately in state waters. Without local support, the governor might exercise his power under the Act to veto the portion in state waters, thus negating the purpose of designation. The sense in the community and the local government was that local people and institutions were capable of managing the area, and that a sanctuary would only add an extra layer of tension and federal bureaucracy without providing additional benefits. As Brian Calvert, Port Commissioner for the Friday Harbor Port District in San Juan County, testified,

> [a]ctive citizens working with local and state governments are the best and more efficient way of managing this resource. The further decisions, rule making and management gets from the place being managed, the less effective it will be and the less involvement you will find from people like me . . . . The [f]ederal [g]overnment is too blunt an instrument to manage the many sensitive issues needed to maintain water quality, the unique quality of human life, the quality of our economy, the quality of marine habitat and the myriad of other issues which require balance and consideration.[549]

Senator Murray echoed these sentiments:

> I was concerned that the creation of a NOAA-controlled advisory committee would undermine the very intent of bringing local community members together to consider the resource protection needs of the Northwest Straits in an objective and open forum. Many members of the local communities have serious concerns about the performance of NOAA over the last several years with regard to the proposed sanctuary.[550]

Apparently, just four years after enacting a Sanctuary Advisory Council provision, Congress was beginning to have second thoughts. The Sanctuary Advisory Councils had been created to address the very type of concerns expressed by San Juan residents, Senator Murray and Representative Metcalf. However, the idea of creating a SAC to assist NOAA with designation and management was now seen as counterproductive, at least in the Northwest Straits, because of public distrust in federal (NOAA) oversight of their local

array of representative ecosystems should be a long-term goal." H.R. Rep. No. 102-565, at 37.

542. 59 Fed. Reg. 24586 (1994).

543. Final Site Evaluation List, 48 Fed. Reg. 35568 (Aug. 4, 1983).

544. 1992 NMSA Amendments, *supra* note 465, §205(a)(4).

545. 54 Fed. Reg. 10398 (Mar. 13, 1989); 1992 NMSA Amendments, *supra* note 465, §2207.

546. 59 Fed. Reg. at 24586, §925.5.

547. The amendments also made permanent the pilot study of the NMS official symbol effective way to increase funding, exempted Sanctuary Advisory Council meetings from the requirement to publish notice in the *Federal Register* to "streamline the public notification process," and required the Secretary to submit a long-range, comprehensive plan for management, stabilization, preservation, and recovery of artifacts and materials of the USS Monitor. Pub. L. No. 104-283, 110 Stat. 3363 (1996) [hereinafter 1996 NMSA Amendments]; H.R. Rep. No. 104-717, at 9 (1996) (on H.R. 3487).

548. 1996 NMSA Amendments, *supra* note 547, §10.

549. *Oversight Hearings on the National Marine Sanctuaries Act: Hearings Before the House Comm. on Resources (testimony of Brian Calvert, Port Commissioner for Friday Harbor Port District)* (1996), *reprinted at* http://resourcescommittee.house.gov/104cong/fishery/mar-21.96/calvert.htm (last visited Dec. 31, 2003).

550. 142 Cong. Rec. 26532-33 (1996) (statements of Sens. Kerry and Murray).

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waters. By the amendment, Congress once again was declaring that the NMSA was ineffective at achieving its purpose. As the Northwest Straits decision shows, the presence or absence of local public support can sway a decision about a candidate site.

During House debate on the 1996 Amendments, Rep. Jim Saxton (R-N.J.) iterated the program's purpose as protecting resources "while ensuring the continuation of all compatible public and private uses," and drew a comparison to national parks.[551] Rep. Sam Farr (D-Cal.) expanded this, saying that sanctuaries "are not just about conserving resources. They are also about protecting coastal economies, such as our billion dollar tourism industry."[552] This economic emphasis was echoed a week after Farr's statement by Jeffrey R. Benoit, the Director of the Office of Ocean and Coastal Resource Management, who testified that the accommodation of multiple uses in sanctuaries encourages recreational use and fosters economic growth and success.[553] These statements reflect what appears to be another shift in thinking about the Marine Sanctuaries Program: whereas the 1992 Amendments had focused on designating areas that Congress deemed worthy for resource protection, by 1996 a swing back towards the multiple use sensibilities of the 1980s had begun.

F. The 2000 Amendments

In 1997, the National Research Council concluded in a report, *Striking a Balance: Improving Stewardship of Marine Areas*, that there is need for a comprehensive regulatory or management framework for current or future activities in federal and state waters or on or under the seabed of the United States.[554] Public polls showed high awareness of the worsening conditions of our coasts, particularly with respect to pollution and overfishing.[555] The 1998 International Year of the Ocean heightened this public awareness, capped off by a National Ocean Conference in Monterey, California, which was attended by President William J. Clinton, Vice President Albert Gore, several cabinet members and members of Congress, and more than 500 ocean experts.[556] Shortly thereafter, President Clinton issued an executive memorandum which included prohibitions on oil and gas exploration or development in any of our NMS.[557]

> I . . . withdraw from disposition by leasing for a time period without specific expiration those areas of the [OCS] currently designated Marine Sanctuaries under the [MPRSA]. Nothing in this withdrawal affects the rights under existing leases in these areas. Each of these withdrawals is subject to revocation by the [p]resident in the interest of national security.[558]

In one brief act, Clinton accomplished what Congress and NOAA had been haggling over for more than 25 years. The memorandum did not, however, cover existing leases in the Channel Islands or Flower Garden Banks sanctuaries or those in close proximity to sanctuaries that could have impacts on sanctuary resources.

In 2000, President Clinton issued an executive order to establish a northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.[559] Additionally, the Thunder Bay NMS, primarily known for its historic shipwrecks, was designated by NOAA in 2000 as the 13th sanctuary.[560]

The 2000 Amendments to the Act, led predominately by Representative Saxton and Sens. John McCain (R-Ariz.) and Olympia Snowe (R-Me.), included significant changes to all aspects of the Act.[561] Representative Farr noted that public interest in the oceans remained an important political force, with several polls showing that "more than [one-]half of Americans have observed that the conditions of our coasts are worsening, especially due to pollution and overfishing, and they want us, [m]embers of Congress, to do something about it."[562] The 2000 Amendments were Congress' answer.

Specifically, the 2000 Amendments:

> added a finding on the benefits of sanctuaries to scientific, cultural, and archaeological resources;
>
> added a ninth purpose "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes";
>
> formally established a "system" to encompass all sanctuaries;
>
> added three new factors to be considered in making new designations: biodiversity, ecological importance, and archaeological, cultural, and historical importance;
>
> clarified and streamlined designation procedures;
>
> prohibited new designations unless the program is determined to have met financial goals;
>
> enhanced enforcement provisions;
>
> placed emphasis on the need for long-term monitoring (as opposed to just monitoring) and wise and sustainable use of marine resources; and
>
> made permanent the trial Marine Sanctuaries Program logo from the 1996 Amendments.[563]

The amendments also made two exceptions to the new provision that limited designations for financial reasons, authorizing designation of Thunder Bay and the northwestern Hawaiian Islands NMS.[564] Finally, the amendments required the Secretary to establish a Dr. Nancy Foster Scholarship

551. *Id.* at 25767 (statement of Rep. Saxton).

552. *Id.* at 11581 (statement of Rep. Farr).

553. H.R. Rep. No. 104-717, at 7.

554. Committee on Marine Area Governance and Management, National Research Council, Striking a Balance: Improving Stewardship of Marine Areas (1997).

555. 145 Cong. Rec. H2282-89 (daily ed. Apr. 22, 1999) (statements of Reps. Farr and Rohrabacher).

556. 144 Cong. Rec. 11659-60 (1998) (statement of Rep. Capps).

557. 25 Wkly. Comp. Pres. Doc. 1111 (June 19, 1998) (Clinton, Arb.)

558. *Id.*

559. Exec. Order No. 13178, 65 Fed. Reg. 76903 (2000), *as amended by* Exec. Order No. 13196, 66 Fed. Reg. 7395 (2001) (declaring the establishment of the reserve complete and ordering the Secretary to "initiate the process to designate the Reserve as a National Marine Sanctuary").

560. 65 Fed. Reg. 39042 (2000).

561. Pub. L. No. 106-513, 114 Stat. 2381 (2000) [hereinafter 2000 NMSA Amendments].

562. 145 Cong. Rec. H2282 (2000).

563. 2000 NMSA Amendments, *supra* note 561.

564. *Id.* §6(f), (g).

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Program to "award graduate education scholarships in oceanography, marine biology or maritime archeology."[565]

1. Sanctuaries as a System

In 1991, NOAA's Marine Sanctuaries Review Team had set a vision that

> by the year 2000, the National Marine Sanctuaries Program will manage a comprehensive and integrated system of the nation's most significant marine areas, managed on the basis of ecologically sound, well-researched principles of resource protection and sustainable use and will focus as well on improving public understanding of the nation's marine heritage and in extending sound marine resource management principles to areas beyond sanctuary boundaries.[566]

Twenty-eight years after the Sanctuaries Program was created, Congress declared that the marine sanctuaries constituted components of a system. The findings stated that management of sanctuaries as an NMS system will:

> (A) improve the conservation, understanding, management, and wise and sustainable use of marine resources;
> (B) enhance public awareness, understanding, and appreciation of the marine environment; and
> (C) maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas.[567]

The new focus on the "system" of NMS has thus far been in name only. "System" implies clear definitions of what a marine sanctuary is, and clear, uniform guidelines about how sanctuaries are supposed to be selected and managed. However, the NMS system remains a group of disparately managed parts rather than a cohesive program with a unified vision. Nevertheless, the system concept is important because it heightens the value of individual sanctuaries and points toward a desired future state.

2. Reemphasis on the Program's Primary Mandate

Drawing on the 1992 consideration of "natural diversity," the 2000 Amendments added a new purpose "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, *restore* and enhance natural habitats, populations, and ecological processes," partially redirecting the Act to its original roots of preservation and restoration.[568] The 2000 Amendments also added more factors to those the Secretary must consider in making future designations. These include: the area's scientific and monitoring value, the feasibility of employing innovative management approaches, and the value of the area as an addition to the system.[569] NOAA claimed the provisions "clarify that resource protection includes maintaining the entire ecosystem, including the structure of natural biodiversity and species assemblages and ecological processes."[570] The impact of this reemphasis, however, was severely tempered by the failure to simplify the program's purposes or to reduce the emphasis on facilitation of compatible uses. In fact, individual members of Congress and committee reports all made comments that appear to strengthen the place of multiple use in the program, rather than to diminish it.[571]

The Senate Committee on Commerce, Science, and Technology emphasized that the primary purpose is resource protection "while" facilitating all multiple uses, and said that "as a general rule, activities like drilling, mining, dredging, commercial fishing, sport fishing, boating, scuba diving, and marine tourism are generally allowed where practicable."[572] In other words, while the primary purpose of a sanctuary is protection, no use is outright prohibited and all may be allowed if they are "practicable" or "compatible." Senators McCain and Snowe declared that they saw the strength of the program to be its emphasis on a "responsible balance" between conservation and compatible multiple uses.[573] It is unclear why a responsible balance between conservation and compatible multiple uses would be needed if the multiple uses are actually compatible with conservation. These comments highlight one of the greatest weaknesses of the Act: the lack of any definition of what constitutes a "compatible" activity such as that found in the Refuge Administration Act.[574]

The 2000 Amendments also reflected a division between Congress and the Administration. Whereas President Clinton had banned all new oil and gas development in marine sanctuaries as of 1998, congressional statements made during the 2000 reauthorization and amendment process made it clear that many in Congress still felt that use of sanctuaries for oil and gas may be appropriate in some cases.[575] The 2000 Amendments would have been the appropriate place to finally enact a clear legislated prohibition on oil and gas development in marine sanctuaries, given President Clinton's stance and the various moratoria then in effect on OCS leasing in significant portions of U.S. coastal waters. Instead, Congress ignored the issue.

3. Funding Constraints on New Sanctuaries

On Earth Day 1999, Representative Farr said that "[w]e have created [NMS], which are essentially national parks in the ocean. We have 12 of those, yet with less than 1% of the funding that we give to our national parks. We have 378 national parks, 155 national forests, but only 12 national marine sanctuaries."[576] Addressing the lack of funding, Congress that year nearly doubled the program's budget from roughly $14 million in FY 1996 to $26 million in FY 2000, still falling short of the $30 million identified as necessary in 1991 by the NOAA Review Team and Rays' reports. Ironically, Representative Farr said this only a year-and-

565. *Id.* §18.

566. House Hearings 1991, *supra* note 475, at 101.

567. 2000 NMSA Amendments, *supra* note 561, §301(b)(3).

568. *Id.* §3(c)(4) (emphasis added).

569. *Id.* §5(b).

570. NOAA, Fact Sheet: National Marine Sanctuaries Act: Administration Reauthorization Bill (2000).

571. *See, e.g.*, 146 Cong. Rec. S10628-42 (daily ed. October 17, 2000) (statements of Sens. McCain, Hollings, and Inouye); 145 Cong. Rec. H8410-16 (daily ed. Sept. 21, 1999) (statements of Rep. Saxton); S. Rep. No. 106-353, at 2.

572. S. Rep. No. 106-353, at 2 (2000) (on S. 1482).

573. 145 Cong. Rec. S10440 (daily ed. Aug. 5, 1999) (statement of Sen. McCain on introduction of S. 1482).

574. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§668dd-668ee (1966).

575. S. Rep. No. 106-353, at 2.

576. 145 Cong. Rec. H2282 (1999).

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one-half prior to the 2000 Amendments that essentially banned new sanctuaries for financial reasons.

The 2000 Amendments prevented the designation of new sanctuaries by the Secretary unless he finds that

> (A) the addition of a new sanctuary will not have a negative impact on the System; and
> (B) sufficient resources were available in the [FY] in which the finding is made to—
>
> i. effectively implement sanctuary management plans for each sanctuary in the System; and
> ii. complete site characterization studies and inventory known sanctuary resources, including cultural resources, for each sanctuary in the System within 10 years after the date that the finding is made if the resources available for those activities are maintained at the same level for each [FY] in that 10-year period.[577]

Although the 2000 Amendments were portrayed as a conservation-minded advance to the NMSA, the moratorium was not desired by most conservation groups involved in the process or by NOAA.[578] The moratorium was opposed by the conservation community because it implements a standard that is nearly impossible to meet. The provisions of the moratorium require the Secretary to undertake new burdens, without any new funding, in a program that already stretches its appropriations further than any other resource preservation program.

The concept of focusing the program on improving management of existing sanctuaries, rather than continuing to designate additional sanctuaries, had been raised by the review team in its 1991 report. By 2000, the idea had gained wide support on the authorizing committees, and was confirmed by a National Academy of Public Administration (NAPA) report, which concluded that

> [t]his is probably not the right time to create more sanctuaries. Perhaps if Congress were to increase the budget and the clout of the program dramatically, the program could handle additional sites, but no one is talking about such a step now. Eventually, the program could grow to include more sites. There are only a few small sites along the Atlantic Coast and in the Gulf of Mexico now, and none in Alaska. However, at this point, the program cannot afford to spend its resources on a long, expensive process to add more sites.[579]

Senator McCain voiced his approval for the restriction by arguing that "by prioritizing our actions over the next few years on making the existing sanctuaries fully operational with education and research programs, a full complement of staff, active public outreach programs, and enforcement we will strengthen the system and help it to reach its full potential."[580]

Representative Saxton stated similar sentiments: the "biggest hurdle is inadequate funding for basic management and outreach activities."[581] Representative Saxton contended that NOAA's concerns about the moratorium were addressed by the provisions that allow new designations if they will not negatively impact management of existing sanctuaries or interfere with the sanctuary resource surveys.[582]

4. Conclusion

The addition of a new purpose of restoring and maintaining natural ecosystems and processes, and several other preservation-oriented provisions in the 2000 Amendments was important in highlighting the Act's preservation goal, but in reality was not much of an advance because of the remaining and numerous nonresource factors and standards that promote multiple use. In addition, the moratorium on growth, other than the approved northwestern Hawaiian Islands sanctuary, means that the sanctuaries-creation process, imperfect though it is, has ground to a halt until Congress chooses to restart it.

V. The Unfilled Preservation Mandate

A. Background

The NMSA has experienced a complex and turbulent evolution. Having precipitated numerous sanctuary designation battles, suffered stop and go implementation, and been the subject of repeated regulatory and legislative amendments over three decades, how effective has the Act been in achieving its preservation purpose?

Some observers have rightly extolled the successes and potential of the Sanctuaries Program under difficult circumstances.[583] Owen notes the program has

> functioned as a popular and effective limit on oil and gas drilling, particularly along the California coast. It has been similarly effective in protecting other limited areas from selected threats; Stellwagen Bank is intact, unmined and without floating casinos, and the reefs in the Florida Keys are better protected from shipping traffic. All of this protection, moreover, grew out of an uncommon level of bipartisan support and cooperation. The program also offers states a source of pride and communities a potentially defining connection to their surrounding environment. Finally, it has provided a platform for the potential development of future protection schemes.[584]

Although existing sanctuaries encompass a variety of qualities that make them nationally or internationally significant, they fail to add up to a complete marine preservation system. Moreover, given past experience with the Act's conflicting and numerous mandates, there is little likelihood that a sanctuary system that preserves the full array of the nation's unique and representative marine features and resources will be realized under the current law.

B. Limited Scope of the Sanctuary System

The scientific consensus is very strong: many of the ocean ecosystems of the United States are in dire and worsening condition. At the same time, public support for ocean protection is growing. Is the Sanctuaries Program capa-

577. 2000 NMSA Amendments, *supra* note 561, §6(f).

578. Telephone Interview with Amy Mathews-Amos, National Marine Sanctuaries Act History (Oct. 20, 2003).

579. Center for the Economy and the Environment, Protecting Our National Marine Sanctuaries 34 (2000).

580. 145 Cong. Rec. at S10636.

581. *Id.* at H8413.

582. *Id.*

583. Center for the Economy and the Environment, *supra* note 579.

584. Owen, *supra* note 6, at 746.

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ble of preserving and restoring ocean ecosystems in a timely fashion?

In the 32 years since the Act's passage, 13 sanctuaries have been established that cover approximately 14,065 square nautical miles, as noted in Table 1. This area equals 0.4% of the nation's EEZ. The sanctuaries range in size from less than 1 square nautical mile (Monitor) to 4,023 square nautical miles (Monterey Bay). Most sanctuaries are relatively small, with eight under 1,000 square nautical miles. Five sanctuaries are between 1,000 and 4,100 square nautical miles in size. The authorized addition of a northwestern Hawaiian Islands Sanctuary of more than 99,500 square nautical miles will increase the size of the current system by sevenfold. But even with this addition, the system would encompass only 3.38% of the U.S. oceans.

Congress has never specified what constitutes an ideal sanctuary system, only that the Act intends to protect special areas that possess national significance. Although NOAA's regional survey teams identified a number of candidate sites in the early 1980s, NOAA has never undertaken a rigorous survey of U.S. ocean waters, similar to the comprehensive wilderness inventories and studies mandated by the Wilderness Act, to determine what marine resource types and areas are adequately protected and which ones merit protection.

1. Resources Missing

Many desirable resources and areas are missing from the system. There are large swaths of the nation's oceans that have no sanctuaries. A look at a map will show blank spaces off many coastal states. No sanctuaries have been designated in the Caribbean or in the North Pacific. There are just three sanctuaries along the entire Atlantic seaboard, one in South Florida, and one in the Gulf of Mexico. On the West Coast, California has four sanctuaries, and Washington one, but Oregon and Alaska have none. Ironically, even Georges Bank, the area Representative Keith set out to protect when he introduced sanctuary legislation in 1967, is missing from the system. Furthermore, only one-half of the 12 marine biotic regions identified by the Rays are represented in existing sanctuaries, as noted in Table 2.

Another example of the system's incompleteness is its inadequate coverage of both endangered and commercially valuable species. In its 1974 regulations, NOAA identified preserving genetic resources, including spawning and nursery grounds and migratory pathways, as one purpose of a sanctuary designation NOAA reconfirmed this in 1988.[585] Congress agreed with NOAA, and in 1992 added as a purpose of the Act: "to maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate."[586] In the 2000 Amendments, Congress declared that one of the purposes of the Act is "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations, and ecological processes."[587] The Act further specifies that among the factors to be considered in creating a sanctuary are "maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site."[588]

There are currently 21 domestic marine species listed as endangered and 13 as threatened, as listed in Table 3. There has been no comprehensive assessment by NOAA of what or how many endangered marine species and critical habitats are encompassed in sanctuaries, or what additional sanctuaries are needed to help conserve these species. Regarding commercial species, although the Act has been used to protect ocean areas from oil development and pollution, it has not been used to protect fisheries stocks from overfishing or uniformly applied to protect sanctuary bottom habitats from destruction by commercial fishermen. For example, bottom trawling, the most environmentally destructive method of commercial fishing,[589] is allowed in Stellwagen Bank and Monterey Bay sanctuaries, but banned in other sanctuaries.

2. What Does Protection Mean?

The Turnstone Group notes that no sanctuary has been set aside as a "fully protected area."[590] As defined by the Turnstone Group, a fully protected area means an area designated based on its "importance to ecosystem structure, function or process or their esthetic or other values," and in which all extractive or potentially disruptive activities are prohibited, resource protection is the singular goal, and protection is permanent.[591] Fully protected zones or sub-areas have been created in two sanctuaries: Florida Keys, Fagatele Bay and proposed in a third, the Channel Islands.[592] All or large portions of the northwestern Hawaiian Islands also will qualify as fully protected zones when the designation process is complete.[593] While it is conceivable the Act could be used to establish sanctuaries whose sole purpose is full protection, the Act has never been used this way.

The Act's purpose of facilitating all uses means that resource conflicts within sanctuaries are common. Generally, it is against the law to "destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations."[594] However, the prohibition on destruction of managed resources applies only to resources identified in individual sanctuary designation documents as the subject of protection. In addition, the designation document, as implemented by the management plan, determines which uses or activities shall be subject to regulations. Uses not listed are not subject to regulation. For example, NOAA's management plan for Stellwagen expressly excludes fishing as subject to the regulation that prohibits altering the sanctuary seabed,[595] despite research that NAPA says "has documented how bottom-trawling has leveled the seabed at

585. 39 Fed. Reg. at 23255, §922.10(a); Marine Sanctuary Program Final Regulations, 53 Fed. Reg. 43802, §922.1(c)(1) (Oct. 28, 1988).

586. 2000 NMSA Amendments, *supra* note 561, §2101(b).

587. *Id.* §3(c)(4).

588. National Marine Sanctuaries Act, 16 U.S.C. §§1431 et seq. (2002).

589. *See, e.g.*, Lance E. Morgan & Ratana Chuenpagdee, Shifting Gears: Addressing the Collateral Impacts of Fishing Methods in U.S. Waters (2003).

590. The Turnstone Group, *supra* note 506.

591. *Id.* at 3-4.

592. *Id.* at 11-12.

593. *Id.* at 12.

594. National Marine Sanctuaries Act, §1436(1).

595. 2000 NMSA Amendments, *supra* note 561, §2202; Marine Sanctuary Program Regulations, 15 C.F.R. §922.142 (2002).

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Stellwagen and stripped vegetation."[596] The Hawaiian Islands Humpback Whale Sanctuary, established primarily for research and education about humpback whales, does not regulate fishing in the sanctuary, even though "overfishing of bottom fish . . . and live capture of reef fish for the pet trade have depleted stocks sharply."[597] Flower Garden Banks, a relatively small sanctuary set in an oil producing area, prohibits oil and gas development in some areas of the sanctuary but not others.[598]

According to the Turnstone Group,

> Even when a sanctuary does prohibit activities in general, there are often exceptions for specific and often significant exceptions.
>
> Some of these exceptions are minor but others substantially weaken protection. For instance, most sanctuaries prohibit discharge or deposit of materials in sanctuary waters, but include exceptions for minor activities such as discharge of deck washdown water. However, Monterey Bay and Gulf of the Farallones . . . include exceptions for disposing of dredge material and the Farallones provides an exception for the discharge of sewage. The Flower Garden Banks prohibits the use of explosives but then gives an exception to the use of explosives for oil and gas exploration.[599]

While one may determine what resources are being protected at each sanctuary by consulting the designation document or the current *Code of Federal Regulations*, it is more difficult to determine the status and trend of any particular resource because NOAA has not developed baseline information or effective monitoring programs.[600] Today, few sanctuaries can report with much specificity how their resources are faring based on objective measures.

3. Oil Development and Commercial Fishing

Two of the biggest threats to sanctuary resources, oil development and commercial fishing, have proved flashpoints in sanctuary designations throughout the Act's history. As things have turned out, new oil development has been prohibited in the sanctuaries system, at least for the moment. Although there were assertions when the Act passed and afterwards that oil development could be a compatible use of a sanctuary, a number of sanctuaries specifically prohibited new oil and gas development at the time they were designated by NOAA, e.g., Channel Islands, Gulf of the Farallones, or by Congress, e.g., Monterey Bay, Cordell Banks. In fact, it was the desire of local citizens to exclude oil from their shores that impelled the creation of sanctuaries such as Monterey Bay and Channel Islands.

More recently, President Clinton issued an executive memorandum to the Secretary of the Interior in 1998 that extended until June 30, 2012 the prohibition on the granting of new oil and gas leases in all sanctuaries, but the issue of oil development is by no means settled.[601] The Clinton memorandum can be rescinded by a succeeding president. Congress can also intervene, as it did in 2003, when a provision was included in the energy bill to allow exploration for oil throughout the entire OCS, including in marine sanctuaries.[602] The measure was passed by the Senate, but rejected by the House due to heavy opposition by members of Congress from coastal states. Energy development on the OCS remains an issue of public debate as it has from the time the Sanctuaries Act was passed.

Since 1972, commercial overfishing has caused severe population declines of many commercial fish species. Depleted populations include New England cod, snapper-grouper reef fish in the South Atlantic and Gulf of Mexico, various species of rockfish and the nearly extinct white abalone along the Pacific Coast, and rock lobster in Hawaii. According to NOAA, 86 populations in the United States are classified as overfished.[603] Populations of depleted stocks are found in many sanctuaries, but most sanctuaries do not prevent or regulate the taking of fish commercially or recreationally except in a few closed areas. Furthermore, seven sanctuaries allow fishing by bottom trawl in all or a portion of their waters. Bottom trawling is known to cause extensive damage to structurally complex seafloor habitats, thereby reducing habitat complexity and "potentially altering the productivity of fish communities that depend on seafloor habitats for food and refuge."[604] Clearly, commercial fishing has had and continues to have significant negative impacts on sanctuary environments, as well as detracting other uses such as recreational fishing and diving.

Sanctuary staff of the National Ocean Service, the NOAA bureau with responsibility for management of the Sanctuaries Program, candidly admit, "We don't do fish," meaning that they leave commercial and recreational fisheries management in federal waters to their sister bureau, the National Marine Fisheries Service (NMFS), and the Regional Fishery Management Councils.[605] This attitude is derived from the Act's provision requiring the Secretary to give the appropriate council "the opportunity to prepare draft regulations for fishing within the [EEZ] as the [c]ouncil may deem necessary to implement the proposed designation."[606] The draft regulations must be guided by the national standards that implement the Magnuson-Stevens Act, the law under which federal fisheries are managed primarily for exploitation.[607] The Secretary must accept council recommendations unless the council action "fails to fulfill the purpose and polices [of the Act] and the goals and objectives of the proposed designation."[608] If the Secretary rejects the council-proposed regulations or the council fails to submit regulations or to submit them in a timely manner, the Secretary

596. Center for the Economy and the Environment, *supra* note 579, at 27.

597. *Id.* at 92.

598. 15 C.F.R. §922.122.

599. The Turnstone Group, *supra* note 506, at 11.

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

601. Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf From Leasing Disposition, 34 Wkly. Comp. Pres. Doc. 1111 (June 12, 1998).

602. S. 14, 108th Cong., §105 (2003).

603. U.S. Department of Commerce, National Marine Fisheries Service, Annual Report to Congress on the Status of U.S. Fisheries—2002 (2003).

604. Committee on Ecosystem Effects of Fishing, National Research Council, Effects of Trawling and Dredging on Seafloor Habitat 2 (2002); Les Watling & Elliott A. Norse, *Disturbance of the Seabed by Mobile Fishing Gear: A Comparison to Forest Clearcutting*, 12 Conservation Biology 1180 (1998).

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

606. National Marine Sanctuaries Act, §1434(a)(5).

607. *Id.*

608. *Id.*

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must prepare the regulations.[609] Although the Sanctuaries Act technically gives the Secretary the power to object to a council recommendation that would harm sanctuary resources, the Act, notes the Turnstone Group,

> [p]uts the burden on the Secretary to show why the regulations from [c]ouncils (that are generally less protective and more interested in resource exploitation) are incompatible with the goals and objectives of a sanctuaries designation. Given the multiple-use standard in the Sanctuaries Act, this finding is a difficult one to make. To our knowledge, this provision has never been used [by the Secretary] to protect [s]anctuary resources from the effects of fishing.[610]

In addition, secretarial action to protect fish in sanctuaries is constrained by the Secretary's conflicting responsibilities. Sanctuaries are managed by the National Ocean Service, and fisheries by the NMFS, both bureaus within the DOC. According to the Turnstone Group, conflicts between the two bureaus typically "get resolved in favor of [the fisheries service] at low levels before ever reaching the level of the Secretary."[611]

Reluctance on the Secretary's part to challenge council-drafted fishery rules for sanctuaries has been further reinforced by Congress' own failure to address head-on the negative impacts of fishing on sanctuaries. For example, the legislative designations of Monterey Bay and Stellwagen Bank were silent on commercial fisheries regulation, leaving it to NOAA to decide whether to include these activities in the list of what would be regulated or prohibited.[612] As a result, neither sanctuary has played a significant role in stopping the drastic decline of certain fish populations in their respective regions. These declines of fish populations and structural habitat impacted by some commercial fishing areas have also affected recreational fishing opportunities.

Clearly, the Sanctuaries Act has been interpreted to give deference to the Regional Fishery Management Councils regarding how to best manage commercial and recreational fishing in sanctuaries. This deference is at odds with the law's purpose of providing for "comprehensive and coordinated conservation and management" of special ocean areas.[613] How can sanctuaries management be comprehensive if sanctuary managers do not have controlling authority over fish or fish habitat within a sanctuary?

4. Moratorium on New Sanctuaries

While the Sanctuaries Program has clearly failed to identify, inventory, and protect the full array of marine resources and places meriting preservation, efforts to designate additional sanctuaries had come to a halt by the mid-1990s, by which time NOAA had inactivated the SEL on the ground that it was to be revised.[614] Before the revisions occurred, new designations were foreclosed by the moratorium mandated by Congress in the 2000 Amendments.[615] The lifting of the moratorium is contingent upon the Secretary publishing a "finding" that the "addition of a new sanctuary will not have a negative impact on the system," and that the DOC budget has sufficient resources in the year of any new designation to inventory known sanctuary resources and complete site characterization studies for all sanctuaries within 10 years, if current funding levels are maintained.[616]

The moratorium is a signal that additions to the sanctuary system are not a high priority for the program's congressional authorizing committees until such time as NOAA proposes an adequate plan and budget for managing existing sanctuaries, and Congress itself provides the appropriations. While the moratorium has had one positive consequence—forcing NOAA to develop a management program for congressional review—it throws a pall of uncertainty over the program because there is no set date for the moratorium's expiration. It is hard to imagine a similar no-growth injunction being placed on the national park or wildlife refuge systems.

C. Structural Flaws of the Sanctuaries Act

1. Lack of Preservation Focus

The Turnstone Group calls the NMSA a paradox because "it provides authority for meaningful protection on the one hand, and then substantially undermines it with the other. The effect on the water is few real protections in marine sanctuaries."[617] Among other things,

> the Act "makes it difficult to prohibit activities";
>
> fisheries management [in sanctuaries] is essentially controlled by the NMFS;
>
> the Act's multiple use mandate "makes it difficult to implement regulations that are contentious or that significantly impact politically well-connected user groups";
>
> the requirement to review sanctuary management plans every five years undermines long-term protection; and
>
> the Act's multiple use mandate and exhaustive consultation requirements make it "fundamentally different" from laws governing other protected systems like parks and wilderness areas which have an overarching conservation frame work.[618]

While we agree the law is riddled with incongruities, in our view, the fundamental flaw of the Sanctuaries Act is its *lack of a singular focus on preservation*. This conclusion is all the more obvious when the Sanctuaries Act is compared to the Wilderness Act, which was enacted just eight years earlier.

The Wilderness Act provides a valuable comparison for the Sanctuaries Program for two reasons. First, the singular objective of the Wilderness Act is preservation of "untrammeled" wilderness. Second, while implementation of the Wilderness Act has not been trouble-free by any means, it has produced very successful outcomes.

609. *Id.*

610. The Turnstone Group, *supra* note 506, at 7.

611. *Id.*

612. 2000 NMSA Amendments, *supra* note 561, §§2202, 2203.

613. National Marine Sanctuaries Act, §1431(b)(2).

614. Marine Sanctuary Program Regulations, 60 Fed. Reg. 66875 (Dec. 27, 1995).

615. 2000 NMSA Amendments, *supra* note 561, §6(f).

616. *Id.*

617. The Turnstone Group, *supra* note 506, at 5.

618. *Id.* at 5-8.

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2. Wilderness Act Model

In his short history of the Wilderness Act, Douglas Scott identifies the features of that Act that have made it such an effective conservation tool.[619] The Wilderness Act:

> "established a clear unambiguous national policy to preserve wilderness, recognizing wilderness itself as a resource of value";
>
> provided a specific definition of wilderness which could be applied practically in the field;
>
> established a permanent wilderness preservation system, described its extent and designated the first 9.1 million acres of wilderness (equivalent to 10,740 square nautical miles of water);
>
> "set out a single, consistent management directive" that applied to all wilderness areas which, among other things, clearly specified allowed and prohibited uses;
>
> mandated a clearly specified wilderness review process," which included an inventory of all federal roadless areas 5,000 acres and larger, and required the executive branch to recommended all suitable wilderness areas to Congress within 10 years;
>
> "asserted the exclusive power of the Congress to designate wilderness areas" and to maintain them as wilderness until Congress decided otherwise; and
>
> "constituted the best, most practical mechanism to actually preserve wilderness *in perpetuity*."[620]

In short, the Wilderness Act established a comprehensive, well-defined program with the *singular purpose of conserving America's remaining wilderness in perpetuity.* The Wilderness Act has led to the designation of wilderness in 46 states.[621] While there have been many political battles over whether particular areas were suitable for or should be designated as wilderness, once designated, wilderness areas must be managed in accordance with uniform preservation standards prescribed in the law. Furthermore, once established, wilderness areas are not subject to change in boundaries or degrees of protection, except by further act of Congress.

In contrast, the Sanctuaries Act has produced just 13 sanctuaries, which constitute less than 0.4% of U.S. waters. Although amended many times since 1972, the Sanctuaries Act still lacks a singular focus on preservation and a rigorous process to achieve it. Moreover, the Secretary of Commerce is not required to establish any particular sanctuary or number of sanctuaries or even to comprehensively inventory the nation's waters for candidate areas. The Sanctuaries Act's conflicting goals of preservation and multiple use, its discretionary and open ended nature, its lack of clear definitions and protection standards, and the multiple intervention points it provides for stakeholders and Congress have burdened the program with enormous implementation difficulties and inefficiencies. The Act's results speak for themselves.

619. Douglas W. Scott, Campaign for America's Wilderness, A Wilderness-Forever Future: A Short History of the National Wilderness Preservation System (2001).

620. *Id.* at 15.

621. *See supra* note 7.

3. Preservation and Multiple Use

Several observers have argued that the primary or central mission of the NMSA has always been protection or preservation, and that NOAA has simply failed to aggressively pursue this mission.[622] We believe the reality is more complex. While it is true that preservation (or protection) always has been a purpose of the Act, it is not the Act's *singular purpose*. More than anything, it is the multiple use provision (and related provisions) that has prevented the development of a marine sanctuary system that lives up to its name.

Even though the Act states that "protection" is the primary objective, by also mandating the facilitation of all public and private uses, the legislation

> gives standing to resource users who can challenge the Secretary's decision to prohibit certain activities, and creates the expectation among resource users that their use will be facilitated. The Secretary must then defend his or her regulatory decisions by demonstrating that such activities are not "compatible" with resource protection. This fact raises the bar for determining whether an activity should be allowed and fundamentally changes the question the Secretary must answer before regulating an activity. Instead of the precautionary question "might this activity harm the resource?" the test is more complex. The Secretary must in effect, answer the question: "Does this activity harm the resource enough in comparison to the benefits people get from that activity to justify regulating it?"[623]

Tarnas found the pursuit of multiple use in sanctuaries "unworkable" because both the meaning of the term and its practical application are unclear.[624] If preservation is the primary purpose of sanctuaries, at what point do multiple uses compromise resource protection? Furthermore, says Tarnas, according to some observers, application of multiple use management is "ineffective." What ocean users "call multiple use appears to amount to a policy of non-exclusion of their favored uses."[625]

Multiple use management would only make sense, says Tarnas, if it were applied comprehensively to the entire ocean to "balance the whole range of marine uses."[626]

> Conflicting activities could be separated, complementary activities allowed together. Designated areas would have different levels of use restrictions to achieve different purposes. For example, a marine protected area, being part of a larger interactive marine ecosystem, would restrict those consumptive uses that conflict with the primary purpose of resource protection.[627]

The Marine Sanctuaries Program, observes Tarnas, has "assumed the task of trying to provide both the overall multiple use management of large ocean areas, and the specialized protective management of smaller areas. Doing both has been difficult and has possibly weakened the program."[628]

622. *See, e.g.*, Tarnas, *supra* note 246; Weber Telephone Interview, *supra* note 374; Center for the Economy and the Environment, *supra* note 579.

623. The Turnstone Group, *supra* note 506, at 6.

624. Tarnas, *supra* note 246, at 278.

625. *Id.* at 279 (quoting Finn, *supra* note 319, at 91).

626. *Id.*

627. *Id.* at 279-80.

628. *Id.* at 280.

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Tarnas concludes:

> Sanctuaries fit into an overall multiple-use strategy for the larger marine ecosystem as one type of specialized marine management. Sanctuaries are marine protected areas with varying levels of protection not afforded by multiple use management. Thus, sanctuaries would operate most effectively within the context of a larger national ocean resource management policy using this multiple use approach. Yet this country has no comprehensive or integrated national ocean policy.[629]

Tarnas' observations ring true. If most of the ocean is generally open to all uses, then the most direct and effective way to *preserve* ocean places is to set some of them aside for the singular purpose of preservation just as national parks and wilderness areas have been created on land. Only truly compatible uses of sanctuaries, such as education, science, and low-impact recreation would be allowed. A comprehensive ocean zoning policy, if we had one, would divide the ocean into a number of a number of different use zones, including preservation zones. This was the strategy recommended by the President's Science Advisory Committee in its 1966 call for a marine wilderness preservation system.

VI. Conclusion

Lacking as it does the singular preservation focus of the Wilderness Act, the Sanctuaries Act has proved to be an unreliable vehicle for the timely preservation of the full array of the nation's marine resources and special places in a comprehensive national system.

That the Sanctuaries Act is ineffective as a reliable preservation statute is reflected in the Act's implementation history. Because of its incongruous and conflicting mandates, lack of strategic implementation guidelines, and failure to prohibit incompatible uses, or define uniform protection standards, the Act proved baffling to NOAA and a continuing frustration to its authorizing committees. Furthermore, the Act's frequent reinvention by Congress and NOAA, though well-intentioned, has not really gotten at the root of the Act's problems.

With the purposes and uses of each sanctuary up for grabs during the designation process, highly contentious and lengthy battles have been waged between conservationists and user groups over a number of candidate sites. Indeed, this contention is almost guaranteed by the Act's elaborate designation process.

When NOAA became bogged down in designation battles in the 1980s, a protection-leaning Congress first was forced to mandate deadlines for NOAA to designate certain sanctuaries, then had to bypass a dysfunctional process to designate Florida Keys, the Hawaiian Islands Humpback Whale, Monterey Bay, and Stellwagen Bank marine sanctuaries. In addition, when Congress found itself unhappy with NOAA's protection strategies for certain candidate sanctuaries, it intervened legislatively to prohibit new oil and gas leases at Cordell Bank and Olympic Coast, included an oil development ban in its legislative designation of Monterey Bay, and prohibited sand and gravel mining (but not oil development) at Stellwagen.

At other times, Congress has been more charitable toward certain user groups or local constituencies. For example, Congress specifically prohibited the designation of a Northwest Straits sanctuary by NOAA because local users feared that federal oversight would result in greater use restrictions without a corresponding increase in protection to the area's resources. Congress also created sanctuaries, e.g., Monterey Bay, in which commercial fishing activities were not subject to regulation under the terms of the legislative designation, despite recognition that fish stocks in those areas were in decline.

The Act is now so constrained by its own architecture that that it stands little chance of ever producing the comprehensive system of marine preservation areas envisioned by early visionaries, who hoped to create a system or marine wilderness preserves analogous to the terrestrial wilderness system. The blueprint of a permanent marine sanctuary system with the singular purpose of preservation was rejected in favor of a law that required preservation to be balanced with other uses within a sanctuary. As a result, progress toward protecting America's ocean resources has been nowhere near that needed to achieve the national network of marine conservation areas scientists say are needed to protect and restore ocean life.

In order to be capable of establishing a system of marine preservation areas that only allows uses that are truly compatible with preservation, the Sanctuaries Act would have to undergo substantial amendment. Alternatively, Congress could authorize a separate system whose components could include any areas of the ocean, including presently managed or protected areas, which met the new law's preservation and protection criteria. This was precisely the approach taken by the Wilderness Act, which provided a wilderness-overlay on existing parks, refuges, forests, and public lands, and allowed compatible uses as defined by the law. Whichever approach is taken, a bold, vigorous, and systematic effort will be needed to identify, protect, and preserve the full array of marine habitats and features during the next 10 years before they are irretrievably degraded or lost. Current trends do not bode well for conservation.

629. *Id.* at 294.

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Table 1: Sanctuary Information

Sanctuary Name	Designation Date	Square Nautical Miles	New Oil/Gas Leases	Bottom Trawling
USS Monitor	1/30/75	0.75	Prohibited	Prohibited
Channel Islands	9/22/80	1,258	Prohibited	Restricted to Certain Areas
Gulf of the Farallones	1/16/81	948	Prohibited	Allowed
Gray's Reef	1/16/81	17	Prohibited	Prohibited
Fagatele Bay	4/29/86	0.19	Prohibited	Prohibited
Cordell Bank[3]	5/24/89	397	Prohibited[2]	Allowed
Florida Keys[1,2]	11/16/90	2,870	Prohibited	Restricted to Certain Areas
Flower Garden Banks[3,4]	1/17/92	42	Prohibited	Prohibited
Monterey Bay[2]	9/18/92	4,023	Prohibited[2]	Restricted to Certain Areas
Stellwagen Bank[2]	11/4/92	636	Prohibited	Restricted to Certain Areas
Hawaiian Islands Humpback Whale[2]	11/4/92	1,035	Prohibited	Prohibited
Olympic Coast[3]	7/16/94	2,500	Prohibited[2]	Allowed
Thunder Bay	10/7/00	338	Prohibited	N/A
Total System		**14,065**		
NWHI Coral Reef Ecosystem Reserve[5]	12/4/00	99,500	Prohibited	

[1] Florida Keys NMS was designated on 11/16/90 and subsumed Key Largo (designated in 1975) and Looe Key (designated in 1981).
[2] Designated by Congress.
[3] Designation required by Congress.
[4] Congress added Stetson Bank to the Flower Garden Banks NMS in 1996.
[5] NWHI is listed as an Active Candidate for sanctuary designation.

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Table 2: Sanctuary Representation of Biogeographical Regions

Sanctuary Name	Acadian	Virginian	Carolinian	West Indian	Louisianian	Veracruzan	Californian	Oregonian	Sitkan	Aleutian	Arctic	Indo-Pacific
USS Monitor			X									
Channel Islands							X					
Gulf of the Farallones								X				
Gray's Reef			X									
Fagatele Bay												X
Cordell Bank								X				
Florida Keys				X								
Flower Garden Banks				X								
Monterey Bay								X				
Stellwagen Bank	X											
Hawaiian Islands Humpback Whale												X
Olympic Coast								X				

Source: updated from House Hearing 1991, *supra* note 475, at 160.

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Table 3: Endangered and Threatened Marine Species

Endangered Marine Species

Species	Populations Protected	Year Designated
Atlantic salmon	NY to Maine	2000
Blue whale	All populations	1973
Bowhead whale	All populations (occur off N. AK)	1973
Caribbean monk seal	All populations (thought to be extinct)	1979
Chinook salmon	2 populations in CA and WA	1994, 1999
Fin whale	All populations (occur in Mid- and N. Atlantic)	1970
Green sea turtle	Breeding populations off FL and the Pacific Coast of Mexico	1978
Hawaiian monk seal	All populations (occur around HI)	1976
Hawksbill sea turtle	All populations	1970
Humpback whale	All populations	1973
Kemp's ridley sea turtle	All populations	1970
Leatherback sea turtle	All populations	1970
Northern right whale	All populations (occur in N. Atlantic)	1070
Olive ridley sea turtle	Mexican nesting population	1978
Sei whale	All populations	1973
Shortnose sturgeon	All populations (only occur along E. Coast of U.S.)	1967
Smalltooth sawfish	All populations (only occur along E. Coast of U.S.)	2003
Sockeye salmon	Snake River	1991
Sperm whale	All populations (occur in N. Atlantic)	1973
Steelhead trout	2 populations off CA, WA	1997
West Indian Manatee	FL and Antillean (occurring off Puerto Rico) stocks	1967
White abalone	All populations (occurs only from S. CA to Mexico)	2001

Source: NMFS, Office of Protected Species.

Threatened Marine Species

Species	Populations Protected	Year Designated
Chinook salmon	7 populations	1992, 1999
Chum salmon	2 populations off OR, WA	1999
Coho salmon	3 populations off CA, OR	1996, 1997, 1998
Green sea turtle	All populations not listed as endangered	1978
Guadalupe fur seal	All populations (occur off S. CA)	1985
Gulf sturgeon	All populations (predominate in Gulf of Mexico)	1991
Johnson's sea grass	All populations (occurs only along E. Coast of FL)	1998
Loggerhead sea turtle	All populations	1978
Olive ridley sea turtle	All populations not listed as endangered	1978
Sockeye salmon	Ozette Lake, WA	1999
Southern sea otter	CA stock	1977
Steelhead trout	8 populations off CA, OR, WA	1997, 1998, 1999, 2000
Steller sea lion	All populations (occur off W. Coast of U.S.)	1990

Source: NMFS, Office of Protected Species.