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Ocean Law Memo

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NATIONAL MARINE SANCTUARY PROGRAM REAUTHORIZED: PAST PROBLEMS AND FUTURE PROSPECTS

INTRODUCTION

On October 19, 1984 President Reagan signed legislation amending and reauthorizing the National Marine Sanctuary Program through fiscal year 1988--Title III of the Marine Protection, Research and Sanctuaries Act (MPRSA), 16 U.S.C. § 1431 et. seq. The legislation authorizes the Secretary of Commerce to designate distinctive ocean areas as marine sanctuaries to be managed in accordance with regulations promulgated by the Secretary. The program is administered by the Sanctuary Programs Division of the National Oceanic and Atmospheric Administration (NOAA).

Although simple in theory, the designation of sanctuaries has been difficult in practice. To date only six sanctuaries have been designated. Opposition to the program has at times been severe, and several attempts have been made to repeal the legislation. The brunt of the opposition has come from segments of the petroleum and fishing industries due to potential use restrictions within particular sanctuaries.

This Memo analyzes the 1984 amendments and discusses the program's future operation. In an attempt to place the 1984 amendments in perspective, the program's evolution is retraced in some detail.

THE 1972 LEGISLATION

Initial proposals for marine sanctuary legislation sought to protect sensitive marine resources by prohibiting oil and gas development in certain ocean areas. These proposals were mainly a reaction to the 1969 Santa Barbara oil spill. While these early bills failed to pass, a marine sanctuary program was finally enacted in 1972 as Title III of MPRSA.

The original Title III was notable for its brevity and its broad delegation of authority to the Secretary of Commerce. The central provision of the statute provided:

> The Secretary, . . ., with the approval of the President, may designate as marine sanctuaries those areas of the ocean waters, . . ., which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values.

Aside from certain consultation and public hearing requirements, the statute lacked any further guidelines or criteria for the designation process. There were, however, some geographical restrictions. Sanctuaries could be designated in coastal waters from the high water mark to the outer edge of the continental shelf. The Great Lakes and their connecting waters were also eligible for designation. Another provision recognized the need for negotiations with other governments if a sanctuary included areas outside U.S. territorial waters. State governors could disapprove sanctuary designations in state waters, which generally extend three miles offshore.

After designation the Secretary of Commerce retained substantial regulatory power. The legislation directed the Secretary to issue necessary and reasonable regulations to control <u>any</u> activities within a sanctuary. Moreover, <u>no</u> other permit, license, or other authorization was valid <u>unless</u> the Secretary certified the activity consistent with the Sanctuary's purpose.

Title III, as initially enacted, raised both hopes and fears about the program's role on the continental shelf. The thrust of the legislation was undoubtedly conservation and resource protection, but the vagueness of the statute left the scope of the program uncertain. Nowhere did the statute indicate what activities should be allowed in a sanctuary. Environmentalists viewed this flexibility as a broad mandate to comprehensively manage ocean areas and resources threatened by development.

The legislative history suggested that multiple uses were to be allowed as long as they were compatible with protection of the sanctuary's resources. In this sense, Title III differed from the early sanctuary proposals which would have placed a blanket prohibition on petroleum activities. The statements of Congressman Hastings Keith were particularly instructive:

> I must admit that the word sanctuaries carries a misleading connotation. . . . Title III simply provides for an orderly review of the activities on our continental shelf. . . . It provides for multiple use of the designated areas.

According to John Epting, Regional Project Manager:

> While a key concept of the program is the protection of identified areas, the program is not intended primarily to regulate uses, but rather to protect the recognized values of the site and manage compatible human uses.

PROGRAM IMPLEMENTATION

The early years of the sanctuary program were uneventful largely because no funds were appropriated. Instead, the Sanctuary Program's Office (now Division) operated on reprogrammed funds. As a consequence the first sanctuary designations were not made until 1975.

The Monitor National Marine Sanctuary was designated in January 1975. This sanctuary protects the civil war ironclad, U.S.S. Monitor located southeast of Cape Hatteras, North Carolina. The sanctuary is one mile in diameter. In December 1975 a second one hundred square mile sanctuary was designated to protect the Key Largo coral reefs off the Florida Keys.

President Carter, in his 1977 Message on the Environment, cited the sanctuary program as an effective mechanism to protect marine resources where oil and gas development was imminent. Subsequent use of the program as a tool to regulate offshore oil and gas development resulted in conflict with the oil industry and the Department of the Interior (DOI) which manages mineral development on the outer continental shelf (OCS) beyond three miles under the OCS Lands Act. (See discussion in Ocean Law Memo No. 12.)

In response to Carter's emphasis on the program, 169 nominations from federal agencies, states, and members of the public were recommended to the agency. This original list of proposals encompassed over 200,000 square miles of ocean area. Seventy of the original nominations were placed on a list of recommended areas (LRA). Active candidates to be considered for designation were then chosen from the LRA.

The LRA itself was controversial. Many of the recommended areas were quite large and the potential designation of significant areas of the OCS mobilized opposition to the program. Three sanctuary proposals, Georges Bank, Flower Garden Banks, and Channel Islands (the only one of the three designated so far), illustrate the problems NOAA faced in the program implementation phase.

Georges Bank was nominated by the Conservation Law Foundation in conjunction with the Department of the Interior's OCS oil and gas lease number 42 in the North Atlantic. The proposed sanctuary was intended to protect the rich Georges Bank fishery resources from impending oil and gas exploration and development. Shortly after nomination, NOAA placed Georges Bank on its list of active sanctuary candidates. The proposed sanctuary covered a 20,000 square mile area, and was vigorously opposed by the oil industry and DOI. DOI argued that any protection provided by Title III was redundant and unnecessary because the Secretary of the Interior would minimize any risks of oil and gas development posed to Georges Bank fishery resources. Ultimately NOAA withdrew its sanctuary proposal in return for the establishment of a biological task force to monitor Georges Bank oil and gas development and recommend protective measures.

The candidacy of the Flower Garden Banks sanctuary experienced similar difficulties. The proposal sought to protect the northernmost tropical coral reefs in the Gulf of Mexico. Again NOAA's proposal was challenged as

redundant and unwarranted regulation of oil and gas development. In its 1979 Flower Garden Banks draft environmental impact statement, NOAA proposed a five year moratorium on oil and gas activities within the 256 square mile proposed sanctuary. Interior's Bureau of Land Management had already designated a "no-activity zone" surrounding the crest of each bank, so Interior argued that the sanctuary was unnecessary. As in the case of Georges Bank, NOAA withdrew the Flower Garden Banks proposal. In August 1984, however, the Flower Garden Banks were again named as an active candidate. This time the sanctuary boundaries will be limited to the existing "no-activity zone", thus avoiding the oil and gas regulation issue.

Unlike the two withdrawn proposals, the Channel Islands Sanctuary was designated in September 1980. Located in the Santa Barbara Channel, the 1252 square mile sanctuary protects large concentrations of marine mammals and seabirds. Again this sanctuary proposal coincided with substantial oil and gas activity. The regulations for the sanctuary prohibit oil and gas development within the sanctuary other than on pre-existing leases. Although the oil industry opposed these restrictions, broad-based public support for the sanctuary secured the designation. The Western Oil and Gas Association (WOGA) filed suit challenging the necessity and reasonableness of prohibiting future oil and gas development within the sanctuary, but no decision on the merits has yet been rendered.

In addition to the Channel Islands sanctuary, three other designations were made in the final days of the Carter Administration: The Gray's Reef (Georgia), Looe Key (Florida), and Point Reyes-Farallon Islands (California) National Marine Sanctuaries. In contrast to the discussed proposals, these three designations did not coincide with substantial oil and gas development. However, local fishermen vigorously opposed the Looe Key Sanctuary due to restrictions on wire and lobster traps and spear fishing within the sanctuary. Similar opposition by recreational and commercial fishermen was recently encountered in connection with the proposed Hawaiian Humpback Whale Sanctuary. Thus, with the exception of the strong fishing industry support for the Georges Bank proposal, the fishing industry remains apprehensive about the sanctuary program even though the only existing fishing gear restrictions are in the Key Largo and Gray's Reef sanctuaries. Generally, the fishermen have argued that fishery regulation and management should be left to the Regional Fishery Management Councils.

PROGRAM REFINEMENTS

The controversies surrounding sanctuary proposals and designations during the late 1970's prompted both administrative and legislative changes to the program. At one extreme Congressman Breaux initiated legislation to repeal Title III, charging that the sanctuary program was "unnecessary, costly, duplicative, interfering and ineffective." Nonetheless, in 1980 Congress amended and reauthorized the program.

The 1980 amendments left the general statutory framework intact, while making changes in the designation process. First, the Secretary of Commerce was directed to specify more clearly the terms of a designation: the geographical size of the sanctuary, the sanctuary characteristics, and the activities subject to regulation. Second, existing activities were presumed to be valid unless the sanctuary's regulations provided otherwise. Third, a Congressional disapproval mechanism was added. Finally, the Secretary of Commerce and the Coast Guard were directed to conduct enforcement activities.

Concurrently with the 1980 Congressional amendment process, two major independent assessments of the sanctuary program were undertaken. Both the Congressional Research Service (CRS) and the General Accounting Office (GAO) investigated the program, and reported favorably on the need for the program. The GAO report concluded that the program:

> (1) provides comprehensive regulation, planning, and management (within the limits of international law) to assure long term preservation of all the resources that require protection;
>
> (2) provides environmental protection where gaps exist in the coverage provided by other laws; and
>
> (3) encourages and supports research and assessment of the condition of sanctuary resources and provides an educational and informational service to promote public appreciation of their value and wise use.

The favorable evaluations helped secure the 1980 program reauthorization.

Administratively, the Sanctuary Program Office redefined the mission and goals of the program in a January 1982 Program Development Plan (PDP) produced

concurrently with the CRS and GAO reports. According to the PDP, the four central goals of the sanctuary program are:

> (1) to enhance resource protection through the implementation of comprehensive, long-term management plans tailored to the resources of special marine areas;
>
> (2) to promote and coordinate research to expand scientific knowledge of significant marine resources to improve management decision making in Marine Sanctuaries;
>
> (3) to enhance public awareness, understanding, and wise use of the marine environment through public education and recreational programs; and
>
> (4) to provide maximum public and private use of special marine areas.

In addition to the more active approach to sanctuary management evidenced by the above goals, the PDP also introduced a more refined approach to designation and management of sanctuaries. Two key changes were the abandonment of the LRA in favor of a Site Evaluation List (SEL) and the preparation of management plans prior to designation. These and other changes introduced through the PDP were codified in the 1983 program regulations. See 15 C.F.R. §§ 922.1-.40 (1984).

The new nomination process is an attempt to avoid the confusion surrounding the LRA. Eight regional teams of scientists were hired to compile a pool of highly qualified sites in their respective regions. Each team was supposed to recommend no more than five sites. Based on public review and comment approximately thirty of the recommended sites were placed on a final SEL in 1983. The predictability of the process has been improved in that active candidates are now chosen solely from the SEL.

Management plan preparation also improves the predictability of the designation process. Completion of a management plan prior to designation ensures that management for the site commences at the time of designation. This requirement adds a full year to the process, but it will undoubtedly lead to a more thorough review and analysis of designation implications, thereby aiding effective public and private interest group participation in the process.

Although the changes introduced by the PDP and 1983 regulations have improved the program, difficulties have still been encountered. The SEL nomination process collapsed in the Alaska region. The scientific team in Alaska apparently deviated from the guidelines by including eighteen sites on the preliminary list, many of them exceptionally large. Thereafter a combination of public misconceptions and ineffective hearings resulted in strong opposition to the proposals. As a result, further consideration of the Alaska sites was terminated. This apparently means that no marine sanctuaries will be designated off Alaska in the near future, despite Alaska's unique and important marine resources, some of which are threatened by major offshore oil and gas development.

Recently, opposition was also encountered in Hawaii regarding the proposed Hawaiian Humpback Whale Sanctuary. Public hearings on the draft management plan and DEIS revealed that commercial and recreational fishermen opposed the sanctuary primarily out of fear of fishing restrictions. The chances of successful designation were further reduced when a local advisory committee recommended against the designation due in part to the adequacy of existing legislation protecting the whales. Consideration of the Humpback Sanctuary has been suspended given the local opposition and the liklihood of gubernatorial disapproval of any designation extending into Hawaiian waters.

THE MARINE SANCTUARY AMENDMENTS OF 1984

Although the House passed a reauthorization bill for Title III in June 1983 by a vote of 379 to 38, the amendments were not enacted until November 1984. The long delay was caused by Senate amendments to the House Bill, and the simultaneous consideration of various attached special interest legislation.

The amendments completely replace the prior legislation. Even so, the amendments will not radically change the current operation of the sanctuary program because the legislation essentially codifies the goals and policies set forth in the 1982 PDP and 1983 regulations. However, some changes will require adjustments to existing procedures. NOAA is drafting regulations to implement the changes.

Beyond the familiar concepts set forth in the PDP and 1983 regulations, the changes fall into six major categories: first, an attempt is made to further define the program's purposes

and policies; second, the program's geographic scope is extended in light of the recently proclaimed U.S. 200 mile Exclusive Economic Zone; third, the decision making process is circumscribed by a series of detailed standards and guidelines; fourth, consultation and coordination is reemphasized; fifth, congressional review is strengthened; and sixth, the designation procedures and disapproval mechanisms are clarified.

PROGRAM DEFINITION

The introductory section of the amendments provides a thorough statement of findings, purposes, and policies. The earlier legislation contained no such statement; as a consequence, the purpose of the program was quite uncertain. In addition to near verbatim adoption of the PDP goals previously incorporated in the 1983 regulations and quoted above, the introductory section also includes a list of congressional findings.

The findings reiterate the need to conserve and manage certain marine areas of special national significance. The criteria which give an area special significance have been expanded to include historical, research, and educational values. This expansion is consistent with active sanctuary management, especially with regard to public awareness, understanding and appreciation.

Taken as a whole, the introductory section provides a firmer foundation for the sanctuary program. It is clear that the overriding goal is resource preservation, but it is also clear that multiple uses are encouraged. The new emphasis is on active conservation and management, with regulation only where necessary to control the various uses and preserve the sanctuary resources.

GEOGRAPHIC SCOPE

Prior to the 1984 amendments marine sanctuaries could only be designated as far seaward as the outer edge of the continental shelf. Changes to the geographic scope of the sanctuary program became necessary after the 1983 Exclusive Economic Zone (EEZ) proclamation. The proclamation extended U.S. jurisdiction over both living and non-living resources to 200 miles seaward of the coastal baseline. (See discussion in Ocean Law Memo No. 25.) Because the outer edge of the continental shelf is in some cases less than 200 miles from the coastal baseline, marine sanctuary jurisdiction needed to be expanded to correspond with the proclamation. This was accomplished in the 1984 amendments by deleting any reference to the continental shelf. Instead, sanctuaries may now be designated in ocean waters and on submerged lands over which the U.S. exercises jurisdiction consistent with international law.

DESIGNATION STANDARDS

In contrast to earlier procedures, the Secretary of Commerce is no longer free to designate any marine sanctuaries he determines necessary. Henceforth, the Secretary may only designate a discrete ocean area as a sanctuary if a two-part test is satisfied. First, the designation must fulfill the purposes and policies of Title III described above. Second, the Secretary must find that:

> (A) the area is of special national significance due to its resource or human-use values;
>
> (B) existing State and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;
>
> (C) designation of the area as a natural marine sanctuary will facilitate the objectives in subparagraph (B); and
>
> (D) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

The Secretary also is directed to weigh and consider nine additional factors. The factors range from the characteristics and uses of an area to the benefits and impact a designation would produce. Taken together, the standards and factors seem repetitive; but it appears that the factors are intended to guide the Secretary's consideration of the standards. While some Congressmen stressed the stringency of the standards, they were not intended to be insurmountable hurdles.

There was some disagreement expressed on the House floor about the definition of "discrete." Congressmen Breaux and Young argued that "discrete" means small, while other statements indicated that the term means "individually distinct." The original House Committee Report suggests that sanctuaries should constitute ecological units with clearly definable boundaries. Both the House Merchant Marine Committee and the PDP recognized that the Channel

Islands sanctuary (1252 square miles) represents an upper limit in size.

CONSULTATION AND COORDINATION

As was previously required, the Secretary must consult with various federal agencies, state and local officials, and other interested parties. The 1984 amendments expand these consultations to include both the House Committee on the Merchant Marine and Fisheries and the Senate Committee on Commerce, Science, and Transportation.

In addition to these general consultation requirements, the Secretary also is specifically directed to collaborate with the Department of Interior and the Regional Fishery Management Councils in the sanctuary designation process. The Secretary, in conjunction with the Secretary of Interior, is supposed to draft a "resource assessment report" documenting the present and potential uses of the proposed area. The initial responsibility for drafting fishing regulations for a sanctuary is delegated to the affected Regional Fishery Management Council. If the Council declines to draft the regulations, or if the Secretary rejects the Council's recommendations, the Secretary can prepare the regulations.

These specific consultation requirements should help ward off future conflicts between NOAA's Sanctuary Programs Division and the oil and fishing industries. Moreover, NOAA and DOI may be able to avoid clashes like those that occurred over the Georges Bank and Flower Garden Banks sanctuary proposals. For fishermen, it is now much less likely that sanctuary regulations will impose restrictions beyond those already imposed by the relevant Regional Fishery Management Councils.

CONGRESSIONAL REVIEW

Congressional review of sanctuary designations has been strengthened considerably by the 1984 amendments, e.g., by requiring that the Secretary submit a detailed prospectus to two Congressional Committees when a designation is proposed. The prospectus must contain: the terms of the proposed designation; the basis for satisfying designation standards; an assessment of designation factors; proposed mechanisms to coordinate existing authorities; a draft management plan; an estimate of annual cost; the draft environmental impact statement; if applicable, an evaluation of the advantages of cooperative state and federal management; and, finally, the proposed regulations for the sanctuary.

This detailed package of information should give Congress substantial oversight capability. After receiving the prospectus the House Merchant Marine and Fishery Committee and the Senate Committee on Commerce, Science and Transportation may hold hearings on the proposed designation. The committees may issue recommendations concerning matters in the prospectus within a forty-five day period. The Secretary must consider these recommendations before designating the sanctuary.

DESIGNATION

After the forty-five day period for Committee comment has elapsed, the Secretary may designate a sanctuary by publishing notice of the designation and the accompanying regulations in the Federal Register. The public is to be advised of the availability of the final management plan and environmental impact statement. However, in a major change from the prior legislation, Presidential approval of the sanctuary designation is no longer required.

The designation becomes effective within forty-five days unless Congress disapproves of the designation by enacting a joint resolution of disapproval. The same forty-five day period applies to gubernatorial disapproval of designations including state waters.

CONCLUSION

The 1984 amendments have replaced a vague, open ended statute with a more detailed statutory scheme. The sanctuary program's mission and goals have been redefined and clarified. Previous uncertainties about the program's geographic and regulatory scope have largely been removed. Furthermore, the new approach to management originally introduced through the PDP and 1983 regulations have been codified. In addition to scientific research and resource protection, the emphasis now includes active management to encourage public use. This approach will familiarize the public with the sanctuary concept, hopefully erasing earlier misconceptions about the program. Such increased understanding should reduce future conflict in the designation process.

However, in some cases, regulation and prohibition of specific activities such as further oil and gas development in the Channel Islands sanctuary will still be necessary to protect a sanctuary's unique resources. The bi-partisan Congressional and Presidential support given to the sanctuary program as amended in 1984 will help sustain such regulations where necessary. In any

event, NOAA's Sanctuary Programs Division now has four more years to demonstrate that the multiple-use ocean management concept represented by the Marine Sanctuaries Program can work effectively to reduce resource user conflict throughout the U.S. Exclusive Economic Zone.

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March 1, 1985

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NEW PUBLICATION

TITLE: FEDERAL FISHERIES MANAGEMENT: A Guidebook to the Magnuson Fishery Conservation and Management Act, Revised Edition

EDITORS: Jon L. Jacobson, Daniel Conner, and Robert Tozer

PUBLICATION NUMBER: ORESU-H-85-001 PRICE: $5.00

NUMBER OF PAGES: 161 pp. DATE: January 1985

-ABSTRACT-

The Magnuson Fishery Conservation and Management Act (MFCMA) has turned out to be one of the most controversial and confusing pieces of federal legislation in recent memory. The controversy is inevitable, but in this handbook the authors clear up the confusion.

The book speaks to a broad range of readers, especially to those who are most affected by the bureaucratic machine created by the MFCMA. Its purpose is to provide useful information and analysis to seafood processors, fisheries managers, legislators and the interested public. Specifically, the authors address two hypothetical readers. One is a commercial fisherman -- a person whose livelihood is directly regulated by the MFCMA. The other is a lawyer who may be confronted with fishery management problems of his or her client but may have no special training in fisheries law.

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