

SECTION 6

FINDINGS AND DETERMINATIONS

6.1 INTRODUCTION

Under the NMSA the Secretary of Commerce may designate an area as a national marine sanctuary. The Secretary can promulgate regulations implementing the designation after making a set of determinations and findings, considering factors, and conducting consultations described in the NMSA (16 U.S.C. § 1433[a] and [b]). Although CBNMS, GFNMS, and MBNMS were designated in 1989, 1981, and 1992 respectively, the NMSA states that terms of designation may be modified only by the same procedures by which the original designation was made. Because this action proposes to revise the terms of designation for all three sanctuaries, relevant determinations and findings based on required factors and consultations are described here. In addition, NEPA requires the NMSP explain how actions described in this document relate to existing law and executive orders. This section meets these NMSA and NEPA requirements by describing the consultations in Section 6.2, making proposed determinations and findings and factors in Section 6.3, and discussing the relation of the proposed action to existing laws and executive orders in Section 6.4.

6.2 CONSULTATIONS AND RESULTS UNDER THE NMSA

Under Section 303(b)(2) of the NMSA, the NMSP is required to conduct a series of consultations with Congress, federal and state agencies, and other interested parties. Per this requirement, NMSP sent consultation letters in October 2004 to the following federal, state, and local agencies:

Federal Agencies

Federal Aviation Administration, Office of Commercial Space Transportation

Pacific Fishery Management Council

US Department of Agriculture

Forest Service

Natural Resource Conservation Service

US Department of Commerce, National Oceanic and Atmospheric Administration

National Marine Fisheries Service

National Ocean Service

US Department of Defense

Undersecretary for the Environment

Army Corps of Engineers

Secretary of the Navy (Environment)

Secretary of the Air Force (Environment, Safety and Occupational Health)
US Department of Energy
 Office of Environmental Policy and Guidance
 General Counsel
US Department of Homeland Security - Coast Guard
US Department of Interior
 Office of Environmental Policy and Compliance
 Bureau of Land Management, California Coastal National Monument
 Fish and Wildlife Service, Farallon National Wildlife Refuge
 Geological Survey
 Minerals Management Service
 National Park Service
 Pacific Region
 Golden Gate National Recreation Area
 Point Reyes National Seashore
US Department of Transportation, Governmental Affairs
US Department of State - Oceans and Fisheries
US Environmental Protection Agency
 Office of Ocean, Wetlands, and Watersheds
US Senate
 California Senate Delegation members
 Committee on Commerce, Science and Transportation
US House of Representatives
 Central and Northern California House of Representatives Delegation members
 Resources Committee

State of California

Office of the Governor
Coastal Commission
Department of Conservation
Department of Fish and Game
 Marine Region
 Elkhorn Slough National Estuarine Research Reserve
Fish and Game Commission
Department of Fish and Game, Oil Spill Prevention and Response
Department of Transportation
Department of Boating and Waterways
Environmental Protection Agency
Resources Agency
State Lands Commission
State Parks
State Water Resources Control Board
Central Coast Regional Water Quality Control Board
San Francisco Bay Regional Water Quality Control Board
California State University
 San Francisco National Estuarine Research Reserve

Local Agencies

Association of Monterey Bay Area Governments
Bolinas Lagoon Technical Advisory Committee
County of Marin
 Marin County Board of Supervisors

County of Monterey
Board of Supervisors
Planning Commission
Planning Department
County of San Luis Obispo
County Board of Supervisors
County of San Francisco
Department of Public Works
City and County Board of Supervisors
County of San Mateo
Board of Supervisors
Parks Department - Fitzgerald Marine Reserve
County of Santa Cruz
Board of Supervisors
County of Sonoma
Planning Department
Board of Supervisors
Tomales Bay Watershed Council

Ports and Harbors

Bodega Bay Harbor District
City of Monterey - Monterey Harbor
Moss Landing Harbor District
San Mateo County Harbor District/Pillar Point Harbor
Santa Cruz Port District Commission

The comments and ideas received in response to the consultation letters were considered in the preparation of the DMP/DEIS. The results of these consultations were used to help make the findings and determinations described in Section 6.3.

An additional set of consultations is also required by the NMSA and other laws and was conducted after the DMP/DEIS was released for public review. These additional consultations include the following:

- Section 7 Endangered Species Act consultation with NOAA Fisheries and the US Fish and Wildlife Service (required under the ESA);
- Essential Fish Habitat with NOAA Fisheries (required under the MSA);
- Federal consistency consultation with the California Coastal Commission (California’s coastal zone management agency because state waters are involved or an activity outside state waters may have an effect on resources within state waters (required by the CZMA); and
- NHPA Section 106 consultation with the State Historic Preservation Office and the Advisory Council on Historic Preservation.

NOAA’s NMSP concluded these consultations as required.

6.3 NMSA AND NEPA FINDINGS AND DETERMINATIONS

6.3.1 Determinations Required Under Section 303 of the NMSA

Section 303(a) of the NMSA (16 U.S.C. § 1433[b][1]) states the Secretary of Commerce may designate any discrete areas of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary determines:

1. *The designation will fulfill the purposes and policies of the NMSA.*
2. *The area is of special national significance due to—*
 - A. *its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities;*
 - B. *the communities of living marine resources it harbors; or*
 - C. *its resource or human-use values.*

The original determinations and findings for each sanctuary were made when CBNMS, GFNMS, and MBNMS were designated in 1989, 1981, and 1992 respectively. The rationale for each of the determinations and findings remain valid. Although there are proposals to modify the terms of designation for each of the three sanctuaries, all of the changes are consistent with and further support the original determinations and findings. The waters and submerged lands of the three sanctuaries, and their associated marine life and historic resources, possess exceptional value in all categories (conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, and aesthetic qualities). The proposed changes to terms of designation would provide additional protection to bottom habitats, water quality, living resources, and historical resources within the Sanctuary.

3. *Existing state and federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education.*
4. *Designation of the area as a national marine sanctuary will facilitate the objectives stated in paragraph 3.*

The preparers of the original FEISs for each of the three sanctuaries came to a similar conclusion about the adequacy of existing state and federal authorities. While certain federal and state authorities did provide some degree of protection for specific marine resources, no single program or authority provided a comprehensive, ecosystem-based management mechanism to address the variety of resource management issues that exist in any one of the sanctuaries. The proposed changes to the terms of designation in each of the sanctuaries would further supplement and provide consistency for the existing federal and state authorities relating to marine resource management, water quality protection, and marine species protection within each of the three sanctuaries. The proposed changes would also allow for a more comprehensive and coordinated management, including scientific research and public education, of living and nonliving resources in the Sanctuary.

5. *The area is of size and nature that will permit the comprehensive and coordinated conservation and management.*

The only significant change to existing boundaries for the three sanctuaries is the addition of Davidson Seamount to the existing MBNMS boundary. This increases the MBNMS area by 585 square nm, or 14.6 percent. Davidson Seamount lies completely in federal waters, and no single federal authority, or combined authorities, can provide comprehensive ecosystem-based protection for the benthic resources on and near

Davidson Seamount like the NMSA. It is physically near though not adjacent to the MBNMS and can be comprehensively managed complementary with the MBNMS resources..

6.3.2 Section 303(b)(1) Discussion

Section 303(b)(1) of the NMSA (16 U.S.C. § 1433[b][1]) requires the following factors be considered when determining if an area of the marine environment meets the standards set forth in Section 303(a). Each factor is discussed below:

1. The area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat or endangered species, and the biogeographic representation of the site.

2. The area's historical, cultural, archaeological, or paleontological significance.

The exceptional natural and ecological qualities for each sanctuary are fully described in their original FEISs, including CBNMS, pages 15 to 33; GFNMS, pages E-1 to E-26; MBNMS II-4 to II-62. In addition, an updated description for the resources of each sanctuary is provided in Chapter 3 of this document and in Section 1.0 within each of the newly revised management plans (Volumes I, II, and III). The proposed changes to terms of designation for each sanctuary recognize the significance of maintaining the water quality, protecting sensitive species and habitats, and protecting historical resources within the Sanctuary.

3. The present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education.

4. The present and potential activities that may adversely affect the factors identified in subparagraphs 1, 2, and 3.

The human uses of each sanctuary are fully described in their original FEISs, including CBNMS, pages 33 to 42; GFNMS, pages E-26 to E-56; MBNMS II-63 to II-103. In addition, an updated description of some of the human uses in each sanctuary is provided in Chapter 3 of this document. The changes to the terms of designation would allow for increased protection for some sanctuary resources, while still allowing such activities as different types of commercial and recreational fishing, diving, boating, wildlife watching, research and education to occur within the sanctuaries.

5. The existing state and federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes of the NMSA.

The management authorities and associated laws and regulations applicable to each sanctuary are described in their original FEISs, including CBNMS, pages 126 to 134; GFNMS, pages F-1 to F-42; MBNMS C-3 to C-24. In addition, an updated description of many of the federal and state authorities is provided throughout Chapter 3 of this document. Existing management authorities were also considered in the final rules designating CBNMS, GFNMS, and MBNMS in 1989, 1981, and 1992, respectively.

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

The only significant change to the boundaries for the three sanctuaries is the proposed addition of Davidson Seamount to the MBNMS boundary. This discrete ecological unit would increase the MBNMS sanctuary area by 585 square nm, or 14.6 percent. Davidson Seamount lies completely in federal waters approximately 75

miles southwest of Monterey, California. Although Davidson Seamount is separated from the MBNMS boundary, its location adjacent to MBNMS would allow sanctuary staff to efficiently expand their research, education, and enforcement programs to encompass this area.

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

The public benefits from sanctuary status for each sanctuary were described in the original FEISs, including CBNMS, pages 6 to 8; GFNMS, pages D1-1 to D-2; MBNMS I-19 to I-20, and in the final rules. The changes to the terms of designation proposed by this FEIS will enhance public benefits by providing for increased protection to water quality, seabed habitats, marine life, sensitive marine species, and cultural and historic resources in the Sanctuary while still allowing for continued public use and enjoyment, education, and research of the Sanctuary environment.

8. The negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development.

9. The socioeconomic effects of sanctuary designation.

An analysis of the socioeconomic impacts of proposed regulatory changes for all three sanctuaries is included in Chapter 3 of this FEIS. The preparers of the socioeconomic analysis concluded impacts of the proposed regulatory changes would be minimal and not significant.

10. The area's scientific value and value for monitoring the resources and natural processes that occur there.

The area's scientific value and value for monitoring the resources and natural processes are described in the original FEISs, management plans, and the final rules designating each of the sanctuaries. The changes to each of the terms of designation proposed by this FEIS enhances the area's scientific and monitoring value by allowing for increased protection of seabed habitats and features, water quality, and living resources in the Sanctuary.

11. The feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses.

The changes to the terms of designation, along with other regulatory and management changes proposed by this FEIS, represent an appropriate mechanism to manage and protect sanctuary resources, and management proposes many innovative approaches to education, research, and resource protection.

12. The value of the area as an addition to the System.

CBNMS, GFNMS, and MBNMS were designated in 1989, 1981, and 1992, respectively, and have been actively managed as individual sites within the larger system of marine protected areas. The addition of Davidson Seamount is important for science to study how the seamount is linked ecologically with the coastal waters, nearshore canyons, and species currently protected in the MBNMS. Protecting it will help facilitate research to understand how the Monterey Bay and Big Sur canyon complexes have an effect on the Davidson Seamount and what the migration pattern of species is between the seamount and nearshore. Less than 0.1 percent of the world's seamounts have been explored for what species live on them, and many species found on the seamounts that have been explored are new to science. Studies indicate that seamounts function as

deep-sea "islands" of localized species distributions, dominated by suspension feeders, like corals, that grow on rock in an otherwise flat, low biomass, sediment-covered abyssal plain. Seamounts create complex current patterns that can influence sea life above them. Commercially valuable fish species often concentrate around relatively shallow seamounts. Conservation issues relevant to seamounts revolve around endemism, harvest, and the low resilience of species. A survey in the southwest Pacific suggests that up to one-third of the species on seamounts can be endemics. No seamounts and habitats of this type are currently designated in the National Marine Sanctuary System.

6.3.3 Resource Assessment

1. Present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial, governmental, or recreational uses.

Chapter 3 of this FEIS (Affected Environment and Impact Analysis) provides a full description of the current and potential uses of the area.

2. Any commercial, governmental, or recreational resource uses in the areas that are subject to the primary jurisdiction of the Department of the Interior.

The Department of the Interior has been contacted at various times in the JMPR, including the notification of an intent to prepare an EIS and conduct a public scoping meeting, to prepare issue-based action plans, and to consult under NMSA Section 303. The DOI will also receive copies of the final management plans and environmental impact statement for review and comment. Coordination and consultation with the National Park Service, Fish and Wildlife Service, Minerals Management Service and Geological Service has occurred and will continue with regard to management and public uses of these three sanctuaries.

3. Information prepared in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator of the Environmental Protection Agency, on any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary

As is the case above, the agencies listed above were contacted on several occasions during the JMPR and were given formal opportunities to consult on the proposed changes to the modified terms of designation (NMSA Section 303 consultation). In addition, MBNMS worked closely with the USEPA and the Defense Department's US Army Corps of Engineers during the JMPR as part of an action plan to relocate the existing dredge disposal sites at Moss Landing, California.

6.4 RELATION TO EXISTING LAWS AND EXECUTIVE ORDERS

Coastal Zone Management Act

The CZMA creates a partnership between the federal and state governments and allows states to develop coastal zone management programs within a set of federal guidelines but tailored to their individual needs. The act also requires each federal agency activity within or outside the coastal zone affecting any land or water use or natural resource of the coastal zone to be carried out in a manner, to the maximum extent practicable, consistent with the enforceable policies of the federally approved state coastal zone management program.

Both GFNMS and MBNMS are located partially within state waters. The managers of both sanctuaries (including CBNMS) work closely with several State of California resource management departments and commissions. The NMSP consulted with the California Coastal Commission on the federal consistency of the original proposed action with the California Coastal Zone Management Program. The California Coastal Commission conditionally concurred with NOAA's determination of consistency.

Magnuson-Steven Fishery Conservation and Management Act

The MSA governs the management and conservation of fisheries in federal waters of the United States and created the PFMC, along with seven other regional fishery management councils. Managers of all three sanctuaries worked closely with the PFMC and NOAA Fisheries on matters pertaining to federally managed fisheries within the Sanctuary.

This act also requires federal agencies to consult with NOAA Fisheries on any action the agencies authorize (such as issuing permits), fund, or undertake that may adversely affect EFH. The NMSP consulted with NOAA Fisheries on the impact of this proposed action on EFH.

National Historic Preservation Act

The NHPA was enacted to help protect and preserve the historic heritage of the United States. Section 106 of the NHPA requires that federal agencies take into account the effects of their activities and programs on historic properties (which are defined as any district, site, building, structure, or object that is included on or eligible for inclusion on the National Register of Historic Places) by providing the Advisory Council on Historic Preservation with the opportunity to comment on proposed actions. The NMSP consulted with Advisory Council on Historic Preservation on the impact of this proposed action on any historic or cultural resource in the Sanctuary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden. If the regulations will have a significant economic impact on a substantial number of small businesses, then a sanctuary must prepare an initial regulatory flexibility analysis and final regulatory flexibility analysis. The NMSP has not prepared an initial regulatory flexibility analysis for this proposed action because the Chief Counsel for Regulation with the Department of Commerce has certified to the Small Business Administration the rules will not have a significant impact on a substantial number of small entities.

Executive Order 12866 Cost-Benefit Analysis

Under Executive Order 12866, if a rule is determined to be significant, then a socioeconomic impact study (i.e., an assessment of the costs and benefits of the regulatory action) must be conducted. Under 12866 a regulatory action is significant if the rule could result in any of the following:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

- Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this executive order.

The NMSP concluded the rules are not significant and the Office of Management and Budget concurred with this conclusion.

Executive Order 13132 Federalism

Under Executive Order 13132, each agency must consult, to the extent practicable and permitted by law, with state and local officials early in the process of developing proposed regulations. In these consultations the agency should seek comment on the compliance costs or preemption, as appropriate to the nature of the rulemaking under development.

When an agency submits a draft final regulation to OMB for review under Executive Order 12866 prior to promulgation of the final regulation, the agency must include a separately identified portion of the preamble to the regulation as a "federalism summary impact statement" that must include the following:

- A description of the extent of the agency's prior consultation with state and local officials;
- A summary of the nature of their concerns and the agency's position supporting the need to issue the regulation; and
- A statement of the extent to which the concerns of state and local concerns have been met.

The NMSP worked with partner agencies within California, local jurisdictions in the vicinity of the three sanctuaries, and the federal government in the development of this FEIS. A federalism summary impact statement will be prepared for the final rule.