
CHAPTER 6

FINDINGS AND DETERMINATIONS

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6. PROPOSED 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 designation documents for all three sanctuaries, relevant determinations and findings based on required factors and consultations are described here. In addition, NEPA requires that the NMSP explain how the proposed actions and regulations 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 this DMP/DEIS. The results of these consultations were also used to help make the findings and determinations described in Section II.

An additional set of consultations is also required by the NMSA and other laws and will be conducted after this DMP/DEIS is 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.

The results of these formal consultations will be included in a revised appendix in the final management plan/final environmental impact statement.

6.3 NMSA AND NEPA FINDINGS AND DETERMINATIONS

6.3.1 Determinations Required Under Section 303 of the NMSA

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 (see Appendix B), 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, there was no single program or authority that could provide 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 of size to the existing boundaries for the three sanctuaries is the proposed addition of Davidson Seamount to the existing MBNMS boundary. This would increase the existing MBNMS sanctuary 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, particularly since many of the partner agencies and user groups are the same ones that use or have jurisdiction in the MBNMS boundary.

Management of each of the three sanctuaries proposes to change the terms of designation to clarify that “submerged lands” (as opposed to “seabed”) are included as part each sanctuary’s described boundary. However, as seabed is already considered part of the Sanctuary’s definition, the change to submerged lands does not change the intent or nature of the original sanctuary designation.

GFNMS is proposing to change the “Description of the Area” to permanently fix the shoreward boundary adjacent to Pt. Reyes National Seashore. The purpose of the proposed action is to create a

static boundary for the Sanctuary that does not fluctuate as the boundaries of the National Seashore may change overtime. This would create consistency for the benefit of sanctuary users and would facilitate enforcement and resource protection efforts.

6.3.2 Section 303(b)(1) discussion

Section 303(b)(1) of the NMSA (16 U.S.C. § 1433[b][1]) requires that the following factors be considered for 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 (Appendix B) recognize the significance of the maintaining the Sanctuary's 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 proposed 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 for 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. The additional protections and comprehensive management approach provided by each of the Sanctuary management plans and regulations continue to apply.

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 of size 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. As such, Davidson Seamount can be comprehensively managed with the other resources of MBNMS, particularly since many of the partner agencies and user groups are the same ones that use or have jurisdiction in the MBNMS boundary.

Management of each of the three sanctuaries proposes changes to the terms of designation to clarify that “submerged lands” (as opposed “seabed”) are included as part of sanctuary’s described boundary. However, as the seabed is already considered part of the Sanctuary, the change to submerged lands does not change the intent or nature of the original sanctuary designation and would not change the overall size, manageability, accessibility, or suitability for monitoring and enforcement activities in the Sanctuary.

GFNMS is proposing to change the Description of the Area to permanently fix the shoreward boundary adjacent to Pt. Reyes National Seashore. The purpose of the proposed action is to create a static boundary for the Sanctuary that does not fluctuate, as the boundaries of the National Seashore may change overtime. This would create consistency for the benefit of sanctuary users and would facilitate enforcement and resource protection efforts.

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 DMP/DEIS will enhance public benefits by providing for increased protection to water quality, seabed habitats, and 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 DEIS. The preparers of the socioeconomic analysis conclude that 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 DMP/DEIS will enhance 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 DMP/DEIS, 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.

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 DEIS (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 draft management plans and environmental impact statement for review and comment. In addition, both GFNMS and CBNMS have close partnerships with several National Park Service and National Wildlife Refuge Service units located adjacent to these sites. CBNMS, GFNMS, and MBNMS conduct numerous joint research benthic survey projects with the US Geological Survey. Coordination and consultation with the National Park Service, Fish and Wildlife Service, and Geological Service has occurred and will continue with regard to management and public uses of these three sanctuaries. Additionally, consultation has occurred and will continue with the Minerals Management Service.

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, all of these 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). These agencies will be sent copies of the draft management plans and environmental impact statement for further comment. 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 two existing dredge disposal sites at Moss Landing and Santa Cruz, California.

6.4 RELATION TO EXISTING LAWS AND EXECUTIVE ORDERS

NEPA requires that a discussion of the relation of the proposed action to other existing laws and executive orders be included. The relation of this DMP/DEIS to other legal requirements is discussed below.

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 that each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone will be carried out in a manner that is, 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 will consult with the California Coastal Commission on the federal consistency of the DMP/DEIS with the California Coastal Zone Management Program.

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. All three sanctuaries have 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 will consult with NOAA Fisheries on the impact of this DMP/DEIS 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 will consult with Advisory Council on Historic Preservation on the impact of this DMP/DEIS 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 that the proposed rule (Appendix D) 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 has concluded that the proposed rule contained in this DMP/DEIS is not significant (see Appendix B), and the Office of Management and Budget has 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 DMP/DEIS. A federalism summary impact statement will be prepared for the final management plan/final environmental impact statement and its final rule.