

Testimony of Meg Caldwell  
Senior Lecturer in Law, Stanford Law School  
Member, California Marine Life Protection Act Initiative Blue Ribbon Task Force

Before the

Subcommittee on Fisheries, Wildlife and Oceans  
Natural Resources Committee  
U.S. House of Representatives

On the

Reauthorization of the National Marine Sanctuaries Act

November 3, 2007  
10 a.m., Kohn Hall  
University of California at Santa Barbara

## **Introduction**

My name is Meg Caldwell. I am a member of the Stanford Law School faculty where I direct the Environmental and Natural Resources Law & Policy Program. For the last three years I have served as a member of the California Marine Life Protection Act Initiative Blue Ribbon Task Force for both the south central coast region and now the north central coast region. I am a former member of the California Coastal Commission, having served as its chairperson for two years.

I greatly appreciate the invitation to testify before the Subcommittee on the reauthorization of the National Marine Sanctuaries Act (NMSA), a historic piece of legislation that has stood for over thirty years as a symbol of the U.S. government's concern for our valuable marine ecosystems. I believe that in the next thirty years our oceans will face even greater threats than those that spurred the original legislation. For this reason I am grateful for the opportunity to respond to your request for recommendations to strengthen and clarify the mission of the National Marine Sanctuaries system so that it can serve as an important line of defense against the dangers confronting our marine environment.

In my testimony I would like to address one of the aspects of the NMSA that I am most familiar with: the freedom the NMSA gives federal and state governments to collaborate on co-managing marine ecosystems that span both state and federal waters. Specifically, I will discuss the contributions that the sanctuaries system has made in the Channel Islands Marine Sanctuary off the coast of Santa Barbara. By contributing its considerable resources and support to California in the Channel Islands, the National Marine Sanctuaries system has provided a model of an effective place-based approach to

restoring and protecting ocean ecosystems, and has created a legacy that serves as an important model nationally.

However, it is unfortunately the case that the marine ecosystem management system in place at the Channel Islands National Marine Sanctuary provides a rare success story for mainland U.S. waters. Many sanctuaries provide minimal protection to the important ecosystems they cover, many of our most valuable marine environments are left unprotected, and several of our coastal states have sanctuaries barely big enough to encompass a shipwreck. Congress now has the opportunity to fulfill the original vision of the NMSA by aligning the actual authority of the National Marine Sanctuaries system with its broad mandate to protect our most valuable ocean ecosystems. With a few targeted changes, the NMSA could make the success embodied in the Channel Islands Sanctuary network of marine protected areas the norm rather than the exception.

### **The Channel Islands Marine Sanctuary's Marine Protected Areas Designation Process**

Established in 1980, the Channel Islands National Marine Sanctuary's original designation document prohibited oil exploration and certain non-fishing activities in the 1,494 square miles of state and federal waters around the islands. In 1998, a group of recreational fishers who were concerned about the dramatic decline they had seen in the fisheries around the islands during their own lives petitioned the California Fish and Game Commission to create fully protected marine reserves in 20% of the waters around the islands. Recognizing the state's severe financial and staffing resource limitations, the Commission joined forces with the Sanctuary and the State Department of Fish and Game to create a multi-stakeholder and multi-agency public process to consider the fishers' petition. Not only did the Sanctuary assume the role of host and convener, but it also provided a majority of the funding for the process, particularly to support extensive engagement of stakeholders and the collection and analysis of ecological and socioeconomic data. Equally important, the Sanctuary provided key leadership and a strong education and outreach program. In 2003, the state approved a network of marine protected areas in state waters around the islands including 101 square nautical miles (nmi) (135 square miles) or 18% of state waters in fully protected marine reserves. And in May 2007, nine years after the process was initiated, NOAA, on behalf of the Secretary of Congress, changed the Sanctuary's designation document, allowing creation and management of a complementary network of marine protected areas in federal waters including 112 square nmi of marine reserves and 1.7 square nmi of marine conservation areas. Collectively, the state and federal marine protected areas now cover over 240 square nmi, totaling 21% of the sanctuary's shallow and deep water habitats.

The development and adoption of complementary adjacent marine protected areas around the Channel Islands occurred in spite of several resource protection laws that often appeared to conspire against such a result. Although its statutory mandate includes ecosystem conservation, the Channel Islands National Marine Sanctuary lacked specific authority to manage fishing (which is typically controlled within marine protected areas) until its designation document ultimately was changed earlier this year. Rather, NOAA

Fisheries and its associated Pacific Fishery Management Council (PFMC) are charged with managing federal fisheries under the Magnuson-Stevens Fishery Conservation and management Act (MSA). After two years of negotiation between the Sanctuary program and the PFMC, a compromise solution was reached: NOAA Fisheries would close the sea floor to benthic fishing under the MSA and the Sanctuary would propose complementary regulation to prohibit all forms of take, including fishing and research activities not addressed by the MSA regulations, principally within the water column. Bifurcating the implementation of federal water marine zones under two separate NOAA statutes likely exacerbated the public's confusion and certainly added years to the regulatory designation processes. Moreover, the absence of clear legislative authority and specific Channel Islands Sanctuary designation authority hampered the Sanctuary's ability to develop and independently implement marine zoning within its jurisdiction.

### **The NMSA's Contributions to the Channel Island Marine Sanctuary**

The National Marine Sanctuary System has proved to be an indispensable partner to the California Department of Fish and Game and the National Park Service in the Channel Islands. The cooperative co-management relationship that the state and federal authorities have developed has allowed both agencies to combine their strengths and make the Channel Islands Sanctuary a success. In fact, in the Channel Islands, the state and federal agencies have worked together so closely that they seem to be – in the words of one Sanctuary manager – “sharing a desk.” The remarkable success of the program is the result of a shared vision of the importance of maintaining California's coastal ecosystems. In this section I will discuss four areas where the Sanctuary has provided invaluable assistance to make that vision a reality.

**Community Involvement:** A marine sanctuary is most likely to succeed if it has both strong federal support in the form of adequate resources and staffing, as well as effective mechanisms for soliciting and incorporating the views of the local stakeholders. However, bringing together diverse community views can be a difficult and resource-demanding process.

In the Channel Islands, the federal Sanctuary System provides both the resources and the administrative structure for ongoing community involvement through the Advisory Council provisions of the NMSA. Section 315 of the NMSA allows for the creation of Advisory Councils to advise and make recommendations regarding the management of national marine sanctuaries. 16 U.S.C. § 1445A. These Advisory Councils draw upon federal and state management experts, members of Regional Fishery Management Councils, scientists, conservations groups, and local users to create multi-user, multiple stakeholder groups to advise the Secretary. Additionally, the NMSA grants the Secretary the authority to provide necessary staffing, funding, and other assistance to the Advisory Councils so that they can fulfill their function of providing expert advice. Finally, the NMSA creates a structure for community involvement in the Advisory Council's deliberations.

California has taken full advantage of the Advisory Council system in the Channel Islands. The management of the Sanctuary has benefited immensely from the input of locals users, fishers, conservationists, and scientists, all of whom have been able to bring their concerns forward so that they can be addressed in management policies. Such collaboration between the state and federal Sanctuary management agencies and the users of the Sanctuary would not be possible without the funding, resources, and structure the NMSA provides.

**Research and Monitoring:** Obtaining data on the health of the marine ecosystem is vital to the management of that system, and our national marine sanctuaries can serve as laboratories for marine ecosystem research that is applicable far beyond their boundaries. Sanctuary managers need to know what policies are effective and which can be improved, and the only way to get that data is to study the environment itself. In the case of the Channel Islands, scientists play a critical role in sanctuary management at all levels – from assisting in the development of comprehensive monitoring plans to advising on day-to-day study of specific sanctuary resources.

The ecosystems contained within the Sanctuary are so varied and extensive that monitoring requires the input of a wide range of state and federal agents, scientists from local and national universities, fishers, community groups and more. One of the other benefits that the NMSA has provided is a structure for facilitating the coordination of all of these different sources of data. For example, at the Channel Islands, the Sanctuary Foundation and other agency partners, including the California Department of Fish and Game and NOAA Fisheries, have provided funding and support for the Collaborative Marine Research Program. This program brings together fishers and scientists to conduct collaborative research for marine resource management and conservation. The program provides basic marine science training to fishers and provides scientists with information about how fishers can assist them with research. The program is designed to provide sound scientific information for resource management in a cost-effective way that strengthens relationships between stakeholders. By combining the expertise of experienced fishers in locating and landing fish with the statistical rigor of science, the program provides a better understanding of the health of the fish stocks and marine ecosystems in California. The Sanctuary has also played a critical role in helping to coordinate a five year study of marine protected areas adopted by the State of California within Channel Islands Sanctuary waters. The data derived from this study will provide guidance not only to the management of the Channel Islands Sanctuary, but also to marine protected areas around the world.

By providing funding, support, and coordination, the National Marine Sanctuaries System lets scientists monitoring the Sanctuary do what they do best while identifying the information that policymakers need for effective management.

**Education and Outreach:** One of the stated purposes of the NMSA is “to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment,” a mandate that the Sanctuaries System has embraced in the Channel Islands. With its dedicated outreach staff and federal funding, the federal

Sanctuary has taken the lead on educating the public about the Sanctuary's environment, as well as the rules and regulations governing it. The state has benefited considerably from the Sanctuary's resources in this area, since the federal government has provided the necessary means to produce maps and brochures that include both federal and state regulations, as well as to put on seminars and public service announcements to educate the users of the Sanctuary. Through a network of volunteers established by the outreach staff, the Sanctuary distributes brochures on sanctuary and fishing regulations to bait-and-tackle shops, dive shops, and tour operators throughout the area. Moreover, they provide the brochures to various enforcement agents to distribute to boaters and fishers in the area during stops.

Without the support that the NMSA provides for education and outreach, California state agencies would not be able to provide the same level of community education in the state waters of the Sanctuary. For example, each year, sanctuary staff and Channel Islands Naturalist Corps (CINC) volunteers provide interpretation and distribute printed educational products at 40 public outreach and community events in Los Angeles, Ventura and Santa Barbara Counties. CINC volunteers also provide outreach on board whale watch excursions and during island hikes, with over 45,000 documented formal and informal public contacts in 2006. The Sanctuary also runs a lecture series, offered twice each month, that engages the public in science and natural history topics related to the Channel Islands, including marine reserves. And finally, Sanctuary NOAA Divers and CINC volunteers support dive operations and naturalist presentations each summer in the Anacapa Marine Reserve. The dive program highlights the importance of the Channel Islands MPA network to ensure long-term protection of the islands' kelp forest communities.

**Enforcement:** While few national marine sanctuaries have locally based enforcement agents and assets, sanctuaries do play an important role in the enforcement of state and federal laws and regulations. At the Channel Islands, for example, the California Department of Fish and Game and NOAA have reached a joint agreement to cross-deputize state wardens so that they may enforce federal environmental laws applicable to the Sanctuary. The Sanctuary also provides training and equipment to state wardens, as well as direct funding for enforcement. Finally, the federal government provides additional enforcement agents in the form of the Coast Guard and National Park Service rangers who patrol the islands.

In addition to providing agents, equipment, and funding, the civil penalties authorized by the NMSA also benefit enforcement in the Sanctuary. The penalties impose steep fines – up to \$100,000 – and are tried quickly by an administrative judge in federal district court. These penalties create a strong deterrent to parties who would otherwise violate the Sanctuary's protections.

Given the limited enforcement capacities of both state and federal agencies, effective partnerships capable of strategically enhancing enforcement presence in the marine environment are critical to the long-term protection of our marine resources. The State of

California and the National Marine Sanctuary Program can and must continue to work closely together on the full range of enforcement activities.

### **Improving the NMSA and the National Marine Sanctuaries System**

The examples cited above demonstrate how the federal and state agencies collaborating in the Channel Islands are “pioneering 21<sup>st</sup> century marine protected areas.” However, it is important to note that these results do not necessarily derive from the National Marine Sanctuaries Act itself. In the Channel Islands case, much of the credit goes to local community members who petitioned the Fish and Game Commission and the Sanctuary for effective area-based protections, to responsive managers at the state and federal level with a strong sense of vision on marine conservation, and to California’s Marine Life Protection Act, which has served as the background to many of the actions and regulations in the Channel Islands Sanctuary since the marine protected areas there were established in both state and federal waters. Thus, while the Channel Islands example should serve as a model for the development and expansion of the National Marine Sanctuaries System, it can best do so by making targeted changes to the NMSA that will clarify its authority to match its mandate. By strengthening the NMSA, Congress can make sure that the benefits already observed in the Channel Islands are available to all coastal states.

In the next section of this testimony, I will address several of the most pressing problems with the NMSA and provide suggestions about how the Act can be changed so that it will live up to its potential.

**Clarify Resource Preservation the NMSA’s Primary Goal:** At present, the NMSA’s primary mandate, which the Act identifies as “resource protection,” is buried in a list of nine “purposes.” 16 U.S.C. § 1431(b). Moreover, the same section of the NMSA requires the National Marine Sanctuary System to “facilitate . . . all public and private uses” of marine resources, to the extent that they are “compatible with the primary objective of resource protection.” *Id.* While this language may appear innocuous, it causes significant confusion in operation. The Act does not specify how a determination of “compatibility” is to occur and where the burden of proof lies in making such a determination. Due to lack of clarity in the statute, in order to control human uses that cause resource impacts, the Secretary has been compelled to demonstrate that such uses are *not* compatible with resource protection, rather than allowing the Secretary to judge whether such uses *are* compatible. In practice, this means that the Secretary rarely denies uses, even ones that are likely damaging sanctuary resources, because it is difficult to meet the burden for denial in the “facilitate all uses” clause. For example, the Sanctuary spends significant time dealing with inappropriate proposals for commercial development such as artificial reefs and commercial fiber optic cables rather than pursuing its primary mandate of resource protection.

The first step that should be taken to strengthen the NMSA is to revise the findings, purposes, and policies provisions to state clearly that resource protection is the primary objective of the NMSA, and that all uses must be consistent with that objective. This will

require removing the “facilitate all uses” clause and reordering the “purposes” section to clarify its meaning.

**Add an Ecological Resource Classification Provision:** Currently the NMSA does not clearly spell out the types of marine resources – the different ecosystem types, species, and biological communities, for example – it seeks to protect. Nor does the Act provide a process for creating an inventory of the types of sanctuary areas that are already protected by the System. Without such an inventory, NOAA has no way of measuring what types of marine ecosystems are being protected. And without a classification system for marine resources, there is no way to prioritize potential sites to develop into sanctuaries. Both of these tools are necessary to provide a benchmark to measure the progress of the Sanctuary System.

In order to create these benchmarks, the NMSA should include a specific provision directing the Secretary to review existing marine ecological classification systems, incorporate the most appropriate classification schemes into the NMSA, and develop an inventory of sites for potential sanctuaries that would contain representative examples of ecosystem types. In the last thirty-three years, NOAA has included less than 0.5 percent of the nation’s ocean domain within the sanctuary system. This small territory represents only six of the twelve biogeographic provinces of the United States and its territories, and many representative examples of ecological communities and habitats remain unidentified and excluded from sanctuaries. Adding the requirements described above will provide structure and accountability to the National Marine Sanctuaries System, and will help it to develop the best protection for the broadest range of marine resources.

**Give NOAA the Explicit Authority to Create Fully Protected Marine Reserves:** When most people hear the term “Marine Sanctuary,” they presume that it means that the habitats and organisms within the sanctuary are protected. However, only 1% of all sanctuary waters are fully protected. In spite of their tremendous promise as an important management tool and a growing scientific consensus on the value of marine reserves, NOAA has rarely applied this tool in the sanctuary setting. The Channel Islands marine reserves are a true conservation success story. However, the eight-year designation process was fraught with inter- and intra-agency wrangling over jurisdiction that heavily taxed the agencies, the sanctuary advisory council, and the general public. Within sanctuaries, giving the NMSP the express authority under the NMSA to create fully protected marine reserves would create an effective tool to protect sanctuary resources and manage uses

To this end, the NMSA should be revised not only to provide NOAA with this express authority, but also to add a requirement that sanctuary management plans include an evaluation of and a proposal to use sanctuary zoning where it is needed to protect marine resources.

**Create a Method to Provide Immediate Protection to Endangered Ecosystems:** The current sanctuary designation process contains considerable requirements for public consultation that can take years, if ever, to achieve a designation of a national marine

sanctuary. Sometimes this is not fast enough for delicate ecosystems that are being damaged by unregulated resource use. While user groups are seeking consensus on sanctuary designation, lasting damage may occur within the ecosystem.

This problem could be remedied by granting the President authority to create a provisional sanctuary in cases where immediate protection and management of the area is warranted due to the site's conservation value or other value privileged by the NMSA. In the meantime, the Secretary would undertake the permanent designation process. Ultimately, the Secretary could decide whether or not to decide to designate the site as a permanent marine sanctuary, but in the meantime resources within the environment would be protected from irreversible damage.

**End the Moratorium on New Sanctuaries:** Currently no new sanctuaries can be established until the Secretary determines that a new sanctuary will not have a negative impact on the System, and that sufficient resources are available to manage the sanctuaries. 16 U.S.C. § 1434(f). This requirement functions as a moratorium on new sanctuaries. Such a limit on the creation of marine sanctuaries stifles the development of long-term protection, and is contrary to current marine conservation science, which emphasizes the need to establish a network of marine protected areas to protect the full range of marine ecosystems.

As part of the reauthorization, the Subcommittee should consider repealing the moratorium, and allowing NOAA to resume its task of creating a system of marine sanctuaries that will truly serve to preserve our nation's marine resources and maritime heritage.

## **Conclusion**

These changes will help to move the NMSA to the forefront of marine conservation. Thank you for the opportunity to present my views to the Subcommittee.