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## **E PROPOSED FINDINGS AND DETERMINATIONS**



## APPENDIX E

### PROPOSED FINDINGS AND DETERMINATIONS

#### INTRODUCTION

Under the NMSA the Secretary of Commerce may designate an area as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary makes a set of determinations and findings and has considered factors and conducted consultations described in the NMSA (16 U.S.C. 1433(a) and (b)). Although CINMS was designated in 1980, 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 CINMS terms of designation somewhat (see summary below), 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 Appendix meets these NMSA and NEPA requirements by describing the consultations in Section I, making proposed determinations and findings and considering factors in Section II, and discussing the relation of the proposed action to existing laws and executive orders in Section III.

#### SUMMARY OF PROPOSED CHANGES TO THE SANCTUARY'S TERMS OF DESIGNATION

Since the NMSP is currently proposing several revisions to the CINMS terms of designation, the NMSP has provided the required findings and determinations from the NMSA after the following summary of the proposed revisions. Proposed revisions of the Description of the Area would: clarify that the submerged lands at CINMS are legally part of the Sanctuary and are included in the boundary description, replace the term "seabed" with "submerged lands of the Sanctuary", and express boundary coordinates based on the North American Datum of 1983 (NAD 83). Proposed changes to the Scope of Regulations would authorize Sanctuary regulation of: exploring for, developing, or producing minerals within the Sanctuary; discharging or depositing from beyond the boundary of the Sanctuary any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality; placing or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary; moving, injuring, possessing, or attempting to move, injure, or possess a Sanctuary historical resource; taking any marine mammal, sea turtle, or seabird within or above the Sanctuary; possessing within the Sanctuary any marine mammal, sea turtle, or seabird; marking, defacing, damaging, moving, removing, or tampering with any sign, notice, or placard, whether temporary or permanent, or any monument, stake, post, or other boundary marker related to the Sanctuary; and introducing or otherwise releasing from within or into the Sanctuary an introduced species. Additional proposed changes to the Designation Document would provide: an updated and more complete description of characteristics that give the Sanctuary particular value; greater clarity on the applicability of Sanctuary emergency regulations (and in keeping with the National Marine Sanctuary Program regulations of general applicability, 15 CFR Part 922, Subpart E); revision of the Scope of Regulations section on consistency with international law with language taken directly from sec. 305(a) of the NMSA, which deals with application of regulations; an updated explanation of the effect of Sanctuary authority on preexisting leases, permits, licenses, and rights; and occasional wording fine-tuning in order to conform wording of the Designation Document, where appropriate, to wording used for more recently designated sanctuaries. No changes are proposed to be made to the "Fishing" and "Defense Activities" sections within Article V (Relation to Other Regulatory Programs) of the Designation Document.

## SECTION I: 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, consultation letters were sent in May 2003 to the following:

- Department of Defense;
- Department of Energy;
- Department of the Interior;
- Department of State;
- Department of Transportation;
- Environmental Protection Agency;
- NOAA Fisheries;
- Pacific Fishery Management Council;
- Governor, State of California;
- California Resources Agency;
- California Department of Fish and Game;
- California Department of Water Resources;
- California Resources Agency;
- California State Lands Commission;
- California Fish and Game Commission;
- California Department of Boating and Waterways;
- California Department of Conservation;
- California Coastal Commission
- City of Santa Barbara
- County of Ventura
- County of Santa Barbara
- House of Representatives Resources Committee;
- Senate Committee on Commerce, Science, and Transportation;
- Members of California's Congressional Delegation
- Sanctuary Advisory Council, CINMS

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 assist in making 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:

- Section 7 Endangered Species Act consultation with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (required by the Endangered Species Act);
- Essential Fish Habitat consultation with the National Marine Fisheries Service (required by the Magnuson-Stevens Act);
- Federal consistency consultation (determination) with the State's coastal zone management agency (again, if State waters are involved or if an activity outside State waters is reasonably likely to have an effect on any land or water use or natural resource of the coastal zone) (required by the Coastal Zone Management Act); and
- National Historic Preservation Act §106 consultation.

The results of these consultations will be included in this Appendix in the Final Management Plan/Final Environmental Impact Statement.

## **SECTION II: NMSA AND NEPA FINDINGS AND DETERMINATIONS**

### A. 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.*

These determinations and findings were made when the Sanctuary was designated in 1980. The proposed addition of submerged lands to the description of the Sanctuary boundary and the other proposed changes to the terms of designation described in this DMP/DEIS (see Appendix D) are consistent with and further support the original determinations and findings. The waters and submerged lands of the Sanctuary, and their associated marine life and historical/cultural resources, possess exceptional value in all categories (conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, and esthetic qualities). The proposed changes would provide additional protection to bottom habitats, water quality, living resources, and historical/cultural resources of 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 original FEIS found that existing statutes did not provide a comprehensive management mechanism for marine waters surrounding the northern Channel Islands. The proposed changes to the terms of designation would allow existing laws relating to marine resource management, water quality protection, and marine species protection within the Sanctuary to be supplemented. The proposed changes would also allow for more comprehensive and coordinated management, including scientific research and public education, of living and non-living resources in the Sanctuary.

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

Although proposed changes to the terms of designation would clarify that submerged lands are included as part of Sanctuary's described boundary, and the Sanctuary's outer boundary coordinates and description of the shoreline boundary demarcation are also proposed for technical corrections and clarification, there would be no change to the Sanctuary's overall size.

B. Section 303(b)(1) of the NMSA (16 U.S.C. 1433(b)(1)) requires that the following factors be considered for purposes of 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 resource and ecological qualities of the Channel Islands National Marine Sanctuary are described in the original FEIS on pages 11-55, and an updated description is provided in this document at Section 3.0 and Appendix D. The proposed changes to the activities that could be regulated (Appendix D) recognize the significance of the maintaining the Sanctuary's water quality, protecting sensitive species and habitats, and protecting historical/cultural resources of 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.*

A description of the human uses of the Sanctuary and its surrounding areas is provided in the original FEIS on pages 59-90, and an updated description is provided in this document at Section 3.0. The proposed changes to the terms of designation would allow for increased protection of the resources that support commercial and recreational fishing, diving, boating, research, and education.

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.*

Management authorities and associated laws and regulations applicable to the Sanctuary are described in the original FEIS on pages F6-49, and an updated description is found in Section 5.0 of this document. Existing management authorities were considered in the final rule designating the Sanctuary in 1980 (45 FR 65198) and the additional protections and comprehensive management approach provided by the Sanctuary management plan 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 proposed changes to the terms of designation would add submerged lands to the description of the Sanctuary's underlying boundary, as well as clarify and provide technical corrections to the Sanctuary's outer boundary, but would not change the overall size, manageability, accessibility or suitability for monitoring and enforcement activities in the Sanctuary.

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 were described in the original 1980 FEIS and final rule designating the Sanctuary (45 FR 65198). The changes to the terms of designation proposed by this DMP/DEIS would enhance public benefits by providing for increased protection to water quality, seabed habitats and marine life, sensitive marine species, and cultural and historical resources of 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 is included in Section 4.0 of this DEIS. The socioeconomic analysis concludes that impacts of the proposed changes would be less than 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 FEIS, management plan, and final rule for designation of the Sanctuary. The changes to the terms of designation proposed by this DMP/DEIS will enhance the area's scientific and monitoring value by allowing for increased protection to seabed habitats and features, water quality, and living resources of 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 propose many innovative management approaches to education, research, and resource protection.

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

The Sanctuary has already been a part of the Sanctuary System since 1980.

### C. 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.*

Section 2.0 of this DMP/DEIS (Affected Environment) 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. Coordination and consultation with the National Park Service has occurred and will continue with regard to management and public use of the Channel Islands National Park. Additionally, consultation has occurred and will continue with the U.S. Fish and Wildlife Service and 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 noted above, these three agencies were consulted. The NMSP is not aware of any actively used past, present, or future disposal or discharge areas designated or to be designated within the Sanctuary by these agencies.

### **SECTION III: 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 proposed action to other legal requirements is discussed as follows:

#### Coastal Zone Management Act (CZMA)

The CZMA creates a partnership between the Federal and State governments that allows States to develop coastal zone management programs within a set of Federal requirements but tailored to their individual needs. The CZMA 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 shall 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.

Located partially within State waters, the Sanctuary works closely with several California state departments and commissions. The NMSP will consult with the California Coastal Commission on the federal consistency of the proposed action with the California Coastal Zone Management Program.

#### Magnuson-Steven Fishery Conservation and Management Act (MSFCMA)

The MSFCMA governs the management and conservation of fisheries in Federal waters of the United States and created the Pacific Fishery Management Council (PFMC), along with seven other regional councils. Sanctuary staff work closely with the PFMC and NOAA Fisheries on matters pertaining to federally managed fisheries within the Sanctuary.

The MSFCMA also requires Federal agencies to consult with NOAA Fisheries regarding any agency action they authorize (e.g., issue permits for), fund, or undertake, that may adversely affect essential fish habitat (EFH). The NMSP will consult with NOAA Fisheries on the impact of the proposed action on EFH.

#### National Historic Preservation Act (NHPA)

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 included in or eligible for inclusion in 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 the proposed action on any historic or cultural resource in the Sanctuary.

### Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act 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 an agency must prepare an initial (IRFA) and final regulatory flexibility analysis (FRFA). The NMSP has not prepared an IRFA 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., assessment of the costs and benefits of the regulatory action) must be conducted. Under 12866 a regulatory action is significant if the rule may:

- have an annual effect on the economy of \$100 million or more or adversely affecting 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
- raises 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 addressed in this DMP/DEIS (see Appendix D) is not significant. 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. These consultations 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:

- 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 has worked with and will continue to work with partner agencies within the State of California, local jurisdictions in the vicinity of the Sanctuary, 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.

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