



DEPARTMENT OF THE NAVY  
OFFICE OF THE ASSISTANT SECRETARY  
(INSTALLATIONS AND ENVIRONMENT)  
1000 NAVY PENTAGON  
WASHINGTON, D.C. 20350-1000

MAY 3 2005

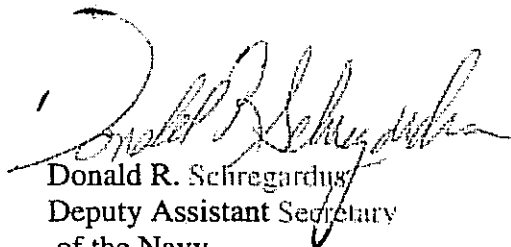
Mr. Daniel J. Basta  
Director, National Marine Sanctuary Program  
National Oceanic and Atmospheric Administration  
1305 East-West Highway, N/ORM-6  
Silver Spring, MD 20910-3281

Dear Mr. Basta:

This is to provide Department of the Navy and Department of the Air Force comments on the National Oceanic and Atmospheric Administration's (NOAA) proposed amendments to the Channel Islands National Marine Sanctuary (Sanctuary), forwarded by your letter of February 18, 2005. We are providing joint comments as we share similar views on NOAA's potential amendments to establish a network of marine reserves, marine parks, and marine conservation areas in the Sanctuary.

The Departments of the Navy and the Air Force have concerns about the authority upon which the National Marine Sanctuary Program could reasonably rely in establishing discretely zoned areas within the Sanctuary, the process whereby such discretely zoned intra-Sanctuary areas would be established, and considerations regarding military activities conducted within the Sanctuary. Moreover, the outstanding issue of how "new military activities" will be defined and applied under revised Sanctuary regulations must be resolved before any discretely zoned areas are established. These and related concerns are more fully addressed in the enclosure.

We appreciate the opportunity to comment on the potential Sanctuary amendments. As the protectors of some of our nation's most ecologically important areas, we look forward to meeting with you and your staff to discuss our concerns, as well as ways to make the Sanctuary designation process compatible with our national defense mission.



Donald R. Schiregardus  
Deputy Assistant Secretary  
of the Navy  
(Environment)

Sincerely,



Richard A. Ashworth, Colonel, USAF  
Acting Deputy Assistant Secretary  
of the Air Force  
(Environment, Safety and Occupational Health)

Enclosure

Copy to:

Mr. Alex Beehler, Assistant Deputy Under Secretary  
of Defense (Environment, Safety and Occupational Health)

Mr. Tim Keeney, Deputy Assistant Secretary, National Oceanic and  
Atmospheric Administration, Department of Commerce

Department of the Navy and Department of the Air Force Comments on *“Possible Amendments to the Channel Islands National Marine Sanctuary Designation Document Related to the Consideration of Marine Reserves, Marine Parks and Marine Conservation Areas”*

Legal Authority Considerations

We recommend that the NMSP review the provisions of the National Marine Sanctuary Act, 16 U.S.C. §§ 1431 et seq. (NMSA), the authority upon which it will rely for establishing discretely zoned areas within the Sanctuary. Given that the Sanctuary was designated under the NMSA as opposed to direct Congressional designation, we question whether the NMSA in its current form provides sufficient legal authority for such action. While we agree that section 1433(b)(1)(F) of the NMSA requires NOAA to assess the adequacy of the state regulatory authorities and the adequacy of those authorities to fulfill the purposes of the NMSA, we see nothing in the NMSA that reasonably authorizes the NMSP to segregate discrete areas and designate them as marine reserves, marine parks, or marine conservation areas.

We also acknowledge that the potential amendments are similar to how the NMSP addressed the issue in the Florida Keys National Marine Sanctuary. However, the NMSP's actions resulting in discretely zoned areas within the Florida Keys National Marine Sanctuary were based upon the specific authority set forth in the Florida Keys National Marine Sanctuary and Protection Act, Pub. L. 101-605, which led to the creation of an internationally recognized Area to be Avoided (ATBA) and enabled the NMSP to “consider temporal and geographical zoning to ensure protection of Sanctuary resources.” We can find no similar authorizing language in the NMSA. Therefore, regarding the Sanctuary and its designation under the NMSA, vice direct Congressional designation, the NMSP must be prepared to rely upon the text of the NMSA in identifying a defensible basis for the potential amendments.

Similarly, we believe that NOAA must be prepared to address arguments along these lines that will be raised by opponents to the potential amendments. In this regard, while we understand that the Pacific Fishery Management Council (PFMC) has recommended extending Sanctuary authority to allow the creation of marine reserves, we are curious to see how the NMSP will be able to defend against opposition arguments in a manner that does not openly call into question the adequacy of the State management plan which establishes the very same discrete areas. Given your statement that the potential amendments have been drafted to be compatible with the State of California Marine Managed Areas Improvement Act, we conclude that this is something the NMSP does not intend to do. Therefore, if the discrete zoning aspects of the State's management plan are in fact adequate, we recommend that the NMSP must be able to articulate convincingly some additional benefit that will be derived from a Federal action that on its face simply mirrors seemingly adequate action already taken by the State of California. We strongly suspect that a simple assertion by the NMSP that such Federal action constitutes a permissible innovative management approach to protect Sanctuary resources, without articulating an additional derived benefit, will prove to be unconvincing in the face of claims by opponents that the NMSP's proposed amendments do nothing more than create an unnecessary layer of Federal involvement.

## Pre-Existing and New Military Activity Considerations

Apart from any comments concerning applicable legal authorities, it is unclear to us how the proposed amendments relate to the ongoing revision of the Sanctuary management plan, a process that has been ongoing since 1999. While we are pleased with the progress we have made with your office regarding the sustainment of military activities that occur within the Sanctuary's boundaries, we strongly believe that the outstanding issue of how new military activities will be defined under the revised implementing regulations must be resolved before the potential discretely zoned areas are established.

While we remain optimistic that this unresolved matter will be addressed in the near future, we request confirmation from your office that the regulatory definition of "new military activity" will apply to the potential discretely zoned areas. Consistent with Congress's express intent regarding the Florida Keys National Marine Sanctuary, it remains our position that any additional Sanctuary restrictions associated with the potentially discretely zoned areas do not apply to military activities occurring within the Sanctuary's boundaries.

## Designation Process Considerations

We strongly believe that the process, whereby the potential discretely zoned areas are established, must adhere to the procedural requirements of the NMSA. There is also some confusion as to how the proposed amendments relate to the ongoing revision of the Sanctuary management plan. As we read your proposed timeline of events, it appears that the NMSP's intent is to establish these discretely zoned areas as part of the ongoing EIS process. Regardless of whether our conclusion is correct, if the squaring off of such areas leads to an expansion of the Sanctuary, albeit a slight expansion, we maintain our position that pre-existing military activities that occur in the new areas covered by any such expansion are not subject to Sanctuary restrictions. Finally, the analysis and procedures of the NMSA must be followed prior to any expansion of the Sanctuary, regardless of size.

## Conclusion

We appreciate the opportunity to provide comments on the potential amendments. NOAA's letter of February 18, 2005, indicates that there may be other potential amendments to Article 4 of the NMSA and the degree of the potential boundary expansion is unknown. Therefore, these are our comments pursuant to the consultation requirements of the NMSA and are not meant to be a full discussion of all potential issues. We look forward to the opportunity to meet and discuss our concerns and comments in greater detail during the remainder of the sanctuary designation process.