2003

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THE DISAPPOINTING HISTORY OF THE NATIONAL MARINE SANCTUARIES ACT

DAVE OWEN*

INTRODUCTION

For years, the United States has struggled to develop a legal framework capable of providing for sustainable management of ocean resources. Despite these efforts, severe environmental problems have persisted. In recent years, despite long-standing attempts at fisheries management, one fish stock after another has collapsed, putting small fishermen out of business and decimating ecosystems and coastal economies. Runoff has loaded coastal waters with nutrients and other pollutants, leading to algal blooms, fish kills, and dead zones. Now, with an energy-industry-friendly administration in power, areas off some of the country’s most popular coastlines are being eagerly eyed, despite local popular opposition, for oil and natural gas drilling.

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1 See generally Robin Kundis Craig, Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio '92, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,190, 10,192 (2002) (“U.S. ocean policy has yet to fully embrace the precautionary approach and the necessary long-term thinking that sustainable use requires.”).


3 Craig, supra note 1, at 10,200-01.

4 See NAT’L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA’S FUTURE, 5-3 to 5-10 (2001) (describing the need for greater domestic energy production, including increased offshore drilling, and showing the locations of America’s oil and natural gas fields), available at http://www.whitehouse.gov/energy/Chapter5.pdf.
Thirty years ago, Congress drafted a law ostensibly intended to address such problems and to ensure sustainable use of America’s oceans. The National Marine Sanctuaries Act (NMSA)—originally enacted as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972⁵—empowered the National Oceanic and Atmospheric Administration (NOAA) to set aside and develop management plans for particularly important areas of America’s oceans.⁶ In 1972, Congress had expressed high hopes for the Act, predicting that it would provide for comprehensive, balanced management of the oceans, protecting them from oil spills and rapacious extraction while also furthering the economic use of marine resources.⁷

The Act, however, has fallen short of these expectations. For years it languished at the hands of unsympathetic presidential administrations. NOAA proved to be a reluctant and ineffectual instigator of the designation process, and few of our current sanctuaries came into existence without substantial help from Congress. While those designations enjoyed widespread political support, and the resulting program seems to arouse little political antipathy, the sanctuaries that currently exist are widely criticized for providing insufficient resource protection. Huge areas of ocean remain unprotected.

This Article traces the history of the marine sanctuary program, a task largely ignored by scholars,⁸ and examines why

⁷ See infra Part I(B).
the program has been a disappointment. Part I begins with the 1972 enactment of the NMSA and discusses the contrast between Congress’s ambitiously stated goals and the anemic, ill-designed law it actually drafted. Part II analyzes the story of the program through successive administrations. The program’s beginnings suffered benign neglect under Ford, briefly reemerged through Carter’s efforts at revitalization, and then disappeared as Reagan and, to a lesser extent, George H.W. Bush attempted to relegate the program to irrelevance. In the late Bush/early Clinton period, it emerged again for a period of intense congressional and executive activity. For most of the remainder of the Clinton presidency it again disappeared from view, as NOAA concentrated on improving sanctuary management rather than on expanding the system, but it reappeared on the national stage in the eleventh hour of Clinton’s administration.

Part III of this Article discusses the lessons of this history, and concludes that Congress delegated NOAA a difficult task without providing it with any of the tools necessary for success, all but ensuring that nothing could be accomplished without the active support of either Congress or the President. Presidential support has mostly been lacking, however, and congressional interest has been sporadic. As a result, the program has provided uneven protection and has fallen well short of providing the comprehensive, balanced management scheme Congress originally envisioned.

The NMSA thus serves as an excellent example of how not to go about protecting the environment. By delegating power to an understaffed agency and providing that agency with nebulous goals, no clear mission, and no internal or external incentives to act, Congress all but ensured ineffectual protection. The result has been a program with few political costs but with disappointingly little environmental protection to its credit. Part IV considers inaccurate. Compare JOSEPH J. KALO ET AL., OCEAN AND COASTAL LAW 525-29 (dividing the history of the program into two phases—the earlier phase involving slow, agency-driven designations of small areas for specific purposes, and the second phase involving streamlined Congressional designation of large areas for broader purposes) with infra Part III (noting that some later designations were slower, and, although generally somewhat larger, were in fact quite consistent in scale and purpose with some of NOAA’s earlier designations, and describing a halt in the designation process between 1994 and 2000 due to lack of concern on Capitol Hill, increased complexity of the process, and increased managerial duties).
various directions in which Congress could take the program, and the Article closes with suggestions for how the NMSA should be strengthened and turned into a more effective instrument of ocean protection.

I

CREATION OF THE NATIONAL MARINE SANCTUARIES ACT

A. Passage of the Act

In 1969, an oil well shaft off the southern California coast ruptured, venting millions of gallons of oil into the biologically rich waters off of Santa Barbara.9 The oil diffused over 800 square miles of ocean and then, when the winds shifted, drifted toward land, blackening coastal beaches.10 The extensive damage appalled the nation, and the spill is still recognized as a seminal event in the development of the modern American environmental movement.11 Even today, the smell of oil lingers over Santa Barbara’s beaches, and judicial decisions continue to acknowledge the lingering shadow of the spill.12

10 California v. Norton, 311 F.3d at 1166; NASH ET AL., supra note 9, at 3.
11 See id. at 1166-67; CLARKE & HEMPHILL, supra note 9; Miles Corwin, The Oil Spill Heard 'Round the Country, L.A. TIMES, Jan. 28, 1989, at 23 (“The blowout was the spark that brought the environmental issue to the nation's attention.”) (quoting Arent Schuyler, lecturer emeritus at the University of California, Santa Barbara).
12 See, e.g., California v. Norton, 311 F.3d at 1167. The case involved California's challenge to the federal government's extension of mineral exploration leases off the California coast. At the outset, the court's opinion states, “[b]efore we embark, we briefly recollect the failures that these environmental protections are designed to prevent by providing for substantial state involvement in federal decisions concerning offshore oil drilling,” and proceeds to discuss the history of the 1969 oil spill. Id. at 1165-67. The court held that the federal government could not extend the leases without allowing California to perform a consistency review and that the federal government needed to provide some justification for determining that the lease extensions were categorically exempt from NEPA review. See id. at 1170-78. The practical result of the decision was to delay, at least for a time, the federal government's
The spill helped spur development of the National Environmental Policy Act (NEPA) and other giants within the rubric of environmental legislation. In addition, it helped galvanize congressional will towards passing the NMSA. Legislative efforts at ocean protection had preceded the spill; in 1968, the House of Representatives considered eleven bills aimed at providing protection to discrete areas of the oceans. Potent industry opposition kept all of these bills from leaving the House Merchant and Marine Fisheries Committee, however, and it was only when the Council on Environmental Quality released a study of ocean dumping, and when the spill and other spectacular disasters further aroused public outrage, that the legislative response began to succeed.

In 1971, the House passed H.R. 9727, which eventually became the Marine Protection, Research, and Sanctuaries Act of 1972. The primary purpose of the bill was to regulate ocean dumping, and much of the associated debate centered around the anti-pollution provisions of Titles I and II. Title III created the National Marine Sanctuaries Program. The bill passed the House with a resounding 305-3 majority, but Title III stalled in the Senate, where numerous senators expressed concern about the legality and advisability of Title III's effects on the United State's ability to restart drilling off the California coast.

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15 See Blumm & Blumstein, supra note 8, at 50,018.
17 See Blumm & Blumstein, supra note 8, at 50,018.
18 92nd Cong. (1971).
21 See, e.g., id. at 30,850-55.
22 Id. at 31,132, 43,056.
23 Id. at 31,159-60.
marine jurisdiction.\footnote{See id. at 43,057-60 (1971) (statements of Sens. Hollings, Jackson & Stevens). Senator Hollings expressed concern that the Act would extend U.S. jurisdiction into international waters. Hollings did not disagree with the need for the Act, but was concerned about such "creeping jurisdiction." Id. at 43,057-58. Senator Jackson expressed concern about the jurisdictional viability of the Act. Id. at 43,058. Senator Stevens rejected the unilateral extension of sanctuaries beyond the territorial sea. Id. at 43,060. The Senate also was concerned that jurisdiction over marine areas more properly rested with the Department of the Interior (DOI). See Blumm & Blumstein, supra note 8, at 50,019. In the House, Rep. Aspinall had expressed similar concerns. See 117 Cong. Rec. 30,863-65 (1971). These jurisdictional disputes between DOI and NOAA would continue to affect the history of the program. See, e.g., infra notes 120-121.} The Senate also passed the bill, but without Title III, and a conference committee then attempted to sort out the differences.\footnote{See Blumm & Blumstein, supra note 8, at 50,019.} One year later, the committee reached its resolution, agreeing on a final bill with the House’s version of Title III essentially reinstated and qualified only by language clarifying the Act’s consistency with accepted principles of international law.\footnote{118 Cong. Rec. 36,041-42 (1972) (statement of Rep. Lennon).} Both the House and Senate passed the bill,\footnote{id. at 36,045.} and on October 23, 1972, President Nixon signed the Act into law.\footnote{Pub. L. 92-532, 86 Stat. 1052 (1972).}

B. \textit{Grand Ambitions: Congress’s Rhetoric}

The passage of the NMSA was accompanied by a flurry of rhetoric, all of which suggests that members of Congress had a fairly clear and consistent vision of what they thought they were accomplishing. This rhetoric suggests that Congress believed it was responding to a major problem with a comprehensive solution. Members of Congress stated that they were creating an important program likely to ensure balanced planning for a wide range of uses on a broad geographic scale—in effect, a program to provide for comprehensive multi-use management of the oceans.

Almost every member of Congress involved in the debate mentioned the geographic scale of the problem and the broad scope of the solution. In a typical remark, Representative Mosher stated that “Title III... emphasizes our national concern over indiscriminate and thoughtless utilization of the oceans. Its purpose is to insure the highest and best use of this national
Representative Lennon similarly emphasized the importance of comprehensive management. Representative Dingell asserted that the bill would afford "considerable environmental protection," and Representative Keith asserted that "[i]ts purpose is to assure the preservation of our coastal areas and fisheries." Even the bill's few opponents assumed its scale would be grand. Representative Aspinall, the most vocal skeptic, argued that it "could result in locking up unnecessarily offshore resources valued at billions of dollars."

There were some hints that the program might not be so comprehensive and that its scale might not be quite so grand. Dingell, for example, noted that, "[T]itle III is permissive—it allows the Secretary of Commerce to declare sanctuaries in appropriate cases. We make no attempt to force him to do so." Similarly, Representative Pelly pointed out that "[h]ow many such marine sanctuaries should be established remains to be determined," and Representative Harrington, despite declaring that "[t]hese sanctuaries will immediately preserve vital areas of our coastline from further damage," stated "[m]y only reservation is that we may be drastically underfunding both titles II and III."

These statements, however, were isolated islands of concern amid a sea of self-congratulation; the overall tone of the debate clearly suggests Congress's belief that it had enacted landmark, comprehensive legislation.

Although the legislation may have been comprehensive, Congress was careful to emphasize that it was intended to be balanced and not prohibitory. Almost all of the bill's proponents emphasized the importance of allowing for both preservation and exploitation. Representative Keith, for example, noted that by...
preserving the oceans, the bill was "protecting our source of protein and at the same time assuring such industrial and commercial development as may be necessary in the national interest." Keith further declared that "the word 'sanctuaries[]' carries a misleading connotation. It implies a restriction and a permanency not provided in the title itself." Similarly, Representative Pelly emphasized that designation under the Act provided for multiple uses, and was not analogous to the designation of a wilderness area.

All of this rhetoric points to a relatively consistent congressional intent. Congress believed that it was creating a system for comprehensive assessment and development of a management scheme for ocean resources—a system analogous not to the National Parks or the wilderness system but instead to the geographically broad, multiple-use-oriented system of the national forests. Designation was to be the beginning of a process of developing a broad-based management scheme rather than the culmination of attempts to create prohibitions. The Act was to be an attempt to bring planning and balance to the United States' ocean management as a whole, rather than to focus particular protections on relatively small areas while leaving the great majority of areas unaddressed.

C. Contents of the Act

Although Congress may have expressed high hopes for the new law, the actual statutory terms do not comport with such a grandiose vision. The law contains more obstacles than spurs to action, and seems designed to ensure a slow and careful designation process rather than broadly sweeping changes. The NMSA sets forth detailed provisions for the designation of sanctuaries, for the development and updating of management plans for those areas, and for enforcement of those management plans. The Act attempts to ensure that designated areas meet detailed criteria, are designated only after substantial input from the public, and are not designated against the wishes of Congress utilizing the oceans. Its purpose is to ensure the highest and best use of this national asset.

38 Id. at 30,858.
39 Id.
40 Id. at 31,136.
or the states in which portions of the sanctuaries will lie. In combination, these provisions ensured that sanctuary designation would be a complicated and difficult process.

Section 301 sets forth the purposes of the Act, which, in their broad scope, appear to track some of the congressional rhetoric. It declares the importance of protecting "special areas" of the ocean, and states that "certain areas of the marine environment possess conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance." After asserting that it will allow for designation and protection of such areas, the Act then states that one of its purposes is to "provide authority for comprehensive and coordinated conservation and management of these marine areas." It then specifies some of the uses to be balanced, emphasizing both the facilitation, "to the extent compatible with the primary objective of resource protection [of] all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities," and its intent "to protect[...], restore and enhance natural habitats, populations, and ecological processes." Thus the management mission, while perhaps limited to special areas, is ambitiously all-encompassing.

Sections 303 and 304 form the heart of the Act, specifying criteria and procedures for designating sanctuaries. Section 303(a) states that "[t]he Secretary may designate" any area meeting a certain set of criteria. The criteria include the resource values of the area, the adequacy of existing regulatory regimes to protect those resources, and the amenability of the area to "coordinated and comprehensive conservation and management." Section 303(b)(1) sets forth a list of "factors" the Secretary must consider in reaching a designation, again requiring consideration of a range of resource values but also requiring consideration of the socioeconomic effects of designation. Section 303(b)(2) requires

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42 Id. § 1431(a)(2).
43 Id. § 1431(b)(2).
44 Id. § 1431(b)(6).
45 Id. § 1431(b)(3).
46 Id. § 1433(a).
47 Id.
48 See id. §§ 1433(b)(1)(A) (requiring consideration of "the area's natural
the Secretary to consult with the relevant House and Senate Committees, the Secretaries of State, Interior, Transportation, and Defense, any other interested federal agency, with state and local agency heads, “the appropriate officials of any Regional Fishery Management Council,” and “other interested persons.”

Section 304 sets forth the procedure for designating a sanctuary, and also includes extensive requirements for the participation of Congress, other agencies, and the public. The Secretary must publish a notice to initiate the process, prepare a draft environmental impact statement (DEIS) and hold public hearings, including “at least one public hearing in the coastal area or areas that will be most affected by the proposed designation.”

The Secretary must submit the DEIS and other documentation to other federal agencies and to House and Senate committees. The committees have forty-five days to hold hearings on the designation, and may prepare a report that the Secretary must then consider. If, after all of these consultations, designation continues, the Secretary must publish a final notice and final regulations for management of the sanctuary.

Together, Sections 303 and 304 provide for a procedurally complex designation process, ensure substantial input from a variety of sources prior to any designation, and give both the public and numerous powerful government entities many opportunities to weigh in on the designation process. But despite setting NOAA up for a potentially difficult task, the Act provides few spurs to action. Its key provision states that NOAA “may designate” sanctuaries, and does nothing to guarantee that NOAA will designate. The Act sets no specific goals for designation; its

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49 Id. § 1433(b)(2).
50 Id. § 1434(a)(1).
51 Id. § 1434(a)(2).
52 Id. § 1434(a)(3).
53 Id. § 1434(a)(1)(C).
54 Id. § 1434(a)(6).
55 Id. § 1434(b)(1). Under 1984 amendments to the Act, the designation will not take effect until Congress has had an additional forty-five days to consider it. Pub. L. 98-498 § 304, 98 Stat. 2296, 2300.
ambitious statements of policy are not bolstered by any kind of numerical targets. Finally, the Act provides no mechanisms, such as citizen suits to enforce deadlines, through which private parties or other government entities may force the designation process.

Thus, the Act created something of a paradox. On one hand, it was clearly intended to be comprehensive. On the other hand, it left actual decisions about the scope of the sanctuary program to NOAA, and provided NOAA with many obstacles blocking designation and few incentives to act. This paradox, not surprisingly, led to disappointingly minimal protection.

II
HISTORY OF DESIGNATIONS

During the 1972 debates, Representative Harrington stated that “[t]hese sanctuaries will immediately preserve vital areas of our coastline from further damage.”57 He was mistaken. For years after passage of the NMSA, the Act had little to do with any ocean protection that was granted, as substantial designations were still almost a decade away. This Part traces the inconsistent history of the Act, following the fits and starts of the designation process through hostile and friendly administrations and uninvolved and activist Congresses.

Table 1: The Marine Sanctuaries

<table>
<thead>
<tr>
<th>Sanctuary</th>
<th>Date Designated</th>
<th>Designator</th>
<th>Area (square miles)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monitor</td>
<td>1975</td>
<td>Ford</td>
<td>1</td>
</tr>
<tr>
<td>Key Largo</td>
<td>1975</td>
<td>Ford</td>
<td>100</td>
</tr>
<tr>
<td>Channel Islands</td>
<td>1980</td>
<td>Carter</td>
<td>1,658</td>
</tr>
<tr>
<td>Gulf of the Farallones</td>
<td>1981</td>
<td>Carter</td>
<td>1,255</td>
</tr>
<tr>
<td>Gray’s Reef</td>
<td>1981</td>
<td>Carter</td>
<td>23</td>
</tr>
<tr>
<td>Looe Key</td>
<td>1981</td>
<td>Carter</td>
<td>5.32 square nautical miles</td>
</tr>
<tr>
<td>Fagatale Bay</td>
<td>1986</td>
<td>Reagan</td>
<td>0.25 (163 acres)</td>
</tr>
<tr>
<td>Cordell Bank</td>
<td>1989</td>
<td>Bush</td>
<td>526</td>
</tr>
<tr>
<td>Florida Keys</td>
<td>1990</td>
<td>Congress</td>
<td>3,674</td>
</tr>
<tr>
<td>Flower Garden Banks</td>
<td>1992</td>
<td>Bush/Congress</td>
<td>56</td>
</tr>
<tr>
<td>Monterey Bay</td>
<td>1992</td>
<td>Congress</td>
<td>5,328</td>
</tr>
<tr>
<td>Stellwagen Bank</td>
<td>1992</td>
<td>Congress</td>
<td>842</td>
</tr>
<tr>
<td>Hawaiian Islands</td>
<td>1992</td>
<td>Congress</td>
<td>1,300</td>
</tr>
</tbody>
</table>


59 Technically, the Banks were designated by legislation. The legislation was necessary, however, only because NOAA scheduled an opening ceremony prior to the end of the statutory congressional approval period, and needed congressional action to save it the embarrassment of a premature ceremony. See 137 CONG. REC. H11,028 (daily ed. Nov. 23, 1991) (statement of Rep. Ortiz).
A. Phase I: The Nixon and Ford Years

The program began slowly. Under Nixon, NOAA created no sanctuaries. It was not until 1974 that NOAA developed program guidelines,\(^6\) and not until 1975 that the first designations took place. Throughout this early period, the program was drastically underfunded; until 1979, NOAA’s budget contained no independent funding for the Sanctuaries program, and management funds came out of its general budget.\(^6\) NOPA did set aside the site of the sunken Civil War ironclad USS Monitor, off the coast of North Carolina, and Key Largo in Florida as the first marine sanctuaries.\(^6\) Partly as a result of its lack of funding, and partly

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\(^6\) Blumm & Blumstein, supra note 8, at 50,021.


because of resistance from the oil industry, NOAA did little else.\textsuperscript{65} When Jimmy Carter took office in 1977, several other sites were under consideration, but the program had been "nearly forgotten."\textsuperscript{66}

Neither of these designations bore much resemblance to the grand visions of Congress.\textsuperscript{57} The entire Monitor sanctuary is one square mile in area,\textsuperscript{68} and exists almost solely to protect the shipwreck’s archaeological resources.\textsuperscript{69} The Key Largo sanctuary, while providing protections against the removal of or damage to natural features,\textsuperscript{70} was only approximately 100 square miles in area,\textsuperscript{71} and would be dwarfed by later designations.

Each designation protected important resources.\textsuperscript{72} Neither, however, resembled the type of broad-based planning described in early congressional rhetoric, and in both sanctuaries the balancing of competing uses, if it took place at all, was minimal. On Key Largo, regulatory provisions maintaining some recreational uses contrasted with other provisions allowing portions of the reef to be closed to all human access,\textsuperscript{73} suggesting at least some variation in uses within the sanctuary. Nevertheless, neither sanctuary was large enough to encompass a wide variety of uses. The designations were therefore more akin to protection of small National Monuments—analagous, perhaps, to the protection of a sequoia grove and the Ford Theater—than to large-scale reservations of land.

\textsuperscript{65} See Blumm & Blumstein, supra note 8, at 50,021; CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 11. In addition to lacking separate funding, the program had no field staff for its first ten years. \textit{Id.}

\textsuperscript{66} Blumm & Blumstein, supra note 8, at 50,016.

\textsuperscript{67} See supra Part I(B).


\textsuperscript{69} See supra Part I(B).

\textsuperscript{70} See supra Part I(B).

\textsuperscript{71} NOAA, MONITOR NATIONAL MARINE SANCTUARY, available at http://monitor.nos.noaa.gov/ (last visited February 23, 2003); CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 7 ("The Monitor Sanctuary off Cape Hatteras, North Carolina is unique in having no natural resources of particular interest.").

\textsuperscript{72} See supra Part I(B).

\textsuperscript{73} Blumm & Blumstein, supra note 8, at 50,023.

\textsuperscript{74} At least, each sanctuary was intended to protect resources. Designating the Monitor sanctuary, however, has not prevented the destruction and decay of the Monitor shipwreck. CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 7, 27.

\textsuperscript{75} See Blumm & Blumstein, supra note 8, at 50,023.
B. Phase II: President Carter and the Emergence of the Sanctuaries Program

In 1977, soon after taking office, President Carter provided the previously moribund program with a strong rhetorical endorsement. In a speech to Congress about his environmental program, Carter stated:

Existing legislation allows the Secretary of Commerce to protect certain estuarine and ocean resources from the ill-effects of development by designating marine sanctuaries. Yet only two sanctuaries have been established since 1972, when the program began.

I am, therefore, instructing the Secretary of Commerce to identify possible sanctuaries in areas where development appears imminent, and to begin collecting the data necessary to designate them as such under the law.74

At least two contemporary commentators viewed the speech as a major turning point, gushing that, “May 23, 1977, may well be the most significant date in the history of efforts to implement the marine sanctuaries program,” and that “the President’s Environmental Message... bestowed upon the program a new level of visibility and has fostered an unparalleled level of program activity.”75

Following the announcement, the program entered one of its most active phases. NOAA drafted criteria for selection of potential sites and solicited the assistance of other agencies in designating such sites.76 The response was overwhelming. The states nominated twenty-four sites and members of the public nominated another thirty-five; NOAA soon had 169 recommendations.77 Three of the most significant nominations came from the state of California, which suggested substantial areas off Point Reyes and the Farallon Islands as well as the Channel Islands and Monterey Bay for sanctuary status.78 At the

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75 Blumm & Blumstein, supra note 8, at 50,025.
76 Id.
77 Id.
same time nominations were flowing in, NOAA twice reorganized to facilitate development of the program. In 1978, NOAA established an Office of Ocean Management. In 1979 that office merged with the Office of Coastal Zone Management to form the Office of Ocean and Coastal Resource Management, and within that office the Marine Sanctuaries Program came into existence.

This new momentum did not result, however, in a rapid increase in designations. In 1977, NOAA expected to complete at least two sanctuary designations by October 1978. Moving the designations through the complicated administrative process took much longer, however, and it was not until September of 1980 that NOAA designated the Channel Islands National Marine Sanctuary. NOAA did not designate the Point Reyes–Farallon Islands National Marine Sanctuary, the Looe Key National Marine Sanctuary, or Gray’s Reef National Marine Sanctuary until January 26, 1981, in the waning minutes of the Carter administration.

The new designations nevertheless represented dramatic developments. Looe Key and Gray’s Reef were similar in scale to the Monitor and Key Largo Sanctuaries—both encompassed small areas with rich wildlife resources, and provided relatively specific protection against physical destruction of reef resources. The two sanctuaries off the California coast, however, were huge. The Channel Islands National Marine Sanctuary, at 1,258 square nautical miles, dwarfed its predecessors, and the Point Reyes-

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79 Id.
80 See id.
81 Blumm & Blumstein, supra note 8, at 50,026.
Farallon sanctuary, at 948 square nautical miles, wasn’t much smaller. In addition, unlike previous designations, which were oriented at protecting relatively small, discrete resources from the greatest threats, the California coast sanctuaries functioned as effective withdrawals of large areas from oil and gas exploration. While fishing was explicitly left unregulated, other activities were deemed permissible, and oil and gas explorations were flatly prohibited within the new sanctuaries.

Thus, at the close of the Carter administration, NOAA had created two very different types of sanctuaries—small but strictly protected trinkets, and large but, with the exception of limitations on oil and gas development, unevenly protected expanses of ocean off the California coast.

C. Phase III: Reagan

At the close of the Carter administration, the Marine Sanctuaries Program appeared to be reborn. Six sanctuaries, four of quite recent vintage, existed. Several others were under consideration, and the wealth of nominations indicated public and state enthusiasm for the program. Over the next eight years, however, only one sanctuary—the smallest of the entire system—would be designated.

89 See id. at 7937. In a passage with prohibitions nearly identical to those for the Channel Islands, and similar to those for future sanctuary designations were motivated by concerns about oil and gas explorations, the designation declared:

the primary purpose of managing the area and of these implementing regulations is to protect and to preserve the marine birds and mammals, their habitats, and other natural resources from those activities which pose significant threats. Such activities include: hydrocarbon exploration and exploitation except for the laying of pipeline outside 2 nmi from the Islands, Bolinas Lagoon or Areas of Special Biological Significance; discharges except for fish cleaning wastes and chumming materials, certain discharges incidental to vessel use of the area such as effluents from marine sanitation devices, engine exhaust and cooling waters, biodegradable galley wastes, and deck wash down, and municipal waste outfalls and dredge disposal with a certified permit; construction on or alteration of the seabed except for navigational aids, for certified pipelines or outfalls, and for certain other minor activities; the unnecessary operation of certain commercial vessels within 2 nmi of sensitive habitats and the operation of certain aircraft at lower than 1000 feet within 1 nmi of these areas; and removing or harming historical or cultural resources.

Id. (citations omitted).
The Reagan years may have been the program's nadir. Beset with the active opposition from the administration, the existing programs suffered. Staff positions went unfilled, and critics charged that management programs at existing sanctuaries languished. Funding levels stabilized at the beginning of the Reagan era but then actually declined during his second term. The levels of funding requested by the administration were even lower; Congress repeatedly allocated more money than the administration estimated was necessary. Most discouragingly for program advocates, NOAA designated no new sites other than Fagatele Bay, allowed the designation process for others to stagnate, and even removed Monterey Bay from the list of proposed sites. NOAA claimed that it was "designating new sanctuaries at a pace which [would] allow [it] to integrate new

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90 MARINE SANCTUARIES REVIEW TEAM, supra note 63, at 10 (asserting that "[t]he Reagan [a]dministration was strongly opposed to the program, but Congressional support, coupled with tacit NOAA assistance, kept it alive").
93 The administration has certainly not provided a realistic assessment of funding needs. Even as the administration has requested less money, it has promised more sanctuaries. In fact, we have ended up with less money and no sanctuaries. . . . Funding for the program has always been low, but in recent years it has been abysmally low.
94 See supra tbl. 1; Fagatele Bay National Marine Sanctuary Regulations, Final Rule and Notice of Designation, 51 Fed. Reg. 15,878, 15,879-80 (April 29, 1986). The designation document stated: [t]he Sanctuary consists of 163 acres . . . of bay area of the southwest coast of Tutuila Island, American Samoa. . . . The Sanctuary contains a unique and vast array of tropical marine organisms, including corals and a diverse tropical reef ecosystem with endangered and threatened species, such as the hawksbill and green sea turtles, and marine mammals like the Pacific bottlenose dolphin. The area provides exceptional scientific value as an ecological, recreational, and aesthetic resource and unique educational and recreational experiences.
sites into a well-managed National Marine Sanctuary System," but its decreasing funding requests made such claims sound disingenuous. Even at sites where the designation process did continue, extractive industries exerted a heavy influence on the process. For example, at Cordell Bank in northern California, NOAA rejected the environmentally preferred option, instead selecting a management option that would have offered protection only to a tiny area dwarfed by surrounding oil and gas leases. As a result, by the close of Reagan’s second term the program was once again suffering and an increasingly exasperated Congress was beginning to consider taking action to jumpstart the designation process.

D. Phase IV: Bush and the Congressional Intervention

The period from 1988 until 1994, beginning with the last year

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96 NMSA 1988 Hearings, supra note 91, at 11 (statement of John Carey, Deputy Assistant Administrator, NOAA).
97 As one Member of Congress stated:
NOAA has indicated that it will be designating two new sites this year and another in 1989. However, the proposed budget for the Program is significantly smaller than last year, leading us to wonder if these new Sanctuaries will be designated or, if they are, if existing Sanctuaries will suffer.
Id. at 6 (statement of Rep. Robert Davis).
98 The Cordell Bank sanctuary is centered around a seamount located off the California coast directly north of the Pt. Reyes-Farallon National Marine Sanctuary. According to NOAA:
[t]he Bank consists of a series of steep-sided ridges and narrow pinnacles rising from the edge of the continental shelf. It lies on a plateau 300-400 feet (91-122 meters) deep and ascends to within about 115 feet (35 meters) of the surface. The seasonal upwelling of nutrient-rich bottom waters to the upper levels of the Bank stimulates the growth of planktonic organisms. These nutrients, combined with high light penetration in Bank waters and wide depth ranges in the vicinity, have led to a unique association of subtidal and oceanic species. The vigorous biological community flourishing at Cordell Bank includes an exceptional assortment of algae, invertebrates, fishes, marine mammals and seabirds.
99 See NMSA 1988 Hearings, supra note 91, at 24 (statement of Mark J. Palmer, Executive Director, The Whale Center) (blasting NOAA’s recommendation of a small and minimally protected alternative); id. at 155 (written statement of Mark J. Palmer entitled National Marine Sanctuaries: A Local Perspective) (illustrating the proposed sanctuary and surrounding proposed oil and gas leases and arguing that the areas to be leased dwarf the sanctuary).
100 See infra Part III(D).
of the Reagan administration and ending in the early portion of the
Clinton administration, was the most active in the program’s
history. Frustrated with the Reagan administration’s unwillingness
to support the program, Congress began, in 1988, to take matters
into its own hands. The Bush administration initially was no more
cooperative than its predecessor, but by 1991 a combination of
congressional and electoral pressures and the political momentum
created by the Exxon Valdez disaster\textsuperscript{101} created a political climate
in which designations could proceed rapidly.

1. 1988 Reauthorizations—Congressional Directives

By the end of the Reagan administration, the program was at a
standstill.\textsuperscript{102} NOAA seemed to be an unwilling and ineffective
manager, and Congress doubted its ability and will to develop the
program.

The 1988 reauthorization hearings and testimony reflected
this frustration. During the hearings, the House Marine Merchant
and Fisheries Committee heard criticism from numerous outside
experts who criticized the lack of funding and blasted existing
efforts.\textsuperscript{103} When asked what steps ought to be taken to correct the
problems, the experts suggested that Congress should at least set
deadlines to restrict the discretion currently enjoyed by the
administration.\textsuperscript{104} One expert, Jack Archer from the Woods Hole
Oceanographic Institute, went further, arguing that “we designate
refuges. We designate parks by legislation. It’s not unheard of.
And in fact, it’s the normal rule. So I think you could put together
a process that allows this as a way of dealing with an
administration that is just simply dragging its heels.”\textsuperscript{105}
Members of Congress condemned the Reagan administration’s
efforts with equal vigor. Representative Gerry Studds, in one of

\textsuperscript{101} Richard Charter, an environmental activist involved with each of the
California sanctuary designations, believes that the selection of the largest
alternative for the Monterey Bay sanctuary was in large part a response to the
political pressure created by the Exxon Valdez spill. Telephone Interview with
Richard Charter, Marine Conservation Advocate, Environmental Defense (May
20, 2002).

\textsuperscript{102} See supra notes 90-95 and accompanying text.

\textsuperscript{103} NMSA 1988 Hearings, supra note 91, at 21-28 (1988) (statements of
Michael Weber; Mark J. Palmer; and Jack Archer, Senior Research Fellow,
Marine Policy Center, Woods Hole Oceanographic Institute).

\textsuperscript{104} Id. at 32 (Weber responding to a question from Rep. Lowry).

\textsuperscript{105} Id. at 33.
the most direct statements, stated:
overall credit for the legislation is owed to the chairman of the Oceanography Subcommittee for his dedicated efforts to pursue a broad based reauthorization that will bring the sanctuaries program back on course and help reverse years of inaction and neglect by the administration. The designations of new sanctuaries that we propose here today should never have been necessary: The extraordinary character of Monterey Bay, Cordell Bank and the other areas in the bill more than justify their inclusion into the system, and my friend from Washington deserves high praise for recognizing the need to override the intransigence of the NOAA officials who have for too long sought to tear down and destroy the program they were charged with nurturing.\(^\text{106}\)

Responding to these problems, Congress attempted to create a strengthened reauthorization of the Act. It established statutory deadlines for the consideration of sites\(^\text{107}\) and allocated increased funding.\(^\text{108}\) In addition, it provided specific directives to NOAA, ordering it to designate Monterey Bay, Cordell Banks, Washington's Olympic Coast, and Flower Garden Banks as sanctuaries within specific timetables.\(^\text{109}\) The bill did not attempt to circumvent the normal designation process; each designation was still to involve all the standard public participation and agency review procedures.\(^\text{110}\) Nevertheless, by supplying specific deadlines, Congress hoped to generate more substantial results.

Such results were not forthcoming. The process of designation remained beset by opposition, primarily from the Department of the Interior, and until 1991, the Bush administration showed little inclination to cooperate with congressional directives. NOAA did complete designation of Cordell Bank

\(^{108}\) MARINE SANCTUARIES REVIEW TEAM REPORT, supra note 63, app. D.
\(^{110}\) See 134 CONG. REC. H5819-20 (daily ed. July 26, 1988) (statement of Rep. Lowry) (stating that the reauthorization will provide deadlines for NOAA to act, but that Congress will not act for NOAA).
National Marine Sanctuary in 1989. It did not, however, complete designation of Flower Garden Banks or Monterey Bay until 1992, and the Olympic Coast National Marine Sanctuary was not designated until 1994. By 1990, Congress had designated the Florida Keys National Marine Sanctuary on its own, ordering the designation of what at that time was the largest marine sanctuary in the system without completing the administrative process. At this time, Congress was also expressing frustration at the slow pace of designation of Stellwagen Bank, a gravel sand bar off the Massachusetts coast, in addition to its lasting frustration with the Monterey Bay and Olympic Coast designations.

The delays largely resulted from battles over extractive uses. In 1990, Representative Leon Panetta, the Monterey Bay Sanctuary's chief advocate, charged that the Bush administration was considering allowing drilling in the Monterey Bay Sanctuary, and in congressional hearings NOAA conceded that the Bush administration's energy policy was a primary impediment to sanctuary designation. In 1991, the Bush administration

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117 William J. Eaton & Rudy Abramson, Bush Urged to Ban Monterey Bay Drilling, L. A. TIMES, Feb. 27, 1990, at A3 ("The Bush administration is debating whether to allow oil and gas drilling in the newly established Monterey Bay national marine sanctuary, Rep. Leon Panetta (D-Carmel Valley) charged Monday. 'I think it's nuts,' Panetta said.").
118 Oversight of the National Marine Sanctuary Program and the Sanctuary Designation Process: Hearing Before the Subcomm. on Oversight and Investigations, Subcomm. on Fisheries and Wildlife Conservation and the Env't., and Subcomm. on Oceanography and Great Lakes for the House Comm. on Merch. Marine and Fisheries, 101st Cong. 17 (1990) [hereinafter Oversight Hearing] (statement of Mr. Keeney, Director, Office of Ocean and Coastal
announced that it was considering permitting oil and gas exploration in the area of the proposed Olympic Coast sanctuary, leading Washington Representative Jolene Unsoeld to charge that "the administration has a single focus, and that's drilling for oil wherever they can."119 In 1992, Representative Studds expressed consternation that the administration was delaying designation of Stellwagen Bank because of a reluctance to prohibit gravel mining.120

By the latter part of Bush’s term, the agency primarily responsible for the delays no longer was NOAA. Representative Panetta praised NOAA for its work on Monterey Bay,121 and Representative Studds gave it similar credit for its efforts surrounding Stellwagen Bank.122 Similarly, inadequate funding...
and the complications of a complex designation process, while perhaps responsible for some delay, ultimately were not applying the brakes, for designations languished even after the administrative process was all but complete. Instead, active opposition from the Department of Energy, the Department of the Interior—particularly the Minerals Management Service—and, to a lesser extent, skepticism from the White House’s Office of Management and Budget were keeping the program in check.

Nevertheless, NOAA also faced continuing internal problems. A 1991 government-funded study found that its management lacked vision and suggested that it had failed to acknowledge its own management mission. The Sanctuary Program, the study found, had been managed as “the runt of the NOAA litter.” The study recommended drastic changes in NOAA’s management, urging that NOAA acknowledge and accept its managerial responsibilities rather than considering itself simply a research body ill-suited for management. It urged that annual funding for the program be drastically increased—from then-current levels of around four million dollars per year to around thirty million. It condemned the lack of vision for the program, and recommended that NOAA set as a goal the development of a comprehensive system of sanctuaries representative of all of the major ecological

123 NOAA’s representative did attribute some delay to these factors. See The Current Status and Future Needs of the National Oceanic and Atmospheric Administration’s National Marine Sanctuary Program: Hearing before the Subcomm. on Oceanography, Great Lakes and the Outer Continental Shelf, Subcomm. on Fisheries and Wildlife Conservation and the Env’t, and Subcomm. on Oceanography and Great Lakes of the House Comm. on Merch. Marine and Fisheries, 102d Cong. 40-41 (1991) (statement of Trudy Coxe, Director, Office of Ocean and Coastal Resource Management, NOAA). Nevertheless, the length of time that these proposals languished in the process, often after scientific studies were completed and support had coalesced, suggests an unwillingness to pull the trigger on designation rather than an inability to complete the process.

124 See, e.g., Oversight Hearing, supra note 118, at 9-10 (statement of Rep. Panetta) (charging that OMB and DOI were obstructing the program, and arguing that the Minerals Management Service has a “knee jerk reaction” to any threat to its ability to offer mineral leases); supra notes 119-120.

125 See MARINE SANCTUARIES REVIEW TEAM REPORT, supra note 63, at 12-14. “In the past, NOAA’s administration of the Marine Sanctuaries Program has lacked leadership, focus, resources and visibility, and the program has suffered for it.” Id. at 12.

126 Id.

127 See id. at 12-13.

128 Id. at 18.
zones in U.S. coastal waters. It also criticized NOAA’s lack of a clear mission, arguing that it should re-envision the program as fundamentally conservation-oriented.

2. Congress Takes the Lead

In response to this perceived “programmatic lassitude,” Congress took more dramatic steps to push the process along. In 1990, in response to several groundings in the Florida Keys, Congress designated the Florida Keys National Marine Sanctuary. This was done without asking NOAA to complete the statutory review process. At 2,800 nautical square miles, the Sanctuary was the largest yet designated. Its size was not unprecedented—the Channel Islands National Marine Sanctuary, although smaller, was of the same scale—but the method of designation was. For the first time, Congress acted as more than an external trigger to the normal designation process, instead creating a sanctuary on its own initiative and entirely outside of the statutorily defined designation process.

Congress followed this effort with the 1992 reauthorization of the NMSA. In addition to reauthorizing the Act, Congress designated the Hawaiian Humpback Whale National Marine Sanctuary, the Monterey Bay National Marine Sanctuary, and...

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129 See id. at 12, 14, 30. The report proposed the following vision statement: By the year 2000, the National Marine Sanctuaries Program will manage a comprehensive and integrated system of the nation’s most significant marine areas. This management will be based on ecologically sound, well-researched principles of resource protection and sustainable use and will focus as well on improving public understanding of the nation’s marine heritage and in extending sound marine resource management principles to areas beyond sanctuary boundaries.

Id. at 14.

130 Id. (urging that the primary program goals should be biological and cultural heritage protection).


133 See supra tbl. 1.

134 See id.


136 Id. §§ 2301-2308, 106 Stat. at 5055-59.

137 Id. § 2203, 106 Stat. at 5048-49.
the Stellwagen Bank National Marine Sanctuary, and required an oil and gas drilling ban for the Olympic Coast National Marine Sanctuary. These designations were unlike the Florida Keys designation, however, for each of the three designated sanctuaries had been considered prior to congressional designation. The Humpback Whale sanctuary was originally recommended by a scientist in 1977, and had gone through much of the designation process before NOAA, but at the request of the state, NOAA removed it from the list of potential sanctuaries in 1984. Consideration began again in 1989 and 1990, and the sanctuary was included in the 1992 reauthorization bill after the state of Hawaii, now a supporter of the sanctuary, presented Congress with testimony favoring designation. Monterey Bay had a similarly long, though even more contentious, history, and Stellwagen Bank had been under active consideration for over a decade before its designation. As a result, members of Congress could accurately characterize its actions as “finalizing the lengthy and tedious designation process where the merits of specific sites are clear and where these sites require immediate management consideration.”

Throughout this period, Congress's actions and rhetoric were characterized by a remarkable degree of unanimity. Stated

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138 Id. § 2202, 106 Stat. at 5048.
141 See Ctr. for the Econ. and the Env't, supra note 58, at 90-93; NOAA, The History of the Sanctuary, at http://www.hihwnms.nos.noaa.gov/about/sanctuary_history.html (last revised Mar. 10, 2003).
143 See Kenneth J. Garcia, Monterey Bay Refuge Exceeds Expectations; However, Environmentalists Worry About Plan's Loopholes, S.F. Chron., Sept. 14, 1992, at A1 (“Since a plan to create the Monterey Bay National Marine Sanctuary first surfaced 15 years ago, it has been ripped apart by conservation groups, torpedoed by commercial fishermen, battled by oil lobbyists and nearly sunk by the Reagan administration.”).
opposition to designations was almost non-existent. Conservatives and liberals alike embraced the program; Representative Don Young of Alaska was repeatedly involved in facilitating sanctuary designations and reauthorizations of the Act, while Representatives Leon Panetta and Gerry Studds, and Senator John Kerry, among others, were strong advocates of programs in their home states. Indeed, Studds once remarked on this bipartisan support, "I do not think in all of those 22 years of the time that I served on that committee I ever heard a partisan observation except as sort of a lighthearted aside."

The nature of the designations may provide some explanation for the universal support. Flower Garden Banks is tiny, and even oil industry spokesmen seemed quite acquiescent to its inclusion in the sanctuary system. Likewise, despite some calls for Alaskan

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146 In the words of Representative Studds:
We have worked together, Don Young and I and the other Members here for the last few years, for a very long time. . . .

. . . I think it was [a] common understanding on [the Committee on Merchant Marine and Fisheries] which brought together people as disparate, for example, as Don Young and myself.

. . . [W]e astonished many people over the years by the closeness of our working, our personal relationship and our friendship, and it was I think because we both understood the Earth and the ocean because it was part intimately of our respective lives.


sanctuaries, Representative Young never needed to take the House floor to comment on a serious designation proposal for his home state. These possible explanations, however, do not change the fact that the sanctuary program enjoyed widespread and enthusiastic rhetorical congressional support.

By 1992, Congress was no longer faced with a completely opposed administration. The Bush administration had succeeded in finalizing the designation of Flower Garden Banks, and embraced the largest possible geographic area proposal for the Monterey Bay sanctuary. In 1990, Dr. Silvia Earle, a prominent oceanographer, assumed the reins at NOAA, and NOAA’s 1992 hearing testimony reflects the enthusiasm of a reinvigorated program. Jennifer Joy Wilson, NOAA’s Assistant Secretary for Oceans and Atmosphere, described NOAA’s enlarged staff, increased budget requests, endorsement of the largest alternative for Monterey Bay, and projected continuation of the designation trend. The record seems to tell the story of a vigorous, thriving program, with NOAA now beginning to embrace a facilitative role in developing a base of information to support designations with Congress, through legislation, supplying the finishing touches.

E. Phase V: Clinton

This enthusiasm about designations appeared likely to carry over into the Clinton administration, but early results were followed by a period of quiet. In 1994, NOAA finalized the designation of the Olympic Coast National Marine Sanctuary. The flurry of designations then came to a halt, however; NOAA designation is not controversial. It is supported by the oil and gas industries.”

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153 See Blumm & Blumstein, supra note 8, at 50,025-26 (discussing President Carter’s directive urging protection of Alaskan waters, and the rush of nominations that followed).
157 See Merch. Marine Hearings, supra note 155, at 37.
did not designate its next sanctuary—Thunder Bay in Michigan—until 2000, and even that designation was more symbolic than protective, building upon already existing state protections.\(^{159}\)

The program was not inactive, however, during the Clinton years. The new designations left NOAA with many new sanctuaries to manage, and NOAA now faced the difficult task of actually implementing management schemes. As a result, during the Clinton administration NOAA focused on improving management of the existing system, which began to evolve from an aspiration into a functional government program. The program hired staff, purchased office equipment, developed community outreach programs, and updated management plans.\(^{160}\) Efforts at designating no-take marine reserves within the Florida Keys and Channel Islands sanctuaries generated enormous controversy and required extensive NOAA involvement, although this involvement resulted in little success.\(^{161}\) NOAA’s website trumpets the significance of the Ocean Conference attended by President Clinton and Vice President Gore in 1998, “the International Year of the Ocean,” and the launching of a deep sea exploration program for the sanctuaries.\(^{162}\) The program began developing a sense of mission, with young, idealistic, and conservation-oriented professionals gradually taking many of its staff positions.\(^{163}\) Perhaps most importantly, the program budget grew significantly, doubling between 1990 and 1993 and again between 1993 and 1998, allowing for improved planning and basic operations at existing sanctuaries.\(^{164}\)

The designation process, however, came nearly to a halt. The

\(^{159}\) See supra tbl. 1; About Thunder Bay Sanctuary, supra note 60 (noting the creation of The Thunder Bay Underwater Preserve by Michigan in the 1980s, well prior to NOAA designation).

\(^{160}\) CTR. FOR THE ECON. AND THE ENV'T, supra note 58, at ix (“Perhaps unavoidably, the program has spent a great deal of energy in the past 10 years on planning and building its institutional capacity.”), 2 (“The sanctuaries are beginning to find effective ways to establish a physical presence on the water, establish and enforce regulations, nourish public understanding of the sites and the threats they face, and encourage research.”).

\(^{161}\) See Brax, supra note 8, at 10-14 (providing a detailed summary and critique of the process of designating these reserve areas).

\(^{162}\) See National Marine Sanctuaries Timeline, supra note 78.

\(^{163}\) CTR. FOR THE ECON. AND THE ENV'T, supra note 58, at 18 (“Most of the staff, especially in the Washington headquarters, are young professionals who are deeply committed to the program and to marine conservation.”).

\(^{164}\) Id. at 31.
only significant activity between 1994 and 2000 was the removal of Norfolk Canyon, off the coast of Virginia, from active consideration, and the abandonment of the possibility of a Puget Sound sanctuary after the State of Washington, in the face of intense and well-organized local resistance, withdrew its support. As the Clinton years drew to a close, there remained little clamor for further designations; a major outside review of the program concluded that creating an effective bureaucracy capable of providing some level of real management at the existing sanctuaries should be NOAA’s first priority. Given NOAA’s persistent lack of funds, the study concluded that further designations would be unwise.

The administration’s quiet appears to have been matched by calm on Capitol Hill. Congress reauthorized the Act in 1996 and again in 2000, but with few changes and minimal hearings or debate. The legislative histories of the reauthorizations contain no indication of frustration with the lack of further designations. Despite acknowledgment that only two sanctuaries were under active consideration, Congress did nothing to spur the process, instead focusing its efforts on allowing the sanctuaries to make more money through trademarks and logos. Congress did increase program budgets throughout this period, but appears to have sought no expansion of the sanctuary system. Rather, in

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165 National Marine Sanctuaries Timeline, supra note 78; supra Table 1.
166 CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 31.
167 Id. at ix-x.
168 The study found that:
[i]t is probably not the right time to create more sanctuaries. Perhaps if Congress were to increase the budget and clout of the program dramatically, the program could handle additional sites, but no one is talking about such a step now.... [A]t this point, the program cannot afford to spend its resources on a long, expensive process to add more sites.
172 CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 31.
2000, Congress added a provision to the NMSA prohibiting further designations unless NOAA demonstrated the existence of adequate resources to manage the current set of sanctuaries.\textsuperscript{173}

This period of quiet occurred for a confluence of reasons. Perhaps most importantly, the designations of the early nineties left NOAA with significantly expanded managerial responsibilities, and concern grew both within the agency and in Congress that designation of additional sanctuaries might compromise NOAA’s ability to manage the existing system.\textsuperscript{174} The program’s budget had expanded, but until the very end of the Clinton years it failed to approach the $30 million called for by the Marine Sanctuaries Review Team,\textsuperscript{175} and critics continued to allege that the program was plagued by underfunding.\textsuperscript{176} The program bureaucracy may have steadily developed throughout the nineties, but sanctuaries were still forced to use creative measures to ensure any level of protection, and often were almost completely dependent upon voluntary community efforts to effectively manage their resources.\textsuperscript{177} Sanctuaries that lacked funding and were unable to forge such community ties remained almost completely unmanaged.\textsuperscript{178}

\textsuperscript{173} NOAA, NMSA History, supra note 14, at 5.
\textsuperscript{174} See Interview with Richard Charter, supra note 101 (describing reasons for the decreased focus on the designation process).
\textsuperscript{175} See supra note 128 and accompanying text; 142 CONG. REC. 11,803 (1996) (statement of Sen. Kerry) (indicating that Congress would be providing $45.5 million in funding over the next three years, or approximately $15 million per year); CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 32.
\textsuperscript{176} See, e.g., CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 11-12 (comparing the budget-per-square mile of the sanctuary program to those of the Forest Service and the National Park Service).
\textsuperscript{177} Id. at 16 (“The sanctuaries need to establish a physical presence on the water, both to enforce sanctuary regulations and to keep track of natural changes and human activities that might threaten sanctuary resources. To do this, sanctuaries usually find it necessary to work with other government agencies or with non-profit organizations.”). The report provides extensive discussion of the ways in which the sanctuaries lack monitoring and enforcement resources and have sought to compensate by mobilizing community support. In typical examples, the Florida Keys National Marine Sanctuary relies on trained volunteers who conduct “interceptive enforcement,” and the Hawaiian Humpback Whale National Marine Sanctuary relies on the efforts of “a small cadre of ‘condo commandos’—retired people with telescopes on the balconies of their condominiums—[who] watch for whales and call the sanctuary office when they think that whale-watchers or researchers are harassing the whales.” Id.
\textsuperscript{178} Id. at 11 (“[S]ome sanctuaries have not been able to develop good working relations with other agencies or to overcome local opposition. Lacking resources
The designation procedure also had become more complex at the same time support was declining. Increasing scientific knowledge about oceans provided increasingly sophisticated critics of the program with far greater leverage for both political and legal challenges to the designation process. As a result, the relatively thin and straightforward Environmental Impact Statements (EISs) of the late seventies were replaced by gigantic, exhaustive, and highly expensive records. This increasingly daunting process might have been overcome through strong political backing, but the program lacked an executive champion. President Clinton, like Presidents Bush and Reagan before him, showed little interest in the program. As Congress moved to the right through the 1990s, executive support that could have been crucial in continuing the designation process instead was largely absent.

At the same time that governmental support for the program was again waning, observers were beginning to raise concerns about the level of protection offered by the sanctuary program. First, observers noted the inability of sanctuaries to translate paper regulations into actual protection. In addition, many critics had come to believe those regulations, even if enforced, would still be inadequate. The program had been used primarily as a protective measure against oil and gas exploration and other threats of physical destruction, but critics started to suggest that additional and public support, these are sanctuaries without defenses.

Interview with Richard Charter, supra note 101. Charter also suggests that increasing aggressiveness and stridency of “wise use” movements, particularly around Puget Sound in Washington, made NOAA’s designation task increasingly difficult. Id. (describing the difference between the two-inch-thick EISs for the Channel Islands and Point Reyes-Farallon NMS designations in 1979 and the approximately five-foot-thick pile of documentation compiled to support the designation of no-take zones in the Channel Islands in the mid-1990s).

Id.; but cf. supra note 162 and accompanying text.

See supra notes 174-178 and accompanying text.

See CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 14, 16-17 (describing the threats that led to sanctuary protection: oil and gas on the West Coast, offshore development and mining at Stellwagen Bank, and ship
protections—particularly from fishing—would be needed if sanctuary status were to provide true protection of natural resources. These concerns may have caused environmentalists’ enthusiasm about the designation process to wane. In addition, the additional protections had the potential to drive enormous wedges between local fishers, who had previously been supportive of many designations, and who had often received promises from legislators that the sanctuaries would never impose such fishing regulations, and other designation advocates. The resulting debates compromised the political weight behind the designation process and set the stage for another data-intensive and complicated, and therefore expensive, scientific debate, thus creating another potential bar to sanctuary designation. In both the Channel Islands and the Florida Keys, battles over no-take zones took on almost explosive intensity, providing clear warning signals to any politician wishing to pursue what previously had been clear political coups.

See id. at 7-8 (describing threats to sanctuaries not currently addressed by the NMSA, such as sewage seepage from land development in Florida Keys, and potential oil spills near Stellwagen Bank, Flower Gardens, and Channel Islands); Brax, supra note 8, at 92-93, 127-29; Interview with Richard Charter, supra note 101 (describing what he believed were important threats to the sanctuaries); Sally Deneen, Unsafe Sanctuaries, E/THE ENVTL. MAG., Sept.-Oct. 1998, http://www.emagazine.com/september-october_1998/0998curr_sanc.html (last visited Apr. 5, 2003).

Richard Charter, for example, was more concerned about improved management of existing sanctuaries than the designation of new sanctuaries. Interview with Richard Charter, supra note 101.

CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 18 (“All along the West Coast, in Hawaii, and in Massachusetts, the local members of Congress promised that sanctuaries would never regulate fishing. NOAA wrote this promise into the initial sanctuary management plans.”).

For example, Zeke Grader of the Pacific Coast Federation of Fishermen’s Associations (PCFFA) had supported the Monterey Bay National Marine Sanctuary. See Garcia, supra note 144, at A15 (describing the alliance, developed when conservation groups agreed not to oppose continued commercial and recreational fishing within the sanctuary, of commercial fishermen with conservation groups in opposing offshore drilling). The PCFFA now, however, is skeptical of the push for marine reserves, and many other fishing groups are extraordinarily strident in their opposition to any further fishing regulation. Brax, supra note 8, at 99.

Cf. supra note 179 and accompanying text.

See Brax, supra note 8, at 105-13.
F. Phase VI: Hawaiian Reef Designation

In December 2000, however, Clinton appeared to place the program on the verge of another revitalization. Executive Order 13,178 directed NOAA to begin designating a new sanctuary to be known as the Northwest Hawaiian Coral Reef Ecosystem Reserve. As described by the Order, the reserve is to be gargantuan in scale; it will encompass most coral reefs in U.S. waters and, at approximately 99,500 nautical square miles, and will dwarf all of the other marine sanctuaries combined. The reserve is also to be managed differently than its predecessors. In addition to the standard prohibitions on oil and gas exploration, the Order directs NOAA to regulate fishing within the reserve and to use a scientific management approach based on the precautionary principle. Other elements of the Order are reminiscent of prior sanctuary designation and management procedures; the Order is explicit about requiring inclusion of a diverse set of stakeholders in the process of developing a management plan. Nevertheless, the Order directs NOAA to undertake something grand and unprecedented.

The future of the reserve, however, is uncertain. Clinton and Congress did substantially increase the Marine Sanctuaries Program budget. And in January, 2001, Clinton issued Executive Order 13,196, which finalized some of the Reserve Protection Measures proposed in Executive Order 13,178.

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193 Id. at 76,907.
194 Id. at 76,904 (“The Reserve shall be managed using available science and applying a precautionary approach with resource protection favored when there is a lack of information regarding any given activity, to the extent not contrary to law.”).
195 Id. at 79,606 (specifying the membership of the reserve’s advisory council).
Shortly thereafter, however, he left office. The Bush administration immediately placed the reserve under review, and its commitment to exploitation of public lands may not bode well for continued support. In addition, as the protracted histories of so many other designations suggest, turning the Clinton administration’s initiative into an actual sanctuary may require years of determined effort, especially if that designation will require heavier regulation of fishermen. In the absence of such support, the designation process may wither, or could even be revoked by a further Executive Order. In short, Clinton’s orders represent only the first step on a potentially long journey.

G. The Current System

In 1972, Congress drafted a law ostensibly intended to lead to a comprehensive system for protecting the nation’s ocean waters. Thirty years later, the vision remains partially and unevenly realized.

The Marine Sanctuaries Program has had major accomplishments. It has functioned as a popular and effective limit on oil and gas drilling, particularly along the California coast. It has been similarly effective in protecting other limited areas from selected threats; Stellwagen Bank is intact, unmined, and without floating casinos, and reefs in the Florida Keys are better protected from shipping traffic. All of this protection,

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200 See supra notes 115-116, 184-189 and accompanying text.
201 Chapman, supra note 191, at 355-58 (providing a thorough account of the Orders’ tenuous status).
202 See, e.g., supra notes 139-140 and accompanying text.
204 Id. at 78.
moreover, grew out of an uncommon level of bipartisan support and cooperation. The program also offers states a source of pride and communities a potentially defining connection to their surrounding environment. Finally, it has provided a platform for the potential development of future protection schemes.

These accomplishments, however, fall short in several ways of the comprehensive vision Congress set forth in 1972. Huge and distinctive areas of ocean remain unprotected. Only off of four states—California, Hawaii, Florida, and Washington—has the program succeeded in protecting large areas of coast, and even off those states, other than California, only a relatively small percentage of the coastal area is protected. Vast areas, including the Alaskan coast, the rich fishing grounds off Maine, and the East Coast from Cape Cod south to Gray’s Reef in Georgia, are almost completely devoid of sanctuaries. Thus the program is still well short of the goal set forth in the 1991 Marine Sanctuaries Team Report—that representative sanctuaries should be established in all of the United States’ marine ecological zones. Instead of providing a comprehensive system of protection, the program has developed, at least in the geographic scale and placement of its protections, into a marine equivalent of the national park system, protecting spectacular but, for the most part, small and widely dispersed areas.

The program’s small geographic scale may fall short of what Congress originally envisioned, but the management failures

205 See supra notes 146-151 and accompanying text.
207 See Brax, supra note 8, at 82-93 (describing the Marine Sanctuary Program as a potential platform for developing a more protective system of marine reserves, but also discussing the potential limitations created by the NMSA’s multiple use approach).
208 See, e.g., supra tbl. 1.
209 The Monitor National Marine Sanctuary is on the East Coast, but it is rather tiny. See supra note 68 and accompanying text.
210 MARINE SANCTUARIES REVIEW TEAM REPORT, supra note 63, at 30.
211 But cf. supra note 176 and accompanying text (noting the lack of funding of marine sanctuaries program relative to the National Parks Service).
within the reserves pose a potentially greater problem. In designing the reserves, Congress appeared to envision something akin to an idealized version of the national forest system, in which multiple uses would be served but no use would compromise the integrity of the unique resources to be protected.\footnote{See supra Part II(B).} Instead, the program has developed as a system of primarily single-purpose reservations, in which a selected group of threats are addressed but other uses—particularly fishing—continue basically unrestrained.\footnote{Interview with Richard Charter, supra note 101. Charter stressed that sanctuary advocates never foresaw the risk posed by human consumptive uses, and that they would have argued for more stringent protections if they had realized how heavily fishing would impact the sanctuaries. Id.} The balancing originally envisioned by Congress generally has not occurred; uses are either unregulated or flatly prohibited.\footnote{This absence of balancing is most evident in the California sanctuaries, where oil and gas exploration is flatly prohibited but fishing is basically unregulated. See also CTR. FOR THE ECON. AND ENV’T, supra note 58, at 10 (noting that, “sanctuaries . . . have difficulty reconciling protection within the concept of multiple use”).} In practice, a lack of funding means that even the modest level of regulation called for on paper is rarely achieved.\footnote{See supra notes 174-178 and accompanying text.} As a result, as Congressman Keith perhaps prophetically noted thirty years ago, the term “sanctuary” is a misnomer, and that the sanctuary system is desperately in need of greater protection.\footnote{See supra note 39 and accompanying text.}

The current system is also notable for the unexpected manner of its designations. Of the current sanctuaries, only one—Monitor—was designated without some sort of pressure from Congress or the Executive. At times, the pressure required was relatively minimal—Jimmy Carter’s address was, relative to the congressional interventions of the late 80’s and early 90’s, a gentle prod, and the process of designating the Channel Island, Point Reyes-Farallon, Looe Key, and Gray’s Reef Sanctuaries probably was reasonably close to what the NMSA’s drafters envisioned.\footnote{See generally supra notes 78-89 and accompanying text.} Most designations, however, have required far more active intervention. NOAA simply never has created significant marine sanctuaries on its own initiative.
III
LESSONS OF HISTORY

The Marine Sanctuary Program has had a difficult history; despite apparent congressional and public support, protection remains spotty, and never has developed in quite the manner envisioned by the National Marine Sanctuaries Act's original drafters. In part, these problems have resulted from political circumstances—for twelve years executives were far more sympathetic to the oil and gas industries than to the sanctuary program. Many of the program's failings, however, can be traced directly to the original statute. The NMSA appears to be classically symbolic legislation, declaring grand goals without providing the means to ensure that those goals are ever achieved. This Part draws on that difficult history and describes several of the Act's basic problems.

A. Wrong Agent for a Difficult Task

Perhaps the greatest challenge faced by NOAA is also the most obvious. Setting aside land or water for protection is extremely difficult politically. The controversies surrounding Clinton's eleventh-hour initiatives, from the Roadless Rule to

218 See generally John P. Dwyer, The Pathology of Symbolic Legislation, 17 ECOLOGY L.Q. 233 (1990). Dwyer criticizes Section 112 of the Clean Air Act, which mandated exceedingly rapid elimination of hazardous air pollution that posed greater than a threshold risk to human health, as symbolic, arguing that legislators mandated an unachievable goal in full awareness that the task they delegated to EPA was impossible. He further argues that such symbolic legislation then undermines the regulatory process by heightening suspicion and providing both sides in subsequent struggles with disincentives to compromise. Id. at 236-250.

The NMSA is, in a sense, the exact opposite of Section 112 of the pre-1990 Clean Air Act, for, although it too states broad goals, it provides no mandated mechanism, rather than an unworkably strong mechanism, for achieving those goals. See supra note 33 and accompanying text. Nevertheless, the result is the same—Congress made a strong symbolic statement, and it was up to an agency to sort out the ensuing mess.

the National Monument designations are only the latest illustrations of a commonplace problem—reserving any kind of resource can lead to intense controversy. When the areas to be set aside are potentially huge, as many potential marine reserves have been, the possibilities for controversy grow accordingly. Moreover, any administrative agency is likely to be well aware that setting aside an area is only the beginning of its troubles—refereeing the often litigious battles between environmentalists, extractive industry, and higher-impact recreational users is an ongoing headache for almost every land management agency.

Perhaps as a result of this difficulty, Congress has never attempted elsewhere to delegate responsibility for reservations to an administrative agency. National parks are designated by congressional legislation, as are wilderness areas and wild and scenic rivers. Congress or the President, not the Bureau of Land Management or the Forest Service, also established most other reservations of public lands from extractive use. The President designates national monuments, subject to congressional acquiescence. The agencies responsible for managing these areas have significant planning responsibilities, and their plans can sometimes accomplish the practical equivalent of a withdrawal. Those plans, however, are generally developed in accordance with

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221 See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 140, 144 (5th ed. 2002).
222 Wilderness Act, 16 U.S.C. §§ 1131-1132 (1994) (requiring agency heads to inventory potential wilderness areas within their jurisdiction, but reserving for Congress final decision-making authority); COGGINS ET AL., supra note 221, at 1110.
223 Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1273 (1994) (again requiring agency input, but reserving the final power to designate rivers to Congress except when the state through which the river flows submits a nomination application to the Secretary of the Interior); COGGINS ET AL., supra note 221, at 1084-85.
224 COGGINS ET AL., supra note 221, at 137, 140-41. Both the Forest Service and the Fish and Wildlife Service have at times been funded to acquire additional lands. Id. at 138-39. However, acquiring lands and compensating the existing owners is likely to be significantly less controversial than changing the use of lands without offering existing users any compensation for their lost interests.
225 COGGINS ET AL., supra note 221, at 141; Brax, supra note 8, at 125; Ranchod, supra note 220, at 537.
226 COGGINS ET AL., supra note 221, at 345-47.
detailed planning statutes that provide substantive and procedural directives far more specific than those offered in the NMSA.\textsuperscript{227} What Congress sought to do in the NMSA, therefore, was unprecedented. Providing only vague and general guidance, it granted an agency the authority to set aside and develop management plans for potentially vast areas of ocean.

The potential problems, in hindsight, seem obvious. A relatively small agency like NOAA has little leverage when dealing with potentially irate opponents to sanctuary designations.\textsuperscript{228} Perhaps more importantly, it has relatively little clout compared to more powerful actors within the executive branch—most notably the State Department, the Department of the Interior, and the Office of Management and Budget—and thus not surprisingly is overmatched when forced to do battle with these agencies over resource management decisions.\textsuperscript{229}

Faced with such opponents and the potential for intense public opposition, NOAA’s potentially strongest weapon, if it chose to push forward with designations, was the integrity of its scientific expertise.\textsuperscript{230} Designating any kind of protected area, however, has always been intensely political, and no amount of science can make the politics go away.\textsuperscript{231} Moreover, groups both supporting and opposing sanctuary designations have grown increasingly sophisticated at dissecting and critiquing science, negating much of the leverage potentially generated by NOAA’s expertise.\textsuperscript{232}

NOAA is also weakened by its dependence on others for

\textsuperscript{227} See, e.g., National Forest Management Act of 1976 § 6, 16 U.S.C. § 1604 (2000); Federal Land Policy and Management Act of 1976 § 202, 43 U.S.C. § 1712 (2000); Coggins et al., supra note 221, at 427-28. The level of detail in these planning statutes provides many potential leverage points for litigators challenging agency decisions, but it also can provide an agency with political cover when making potentially unpopular decisions.

\textsuperscript{228} See CTR. FOR THE ECON. AND ENV’T, supra note 58, at 10 (“The sanctuary program’s influence is also constrained by its small size and location deep inside NOAA.”).

\textsuperscript{229} See supra notes 120-121.

\textsuperscript{230} The charisma of the resources it seeks to protect also provides a compelling reason for designation, of course.

\textsuperscript{231} See CTR. FOR THE ECON. AND ENV’T, supra note 58, at 40 (“The sanctuary program is important because it is quite different from almost all of the other agencies and programs within NOAA. Most of these programs are highly technical or scientific, whereas the sanctuary program focuses on practical natural resource management issues and has to work closely with communities.”). See also supra notes 179-180 and accompanying text.

\textsuperscript{232} Interview with Richard Charter, supra note 101.
funding. Congress can designate a national park and appropriate funds for its management. Likewise, the President has substantial political power to seek or redirect funds. Nothing in the NMSA, however, guaranteed NOAA funding increases following designations. Instead, NOAA could only hope that Congress would respond to designations with greater funding, and the persistent inadequacy of Congressional allocations would have made such hopes seem unfounded. For NOAA, designations thus meant more work without any guarantee of greater funding. Only a strange bureaucracy would be enticed by such a possibility.

B. Lack of an External Impetus

In addition to delegating the task of designating sanctuaries to a relatively weak agency, Congress also failed to provide any significant external pressures for designation. The NMSA created no specific goals for designations. Instead of requiring that a certain number of sanctuaries be designated, setting goals for total area to be protected, or identifying certain habitats for which NOAA should prioritize its activity, the Act left NOAA with a completely unbounded mission. Faced with an incredibly broad area potentially subject to designation, and with no clear measuring stick for its success or failure, NOAA tended to err on the side of modest accomplishment.

The lack of clear goals and standards was compounded by the Act’s failure to clearly define a purpose. The NMSA directs NOAA to provide balanced protection of those areas of ocean that are special. This left the role of defining the policy goals of the program to an agency that viewed its mission as primarily scientific and technical, in effect asking the agency to make value judgments it probably would have preferred to avoid. If those

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233 See COGGINS ET AL., supra note 221, at 140, 144.
234 See supra Part I.C.
235 See 117 CONG. REC. 30,852 (1971) (statement of Rep. Dingell) (“Title III . . . authorizes but does not direct . . . the Secretary of Commerce to designate certain areas of the oceans, coastal and other waters . . . as marine sanctuaries.”); supra notes 35-36 and accompanying text.
236 See MARINE SANCTUARIES REVIEW TEAM REPORT, supra note 63, at 10 (noting that the Act failed to give any workable meaning to its requirement of multiple use).
237 See id. at 12-13 (encouraging NOAA to take on its management role more actively, and noting tension between the management and scientific roles of agency); see also supra note 231.
value judgments were challenged, NOAA’s strength—the leverage derived from its scientific expertise—would be of little use. Similarly, NOAA’s critics could only measure its performance against the vague notion that it was expected to protect something, and lacked a specific set of statutory standards against which to measure the value of areas potentially to be designated.

NOAA was unlikely to see broad popular support for many designations. Even if the need for sanctuaries was great, degradation of ocean areas is less visible, and therefore less capable of galvanizing political outrage, than many other environmental problems. Oil spills, of course, are spectacularly effective at arousing public will. Likewise, an oil rig that has not spilled still looms ominously on the horizon, providing a clear visual symbol of potential environmental destruction. But many of the other threats facing sanctuaries—pollution runoff, damage to the substrate, and, most of all, overfishing—are, to the average tourist or television viewer, difficult to see, if not invisible. Likewise, affirmative protection of a sanctuary is hardly visible; unlike national forests, which typically are demarcated by signs and, more importantly, usually stand out from the surrounding landscape because they quite visibly do contain forests, or national parks, which also are likely to have both a distinct landscape and plenty of visible signs and promotions, the ocean within a marine sanctuary is likely to look exactly the same as the surrounding unprotected ocean, and even the sanctuary’s neighbors may be unaware of its existence. In the absence of compelling symbols, catalyzing support for an otherwise controversial management decision is a difficult thing to do. Thus, unless a photogenic ecological disaster occurred or was plainly imminent, NOAA was unlikely to see any of its designation efforts bolstered by widespread popular support.

Nor did Congress provide citizens with procedural or substantive mechanisms to effectively force the designation of sanctuaries. Other environmental laws include mandatory goals and citizen suit provisions, allowing the public to force action even when agencies are reluctant. The Endangered Species Act, for

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238 See supra notes 9-14 and accompanying text (describing the effects of the 1969 Santa Barbara oil spill).
239 See NAT’L ENERGY POLICY DEV. GROUP, supra note 4, at 5-2.
example, creates very specific requirements for agency action and, by allowing private citizen suits to enforce those provisions, leaves relatively little discretion for agencies to avoid fulfilling those obligations. Private citizens are capable of driving much of the process, potentially forcing listing of endangered or threatened species, designation of critical habitat, and injunctions against activities potentially jeopardizing those species or areas.

Congress could have created a similar structure for designating marine sanctuaries, allowing citizens to force consideration of sites by demonstrating that they meet certain criteria, requiring completion of the steps of the consideration process within specific timetables, and allowing citizens to sue, based again on specific decisional criteria, to challenge either sanctuary designations or failures to designate. The result might have been a litigious, contentious designation process, but that process would likely have moved forward without requiring Congress’s active intervention.

There are, at least in theory, some potential benefits to the alternative Congress selected. Many critics chafe at the top-down, litigious, command-and-control style of federal environmental law enforcement; by delegating power to an underfunded, understaffed agency not accustomed to resource policy-making, Congress may have limited the possibility of overbearing behavior. Additionally, an energetic, ambitious, idealistic, and conservation-oriented staff faced with a dearth of resources might develop suits to enforce the Act's provisions); Clean Air Act, 42 U.S.C. § 7604(a) (2000) (also authorizing citizen suits); Endangered Species Act, 16 U.S.C. § 1540(g) (2000) (also authorizing citizen suits).

See 16 U.S.C. §§ 1540(g), 1536 (prohibiting federal agencies from taking actions likely to jeopardize the survival of endangered species, and requiring specific consultation procedures designed to ensure that such actions are avoided).

Id. § 1540(g); § 1533 (creating detailed, enforceable duties for the Secretary of the Interior to fulfill when considering species for listing).

Id. §§ 1540(g), 1533(b)(2).

See id. § 1540(g)(1)(b), (c).

Cf. supra notes 104-107.

creative new ways of achieving environmental protection. Out of all the community outreach and grassroots development work done by the program staff, an alternative to the traditionally litigious model of federal environmental policy-making might develop. The 1998 Center for the Economy and the Environment Report hints at just such an outcome, suggesting that the Sanctuary Program was beginning to develop a new and more modern bureaucratic model.

That new model isn’t worth much, however, if it cannot provide effective protection, and so far all reports indicate that current system, while perhaps enabling some sanctuaries to achieve laudatory and surprising successes, is not sufficient to achieve the goals set by Congress in 1972. The program has provided only uneven protection of its existing system, and certainly has not been able, without outside assistance, to power any sanctuary nominations through the designation process. Creative outreach and an idealistic staff may be invaluable assets but, absent strong legal or financial incentives, they will rarely provide sufficient leverage to protect national resources. Congress could have provided such financial or legal incentives, but instead left the program without any sort of internal or external engine. As a result, the slow pace of designations ought to be anything but surprising.

C. Political Expedience of Frustration

The underlying problems with the Act could have made the program a complete failure. Instead, Congress adapted, applying irregular but at times intense external pressure and ensuring that at least some designations would take place. The result was some frustration, but also the creation of an alternative system that proved politically expedient, allowing Congress to accept credit for the program’s successes and duck responsibility for its failures. Accordingly, despite past outbursts of congressional outrage, the Marine Sanctuaries Program could prove difficult to change.

\[\text{Cf. supra notes 163, 177, and accompanying text.}\]
\[\text{Of course, even outreach, although potentially cheaper than enforcement, requires money.}\]
\[\text{CTR. FOR THE ECON. AND THE ENV’T, supra note 58, at 29 (“The federal land management agencies offer one possible model for how the sanctuary program could organize itself to get work done. But the sanctuary program is slowly developing a different and indeed more modern model.”).}\]
By delegating authority to an underfunded, outgunned agency and giving both stakeholders and legislators numerous access points to influence the designation process, Congress ensured that designations were unlikely to occur in the absence of congressional support. Few members of Congress would expect to face unwanted designations in their districts. On the other hand, if Congress did wish to have protection, NOAA was unlikely to be able to provide it, and thus individual members had the opportunity to play the hero in bringing protection to their areas. And if those designations failed to occur, NOAA or the administration, rather than Congress, was likely to be the villain. The system was not politically perfect; a strongly opposed administration could thwart Congress's desire to gain even highly desired sanctuaries, and the Reagan and Bush administrations may, from Congress' perspective, have played the villain's role with sometimes frustrating enthusiasm. Nevertheless, the Marine Sanctuaries Program quickly came to offer Congress extraordinary political gains at almost no cost. The consistent congressional support for the program therefore is not surprising; as a political tool, at least, the program has been rather convenient.

IV

THE FUTURE OF THE PROGRAM

Thirty years after its original passage, the NMSA now stands at an uncertain junction. On one hand, the Hawaiian Islands designation has the potential to usher in an entirely new era of marine protection.251 At the same time, a conservative administration and Congress are showing little inclination to broadly extend federal protection of natural resources. The political moment may not be right to even sustain Clinton's eleventh hour initiatives, let alone transform the marine sanctuaries system into an effective comprehensive ocean management scheme with a clearly defined mission. Nevertheless, the Act will be due for reauthorization in 2005, and stories about the need for expanded and heightened protection of oceans are almost commonplace in the news and the academic literature.252 Congress

251 See supra notes 190-195 and accompanying text.
252 See, e.g., Brax, supra note 8, at 127-29; Carr & Scheiber, supra note 2, at 45-46; Craig, supra note 1, at 10,192-93.
will have, if it chooses, the opportunity to seize this moment and give the program the direction it needs to truly succeed.

Congress may choose to continue the system as it currently exists. Designations will remain sporadic and geographically piecemeal, dependent upon the whims of Congress and the executive, or will require extraordinary and basically unprecedented determination from NOAA. Protection within the sanctuary system will be at times creative and innovative but will generally remain uneven, with critics charging that the greatest threats to sanctuary protection often remain unaddressed. Those sanctuaries that are designated, however, will be, for at least some politicians, politically valuable triumphs.

Alternatively, Congress could overhaul the National Marine Sanctuaries Act. Instead of continuing to grant a degree of discretion unprecedented on land, it could create a more rational system of sanctuary designation. Such a system ought to have several elements. First, Congress or the President, rather than NOAA, ought to be the primary agent of designations. NOAA ought to play a facilitative role; its scientific expertise would be quite helpful. Asking it to direct the designation process, however, only insulates Congress and the President from accepting responsibility for making intensely controversial political decisions. Second, Congress ought to clarify the mission of the sanctuaries. If sanctuaries are to function, as they have in the past, primarily as withdrawals from oil and gas leasing, Congress need not perpetuate the charade of requiring much broader studies of protection or the illusion that once a sanctuary is designated comprehensive protection exists. On the other hand, if sanctuaries truly are to provide such comprehensive protection, Congress ought to provide some baseline sustainability-based criteria to guide their management.²⁵³

If Congress does leave responsibility in the hands of NOAA, it could, through more specific evaluation criteria and specific procedural deadlines, facilitate a more effective designation process. It also could explicitly tie NOAA’s funding to successful designations. These reforms, in combination, would provide NOAA with more specific direction for its designation efforts and

²⁵³ This suggestion is not new, and the mission statement suggested by the Marine Sanctuaries Review Team ought to provide a good starting point. See supra notes 129-130 and accompanying text.
with incentives to move it through the designation process. The result would probably be far less effective than direct congressional intervention, but it would at least provide NOAA with more leverage than it currently enjoys. These changes would create a more controversial program, of course. The travails of the land management agencies illustrate that an increased scope of responsibility inevitably increases an agency’s headaches. Protection, however, will not be possible without such controversy, and protection of America’s oceans is badly needed.

CONCLUSION

Thirty years ago, Congress created a program ostensibly intended to insure comprehensive, balanced management of America’s ocean resources. The program has met with some success, but flaws inherent in the original National Marine Sanctuaries Act have prevented the program from functioning as planned. Instead of creating a process by which NOAA could utilize a science-based designation and management process, Congress, by failing to delegate authority to a sufficiently powerful agency and by depriving that agency of the funding necessary to achieve its goals, almost assured a history of inaction. As a result, NOAA’s weakness, in combination with active opposition from oil and gas-friendly administrations, necessitated congressional intervention in order to make any significant progress in moving the Marine Sanctuary Program closer to its stated goals.

Congress could, and should, reform the program. By allocating more money to NOAA, and by either supplying NOAA with stronger incentives or by accepting on its own shoulders responsibility for sustaining the program, Congress could create a more effective system of designation and management, strengthening existing protections and extending protection to vast areas currently uncovered by the program. To do so will require Congress to deprive itself of a risk-free opportunity to curry favor with voters, transforming a politically innocuous program into one capable of generating intense controversy. In the absence of the political resolve necessary to make such a step, however, the program will continue to provide uneven and inadequate protection, achieving some modest successes but falling well short of its potential.