Legal Pathways to Marine Reserves in Federal and State-Managed Waters off Oregon

by

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Introduction

In this paper my emphasis is on the narrower "marine reserve" concept (including "no take zones") rather than the broader, multiple-use "marine protected area" (MPA) concept which I also discuss. Among the different pathways that I discuss, the channels for scientific input vary greatly and often are unclear. One of my purposes is to stimulate discussion on how much of a problem this really is. My perception heading into this workshop is that the support in the scientific community for establishing marine reserves is out in front of the relevant legal and political processes.

Most established and proposed marine reserves prohibit most, if not all, commercial and recreational fishing activities in order to achieve their ecological goals. Other resource extractive activities like oil and gas drilling and seabed mining also often are prohibited. The impacts of fishing have come under intense scrutiny recently with the release of the Pew Oceans Commission 2002 report, *Ecological Effects of Fishing in Marine Ecosystems of the United States*, and the National Research Council's 2002 report, *Effects of Trawling and Dredging on Seafloor Habitat*. However, marine reserves, especially those included within the boundaries of larger multiple-use MPAs, also can strengthen the protection of the ocean environment from the adverse impacts of commercial and recreational navigation and help control pollution of the ocean from both point and non-point land-based sources.

Although other ocean uses can be significantly affected by the rules protecting marine reserves, only rarely will there be serious questions raised about whether compensation to adversely affected users is constitutionally required under the United States Constitution's Fifth Amendment. The seabed and water column resources within marine reserves usually are publicly owned, with the governmental permission issued to resource users generally not creating property rights protected by the Fifth Amendment in those users. This holds true even

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for fisheries managed pursuant to a system of individual fishing quotas. One possible exception would be a situation where a newly established marine reserve prohibited oil and gas or seabed mining operations under seabed leases previously issued by the federal or coastal state government.

One reason I willingly accepted the invitation to join the steering committee for this workshop was the potential I saw for marine reserves to be a very useful tool in managing our ocean resources in a more sustainable way. I view marine reserves as a technique for implementing a more precautionary approach to the use of ocean resources. Like many others, I feel that where marine reserves are established based on the best available scientific information, thereafter they should be closely monitored and there should be specific legal requirements for adaptive management adjustments to the reserves' boundaries and operating rules.

A common characteristic of the relevant federal and state laws reviewed next is that while they do not specifically authorize the establishment of marine reserves, they also do not prohibit them. The broad delegations of management authority to federal and state agencies seem to allow, and are in fact being used to establish, marine reserves pending legislative clarification from the Congress and state legislatures. This paper generally recommends that relevant statutes be amended to expressly authorize the use of marine reserves where scientifically and managerially appropriate.

Even President Bill Clinton's Executive Order 13158 of May 2000, which requires relevant federal agencies to take appropriate action to protect and expand MPAs in U.S. waters, does not specifically mention marine reserves. But it seems appropriate to view marine reserves as one type of MPA within the scope of the order.

State law controls the establishment of marine reserves within three miles of the ocean coastline while federal law controls the establishment of marine reserves between three miles and two hundred miles offshore, the zone in which it seems scientists have the greatest interest in seeing marine reserves established.

Federal Pathways

The principal federal laws under which marine reserves are being established or proposed are the National Marine Sanctuaries Act (NMSA) and the Magnuson-Stevens Fishery Conservation and Management Act (FCMA).

National Marine Sanctuaries Act

The thirteen national marine sanctuaries, including four off California's central coast, one off Washington's Olympic coast, and one covering Hawaii's inter-island waters (but none off Oregon or Alaska), are predominantly multiple-use MPAs. Marine reserves have been proposed but not yet established in the Channel Islands National Marine Sanctuary. Only the tiny Fagatele Bay sanctuary (one-quarter-mile square) in American Samoa and portions of the much larger Florida Keys sanctuary qualify as marine reserves in which many significant human activities, including fishing, are prohibited or strictly regulated.

Local fishermen, fearing restrictions on fishing activity, generally have opposed the establishment of national marine sanctuaries. Such fears helped temporarily delay designation of the humpback whale marine sanctuary in Hawaii. But most sanctuaries restrict fishing moderately or not at all. Some sanctuaries prohibit bottom trawling while permitting other commercial and recreational fishing. Furthermore, 1984 amendments to the NMSA require participation by the relevant regional fishery management council in the drafting of sanctuary fishing regulations, and this process presumably applies to marine reserves that restrict fishing. The courts have tended to uphold sanctuary restrictions (where they have been imposed) on commercial and recreational fishing, boating, and diving.

New oil and gas development is prohibited in large areas of most of the sanctuaries. In addition, the Monterey Bay sanctuary includes a water quality protection program designed to reduce upland runoff into sanctuary waters. In May 2000, the International Maritime Organization (IMO) approved a Monterey Bay Vessel Traffic Plan designed to facilitate safe, efficient travel by large vessels through the Monterey Bay, Gulf of the Farallones, and Channel Islands sanctuaries off California. In 2002, the IMO designated portions of the Florida Keys sanctuary as "areas to be avoided by commercial navigation."

The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve was created in December 2000 by a combination of congressional and presidential action. The reserve includes "reserve preservation areas" around various atolls, islands, and banks where most extractive uses are prohibited but certain fisheries are allowed to continue at their pre-existing levels. The Bush administration began a review of the reserve in 2001, creating uncertainty as to whether the secretary of commerce would follow up the presidential executive order by designating the reserve a national marine sanctuary. The Western Pacific Fishery Management Council has submitted to the secretary a competing Coral Reef Ecosystems Fishery Management Plan, which the council argues makes the reserve unnecessary. As it has in the past for the Florida Keys and other sanctuaries, Congress could bypass the secretary and proceed to designate the reserve a sanctuary through special legislation.

The Bush administration has indicated that it does support the implementation of President Clinton's MPA Executive Order 13158, citing the process by which marine reserves were established in the Dry Tortugas as part of the Florida Keys sanctuary as a "model for the years ahead" due to the planning process that secured grassroots support. Outside the Northwestern Hawaiian Islands, Congress has instructed the commerce secretary not to nominate new national marine sanctuaries until there are significant financial resources available to effectively implement sanctuary management plans for each of the existing thirteen sanctuaries.

The strength of the NMSA is that state waters can be included in a national marine sanctuary with the state governor's consent. Florida state waters have been included in some of the marine reserves established in the Florida Keys sanctuary. To clarify the authority of sanctuary managers outside the Florida Keys to establish marine reserves, it would be helpful if Congress amended the act to expressly delegate such authority to the commerce secretary. Pending such amendments, the secretary would seem to have sufficient authority to issue binding

regulations under the act establishing procedures and criteria for the designation of marine reserves within existing and future sanctuaries.

Legal advantages of including state waters within national marine sanctuaries and marine reserves within them include strengthened legal protection of the environment and control over ocean uses with potentially negative impacts. As the state of Oregon found out in connection with the *New Carissa* grounding incident, when a foreign flag vessel pollutes waters and beaches of the Oregon coast, it can be an arduous process for the state to collect all the damages to which it is entitled. Congress recently strengthened the NMSA to expedite the recovery of damages from responsible parties. These and other legal considerations lead me to recommend that the scientific community work with effective user groups and state and federal officials to establish a Heceta-Stonewall Banks National Marine Sanctuary in state and federal waters off the central Oregon coast. The Oregon Ocean Policy Advisory Council (OPAC) process could be used to identify candidate marine reserves within the proposed sanctuary, and a similar process could be used to identify potential marine reserves in the federal waters portion of the sanctuary. I also recommend this based on the comments of scientists who met with the OPAC marine reserves task force in February 2002, which seemed to indicate that many of the important areas to be included in marine reserves off the Oregon coast were beyond three miles offshore and thus in federal waters.

With respect to navigation in the proposed sanctuary, the Pacific States/British Columbia Oil Spill Task Force, which has extensive experience with the routing of international and domestic maritime traffic on the West Coast, could be asked to develop a routing plan for IMO approval similar to the plan the IMO recently approved with respect to navigation traffic in the national marine sanctuaries off California and the Florida Keys.

Magnuson-Stevens Fishery Conservation and Management Act

The *Science of Marine Reserves* brochure published by the Partnership for Interdisciplinary Studies of Coastal Oceans (PISCO) uses the recent closure of 6,500 square miles of Georges Bank off the coast of New England to all fishing gear except lobster traps to illustrate potential habitat and species recovery benefits of marine reserves established through the federal fishery management process. Building on these and other experiences, one of my recommendations to the Pew Oceans Commission was that the commission recommend to the 108th Congress that legislation reauthorizing the FCMA include explicit statutory authorization for the regional fishery management councils, such as the Pacific Fishery Management Council (PFMC), to include marine reserves in the fishery management plans that they develop for approval and regulatory implementation by the commerce secretary. Workshop participants who are in agreement with that recommendation could express their support for such amendments to the FCMA to members of Oregon's congressional delegation. Such amendments, I believe, would be in accord with the major attempt Congress launched in 1996 through the Sustainable Fisheries Act amendments to the FCMA to make fishing in U.S. waters more sustainable through strengthened regulation of overfishing, bycatch, fishing gear, and other negative impacts on habitat. In fact, the National Marine Fisheries Service's (NMFS's) essential fish habitat (EFH) regulations identify marine reserves and marine protected areas as tools that may be used to protect fish habitat.

As part of their habitat protection and fishery management processes, several councils, including the PFMC, have considered using marine reserves and MPAs, but they continue to rely principally on more traditional seasonal and temporary area closures. The North Pacific council has placed some restrictions on trawling to protect the sea bottom and places where crabs congregate, and the Gulf of Mexico council designated two areas designed to prevent overfishing. The North Pacific council for several years has designated relatively small six- to twenty-mile-diameter closed areas surrounding endangered Steller sea lion rookeries. NMFS closed federal waters off the mouth of the Delaware Bay to horseshoe crab fishing in order to prevent overfishing and provide declining migratory shorebirds with sufficient crab eggs to feed on. Council designations of EFH pursuant to the 1996 amendments would not seem to qualify as marine reserves or even MPAs given the act's relatively weak enforcement provisions. However, council designations of "habitat areas of particular concern" within their broad EFH designations built into fishery management plans and their implementing regulations could be viewed as marine reserves depending on how protective the plans and regulations are.

Other Federal Laws

Two examples of the use of national wildlife legislation to create marine reserves are the Merritt Island, Florida, refuge described in the PISCO brochure and the Palmyra Atoll refuge in the Pacific Ocean. The brochure uses Anacapa Island in the Channel Islands off the south-central California coast to illustrate the use of national parks legislation to help create a marine reserve. The Endangered Species Act and the Marine Mammal Protection Act are being used to create manatee refuges in Brevard County, Florida, in which human water-oriented activities are restricted and vessels operating within the refuges are required to proceed at slow speeds. Presidential designations under the Antiquities Act have been used to designate national monuments protecting submerged lands and waters in the Channel Islands off California and Santa Rosa Island off Florida and thirty thousand acres of land and water including coral reefs at two sites in the Virgin Islands.

President Clinton's MPA executive order instructs the federal Environmental Protection Agency (EPA) to use its existing authority under the Clean Water Act to identify and protect areas that warrant additional pollution protection. Following up on the executive order, in January 2001, the EPA proposed the designation of four "special ocean sites," which would have been covered by more stringent Clean Water Act standards than other coastal waters. Two of the four sites included portions of the Gorda Ridge off the Oregon and California coasts. The proposal was then withdrawn. Even if designated, such sites would not qualify as marine reserves unless the strengthened Clean Water Act standard had the practical effect of precluding resource extractive activities in the designated area.

State Pathways

The PISCO brochure describes how combined actions of the University of Washington and the Washington Department of Fish and Wildlife established five small marine reserves in the San Juan Islands of Puget Sound. Elsewhere in Washington and Oregon, a variety of federal and state authorities have been used to create various types of special management areas in state

ocean waters and coastal estuaries and along shorelines. However, given their typically narrowly focused restrictions on resource exploitation and their small geographic scale, none of them probably qualifies as a marine reserve. All of Oregon's state ocean waters probably qualify as an MPA subject to multiple-use management pursuant to Oregon's 1994 Territorial Sea Plan. However, neither that plan nor the 1991 Oregon Ocean Plan and the 1987 Oregon Territorial Sea Management Study upon which it is based mention MPAs or marine reserves. Like the federal laws just reviewed, the state laws implementing the Territorial Sea Plan neither authorize nor prohibit the establishment of marine reserves. The statutorily created Ocean Policy Advisory Council has recently recommended to the governor a process of establishing marine reserves on an experimental basis. The governor is expected to respond to those recommendations by the end of 2002. One issue workshop participants might want to consider is the role for joint review panels, which are authorized by the Territorial Sea Plan to be used in site- and project-specific interagency decision making involving Oregon's ocean waters. Similarly, the convening of the 2003 Oregon legislature in January presents an opportunity for the introduction of legislation that would explicitly authorize the use of marine reserves in Oregon ocean management. Gubernatorial executive orders also can play a helpful role in establishing marine reserves in state ocean waters. Recent examples include Governor John Kitzhaber's sustainability executive order and, at the federal level, President Clinton's MPA and Northwestern Hawaiian Islands executive orders.

Under current law, the two Oregon agencies with the most relevant resource management authority are the Department of Fish and Wildlife, which manages living resources in ocean waters, and the Division of State Lands, which manages the seabed under Oregon's ocean waters. Also playing a very significant role is the Department of Land Conservation and Development (DLCD). DLCD provides staff for OPAC and administers Oregon's federally approved coastal zone management program within the legal framework of the federal Coastal Zone Management Act, which includes provisions requiring federal agencies to act consistently with the enforceable polices of Oregon's coastal management program. DLCD also administers the state land use law, which similarly requires state agencies to act consistently with the state's coastal management program, which includes various state statutes controlling the use of ocean and coastal resources. A so-far unutilized provision of the state land use law (Or. Rev. Stat. § 197.405) authorizes DLCD to recommend to the legislature the designation of "areas of critical state concern." More research is needed on whether this process could be usefully adapted to establishing marine reserves.

A possible model for new state MPA and marine reserves legislation would be California's Marine Life Protection Act, whose implementation by the California Department of Fish and Game has resulted in controversy and delays in the statutory time table for establishing marine reserves in California waters. Regarding marine reserves established by Oregon, Washington, or California near the border of a neighboring state, the federal Coastal Zone Management Act includes an interstate consistency process mandating that any federal agencies involved with such marine reserves act consistently with the enforceable policies of the federally approved coastal management programs of all affected states. As mentioned above, the Pacific States/British Columbia Oil Spill Task Force could play a useful interstate coordination role with respect to commercial navigation in and near state-established marine reserves.