

DEPARTMENT OF DEFENSE

48 CFR Parts 232 and 252

Department of Defense Federal Acquisition Regulation Supplement; Limitation of Progress Payments

AGENCY: Department of Defense (DoD).

ACTION: Final rule; correction.

SUMMARY: This document corrects the effective date contained in a final rule which was published April 21, 1986 (51 FR 13513).

FOR FURTHER INFORMATION CONTACT:

Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P)/DARS, c/o OASD(A&L), Room 3C841, The Pentagon, Washington, DC 20301-3062, telephone (202)697-7266.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

The Department of Defense is correcting the effective date to read as follows:

EFFECTIVE DATE: For solicitations issued on or after April 7, 1986.

[FR Doc. 86-9702 Filed 4-29-86; 8:45 am]

BILLING CODE 3810-01-M

48 CFR Parts 242 and 252

Department of Defense Federal Acquisition Regulation Supplement; Indirect Cost Certificate

AGENCY: Department of Defense (DoD).

ACTION: Final rule; correction.

SUMMARY: This document corrects amendatory language contained in a final rule which was published April 21, 1986 (51 FR 13517).

FOR FURTHER INFORMATION CONTACT:

Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P) / DARS, c/o OASD(A&L), Room 3C841, The Pentagon, Washington, DC 20301-3062, telephone (202)697-7266.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

The Department of Defense is correcting amendatory language to read as follows:

1. Numbered paragraph 2, appearing on page 13517, is corrected to read as follows:

Sections 242.770 and 242.770-1 are revised; and section 242.770-2 is removed, as follows:

2. Numbered paragraph 3, appearing on page 13518, is corrected to read as follows:

Section 252.242-7003 is revised to read as follows:

[FR Doc. 86-9701 Filed 4-29-86; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Rule To Determine the Sonora Chub To Be a Threatened Species and To Determine Its Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines a fish, the Sonora chub (*Gila ditaenia*), to be a threatened species and determines its critical habitat under the authority contained in the Endangered Species Act of 1973, as amended. A special rule allowing take in accordance with applicable Arizona State laws and regulations is also included. The Sonora chub occurs in Santa Cruz County, Arizona, and in Sonora, Mexico. It is threatened by the possible introduction of exotic fishes and their parasites into its habitat, and by potential mining activities. It is particularly vulnerable to these threats because of its very limited range, and because of the intermittent nature of the stream. This rule implements Federal protection provided by the Endangered Species Act of 1973, as amended, for the Sonora chub.

DATES: The effective date of this rule is May 30, 1986.

ADDRESSES: The complete file for this rule is available for inspection during normal hours, by appointment, at the Region 2 Office of Endangered Species, U.S. Fish and Wildlife Service, 500 Gold Avenue, SW., Room 4000, Albuquerque, New Mexico 87103.

FOR FURTHER INFORMATION CONTACT:

Mr. Gerald Burton, Endangered Species Biologist, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103 (505/766-3972 or FTS 474-3972).

SUPPLEMENTARY INFORMATION:

Background

The Sonora chub was first collected by E.A. Mearns in 1893 from Sycamore Creek, Arizona. It was described from fish collected by R.G. Miller (1945) from the Rio Magdalena near the town of La Casita in Sonora, Mexico. This fish is a member of the minnow family and is

generally less than 125 millimeters (5 inches) in total length. It is a moderately chubby, dark colored fish, with two prominent black lateral bands on the sides and a dark oval spot at the base of the tail. In breeding males, a red coloration develops at the bases of the lower fins and some orange coloration is present on the belly. The Sonora chub is primarily a pool dweller, but is highly secretive and little is known of its behavior and habitat preferences (Minckley, 1973).

In the United States, the Sonora chub occurs in Sycamore Canyon in Sycamore Creek proper, Yank's Spring, and in two of its tributaries, located on the Coronado National Forest northwest of Nogales, Santa Cruz County, Arizona. The tributaries include the lower 1.25 stream miles (sm) of Penasco Creek, and the lower .25 sm of an unnamed stream in an unnamed canyon that enters Sycamore Canyon from the west in the NW ¼ of Section 23, T. 23 S., R. 11 E. (Bell, 1984). Yank's Spring is a perennial spring which has been impounded in a concrete tank for many years. Sycamore Creek starts to flow about .5 mile below Yank's Spring and flows downstream 3.7 miles (USDA, 1982) in a series of pools and small riffles over a bedrock and rubble substrate. It is intermittent during part of the year, at which time it is a series of pools of varying depth (L. Miller, 1949; Brooks, 1982). When intermittent, pools are maintained in shaded areas against cut banks or the canyon walls by underground flow Minckley, 1973). During years of heavy rainfall, water does reach to the International Border, some 5 miles downstream from Yank's Spring, at which time the Sonora chub presumably extends its range to that boundary, if not beyond. Pensaco Creek is a west-flowing tributary to Sycamore Creek. It drains a large portion of the east side of the Sycamore Creek watershed, but has only intermittent flow. The chub is found in the lower 1.25 sm of the creek in pools in bedrock or pools maintained by underground flow (Bell, 1984). The unnamed stream channel supports three perennial bedrock pools in the .25 sm just above its confluence with Sycamore Creek. The lower two pools support large numbers of Sonora chubs (Bell, 1984).

Available life history information is limited to food habit observations based on a few individuals and to spawning observations based on the presence of young in various collections (Minckley, 1973). Information on the riparian habitat is provided in earlier works by R.G. Miller (1945), L. Miller (1949), and Gooding (1961). Recent water quality

and habitat information is presented by Brooks (1982) in a brief characterization of the physio-chemical features of Sycamore Creek. This information is summarized in the 1983 status report on *Gila ditaenia* (Minckley, 1983).

Current threats to the United States population include the stocking of exotic fishes and their associated parasites, and possible uranium mining activities.

In the State of Sonora, Mexico, this fish is known from very few localities, and nothing is known about its biology. The 1940 type locality was the Río Magdalena near La Casita, Sonora, Mexico. At that time the Río Magdalena was a clear stream 4 to 5 feet wide, about 1 foot deep, and with a fairly swift current over a bottom of sand and gravel. The principal vegetation was watercress, found in backwaters along the stream (R.G. Miller, 1945). It is not known if habitat for *Gila ditaenia* still exists at this location, or if so, its condition. *Gila ditaenia* has been collected as recently as 1981 from the Río Magdalena drainage at Campo Carretero and Cienega La Atascosa (D. Hendrickson, Arizona State University, pers. comm., 1983; and in press). These collections indicate the possibility of hybridization between *Gila ditaenia* and *Gila purpurea*, the Yaqui chub, in at least one locality.

In November 1982, the U.S. Fish and Wildlife Service contracted Mr. C.O. Minckley to prepare a report on the status of *Gila ditaenia*. Minckley recommended threatened status with critical habitat because of threats to the species from the introduction of exotic fishes and their associated parasites, and potential mining activities; and the fact that this fish occurs in a very limited area in Arizona and has an uncertain status in Mexico.

Gila ditaenia was included on the Service's December 30, 1982, Vertebrate Notice of Review (47 FR 58454) in category 2. Category 2 includes those taxa that are thought to possibly warrant listing as threatened or endangered, but for which more information is needed to determine the status of the species and to support listing. That information is now available for *Gila ditaenia* in a status report (Minckley, 1983). On June 6, 1984, the Service published a proposed rule to determine *Gila ditaenia* to be a threatened species with critical habitat (49 FR 23402).

Gila ditaenia is listed by the State of Arizona as a threatened species, Group 3 (Arizona Game and Fish Commission, 1982), which comprises those species "... whose continued presence in Arizona could be in jeopardy in the foreseeable future."

Summary of Comments and Recommendations

In the June 6, 1984, proposed rule (49 FR 23402) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice was published in the *The Nogales Herald* in Nogales, Arizona, on July 3, 1984, that invited general public comment. Nine comments, all in support of the proposal, were received and are discussed below. No public hearing was requested or held.

The U.S. Forest Service supported the listing of *Gila ditaenia* as threatened and the designation of critical habitat. However, it recommended that the lower 1.25 sm of Penasco Creek, a small tributary of Sycamore Creek, be added to the critical habitat. It also requested that a recovery team be appointed as soon as possible. In light of additional biological information furnished by the Forest Service, the Fish and Wildlife Service agrees that Penasco Creek should be added to the designated critical habitat. This has been done in this final rule.

Letters in support of the listing and designation of critical habitat were received from the Arizona Game and Fish Department, the Board of Supervisors of Santa Cruz County, the International Union for Conservation of Nature and Natural Resources (IUCN), the Yuma Audubon Society, the American Society of Ichthyologists and Herpetologists, the Desert Fishes Council, and C.O. Minckley. In addition, the IUCN stated that if will include this species in the forthcoming edition of the IUCN Fish Red Data Book, probably in the vulnerable category.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Sonora chub should be classified as a threatened species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations promulgated to implement the listing provisions of the Act (codified at 50 CFR Part 424) were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their

application to the Sonora chub are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* Known present and historic range of *Gila ditaenia* in the United States consists of Sycamore Creek, Yank's Spring, the lower 1.25 sm of Penasco Creek, and the lower .25 sm of an unnamed tributary stream entering Sycamore Creek from the west. All are located on the Coronado National Forest in Santa Cruz County, Arizona. Its very limited distribution makes this fish quite susceptible to any habitat disturbances, especially during periods when the stream flow is intermittent. Habitat disturbances that could be detrimental to the species are increased siltation and runoff subsequent to mining or other activities, depletion of the stream flow, and the introduction of manmade pollutants into the stream. It is quite possible that this species could be extirpated throughout its small U.S. range in a relatively short time by such habitat damage and loss (Minckley, 1983).

Sycamore Canyon at present remains in a basically unaltered state, and present impacts of human activities in the area are relatively minor. A portion of Sycamore Creek (4.75 sm), Penasco Creek, and an unnamed tributary of Sycamore Creek are contained within the Pajarito Wilderness Area. The remaining 1.5 sm of Sycamore Creek and the lower portion of the unnamed tributary containing the Sonora chub are also contained within the Goodding Research Natural Area, which is a special use designation of the U.S. Forest Service. This area is withdrawn from mineral entry and is closed to grazing. Recreation is limited to non-developed and dispersed uses. The canyons that contain critical habitat, however, do receive heavy visitor use. Yank's Spring is the site of a trailhead parking lot for visitors, but the spring has been impounded in a concrete tank for many years and is resistant to habitat damage.

In addition to the Sonora chub, Sycamore Canyon supports several rare and unique plant and animal species. One of these, the Tarahumara frog, which is a candidate for Federal listing, experienced a catastrophic die-off in Sycamore Canyon in 1974 and has not been found there since. The factors causing its disappearance are not fully known.

At present no mining is occurring anywhere within the Sycamore Creek watershed and none is expected in the near future (R.B. Tippecanoe, U.S. Forest Service, pers. comm., 1983);

however, active mining is ongoing in California Gulch, just one watershed to the west. Exploration for uranium occurred in 1981 on the upper eastern slopes of the Sycamore drainage on mining claims occupying approximately 4 to 5 square miles. Uranium was found and the claims are being maintained; however, no active mining is presently planned there. The Sycamore Creek drainage contains valuable minerals, and the development of mining activity within the watershed would have the potential for severe adverse effects on *Gila ditaenia* through such activities as increased water demand and withdrawal, habitat disturbance, siltation, and pollution.

Although the canyon is included in a livestock grazing allotment, there is little direct effect on the Sonora chub habitat, due in part to steep, rocky streambank topography. Indirect effects of grazing, such as erosion and siltation, are minor at present, but could have significant effects on the Sonora chub habitat if grazing were increased.

Very little is known about the habitat of *Gila ditaenia* in Mexico. Hendrickson (Arizona State University, pers. comm., 1983) noted that the habitat near Cienega La Atascosa was in good condition in 1981; however, there is no protection for habitat or species in Mexico and the current or proposed uses in the area are not fully known. There is irrigated agriculture along the river, but very little groundwater pumping seems to be occurring. The amount of land under cultivation, the amount of water diversion, the pollution, and the riparian and channel damage appear to have remained fairly constant in the past (G. Nabhan, University of Arizona, pers. comm., 1983).

B. Overutilization for commercial, recreational, scientific, or educational purposes. There is no indication that this species is overused for any of these purposes.

C. Disease or predation. Predation by introduced exotic fishes could prove disastrous for *Gila ditaenia*, leading to its extirpation in the United States. The introduction of exotic fishes, particularly game fish, into Sycamore Canyon would undoubtedly result in predation of the Sonora chub. Currently, predatory green sunfish occur in small numbers in the lower portions of Sycamore and Penasco Canyons; however, the extent of their impact is unknown. In 1983, mosquitofish were observed in an ephemeral pool in Penasco Canyon. The source of these fish was not determined and it is not known if they survived. The spread of mosquitofish into Penasco and Sycamore Canyons could be damaging to the Sonora chub since they are an

aggressive predator. Both green sunfish and mosquitofish have been shown to be contributing factors in the decline of other southwestern native fishes. The adverse impacts of parasites, introduced along with exotic fishes, on other species of *Gila* have been documented (James, 1983; Minckley *et al.*, 1981; Wilson *et al.*, 1966) and would probably occur with *Gila ditaenia*.

D. The inadequacy of existing regulatory mechanisms. The State of Arizona lists this species under Group 3 of the "Threatened Native Wildlife in Arizona." Group 3 includes "Species or subspecies whose continued presence in Arizona could be in jeopardy in the foreseeable future. Serious threats to the occupied habitats have been identified and populations (a) have declined or (b) are limited to a few individuals in few locations" (AGFC, 1982). No protection of the habitat is included in such designation and no management plan exists for this species. The State of Arizona requires a scientific collecting permit for taking individuals of the Sonora chub. In Mexico no protection exists for either the species or its habitat.

E. Other natural or manmade factors affecting its continued existence. Although unlikely, the United States population could be extirpated by natural phenomena (drought), if the water supply for Sycamore Creek should fail. The possibility of this occurring is increased by human activities which are likely to occur in the area. Watershed disturbances within the basin, such as poor grazing practices, mining, roads, or ORV use, can contribute to erosion, lowering water tables, and disturbed runoff patterns, and may affect the amount of flow in Yank's Spring, Sycamore Creek, and Penasco Canyon. Direct manipulation of water within the basin, such as stock tank construction and groundwater pumping, could also affect the flows.

In Mexico, Hendrickson (pers. comm., 1983; and in press) found that *Gila purpurea*, the Yaqui chub, which is native to the drainages of the Rios Yaqui, Matape, and Sonora, is now present in the Rio Magdalena along with *Gila ditaenia*. His collections indicate that hybridization may be occurring between the two species in at least one location. Spread of *Gila purpurea* in the Rio Magdalena could result in extensive losses of *Gila ditaenia* through hybridization.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the

preferred action is to list the Sonora chub as threatened with critical habitat. It was apparent that not listing this species would probably result in its becoming endangered in the foreseeable future because of:

- (1) The small size of the U.S. population and its habitat and its resultant vulnerability to damage from a single or multiple sources,
- (2) The potential for mineral development in the area, and
- (3) The uncertain status of the Mexican population, its lack of any legal protection, and increasing water demand in its range. However, the status of the United States population of *Gila ditaenia* is presently stable, and at least some populations exist in Mexico. The U.S. population currently receives some protection through State regulations and by management policies of the U.S. Forest Service. Therefore, endangered status seems inappropriate.

Critical Habitat

Section 3 of the Act defines "critical habitat" as (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4(a)(3) of the Act requires that critical habitat be designated to the maximum extent prudent and determinable concurrently with the determination that a species is endangered or threatened. Critical habitat is designated for *Gila ditaenia* to include the entire area where the species is known to occur in the United States. This consists of Sycamore Creek, starting from and including Yank's Spring, downstream to the International Border with Mexico, plus the lower 1.25 miles of Penasco Creek, and the lower .25 miles of an unnamed stream that enters Sycamore Creek from the west in the NW ¼ of Section 23, T.23S., R.11E. in Santa Cruz County, Arizona. This critical habitat includes a 25 foot wide riparian area along each side of Sycamore and Penasco Creeks. This riparian zone is essential to the maintenance of the creek ecosystems and the stream channels, and thus to the conservation of the species. The riparian zone around the Yank's Spring has been removed from the critical habitat

designation because the spring is impounded in a concrete tank and does not have a riparian zone. No riparian zone is designated for the unnamed stream because this portion of critical habitat consists of bedrock pools that are relatively unaffected by the riparian zone. All of the designated area is located within the Coronado National Forest.

Yank's Spring, Sycamore Creek, and two of its tributaries were chosen for critical habitat designation for the Sonora chub because they presently support the only U.S. population of this species. The area provides all of the ecological, behavioral, and physiological requirements necessary for the survival of this chub. The remaining portion of the range is in Mexico. Critical habitat is not designated in areas outside U.S. jurisdiction (50 CFR 424.12(h)).

Section 4(b)(8) of the Act requires, for any proposed or final regulation that designates critical habitat, a brief description and evaluation of those activities (public and private) that may adversely modify such habitat or may be affected by such designation. Activities in Sycamore Canyon during times of intermittent flow, such as mining activities, could be detrimental to the critical habitat. Any activities that would deplete the flow or would significantly alter the natural flow regime in Yank's Spring, the unnamed tributary, or Sycamore or Penasco Creeks, such as excessive groundwater pumping, impoundment, or water diversion, would adversely impact the critical habitat. Any activities that would extensively alter the channel morphology of Sycamore or Penasco Creeks, Yank's Spring, or the unnamed tributary, such as mining, excessive sedimentation, impoundment, or riparian destruction, would adversely impact the critical habitat. Any activities that would significantly alter the water chemistry of Yank's Spring, Sycamore or Penasco Creeks, or the unnamed tributary, such as release of chemical or biological pollutants at a point source or by dispersed release, would adversely impact the critical habitat. Additionally, the introduction of exotic fish may prove detrimental to the Sonora chub's critical habitat due to predation and to competition for food and space. Any parasites associated with such introduction would also be detrimental. As no Federal activities are currently planned for this area, critical habitat designation is not expected to cause an impact in the near future. If, in the future, activities are planned, the critical habitat of the Sonora chub

would have to be considered in such planning.

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of designating a particular area as critical habitat. The Service has evaluated the proposed critical habitat designation for the Sonora chub, taking into consideration all additional comments received. The critical habitat, except Yank's Spring, is contained within a natural area and a wilderness area. Forest Service management of these areas is apparently compatible with the critical habitat designation. Livestock grazing is not expected to affect or be affected by the critical habitat designation since the steep topography of the critical habitat generally precludes grazing access. There are mining claims in the vicinity of the critical habitat; however, no mining activities are currently ongoing or planned within or in the vicinity of the critical habitat designation. Recreational activities in the vicinity of Yank's Spring are not expected to affect or be affected by the critical habitat designation because the spring is impounded in a concrete tank and is resistant to habitat damage. No information was brought forward on economic or other impacts which warranted adjusting the boundaries of the critical habitat designation. Additional biological information from the U.S. Forest Service, however, did warrant adjustment of the proposed critical habitat designation to include an additional 1.5 miles of tributary streams containing the Sonora chub. The additional area is entirely on U.S. Forest Service lands and no significant economic or other impacts are expected from the adjustment of the critical habitat designation.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages the results in conservation actions by other Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402 and are now under revision (see proposal at 48 FR 29990; June 29, 1983). Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal activity may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The only known United States population of the Sonora chub, and all critical habitat for the species, are located on the Coronado National Forest. Sycamore Canyon and the adjacent canyons containing critical habitat are fairly remote and approximately 1.5 miles of Sycamore Creek is included in a natural area and a wilderness area. Present management of these areas is compatible with the critical habitat designation. Therefore, apparently Federal activities are not expected to affect or be affected by the critical habitat designation.

The Act and its implementing regulations found at 50 CFR 17.21 and 17.31 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving threatened animal species under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23, and 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or special purposes consistent with the purposes of

the Act. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

The above discussion generally applies to threatened species of fish or wildlife. However, the Secretary has discretion under section 4(d) of the Act to issue special regulations for a threatened species that are necessary and advisable for its conservation. *Gila ditaenia* is threatened primarily by habitat disturbance or alteration, not by intentional, direct taking of the species or by commercialization. Given this fact and the fact that the State currently regulates direct taking of the species through the requirement of State collecting permits, the Service has concluded that the State's collection permit system is more than adequate to protect the species from excessive taking, so long as taking is limited to: educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Endangered Species Act. A separate Federal permit system is not required to address the current threats to the species. Therefore, a special rule is issued that allows take to occur for the above-stated purposes without the need for a Federal permit if a State collecting permit is obtained and all other State wildlife conservation laws and regulations are satisfied. The special rule also acknowledges the fact that incidental take of the species by State-licensed recreational fishermen is not a significant threat to this species. In fact, angling is an unlikely method of capture of the species. Therefore, under this special rule such incidental take would not be a violation of the Act if the fishermen immediately returned the individual fish taken to its habitat. Any activities involving the taking of this species not otherwise enumerated in the special rule are prohibited. Without this special rule, all of the prohibitions of 50 CFR 17.31 would apply. This special rule will allow for more efficient management of the species, and thus will enhance the conservation of the species. For these reasons, the Service concludes that this regulation is necessary and advisable for the conservation of the Sonora chub.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined by the National Environmental Policy Act of 1969, need

not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Regulatory Flexibility Act and Executive Order 12291

The Department of the Interior has determined that designation of critical habitat for this species will not constitute a major action under Executive Order 12291 and certifies that this designation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). No significant economic or other impacts are expected to result from the critical habitat designation. This conclusion is based on Forest Service management of recreational and other activities within the Coronado National Forest, the absence of any mining activities or plans to mine the claims within or in the vicinity of the critical habitat, and the unquantifiable benefits that may result from the critical habitat designation. In addition, no direct costs, enforcement costs, or information collection or recordkeeping requirements are imposed on small entities by this designation of critical habitat. These findings are based on a Determination of Effects that is available at the Region 2 Office of Endangered Species, U.S. Fish and Wildlife Service (See **ADDRESSES**).

Literature Cited

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Authors

The primary authors of this final rule are S.E. Stefferud and A.M. Shull, Endangered Species staff, U.S. Fish and Wildlife Service, Albuquerque, New Mexico 87103 (505/766-3972).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulations Promulgation

PART 17—[AMENDED]

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Amend § 17.11(h) by adding the following, in alphabetical order under "Fishes," to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
FISHES							
Chub, Sonora	<i>Gila ditaenia</i>	U.S.A., (AZ), Mexico	Entire	T	227	17.95(e)	17.44(o)

3. Add the following paragraph (o) as a special rule to § 17.44.

§ 17.44 Special rules—fishes.

(o) Sonora chub, *Gila ditaenia*.

(1) No person shall take the species, except in accordance with applicable State fish and wildlife conservation laws and regulations in the following instances: (i) For educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act; or, (ii) incidental to State-permitted recreational fishing activities, provided that the individual fish taken is immediately returned to its habitat.

(2) Any violation of applicable State fish and wildlife conservation laws or regulations with respect to the taking of this species will also be a violation of the Endangered Species Act.

(3) No person shall possess, sell, deliver, carry, transport, ship, import, or export, by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife conservation laws or regulations.

(4) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (o) (1) through (3) of this section.

4. Amend § 17.95(e) by adding the critical habitat of the Sonora chub as follows (the position of the following critical habitat entry under § 17.95(e) will follow the same sequence as the species occurs in 17.11):

§ 17.95 Critical habitat—fish and wildlife.

(e) * * *

Sonora Chub (*Gila ditaenia*)

Arizona, Santa Cruz County. An area of land and water in the Coronado National Forest, consisting of the following:

1. Sycamore Creek, and a riparian zone 25 feet wide along each side of the creek, from Yank's Spring downstream approximately 5 stream miles to the International Border with

Mexico within sections 14, 22, 23, 27, 33, and 34, T. 23 S.; R. 11 E.

2. Yank's Spring in the SE¼ of the NW¼ of sec. 14, T. 23 S.; R. 11 E.

3. Penasco Creek, including a riparian zone 25 feet wide along each side of the creek, from its confluence with Sycamore Creek (SW¼ of the SW¼ of sec. 23, T. 23 S.; R. 11 E.) upstream approximately 1¼ miles to the east boundary of sec. 26, T. 23 S.;

4. An unnamed tributary to Sycamore Creek, from its confluence with Sycamore Creek (SW¼ of the NW¼ of sec. 23, T. 23 S.; R. 11 E.) upstream approximately ¼ mile to the west boundary of the NE¼ of the SE¼ of the NE¼ sec. 22, T. 23 S.; R. 11 E.



Known primary constituent elements include clean permanent water with pools and intermediate riffle areas and/or intermittent pools maintained by bedrock or by subsurface flow in areas shaded by canyon walls.

Dated: March 25, 1986.

P. Daniel Smith,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 86-9669 Filed 4-29-86; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 41152-6061]

Designated Critical Habitat; Hawaiian Monk Seal

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: By this rule NOAA designates critical habitat for the Hawaiian monk seal (*Monachus schauinslandi*) under the Endangered Species Act of 1973 (ESA). The habitat designated includes all beach areas, lagoon waters, and ocean waters out to a depth of 10 fathoms around Kure Atoll, Midway Islands (except Sand Island), Pearl and Hermes Reef, Lisianski Island, Laysan Island, Gardner Pinnacles, French Frigate Shoals, Necker Island, and Nihoa Island. The designation of critical habitat will benefit the Hawaiian monk seal by requiring Federal agencies to ensure that their actions are not likely to result in the destruction or adverse modification of the critical habitat.

DATE: This rule become effective on May 30, 1986.

FOR FURTHER INFORMATION CONTACT:

Eugene T. Nitta, Western Pacific Program Office, Southwest Region, National Marine Fisheries Service, P.O. Box 3830, Honolulu, HI 96812, Telephone (808) 955-8831; James H. Lecky, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731, Telephone (213) 548-2518; or Margaret Lorenz, Protected Species Division, National Marine Fisheries Service, Washington, D.C. 20235, Telephone (202) 634-7529. Copies of the final environmental impact statement prepared for this rule are also available from these offices.

SUPPLEMENTARY INFORMATION:

Background

The NMFS listed the Hawaiian monk seal as an endangered species under the ESA in November 1976. In December 1976, the Marine Mammal Commission recommended designating certain portions of the Hawaiian monk seal's range as critical habitat. The NMFS prepared an environmental assessment to evaluate the need for the action and to identify alternatives.

On March 7, 1980, the NMFS published a Draft Environmental Impact Statement (DEIS) on the proposed designation of critical habitat, and incorporated three boundary options in the preferred alternative (to designate critical habitat). These options were to place the seaward limit at the 10-fathom isobath, at the 20-fathom isobath, or at three miles from shore. The 10-fathom option included pupping beaches, beaches used for hauling out (coming ashore), water inhabited by females and young during nursing and post-weaning, and a portion of the foraging habitat used by monk seals while they are near the islands. The 20-fathom option was developed to incorporate additional foraging habitat. The three-mile option was essentially the original recommendation from the Marine Mammal Commission.

Thirty comments were received during the public comment period on the DEIS. Twenty-three commenters favored the designation of critical habitat, but there was no consensus for a preferred boundary option. Seven commenters opposed designation of critical habitat because they felt that data substantiating a need for critical habitat were lacking, existing regulatory mechanisms were providing adequate protection, and the designation would impede development of commercial fisheries. Those in opposition included the State of Hawaii, the Western Pacific Fishery Management Council, and the Hawaii Fishing Coalition.

The NMFS postponed further action until the Hawaiian Monk Seal Recovery Team (Recovery Team) had reviewed the DEIS and submitted its recommendations. On October 9, 1980, the Recovery Team supported the 20-fathom option and recommended including Nihoa Island, Gardner Pinnacles, and Maro Reef in the designation. The NMFS deferred the designation process pending the completion of the Hawaiian Monk Seal Recovery Plan (Recovery Plan). The Recovery Plan was submitted to NMFS in March 1983, with a recommendation to designate critical habitat out to 20-fathoms including Nihoa Island, Gardner Pinnacles, and Maro Reef.

Based on an evaluation of the need for critical habitat, the NMFS published a proposed rule for designating Hawaiian monk seal critical habitat in the **Federal Register** on January 9, 1985 (50 FR 1088-1095). A Supplemental Environmental Impact Statement (SEIS) regarding the proposed action was published on December 21, 1984. Comments on the proposed rule and SEIS were accepted until March 11, 1985.

A combined public meeting and public hearing was held on February 5, 1985, in Honolulu, Hawaii, regarding the proposed rule and the SEIS for the Proposed Designation of Critical Habitat for the Hawaiian Monk Seal in the Northwestern Hawaiian Islands (NWHI). Nine individuals representing the Hawaii Audubon Society, Greenpeace Hawaii, the Sierra Club—Hawaii Chapter, the Sierra Club Legal Defense Fund, Life of the Land, the University of Hawaii Environmental Center, and interested members of the general public presented testimony. Eight of the nine were in favor of designation of critical habitat out to 20 fathoms. One individual, speaking for himself, testified in favor of no action, noting that his interpretation of the information presented in the SEIS was that there would be no appreciable benefits to monk seals from the proposed designation of critical habitat.

Twenty-eight organizations and individuals provided written comments on either the proposed rule or SEIS. Twelve commenters recommended designation of critical habitat out to 20 fathoms based on their interpretation of the information presented in the SEIS. Six commenters recommended 10 fathoms for critical habitat. Two commenters supported designation of critical habitat with no preference for boundaries. Three indicated no comments on the proposal and another suggested that a more precise definition of the inland boundary of critical habitat was necessary. Four comments were received against designation based on lack of sufficient data to support critical habitat designation, no demonstrated advantage of designation versus no action, and/or the fear of Federal pre-emption in resource management activities.

The NMFS has decided to proceed with the designation of critical habitat for the Hawaiian monk seal basically as described in the SEIS and proposed rule because the NMFS believes the area designated is consistent with the criteria established by the definition of critical habitat (16 U.S.C. 1532(5)(A)). No significant new information regarding Hawaiian monk seal biology,

commercial fishing activities, or Federal agency activities in the NWHI was received during the comment period.

The specific written and oral comments requiring a response are summarized below.

Comment: Twenty commenters recommended designating critical habitat out to 20 fathoms.

Response: The ESA defines critical habitat as " * * * the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection." The comments in favor of the 20-fathom alternative address the first criterion for designation, but not the second. The NMFS reviewed the Recovery Team's recommendation to designate critical habitat out to 20 fathoms, but determined that only the habitat out to 10 fathoms is in need of special management considerations or protection. This conclusion was reached after the NMFS reviewed recommendations for management measures in the Recovery Plan, the record of section 7 consultations on Federal activities potentially affecting monk seals in the NWHI, and information on the biology of the monk seal. These sources indicate that the habitat which may be in need of special management considerations or protection is that habitat used by monk seals for pupping and nursing, where weaned pups learn to swim and forage, and major hauling out areas where growth has been substantial and pupping is imminent. Designating critical habitat to 10 fathoms will include all habitat utilized for these purposes, and is consistent with the criteria in the definition of critical habitat.

Comment: Seven commenters stated that Maro Reef should be included in the critical habitat designation.

Response: The NMFS has determined that the portion of the monk seal's habitat consistent with the definition of critical habitat is the portion used for pupping and nursing pups, and the shallow nearshore waters where weaned pups learn to swim and forage (see previous response). Maro Reef contains no emergent land and, therefore, no pupping habitat. It provides foraging habitat for transient seals from atolls with emergent land. There has been no indication that the foraging habitat at Maro Reef might be in need of special management considerations or protection, as is required by the definition of critical

habitat. Therefore, the NMFS has decided not to include Maro Reef in the final designation.

Comment: Three commenters stated that Sand Island at Midway should be included in the critical habitat designation.

Response: Sand Island was excluded from the proposed designation because it has been substantially modified by the military. The Marine Mammal Commission stated that excluding Sand Island is reasonable because it has been developed and human activity limits monk seal use of its beaches.

Comment: Four commenters stated that critical habitat is redundant to the other consultation requirements of section 7 of the ESA.

Response: A critical habitat designation may enhance the section 7 process by requiring Federal agencies to consult in instances where their activities may modify or destroy habitat without directly affecting the species. The benefit provided by the designation is the clear and early notification to Federal agencies and the public of the existence of critical habitat and the importance of the area to the Hawaiian monk seal.

Comment: The Minerals Management Service suggested that the harbors at Midway should be excluded from critical habitat to eliminate potential controversy in the event that Midway is used to support deep ocean mining efforts near the NWHI. They noted that this activity would be subject to a formal consultation under section 7 whether or not the harbors were included in critical habitat.

Response: Sand Island and its harbor are excluded from the designation of critical habitat.

Comment: The State of Hawaii commented that there is insufficient data to support designation of critical habitat.

Response: Based on the best scientific information available, the NMFS has determined that there is sufficient justification to define and designate critical habitat for the Hawaiian monk seal. The components of monk seal habitat identified as critical habitat in the Final Environmental Impact Statement (FEIS) include breeding areas, pupping and major haul-out sites, and nearshore waters used by females and pups.

Comment: The State of Hawaii indicated that available information does not show that the area proposed for critical habitat is any more critical than the seals' entire habitat.

Response: Critical habitat, as defined in the ESA, is habitat that is essential to the conservation of a species and that

may be in need of special management considerations or protective measures to conserve the habitat. The best available information concerning the Hawaiian monk seal, the management recommendations in the Recovery Plan, and the concerns raised in section 7 consultations indicate that the habitat utilized by monk seals for pupping and nursing and where weaned pups learn to swim and forage is critical habitat as defined by the ESA.

Comment: Two commenters suggested that critical habitat designation would also provide increased habitat protection for other species of plants and animals found in the NWHI.

Response: Although there may be habitat protection for other species, this is not a factor in the decision to designate critical habitat.

Comment: The Fish and Wildlife Service and Hawaii Chapter of the Sierra Club comments that the 20-fathom contour provides a more cohesive and recognizable administrative boundary for critical habitat that would be easier to enforce than the 10-fathom contour line which is highly irregular.

Response: The point regarding smoothness and continuity of bottom contours is well taken. However, our review of the best available information indicates that habitat within 10 fathoms is the only habitat in need of special management considerations or protection.

Comment: The State of Hawaii, Department of Land and Natural Resources (DLNR) and the U.S. Coast Guard suggested that the inshore extent of critical habitat be defined more precisely.

Response: Vegetation behind pupping beaches is important because it provides shade from intense solar radiation for nursing females, pups, and other seals. It may also screen seals on the beach from potentially disturbing stimuli behind the vegetation. The extent of vegetation is so variable that a more precise definition is difficult to construct. However, the NMFS has clarified the description in the final rule.

Critical Habitat

The ESA defines critical habitat as " * * * (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination

by the Secretary that such areas are essential for the conservation of the species" (16 U.S.C. 1532(5)(A)). "Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied" by the species (16 U.S.C. 1532(5)(C)).

The criteria to be considered in making a critical habitat designation are included in 50 CFR 424.12. The following biological requirements must be considered in designating critical habitat:

- (1) Space for individual and population growth, and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally,
- (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of listed species.

Regulations designating critical habitat must be based on the best available scientific data and to the maximum extent practicable must be accompanied by a brief description and evaluation of those activities that may adversely modify such habitat or may be affected by such designation. Economic and other relevant impacts of specifying critical habitat must also be considered when designating habitat, and any area may be excluded from a critical habitat designation if a determination is made that the benefits of the exclusion outweigh the benefits of designation. The only exception to this provision is where the failure to designate such habitat will result in the extinction of the species.

In order to determine what portion of the monk seal's range contains habitat that is consistent with the definition of "critical habitat", the NMFS reviewed the available biological information, responses to the requests for comments on the SEIS and proposed rule, the management recommendations in the Recovery Plan, and the record of section 7 consultation on Federal activities in the NWHI with a potential for affecting monk seals.

There are no inherent restrictions on human activities in an area designated as critical habitat. A critical habitat designation affects only those actions authorized, funded, or carried out by Federal agencies. It provides notification to Federal agencies that a listed species is dependent on a particular area for its continued existence and that any

Federal action that may affect that area is subject to the consultation requirements of section 7 of the ESA. Certain activities such as commercial fisheries that are Federally regulated, scientific research conducted under Federal permits or funding, Federal management of other resources, and military operations may be conducted within an area designated as critical habitat if the authorizing Federal agency determines through the section 7 consultation process that the activity is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Activities that are conducted by state agencies or the private sector without Federal involvement may be carried out without regard to section 7, although other provisions of the ESA may impose prohibitions on activities resulting in the taking of endangered or threatened species.

Hawaiian Monk Seal Biology

The biology of the Hawaiian monk seal is discussed in the SEIS and FEIS. The discussion includes the history of exploitation, trends in population size, current status of the population, life history parameters, habitat requirements, and biological problems confronting the species. Further information is available from the DEIS, the Recovery Plan, and the Status Review for the Hawaiian Monk Seal. The pertinent habitat requirements are summarized below.

Habitat Requirements

Existing data indicate that all beach areas used by the Hawaiian monk seal for pupping, nursing, and rearing pups and some haul-out areas where pupping is imminent (e.g. Tern Island, French Frigate Shoals) are essential for the continued existence of the species. This critical area includes the first line of vegetation backing these beaches which provides shelter from the wind and other elements. Lava bench and boulder beach habitat found at Necker and Nihoa Islands also constitute pupping and haul-out areas. Because of the limited terrestrial habitat available to the Hawaiian monk seal, any loss of pupping, nursing, and major haul-out areas could affect the conservation of the species adversely.

Shallow, protected water immediately adjacent to beaches is also important to the Hawaiian monk seal. With the exception of undisturbed dry sand beaches, this nearshore protected water habitat is the most important factor for a successful pupping area. Pregnant females use beaches adjacent to shallow

protected waters for pupping, apparently to have a protected shallow area to take their pups when they first enter the water.

Studies have shown that, for three months after weaning, pups make daily sorties from the beaches, presumably to feed. They are seen in the water close to shore, and it is assumed that the critical stage of learning to feed is carried out in nearshore waters. During the first month, the pups lose weight, then stabilize, and finally begin to gain weight. By four months post-weaning, pups begin spending up to 10 days at a time away from the island.

Further observations indicate that adult female monk seals leave the islands for about two to three weeks upon weaning their pups. They leave in an emaciated condition and return in relatively good condition, remain for a few days on the islands, then depart for an additional period of a few weeks before reappearing well nourished. Since they do not haul out during these protracted periods away, it is assumed that they are feeding at least beyond the inner reef and probably a considerable distance from shore.

Information on foraging habitat is available from studies on food habits and surveys of nearshore fish resources. Watson and Peiterson (1984), analyzed hard parts recovered from scats and spewings to define the prey base exploited by monk seals. They found that monk seals feed on octopus, squid, and a diverse list of fishes which were identified to family. They did not report lobster as a prey species, although it has been reported elsewhere (e.g. DeLong *et al.* 1982). Studies on the distribution of fishery resources within 10 fathoms in the NWHI show that octopus and the families of fish preyed upon by monk seals occur in nearshore waters at most of the NWHI (Okamoto and Kanemaka 1984).

Information on foraging behavior is available from observations of monk seals and depth of dive studies. Rauzon *et al.* (1977) observed 301 dives in the channel off the western end of Tern Island, French Frigate Shoals. They did not observe consumption of prey but concluded from the regularity of the dives that the seals were foraging. Water depths in the area of observation varied from less than one fathom to five fathoms. Studies of depth of dive for the seals were conducted at Lisianski Island in 1980 (DeLong *et al.* 1982) and 1982 (Schlexer 1984) to provide additional information on habitat use. DeLong *et al.* (1982) attached depth-of-dive recorders to seven adult male monk seals. Over 4,800 dives by six animals (one recorder

failed) were recorded. Fifty-nine percent of the dives were in the range of 5.5 to 21.9 fathoms (10-40 meters). No information was collected on diving in water less than 5.5 fathoms, and maximum dives ranged beyond 66.2 fathoms (121 meters). Schlexer (1984) placed recorders on five adult males, one subadult female, one juvenile male, and one juvenile female. The dive recorders malfunctioned, so that the dive profiles recorded may not be a true reflection of habitat use (Schlexer 1984). In spite of the malfunction, Schlexer reported that his data were generally consistent with the data collected by DeLong *et al.* (1982) for adult males. The subadult and juvenile females made dives in excess of 80 fathoms (150 meters) extending the known diving range of monk seals.

Thus, the biological information shows that monk seals forage from near shore waters (<0.5 fathoms) (Rauzon *et al.* 1977) to some depths down the reef slope beyond 80 fathoms (Schlexer 1984). Monk seals have also been reported to be absent from the breeding beaches for an extended period of time (Johnson and Johnson 1978). Feeding habits of monk seals during these absences have not been studied. They may be attracted to forage resources over sea mounts and submerged reefs. Monk seals have been reported at Maro Reef which has no emergent land (Gilmartin 1983).

The only observed monk seal matings have been in the nearshore and shallow offshore waters around Laysan Island. Critical habitat delineated by the 10-fathom isobath would include the known breeding habitat as well as a portion of foraging habitat for the Hawaiian monk seal.

Based on available information, habitat requirements for the health, well being, and continued viability of the Hawaiian monk seal population, listed in order of probable importance, consist of the following:

1. Pupping and major hauling beaches including the vegetation immediately backing the beaches (coral sand beaches and lava benches).
2. Shallow protected water adjacent to the above (tide pools, inner reef waters, shoal areas, and near shore shallows).
3. Deeper inner reef areas and lagoon waters.
4. Other waters surrounding the NWHI to at least 80 fathoms.
5. Banks and shoals without emergent lands and pelagic waters.

To define the portion of the monk seal's habitat that might be in need of special management considerations or

protection, the NMFS reviewed recommendations for management measures in the Recovery Plan, the record of section 7 consultations on Federal activities potentially affecting monk seals in the NWHI, and information on the biology of the monk seal. These sources indicate that nearshore and terrestrial habitat constitute the areas in need of special management considerations or protection.

Most of the management measures recommended in the Recovery Plan are directed at limiting access to terrestrial habitat to minimize the adverse effects of human-caused disturbance. Other management measures identified in the plan include improved monitoring of the population, emergency response plans, activities to promote the survival of seals, and the implementation of management measures that may be indicated by future research. These other measures are either not directed at the conservation of habitat or are likely to be directed at terrestrial habitat.

As of December 1985, the NMFS had completed eight formal consultations and three informal consultations on Federal activities potentially affecting monk seals in the NWHI. Of the formal consultations, two concluded in "jeopardy" opinions, five concluded in "no jeopardy" opinions, and one concluded that there was insufficient information available to ensure "no jeopardy". The informal consultations concluded with determinations that the proposed activities would not affect the monk seal population. "Jeopardy" opinions were issued for activities that would result in increased levels of disturbance of monk seals on the beaches or in the water adjacent to the beaches used for pupping. "No jeopardy" opinions were issued for activities offshore or that could be conducted on shore without increased levels of disturbance.

The one consultation in which NMFS concluded there was insufficient information to make a determination of either "jeopardy" or "no jeopardy" was a consultation with the Western Pacific Fisheries Management Council on implementation of the Spiny Lobster Fishery Management Plan. In the biological opinion on this activity, the NMFS stated that monk seals could be affected by disturbance, incidental mortality, and reduction of a prey population. The concern for adverse effects of disturbance were centered on the need to protect beaches used for pupping. No incidental mortality has been reported since the consultation was initiated in January 1980. The

effects of competing with a commercial fishery for a food resource remain undetermined. However, studies on food habitats verify that the monk seal exploits a variety of species and does not depend on lobster.

The NMFS believes that the section 7 record through December 1985 provides a comprehensive overview of Federal activities in the NWHI and that the level of activity in the NWHI is likely to remain stable into the future. There may be some growth in commercial fisheries, and there may be leasing of the deep sea floor for exploration and development of manganese crust resources. Growth in commercial fisheries will be managed under fishery management plans which provide protective measures for monk seals. Leasing of the deep sea floor is the responsibility of the Minerals Management Service (MMS). The MMS is drafting an environmental impact statement for leasing in the NWHI and has initiated the section 7 processes informally. Development of a manganese crust mining industry is likely years away because the technology for mining at the depths at which manganese crusts occur (> 1,000 meters) is still developing. Therefore, the NMFS believes that activity generated by the MMS decision to proceed with leasing will be minimal and in locations not likely to affect monk seal habitat.

Studies of trends in distribution and abundance indicate that special management measures may be necessary to control the adverse effects of human activity on land and near pupping beaches. Kenyon (1972) attributed the decline in the number of monk seals at Kure and Midway during the 1960's to frequent human disturbance of hauled out seals. The increase in use of Tern Island (French Frigate Shoals) by monk seals as a hauling out site subsequent to the closure of the Coast Guard Station there (Ittner unpublished observation cited in Gilmartin 1983) supports Kenyon's hypothesis.

Information on the susceptibility of monk seals to disturbance in water is limited to anecdotal reports that monk seals approach fishing vessels to rob fishermen's lines of hooked fish. These reports are supported by a photograph of a monk seal with a fish hook in its mouth. Other pinniped species that are known to be sensitive to disturbance on land (e.g. California sea lions, and harbor seals) are relatively bold in the water. They approach fishing boats to take hooked fish off of fishermen's lines (Miller *et al.* 1983) and they approach divers closely. Since thresholds for disturbance are likely higher in the

water than on land, management measures to control human presence in the offshore environment are not critical.

The recommended management measures in the Recovery Plan and the biological opinions resulting from formal consultations, and information on trends in abundance indicate that the habitat which may be in need of special management considerations or protection is that habitat utilized by monk seals for pupping and nursing, where weaned pups learn to swim and forage, and major hauling out areas where growth has been substantial and pupping is imminent. A precise boundary to the area in need of special management considerations or protection is difficult to draw, but designating critical habitat out to 10 fathoms will include all such areas. The depth-of-dive studies and other available information do not indicate that any portion of the foraging habitat is more important than other portions, and no need for special management measures to protect any of the foraging habitat has been identified.

Therefore, the NMFS designates as critical habitat for the Hawaiian monk seal; all beach areas, including all beach crest vegetation to its deepest extent inland, lagoon waters, and ocean waters out to a depth of 10 fathoms around Kure Atoll, Midway Islands (except Sand Island and its harbor), Pearl and Hermes Reef, Lisianski Island, Laysan Island, Gardner Pinnacles, French Frigate Shoals, Necker Island, and Nihoa Island. Many of the habitat components such as beach areas, vegetation, nearshore shallow water areas, and offshore banks and shoals cannot be simply delineated as specific stretches of beach or specific offshore areas. Therefore, it is necessary to designate entire areas without piecemeal delineations. For example, monk seals use all of the beaches on Green Island at Kure as hauling areas and certain other areas for pupping areas. Additionally, the various sand spits and islets grow, shrink, disappear, change shape, and even change location. In some cases, new islets appear after storms or strong tide conditions. Therefore, references to beaches or beach areas should be assured to include all sand spits and islets.

If ongoing or future research or other new information indicates that habitat beyond 10 fathoms is essential and that special management considerations or protective measures may be needed to protect the habitat, the NMFS will initiate rulemaking to make the

appropriate changes in the critical habitat boundaries.

Effect of the Rulemaking

This action only directly affects Federal agencies. It does not affect State and local government activities or private actions which are not dependent on or limited by Federal authority, permits, or funds; however, many of the activities in the NWHI are subject to some Federal control and could potentially be affected. Section 7 requires Federal agencies to consult with the NMFS to ensure that any activity funded, authorized, or undertaken by them is not likely to jeopardize the continued existence of endangered species or result in the destruction or adverse modification of its critical habitat.

Currently, Federal agencies are required to consult on actions that may affect Hawaiian monk seals. The designation of critical habitat will require Federal agencies to evaluate their activities with respect to critical habitat and consult with the NMFS on any action which may affect critical habitat to ensure that it is not likely to result in the destruction or adverse modification of the critical habitat. In most situations consultation would be required even without a critical habitat designation because actions that affect critical habitat are also likely to affect the monk seal. Designating critical habitat will assist Federal agencies in evaluating the potential effects of their activities on monk seals or their critical habitat and in determining when consultation with the NMFS would be appropriate. The additional consultations that will be required are minimal. Therefore, the designation of critical habitat will not substantially add to the Federal agencies' responsibilities, and will not have any significant adverse economic impacts on State or private entities, including small businesses. The Federal agencies most likely to be affected by critical habitat designation include the U.S. Coast Guard, U.S. Navy, U.S. Fish and Wildlife Service (FWS), Western Pacific Regional Fishery Management Council, and the NMFS.

The final rule is not expected to have any direct impact on existing fisheries in the NWHI. The only direct economic costs will be those associated with more extensive monitoring of Federal activities by the NMFS and those from administrative actions by Federal activities resulting from reviews of their activities in the NWHI. The additional costs are expected to be minimal since Federal agencies would have had to conduct section 7 consultations for

activities that may affect Hawaiian monk seals and/or conform to National Environmental Policy Act (NEPA) requirements for actions that significantly affect the quality of the human environment.

Future activities which may require evaluation under section 7 of the ESA include (1) construction activities of the Coast Guard on Green Island at Kure Atoll, the Navy on Sand Island at Midway Islands, and the FWS on Tern Island at French Frigate Shoals; (2) habitat manipulation/enhancement by the FWS within the Hawaiian Islands National Wildlife Refuge; (3) deep ocean mining; (4) ocean dumping of wastes and chemicals; (5) Federally funded or regulated fishing activities; and (6) fisheries and wildlife research conducted, funded, supported, or controlled by Federal agencies in the NWHI.

Classification

For reasons discussed in *Effect of the Rulemaking* above, the NOAA Administrator has determined that this is not a major rule requiring a regulatory impact analysis under Executive Order 12291. The regulations are not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Further, the General Counsel of the Department of Commerce has certified that the final rule will not have a significant economic impact on a substantial number of small business entities as described in the Regulatory Flexibility Act; therefore, a regulatory flexibility analysis is not required. This rule does not contain a collection of information requirements for purposes of the Paperwork Reduction Act of 1980.

National Environmental Policy Act

This action is categorically excluded from the requirements to prepare an environmental assessment and environmental impact statement under NEPA by NOAA Directive 02-10 (49 FR 29644; July 23, 1984). This final rule will not have any adverse environmental consequences. However, since a DEIS and SEIS were prepared, the NMFS has elected to continue with the NEPA process. Accordingly, an FEIS has been prepared for this action and copies are

available upon request from the NMFS (see "For Further Information Contact" section for address).

Coastal Zone Management Consistency Statement

The Assistant Administrator for Fisheries, NOAA, determined that the designation of critical habitat for the Hawaiian monk seal is consistent with the approved State of Hawaii Coastal Zone Management Program.

The relevant Coastal Zone Management Objective is to "(p)rotect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems". State of Hawaii Coastal Zone Management Program and Federal Environmental Impact Statement (Hawaii Program; p. 37, HRS section 205 A-2(b)(4)). One of the supporting policies is to protect endangered species which includes the Hawaiian monk seal (Hawaii Program pp. 38-39, HRS Chapter 195D).

The purpose of designating critical habitat is to protect the area, a valuable coastal ecosystem, from disruption and adverse impacts. The ultimate purpose is to protect and conserve the monk seal. Therefore, the critical habitat designation is consistent with the approved Hawaii Coastal Zone Management Plan.

This determination was submitted to the State of Hawaii's Department of Planning and Economic Development for review under section 3.7 of the Coastal Zone Management Act. The State agency agreed with the consistency determination.

List of Subjects in 50 CFR Part 226

Endangered and threatened wildlife, Marine mammals.

Dated: April 24, 1986.

Carmen J. Blondin,

Assistant Administrator for Fisheries Resource Management, National Marine Fisheries Service.

PART 226—[AMENDED]

Accordingly, Part 226 of Chapter II of Title 50 of the Code of Federal Regulations is amended as set forth below.

1. The authority citation for Part 226 is revised to read as follows:

Authority: 16 U.S.C. 1533.

2. A new Subpart B is added to Part 226 to read as follows:

Subpart B—Critical Habitat for Marine Mammals**§ 226.11 Northwestern Hawaiian Islands.****Hawaiian Monk Seal***(Monachus schauinslandi)*

All beach areas, sand spits and islets, including all beach crest vegetation to its deepest extent inland, lagoon waters, inner reef waters, and ocean waters out to a depth of 10 fathoms around the following:

Kure Atoll (28°24' N., 178°20' W.)

Midway Islands, except Sand Island and its harbor (28°14' N., 177°22' W.)

Pearl and Hermes Reef (27°55' N., 175° W.)

Lisianski Island (26°04' N., 173°58' W.)

Laysan Island (25°46' N., 171°44' W.)

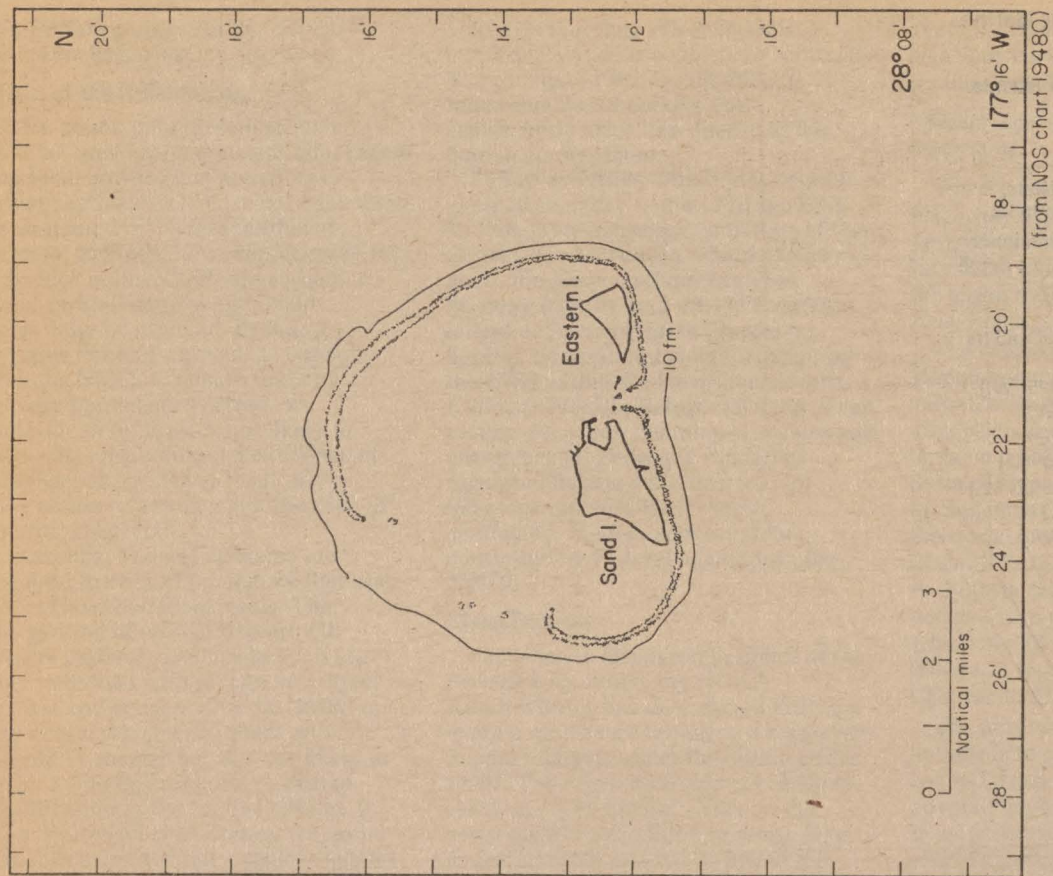
Gardner Pinnacles (25°00' N., 168°00' W.)

French Frigate Shoals (23°45' N., 166°00' W.)

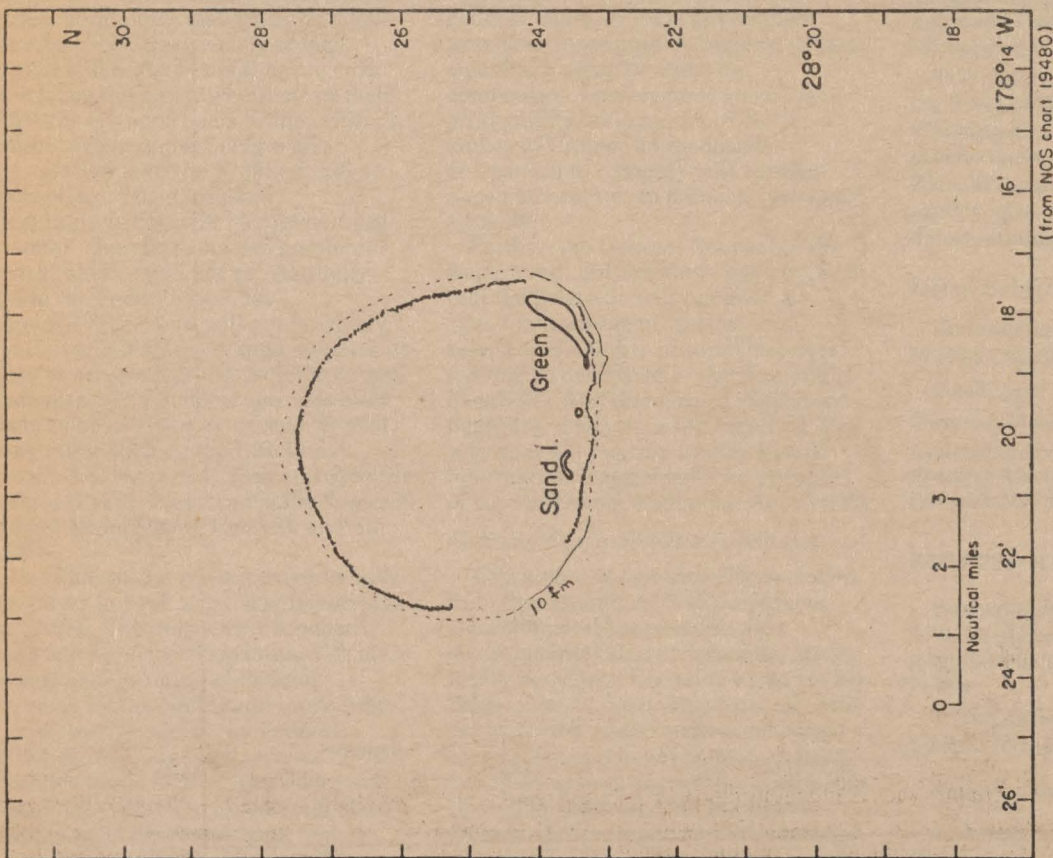
Necker Island (23°34' N., 164°42' W.)

Nihoa Island (23°03.5' N., 161°55.5' W.)

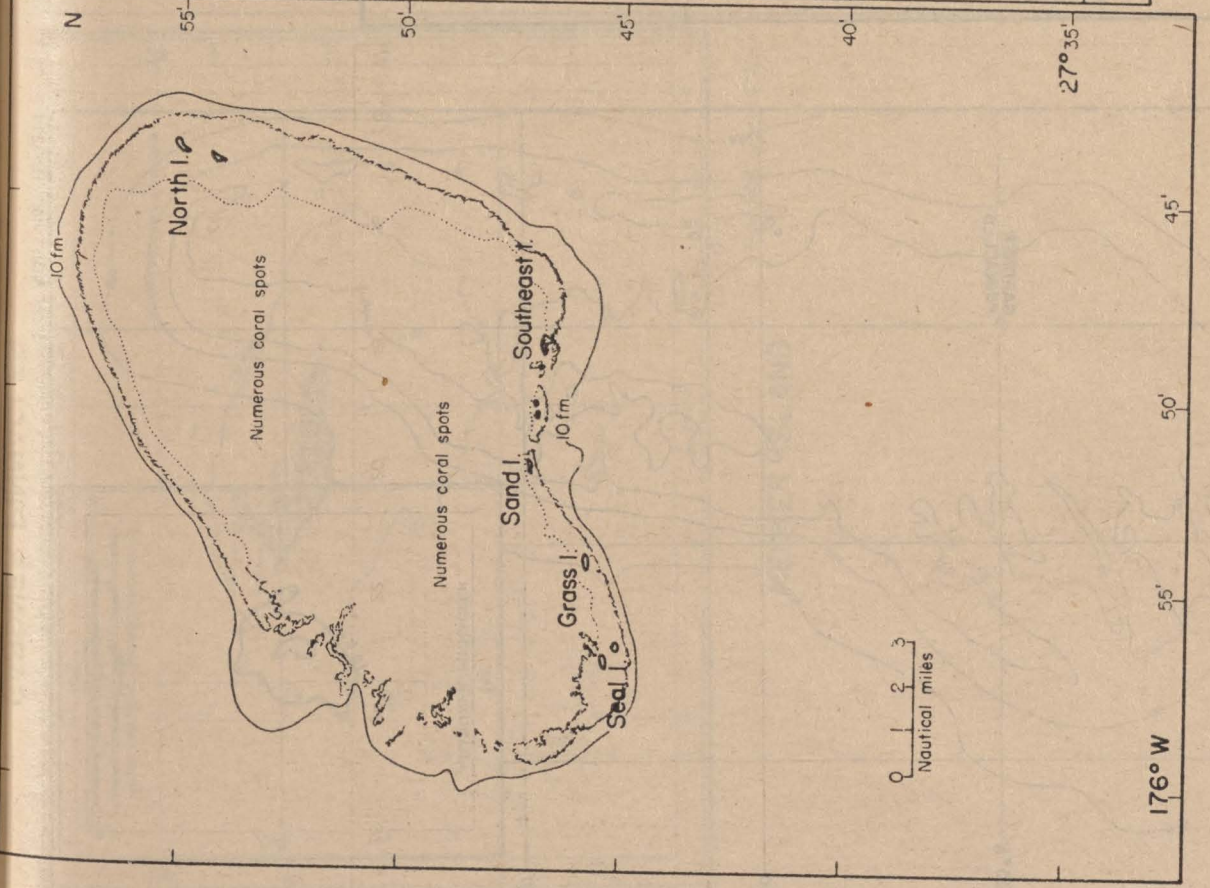
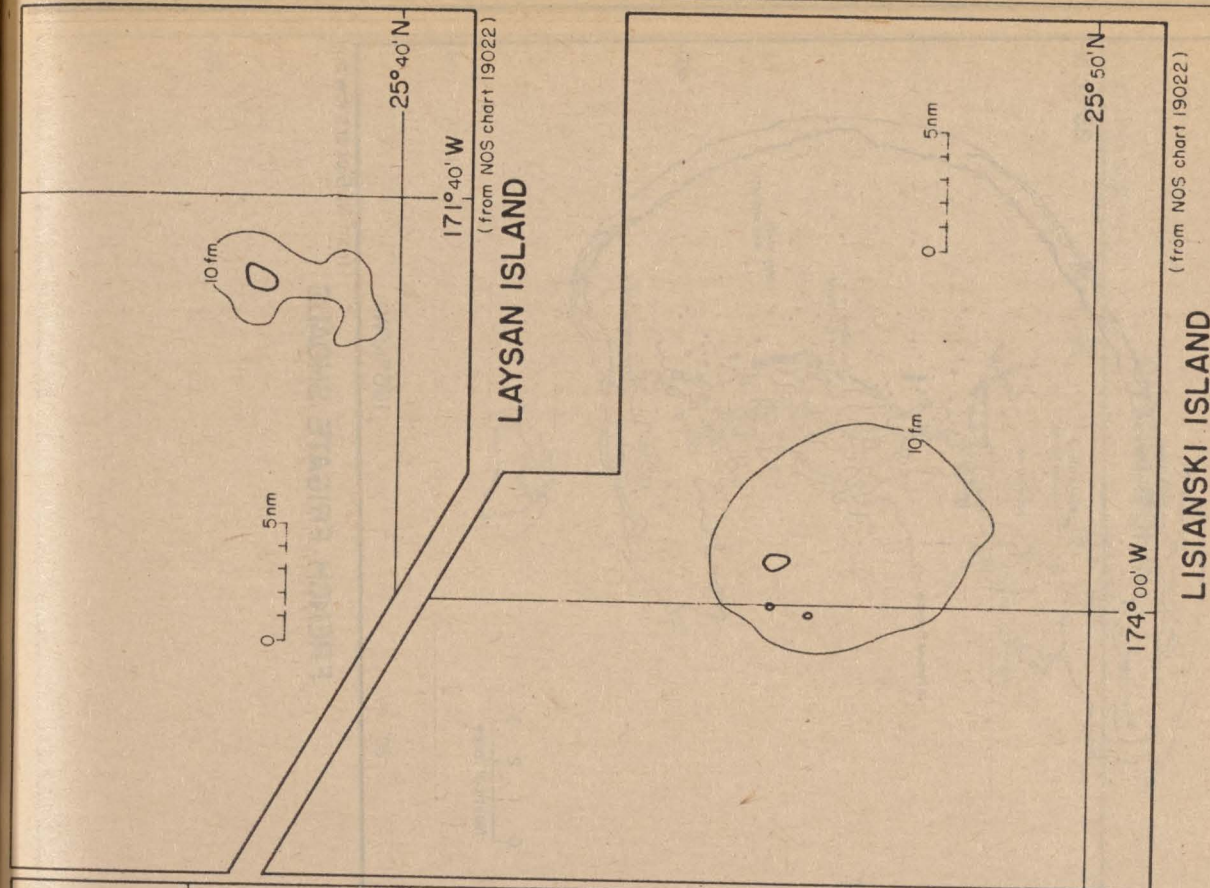
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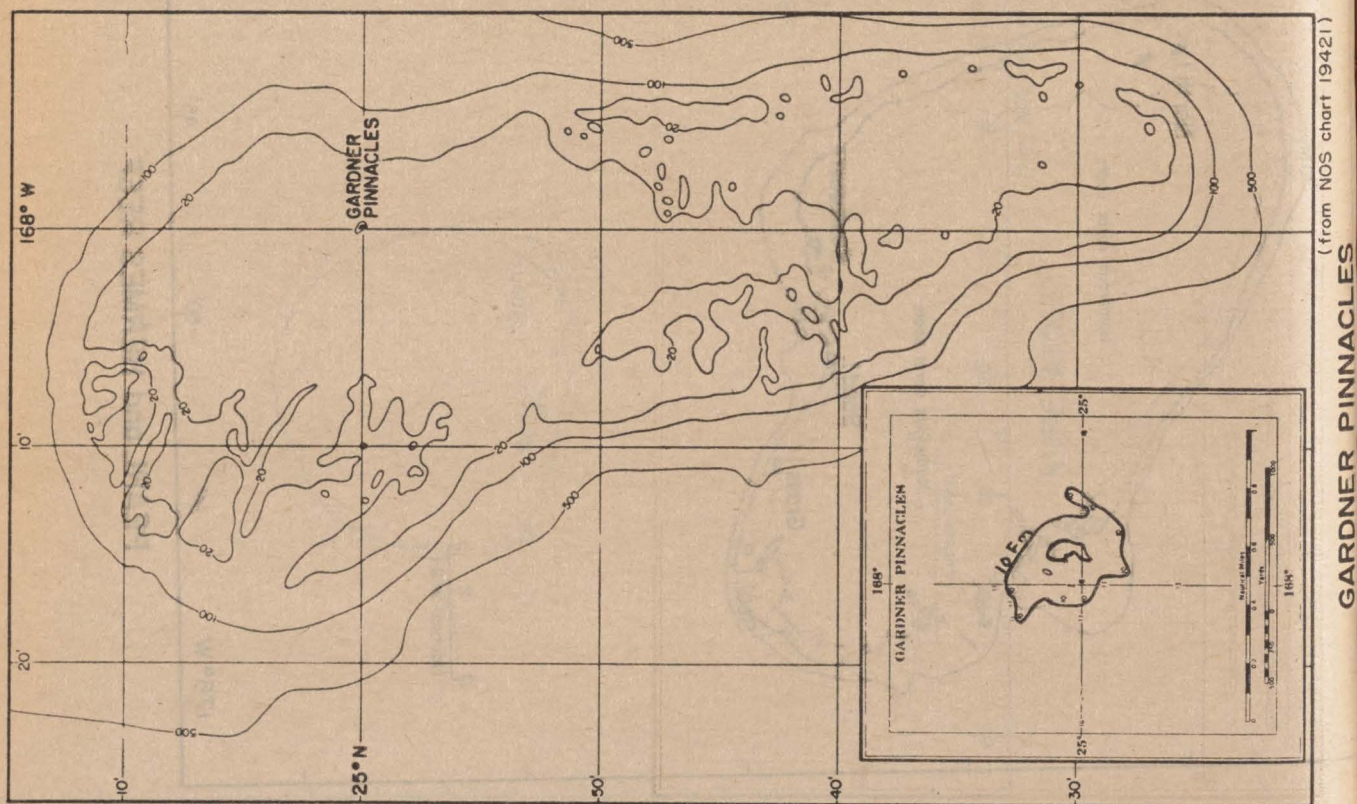
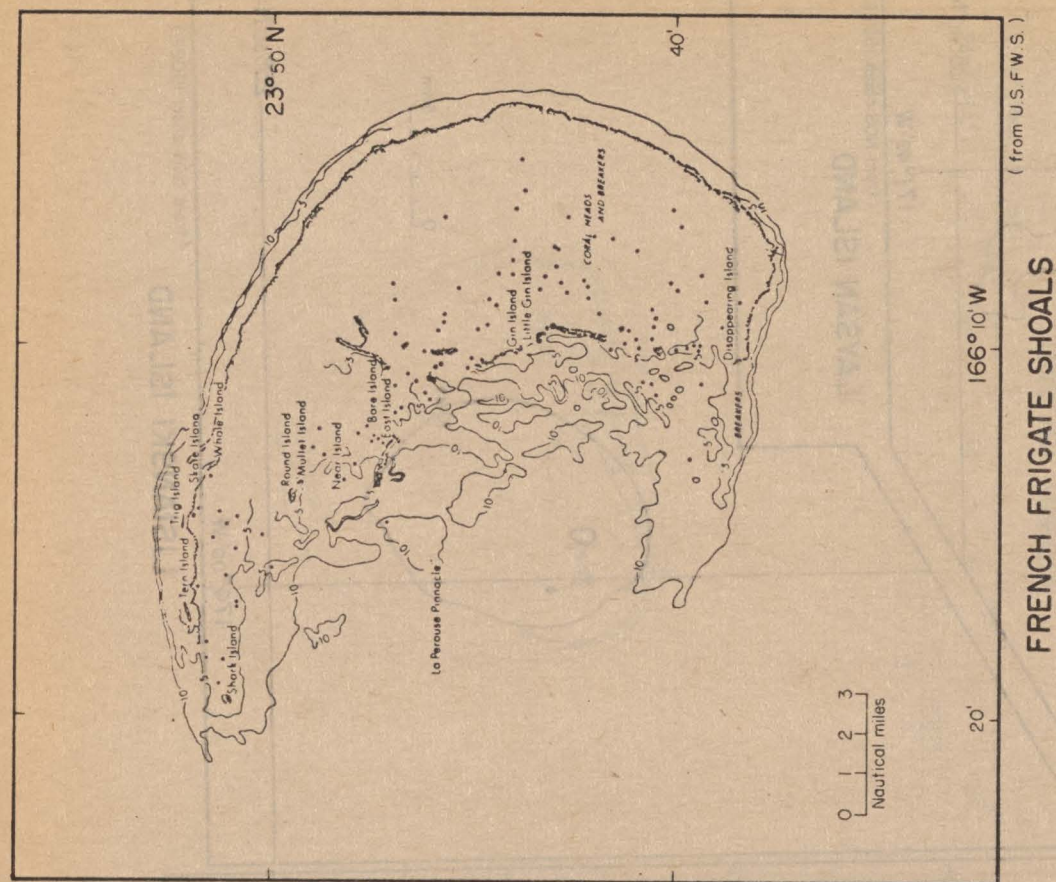


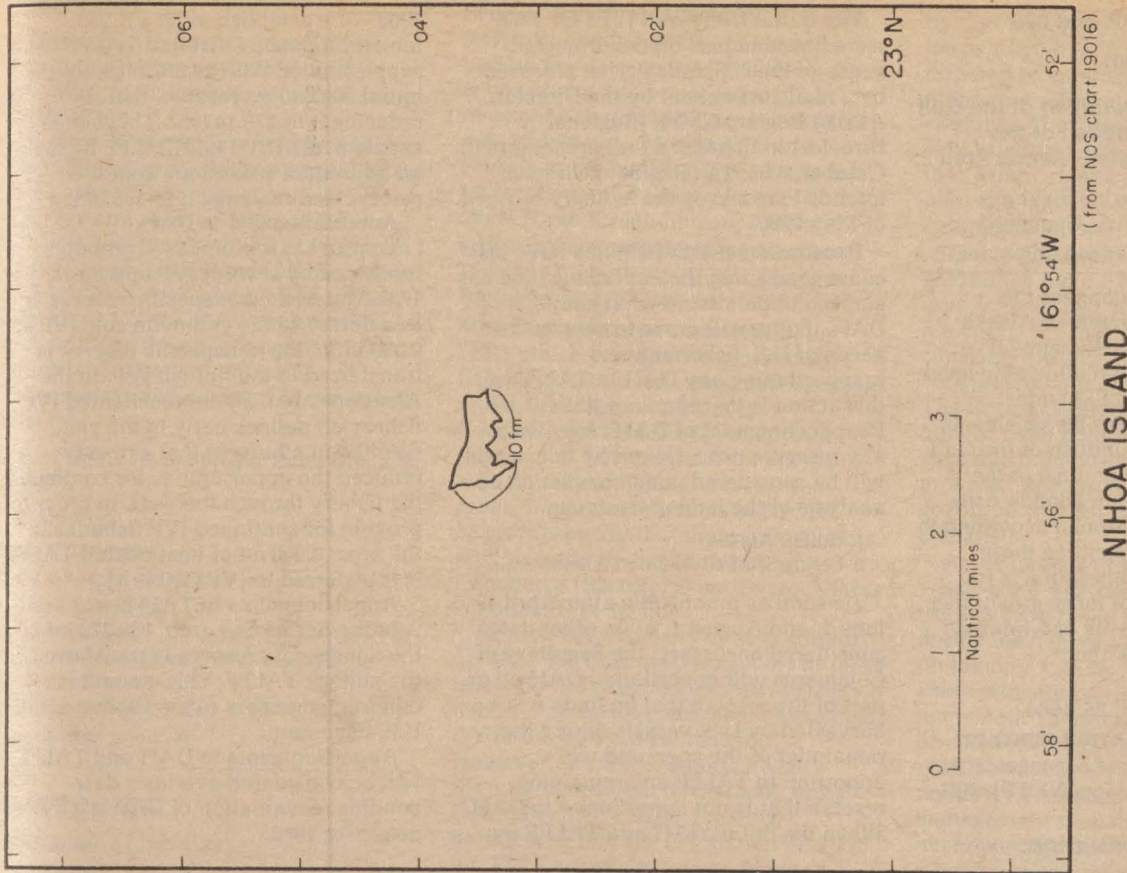
MIDWAY ISLANDS



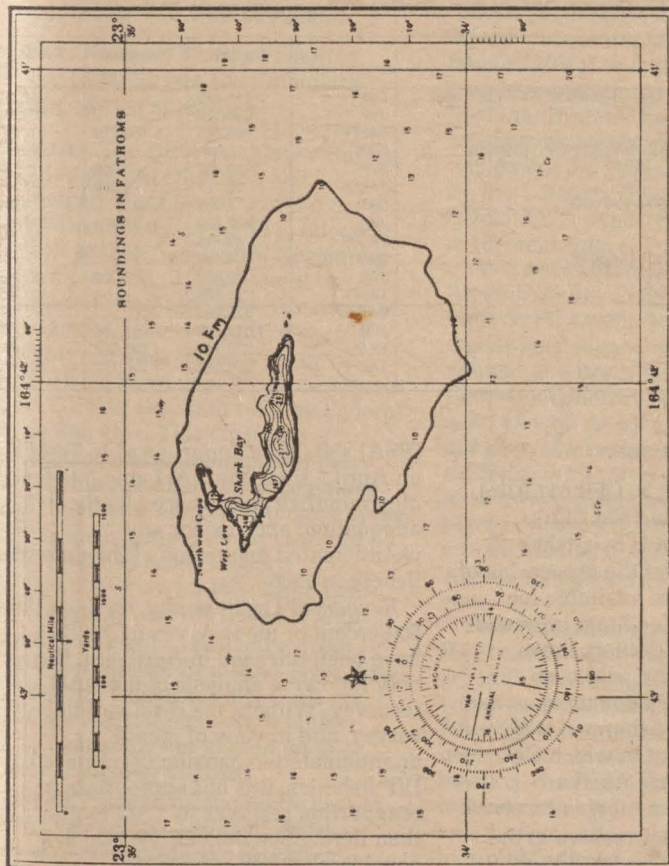
KURE ATOLL







NIHOA ISLAND



(from NOS chart 19016)

NECKER ISLAND