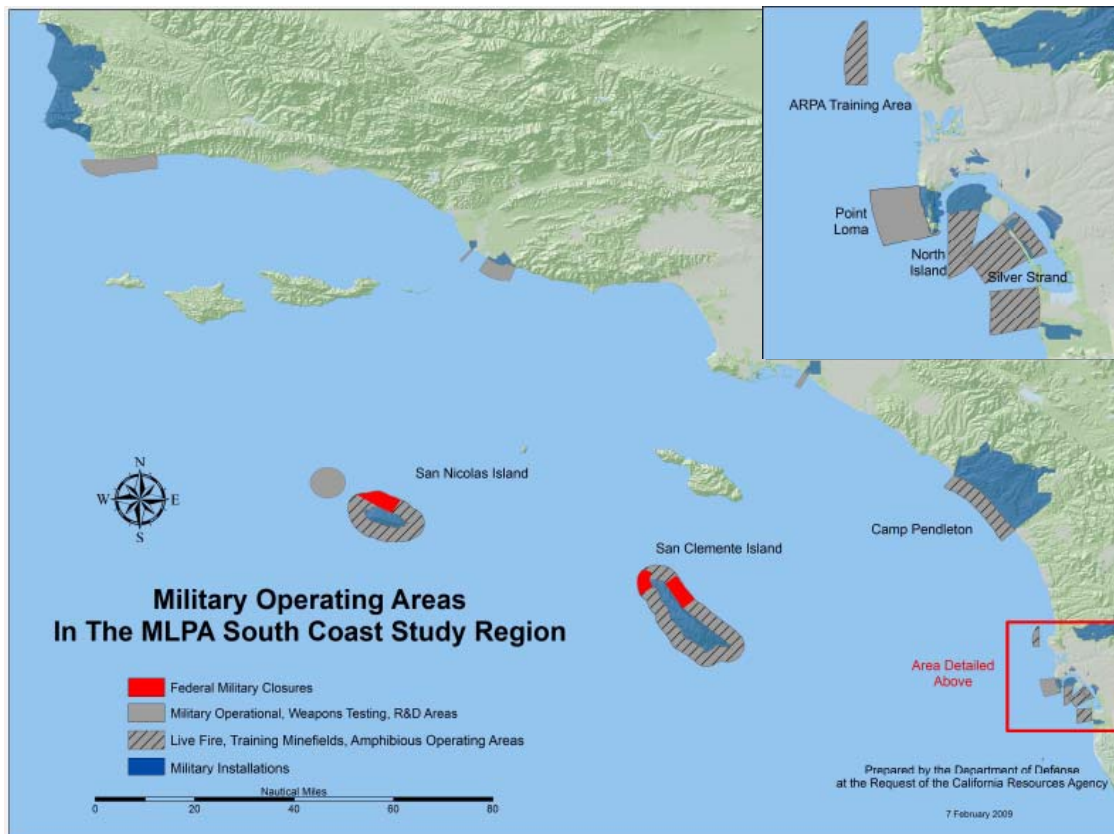


# *Memorandum on Pending Military Closures at San Clemente Island and San Nicolas Island*

Prepared by  
**J. Michael Harty**

**April 1, 2009**



**Supporting Materials**  
**Compiled by California MLPA Initiative Staff**



**HARTY** *Conflict Consulting & Mediation*



## HARTY *Conflict Consulting & Mediation*

To: MLPA Initiative Blue Ribbon Task Force  
Cc: Ken Wiseman, Executive Director  
From: J. Michael Harty  
Date: April 1, 2009  
Subject: *Memorandum on Pending Military Closures at San Clemente Island and San Nicolas Island*

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The attached memorandum addresses policy issues raised by the BRTF at its February 26, 2009 meeting regarding pending military closures at San Clemente and San Nicolas Islands and a Navy proposal that MPAs not be designated at those islands. The memorandum is accompanied by a binder with extensive supporting information. My understanding is that the issues addressed in the memorandum will be discussed at the next BRTF meeting scheduled for April 15-16.

I appreciate this opportunity to assist the Initiative and hope this document is useful for your deliberations. My recommendation is that any questions provoked by the memorandum be addressed to Ken Wiseman and the I Team.

**TABLE OF ACRONYMS USED IN THIS DOCUMENT**

<b>Acronym</b>	<b>Title</b>
ASBS	Areas of Special Biological Significance
BRTF	Blue Ribbon Task Force
CC	Central Coast (perhaps use CCSR)
CCC	California Coastal Commission
CINMS	Channel Islands National Marine Sanctuary
CDFG	California Department of Fish and Game
CRA	Cooperative Research Agreement
CWA	Clean Water Act
DEIS	Draft Environmental Impact Statement
DoD	Department of Defense
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FGC	Fish and Game Commission
INRMP	Integrated Natural Resources Management Plan
IT	Initiative Team
LOP	Level of Protection
MLPA	Marine Life Protection Act
MMPA	Marine Mammal Protection Act
MPA	Marine Protected Area
MOU	Memorandum of Understanding
NCCRSG	North Central Coast Regional Stakeholder Group
NEPA	National Environmental Protection Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
OPAREA	Operating Area
RCA	Rockfish Conservation Area
ROD	Record of Decision
SAT	Science Advisory Team
SCRSG	South Coast Regional Stakeholder Group
SCSR	South Coast Study Region
SMR	State Marine Reserve
SOCAL Range	Southern California Range Complex
SWRCB	State Water Resources Control Board
USACE	United States Army Corps of Engineers
USCG	United States Coast Guard
USN	United States Navy

## ***I. BACKGROUND SUMMARY AND PURPOSE***

The South Coast Study Region [SCSR] includes potentially valuable marine habitat at military use areas and pending closures on the mainland and offshore islands. The U.S. Navy [Navy] has proposed that the Initiative not designate Marine Protected Areas [MPAs] within three miles of San Clemente Island [SCI] and San Nicolas Island [SNI] due to the nature of critical military activities in those waters. The Navy further proposes that ecosystem benefits from three pending military closures [and other security zones] at these islands be evaluated as contributing to MLPA goals for the SCSR. The Navy's proposal raises a set of policy issues that have been addressed only partially in previous MLPA study regions. In particular, the Initiative has not previously evaluated the contribution from non-MPAs toward MLPA goals.

The BRTF received details on the Navy proposal at its February 26, 2009 meeting in a series of presentations:

- Initiative ED Ken Wiseman presented a set of slides entitled “Military Use Areas and Pending Military Closures—Policy Background.” [Tab 1]
- The Navy presented its proposed approach in a slide presentation entitled “San Clemente Island & San Nicolas Island Naval Restricted Areas.” [Tab 2]
- The Science Advisory Team [SAT] presented its preliminary analysis of Military Use Areas in the SCSR, including SCI and SNI. [Tab 3]
- Initiative Staff recommended potential actions for the South Coast Regional Stakeholder Group with regard to Military Use Areas and Pending Military Closures [Tab 4]

The timing of the Navy's proposal and SCRSG work in Round One to develop initial arrays led the BRTF to unanimously adopt the following interim guidance for the SCRSG at its February meeting:

*For the islands:*

- *Allow the SCRSG work groups to propose MPAs within military use areas at the islands in one of two “draft MPA arrays” within their work groups*
- *Direct the SCRSG work groups to include only pending military closures in the second of two “draft MPA arrays” within their work groups*
- *Resolve conflicts with military uses in later rounds*

The BRTF's guidance was essentially to design “with and without” the Navy's proposal in order to maximize flexibility for future decision making. The BRTF also issued interim policy guidance to the SAT to use a Very High Level of Protection [LOP] (analogous to a state marine reserve) in evaluating the pending military closures based on no future fishing activity.<sup>1</sup> Consistent with this guidance, the SCRSG (and external

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<sup>1</sup> Tab 4.

submitters) included the pending closures in multiple arrays and proposals for evaluation by the SAT. Military use areas at SCI other than the pending closures—such as the Shore Bombardment Area, or SHOBA—also are included in some, but not all, arrays and proposals.<sup>2</sup> The SAT will report back on its evaluations of Round One arrays and proposals at the April 15-16 BRTF meeting. The SCRSG is scheduled to meet again on April 28 to review Round One evaluations and work toward fewer arrays in Round Two.

The BRTF also requested a policy and legal analysis of issues raised by the Navy's proposal prior to its April 15-16 meeting and identified five topics. This memorandum is part of a response to that request; the BRTF will receive input on science, socioeconomics, and legal issues from other sources. This memorandum analyzes policy aspects of three questions listed below, with a narrow focus on pending closures at SCI and SNI. This analysis should also support decision making at other military use areas, e.g., on the mainland, in the SCSR.<sup>3</sup>

**Question One:** What areas around SCI and SNI, if any, are appropriate candidates for inclusion in an MPA network in terms of the MLPA and SCSR goals, objectives, and design criteria?

**Question Two:** How do current and future military activities at SCI and SNI impact their potential value as part of an MPA network?

**Question Three:** How well does the Navy's proposal address the State's interests related to MPA design and management, including enforcement, monitoring, research, and adaptive management?

The memorandum is structured as follows:

- Sections II and III provide background on two topics: Navy objections to designation of MPAs at SCI and SNI, and current and future military uses at SCI and SNI
- Section IV addresses policy aspects of the three framing questions presented above
- Section V discusses alternatives, and
- Section VI presents a set of recommendations.

The references to "Tabs" are for an accompanying binder that contains extensive supporting materials.

This document has been prepared through consultation, review, and coordination with members of Initiative staff, the "I Team," including the Executive Director. It does not include formal input from the Department of Fish and Game [CDFG], although CDFG staff assisted with the review process. Sean Hastings and Sara Townsend made

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<sup>2</sup> Tab 5.

<sup>3</sup> The "key questions" identified in an initial scoping memorandum to the BRTF dated March 13, 2009 are part of the analysis but are not an organizational tool.

significant research and review contributions that are greatly appreciated. Final choices about the contents of this memorandum are the responsibility of HCCM.

## ***II. NAVY OBJECTIONS TO DESIGNATION OF MPAS AT SCI AND SNI***

In 2004, Rear Adm. J. L. Betancourt sent a letter to then-BRTF Chair Phil Isenberg. In the letter the Navy withdrew a 2001 proposal to the California Fish and Game Commission [FGC] for designation of new MPAs off SCI and SNI.<sup>4</sup> According to the letter, the Navy's initial proposal for MPAs was "inconsistent with the long-term needs of DoD's national defense mission . . . DoD has already experienced an increase in training delays, with a resulting loss at San Clemente Island, from the recent implementation of MPAs in the Channel Islands." The letter stated that California's coastal waters are "critical to our national defense" and emphasized DoD's "strong concerns over any future designations that may impede the conduct of military missions."<sup>5</sup>

On April 4, 2007 RADM Hering sent a letter to Mr. Michael Flores, former President of the FGC, regarding the proposed State Marine Reserve off-shore of Vandenberg Air Force Base in the Central Coast study region. The letter referenced earlier concerns expressed by the Navy and offered to "work with you on the SMR establishment language to ensure that it does not subject DoD activities to state regulation or inadvertently restrict current or future military readiness activities." Admiral Hering went on to "reemphasize . . . that DoD is opposed to establishment of MPAs that adversely affect national defense considerations around San Clemente and San Nicolas Islands or the Camp Pendleton coast. These offshore waters are central features of a large network of land, air, and sea ranges that are absolutely vital to national security, including training, research, development, and testing and evaluation of weapons systems and sensors. Designation of any such MPA in these waters will create future operational constraints, which would compromise DoD's ability to carry out its national defense mission."<sup>6</sup>

At the February BRTF meeting, the Navy advised that its facilities at SCI and SNI, and its ability to use waters around those islands for operations, training, and testing, are "critical" to fulfilling the Navy's national defense mission. The Navy has made substantial investments in the two islands and has planned extensively around their future roles. According to the Navy, the prospect of state MPAs at the two islands creates risks for its ability to conduct mission-critical activities.

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<sup>4</sup> The 2001 letter proposing MPAs can be found at Tab 6 along with subsequent DoD correspondence.

<sup>5</sup> Tab 6.

<sup>6</sup> Tab 6. The FGC established a Vandenberg SMR and provided for a Memorandum of Understanding in the regulatory language. That MOU reportedly has been approved by DoD and is pending signature at CDFG. The MOU was not available for review during preparation of this memorandum.

The Navy has identified three general objections to MPAs that underlie its specific concerns related to SCI and SNI. The general objections are:

1. The existence of MPAs generally increases potential for efforts to restrict or regulate military activities even when an activity is exempted by regulations.
2. MPAs create public expectations about the types of activities occurring inside, in particular an impression that these areas are largely undisturbed when the reality is that military activity is ongoing.
3. It is important to maintain a distinction between MPAs created pursuant to the MLPA and 'Federal Restricted Areas and Proposed Safety Zones' created for military operational purposes through federal rulemaking by USCG or USACE.<sup>7</sup>

The Navy's specific objections to MPAs at SCI and SNI are:

- Importance of the SOCAL Range Complex and SCI: supports critical, one-of-a-kind *operational* activities. "Every Carrier Strike Group and Expeditionary Strike Group in the eastern Pacific trains on the San Clemente Island Range Complex prior to overseas deployment."<sup>8</sup>
- Importance of SNI: supports critical, one-of-a-kind *research* activities.
- *MPAs won't add protection*: existing offshore military closures at SCI [and the Safety Zones initiative with Coast Guard] accomplish the same or greater protection.<sup>9</sup>
- Could adversely affect critical military training and research activities.
- DoD has invested \$12 million dollars in completing federally mandated environmental laws and regulatory consultations; SCI and SNI are covered under NEPA and the Navy has fulfilled all applicable, federally mandated regulatory requirements.

The Navy's general and specific objections are addressed below.

### ***Attempts to regulate military activities***

The first general objection appears to be the most significant. The Navy advised the BRTF at its February meeting that "[t]here have been attempts to regulate military activities or seek court injunctions to prohibit the Navy from training in certain areas."<sup>10</sup> The Navy identified three examples of such attempts involving (1) Papahānaumokuākea Marine National Monument [PMNM] (formerly the Northwestern Hawaiian Islands Marine National Monument), (2) Channel Islands National Marine Sanctuary [CINMS], and (3) Olympic Coast National Marine Sanctuary [OCNMS]. These examples all involve federal monuments or sanctuaries. The Navy's concern is that establishing state MPAs at SCI and SNI could lead to the same types of challenges to Navy activities.

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<sup>7</sup> Tab 2. The Navy has not raised the high-profile example of its former range at Vieques, Puerto Rico, which received significant media and public attention over a complex set of issues. It is not known whether the factors that influenced the Navy's decision to end operations at Vieques are relevant for SCI and SNI.

<sup>8</sup> Navy comment on draft memorandum.

<sup>9</sup> Navy slide 19, Tab 2.

<sup>10</sup> Navy slide 19, Tab 2.

Initial research into the Navy examples confirms that the Navy has faced a series of challenges related to its operations despite federal regulatory language that generally exempts existing military activities, with certain limitations linked to compliance with other laws. Two of the examples [PMNM and CINMS] involve the complex, technical, and extended disagreement over potential impacts from the Navy's use of sonar, principally on marine mammals. This disagreement has spawned multiple lawsuits covering multiple operational locations, and recently resulted in a U.S. Supreme Court decision. In the third example, at OCNMS, an advisory council for the sanctuary raised objections in 2008 through the NEPA process to the Navy's proposal to significantly expand its training in the Pacific Northwest Range inside the sanctuary. It is not clear what impact the advisory council's objections ultimately may have on mission-critical Navy operations as no Record of Decision has been issued.

The Navy does not appear to be opposed in principle to state MPAs, and even offered a proposal in 2001 as part of early MLPA implementation efforts.<sup>11</sup> The Santa Barbara Island state and federal marine reserves (located in the SOCAL Range Complex) are not included in the list of examples referenced above. Other northern Channel Islands reserves (Footprint State and Federal MR, Gull Island State and Federal SMR) are in the Point Mugu Sea Range. The Navy did not comment on either the state or federal regulatory actions establishing these reserves.<sup>12</sup> The Navy has not asserted to date that the Initiative, and the State, lack authority under the MLPA to designate MPAs around SCI and SNI. The Navy's clear position is that CDFG and the FGC lack authority under the MLPA to regulate military activities.<sup>13</sup>

The Navy asserts that its mission-critical activities have been restricted despite regulations designed to limit or prevent such restrictions, and sees creation of state MPAs at SCI and SNI as opening the door to similar restrictions. The Navy is the appropriate entity to make judgments about national defense requirements. There is no doubt that the Navy's use of sonar has been the subject of extensive external *efforts* to impose restrictions to protect marine mammals [and other species including humans]. The practical, operational impact of these efforts on the Navy is not known. *Apart from the complex context of sonar, however, a clear example of critical Navy activities being restricted due to a state or federal MPA has not been identified for this memorandum. As*

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<sup>11</sup> See 2001 Navy letter at Tab 6.

<sup>12</sup> As part of its accuracy review of portions of this memorandum the Navy provided a clarification: "These were all in areas where no specific Navy activities took place, so the Navy did not raise an issue with those designations."

<sup>13</sup> Navy slide 19, additional Navy input. While this memorandum does not address legal issues raised by the Navy proposal, the following language in *Title 14 Calif. Code of Regulations, Section 632, Marine Protected Areas (MPAs), Marine Managed Areas (MMAs), and Special Closures*, may be relevant here as well as for that analysis: "Nothing in this section expressly or implicitly precludes, restricts or requires modification of current or future uses of the waters identified as marine protected areas, special closures, or the lands or waters adjacent to these designated areas by the Department of Defense, its allies or agents."



*a next step, it may be useful to explore the potential for sonar to become an issue at SCI and SNI.*<sup>14</sup>

### ***Potential for public misunderstanding***

A second general objection offered by the Navy for resisting MPAs is that they create public expectations about the types of activities occurring inside, in particular an impression that these areas are largely undisturbed when the reality is that military activity is ongoing. This risks undermining the goal of building public support for MPA networks. Apart from the Vandenberg SMR, the Initiative has not faced the issue of military impacts occurring inside state MPAs, and it appears such impacts are minimal at Vandenberg based on conversations with Initiative staff. The issue of the appropriate designation for a state MPA with significant military activity and impacts (e.g., SMR? SMCA? Other?) has not been directly addressed. *The Navy's point merits consideration, particularly once the BRTF receives input from the SAT on its evaluation of potential impacts from military activities.*

### ***Maintaining a distinction between MPAs and military areas***

A third general Navy objection is that it is important to maintain a distinction between MPAs created pursuant to the MLPA and 'Federal Restricted Areas and Proposed Safety Zones' created for military operational purposes through federal rulemaking by USCG or USACE.<sup>15</sup> This objection is related to concerns discussed above about public perceptions and expectations and, ultimately, efforts to limit military activities, according to the Navy.

### ***No additional environmental benefit***

The specific Navy objection that designating MPAs at SCI and SNI will not provide any additional environmental benefit is critical. It appears to rest on the Navy's position that the State, namely CDFG and the FGC, cannot regulate military activities in areas designated as MPAs. The State has significant interests in long-term management of its MPA network, including enforcement, research and monitoring, and adaptive management. The Navy appears increasingly appreciative of these interests, but its ability to accommodate them is unknown at this time. State interests related to management are discussed further in Section IV below.

A complete review of the Navy's regulatory relationship with California is beyond the scope of the memorandum. However, it appears the Navy is subject to the State's water

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<sup>14</sup> The Navy received detailed comments on the SOCAL Range DEIS on the subject of sonar from environmental advocacy organizations and the California Coastal Commission [CCC]. These can be reviewed online at the EIS web site.

<sup>15</sup> Navy slide 19, Tab 2.

quality regulatory process according to the SWRCB and an initial review of documents. The waters around SCI and SNI (including Begg Rock) are Areas of Special Biological Significance, or ASBS, designated pursuant to the California Ocean Plan.<sup>16</sup> The Navy operates under a general industrial storm water NPDES permit for runoff at SNI. The Navy reportedly has not taken that position that its industrial and storm water discharges affecting ocean water quality cannot be regulated by the State, but rather has taken steps to comply with state requirements.<sup>17</sup>

### ***III. CURRENT AND FUTURE MILITARY USES AT SAN CLEMENTE ISLAND AND SAN NICOLAS ISLAND***

#### ***SCI: Current Uses***

SCI was transferred to the Secretary of the Navy by President Franklin D. Roosevelt in 1934 for dedicated “naval purposes.”<sup>18</sup> SCI is a “federally owned property” that is restricted to military activities, but “many ocean areas around the island are accessible to the public for recreational and commercial purposes.”<sup>19</sup>

“A component part of the SOCAL Range Complex, SCI is composed of existing land ranges and training areas that are integral to training of Pacific Fleet air, surface, and subsurface units; 1<sup>st</sup> Marine Expeditionary Force (I MEF) units; NSW units; and selected formal schools. SCI provides instrumented ranges, operating areas, and associated facilities to conduct and evaluate a wide range of exercises within the scope of naval warfare. SCI also provides range areas and services to RDT&E activities.<sup>20</sup> Over 20 Navy and Marine Corps commands conduct training and testing activities in the SCI. Due

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<sup>16</sup> “Since 1983, the Ocean Plan has prohibited waste discharges to ASBS (State Water Board 1983). Similar to previous versions of the Ocean Plan, the 2005 Ocean Plan (State Water Board 2005) states: “Waste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.” The concept of “special biological significance” recognizes that certain biological communities, because of their value or fragility, deserve very special protection that consists of preservation and maintenance of natural water quality conditions. This is entirely consistent with the State Water Board’s mission to “preserve, enhance and restore the quality of California’s water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.” SWRCB, Status Report, Areas of Special Biological Significance, 2006, at 58.

<sup>17</sup> It may be argued that the State’s Ocean Plan is required under the Clean Water Act, and that the Navy is ultimately complying with federal law, but that discussion is beyond the scope of this memorandum. The Navy’s relationship with the SWRCB should be addressed directly with the SWRCB if details are important for BRTF decision making. For example, there reportedly is a possibility that the State Board will soon consider granting “permission” to the Navy for certain activities as long as there are appropriate limits.

<sup>18</sup> Executive Order 6897, November 7, 1934. Information provided by Navy.

<sup>19</sup> Navy document entitled “Southern California Range Complex, Public Access and Safety around San Clemente Island.” The description of military and non-military uses in this section is taken directly from Navy documents.

<sup>20</sup> Research, Development, Testing & Evaluation.

to its unique capabilities, SCI supports multiple training activities from every Navy Primary Mission Area (PMAR), and provides critical training resources for Expeditionary Strike Group (ESG), Carrier Strike Group (CSG), and Marine Expeditionary Unit (MEU) certification exercises. SCI land ranges are described in Tables 2-3 and 2-4 and depicted in Figures 2-4 and 2-5.”<sup>21</sup>

“Due to San Clemente Island’s (SCI’s) remote location, nearshore recreation in its vicinity is usually limited to military personnel and contractors stationed at SCI. Chartered and privately operated boats occasionally enter the nearshore areas of SCI for tourism and recreation. SCI’s relatively warm waters, good underwater visibility, and largely pristine diving conditions make it a popular destination. A review of scuba diving charter advertisements shows dive trips scheduled as often as weekly by some operators. Most dive charters are scheduled for weekends. Diving occurs year-round, though the number of trips to SCI appears to peak during lobster season (October to March). Navy hazardous activities in the nearshore waters of SCI include airborne mine-laying training with wholly inert mine shapes, underwater demolition training, naval gunfire at targets in the Shore Bombardment Area (SHOBA), and air-to-surface munitions delivery in SHOBA.

Several exclusive use, security, and danger zones have been established around SCI (Figure 3.16-1, Table 3.16-1). These coastal areas are identified and described in 33 Code of Federal Regulations (C.F.R.) Parts 110, 165, and 334 as being restricted to naval vessels only or as presenting a hazard to mariners. The security zone, restricted anchorage, and restricted area around Wilson Cove are continuously restricted and regularly monitored. Other designated zones are not continuously restricted. When not in use by the Navy, these areas are accessible by boaters, divers, and fisherman, with nearshore anchorages available. NOTMARs and NOTAMs are issued about the hazards of operating vessels or aircraft in the vicinity of SCI.”<sup>22</sup>

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<sup>21</sup> SOCAL EIS at 2-2.

<sup>22</sup> SOCAL EIS §3.16. A NOTMAR is a Notice to Mariners.

**Table 3.16-1: San Clemente Island Exclusive Use, Security, and Danger Zones**

Area	Description	Public Use
<b>Wilson Cove</b>		
Exclusive Use Zone (33 C.F.R. 110.218)	Located immediately offshore of Wilson Cove and used extensively by Navy ships for anchorage adjacent to the port facilities at Wilson Cove.	Anchoring is restricted to Navy vessels.
Security Zone (33 C.F.R. 165.1131)	Extends to the northeast from Wilson Cove for approximately 2 nm (4 km) from the coast and to the southeast for approximately 3 nm (6 nm) along the coast.	Entry prohibited except for Navy vessels, vessels authorized by the Navy, and emergencies.
Southeast Restricted Area (33 C.F.R. 334.920)	Covers the ocean areas near Naval Ordnance Test Station (NOTS) Pier and extends offshore for about 2 nm (4 km).	
<b>West Cove</b>		
Restricted Area (33 C.F.R. 334.921)	Extends to sea approximately 5 nm (9 km) to the southwest from the West Cove area, over the area where the underwater cables are laid to the acoustic sensors on the Southern California Anti-submarine Warfare (ASW) Range (SOAR).	When not in use by the Navy, available for public boating, diving, and fishing. No anchorage allowed in the West Cove restricted area. The public is informed of danger zone activities through the SCI website, NOTMARs, and NOTAMs.
Danger Zone (33 C.F.R. 334.960)	An approximately 1 nm by 3 nm (2 km by 6 km) rectangle for intermittent firing events, located 0.5 nm (0.9 km) offshore south of West Cove.	
<b>Other</b>		
Northwest Danger Zone (33 C.F.R. 334.961)	Extensive firing and demolition activities occur in this zone, located approximately 3 nm (6 km) off the northwestern end of SCI.	
SHOBA Danger Zone (33 C.F.R. 334.950)	Activities include naval gunfire, air-to-ground munitions delivery, and laser employment. Covers the entire southern third of SCI on both coasts.	

NOTES: nm - nautical miles, km - kilometer, C.F.R. - Code of Federal Regulations.

See diagram at Tab 7.

According to the Navy, “[b]ecause access restrictions to fishing areas are brief (usually from two to six hours for most Navy operations), Navy operations are not considered to significantly affect the economic well being of commercial fishermen, recreationists, or other users of the waters around [SCI].”<sup>23</sup>

Commercial logbook and landings receipt data show the following for SCI and SNI fishing activity:<sup>24</sup>

<sup>23</sup> SOCAL EIS §3.16

<sup>24</sup> See South Coast Regional Profile, Maps, 5.4-1.

	<b>San Clemente Island</b>	<b>San Nicolas Island</b>
“High Landings” [based on top two of five categories of quantities]	Spiny Lobster; Red Urchin; Spot Prawn	Nearshore Rockfish and Cabezon; CA Sheephead; Red Urchin; Spot Prawn
Other Landings	Sardines; Mackerel and Anchovy; Nearshore Rockfish and Cabezon; CA Sheephead; Sharks and Skates; Swordfish White Seabass; Dover Sole, Thornyhead, and Sablefish; Pacific Bonito; Ridgeback Prawn; Squid	Sharks and Skates Swordfish White Seabass Dover Sole, Thornyhead, and Sablefish Pacific Bonito Spiny Lobster

Rod and reel sport fishing also occurs around the islands, as well as scuba diving for spiny lobster and scallops, and spear fishing for rockfish, sheephead, and swordfish.<sup>25</sup>

The Navy encourages the public to visit [www.scisland.org](http://www.scisland.org) for information about access.

***Military Activities in Pending Closures***

Appendix A of the SOCAL Range Complex EIS provides the most definitive description of military activities within the SOCAL Range Complex, including SCI, according to Navy.<sup>26</sup> Review of Appendix A indicates that its descriptions rarely are linked directly to SCI. The following is a summary of SCI military activity prepared by the Navy in response to BRTF requests.

- SWAT 1 Safety Zone off Northwest San Clemente Island is primarily used by Naval Special Warfare (NSW) as part of a one-of-a-kind training complex using small arms fire with land based targets. The Military Operations in Urban Terrain (MOUT) and small arms training ranges provide critical, unparalleled training to SEAL teams across the country in support of the United States’ Global War on Terror. Other activities include small craft over-the-beach activities with live fire at land based targets, as well as live-fire Basic Training Sites for Naval Special Warfare Center’s BUD/S Third Phase training objectives.
  - Note: BUD/S refers to Basic Underwater Demolition/Seal
- Wilson Cove Security/Safety Zone off East San Clemente Island is also used by Naval Special Warfare as a safety zone for land-based small arms fire, is a critical underwater Research, Development, and Testing area, and supports underwater

<sup>25</sup> Pt. Mugu Sea Range EIS at §3.10.2.4, Recreational Activities.

<sup>26</sup> <http://www.socalrangecomplexeis.com/Documents/Appendix%20A%20Training%20and%20RDTandE%20Descriptions.pdf>

missile launches. Other activities include ship-radiated noise measurements and sonobuoy quality assurance tests.

SWAT 1 and Wilson Cove, along with the Alpha Restricted Area at SNI [see below], are the “pending closures” covered by the Navy proposal to the BRTF.

### ***Military Activities Outside Pending Closures***

Other military activities at SCI from the same Navy summary that are not part of the pending closures:

- *Special Warfare and Training [SWAT] Area 2 [adjacent to SWAT 1 Safety Zone pending closure].* SWAT 2 is an underwater explosives range, supporting underwater detonations up to 500 lbs. While the Navy employs comprehensive mitigation measures to avoid affecting marine mammals and sea turtles during the underwater activities, the marine ecosystem, including kelp, fish and invertebrates, are exposed to the over-pressure generated by these large underwater detonations. Given its proximity to land-based support facilities and distance from sensitive, in-water communication and tracking systems, SWAT 2 has uniquely supported underwater detonations training for over 40 years, and will continue to support this training for many years to come [ref: SOCAL EIS/OEIS, 2009].
- SHOBA (Shore Bombardment Area) Danger Zone around the southern portion of SCI includes: large ship shelling, mine laying, NSW ship-to-ship and ship-to-shore live-fire operations, permanent shallow water minefield for mine countermeasure neutralization training, underwater detonations, live-fire over-the-beach insertions/extractions, danger zone for Naval Surface Fire Support training (large 5-inch shells), over-the-beach live-fire exercises for U.S. Marine Corps Expeditionary Fighting Vehicle training (tracked vehicles), Expeditionary Fires Exercises, Military Operations Specialist mortar firing exercises, instrumented Shallow Water Training Range, and Research, Development, Test and Evaluation (RDT&E) activities [ref: SOCAL EIS/OEIS, 2009].<sup>27</sup>

A summary table of current military activity at SCI (and SNI) can be found at Tab 8.

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<sup>27</sup> According to the existing regulations, unexploded ordinance exists within the SHOBA, including waters surrounding SCI. 33 CFR §334.950(2).

### ***SCI: Future Military Activity***

The SOCAL Range Complex EIS analyzed two alternatives in addition to the current level of military activities. The current level of activity is substantial, as described above for marine areas, although specific time periods and levels of intensity for different activities have not been investigated for this memorandum. The preferred alternative, Alternative Two, was selected in the Record of Decision. The Navy eliminated from detailed analysis alternatives based on temporal, seasonal, or geographic constraints on activity.<sup>28</sup>

Alternative 1 would maintain current operations and support an increase in training operations including major range events and force structure changes associated with introduction of new weapons systems, vessels, and aircraft into the Fleet. The increased training operations include “*a battalion-sized amphibious landing and additional amphibious training events at SCI,*” according to the EIS. Alternative 2 would include all elements of Alternative 1 plus increased levels of current training operations and certain range enhancements including a shallow water minefield. Alternative 2 is the preferred alternative, because it would “optimize the training capability of the SOCAL Range Complex.”

According to the EIS, under Alternative 2 there will be “no significant impacts to birds or sea turtles, no long-term impacts to marine plants or invertebrates, no long-term changes to species abundance or diversity, no loss or degradation of sensitive habitats.”<sup>29</sup> The EIS also identified mitigation measures for the marine environment. The Point Mugu EIS provides a similar level of information regarding impacts for SNI. By its own admission the Navy did not disclose classified information about military activities, but advised the BRTF at the February 26 meeting that EIS conclusions about impacts included those classified activities.

The EIS analysis of socioeconomic impacts concluded that no significant short or long-term impacts are expected from implementing Alternative 2. Here is the explanation from the ROD:

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<sup>28</sup> EIS at 2-17. Here is language from the RoD: “In developing a reasonable range of alternatives, the Navy eliminated four alternatives from further consideration: (1) alternative locations for training conducted in the SOCAL Range Complex; (2) reduction or elimination of training in the SOCAL Range Complex; (3) temporal or geographic constraints on use of the SOCAL Range Complex; and (4) computer simulation in lieu of live training (including active sonar). The Navy eliminated these alternatives based on careful consideration, concluding that these alternatives were unreasonable because none would meet the Navy’s purpose and need for the proposed action.” [Page 10]

<sup>29</sup> Navy slide 15, Tab 2. In its comments on the DEIS, CDFG pointed out that the DEIS concluded the proposed action would have “significant adverse impacts to marine resources and habitats” and that mitigation measures were required to reduce impacts. In the FEIS, “many marine resources have been addressed with mitigation measures that may help. However, additional potential impacts to marine resources should be addressed.” CDFG comments Page 1, available in FEIS at 10-92.

“To help manage competing demands and maintain public access in the SOCAL OPAREAs, the Navy conducts its offshore operations in a manner that minimizes restrictions to commercial fisherman. Temporary range clearance procedures for safety purposes have minimal and short-term adverse effects on economic or recreational activities such as fishing, shipping, tourism, diving, boating, and surfing. The Navy has performed military operations within this region in the past and has only temporarily limited fishing or recreational uses in the SOCAL OPAREAs. When range clearance is required it is posted on the Navy’s official SCI public website ([www.scisland.org](http://www.scisland.org)), and the public is notified via a notice to mariners. These measures provide mariners advance notification of Navy use areas, which allow non-participants to select an alternate destination without appreciable affect to their activities. Upon completion of training, the range would be reopened and fishermen would be able to return to fish in the previously closed area. No new mitigation measures have been identified.”

### ***SCI: Navy Proposal***

The Navy’s proposal would not result in any MPA designations in waters around SCI but would, in the Navy’s view, yield benefits consistent with MLPA goals. *The Navy’s pending closures and safety zones are designed primarily to achieve operational and public safety objectives; any contribution to MLPA goals would be incidental.* Details of the Navy proposal include:

- The Navy intends to change its current system of designations for waters around SCI. Under the new system the entire island will be surrounded by Safety Zones. Two of the safety zones, at SWAT 1 and Wilson Cove, will be closed at all times. These are described by the Navy as “pending closures.”<sup>30</sup>
- No fishing will be permitted in SWAT 1 and Wilson Cove, either military or non-military.
- The new Safety Zones around SCI will be established through notice and comment in the Federal Register. The zones will be established and enforced by the US Coast Guard.<sup>31</sup>
- The Navy identified multiple options for enforcement of the Safety Zones: USCG, Navy, and an MOU with the LA County Sheriff’s Department.<sup>32</sup> This relationship reportedly is being memorialized in an MOU, currently in draft form and not available to Initiative staff. CDFG is not included as an enforcement partner in the internal draft MOU.
- The two permanently closed areas at SWAT 1 and Wilson Cove would not be designated as State MPAs. No MPAs would be designated in other Safety Zones.

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<sup>30</sup> Shaded areas in Navy slide 9. A safety zone is defined as “a water area, shore area, or water and shore area to which, for safety or environmental purposes, access is limited to authorized persons, vehicles, or vessels.” 33 CFR §165.20.

<sup>31</sup> See 33 CFR 165.20.

<sup>32</sup> Navy slide 11, Tab 2.



- The Navy will provide “excellent environmental management” made possible by the SOCAL EIS, INRMP, and CRAs.<sup>33</sup> This includes mitigation for the marine environment such as a long term near shore monitoring program for fish.<sup>34</sup>
- The Navy also points out that waters around SCI are designated as an Area of Special Biological Significance, or ASBS, pursuant to the State’s Ocean Plan. The Navy’s approach to water quality regulation by the State is discussed above.
- The permanently closed areas (along with Alpha Restricted Area at SNI) would meet MLPA Goals 1, 2, and 4.<sup>35</sup> They would be protective of marine resources, and are very large areas that would satisfy MLPA design criteria.<sup>36</sup>

The Navy proposal for SCI would result in the following changes in public use from the current situation based on an initial review:

- SWAT 1: Currently is available for public boating, fishing, and diving when not used by Navy. This area no longer would be available for public use.
- Wilson Cove: Much of this area is already closed to the public. Currently available for public transit in some portions. This availability would be lost.

The Navy’s approach to research and monitoring has evolved during the preparation of this memorandum. The following is the most recent Navy view, provided in the form of comments on a draft of portions of this document:

“Research and monitoring is routinely done around SCI and SNI under the existing Cooperative Research Agreement (CRA) process; and DoD has provided several examples of these standard agreements. Navy personnel routinely provides assistance to the researchers and schedules access to areas under these CRAs so that it is done safely and does not interfere with classified or hazardous operations. To facilitate a new CRA for MLPA monitoring, DoD has requested more detailed information on the estimated number of days needed for monitoring and a detailed list of what information the State collects in existing MPAs.

*DoD is already gathering extensive marine ecosystem data around SCI and San Nicolas in accordance with existing regulatory compliance requirements and under Cooperative Research Agreements (CRAs). In a spirit of cooperation, DoD is collecting the existing CRAs and would be willing to share this information to limit the number of days needed for monitoring and associated expense.” [Emphasis supplied]*

In its comments the Navy appears to be recommending a CRA as the appropriate vehicle to address research and monitoring interests; in a telephone conversation that preceded its

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<sup>33</sup> Navy slide 6, Tab 2.

<sup>34</sup> Navy slide 15. Tab 2. CDFG recommended fish monitoring due to potential impacts from increased detonations in its comments on the DEIS.

<sup>35</sup> Navy slide 20. Tab 2.

<sup>36</sup> Navy slide 20. Information in this section is drawn from Navy sources and does not reflect IT analysis.

written comments a “Vandenberg-type MOU” option was rejected. The Navy proposal currently lacks detail about how an “agreement” for SCI would be worked out and what terms an agreement would include. There is no further information about addressing the State’s enforcement interests.<sup>37</sup>

***SNI: Current and Future Uses***

SNI is owned to the high tide line by the Navy and operated under the command of the Naval Air Warfare Center Weapons Division Pt. Mugu Sea Range.<sup>38</sup>

“The Point Mugu Sea Range provides safe, highly instrumented, air and sea space in which controlled tests and operational training missions are conducted. The Point Mugu Sea Range is used by U.S. and allied military services to test and evaluate weapon systems associated with air warfare, missiles and missile subsystems, aircraft weapons integration, and airborne electronic warfare systems to provide realistic training opportunities and to maintain the operational readiness of these forces. This test and evaluation process is critical to successful assessment, safe operation, and improvement of the capabilities of current and future Naval weapon systems.”<sup>39</sup>

Existing regulations designate a Naval Restricted Area within three nautical miles of SNI, with three sections: Alpha, Bravo, Charlie. These regulations have been in existence since 1965.<sup>40</sup>

- The regulations *prohibit* dredging, dragging, seining, anchoring or other fishing operations inside the Alpha Restricted Zone at all times.
- The regulations *allow* dredging, dragging, seining or other fishing operations inside Bravo and Charlie Restricted Zones subject to closures by the Navy.
- Boats must remain 300 yards offshore from SNI at all times.

Alpha Restricted Area *currently* is used for missile and aircraft overflights. West San Nicolas Island and Begg Rock currently are used for live missile overflights, missile intercepts, launches, and aircraft overflights.<sup>41</sup>

Alpha Restricted Area is “*proposed* to be used for missile impacts and laser testing and training operations.” West San Nicolas Island and Begg Rock also are proposed to be used for “missile impacts and laser testing and training operations”<sup>42</sup>

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<sup>37</sup> Various precedents for addressing state interests are discussed in detail in Section IV.

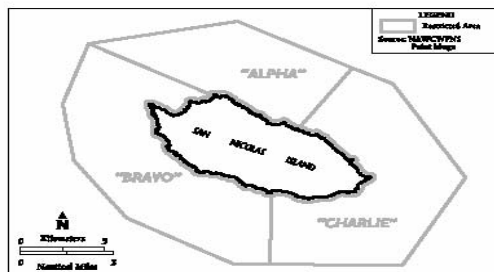
<sup>38</sup> It is worth noting that the commander for SNI is different from the commander for SCI, although IT staff understands that both commanders ultimately report to the same senior officer.

<sup>39</sup> SNI INRMP 2005, Tab 12.

<sup>40</sup> Tab 9. 33 CFR §334.980.

<sup>41</sup> The Point Mugu FEIS provides information on activities at SNI but is no longer available on the Web. The IT acquired a copy on March 25, 2009 and are continuing a review. The Navy reports a copy has been provided to CDFG.

<sup>42</sup> Navy information.



Surface Restricted Areas at San Nicolas Island

The BRTF heard at its February 26 meeting about interest in commercial fishing at San Nicolas, although specific locations were not mentioned. Navy has not consistently enforced the regulatory restriction on fishing and anchoring in the Alpha Restricted Area. According to the Navy, “Area Alpha . . . has been enforced intermittently due to military requirements. The main purpose of this closure is to ensure no conflicts between fishing activities and military operations.” IT staff understand that the commercial fishing prohibition was enforced in the 1960’s and 1970’s, but that enforcement effectively ended in the 1980s. Currently there is no fishing enforcement except when military operations require clearing the Alpha Restricted Area.

CDFG has primary responsibility for enforcement of fishing laws and regulations on SNI.<sup>43</sup> IT staff understand that CDFG patrols the SNI restricted areas but there are no details about frequency of either vessel or aerial presence. This memorandum does not include direct input from CDFG about its patrol or enforcement activities.

### *SNI: Navy Proposal*

The Navy proposal for SNI would include the following changes:

- Similar to the proposal for SCI, no MPAs would be designated within three miles of SNI.
- Differs from SCI proposal in that new Safety Zones are not being designated.
- Shift to consistent enforcement of existing regulations for Alpha Restricted Area with support from the Coast Guard
- No military fishing, enforced by military police
- No regulatory change or new regulatory action is required according to Navy.
- Enforcement proposal from the Navy: “Once the MLPA process is finalized, the Navy would request the Coast Guard permanently enforce Alpha and military police would contact the CG if a violation is observed from shore. The Navy would also

<sup>43</sup> SNI INRMP 2005. See excerpts at Tab 12.

voluntarily restrict military fishing from shore in this area and military police would enforce that restriction in accordance with base orders.” [Navy information]

- Research, monitoring, adaptive management: assumed to be similar to SCI for purposes of this memorandum. The different command structure and activities at SNI may offer an opportunity for a different approach but this should not be assumed at this time.

#### ***IV. POLICY IMPLICATIONS FOR MPA NETWORK DESIGN AND MANAGEMENT FROM NAVY PENDING CLOSURES PROPOSAL***

The Navy’s proposal brings three broad policy questions into focus:

**Question One:** What areas around SCI and SNI, if any, are appropriate candidates for inclusion in an MPA network in terms of the MLPA and SCSR goals, objectives, and design criteria?

This question is primarily being addressed by the SCRSG and SAT. The SAT provided an initial report to the BRTF in its “DRAFT Analysis of Military Use Areas in the MLPA South Coast Study Region” document dated February 23, 2009.<sup>44</sup> The BRTF will receive a report from the SAT on its evaluation of Round One arrays and external proposals during its April 15-16 meeting. The BRTF also will receive a report from Ecotrust regarding potential socioeconomic impacts at the same meeting.

**Question Two:** How do current and future military activities at SCI and SNI impact their potential value as part of an MPA network?

The Navy has proposed that the three pending closures contribute to MLPA goals for the SCSR. These contributions would include (1) “no fishing” in the pending closures, and (2) other habitat and species benefits in the pending closures and safety zones. The extensive level of military activity at SCI and SNI raises important questions about how that activity would impact contribution to an MPA network. Precedents for this type of evaluation are discussed below.

**Question Three:** How well does the Navy’s proposal address the State’s interests related to MPA design and management, including enforcement, monitoring, research, and adaptive management?

The Navy’s proposal raises an important set of new issues for the Initiative related to overall network design and adaptive management. The Initiative has not previously included benefits from non-MPAs in evaluating contributions to MLPA goals. The Initiative also has not addressed a proposal identical to the Navy’s involving extensive military interests and activities. These issues are discussed below.

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<sup>44</sup> Tab 3.

### ***Evaluating Impacts of Military Activities in Pending Closures and Safety Zones***

In its initial analysis the SAT concluded that: “[t]he military use areas on [SNI and SCI] are particularly important to meeting MLPA objectives within the West Channel Islands and East Channel Islands Bioregions.” The two islands offer key habitat and unique biological communities, and are potentially significant based on modeling for their connection to other locations in the SCSR, including the mainland.<sup>45</sup> The SAT recommended these areas be evaluated in the context of alternative SCRSG proposals for the entire SCSR, and that they be viewed as part of an overall network. The SAT did not address the issue of impacts associated with military activity in its initial analysis.

The Navy uses SCI and SNI extensively for a wide range of activities deemed “critical,” as explained above. Some of these activities have the potential to impact marine species and habitat and affect their contribution to MLPA goals in the SCSR.<sup>46</sup> The SOCAL EIS and ROD concluded that, with mitigation measures, there would no significant impacts from its preferred alternative that includes SCI. The Point Mugu EIS contains similar conclusions for its analysis that includes SNI. These analyses, while potentially useful, did not focus on key issues of MPA network performance. It is important that the SAT address these issues as part of decision making for the SCSR.

The Initiative has not previously been faced with the need to evaluate potential impacts from military activities of the same type and intensity as those occurring at SCI and SNI.<sup>47</sup> The Initiative has evaluated potential impacts from different levels of fishing activity in proposed MPAs using a methodology developed by the SAT called Level of Protection, or LOP. The SAT also has developed a methodology for evaluating impacts associated with water quality for the SCSR. An approach similar to the water quality methodology appears better suited to evaluating military impacts; both tools are discussed below.

#### **Level of Protection**

SAT has developed a methodology to evaluate the impacts of regulated extractive activities, i.e., fishing, on their contribution to MLPA goals. The SAT evaluates “permissiveness” within the MPA and assigns a corresponding Level of Protection, or LOP. According to the SAT: “The level of protection (LOP) concept is simple: the more permissive an MPA, the lower its LOP. Permissiveness, as used here, means the degree to which the MPA’s regulations permit impacts to habitat or community structure. If a

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<sup>45</sup> SAT DRAFT Analysis, February 23, 2009, at 14-15. Tab 3.

<sup>46</sup> Examples include underwater demolition, missile impacts and launches, use of sonar, live fire, and amphibious exercises. The National Marine Fisheries Service [NMFS] has issued incidental take permits to the Navy for both SCI and SNI pursuant to the Marine Mammal Protection Act. See footnote 60.

<sup>47</sup> The Vandenberg SMR established in the Central Coast study region involved an existing state reserve and military activity that occurred primarily on land.

proposed MPA permits activities having high impact on habitat or community structure, then that MPA is said to have a low LOP. An MPA which permitted no human activity at all would on the other hand be said to have a high LOP.” The SAT uses this LOP to facilitate comparisons among proposed MPAs, using the following scale: Very High, High, Moderate-High, Moderate-Low, Low.<sup>48</sup>

The SAT assignment of LOP focuses narrowly on fishing (or “extractive”) activities and does not include every activity that may result in “take” of marine species. This focus is based on policy guidance from the Initiative staff that links (1) FGC authority to regulate fishing activity within an MPA and (2) activities that each regional stakeholder group can propose to allow or disallow within an MPA. The SAT methodology is tailored to this narrow regulatory context and has not been used to evaluate non-fishing activity in other study regions.<sup>49</sup>

In interim guidance to SAT at its February 26 meeting, BRTF directed the SAT to use a “very high” LOP for pending military closures, based on that the Navy’s advice that there would be no fishing activity in the pending closures at SCI and SNI. The BRTF further directed the SAT to evaluate MPAs based on proposed allowed uses and not on military activities that may occur. This guidance was a “placeholder” pending further review of issues in this memorandum and possible development of tools for evaluating impacts from military activities.

There has been at least one suggestion that the SAT use LOP, or a variant, to evaluate impacts from military activities. This approach would expand LOP from its current, narrow focus. It also would address activity that the FGC lacks authority to regulate and that the SCRS is not authorized to either allow or disallow. LOP is one tool available to the Initiative to evaluate protectiveness, but it is not the only available tool, as discussed below.

Finally, the public may not understand the narrow purpose of the LOP designation and may have a general expectation that a Very High LOP means there are no activities that could result in take of marine species or harm valuable habitat. This misperception could be exacerbated for military activities.

### **SAT Water Quality Guidance for SCSR**

The SAT is developing water quality guidance to support MPA design in the SCSR. The guidance includes examples of three “water quality concern areas:”

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<sup>48</sup> Tab 10.

<sup>49</sup> SAT evaluations that rely on LOP include analyses of habitat representation, habitat replication, and MPA size and spacing. SAT evaluations that do not utilize LOPs, but instead reference proposed fishing activities directly, include analysis of benefits to marine birds and mammals, bioeconomic modeling, and analysis of potential impacts to commercial and recreational fisheries.

1. Cooling water intake sites for power plants,
2. Municipal sewage or industrial outfalls, and
3. Pollutants from large industrial or developed watersheds.

The guidance also identifies “opportunity areas” such as State Water Quality Protection Areas, including ASBS. In general terms, the SAT is proposing to score MPA proposals based on whether they include water quality concern areas [minus] and opportunity areas [plus]. The water quality analysis would supplement the formal SAT evaluation process for proposed MPAs.

There is interest among SAT members in developing a methodology to evaluate the potential effects of current and future military activities in pending military closures and proposed MPAs in the SCRS. The water quality approach, which focuses on a specific, non-fishing activity, offers a flexible model that appears better suited to the current context than LOP.<sup>50</sup> The SAT has not performed an evaluation or supplemental analysis of military activity impacts for Round One MPA arrays and proposals, although this topic is under discussion with the IT. Key issues likely will include:

- potential methods and criteria for such an evaluation, i.e., how to differentiate levels of impact on shoreline, sea bed, water, and species
- process and timing to develop and apply a methodology in light of SCSR schedule, and
- significance of limited information about military activities

### **“No fishing” and “take”**

It is not clear whether “no fishing” in the three pending closures means “no take.”<sup>51</sup> The Navy’s description of future military activities around SCI anticipates fish mortality due to detonations, and CDFG raised this issue in its comments on the DEIS: “fish species that are “sensitive” . . . could be significantly impacted from increased detonations. . . The Department does not concur with the DEIS conclusion of no significant impacts and no proposed mitigation measures.”<sup>52</sup> To the extent there are detonations in the closed areas, there is a potential for fish mortality. The Navy’s position is that the State cannot regulate such mortality, even if it meets the State’s definition of take. Consequently it is not clear at this time what the overall benefit of “no fishing” will be for MLPA goals. An analysis by Ecotrust of fishing effort may shed further light on what value “no fishing” restrictions in the pending closures will actually provide.<sup>53</sup>

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<sup>50</sup> The evaluation process for the Vandenberg SMR may provide a useful precedent.

<sup>51</sup> CA Fish and Game Code Section 86 defines “take” as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill.

<sup>52</sup> CDFG comments on EIS Page 2 of 7, included in FEIS at 10-93.

<sup>53</sup> The Initiative has designated MPAs that include a range of activities including kelp harvesting, dredging, and waterfowl hunting. The SMR designation, which does not allow “take,” has not been used where these activities are conducted. Instead, the SMCA designation typically has been used. As one example, CDFG provided guidance to the Initiative regarding commercial kelp harvesting in a January 24, 2006

*Conclusion: The Initiative should evaluate both the potential contribution of SCI and SNI to MLPA goals [Question One] and the potential impacts on that contribution of current and future military activities [Question Two]. While the Navy claims such a contribution under their proposal, independent evaluation by the SAT of these claims would increase the credibility of a BRTF decision that likely will receive significant scrutiny. Initiative staff have provided guidance in prior study regions as well as the SCSR that limits use of LOP to activities regulated by the FGC. The BRTF is the appropriate entity within the Initiative to make any recommendations about changing the narrow focus of LOP. On balance, a customized methodology along the lines of the water quality approach appears better suited to evaluating military impacts than a methodology that extends the LOP tool beyond its intended purpose and previous use. Using a customized methodology also limits the potential for public confusion over the LOP terminology.*

### ***The Navy's Proposal and State Interests in MPA Network Design and Management***

The Navy's proposal raises an additional set of issues covered by Question Three, above.<sup>54</sup> In broad terms, the state has obvious interests in being able to exercise jurisdiction under state law, including the MLPA, to effectively enforce and adaptively manage its MPA network. Long-term management activities include research and monitoring and will require access. In previous study regions the State has addressed these interests by designating MPAs and relying on its legal authority under the MLPA and related state law. The Navy's proposal presents a set of inter-related questions for the State about whether its interests can be addressed *without* designating state MPAs.<sup>55</sup>

### **Approach to non-MPAs in previous MLPA study regions**

The Initiative has encountered areas with potentially suitable habitat that are restricted in their uses or closed to access in previous study regions. These areas have not contributed to MLPA goals unless designated as a state MPA. It does not appear that this policy was

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memorandum entitled "MLPA provisions related to state marine reserves and commercial kelp harvesting." According to the memorandum, kelp harvesting is an extractive activity prohibited in SMRs that do not allow "take." The existence of commercial kelp beds must be considered in establishing an MPA network. Fish and Game Code §2857(d). The FGC issues kelp bed leases, and CDFG recommended that the FGC address issues related to these leases in the context of specific proposed MPAs. The status of this recommendation was not confirmed with CDFG for this memorandum.

<sup>54</sup> State interests related to the exercise of jurisdiction consistent with authority in state waters will be addressed in the separate legal memorandum being prepared for the BRTF.

<sup>55</sup> In particular, the Navy's proposal is that species and habitat protections associated with "no fishing" enforcement in three pending military closures be part of the Initiative's evaluation of an MPA network for the SCSR. It appears that ecosystem protection from other Safety Zones around SCI also could be included in MPA network evaluations under this approach, i.e., no MPA designations, although fishing may be allowed.



established in a single Initiative document but rather in discrete decisions. These are discussed below, beginning with fisheries management.

*Fisheries Management Areas.* The Initiative faced the issue of ecosystem protections from fishery management areas contributing to MLPA goals in the NCC study region. CDFG prepared a memorandum for the BRTF and NCCRSR entitled “Existing fishing regulations and statutes related to the development of alternative marine protected area proposals for the Marine Life Protection Act,” dated July 2, 2007.<sup>56</sup> The memorandum identified reasons why including protections from fisheries management areas, such as the Rockfish Conservation Areas [RCAs] established by NOAA Fisheries pursuant to recommendations by the Pacific Fisheries Management Council, would be problematic, unless they were designated as MPAs. One reason is fisheries management involves temporal as well as spatial restrictions, with the potential for regulations and boundaries to be changed on a year-to-year basis, or even during a year. A second reason is that fisheries designations in the past have been based not on MLPA goals and objectives, but on species-specific management needs. A third reason is the lack of jurisdictional control by the FGC and CDFG in federally managed fishery areas.

CDFG recommended that, rather than count benefits from non-MPAs in fisheries management areas, the Initiative “incorporate portions of areas such as the RCA into specific proposed MPAs as appropriate.” This approach would “achieve a long-term/permanent degree of protection” as well as minimize negative socio-economic impacts. This recommendation established a precedent for including ecosystem benefits from fishery management areas where a state MPA is also designated.

*Diablo Canyon Power Plant Security Zone.* During the Central Coast process the Initiative addressed a proposal [Package 1] to designate all or a portion of the security zone around the Diablo Canyon Nuclear Plant as a SMCA with a High LOP.<sup>57</sup> Some documents indicate this proposed SMCA was included in evaluation of the network alternative. The Commission did not ultimately designate the SMCA. Initial review of documents suggests concern on the part of the SAT about fish mortality associated with intakes for the power plant, but the extent to which this concern may have influenced the Commission’s decision is not known. However, proposing a SMCA that contributes to MLPA goals appears consistent with the approach described above for fisheries management areas in the NCC.

*Adjacent MPAs.* The Initiative has designated MPAs adjacent to closed areas. Such closures serve a variety of purposes, including the ability to “leverage” existing fisheries and other closures into MPAs that maximize scientific goals, and opportunities for

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<sup>56</sup> Tab 11.

<sup>57</sup> There is a 2,000 yard radius security zone established by the Coast Guard. 33 CFR §165.1155. The Commission’s boundaries for the Point Buchon SMR appear to include a small portion of the security zone.

comparisons of the effects of different levels of activity. The Point Buchon SMR, which appears to overlap slightly with the Diablo Canyon security zone, is one example.

The Navy's proposal that the pending military closures at SCI and SNI contribute to MLPA goals is inconsistent with precedents for the CC and NCC based on research to this point. Breaking from past precedents might create support among commercial and recreational fishing interests in the SCSR, but potentially would lead to criticism about fairness from fishing interests impacted by prior decisions.<sup>58</sup> Treating non-MPA benefits as contributions would raise questions about whether those benefits are being realized if the State does not have adequate "control" over management activities such as enforcement, research, and monitoring, either directly or through negotiated agreements. It would also raise questions about how the State would ensure the overall functioning of its MPA network if assumed benefits were not available due to military activities.<sup>59</sup>

*Uniqueness.* If the Navy proposal is "unique" in its approach to permanence and control there may be less likelihood of it becoming a precedent. As noted above in Section III, the Navy is pursuing designation of Safety Zones around all of SCI that would close SWAT 1 and Wilson Cove to public use including fishing. The Safety Zones would be codified as federal regulations using Coast Guard authority, and would go through a notice and comment process including publication in the Federal Register. At SNI federal regulations to prevent fishing already exist, although they have not been consistently enforced. It could be argued that these federal regulations afford a greater assurance that ecosystem benefits will be "permanent" than the assurance associated with fishery management areas that have a significant temporal component.<sup>60</sup> They may also provide at least as much assurance of permanence as MPAs established through the MLPA process, which are subject to review by the Commission on a five-year schedule.

The issue of control is more challenging. The ability of the State to exercise effective jurisdictional "control" in the pending closures for purposes of the MLPA is unclear at this time:

- The Navy has insisted that the State lacks authority to regulate military activities in these Safety Zones, presumably including activities that impact the marine ecosystem.
- CDFG reportedly patrols around SCI and SNI at this time based on informal conversations and language in the SNI INRMP. The Navy proposal does not include CDFG in an enforcement role, but rather points to the Navy, USCG, and possibly LA County Sheriff's Department for enforcement for SCI.
- To the extent control means the ability to conduct research and monitoring, and adaptively manage toward MLPA goals, the Navy proposal lacks details and is open

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<sup>58</sup> CDFG likely will have useful views on this issue.

<sup>59</sup> For example, would it be necessary to develop explicit contingency plans in advance of establishing a network component that relied on benefits from non-MPAs?

<sup>60</sup> The nature of regulatory "permanence" was raised at the February BRTF meeting. The Navy described its safety zones, and their benefits, as "permanent" because they will be codified under federal law. Navy slide 20, Tab 2.

to a range of interpretations. The Navy cites the existence of INRMPs at SCI and SNI, and CRAs, as examples of its commitment to natural resource stewardship. The Navy also has inquired about specific numbers of days required for research, monitoring, and related management activities. It is not clear whether these activities can be pre-determined or scheduled and satisfy other MLPA management objectives.

### ***Other State Interests***

The Navy's proposal highlights additional state interests discussed below:

*Enforcement:* CDFG relies on cooperative partnerships with other law enforcement agencies to satisfy the demands it faces in California. The CDFG has a solid cooperative partnership with USCG similar to the Navy's, and it is not clear that the enforcement benefit identified in the Navy proposal is greater than what exists or could be established.

*Monitoring and research:* The ability to monitor a military closure that excludes fishing provides an opportunity to better understand and define the nature and degree of impacts attributed to military operations. DoD is a potential option for partnership and even funding of MPA network-related monitoring and research. Fish monitoring is one example cited earlier in this memorandum. The State faces significant challenges in funding monitoring and research to support adaptive management of its MPA network.

*Public support for MPAs:* The State has a strong interest in building and maintaining public support for MPAs in the SCSR, including support from stakeholders. The Navy suggests that MPA designation where military activities are "taking" fish or otherwise impacting the ecosystem may undermine such support. It is not clear whether the option of using MPA designations other than SMRs, such as SMCAs, might mitigate this risk.

### ***Potential Navy Management Models***

The Navy sees itself as a responsible environmental steward. It points to the \$12 million spent on compliance with NEPA and other environmental laws for the SOCAL EIS, which includes future mitigation measures. The Navy holds Incidental Harassment Authorizations through NMFS for its activities at SCI and SNI.<sup>61</sup> The Navy also points out that waters around SCI and SNI are ASBSs that require steps to protect water quality. The Navy has identified two types of natural resource management agreements as possible models for addressing state interests at SCI and SNI: Integrated Natural Resource Management Plans [INRMPs], and Cooperative Research Agreements [CRAs]. NMFS also negotiated a MOU with the Navy in 1981 to protect SCI pinnipeds and cetaceans. These examples are reviewed briefly below.

*INRMPs.* A general summary of the purpose for INRMPs as a cooperative management tool can be found at Tab 12. SCI and SNI each have such a plan in place that provides a framework for management of the islands' natural resources.<sup>62</sup> "The INRMP identifies natural resources and their management and provides recommendations for operating procedures to manage significant natural resources at SNI. The INRMP helps support the maintenance of quality lands to accomplish the military's mission on a sustained basis and to implement natural resources conservation measures consistent with military activities and federal stewardship requirements. It assists decision makers in planning, developing, and implementing environmental compliance activities."<sup>63</sup> For SNI, the Commanding Officer, USFWS and CDFG are signatories to the plan. See Tab 12 to review excerpts from the SNI INRMP.<sup>64</sup>

*CRAs.* The Navy has entered into CRAs in the past to provide access for research, including at SCI. Two examples were reviewed for this memorandum and can be found at Tab 13:

- Tidepool research at Naval Base Point Loma by NPS staff.
- Intertidal surveys and monitoring at SCI by Vantuna Research Group staff.

These CRAs appear to follow a similar format. Further review is recommended to understand the specific requirements for CRAs and their potential as a resource management tool.

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<sup>61</sup> 50 CFR Part 216: Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Missile Launch Operations from San Nicolas Island, CA. "NMFS, upon application from the U.S. Navy, is issuing regulations to govern the unintentional takings of small numbers of marine mammals incidental to missile launch operations from San Nicolas Island, CA (SNI). Issuance of regulations, and Letters of Authorization under these regulations, governing the unintentional incidental takes of marine mammals in connection with particular activities is required by the Marine Mammal Protection Act (MMPA)..."

<sup>62</sup> The SCI plan extends out 300 yards from shore. Navy slide 16, Tab 2.

<sup>63</sup> SNI INRMP, Sept. 2005

<sup>64</sup> IT staff did not receive a copy of the SCI INRMP from the Navy in time for review as part of this memorandum.

*MOU for SCI Pinnipeds and Cetaceans.* In 1981 the Navy and NMFS entered into an MOU that provides for protection of pinnipeds and cetaceans at SCI. The MOU provides for education of Navy personnel and for coordination regarding issuance of permits for research.<sup>65</sup>

Based on available information, the Vandenberg SMR established in waters off Vandenberg Air Force Base in the Central Coast study region is a limited precedent. This SMR was established in a location with a pre-existing SMR, and the USAF does not conduct military activities in marine areas around Vandenberg of a type or intensity that match activities at SCI and SNI.<sup>66</sup>

There presently is no dispute that the waters around SCI and SNI are “state waters.” Based on (1) current limited information, and (2) the Navy’s position that its activities in those waters cannot be regulated by the State under the MLPA, imagining a future scenario in which CDFG and the FGC exercise the same degree of jurisdictional control currently exercised within state MPAs is challenging. In light of the Navy’s present and future use of these waters, a written agreement for each island that describes Navy and State jurisdiction, activities, and positive relationships, e.g., environmental partnership, appears essential. It may be possible to negotiate an acceptable degree of control with the Navy that addresses State interests but prospects are unclear. This is not intended as criticism of the Navy, but rather as a statement of present uncertainty. The Navy appears increasingly aware of state interests in research and monitoring, but less aware of state enforcement interests. As noted above, the Navy project team rejected the possibility of an MOU similar to that negotiated for the Vandenberg SMR during a recent conference call, and appears at this time to prefer a CRA model. It is not clear at this time whether the situations at SCI and SNI are sufficiently different that separate agreements, potentially with different approaches based on specific conditions and requirements, are an option.

### ***Conclusions:***

*Treating non-MPAs as contributing to MLPA goals under the Navy proposal would set a precedent for the Initiative. Based on the criteria discussed above, and given current uncertainty about the State’s ability to address its long-term management interests, it may be difficult to persuade some MLPA stakeholders that a contribution to MLPA goals from SCI and SNI as non-MPAs is a unique situation.*

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<sup>65</sup> Tab 13.

<sup>66</sup> As noted above, an MOU required by the FGC as part of this SMR reportedly has been approved by DoD and is in review at the CDFG. A series of letters between the Resources Agency and Air Force that identify key issues requiring resolution can be found at Tab 14. The Navy’s concerns about the Vandenberg SMR as a precedent were discussed in Section II, above.

*If the Commission designates MPAs, the Navy's objections create present uncertainty about how the State would exercise sufficient jurisdictional control in those MPAs to meet its objectives for enforcement, research, monitoring, and adaptive management.*

*There is insufficient information available to the BRTF at this time to evaluate whether the State could negotiate arrangements with the Navy, Coast Guard, and other institutions and organizations that would provide a sufficient level of assurance regarding enforcement, research, monitoring, and adaptive management. Existing models, including INRMPs, CRAs, and MOUs, appear to provide the basis for further discussions.*

## **V. DISCUSSION OF ALTERNATIVES**

As noted above, the Navy is principally concerned about the potential for future efforts to limit critical military activities based on the existence of state MPAs. In developing a response to the Navy proposal the core choice for the Initiative, and ultimately the State, is whether to designate MPAs in waters around SCI and SNI.

*A. If the choice is to avoid MPA designation*—the Navy's request—there are related choices about (1) *how* to evaluate potential contributions to MLPA goals in light of military activity, (2) *whether* to include such contributions, (3) whether to assign a LOP, (4) how to ensure contributions are available long term through an agreement with the Navy that satisfies state interests, and (5) how to shape guidance to the SCRSG.

Whether to include contributions from non-MPAs is a discrete and complex issue that depends substantially on (1) and (4) above. As discussed earlier in this memorandum, the Initiative previously has evaluated contributions only for proposed MPAs. In particular, CDFG has recommended designating existing fisheries management areas as MPAs in order to establish jurisdictional control.

*B. If the choice is to designate MPAs*—against the Navy's wishes at this time—there are related choices about (1) how to evaluate contributions from proposed MPAs in light of military activity, (2) whether to assign a LOP, (3) how to ensure the MPAs can be managed effectively, and (4) how to shape guidance to the SCRSG about MPA design.

For both A and B critical information is needed to inform the core decision:

- A methodology for evaluating potential contribution to MLPA goals and the effects of proposed military activities. The SOCAL EIS and ROD assert that there will be no significant environmental impacts from proposed actions at SCI. However, there is little doubt that military activities around SCI currently result in take of fish. The SAT reportedly addressed a discrete fish "take" situation at the Diablo Canyon power plant intakes, and the Initiative designated an expanded SMR at Vandenberg, but the SAT

has not previously been requested to evaluate impacts from military activities on the scale presented at SCI and SNI.<sup>67</sup>

- Assurances that State interests related to long-term management of its MPA network can be achieved. For long-term management, the present Navy proposal contains limited information and no role for CDFG in enforcement. It is plausible that the State's interests in monitoring, research, and adaptive management could be addressed, possibly through an INRMP, CRA, MOU, or a hybrid. However, there are insufficient details at this time to provide reliable answers, and the Navy's evolving proposal remains short of a commitment that the State's interests would be addressed.

### *Options for SCRSO Guidance*

There appear to be three basic options for guidance to the SCRSO in Round Two:

1. Include only the three pending military closures in the next round of proposals; do not include any MPAs at SCI and SNI. Assume that the pending closures will contribute to MLPA goals, and that the SAT will provide an evaluation of this contribution.
2. Include any combination of the three pending military closures and state MPAs in the next round of proposals, including MPAs that match pending closures or overlap with pending closures, and MPAs in other locations at SCI and SNI. Assume that pending closures will contribute to MLPA goals and that the SAT will provide an evaluation of this contribution.
3. Exclude SCI and SNI from the proposed MPA network: do not include either pending closures or MPAs. Do not assume any contribution to MLPA goals.

The first option reflects the Navy's preferred approach but limits potential network flexibility without information needed to support decision making on key issues including future management.

The second option maximizes flexibility for MPA network design pending additional information and allows other SCRSO members to continue engaging with Navy representatives regarding key interests and potential solutions. This guidance leaves open the appropriate classification for any MPAs pending input from the SAT about impacts of military activities.

The third option avoids issues related to evaluation of military impacts and contribution of non-MPAs toward network goals. It also limits network design flexibility and potentially increases requirements to achieve network goals to other areas in the SCSR.

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<sup>67</sup> At its April 1 meeting the IT recommended that the SAT undertake this evaluation and report back to the BRTF in May.

## **VI. RECOMMENDATIONS**

- The BRTF should preserve the option of designating state MPAs at SCI and SNI pursuant to the MLPA at this time.
- The BRTF should provide guidance to Initiative staff regarding discussions with the Navy about the Navy's proposal and options for addressing critical state interests.
- The BRTF should provide guidance to the SCRSG for Round Two consistent with Option Two above.
- The BRTF should request SAT views about contributions to MLPA goals from pending military closures and proposed MPAs in light of military activities around SCI and SNI.
- The BRTF should seek input from CDFG and others about requirements for effective State enforcement, monitoring, research, and long-term adaptive management.
- The BRTF should continue to support efforts of SCRSG members, including the Navy team, to develop integrative solutions for achieving SCRSG regional goals and objectives.
- The BRTF should coordinate with the FGC and CDFG about the federal regulatory process for designating Safety Zones and the possibility of commenting formally. A Federal Register notice on interim safety zone closures is expected within a month, and a notice regarding designation of permanent safety zones is expected within the next three to four months. Comments could address State interests and request details about enforcement, monitoring, research, and adaptive management.