

schauinslandi) pursuant to the Endangered Species Act of 1973 (ESA). Habitat proposed for designation 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, French Frigate Shoals, Gardner Pinnacles, Necker Island and Nihoa Island. The proposal is based on the determination that designating critical habitat will benefit the Hawaiian monk seal by protecting habitat essential for the survival and recovery of the species. The designation would require Federal agencies to ensure that their actions are not likely to result in the destruction or adverse modification of the critical habitat.

DATES: Comments must be received by March 11, 1985.

A combined public meeting and public hearing has been scheduled for 7:00 p.m. on February 5, 1985.

ADDRESSES: Interested persons or organizations are requested to submit written comments to E.C. Fullerton, Regional Director, Southwest Region, National Marine Fisheries Service, 300 S. Ferry St., Terminal Island, CA 90731.

The public meeting/public hearing will be held at the McCoy Pavilion, 1201, Ala Moana Boulevard, Honolulu, Hawaii.

Comments and other material relating to this rule will be available for public inspection by appointment during normal business hours (8:00 a.m. to 4:30 p.m.) at the Western Pacific Program Office, NMFS, 2570 Dole Street, Honolulu, Hawaii, and at the California address noted above.

FOR FURTHER INFORMATION CONTACT: Eugene T. Nitta, Protected Species Program Coordinator, Western Pacific Program Office, National Marine Fisheries Service, P.O. Box 3830, Honolulu, HI 96812, Telephone (808) 955-8831; James Lecky, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Room 2015, Terminal Island, California 90731, Telephone (213) 548-2518; or Patricia Montanio, Protected Species Division, National Marine Fisheries Service, Washington, D.C. 20235, Telephone (202) 634-7529.

SUPPLEMENTARY INFORMATION:

Background

The NMFS listed the Hawaiian monk seal as an endangered species under the ESA in November of 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. In October 1978, the NMFS selected five alternatives for incorporation in a pre-environmental impact statement discussion paper that was circulated for comment. The State of Hawaii objected to designating critical habitat because they thought insufficient information was available for identifying essential components of the monk seal's habitat. The Hawaiian commercial fishing community also expressed concern about the designation of critical habitat, primarily because they believed that fishing in the area designated as critical habitat would be strictly regulated.

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. These 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 incorporated pupping beaches, beaches used for hauling-out (coming ashore), waters inhabited by females and young during nursing and post-weaning, and a portion of the foraging habitat used by adults 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 designation of critical habitat, but there was no consensus for a preferred boundary option. Seven commenters opposed designation of critical habitat because data substantiating a need were insufficient, existing regulatory mechanisms were providing adequate protection, and the designation would impede development of commercial fisheries. Among those in opposition were the State of Hawaii; the Western Pacific Fishery Management Council; and the Hawaiian Fishing Council, an ad hoc group of commercial fishermen.

The NMFS postponed further action until the Hawaiian Monk Seal Recovery Team (Recovery Team) had reviewed the DEIS and submitted its recommendation. On October 9, 1980, the Recovery Team forwarded its recommendation supporting the 20-fathom option and added to it Nihoa Island, Gardner Pinnacles, and Maro Reef. This was not a unanimous recommendation, however. One team member supported a designation to 10

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 41152-4152]

Designated Critical Habitat; Hawaiian Monk Seal

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

ACTION: Proposed rule, public hearing and meeting.

SUMMARY: The NOAA proposes to designate critical habitat for the Hawaiian monk seal (*Monachus*

fathoms, and another support designating only the beaches, lava benches, and nearshore waters.

Due, in part, to the continuing opposition of the State of Hawaii and the lack of a unanimous recommendation from the Recovery Team, the NMFS deferred the designation pending completion of the Monk Seal Recovery Plan (Recovery Plan). The Recovery Plan was submitted in March 1983, with a recommendation to designate critical habitat to 20 fathoms.

During the four years since the DEIS was published, the NMFS has consulted with the Federal agencies that operate in the Northwestern Hawaiian Islands (NWHI) regarding the effects of their activities on the monk seal population. These consultations conducted under section 7 of the ESA appeared to satisfy a primary purpose of designating critical habitat by notifying Federal agencies of their responsibilities under the ESA and to assist those agencies in ensuring that their actions are not likely to jeopardize the continued existence of the Hawaiian monk seal. Because the record of consultations in the NWHI appeared to preclude the need for critical habitat designation, the NMFS Southwest Region requested NOAA General Counsel, Southwest (GCSW) to prepare a legal opinion on whether the NMFS was required to proceed with the designation.

The legal opinion concluded that critical habitat must be designated as recommended in the Recovery Plan unless the Assistant Administrator for Fisheries (Assistant Administrator) finds that designation of critical habitat will not benefit the species, that the area described in the Recovery Plan is not critical habitat as defined in the ESA and regulations, or that he should devote his resources to other areas.

The Assistant Administrator decided (Decision Memorandum dated May 15, 1984) to propose critical habitat for the Hawaiian monk seal and selected a modification of the 10-fathom option presented in the DEIS. The 10-fathom alternative incorporates essential breeding, pupping, and hauling-out areas; nearshore waters used by females and pups during nursing and post-weaning; and a portion of the foraging habitat used during the breeding season. His decision was based on a review of the administrative record, which generally supports designation, the GCSW legal opinion, the record of section 7 consultations in the NWHI (which indicates that the NMFS is most concerned with human activities in the terrestrial and nearshore environments), and a review of available biological

information. Also, there were no apparent benefits to be derived from extending the seaward boundary of the designation to incorporate additional foraging habitat.

Critical Habitat

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" and "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 critical habitat designation are set forth in Title 50, Code of Federal Regulations, § 424.12. The Assistant Administrator is required to consider those physiological, behavioral, ecological, and evolutionary requirements that are essential to the conservation of the species and which may require special management considerations or protection. Such requirements include, but are not limited to:

- (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.

When considering the designation of critical habitat, the Assistant Administrator is required to focus on the biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements that may be identified include, but are not limited to, the following: Roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host animal or plant pollinator, geological

formation, vegetation type, tide, and specific soil types.

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.

There are no inherent restrictions on human activities in an area designated as critical habitat. 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, 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 the involvement of the Federal Government may be carried out without being subjected to the section 7 consultation process.

Hawaiian Monk Seal Biology

The biology of the Hawaiian monk seal is discussed in the Supplemental Environmental Impact Statement (SEIS). That discussion covers the history of exploitation, trends in population size, the current status of the population, life history parameters, habitat requirements, and biological problems confronting the population. Further information and lists of references can be found in the DEIS, Recovery Plan, and the Hawaiian monk seal status review. Only the habitat requirements are summarized here.

Habitat Requirements

Existing data indicate that the beach areas used by the Hawaiian monk seal for hauling out, pupping, and nursing are critical to the well being of the species. This critical area also includes the first line of vegetation (usually *Scaevola* or *Eragrostis spp.*) backing these beaches which provides shelter from wind and other elements. Lava bench and boulder beach habitat found at Necker and Nihoa Islands are also essential pupping and hauling-out areas.

Shallow protected water immediately adjacent to beaches is important to the Hawaiian monk seal. During the April 1977 monk seal survey it became evident that 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. This type of habitat exists off the leeward side of Laysan Island and off the windward side of Lisianski Island where the majority of pupping occurs on these two islands. Round Island at French Frigate Shoals is small, low, and unvegetated, but is ringed with the requisite shallow protected water.

Monk seals have been observed by divers on the bottom in 10 fathoms or shallower water near anchored vessels at rookery islands. The seals appear to favor a rugged, broken bottom substrate containing many caves and crevices. They spend time in these coral caves where it has been reported they trap exhaled air against the cave ceilings possible to be used later in order to extend their bottom time.

Studies on Laysan Island indicate 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 slightly. By four months post-weaning, pups begin spending periods up to 10 days away from the island.

Observations at Laysan Island indicate that immediately upon weaning their pups adult female monk seals leave the island for at least 20 days. They leave in an emaciated condition and return in relatively good condition, stay one to four days on the island, then leave for an additional 20 days before reappearing apparently well nourished. Since they do not haul out a Laysan

during these two 20-day periods, it is assumed that they are feeding at least beyond the inner reef and probably a considerable distance from shore. This component of the foraging habitat has not been defined, and is not included in the proposed critical habitat designation.

From samples of regurgitated material found on the beaches it is known that monk seals consume spiny lobsters, octopuses, moray eels, and various smaller reef fish. These known prey species are distributed over and with the coral structures, from the inner reef waters very near the shore and in the lagoons, to offshore waters over the extensive banks surrounding many of the rookery islands, and some distance down the bank slopes, which drop off quickly to deep ocean waters beyond 100 fathoms. Studies have shown that monk seal are capable of diving to considerable depth. Thus, feeding probably occurs in the lagoons and in the offshore waters along the bank slopes to the deepest extent of their diving capabilities whenever prey is abundant.

Depth of dive studies have shown that adult male Hawaiian monk seals are capable of diving to at least 120 meters (393.7 ft., 65.6 fm), and that juvenile and subadult females are able to dive to at least 152 m (498.7 ft., 83.1 fm). In the studies conducted, the majority of dives recorded were in the 0-15 m (8.2 fm) depth range. Based on these data and a 1978 review of pinniped diving, it is reasonable to assume that a majority of the recorded dives were for foraging.

The only observed monk seal matings have been in the nearshore and shallow offshore waters around Laysan Island. In May 1978, a mating of Hawaiian monk seals was observed approximately one kilometer (0.62 miles) off Laysan Island outside the reef in water ranging from about 6 to 12 fathoms. Another observation of copulation was observed in shallow waters near the beach off the southwest side of Laysan Island also in May 1978. Thus, critical habitat delineated by the 10-fathom isobath would include the known breeding habitat, as well as some foraging habitat, for Hawaiian monk seals.

Based on available information, the following habitat components, listed in order of their probable importance, are considered to be essential for the health, well being, and continued viability of the Hawaiian monk seal population.

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, lagoon waters, and all other water areas out to the 10-fathom isobath.

The NMFS therefore proposes to designate as critical habitat for the Hawaiian monk seal all beach areas, lagoon waters, and ocean waters out to a depth of 10 fathoms around Kure Atoll, Midway Island, (except Sand Island), Pearl and Hermes Reef, Lisianski Island, Laysan Island, French Frigate Shoals, Gardner Pinnacles, Necker Island, and Nihoa Island. Many of the habitat components such as beach areas, nearshore shallow water areas, and offshore banks and shoals cannot be simply delineated as specific distances along specified beaches or arbitrary distances offshore. Therefore, it is necessary to designate the entire area without piecemeal delineations. For example, monk seals use all of the beaches on Green Island at Kure as hauling areas and the more isolated areas (from human disturbance) for pupping areas. Additionally, the various sand spits and islets grow, shrink, disappear, change shape, and even even change location. In some cases new islets appear after storms or strong tide conditions. Therefore, references to beaches or beach areas should be assumed to include all of the above.

Monk seals are found over other banks and shoals without emerged land, in waters beyond 10 fathoms, and in pelagic areas. However, the importance of these areas to this species is not known at this time. If investigations reveal that these areas are essential to the conservation of the species and require special management considerations or protection, the Assistant Administrator will consider modification of the critical habitat boundaries.

Expected Impacts

The designation would require Federal agencies to evaluate their activities with respect to critical habitat in the NWHI and consult with the NMFS pursuant to section 7 of the ESA prior to engaging in any action which may affect critical habitat. Federal agencies must ensure that their activities are not likely to result in the destruction or adverse modification of the critical habitat. Currently, Federal agencies operating in the NWHI are required to consult with the NMFS regarding projects and activities they permit, fund, or otherwise carry out that may affect the Hawaiian monk seal. In most situations, if not all,

such consultation would be required even without a critical habitat designation because an action that is likely to affect critical habitat also probably would affect the species. Designating critical habitat will also assist those 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 would be required would be minimal. The Federal agencies that most likely will be affected by critical habitat designation include the U.S. Coast Guard, U.S. Navy, U.S. Fish and Wildlife Service, Western Pacific Regional Fishery Management Council, and the NMFS.

The proposed 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 agencies 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 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, of the Navy on Sand Island at Midway Islands, and of the Fish and Wildlife Service on Tern Island at French Frigate Shoals; (2) deep ocean mining; (3) ocean dumping of wastes and chemicals; (4) Federally funded, or controlled fishing activities; and (5) fisheries and wildlife research conducted, funded, supported, or controlled by Federal agencies in the NWHI.

Public Comments Solicited

To ensure that any final rule implementing the Act is as effective as possible, the NMFS is soliciting information, comments or recommendations on any aspect of this proposed rule from the public, concerned government agencies, the scientific community, industry, private interests, or any other interested party. The NMFS will consider all comments received in reaching a final decision. The final rule may differ from the

proposed rule depending on comments and recommendations received. In order to provide further opportunities for public comment, a public meeting and hearing has been scheduled as noted in the **DATES** and **ADDRESSES** sections of this proposed rule.

Classification

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. The General Counsel of the Department of Commerce has certified that the proposed rule, if adopted, would 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.

The rules contained in this proposal are definitive and procedural in nature. Any substantive potential impacts of critical habitat designation would be secondary to tertiary and would result whether or not this proposed rule were implemented.

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 proposed rule will not have any adverse environmental consequences. However, since a DEIS was prepared, the NMFS has elected to continue with the NEPA process. Accordingly, an SEIS has been prepared for this proposed action and copies are available upon request from the NMFS.

Coastal Zone Management Consistency Statement

The Assistant Administrator for Fisheries has determined that the proposed 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 § 205 A-2 (b)(4)). One of the supporting policies is to protect endangered species, which includes the Hawaiian monk seal (Hawaii Program p. 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 the monk seal. Therefore, the proposed critical habitat designation is consistent with approved Hawaii Coastal Zone Management Plan.

List of Subjects in 50 CFR Part 226

Endangered and threatened wildlife, Marine mammals.

Dated: January 4, 1985.

William G. Gordon,

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

Proposed Regulation Promulgation

Accordingly, Part 226 of Chapter II of Title 50 of the Code of Federal Regulations is proposed to be 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

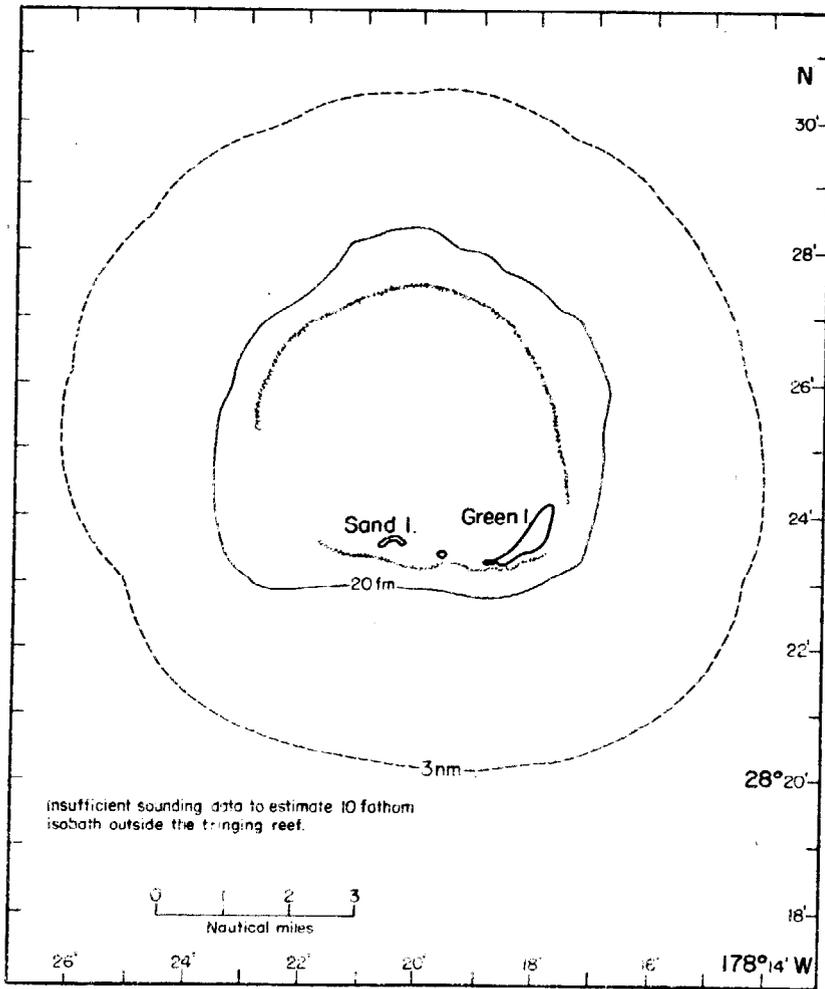
§ 226.11 Northwestern Hawaiian Islands Hawaiian Monk Seal

(*Monachus schauinslandi*)

In all beach areas, lagoon waters, and ocean waters out to a depth of 10 fathoms around:

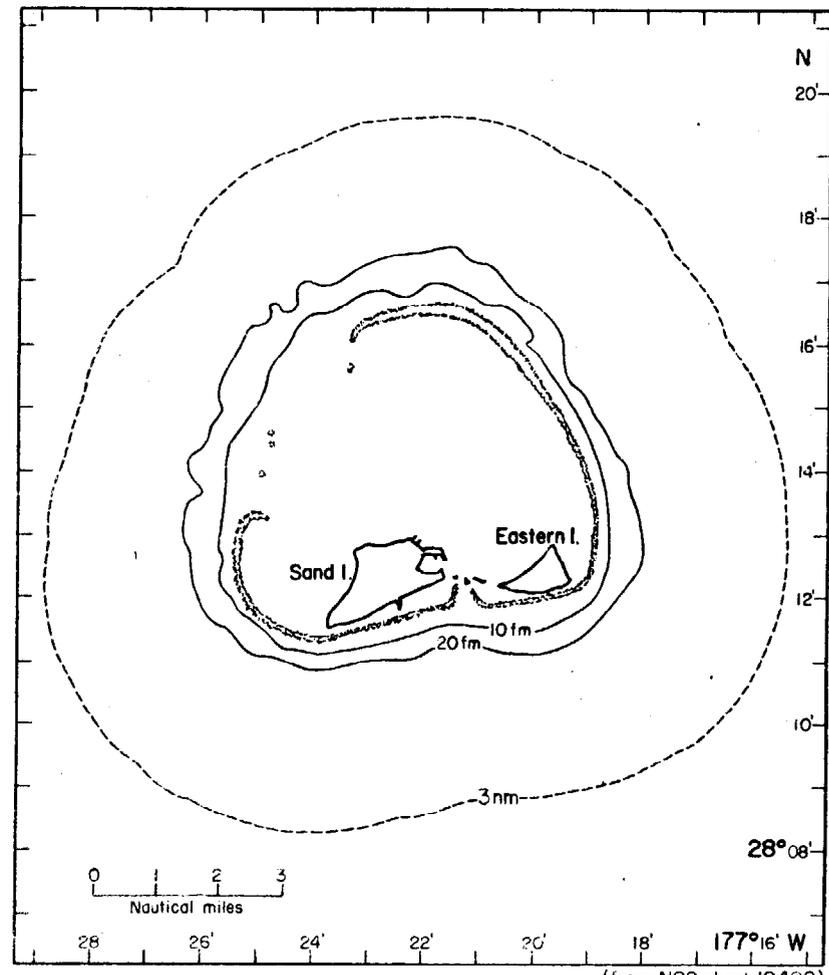
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Midway Islands (Except Sand Island) (28°14' N, 177°22' W)
Pearl and Hermes Reef (27°55' N, 175° W)
Lisianski Island (26°04' N, 173°58' W)
Laysan Island (25°48' N, 177°44' W)
French Frigate Shoals (23°45' N, 166°00' W)
Gardner Pinnacles (25°00' N, 168°00' W)
Necker Island (23°34' N, 164°42' W)
Nihoa Island (23°03.5' N, 161°55.5' W)

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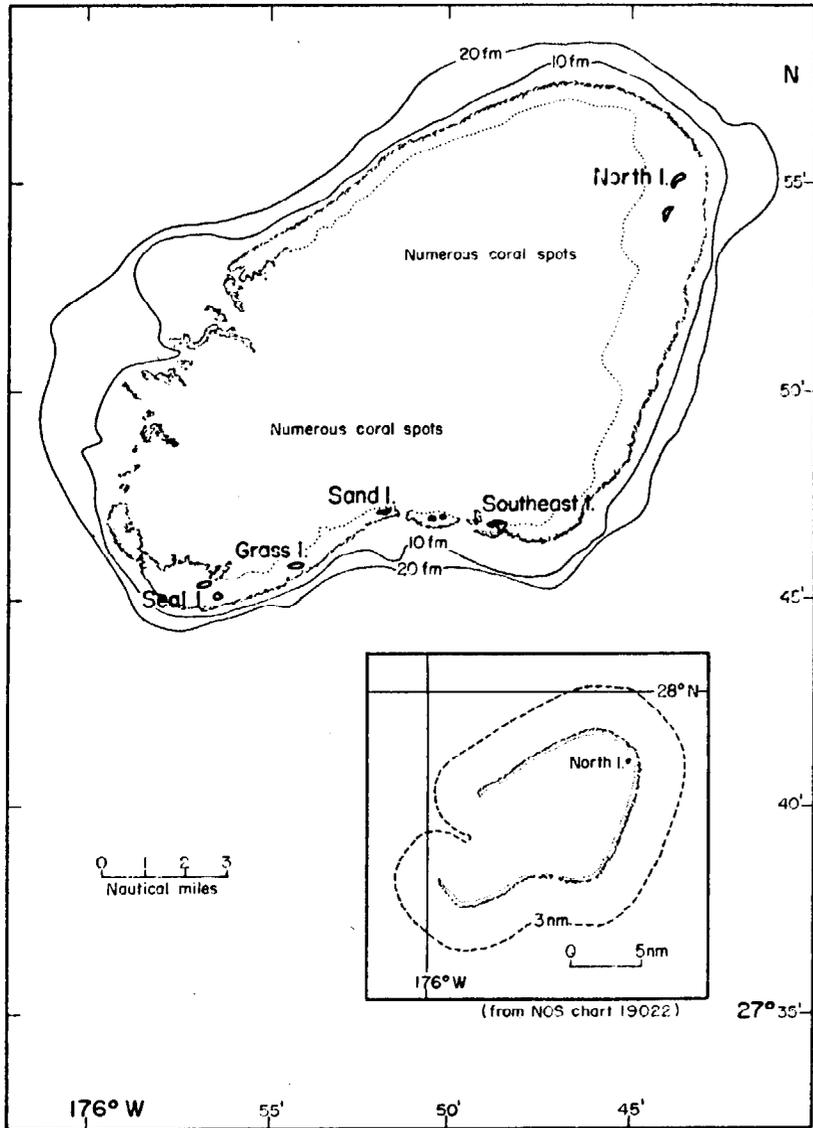
KURE ATOLL

(from NOS chart 19480)

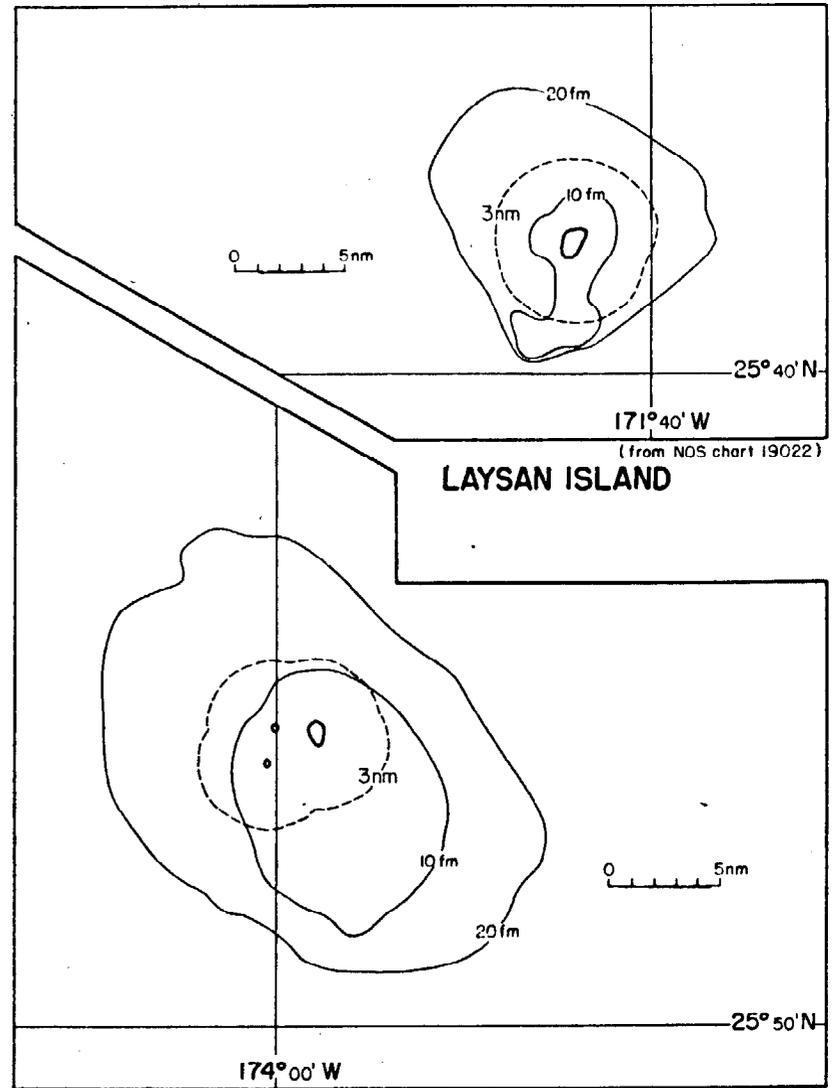


MIDWAY ISLANDS

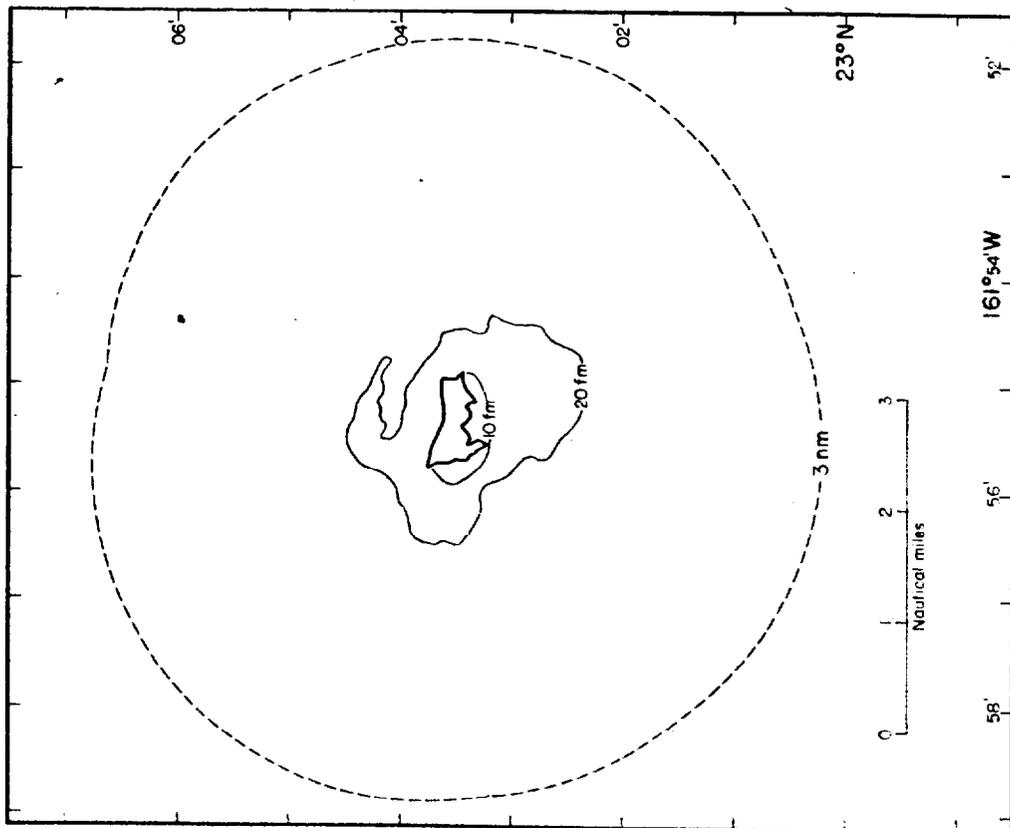
(from NOS chart 19480)



PEARL and HERMES REEF

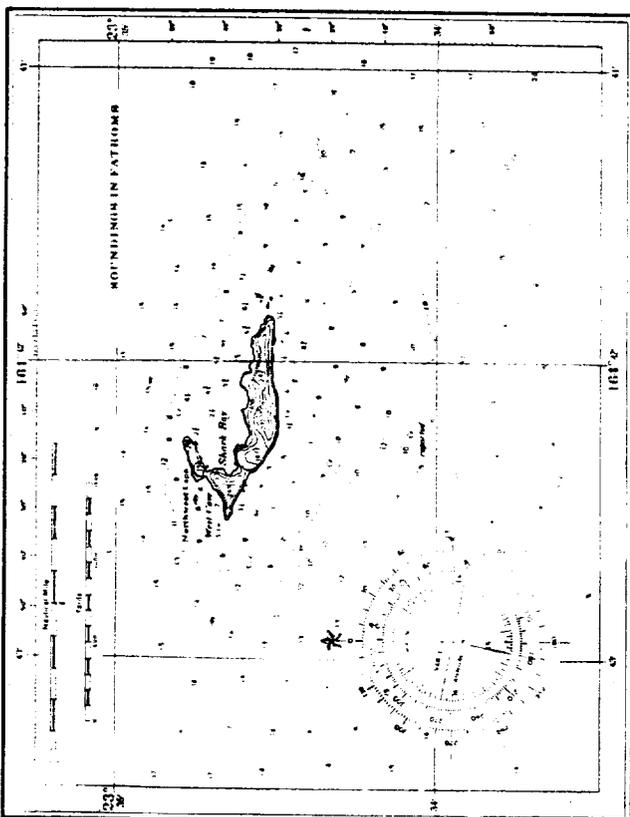


LISIANSKI ISLAND



(from NOS chart 19016)

NIHOA ISLAND



(from NOS chart 19016)

NECKER ISLAND

[FR Doc. 85-602 Filed 1-8-85; 8:45 am]

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