



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

Docket No.: 0908041219-1413-02

RIN 0648-AX79

Overflight Regulations for the Channel Islands, Monterey Bay, Gulf of the Farallones, and Olympic Coast National Marine Sanctuaries

AGENCY: Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: NOAA is amending the regulations for the Channel Islands, Monterey Bay, Gulf of the Farallones, and Olympic Coast National Marine Sanctuaries by requiring that motorized aircraft maintain certain minimum altitudes above specified locations within the boundaries of the listed sanctuaries and stating that failure to comply with these altitude limits is presumed to disturb marine mammals and seabirds and is a violation of the sanctuary regulations.

DATES: These regulations are effective on [INSERT 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Office of National Marine Sanctuaries, 1305 East-West Highway, Silver Spring, MD 20910. Phone: 301-713-3125.

SUPPLEMENTARY INFORMATION:

Electronic Access:

This Federal Register document is also accessible via the Internet at

<http://www.gpoaccess.gov/fr/index.html>.

I. Background

The National Marine Sanctuaries Act (NMSA) authorizes NOAA to prohibit or otherwise regulate activities to prevent or minimize the destruction of, loss of, or injury to a resource of a national marine sanctuary (16 U.S.C. 1436(1)).

Regulations for the Monterey Bay, Channel Islands, Gulf of the Farallones and Olympic Coast National Marine Sanctuaries all restrict low altitude overflights within specified zones in each sanctuary (subject to certain exceptions) in order to protect marine mammals and seabirds from disturbance by aircraft. At Monterey Bay, Channel Islands, and Gulf of the Farallones, flights below 1000 feet are prohibited within the designated zones. At Olympic Coast, flights below 2000 feet are prohibited within one nautical mile of Flattery Rocks, Quillayute Needles, or Copalis National Wildlife Refuge, or within one nautical mile seaward from the coastal boundary of the sanctuary.

These regulations vary slightly with each sanctuary. The regulations for the Monterey Bay and Olympic Coast sanctuaries prohibit overflights below a certain level within designated zones – 1000 feet in Monterey Bay and 2000 feet in Olympic Coast, as noted above – without requiring a specific showing that marine mammals or seabirds have been disturbed. The regulations for the Channel Islands and the Gulf of the Farallones prohibit disturbing marine mammals or seabirds by flying below 1000 feet within specified zones of the sanctuaries.

With this final rule, NOAA has standardized these regulations by adopting a single, consistent and clear regulatory approach regarding overflights in these sanctuaries. The regulations for each sanctuary now establish a rebuttable presumption that flying motorized aircraft below the existing minimum altitudes within any of the existing zones results in the disturbance of marine mammals or seabirds. This means that if a pilot were observed flying below the established altitude within a designated zone, it would be presumed that marine mammals or seabirds had been disturbed and that a violation of sanctuary regulations had been committed. This presumption of disturbance could be overcome by contrary evidence that disturbance did not, in fact, occur (e.g., evidence that no marine mammals or seabirds were present in the area at the time of the low overflight). Adding a rebuttable presumption to these regulations is justified by ample evidence in the administrative records that were developed for the designations of these sanctuaries. These administrative records describe the need to protect nearshore and offshore resources from unnecessary disturbance, and explain how low altitude overflights can disrupt various marine mammal and seabird behavior patterns, including breeding and nesting.

Low overflights in these sites clearly pose a risk of harmful disturbance to marine mammals and seabirds, including movement and evacuation in response to low overflights where the young (pups, chicks, eggs) are crushed during an evacuation or exposed to predation as a consequence of loss of parental protection. Indeed, given the connection between low overflights and disturbance, the Southwest Region of the National Marine Fisheries Service developed marine mammal viewing guidelines for its region (which includes the three California sanctuaries), recommending that aircraft avoid flying below 1000 feet over marine mammals. Similarly, the State of California prohibits overflights less than 1000 feet above designated

wildlife habitat areas within the state waters of each sanctuary off of California. In the Olympic Coast National Marine Sanctuary, offshore islands of the Flattery Rocks, Quillayute Needles, and Copalis National Wildlife Refuges have high pinnacles that provide important habitats for 14 species of seabirds, warranting the prohibition on flights below 2000 feet in this sanctuary to better protect these sanctuary resources. This prohibition is further consistent with an advisory published by the Federal Aviation Administration (FAA) that applies to these same areas (FAA Advisory Circular AC 91-36D).

The existing NOAA overflight regulations are not indicated on current FAA aeronautical charts. The FAA has advised NOAA that with the promulgation of this final rule, it will revise the notation on current aeronautical charts to indicate the sanctuaries' overflight regulations. The notation on FAA aeronautical charts in no way imposes additional FAA obligations on aircraft operators. Rather, NOAA expects that the revised notation will likely result in improved compliance and thereby help to ensure the protection of resources under NOAA's stewardship.

II. Summary of Rulemaking

NOAA is amending ONMS regulations (15 CFR Part 922) for these four sanctuaries. The amendments harmonize NOAA's long-standing regulatory provisions prohibiting low overflights over certain areas within these sanctuaries and more clearly connect the adverse impacts upon marine mammals or seabirds caused by low overflights as the regulatory basis for NOAA's overflight regulations.

III. Response to Comments

The comments received on the proposed rule that was published on December 7, 2010 (75 FR 76319) are summarized below, together with responses from NOAA. There were 169 submissions from individuals, organizations, state representatives, state agencies, and Federal

agencies. Because many of the submissions contained the same or similar comments, those comments have been grouped together by subject and responded to as one comment.

1. Comment: FAA is the sole authority for restricting airspace.

Response: NOAA recognizes FAA's authority to regulate airspace and has worked closely with the FAA to craft the rule in a way that is explicitly linked to NOAA's statutory authority. NOAA and the FAA share the view that the final rule does not alter or change either agency's existing authority.¹

2. Comment: The proposed amendments to the existing regulations for low overflights in designated areas of the four national marine sanctuaries should be implemented for several reasons, including: to reduce the risk of disturbance from low flying aircraft on normal wildlife behavior; to improve pilot compliance with minimum altitude restrictions; to standardize the application of these regulations with a single, consistent and clear regulatory approach; and to apply the presumption of disturbance for any flight below the minimum altitude level.

Response: NOAA agrees the amendments to the existing overflight regulations will reduce the risk of harmful disturbance to marine mammals and seabirds. NOAA believes the amended, standardized language, along with the publication of these altitude limitations on FAA's aeronautical charts, will improve notice to pilots and increase compliance.

3. Comment: The proposed amendments to the existing regulations for low overflights in designated areas of the four national marine sanctuaries should be adopted but without the inclusion of a rebuttable presumption.

¹ The FAA, in a letter concerning this rulemaking to the Aircraft Operators and Pilots Association (AOPA), stated that it does not view NOAA's rulemaking action as an airspace regulation nor as an infringement on the FAA's stated authority.

Response: The addition of the rebuttable presumption to the overflight regulations was made to link failure to comply with the altitude limits within any of the designated zones to disturbance of marine mammals or seabirds and is thus a violation of sanctuary wildlife protection regulations, rather than FAA flight regulations. This change is important because 1) it avoids the appearance that NOAA is infringing on the FAA's authority, since the regulations are tied to a resource disturbance, not merely altitude limits; and 2) it is responsive to industry's concern with an absolute prohibition on flying at certain altitudes. Including a rebuttable presumption will also facilitate compliance efforts with the regulation.

4. *Comment:* The rebuttable presumption puts an unreasonable burden on pilots to prove their innocence.

Response: A rebuttable presumption does not impose an unreasonable burden on pilots. The rebuttable presumption provides pilots with the opportunity to show that there is no violation if no marine mammals or seabirds are disturbed. Rebuttable presumptions have commonly been used in analogous legal authorities. For example, the Endangered Species Act imposes a rebuttable presumption with regard to species held in captivity,(16 U.S.C. 1538(b)(1)), and NOAA regulations apply a rebuttable presumption in certain commercial fisheries (e.g., 50 CFR 635.4(f)(1); 697.20(c)) as well as in some national marine sanctuaries (e.g., 15 CFR 922.92(a)(5)(ii); 922.112(a)(2)). Combined with notification of NOAA's overflight regulations on FAA aeronautical charts, pilots will better understand the potential legal consequences of ignoring sanctuary overflight prohibitions, and it is expected that the vast majority of pilots will comply with the regulations.

5. *Comment:* If a rebuttable presumption is added to the regulations, the presumption of a violation should focus on the presence or absence of marine mammals or seabirds rather than

whether there has been a disturbance of marine mammals or seabirds, since some disturbances, such as spikes in hormones, cannot be observed.

Response: NOAA is sensitive to the concern that some disturbance effects on marine mammals or seabirds, such as hormonal responses, may be difficult to assess where this regulation is violated. However, basing a violation strictly on the presence or absence of marine mammals and seabirds creates a potential violation where marine mammals or seabirds are present but not disturbed by low overflight. The regulations as written make clear that it is not NOAA's intent to consider a violation when marine mammals or seabirds are present during a low overflight, but not disturbed.

6. *Comment:* NOAA should define minimum altitude as measured from the highest terrain within 2000 feet laterally of the designated zones in the Gulf of Farallones and the Monterey Bay national marine sanctuaries. This is needed because seabirds nest along shoreline cliffs as high as 600 feet. Consequently, a minimum height of 1000 feet above water could only be 400 feet from nesting seabirds and thus fail to protect.

Response: The minimum altitude prohibitions of the four west coast national marine sanctuaries included in this amended rule were determined at the time of each sanctuary's designation, and this accounts for the terrain in setting the minimum altitude. When the sanctuaries were created, NOAA followed NEPA and APA procedures and developed environmental impact statements that underwent public review. Changes to the current minimum altitudes are beyond the scope of this regulatory action.

7. *Comment:* NOAA does not have any proof that the regulations are necessary.

Response: The administrative records establishing overflight restrictions in all four sanctuaries describe the need to protect nearshore and offshore resources from unnecessary

disturbance, and explain how low altitude overflights can disrupt various marine mammal and seabird behavior patterns including breeding and nesting.

Additional documentation supporting the need for overflight regulations in order to reduce the risk of harmful disturbance to marine mammals and seabirds was submitted during the public comment period and can be found at [Regulations.gov](https://www.regulations.gov), Docket No. NOAA-NOS-2009-0237.

8. *Comment:* The use of the term "restrict" in the NPRM appears to contradict FAA's definition of the term. The phrase "restricted area" has a very specific and well-defined meaning within Federal Aviation Regulations (FARs) airspace designated under part 73 within which the flight of aircraft, while not wholly prohibited, is subject to restriction.

Response: NOAA used the terms "restrict" and "restrictions" in the NPRM interchangeably with the terms "regulations", "prohibitions", and "limitations". In order to avoid confusion with FAA terminology, NOAA has removed the terms "restrict" and "restrictions" from this final rule and replaced them with comparable terms.

9. *Comment:* The final rule for the Olympic Coast National Marine Sanctuary should exempt flight operations for the purposes of taking off and landing at Copalis, Quillayute, or Sekiu airports.

Response: NOAA agrees that exemptions for flight operations to and from Copalis airport may be necessary because the proximity of the airport to the Olympic Coast National Marine Sanctuary makes it difficult for pilots to comply with sanctuary regulations when merely flying in and out of the airport. However, since such a change in ONMS regulations is beyond the scope of this action, NOAA will consider this in a separate rulemaking action, subject to review and comment. NOAA disagrees, however, that exemptions are necessary for Quillayute or Sekiu airports because both airports are far enough inland that no exemption is necessary.

The configuration and location of Quilayute Airport (KUIL) does not require general aviation aircraft to descend below 2,000 feet above ground level (AGL) over the ocean during downwind or straight-in approach to this airport's only open runway, Runway 04/22 (RWY 04/22). Sekiu Airport (11S) is located on the Strait of Juan de Fuca and is over 10 nautical miles from the boundary of Olympic Coast National Marine Sanctuary.

10. *Comment:* Search and rescue operations should be exempted from the final rule.

Response: Current ONMS regulations specifically exempt activities as may be necessary to respond to an emergency threatening life, property, or the environment. Search and rescue operations would be considered an emergency activity and are therefore exempt from the regulations. Accordingly, NOAA made no changes to the regulations in response to this comment.

11. *Comment:* Penalties for violations should be defined.

Response: The assessed penalty amount for a violation of sanctuary overflight regulations would be determined in accordance with NOAA's regulations at 15 C.F.R. 904 and with the National Marine Sanctuaries Act Vessel/Aircraft Schedules of NOAA's policy for assessment of penalties and permit sanctions. See www.gc.noaa.gov/documents/031611_penalty_policy.pdf

12. *Comment:* NOAA should prepare an EIS for this action.

Response: NOAA disagrees. The amendments to the sanctuary regulations in the four national marine sanctuaries identified in this notice do not have significant environmental impacts and are categorically excluded from the need to prepare an environmental assessment pursuant to the National Environmental Policy Act. Specifically, the proposed amendments to the regulations are legal in nature, establishing a rebuttable presumption regarding disturbance

below a certain level and are thus categorically excluded by NOAA Administrative Order 216-6 Section 6.03c.3(i).

13. Comment: The Olympic Coast National Marine Sanctuary regulation would create a safety concern. Cloud ceilings are typically at 2000 to 2500 feet in this sanctuary. FAA requires pilots to remain 500 feet below clouds to maintain safe flight, but doing so would routinely violate NOAA's regulation.

Response: This rule does not change the applicable long-standing minimum altitudes that are codified in the regulations for the Olympic Coast National Marine Sanctuary and the national marine sanctuaries off California. These existing regulations have not created a safety issue of this nature in the 18 years since OCNMS was designated. Nonetheless, if weather conditions are such that maintaining visual flight rules (VFR) cannot be achieved while avoiding the flight ceiling, rather than violating the overflight regulations the pilot could instead choose to do any of the following: 1) avoid flying over sanctuary waters by flying inland; 2) fly instrument flight rules (IFR) through the clouds; or 3) fly above the clouds.

14. Comment: NOAA's regulations would require new charting symbols.

Response: NOAA disagrees. FAA has the responsibility for preparation and publication of aeronautical charts. NOAA will provide any information necessary to assist FAA.

15. Comment: Tomales Bay should be added to the list of protected areas under the Gulf of Farallones regulation.

Response: NOAA recognizes the significance of Tomales Bay as an important area for seabirds and marine mammals. However, the identification of this area as a new designated zone is beyond the scope of this rulemaking.

16. *Comment:* The final amendments should expressly maintain the existing exemptions for Navy activities involving low-level military overflights of sanctuaries.

Response: This rulemaking does not alter the existing exemptions for Department of Defense activities from certain sanctuary prohibitions.

17. *Comment:* How will NOAA educate pilots about the amended regulations in the designated zones?

Response: As mentioned above, one of the purposes of this rulemaking is to facilitate the publication of these overflight regulations on aeronautical charts. In addition, however, NOAA will continue to collaborate with FAA to educate pilots on the overflight regulations for sanctuaries. Such coordination would include working with local FAA aviation safety program managers to get the word out to pilot associations. Other outreach strategies would likely include press releases, presentations to flight clubs, articles in general aviation magazines, and flyers/posters at local airports. The addition of the notation to the aeronautical charts is to assist aircraft operators by placing the information on a chart, which is a logical place for operators to consult for flight information.

IV. Summary of Changes from the Proposed Rule

NOAA has made two changes to this final rule as compared to the proposed rule. NOAA corrected the Channel Islands National Marine Sanctuary regulatory citation from §922.72 paragraph (a)(5) to §922.72 paragraph (a)(7) and the Olympic Coast National Marine Sanctuary regulatory citation from §922.152 paragraph (a)(6) to §922.152 paragraph (a)(7).

IV. Classifications

A. National Environmental Policy Act

The amendments to the sanctuary regulations in the four national marine sanctuaries identified in this notice do not have significant environmental impacts and are categorically excluded from the need to prepare an environmental assessment pursuant to the National Environmental Policy Act. Specifically, the proposed amendments to the regulations are legal in nature, establishing a rebuttable presumption regarding disturbance below a certain level and are thus categorically excluded by NOAA Administrative Order 216-6 Section 6.03c.3(i).

B. Executive Order 12866: Regulatory Impact

This proposed rule has been determined to be not significant within the meaning of Executive Order 12866.

C. Executive Order 13132: Federalism Assessment

NOAA has concluded this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

D. Paperwork Reduction Act

This rule does not contain any new or revisions to the existing information collection requirement that was approved by OMB (OMB Control Number 0648-0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule,

if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this rule. As a result, a final regulatory flexibility analysis was not prepared.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Environmental protection, Fish, Harbors, Marine pollution, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Research, Water pollution control, Water resources, Wildlife, Overflights.

Dated: January 20, 2012

Holly A. Bamford,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management

Accordingly, for the reasons set forth above, 15 CFR part 922 is amended as follows:

PART 922 – NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

1. The authority citation for part 922 continues to read as follows:

Authority: 15 U.S.C. 1431 *et seq.*

Subpart G - Channel Islands National Marine Sanctuary

2. Amend §922.72 by revising paragraph (a)(7) to read as follows:

§ 922.72 Prohibited or otherwise regulated activities—Sanctuary-wide.

(a)* * *

(7) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 1,000 feet over the waters within one nautical mile of any Island, except to engage in kelp bed surveys or to transport persons or supplies to or from an Island. Failure to maintain a minimum altitude of 1,000 feet above ground level over such waters is presumed to disturb marine mammals or seabirds.

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Subpart H - Gulf of Farallones National Marine Sanctuary

3. Amend § 922.82 by revising paragraph (a)(8) to read as follows:

§ 922.82 Prohibited or otherwise regulated activities.

(a)* * *

(8) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 1,000 feet over the waters within one nautical mile of the Farallon Islands, Bolinas Lagoon, or any ASBS, except to transport persons or supplies to or from the Islands or for enforcement purposes. Failure to maintain a minimum altitude of 1,000 feet above ground level over such waters is presumed to disturb marine mammals or seabirds.

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Subpart M - Monterey Bay National Marine Sanctuary

4. Amend § 922.132 by revising paragraph (a)(6) to read as follows:

§ 922.132 Prohibited or otherwise regulated activities.

(a)***

(6) Disturbing marine mammals or seabirds by flying motorized aircraft, except as necessary for valid law enforcement purposes, at less than 1,000 feet above any of the four zones within the Sanctuary described in Appendix B to this subpart. Failure to maintain a minimum altitude of

1,000 feet above ground level above any such zone is presumed to disturb marine mammals or seabirds.

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Subpart O - Olympic Coast National Marine Sanctuary

5. Amend § 922.152 by revising paragraph (a)(7) to read as follows:

§ 922.152 Prohibited or otherwise regulated activities.

(a)* * *

(7) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 2,000 feet over the waters within one nautical mile of the Flattery Rocks, Quillayute Needles, or Copalis National Wildlife Refuges or within one nautical mile seaward from the coastal boundary of the Sanctuary, except for activities related to tribal timber operations conducted on reservation lands, or to transport persons or supplies to or from reservation lands as authorized by a governing body of an Indian tribe. Failure to maintain a minimum altitude of 2,000 feet above ground level over any such waters is presumed to disturb marine mammals or seabirds.

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