

fathoms will benefit the species because it includes additional areas that may require special management consideration or protection. Also, NMFS is adding Maro Reef to the areas designated as critical in the Northwestern Hawaiian Islands (NWHI).

DATE: This rule becomes effective on June 27, 1988.

ADDRESS: Dr. Nancy Foster, Director, Office of Protected Resources, NMFS, Washington, DC 20235.

FOR FURTHER INFORMATION CONTACT: James H. Lecky, NMFS, Southwest Region, Terminal Island, CA 90731, 213-548-2518; or Margaret Lorenz, Protected Species Management Division, NMFS, Washington, DC 20235, 202-673-5349.

SUPPLEMENTARY INFORMATION:

Background

After the final rule designating critical habitat out to 10 fathoms was issued (April 30, 1986, 51 FR 16047), NMFS continued to examine the basis for its decision. Of particular concern was whether areas beyond 10 fathoms were in need of special management consideration or protection either now or in the reasonably foreseeable future.

After inviting comments on whether the area between 10 to 20 fathoms around the islands may require special management consideration or protection and reviewing our earlier decision, NMFS proposed regulations that would extend the designation of critical habitat out to 20 fathoms in all areas currently designated as critical and would include Maro Reef (January 8, 1988).

All commenters on the proposed rule, except the State of Hawaii, favored extending critical habitat out to 20 fathoms and including Maro Reef in the areas designated as critical. The State believes there is insufficient evidence to show that waters from 10 to 20 fathoms deep, or around Maro Reef, are particularly critical, and they believe there is no legal basis for the proposed rulemaking. The State did not agree with the original designation of critical habitat in the NWHI. In this case, the State believes that, to date, there has been no convincing demonstration through the best available scientific evidence of a need for critical habitat designation. However, based on the best scientific data available, NMFS believes that there is sufficient justification to designate critical habitat out to 20 fathoms and to include Maro Reef in the designation. The components of monk seal habitat identified in the FEIS include foraging and breeding areas, pupping and major haul-out sites, and

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 70639-8060]

Critical Habitat; Hawaiian Monk Seal; Endangered Species Act

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

ACTION: Notice of final rule.

SUMMARY: NMFS is extending critical habitat for Hawaiian monk seals from 10 to 20 fathoms in all areas previously designated as critical. NMFS believes the designation of critical habitat to 20

nearshore waters used by females and pups.

Comments favoring the extension of critical habitat were received from the U.S. Department of the Interior, the Humane Society of the United States, the Sierra Club Legal Defense Fund, Greenpeace, the Committee for Humane Legislation, the Center for Environmental Education and one individual. However, Interior stated that they disagreed with the assessment contained in the proposed rule that the Minerals Management Service is one of the Federal agencies most likely to be affected by the designation of critical habitat. Interior believes the contention that there may be conflicts between deep seabed mining and monk seal critical habitat is not supported by any available scientific and commercial data.

NMFS agrees that deep seabed mining itself probably will not affect monk seals. However, the development of on- or near-shore support facilities may affect monk seals. If so, and if these facilities were subject to Interior's jurisdiction, it would be necessary for MMS to consult with NMFS.

The action NMFS is taking is described in Alternative One of the Final Environmental Impact Statement—Proposed Designation of Critical Habitat for the Hawaiian Monk Seal in the Northwestern Hawaiian Islands (May 1986). NMFS especially focused on the extensive comments regarding the areas that may need special management consideration or protection. The designation of critical habitat to 20 fathoms affords substantial protection for the Hawaiian monk seal and includes areas that are both essential and in need of special management consideration or protection. The additional areas incorporated in this designation consist primarily of foraging habitat.

To determine what portion of the monk seal's range contains habitat that is consistent with the definition of "critical habitat," NMFS reviewed the available biological information, comments on the Supplemental Environmental Impact Statement, the management recommendations made by the Recovery Team and the Marine Mammal Commission, the comments received in response to the advance notice and the proposed rule and the record of Endangered Species Act Section 7 consultations on Federal activities in the NWHI.

There are no inherent restrictions on human activities in an area designated as critical habitat. However, when an area is designated as critical, all activities that take place in that area are

affected if they are authorized, funded, or carried out by Federal agencies. Critical habitat designation notifies Federal agencies that a listed species depends 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. Any Federally controlled activity may be conducted in an area designated as critical habitat if the authorizing Federal agency determines through the Section 7 consultation process that the activity is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Activities that are conducted by state agencies or the private sector without Federal involvement may be carried out without regard to Section 7 although other provisions of the ESA and other Federal and State laws may impose prohibitions on activities resulting in the taking of endangered or threatened species.

Hawaiian Monk Seal Biology

The biology of the Hawaiian monk seal is discussed in the Supplemental and Final Environmental Impact Statements. The discussion includes the history of exploitation, trends in population size, current status of the population, life history parameters, habitat requirements, and biological problems confronting the species. Further information is available from the Draft Environmental Impact Statement, the Recovery Plan, and the 5-year Status Review for the Hawaiian monk seal. A summary of research studies concerning habitat requirements of the Hawaiian Monk Seal was provided in the proposed rule.

This final rule designates as critical habitat for the Hawaiian monk seal all beach areas, including all beach crest vegetation to its deepest extent inland, lagoon waters, and ocean waters out to a depth of 20 fathoms, around Kure Atoll, Midway Islands (except Sand Island and its harbor), Pearl and Hermes Reef, Maro Reef, Lisianski Island, Laysan Island, Gardner Pinnacles, French Frigate Shoals, Necker Island, and Nihoa Island. References to beaches or beach areas include all sand spits and islets.

Effect of the Rulemaking

This action directly affects only Federal agencies and those who need Federal authorization or funding for their actions. It does not affect State and local government activities or private actions which do not depend on or are not limited by Federal authorization, permits or funds, although other law

may prohibit actions that result in the taking of endangered or threatened species. However, many of the activities in the NWHI are subject to some Federal control and could be affected. Section 7 of the ESA requires Federal agencies to consult with NMFS to ensure that any activity funded, authorized, or undertaken by them is not likely to jeopardize the continued existence of endangered species or result in the destruction or adverse modification of critical habitat.

Currently, Federal agencies are required to consult on actions that may affect Hawaiian monk seals. The extension of designated critical habitat requires Federal agencies to evaluate their activities with respect to critical habitat to ensure that these activities are not likely to result in the destruction or adverse modification of the critical habitat. In most situations, consultations are required even if critical habitat has not been designated because actions that affect critical habitat are also likely to affect the monk seal. Therefore, expanding the designation of critical habitat does not substantially add to the Federal agencies' responsibilities and does not have any significant adverse economic impacts on State or private entities including small businesses. Extending the designation of critical habitat will assist Federal agencies in evaluating the potential effects of their activities on monk seals and in determining when consultation with NMFS would be required. The Federal agencies most likely to be affected by this designation include the U.S. Coast Guard, U.S. Navy, U.S. Fish and Wildlife Service, Minerals Management Service, Western Pacific Regional Fishery Management Council, and NMFS.

This final rule is not expected to have any direct impact on fisheries in the NWHI. The only direct economic costs are those associated with more extensive monitoring of Federal activities by NMFS or when other Federal agencies, after a review of their activities in the NWHI, must take certain administrative actions. Since Federal agencies are required to conduct Section 7 consultations for activities that may affect Hawaiian monk seals and conform to National Environmental Policy Act (NEPA) requirements for actions that significantly affect the quality of the human environment, any additional costs are expected to be minimal.

Classification

For reasons discussed in *Effects of the Rulemaking*, the NOAA Administrator has determined that this is not a major

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

Further, the General Counsel of the Department of Commerce has certified to the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small 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 requirement for purposes of the Paperwork Reduction Act of 1980.

This final rule does not contain policies with federalism implications

sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

National Environmental Policy Act

Draft, draft supplemental, and final environmental impact statements were prepared on the action to designate critical habitat out to 10 fathoms. This proposed action to extend critical habitat to 20 fathoms is analyzed as Alternative One in the FEIS.

List of Subjects in 50 CFR Part 226

Endangered and threatened wildlife, marine mammals.

Dated: May 19, 1988.

James E. Douglas, Jr.,
Deputy Assistant Administrator for Fisheries.

PART 226—[AMENDED]

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

1. The authority citation for Part 226 continues to read as follows

Authority: 16 U.S.C. 1533.

2. Section 226.11 under Subpart B is revised to read as follows:

§ 226.11 Northwestern Hawaiian Islands.

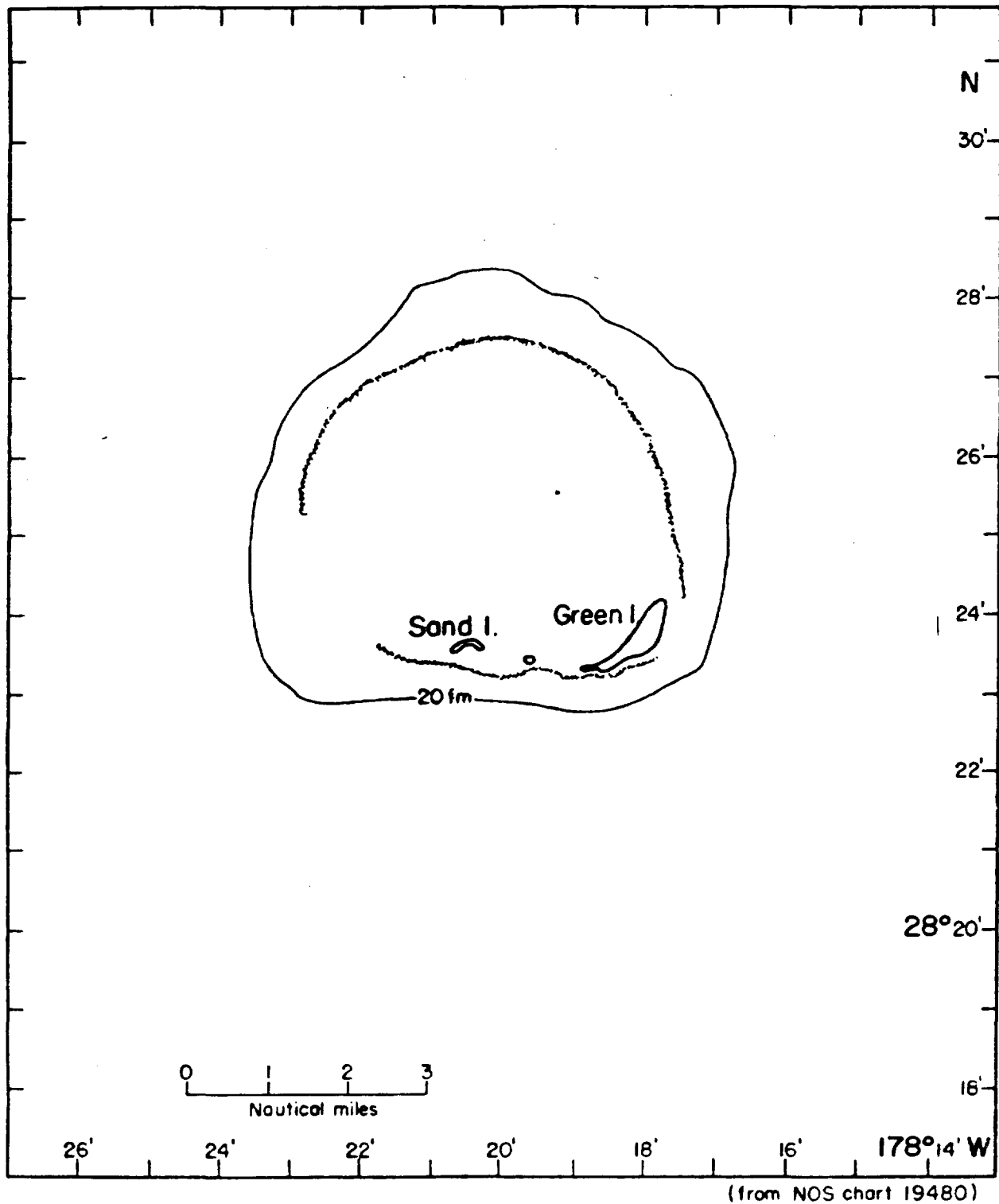
Hawaiian Monk Seal

(*Monachus schauinslandi*)

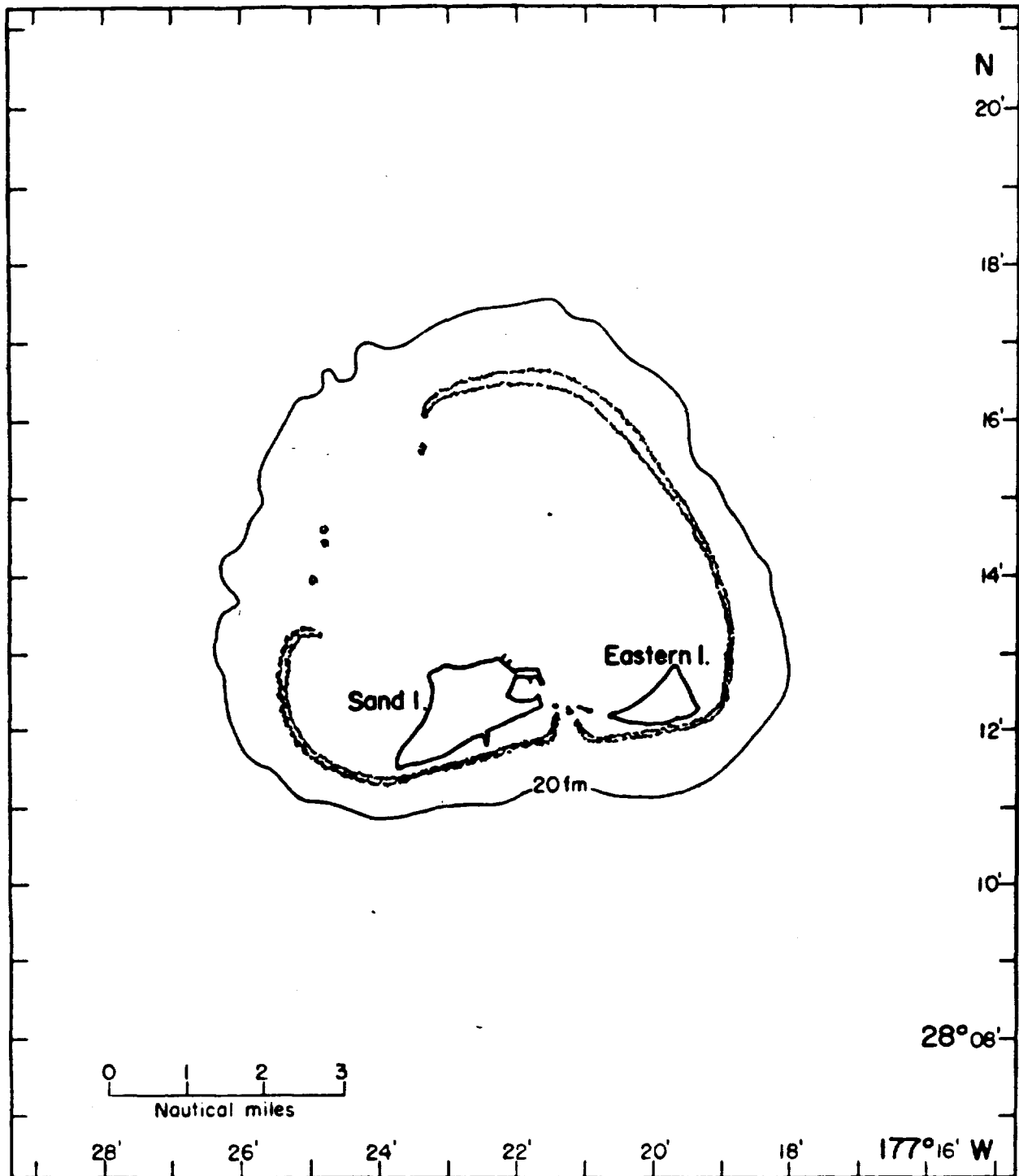
All beach areas, sand spits and islets, including all beach crest vegetation to its deepest extent inland, lagoon waters, inner reef waters, and ocean waters out to a depth of 20 fathoms around the following:

Kure Atoll (28°24' N, 178°20' W)
Midway Islands, except Sand Island and its harbor (28°14' N, 177°22' W)
Pearl and Hermes Reef (27°55' N, 175° W)
Lisianski Island (26°46' N, 173°58' W)
Laysan Island (25°46' N, 171°44' W)
Maro Reef (25°25' N, 170°35' W)
Gardner Pinnacles (25°00' N, 168°00' W)
French Frigate Shoals (23°45' N, 166°00' W)
Necker Island (23°34' N, 164°42' W)
Nihoa Island (23°03.5' N, 161°55.5' W).

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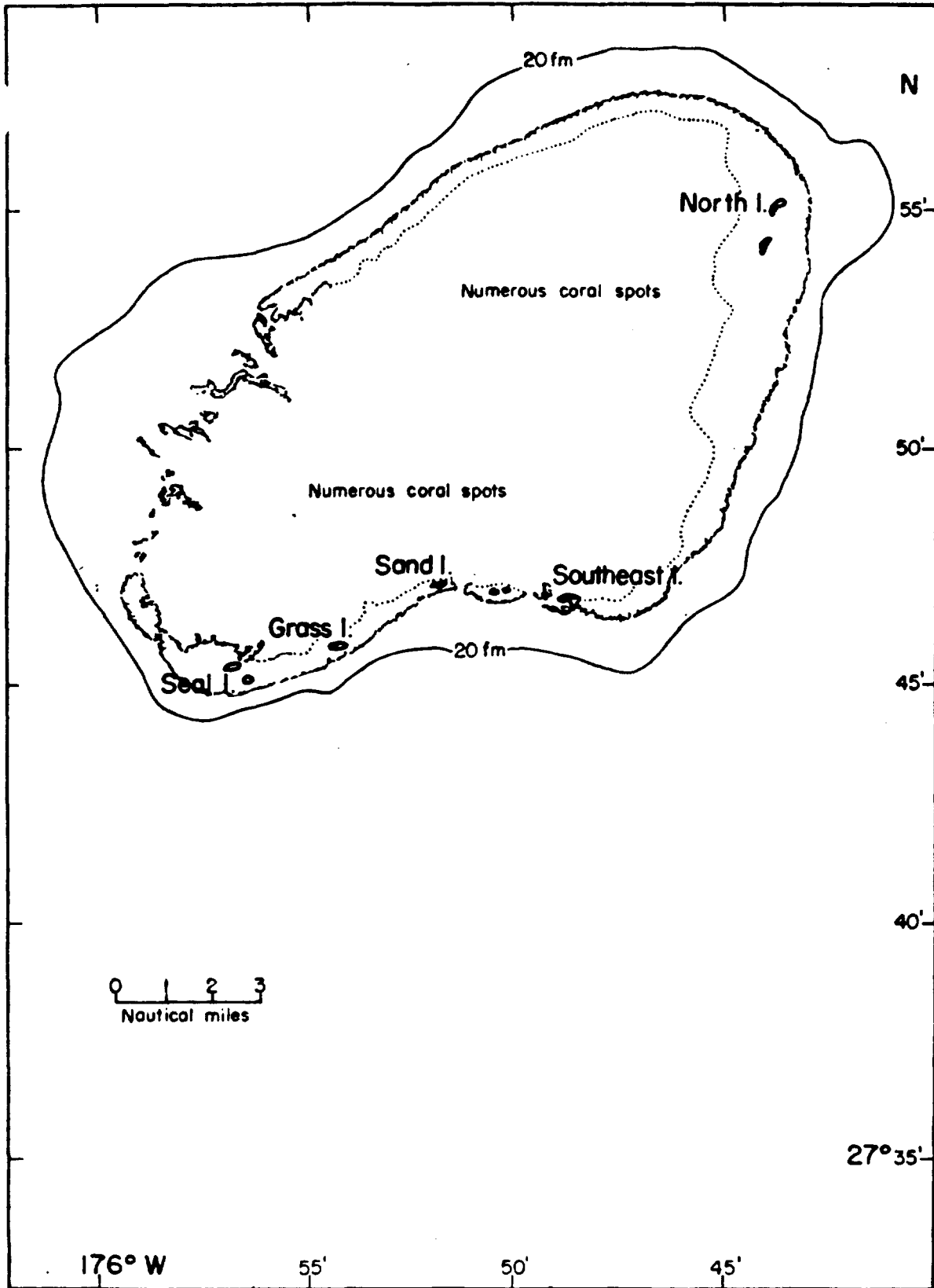


KURE ATOLL

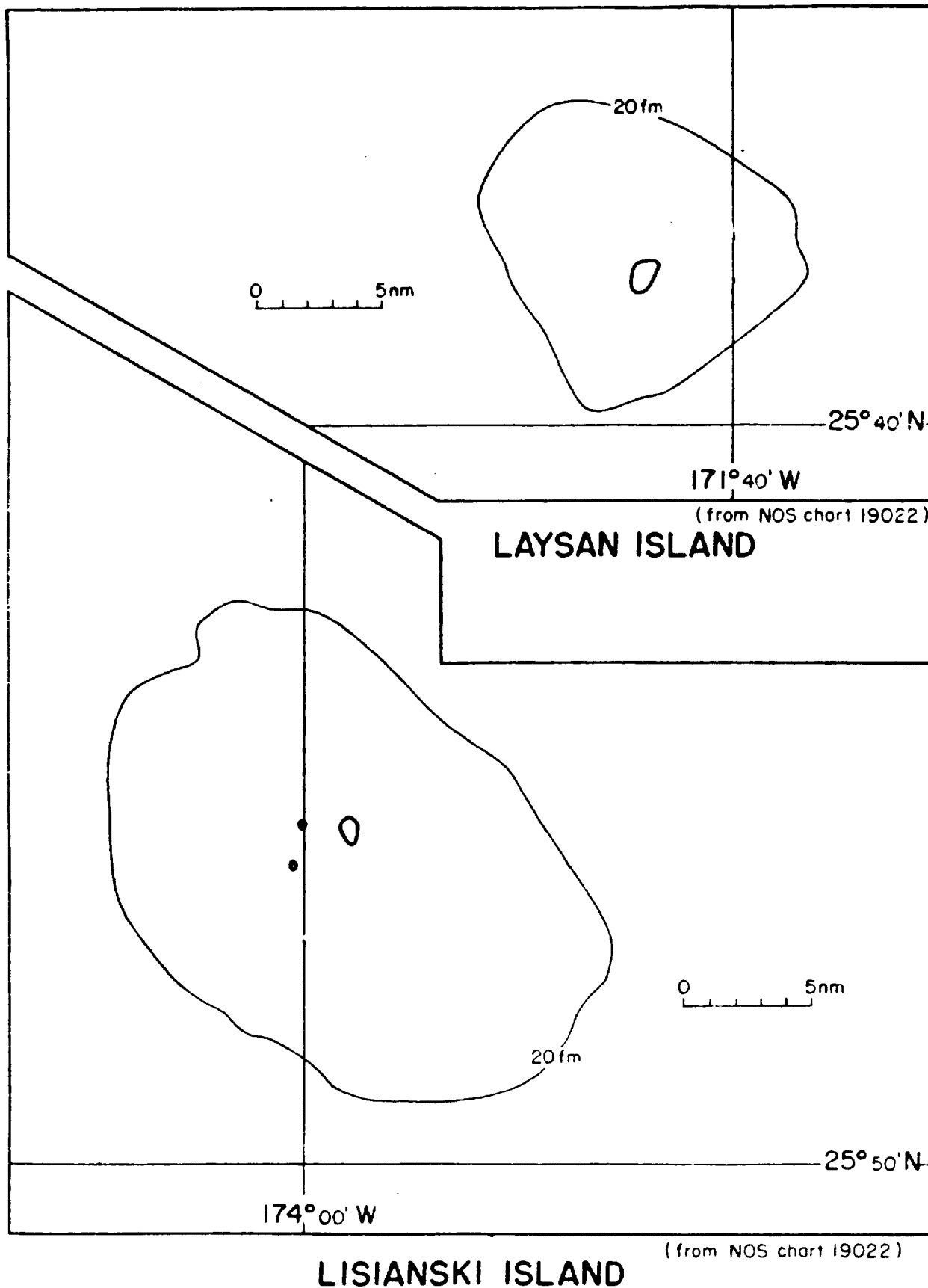


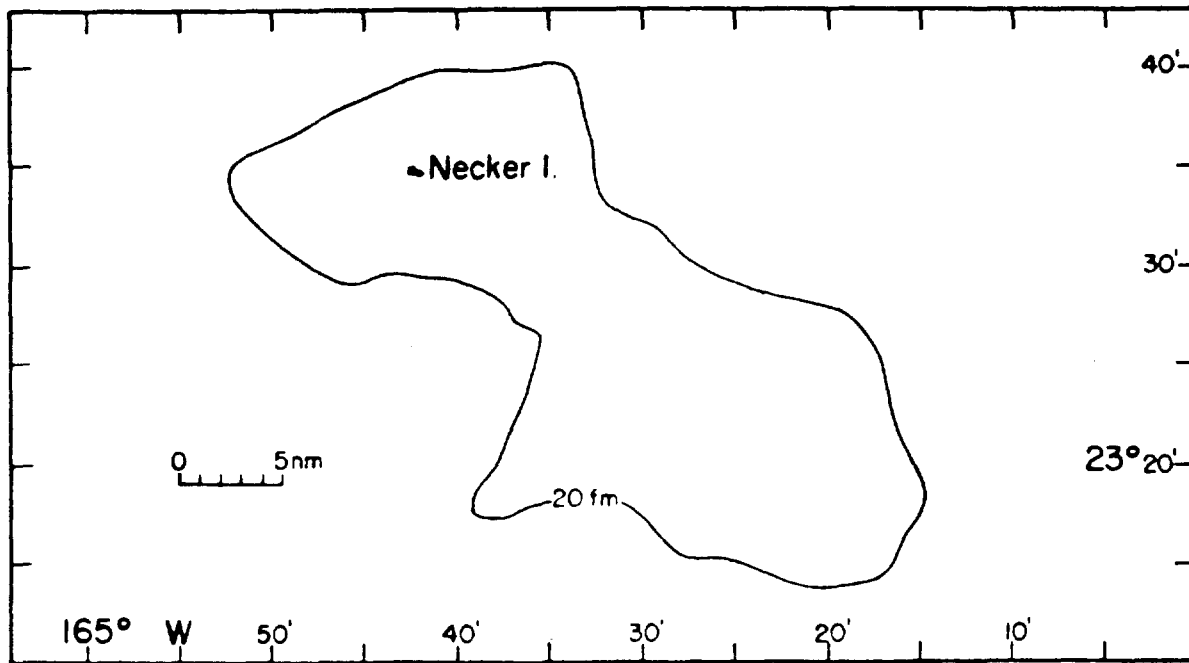
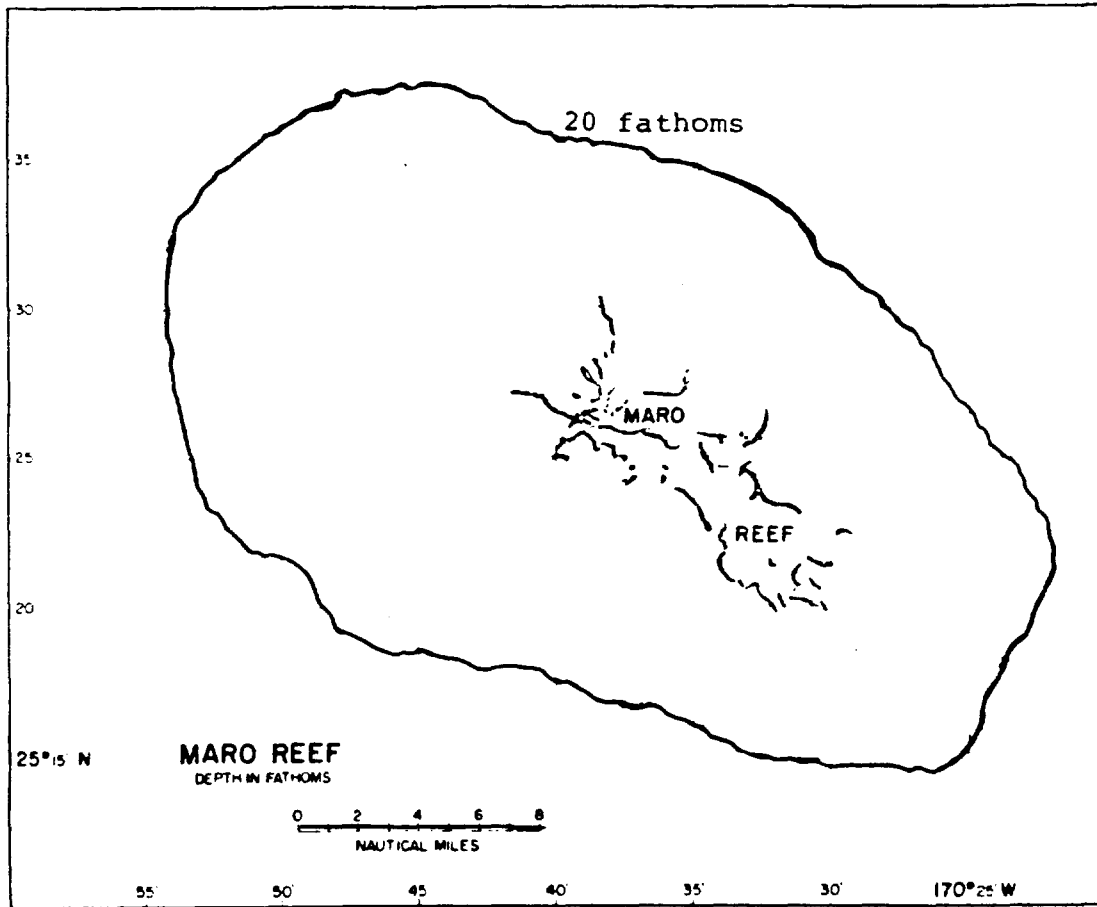
(from NOS chart 19480)

MIDWAY ISLANDS

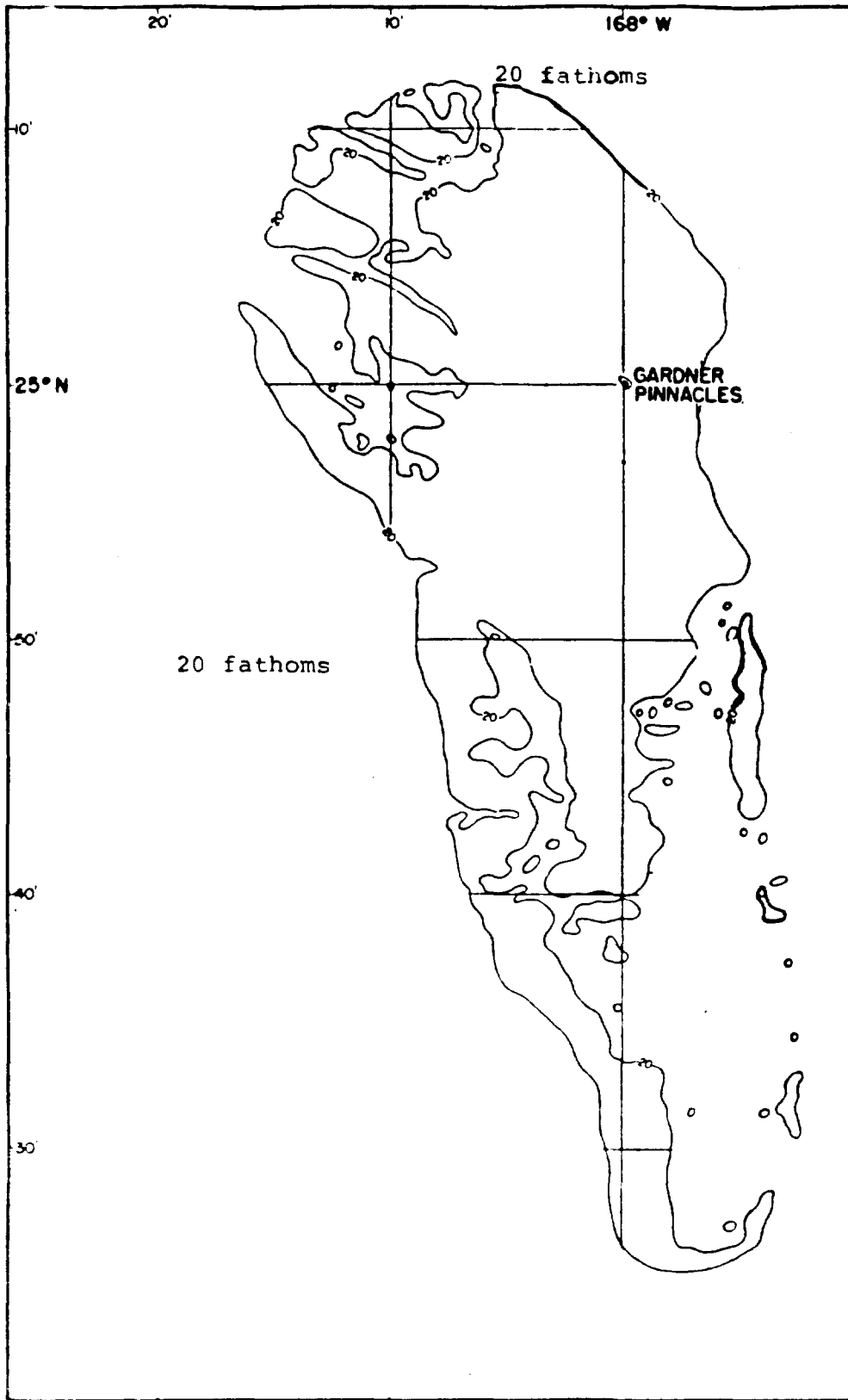


PEARL and HERMES REEF



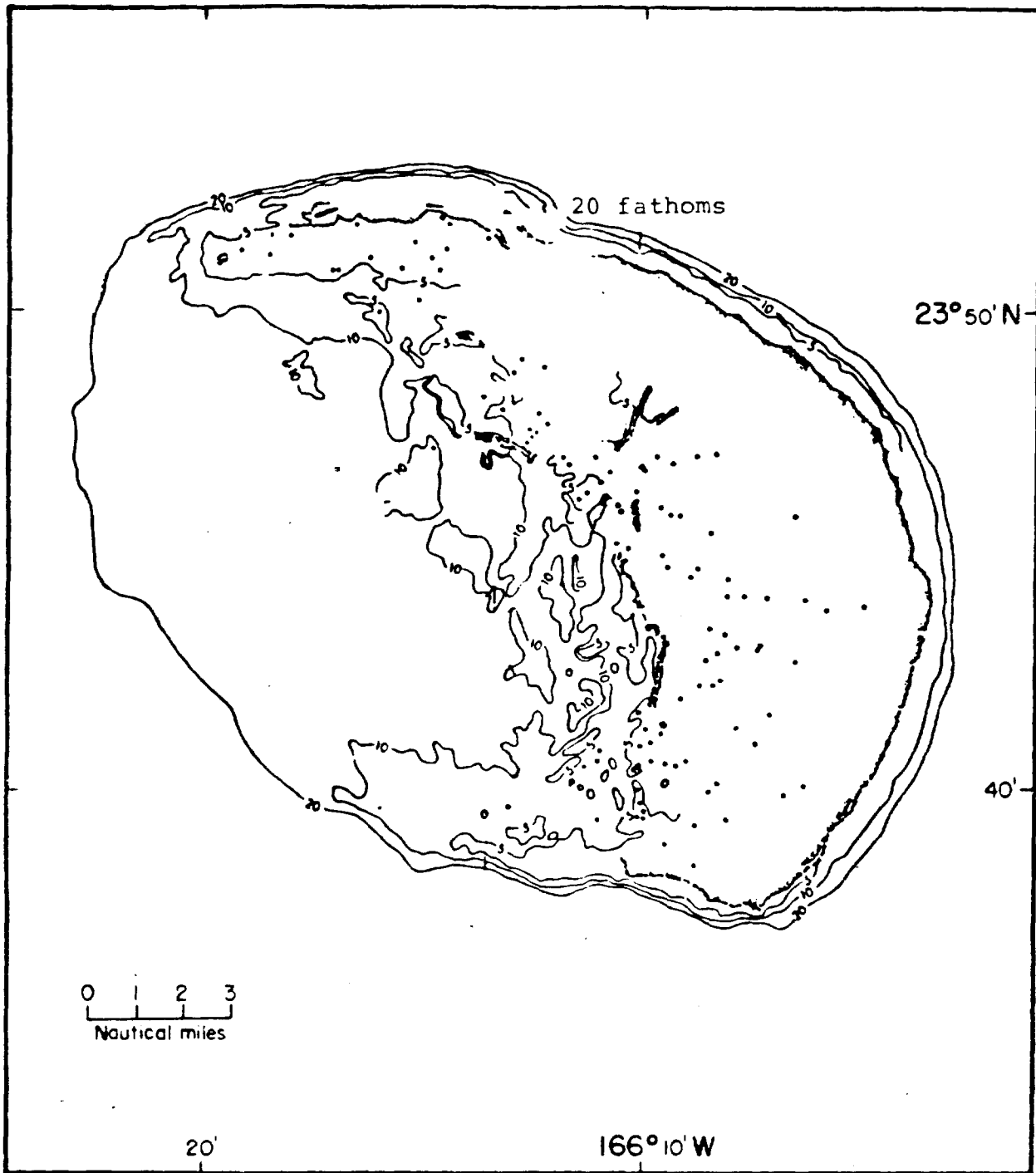


NECKER ISLAND



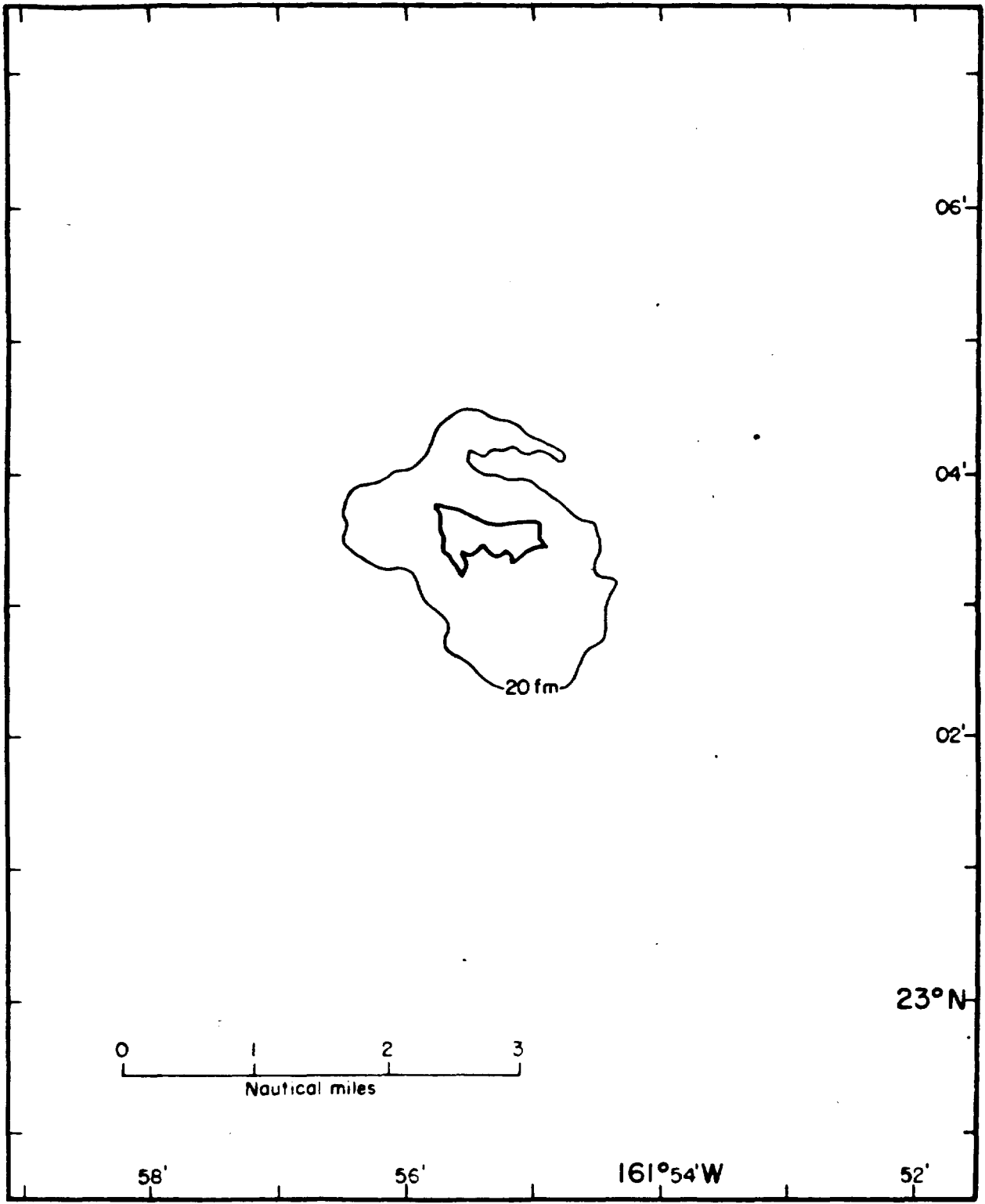
(from NOS chart 19421)

GARDNER PINNACLES



(from U.S.F.W.S.)

FRENCH FRIGATE SHOALS



(from NOS chart 19016)

NIHOA ISLAND