



July 26, 2017

Submitted Via the Federal eRulemaking Portal

Secretary Wilbur Ross
U. S. Dept. of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Review of National Marine Sanctuaries and Marine National
Monuments Designated or Expanded Since April 28, 2007;
Docket No. NOAA–NOS–2017–0066

Dear Secretary Ross:

Turtle Island Restoration Network (“Turtle Island”), a California nonprofit public benefit corporation, requests that you consider these comments in your review and formulation of recommendations concerning the National Marine Sanctuaries and the Marine National Monuments pursuant to Executive Order 13795. We appreciate the opportunity to comment on this docket and the important issues it raises concerning the obligations imposed by the Antiquities Act of 1906, 16 U.S.C. §§ 431 – 433 (2000) (“Antiquities Act”), the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431 – 1445 (2000) (“Sanctuaries Act”),¹ and regulations promulgated thereunder.

These comments are submitted by Turtle Island on behalf of its staff and 81,000 active members and supporters. Turtle Island is a leading advocate for the world’s endangered marine wildlife and the ocean habitats upon which it depends through hands-on conservation, research and advocacy campaigns. Since 1989, Turtle Island has worked to protect and restore populations of

¹ *Reauthorized* by National Marine Sanctuaries Program Amendments of 1992, Pub. L. 102-587, 106 Stat. 5039 (codified as amended at 16 U.S.C. §§ 1431-1445 (2000)).

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endangered sea turtles and the habitat, and have extended our successful strategies to safeguard endangered whales, dolphins, seals, seabirds, sharks, and fish.

The issues raised by the review mandated under Executive Order 13795 directly impact protected areas of importance to Turtle Island, whose advocacy efforts include initiatives to reform fisheries, create marine protected areas, safeguard marine and coastal watershed habitats, and build community engagement. These efforts extend from our offices in Northern California and the Gulf Coast in Texas to the waters of the Pacific off the West Coast, Hawaii and the Western Tropical Pacific, to Texas sea turtle nesting beaches and the Gulf of Mexico, to Central American nesting beaches and the Eastern Tropical Pacific Seascape, and to other key ocean habitats. Our Executive Director is a member of the Advisory Council for the Cordell Banks National Marine Sanctuaries, and our Gulf of Mexico Campaign Director is a member of the Flower Garden Banks National Marine Sanctuaries Advisory Council.

Summary of Issues and Comments

- Under the Antiquities Act, the Executive Branch does not have the authority to unilaterally eliminate any National Monument, or to downsize the geographical area or reduce the protections of any National Monument.
- Under the Sanctuaries Act, it is incompatible with Congressional intent for enacting the law, with the express purpose of the law, and with the specific prohibitions imposed by management provisions to permit the exploration, development and production of energy and mineral resources within each National Marine Sanctuary affected by this review.
- Any review that will affect a National Marine Monument or a National Marine Sanctuary that is part of a Marine Protected Area must include a review of the local, regional and ocean basin networks of which the monument or sanctuary is a part.

Discussion of Issues and Comments

Introduction

Executive Order 13795 directs the Secretary to conduct a review of all designations and expansions of each National Marine Sanctuary (“NMS”) and Marine National Monument (“MNM”) that was designated or expanded since April 28, 2007. These comments specifically address those two aspects of Executive Order 13795 which direct the Secretary to review each NMS and MNM identified in the Executive Order regarding (1) the “opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf” and (2) the applicability of certain factors identified in the “Notice—Review of Certain National Monuments Established Since 1966,” 82 Fed.Reg. 22016 (May 11, 2017). In addition, these comments specifically address the reviews mandated by Executive Order 13795 as applicable to the five MNMs and four NMSs identified herein.

Marine National Monuments

The MNMs subject to review under Executive Orders 13795 and 13792 (including the enacting President and year of designation or expansion) include the Papahānaumokuākea (George W. Bush 2006, Barack Obama 2016), Marianas Trench (George W. Bush 2009), Pacific Remote Islands (George W. Bush 2009, Barack Obama 2014), Northeast Canyons and Seamounts (Barack Obama 2016) and Rose Atoll (George W. Bush 2009). Executive Order 13792 directs the Secretary of the Interior, in consultation with the Secretary of Commerce, to review the designation or expansions of the MNMs to consider, *inter alia*, “(i) The requirements and original objectives of the [Antiquities] Act, including the Act’s requirement that reservations of land not exceed “the smallest area compatible with the proper care and management of the objects to be protected” and “(iii) the effects of a designation on the available uses of designated Federal lands (. . .).”

These five MNMs are unparalleled in size (215 million combined acres) and the importance of the protections they provide for marine wildlife and seabird species, as well as for the unique and ecologically significant environments and biological communities within their boundaries:

- Papahānaumokuākea Marine National Monument: This MNM is located in the Pacific Ocean (89.6 million acres) is home to over 7,000 marine species, one quarter of which are found only in the Hawaiian Archipelago. Species protected include the threatened green turtle, the endangered Hawaiian monk seal, and the world's most endangered duck, the Laysan duck.

- Marianas Trench Marine National Monument: This MNM is located in the Pacific Ocean (60.9 million acres) and includes the Marianas Trench, the deepest known place on Earth, and protects and conserves the refuge provided by the Mariana Archipelago for seabirds, sea turtles, unique coral reefs that support large populations of reef fishes and apex predators, and the greatest diversity of hydrothermal vent life yet discovered.

- Pacific Remote Islands Marine National Monument: This MNM is located in the Pacific Ocean (55.6 million acres) protects ancient coral atolls up to 5,000 years old. This MNM also protects and conserves coral reef ecosystems that sustain a diversity of species including corals, fish, shellfish, marine mammals, seabirds, land birds, insects, and vegetation not found anywhere else in the world. Many threatened, endangered, and depleted species thrive in the Pacific Remote Islands, including the green and hawksbill turtle, pearl oyster, giant clams, reef sharks, coconut crabs, groupers, humphead and Napoleon wrasse, bumphead parrotfish, dolphins and whales.

- Northeast Canyons and Seamounts Marine National Monument: This MNM is the first one located in the Atlantic Ocean (3.1 million acres), and protects four seamounts that are the only ones found in U.S. Atlantic waters. The canyons and seamounts provide habitat for protected species such as endangered sperm, fin, sei and North Atlantic right whales and Kemp's ridley turtles. Centuries-old cold-water corals are the foundation of this deep-sea ecosystem and upwellings of deep, cold water deliver nutrients to plankton, squid and forage fish that feed the sperm whales and North Atlantic right whales that thrive in these waters.

- Rose Atoll Marine National Monument in American Samoa: This MNM is located in the Pacific Ocean (8.6 million acres) and protects one of the last and most pristine atolls in the world. The marine environment around Rose Atoll supports a dynamic reef ecosystem that is home to a

diverse assemblage of marine species, many of which are threatened or endangered. Rose Atoll provides isolated, undisturbed nesting grounds for green and hawksbill turtles, and waters within and surrounding the Rose Atoll MNM are frequented by numerous large predators such as whitetip, blacktip, and gray reef sharks, snappers, jacks, groupers, and barracudas.

The mission of the Marine National Monument Program is to “Understand and protect the unique natural and cultural resources within the Marine National Monuments through the advancement of scientific research, exploration, and public education.” This mission can be served only by respect for the scientific and cultural bases for the designation of each MNM as described in its Proclamation, conservation of the unique features and resources of each MNM, and protection from incompatible uses that would endanger the very resources that each MNM was intended to protect.

As discussed below and in referenced sources, the legal bases for diminishing these MNMs in size or their protections is contrary to over a century of established law and practice.

The Antiquities Act

The Antiquities Act delegates to the President the power to reserve land by declaring a national monument by “public proclamation.”² Since its enactment in 1906, this authority has been exercised by Presidents of both political parties to designate national monuments throughout the United States.³ Starting in 2006, Presidents have created five MNMs in certain portions of the Atlantic and Pacific Oceans.⁴

Preliminarily, regarding the MNMs at issue in this review, it is well-settled that a President can authorize national monuments on submerged lands that are subject to the ownership or economic control of the United States. In

² 54 U.S.C. § 320301(a) (2012).

³ See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 487 – 514 (2003).

⁴ See NOAA, *Marine National Monument Program*, available at http://www.fpir.noaa.gov/MNM/mnm_index.html; NOAA, *First marine national monument created in the Atlantic* (Sept. 15, 2016), available at <http://www.noaa.gov/news/first-marine-national-monument-created-in-atlantic>.

an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea—3-12 nautical miles from the shore—or the exclusive economic zone—12-200 nautical miles from the shore.⁵

From the language of Executive Order 13792, and statements of the current Administration referring to national monuments as a “massive federal land grab,”⁶ the withdrawal of a national monument designation or reduction in size is under consideration for each of the MNMs identified in the Executive Order. However, the Executive Branch does not have the authority to unilaterally take such actions.

As plainly stated in a comment to Docket No. DOI-2017-0002 submitted by 121 natural resources and public lands law professors:

Under our constitutional framework, the Congress exercises plenary authority over federal lands. The Congress may delegate its authority to the President or components of the executive branch so long as it sets out an intelligible principle to guide the exercise of authority so delegated.⁶ The Antiquities Act is such a delegation. It authorizes the President to identify “objects of historic or scientific interest” and reserve federal lands necessary to protect such objects as a national monument. But the Antiquities Act is a limited delegation: it gives the President authority only to identify and reserve a monument, not to diminish or abolish one. Congress retained that power for itself.⁷

In addition to the express language of Antiquities Act, the Federal Lands Policy Management Act of 1976, 43 U.S.C. §§ 1701–1782 (2012)

⁵ Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 183–85 (Sept. 15, 2000).

⁶ Fox News Politics, “Trump orders review of national monument designations” (Apr. 26, 2017), available at <http://www.foxnews.com/politics/2017/04/26/trump-orders-review-national-monument-designations.html>.

⁷ Comment ID DOI-2017-0002-86945 (Jul. 6, 2017); *See also* Mark S. Squillace, et al., Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 VA L.Rev. Online 55, 56-69 (2017).

(“FLPMA”) provides further support for Congress’ reservation of authority to revoke or downsize a national monument. Specifically, Section 204(j) FLPMA indicates that the Executive Branch may not “modify or revoke any withdrawal creating national monuments” and authorizes the Secretary of the Interior “to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section.”⁸ The legislative record reinforces the interpretation that this provision reserves the authority to modify or revoke withdrawals of lands designated as national monuments to Congress.⁹

Even though FLPMA is only directly applicable to “public lands” managed by the Secretary of the Interior through the Bureau of Land Management, it is still persuasive authority that the right to downsize or diminish the protections of a national monument managed by other agencies is reserved exclusively to Congress.¹⁰ This reservation is of particular importance to two of the MNMs subject to review under this Docket, which have management provisions in their designating proclamations that specifically exclude energy exploration and development activities as incompatible with the conservation purpose for the creation of the MNM.¹¹

To echo the conclusion of the law professors in their comment:

It is beyond question that the proclamations creating the national monuments under review—both the terrestrial monuments and the marine monuments— identify a wealth of unique and precious resources that qualify as “objects of historic and scientific interest”

⁸ 43 U.S.C. § 1714(j) (2012).

⁹ See Squillace, et al., 103 VA L.Rev. Online at 59 – 64.

¹⁰ 43 U.S.C. §1072(e).

¹¹ See Presidential Proclamation – Papahānaumokuākea Marine National Monument Expansion (Aug. 26, 2016) (“The Secretaries shall prohibit persons from (. . .) [e]xploring for, developing, or producing oil, gas, or minerals, or any energy development activities within the Monument Expansion.”); Presidential Proclamation -- Northeast Canyons and Seamounts Marine National Monument (Sept. 15, 2016) (“The Secretaries shall prohibit, to the extent consistent with international law, any person from (. . .) [e]xploring for, developing, or producing oil and gas or minerals, or undertaking any other energy exploration or development activities within the monument.”).

throughout the reserved federal lands. These proclamations are, therefore, lawful. If the new administration believes that those objects and the lands containing them do not warrant protection, or that factors external to the Antiquities Act should be considered in evaluating national monument designations, the administration must turn to Congress for a remedy.¹²

The MNMs under review by Executive Orders are, like the oceans that they protect, expansive in area and the diversity of marine features and ecosystems. The size of these monuments and protections they provide are not subject to downsizing or reduction by a fiat from the Executive Branch.

National Marine Sanctuaries

Executive Order 13795 identifies eleven NMSs and MNMs for the Secretary to review for three factors, including the opportunities for energy and mineral exploitation from the Outer Continental Shelf (“OCS”).¹³ The following portion of this comment specifically addresses the review of four NMSs described below that are located within the area designated as the OCS and potentially affected by the exploration, development and production of oil and mineral resources:¹⁴

- Channel Islands NMS: Designated in 1980 by NOAA, the sanctuary spans 1,470 square miles surrounding five of the Channel Islands off Central/Southern California, and protects a wide variety of Federal or state-protected marine wildlife including blue, humpback, fin, sei and sperm whales, leatherback and green sea turtles, and white abalone in addition to protecting deep-sea coral and sponge communities.

- Cordell Bank NMS: Designated in 1979 and expanded in 2015, the sanctuary protects 1,286 square miles of entirely offshore marine habitat.

¹² Comment ID DOI-2017-0002-86945 (Jul. 6, 2017).

¹³ The “Outer Continental Shelf” is defined under the Outer Continental Shelf Lands Act (OCSLA) is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States (. . .)” which are under U.S. jurisdiction and control. 43 U.S.C. § 1331(a).

¹⁴ This review also affects one MNM, the Northeast Canyons and Seamounts MNM, that is located within the OCS area.

The centerpiece of the Sanctuaries is Cordell Bank, a rocky undersea feature located 22 miles west of the Point Reyes headlands which creates a rich and diverse biological community of fish, whales and other marine mammals, invertebrates and seabirds.

- Greater Farallones NMS: Designated in 1981 and expanded in 2015, the sanctuary protects 3,295 square miles within the California Current ecosystem, one of the most biologically productive regions in the world. The ecosystem provides breeding and feeding grounds for at least twenty-five endangered or threatened species; thirty-six marine mammal species, including blue, gray, and humpback whales, harbor seals, elephant seals, Pacific white-sided dolphins, and one of the southernmost U.S. populations of threatened Steller sea lions; over a quarter-million breeding seabirds; and one of the most significant white shark populations on the planet.

- Monterey Bay NMS: Designated in 1992, the sanctuary protects 276 miles of shoreline and 6,094 square miles of marine habitat that includes extensive kelp forests and deep near-shore marine canyons. These habitats support numerous endangered and threatened species including whales (Sei, Blue, Finback, Humpback, Right and Sperm) and other marine mammals, sea turtles (Green, Leatherback, Pacific Ridley, Loggerhead), salmon and sea birds.

Preliminarily, it must be noted that making an “opportunity cost” analysis as specified in Executive Order 13795 is inappropriate when valuing the energy and mineral resources of these protected areas. As stated by NOAA, “The opportunity cost of using a resource in a certain way is the value of the next most preferred use. Opportunity costs exist only in situations where there is a scarcity of the resource (i.e. not enough of the resource to accommodate all of the existing demands).”¹⁵ Given the abundance of developed and recoverable energy and mineral resources in the United States, there is simply no basis to conclude that exploitation of such resources located any NMS or MNM is necessary “to accommodate all of the existing

¹⁵ Peter C. Wiley, Valuing our National Marine Sanctuaries (NOAA Aug. 2003) at 9, available at <http://sanctuaries.noaa.gov/science/socioeconomic/pdfs/valuation.pdf>.

demands.”¹⁶ Accordingly, evaluating these protected areas using an opportunity cost analysis is inappropriate.

Further, if an opportunity cost analysis is used, then such analysis must accurately value and consider the “value of the next most preferred use” which, in this case, is the aggregated lost value of all sustainable resources and uses (e.g. the natural, ecological, biological services, socio-economic resources, aesthetic and other sustainable resources) that the non-sustainable use of energy exploration development and production would likely degrade and possibly destroy. As stated by NOAA:

There are certain tradeoffs between alternative uses of the resource that may not be conducive to sustainable resource use. Certain uses of the resource may result in degradation of the resource, which has the potential to eliminate the possibility of other uses. For example, if consumptive uses either degrade the environmental quality of an area or result in a decrease in the amount or diversity of wildlife, there is a resultant opportunity cost accrued to those who would use the resource in non-consumptive or in sustainable consumptive ways.¹⁷

In addition to comparing the sustainable and non-sustainable uses of natural and other sanctuary resources, in assessing the “opportunity cost” of permitting off-shore energy and mineral exploitation NOAA review must consider the enormous economic and market values these protected areas provide in their unexploited state.

From restaurants and hotels, to aquariums and kayak operators, the success of many businesses, millions of dollars in sales and thousands of jobs, directly depend on thriving national marine sanctuaries. Across all national marine sanctuaries, about \$8 billion annually is generated in local, coastal and

¹⁶ See e.g., Crude Oil Reserves (U.S. Dept. of Energy Dec. 14, 2016), *available at* https://www.eia.gov/dnav/pet/pet_crd_pres_dcu_SCA_a.htm (32 billion barrels “proven reserves”); Magnus Nysveen, The US Now Holds More Recoverable Oil Reserves Than Both Saudi Arabia and Russia (Jul. 4, 2016), *available at* <https://www.rystadenergy.com/NewsEvents/PressReleases/united-states-now-holds-more-oil-reserves-than-saudi-arabia> (264 billion barrels “recoverable oil”).

¹⁷ Wiley, *supra*, at 9.

ocean dependent economies from diverse activities like commercial fishing, research, education and recreation-tourist activities.¹⁸ Specifically regarding the four NMSs under review:

- Between 2010 and 2012, there were, on average, \$69.2 million in harvest revenue/value of landings from commercial catch in the four California national marine sanctuaries. This revenue generated, with multiplier impacts, almost \$144 million in output, \$76.9 million in value-added (gross regional product), and \$70 million in income, which supported 1,840 jobs in the coastal counties of California.
- Between 2010 and 2012, there were, on average, \$155.6 million in spending for recreational fishing in the four California national marine sanctuaries. This spending generated, with multiplier impacts, \$213 million in output, \$129 million in value-added (gross regional product), and \$74.6 million in income, which supported 1,376 jobs in the coastal counties of California.¹⁹
- Whale watching has been determined to be “an important system-wide activity” that makes significant contributions to the local and regional economies near a NMS.²⁰ A 2009 study concluded that all whale watching activities in California generated almost \$83 million in total

¹⁸ NOAA Factsheet: National Marine Sanctuaries and Local Economies, *available at* <http://sanctuaries.noaa.gov/science/socioeconomic/factsheets/national-system.html>.

¹⁹ *Id.*; See also Leeworthy, V.R., Jerome, D. Schueler, K. Economic Impact of the Commercial Fisheries on Local County Economies from Catch in the Channel Islands National Marine Sanctuaries 2010, 2011 and 2012 (NOAA 2014) at ii, *available at* http://sanctuaries.noaa.gov/science/socioeconomic/channelislands/pdfs/cinms_fishing_report.pdf (“The three year average for 2010 to 2012 finds that landings of catch from [Channel Islands] NMS generated \$27,275,539 in harvest revenue, \$45,396,225 in output, \$30,894,393 in value added, \$27,836,552 in total income and 659 full and part-time jobs across five counties.”).

²⁰ See The Economic Contribution of Whalewatching to Regional Economies: Perspectives From Two National Marine Sanctuaries (NOAA Jul. 2000), *available at* http://hawaiihumpbackwhale.noaa.gov/documents/pdfs_science/whalewatch_benefits.pdf;

expenditures, including activities conducted in the four California NMSs.²¹

Finally, in conducting this review and formulating recommendations, NOAA must consider the legal authorities that dictate the management of each NMS or MNM that is under review. Each NMS was created to protect the natural, cultural and other resources described in its individual designation.²² Each NMS is managed according to both the Sanctuaries Act and implementing regulations,²³ and all of these units are subject to provisions prohibiting the exploration, development or production of oil and gas or minerals within their boundaries.²⁴ As discussed below, these prohibitions are not subject to unilateral amendment or elimination by the Executive Branch.

The Sanctuaries Act

The Sanctuaries Act empowers the Secretary of Commerce (“Secretary”), with the authority to designate, conserve and manage marine environments that are of “national significance” due to, *inter alia*, their conservation, ecological and scientific qualities, its “communities of living marine resources” or its “resource or human-use values.”²⁵ A marine

²¹ See O’Connor, S., Campbell, R., Cortez, H., & Knowles, T., *Whale Watching Worldwide: tourism numbers, expenditures and expanding economic benefits*, a special report from the International Fund for Animal Welfare, Yarmouth MA, USA (Economists at Large 2009) at 223 – 227, available at http://sanctuaries.noaa.gov/science/socioeconomic/hawaii/bw/pdfs/2009_sconnor.pdf.

²² 15 C.F.R. 922.2(a) (“In accordance with (. . .) the National Marine Sanctuaries Act (Act) the mission of the National Marine Sanctuaries program (Program) is to identify, designate and manage areas of the marine environment of special national, and in some cases international, significance due to their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities.”).

²³ 15 C.F.R. §§ 922.1 – 922.198.

²⁴ See 50 C.F.R. § 922.72(a)(1) & (2) (Channel Islands NMS); 50 C.F.R. § 922.112(a)(1) (Cordell Bank NMS), 50 C.F.R. § 922.82(a) (Greater Farallones NMS) and 50 C.F.R. § 922.132(a)(1) (Monterey Bay NMS); See also nt. 11, *supra* (Northeast Canyons and Seamounts Marine National Monument).

²⁵ 16 U.S.C. § 1433(a)(2)(A) – (C); See also §§ 1433(b)(1)(A) (requiring consideration of “the area’s natural resource and ecological qualities”), (b)(1)(B) (historic values), (b)(1)(H)

sanctuary is designated by the Secretary in a notice-and-comment rulemaking process that is subject to review by the appropriate committees of both Houses of Congress.²⁶ In addition to the designation of marine sanctuaries by the Secretary, Congress itself has on occasion designated marine sanctuaries.²⁷

Congress enacted the Sanctuaries Act in 1972 in response to a “growing concern about the increasing degradation of marine habitats.”²⁸ Given the comprehensive framework of the Sanctuaries Act, it deliberately balances multiple uses. By authorizing and managing compatible uses of the ocean, the NMSA helps harmonize marine preservation, and human use and enjoyment. Sanctuaries can allow for commercial activity like fishing, for recreational activities that depend on an intact natural environment, and for long-term preservation.²⁹

Like other multiple-use public lands, the Sanctuaries Act empowers the NOAA to “manage” all NMSs pursuant to a sanctuary-specific management plan “designed to protect Sanctuaries resources.”³⁰ The statute defines “sanctuary resource” broadly to mean any living or nonliving resource of a NMS that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary.³¹

(“the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resource development”), (b)(1)(I) (“the socioeconomic effect of the Sanctuaries designation”).

²⁶ 16 U.S.C. 1434; *See, e.g.*, Flower Garden Banks National Marine Sanctuaries Regulations, 43 Fed.Reg. 63634 (Dec. 5, 1991).

²⁷ *See, e.g.*, Florida Keys National Marine Sanctuaries and Protection Act, Pub.L. No. 101-605, 104 Stat. 3089 (1990).

²⁸ S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387; *United States v. Fisher*, 22 F.3d 262, 264 (11th Cir. 1994).

²⁹ Jason Patlis, *et. al.*, The National Marine Sanctuaries System: The Once and Future Promise of Comprehensive Ocean Governance, 44 *Envtl. L. Rep. News & Analysis* 10932, 10940 (2014).

³⁰ 16 U.S.C. § 1434(a)(2)(C); 15 C.F.R. § 922.30(a).

³¹ 16 U.S.C. § 1432(8).

The implementing regulations are clear that the regulation of activities in a NMS must be “consistent with [the] terms of designation.”³² As noted above, all of the four NMSs subject to this review have management provisions that prohibit the exploration, development and production of oil, gas and minerals.³³ Regulations promulgated by NOAA to restrict an activity that interfered with or threatened sanctuary resources have been upheld as a valid exercise of the agency’s management authority.³⁴ As with the FLPMA, given the clear delegation of authority by Congress to NOAA over the authority to manage each NMS, in mandating a review to facilitate the exploitation of energy resources the Executive Branch cannot ignore the regulations implementing the terms of designation that prohibit the exploration, development and production of oil, gas and minerals in the NMSs subject to this review.³⁵

Further, facilitating the exploitation of energy resources in NMSs is incompatible with the conservation of other “sanctuary resources.” This is most clearly illustrated by the importance of maintaining sanctuaries for the rebuilding and conservation of fish stocks and marine habitat. As stated by one commentator:

When amending the [Sanctuaries Act] in 1996, Congress noted that “[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery

³² 15 C.F.R. § 922.40 (“The purpose of the regulations in this subpart and in subparts F through R is to implement the designations of the thirteen National Marine Sanctuaries for which site specific regulations appear in subparts F through R, respectively, by regulating activities affecting them, consistent with their respective terms of designation in order to protect, preserve and manage and thereby ensure the health, integrity and continued availability of the conservation, ecological, recreational, research, educational, historical and aesthetic resources and qualities of these areas.” [emphasis added]).

³³ See nt. 24, *supra*.

³⁴ *Personal Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 541 (D.C. Cir. 1995).

³⁵ See nts. 10 & 11 and accompanying text, *supra*.

resources of the United States.” 16 U.S.C. § 1801(a)(9). Thus, one of the purposes of the [Sanctuaries Act] is “to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.” [Id. § 1801(b)(7).]³⁶

The promotion of energy resource extraction within the NMS system is also likely to negatively impact the conservation of marine wildlife habitat and protection for migratory species. “The purpose of the [Sanctuaries Act] relevant to protection of migrants is “to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes” ‘ citing 16 U.S.C. § 1431(b)(3) (2006).³⁷ Because some uses, notably including mineral extraction, are incompatible with the simultaneous presence of many wildlife species, “the result of multiple use must be a reduction in the overall area available for most wildlife, including migrating wildlife.”³⁸

The Sanctuaries Act vests management authority in NOAA to balance the multiple use of sanctuary resources in such a way that best protect the resources which were the foundation for the sanctuary’s designation. The promotion of energy and mineral exploitation is contrary to both the express prohibitions of each NMS subject to this review and to NOAA’s obligation to protect the unique sanctuary resources of each NMS.

National System of Marine Protected Areas

Preliminarily, each of the NMSs and MNMs subject to this review are a Marine Protected Area (“MPA”) and part of the National System of Marine Protected Areas (“National MPA System”). The National MPA System was created by Executive Order 13158 to “strengthen the management, protection, and conservation of existing marine protected areas and establish new or

³⁶ David Pettit & David Newman, Federal Public Law and the Future of Oil and Gas Drilling on the Outer Continental Shelf, 17 Roger Williams U. L. Rev. 184, 195 (2012).

³⁷Vicky J. Meretsky, et. al., Migration and Conservation: Frameworks, Gaps, and Synergies in Science, Law, and Management, 41 Env’tl. L. 447, 503 (2011).

³⁸ *Id.* at 496.

expanded MPAs (. . .) and avoid causing harm to MPAs through federally conducted, approved, or funded activities.”³⁹

Although the National MPA system does not establish any new legal authority for the management of individual MPAs, the principals underlying it have several important implications for the current review. First, such review should not only consider each MPA as a separate unit, but rather as a part of local, regional and ocean basin-wide networks that link and coordinate other MPAs under Federal, state, tribal or local governmental control to achieve a larger ecosystem-based approach to managing marine resources, specifically including migratory species.⁴⁰ Second, any action by a Federal Agency shall “[t]o the extent permitted by law and to the maximum extent practicable, each Federal agency (. . .) avoid harm to the natural and cultural resources that are protected by an MPA.”⁴¹

For example, the Channel Islands NMS is part of a MPA network established in 2002 by the California Fish and Game Commission within the nearshore waters of the Channel Islands NMS and expanded into the Sanctuary’s deeper waters in 2006 and 2007. The entire MPA network consists of 11 state and Federal marine reserves and encompasses 318 square miles, making it the largest network off of the continental United States.

Accordingly, in conducting this review and making recommendations, NOAA must consider the effects to each individual MPA (including those under Federal, state, tribal or local control), to the local MPA network of which each unit is a part, and to the National MPA System. In so doing, NOAA must avoid the potential for harm to all protected areas within an MPA network, and to the local and national MPA networks, “to the maximum extent practicable.”

³⁹ 65 Fed.Reg. 34909 (May 26, 2000).

⁴⁰ Framework for the National System of Marine Protected Areas Of the United States of America (Mar. 2015) at 8 – 12, *available at* <http://marineprotectedareas.noaa.gov/nationalsystem/framework/final-mpa-framework-0315.pdf>.

⁴¹ *Id.* at 19.

Conclusion

The mandated review of MNMs and NMSs contemplates recommendations that must account for the legal impediments in downsizing the area or reducing the protections specified in their designation, and incorporates a flawed mandate to review the “opportunity cost” of a prohibited activity. Further, the vastly greater significance of these unique “public oceans” for the conservation of sustainable natural and economic resources outweighs the purely economic value of a consumptive use for non-sustainable extraction development. Turtle Island strongly opposes any recommendations that support reductions in the current size, protections and management provisions of these important conservation areas.

On behalf of Turtle Island’s staff, members and supporters, I appreciate your consideration of these comments.

Sincerely,



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