



Dear Congressional Representative,

We write to alert you to a crucial environmental issue in the Gulf of Mexico: the decision to constrain the expansion of the Flower Garden Banks National Marine Sanctuary (“FGBNMS”), 86 Fed. Reg. 4937 (Jan. 19, 2021).

The Trump administration’s decision, which will become final after the close of a review period of 45 days of continuous session of Congress is not in the best interest of our ocean resources and requires your immediate attention. In particular, it is:

- Not based on the best available science;
- The result of undue pressure from the oil and gas industry, an obvious conflict of interest;
- Appropriated by the Co-Chair of the Sanctuary Advisory Council Working Group, an oil and gas industry representative; and
- Unlawfully changed from the National Oceanic and Atmospheric Administration’s (“NOAA”) original preferred alternative without proper environmental review.

As this rule falls under President Biden’s 60-day freeze on final regulations promulgated under the Trump administration,¹ it is extremely timely for Congress to exercise oversight over this misguided decision. This role is consistent with the National Marine Sanctuaries Act (“NMSA”), which requires a Congressional review period following an agency decision before it may take effect.²

Please use your platform as a member of Congress to work with NOAA to ensure the agency chooses a rule with meaningful expansions to the sanctuary based on science.

Please support science-based FGBNMS conservation efforts by working with NOAA to ensure that the agency implements an expansion that is at least as protective as Alternative 3.

¹ Memorandum for the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/?mkt_tok=eyJpIjojTVdWbFlqYzRZelV4WVdVNCIsInQjOiJlVjRlOExjM1E3NGtwbWVwYjIMVUUhPK0twTO9JK3djc29sY0NiT2RLSE94VjNiNGVlbnHU5Uk43eUozbFwvd0JxOC9vQUdsZWZlZ1VVRm9HcnRoUGp3VmFEYkR1QnRNSFczNHFXOXobVXZ3Z2ekxMMkFDdSs3b29cL2N3Ynh2MIYifQ%3D%3D; *see also* Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990, Sec. 2 (Jan. 20, 2021), *reprinted in* 86 Fed. Reg. 7037 (Jan. 25, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

² 16 U.S.C. § 1434(b); *see also* 86 Fed. Reg. 4937 (FGBNMS expansion “shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress” beginning on January 19, 2021).

The Final Rule is Not Based on the Best Available Science

FGBNMS is located in the northwestern Gulf of Mexico and is known for its unique geological features. It is composed of three underwater salt domes which in total encompass roughly 56 square miles: East Flower Garden Bank, West Flower Garden Bank, and Stetson Bank.³ The sanctuary offers diverse habitat conditions that host a multitude of species such as sponges, fish, birds, and sharks. It also provides refuge for species listed under the Endangered Species Act such as sperm and fin whales; green, loggerhead, hawksbill, Kemp’s ridley, and leatherback sea turtles; lobed star, mountainous star, boulder star, and elkhorn corals; and giant manta rays.⁴

Nearby banks also offer similar geologic features and habitat conditions, but are exposed to destructive activities such as oil and gas exploration and development, commercial fishing, large vessel anchoring, and marine salvage operations.⁵ Therefore, in 2012, NOAA initiated the process to expand protections of this environmentally crucial yet imperiled area. NOAA’s environmental analysis presented several potential expansion configurations in a Draft Environmental Impact Statement (“2016 DEIS”) pursuant to the National Environmental Policy Act (“NEPA”) and NMSA.⁶

While the original alternative preferred by NOAA staff in the 2016 DEIS would have increased the sanctuary size to 383 square miles, including 15 banks and reefs, the Trump administration created a new alternative that would only increase the sanctuary size to 160 square miles. This is a decrease of about 68% in the proposed size of the expansion. The modified alternative also entirely eliminates the incorporation of a crucial area for marine life, Bryant Bank, from the expansion area.⁷

³ 56 Fed. Reg. 63,634 (Dec. 5, 1991); 85 Fed. Reg. 25,359 (May 1, 2020).

⁴ NOAA, Draft Environmental Impact Statement: Sanctuary Expansion, Volume 1: Chapters 1–6, at 4-24 (June 2016) (“DEIS”), *available at* <https://nmsflowergarden.blob.core.windows.net/flowergarden-prod/media/archive/doc/expansion/fgbnmsexpansiondeis.pdf>.

⁵ 85 Fed. Reg. at 25,360.

⁶ *See* 42 U.S.C. § 4332 (NEPA EIS requirement); 16 U.S.C. § 1434(a)(2)(A) (NMSA EIS requirement).

⁷ 85 Fed. Reg. at 25,363; NOAA, Supplemental Information Report to the 2016 Flower Garden Banks National Marine Sanctuary Expansion Draft Environmental Impact Statement (RIN 0648-BA21), at 5 (Mar. 22, 2019) (“Supplemental Information Report”), *available at* <https://nmsflowergarden.blob.core.windows.net/flowergarden-prod/media/archive/doc/expansion/deissupplementalinforeport.pdf>.

Comparison of Alternatives

Topic Area	Revised Preferred Alt.	Alt. 1: No Action	Alt. 2	Alt. 3	Alt. 4	Alt. 5
# of Banks/ Features	17 (14 new)	3	12 (9 new)	18 (15 new)	43 (40 new)	57 (54 new)
# of Areas (polygons/ units)	19 (16 new)	3	9 (6 new)	11 (9 new)	29 (26 new)	45 (42 new)
Total Size (mi ²)	160.35	56.21	281.15	383.19	633.76	935.18
Management Plan and Regulations	Apply current mgmt. plan and regs.					

The modified alternative undermines the rationale of the expansion, which is to expand the network of protected areas, include additional important and sensitive marine habitat areas outside the current sanctuary borders, and to simplify the recommended boundaries for ease of enforcement and consistency with existing regulations.⁸ The modified alternative complicates rather than simplifies recommended boundaries. Indeed, it features complex boundary lines with no rational ecological purpose that were drawn closely around topographical features without regard for connectivity of corridors.⁹ The modified alternative fails to adequately account for marine protected areas, climate change, buffer zones, migratory corridors, or connectivity of the sanctuary, and the reduction in area is not supported by science. Instead, as discussed below, the boundaries were drawn to avoid expanding protections from oil and gas exploration and development by closely mirroring the boundaries of areas where these activities are already prohibited.

Conservation organizations advocate for the expansion of the sanctuary, as it is critical for the protection of important and vulnerable mesophotic and deep benthic habitats, as well as important cultural and historic resource sites.¹⁰ Protection of the sanctuary in a manner based on science is critical for the protection of coral and other species from threats such as those posed by oil and gas development, fishing, and climate change. The best available science indicates the need to include areas near the *Deepwater Horizon* oil spill, pinnacle reef ecosystems, and culturally significant areas, which will allow for further study and rehabilitation of Gulf ecosystems from the oil spill. The best available science also indicates the need to include migratory connective corridors and dense areas of threatened and endangered corals.

The Final Rule is a Result of Undue Pressure from the Oil and Gas Industry

FGBNMS has been recognized as invaluable for diverse coral communities and fragile ecosystems. The George H. W. Bush administration provided the area with sanctuary protections

⁸ DEIS, at ES-4, 3-6.

⁹ DEIS, at ES-3, ES-4, 3-6.

¹⁰ DEIS, at ES-3.

in 1992 pursuant to the NMSA because the environmentally sensitive area needed to be safeguarded from increasing human activities, including oil and gas extraction, anchoring on the reefs, and wildlife harvesting. Therefore, we were thrilled when we heard that the sanctuary was to be offered greater protections, which it so desperately and immediately needs.

NOAA changed its original proposal in direct response to concerns raised by the oil and gas industry. The Sanctuary Advisory Council, which was chaired by representatives from the oil and gas industry and fishing industry, was largely influenced by new information on oil and gas reserves in the sanctuary area.¹¹ According to NOAA, the revised preferred alternative was based primarily on a configuration drawn by the FGBNMS Sanctuary Advisory Council, which was chaired by representatives of the oil and gas industry and commercial fishing industry. As can be easily discerned from the meeting minutes, the Co-Chair of the Sanctuary Advisory Council (a representative from the oil industry) came up with the revised preferred alternative by tightly drawing the “expanded” protections around areas known as “No Activity Zones” (“NAZs”), which already prohibit anchoring or structures related to oil and gas operations. Thus, oil and gas interests effectively co-opted the process, which should have been based on science, and instead chose an “expanded” sanctuary zone that offers little expanded protections to FGBNMS.

Following the recommendation from the Sanctuary Advisory Council, NOAA finalized the modified alternative to its current state, which is the subject of our concern.¹² According to NOAA, “the focus on the NAZs ... was in response to concerns raised primarily by the oil and gas industry regarding potential impacts to offshore energy operations from FGBNMS expansion in this portion of the Gulf of Mexico.”¹³ Thus, NOAA fully recognizes that the primary reason for the modified alternative was because oil and gas representatives co-opted the advisory process.

The Advisory Council’s meeting minutes show the Co-Chair of the working group in charge of establishing the boundaries, a representative of the oil and gas industry, pressured the group into voting for boundaries that were tightly drawn in an arbitrary manner devoid of scientific analysis. For example, NOAA’s National Centers for Coastal and Ocean Science (“NCCOS”) developed an analysis tool to assist the working group in its deliberations, which synthesized relevant information on biology, ecology, human use, and management designations in the study area. Rather than the group using the modeling tool during deliberations to help derive an outcome, the tool appeared to be used in response to proposals, rather than to establish proposals. At one point, instead of judiciously deliberating on the optimal percentage for each type of biological and ecological observation in the tool, the Co-Chair simply requested the NOAA contractor responsible for modeling to half all of the percentages of ecological goals.¹⁴ According to the meeting minutes, as a result, the goal for capturing Core Sensitivity Zones was arbitrarily lowered from 80% to 40%, and remote operated vehicle annotations for high coral

¹¹ In 2019, the Bureau of Ocean Energy Management provided NOAA with new information regarding availability of oil reserves. Supplemental Information Report, at 8.

¹² NOAA revised its recommendation “based primarily on the May 2018 recommendation from the FGBNMS Advisory Council.” 85 Fed. Reg. at 25,363.

¹³ 85 Fed. Reg. at 25,363.

¹⁴ Flower Garden Banks National Marine Sanctuary, Sanctuary Advisory Council Boundary Expansion Working Group Meeting Minutes, at 2 (Mar. 21, 2018), *available at* <https://flowergarden.noaa.gov/advisorycouncil/workinggroups.html>.

abundance was lowered from 100% to 50%.¹⁵ One non-voting member of the working group and the Gulf Program Director with the Turtle Island Restoration Network, Joanie Steinhaus, repeatedly expressed concerns over the lack of any discernable criteria used by the working group to develop the modified proposal.¹⁶ Another council member and representative of research interests expressed concerns because she “does not think the [working group] process used enough science and evidence.”¹⁷

Additionally, Bryant Bank was completely removed from the expansion area, seemingly due to nearby oil and gas reserves. The Co-Chair’s former company, GulfSlope Energy, owned a lease block that fell within the Bouma Bank Complex of the Sanctuary area, including a ridge leading to Bryant Bank.¹⁸ A key purpose of the sanctuary is to protect high density coral areas, and Bryant Bank indeed includes high numbers of high-density coral colonies. After multiple members suggested drawing a boundary that would incorporate Bryant Bank, the Co-Chair responded that “this block is one with significant oil and gas accumulations,” and noted that “he and his industry would not support” the motion to include it.¹⁹

The council ultimately failed to incorporate much of NOAA employees’ knowledge and expertise when developing its final recommendation for the area to reflect the NAZs. For example, a NOAA employee brought a study to the working group’s attention, which concluded that higher numbers of mesophotic coral colony counts were observed outside the NAZs (and therefore outside of the modified alternative) than inside the NAZs. However, the council ultimately recommended virtually no areas with these coral colonies in their expansion. Indeed, almost no such areas were included in the expansion other than the already-existing NAZs. Members of the council voted to approve of the boundaries put forth by the Co-Chair with the understanding that it was not possible to attain more protective boundaries in light of political pressures and assertions that the oil and gas and commercial fishing industries would abandon the expansion process if more protective measures were pursued.

However, it is not too late to correct those misconceptions. The NMSA explicitly provides for the current Congressional review period. We therefore request that you support science-based FGBNMS conservation efforts by working with NOAA to ensure that the agency implements an expansion that is at least as protective as Alternative 3.

¹⁵ *Id.*

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 12 (remarks of Dr. Adrienne Simoes Correa).

¹⁸ Flower Garden Banks National Marine Sanctuary, Sanctuary Advisory Council Boundary Expansion Working Group Meeting Minutes, at 5 (Apr. 12, 2018), *available at* <https://flowergarden.noaa.gov/advisorycouncil/workinggroups.html>.

¹⁹ Flower Garden Banks National Marine Sanctuary, Sanctuary Advisory Council Boundary Expansion Working Group Meeting Minutes, at 7 (Apr. 30, 2018), *available at* <https://flowergarden.noaa.gov/advisorycouncil/workinggroups.html>.

The Final Modified Preferred Alternative was Unlawfully Selected Without Proper Environmental Review

NEPA and the NMSA both require NOAA to develop an Environmental Impact Statement (“EIS”) before identifying or expanding a National Marine Sanctuary.²⁰ In 2016, the Draft Environmental Impact Statement (“DEIS”) analyzed options for FGBNMS protections, choosing the preferred alternative, “Alternative 3.” Then in 2019, NOAA chose a completely new alternative that had not been included in the previous suite of alternatives from the 2016 DEIS. This new revised proposed alternative significantly and unjustifiably impacts and jeopardizes species and habitats, and arbitrarily limits the amount of areas to be protected.

The original suite of alternatives analyzed in the 2016 DEIS, excluding the “no action” alternative, considered expanding the sanctuary anywhere from 281.15 square miles (Alternative 2) at the least, to 935.18 square miles (Alternative 5) at the most.²¹ Alternative 3, the originally identified preferred alternative would have expanded the sanctuary to 383 square miles. The DEIS described Alternative 3 as the preferred alternative because it would “fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors.”²² NOAA further explained that Alternative 3 was chosen because it maximized environmental benefit without exceeding the sanctuary’s operational capacity and budget.²³ The modified preferred alternative, in comparison, is roughly 160 square miles, 43% smaller than the most minimal acreage evaluated in the DEIS (Alternative 2).

Despite the modified alternative’s significant departure from any of the alternatives considered in the 2016 DEIS, NOAA never drafted a Supplemental Environmental Impact Statement (“SEIS”) on the modified alternative. Instead, NOAA briefly discussed the revised alternative in a Supplemental Information Report, arguing that the modified alternative only served as a minor change to the original proposal and therefore fell within the scope of alternatives discussed in the DEIS.²⁴ Resultingly, and despite objections from conservation groups, NOAA never provided the public with a meaningful opportunity to consider and comment on the current proposal, since it never completed an environmental analysis analyzing bank boundaries under the new scheme.

NOAA failed to comply with NEPA by developing and choosing an alternative that was never analyzed in the DEIS without creating a SEIS. NEPA requires the environmental impacts of a chosen alternative be disclosed and analyzed in the environmental review process.²⁵ Although NEPA permits agencies to make changes to a proposed action in response to public comments or evolving circumstances, substantial changes require further analysis and public engagement in the form of a SEIS.²⁶

NOAA attempts to justify this change without abiding by the environmental review process by stating that the revised alternative constitutes minor and inconsequential changes. However, this

²⁰ 16 U.S.C. § 1434(a)(2)(A) (NMSA EIS requirement); 42 U.S.C. § 4332 (NEPA EIS requirement).

²¹ DEIS, at ES-4.

²² DEIS, at ES-5.

²³ DEIS, at ES-5.

²⁴ Supplemental Information Report, at 1.

²⁵ 42 U.S.C. § 4332(C)(i)–(ii); 40 C.F.R. § 1508.25(c)(1)–(3).

²⁶ 40 C.F.R. § 1502.9(c)(1)(i)–(ii).

is clearly not the case, and NOAA has failed to account for significant new circumstances and information relating to environmental concerns, including the process being co-opted by special interests, the newly disclosed quantification of oil and gas resources, and the new Endangered Species Act listing of the threatened giant manta ray. The discovery of new information concerning the quantification of oil and gas resources in the area allowed NOAA to weigh the economic benefits of excluding such areas in the bank boundaries,²⁷ excluding eligible banks and cultural sites, and decreasing the amount of protected acreage in a substantial way.

Further, the modified alternative substantially differs in size and scope from all alternatives originally considered in the DEIS. The change in physical space alone would reduce the area protected in the modified preferred alternative by 222.79 square miles, or 58% from the original preferred alternative, and the modified preferred alternative is 43% smaller than the most minimal expansion considered in the DEIS. The revised alternative significantly reduces connectivity and migratory corridors. It also excludes crucial coral habitats, including the densest coral areas, from protection in a manner that significantly and unjustifiably impacts protected species and habitats.

In addition to flouting NEPA's requirement to fully disclose and analyze the environmental impacts of the chosen alternative, NOAA has also failed to demonstrate that the revised preferred alternative meets designation standards of the NMSA. The purpose of the FGBNMS expansion is to address the NMSA designation standards of conserving and managing areas of the marine environment with special national significance, and yet NOAA has not drawn a rational connection between how its current revised proposal would achieve the NMSA's designation standards.²⁸

Thus, we ask you to please use this time to raise concerns on this rule, and compel NMFS to expand protections offered within the FGBNMS in a manner based on science—not special interests. While we cannot afford to start this process over entirely, neither can we afford to succumb to oil and gas interests at the benefit of our coastal environment and imperiled marine life.

Please support science-based FGBNMS conservation efforts by working with NOAA to ensure that the agency implements an expansion that is at least as protective as Alternative 3.

Thank you for your consideration and please feel free to contact us with any questions.

Sincerely,

Joanie Steinhaus
Gulf Program Director
Turtle Island Restoration Network

Jaclyn Lopez
Florida Director
Center for Biological Diversity

Paul Sanchez-Navarro
Senior Representative Texas
Defenders of Wildlife

²⁷ On February 25, 2019, the Bureau of Ocean Energy Management (“BOEM”) provided NOAA with new information regarding amounts of oil that would be impacted by the Revised Preferred Alternative. Supplemental Information Report, at 8.

²⁸ 16 U.S.C. § 1433(a).