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Marine Protected Areas (MPAs): Federal Legal Authority

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Summary

Recent events, including the release of the President's U.S. Ocean Action Plan and reports issued by the United States Commission on Ocean Policy and the Pew Oceans Commission and, have prompted a reexamination of U.S. ocean policy and debate over an "ecosystem approach" to ocean resource management. One proposed mechanism for conserving ocean resources is the Marine Protected Area (MPA), conceptualized as a zoning system for the portions of the ocean under U.S. jurisdiction.

The relative merits and the potentially negative consequences of such an MPA system have been widely discussed. Other, more focused types of ocean resource protections have been put into place under various federal and state laws. Advocates of additional protection argue that a more comprehensive system should be established. Others argue that the current system is effectively managing ocean resources and that additional restrictions would be economically harmful.

Apart from the relative merits of each position, there is some question as to the applicability of current federal law to the oceans and whether new protections could be imposed administratively, without additional legislation. To some extent, regulatory authority will depend upon the nature of the jurisdiction that the United States has claimed over various ocean resources vis-a-vis other nations and vis-a-vis the states.

Consistent with international law, the United States claims jurisdiction over marine areas extending 200 nautical miles from its coast and has regulated resources in the zones composing this area under multiple legal authorities. Several current laws which might provide authority for the creation of MPAs are aimed specifically at the ocean environment. The National Marine Sanctuary Program, established by the Marine Protection, Research and Sanctuaries Act, as well as the Magnuson-Stevens Fishery Conservation and Management Act, and the Coastal Zone Management Act each specifically contemplate various levels and forms of aquatic resource protection. Additionally, certain generally applicable laws, while primarily intended for use on land, would arguably support the designation of an MPA in some circumstances. Indeed, U.S. MPAs within the territorial seas have been established as national monuments, national parks, national wildlife areas, and, most recently, as a reserve via executive order.

This report will outline U.S. jurisdiction over ocean resources, analyze the existing laws to assess their application to marine environments, and describe the regulatory authorities available under each option. It will be updated as necessary.

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Marine Protected Areas: Federal Legal Authority

Introduction

Scientific documentation of the ecological condition of the oceans, such as the reports recently issued by the United States Commission on Ocean Policy and the Pew Oceans Commission, has been cited as evidence of deteriorating aquatic conditions. The President has responded to the U.S. Commission report, as required by law, by creating the Committee on Ocean Policy within the White House's Council on Environmental Quality.¹ The Bush Administration has also released its U.S. Ocean Action Plan, a report setting forth Administration support for development of a Global Ocean Observing System; various state, local, and federal partnerships in ocean stewardship and management; individual fishing quotas and greater use of market-based systems for fisheries management; development of an Ocean Research Priorities Plan and Implementation Strategy; and a National Freight Action Agenda to ensure a safe, reliable, efficient, and competitive freight transportation system. The Plan also indicates that the President will seek \$2.7 million for Coral Reef Local Action Strategies in the FY2006 budget, U.S. accession to the UN Convention on the Law of the Sea, and passage of legislation to more clearly define the National Oceanic and Atmospheric Administration's responsibilities within the Department of Commerce.²

These events have sparked debate over whether the development of a more comprehensive system of marine resource preservation is appropriate. A network of marine protected areas (MPAs), conceptualized as a zoning system for the portions of the ocean under U.S. jurisdiction, has been proposed as one method to achieve additional ocean resource preservation.³ Currently, a number of U.S. marine sites

¹ The Committee is to:

- (a) coordinate the activities of executive departments and agencies regarding ocean-related matters in an integrated and effective manner to advance the environmental, economic, and security interests of present and future generations of Americans; and
- (b) facilitate, as appropriate, coordination and consultation regarding ocean-related matters among Federal, State, tribal, local governments, the private sector, foreign governments, and international organizations. Exec. Order No. 13366, 69 Fed. Reg. 76,591 (December 17, 2004).

² U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy, (December 17, 2004) *available at* [<http://ocean.ceq.gov/>].

³ The relative merits and the potentially negative consequences of such an MPA system have been widely discussed. Other, more focused types of ocean resource protections have been
(continued...)

have been designated for and receive special protections under laws specifically aimed at preserving ocean resources, such as the National Marine Sanctuary Program, established in 1972 by the Marine Protection, Research and Sanctuaries Act;⁴ the Magnuson-Stevens Fishery Conservation and Management Act;⁵ and the Coastal Zone Management Act.⁶

Additional federal authority for establishing areas for preservation may already exist. Many of these laws and programs are arguably intended only for use on land. Application of various laws to ocean resources may also be complicated by the nature of U.S. jurisdiction over its surrounding waters. U.S. waters are broken into various zones, and U.S. regulatory authority may be limited by the type of jurisdiction that has been claimed. Still, general resource protection laws have been used to conserve certain aquatic resources in some circumstances. Indeed, U.S. MPAs have been established as national monuments, national parks, national wildlife areas, and, most recently, as a reserve via executive order.⁷

The official U.S. definition of a marine protected area is: “Any area of the marine environment that has been reserved by federal, state, territorial, tribal or local laws or regulations to provide lasting protection to part or all of the natural or cultural resources therein.”⁸ Executive Order 13,158, issued by President Clinton and retained by the Bush Administration, has made MPA designation and management national priorities. Under Executive Order 13,158, federal agencies are directed to strengthen general protections for existing MPAs and to prevent federal actions from resulting in harm to these areas. Agencies are also directed to improve management efforts, in part through establishing a comprehensive national MPA system.⁹ The Executive Order does not clarify where (i.e. which zone of U.S. jurisdiction) MPAs can be created or what laws authorize their creation. It should be noted, however, that Executive Order 13,158 does not confer new designation or management authority on the federal agencies, stating that “[e]ach Federal agency *whose authorities provide for* the establishment or management of MPAs shall take appropriate actions to enhance or expand existing MPAs and establish or

³ (...continued)

put into place under various federal and state laws. Advocates of additional protection argue that a more comprehensive system should be established. Others argue that the current system is effectively managing ocean resources and that additional restrictions would be economically harmful.

⁴ Act of Oct. 23, 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified at scattered sections of titles 16 and 33).

⁵ 16 U.S.C. §§ 1801-1882.

⁶ 16 U.S.C. §§ 1451-1465.

⁷ COMMITTEE ON THE EVALUATION, DESIGN, AND MONITORING OF MARINE RESERVES AND PROTECTED AREAS IN THE U.S., NAT’L RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS, 151 (National Academy Press 2001) *available at* [<http://www.nap.edu/books/0309072867/html/>].

⁸ Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

⁹ *Id.*

recommend, as appropriate, new MPAs.”¹⁰ Additionally, the Order states that when designating MPAs, federal agencies must “act in accordance with international law and with Presidential Proclamation 5928 of December 27, 1988, on the Territorial Sea of the United State of America, Presidential Proclamation 5030 of March 10, 1983, on the Exclusive Economic Zone of the United States of America, and Presidential Proclamation 7219 of September 2, 1999, on the Contiguous Zone of the United States.”¹¹

This report will analyze the existing laws and executive actions to assess their possible application to marine environments and outline the protection and management system each might support. This report will be updated as necessary.

U.S. Jurisdiction Over Marine Resources

International law recognizes that coastal nations have legal authority to manage certain ocean resources within their jurisdiction. The 1982 United Nations Convention on the Law of the Sea (UNCLOS III) recognizes general zones within which signatory nations may regulate exploitation of marine resources. UNCLOS III recognizes a region extending up to twelve “nautical miles”¹² from a nation’s coast, the territorial sea of that nation, in which the coastal nation may claim full ownership and sovereignty over the waters, seabed, and the subsoil.¹³ Coastal nations can further regulate beyond the territorial sea up to twenty-four nautical miles from the coast, the contiguous zone, in so far as necessary to protect the territorial sea and to enforce its customs, fiscal, immigration, and sanitary laws.¹⁴ Further, UNCLOS III allows for an exclusive economic zone (EEZ), which extends two hundred nautical miles from the coast. In its EEZ, the coastal nation has sovereign rights to explore, exploit, conserve, and manage marine resources.¹⁵ Many elements of the jurisdictional scheme under UNCLOS III reflect long-standing practice and may be considered customary international law. The concept of the territorial sea and the contiguous zone was recognized in the 1958 Convention on the Territorial Seas and Contiguous Zone.¹⁶ The EEZ concept appears to have initiated from the jurisdictional claims of various countries in the 1970s and crystallized in the expression of the concept given in UNCLOS III.¹⁷ Some commentators now argue that a nation’s authority over its EEZ is also now provided for under customary

¹⁰ *Id.* at § 3 (emphasis added).

¹¹ *Id.* at § 7.

¹² Relevant measurements: (geographical mile = 6,087.15 ft.), (land mile = 5,280 ft.), (marine league = 18,228.3 ft.), (nautical mile = 6,076.1 ft.).

¹³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 2.1, 2.2, 3, 21 I.L.M. 1261 (entered into force Nov. 16, 1994)(hereinafter UNCLOS III).

¹⁴ *Id.* art. 33.

¹⁵ *Id.* art. 56.1.

¹⁶ *See* United States v. De Leon, 270 F.3d 90, 94 (1st Cir. 2001).

¹⁷ Karen Hopfl, Comment, *Go Fish! Individual Transferable Quotas and International Possibilities in the South Pacific*, 8 COLO. J. INT’L ENVTL. L. & POLICY 137, 138 (1997).

international law, a position the United States appears to have taken when it proclaimed its own EEZ jurisdiction.¹⁸

Although the United States has signed the most current version of the UNCLOS III agreement, it has yet to ratify the treaty; consequently, the United States is not a formal party. Even absent ratification, however, the U.S. has claimed jurisdiction over zones virtually identical to those contemplated by UNCLOS III via a series of presidential proclamations.¹⁹

Several federal laws explicitly apply to U.S. waters, including the territorial sea, contiguous zone, and EEZ.²⁰ Additionally, certain resource protection and management frameworks now in place might also be applied to ocean resources in the territorial sea, the contiguous zone, and the EEZ should Congress or the President designate such areas for protection. Generally, Congress has broad constitutional authority to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”²¹ Also, any portions of the U.S.-claimed waters and resources that might not be fairly characterized as “Territory” or “Property” might nonetheless fall under congressional authority to “regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes” among others.²²

The President, even if not explicitly granted regulatory authority by statute, may also have constitutional authority to impose regulations on the use of ocean resources claimed by the United States. For instance, the Constitution grants the President broad authorities regarding the foreign relations, national defense, and treaties of the United States.²³

Additionally, should UNCLOS III be ratified, its many marine habitat provisions, which require parties to protect and preserve the marine environment,²⁴ may provide the President and Congress with additional authority for the regulation of marine resources in order to execute the treaty obligations of the U.S. The President and Congress may also have authority to protect ocean resources under the

¹⁸ *Id.*; Proclamation 5030, Exclusive Economic Zone of the United States of America, Mar. 10, 1983.

¹⁹ See UNITED NATIONS, STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 10 (May 30, 2002); Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983); Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988); Contiguous Zone of the United States, Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999).

²⁰ See, e.g., 16 U.S.C. §§ 1362(15); 1432(3); 1538(a)(1)(B)-(C).

²¹ U.S. CONST. art IV, § 3.

²² U.S. CONST. art. I, § 8.

²³ U.S. CONST. art II, § 2.

²⁴ See CRS Report RL32185, *U.N. Convention on the Law of the Sea: Living Resources Provisions*, by Eugene Buck.

auspices of implementing current U.S. treaty obligations. Under the Protocol Amending the 1916 Convention for the Protection of Migratory Birds, for instance, the government of a signatory nation is directed to “use its authority to protect and conserve habitats essential to migratory bird populations.”²⁵ This might authorize the protection of ocean resources to the extent necessary to implement the purpose of the underlying treaty.

The current extent of the authority of the U.S. federal government in each zone is complex and must be considered in two contexts: the federal government vis-a-vis the international community and the federal government vis-a-vis the states. An overview of the relative authorities in each zone follows.

The Territorial Sea. As stated above, UNCLOS III recognizes a territorial sea extending twelve nautical miles from a nation’s coast in which a coastal state may exercise full jurisdiction to the extent that it does not conflict with the right of foreign vessels to innocent passage.²⁶ This sovereign authority extends to the air space above and the subsoil below the twelve nautical mile zone.²⁷

The United States claims a twelve nautical mile territorial sea consistent with the UNCLOS III expression. Presidential Proclamation 5928 states that the United States “exercises sovereignty and jurisdiction . . . that extend to the airspace over the territorial sea, as well as to its bed and subsoil.”²⁸ Thus, the United States is generally considered to exercise full sovereign authority over its territorial sea vis-a-vis other nations. The United States Supreme Court has also recognized U.S. authority to impose significant protective measures on ocean resources in this area.²⁹ In addition, prior to both the Presidential extension of the U.S. territorial sea from three miles to twelve nautical miles and the enactment of the Submerged Lands Act, the Supreme Court held that the United States owned the submerged lands three miles from the coast, lending support to the argument that the United States now “owns” the extended territorial sea.³⁰ Thus, it would appear relatively clear that, in the international law context, U.S. jurisdiction over the territorial sea is analogous to the sovereignty a nation possesses over its land territory, subject to the right of innocent passage.³¹

²⁵ Protocol Amending the 1916 Convention for the Protection of Migratory Birds (Dec. 5, 1995), *available at* [http://www.le.fws.gov/pdf/Canada_Mig_Bird_Treaty.pdf].

²⁶ UNCLOS III arts. 2.1, 17-26, 37-44, 53.

²⁷ *Id.* art. 2.2.

²⁸ Proc. No. 5928 (Dec. 27, 1988).

²⁹ *See, e.g.*, *United States v. California*, 436 U.S. 32, 36 (1978); *United States v. Alaska*, 422 U.S. 184, 199 (1975).

³⁰ *United States v. California*, 332 U.S. 19 (1947); *Alabama v. Texas*, 347 U.S. 272, 273-74 (1954).

³¹ *See* UNCLOS III, art. 2.1; Restatement (Third) of the Foreign Relations Law of the United States, §§ 512, 513 (1986).

Jurisdiction over the territorial sea of the United States is complicated by the authority of coastal states under our federal system. The Federal Submerged Lands Act of 1953³² assured coastal states title to the lands beneath coastal waters in an area stretching, in general, three “geographical miles”³³ from the shore.³⁴ Thus states may regulate the coastal waters within this area, subject to federal regulation for “commerce, navigation, national defense, and international affairs . . .”³⁵ and the power of the federal government to preempt state law.³⁶ The remaining outer portions of waters over which the United States exercises jurisdiction are federal waters.³⁷

The Exclusive Economic Zone. Consistent with UNCLOS III and international law, the United States has claimed an EEZ extending, in general, 200 nautical miles from its coasts.³⁸ In its EEZ, the United States has sovereign rights over the exploration, exploitation, conservation, and management of the natural resources of the sea-bed, subsoil, and the superadjacent waters.³⁹ According to UNCLOS III, U.S. jurisdiction also extends over “other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”⁴⁰ and, subject to some limitations, “the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.”⁴¹

While UNCLOS III does not state so explicitly, the rights of nations on the high seas extend to the EEZ, consistent with historical practice.⁴² Therefore, all states

³² 43 U.S.C. §§ 1301-1303, 1311-1315.

³³ Relevant measurements: (geographical mile = 6,087.15 ft.), (land mile = 5,280 ft.), (marine league = 18,228.3 ft.), (nautical mile = 6,076.1 ft.).

³⁴ *Id.* § 1301(a)(2). Certain coastal states, namely Florida and Texas, have slightly different claims, as recognized by the Submerged Lands Act. Each of these states may claim title to 3-marine league (9 nautical miles) seaward boundary within which the states own and regulate marine resources, including fish and offshore minerals. *Id.* See also *United States v. Louisiana*, 363 U.S. 1, 66 (1960) (“pursuant to the Annexation Resolution of 1845, Texas’ maritime boundary was established at three leagues from its coast for domestic purposes Accordingly, Texas is entitled to a grant of three leagues from her coast under the Submerged Lands Act”); *United States v. Florida*, 363 U.S. 121, 129 (1960) (“We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida’s 1868 Constitution.”).

³⁵ *Id.* § 1314(a).

³⁶ *Id.* § 1311(a)(2).

³⁷ *Id.* § 1302.

³⁸ Proc. No. 5030 (Mar. 10, 1983).

³⁹ UNCLOS III arts. 56, 58.

⁴⁰ *Id.* art. 56.1.

⁴¹ *Id.* art. 56.1(b).

⁴² Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of* (continued...)

enjoy freedom of navigation and overflight as well as other internationally lawful uses of the sea in the U.S. EEZ, subject to the regulatory jurisdiction granted the coastal state over such things as setting optimum fishing allowances.⁴³ While the United States does claim sovereign rights over natural resource management and the regulation of certain economic activities, it has less than full sovereignty and ownership of its EEZ.⁴⁴ As with the contiguous zone, it remains unclear precisely how this might limit U.S. regulation or the application of federal law currently aimed at areas “within the United States.”

The Contiguous Zone. In addition to the authority a coastal nation may exercise throughout its 200 nautical mile EEZ, under UNCLOS III and customary international law, a coastal nation may claim a contiguous zone extending beyond its territorial sea and up to twenty-four nautical miles from the coast, in which a coastal nation may also claim jurisdiction and regulate as may be necessary to protect the territorial sea and to enforce its customs, fiscal, immigration, and sanitary laws.⁴⁵ After the extension of the U.S. territorial sea, President Clinton issued Proclamation No. 7219, claiming a U.S. contiguous zone reaching twenty-four nautical miles from the coast.⁴⁶ Consistent with UNCLOS III, the Proclamation states that the United States “may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.”⁴⁷

The exact contours of U.S. authority in the contiguous zone are not, however, clearly defined. In *United States v. De Leon*, the Court of Appeals for the First Circuit stated “[t]he contiguous zone is an area in which the United States claims certain rights short of sovereignty.”⁴⁸ The court did not go on to define the U.S. rights in the area nor does it appear that other courts have had the opportunity to do so. Thus, while it is clear that Congress has directed legislation at contiguous zone resources and that the United States can exercise some amount of regulatory control over the zone, it would not appear that this area would constitute U.S. territory subject to full U.S. sovereignty or ownership.⁴⁹ Accordingly, the regulatory authority of the United States or the applicability of federal laws directed at areas “within the United States” may be limited.

⁴² (...continued)

Technology, 23 CARDOZO L. REV. 149,161-62 (2001).

⁴³ Restatement (Third) of the Foreign Relations Law of the United States, § 514 (1986).

⁴⁴ *Id.* § 514, cmt. c.

⁴⁵ *Id.* art. 33.

⁴⁶ Proc. No. 7219 (Sept. 2, 1999).

⁴⁷ *Id.*

⁴⁸ *United States v. De Leon*, 270 F.3d 90, 91 n.1 (1st Cir. 2001).

⁴⁹ *See Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir.1995) (control and jurisdiction is not equivalent to sovereignty).

Current Law Specific To Marine Environments

National Marine Sanctuaries Act. The National Marine Sanctuaries Act (NMSA),⁵⁰ found in title III of the Marine Protection, Research, and Sanctuaries Act of 1972, comes the closest to providing the legal framework for the creation of a national system of marine protected areas.⁵¹ The scope of this act looks beyond species or resource-specific protection and focuses on protecting entire marine ecosystems (an approach also adopted under the essential fish habitat provisions of Magnuson-Stevens, discussed, *infra*, page 10).⁵² Thirteen national marine sanctuaries, covering approximately 18,000 square miles in the Atlantic and Pacific Oceans, have been established.⁵³ While these sites vary significantly as to geographic region and the types of resources they contain, it would appear that each is located in the territorial sea of the United States or one of its island territories.⁵⁴

Designation of national marine sanctuaries under the act can take place by act of Congress or administratively.⁵⁵ As to administrative designation, the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), is authorized to designate “any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation. . . .”⁵⁶ Administrative designation under the act requires compliance with a statutorily imposed process, described below.

The administrative designation process begins with publication of several documents in the Federal Register, including a notice of the proposal.⁵⁷ The Secretary must also furnish the “terms of the proposed designation,”⁵⁸ the draft management plan, proposed regulations, the draft Environmental Impact Statement

⁵⁰ 16 U.S.C. §§ 1431-1445b (2003)(as amended).

⁵¹ *Id.* § 1431(b)(2).

⁵² *Id.* §§ 1431(a), 1433.

⁵³ COMMITTEE ON THE EVALUATION, DESIGN, AND MONITORING OF MARINE RESERVES AND PROTECTED AREAS IN THE U.S., NAT’L RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS at 156 (2001).

⁵⁴ See [http://www2.mpa.gov/mpa/mpaservices/inventory/explore_inventory.lasso].

⁵⁵ Congress has designated two marine sanctuaries. See Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101- 605, 104 Stat. 3089 (1990); Hawaiian Islands National Marine Sanctuary Act, Pub. L. No. 102-587, 106 Stat. 5055 (1992). The others were created administratively.

⁵⁶ 16 U.S.C. § 1433(a).

⁵⁷ *Id.* § 1434(a)(1)(A).

⁵⁸ *Id.* § 1434(a)(2)(C)(i). “The terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic [sic] value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. The terms of designation may be modified only by the same procedures by which the original designation is made.” *Id.* § 1434(a)(4).

(EIS), and cost estimates, as well as other supporting documents.⁵⁹ The law requires a public hearing to be held in the coastal area or areas most affected by the designation.⁶⁰ The act provides for congressional oversight of the designation process, allowing the House Committee on Resources and the Senate Committee on Commerce, Science, and Transportation to issue reports that the Secretary must consider before publishing notice of an intent to designate.⁶¹ Further, no designation may be proposed unless the Secretary finds the new designation will not have a negative impact on the existing system and there are sufficient fiscal resources for effectively implementing the management plan and complying with various site study requirements. Having complied with these procedural requirements, the Secretary may designate a marine sanctuary upon finding that:

- (1) the designation will fulfill the purposes and policies of [the NMSA];
- (2) the area is of special national significance due to--
 - (A) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities;
 - (B) the communities of living marine resources it harbors; or
 - (C) its resource or human-use values;
- (3) existing State and Federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;
- (4) designation of the area as a national marine sanctuary will facilitate the objectives stated in paragraph (3); and
- (5) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.⁶²

The act also sets forth a list of factors to consider in making the above findings and requires agency consultation with interested state and federal authorities as well as other interested persons.⁶³ A final designation does not take effect until notice of the designation decision, the availability of a final EIS and management plan, and publication of the final regulations implementing the plan.⁶⁴ Designations within the seaward boundaries of a state are also subject to approval by the Governor.⁶⁵

Regulation of marine sanctuaries can vary significantly from site to site. Leaving such determinations to the Secretary of Commerce, the NMSA does not prescribe specific protections for sites designated under its authority and, in fact, encourages multiple uses.⁶⁶ Thus, unlike national parks, which generally receive

⁵⁹ *Id.* § 1434(a).

⁶⁰ *Id.* § 1434(a)(3).

⁶¹ *Id.* § 1434(a)(6).

⁶² *Id.* § 1433(a).

⁶³ *Id.* §§ 1433(b), (b)(2).

⁶⁴ *Id.* § 1434(b)(1).

⁶⁵ *Id.*

⁶⁶ *Id.* § 1431(b)(6).

stringent ecological protection, sanctuaries designated under this act frequently allow fishing and shipping activities.⁶⁷

As part of the EIS for a proposed sanctuary, the Secretary must prepare and publish a resource assessment report documenting “present and potential uses of the area,” with an emphasis on compatible uses such as fishing, energy development, research, and recreational uses.⁶⁸ Further, the Secretary must consider “the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development” and “the socioeconomic effects of sanctuary designation.”⁶⁹ Fishing interests are afforded special protection. The Secretary is directed to consider present commercial and recreational fishing interests when making a designation.⁷⁰ The appropriate Regional Fishery Management Council⁷¹ is given the first opportunity to draft all fishing regulations “as the Council may deem necessary to implement the proposed designation.”⁷² The Secretary is directed to accept the Council’s proposed rules “unless the Secretary finds that the Council’s action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation.”⁷³ Further, a designation will not terminate “a valid lease, permit, license, or right of subsistence use or access in existence on the date of designation.”⁷⁴ The Secretary is empowered to regulate the exercise of such rights; however, fishing is expressly excluded from the activities requiring a special-use permit under the act.⁷⁵

While the act does not provide for specific protections, it does authorize the Secretary to undertake “all necessary actions” to prevent or respond to damage to a marine sanctuary.⁷⁶ Such actions are funded, at least in part, by any damages received from the party responsible for a particular injury.⁷⁷ Thus, for instance, when illegal poaching or an oil spill takes place, resources may be rehabilitated with recovered funds. Liability under the act has been interpreted broadly, with the

⁶⁷ Robin Kundis Craig, *Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 MCGEORGE L. REV. 155, 204 (2003).

⁶⁸ 16 U.S.C. § 1433(b)(3). The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, requires the preparation of a detailed statement as to the environmental effects of any major federal actions that might significantly affect the environment.

⁶⁹ *Id.* §§ 1433(b)(1)(H), (I).

⁷⁰ *Id.* § 1433(b)(1)(C).

⁷¹ See discussion in the next section of this report.

⁷² *Id.* § 1434(a)(5).

⁷³ *Id.*

⁷⁴ *Id.* § 1434(c).

⁷⁵ *Id.* § 1441(g).

⁷⁶ *Id.* § 1443(b).

⁷⁷ *Id.* § 1443(d).

Eleventh Circuit holding that the National Marine Sanctuaries Act imposes strict liability for injuries to protected marine resources.⁷⁸

Magnuson-Stevens Fishery Conservation and Management Act.

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens)⁷⁹ establishes a “national program for the conservation and management of the fishery resources of the United States . . . to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.”⁸⁰ This law establishes a regulatory system applicable to management of domestic fisheries within U.S. waters, excluding the region coastal states control under the Federal Submerged Lands Act.⁸¹

Magnuson-Stevens gives primary responsibility for the nation’s marine resources to eight regional Fishery Management Councils.⁸² For fisheries within their region, the Councils prepare and implement Fishery Management Plans (FMPs), any subsequent FMP amendments, and fishery regulations, all subject to prescribed national standards.⁸³ The crux of this act directs that fishery management, through the above-mentioned FMPs and FMP implementing regulations, “prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”⁸⁴ “Optimum yield” is defined as the amount of fish which:

(A) will provide the greatest overall benefit to the Nation, particularly with reference to food production and recreational opportunities, and taking into account the protection of marine ecosystems;

(B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and

(C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.⁸⁵

The act also defines “overfished” as the rate at which mortality “jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.”⁸⁶

⁷⁸ *United States v. M/V Jacquelyn L*, 100 F.3d 1520 (11th Cir. 1996); *see also* 16 U.S.C. §§ 1443(a)(1), (2).

⁷⁹ 16 U.S.C. §§ 1801-1882.

⁸⁰ *Id.* § 1801(a)(6).

⁸¹ *Id.* §§ 1801(a)(7), 1811; *see supra*, note 30 and accompanying text.

⁸² *Id.* § 1852(a).

⁸³ *Id.* at §§ 1853, 1852(h), 1851(a)(1)-(7).

⁸⁴ *Id.* § 1851(a)(1).

⁸⁵ *Id.* § 1802(28), as amended by Pub. L. No. 104-297, §102, 110 Stat. 3560 (Oct. 11, 1996).

⁸⁶ *Id.* § 1802(29).

The regulations and FMPs submitted by the regional councils are reviewed by the Secretary of Commerce and are subject to the Secretary's approval.⁸⁷ While Magnuson-Stevens establishes a basic policy and framework for fishery regulation and management, it does not impose specific, blanket requirements for such activities. Indeed, it suggests possible courses of action, including a broad provision authorizing such "measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery" in order to accommodate the needs of divergent sites.⁸⁸ Typical management techniques include limiting access for seasonal or more indefinite terms, applying fishing quotas (often referred to as Total Allowable Catch), imposing gear restrictions (such as regulating the mesh size used in nets to control the size of fish and/or the species taken), and taxing the amount of fish caught.⁸⁹ Magnuson-Stevens authorizes additional preservation authorities, empowering regional councils to ensure compliance with FMPs and regional regulations. The act authorizes regional councils to close fisheries to all exploitation in order to remedy or prevent overfishing, as defined by the act and its regulations.⁹⁰ Regionally applicable regulations and rules geared toward specialized situations provide more specific guidance as to the procedures for fishery closure.⁹¹

Additionally, Magnuson-Stevens requires that regional councils, through FMPs, protect "essential fish habitat" (EFH), an authority that is, in some respects,

⁸⁷ *Id.* § 1854. Approval authority has been delegated from the Secretary of Commerce to the NOAA Administrator. The Administrator subsequently delegated approval authority to the National Marine Fisheries Service (NMFS) Director, who in turn delegated to the regional NMFS directors. Each delegation required the subordinate agency or council to "advise" the delegator prior to approving an FMP or FMP amendment. The Court of Appeals for the D.C. Circuit held in 1991 that each agency retained approval authority under these delegations. *C&W Fish Company, Inc. v. Fox*, 931 F.2d 1556 (D.C. Cir. 1991). Since the time of that decision, the directives establishing the delegations in question have been modified, removing certain language relied upon by the court in reaching its conclusion. However, the term "advise" remains in place and was also integral to the court's decision that superior agency approval and not mere notice was required. Subsequent decisions do not appear to have addressed this issue. Thus it remains, for the time being, unclear whose approval of FMPs or FMP amendments is necessary.

⁸⁸ *Id.* §§ 1851(a)(6), 1853(b)(12). The options suggested by Magnuson-Stevens include permitting, specified zones, overall catch limits, and vessel and gear prohibitions. *Id.* § 1853.

⁸⁹ Fikret Berkes, Robin Mahon, Patrick McConney, Richard Pollnac, and Robert Pomeroy, *MANAGING SMALL-SCALE FISHERIES: ALTERNATIVE DIRECTIONS AND METHODS* 6.3.2 (2001).

⁹⁰ 16 U.S.C. § 1853(a). This section states that FMPs must "specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished . . . and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery . . ." *Id.* See also 50 C.F.R. § 600.1002.

⁹¹ See, e.g., 50 C.F.R. § 300.29 (eastern Pacific fisheries management); 50 C.F.R. § 622.34 (Gulf EEZ seasonal and/or area closures); 50 C.F.R. § 600.51 (foreign fishing closure procedures).

comparable to the ability to designate MPAs.⁹² The law requires regional councils to identify EFH for species in need of protection and, with the aid of an ecosystem panel, to develop a plan to conserve and enhance EFH.⁹³ The National Marine Fishery Service (NOAA Fisheries) has further refined the EFH statutory requirements in its regulations. Under these regulations, FMPs must identify those species in need of protection, and then identify and designate the EFH for that species.⁹⁴ While focusing on protecting particular species, the regulations adopt an “ecosystem approach” to defining EFH, stating “EFH should be based on . . . the quality and quantity of habitat that is necessary to maintain a sustainable fishery and the managed species’ contribution to a healthy ecosystem . . . where ecological productive capacity is maintained, diversity of the flora and fauna is preserved, and the ecosystem retains the ability to regulate itself.”⁹⁵ Once EFH has been designated, regional councils are required to “prevent, mitigate, or minimize” degradation of the EFH resulting from fishing operations.⁹⁶ As is generally true under Magnuson-Stevens, no specific protection or mitigation measures are required, leaving open a variety of protection options.⁹⁷

Management flexibility is a key goal under Magnuson-Stevens, with the act and its implementing regulations recognizing the need for adaptive regulatory techniques. The act requires periodic review and continuous assessment of FMPs and allows for necessary amendments.⁹⁸ FMP implementing regulations may also be amended “on a timely basis, as new information indicates the necessity for change in objectives or management measures.”⁹⁹ In addition, the regulations also take into account the need for flexibility in fishery management, allowing for certain, necessary modifications of regulatory techniques as conditions in each fishery require. To this end, the general regulations issued under Magnuson-Stevens specifically recognize the uncertainties inherent in the planning process and encourage FMPs to include multiple regulatory options that can be implemented as needed without amending FMPs or their own implementing regulations.¹⁰⁰

Thus, Magnuson-Stevens, while aimed at sustaining fish stocks and providing broader ecosystem protection, establishes a framework which can provide for flexible and responsive management of marine resources. The authority to set optimum yield, catch quotas, and to close fisheries as necessary to protect fish populations provides regulators with significant tools for implementing fishery preservation.

⁹² *Id.* § 1855(b); 50 C.F.R. § 600.805(a) (2003).

⁹³ 16 U.S.C. §§ 1855(b), 1882(a); 50 C.F.R. § 600.805(a) (2003).

⁹⁴ 50 C.F.R. § 600.815.

⁹⁵ *Id.* §§ 600.815(a)(2)(ii)(E), 600.810(a).

⁹⁶ *Id.* § 600.815(a)(2)(ii).

⁹⁷ *Id.* § 600.815.

⁹⁸ 16 U.S.C. § 1852(h).

⁹⁹ *Id.* § 1853(c)(2); 50 C.F.R. § 600.315(d) (2003).

¹⁰⁰ 50 C.F.R. § 600.335(c)(2); (d).

Outer Continental Shelf Lands Act. The Outer Continental Shelf Lands Act of 1953, as amended, (OCSLA)¹⁰¹ establishes exclusive federal jurisdiction over all submerged lands lying seaward and outside of the areas designated by the Submerged Lands Act as under state jurisdiction.¹⁰² The OCSLA authorizes the Secretary of the Interior to grant mineral leases on Outer Continental Shelf (OCS) lands “to the highest responsible qualified bidder or bidders by competitive bidding.”¹⁰³ While providing for orderly development of OCS mineral resources, the OCSLA provides the Secretary of the Interior with broad leeway to refrain from offering areas for mineral development.

The Secretary of the Interior is instructed to prepare a comprehensive “oil and gas leasing program.”¹⁰⁴ This program is required to provide for a five-year leasing schedule, documenting the size, timing, and location of foreseeable leasing activity and must consider “economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.”¹⁰⁵

The Secretary has broad authority to impose conditions on the development of OCS resources governed by the OCSLA and may refrain from leasing areas for development altogether.¹⁰⁶ When a lease has been approved, a lessee must submit development plans and permit applications to the Secretary of the Interior at each development stage.¹⁰⁷ The Secretary is directed to disapprove a particular plan or cancel a lease should the Secretary find that such plan or lease will necessarily result in serious harm to environmental or mineral resources.¹⁰⁸ In addition to whatever environmental or resource impacts the Secretary of Interior may consider in reviewing a development plan, development plans must be consistent with state

¹⁰¹ 43 U.S.C. §§ 1331-1356.

¹⁰² 43 U.S.C. §§ 1301, 1331(a).

¹⁰³ 43 U.S.C. §§ 1334(a), 1337.

¹⁰⁴ 43 U.S.C. § 1344.

¹⁰⁵ *Id.*

¹⁰⁶ 43 U.S.C. § 1334; The OCSLA states:

The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. *Id.*

¹⁰⁷ 43 U.S.C. § 1340(c)(1).

¹⁰⁸ *Id.* §§ 1340(c), 1334(a)(2) (stating that permanent cancellation of a lease or permit may occur provided that certain findings are made and appropriate administrative procedures are followed); *see also* Mobil Oil Exploration and Producing Southeast, Inc. v. U.S., 530 U.S. 604 (2000); Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973).

regulation as provided for under the Coastal Zone Management Act.¹⁰⁹ States may prevent Interior approval of a development plan unless the Secretary of Commerce overrides a state finding of inconsistency with coastal zone management regulations.¹¹⁰

Thus, the OCSLA provides significant authority for ensuring environmentally sensitive mineral development. Further, in conjunction with other resource-oriented statutes, such as the Magnuson-Stevens Fishery Conservation and Management Act and state coastal zone management plans, current statutory authority to withhold areas from production¹¹¹ administratively would appear to provide significant preservation authorities.

Coastal Zone Management Act. As discussed above, the jurisdiction of coastal states, in most cases, extends three geographical miles from the shoreline under the Federal Submerged Lands Act, giving states primary regulatory responsibility for preservation and regulation of the nation's coastal areas.¹¹² The Coastal Zone Management Act (CZMA)¹¹³ was designed to encourage states to enact coastal zone management plans to coordinate protection of habitats and resources in coastal waters. The act establishes a policy of preservation alongside sustainable use and development when such activities are compatible with resource protection.¹¹⁴

Programs under the CZMA are managed by the states, the Department of Commerce through the National Oceanic and Atmospheric Administration (NOAA), and the Environmental Protection Agency (EPA). Under the act, state coastal zone management programs that are approved by the Secretary of Commerce receive federal monetary and technical assistance. Relevant for resource protection purposes, to qualify for federal funds state programs must designate land and water conservation measures and permissible uses,¹¹⁵ and must address various sources of water pollution.¹¹⁶ Of particular importance, the CZMA also requires that the federal government and federally permitted activities comply with state programs.¹¹⁷

¹⁰⁹ *See id.* § 1340(c)(2).

¹¹⁰ *Id.*

¹¹¹ It should be noted that if a lease has been granted by the government and subsequent development is not permitted, the denial of the permit may constitute a compensable taking. *See Mobil Oil Exploration and Producing Southeast, Inc. v. U.S.*, 530 U.S. 604 (2000).

¹¹² *See supra*, note 30 and accompanying text.

¹¹³ 16 U.S.C. §§ 1451-1465.

¹¹⁴ *Id.* § 1452(1), (2).

¹¹⁵ *Id.* § 1455(d)(2), (9)-(12).

¹¹⁶ *Id.* §§ 1455(d)(16).

¹¹⁷ *Id.* § 1456(c).

The CZMA also created the National Estuarine Research Reserve System, a system of estuaries set aside and protected primarily for research purposes.¹¹⁸ The National Ocean Service (NOS) within NOAA administers the National Estuarine Research Reserve program. Sites are designated by the states who, subject to federal approval, manage them with the assistance of federal funds. Twenty-six National Estuarine Research Reserves have been established to date, and two more are under consideration.¹¹⁹

General Preservation Laws

National Monuments. The Antiquities Act¹²⁰ has been used to designate many national monuments since the law's enactment in 1906 and, on several occasions, has been the basis for setting aside marine areas for protected status. The Act delegates a broad authority to the executive branch and, in relevant part, states:

The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated *upon the lands owned or controlled by the Government of the United States* to be national monuments, and may reserve as a part thereof *parcels of land*, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.¹²¹

While the precise language of the statute might appear to limit monuments to “landmarks,” “structures,” or other objects which are “situated on the lands” and limits what may be reserved to “parcels of land,” the Executive’s power under the Antiquities Act has been interpreted quite broadly.¹²² The act has been interpreted to cover submerged lands under U.S. jurisdiction. In fact, submerged lands (e.g. coral reefs) have been included in national monuments on several occasions, but always, apparently, in connection with protection of some associated surfacelands, such as islands.¹²³ In addition to the submerged lands themselves, the act has been “read to authorize protection of the water column above submerged lands as well,” provided that a qualifying object located on the submerged lands could not be

¹¹⁸ *Id.* § 1461(a), (b).

¹¹⁹ See [http://nerrs.noaa.gov/Background_Chart.html].

¹²⁰ Act of June 8, 1906, 34 Stat. 225 (codified at 16 U. S.C. §§ 431-433).

¹²¹ 16 U.S.C. § 431 (2003) (emphasis added).

¹²² See generally Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 540 (2001).

¹²³ See Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938) (Channel Islands National Park); Proclamation No. 2337, 3 C.F.R. 88 (1938-1943) (Santa Rosa Island National Monument); Proclamation No. 3443, 3 C.F.R. 152 (1959-1963) (Buck Island Reef National Monument); Proclamation No. 7392, 66 Fed. Reg. 7,335, 7,336 (January 17, 2001) (Buck Island Reef National Monument Expansion); Proclamation No. 7399, 66 Fed. Reg. 7,364 (Jan. 17, 2001) (Virgin Islands Coral Reef National Monument).

adequately protected absent water column protection.¹²⁴ This reading of the act was apparently embraced by the Clinton Administration when the President expanded protection for the Buck Island Reef National Monument, where, in addition to protection for submerged lands themselves, fishing is now prohibited.¹²⁵ A monument designation protecting only water resources, and not an underlying land-based monument, would seem to strain the language of the statute. It should be noted again, however, that the act has been interpreted broadly, and it does not appear that there has ever been a successful challenge to a designation.

An additional issue is whether the U.S. government “owns” or “controls” these submerged lands as contemplated by the Antiquities Act. This question is complicated by the breakdown of the sea into various jurisdictional zones. Ownership and control may vary depending on which seaward area is involved. As discussed above, the United States asserts full sovereignty and jurisdiction over the territorial sea, regulatory control for certain purposes over the contiguous zone, and sovereign rights and related jurisdiction over the natural resources, certain economic activities and environmental protection of the EEZ pursuant to presidential proclamations.

As to those portions of the territorial sea that do not belong to the states, where U.S. jurisdiction over ocean resources is arguably at its strongest, there has been no definitive resolution as to whether U.S. authority over the area amounts to “ownership or control” for purposes of the Antiquities Act. There are, however, several authorities supporting the conclusion that the U.S. does “own” or “control” at least portions of the territorial sea as contemplated by the Antiquities Act. First, the Supreme Court has held that the United States owned the lands within the territorial sea and that the Property Clause of the U.S. Constitution authorized Congress to dispose of such lands.¹²⁶ Additionally, prior to President Reagan’s proclamation extending U.S. jurisdiction over the seas to parallel international law on the subject, the territorial sea was limited to three miles from the shoreline. During this time, the Supreme Court did state that “[t]here can be no serious question . . . that the President in 1949 had the power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts¹²⁷ as a national monument—since they were then controlled by the Government of the United

¹²⁴ *Ranchod*, *supra* note 116, at 578-79; *see also* *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *United States v. California*, 436 U.S. 32, 36 n.9 (1978). *See* *Cameron v. United States*, 252 U.S. 450 (1920); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978); *Anaconda Copper Co. v. Andrus*, 14 Env’t Rep. Cas. (BNA) 1853 (D. Alaska 1980).

¹²⁵ Proclamation No. 7392, 66 Fed. Reg. 7,335, 7,336 (January 17, 2001).

¹²⁶ *United States v. California*, 332 U.S. 19 (1947); *Alabama v. Texas*, 347 U.S. 272, 273-74 (1954).

¹²⁷ The decision speaks in terms of one-mile belts because this was the location of the national monument and submerged lands at issue in the case. It would not appear, however, that the reasoning behind the decision would be limited to a one-mile region within the territorial sea. *United States v. California*, 436 U.S. 32, 34-35 (1978).

States.”¹²⁸ These holdings support the concept of federal ownership or control and would most likely be applicable to those areas extending twelve miles from the shore which are under federal jurisdiction. The Submerged Lands Act, discussed below, has altered this balance to some extent.

The Submerged Lands Act (SLA)¹²⁹ would appear to impact federal ownership and control. The SLA established or confirmed state title to and ownership of “the lands beneath the navigable waters within the boundaries of the respective states and the natural resources within such lands and waters”¹³⁰ The boundaries of the states were designated as generally including the submerged lands up to three geographical miles from each state’s coast.¹³¹ The federal government retained, however, “its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs. . . .”¹³² Further, these rights are paramount to, but do not include, the states’ “proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources”¹³³

Thus, it is clear that, vis-a-vis the states, the federal government does not now “own” the submerged lands and waters to the extent that such rights have been ceded to the states, although the area remains in U.S. ownership vis-a-vis other nations. Determining federal “control” may be somewhat more elusive. Significant federal controls have been both ceded and retained, and, as indicated above, the standard for determining “control” does not appear to have been provided by statute or court decision. However, the Supreme Court’s decision in *United States v. California*, which held that the Submerged Lands Act transferred “dominion” over the three mile coastal region to the states and thus nullified a previously valid designation under the Antiquities Act, would appear to support the argument that the President would not have authority to designate a national monument in those areas affected by the SLA.¹³⁴ Further, at least one federal court decision has held that the Antiquities Act is inapplicable to state submerged lands, basing its conclusion on *United States v. California*.¹³⁵

Areas within the territorial sea but beyond the region affected by the SLA would appear to remain subject to federal ownership or control as contemplated by the

¹²⁸ *United States v. California*, 436 at 36.

¹²⁹ Act of May 22, 1953, ch. 65, 67 Stat. 29 (codified at 43 U.S.C. §§ 1301-1303, 1311-1315).

¹³⁰ 43 U.S.C. § 1311.

¹³¹ *Id.* § 1312; *see supra*, note 30 and accompanying text.

¹³² *Id.* § 1314.

¹³³ *Id.*

¹³⁴ *United States v. California*, 436 U.S. 32, 36 (1978).

¹³⁵ *Subaqueous Exploration & Archaeology Ltd. v. Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 610 (D. MD 1983).

Antiquities Act.¹³⁶ Further support for this position is found in the Outer Continental Shelf Lands Act (OCSLA).¹³⁷ In describing the OCSLA, the U.S. Supreme Court has stated that “Congress declared that the United States *owned* all submerged land in the continental shelf seaward of the lands granted to the States”¹³⁸ However, it would not appear that the Court was interpreting whether the United States had ownership or a lesser interest in Outer Continental Shelf lands in that decision. As this assertion would appear to be nonbinding dicta, the extent of the U.S. claim to submerged lands under the OCSLA remains unclear. Indeed, the OCSLA does not state that the U.S. owns Outer Continental Shelf submerged lands. The statute defines the Outer Continental Shelf as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed *appertain* to the United States and are subject to its jurisdiction and control.”¹³⁹ The nature of any U.S. ownership or jurisdictional interest would also appear to be circumscribed by additional provisions of the OCSLA. The law states:

It is hereby declared to be the policy of the United States that—
 (1) the subsoil and seabed of the outer Continental Shelf *appertain* to the United States and are subject to its *jurisdiction, control, and power of disposition as provided in this subchapter . . .*¹⁴⁰

The use of these terms would appear to indicate that the U.S. interest in OCS submerged lands does not amount to ownership by virtue of the Outer Continental Shelf Lands Act itself, at least as to those areas beyond the territorial sea. However, even beyond the territorial sea, U.S. waters may still be subject to control as contemplated by the Antiquities Act.

As discussed earlier, in its EEZ, a zone beyond its territory, a coastal nation has sovereign rights to explore, exploit, conserve, and manage marine and seabed resources.¹⁴¹ The Presidential Proclamation establishing the U.S. EEZ states that the United States claims these rights in the 200 nautical mile area allowable under international law.¹⁴² The extent of control claimed by the U.S. over the EEZ is less extensive than that which it has claimed and exercised over the territorial sea. Recognition of a contiguous zone, allows for additional regulatory authority over the

¹³⁶ See *United States v. California*, 436 U.S. 32, 36 (1978). At the time of the designation, which the court held was then within the President’s authority, the territorial sea only extended three miles from shore. The subsequent expansion of the territorial sea would not appear to fundamentally alter the type of control asserted over the ocean resources, just the geographic scope of control. Thus, it seems reasonable to conclude that the court’s reasoning in determining that the Antiquities Act applied within the three-mile area would now apply to areas outside the three mile region but still within the twelve mile boundary.

¹³⁷ 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.*

¹³⁸ *U.S. v. California*, 381 U.S. 139, 148 (1965) (emphasis added).

¹³⁹ 43 U.S.C. § 1331(a) (emphasis added).

¹⁴⁰ 43 U.S.C. § 1332 (emphasis added).

¹⁴¹ Proclamation No. 5030 (March 10, 1983), *reprinted in* 16 U.S.C. § 1453 note.

¹⁴² *Id.*

area extending 24 nautical miles from the coast for specified purposes. It is not immediately clear if the levels of regulatory authority in these zones would be a determinative factor in deducing if the U.S. exercises “control” under the Antiquities Act. However, it should be noted that the United States claims significant authority, consistent with international law, to regulate the EEZ and contiguous zone for environmental and economic purposes.¹⁴³ Thus, whether control claimed over these submerged lands is sufficient to meet the requirements of the Antiquities Act remains an unsettled issue.

National Park System. While only Congress itself can designate a national park, the National Park Service Organic Act¹⁴⁴ allows the Secretary of the Interior to recommend areas to Congress for inclusion in the National Park System.¹⁴⁵ Upon receiving appropriations for study of specific areas,¹⁴⁶ themselves recommended by DOI, the Secretary must determine and report to Congress whether an area possesses national significance and is suitable and feasible for inclusion in the National Park System.¹⁴⁷ In determining the eligibility of a site for inclusion, the Secretary must consider nine factors:

- (i) the rarity and integrity of the resources;
- (ii) the threats to those resources;
- (iii) [whether] similar resources are already protected in the National Park System or in other public or private ownership;
- (iv) the public use potential;
- (v) the interpretive and educational potential;
- (vi) costs associated with acquisition, development and operation;
- (vii) the socioeconomic impacts of any designation;
- (viii) the level of local and general public support; and
- (ix) whether the area is of appropriate configuration to ensure long-term resource protection and visitor use.¹⁴⁸

Thus, while the Secretary is directed to evaluate site suitability and while the enumerated factors may militate for or against inclusion of any particular area, there is no indication that marine sites could not be included in the Secretary’s recommendations or the National Park System itself. Congress, in fact, has broad power to make such designations and has included marine resources, notably coral reefs, in the National Park System. For example, Congress created the National Park of American Samoa “to preserve and protect the tropical forest and archeological and

¹⁴³ See UNCLOS III arts. 61-73. Cases deciding the Antiquities Act did not apply beyond the three mile point were decided before the extension of the territorial sea and claim to the contiguous zone and EEZ. *See* *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).

¹⁴⁴ 16 U.S.C. §§ 1-3.

¹⁴⁵ *Id.* § 1a-5.

¹⁴⁶ The Secretary may initiate the listing process without specific congressional authorization when such activities cost less than \$25,000. *Id.* § 1a-5(b)(3), (4).

¹⁴⁷ *Id.* § 1a-5(c).

¹⁴⁸ *Id.* § 1a-5(c)(3)(A).

cultural resources of American Samoa, and of associated reefs.”¹⁴⁹ Hence, fishing in the designated areas is prohibited unless for subsistence purposes.¹⁵⁰

Management of parks is delegated by statute to the National Park Service, which is directed to prepare general management plans. These plans must include, among other things, “measures for the preservation of the area’s resources. . . .”¹⁵¹ Broad, general authority to prescribe rules related to the management of the National Park System is also granted to the Secretary of the Interior.¹⁵² Moreover, the Secretary of the Interior is specifically authorized to promulgate rules “concerning boating and other activities on or relating to waters located within areas of the National Park System. . . .”¹⁵³

Thus, while significant legislative action is required for the designation of any national park, marine resources are not outside the scope of the system now in place. Furthermore, the broad management powers generally available under the National Park Service Organic Act and Congress’ power to further refine marine resource management could provide flexible and comprehensive regulation.

Currently, all national parks containing ocean resources are within the territorial sea of the United States proper or adjacent to U.S. island territories.¹⁵⁴ Indeed, as the United States owns and exercises full sovereignty over its territorial seas, establishment of a park in that zone would not appear to pose particular jurisdictional problems, although state ownership, as expressed in the Submerged Lands Act may require consideration. Designation within the other zones may prove more complicated. The Park Service Act makes no apparent distinction among waters, and hence ocean resources, based on the various zones. In fact, in 16 U.S.C. section 1a-2(h), the act states that the Secretary shall:

[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the *jurisdiction* of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.¹⁵⁵

Thus arguably, under the terms of Park Service Organic Act, designation of a park in the waters of any zone appears permissible as a form of regulating ocean resources so long as consistent with the sovereignty or jurisdiction that the United States claims.

¹⁴⁹ 16 U.S.C. § 410qq(b); see also 16 U.S.C. 398 et seq. (Virgin Islands National Park).

¹⁵⁰ *Id.* § 410qq-2(b)(2).

¹⁵¹ *Id.* § 1a-7(b).

¹⁵² *Id.* § 3.

¹⁵³ *Id.* § 1a-2(h) (emphasis in original).

¹⁵⁴ See [http://www.mpa.gov/inventory/atlas/fig4_npsmap_west.html].

¹⁵⁵ 16 U.S.C. § 1a-2(h) (emphasis added).

The National Wildlife Refuge System. The National Wildlife Refuge System Administration Act of 1966 (NWRSA) ¹⁵⁶ authorizes the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service (FWS), “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of the present and future generations of Americans.” ¹⁵⁷ Thus, the act would appear to contemplate the possibility of marine resources receiving wildlife refuge status. Nothing in the language of the act would appear to preclude this understanding of the statute. The Refuge System currently includes lakes and marshes and freshwater swamps, certain coastal areas, and submerged lands and waters, although it would appear that each ocean refuge is in some way connected to Hawaiian islands or territories owned by the United States and incorporates the territorial waters of those possessions. ¹⁵⁸ Thus, it would not appear that an independent refuge in the EEZ has been established to date.

In some settings, it is clear that the jurisdiction of the FWS over marine resources has been circumscribed. The U.S. Fish and Wildlife Service, as created by the Fish and Wildlife Act of 1956, was composed of the Bureau of Commercial Fisheries and the Bureau of Sport Fisheries and Wildlife. ¹⁵⁹ The Bureau of Commercial Fisheries, which had authority over fishery management, was transferred to the Department of Commerce and the National Oceanic and Atmospheric Administration by Executive action. ¹⁶⁰ The Bureau of Sport Fisheries and Wildlife remained in DOI, although its authorities related to the protection of migratory marine species of game fish were also transferred by the Reorganization Plan. ¹⁶¹ Under the resulting reorganization, the FWS retained authority over only those Bureau of Commercial Fisheries functions related to “(1) Great Lakes fishery research and activities related to the Great Lakes Fisheries Commission, (2) Missouri River Reservoir research, (3) the Gulf Breeze Biological Laboratory of the said Bureau at Gulf Breeze, Florida and (4) Trans-Alaska pipeline investigations.” ¹⁶² Thus, it is relatively clear that the FWS does not retain significant jurisdiction over

¹⁵⁶ 16 U.S.C. §§ 668dd-668ee.

¹⁵⁷ *Id.* § 668dd(a)(1), (2).

¹⁵⁸ See [http://www.mpa.gov/inventory/atlas/fwsmap_west.html]; e.g., Exec. Order 13022 (October 31, 1996) (“Midway Islands, Hawaiian group, *and their territorial seas* . . . are hereby transferred to the jurisdiction and control of the Department of the Interior.” (emphasis added)).

¹⁵⁹ Reorg. Plan No. 3 of 1940, 3 C.F.R. 1298 (1938-1943).

¹⁶⁰ Reorg. Plan No. 4 of 1970, 35 Fed. Reg. 15627 (Oct 3, 1970). The jurisdiction of the FWS as to marine resources has changed dramatically over the years. In 1939, the Bureau of Fisheries within the Department of Commerce was transferred to DOI, and later incorporated into the FWS. Subsequently, the FWS Bureau of Commercial Fisheries was returned to the Department of Commerce, and renamed the National Marine Fisheries Service. See George Cameron Coggins and Doris K. Nagel, Nothing Beside Remains: The Legal Legacy of James G. Watt’s Tenure [sic] as Secretary of the Interior on Federal Land Law and Policy, 17 B.C. ENVTL. AFF. L. REV. 473, 550 n. 46 (Spring 1990).

¹⁶¹ Reorg. Plan No. 4 of 1970, 35 Fed. Reg. 15627 (Oct 3, 1970).

¹⁶² *Id.*

ocean resources under the authorities originally granted to the Bureau of Commercial Fisheries. However, the FWS's jurisdiction under other laws would not appear to be affected by the 1970 reorganization. Indeed, its authority to manage resources as part of the National Wildlife Refuge System was not involved in the transfer of the duties of the Bureau of Commercial Fisheries and, thus, would appear to remain intact to the extent provided for in specific congressional authorizations.

There is no single method for national wildlife refuge designation, and various administrative, executive, and legislative processes have been employed in the past, sometimes in combination.¹⁶³ Generally, refuges have been created through legislation, executive order, or acquisition of private land.¹⁶⁴ Past legislation has either directly designated a refuge or authorized specific executive action to do so.¹⁶⁵

There are two primary statutes guiding FWS regulation of refuge areas, the Refuge Recreation Act of 1962¹⁶⁶ and the National Wildlife Refuge System Administration Act of 1966, significantly amended in 1997. The Secretary is given broad discretion to regulate activities in refuge areas and is authorized to “permit the use of any area within the System for any purpose . . . whenever he determines that such uses are compatible with the major purposes for which such areas were established.”¹⁶⁷ The act defines compatible use as “a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.”¹⁶⁸ FWS regulations further clarify the compatible use standard and allow for, under specified circumstances, recreational uses of refuges,¹⁶⁹ certain economic uses,¹⁷⁰ hunting and fishing,¹⁷¹ and

¹⁶³ Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, (1994).

¹⁶⁴ The primary mechanism for expanding the NWRS is acquisition of private lands. The most often utilized law of this sort is the Migratory Bird Conservation Act (MBCA) of 1929. In addition, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, and the Endangered Species Act also provide general acquisition authorities; these statutes rely on annual appropriations from Congress.

¹⁶⁵ *See, e.g.*, Act of May 23, 1908, Pub. L. No. 136, ch. 192, 35 Stat. 251, 267 (codified at 16 U.S.C. § 671).

¹⁶⁶ Pub. L. No. 87-714, 76 Stat. 653 (codified at 16 U.S.C. §§ 460(k)-460(k)(4)).

¹⁶⁷ 16 U.S.C. § 668dd(d)(1).

¹⁶⁸ 16 U.S.C. § 668ee(1).

¹⁶⁹ 50 C.F.R. § 26 (2003) (including special regulations for individual refuges and generally applicable provisions which cover the process for determining which uses are compatible uses.)

¹⁷⁰ *Id.* § 29.

¹⁷¹ *Id.* § 32

subsistence uses.¹⁷² The regulations also prohibit certain activities.¹⁷³ In general, refuge protection standards would appear to be more permissive than the standards applicable to national parks and less permissive than standards applicable to multiple-use lands.¹⁷⁴

An additional issue is whether the NWRSA is meant to apply in the territorial sea and the EEZ. The statute states:

The mission of the System is to administer a national network of lands and *waters* for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats *within the United States* for the benefit of present and future generations of Americans.¹⁷⁵

Units of the Refuge System would presently appear to be confined to areas within the territory of the United States, including the territorial sea.¹⁷⁶ Because of the extent of the U.S. claim to ownership and sovereign jurisdiction over the territorial sea, the territorial sea could arguably be considered “within the United States.” On the other hand, it is arguable that “within the United States” does not include any area beyond the U.S. coastline. However, as multiple refuges currently contain portions of the territorial sea and as there is little to indicate that the territorial sea is not meant to be considered a part of the United States for purposes of the NWRSA, it would seem that refuge designation within the territorial sea is permissible. Whether designation in the EEZ or contiguous zone would be permissible under current law is more questionable.

Conforming to international law, the Presidential Proclamation establishing the U.S. EEZ, states that the EEZ “remains an area *beyond the territory* and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.”¹⁷⁷ As pointed out in *Natural Resources Defense Council v. United States Department of the Navy*, “while the EEZ is not part of United States territory, the United States does enjoy certain ‘sovereign rights’ there, including sovereign rights ‘for the purpose of exploring, exploiting, conserving and managing natural resources.’”¹⁷⁸ Thus, while the United States would likely be empowered to create refuge-like protections for areas within its EEZ, if Congress deemed it appropriate, it is doubtful that the areas beyond the territorial sea would qualify as “within the United States” for current NWRSA purposes.

¹⁷² See, e.g., *id.* §§ 36.11-36.16; 100.

¹⁷³ *Id.* §§ 27, 70.

¹⁷⁴ Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 27 (1994).

¹⁷⁵ 16 U.S.C. § 668dd(a)(2) (emphasis added).

¹⁷⁶ See [http://www.mpa.gov/inventory/atlas/fwsmmap_west.html].

¹⁷⁷ Pres. Proc. No. 5030 (March 10, 1983) (emphasis added).

¹⁷⁸ *Natural Resources Defense Council v. United States Department of the Navy*, No. CV-01-07781 CAS(RZX) (C.D. Cal., Sept. 17, 2002) (internal citations omitted).

Marine Preservation Through Executive Order. Near the end of his administration, President Clinton issued Executive Orders 13,178¹⁷⁹ and 13,196,¹⁸⁰ thereby creating the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (NHIR). The reserve covers approximately 99,500 square nautical miles, making it substantially larger than other marine sanctuaries. NHIR would appear to be the first U.S. designation of its kind, i.e. the creation of a “marine reserve” via executive order.¹⁸¹ Like other U.S. MPAs discussed in this report, the reserve surrounds certain U.S. owned Pacific islands.

Presidential designation of the NHIR was specifically authorized in the 2000 amendments to the National Marine Sanctuaries Act,¹⁸² which were enacted shortly before President Clinton issued the NHIR Orders. The amended act also directs the Secretary of Commerce, upon the creation of a reserve, to initiate its designation as a marine sanctuary under the National Marine Sanctuaries Act.¹⁸³ Further, the amendments state that, in the period before designation of the reserve as a marine sanctuary, the NHIR be managed in a manner consistent with the purposes of the National Marine Sanctuaries Act.¹⁸⁴ These requirements are reflected in the Executive Orders as well.¹⁸⁵ Thus far, the NHIR has been designated and the process for redesignation as a marine sanctuary has begun as well. It should be noted, however, that unless the provisions of an executive order are enacted into law, an executive order can be delayed, abandoned, or expressly overturned by a later order. The congressional authorization here does not compel a designation, and while it authorizes the creation of a reserve, it would not appear to imbue the Clinton Orders with any additional force of law.¹⁸⁶

The regulatory authority exercised over the NHIR pursuant to the Executive Orders derives from several preexisting legal sources. Generally, an executive order is used by the President to direct some action within the executive branch. Executive orders may be based upon the President’s constitutional powers and/or upon specific statutory authority. The Orders at issue here cite several authorities in support of the President’s designation, including the Constitution, the National Marine Sanctuaries Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Protection, Research, and Sanctuaries Act, the Coastal Zone Management Act, the Endangered Species Act, the Marine Mammal Protection Act, the Clean Water Act,

¹⁷⁹ Exec. Order No. 13,178, 65 Fed Reg. 76,903 (Dec. 7, 2000).

¹⁸⁰ Exec. Order 13,196, 66 Fed. Reg. 7,395 (Jan. 23, 2001) (finalizing and slightly modifying EO 13,178 after public comment.)

¹⁸¹ Nat’l Oceanographic and Atmospheric Admin., Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve: Questions and Answers, available at [<http://hawaiiireef.noaa.gov/qanda/qanda.html>].

¹⁸² Act of November 13, 2000 Pub. L. No. 106-513, 114 Stat. 2381; *see also* Act of Dec. 21, 2000, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763.

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 6(g), *codified at* 16 U.S.C. § 6401 Note.

¹⁸⁵ Exec. Order No. 13,178; Exec. Order 13,196.

¹⁸⁶ *See id.* § 6(g)(5).

the National Historic Preservation Act, the National Wildlife Refuge System Administration Act, and “other pertinent statutes.”¹⁸⁷ Thus, President Clinton directed the federal agencies to protect the NHIR as authorized by the applicable statutes. The Executive Orders would not appear to authorize or establish any new regulatory capabilities that were not available under preexisting law.

The Orders themselves establish certain baseline protections for the designated area. They limit development of the reserve’s resources and generally prohibit oil and gas exploration and production, anchoring on coral reefs, alteration of the seabed, discharges into the reserve, and, under certain circumstances, the taking of biological resources.¹⁸⁸ The Orders permit certain categories of commercial and recreational fishing to continue at current levels in most portions of the reserve, while establishing eight Preservation Areas where permitted fishing may temporarily take place, and seven Preservation Areas where no resource development is allowed.¹⁸⁹

The Orders also provide for additional, more detailed management and conservation measures to be developed by the Secretary of Commerce in conjunction with the Secretary of the Interior, the State of Hawaii, the Western Pacific Fishery Management Council (WesPac),¹⁹⁰ and the Coral Reef Ecosystem Reserve Council. This group is directed to develop general Reserve Management Principles, conservation measures, and a Reserve Operations Plan. The basic regulatory authority contained in several of the most relevant statutory authorities has been described above; however, several additional regulatory authorities deserve attention here: namely the Endangered Species Act, the Marine Mammal Protection Act, the Clean Water Act, and the Ocean Dumping Act.

The Endangered Species Act (ESA)¹⁹¹ prohibits the “taking”¹⁹² of any threatened or endangered species and generally prohibits federal agencies from harming these species through direct action or through federally funded activities.¹⁹³ Species protection under the ESA has been interpreted to include the designation and protection of critical habitat.¹⁹⁴ Thus, significant protections for both individual species and their habitat may be available under the ESA. However, the ESA allows for “take permits,” which could include allowances for harm to individuals or critical

¹⁸⁷ Exec. Order 13,178 preamble.

¹⁸⁸ Exec. Order No. 13,178 § 7(b)(1)-(5); Exec. Order 13,196, § 3(4).

¹⁸⁹ Exec. Order 13,196 §§ 3-4, amending Exec. Order 13,178 §§ 7-8.

¹⁹⁰ This is the applicable regional fishery council under the Magnuson Act, see page 10 *supra*.

¹⁹¹ Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994).

¹⁹² “Take” means “to harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct,” and includes significant habitat modification or degradation that actually kills or injures wildlife. 16 U.S.C. § 1453(19).

¹⁹³ 16 U.S.C. §§ 1538(a), 1536(a).

¹⁹⁴ See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

habitat if it is determined that the taking is incidental to a lawful activity and will not endanger the species.¹⁹⁵

The Marine Mammal Protection Act (MMPA)¹⁹⁶ is also cited as an authority for the President's reserve designation. Unlike the ESA and its protections for critical habitat designation, the MMPA addresses only species management. The law generally prohibits the taking of marine mammals but allows for incidental takings during fishing operations. It does authorize the Secretary of Commerce to close fisheries or revoke individual permits if the terms of incidental take restrictions are not followed.¹⁹⁷

The Clean Water Act (CWA)¹⁹⁸ prohibits discharging pollutants into ocean waters when such discharges might cause adverse impacts to the marine environment.¹⁹⁹ The act directs the Administrator of the EPA to "promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans," incorporating "the effect of disposal of pollutants on marine life."²⁰⁰ Using these guidelines, the appropriate Regional, State, or Tribal Director²⁰¹ must determine if any pollutant discharge will unreasonably degrade²⁰² the marine environment and can issue a discharge permit only upon a finding that unreasonable degradation will not occur.²⁰³

¹⁹⁵ 16 U.S.C. § 1536(b)(4).

¹⁹⁶ Marine Mammal Protection Act, 16 U.S.C. §§ 1361- 1421.

¹⁹⁷ 16 U.S.C. § 1387.

¹⁹⁸ 33 U.S.C. §§ 1251 *et seq.*

¹⁹⁹ *Id.* § 1343(a), (c).

²⁰⁰ *Id.*

²⁰¹ According to EPA regulations, the term "Director" may have several different meanings depending upon the situation. The regulations state:

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administrative program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.1.) In such cases, the term "Director" means the Regional Administrator and not the State Director. 40 C.F.R. § 122.2.

²⁰² Unreasonable degradation is defined as "(1) Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities, (2) Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or (3) Loss of esthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge."40 C.F.R. § 125.121(e) (2003).

²⁰³ 40 C.F.R. § 125.122, 125.123 (2003).

Title I of the Marine Protection, Research and Sanctuaries Act (MPRSA),²⁰⁴ commonly referred to as the Ocean Dumping Act, supplements the CWA's discharge limitations and prohibits the "dumping in ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities," without appropriate authorization.²⁰⁵ The MPRSA authorizes EPA to designate specific areas where dumping is completely prohibited and to issue discharge permits, similar to those under the CWA.²⁰⁶ Permit issuance is governed by the CWA's ocean discharge criteria and the London Dumping Convention.²⁰⁷

Additionally, while the Executive Orders direct coordinated management and interagency cooperation, the overlapping agency jurisdiction could result in some level of tension. While in most instances the Executive Orders appear to vest primary management authority in the Secretary of Commerce pursuant to congressional authorization, the Secretary would not appear to have primary jurisdiction over portions of the NHIR. The reserve boundaries are established in Executive Order 13,178, stating:

The Reserve shall be adjacent to and seaward of the seaward boundaries of the State of Hawaii and the Midway Atoll National Wildlife Refuge, and *shall overlay the Hawaiian Islands National Wildlife Refuge* to the extent that it extends beyond the seaward boundary of the State of Hawaii.²⁰⁸

Thus, a portion of the NHIR includes a portion of a National Wildlife Refuge. The Secretary of Commerce's management authority may be problematic in this area because of a general statutory requirement that the National Wildlife Refuge System be managed by the Secretary of the Interior through the United States Fish and Wildlife Service.²⁰⁹ However, as indicated in the legislative history surrounding the development of this jurisdictional limitation and the cases interpreting it, DOI may delegate some of its responsibilities and coordinate management activities with state

²⁰⁴ Act of Oct. 23, 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified at 33 U.S.C. §§ 1401-1445).

²⁰⁵ 33 U.S.C. §§ 1411(a)(1)-(2), 1402.

²⁰⁶ 33 U.S.C. § 1412(c).

²⁰⁷ 33 U.S.C. §§ 1343(c), 1412(a).

²⁰⁸ Exec. Order 1378 § 3. It should also be noted that the precise boundaries of the Hawaiian Islands National Wildlife Refuge are relatively unclear. The Refuge was established by President Theodore Roosevelt in 1909 by Executive Order and subsequently included in the National Wildlife Refuge System. The boundaries are not precisely described in the original Executive Order and would appear to be based solely upon a crudely drawn map. The FWS has apparently established working boundaries, based on practical enforcement of its regulations; however, should jurisdictional authority among the agencies become an issue, precise delineation of refuge boundaries may become necessary.

²⁰⁹ 16 U.S.C. § 668dd(a)(1); *see also* S. Rep. No. 94-593, at 2 (1976)(indicating that split jurisdiction should be avoided when possible).

or federal agencies.²¹⁰ The courts have indicated that the level of discretion that can be vested in other entities with regard to refuge management is limited and that DOI must retain ultimate authority and responsibility for refuge resources.²¹¹

It is arguable that the law authorizing presidential designation of the NHIR had some impact on the general placement of refuge authority in DOI. The law states that the reserve is “to be managed by the Secretary of Commerce.”²¹² This could be interpreted as an authorization for the President to effectively place primary management authority for a Wildlife Refuge in the hands of the Secretary of Commerce should the President choose to include such an area in the reserve. As described above, this could result in the application of the generally weaker reserve protective standards to the refuge. On the other hand, it is arguable that had Congress intended such a result, it would have spoken to this issue directly. There is a general presumption that Congress will specify its intention that a new statute is meant to supersede an earlier one.²¹³ Further, courts will generally read a subsequent enactment as an amendment or repeal only when the conflict between two provisions is irreconcilable or the subsequent enactment is clearly intended as a substitute.²¹⁴ Applying this general canon of statutory construction would appear to favor an interpretation of the reserve designation provision that leaves the primary refuge management authorities with FWS alone. Still, the statute arguably authorizes cooperative management efforts among the relevant agencies, even if primary authority remains with DOI.

The Executive Orders would not appear to definitively clarify where management authority rests. They direct that “the Secretary of Commerce, or his designee, . . . manage the Reserve,” and that the management system facilitate coordination among the state and federal agencies involved.²¹⁵ These statements appear to indicate an intention that the Secretary of Commerce have ultimate regulatory responsibility. On the other hand, there is some indication that regulatory authority over the Hawaiian Islands National Wildlife Refuge is separate from the rest of the reserve. For example, the provisions that guide the preparation of the Reserve Operations Plan (ROP) state that the ROP must provide for coordinated management between the Reserve and the Hawaiian Islands National Wildlife Refuge.²¹⁶ Similarly, the Orders direct the Secretary of Commerce to negotiate any necessary Memoranda of Understanding with the Secretary of the Interior and the

²¹⁰ H.R. Rep. No. 104-218, at 12 (1995).

²¹¹ *Calhoun County v. United States*, 132 F.3d 1100, 1102 (5th Cir. 1998); *Bunch v. Hodel*, 793 F.2d 129 (6th Cir. 1986); *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1304-05 (D. Alaska 1981).

²¹² Act of Dec. 21, 2000, Pub. L. No. 106-554, § 1(a)(4) [Div. B, Title I, § 144(f)], 114 Stat. 2763; Act of Nov. 13, 2000, Pub. L. No. 106-513, § 6(g), 114 Stat. 2385.

²¹³ *United States v. Fausto*, 484 U.S. 439, 453 (1988).

²¹⁴ *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

²¹⁵ Exec. Order 13,178 § 4.

²¹⁶ *Id.* § 5(b)(1)

State of Hawaii regarding management coordination between the reserve and the Wildlife Refuge.²¹⁷ Thus, arguments could be made that ultimate Refuge authority has been placed in either of the agencies by the Executive Orders. However, as described above, should a court find that the congressional authorization of the creation of a reserve was not intended to supersede the general requirement that refuge authority rest in DOI, an Executive Order would not appear to be the appropriate vehicle for redistributing management responsibilities, except to the extent afforded by established case law.

The enabling statute and the Executive Orders also leave the role of the regional fishery management council, WesPac, vis-a-vis the other regulatory authorities relatively vague. It would appear, however, that WesPac is intended to remain an active regulator under Magnuson-Stevens and continue with such activities as it has heretofore undertaken. As described above, WesPac, as the regional fishery management council, is primarily responsible for the development of fishery management plans in accordance with Magnuson-Stevens, subject to approval by the Secretary of Commerce.²¹⁸ WesPac has apparently voiced some concern that certain requirements contained in the Executive Orders and the NHIR regulations may violate the Magnuson Act by preventing resource utilization as permitted under law.²¹⁹ This opinion may result from an understanding that Magnuson-Stevens generally requires fishery management plans to include conservation and management measures that achieve “optimum yield” from each fishery while preventing overfishing.²²⁰ These management measures are to be based on the best scientific information available.²²¹ Thus, it is conceivable that the base restrictions required by the Executive Orders could conflict with the levels of sustainable fishing as determined by the regional council. However, the maximum sustainable yield from any fishery is to be reduced by the relevant social, economic, and ecological factors.²²² Further, conservation and management activities are required to rebuild, restore, or maintain fishery resources and the marine environment.²²³ It would appear to be within the President’s authority to direct fishery management so that conservation of the marine environment is the primary objective. If, however, specific restrictions on resource exploitation could not be supported as necessary by scientific information, as required by law, additional fishing may have to be permitted, unless the more stringent restrictions could be based on some superseding authority.

²¹⁷ *Id.* § 5(d).

²¹⁸ 16 U.S.C. § 1854(a)(3).

²¹⁹ Jennifer Van Trump, Protecting the ‘Rainforests of the Sea’: Creating the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve By Executive Order, 11 PENN STATE ENV’T L. R. 273, 284 (2003).

²²⁰ 16 U.S.C. § 1851(a)(1).

²²¹ *Id.* § 1851(a)(2).

²²² *Id.* § 1802(28).

²²³ *Id.* § 1802(5).

Conclusion

A series of statutory authorities exist for the creation and management of MPAs. The National Marine Sanctuaries Act would appear to be directly aimed at the creation of MPAs, although, in practice, the protections provided areas designated under its authority have not necessarily been extensive. Other legislation, such as the Coastal Zone Management Act and the Magnuson-Stevens Fishery Conservation and Management Act, also have the potential to protect marine resources in a fashion similar to MPAs. More general preservation laws may also be an option for the protection and management of marine resources. The Antiquities Act, the National Park Service Organic Act, and the National Wildlife Refuge System Administration Act appear to generally allow the designation of marine resources as national monuments, national parks, or national wildlife refuges. However, use of these various conservation authorities for the creation of an MPA would carry concerns peculiar to each particular statute and would be limited by the extent of U.S. jurisdiction over offshore lands and waters. Their application to the territorial sea would generally appear permissible. Application beyond the territorial sea is less certain.