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The Use of the National Marine Sanctuaries Act as a Tool for the Enhanced Preservation of Marine Resources under the New National Oceans Policy

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EXECUTIVE SUMMARY:

The Use of the National Marine Sanctuaries Act as a Tool for the Enhanced Preservation of Marine Resources under the New National Ocean Policy.

Since the late 19th century, the federal government has sought to preserve areas of cultural, educational, historic or scientific value. Since the 1970s this policy has been extended to culturally significant marine areas as well. The preservation of these marine resources has become increasingly important as the advance of technology has made it possible to deplete resources at a historically unprecedented speed. A balance must be struck between economic and ecological concerns.

Beginning in the late 1960s and as recently as 2010, a number of government and private organizations have commissioned studies of this area of law. Each of these bodies has concluded that the best ocean policy is one that uses a comprehensive “ecosystem-based” approach to dealing with these problems. Despite these findings, the general approach has been to adopt a “use-based” approach. This means that the laws are drafted to deal with specific ocean uses, such as commercial fishing or offshore mineral extraction. Under this use based system there is now a hodgepodge of overlapping laws on the books to govern activity at sea.

Two of these use-based approaches are the Outer Continental Shelf Lands Act (“OCSLA”), addressing development of the outer continental shelf, and the Magnuson-Stevens Fishery Conservation and Management Act (“FCMA”), addressing commercial fishing. While both these laws have environmental protection provisions, the main goal of these laws is to regulate an industry.

The Antiquities Act, now over one hundred years old, has recently been re-tasked to preserve marine resources. The Antiquities Act grants the President broad powers to preserve public areas with scientific, historic, or other cultural value. Under this law, the President is able to preserve public areas quickly and almost unilaterally. This process does not require a great deal of public input.

The National Marine Sanctuaries Act (“NMSA”) was passed in the early 1970s and designed to provide a comprehensive approach to ocean preservation. The designation process involves a great deal of public and governmental input to ensure that the sanctuary meets the needs of those who live and work on its waters. The NMSA provides for a great deal of flexibility in the designation and management process, and many of the existing sanctuaries provide a good balance between human use and ecological preservation.

In 2010, the Interagency Ocean Policy Task Force (“Task Force”) recommended the establishment of a new National Ocean Policy (“NOP”). Three of the main goals of this policy were to: (1) promote an ecosystem based approach to ocean preservation; (2) to encourage marine spatial planning (essentially municipal zoning for the oceans); and (3) accomplish these goals with the input of the stakeholders who use a particular waterway and most impacted by these new policies.

Of the laws listed above, the Antiquities Act is certainly the most expeditious conservation tool, and the NMSA stands in the best position to accomplish the goals of the National Ocean Policy. In fact, many of the existing sanctuaries have accomplished many of these goals. The Monterey Bay National Marine Sanctuary has strong stakeholder input, balances economic and environmental factors through marine spatial planning and provides a management plan for an area larger than Yosemite National Park.

TO: Jeb Berman, National Marine Sanctuary Foundation
Julia Wyman, Esq., Rhode Island Sea Grant Legal Program

FROM: Colin F. Lynch

DATE: December 20, 2011

RE: The Use of the National Marine Sanctuaries Act as a Tool for the Enhanced
Preservation of Marine Resources Under the New National Ocean Policy.

Since the late 19th century, the federal government has sought to preserve areas of cultural, educational, historic or scientific value. In the 21st century, technology has developed to the point where resources that were once thought to be unreachable are now accessible; resources thought to be inexhaustible have started to dwindle. The federal government, particularly over the past half century, has attempted to balance competing economic and ecological concerns. In few places are these competing interests more apparent than at sea. So far, the federal government has attempted to manage these interests by looking to individual uses of the ocean. Under this “use-based” strategy for ocean management, the federal government drafts laws which deal with specific industries or uses, such as commercial fishing or offshore oil production.

Like any system of laws, this use-based strategy for ocean management has both its strengths and weaknesses. In 1967, the Stratton Commission was formed by President Johnson to explore how to most effectively manage American marine resources. In 1969, the Stratton Commission released its final report; its findings focused on the weaknesses of use-based management. The Stratton Commission recognized a need to promote the orderly and responsible use of economic resources in the ocean while minimizing the impact that

development would have on the physical environment.¹ To organize and coordinate the various uses of the ocean, the Stratton Commission recommended that one centralized body be created to administer a complete ocean policy; the National Oceanic and Atmospheric Administration (NOAA) was created to fill this role.² This represented a shift away from the traditional use-based strategy to a comprehensive “ecosystem based” management strategy. Despite the creation of NOAA, no comprehensive plan for the ocean was established, and use-based management remained the status quo. This was reflected in a report issued by the Pew Charitable Trusts in 2003. The report reached many of the same conclusions as the Stratton Commission, but focused on the increasing environmental pressures placed upon the ocean. In response to its report findings, the Pew Commission recommended a comprehensive approach to ocean management.³ In 2000, the Oceans Act passed Congress and President Clinton appointed another commission to study how the United States approached ocean management issues. In 2004, this commission presented its report to President Bush and it echoed both the Stratton Commission and Pew reports.⁴ Just a few years later, President Obama commissioned another report, released in 2010. The Interagency Ocean Policy Task Force (Task Force) recommended the establishment of a new National Ocean Policy (NOP) which called for an ecosystem based management of marine resources with strong stakeholder input.⁵

This paper will provide an analysis of the federal laws which make up the current use-based system of ocean management and explore suggestions for strengthening this system. First, this paper will look into the history and application of the existing laws geared toward managing

¹ Commission on Marine Resources and Engineering, Our Nation and the Sea: A Plan for Action, vi, 1, (Government Printing Office January 1969).

² Id. at 230.

³ Pew Oceans Commission, A Report to the Nation: Recommendations for a New Ocean Policy, 102 (May 2003).

⁴ US Commission on Ocean Policy, An Ocean Blueprint 4, (Washington, DC 2004).

⁵ The White House Council on Environmental Quality, Final Recommendations of the Interagency Ocean Policy Task Force, 6, 13-14 (Washington, DC 2004) (hereinafter “National Ocean Policy”).

ocean resources. Next, this paper will provide an in-depth analysis of the National Marine Sanctuaries Act (NMSA) focusing on how the law could provide for better ecosystem based management of ocean resources, as called for in the NOP. Last, this paper will provide case studies to illustrate the positive and negative aspects of the NMSA.

I. A SURVEY OF EXISTING LAWS GEARED TOWARDS PRESERVING MARINE RESOURCES.

While some of the recommendations of the Stratton Commission were adopted by the United States, many were not followed. Below is a synopsis of existing ocean management laws and how they relate to marine sanctuaries management.

A. The Antiquities Act: A Unilateral Approach to Conservation.

The Antiquities Act was established in 1906, but has only recently been used to set aside large areas of the ocean for preservation. The Act was first conceived in the late 19th Century when a group of citizens, including Senator Hoar of Massachusetts, became concerned over the deteriorating state of archeological sites in the American Southwest; it took nearly a quarter century of political maneuvering, but the law was ultimately passed by Congress.⁶ Eventually, politicians were persuaded to preserve, and the Antiquities Act was born. This political fight a century ago and the current political fight to preserve marine resources center on very similar tensions and themes: (1) whether the government has the power to set aside large sections of the public domain for preservation; and (2) whether the government should conduct these preservation activities at the expense of economic activities.⁷

⁶ Francis P. McManamon, *The Antiquities Act- Setting Basic Preservation Polices*, *CRM* 19(7):18, (1996) (available at <http://www.nps.gov/archeology/sites/antiquities/about.htm>).

⁷ *Id.*

The Antiquities Act grants the President broad powers to preserve public areas with scientific, historic, or other cultural value.⁸ Once the President designates such an area it is considered a National Monument and the area is administered by the Department of the Interior.⁹ A benefit of the Antiquities Act is that it allows the President to act quickly and unilaterally to preserve culturally significant areas. Furthermore, a legal challenge to a designation under the Antiquities Act has never been successful and Congressional challenges are rare.¹⁰

For most of its legislative life, the Antiquities Act had been used to preserve landlocked areas. In 2000, President Clinton issued two executive orders that established the Northwestern Hawaii Coral Reef Ecosystem Reserve.¹¹ While President Clinton relied primarily on NMSA authority to establish this reserve, President Bush used his executive authority under the Antiquities Act to establish the Papahānaumokuākea Marine National Monument in 2006 and 2007. This Marine Monument covers 140,000 square miles northwest of the Hawaiian Islands stretching from Nihoa Island to the Midway Islands and includes within its boundaries the Coral Reef Reserve.¹² When they declared these areas, Presidents Clinton and Bush relied partially upon a legal memorandum prepared by the Attorney General's office. This memorandum stated that each President was working within his authority under the Antiquities Act in proclaiming National Marine Monument throughout the Exclusive Economic Zone (out to the 200 mile

⁸ 16 USCA §431 (West 2011)

⁹ *Id.*

¹⁰ Jeff Brax, Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America, 29 Ecology L. Q. 71, 125, 126 (2002).

¹¹ Exec. Order No. 13,178, 16 USCA § 6401 (2000); Exec. Order No. 13,196 16 USCA § 6401 (2000); National Marine Sanctuary History Time Line (available at <http://sanctuaries.noaa.gov/about/history/welcome.html#1999> last accessed November 29, 2011) (herein after Sanctuary Time Line).

¹² Proclamation No. 8013; 71 Fed. Reg. 36,443 (June 15, 2006); Proclamation No. 8112; 72 Fed. Reg 10,031. (March 6, 2007).

limit).¹³ In reaching this conclusion, the Assistant Attorney General relied on principles of constitutional and international law.¹⁴ However, there are limits on how these areas may be administered. The analysis in the memorandum suggests that the Department of Interior (DOI) has ultimate responsibility to administer National Marine Monuments, though depending on the situation, the DOI may share this responsibility with other agencies.¹⁵

Before the end of his second term, President Bush declared three more Marine National Monuments: the Rose Atoll National Marine Monument; the Marianas Trench National Marine Monument; and the Remote Pacific Islands National Marine Monuments, a series of protected areas throughout the Pacific Ocean.¹⁶ Through the declaration of these Marine National Monuments, President Bush established the Antiquities Act as an important legal tool for the conservation of marine resources.

The most compelling benefit of using the Antiquities Act as a tool for the larger preservation of marine resources is that the President has broad, nearly unilateral, authority to preserve these areas. Furthermore, this broad authority is supported by more than one hundred years of jurisprudence which, with only a few minor limitations, reinforces this Presidential authority. There are, however, drawbacks to such a system. The NOP calls for enhanced stakeholder participation in ocean management, and there is very little of this type of input in the management of National Marine Monuments. Further, the management of these areas can get

¹³ Randolph D. Moss, Assistant Attorney General, Administration of Coral Reef Resources in the Northwest Hawaiian Islands, §§1(A), 1(B) (September 15, 2000) (available at <http://www.justice.gov/olc/coralreef.htm> last accessed November 29, 2011) (hereinafter "Moss Memorandum").

¹⁴ Id.

¹⁵ Id. at §III(A)-(B).

¹⁶ Sanctuary Timeline *supra* note 11.

somewhat convoluted, with a number of government agencies having management authority over National Marine Monuments.¹⁷

B. The Outer Continental Shelf Lands Act- A Use Based Management Approach Geared Toward Mineral Extraction.

In the early 1950s, the technology to exploit subsea mineral resources began to come of age. In response to these technological developments, Congress passed two acts designed to ensure fair management of these resources. First, Congress passed the Submerged Lands Act (SLA). Essentially, this act grants states the rights to the mineral resources three miles out to sea.¹⁸ The SLA was drafted primarily to counteract the holding in United States v. California, which held that the rights of the federal government to provide for the defense of the nation and manage international relations trumped a state's interest in its territorial seas.¹⁹

The second of these acts was the Outer Continental Shelf Lands Act (OCSLA). OCSLA was drafted to provide management and regulation to the subsea lands seaward of the three mile limit and provide for the orderly development of subsea resources on the continental shelf.²⁰ Where the SLA provides for state coverage of these lands, OCSLA establishes federal control over the waters beyond the territorial sea. Over the years, OCSLA has been expanded to provide enhanced protections to those working on offshore oil rigs as well as to provide assistance to local communities impacted by the development of the OCS.²¹

Under the authority vested in them by the SLA and the Coastal Zone Management Act, several states have used their control of the territorial sea to engage in extended conservation activities. Massachusetts, Rhode Island, New York, and California have all adopted some form

¹⁷ Moss Memorandum, *supra* note 13 at §III(a).

¹⁸ 43 USCA §1312 (West 2011).

¹⁹ US v. California, 322 U.S. 19 (1947).

²⁰ 43 U.S.C.A § 1332 (West 2011).

²¹ Id. at §§1333(b); 1356A.

of marine spatial planning (MSP) within their territorial seas. MSP is a form of ecosystem based management of marine resources, while many of these plans are still in their infancy, scholars and scientists are optimistic about their potential impact.²²

OCSLA, thought primarily an industrial act geared at managing the extraction of minerals, does contain certain provisions geared at environmental preservation. OCSLA grants the Secretary of the Interior the power to lease the sea bed for the purpose of oil and mineral extraction. Here, the Secretary of the Interior is required develop a plan, responsive to national energy priorities and environmental concerns.²³ Before a specific area is leased, there is an extensive comment period, and the DOI has the power to declare “No Activity Zones.” These zones are typically narrowly drafted to protect certain sensitive areas of the OCS; additionally, the DOI can place other encumbrances on leases to ensure the preservation of particular resources.²⁴ Also, OCSLA provides for “Presidential Withdrawals.” This means that the President has the power to remove any unleased portion of the OCS from the Secretary of the Interior’s plan.²⁵ However, OCSLA was not designed with strong environmental protections in mind. Experts point to shortcomings in OCSLA oversight provisions as contributing to the BP Oil Spill in the Gulf of Mexico in 2010.²⁶ Following the spill, OCSLA came under close scrutiny for the first time in decades. A close examination of these provisions revealed limited focus on safety or mitigating environmental damage. In fact, a recent expansion of OCSLA encouraged drilling in deeper waters while ignoring potential safety and environmental concerns.

²² Morgan Gopnik, Integrated Marine Spatial Planning in U.S. Waters: the Path Forward, 39-41 (2008) (available at http://www.msp.noaa.gov/_pdf/Gopnik_MSP_in_US_Waters.pdf last accessed November 29, 2011).

²³ Meghan Jeans, The Role of the Regional Fishery Management Councils in Multi-Sector Spatial Planning: Exploring Existing Tools and Future Opportunities, 29 (2011) (available at <http://www.fisheriesforum.org> last accessed November 29, 2011).

²⁴ 30 CFR § 550.101 (2011); Id. at 31-32.

²⁵ 43 USCA § 1341 (West 2011).

²⁶ Alyson C. Flournoy, Three Meta-Lessons Government and Industry Should Learn from the BP Deepwater Horizon Disaster and Why They Will Not, 38 B.C. Env'tl. Aff. L. Rev. 281, 296 (2011).

C. The Magnuson-Stevens Fishery Conservation and Management Act.

Fisheries have played an important role in the economic development of this country; however, an agency to govern fisheries, the Office of the US Commissioner of Fish and Fisheries was not established until 1871.²⁸ Since the establishment of that office, the responsibilities for oversight of fisheries has shifted between federal agencies. The Office of the US Commissioner of Fish and Fisheries was transferred to the Department of Commerce (DOC) in 1903, and then transferred to the DOI in 1939.²⁹ Later, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens) recognized the threats to American fisheries and authorized the Secretary of Commerce to deal with those threats.³⁰ First promulgated in 1976, Magnuson-Stevens was drafted to ensure that the nation's fisheries were properly managed. Magnuson-Stevens touched on three main areas to regulate fishing. First, Magnuson-Stevens sought to address the detrimental impact that foreign vessels were having on American fisheries.³¹ Second, the act established a basic national framework to govern fisheries and establishes eight Regional Fishery Management Councils (RFMC) to develop and manage Fishery Management Plans responsive to changing local conditions.³² Lastly, the act established a mechanism for collecting information on the nation's fisheries through the registration of fishing vessels, allowing the Secretary of Commerce to access catch information on the vessels. This was to ensure that the Fishery Management Plans were kept up-to-date.³³

²⁷ Id.

²⁸ Peter Van Tuyn, Valerie Brown, A Look Within: Executive Branch Authority to Ensure Sustainable Fisheries, 14 *Ocean & Coastal L. J.* 1, 4-5.

²⁹ Id.

³⁰ Id. at 7.

³¹ 16 USCA § 1821 (West 2011).

³² See generally, 16 USCA §§ 1851, 1853 (West 2011).

³³ 16 USCA §§ 1881, 1881a (West 2011).

Magnuson-Stevens can also be used as a tool to preserve marine resources. The 1996 amendments to the act require those developing fishery management plans to identify essential fish habitat (EFH) and to “minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.”³⁴ In identifying this habitat, the Secretary of Commerce (Secretary) must work with the RFMCs to determine which habitats are endangered, ensuring stakeholder involvement in these important decisions.³⁵ An EFH can be in state or federal waters, and should be cooperatively preserved by all government agencies whose jurisdiction may impact that habitat.³⁶ Habitat Areas of Particular Concern (HAPC) are a subset of EFH, which require enhanced protections. When an area is designated a HAPC or an EFH, the FMC through the Fishery Management Plan, must take action to minimize any damage to that area; the specifics are left to the discretion of the RFMC.³⁷

There are indicators that Magnuson-Stevens is addressing threats to American fisheries, some evidence suggests that fisheries are generally on the rebound and the number of “overfished” species is diminishing.³⁸ However, despite this optimistic outlook, certain important fish stocks continue to decline. For example, the future of the New England cod fishery remains in jeopardy.³⁹ In the 19th Century, a sailing vessel working the Gulf of Maine with hooks and hand lines would catch about 70,000 metric tons of cod a year; today, a modern

³⁴ *Id.* § 1853(a)(7).

³⁵ *Id.* § 1855(b).

³⁶ Jeans, *supra* note 26 at 17.

³⁷ *Id.* at 17, 19, 20.

³⁸ NOAA’s Fisheries Service, Status of Stocks: 2010 Status of Marine Fisheries, 7 (2010) (available at http://www.nmfs.noaa.gov/sfa/statusoffisheries/2010/2010_Report_to_Congress.pdf last accessed November 29, 2011).

³⁹ Richard Gaines, Study: Cod Now in Dire Straits, Gloucester Times, (October 27, 2011) (available at <http://www.gloucestertimes.com/local/x783645006/Study-Cod-now-in-dire-straits> last accessed November 29, 2011).

vessel catches roughly 3,000 metric tons a year in the same waters.⁴⁰ This decline continues despite active management by the New England Fisheries Management Council. Furthermore, critics suggest that the RFMCs are dominated by members of the fishing industry, and these bodies are increasingly inflexible towards measures which limit fishing rights to promote sustainability.⁴¹

D. Of the Existing Laws, the Antiquities Act Has a Short but Excellent Track Record for the Preservation of Marine Resources.

The extension of the Antiquities Act has provided a strong tool for the preservation of marine resources. Certain provision of the use-based OCSLA and Magnuson-Stevens do provide enhanced protections, but they also have drawbacks and limits in their application.

II. CAN THE NATIONAL MARINE SANCTUARIES ACT SERVE A LARGER ROLE UNDER THE NATIONAL OCEAN POLICY?

The laws mentioned above were not created to provide for the comprehensive management of ocean ecosystems. NMSA was drafted and passed with this goal in mind. This section will provide historical context for the NMSA, describe how the mechanics of the NMSA work, address the pros and cons of using the act as a vehicle for larger environmental preservation, and finally discuss whether the NMSA fits into the framework of the National Ocean Policy (NOP).

A. How Marine Dumping and Oil Spills Lead to the Creation of the National Marine Sanctuaries Act.

Much of the legislation designed to protect the environment was drafted and passed in the late 1960s through the mid-1970s, just as many Americans were becoming conscious of the

⁴⁰ Doug Fraser, Stellwagen Decline Began Long Ago, Cape Cod Times (July 30, 2010).

⁴¹ Dave Owen, The Disappointing History of the National Marine Sanctuaries Act, 11 NYU Env'tl. L. J., 711, 712 (2003).

impact that economic development was having on the environment.⁴² The NMSA was conceived largely in response to two environmental disasters. First, the Santa Barbara Oil spill of 1969. Here, an explosion on an offshore oil rig caused an estimated three million gallons of oil to flow into the waters of southern California; this spill aroused the conscience of the nation, effectively launching the environmental movement.⁴³ The other source of the bill was as a response to the common practice of ocean dumping.⁴⁴ The hazards of this practice were outlined in a report to President Nixon in 1970. Until then, the practice was extensive and included the dumping of sewage, municipal garbage and even radioactive waste and unused military munitions including chemical weapons.⁴⁵

What ultimately became the NMSA was originally drafted as Title III to the Marine Protection, Research, and Sanctuaries Act of 1972. It was envisioned by its proponents in Congress as a comprehensive framework to preserve this country's marine resources.⁴⁶ The bill passed the House of Representatives overwhelmingly, but the provisions of Title III were challenged in the Senate, over concerns that the sanctuaries portion of the bill was illegal. Senate opposition to the Title III centered on two issues: first that Congress lacked the authority to regulate the water column above the OCS under international law, and second that because sanctuaries were located over the OCS, the creation of Marine Sanctuaries would infringe upon the authority to govern that area granted by OCSLA to the Secretary of the Interior.⁴⁷ The first argument against the NMSA was rejected because Congress adopted a wider view of the

⁴² *Id.* at 714-15.

⁴³ Keith C. Clarke & Jeffery Hemphill, The Santa Barbara Oil Spill: A Retrospective, Yearbook of the Association of Pacific Coast Geographers, 157-62. (2002) (available at <http://www.geog.ucsb.edu/~kclarke/Papers/SBOilSpill1969.pdf>).

⁴⁴ Owen, *supra* note 40 at 715.

⁴⁵ Council on Environmental Quality, Ocean Dumping: A National Policy, 30-40 (October 1970).

⁴⁶ Owen, *supra* note 40 at 716-718.

⁴⁷ The Center for Natural Areas, An Assessment for the Needs of a National Marine Sanctuaries Program, 35-36 (1977) (hereinafter "Needs Assessment").

authorities and responsibilities for waters beyond the territorial sea. The second argument was rejected because the NMSA was intended as comprehensive and OCLSA regulations would fall under the NMSA authority.⁴⁸ These issues were resolved in conference and the act was signed into law on October 23, 1972 in a form which included the strong environmental protections and sanctuary provisions suggested by the House.⁴⁹

Initial reaction after the passage of the NMSA was optimistic. Congressman Lennon noted that Title III “emphasizes our national concern over indiscriminate and thoughtless utilization of the oceans. Its purpose is to ensure the highest and best use of this national asset.”⁵⁰ Congressman Harrington was slightly less optimistic, stating that “...these sanctuaries will immediately preserve vital areas of our coastline from further damage. My only reservation is that we may be drastically underfunding Title II and Title III.”⁵¹ However several congressmen noted that the term sanctuaries was misleading, as these areas were not intended to be preserves, but to support multiple uses.⁵²

Despite this initial excitement over the passage of the Act, progress toward establishing marine sanctuaries was slow. The first sanctuary was not established until 1975; it was small, designed to protect the USS Monitor shipwreck off the coast of North Carolina.⁵³ President Carter’s environmental address to Congress loosened reservations about creating marine sanctuaries and suggestions for potential marine sanctuaries were submitted from across the country. President Carter’s speech served as a catalyst for the designation of several sanctuaries

⁴⁸ Id.

⁴⁹ Id. at 36-7.

⁵⁰ Owen, *supra* note 40 at 716-17.

⁵¹ Needs Assessment *infra* note 46 at 35.

⁵² Owen, *supra* note 40 at 718.

⁵³ Sanctuary Timeline, *supra* note 11.

in the late 1970s and early 1980s.⁵⁴ The interest in the creation of marine sanctuaries slowed during the Reagan administration. It took another great national tragedy to revive the national environmental consciousness. In 1989, the Exxon Valdez ran aground off Alaska, spilling millions of gallons of oil onto those pristine shores. Responding to a public outcry, Congress reacted by passing legislation to deal with this crisis. Among these bills was an extension of the NMSA and with it the creation of several more marine sanctuaries.⁵⁵

B. Preserving Our Nation's Aquatic Resources: How the National Marine Sanctuaries Act Works

The NMSA was drafted to ensure the protection of marine areas of significant cultural, historic, scientific, educational, or environmental value.⁵⁶ Like the Antiquities Act described above those designating the areas have broad discretion to determine which areas are of value. Unlike the Antiquities Act, the process for designating a marine sanctuary is complex and requires the input of many parties.

The law designates a strict process for the creation of a sanctuary. First, NOAA is to maintain a site evaluation list (SEL) with basic information regarding each sanctuary candidate. Once a potential site is chosen from the SEL, the active designation process begins.⁵⁷ The first step is notification to those individuals and groups which may be impacted by the development of a marine sanctuary. This step is designed to provide notice and elicit comments from stakeholders who make use of the waterway.⁵⁸ Next, the Secretary must prepare extensive documentation regarding the site including an environmental impact statement, a draft management plan and a map delineating the boundaries of the proposed sanctuary. During this

⁵⁴ Owen, *supra* note 40 at 725-26.

⁵⁵ *Id.* at 730.

⁵⁶ 16 USCA 1433(a)-(b) (West 2011).

⁵⁷ 15 CFR § 922.21 (West 2011).

⁵⁸ 16 USCA 1434(a)(1) (West 2011).

documentation stage, the Secretary must consult with a variety of government agencies to minimize the potential for conflicting use and management.⁵⁹ Following this documentation stage, the Secretary is required to hold public hearings, prepare a fisheries plan with the RFMC, and hold hearings before the appropriate House and Senate committees.⁶⁰ Once a sanctuary is approved, it is managed by the Secretary of Commerce, through the Office of National Marine Sanctuaries. The Secretary is also authorized to establish local advisory councils to assist with the administration of these sites; these councils are made up of employees of the federal government with experience in natural resource management, members of the regional fisheries councils, and members of concerned groups.⁶¹ Each of these steps is designed to provide for maximum stakeholder involvement.

Currently, the process for creating new sanctuaries is stalled. In the mid-1990s, NOAA deactivated the SEL, as the list and its underlying selection process had become out of date.⁶² Further roadblocks to the creation of new sanctuaries were erected by Congress in the 2000 amendments to the NMSA. Here, Congress places strict, nearly impossible to meet, funding requirements on potential sanctuaries.⁶³

C. Could the NMSA Work as a Larger Vehicle for Preservation Under the NOP?

⁵⁹ *Id.* at (a)(2).

⁶⁰ *Id.* at (a)(3)-(6).

⁶¹ *Id.* at 1445(a).

⁶² 16 USCA 1434(f)(1) (West 2011); William Chandler & Hannah Gillelan, The Makings of the National Marine Sanctuaries Act: A Legislative History And Analysis, 28 (May 2005).

⁶³ Chandler, *infra* note 61 at 28.

In June of 2009, President Obama formed the Interagency Ocean Task Force and assigned this group with developing a set of recommendations to ensure that in the future, the nation would be able to meet its environmental stewardship responsibilities regarding the ocean.⁶⁴ As mentioned above, the NOP is the latest in a string of public and private commissions tasked with updating marine management law and developing a comprehensive ocean policy.

In its recommendations, the Task Force recognized that one of the main obstacles to creating an effective and comprehensive national policy to manage marine resources was the current system of use based laws.⁶⁵ In addressing these issues and in the hopes of formulating a better policy the Task Force has made nine recommendations to the President.⁶⁶ Of these recommendations, three will have the largest impact on this problem. First, national policy must shift toward an “ecosystem based management” of marine resources. This ecosystem based management marks a clear departure from the plans adopted and developed in the past. An ecosystem based management plan looks to maintaining the health of the entire resource as opposed to setting guidelines for a single industry or use.⁶⁷ The second recommendation is a shift toward marine spatial planning. This would regulate activities on the ocean, much like municipal zoning regulations dictate how land within city limits may be used.⁶⁸ Finally, the Task Force recommends that stakeholder groups must be allowed to make their opinions known on these issues, to ensure that management of these resources is as responsive to the needs those impacted by the new policies.⁶⁹

Here, the provisions of the NMSA provide a basis for achieving all these goals, the

⁶⁴ National Ocean Policy, *supra* note 5 at 1.

⁶⁵ Id. at 2.

⁶⁶ Id. at 6.

⁶⁷ Id. at 2.

⁶⁸ Id. at 41.

⁶⁹ Id. at 7.

inherent flexibility in management plans for marine sanctuaries addresses the call for ecosystem based management of ocean resources and enhanced marine spatial planning. In fact, several of the existing marine sanctuaries have already engaged in marine spatial planning. The Florida Keys has specifically set aside “no take” areas, where fish may not be caught, and limited other uses of the area as well. As a result, the overall health of the coral reefs has improved, as have fish stocks.⁷⁰ A number of other sanctuaries have each adopted one form or another of MSP. Perhaps the best illustration of a sanctuary’s effective adoption of marine spatial planning is in the Stellwagen Bank National Marine Sanctuary. The shipping lanes for Boston Harbor run directly through Stellwagen Bank, and as result a number of critically endangered right whales were being stuck by the commercial shipping traffic. Using data collected by the sanctuary, officials were able to shift the channel north. A move that dramatically reduced the number of whale strikes while adding just a few minutes onto the transit time of the commercial vessels.⁷¹ Beyond that, the NMSA was conceived as a statute that can manage multiple uses and create room for other federal agencies in its management scheme. Assistant Attorney General Moss recognized this in his memo regarding the legality of National Marine Monuments, even suggesting that eventually, marine sanctuaries could be used to absorb the designated National Marine Monuments.⁷² Another attractive element of the NMSA is that the act can prosecute the violators of the act through substantial fines and seizures of property.⁷³

The NMSA also provides for strong stakeholder involvement. Without the input of those who would be impacted (both positively and negatively) there is little hope that a sanctuary could flourish. History has indicated, and the following section will illustrate, the sanctuaries

⁷⁰ National Oceanic and Atmospheric Agency, Florida Keys National Marine Sanctuary Revised Management Plan, 143 (December 2007).

⁷¹ National Ocean Policy, *supra* note 5 at 45.

⁷² Moss Memorandum §III(C).

⁷³ 43 USCA § 1437 (West 2011).

with the strongest community support are often the most successful. The NMSA fits well with the stated goals of the NOP as it provides for that input throughout the advisory councils.

NOAA's figures indicate that in 2010 seven hundred thirty-one people participated in these advisory councils, contributing nearly 13,000 volunteer hours.⁷⁴

III. AN ANALYSIS OF EXISTING AND POTENTIAL SANCTUARIES ILLUSTRATES HOW MARINE SANCTUARIES COULD SERVE THE ENDS OF THE NOP.

As demonstrated above, marine sanctuaries could prove to be a useful tool in addressing the requirements of the NOP. However, the Secretary of Commerce and Congress have wide latitude in choosing what they want to protect. As a result, no two marine sanctuaries are the same. The following section will evaluate how well two of these marine sanctuaries work. The third section takes an unmanaged section of the ocean to explore how a new sanctuary could be established.

A. Monterey Bay National Marine Sanctuary a Comprehensive Example.

The Monterey Bay National Marine Sanctuary (MBNMS) is located off the coast of central California and it extends about thirty miles offshore. It covers an area larger than Yosemite National Park, and spans the coast of California for nearly one fifth of its entire length.⁷⁵ The process to have this area dedicated a marine sanctuary traces its origin back to the late 1970s when a grassroots organization known as *Save our Shores* began protesting offshore oil development.⁷⁶ This community commitment carries through today, as there are a number of institutionalized volunteer opportunities and strong public input in the management of the

⁷⁴ National Marine Sanctuaries, 2010 Accomplishment Report, (available at <http://sanctuaries.noaa.gov/report2010/community.html>) (last visited November 29, 2011).

⁷⁵ Susan Danielson, Save Our Shores: A coastal steward since 1978, San Mateo County Times (April 17, 2002).

⁷⁶ Id.

MBNMS.⁷⁷ As a result, the MBNMS enjoys strong name recognition, strong public support and a positive image in the community. Though initial distrustful, California fishermen have come to see the wisdom in preserving areas of the ocean of particular importance as nurseries.⁷⁸

The MBNMS encompasses a vast area and a wide variety of aquatic features from rocky intertidal zones and sandy beaches, to seamounts, kelp forests, and open ocean. As the California current flows past this area, it also provides a nutrient-rich environment, providing an ideal habitat for a number of marine mammals, fish and birds, including 24 endangered species.⁷⁹ Given this geological and biological diversity, the management plan for this area is quite complex and provides an action plan for each category of area, tailoring permissible and impermissible activities for each area.⁸⁰ These action plans demonstrate the flexibility of the NMSA and are an excellent example of marine spatial planning.

Adding to the complexity of this geologically and biologically diverse area, there are also a number of competing human uses. Here, the sanctuary must balance the ecological needs against the need for heavy commercial shipping, commercial fishing, military and recreational use.⁸¹ Furthermore, the sanctuary management plan attempts to limit disruption to marine animals by limiting area where personal watercraft may be used and where low flying aircraft may fly.⁸² The Management Plan also looks to limit the impact that certain activities on shore have on the Sanctuary. The plan attempts to limit and regulate shore armoring, the construction of seawalls; a practice which has linked to accelerated rates of beach erosion.⁸³

⁷⁷ US Department of Commerce, Monterey Bay National Marine Sanctuary: Final Management Plan, 23 (October 2008) (herein after "MBNMS Management Plan").

⁷⁸ Id.

⁷⁹ Id. 40.

⁸⁰ Id. at Appendix 8, 1-8.

⁸¹ Id. at 49.

⁸² Id. at 45.

⁸³ Id. at 71-72.

The MBNMS represents an effective and well-managed approach to marine resource management. Given the diverse biological resources, numerous geological features, and variety of human uses in the sanctuary, OCSLA and the FCMA would not provide adequate support for these resources. OCSLA ignores environmental concerns in favor of the industrial, while the FCMA is primarily concerned with preserving fish stocks. Further, the management of the MBNMS falls directly in line with the requirements under the NOP. In fact, MBNMS managers have been quite successful in getting parties who use sanctuary waters to change their habits to protect habitat; both Marines and big wave surfers have had to change the way that they operate in sanctuary waters (the surfers when getting towed into bigger waves and the Marines when conducting war games).⁸⁴ This management provides for extensive stakeholder involvement, excellent marine spatial planning, and an ecosystem based approach.

B. Stellwagen Bank National Marine Sanctuary- Focused on Specific Goals.

Compared to the MBNMS, the Stellwagen Bank National Marine Sanctuary (SBNMS) is much smaller in size and scope. The protected area covers 842 square miles in federal waters off the coast of Massachusetts, between Cape Cod and Cape Ann. The western boundary of the Sanctuary is about 25 miles outside Boston harbor.⁸⁵ As a result of its underlying geological features, Stellwagen Bank provides for immense biodiversity. Prevailing currents hit this shoal in such a manner that there are natural nutrient blooms twice a year.⁸⁶ These blooms attract a wide variety of marine life, including swordfish, cod and tuna, all mainstays of the New England fishery. These blooms also attract a number of marine mammals who use Stellwagen bank as a nursery and feeding ground. For centuries, this biodiversity has attracted fishermen and

⁸⁴ Ashley Powers, Proposal Could Leave Surfers Cooling Their Jets, B-1, Los Angeles Times (November 25, 2006); Sarah Yang, Maneuvers Canceled at Monterey Bay, A-14 Los Angeles Times (March 13, 1999).

⁸⁵ National Oceanic and Atmospheric Agency, Stellwagen Bank National Marine Sanctuary: Final Management Plan and Environmental Assessment, 40 (June 2010) (herein after "SBMNS Management Plan").

⁸⁶ Id. at ii, 296.

countless fishing communities dot the coast around the SBNMS.⁸⁷ Today, commercial fishing on Stellwagen Bank accounts for numerous jobs and hundreds of millions of dollars in revenue each year. Over the past 30 years, tourism has become another important industry in the waters over Stellwagen Bank. Whale watching has become responsible for generating approximately \$35,000,000.00 in direct tourism dollars with another \$91,000,000.00 in indirect revenue.⁸⁸

The importance of these two industries, commercial fishing and tourism, is reflected in the SBNMS Management Plan. Nearly the entire sanctuary is open to commercial and recreational fishermen, as it has been for centuries.⁸⁹ As mentioned above, despite active management, fish stocks in the northeast, and especially on Stellwagen Bank, continue to dwindle. Many in the community have begun to recognize the shortcomings of the protections imposed on the Stellwagen fisheries, and have begun to call for stricter limits on fishermen within the Sanctuary.⁹⁰ The lack of regulation of fishing on Stellwagen is linked to the downturn in fish stocks. When SBNMS was created, the commercial fishing industry represented a powerful lobby. Many commercial fishermen believe that without their consent, there would be no sanctuary, and that they have a promise from the federal government to be allowed to fish these waters. Should new fishing regulations be imposed, certain fishermen have threatened to band together to lobby Congress to have the SBNMS dissolved.⁹¹ In the face of these declining stocks, it becomes imperative to preserve area where fish spawn.

While fishing remains sacrosanct, managers of the SBNMS have had great success in preserving endanger right whales which feed and nurse in the sanctuary. The shift of the Boston

⁸⁷ Id. at 132-33.

⁸⁸ S. O'Connor, R. Campbell, H. Cortez, & T. Knowles, 2009, Whale Watching Worldwide: Tourism Numbers, Expenditures and Expanding Economic Benefits, 228, 230 (2009).

⁸⁹ SBNMS Management Plan supra note 83 at 134.

⁹⁰ Beth Daley, A Push to Protect Marine Sanctuary, Boston Globe (July 6, 2010).

⁹¹ Don Cokley, Sanctuary Battleground: A Promise is a Promise, The Patriot Ledger (Quincy, MA)(February 3, 2004).

shipping lanes mentioned above were a collaborative effort between the US Coast Guard, NOAA, Fisheries Service and the International Maritime Organization. This minor shift adds just a few minutes onto the transit time of vessels using the Port of Boston, but reduces the number of whale strikes by vessels 81%, 58% for the critically endangered right whale.⁹² Beyond that, the management plan calls for regulations of the speed and maneuverability of whale watching vessels to reduce the likelihood that a marine mammal will be injured as a result of whale watching boat activity.⁹³

In drafting the management plan for Stellwagen Bank, managers and stakeholders have crafted a plan which allows for the preservation of marine life and compatible human use. The managers of SBNMS have made some important strides in preserving the vibrant marine environment around Stellwagen Bank. This management would not be possible under a use based management laws outlined above, such as OCSLA. Had the SBNMS been managed under a different regulatory scheme, the cooperative study that allowed for the shift in the shipping lanes may have been significantly more difficult, even impossible. There is a down side to the flexibility in the NMSA. The SBNMS does not touch upon fishing, the single most important use of the sanctuary.

C. The Gulf Coast: A Strong Marine Sanctuary Could Assist in the Recovery from the BP Oil Spill and Mitigate Damage from Future Environmental Disasters.

Despite the deactivation of the SEL more than 15 years ago, interested parties continue to submit potential areas for preservation, despite Congressional and Executive inaction. In selecting the next Marine Sanctuary, NOAA and Congress should learn the lessons of past sanctuaries to ensure a strong and vibrant sanctuary. Considering all these factors, policymakers

⁹² SBNMS Management Plan supra note 83 at 129; National Ocean Policy, *supra* note 5 at 45.

⁹³ Id. at Appendix M-N.

should look south for the next Marine Sanctuary; an ideal location for the next sanctuary would be the Gulf of Mexico. This could be accomplished either through an expansion of the existing Flower Banks National Marine Sanctuary (“FBNMS”), (located about 115 miles off the coast of Texas and Louisiana), or the creation of an entirely new sanctuary in the Gulf of Mexico.⁹⁴

Expansion of the Sanctuary Program into the Gulf of Mexico makes sense for two reasons. First, since the oil spill, residents of the Gulf of Mexico have come to appreciate the environmental impacts of offshore oil production. Studies indicate that the health of those exposed to the spill could suffer for years to come.⁹⁵ This increased environmental sensitivity has been recognized by the Executive Branch; the EPA has allocated resources for community, faith-based and tribal interest groups dedicated to cleaning up after the disaster.⁹⁶ It is also illustrated through the blogging community that has sprung up around the disaster.⁹⁷ This indicates that there is a motivated grass roots organization, similar to the movement behind the creation of the MBNMS, which could lend credence to a movement to preserve larger portions of the Gulf. Second, following the BP Oil Spill, residents of the Gulf are acutely aware of their reliance on the offshore oil industry and the commercial fishing industry. In the wake of this disaster, though troubled by the actions of oil companies, residents have realized that an economically strong BP promotes recovery in the Gulf.⁹⁸ Residents also realize that in order for the region to thrive economically commercial fishing, tourism and offshore oil production will

⁹⁴ National Oceanic and Atmospheric Agency, Flower Banks Garden: Draft Management Plan and Environmental Assessment, 6 (October 2010).

⁹⁵ Bill Barrow, BP Oil Spill's Health Effects Will Be Felt for Generations, Scientist Warns, Times-Picayune (February 5, 2011) (available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/02/bp_oil_spills_health_effects_w.html last accessed November 29, 2011).

⁹⁶ United States Environmental Protection Agency, Cooperative Agreements to Support Communities Affected by the BP Oil Spill. <http://www.epa.gov/compliance/ej/grants/bp-spill-grants.html#overview>.

⁹⁷ See generally, <http://healthygulf.org/blog/>; <http://gulfoilspill.blogspot.com/>; <http://bpoilslick.blogspot.com/>.

⁹⁸ Brian Skoloff & Jane Wardell, BP's Oil Spill Costs Grow; Gulf Residents React, The Herald-Sun (November 2, 2010) (available at http://www.heraldsun.com/view/full_story/10139582/article-BP-s-oil-spill-costs-grow--Gulf-residents-react last accessed November 29, 2011).

have to work in harmony, and damage to any of these components will have dire economic consequences for the region.⁹⁹ These human uses provide an ideal blueprint for marine spatial planning.

The expansion FBNMS or creation of a new Marine Sanctuary in the Gulf is ideal because there is a well-educated base of grassroots supporters who understand the importance of multiple uses, and thus, MSP. The establishment of a marine sanctuary also provides strong sanctions for those who violate. These sections, along with the regulations in the Oil Pollution Act and Clean Water Act will provide an important deterrent to polluters, but also a much needed boost should the worst happen.¹⁰⁰ The expansion into the Gulf at this point would also serve to protect and rebuild damaged fish stocks, preserving that ecosystem for years to come.

IV. CONCLUSIONS

The Antiquities Act, NMSA, OCSLA, and FCMA each provide a valuable set of tools for ensuring the preservation of marine resources. The Antiquities Act provides for rapid preservation of endangered resources, while the establishment of a marine sanctuary is a far more deliberative process. The FCMA and OCSLA are dedicated to use-based management, but they do have provisions which allow for enhanced protection of resources. Given the new priorities established by the NOP, the NMSA provides the best rubric achieving the goals of establishing eco-system based management, enhancing marine spatial planning and providing strong stakeholder involvement. The NMSA was intended to balance economic and ecological considerations. As seen in the MBNMS, with popular involvement, and a solid plan, these goals are achievable.

⁹⁹ Lauren O'Neil, Obama's Gulf Economic Analysis of Drilling Ban Comes Under Fire, Natural Gas Week (September 20, 2010); European Space Agency Bluefin Tuna Hit Hard by "Deepwater Horizon" Disaster, ESA News, (October 18, 2010) (available at http://www.esa.int/esaCP/SEM1K4WO1FG_index_0.html. last accessed November 29, 2011).

¹⁰⁰ 16 USCA 1437 (d)(1) (West 2011).