



# Sea Shepherd Legal

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*Submitted via Federal e-Rulemaking Portal*

Mr. John Armor  
Office of National Marine Sanctuaries  
National Oceanic and Atmospheric Administration  
Silver Spring Metro Campus Building 4 (SSMC4)  
1305 East-West Highway  
Silver Spring, MD 20910

**Re: E.O. 13795 Review**

Dear Mr. Armor:

On behalf of Sea Shepherd Legal, we submit the following comments on the National Oceanic and Atmospheric Administration's review of National Marine Sanctuaries and Marine National Monuments pursuant to Executive Order 13795. *Review of National Marine Sanctuaries and Marine National Monuments Designated or Expanded Since April 28, 2007; Notice of Opportunity for Public Comment*, 82 Fed. Reg. 28827 (June 26, 2017).

Thank you for the opportunity to comment.

Respectfully submitted,

/s/Brett Sommermeyer  
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Legal Director  
Sea Shepherd Legal

/s/Nick Fromherz  
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Encl.

*Sea Shepherd Legal (SSL) is an international, nonprofit, public interest environmental law firm with a mission to save marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. SSL works on a range of matters from ensuring proper governmental agency action to developing innovative policy approaches to encourage greater protections for marine wildlife and ecosystems.*

## **I. I. Introduction**

SSL submits these comments to express its opposition to any adverse modification of a National Marine Sanctuary (NMS) or Marine National Monument (MNM) made pursuant to Section 4(b) of Executive Order 13795.<sup>1</sup> Section 4(b) of this Executive Order (E.O.), titled *Implementing an America-First Offshore Energy Strategy*, directs the Secretary of Commerce to “conduct a review” of each of the eleven designations or expansions of National Marine Sanctuaries and Marine National Monuments completed since April 28, 2007.

The supposed goal of this E.O., including the review of the designations and expansions of National Marine Sanctuaries and Marine National Monuments made over the last decade, is “to maintain global leadership in energy innovation, exploration, and production.” Yet the policy behind this E.O. is not about promoting “energy innovation” writ large (including, for example, cleaner forms of energy production to mitigate climate change). Rather, this E.O. aims to promote oil and gas. This is exactly the opposite of what is needed when it comes to priorities involving the world’s oceans. Rather than threaten or further damage our marine ecosystems with extractive activities, aggressive and collaborative international action must be pursued to protect and rehabilitate them.

## **II. Discussion**

### **A. The Global Need for Marine Protected Areas**

The importance of the world’s oceans, seas, and coastal areas is difficult to overstate. They provide a home and way of life for over three billion people, generate valuable ecosystem goods and services, contain a tremendous reservoir of biodiversity, and serve as the primary regulator of the global climate.<sup>2</sup> However, despite their inherent value and significance for the well-being of humans and countless other species, a 2016 Food and Agriculture Organization report concludes that these marine environments “are under threat from overexploitation, pollution, declining biodiversity, expansion of invasive species, climate change and acidification” and that these anthropogenic stresses “on the oceans’ life support systems have reached unsustainable levels.”<sup>3</sup>

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<sup>1</sup> Exec. Order No. 13795, 82 Fed. Reg. 20815 (April 28, 2017), available at <https://www.federalregister.gov/documents/2017/05/03/2017-09087/implementing-an-america-first-offshore-energy-strategy> (last visited July 22, 2017)

<sup>2</sup> United Nations, *Sustainable Development Knowledge Platform, Topic – Oceans and Seas*, available at <https://sustainabledevelopment.un.org/topics/oceanandseas> (last visited July 22, 2017).

<sup>3</sup> FAO, *The State of World Fisheries and Aquaculture 2016 – Contributing to Food Security and Nutrition for All*, 184 (2016).

With more than 90% of the oceans' large predatory fishes lost,<sup>4</sup> some scholars are suggesting fishing efforts need to be reduced 40-60% worldwide.<sup>5</sup>

While there is no panacea for solving these serious problems, one of the best global solutions available is the creation of marine protected areas<sup>6</sup> (MPAs), particularly “no-take”<sup>7</sup> areas. The designations and expansions of the National Marine Sanctuaries and Marine National Monuments that this E.O. targets are examples of such MPAs. According to the OECD, marine protected areas can provide a variety of benefits, including the protection of habitat for species, the enhancement of fish stocks, and the removal of excess nutrients and pollution from the water.<sup>8</sup> They can also generate revenue related to tourism and recreational use, as well as provide protection to culturally significant areas.<sup>9</sup>

Despite the well understood social, economic, and environmental benefits of MPAs, only a small portion of the world's oceans are under their protection. Worldwide, only 3% of marine waters are within actively managed marine protected areas.<sup>10</sup> And of that 3%, only around 1% is strongly protected within no-take reserves.<sup>11</sup> Within the United States, MPAs cover about 32% of marine waters, of which around 3% are fully protected in no-take reserves.<sup>12</sup> As explained below, this falls far short of internationally negotiated goals.

Recognizing that human impacts on marine ecosystems are currently unsustainable, the global community has come together and established a goal under both the Convention on Biological Diversity and the Sustainable Development Goals to conserve 10% of marine and coastal areas by 2020.<sup>13</sup> A resolution was also passed at the IUCN<sup>14</sup> 2016 World Conservation Congress that encourages governments “to designate and implement at least 30% of each marine habitat in a network of highly protected MPAs . . . with the ultimate aim of creating a fully

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<sup>4</sup> Ria Fitriana, *Assessing the impact of a marine protected area on coastal livelihoods: A case study from Pantar Island, Indonesia*, 1-230, 1 (March, 2014) (unpublished thesis submitted for the degree of Doctor Philosophy Research Institute for the Environment and Livelihoods Faculty of Engineering, Health, Science and the Environment Charles Darwin University).

[https://espace.cdu.edu.au/eserv/cdu:44890/Thesis\\_CDU\\_44890\\_Fitriana\\_R.pdf](https://espace.cdu.edu.au/eserv/cdu:44890/Thesis_CDU_44890_Fitriana_R.pdf).

<sup>5</sup> See Results Section: Ussif Rashid Sumaila, *Benefits of Rebuilding Global Marine Fisheries Outweigh Costs*, PLoS ONE, (July 13, 2012). <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0040542#s1>.

<sup>6</sup> In the United States, the term ‘marine protected area’ has been defined as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.” See Exec. Order 13158, 105 Fed. Reg. 34909 (May 26, 2000). <http://marineprotectedareas.noaa.gov/pdf/eo/execordermpa.pdf>

<sup>7</sup> A “no-take” MPA is also referred to as a “marine preserve” in the United States and it is defined as “a highly protected type of MPA where removing or destroying natural or cultural resources is prohibited.” See NOAA, Marine Protected Areas, About Marine Protected Areas, available at <http://marineprotectedareas.noaa.gov/aboutmpas/> (last visited July 24, 2017).

<sup>8</sup> OECD Environment Directorate, *Marine Protected Areas - Economics, Management and Effective Policy Mixes*, 7 (December, 2016). <https://www.oecd.org/environment/resources/Marine-Protected-Areas-Policy-Highlights.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Marine Conservation Institute, MPAtlas (online). <http://www.mpatlas.org/> (last visited July 22, 2017).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Dept. of State, Our Ocean Conference website, Areas of Focus - Marine Protected Areas. (September, 2016). <http://ourocean2016.org/areas-of-focus-1/#marine-protected-areas> (last visited July 22, 2017).

<sup>13</sup> OECD, *supra* note 8, at 5.

<sup>14</sup> International Union for the Conservation of Nature – a membership body of State and non-state actors that is known for passing resolutions that shape the global environmental agenda.

sustainable ocean, at least 30% of which has no extractive industries” by 2030.<sup>15</sup> It is in this international context, with the United States government having helped to lead the way toward these goals, that the Trump administration is dramatically changing course and initiating this review.

Given the importance of marine ecosystems, their current degraded, threatened, and vulnerable state, and the fact that the U.S. has helped to lead a global effort to protect them through the establishment of marine protected areas, the U.S. government should maintain the National Marine Sanctuaries and Marine National Monuments that have been established or expanded since 2007. The protection of this progress is so critical that following the announcement of this review, over 500 scientists signed a letter that was sent to the relevant House and Senate Committees calling on the U.S. government to maintain its existing ocean protections and to increase protections for diverse habitats throughout U.S. marine waters.<sup>16</sup> Removing the protected status of any of these eleven marine protected areas with an eye toward energy production and mining may seem to make short-term political sense—and even that is doubtful—but it would be unjustifiable from any other perspective.

## **B. The Legal Infirmary of Sec. 4(b) of E.O. 13795**

Even if the U.S. government remains unconvinced by science and reason, this review will be unable to remove protections from these marine protected areas because the E.O. that ordered the review is an unlawful exercise of executive authority. E.O. 13795 is unlawful because it implies that the Secretary or the President can ignore the statutory content of duly enacted legislation. In neither the National Marine Sanctuaries Act<sup>17</sup> (NMSA) nor the Antiquities Act<sup>18</sup> is there authority to instantaneously alter or rescind the boundaries of existing National Marine Sanctuaries or Marine National Monuments. In fact, the Antiquities Act provides no authority at all for rescinding the designation of a MNM, and any alteration of a NMS under the NMSA involves the completion of the same lengthy process that is required to designate one.

There is no authority or precedent for rescinding a Presidential designation under the Antiquities Act. Any power that the President has must arise from either an act of Congress or the Constitution.<sup>19</sup> Since authority over federal lands is explicitly granted to Congress in the Constitution, the only authority the President has in this arena is that which is expressly delegated to him by Congress.<sup>20</sup> Although the Antiquities Act provides the Executive Branch with the substantial power to designate “objects of historic and scientific interest” as National Monuments, it does not explicitly grant the power to revoke those designations.<sup>21</sup> Thus, neither the Constitution

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<sup>15</sup> See Resolution 050: IUCN, *IUCN Resolutions, Recommendations and other Decisions*, Gland Switzerland: IUCN, 1-298,118 (2016). <https://portals.iucn.org/library/sites/library/files/documents/IUCN-WCC-6th-005.pdf>.

<sup>16</sup> See statement at: [https://marine-conservation.org/media/filer\\_public/2014/05/22/nceas\\_marine\\_reserves\\_consensus\\_statement.pdf](https://marine-conservation.org/media/filer_public/2014/05/22/nceas_marine_reserves_consensus_statement.pdf).

<sup>17</sup> National Marine Sanctuaries Act, 16 U.S.C. §1431 *et seq.* (as amended by public Law 106-513, November 2000). <http://sanctuaries.noaa.gov/library/national/nmsa.pdf>.

<sup>18</sup> Antiquities Act of 1906, 16 U.S.C. §431-433 (1906).

<sup>19</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>20</sup> See U.S. Const. Art. IV, § 3, cl.2.

<sup>21</sup> See 54 U.S.C. § 320301(a),(b).

nor the Antiquities Act, the only two possible sources for this executive power, explicitly grants the President the authority he claims to have in his E.O.

Without having explicit authority from the Antiquities Act to revoke National Monuments, the only way the President could presume he has the authority to issue E.O. 13795 would be if the Executive Branch had an implied right to rescind monument designations. This is not the case. An implied right in the Antiquities Act to revoke National Monuments would contradict the purpose of the Act and run contrary to Congressional intent. The purpose of the Antiquities Act is to vest the President with the power to use his or her discretion to identify public lands deserving of being *protected* into perpetuity as National Monuments.<sup>22</sup> Reading into a law with this purpose an implied power for a later President to whimsically *remove* protection from an area that a previous President had considered a national treasure defies this purpose as well as reason and precedent.<sup>23</sup> Furthermore, an analysis of other similar and contemporaneously enacted statutes shows that Congress intentionally elected not to delegate the authority to revoke National Monuments in the Antiquities Act.<sup>24</sup>

Like the Antiquities Act, the NMSA does not permit a President to immediately rescind or alter an existing National Marine Sanctuary. Instead, Section 304(a)(4),<sup>25</sup> which addresses the terms of designation of a National Marine Sanctuary, specifically states: “The terms of designation may be modified only by the same procedures by which the original designation is made.” Since the elimination of a National Marine Sanctuary is an extreme form of modification, this requirement must be interpreted to apply if either modification or elimination of a National Marine Sanctuary is desired. Thus, any attempt by the Secretary to modify or eliminate a National Marine Sanctuary will involve compliance with the numerous and time-consuming procedures required to establish it in the first place.

Perhaps even more significant than the procedural hurdles that would stand in the way of modifying a National Marine Sanctuary is the legal requirement that an agency be able to articulate a satisfactory explanation for its action.<sup>26</sup> Although the President has significant authority to

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<sup>22</sup> See 16 U.S.C. § 431.

<sup>23</sup> See *Proposed Abolishment of Castle Pinckney Nat'l Monument*, 39 Op. Atty. Gen. 185, 186-67 (1938), (“[I]f public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.”); see also *Chamber of Commerce of U.S. v. Dep't of Agric.*, 459 F. Supp. 216, 221 (D.D.C. 1978) (holding that only where it is necessary for effective execution of a statute should a court imply a particular grant of power to achieve that end.)

<sup>24</sup> See Picket Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976) (authorizing the President to reserve lands “until revoked by him of an Act of Congress”), Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. §475 (2006)) (authorizing the President to “reduce the area or change the boundary lines of such reserve, or vacate altogether any order creating such reserve.”).

<sup>25</sup> See 16 U.S.C. §1434(a)(4). <http://sanctuaries.noaa.gov/library/nmsa.pdf>.

<sup>26</sup> *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). In *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), Justice Kennedy explained that an agency must reckon with actions taken under a different presidential administration, a requirement that effectively increases the agency’s burden under arbitrary-and-capricious review:

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient

communicate his policy preferences to an executive agency, and agencies often have latitude to administer legislation, agency action is still confined by the boundaries of the law. In this case, that means that an agency can only proceed with the modification or elimination of a National Marine Sanctuary if it has considered the relevant factors and is able to provide a rational basis for its actions.<sup>27</sup> Any attempt to do that would not only be extremely difficult for the agency, it would also surely be challenged in court.

### C. Analysis Under E.O. Factors

The Department of Commerce seeks public comments related to the application of factors in Sec. 4(b)(i)(A), (B) and (C), as stated in E.O. 13795. These factors are: (1) an analysis of the acreage affected and an analysis of the budgetary impacts of the costs of managing each National Marine Sanctuary or Marine National Monument designation or expansion; (2) an analysis of the adequacy of any required Federal, State, and tribal consultations conducted before the designations or expansions; and (3) the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region.

Following consideration of the application of each of these three factors, SSL is of the opinion that each one of them supports maintaining the National Marine Sanctuaries and Marine National Monuments under review at their current sizes. SSL also feels compelled to point out that each of the review criteria were clearly designed to produce analyses critical of maintaining the status quo when it comes to our National Marine Sanctuaries and Marine National Monuments. This is tantamount to writing a poll that asks people to choose among three options that all identify something different that is wrong with chocolate. What if you don't think *anything* is wrong with chocolate? SSL disagrees with this approach to writing review criteria and hopes that in the future such criteria are written so that they promote a balanced analysis of the topic at hand.

#### i. Acreage Affected and Budgetary Impacts of the Costs of Management

The first factor relates to the amount of acreage affected and the budgetary impacts of the costs of managing each National Marine Sanctuary or Marine National Monument designation or expansion. **The conclusion of SSL's analysis is that the amount of acreage affected is insignificant relative to the United States' Exclusive Economic Zone, and the benefits associated with managing the relevant marine protected areas are well worth the cost.**

An analysis of this first factor includes two separate but related inquiries. The first inquiry involves an examination of the amount of the acreage involved in this review. The second relates to the budgetary impact of managing the relevant areas. With respect to the issue of acreage affected, SSL does not consider total acreage affected to be a productive way of framing the issue. A superior alternative would be to consider the percentage of the U.S. Exclusive Economic Zone

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factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

*Id.* at 537 (Kennedy, J., concurring).

<sup>27</sup> *Id.*

(EEZ) that has been set aside as a marine protected area or a “no-take” reserve. This would at least put into perspective the percentage of U.S. marine waters being protected.

An even better approach, however, would also consider how the percentage of U.S. protected waters compares with the global community’s goal for each country. When examined this way, it is difficult to view as excessive the approximately 1% of U.S. waters protected as no-take reserves and the 32% of its EEZ that bears some form of lesser protected status.<sup>28</sup> In fact, when one considers that the global community is aiming to achieve 30% protection as “highly protected MPAs” without the presence of extractive industries, it becomes clear that the U.S. will need to act ambitiously for many years to come if it hopes to reach this goal.<sup>29</sup>

The second inquiry here involves an examination of the costs associated with these marine protected areas. Once again, SSL takes issue with the framing of this inquiry. A comment that solely focused its analysis on the costs involved with managing each NMS and MNM designation or expansion would be inherently biased. Putting aside issues of whether cost-benefit analysis is the best tool for making these types of decisions, in order to have any hope of fairly analyzing the costs associated with marine protected areas, one has to also consider any related benefits. In fact, one of the basic principles of administrative law is that if an agency wants to take an action, it must explain its rationale. Unlike with the framing of this factor where it is presumed that maintaining marine protected areas is costly, if an agency wants to justify an action based on cost, it has the burden of proving that that action actually is costly.<sup>30</sup>

Contrary to the way this first factor frames its desired analysis, readily available information suggests that maintaining MPAs is relatively efficient and provides more benefits than costs. One of the reasons this is the case is because the largest cost associated with an MPA often stems from the establishment phase, rather than its management.<sup>31</sup> Here, of course, we are dealing with *established* MPAs. Instead of being a costly burden on government, marine reserves are often dramatically cheaper and easier for governments to implement and monitor than other types of fishery regulations and management programs.<sup>32</sup> Moreover, the better governed the MPA, the more cost-effective they tend to be.<sup>33</sup> While MPAs are not “free,” they may be the most cost-effective tools governments have to protect their marine resources.

Recent global studies also conclude that MPAs are economically advisable because they provide more benefits to a host country than costs. One such study from 2015, found that the net benefits of protecting marine ecosystems through the creation of “no-take” MPAs exceeded the

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<sup>28</sup> *Supra* note 12.

<sup>29</sup> *Supra* note 15.

<sup>30</sup> *National Lime Asso. v. Environmental Protection Agency*, 627 F.2d 416, 433 (D.C. Cir. 1980) (holding that the “burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the agency”)

<sup>31</sup> OECD, *supra* note 8, at 7.

<sup>32</sup> 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.* 72-130, 103 (2002).

<http://scholarship.law.berkeley.edu/elq/vol29/iss1/2/>

<sup>33</sup> Maria Zita Toribio *et al.*, *Sharing the Costs and Benefits of Marine Protected Areas: Implications for Good Coastal Resource Governance* (2013). [https://link.springer.com/chapter/10.1007/978-94-007-5176-7\\_8/fulltext.html](https://link.springer.com/chapter/10.1007/978-94-007-5176-7_8/fulltext.html)

associated costs.<sup>34</sup> This held true until a government reached 30% of its maritime territory, which was only the *extent of the study*, not where the balance shifted.<sup>35</sup> The estimated benefits of achieving 30% coverage over the period 2015-2025 were found to range between USD 719-1,145 billion.<sup>36</sup> Among the ecosystem services calculated in the estimated benefits were tourism, fisheries, carbon storage, coastal protection, and recreation.<sup>37</sup> Again, the U.S. has protected only 1% of its waters as “no-take” areas.

On the subject of national budget considerations and marine protected areas, SSL finds it relevant to highlight the countries of Palau and Gabon. With much more limited budgets than the U.S., both of these countries have recently created impressively large marine protected areas. In 2015, Palau enacted a law that will keep 80% of its maritime territory completely closed to any extractive activities, including fishing and mining.<sup>38</sup> The marine protected area network that Gabon created earlier this year is also ambitious. It includes 9 marine parks and 11 aquatic reserves that cover 26% of its maritime territory.<sup>39</sup> If countries with so few resources available to them are able to take such bold action, surely the United States, which has spent more than four trillion USD over the last 15 years on war, can afford to maintain its marine protected areas at their current sizes.<sup>40</sup>

## ii. Adequacy of Consultation

The second factor identified by the Secretary is the adequacy of any required Federal, State and tribal consultations conducted before the relevant designations or expansions. **SSL’s analysis is that the consultations during the applicable time period were undertaken in good faith and complied with all relevant laws.**

Of the two laws used to establish and expand the eleven marine protected areas under review, the Antiquities Act and the NMSA, only the NMSA has any consultation requirements. The Antiquities Act lacks any such requirements, even for notice or public participation. In stark contrast with this, the process for designating a National Marine Sanctuary under the NMSA is so lengthy and rigorous that the establishment of a National Marine Sanctuary itself implies significant support from all the relevant stakeholders.

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<sup>34</sup> Luke Brander et al., *The benefits to people of expanding marine protected areas*, IVM Institute for Environmental Studies, 1-91, 5-6 (May, 2015). [http://assets.wfnf.nl/downloads/mpa\\_rapport\\_volledig.pdf](http://assets.wfnf.nl/downloads/mpa_rapport_volledig.pdf).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Press Release from the Pew Charitable Trusts, *Palau to Sign National Marine Sanctuary into Law* (October 22, 2015). <http://www.pewtrusts.org/en/about/news-room/press-releases/2015/10/22/palau-to-sign-national-marine-sanctuary-into-law>.

<sup>39</sup> Press Release from the World Conservation Society, *Gabon Announces Vast Marine Protected Area Network at UN Ocean Conference* (June 5, 2017). <https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/10114/Gabon-Announces-Vast-Marine-Protected-Area-Network-at-UN-Ocean-Conference.aspx>.

<sup>40</sup> Nita C. Crawford, *Cost of War - U.S. Budgetary Costs of Wars through 2016: \$4.79 Trillion and Counting*, Watson Institute - International and Public Affairs, Brown University, 1-22, 1 (September, 2016). <http://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/Costs%20of%20War%20through%202016%20FINAL%20final%20v2.pdf>.

The procedures required for designating a National Marine Sanctuary under the NMSA are many and are found in Sections 303 and 304 of the law. Unlike section 301 of the law, which seems to prioritize conservation and preservation of marine resources over economic concerns, Sections 303 and 304 clearly allow for a thorough investigation of economic impacts during the complex cost-benefit analysis that is required. For example, Section 303(b)(1)(h) allows for the consideration of “the negative impacts produced by management restrictions on income generating activities” of living and nonliving resources in the area when considering if the discrete area is appropriate. The consultation requirements found in these sections also complicate the designation of a National Marine Sanctuary. Among the requirements imposed on the Secretary during the designation process are consultations with government Committees, the heads of “interested Federal agencies,” officials from State and local government entities, officials from Regional Fishery Management Councils, and even “other interested persons.”<sup>41</sup>

The benefit of this extremely lengthy consultation and approval process is that when a sanctuary is finally approved, one can be confident that there was significant buy-in from all the relevant stakeholders. As one legal scholar noted, “this gauntlet of consultations appears intended to produce polished, strongly-supported sanctuary proposals at the end of the pipeline.”<sup>42</sup> To the extent there was any significant opposition, there was ample opportunity for those opposed to block a designation.<sup>43</sup> This designation process alone casts serious doubt on any effort to call into question the adequacy of previous consultations undertaken under the NMSA.

Apart from the support implied by the intensive NMSA designation process, there is also significant evidence that the designations and expansions of the Marine National Monuments and National Marine Sanctuaries under review were widely supported. A 2016 poll conducted by Edge Research, a nonpartisan organization, found that 80% of people in the nearby states of Massachusetts and Rhode Island supported permanent protection of the Northeast Canyons and Seamounts MNM from drilling, mining, and fishing.<sup>44</sup> The poll also found that support for the MNM transcended political affiliations and that 87% of respondents said a healthy ocean was important to them personally.<sup>45</sup>

Evidence of popular support can easily be found for many of the other marine protected areas under review as well. One of these is the Papahānaumokuākea Marine National Monument. The original designation of this Marine National Monument, as well as its later expansion, was widely supported. During the lead up to the expansion, more than one million people signed petitions or wrote letters to the White House and lawmakers.<sup>46</sup> Among the diverse public supporters of the expansion in Hawaii were Hawaiians like Sol Kaho’ohalahala, a member of the

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<sup>41</sup> See 16 U.S.C. 1433 § 303 (b)(2)(A-E).

<sup>42</sup> *Supra* note 31, at 87.

<sup>43</sup> *Id.* at 85-90.

<sup>44</sup> Poll from the Conservation Law Foundation, New Poll: 4 Out of 5 Massachusetts and Rhode Island Residents Support Permanent Protection of Special Ocean Areas (July 11, 2016). <https://www.clf.org/newsroom/new-poll-4-5-massachusetts-rhode-island-residents-support-permanent-protection-special-ocean-areas/>.

<sup>45</sup> *Id.*

<sup>46</sup> Press release from The Pew Charitable Trusts, Pew Applauds Expansion of Papahānaumokuākea Marine National Monument (August 26, 2016). <http://www.pewtrusts.org/en/about/news-room/press-releases/2016/08/26/pew-applauds-expansion-of-papahanaumokuakea-marine-national-monument>.

Northwestern Hawaiian Islands Native Hawaiian Cultural Working Group, politicians including U.S. Senator Brian Schatz of Hawai'i, and organizations like the Office of Hawaiian Affairs (OHA), which noted at the time that the expansion would give Hawaiians and the State of Hawai'i more access to the area, not less.<sup>47</sup> Beyond popular support for the expansion, there was also a recognition that the consultation process had been successful. The Governor of the State of Hawai'i, David Ige, for example, wrote a letter to President Obama stating, "The State of Hawai'i appreciates your thoughtful consideration of this proposal and the opportunities that your administration has afforded our communities to engage in this collaborative process."<sup>48</sup>

Even if there was an absence of support showing that these consultations were well executed and popular, the legal presumption should be that they were properly conducted. This is because courts have long recognized a presumption of honesty and integrity in those serving as adjudicators.<sup>49</sup> Once again the discussion turns to the burden of proof. Unless there is evidence that the consultations carried out during the relevant designations and expansions fell short of the legal requirements, an agency adjudicator is presumed to act in good faith.<sup>50</sup> As described above, the evidence available strongly suggests that the pertinent designations and expansions were properly conducted.

### iii. Opportunity Costs

The third factor for which the Secretary has solicited public comment is the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf (OCS), in addition to any impacts on production in the adjacent region. **SSL finds that the positive benefits associated with the maintenance of these marine protected areas at their current sizes far outweighs the opportunity costs related to potential energy or mineral development on the OCS.**

The opportunity costs associated with potential energy and mineral development from the OCS are far reduced when the risks and long-term costs involved in pursuing those extractive activities are fully taken into consideration. One of the most obvious costs that would be associated with the development of energy or mineral resources would be the international and domestic political price of such action. Not only do Americans support maintaining their protected areas, they also support an international transition away from fossil fuel extraction and towards clean renewable energy. In a December 2016 poll from the Yale Program on Climate Change Communication, less than half of registered American voters supported more drilling for fossil fuels on public lands and a full 69% of them wanted the U.S. to participate in the Paris Climate

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<sup>47</sup> NBC News, *Activists Push for Hawaii National Monument Expansion After Public Meetings* (August 4, 2016). <http://www.nbcnews.com/news/asian-america/activists-push-hawaii-national-monument-expansion-after-public-meetings-n622166>.

<sup>48</sup> Letter from Governor David Ige for the Honorable Barack Obama (August 24, 2016).

<https://governor.hawaii.gov/wp-content/uploads/2016/08/2016.08.24-Pres-Obama-Papahanaumokuakea.pdf>.

<sup>49</sup> See *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). Accord, *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229, 91 L. Ed. 854, 67 S. Ct. 756 (1947); *United States v. Morgan*, 313 U.S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999 (1941).

<sup>50</sup> See, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 700-03, 92 L. Ed. 1010, 68 S. Ct. 793 (1948); *Lead Industries Association v. EPA*, 208 U.S. App. D.C. 1, 647 F.2d 1130, 1178 (D.C. Cir.), cert. denied, 449 U.S. 1042, 66 L. Ed. 2d 503, 101 S. Ct. 621 (1980).

Agreement.<sup>51</sup> Apart from the pushback the President would face in the U.S. if he began drilling or mining inside or around what was previously a Marine National Monument or National Marine Sanctuary, he would also face international consequences. This would be the case because he would be further damaging the U.S. government's reputation as a leader when it comes to both marine conservation and climate change.

There would also be significant environmental and economic costs that may accompany the development of energy or mineral resources in the current vicinity of the relevant marine protected areas. One of these costs would be the risk that if energy or mineral development eventually occurred within the current boundaries of the MPAs under review, the affected areas would cease to be sizeable enough to protect large, mature fish and allow for a positive spillover effect to occur outside of the reserve.<sup>52</sup> While it is always debatable what size a particular MPA needs to be to reap the desired benefits, it is known that a precautionary approach should be adopted because the reduction of an MPA could undermine its ecosystem benefits to the point where the value of the reserve itself becomes questionable.<sup>53</sup> In this case, given that the MPAs under consideration were carefully selected and sized, a precautionary approach would entail leaving them at their current sizes.

Another environmental cost of pursuing fossil fuel production in or adjacent to these marine protected areas would come from the oil and gas development itself. It is well understood that all stages of oil and gas development hurt marine mammals, birds, and fish.<sup>54</sup> Everything from seismic operations and surveys to exploration and actual production harms marine life.<sup>55</sup> These risks are compounded by the fact that they also carry with them the serious risk of an oil spill. While most spills are of a lesser magnitude, the BP Deepwater Horizon oil spill is a reminder of what can result from offshore oil production. During that spill, an estimated 171 million gallons of oil leaked into the Gulf of Mexico with catastrophic environmental and economic consequences.<sup>56</sup> While the full costs of the spill remain unknown and can never be reduced to a dollar figure, the more than \$13 billion in damages BP has already paid out, which could still rise to over \$19 billion, at least partially quantify the tremendous impact.<sup>57</sup>

Apart from the risks and costs involved in pursuing energy or mineral development in or around the eleven MPAs targeted for review, there are also many positive benefits to maintaining them at their current sizes that the E.O. intentionally attempts to avoid taking into account. The Secretary's request that comments focus their analysis on opportunity costs belies this point. In

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<sup>51</sup> Poll from Yale Program on Climate Change Communication, *American Voters Support Action on Climate Change* (December 13, 2016). <http://climatecommunication.yale.edu/news-events/american-voters-support-action-climate-change/>.

<sup>52</sup> Benjamin Halperin & Warner Robert, *Matching marine reserve design to reserve objectives. Proceedings of the Royal Society*. Lond. V. 270, pp 1871–1878, 1873 (July 17, 2003). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1691459/pdf/14561299.pdf>.

<sup>53</sup> *Id.* at 1875.

<sup>54</sup> OSPAR Commission, *Assessment of Impacts of Offshore Oil and Gas Activities in the Northeast Atlantic*, 1-39, 8 (2009). <https://www.ospar.org/documents?d=7154>.

<sup>55</sup> *Id.* at 13-17.

<sup>56</sup> NRDC Issue Paper, *Summary of Information concerning the Ecological and Economic Impacts of the BP Deepwater Horizon Oil Spill Disaster*, 1-9, 1 (June 2015). <https://www.nrdc.org/file/4218/download?token=M2Bxrq5m>.

<sup>57</sup> *Id.* at 6.

order to fully understand what the opportunity costs of maintaining the borders of the relevant MPAs would be, it is essential that both the benefits and costs associated with that decision be considered. This is particularly critical here, where the benefits support keeping the pertinent marine protected areas at their current sizes and free from energy or mineral development.

While providing an exhaustive list of the benefits of MPAs would require writing a book, a brief look at some of the environmental and economic benefits that can arise from MPAs will serve the purpose of undercutting the argument that the sizes of the MPAs at issue here should be reconsidered. It is also worth noting that in a recent study 85% of Americans participating in a survey reported that they felt they had personally benefitted from the country's National Parks and historic sites, regardless of whether they had visited the parks or not.<sup>58</sup> The logical conclusion is that average Americans are more likely to be concerned with the protection of MPAs than they are about management costs or the opportunity costs associated with maintaining them.

Among the many environmental benefits that result from MPAs are those that relate to the health of the ecosystems in those areas. Properly sized MPAs are known not only for helping to maintain healthy and biodiverse ecosystems, but also for aiding marine ecosystems to adapt to the impacts of climate change.<sup>59</sup> Studies have also shown that MPAs, particularly no-take reserves, often lead to an increase in the size, numerical density, and diversity of species.<sup>60</sup> With time, these positive effects are experienced not just within established MPAs, but also in surrounding waters.<sup>61</sup> MPAs can also provide a haven for vulnerable species threatened with extinction, as do a number of the MPAs affected by this review.<sup>62</sup> For example, both the Mariana Trench NMN<sup>63</sup> and Hawaii's Papahānaumokuākea NMN<sup>64</sup> are home to endangered species.

MPAs are also understood to bring significant economic benefits. This economic value can come from sources such as tourism, recreation, and ecosystem goods and services. After a lengthy consultation process with stakeholders, the government of Belize, for example, established a marine protected area that was divided into four zones, including a no-take zone that covered about a third of the reserve. This MPA was not only successful at protecting and increasing marine wildlife, it also became the center of a growing tourism industry based around marine recreation and science.<sup>65</sup> In the Florida Keys National Marine Sanctuary, as well as elsewhere, studies report

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<sup>58</sup> Michelle Haefele et al, Total Economic Valuation of the National Park Service Lands and Programs: Results of a Survey of The American Public, 1-48, 3 (June 30, 2016). <https://www.nationalparks.org/sites/default/files/NPS-TEV-Report-2016.pdf>.

<sup>59</sup> Callum Roberts *et al.*, Marine reserves can mitigate and promote adaptation to climate change, 114, 6167-6175 (June 5, 2017). <http://www.pnas.org/content/114/24/6167.abstract?tab=author-info>.

<sup>60</sup> Sarah Lester *et al.*, *Biological effects within no-take marine reserves: a global synthesis*, Mar Ecol Prog Ser, 384, 33-46, 33 (May 29, 2009). <http://www.int-res.com/articles/meps2009/384/m384p033.pdf>.

<sup>61</sup> Mark Hixon et al, BOFFFFs: on the importance of conserving old-growth age structure in fishery populations, ICES J Mar Sci, 71, 2171-2185, 2171 (2014). <https://academic.oup.com/icesjms/article-lookup/doi/10.1093/icesjms/fst200>.

<sup>62</sup> *Supra* note 31.

<sup>63</sup> See US Fish and Wildlife Service: Marianas Trench Marine National Monument Fact Sheet: [https://www.fws.gov/uploadedFiles/Region\\_1/NWRS/Zone\\_1/Mariana\\_Trench\\_Marine\\_National\\_Monument/Documents/MTNM%20brief%2005-24-2012.pdf](https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTNM%20brief%2005-24-2012.pdf) (last visited July 25, 2017).

<sup>64</sup> See NOAA/ USFWS. About - Papahānaumokuākea Marine National Monument. <http://www.papahanaumokuakea.gov/about/> (last visited July 25, 2017)

<sup>65</sup> *Supra* note 31 at 98.

the appearance of larger specimens of fish after the establishment of no-take reserves.<sup>66</sup> It is for reasons such as these that studies have consistently concluded the net benefits of protecting marine habitats through no-take MPAs exceed the costs.<sup>67</sup>

### **III. Conclusion**

For over a century we have recognized the importance of protecting our public lands. This recognition led to the creation of our National Park system, Wilderness Areas, National Forests, and much more. However, these preservation and conservation efforts have been primarily directed at public lands located above the high water mark of the oceans. Only relatively recently have we begun to take action to also provide protection to the more than 43% of the nation's public lands and waters lying offshore.<sup>68</sup>

Fortunately, since then, we have been moving in the right direction. Under both Democratic and Republican Presidents, MPAs have continued to be designated and expanded. International progress has been steady as well. A growing consensus around the necessity of establishing MPAs is forming, and international goals have been developed to meet that consensus. However, this progress is now in jeopardy.

E.O. 13795 demonstrates that this new administration wants to halt this positive momentum and reverse course. The administration has done its best to mask its intentions by making it sound like the E.O. is about "energy innovation," but its content shows it was written with the aim of promoting mining and oil and gas development on the OCS. Section 4(b) of the E.O., which this comment addresses, is nothing more than an attempt to accomplish this end by justifying the diminution of the National Marine Sanctuaries and Marine National Monuments that have been created since April 2007.

In this comment, SSL arrived at two main conclusions. The first relates to the legality of Section 4(b) of the E.O., and the second follows from SSL's analysis of the three factors the Secretary identified for public comment.

First, despite the intent of this E.O., the current administration will be unable to reduce the size of these MPAs because the review ordered by the E.O. is an unlawful exercise of executive authority. Neither the Antiquities Act nor the NMSA provide the President with the power to alter or abolish the designations at issue

Second, SSL's consideration of the three factors in Section 4(b) leads it to conclude that each one of them supports maintaining the National Marine Sanctuaries and Marine National Monuments under review at their current sizes. With respect to the first factor, SSL concludes that the amount of acreage affected is insignificant relative the size of the U.S. EEZ and that the benefits associated with managing these marine protected areas are well worth the costs. In response to the second factor, which requested an analysis of the adequacy of Federal, State, and tribal consultations conducted before the designations and expansions, SSL determined that the

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<sup>66</sup> *Supra* note 49 at 1874.

<sup>67</sup> *Supra* note 33.

<sup>68</sup> *Supra* note 31 at 74.

consultations were undertaken in good faith and complied with all relevant laws. Lastly, in response to the third factor that addressed the opportunity costs associated with potential energy and mineral exploration and production from the OCS, SSL found that the positive benefits associated with the maintenance of these marine protected areas at their current sizes far outweigh the opportunity costs.

In sum, this entire review process is at once unlawful and unwise. We encourage the Secretary and President Trump to abandon this folly immediately.