

MONUMENTAL SEASCAPE MODIFICATION UNDER THE ANTIQUITIES ACT

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This Article is the first to explore an alternate means to modify and protect existing national marine sanctuaries when Congress fails to do so. The 1972 National Marine Sanctuaries Act is the only federal legislation that provides for the designation of large-scale ocean areas for long-term protection and management. For nearly thirty years, it was customary for Congress to reauthorize the Act to meet the increasingly complex regulatory and stakeholder needs of sanctuary management—until now. Congress has not reauthorized the Act since 2000, and a pall of uncertainty has been cast over the National Marine Sanctuaries Program. The most pressing need for national marine sanctuaries is the development of a resourceful way to achieve conservation objectives despite this congressional inaction. The Antiquities Act, a century-old statute providing for the declaration of national monuments (which has been applied almost exclusively to dry land) may provide a useful tool to help maintain existing national marine sanctuaries until Congress is able to reauthorize the National Marine Sanctuaries Act.

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I. INTRODUCTION

*Any plan is better than no plan.*¹

Government action is urgently needed to address the existing needs and growing challenges facing our nation's underwater treasures. Some of the most pressing of these problems are the lack of effective adaptive management programs, as well as duplicative and inefficient procedural obstacles. This Article explores an alternate means to modify and protect existing national marine sanctuaries when Congress fails to do so. Surprisingly, the key may lie in a dusty old statute that was passed over a century ago—the Antiquities Act²—which has been applied almost exclusively to dry land.³ Although a few scholars have explored the Antiquities Act as a means to create new sanctuaries,⁴ none have considered its usefulness to modify existing ones.

The National Marine Sanctuaries Act (Marine Sanctuaries Act)⁵ is the only federal statute that allows designation of large-scale ocean areas for

¹ Lostpedia, *LaFleur Transcript*, http://lostpedia.wikia.com/wiki/LaFleur_transcript (last visited Feb. 17, 2013) (quoting *Lost: LaFleur* (ABC television broadcast Mar. 4, 2009)).

² Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2006).

³ See e.g., Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002); 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, 74 (2002). Of the 102 monuments currently in existence, only seven—Buck Island, California Coastal, Marianas Trench, Pacific Remote Islands, Papahānaumokuākea, Rose Atoll, and Virgin Islands Coral Reef—protect marine, rather than terrestrial, areas. *Id.* at 125–26 (listing the three marine areas that were designated as monuments as of 2002); Jim DiPeso, *Few Americans Are Ever Likely to See George W. Bush's Greatest Environmental Legacy*, GRIST, Jan. 17, 2009, <http://www.grist.org/article/republican/> (last visited Feb. 17, 2013) (listing the four additional marine monuments designated since 2002).

⁴ See, e.g., Brax, *supra* note 3; Jennifer C. White, *Conserving the United States' Coral Reefs: National Monument Designation to Afford Greater Protection for Coral Reefs in Four National Marine Sanctuaries*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 901 (2008); Joseph Briggett, Comment, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 TUL. ENVTL. L.J. 403 (2009); Mark Laemmle, Comment, *Monumentally Inadequate: Conservation at Any Cost Under the Antiquities Act*, 21 VILL. ENVTL. L.J. 111 (2010).

⁵ 16 U.S.C. §§ 1431–1445c-1 (2006).

permanent protection and long-term management. The Marine Sanctuaries Act authorizes executive branch designations, subject to approval by Congress and the states.⁶ In contrast, Congress used the Antiquities Act to delegate authority to declare monuments directly to the President without the need for subsequent congressional approval.⁷

The Marine Sanctuaries Act establishes the National Marine Sanctuaries Program (Marine Sanctuaries Program),⁸ “the Nation’s only comprehensive system of marine protected area[s].”⁹ But the Marine Sanctuaries Act was last reauthorized in 2000,¹⁰ and a pall of uncertainty has been cast over the Marine Sanctuaries Program because there is no specific date for the expiration of Congress’s prohibition on designating new national marine sanctuaries,¹¹ the redesignation of existing sanctuaries,¹² or the reactivation of the National Oceanic and Atmospheric Administration’s (NOAA) register of sanctuary candidate sites.¹³ It is hard to imagine a similar suspension of the expansion of the national park or national wildlife refuge systems.¹⁴ In fact, just the opposite has happened; since 2000, two national parks¹⁵ and twenty-one national wildlife refuges¹⁶ have been created, and over 8,102

⁶ *Id.* §§ 1433–1434.

⁷ 16 U.S.C. § 431 (2006). The Antiquities Act also reserves authority for Congress to declare some national monuments independent of the President’s authority. *See id.* § 431a.

⁸ 16 U.S.C. §1431(c).

⁹ *Reauthorization of the National Marine Sanctuaries Act: Hearing on H.R. 1243 Before the H. Subcomm. on Fisheries Conservation, Wildlife and Oceans*, 106th Cong. 1 (May 6, 1999) (statement of Sally Yozell, Deputy Assistant Sec’y for Oceans and Atmosphere, National Oceanic and Atmospheric Administration), <http://naturalresources.house.gov/uploadedfiles/yozelltestimony05-06-99.pdf> (last visited Feb. 13, 2012).

¹⁰ Nat’l Marine Sanctuary Found., *National Marine Sanctuaries Act Reauthorization*, <http://nmsfocean.org/national-marine-sanctuaries-act-reauthorization> (last visited Dec. 30, 2012) (“The NMSA [National Marine Sanctuaries Act] was last reauthorized in 2000 through 2005”).

¹¹ *See* 16 U.S.C. § 1434(f) (2000).

¹² *See id.*

¹³ *See* National Marine Sanctuary Program, 60 Fed. Reg. 66,875, 66,876 (Dec. 27, 1995) (codified at 15 C.F.R. pt. 922) (stating that this register, called the Site Evaluation List (SEL), “is currently inactive.”); *see also infra* notes 74–81 and accompanying text.

¹⁴ William J. Chandler & Hannah Gillelan, *The Makings of the National Marine Sanctuaries Act: A Legislative History and Analysis*, 34 ENVTL. L. REP. 10,505, 10,560 (2004) [hereinafter Chandler & Gillelan, *Makings of the Sanctuaries Act*].

¹⁵ Department of the Interior and Related Agencies Appropriations Act, Pub. L. 108-108, § 135, 117 Stat. 1241, 1270 (2003) (declaring the Congaree Swamp National Monument as the Congaree National Park); Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. 106-530, 114 Stat. 2527, 2529 (2000).

¹⁶ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 2821, 116 Stat. 2458, 2710–11 (2002); National Cemetery Expansion Act of 2003, Pub. L. No. 108-109, § 145, 118 Stat. 443 (2004); Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. § 9(g) (2004); Detroit River International Wildlife Refuge Establishment Act, Pub. L. No. 107-91, 115 Stat. 894 (2001); Establishment of Flint Hills Legacy Conservation Area, Kansas, 77 Fed. Reg. 9,693 (Feb. 17, 2012); Establishment of Dakota Grassland Conservation Area, North Dakota and South Dakota, 77 Fed. Reg. 9,260 (Feb. 16, 2012); Establishment of Everglades Headwaters National Wildlife Refuge and Conservation Area, 77 Fed. Reg. 2,754 (Jan. 19, 2012); Establishment of Rocky Flats National Wildlife Refuge, 72 Fed. Reg. 43,293 (Aug. 3, 2007); Baca National Wildlife Refuge, 68 Fed. Reg. 11,579 (Mar. 11, 2003); Cahaba River National Wildlife Refuge, 67 Fed. Reg. 78,238 (Dec. 23, 2002); Red River National Wildlife Refuge, 67 Fed. Reg.

square miles of protected lands have been set aside by reservation of federal lands and by expansion through acquisition and reservation of private lands.

To address the existing needs and growing challenges facing our nation's sanctuaries, the federal government must implement effective adaptive management programs, as well as consolidate redundant public processes and regulatory overlaps. Although management plans are developed during the initial designation process, these were never intended to be static documents.¹⁷ Because marine sanctuaries naturally experience dynamic ecological changes over varying timescales, marine management authorities should adopt more adaptive, flexible, and site-specific methods of sanctuary management. However, Congress has prescribed an elaborate consultation and modification process, such that any proposal to change the original terms of a designation (e.g., its purposes, the resources protected, or activities regulated) must repeat the procedural steps of the original designation.¹⁸ This is compounded by the inefficiency of marine sanctuaries' bewildering array—and overlapping responsibilities—of federal, regional, and state enforcement authorities, ultimately leading to an overall ineffective marine sanctuary management scheme.

Congress has yet to address the moratorium issue, which the 2000 reauthorization contemplated would last only five years.¹⁹ This, and the evolution of management practices,²⁰ have put the Marine Sanctuaries

78,238 (Dec. 23, 2002); Creating the Coldwater River National Wildlife Refuge, Mississippi, 66 Fed. Reg. 20,680 (Apr. 24, 2001); U.S. FISH & WILDLIFE SERV., DAKOTA TALLGRASS PRAIRIE WILDLIFE MANAGEMENT AREA GRASSLAND EASEMENT PROGRAM 3 (2000); U.S. FISH & WILDLIFE SERV., ASSABET RIVER NATIONAL WILDLIFE REFUGE (2006), *available at* http://library.fws.gov/Refuges/AssabetRiver_facts06.pdf; U.S. FISH & WILDLIFE SERV., CHERRY VALLEY NATIONAL WILDLIFE REFUGE, FINAL ENVIRONMENTAL ASSESSMENT 1-1 (2008); U.S. FISH & WILDLIFE SERV., PROPOSED GLACIAL RIDGE NATIONAL WILDLIFE REFUGE POLK COUNTY, MINNESOTA, FINAL ENVIRONMENTAL ASSESSMENT 1 (2001); U.S. FISH & WILDLIFE SERV., TULARE BASIN WILDLIFE MANAGEMENT AREA, PLANNING UPDATE NO. 5 (2007); Press Release, U.S. Fish & Wildlife Serv., Creation of Bayou Teche National Wildlife Refuge Protects Threatened Black Bear (Nov. 15, 2001), *available at* <http://www.fws.gov/southeast/news/2001/r01-097.html>; Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Establishes Rocky Mountain Front Conservation Area (Aug. 10, 2005), <http://www.fws.gov/mountain-prairie/pressrel/05-56.htm> (last visited Feb. 17, 2013); Press Release, U.S. Fish & Wildlife Serv., Fish & Wildlife Service Approves Establishment of Neches River National Wildlife Refuge in Texas (June 12, 2006); U.S. Fish & Wildlife Serv., *O'ahu Forest National Wildlife Refuge*, <http://www.fws.gov/oahuforest/index.html> (last visited Feb. 17, 2012).

¹⁷ Lindsey Etheridge, Tera Bowling & Stephanie Showalter Otts, *The Adaptive Management Experience of the National Marine Sanctuaries Program*, SEA GRANT L. & POL'Y J., Summer 2010, at 3, 10.

¹⁸ See Brax, *supra* note 3, at 77, 92; see also William J. Chandler, The Future of the National Marine Sanctuaries Act in the Twenty-First Century 119 (May, 2006) (unpublished M.A. dissertation, Johns Hopkins University), *available at* http://www.marine-conservation.org/media/filer_private/2011/04/18/chandler_2006.pdf.

¹⁹ National Marine Sanctuaries Act, 16 U.S.C. § 1444 (2000) (listing appropriations from 2001–2005).

²⁰ See NAT'L OCEANIC & ATMOSPHERIC ADMIN., FLORIDA KEYS NATIONAL MARINE SANCTUARY REVISED MANAGEMENT PLAN 19–26 (2007) [hereinafter REVISED MANAGEMENT PLAN], *available at* http://floridakeys.noaa.gov/mgmtplans/2007_man_plan.pdf (discussing the reorganization and adoption of additional “action plans” in 2007 and comparing 2007's policies to 1996's).

Program in dire need of a resourceful way to attain its conservation objectives until Congress can address the moratorium. In the absence of legislative action, the flat prohibition of the redesignation of existing sanctuaries and designation of new ones critically weakens NOAA's only stewardship program.

II. HISTORY OF MARINE SANCTUARY DESIGNATIONS

Since the creation of the Marine Sanctuaries Program, fourteen marine protected areas—thirteen national marine sanctuaries and one marine national monument—comprising approximately 113,565 square nautical miles (or 3% of the U.S. exclusive economic zone) have been established.²¹ The program's development has been neither easy nor coherent.²² A series of presidential administrations with dramatically different environmental priorities,²³ an alternately inertial, protection-averse, and protection-leaning Congress,²⁴ and industry-friendly Regional Fishery Management Councils have left the program pockmarked with an erratic history.²⁵

A. Genesis: 1972–1981

The Marine Sanctuaries Program's earliest years under the Ford administration resulted in the designation of two very small sanctuaries, both of which were designed to protect non-environmental resources.²⁶ The first sanctuary, the Monitor National Marine Sanctuary, was designated off the coast of North Carolina around the one-mile area surrounding the sunken Civil War ironclad U.S.S. Monitor on January 31, 1975.²⁷ Soon afterward, the Key Largo National Marine Sanctuary was designated to cover

²¹ William J. Chandler & Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 ENVTL. L. REP. 10,505, 10,558 (2004) [hereinafter Chandler & Gillelan, *Evolution of the Sanctuaries Act*]; Nat'l Oceanic & Atmosphere Admin., *About Your Sanctuaries*, <http://sanctuaries.noaa.gov/about/faqs/welcome.html> (last visited Feb. 17, 2012).

²² See discussion *infra* Part II.A–D.

²³ See Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 723–30, 738–40, 744–45 (2003) (discussing the program's varied application under Presidents Nixon, Ford, Carter, Reagan, Bush Sr., and Clinton).

²⁴ See *id.* at 716–18, 730–31, 740–41 (discussing Congress's initial optimistic hope for a comprehensive program and the subsequent varied, at times minimal, legislative efforts to develop it).

²⁵ MARY A. GADE ET AL., NAT'L ACADEMY OF PUBLIC ADMIN., COURTS CONGRESS AND CONSTITUENCIES: MANAGING FISHERIES BY DEFAULT, ix (2002), available at http://www.mtholyoke.edu/~merto22j/classweb/international_fisheries/gam03.pdf.

²⁶ National Marine Sanctuaries Act, 16 U.S.C. § 1432(8) (2000) (“[S]anctuary resource’ means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreation, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary.”); see 41 Fed. Reg. 2,378, 2,378–79 (Jan. 16, 1976); Michael C. Blumm & Joel G. Blumstein, *The Marine Sanctuaries Program: A Framework for Critical Areas Management in the Sea*, 8 ENVTL. L. REP. 50,016, 50,023 (1978); Owen, *supra* note 23, at 722 tbl.1, 723–24 (citing 40 Fed. Reg. 21,706 (May 19, 1975) (codified at 15 C.F.R. pt. 924 (1976))).

²⁷ 40 Fed. Reg. 5,349 (Feb. 5, 1975) (codified at 15 C.F.R. pt. 924 (1976), accord Owen, *supra* note 23, at 723–24.

a 103-mile area off the South Florida coast for the purpose of supplementing the existing John Pennekamp Coral Reef State Park.²⁸ Although both sanctuaries were protected as nationally significant marine resources, neither one was particularly significant in size, nor designed to protect marine environments—the first protected a shipwreck, while the latter nominally extended the reach of an existing state park.²⁹ Meanwhile, the Marine Sanctuaries Program “did not receive any funding until 1977, when it operated [using] funds [redirected] from NOAA’s administrative budget.”³⁰ By 1978, the program was almost forgotten.³¹

During the Carter administration’s twilight years, however, the Marine Sanctuaries Program enjoyed a remarkable comeback. In 1980, the Channel Islands National Marine Sanctuary off the coast of California became the first sanctuary designated to protect stand-alone environmental resources.³² Moreover, its 1,100 nautical square mile size dwarfed the diminutive Monitor and Key Largo sanctuaries.³³ In 1981, the 948 square nautical mile Gulf of the Farallones National Marine Sanctuary, also off the coast of California, was designated.³⁴ These two sanctuaries—which flatly prohibited fossil fuel exploration and development, but left commercial fishing unregulated—also represented the first large-scale demonstrations of the Marine Sanctuaries Program’s limited compatible use standard.³⁵

That same year, other sanctuaries were designated off the coast of Florida at Looe Key, and off the coast of Georgia at Gray’s Reef.³⁶ By 1981,

²⁸ 41 Fed. Reg. at 2,378–79 (Jan. 16, 1976) (codified at 15 C.F.R. pt. 929 (1984)); REVISED MANAGEMENT PLAN, *supra* note 20, at 2; *accord* Owen, *supra* note 23, at 723–24; *see also* John Epting, *National Marine Sanctuary Program: Balancing Resource Protection With Multiple Use*, 18 HOUS. L. REV. 1037, 1042 (1981) (discussing the program’s beginning).

²⁹ *See* Owen, *supra* note 23, at 724 (“The [Monitor and Key Largo sanctuaries] were therefore more akin to protection of small monuments—analogueous, perhaps, to the protection of a sequoia grove and the Ford Theater—than to large-scale reservations of land.”).

³⁰ David A. Tamas, *The U.S. National Marine Sanctuary Program: An Analysis of the Program’s Implementation and Current Issues*, 16 COASTAL MGMT. 275, 282 (1988); *see also* Leah L. Bunce et al., *The National Marine Sanctuary Program: Recommendations for the Program’s Future*, 22 COASTAL MGMT. 421, 421–23 (1994) (discussing the first six years of funding).

³¹ Blumm & Blumstein, *supra* note 26, at 50,016; *accord* Brax, *supra* note 3 at 91.

³² Final Rule: The Channel Islands National Marine Sanctuary, 45 Fed. Reg. 65,198, 65,199 (Oct. 2, 1980) (codified at 15 C.F.R. § 922.70 (1981)).

³³ *Id.*

³⁴ Final Rule: The Point Reyes-Farallon Islands National Marine Sanctuary, 46 Fed. Reg. 7,936 (Jan. 26, 1981) (codified at 15 C.F.R. § 922.80 (1982)); *see* Owen, *supra* note 23, at 727.

³⁵ National Marine Sanctuaries Act, 16 U.S.C. § 1431(b) (2000) (“The purposes and policies of this chapter are . . . to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.”); 46 Fed. Reg. at 7,937 (“[T]he primary purpose of managing the area and of these implementing regulations is to protect and preserve the marine birds and mammals, their habitats, and other natural resources from those activities which pose significant threats . . . including hydrocarbon exploration and exploitation.”).

³⁶ Final Rule: Looe Key National Marine Sanctuary, 46 Fed. Reg. 7,946 (Jan. 26, 1981); Final Rule: Gray’s Reef National Marine Sanctuary, 46 Fed. Reg. 7,942 (Jan. 26, 1981) (codified at 15 C.F.R. § 922.90).

the Marine Sanctuaries Program had grown to include four additional marine sanctuaries—for a total of six.³⁷

B. Arrested Development: 1981–1989

During the Reagan administration, the Marine Sanctuaries Program ground to a halt. Over eight years, and despite a number of nominations, the administration designated only one sanctuary, Fagatele Bay National Marine Sanctuary, which, at 0.25 square miles, is the smallest sanctuary in the program.³⁸ The administration's opposition to the program caused it to further atrophy through dramatically reduced funding and staff vacancies that were left unfilled.³⁹

Congress eventually grew frustrated with executive inaction, and signaled as much when it reauthorized the Marine Sanctuaries Act in 1984 and expanded the designation criteria to include ecosystem services, as well as historical, archaeological, or paleontological resources.⁴⁰ At the same time, however, the list of mandatory factors for NOAA to consider were expanded to include any potentially negative economic effects of a sanctuary.⁴¹ Congress also imposed a requirement that NOAA consult with Regional Fishery Management Councils when the agency proposes a designation.⁴²

C. Legislative Revival and Consolidation: 1989–1995

The Marine Sanctuaries Program enjoyed its most active years during the presidency of George H. W. Bush.⁴³ Although President Bush had initially opposed the program as much as his predecessor, the 1989 Exxon Valdez oil spill disaster galvanized congressional and public pressure, forcing the administration to switch positions and lukewarmly support the program.⁴⁴ Despite the added impetus of the Valdez disaster, NOAA labored under the gridlock-prone Marine Sanctuaries Act procedures to designate new sanctuaries. As a result, it was only able to designate the Cordell Bank National Marine Sanctuary off California, and failed to complete the

³⁷ See Owen, *supra* note 23, at 727.

³⁸ 15 C.F.R. § 922.101 (2012); see also Brax, *supra* note 3, at 91.

³⁹ NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NATIONAL MARINE SANCTUARIES: CHALLENGE AND OPPORTUNITY 4 (Frank Potter ed., 1993), available at http://sanctuaries.noaa.gov/management/pdfs/external_review_team_1993.pdf.

⁴⁰ See Marine Sanctuaries Amendments of 1984, Pub. L. No. 98-498, § 303(b)(1)(A)–(B), 98 Stat. 2296, 2297 (codified as amended at 16 U.S.C. § 1433(b)(1)(A)–(B) (2006)); accord Mary Gray Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 511 (2002).

⁴¹ National Marine Sanctuaries Act, 16 U.S.C. § 1433(b)(1)(H)–(I) (2006); accord Davidson, *supra* note 40, at 511–12.

⁴² Marine Sanctuaries Amendments of 1984, § 303(b)(2)(D), 98 Stat. at 2298.

⁴³ Owen, *supra* note 23, at 729–30.

⁴⁴ *Id.* at 730.

designation of long-tabled proposal sites at the Flower Garden Banks off the coasts of Texas and Louisiana, and at Monterey Bay off California.⁴⁵

Recognizing NOAA's struggle to designate under the Marine Sanctuaries Act, and in response to several highly publicized vessel groundings in the Florida Keys, Congress unilaterally designated the Florida Keys National Marine Sanctuary.⁴⁶ For the first time in the history of the Marine Sanctuaries Program, a sanctuary was created by a governmental entity other than NOAA.⁴⁷

Soon thereafter, Congress designated three other sanctuaries, at Stellwagen Bank,⁴⁸ Monterey Bay,⁴⁹ and the Hawaiian Humpback Whale National Marine Sanctuary.⁵⁰ However, all three were originally sponsored by NOAA at earlier points in time, and were re-animated after having long been tabled by Congress. For example, the Humpback Whale sanctuary had been proposed in 1977,⁵¹ retracted in 1984, and re-proposed in 1989.⁵² The legislative histories of the Monterey Bay⁵³ and Stellwagen Bank⁵⁴ sanctuaries were similarly convoluted.

This period was characterized by a remarkable degree of congressional bipartisanship and unanimity of opinion on the designation of sanctuaries.⁵⁵ With the exception of the Florida Keys sanctuary, there was virtually no public opposition to any of the sanctuaries designated during this period⁵⁶—although this may be attributable to their small scales. For example, the Flower Garden Banks sanctuary has an area of fifty-six nautical miles in the Gulf of Mexico, and at approximately 105 miles off the coasts of Texas and Louisiana, is located far from state waters.⁵⁷ By 1992, intervention by Congress had ensured the revival and survival of the program.⁵⁸

⁴⁵ Cordell Bank National Marine Sanctuary, 54 Fed. Reg. 22,417, 22,423 (May 24, 1989) (codified at 15 C.F.R. pt. 942); Marine Protection, Research, and Sanctuaries Act of 1972 Amendments, Pub. L. 100-627, 102 Stat. 3213, 3217 (1988) (codified as amended at 16 U.S.C. § 1438, (*repealed* 1988)); 15 C.F.R. § 922.110 (2012).

⁴⁶ Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990); *see also* 15 C.F.R. § 922.160 (2012).

⁴⁷ Owen, *supra* note 23, at 735.

⁴⁸ National Marine Sanctuaries Program Amendments Act of 1992, Pub. L. No. 102-587, § 2202, 106 Stat. 5039, 5048 (1992); *see also* 15 C.F.R. § 922.140 (2012).

⁴⁹ Pub. L. No. 102-587, § 2203, 106 Stat. 5048 (1992); *see also* 15 C.F.R. § 922.130 (2012).

⁵⁰ Hawaiian Islands National Marine Sanctuary Act, Pub. L. No. 102-587, §§ 2301–2305, 106 Stat. 5055 (1992); *see also* 15 C.F.R. § 922.180 (2012).

⁵¹ CTR. FOR THE ECON. & THE ENV'T, NAT'L ACAD. OF PUB. ADMIN., PROTECTING OUR NATIONAL MARINE SANCTUARIES 93 (2000), *available at* <http://www.sanctuaries.noaa.gov/management/pdfs/NAPARpt.pdf> [hereinafter PROTECTING OUR SANCTUARIES].

⁵² Owen, *supra* note 23, at 736.

⁵³ *See generally* PROTECTING OUR SANCTUARIES, *supra* note 51, at 100–05 (describing the history of the Monterey Bay sanctuary).

⁵⁴ *See generally id.* at 109–13 (describing the history of the Stellwagen Bank sanctuary).

⁵⁵ Owen, *supra* note 23, at 737.

⁵⁶ *Id.* at 736–37.

⁵⁷ PROTECTING OUR SANCTUARIES, *supra* note 51, at 6 tbl.1.

⁵⁸ *See Nat'l Marine Sanctuary Program Reauthorization, Part II: Hearing Before the Subcomm. on Oceanography, Great Lakes and the Outer Cont'l Shelf and the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the Comm. on Merch. Marine and*

During the Clinton administration, the program experienced a quiet period, as NOAA only designated the Olympic Coast National Marine Sanctuary.⁵⁹ The program was not inactive, though. The inconsistent flurries of sanctuary designations had flooded the agency with a surge of management responsibilities that it strained to meet. Focus shifted away from creating new sanctuaries to managing existing ones.⁶⁰ Vacant staff positions were finally filled, modern equipment was purchased, and the creation of an effective bureaucracy ensued.⁶¹

In 2000, President Clinton issued Executive Order No. 13,158, which called for NOAA and the Department of the Interior (DOI) to create a National System of Marine Protected Areas.⁶² While the order and the system created binding obligations on NOAA and DOI, the order merely furnished a set of guiding principles,⁶³ while the titular system laid down aspirational groundwork for the creation of a unified management system among all U.S. marine protected areas.

The Marine Sanctuaries Program plays a critical foundational role in the development of the system's framework.⁶⁴ The program is the foremost authority on the protection of particular coastal and marine areas.⁶⁵ Its sanctuaries are the most visible and strategically important marine protected areas in the country.⁶⁶ It is difficult to envision a successful marine conservation and management system in the absence of an effective keystone component such as the Marine Sanctuaries Program.

D. Wavering Protection Beneath the Waves: 1995–2012

In response to calls for clear standards and more public notification and input, NOAA created a list of recommended areas (LRAs) in 1979 to catalog both proposed sites that had been nominated by citizens or organizations, as

Fisheries, 102d Cong. 37 (Mar. 31, 1992) (statement of Jennifer Joy Wilson, Assistant Sec'y of Commerce for Oceans and Atmosphere, NOAA) (describing NOAA's enlarged staff and increased budget requests); *see also* Owen, *supra* note 23, at 738.

⁵⁹ Olympic Coast National Marine Sanctuary Regulations, 59 Fed. Reg. 24,586, 24,586–615 (May 11, 1994) (codified at 15 C.F.R. §§ 922.150–154); Olympic Coast National Marine Sanctuary Pub. L. No. 102-587, § 2207, 106 Stat. 5053 (1992); 15 C.F.R. pt. 922, subpt. O (2012).

⁶⁰ Owen, *supra* note 23, at 739.

⁶¹ *See* PROTECTING OUR SANCTUARIES, *supra* note 51, at ix–2 (“[T]he program has spent a great deal of energy in the past 10 years on planning and building its institutional capacity The sanctuaries are beginning to find effective ways to establish a physical presence on the water, establish and enforce regulations, nourish public understanding of the sites and the threats they face, and encourage research.”).

⁶² Exec. Order No. 13,158, § 4, 65 Fed. Reg. 34,909 (May 31, 2000).

⁶³ *Id.* § 5 (requiring federal agencies to “avoid harm to the natural and cultural resources that are protected by . . . [marine protected areas]” within the national system, “to the extent permitted by law and to the maximum extent practicable.”).

⁶⁴ Brax, *supra* note 3, at 74.

⁶⁵ *See* Donald C. Baur et al., *Putting “Protection” Into Marine Protected Areas*, 28 VT. L. REV. 497, 521 (2004) (stating that the Marine Sanctuaries Program is the most prominent player for protecting marine and coastal regions).

⁶⁶ *See, e.g.,* Owen, *supra* note 23, at 746.

well as sites that had been selected by NOAA for sanctuary consideration.⁶⁷ Anyone could nominate a site for sanctuary status, and NOAA would screen the nomination.⁶⁸ The sites that passed the initial screening were kept on the LRA only if they met one or more of five environmental, recreational, historical, scientific, or educational factors.⁶⁹ Afterward, they were screened again to determine their “active candidacy” based on several factors that were far less singularly focused on resource protection and preservation.⁷⁰

The LRA requirement was difficult to manage and threatened to turn the designation process into a cost-benefit analysis and allow the negative economic impacts of designation to potentially trump the need for protection.⁷¹ It also enabled NOAA to avoid responsibility for designating viable candidate sites by claiming budget problems or by determining that an area or its resources could be protected by other agencies—which it did when the Flower Garden Banks sanctuary was initially proposed.⁷² The LRA requirement also resulted in “putting the program in a reactive posture, responding to a large number of nominations, some inappropriate, but minimally acceptable under the guidelines.”⁷³

In response to the failure of the LRA, NOAA completed a program development plan for sanctuaries in 1982, which set forth goals explicitly

⁶⁷ Tarnas, *supra* note 30, at 281.

⁶⁸ Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,534.

⁶⁹ Marine Sanctuaries, 44 Fed. Reg. 44,837, 44,838 (July 31, 1979) (codified at 15 C.F.R. § 922.21(b)(1979)) (“To be eligible for placement on the List of Recommended Areas . . . a candidate area shall contain one or more of the following: (1) Important habitat on which any of the following depend for one or more of life-cycle activity, including breeding, feeding, rearing young, staging, resting or migrating: (i) Rare, endangered or threatened species; or (ii) Species with limited geographic distribution, or (iii) Species rare in the waters to which the Act applies, or (iv) Commercially or recreationally valuable marine species. (2) A marine ecosystem of exceptional productivity indicated by an abundance and variety of marine species at the various trophic levels in the food web. (3) An area of exceptional recreational opportunity relating to its distinctive marine characteristics. (4) Historic or cultural remains of widespread public interest. (5) Distinctive or fragile ecological or geologic features of exceptional scientific research or educational value.”).

⁷⁰ *Id.* at 44,838–39 (suggesting that a site on the LRA will be selected as an active candidate for designation as a marine sanctuary on the basis of: (1) The significance of the site’s resources; (2) The extent to which the means are available to conduct the required Public Workshop(s) within six months of selection as an Active Candidate; (3)(i) The severity and imminence of existing or potential threats to the resources including the cumulative effect of various human activities that individually may be insignificant; (3)(ii) The ability of existing regulatory mechanisms to protect the values of the site; (3)(iii) The significance of the area to research opportunities; (3)(iv) The value of the area in complementing other areas of significance to public or private programs with similar objectives, such as approved Coastal Zone Management programs; (3)(v) The aesthetic qualities of the area; (3)(vi) The type and estimated economic value of the natural resources and human uses within the area which may be foregone as a result of marine sanctuary designation, taking into account the economic significance to the nation of such resources and uses and the probable impact on them of regulations designed to achieve the purposes of sanctuary designation; and (3)(vii) The economic benefits to be derived from protecting or enhancing the resources within the sanctuary).

⁷¹ See Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,535.

⁷² *Id.*

⁷³ Tarnas, *supra* note 30, at 282.

oriented toward environmental preservation and protection,⁷⁴ and replaced the LRA with a site evaluation list (SEL).⁷⁵ The purpose of the SEL was to resolve the weaknesses in the LRA, most notably the overwhelming number of nominations that were accompanied by limited or poor information on a proposed site.⁷⁶ Under the SEL process, NOAA assigned eight regional resource evaluation teams, one to each fishery management region, to identify, evaluate, and recommend suitable sites for inclusion.⁷⁷ After further review, the Secretary would determine which sites to add to the list and publish them in the *Federal Register*.⁷⁸ The SEL, while an improvement on the LRA, was still vulnerable to special interests and highly susceptible to delay due to its lack of deadlines and open endedness.⁷⁹

In 1995, NOAA deactivated the SEL on the ground that it needed to be revised, but it has remained deactivated.⁸⁰ This has profoundly stunted the development of the Marine Sanctuaries Program. As NOAA Conservation Policy and Planning Division Chief John Armor stated, “the most impactful reason for the lack of [new or modifying] sanctuary designations has been the lack of a reactivated, up-to-date site evaluation list.”⁸¹

Congress added two key provisions to the Marine Sanctuaries Act in its 2000 reauthorization. The first established a budget-dependent moratorium on the addition of any new marine sanctuaries.⁸² The second provision authorized President Clinton to designate the Northwestern Hawaiian Island Coral Reef Ecosystem Reserve, a 140,000 square nautical mile area in Hawaii, and provided for its eventual designation as a national marine sanctuary.⁸³ The moratorium indicates that additions to the Marine Sanctuaries Program are not a high priority for congressional authorizing committees until such time as NOAA proposes an adequate plan and budget

⁷⁴ U.S. DEP’T OF COMMERCE, NATIONAL MARINE SANCTUARY PROGRAM: PROGRAM DEVELOPMENT PLAN 13 (1982).

⁷⁵ Marine Sanctuary Program Regulations, 48 Fed. Reg. 24,296, 24,296 (May 31, 1983) (codified at 15 C.F.R. pt. 922).

⁷⁶ U.S. DEP’T OF COMMERCE, *supra* note 74, at 19.

⁷⁷ *Id.* at 21.

⁷⁸ *Id.* at 28.

⁷⁹ Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,537.

⁸⁰ Marine Sanctuary Program Regulations, 60 Fed. Reg. 66,875, 66,875 (Dec. 27, 1995) (codified at 15 C.F.R. pt. 922).

⁸¹ Telephone Interview with John Armor, Conservation Policy and Planning Division Chief, Nat’l Oceanic and Atmospheric Admin. (Jan. 4, 2012).

⁸² National Marine Sanctuaries Act, 16 U.S.C. § 1434(f)(1); National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106-513, § 6(f), 114 Stat. 2,381, 2,385 (2000) (“The Secretary may not publish in the Federal Register any sanctuary designation notice or regulations proposing to designate a new sanctuary, unless the Secretary has published a finding that: (A) the addition of a new sanctuary will not have a negative impact on the [Sanctuaries Program]; (B) sufficient resources were available in the fiscal year in which the finding is made to: (i) effectively implement sanctuary management plans for each sanctuary in the [program]; and (ii) complete site characterization studies and inventory known sanctuary resources, including cultural resources, for each sanctuary in the [program] within 10 years after the date that the finding is made if the resources for those activities are maintained at the same level for each fiscal year in that 10 year period.”).

⁸³ National Marine Sanctuaries Amendments Act § (6)(f)(3)(B).

for managing existing sanctuaries,⁸⁴ and Congress itself provides the appropriations necessary to do so.⁸⁵

III. THE NATIONAL MARINE SANCTUARIES ACT AND THE ANTIQUITIES ACT OF 1906

A. Marine Sanctuaries Act: Requirements and Problems

The National Marine Sanctuaries Act directs the Secretary of Commerce⁸⁶ to “designate” marine areas of “special national significance” into national marine sanctuaries,⁸⁷ and confers the Secretary with discretionary authority to promulgate any regulations necessary to manage the Marine Sanctuaries Program.⁸⁸

The Act, in pertinent part, reads:

The Secretary [of Commerce] may designate . . . area[s] of the marine environment as National Marine Sanctuar[ies] . . . [with] special national significance due to [their] conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities. . . . The Secretary may issue such regulations as may be necessary to carry out this chapter.⁸⁹

Sanctuary designation under the Act involves highly complex and time-consuming procedures. NOAA must first consider twelve different competing development and conservation factors.⁹⁰ Then it must submit a

⁸⁴ Chandler & Gillelan, *Makings of the Sanctuaries Act*, *supra* note 14, at 28 (“The moratorium is a signal that additions to the sanctuary system are not a high priority for Congress . . .”).

⁸⁵ Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,560.

⁸⁶ Cabinet officers such as the Secretary of Commerce are nominated by the President and confirmed or rejected by the Senate. While the text of the Sanctuaries Act does not mention the President, the Secretary is under the President’s control.

⁸⁷ 16 U.S.C. § 1433(a) (2006) (“The Secretary [of Commerce] may designate any discrete area of the marine environment as a national marine sanctuary . . . if the Secretary determines that . . . the area is of . . . special national significance due to . . . its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or aesthetic qualities[.]”).

⁸⁸ *Id.* § 1439 (2006); *see also* Marine Protection, Research, and Sanctuaries Act Amendments of 1980, Pub. L. No. 96-332, §2(2), 94 Stat. 1057, 1057 (codified as amended at 16 U.S.C. § 1432 (2000)).

⁸⁹ 16 U.S.C. §§ 1433(a), 1439 (2006).

⁹⁰ *Id.* § 1433(b)(1)(A)–(L) (2006) (“For purposes of determining if an area of the marine environment meets the standards set forth [in this section] the Secretary shall consider . . . the area’s natural resource and ecological qualities . . . the area’s historical, cultural, archaeological, or paleontological significance . . . the present and potential uses of the area that depend on maintenance of the area’s resources, including . . . fishing, subsistence uses, other commercial and recreational activities, and research and education; the present and potential activities that may adversely affect [such factors] . . . the existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this chapter . . . the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities . . . the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate

draft environmental impact statement to Congress. If Congress does not reject or indefinitely table NOAA's submission, the agency must then engage in a series of notice and comment proceedings⁹¹ and organize public hearings.⁹²

Afterward, the agency must obtain final legislative approval. The legislative component requires the Secretary and NOAA Administrator to appear before and gain the approval of two committees in the House and Senate.⁹³ The committees may reject the agency's proposal or any portion of its terms,⁹⁴ or accept the proposal and issue a recommendation report that the agency must consider before publishing its proposal in the *Federal Register*.⁹⁵

Next, NOAA must engage in three levels of interagency consultation. The agency must first laterally consult with at least five other executive agencies.⁹⁶ Then, it must consult with state agencies that may be affected by any changes to a sanctuary.⁹⁷ The states then may either consent to the proposed changes, or declare any parts inapplicable within state waters.⁹⁸

The last step in the process requires NOAA to consult with the Regional Fishery Management Councils that would or could potentially be affected by

tourism . . . the negative impacts produced by management restrictions on income-generating activities such as . . . resources development . . . the socioeconomic effects of sanctuary designation . . . the area's scientific value and value for monitoring the resources and natural processes that occur there . . . the feasibility . . . of employing innovative management approaches to protect the sanctuary resources or to manage compatible uses; and . . . the value of the area as an addition to the System.”)

⁹¹ *Id.* § 1434(a)(1)(A)–(B) (“In proposing to designate a national marine sanctuary, the Secretary shall . . . issue . . . notice of the proposal, proposed regulations that may be necessary and reasonable to implement the proposal, and a summary of the draft management plan . . . [and] provide notice of the proposal [in general paper and electronic media] in the communities that may be affected by the proposal”).

⁹² *Id.* § 1434(a)(3) (“[T]he Secretary shall hold at least one public hearing in the coastal area or areas that will be most affected by the proposed designation of the area.”).

⁹³ *Id.* § 1433(b)(2) (“In making determinations and findings, the Secretary shall consult with . . . the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate; . . .”).

⁹⁴ *See* Baur et al., *supra* note 65, at 509 (2004) (discussing Congress's ability to reject a designation or any of its terms through the adoption of a concurrent resolution during the review period).

⁹⁵ 16 U.S.C. § 1434(a)(6), (b)(1) (2000).

⁹⁶ *Id.* § 1433(b)(2)(B) (“In making determinations and findings, the Secretary shall consult with . . . the Secretaries of State, Defense, Transportation, and the Interior, the [NOAA] Administrator, and the heads of other interested Federal agencies”).

⁹⁷ *Id.* § 1433(b)(2)(C) (noting that the Secretary shall consult with “the responsible officials or relevant agency heads of the appropriate State and local government entities . . . that will or are likely to be affected by the establishment of the area as a national marine sanctuary”).

⁹⁸ *Id.* 1434(b)(1) (designation “shall take effect . . . unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State”).

changes to the terms of an existing sanctuary.⁹⁹ Here, NOAA must provide affected or potentially affected Regional Councils with the opportunity to draft fishing regulations that will govern the area of proposed changes to a sanctuary.¹⁰⁰ This creates a radically different relationship between NOAA and consulted authorities compared to the earlier congressional and interagency consultations. Notwithstanding the Marine Sanctuaries Act's goal to promote marine conservation, the Magnuson-Stevens Act¹⁰¹—a statute enacted to promote the fishing industry's optimal exploitation of fisheries¹⁰²—supplants the Marine Sanctuaries Act if and when sanctuary designations affect U.S. fisheries in any way.¹⁰³

The hurdles standing in the way of future sanctuary designations under the Marine Sanctuaries Act are primarily political and legal in nature. Consequently, when Congress revisits the Act, it will have more to contend with than simply repealing the prohibition on future designations. The delayed designations of the Florida Keys and the Northwest Hawaiian Islands sanctuaries under the Act, as discussed below, illustrate some of its most common political and legal obstacles.

Similarly, structural deficiencies in the Marine Sanctuaries Act itself have made it increasingly difficult for the Marine Sanctuaries Program to redesignate, or modify, the terms of sanctuaries at scale or in degree. Reshaping boundaries by contraction or expansion and managerial restructuring are illustrative examples of modifications of scale. Revisions of marine zones and activity restrictions into more or less permissive iterations are examples of modifications of degree. The Act's excessive layers of procedural review and redundant public processes prevent the timely implementation of such modifications, and impede the preservation of the Marine Sanctuaries Program.¹⁰⁴ The Act's stunting effect on the Marine Sanctuaries Program has also interrupted its crucial role in the development of a National System of Marine Protected Areas.¹⁰⁵

The Marine Sanctuaries Act is unrealistically designed to achieve the maximum consensus between conservation and exploitation interests, while also producing widely supported sanctuaries. The Marine Sanctuaries Act's designation legacy has been fraught with halting challenges because a proposed designation must gain congressional attention and approval,

⁹⁹ *Id.* § 1433(b)(2) (“[T]he Secretary shall consult with . . . the appropriate officials of any Regional Fishery Management Council [established under the Magnuson-Stevens Act] that may be affected by the proposed designation.”).

¹⁰⁰ *Id.* § 1434(a)(5) (“The Secretary shall provide the . . . Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary.”).

¹⁰¹ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (2006).

¹⁰² *Id.* § 1801(b)(4) (“[T]o provide for the preparation and implementation . . . of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.”).

¹⁰³ *See* National Marine Sanctuaries Act, 16 U.S.C. § 1434(a)(5) (2000); *see also* Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21 at 10,559–60.

¹⁰⁴ Brax, *supra* note 3, at 92.

¹⁰⁵ *Id.* at 77.

successfully maneuver through a lengthy, politically complicated period of interagency consultation, and clear partisan public processes, in addition to securing the approval of Regional Councils under the Magnuson-Stevens Act.

During opportunities for public input on sanctuary management, commercial and industrial interests are vastly overrepresented as compared to conservation and community interests.¹⁰⁶ It is difficult to secure the participation of non-affiliated stakeholders because they generally have a modicum of experience with local government.¹⁰⁷ Further, having meaningful, consistent involvement in public comment periods and hearings requires a substantial devotion of time and financial resources that most ordinary stakeholders do not have. The number of these public processes, and the resources required to participate in them, tend to allow single-interest recreational, commercial, and industrial groups to halt or corrupt the process of designating the terms of a sanctuary.¹⁰⁸ For example, attendance by commercial and recreational fishermen at NOAA-sponsored opportunities for public input on the status of changes to the terms of the Florida Keys sanctuary has been significant, but non-affiliated stakeholder turnout has been sparse.¹⁰⁹ Counter to the democratic purpose of public comment periods and hearings, these problems with the Act's public processes have benefited stakeholders with consolidated political and financial capital, while disadvantaging less well organized, individual stakeholders.

*B. Magnuson-Stevens Fishery and Conservation Act: Conservation
in Name Only*

In 1976, congressional interest in the marine environment was piqued by economics. To quell the problem of foreign fishing fleets' exploitation of American fisheries and promote optimum yield management of domestic fisheries through Regional Councils, Congress passed the Magnuson-Stevens

¹⁰⁶ See, e.g., Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,528 (describing the oil industry's antipathy toward national marine sanctuaries and history of political mobilization against them); JOSH EAGLE ET AL., *TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS* 13 (Island Press, 2003) (describing commercial stakeholders' dominance of Regional Fishery Management Councils); see also HAROLD F. UPTON & EUGENE H. BUCK, CONG. RESEARCH SERV., RL32154, *MARINE PROTECTED AREAS: AN OVERVIEW* 1 (2010) (describing the varying perspectives of the scientific, environmental, and commercial communities as they concern designations of Marine Protected Areas); accord Niki L. Pace, *Ecosystem-Based Management Under the Magnuson-Stevens Act: Managing the Competing Interests of the Gulf of Mexico Red Snapper and Shrimp Fisheries*, 2 SEA GRANT LAW & POL'Y J. 1, 14–15 (Winter 2009/2010).

¹⁰⁷ See generally Tracey Morin, *Sanctuary Advisory Councils: Involving the Public in the National Marine Sanctuary Program*, 29 COASTAL MGMT. 327, 335–39 (2001) (discussing the difficulties and frustrations shared by some members of Sanctuary Advisory Councils who were participating in the implementation of the National Marine Sanctuaries Program).

¹⁰⁸ Brax, *supra* note 3, at 87.

¹⁰⁹ Telephone interview with Karrie Carnes, Commc'ns Dir., Fla. Keys Nat'l Marine Sanctuary (Dec. 15, 2011).

Act.¹¹⁰ Many of the current problems associated with marine sanctuary management are because the Magnuson-Stevens Act supplants portions of the Marine Sanctuaries Act,¹¹¹ and requires NOAA to consult Regional Councils.¹¹²

Under the Marine Sanctuaries Act, NOAA must accept Council-issued regulations.¹¹³ The binding nature of Council-issued regulations presents a conflict of missions between the Marine Sanctuaries Program and the Magnuson-Stevens Act—a conflict that is resolved in favor of the latter.¹¹⁴ The Councils' discretion to craft binding regulations of their own allows them to exercise more influence on the designation process than the states, other executive agencies, or even Congress. States are jurisdictionally limited to accepting or rejecting a sanctuary designation's new terms within state waters.¹¹⁵ Other executive agencies may either accept designation proposals, or attempt to leverage political power within the executive branch to force NOAA to alter or abandon its proposed designation. Congress must either accept designation proposals and attach non-binding recommendations, or reject them in part or in whole. Although the Marine Sanctuaries Act technically grants the Secretary the power to object to Council regulations on the basis that they would harm the resources of a sanctuary, it puts the burden on the Secretary to demonstrate how these regulations are incompatible with the goals and objectives of a marine sanctuary—a difficult burden to discharge, since all marine sanctuaries are governed by a compatible use standard.¹¹⁶

A related problem is the allocation of power within the Regional Councils, which, as a collective independent federal authority, are not subject to the Secretary's authority. The Regional Councils are largely composed of parochial state and private fishing industry interests,¹¹⁷ and the lack of power sharing between Council committees results in these

¹¹⁰ Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,530.

¹¹¹ *Id.* at 10,559–60; *see also* National Marine Sanctuaries Act, 16 U.S.C. § 1434(a)(5) (2000).

¹¹² 16 U.S.C. § 1433(b)(2)(2000).

¹¹³ *Id.* § 1434(a)(5).

¹¹⁴ *Id.* (“Draft regulations prepared by the Council . . . shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation.”).

¹¹⁵ *Id.* § 1434(b)(1).

¹¹⁶ *See supra* note 35 and accompanying text; *see also* ADAM VANN, CONG. RESEARCH SERV., RL32486, MARINE PROTECTED AREAS (MPAS): FEDERAL LEGAL AUTHORITY 10 (2008).

¹¹⁷ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1852(b)(1)(A) (2000) (“The voting members of each Council shall be . . . the principal State official with marine fishery management responsibility . . . in each constituent State”); *id.* § 1852(b)(2)(C) (2000) (“The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State.”); *id.* (“A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has . . . first consulted with representatives of the commercial and recreational fishing interests of the State.”); EAGLE ET AL., *supra* note 106, at 24 (“Only 18 % of the appointed council members in 2001 did not directly work in or represent the fishing industry. Many of these members, moreover, were academic scientists or economists with long-standing affiliations with the fishing industry.”).

economic interests trumping scientific interests.¹¹⁸ While Council fishing industry committees enjoy advisory status and are empowered to make recommendations,¹¹⁹ Council science committees lack the power to make recommendations and explicitly exist to serve the Councils in gathering information.¹²⁰

A third area of concern is the Councils' virtually unlimited regulatory authority under the Magnuson-Stevens Act. Unlike NOAA's well-defined and circumscribed authority to draft regulations under the Marine Sanctuaries Act,¹²¹ the Magnuson-Stevens Act does not confine Councils to the regulation of fisheries, since almost any proposed designation or regulation by NOAA could affect, or potentially affect, a fishery. Finally, the Secretary is vexed by his or her conflicting responsibilities to manage sanctuaries for conservation, as well as manage fisheries for exploitation purposes. Any countervailing power the Secretary technically possesses to check Council regulations that exceed the scope of their authority is paralyzed in practice, and is usually resolved in favor of Council regulations.¹²² At a more general level, the Magnuson-Stevens Act's separate procedural requirements superimpose several redundant layers of mandatory public process upon the Marine Sanctuaries Act's already cumbersome and vulnerable public process requirements.

C. Antiquities Act: Substantive and Procedural Requirements

The Antiquities Act's concise text belies its historically extensive power and present-day usefulness. In this one-page act, Congress delegated to the President discretionary authority to declare objects of scientific or historic interest as national monuments.¹²³ Presidents have used the Antiquities Act

¹¹⁸ Thomas A. Okey, *Membership of the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 MARINE POL'Y 193, 197-99 (2003) (finding that between 1990 and 2001, Council members representing commercial fishing interests far outnumbered those representing the scientific community and conservation groups); Pace, *supra* note 106, at 14 ("[S]cientists and environmentalists rarely are represented on regional councils.").

¹¹⁹ 16 U.S.C. § 1852(g), (h) (2006).

¹²⁰ *See id.* § 1852(g)(1)(A) ("Each Council shall establish [and] maintain . . . a scientific and statistical committee to assist it in the development . . . [and] evaluation . . . of such statistical, biological, economic, social, and other scientific information as is relevant to [a] Council's development and amendment of any fishery management plan.").

¹²¹ National Marine Sanctuaries Act, 16 U.S.C. § 1439 (2006).

¹²² *See* Chandler & Gillelan, *Evolution of the Sanctuaries Act*, *supra* note 21, at 10,560 ("[S]ecretarial action to protect fish in sanctuaries is constrained by the Secretary's conflicting responsibilities. Sanctuaries are managed by the National Ocean Service, and fisheries by the [National Marine Fisheries Service], both [NOAA] bureaus within the DOC . . . [C]onflicts between the two bureaus typically 'get resolved in favor of [the fisheries service] at low levels before ever reaching the level of the Secretary.'").

¹²³ Antiquities Act of 1906, 16 U.S.C. § 431 (2006); *see also* William D. Neighbors, Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 105-06 (1964) (discussing the differences between presidential proclamations and executive orders); Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 540-41 (2000).

to create over 100 national monuments that have protected millions of acres of land and marine resources.¹²⁴ More importantly, precedent exists for presidential use of the Act to modify existing marine national monuments.¹²⁵

The Act, in pertinent part, reads:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract . . . held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.¹²⁶

Two events in the Antiquities Act's legislative history gave rise to a broad interpretation of the executive's power. Presidential discretion substantially increased when Congress expanded the Antiquities Act's initial scope from "historic landmarks and structures" to objects of "historic or scientific" interest.¹²⁷ Similarly, Presidential discretion was preserved when a provision in a draft version of the Act imposed a 640-acre limit that was later deleted and replaced it with the more liberal standard that each monument be "confined to the smallest area compatible" necessary to ensure protected objects' proper care and management.¹²⁸ The "historic or scientific" and "smallest area compatible" standards are more cursory than rigorous. To satisfy them, presidents have merely needed to insert the words "scientific" or "historic" and the phrase "smallest area compatible" into a proclamation to create a monument.¹²⁹

The distinction between "declaration" in the Antiquities Act and "designation" in the Marine Sanctuaries Act is crucial. The Marine Sanctuaries Act contains a "charter" provision that mandates procedural consistency across all designations that modify the terms of a sanctuary originally designated under that Act.¹³⁰ The provision states, "the terms of [a sanctuary's] designation may be modified only by the same procedures by

¹²⁴ See Klein, *supra* note 3, at 1343.

¹²⁵ See Robin Kundis Craig, *Are Marine National Monuments Better Than National Marine Sanctuaries? U.S. Ocean Policy, Marine Protected Areas, and the Northwest Hawaiian Islands*, 7 SUSTAINABLE DEV. L. & POL'Y 27, 31 (2006); Klein, *supra* note 3, at 1341–42.

¹²⁶ 16 U.S.C. § 431 (2006).

¹²⁷ See Klein, *supra* note 3, at 1341.

¹²⁸ 16 U.S.C. § 431 (2006); Ronald F. Lee, *The Antiquities Act of 1906*, 42 J. SOUTHWEST 197, 240–41 (2000).

¹²⁹ Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RESOURCES L. REV. 153, 163 (2011).

¹³⁰ National Marine Sanctuaries Act, 16 U.S.C. § 1434(a)(4) (2006).

which the original designation was made.”¹³¹ In other words, modifying the terms of an existing sanctuary requires following the same procedures employed in the original designation under the Marine Sanctuaries Act. Another important difference lies in the mechanics of the two Acts. The Antiquities Act neither designates nor modifies in the way contemplated by the Marine Sanctuaries Act’s charter provision. In contrast to the Marine Sanctuaries Act, which redesignates and preserves sanctuaries subject to approval by Congress and the states, the Antiquities Act requires only executive approval to declare new monuments.

1. Legislative and Judicial History

Presidents have used the Antiquities Act many times to modify existing terrestrial and aquatic monuments,¹³² and have garnered consistent approval by both the legislative and judicial branches.¹³³ The effects of modifications under the Act have been far from single-minded. Eight presidents have expansively modified fifteen monuments by approximately 995,235 acres. Seven presidents have contractively modified eight monuments by approximately 444,905 acres. Two presidents have expansively modified one marine monument by 17,285 acres.¹³⁴

Legal challenges to the Antiquities Act have been scant.¹³⁵ The United States Supreme Court has addressed it only twice.¹³⁶ When the first challenge was brought,¹³⁷ three presidents had already created nearly fifty monuments incorporating over 2.7 million acres,¹³⁸ setting a precedent that the Court was and has remained unwilling to disturb for over 100 years.¹³⁹ As of this writing, a president’s exercise of authority under the Antiquities Act has never been curtailed or invalidated.¹⁴⁰

¹³¹ *Id.* Neither the Marine Sanctuaries Act’s language nor its legislative history provide any indication of congressional intent that the Act should serve as the exclusive mechanism for modifying sanctuaries. The Senate committee report for the 2000 Amendments to the Sanctuaries Act actually deletes “only by the same procedures by which the original designation is made” and replaces it with the phrase “by following the applicable procedures of the National Environmental Policy Act of 1969.” See S. REP. NO. 106-353, at 17 (2000); see also 146 CONG. REC. 5, 34 (daily ed. Oct. 17, 2000).

¹³² See generally Nat’l Park Serv., *National Monument Proclamations Under the Antiquities Act*, <http://www.nps.gov/history/history/hisnps/NPSHistory/monuments.htm> (last visited Feb. 17, 2012).

¹³³ Klein, *supra* note 3, at 1336.

¹³⁴ See *infra* Part III.C.2 and text accompanying notes 162–64.

¹³⁵ Klein, *supra* note 3 at 1344.

¹³⁶ *Accord id.*; see *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (rejecting a challenge to executive authority to create the Devil’s Hole National Monument); *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (rejecting a challenge to executive authority to create the Grand Canyon National Monument).

¹³⁷ *Accord* Klein, *supra* note 3, at 1343; see generally *Cameron*, 252 U.S. at 450 (upholding President T. Roosevelt’s proclamation that established the Grand Canyon National Monument).

¹³⁸ *Accord* Klein, *supra* note 3, at 1343; see 146 CONG. REC. S7030 (daily ed. Jul. 17, 2000).

¹³⁹ Klein, *supra* note 3, at 1343–44.

¹⁴⁰ See Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 172–84 (2004).

2. *Executive Precedent and Land Monuments*

In addition to the authority to create national monuments, the Antiquities Act also authorizes the President to expansively modify the size of existing monuments.¹⁴¹ There are numerous examples of Presidents using this authority. President Wilson enlarged two monuments by over 77,700 acres total,¹⁴² President Harding enlarged an existing monument by 128 acres,¹⁴³ President Coolidge enlarged an existing monument by 21,509 acres,¹⁴⁴ and President Hoover enlarged a monument by 11,010 acres.¹⁴⁵ President F.D. Roosevelt enlarged six monuments by over 209,300 acres total.¹⁴⁶ Principal among them was the 203,885-acre enlargement of the Dinosaur National Monument,¹⁴⁷ which President Roosevelt declared despite vigorous opposition by local landowners who railed against the threat of increased federal restrictions on their property rights—a fear that was never realized.¹⁴⁸ President Truman enlarged two monuments by 624 acres,¹⁴⁹ and President Kennedy enlarged a monument by 373 acres.¹⁵⁰ Later, President Clinton enlarged two monuments by over 670,000 acres.¹⁵¹

As many other examples can show, the Antiquities Act also authorizes the President to reduce the size of existing national monuments.¹⁵² In 1911, President Taft determined that the Petrified Forest National Monument¹⁵³ was “much larger than necessary to protect the objects for which [it] was created,” and diminished it by 25,625 acres.¹⁵⁴ In 1912, President Taft reduced the size of the Navajo National Monument by forty acres.¹⁵⁵ Three presidents between 1912 and 1929 cumulatively reduced the size of the Mount Olympus

¹⁴¹ Antiquities Act of 1906, 16 U.S.C. § 433(h) (2006).

¹⁴² Proclamation No. 1377, 40 Stat. 1673 (1917); Proclamation No. 1435, 40 Stat. 1760 (1918).

¹⁴³ Proclamation No. 1608, 42 Stat. 2249 (1921).

¹⁴⁴ Proclamation No. 1826, 45 Stat. 2937 (1928).

¹⁴⁵ Proclamation No. 1927, 46 Stat. 3040 (1930).

¹⁴⁶ Proclamation No. 2050, 48 Stat. 1701 (1933); Proclamation No. 2226, 50 Stat. 1817 (1937); Proclamation No. 2230, 50 Stat. 1825 (1937); Proclamation No. 2250, 51 Stat. 393 (1937); Proclamation No. 2528, 55 Stat. 1709 (1941).

¹⁴⁷ Proclamation No. 2290, 53 Stat. 2454 (1938).

¹⁴⁸ See STEVEN F. MEHLS, DINOSAUR NATIONAL MONUMENT HISTORIC RESOURCES STUDY 160 (1985).

¹⁴⁹ Proclamation No. 2773, 13 Fed. Reg. 1,603 (Mar. 26, 1948), *reprinted in* 62 Stat. 1491 (1948); Proclamation No. 2932, 16 Fed. Reg. 6,269-71 (June 29, 1951), *reprinted in* 65 Stat. c20-c22 (1951).

¹⁵⁰ Proclamation No. 3467, 27 Fed. Reg. 3,791 (Apr. 20, 1962), *reprinted in* 76 Stat. 1465 (1962).

¹⁵¹ Proclamation No. 7266, 65 Fed. Reg. 2,831 (Jan. 11, 2000); Proclamation No. 7373 (Nov. 9, 2000), 65 Fed. Reg. 69,221-24 (Nov. 15, 2001).

¹⁵² Justin Quigley, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 79 (1999); accord Scott Nishimoto, *President Clinton's Designation of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 J. ENVTL. L. & LITIG. 51, 55 (2002).

¹⁵³ Petrified Forest National Park Act, Pub. L. No. 85-358, 72 Stat. 69 (1958).

¹⁵⁴ Proclamation No. 1167, *reprinted in* 37 Stat. 1716 (July 31, 1911) (reducing it from 60,776 acres to 35,151 acres).

¹⁵⁵ Proclamation No. 1186, *reprinted in* 37 Stat. 1733 (Mar. 14, 1912).

National Monument by 314,080 acres.¹⁵⁶ In 1940, President F.D. Roosevelt reduced the size of the prized Grand Canyon National Monument by 71,854 acres,¹⁵⁷ and in 1941 reduced the size of the Wupatki National Monument by fifty-two acres.¹⁵⁸ In 1955, President Eisenhower reduced the size of the Glacier Bay National Monument by 29,118 acres,¹⁵⁹ and in 1959 reduced the size of the Colorado National Monument by 211 acres.¹⁶⁰ In 1963, President Kennedy reduced the size of the Bandelier National Monument by 3,925 acres.¹⁶¹

3. Executive Precedent and Marine Monuments

Presidents have used the Antiquities Act to create new marine national monuments in addition to the Hawaiian monument. In 1961, President Kennedy used it to create an 850-acre monument in heavily fished waters surrounding a small portion of a threatened 4,554-acre elkhorn coral reef in the Virgin Islands.¹⁶² In 2000, President Clinton used it to create a 1,000-acre national monument to ensure the protection of all exposed reefs, shoreline habitats, and islets from the coast of California to a distance of twelve nautical miles along the entire 840-mile California coastline.¹⁶³ President Clinton used it again in 2001 to create the Virgin Islands Coral Reef National Monument, which covers 12,708 acres of federal submerged lands.¹⁶⁴

President Bush used the Antiquities Act to create three marine monuments in 2009. One was the Marianas Trench Marine National Monument,¹⁶⁵ which spans nearly 100,000 square miles and covers the coral reefs of the waters surrounding the Northern Mariana Islands of Farallón de Pájaros, Maug, and Asuncion,¹⁶⁶ several miles of submerged volcanic lands, and an extensive area of the Mariana Trench including Challenger Deep, the deepest known point in the ocean. The second was the Pacific Remote Islands Marine National Monument, which covers 86,888 square miles of

¹⁵⁶ Proclamation No. 1191, *reprinted in* 37 Stat. 1737 (Apr. 17, 1912); Proclamation No. 1293, *reprinted in* 39 Stat. 1726 (May 11, 1915); Proclamation No. 1862, *reprinted in* 45 Stat. 2984 (Jan. 7, 1929).

¹⁵⁷ Proclamation No. 2393, *reprinted in* 54 Stat. 2692 (Apr. 4, 1940).

¹⁵⁸ Proclamation No. 2454, 3 C.F.R. §§ 52–53 (Jan. 22, 1941).

¹⁵⁹ Proclamation No. 3089, 20 Fed. Reg. 2130, 2130 (Apr. 5, 1955).

¹⁶⁰ Proclamation No. 3307, 24 Fed. Reg. 6741, 6741 (Aug. 12, 1959).

¹⁶¹ Proclamation No. 3539, 28 Fed. Reg. 5407, 5407–09 (June 1, 1963).

¹⁶² Proclamation No. 3443, 27 Fed. Reg. 31, 32 (Jan. 4, 1962). This proclamation established the Buck Island Reef National Monument, which should not to be confused with the Buck Island National Wildlife Refuge, which occupies a different but identically named Buck Island near St. Thomas.

¹⁶³ Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 18, 2000).

¹⁶⁴ Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001).

¹⁶⁵ Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 12, 2009). Technically, the monument declaration covered 95,216 miles. *Id.* at 1,558.

¹⁶⁶ For more information about these volcanoes, and their unique characteristics and topography see Global Volcanism Program, Smithsonian National Museum of Natural History, *Volcanoes of Japan, Taiwan, and the Marianas*, www.volcano.si.edu/world/region.cfm?num=08&rpge=list (click on the links for “Farallón de Pájaros,” “Maug,” and “Asuncion”) (last visited Feb. 17, 2013).

coral reef habitat in the waters around Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Palmyra Atoll, and Wake Island.¹⁶⁷ The last was the Rose Atoll Marine National Monument, which encompasses 13,451 square miles of the waters around Rose Island, the easternmost Samoan island and southernmost point in the United States. This area contains some of the most rare fringing coral reefs in the world, and provides habitat for several kinds of marine species.¹⁶⁸

Presidents have also used the Antiquities Act to modify existing marine monuments. In 1975, President Ford used the Act to expansively modify the Buck Island Reef monument by an additional thirty acres.¹⁶⁹ In 2001, President Clinton used the Act to expansively modify the reef to encompass an additional 18,135 marine acres,¹⁷⁰ despite vigorous opposition by local fishermen who, similar to the ranchers initially opposed to President Roosevelt's enlargement of the Dinosaur National Monument,¹⁷¹ feared the imposition of severe catch limits¹⁷²—a fear that has not been realized.

4. Legislative Responses

Legislators have sometimes criticized the Antiquities Act as a relic or an undemocratic exercise in excessive executive power. However, Congress has done very little to prevent its use.¹⁷³ The history of the Act and legislative responses to monument creations make clear that Congress has affirmed presidents' broad discretionary authority and approved funding for managing new monuments almost without fail.¹⁷⁴ Rather than attack the Antiquities Act itself, when Congress has objected to certain monument declarations, it has passed legislation that either modified the monuments

¹⁶⁷ Proclamation No. 8336, 74 Fed. Reg. 1565, 1567 (Jan. 12, 2009); *see also* Jon M. Van Dyke et al., *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?*, 25 SAN DIEGO L. REV. 425, 431–32, 440 (1988) (describing the various islands that are located within the Pacific Remote Islands Marine National Monument); 74 Fed. Reg. 1565 (Jan. 12, 2009) (“Wake Island . . . [is] perhaps the oldest living atoll in the world . . . shallow coral reefs thrive around the perimeter [of the island].”).

¹⁶⁸ Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 12, 2009).

¹⁶⁹ Proclamation No. 4359, 40 Fed. Reg. 14,565 (Apr. 1, 1975).

¹⁷⁰ Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 22, 2001).

¹⁷¹ MEHLS, *supra* note 148.

¹⁷² *See* Jamie Bate, *St. Croix Fishermen Wary of Monument Plans*, ST. CROIX SOURCE, Jan. 11, 2001, <http://stcroixsource.com/content/news/local-news/2001/01/11/st-croix-fishermen-wary-monument-plans-0> (last visited Feb. 17, 2013).

¹⁷³ Klein, *supra* note 3, at 1335, 1355, 1403.

¹⁷⁴ CAROL HARDY VINCENT & KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2010), *available at* <http://www.fas.org/sgp/crs/misc/R41330.pdf>; *accord* Klein, *supra* note 3, at 1355; *cf.* Davidson, *supra* note 40, at 516 (“Since the passage of the Antiquities Act, fourteen of seventeen presidents have used it to establish 123 national monuments. Congress has only abolished seven of those monuments and five others have been reduced in size, which seems to indicate Congress’s reluctance to override the Executive in this.”).

into less sizeable or with fewer restrictive uses,¹⁷⁵ or eliminated them entirely.

The Act does nothing to limit Congress's ability to pass legislation to reduce the size of monuments,¹⁷⁶ revise their zones to suit local needs,¹⁷⁷ eliminate them, or enhance opportunities for public participation in the management of the monument—all of which it has done multiple times.¹⁷⁸ Since the Act's passage, Congress has abolished nine monuments entirely and down-listed eleven monuments into less protective variations.¹⁷⁹

Congress un-designated the Papago Saguaro, Mount of the Holy Cross, Wheeler Geologic Area, Shoshone Cavern, Old Kasaan, Castle Pinckney, Verendrye, Fossil Cycad, and Gran Quivira national monuments.¹⁸⁰ It also revoked the designation of the Lewis and Clark and Father Millet Cross monuments, returning them to their respective states, which then elected to preserve them as state parks.¹⁸¹ Additionally, Congress redesignated the Chesapeake and Ohio Canal, Sitka, Chaco Canyon, Tumacacori, and Mound City Group monuments as National Historical Parks.¹⁸² It also redesignated

¹⁷⁵ See Klein, *supra* note 3, at 1356–58 (discussing examples when Congress has limited the Executive's authority to declare monuments under the Antiquities Act).

¹⁷⁶ *But cf.* Ranchod, *supra* note 123, at 552 (stating that although Congress has the power to change or reverse a designation, it is practically challenging to do so because it is difficult to generate the legislative super-majorities that are necessary overcome presidential vetoes).

¹⁷⁷ *Id.*; see, e.g., Act of Sept. 8, 1960, Pub. L. No. 86-729, 74 Stat. 857 (enlarging Dinosaur National Monument from 203,885 acres to 211,141 acres and eliminating cattle grazing on it).

¹⁷⁸ See Ranchod, *supra* note 123, at 552; see also VINCENT & ALEXANDER, *supra* note 174, at CRS-22 (“For instance, Congress could allow more . . . uses than is typical for national monuments created by the President, for instance by allowing new commercial development”).

¹⁷⁹ *But cf.* Ranchod, *supra* note 123, at 552 (stating that very few monuments have been undone by Congress, and that those few that have been undone involved very small areas of little national significance).

¹⁸⁰ Act of April 7, 1930, ch. 107, 46 Stat. 142 (abolishing Papago Saguaro National Monument and returning it to the cities of Tempe and Phoenix, Arizona); Act of Aug. 3, 1950, ch. 530, 64 Stat. 404 (abolishing the Holy Cross National Monument); Act of Aug. 3, 1950, ch. 534, 64 Stat. 405 (abolishing the Wheeler National Monument, transferring it to the U.S. Forest Service, and later incorporating it into the La Garita Wilderness Area); Act of May 17, 1954, Pub. L. No. 83-360, 68 Stat. 98 (abolishing the Shoshone Cavern National Monument and returning it to the city of Cody, Wyoming); Act of July 26, 1955, Pub. L. No. 84-179, 69 Stat. 380 (abolishing the Old Kasaan National Monument and transferring it to the United States Forest Service); Act of Mar. 29, 1956, Pub. L. No. 84-447, 70 Stat. 61 (abolishing the Castle Pinckney National Monument); Act of July 30, 1956, Pub. L. No. 84-846, 70 Stat. 730 (abolishing the Verendrye National Monument, transferring it to the State of North Dakota, and subsequently flooding it as part of the Lake Sasakawea reservoir); Act of Aug. 1, 1956, Pub. L. No. 84-891, 70 Stat. 898 (abolishing the Fossil Cycad National Monument and transferring it to the Bureau of Land Management); Act of Dec. 19, 1980, Pub. L. No. 96-550, 94 Stat. 3231–32 (abolishing the Gran Quivira National Monument).

¹⁸¹ Act of Aug. 24, 1937, Pub. L. No. 75-343, 50 Stat. 746 (abolishing and transferring to the State of Montana property presently known as the Lewis and Clark State Park); Act of Sept. 7, 1949, Pub. L. No. 81-292, 63 Stat. 691 (abolishing and transferring to the state of New York property presently known as the Old Fort Niagara State Park).

¹⁸² Act of Jan. 8, 1971, Pub. L. No. 91-664, 84 Stat. 1978 (establishing the Chesapeake and Ohio Canal National Historical Park); Act of Oct. 18, 1972, Pub. L. No. 92-501, 86 Stat. 904 (redesignating the Sitka National Monument as the Sitka National Historical Park); Act of Dec. 19, 1980, Pub. L. No. 96-550, 94 Stat. 3221 (establishing the Chaco Culture National Historical Park in New Mexico); Act of Aug. 6, 1990, Pub. L. No. 101-344, 104 Stat. 393 (abolishing the

the Fort Laramie and Edison Laboratory National Monuments into National Historic Sites,¹⁸³ and redesignated the Big Hole Battlefield as a National Battlefield and Perry's Victory and International Peace Memorial as a National Memorial.¹⁸⁴

D. Antiquities Act Problems and Solutions

As noted above, some have debated the Antiquities Act's propriety as a means to create new sanctuaries, but none have considered its usefulness to modify existing ones.¹⁸⁵ On the one hand, the Act has been criticized as undemocratic because it circumvents congressional intent and public participation,¹⁸⁶ while on the other, it has been touted as preventing political capture of the public process and providing an automatic protective status that can be subsequently negotiated.¹⁸⁷ But that debate is unripe until Congress repeals the indefinite moratorium on new sanctuaries, and NOAA reactivates the SEL.¹⁸⁸ If the Act were instead used to facilitate critically needed modifications for existing sanctuaries by displacing them as sanctuaries and replacing them as monuments, it would preserve existing marine sanctuaries until Congress decides to act.

It is easy to overstate the virtues of the Antiquities Act, which are functions of the statute's age. The Act was passed before public notice and comment became the norm for democratic participation in government actions, and well before both the rise of administrative agencies and Congress's confinement of agency discretion through the Administrative Procedure Act.¹⁸⁹

The amount of power that the Antiquities Act confers to presidents is great, and just as perilous as it is promising. It can be used to minimize or abolish monuments just as easily as it can be used to expand or enhance them. The Act also forecloses many of the ordinary avenues to challenge agency actions. For example, the Act is not subject to review under the National Environmental Policy Act because NEPA regulates federal "agencies" and therefore does not apply to actions of the President himself

Tumacacori National Monument, and establishing in its stead, the Tumacacori National Historical Park); Act of May 27, 1992, Pub. L. No. 102-294, 106 Stat. 185 (redesignating the Mound City Group National Monument as the Hopewell Culture National Historical Park).

¹⁸³ Act of Apr. 29, 1960, Pub. L. No. 86-444, 74 Stat. 83 (redesignating the Fort Laramie National Monument as the Fort Laramie National Historic Site); Act of Sept. 5, 1962, Pub. L. No. 87-628, 76 Stat. 428 (redesignating the Edison Home National Historic Site and the Edison Laboratory National Monument as the collective Edison National Historic Site).

¹⁸⁴ Act of May 17, 1963, Pub. L. No. 88-24, 77 Stat. 18 (redesignating the Big Hole Battlefield National Monument as the Big Hole National Battlefield); Act of Oct. 26, 1972, Pub. L. No. 92-568, 86 Stat. 1181 (redesignating the Perry's Victory and International Peace Memorial National Monument as an International Peace memorial).

¹⁸⁵ See *supra* note 4 and accompanying text.

¹⁸⁶ Briggitt, *supra* note 4, at 413; Laemmle, *supra* note 4, at 155-56.

¹⁸⁷ See Brax, *supra* note 3, at 113; White, *supra* note 4, at 119.

¹⁸⁸ Armor, *supra* note 81.

¹⁸⁹ 5 §§ U.S.C. 511-599, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

under the Antiquities Act.¹⁹⁰ Consequently, putting faith in one president to exercise this authority delegated by Congress necessarily means trusting all presidents. Some may choose to create and expand protected areas. But, others may choose to impair them. Independent of the result, notice and comment is a *sine qua non* of modern administrative procedure, and the Act's lack of a citizen participation provision presents a separate problem.

Precedent supports the proposition that it can be used to modify a marine protected area to effectuate necessary changes. These examples provide guidance on how to use the Antiquities Act in an appropriate manner. The Act has twice been used to expansively modify an existing marine monument at the Buck Island Reef monument, and once to re-dedicate the Northwestern Hawaiian Island Coral Reef Ecosystem Reserve into a much larger monument.¹⁹¹

These experiences provide useful lessons on how to set parameters to avoid abuse of power concerns surrounding the Antiquities Act. Although both of these modifications occurred before the moratorium was enacted, they did occur long after the passage of the Administrative Procedure Act. Moreover, both implicated areas of the marine environment that were or had been subjected to intense human use.¹⁹²

The Antiquities Act should be strictly used to modify existing sanctuaries so as to manage and maintain them until Congress can repeal the moratorium on sanctuary designations.¹⁹³ The Marine Sanctuaries Act, by contrast, provides no way for the executive to assist Congress in an effective, timely fashion. The Antiquities Act, if used this way, acknowledges, but does not bypass, the congressional moratorium.

The Antiquities Act's public participation issues may have already been addressed. NOAA views the Act with caution because of its capacity to damage the agency's stakeholder relationships and public image in a climate of tightening budgets. Congress has consistently paid little attention to NOAA, and has generally underfunded the agency, as well as the Marine Sanctuaries Program.¹⁹⁴ As such, the agency is likely loath to agitate stakeholders for fear of attracting negative attention from the public and their representatives.

Public participation, in fact, confers substantial benefits upon NOAA. To compensate for legislators' historical disinterest in the agency, NOAA actually benefits by maximizing stakeholder involvement. When the public

¹⁹⁰ *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978); accord Klein, *supra* note 3, at 1352–53.

¹⁹¹ Proclamation No. 8031, 71 Fed. Reg. 36443 (June 26, 2006); Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 22, 2001); Proclamation No. 4359, 40 Fed. Reg. 14565 (Apr. 1, 1975).

¹⁹² See discussion on expansive modification of the Buck Island Reef National Monument *supra* note 169–170 and accompanying text, and discussion on expansive modification of the Papahānaumokuākea Marine National Monument *infra* Part IV.B.

¹⁹³ See discussion on sanctuary management and local government gridlock *supra* Part III.A–B.

¹⁹⁴ See, e.g., U.S. SENATE COMM. ON APPROPRIATIONS, FISCAL YEAR 2013 COMMERCE, JUSTICE, SCIENCE APPROPRIATIONS 1, 2 (2012), <http://www.appropriations.senate.gov/news.cfm?method=news.view&id=6bc432b7-656b-4930-b0cf-bd3deef4fc3a> (last visited Feb. 17, 2013); see also *supra* Part II.A–B.

participates, NOAA enhances its political visibility and standing in Congress. This occurred during the creation of the Hawaiian monument when NOAA voluntarily committed itself to engage with the public and respond to comments. Even if NOAA did not take this pro-participation stance, Presidents and legislators are not isolated from the political process.¹⁹⁵ As soon as a monument is created, Congress could easily pass legislation to require public comment and opportunities for participation. It could even eliminate the monument modification entirely and revert it back to its previous status as a sanctuary. As noted, it has not hesitated to de-list and modify monuments in the past.¹⁹⁶

A last check on excessive use of the Antiquities Act is NOAA's administrative restraint. There is no indication that the agency would abruptly subject vast swaths of ocean to no-take reserves. Marine protected areas are, like lands, zoned to permit and prohibit certain kinds of uses and activities.¹⁹⁷ Contrary to some assumptions, no-take reserves comprise less than one one-hundredth of all marine protected areas.¹⁹⁸ As such, NOAA's institutional restraint toward expansive no-take zoning provides a safeguard against executive overreach.

Parallel structures in other statutes attest to the propriety of modifying marine sanctuaries through the mechanism of monument creation. The mission and goals of the Marine Sanctuaries Program are similar to land-based resource management programs such as national wildlife refuges.¹⁹⁹ Another similarity is the national park system's program of national natural landmarks, which also operates under a compatible use standard.²⁰⁰

The national refuge system and natural landmark program both allow the executive to exercise a great deal of power. All of the refuges situated within or adjacent to marine national monuments have been created by executive action without congressional approval.²⁰¹ The fact that Congress

¹⁹⁵ Accord Hartman, *supra* note 129, at 168; see Sandra B. Zellmer, *The Devil, The Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1047 (2000);

¹⁹⁶ See discussion *supra* Part III.C.4.

¹⁹⁷ See UPTON & BUCK, *supra* note 106, at 3–4; Kim Diana Connolly et al., *Marine Protected Areas*, in OCEAN AND COASTAL LAW AND POLICY 535, 539 (Donald C. Baur, Tim Eichenburg & Michael Sutton eds., 2008).

¹⁹⁸ Thomas E. Fish et al., *Marine Protected Areas: Framing the Challenges*, 20 CURRENT J. MARINE EDUC. no. 3, 2004, at 2; but see Baur et al., *supra* note 65, at 505 (noting that some stakeholders have opposed MPAs because they assume that the use-restrictions are too onerous).

¹⁹⁹ Cf. Chandler & Gillelan, *Makings of the Sanctuaries Act*, *supra* note 14, at 29–30 (noting the aspirational goals of the National Marine Sanctuaries Act and how they are similar to those of statutes like the Wilderness Act—even if they're not as well implemented) See generally, Owen, *supra* note 23 (summarizing the NMSA's poor design).

²⁰⁰ JEFFREY A. ZINN ET AL., CONG. RESEARCH SERV., RL32154, MARINE PROTECTED AREAS: AN OVERVIEW 10 (2008); see also Epting, *supra* note 28, at 1,041.

²⁰¹ See generally Buck Island, Green Cay, and Sandy Point National Wildlife Refuges, U.S. VI, 74 Fed. Reg. 47,815, 47,816 (Sept. 17, 2009) (providing background information on when and why these national wildlife refuges were established in the U.S. Virgin Islands near the Buck Island Reef National Monument); Exec. Order No. 13,022, 61 Fed. Reg. 56,875, 56,875 (Nov. 4, 1996) (establishing by executive order the Midway Atoll National Wildlife Refuge); Proclamation No. 8336, 74 Fed. Reg. 1,565, 1,565 (Jan. 12, 2009) (establishing the Pacific Remote Islands Marine

has modified intensively used coastal and ocean refuges suggests that it would be uncontroversial for the executive to exercise the Antiquities Act to modify marine sanctuaries—several of which are located in substantially less heavily exploited or contested areas. All natural landmarks have similarly been designated without congressional approval. Coastal or ocean sites comprise 39 of the 594 total national natural landmarks that have been designated.²⁰²

The National Wildlife Refuge System²⁰³ includes 180 ocean and coastal refuges that encompass approximately 7 million acres of tidal holdings and 30 million coastal acres.²⁰⁴ The refuge system is governed by the National Wildlife Refuge Administration Act of 1966²⁰⁵ as amended by the National Wildlife Refuge System Improvement Act of 1997.²⁰⁶ Like the Antiquities Act, the Refuge Acts authorize the President to quickly declare eligible federal lands and waters to be a wildlife refuge without approval by Congress. The Acts also authorize the President, through the Secretary of the Interior, to adjust refuge boundaries without Congress's approval. In doing so, the Secretary is charged with managing refuges to maintain their biological integrity, diversity, and environmental health under a compatible use paradigm.²⁰⁷

Presidents, all without congressional approval, created all of the refuges situated within or adjacent to marine national monuments. These include the actual islands and near shore areas of the Hawaiian marine national monument, the Pacific Remote Islands monument,²⁰⁸ and the Rose Atoll monument.²⁰⁹ Congress has also expanded and reduced the sizes of certain refuges. For example, it redesignated the Key West National Wildlife Refuge, originally a bird preserve,²¹⁰ to encompass several islands and their nearshore waters.²¹¹ Congress also redesignated the Great White Heron

National Monument and establishing Baker, Howland and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll as national wildlife refuges by presidential proclamation).

²⁰² See NAT'L PARK SERV., NATIONAL REGISTRY OF NATIONAL LANDMARKS 1 (2009), available at <http://nature.nps.gov/nnl/docs/NNLRegistry.pdf> (listing national natural landmarks including the 39 in coastal or ocean areas).

²⁰³ U.S. Fish & Wildlife Serv., *National Wildlife Refuge System: Special Management Areas*, <http://www.fws.gov/refuges/whm/wilderness.html> (last visited Feb. 17, 2013).

²⁰⁴ U.S. Fish & Wildlife Serv., *National Wildlife Refuge System: Coastal and Marine Resources*, <http://www.fws.gov/refuges/whm/coastalandmarine.html> (last visited Feb. 17, 2013).

²⁰⁵ National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2006).

²⁰⁶ National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified as amended at 16 U.S.C. §§ 668dd–668ee (2006)).

²⁰⁷ U.S. FISH & WILDLIFE SERV., MARINE REFUGES: NATIONAL WILDLIFE REFUGE SYSTEM, available at http://www.fws.gov/refuges/whm/pdfs/MarineProgramFactSheet_7.pdf.

²⁰⁸ Proclamation No. 8336, 70 Fed. Reg. 1,565 (Jan. 12, 2009); see also Secretarial Order No. 3284 (Jan. 16, 2009), available at <http://www.fws.gov/marianastrenchmarinemonument/so3284.pdf>.

²⁰⁹ Proclamation No. 8337, 70 Fed. Reg. 1,577 (Jan. 12, 2009); see also Secretarial Order No. 3284 (Jan. 16, 2009) available at <http://www.fws.gov/marianastrenchmarinemonument/so3284.pdf>.

²¹⁰ Exec. Order No. 763, reprinted in U.S. DEP'T OF AGRIC., LAWS APPLICABLE TO THE UNITED STATES DEPARTMENT OF AGRICULTURE 214 (1913).

²¹¹ Act of Jan. 3, 1975, Pub. L. No. 93-632, § 1(b), 88 Stat. 2153.

National Wildlife Refuge, also a former bird preserve in South Florida,²¹² to reduce it by twenty-five acres.²¹³

The National Natural Landmarks Program originated as a result of a creative interpretation of the Historic Sites Act of 1935²¹⁴ by Secretary of the Interior Stewart Udall.²¹⁵ “Reasoning that significant ecological and geological areas or features qualified as ‘objects of national significance’ under the Historic Sites Act, Secretary Udall created the program in 1962.”²¹⁶ The program, which is governed by federal regulations, “identifies and preserves natural areas that best illustrate the biological and geological character of the United States.”²¹⁷

To qualify for entrance into the program, sites must first meet National Park Service criteria for suitability and feasibility.²¹⁸ If qualified, they are entered into a pool of potential sites. The Secretary may designate any site candidate from this pool without having to seek congressional approval.

Natural landmark designations do not change the ownership of or impose any encumbrances or land use restrictions on property,²¹⁹ as such, these designations can occur on federal, state, and private property—unlike other federal protection systems and programs. However, the National Park Service has reserved the right to consider boundary modifications to one or more of six particular natural landmarks.²²⁰ States or local governments may also choose to impose restrictions of their own after a site has been designated as a natural landmark. Hence, the Secretary can easily precipitate new land use restrictions by working with state and local governments.

IV. THE SANCTUARY AND THE MONUMENT

The experiences of the Florida Keys sanctuary and Hawaiian monument together provide the best insight into the workings of both the Marine Sanctuaries and Antiquities Acts. The history of each of these sites makes them optimal candidates for comparison. The Florida Keys sanctuary formed out of a combination of several smaller marine protected areas. The Northwestern Hawaiian Islands—or Papahānaumokuākea Marine National Monument—was formed from the expansion of a smaller marine protected area into a significantly larger one.²²¹ For these reasons, this sanctuary and

²¹² Exec. Order No. 7993, 3 Fed. Reg. 2,581 (Oct. 29, 1938).

²¹³ Act of June 30, 1982, Pub. L. No. 97-211, 96 Stat. 141.

²¹⁴ Historic Sites Act of 1935, ch. 593, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461–467 (2006)).

²¹⁵ MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 430 (3d ed. 1997).

²¹⁶ *Id.*

²¹⁷ 36 C.F.R. § 62.1(b) (2012).

²¹⁸ National Natural Landmarks Program, 64 Fed. Reg. 25,708, 25,711–12 (May 12, 1999).

²¹⁹ 36 C.F.R. § 62.3 (2012).

²²⁰ 64 Fed. Reg. at 25,710.

²²¹ *See* NAT’L OCEANIC AND ATMOSPHERIC ADMIN. ET AL., *NORTHWESTERN HAWAIIAN ISLANDS MARINE NATIONAL MONUMENT: A CITIZEN’S GUIDE* 12, *available at* http://www.papahanaumokuakea.gov/PDFs/Citizens_Guide_Web.pdf.

monument are uniquely illustrative of how both Acts can be used to modify existing marine protected areas into consolidated sanctuaries and larger monuments. Both the Florida Keys sanctuary and Hawaiian monument were also considered for sanctuary status for an extended period of time under the Marine Sanctuaries Act.

The Florida Keys sanctuary protects unique tropical corals, seagrasses, and threatened fisheries; it is the second largest sanctuary in the program, one of the most recent, and arguably the best known.²²² The Hawaiian monument protects many of the same kinds of resources as the Florida Keys sanctuary. They are both also difficult to manage, but for different reasons. The Florida Keys sanctuary is challenging to manage because it is presently heavily used and contested by stakeholders, while the challenge of managing the Hawaiian monument results from its heavy former use and sprawling size.²²³ They also differ considerably in geography, surrounding population density, and use intensity. The Florida Keys sanctuary is located near a sizeable population and plays an important role in the local economy, while the Hawaiian monument is essentially an uninhabited space and is not as economically important to nearby communities. Moreover, the Hawaiian monument protects historical and cultural resources in addition to environmental resources, whereas the Florida Keys sanctuary exclusively protects environmental resources.

A. The Florida Keys National Marine Sanctuary

The Florida Keys sanctuary is the Marine Sanctuary Program's bellwether sanctuary, and along with the Hawaiian monument, is one of the most difficult to manage. Extending 220 square nautical miles southwest from Florida's southern tip, the 2,800-nautical-mile sanctuary encompasses two-thirds of the Florida Reef Tract. The reef itself is the third longest in the world, the only barrier coral reef in North America, and has the largest seagrass bed in the world.²²⁴

The environmental threats that face the Florida Keys sanctuary are mostly attributable to its location. Its waters are subject to extremely intensive commercial fishing and recreational tourist use,²²⁵ in addition to being one of the most heavily trafficked shipping lanes in the world.²²⁶ Acute eutrophic damage from nearby nonpoint sources of pollution such as

²²² See, e.g., REVISED MANAGEMENT PLAN, *supra* note 20, at i.

²²³ NAT'L OCEANIC AND ATMOSPHERIC ADMIN. ET AL., *supra* note 221 at 3, 5, 12.

²²⁴ See *id.* at i, 4, 323, 340. See generally Jean-Michel Cousteau *Ocean Adventures: America's Underwater Treasures* (PBS television broadcast Sept. 20, 27, 2006) [hereinafter *America's Underwater Treasures*].

²²⁵ See Sylvie Guénette et al., *Marine Protected Areas with an Emphasis on Local Communities and Indigenous Peoples: A Review*, 8 FISHERIES CENTRE RES. REP., 1, 19 (2000); see also *America's Underwater Treasures*, *supra* note 224.

²²⁶ See, e.g., Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA Receives Initial Green Light to Extend International Protection of the Florida Keys (Jul. 10, 2001), available at <http://www.sanctuaries.noaa.gov/news/pdfs/pr01archive.pdf>; Davidson, *supra* note 40, at 513.

marinas, cesspools, and septic tanks harm sanctuary resources.²²⁷ In addition, there is also chronic eutrophic damage, which occurs as a result of nutrient loading wrought by nonpoint sources of pollution such as agricultural runoff cascading down from Midwestern and Southeastern farms into the area.²²⁸

The Florida Keys sanctuary originally consisted of a disparate trio of smaller sanctuaries at Key Largo, Looe Key, and the John Pennekamp Coral Reef State Park.²²⁹ The saga of consolidating and expanding their overall area into the Florida Keys sanctuary began around 1980 and lasted until 1990. For nearly ten years, the initiative languished because legislative advocates were unable to gather enough political support in Congress.²³⁰ Even then, it took an exceptional confluence of events to overcome the political obstacles to designate the sanctuary. It took several vessel groundings in the Florida Keys to set the sanctuary's designation in motion.²³¹ This resulted in extensive media coverage of the accidents and criticism over NOAA's nine-year period of inaction under the Reagan and George H. W. Bush administrations. This unique set of events triggered just enough political pressure to generate sufficient interest and bipartisanship in Congress to finally designate the Florida Keys sanctuary.²³²

Congressional initiative was just the first step in the designation process. NOAA still had to clear the Marine Sanctuaries Act's public process hurdles before the sanctuary could be established.²³³ Single-interest groups such as the tourism and fishing industries, which have a tremendous amount of political power in Florida, stridently opposed the consolidation and expansion of the two small sanctuaries at Key Largo and Looe Key and the state marine park.²³⁴ Prior to the designation, single-interest groups conducted a massive publicity campaign to spread scientifically unsupported claims that threats to marine resources could not be attributed to human activities, and convinced many unaffiliated locals that marine sanctuaries were off-limit areas benefiting only wealthy vacationers.²³⁵ Political mobilization paid off. During public comment periods and local hearings, organized commercial groups and industry provoked sufficient opposition to the sanctuary to dramatically weaken its boating and fishing regulations.²³⁶

²²⁷ See MARK D. SPALDING ET AL., WORLD ATLAS OF CORAL REEFS 97–98 (2001).

²²⁸ See *id.*

²²⁹ REVISED MANAGEMENT PLAN, *supra* note 20, at i, 4.

²³⁰ See *generally* Brax, *supra* note 3, at 105 (“The seven-year effort to develop marine reserves in the Florida Keys NMS provides a sobering and disquieting lesson about the ability of single-issue, self-interested industry groups to derail plans . . .”).

²³¹ Beth Baker, *First Aid for an Ailing Reef: Research in the Florida Keys National Marine Sanctuary*, 49 BIOSCIENCE 173, 174 (1999).

²³² See Owen, *supra* note 23, at 736–37.

²³³ See National Marine Sanctuaries Act, 16 U.S.C. § 1434(a)(1)(A)–(B), (a)(3)(2006).

²³⁴ Brax, *supra* note 3, at 115–16.

²³⁵ *Id.* at 106.

²³⁶ See *id.*; Baker, *supra* note 231, at 174–75.

In the Florida Keys, the initial designation process was long and arduous, and NOAA was unable to navigate many of the Marine Sanctuaries Act's legal requirements without ultimately sacrificing the number and the integrity of sanctuary protections needed. Interest groups mounted a powerful political campaign that sparked an atmosphere of hostility. Some distributed "Say No to NOAA!" bumper stickers and signs, and threw coconuts at sanctuary supporters.²³⁷ Others hung an effigy of sanctuary manager Billy Causey.²³⁸

This experience illustrates the political challenges facing Congress when it designates sanctuaries, and it also shows the crippling legal obstacles that bar effective use of the Marine Sanctuaries Act. It took an extraordinary sequence of accidents and fortuitous publicity to generate enough political pressure for Congress to react. This indicates Congress's lack of interest in, and bipartisan support for, marine protected areas. Congress's posture toward sanctuary designations in particular, and toward marine protected areas in general, has been consistently reactive rather than proactive. Without disasters and negative publicity to prompt Congress, it is very unlikely to act on its own to legislate marine environmental protections and designate additional sanctuaries.

B. The Papahānaumokuākea Marine National Monument

Prior to the designation of the Hawaiian marine national monument, less than 1% of the U.S. exclusive economic zone was included in the thirteen preceding sanctuary designations. Including the Hawaiian monument, the figure rises to 4%.²³⁹ The monument consists of the waters surrounding Midway Island, Kure Atoll, Nihoa Island, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, Ka'ula Islet, and the Pearl and Hermes Atoll.²⁴⁰ These eleven uninhabited islands and atolls stretch for more than 1,200 miles northwest of the main Hawaiian islands.²⁴¹

The monument protects the only near-pristine, warm-water coral reef left in the United States,²⁴² which provides habitat for roughly 7,000 marine

²³⁷ Brax, *supra* note 3, at 106–07.

²³⁸ Sean Paige, *NOAA's Disputed Archipelago*, INSIGHT ON THE NEWS, May 4, 1998, at 20; accord Brax, *supra* note 3, at 107.

²³⁹ Richard G. Hildreth, *Place-Based Ocean Management: Emerging U.S. Law and Practice*, in 51 OCEAN & COASTAL MGMT. 659, 660 (2008).

²⁴⁰ For descriptions of the individual islands, rocks, shoals, banks and atolls that make up the Papahānaumokuākea National Monument, see Van Dyke et al., *supra* note 167, at 468–82; see also Craig S. Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come*, 25 NAT. RESOURCES J. 317 (1985).

²⁴¹ Alan Friedlander et al., *Northwestern Hawaiian Islands*, in THE STATE OF CORAL REEF ECOSYSTEMS OF THE UNITED STATES AND PACIFIC FREELY ASSOCIATED STATES: 2005, at 270, 270–76, (J.E. Waddell ed., NOAA Technical Memorandum NOS NCCOS 11, 2005), available at http://ccma.nos.noaa.gov/ecosystems/coralreef/coral_report_2005/.

²⁴² U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 323 (2004), available at http://www.oceancommission.gov/documents/full_color_rpt/welcome.html.

species, 1,750 (or 25%) of which cannot be found anywhere else in the world.²⁴³ It also protects significant cultural resources. Four Hawaiian words compose the name “Papahānaumokuākea”: “Papa” is a Hawaiian deity similar to Mother Earth;²⁴⁴ “hanau” means to give birth; “moku” means island; and “akea” refers to a broad expanse.²⁴⁵ Marine resources in this area are profoundly important to the cosmological belief systems and cultural traditions of many native Hawaiians.²⁴⁶ These waters provide native Hawaiians with a rare unblemished place to practice traditional hunting and fishing techniques.²⁴⁷

The monument protectively surrounds significant historic and archaeological resources, too. Four of the ten Northwestern Hawaiian Islands have hosted small indigenous communities in the last century.²⁴⁸ Two of the islands contain the remains of spiritual shrines that are periodically visited for cultural and educational purposes.²⁴⁹ It also protects an unknown quantity of valuable cobalt-rich manganese, copper, and nickel deep-sea ores.²⁵⁰

The environmental threats to the Hawaiian monument are attributable to poor landuse practices, use intensity, and the deposit of significant amounts of trash by ocean currents. The area has a history of irregular industrial uses that has left a legacy of contamination.²⁵¹ Presently defunct companies that operated now-abandoned guano mines left behind poisonous debris such as lead batteries, transformers, and unlined landfills.²⁵² Two abandoned Coast Guard stations transformed a pair of coastal shoals into point sources of petroleum and polychlorinated biphenyls (PCBs), and abandoned military training installations on four islands left behind barrels of chemical waste that deposited petroleum, lead, nickel, copper, and arsenic into the soil.²⁵³ Nuclear testing conducted on one atoll during the

²⁴³ America’s Underwater Treasures, *supra* note 224; Craig, *supra* note 125, at 28.

²⁴⁴ Dan Nakaso, *Papahānaumokuākea New Monument Name*, HONOLULU ADVERTISER, Mar. 3, 2007, <http://the.honoluluadvertiser.com/article/2007/Mar/03/In/FP703030341.html> (last visited Feb. 17, 2013).

²⁴⁵ Heather Ward, *Creating the Papahānaumokuākea Marine National Monument: Discourse, Media, Place-making, and Policy Entrepreneurs* 12 (Oct. 2010) (unpublished Ph.D. dissertation, East Carolina University), *available at* <http://thescholarship.ecu.edu/handle/10342/3191>.

²⁴⁶ *See also* STATE OF HAW. ET AL., NOMINATION OF PAPAHAUUMOKUAKEA MARINE NATIONAL MONUMENT FOR INSCRIPTION ON THE WORLD HERITAGE LIST (2009), *available at* <http://www.papahānaumokuākea.gov/management/worldheritage.html> (click on “Full Application” to download). *See generally* 1 NAT’L OCEANIC AND ATMOSPHERIC ADMIN. ET AL., PAPAHAUUMOKUAKEA MARINE NATIONAL MONUMENT MANAGEMENT PLAN 45–47 (2008), *available at* www.papahānaumokuākea.gov/management/mp.html.

²⁴⁷ *See* E.M. De Santo et al., *Fortress Conservation at Sea: A Commentary on the Chagos Marine Protected Area*, 35 MARINE POL’Y 258, 259 (2011).

²⁴⁸ *Id.*

²⁴⁹ *See also* World Heritage Committee, Dec. 34, COM 8B.10, Rep. of the Decisions Adopted by the World Heritage Committee, 34th Sess., July–August 2010, WHC-10/34.COM/20, at 183–87 (Sept. 3, 2010), *available at* <http://whc.unesco.org/document/104960>.

²⁵⁰ Harrison, *supra* note 240, at 321.

²⁵¹ *See* Friedlander et al., *supra* note 241, at 270–76.

²⁵² *Id.* at 276.

²⁵³ *Id.*

1960s has left some corals with detectable levels of plutonium.²⁵⁴ The area's non-industrial, non-military use history is mixed. On one hand, its remote location has resulted in minimal use impacts from fishing; on the other, vessel-based pollution and groundings have seriously injured many coral reefs in the area.²⁵⁵

The Northwestern Hawaiian Islands, with the exception of Midway Island, were originally reserved by President T. Roosevelt in 1909 as a preserve for native birds.²⁵⁶ Almost 100 years later, President Clinton designated the preserve as the Northwestern Hawaiian Island Coral Reef Ecosystem Reserve²⁵⁷ by executive order pursuant to the 2000 Amendments to the Marine Sanctuaries Act. In doing so, he expansively modified it to encompass an additional area of 132,000 square nautical miles and implemented more robust regulations to protect coral reefs and marine species.²⁵⁸

Congress stated in its 2000 Amendments to the Marine Sanctuaries Act that the area's status as an Ecosystem Reserve was meant to be provisional, and that its intent was to have the Reserve eventually become a full-fledged national marine sanctuary and ascend into the Marine Sanctuaries Program.²⁵⁹ However, from 2001 to 2006, NOAA and state authorities became gradually bogged down in the Marine Sanctuaries Act's designation process.²⁶⁰ In response, President G.W. Bush used the Antiquities Act to declare the Ecosystem Reserve as the Northwestern Hawaiian, or Papahānaumokuākea, Marine National Monument.²⁶¹ This included an expansive modification that annexed an additional 8,000 square nautical miles of seascape, which made it the largest marine protected area in the world at 140,000 total square nautical miles.²⁶²

President Bush's re-dedication of the area into a marine monument took NOAA and the state of Hawaii by surprise.²⁶³ On one hand, the President's action timely provided a way to meet the burgeoning needs of the ossifying Ecosystem Reserve. It encouraged institutional consolidation of the duties and responsibilities of the different agencies in charge of the

²⁵⁴ *Id.*

²⁵⁵ See K.A. Selkoe et al., *A Map of Human Impacts to a "Pristine" Coral Reef Ecosystem, Papahānaumokuākea Marine National Monument*, 28 CORAL REEFS 635, 635–50 (2009).

²⁵⁶ Exec. Order No. 1,019 (Feb. 3, 1909).

²⁵⁷ Craig, *supra* note 125, at 29.

²⁵⁸ Exec. Order No. 13,178, 65 Fed. Reg. 76903 (Dec. 4, 2000).

²⁵⁹ See National Marine Sanctuaries Act of 2000, Pub. L. No. 106-513, §6(g), 114 Stat. 2381, 2385–86.

²⁶⁰ Craig, *supra* note 125, at 28.

²⁶¹ Proclamation No. 8031, 71 Fed. Reg. 36443 (June 15, 2006) (establishing the Northwestern Hawaiian Islands Marine Monument); Proclamation No. 8112, 72 Fed. Reg. 10031 (Feb. 28, 2007) (renaming the Northwestern Hawaiian Islands Marine Monument as the Papahānaumokuākea Marine National Monument).

²⁶² Craig, *supra* note 125, at 28–31.

²⁶³ See JOHN N. KITTINGER & LAURA LAFRANCE, GOVERNING LARGE-SCALE MARINE PROTECTED AREAS: PROTECTION OF THE NORTHWESTERN HAWAIIAN ISLANDS 2–3 (2010), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/9/6/2/4/p296249_index.html.

islands, nearshore waters, and more distant, deeper waters to occur on a much shorter timescale than had ever been achieved under the Marine Sanctuaries Act. As a result, monument managers were able to develop a cohesive ecosystem-based adaptive management strategy quickly and effectively. For example, merely two years after the monument's creation, NOAA and the state of Hawaii jointly adopted a comprehensive action plan that aims to complete all cleanup operations, beach and coral restorations, and indigenous stewardship obligations in the area within fifteen years.²⁶⁴

On the other hand, unofficial accounts of NOAA's disposition suggest that the agency was and remains divided on the issue of whether the time has come to turn to the Antiquities Act to create new marine monuments, or if the agency should continue to wait to designate new sanctuaries under the Marine Sanctuaries Act. The agency's inexperience and unfamiliarity with the Antiquities Act led it to solicit public comment from stakeholders anyway, and it received over 6,400.²⁶⁵ NOAA's successful consideration of the public's input resulted in virtually no stakeholder criticism. From Congress's perspective, it had no quarrel. Some in Congress had taken issue with President Clinton's Executive Order because it had no firm basis in statutory law, but no challenges were raised against President Bush's proclamation since it had been made directly pursuant to a longstanding statute with a history of broad discretionary authority.²⁶⁶

There is no question of the positive effects that have been felt on the ground. Since the area was modified from an Ecosystem Reserve into a monument, the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service have been able to coordinate cleanup operations on many of the islands and in nearshore waters.²⁶⁷ The Coast Guard has undertaken more extensive cleanup operations at its abandoned installations as well.²⁶⁸

This reinforces the lesson of the Florida Keys sanctuary designation. NOAA took nine years to designate the Florida Keys sanctuary, and, without designation in sight, was mired in its fifth year at the Hawaiian site. Without an extraordinary unanticipated improvement in federal-state cooperation or an extraordinary circumstance such as a disaster, there was little hope for the designation of the Hawaiian sanctuary.

C. Lessons

While the Florida Keys sanctuary has succeeded in protecting some marine resources, the Marine Sanctuaries Act has also enabled dangerous

²⁶⁴ 1 NAT'L OCEANIC AND ATMOSPHERIC ADMIN. ET AL., *supra* note 246, at 111–253.

²⁶⁵ 3 NAT'L OCEANIC AND ATMOSPHERIC ADMIN. ET AL., PAPAHAUUMOKUAKEA MARINE NATIONAL MONUMENT MANAGEMENT PLAN app. B at 6, 38 (2008), *available at* <http://www.fws.gov/midway/monument.html>.

²⁶⁶ *See* Craig, *supra* note 125, at 29–31.

²⁶⁷ Alan Friedlander et al., *The State of Coral Reef Ecosystems of the Northwestern Hawaiian Islands*, in THE STATE OF CORAL REEF ECOSYSTEMS OF THE UNITED STATES AND PACIFIC FREELY ASSOCIATED STATES: 2008, at 269 (NOAA Technical Memorandum NOS NCCOS 73, 2008), *available at* <http://ccma.nos.noaa.gov/ecosystems/coralreef/coral2008/pdf/NWHI.pdf>.

²⁶⁸ *Id.*

political brinksmanship. This case study demonstrates that the Marine Sanctuaries Act's architecture of public and consultative processes is procedurally ineffective, and NOAA initiatives can be halted or weakened at multiple junctures.²⁶⁹ Single-interest groups' domination of public procedures in Florida illustrate the weakness of the Sanctuaries Act's democratic safeguards. As a result, the sanctuary has not been provided with the modifications necessary to adequately protect its fragile ecosystem.²⁷⁰ To address current threats to marine sanctuaries, management authorities need to be able to use adaptive management techniques and reduce the degree of regulatory inefficiencies that impede their implementation.²⁷¹ Over time, however, these goals have gradually become more aspirational than realizable.²⁷²

Hawaii never experienced the political pressures of the Florida Keys, yet the entropy among different government actors in the failed effort to designate the Hawaiian sanctuary underscores the legal inefficiencies of the Act's consultative procedures. In Hawaii, cooperation between federal and state authorities was just as difficult to attain as it was in Congress for the Florida Keys. But for President Bush's use of the Antiquities Act, the Hawaiian monument's managers never would have been able to provide the necessary spatial and administrative modifications that the marine environment badly needed.²⁷³

V. CONCLUSION

The Antiquities Act avoids most of the problems embodied in the Marine Sanctuaries Act's internal and external procedural requirements.²⁷⁴ In the absence of direct action by Congress, executive rededication of existing sanctuaries as monuments would allow management authorities the chance to implement urgently needed conservation programs, and would avoid the problems of congressional gridlock and emasculation by Regional Councils. Another benefit of the Antiquities Act is that it provides the executive with discretion to embrace more protective measures than those compelled by the Marine Sanctuaries Act's compatible-use standard. This would enable sanctuary managers to focus their efforts on resource protection—and force consumers to justify further resource use.

As the Florida Keys sanctuary designation and the Hawaiian sanctuary's aborted designation illustrate, the Marine Sanctuaries Act, and the current moratorium on sanctuary designations, prevent Congress from

²⁶⁹ See Brax, *supra* note 3, at 115.

²⁷⁰ *Id.* at 105.

²⁷¹ See *supra* notes 17–18 and accompanying text.

²⁷² See Fish et al., *supra* note 198, at 3.

²⁷³ See Craig, *supra* note 125, at 31.

²⁷⁴ See Brax, *supra* note 3, at 123 (discussing various problematic external procedural requirements).

implementing effective marine sanctuary conservation measures.²⁷⁵ The lack of interest in reactivating the SEL and rescinding the moratorium, as well as almost fifteen years of inactivity on national marine sanctuaries signals that the Marine Sanctuaries Program is not a high legislative priority. Moreover, the Act's susceptibility to congressional gridlock,²⁷⁶ easily captured political processes,²⁷⁷ Regional Councils' unchecked power to rewrite NOAA regulations,²⁷⁸ and conflicting secretarial mandates prevent it from functioning as an effective stopgap even if Congress did unexpectedly renew interest in the program.

The Antiquities Act, on the other hand, provides a timely way for NOAA to assist Congress in protecting marine sanctuaries until the Marine Sanctuaries Act can be revived and reformed.²⁷⁹ In addition to its immediacy, the Antiquities Act presumes the validity of executive facts and findings, which relieves sanctuary managers from shouldering the burden of demonstrating the need to make a stopgap modification.²⁸⁰ The Antiquities Act's legislative history and judicial precedent support a liberal construction of executive power. Likewise, the two modifications to the Buck Island Reef National Monument offer supporting precedent for using the Act to make limited, need-based, modifications to marine sanctuaries. This is reinforced by the Refuge System's and National Natural Landmark Program's similar writs of executive power, and the Refuge System's history that strongly suggests congressional acquiescence to small-scale modifications.

The Antiquities Act would neither improve nor worsen the status quo of the Marine Sanctuaries Program. It is no panacea, especially in the hands of protection-averse administrations, however, in the hands of a proactive executive branch, the Act could overcome the obstacle of legislative inaction and become a meaningful conservation tool. Furthermore, as the legislative history of the Act demonstrates, Congress has not often intervened to amend a president's monument declarations. It is therefore unlikely that Congress would refuse to support new monuments. The last time Congress abolished a monument was in 1980, and all eleven cases where Congress abolished monuments were due to site mismanagement, fundamental misunderstandings of the area's history, or acquiescence to states' request to oversee the monuments instead. There is an institutional check as well.

²⁷⁵ See Chandler & Gillelan, *Makings of the Sanctuaries Act*, *supra* note 14, at 19; see also Cassandra Barnes & Katherine W. McFadden, *Marine Ecosystem Approaches to Management: Challenges and Lessons in the United States*, 32 MARINE POL'Y 387 (2008).

²⁷⁶ See Daniel Dustin et al., *Land as Legacy*, 40 PARKS & RECREATION 60, 63 (2005).

²⁷⁷ *Id.* at 90–92; accord Brax, *supra* note 3 at 116; see also Hartman, *supra* note 129, at 159; Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 ECOLOGY L.Q. 799, 800 (1997) (“Fishermen almost universally resist regulation of virtually any kind. . .”).

²⁷⁸ National Marine Sanctuaries Act, 16 U.S.C. § 1433(b)(2)(D) (2006).

²⁷⁹ Brax, *supra* note 3, at 75; see generally Davidson, *supra* note 40, 515–16.

²⁸⁰ See Frank Norris, *The Antiquities Act and the Acreage Debate*, 23 GEORGE WRIGHT F. 6, 15 (2006); see also Craig, *supra* note 125, at 31; Hartman, *supra* note 129, at 163 (“At a minimum, the president has discretion in the facts and findings included within [a] proclamation. This discretion practically defeats all challenges to the Antiquities Act.”).

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NOAA has a far more restrained disposition toward marine habitat modifications, which makes it much less likely that the agency would solicit a protection-averse administration to enact harmful sanctuary modifications.

A way to assist Congress until it can act to reauthorize the Marine Sanctuaries Program must be sought. This need will amplify as budgets are tightened and available resources become scarcer. As such, unless Congress redefines its expectations of the program, a resourceful solution must be found within existing statutory law. The Antiquities Act provides a way to assist Congress with this problem until it is able to reauthorize the program and act on the needs of our nation's underwater treasures.