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"Un-Designating" Marine Sanctuaries?: Assessing President Trump's America-First Offshore Energy Strategy

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“UN-DESIGNATING” MARINE SANCTUARIES?: ASSESSING PRESIDENT TRUMP’S AMERICA-FIRST OFFSHORE ENERGY STRATEGY

KEVIN O. LESKE*

On April 28, 2017, President Donald J. Trump issued Executive Order No. 13795 to implement his vision of an America-First Offshore Energy Strategy. The order is primarily designed to facilitate the Secretary of Interior’s efforts to maximize oil and gas lease sales in parts of the Gulf of Mexico, Arctic waters, and mid- and south Atlantic Ocean. And one intent of the executive order is an attempt to nullify former President Barack Obama’s withdrawal of approximately 119 million acres of submerged land on the outer continental shelf from oil and gas drilling, which was made under the Outer Continental Shelf Lands Act of 1953 (“OCSLA”).

But of equal concern is the executive order’s pronouncement that the Trump administration would “refrain from designating or expanding any National Marine Sanctuary” absent a “full accounting from the Department of the Interior (“DOI”) of any energy or mineral resource potential.” And even more troubling, the order calls for a review of various past designations and expansions of National Marine Sanctuaries and Marine National Monuments within the past ten years.

Congress originally enacted the national marine sanctuaries provisions as part of the Marine Protection, Research, and Sanctuaries Act of 1972 (“MPRSA”). It “provide[s] authority for comprehensive and coordinated conservation and management” of “areas of the marine environment which are of special national significance.” Based on the Trump Administration’s new energy policy, however, some of these protected areas are now in jeopardy. But how significant is this threat? And what if the new administration proposes to “un-designate” or to modify the terms of one of the marine sanctuaries under review?

* Associate Professor of Law, Barry University School of Law. I would like to thank Dean Leticia Diaz for her support, as well as the editors and staff of *William & Mary Environmental Law and Policy Review* for their excellent work. I am grateful for the feedback that I received at Vermont Law School’s Eighth Annual Colloquium on Environmental Scholarship.

This Article examines these key questions. It introduces the importance of marine ecosystems and explores the national sanctuary provisions in the MPRSA. Next, it explains both President Trump's Executive Order as it relates to national marine areas and the related Department of Commerce action implementing the order. Finally, it assesses the potential impact of Executive Order 13795 on national marine sanctuaries and analyzes the potential success of a proposal to eliminate or alter a sanctuary under review. The Article concludes that the executive order's review of marine sanctuaries is surprisingly limited. Moreover (and ironically), much of the criticisms of the MPRSA levied by environmental advocates will help counter future attempts to "un-designate" a sanctuary.

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INTRODUCTION

As with many of our environmental problems, the pollution of U.S. ocean and coastal waters by industrial, commercial activities such as ocean dumping rose to the forefront of the public’s attention in the 1960s.¹ The “bio-accumulation” of toxins from ocean dumping were depleting fish populations, organic pathogens were sickening unsuspecting consumers who ate contaminated fish and shellfish, and the deposition of myriad pollutants was resulting in near collapses of marine ecosystems.² But after years of inaction, a disastrous oil spill on January 28, 1969, which soiled the coast of Santa Barbara, California, helped ensure that fragile marine ecosystems would receive protection in the future.³

In 1972, Congress enacted the Marine Protection, Research and Sanctuaries Act (“MPRSA”) to establish a three-part statutory framework to provide for the protection and restoration of ocean ecosystems.⁴ Title I seeks to eliminate ocean dumping and Title II authorizes the Secretary of Commerce to research marine environments including ocean dumping.⁵ Title III authorized a Marine Sanctuaries Program, which was

¹ William J. Chandler & Hannah Gillelan, *History and Evolution of the National Marine Sanctuaries Act*, 34 ENVTL. L. REP. 10505, 10506 (2004).

² Charles B. Anderson, *Ocean Dumping and the Marine Protection, Research and Sanctuaries Act*, 1 LOY. MD. L.J. 79, 81 (2002).

³ Jason Patlis et al., *The National Marine Sanctuary System: The Once and Future Promise of Comprehensive Ocean Governance*, 44 ENVTL. L. REP. 10932, 10936 (2014).

⁴ Chandler & Gillelan, *supra* note 1, at 10506.

⁵ Marine Protection, Research and Sanctuaries Act of 1972 §§ 101, 201 (codified at 43 U.S.C. § 1431 et seq.).

“intended to authorize the federal government to properly manage and conserve areas of the marine environment . . . which are of special national significance due to their resources or human use values.”⁶ And because the “marine environment” is defined as “any area of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction,” the MPRSA grants broad spatial authority to the Department of Commerce (“DOC”)⁷ to protect marine resources.⁸

The standards for designating a marine area as a national marine sanctuary are layered and rigorous. DOC must find that:

- (1) the area is of special national significance due to its conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or esthetic qualities; the communities of living marine resources it harbors; or its resource or human-use values; (2) existing state and federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; (3) designation of the area as a national marine sanctuary will facilitate the objectives of coordinated and comprehensive conservation and management of the area; and (4) the area is of a

⁶ 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 79 (2018).

⁷ *Id.* Although the MPRSA refers to the “Secretary of Commerce,” the Secretary has delegated authority to the National Oceanic and Atmospheric Association (“NOAA”). *See, e.g.,* Mallows Bay—Potomac River National Marine Sanctuary; Notice of Proposed Rule-making and Availability of Draft Environmental Impact Statement and Management Plan, 82 Fed. Reg. 2254, 2255 (Jan. 9, 2017) (“Day-to-day management of national marine sanctuaries has been delegated by the Secretary to NOAA’s Office of National Marine Sanctuaries (ONMS)”). However, for uniformity, the Article will use the broader term “Department of Commerce” or “DOC.”

⁸ *Fish, Game, and Wildlife Conservation*, *supra* note 6, § 79; 43 U.S.C. § 1432(3) (defining “marine environment” means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law). The MPRSA also broadly defines a “sanctuary resource.” 43 U.S.C. § 1432(8) (defining “sanctuary resource” to “mean[] any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary”).

size and nature that will permit comprehensive and coordinated conservation and management.⁹

Once an area is designated as a national marine sanctuary, the MPRSA applies an ecosystem-based management approach which protects “functions and key processes within a system and focuses on the range of activities impacting” such resources.¹⁰ Although the MPRSA has not been without its critics, presently there are thirteen national marine sanctuaries under protection, which cover more than 600,000 square miles of marine and Great Lakes waters.¹¹

But President Donald Trump has called this commitment to protect our marine resources into question. On March 28, 2017, he redirected the energy policy of the United States via an executive order that stated that it was in the national interest to develop “our Nation’s vast energy resources” and that regulations that currently “unduly burden the development of domestic energy resources” should be suspended, revised, or rescinded.¹²

On April 28, 2017, he followed up on his vision by setting forth “an America-First Offshore Energy Strategy” in a separate executive order.¹³ The order is designed to facilitate the Secretary of Interior’s efforts to maximize oil and gas lease sales in parts of the Gulf of Mexico, the Chukchi Sea, Beaufort Sea, Cook Inlet, and in the mid- and south Atlantic.¹⁴ It also directs the Secretary of the Interior to review various safety and environmental regulations applicable to oil and gas drilling operations on the outer continental shelf.¹⁵ A prime focus of the executive order is an attempt to nullify President Barack Obama’s December 20, 2016, withdrawal of approximately 119 million acres of submerged land on the outer continental shelf from oil and gas drilling.¹⁶ President Obama’s actions, which were

⁹ Sanctuary Designation Standards, 16 U.S.C. § 1433 (2000).

¹⁰ Patlis et al., *supra* note 3, at 10934.

¹¹ This acreage estimate includes the Papahānaumokuākea and Rose Atoll marine national monuments, which the NOAA’s Office of National Marine Sanctuaries also oversees. *See* OFFICE OF NAT’L MARINE SANCTUARIES, <https://sanctuaries.noaa.gov/about/> [<https://perma.cc/2AEN-47VC>] (last visited Apr. 4, 2018).

¹² Exec. Order No. 13783, 82 Fed. Reg. 16093, 16093 (Mar. 31, 2017).

¹³ Exec. Order No. 13795, 82 Fed. Reg. 20815, 20815 (May 3, 2017) [hereinafter America-First Strategy E.O.].

¹⁴ *Id.*

¹⁵ *Id.* at 20815–17.

¹⁶ *See* Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 00860 (Dec. 20,

made under section 12(a) of the Outer Continental Shelf Lands Act of 1953 ("OCSLA"), were a significant step to protect the fragile ecosystems of the Chukchi Sea and parts of the Beaufort Sea in the Arctic, as well as ecosystems along the edge of the continental shelf in the Atlantic Ocean.¹⁷

Equally concerning is President Trump's pronouncement that his administration would "refrain from designating or expanding any National Marine Sanctuary," absent a "full accounting from the DOI of any energy or mineral resource potential . . ."¹⁸ And even more troubling, the order calls for a review of past designations and expansions of National Marine Sanctuaries within the past ten years.¹⁹ Environmental advocates condemned the order as threatening sensitive ocean ecosystems, especially from the damaging impact of oil and gas development.²⁰ But how concerned should we be with President Trump's call for a review of these national sanctuaries? And what if the Trump administration subsequently proposes to "un-designate" or to modify the terms of a marine sanctuary? This Article examines these key questions. It first introduces the importance of marine ecosystems and explores the national sanctuary designation provisions in the MPRSA. Next, it explains both President Trump's Executive Order as it relates to national marine areas and the related Department of Commerce action implementing the Order. Finally, it assesses the potential impact of Executive Order 13795 on national marine sanctuaries and analyzes the potential success of a proposal to eliminate or alter a sanctuary under review.

First, the Article concludes that with respect to marine sanctuaries, President Trump's action against sanctuaries is surprisingly limited.²¹ Because Executive Order 13795 contains a temporal limitation of ten years

2016) [hereinafter Memo on Withdrawal of Arctic Outer Continental Shelf]; *see also* Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 00861 (Dec. 20, 2016) [hereinafter Memo on Withdrawal off Atlantic Coast].

¹⁷ 43 U.S.C. § 1341(a) (2011); *see* Kevin O. Leske, "Un-Shelfing" Lands Under the Outer Continental Shelf Lands Act (OCSLA): Can a Prior Executive Withdrawal under Section 12(a) Be Trumped by a Subsequent President?, 26 N.Y.U. ENVTL. L.J. 1, 1 (2017).

¹⁸ America-First Strategy E.O., *supra* note 13, at 20815.

¹⁹ *Id.* at 20816.

²⁰ *See* Trump now quietly trying to drill in ocean monuments, sanctuaries, THE WILDERNESS SOC'Y (July 18, 2017), <http://wilderness.org/blog/trump-now-quietly-trying-drill-ocean-monuments-sanctuaries> [<https://perma.cc/HQ45-BQV9>]; Clark Mason, *Top California Democrats, drilling foes unite in opposition to Trump's marine sanctuaries review*, THE PRESS DEMOCRAT (Aug. 23, 2017), <http://www.pressdemocrat.com/news/7335418-181/top-california-democrats-drilling-foes?artslide=0> [<https://perma.cc/4G6K-ZJ7M>].

²¹ *See* discussion *infra* Section III.A.

from its signing date, the Order only places eleven newly designated or expanded marine areas under DOC review.²² And of these eleven areas, all five of the actions under review involving marine sanctuaries are expansions of existing sanctuaries.²³ Moreover, an analysis of each of these areas reveals that most either do not have oil and gas resources (and thus none would be prime targets of a future action to “un-designate”) or are protected from oil and gas development by statute, which would require Congress to override.²⁴ In addition, the remaining five marine environmental areas are classified as national marine monuments.²⁵ Any proposed modification or abolishment of a monument falls within an entirely different statutory scheme: the Antiquities Act of 1906.²⁶ As scholars have recently opined, any proposed abolishment or modification would face significant hurdles.²⁷

Second (and ironically), much of the criticisms of the MPRSA levied by environmental advocates will help counter future attempts to “un-designate” a sanctuary.²⁸ The main reason for this is rooted in Congress’s requirement that the DOC undertake the same procedures for modifying a sanctuary as it does to establish one.²⁹ Therefore, criticism such as that the sanctuaries program has too many substantive and procedural steps and that its “public and consultative processes [are] procedurally ineffective” resulting in sanctuary actions to be “halted or weakened at multiple junctures”³⁰ will help defeat future attempts to “un-designate” or modify existing sanctuaries.³¹

²² America-First Strategy E.O., *supra* note 13, at 20816.

²³ Review of National Marine Sanctuaries and Marine National Monuments Designated or Expanded Since April 28, 2007; Notice of Opportunity for Public Comment, 82 Fed. Reg. 28827, 28828 (June 26, 2017).

²⁴ *See id.* at 28827–28.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Comments from Sea Shepherd Legal on the National Oceanic and Atmospheric Administration’s review of National Marine Sanctuaries and Marine National Monuments pursuant to Executive Order 13795 at 5, to John Armor, Director of the Office of National Marine Sanctuaries (July 26, 2017), <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-97583> [<https://perma.cc/A2K2-Q35T>].

²⁸ *See* Patlis et al., *supra* note 3, at 10941.

²⁹ *See* Allison R. Mahaney, *Charting Off Course: National Marine Planning Without Legal Authority to Preserve Marine Resources*, 23 N.Y.U. ENVTL. L.J. 1, 25 (2015).

³⁰ Peter H. Morris, *Monumental Seascape Modification Under the Antiquities Act*, 43 ENVTL. L. 173, 206–07 (2013); Chandler & Gillelan, *supra* note 1, at 10562 (stating that the MPRSA “is now so constrained by its own architecture”).

³¹ *See* Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 713 (2003).

I. MARINE RESOURCES AND THE LEGAL FRAMEWORK FOR THE PROTECTION OF MARINE RESOURCES

This Part briefly explains the peril that our marine resources face today and the legal framework for their protection. Next, this Part explores the MPRSA, including its designation standards. This will serve as an introduction to a discussion of President Trump's new energy policy in Part II, followed by an assessment of the significance of his Executive Order of April 27, 2017, on national marine sanctuaries in Part III.

A. *Our Ocean Ecosystems*

While we once thought our ocean ecosystems were too massive to fall prey to human activity, it is not hyperbole to say that "[m]arine resources are under attack."³² For instance, the International Programme on the State of the Ocean has concluded that the deteriorating health of our ocean ecosystems is the result of an array of stressors.³³ Climate change, ocean warming and related acidification, pollution, and overexploitation of resources have come together to produce "a perfect storm of impacts on global ocean resources."³⁴ Fish-stocks are being depleted, coastal habitat is disappearing due to development, pollution from land and sea have resulted in red-tide algal blooms and dead zones in patches of the ocean waters.³⁵ Likewise, there have been countless oil spills in U.S. waters from Alaska to the Gulf of Mexico polluting the marine environment.³⁶

The most significant stressors on our oceans are commercial fishing and oil and gas development.³⁷ Commercial overfishing has extinguished "New England cod, snapper-grouper reef fish in the South Atlantic and Gulf of Mexico, various species of rockfish . . . [the] white abalone along the Pacific Coast, and rock lobster in Hawaii."³⁸ And the National

³² Mahaney, *supra* note 29, at 6; see Patlis et al., *supra* note 3, at 10933.

³³ Mahaney, *supra* note 29, at 6.

³⁴ *Id.* at 6–7.

³⁵ Patlis et al., *supra* note 3, at 10932.

³⁶ See Chandler & Gillelan, *supra* note 1, at 10515.

³⁷ For example, with respect to the Arctic ocean waters, these areas can hold "important, irreplaceable" ecological resources and "the vulnerability of these ecosystems to an oil spill" is significant; more specifically, the outer continental shelf extending from Alaska's Chuckchi and Beaufort Seas provides invaluable wildlife habitat for marine mammals and other wildlife, as well as Alaska Native subsistence use. Memo on Withdrawal of Arctic Outer Continental Shelf, *supra* note 16.

³⁸ Chandler & Gillelan, *supra* note 1, at 10559.

Oceanic and Atmospheric Administration (“NOAA”) estimates that eighty-six fish populations in the United States are overfished.³⁹ Especially when recent estimates place the ocean’s production of seafood each year to eighty million metric tons, the need for their protection comes sharper into focus.⁴⁰

An even more troubling statistic is the estimate that the roughly 100,000 commercial ships and innumerable smaller vessels navigating our oceans each day jettison approximately 1,245,200 metric tons of oil pollution annually.⁴¹ Likewise, even absent an oil spill, pollution results from the mere exploration and subsequent normal production of oil or gas.⁴² Although the type and degree of environmental impacts differ depending on the specific project and its location, most projects display common effects.⁴³ For example, installation of oil and gas wells can decimate fragile bottom-dwelling marine communities.⁴⁴ When necessary, constructing pipelines to transport the oil or gas “often cross fragile coastal zone areas.”⁴⁵ Drilling operations routinely utilize lubrication fluids to prevent overheating of the drill bits.⁴⁶ Although precise contents and qualities are unknown, such lubricants contain chemicals and toxic additives that have the potential to pollute the receiving water.⁴⁷

But these environmental impacts pale in comparison with the “real hobgoblin” of oil development: an oil spill.⁴⁸ “[I]t is universally agreed that the available technology for spill containment is incapable of containing a spill in unfavorable weather conditions.”⁴⁹ As a result, not even the most comprehensive response after a spill can prevent catastrophic results.⁵⁰ As one commentator stated, an oil spill’s “consequences for wildlife and scenery can be devastating.”⁵¹

³⁹ *Id.*

⁴⁰ Mahaney, *supra* note 29, at 2.

⁴¹ *Id.*

⁴² Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems and the Opportunity for Change*, 12 J. ENERGY NAT. RES. & ENVTL. L. 75, 87 (1992).

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (stating that “drilling fluid discharges may range from 3,000 to 6,000 barrels per well drilled”) (citing NAT’L RES. COUNCIL, *Drilling Discharges in the Marine Environment* 15 (1983)).

⁴⁷ *See id.* at 87–88.

⁴⁸ Wiygul, *supra* note 42, at 89 (calling oil spills “unpredictable” and “ugly”).

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Id.* For example, the outer continental shelf in parts of the Atlantic Ocean is home to

B. The Marine Protection, Research, and Sanctuaries Act

Like many of our foundational environmental laws, Congress enacted the MPRSA in response to environmental disasters that played out before the nation's eyes.⁵² On January 28, 1969, a federally leased oil well in the Santa Barbara Channel ruptured, spewed 3.3 million gallons of oil, and devastated 800 square miles of ocean and adjacent California coast.⁵³ Because the spill was not brought under control for several months it garnered significant media coverage.⁵⁴ And feeding fuel to the fire, subsequent large spills in the Long Island Sound, Gulf of Mexico, and San Francisco helped prompt Congress to finally act to protect fragile marine ecosystems for future generations.⁵⁵

At long last, Congress enacted the MPRSA to establish a three-part statutory framework to provide for the protection and restoration of ocean ecosystems.⁵⁶ Title I seeks to eliminate ocean dumping and Title II authorizes the Secretary of Commerce to research marine environments including ocean dumping.⁵⁷ Title III authorized a Marine Sanctuaries Program, which was "intended to authorize the federal government to properly manage and conserve areas of the marine environment . . . which are of special national significance due to their resources or human use values."⁵⁸ And because the "marine environment" is defined as "any area of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction," the MPRSA grants broad spatial authority to DOC to protect marine resources.⁵⁹

canyons that support deep water corals, marine mammals, and other wildlife, upon which commercial fisheries depend. *See* Memo on Withdrawal off Atlantic Coast, *supra* note 16.

⁵² *See* Patlis et al., *supra* note 3, at 10936.

⁵³ Chandler & Gillelan, *supra* note 1, at 10515; Owen, *supra* note 31, at 714.

⁵⁴ Chandler & Gillelan, *supra* note 1, at 10515.

⁵⁵ *Id.*

⁵⁶ *Id.* at 10506.

⁵⁷ *Id.*

⁵⁸ *Fish, Game, and Wildlife Conservation*, *supra* note 6, § 79; 16 U.S.C. § 1431(a)(4) (2016) (stating "the purpose of preserving or restoring [marine] areas for their conservation, ecological, or esthetic values").

⁵⁹ *Fish, Game, and Wildlife Conservation*, *supra* note 6, § 79; 16 U.S.C. § 1431(a)(4) (2016) (defining "marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law).

In Title III, Congress found that although the U.S. “historically had recognized the importance of protecting special areas of its public domain,” such protections had been devoted “almost exclusively to land areas above the high-water mark.”⁶⁰ It recognized that there are marine environments that hold “conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance.”⁶¹ But instead of controlling impacts by enacting “resource-specific legislation,” Congress sought to establish “a coordinated and comprehensive approach to the conservation and management of special areas of the marine environment.”⁶² To achieve that end, it sought to give “authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities.”⁶³

Congress recognized that its establishment of a federal National Marine Sanctuary System would “improve the conservation, understanding, management, and wise and sustainable use of marine resources, [] enhance public awareness, understanding, and appreciation of the marine environment; and [] maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas.”⁶⁴ As a central goal, Congress stated that the National Marine Sanctuary Program should “maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes.”⁶⁵ Thus, although Congress wanted to facilitate “all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities,” such uses would have to be “compatible with the primary objective of resource protection.”⁶⁶

⁶⁰ 16 U.S.C. § 1431(a)(1) (2016).

⁶¹ *Id.* § 1431(a)(2).

⁶² *Id.* § 1431(a)(3); *see also id.* § 1433(a)(5) (requiring that the Secretary of Commerce find that “the [sanctuary] area is of a size and nature that will permit comprehensive and coordinated conservation and management”).

⁶³ *Id.* § 1431(b)(2).

⁶⁴ 16 U.S.C. §§ 1431(a)(4)(A)–(C).

⁶⁵ *Id.* § 1431(b)(3); *see also id.* § 1431(b)(5) (“support, promote, and coordinate scientific research on, and long-term monitoring of, the resources of these marine areas”).

⁶⁶ *Id.* § 1431(b)(6). Congress also wanted this to be accomplished with other federal agencies, states, and Native American Tribes, and other interested parties; *id.* § 1431(b)(7) (Secretary of Commerce is to “develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments,

Although DOC has developed regulations set forth in what is known as the Marine Sanctuaries Program to implement the MPRSA, Congress was fairly detailed in setting the standards for DOC to apply to designate a national marine sanctuary.⁶⁷ As a threshold matter, Congress vested the DOC wide authority to designate “any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing [such] designation.”⁶⁸

The key finding that the DOC must make to designate a national marine sanctuary is that “the area is of special national significance.”⁶⁹ In turn, Congress expounded that this significance could be based on “conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities;” or “communities of living marine resources it harbors;” or “its resource or human-use values.”⁷⁰ In addition, a national marine sanctuary designation was only appropriate upon a finding that “existing State and Federal authorities are inadequate or should be supplemented” in order to “ensure coordinated and comprehensive conservation and management of the area” and that “designation of the area as a national marine sanctuary will facilitate the objectives.”⁷¹ Congress was therefore cognizant that a sanctuary designation was necessary in circumstances when the area was not being sufficiently protected to ensure its long-term survival.

The MPRSA also contains specific provisions setting forth factors for DOC to consider when making the requisite finding to designate a sanctuary, as well as requires a consultation process with a host of interested parties.⁷² Likewise, Congress established a layered administrative process

Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas”).

⁶⁷ In 1995, NOAA consolidated national marine sanctuary regulations in 15 C.F.R. Part 922. See National Marine Sanctuary Program, 60 Fed. Reg. 66875 (Dec. 27, 1995). The rule did “not make substantive changes to the existing regulations . . . rather it remove[d] duplicative and outdated provisions, ma[de] technical changes to incorporate current term usage and achieve uniformity in regulatory language, and consolidate[d] and reorganize[d] all remaining provisions in a more logical and cohesive order;” *id.* NOAA stated that its intent was “to make the regulations implementing the Act more concise, better organized, and thereby easier for the public to use.”

⁶⁸ 16 U.S.C. § 1433(a).

⁶⁹ *Id.* § 1433(a)(2). As an initial matter, DOC must determine that “the designation will fulfill the purposes and policies of this chapter;” *id.* § 1433(a)(1).

⁷⁰ *Id.* §§ 1433(a)(2)(A)–(C).

⁷¹ *Id.* §§ 1433(a)(3)–(4).

⁷² *Id.* § 1433. The factors to be considered when making a designation are discussed Section III.B.1.

for DOC to follow when proposing a designation.⁷³ These provisions become critical in assessing DOC’s ability to “un-designate” sanctuaries in Part III.

II. PRESIDENT TRUMP’S NEW ENERGY POLICY

This Part explains the shift in U.S. energy policy under the Trump Administration and, more specifically, the new policy’s application to national marine sanctuaries. It first explains President Trump’s recent executive order setting forth his vision for the country’s energy policy and then details DOC’s actions to implement this new policy.

A. *Executive Order 13795 of April 28, 2017*

Upon his accession to the presidency, Donald Trump has directed his administration to change course with respect to the energy policy of the United States.⁷⁴ This shift has a direct impact on present and future marine sanctuaries.⁷⁵ In his Executive Order 13795 of April 28, 2017, titled *Implementing an America-First Offshore Energy Strategy*, President Trump declared that “energy and minerals produced from lands and waters under Federal management are important to a vibrant economy and to our national security.”⁷⁶ Accordingly, he established that “the policy of the United States [is] to encourage energy exploration and production, including on the Outer Continental Shelf.”⁷⁷

With respect to marine sanctuaries, in section 4, *Responsible Planning for Future Offshore Energy Potential*, President Trump directed that the “Secretary of Commerce shall, unless expressly required otherwise, refrain from designating or expanding any National Marine Sanctuary” unless such designation or expansion “includes a timely, full accounting from the DOI of any energy or mineral resource potential within the designated area.”⁷⁸ This review must also include the potential impact that

⁷³ 16 U.S.C. § 1433. The procedures that DOC is required to undertake are discussed in Section III.B.2.

⁷⁴ America-First Strategy E.O., *supra* note 13, at 20815.

⁷⁵ *Id.* at 20815–16.

⁷⁶ *Id.* at 20815.

⁷⁷ *Id.*

⁷⁸ *Id.* at 20815–16. These potential sources are to include “wind, oil, natural gas, methane hydrates, and any other source that the Secretary of Commerce deems appropriate.”

any such proposed marine sanctuary designation or expansion would have on developing such resources.⁷⁹ The order gives the Secretary of the Interior sixty days to produce the accounting from the receipt date of a notification from the Secretary of Commerce of intent to propose a new or expanded National Marine Sanctuary.⁸⁰

Likewise, the executive order instructs the DOC to “conduct a review of all designation and expansions of National Marine Sanctuaries” as well as Marine National Monuments under the Antiquities Act of 1906, that were designated or expanded within the ten-year period from the date of the executive order.⁸¹ In performing such review, the Secretary of Commerce is to consult with the Secretaries of Defense, Interior, and Homeland Security.⁸²

The review required by DOC must include:

- (A) an analysis of the acreage affected and an analysis of the budgetary impacts of the costs of managing each National Marine Sanctuary or Marine National Monument designation or expansion;
- (B) an analysis of the adequacy of any required Federal, State, and tribal consultations conducted before the designations or expansions; and
- (C) the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region.⁸³

The deadline for the review is six months from the Executive Order’s signing date of April 28, 2017, upon which time the Secretary of Commerce in consultation with the Secretary of Defense and the Secretary of the Interior must report the results to the Director of the Office of Management

⁷⁹ America-First Strategy E.O., *supra* note 13, at 20816.

⁸⁰ *Id.*

⁸¹ *Id.* See Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827; see also Antiquities Act of 1906, 16 U.S.C. §§ 431–33 (1906) (recodified as 54 U.S.C. §§ 320301–03 (2014)). Thus, the review of new or expanded marine sanctuaries goes back to April 28, 2007.

⁸² America-First Strategy E.O., *supra* note 13, at 20816.

⁸³ *Id.*

and Budget, the Chairman of the Council on Environmental Quality, and the Assistant to the President for Economic Policy.⁸⁴

B. The Department of Commerce’s Action Implementing Executive Order 13795

On June 26, 2017, DOC commenced its review of National Marine Sanctuaries and Marine National Monuments that had been designated or expanded since April 28, 2007, as directed by Executive Order 13795.⁸⁵ Its review covers a total of eleven national marine sanctuaries and monuments.⁸⁶ The federal register document is termed a “Notice of Opportunity for Public Comment” and requested public comments addressing the factors set forth in Executive Order 13795 to these designations and expansions.⁸⁷ Specifically, DOC is reviewing the sanctuary’s acreage, budget, consultation efforts, opportunity costs of energy resources, and impact on adjacent resource development.⁸⁸

The notice also references the related review that the DOI is performing under a similar executive order calling for a review of designations under the Antiquities Act of 1906.⁸⁹ In DOI’s Notice of Opportunity for Public Comment, it indicated that it is reviewing those national monuments “designated or expanded since 1996 under the Antiquities Act of 1906 in order to implement Executive Order 13792 of April 26, 2017.”⁹⁰ DOI will use its review of the national monuments “to determine

⁸⁴ *Id.* Related to the command to review marine sanctuaries (and the focal point of the Executive Order), the E.O. also directed the Secretary of the Interior to, “the maximum extent permitted by law,” increase oil and gas leases on the outer continental shelf. Although the legality of this section is questionable (and already subject to litigation), the order purports to rescind previous withdrawals of outer continental shelf lands from oil and gas drilling under the OCSLA by attempting to modify previous actions by President Obama. *See* Leske, *supra* note 17, at 1–2.

⁸⁵ Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827. The notice was submitted by the Office of National Marine Sanctuaries (“ONMS”), the National Ocean Service (“NOS”), and the National Oceanic and Atmospheric Administration (“NOAA”).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ America First-Strategy E.O., *supra* note 13, at 20815; Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827.

⁸⁹ Exec. Order No. 13792, 82 Fed. Reg. 20429 (May 1, 2017); Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22016, 22016 (May 11, 2017).

⁹⁰ Review of Certain National Monuments Established Since 1996, 82 Fed. Reg. at 22016 (May 11, 2017).

whether each designation or expansion conforms to the policy stated in the Executive Order and to formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy.”⁹¹ In the notice, DOI identified twenty-seven designated national monuments, which overlaps with DOC’s review as to five marine national monuments.⁹² Accordingly, the DOC indicated that it would “receive a copy of and consider all public comments submitted during the Department of the Interior’s public comment period for Executive Order 13792 for Marine National Monuments that are affected by Executive Orders 13792 and 13795.”⁹³

The DOC Notice originally called for comments on the marine sanctuaries and monuments subject to review to be submitted by July 26, 2017, but on July 31, 2017, DOC reopened the public comment period until August 15, 2017.⁹⁴ At the close of the comment period, the rulemaking docket showed that 99,910 comments had been received.⁹⁵ It is reported that a “vast majority were in favor of retaining the current protections” of the sanctuaries and monuments under review.⁹⁶ On October 25, 2017, DOC Secretary Wilbur Ross forwarded his report to President Trump, but the report was not made public.⁹⁷

III. UN-DESIGNATING SANCTUARIES?

With this background explained, this Part evaluates the potential impact of Executive Order 13795 on national marine sanctuaries. As part of this assessment, it analyzes the crucial issue of whether the new

⁹¹ *Id.*

⁹² *Id.*; Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827.

⁹³ Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827.

⁹⁴ *Id.*

⁹⁵ REGULATIONS.GOV, *Review of National Marine Sanctuaries and Marine National Monuments Designated or Expanded Since April 28, 2007; Notice of Opportunity for Public Comment*, Docket ID: NOAA-NOS-2017-0066, <https://www.regulations.gov/docket?D=NOAA-NOS-2017-0066> [<https://perma.cc/373G-WUSL>] (last visited Apr. 4, 2018).

⁹⁶ Valerie Volcovici, *U.S. marine sanctuary oil drilling report sent to Trump, not public*, REUTERS, <https://www.reuters.com/article/us-usa-oceans-drilling/u-s-marine-sanctuary-oil-drilling-report-sent-to-trump-not-public-idUSKBN1CU2Y2> [<https://perma.cc/NQ8U-2HLU>] (last visited Apr. 4, 2018).

⁹⁷ *Id.*

administration could (and would) “un-designate” one or more of the marine sanctuaries under review. And, if so, it outlines the steps DOC would have to undertake to do so. This analysis shows that, although possible, an attempt by DOC to rollback protections to a marine sanctuary would be ill-advised.

A. *The Limited Scope of Executive Order 13795 Will Blunt the Impact of the Department of Commerce’s Review*

Although Executive Order 13795 seems ominous, its scope is rather limited with respect to national marine sanctuaries. Because the order contains a temporal limitation of ten years from its signing date, it only places eleven newly designated or expanded marine areas under DOC review. And of these eleven areas, all five of the actions under review involving marine sanctuaries are expansions of existing sanctuaries.

Moreover, an analysis of each of these areas reveal that most either do not have energy resources, which would make them a prime target of a future action to “un-designate” them, or they are protected from oil and gas development by statute, which would require Congress to override. Finally, the remaining five marine environments are classified as national marine monuments. Any proposed modification or abolishment falls within an entirely different statutory scheme: the Antiquities Act of 1906. As scholars have recently opined, any proposed abolishment would face significant legal challenges.

1. *Because the Executive Order Is Temporally Limited to Designations and Expansions Within the Past Ten Years, Its Impact Should Be Similarly Limited*

Executive Order 13795 limits DOC’s review of newly designated and expanded sanctuaries to a period of ten years prior to the signing date of April 28, 2017.⁹⁸ This significantly narrows the scope of DOC’s review. In its Notice of Opportunity for Public Comment, DOC set forth the universe of its review, as follows⁹⁹:

⁹⁸ America-First Strategy E.O., *supra* note 13, at 20815.

⁹⁹ Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28828 (adapted from chart).

<u>Name</u>	<u>Location</u>	<u>Action</u>	<u>Dates</u>	<u>Size (acres)</u>
<i>Sanctuaries:</i>				
Channel Islands National Marine Sanctuary	California	Expansion	May 24, 2007	9,600
Cordell Bank National Marine Sanctuary	California	Expansion	March 12, 2015	484,480
Greater Farallones National Marine Sanctuary	California	Expansion	March 12, 2015	1,288,320
Monterey Bay National Marine Sanctuary	California	Expansion	November 20, 2008	496,000
National Marine Sanctuary of American Samoa	American Samoa	Expansion	July 26, 2012	8,691,840
Thunder Bay National Marine Sanctuary	Michigan	Expansion	September 5, 2014	2,465,280
<i>Monuments:</i>				
Northeast Canyons and Seamounts Marine National Monument	Atlantic Ocean	Designation	September 15, 2016	3,114,320
Marianas Trench Marine National Monument	Commonwealth of the Northern Mariana Islands/ Pacific Ocean	Designation	January 6, 2009	60,938,240
Rose Atoll Marine National Monument	American Samoa	Designation	January 12, 2009	8,608,640
Pacific Remote Islands Marine National Monument	Pacific Ocean	Designation; Expansion	January 6, 2009; September 25, 2014	55,608,320
Papahānaumokuākea Marine National Monument	Hawaii	Expansion	August 26, 2016	283,379,840

As shown above, the Notice of Opportunity for Public Comment lists eleven national marine sanctuaries and monuments that are subject

to review.¹⁰⁰ And of the six sanctuaries under review, none of the original sanctuary designations fall within the executive order’s purview.¹⁰¹ It is their subsequent expansions within the ten-year window that will be analyzed by DOC.¹⁰² The current review therefore should be confined to an application of the Executive Order’s factors concerning resources and energy potential to the expanded area only.

2. Many of the Sanctuary Expansions Under Review Are Not Prime Candidates for Energy Development and Therefore Will Not Likely Be Targeted for Modification or Elimination

An analysis of each of the five national sanctuary expansions under review suggests that they are not prime candidates for future modification or elimination in order to open them for oil and gas resources. And due to the MPRSA’s burdensome procedures and the other legal impediments that must be undertaken to make them available for energy development, it does not seem prudent for DOC to take the significant time and resources required to do so.

For instance, in two of the sanctuary expansions under review, there does not appear to be any oil and gas reserves within the area that would prompt DOC to challenge the expansions. The Thunder Bay National Marine Sanctuary (“TBNMS”) underwent a boundary expansion in 2014.¹⁰³ The sanctuary is situated in northwestern Lake Huron and “is adjacent to some of the most treacherous stretches of water within the Great Lakes system.”¹⁰⁴ As DOC observed in its expansion rulemaking, “[u]npredictable weather, murky fog banks, sudden gales, and rocky shoals earned the area the name ‘Shipwreck Alley’ Fire, ice, collisions, and storms have claimed nearly 200 vessels in and around Thunder Bay over the last 150 years.”¹⁰⁵

TBNMS was originally designated as a national marine sanctuary in 2000 and its primary purpose “is to provide comprehensive, long-term

¹⁰⁰ *Id.* (adapted from chart).

¹⁰¹ *Id.*

¹⁰² *Id.* The establishment of the Papahānaumokuākea Marine National Monument is also not under review: only the expansion in 2016.

¹⁰³ Boundary Expansion of Thunder Bay National Marine Sanctuary, 79 Fed. Reg. 52960, 52960 (Sept. 5, 2014).

¹⁰⁴ *Id.* at 52961.

¹⁰⁵ *Id.*

protection for these nationally-significant shipwrecks and maritime heritage sites.”¹⁰⁶ Accordingly, the expansion in 2014 increased “the size of the sanctuary from 448 square miles to 4,300 square miles and extends protection” for “47 additional known historic shipwrecks of special national significance, and other maritime heritage resources (e.g., docks, cribs), located in Lake Huron outside the sanctuary’s original boundary.”¹⁰⁷

The original designation and expansion documents for TBNMS do not suggest that there are significant oil and gas potential in the sanctuary or immediate area. Nor do the documents suggest wind, methane hydrates, or “any other [energy] source” that DOC would pursue at this time.¹⁰⁸ Following Executive Order 13795’s mandate for “Responsible Planning for Future Offshore Energy Potential,” it does not seem that the Thunder Bay sanctuary expansion would be subject to intense scrutiny.¹⁰⁹

Another sanctuary subject to DOC review that is not likely to be pursued as a candidate for modification or elimination is the National Marine Sanctuary of American Samoa (“NMSAM”). The sanctuary was originally designated in 1986 as the Fagatele Bay National Marine Sanctuary and it extends for 163 acres (0.25 square miles) of bay area off the southwest coast of Tutuila Island, American Samoa.¹¹⁰ DOC’s action in 2012 comprised of a name change for the sanctuary to National Marine Sanctuary of American Samoa, as well as adding five discrete geographical areas to the sanctuary: Fagaluva/Fogama’a (described as Larsen Bay in the proposed rule), Swains Island, Ta’u, Aunu’u and Muli[amacr]va (Rose Atoll).¹¹¹

DOC describes the areas as “nestle[d] in an eroded volcanic crater . . . provid[ing] a home to a wide variety of animals and plants that

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 52960–61.

¹⁰⁸ America-First Strategy E.O., *supra* note 13, at 20815–16. These potential sources are to include “wind, oil, natural gas, methane hydrates, and any other source that the Secretary of Commerce deems appropriate. *Id.* at 20816.

¹⁰⁹ *Id.* at 20815–16.

¹¹⁰ Expansion of Fagatele Bay National Marine Sanctuary, Regulatory Changes, and Sanctuary Name Change, 77 Fed. Reg. 43942, 43942 (amended July 26, 2012) (codified at 15 C.F.R. pt. 922, subpart J).

¹¹¹ *Id.* Specifically, the sanctuary was expanded as follows: Fagaluva/Fogama’a, which contains 0.46 square miles of bay area off the southwest coast of Tutuila Island, American Samoa; the waters around part of Aunu’u Island, American Samoa that contain 5.8 square miles; the waters around part of Ta’u Island, American Samoa that contain 14.6 square miles; the waters around Swains Island, American Samoa that contain 52.3 square miles; and the waters around Rose Atoll, called Muli[amacr]va in Samoan, that contain 13,507.8 square miles.” *Id.* at 43943–44. The precise boundaries are defined by regulation. *Id.* at 43944.

thrive in the protected waters of the bay.”¹¹² The NMSAM supports “a unique and vast array of tropical marine organisms, including corals and a diverse tropical reef ecosystem with endangered and threatened species, such as the hawksbill and green sea turtles, and marine mammals like the Pacific bottlenose dolphin.”¹¹³ The NMSAM also has “near-shore, mid-shore, deep reef, seamount, open pelagic waters and other habitats and areas of historical and cultural significance.”¹¹⁴ But, like Thunder Bay, it does not appear to have any energy potential that would warrant eliminating or modifying the 2012 expansion.

Other sanctuaries under review, however, are located in areas with oil and gas resources. Nonetheless, they are not well suited for DOC to alter due to either the scope of the expansion under review or other legal (not to mention, political) barriers. For example, in 1980 DOC designated the Channel Islands National Marine Sanctuary (“CINMS”) to “protect the area’s rich and diverse range of marine life and habitats, unique and productive oceanographic processes and ecosystems, and culturally significant resources.”¹¹⁵ The sanctuary encompasses approximately 1,113 square nautical miles along the California coast near San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock, and extends approximately six nautical miles seaward.¹¹⁶ CINMS supports “commercial and recreational fishing, marine wildlife viewing, boating and other recreational activities, research and monitoring activities, numerous educational activities, and maritime shipping.”¹¹⁷ DOC observed that “the waters surrounding California’s Channel Islands represent a globally unique and diverse assemblage of habitats and species.”¹¹⁸

The review that is underway pursuant to Executive Order 13795 is an expansion of the CINMS included in DOC’s action on May 24, 2007.¹¹⁹ Although the prime purpose of the action established a network of marine zones (i.e., marine reserves and marine conservation areas) within

¹¹² *Id.* at 43942.

¹¹³ *Id.* at 43944.

¹¹⁴ Expansion of Fagatele Bay National Marine Sanctuary, 77 Fed. Reg. at 43944.

¹¹⁵ Establishment of Marine Reserves and a Marine Conservation Area Within the Channel Islands National Marine Sanctuary, 72 Fed. Reg. 29208, 29208 (May 24, 2007) (citing 45 Fed. Reg. at 65198).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ America-First Strategy Executive Order, *supra* note 13, at 20816.

the sanctuary, DOC also modified the terms of the designation “to allow for the regulation of extractive activities, including fishing, in marine reserves and marine conservation areas,” as well as a “slight modification to the outer boundary” of the sanctuary.¹²⁰

In the 2007 action, DOC slightly expanded the sanctuary’s overall size by approximately fifteen square nautical miles—from approximately 1,113 square nautical miles to approximately 1,128 square nautical miles.¹²¹ Thus, this expansion represents an approximately 1% increase and “[t]his small amount added allows the boundary of four of the marine reserves to be defined by straight lines projecting outside the current CINMS boundary, allowing for better enforcement of the marine reserves.”¹²²

Because this slight expansion intended to help “clean up” boundary issues and there is nothing in the rulemaking to suggest that this particular area has any more significant energy potential than the sanctuary as a whole, it does not seem likely that it would be a candidate for reversal. And in any event, such action should not lead to a future action opening the area for oil and gas drilling. In a different part of Executive Order 13795, President Trump maintained a ban on oil and gas drilling in any marine sanctuaries “designated as of July 14, 2008.”¹²³ Because the CINMS expansion occurred on May 24, 2007, it falls within the prohibition established in 2008 by President Bush, which President Trump subsequently cited in Executive Order 13795.¹²⁴

The three remaining sanctuaries under DOC review, however, have significant energy reserves potential.¹²⁵ In 2008, DOC expanded the

¹²⁰ 72 Fed. Reg. at 29208. Marine zones “are discrete areas that have special regulations differing from the regulations that apply throughout or above the Sanctuary as a whole.” *Id.*

¹²¹ *Id.* at 29215.

¹²² *Id.*

¹²³ America-First Strategy Executive Order, *supra* note 13, at 20816.

¹²⁴ *Id.*; Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 2008 PUB. PAPERS 1015, 1015 (July 14, 2008). As noted in n. 84, some question the lawfulness of President Trump’s alteration of past president’s withdrawal under OCSLA section 12(a). Despite the potential unlawfulness of President Trump’s modifications, the prohibition of oil and gas development remains applicable to the CINMS expansion.

¹²⁵ In September, 2017, Greenpeace USA analyzed the periodic National Assessments of U.S. offshore oil and gas resources produced by the Bureau of Ocean Energy Management (“BOEM”). The Greenpeace study then performed a geospatial analysis of the overlap between the areas covered in the geologic basins in the 2016 Pacific Outer Continental Shelf assessment and within the areas of these sanctuaries. The report concluded that 1.8 million acres of the original designation areas of the GFNMS, MBNMS, and CBNMS

Monterey Bay National Marine Sanctuary (“MBNMS”).¹²⁶ Then, in 2015, the DOC expanded the Gulf of the Farallones National Marine Sanctuary (“GFNMS”) and Cordell Bank National Marine Sanctuary (“CBNMS”).¹²⁷ But, laws and regulations prevent oil and gas development, so even if DOC targeted these sanctuaries, Congress would still have to open the area to development.

The MBNMS, originally designated in 1992 and found off of California’s central coast, adjoins GFNMS from the south.¹²⁸ The sanctuary covers a “shoreline length of approximately 276 statute miles (240 nmi) between Marin Rocky Pt. in Marin County and Cambria in San Luis Obispo County” and including the 2008 expansion incorporating the underwater structure known as the Davidson Seamount, encompasses approximately 6,094 square statute miles (4,602 square nautical miles).¹²⁹ According to DOC, MBNMS houses “some of the world’s most diverse marine ecosystems,” such as “numerous mammals, seabirds, fishes, invertebrates, sea turtles and plants in a remarkably productive coastal environment.”¹³⁰

The GFNMS, situated “along and offshore California’s north-central coast, west of northern San Mateo, San Francisco, Marin and southern Sonoma Counties,” originally spanned “approximately 1,282 square miles (968 square nautical miles (sq. nmi)) of offshore California waters extending out to and around the Farallon Islands, nearshore waters [] from Bodega Head to Rocky Point in Marin, and the submerged lands beneath these waters.”¹³¹ Designated in 1981, the sanctuary protects and preserves

overlap with geologic basins containing undiscovered, recoverable oil and gas deposits. Tim Donaghy, *California National Marine Sanctuaries Under Trump Review Contain Sizable Oil and Gas Deposits*, GREENPEACE (Sept. 25, 2017), <https://www.greenpeace.org/usa/research/californias-national-marine-sanctuaries-contain-sizable-oil-and-gas-deposits/> [https://perma.cc/K2Q5-35X4].

¹²⁶ Gulf of the Farallones National Marine Sanctuary Regulations; Monterey Bay National Marine Sanctuary Regulations; and Cordell Bank National Marine Sanctuary Regulations, 73 Fed. Reg. 70488 (Nov. 20, 2008).

¹²⁷ Expansion of Gulf of the Farallones and Cordell Bank National Marine Sanctuaries, and Regulatory Changes, 80 Fed. Reg. 13078, 13078 (Mar. 12, 2015).

¹²⁸ 73 Fed. Reg. at 70488.

¹²⁹ *Id.* at 70488–89. The Davidson Seamount is seventy nautical miles southwest of Monterey and “is one of the largest known seamounts in U.S. waters.” *Id.* at 70493. It lies 4,101 feet (1,250 meters) below the surface and extends twenty-six statute miles long and is eight statute miles wide with a base to crest height of 7,480 feet. *Id.*

¹³⁰ *Id.* at 70489.

¹³¹ 80 Fed. Reg. at 13078. The Farallon Islands “lie along the outer edge of the continental shelf, between 15 and 22 miles (13 and 19 nmi) southwest of Point Reyes and approximately 30 miles (26 nmi) due west of San Francisco.” *Id.*

“a unique and fragile ecological community, including the largest seabird colony in the contiguous United States and diverse and abundant marine mammals.”¹³² Because it is within the “California current,” its waters are “characterized by wind-driven upwelling, localized eddies, counter-current gyres, high nutrient supply, and high levels of phytoplankton.”¹³³

The CBNMS, designated in 1989 and found “offshore of California’s north-central coast, west of Marin County,” originally covered approximately 399 sq. nmi.¹³⁴ The entirely offshore sanctuary shares both its southern and eastern boundary with the GFNMS.¹³⁵ Like the GFNMS, the CBNMS sits in “a major coastal upwelling system,” so the designated sanctuary “protect[s] and preserve[s] the extraordinary ecosystem, including invertebrates, marine birds, mammals, and other natural resources, of Cordell Bank and its surrounding waters.”¹³⁶

With respect to the actions under DOC review, all three sanctuaries underwent expansion within the window established by Executive Order 13795. In 2008, DOC expanded the boundaries of MBNMS to capture the Davidson Seamount.¹³⁷ In 2015, DOC expanded both CBNMS and GFNMS; CBNMS grew to a total of 1,286 square miles (971 sq. nmi) and GFNMS expanded to a total of 3,295 square miles (2,488 sq. nmi).¹³⁸

With respect to the MBNMS, DOC explained the “Davidson Seamount is home to previously undiscovered species and species assemblages, such as large patches of corals and sponges, where there is an opportunity to discover unique associations between species and other ecological processes [and the] high biological diversity of these assemblages has not been found on other California seamounts.”¹³⁹ The “endemism of seamount species, potential future harvest damage to coral and sponge assemblages, and the low resilience of these species” prompted DOC to conserve the seamount.¹⁴⁰

¹³² *Id.*

¹³³ *Id.* The sanctuary contains sandy beaches and small coves, as well as “open bays (Bodega Bay, Drakes Bay) and enclosed bays or estuaries (Bollinas Lagoon, Tomales Bay, Estero Americano, and Estero de San Antonio).” *Id.*

¹³⁴ *Id.* The sanctuary features Cordell Bank, “an offshore granite bank located on the edge of the continental shelf, about 49 miles (43 nmi) northwest of the Golden Gate Bridge and 23 miles (20 nmi) west of the Point Reyes lighthouse.” 80 Fed. Reg. at 13078.

¹³⁵ *Id.*

¹³⁶ *Id.* The DOC found the “combination of oceanic conditions and undersea topography provide[d] for a highly productive environment in a discrete offshore area.” *Id.* at 13078–79.

¹³⁷ 73 Fed. Reg. at 70492.

¹³⁸ 80 Fed. Reg. at 13078–79.

¹³⁹ 73 Fed. Reg. at 70494.

¹⁴⁰ *Id.* DOC also observed “[a]bundant and large, fragile species (e.g., corals greater than

In the CBNMS and GFNMS action, DOC expanded “the boundaries of GFNMS and CBNMS north and west of the sanctuaries’ original boundaries to extend regulatory protections and management programs to the nationally significant marine resources and habitats of the waters and submerged lands offshore of San Mateo, San Francisco, Marin, Sonoma and Mendocino Counties.”¹⁴¹ DOC explained the expanded area, which for the GFNMS amounted to 1,288,320 acres, ecologically connected to the current sanctuaries, waters in the area are the “regional ecosystem driver for productivity in coastal waters of north-central California[,]” and “[t]he area supports a rich marine food web made up of many species of algae, invertebrates, fish, birds, and marine mammals.”¹⁴² DOC concluded “these sensitive resources are particularly susceptible to damage from human activities,” and therefore expanding CBNMS and GFNMS “conserves and protects critical resources by preventing or reducing human-caused impacts such as marine pollution, and wildlife and seabed disturbance.”¹⁴³

DOC also found the expansion of CBNMS and GFNMS sanctuaries “protects significant submerged cultural resources and historical properties, as defined by the National Historic Preservation Act, 16 U.S.C. 470, et seq., and its regulations (historical properties include among other things: Artifacts, records, remains related to or located in the properties of traditional religious and cultural importance to an Indian tribe and that meet the National Register criteria).”¹⁴⁴ It observed “[s]everal state and federal laws . . . that provide some degree of protection of historical resources, but the State of California regulations only extend 3 nautical miles offshore, and existing federal regulations do not provide comprehensive protection of these resources.”¹⁴⁵

eight feet tall, and at least 200 years old, as well as vast fields of sponges) and a physically undisturbed sea floor appear relatively pristine.” *Id.*

¹⁴¹ 80 Fed. Reg. at 13079. DOC explained “[s]ome species are transitory, travelling hundreds, thousands or tens of thousands of miles to the region, such as endangered blue whales, albatross, shearwaters, white and salmon sharks, while others live year round in the sanctuaries, such as Dungeness crab, sponges, other benthic invertebrates, salmon, many species of rockfish and flatfish, and harbor seals and harbor porpoises.” *Id.* DOC also observed “the largest assemblage of breeding seabirds in the contiguous United States is at the Farallon Islands, and each year their breeding success depends on a healthy and productive marine ecosystem to allow breeding adults and fledgling young to feed and flourish.” *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Historical documents reveal “over 200 vessel and aircraft losses between 1820 and 1961 along California’s north-central coast from Bodega Head north to Point Arena.” 80 Fed. Reg. at 13079. Submerged archaeological remnants “could include landings, wire, trapeze loading chutes and offshore moorings.” *Id.*

¹⁴⁵ *Id.*

With respect to oil and gas development in these sanctuaries, DOC noted during the rulemaking for the expansions “[DOC] may not under any circumstances issue a permit or authorization for exploring for, developing or producing oil, gas, or minerals within the Sanctuary.”¹⁴⁶ It rejected a comment stating “[DOC] should adopt balanced policies that support affordable, reliable oil and gas development” because “700 million barrels of oil and 700 billion cubic feet of natural gas located in federal waters would be precluded by the expansion.”¹⁴⁷ DOC recognized as one of its mandates to “facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources [. . .].”¹⁴⁸ But because “[o]il and gas development in the marine environment has historically posed significant risks to marine resources, as evidenced by the magnitude of the impacts of some offshore oil spills,” DOC “has usually excluded traditional energy exploration and production in our nation’s national marine sanctuaries.”¹⁴⁹

Similarly, in the 2008 MBNMS action to add the Davidson Seamount to the sanctuary, DOC noted, with limited exception for jade collection, that “[i]n no event may the Secretary or designee issue a permit authorizing, or otherwise approve [. . .] [t]he exploration for, development of or production of oil, gas, or minerals within the Sanctuary.”¹⁵⁰ And, in any event, a recent geospatial analysis of the potential for oil and gas development in the MBNMS expansion suggests no significant amounts of undiscovered recoverable resources exist there.¹⁵¹ Moreover, DOC also included in the Davidson Seamount expansion rulemaking (which also included changes to both CBNMS and GFNMS) statutory prohibitions in the MBNMS and CBNMS “on certain oil and gas activities NOAA cannot

¹⁴⁶ *Id.* at 13080–81. The action also made other changes, including the replacement of “seabed” with the term “submerged lands” used throughout the terms of designation and regulations, replacing “hydrocarbon operations” with a more complete description of oil and gas activities, and adding “minerals” to what had been “hydrocarbon operations.” *Id.*; see also *id.* at 13116 (“§ 922.112: Prohibited or otherwise regulated activities. (a) The following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary: (1) Exploring for, developing, or producing oil, gas, or minerals.”).

¹⁴⁷ 80 Fed. Reg. at 13101.

¹⁴⁸ *Id.* at 13100 (citing 16 U.S.C. 1431(b)(6)).

¹⁴⁹ *Id.* at 13101.

¹⁵⁰ 73 Fed. Reg. at 70494; see also 15 C.F.R. § 922.132(a) (making it unlawful to explore for, develop, or produce oil, gas, or minerals within the MBNMS, except for jade in certain locations).

¹⁵¹ Donaghy, *supra* note 125.

change.”¹⁵² Citing Public Law 101-74 from August 9, 1989, DOC noted a prohibition against “the exploration for, or the development of production of, oil, gas, or minerals in any area” of the CBNMS, and, under Public Law 102-587 from November 4, 1992, “any leasing, exploration, development, or production of oil or gas” within the MBNMS.¹⁵³

Therefore, based on statutory and regulatory prohibitions, the Gulf of Farallones sanctuary, expanded by 1,288,320 acres, remains the only area covered by Executive Order 13795 facing a reasonable prospect of oil and gas development.¹⁵⁴ A geospatial analysis of the sanctuary expansion by NOAA and BOEM suggests 23% of the area, amounting to approximately 300,000 acres, overlaps with geologic basins containing undiscovered recoverable oil and gas resources.¹⁵⁵ Of course, DOC—independent of the scope of the Executive Order—cannot modify the size or uses within a sanctuary (including eliminating the regulatory prohibition against oil and gas development). But, as set forth in Section III.B, the substantive and procedural requirements would make such an attempt arduous and subject to challenge for years.

3. A More Challenging Statutory Scheme and Legal Framework than MPRSA Governs National Marine Monuments

DOC classified five of the areas under review in its recent Notice of Opportunity for Public Comment as national marine monuments as opposed to national marine *sanctuaries*: the Northeast Canyons and Seamounts Marine National Monument,¹⁵⁶ the Pacific Remote Islands Marine National Monument,¹⁵⁷ the Marianas Trench Marine National

¹⁵² 73 Fed. Reg. at 70503.

¹⁵³ *Id.*

¹⁵⁴ Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28827.

¹⁵⁵ Donaghy, *supra* note 125.

¹⁵⁶ Proclamation 9496: Northeast Canyons and Seamounts Marine National Monument, 81 Fed. Reg. 65161 (Sept. 21, 2016). Created by President Obama in 2016 and located off the New England Coast, the Northeast Canyons and Seamounts Marine National Monument spans 3.1 million acres. *Id.*; Paul Rogers, *Trump order that could shrink California and Pacific Ocean marine sanctuaries moves forward*, MERCURY NEWS (June 16, 2017), <https://www.mercurynews.com/2017/06/26/trump-order-that-could-shrink-california-and-pacific-ocean-marine-sanctuaries-moves-forward/> [<https://web.archive.org/web/20170919064943/https://www.mercurynews.com/2017/06/26/trump-order-that-could-shrink-california-and-pacific-ocean-marine-sanctuaries-moves-forward/>].

¹⁵⁷ Proclamation 8336: Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 12, 2009); Proclamation 9173: Pacific Remote Islands Marine National Monument Expansion, 79 Fed. Reg. 58645 (Sept. 29, 2014). The Pacific

Monument,¹⁵⁸ the Papahānaumokuākea Marine National Monument,¹⁵⁹ and the Rose Atoll Marine National Monument.¹⁶⁰

The difference between marine monuments sanctuaries has significant implications for future attempts to abolish or modify these monuments. National monuments are created under the Antiquities Act of 1906, which gives the president the power to set aside federal lands as national monuments to “protect historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest sensitive lands.”¹⁶¹

Although an in-depth analysis of the whether (and if so, how) a national monument can be modified or abolished is beyond the scope of this Article, a serving U.S. Attorney General opined that “the statute does not in terms authorize the President to abolish national monuments” and also concluded that the president does not have implied authority to rescind a prior reservation either.¹⁶² Scholars, as well as a Congressional Research

Remote Islands Marine National Monument, created by President Bush in 2009 and subsequently expanded in 2014 by President Obama, spans approximately fifty-five million acres and primarily includes the Johnston Atoll, Palmyra Atoll, and Wake Island. 79 Fed. Reg. at 58645; Rogers, *supra* note 156.

¹⁵⁸ Proclamation 8335: Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557 (Jan. 6, 2009). Located at and created by President Bush to protect the Marianas Trench (the deepest ocean area). *Id.*

¹⁵⁹ Proclamation 9478: Papahānaumokuākea Marine National Monument Expansion, 81 Fed. Reg. 60227 (Aug. 31, 2016). Located in the northwest Hawaiian Islands, the monument, originally established by President Bush, expanded in 2016 by President Obama to form the largest ocean preserve in the United States. *Id.*; Rogers, *supra* note 156.

¹⁶⁰ Proclamation 8337: Establishment of the Rose Atoll Marine National Monument, 74 Fed. Reg. 1577 (Jan. 12, 2009). Established in 2009, the Rose Atoll Marine National Monument lies approximately 130 nautical miles east-southeast of Pago Pago Harbor, American Samoa. It is the easternmost Samoan island and the southernmost point of the United States. *See Marine National Monument Program*, NOAA, http://www.fpir.noaa.gov/MNM/mnm_rose_atoll.html [<https://perma.cc/H8X4-DRMQ>] (last visited Apr. 4, 2018). The Rose Atoll Marine National Monument is contained within the National Marine Sanctuary of American Samoa. *Id.* Therefore, any attempt to modify the marine environment triggers substantive and procedural requirements under both MPRSA and the Antiquities Act of 1906. Review of National Marine Sanctuaries and Marine National Monuments, 82 Fed. Reg. at 28828.

¹⁶¹ ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 1 (2016); *see* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 300–08 (1982). The reservation provisions found in section 2 of the act state “[t]hat the President of the United States is hereby authorized, in his discretion, to declare by public proclamation . . . 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 proper care and management of the objects to be protected.” 16 U.S.C. § 431.

¹⁶² Homer Cummings, *Proposed Abolishment of Castle Pinckney National Monument*, 39 Op. Att’y Gen. 185, 186 (1941). Attorney General Homer Cummings, serving President Franklin D. Roosevelt, reviewed a proposed proclamation of the Acting Secretary of the

Service report to Congress came to the same conclusion.¹⁶³ Therefore, the national monuments under review based on Executive Order 13795 also face an uphill battle if DOC attempts to modify or abolish them.

B. Weaknesses Previously Identified in the MPRSA Will Serve to Protect Against Attempts to “Un-Designate” (or Otherwise Modify) Sanctuaries

When enacting MPRSA, Congress naturally believed its sanctuaries program would protect and conserve critical marine resources.¹⁶⁴ But, history revealed the program to be less successful than what Congress intended. As one commentator noted, “[d]espite the aims of a progressive Congress, the National Marine Sanctuaries have struggled politically and economically to gain traction.”¹⁶⁵ Another commentator remarked that “pluralist public participation complicates lawmaking, the highly politicized, Congressional designation of a sanctuary can take close to a decade, and, upon designation, managers encounter political roadblocks to management plan implementation and programmatic funding.”¹⁶⁶ And yet another scholar concluded that the sanctuaries program “has also enabled dangerous political brinksmanship” and its “architecture of public and consultative processes is procedurally ineffective, and [thus] initiatives can be halted or weakened at multiple junctures.”¹⁶⁷

Ironically, however, these same substantive and procedural requirements that render the sanctuary system ineffective in some commentators’ views, remain critical in the preservation of the current status of the sanctuaries under review. The main reason for this is rooted in Congress’s requirement that DOC go through the same procedures for modifying or eliminating a sanctuary as it does to establish one.¹⁶⁸

Interior abolishing the Castle Pinckney National Monument in Charleston, South Carolina, which a presidential proclamation previously established in 1924 under the Antiquities Act of 1906. *Id.* at 185–86.

¹⁶³ WYATT, *supra* note 161, at 1; Mark Squillace et al., *Presidents Lack The Authority To Abolish Or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017).

¹⁶⁴ Mahaney, *supra* note 29, at 25.

¹⁶⁵ *Id.* Scholars identify permissible uses within sanctuaries as potential weaknesses. *Id.* The MPRSA establishes a “primary objective of resource protection” but then prescribes “a balancing of economic impacts, human-use values, and conservation,” which “effectively institute[es] an environmental cost-benefit analysis and providing only conservation-oriented resource protection”—not preservation. *Id.* at 25–26.

¹⁶⁶ *Id.* at 25; *see also* Owen, *supra* note 31.

¹⁶⁷ Morris, *supra* note 30, at 206–07; Chandler & Gillelan, *supra* note 1, at 10562 (stating that the MPRSA “is now so constrained by its own architecture”).

¹⁶⁸ 16 U.S.C. § 1434(a)(4) (2018).

In section 1434(a)(4) of MPRSA, Congress specified that “the terms of [a national sanctuary] designation may be modified only by the same procedures by which the original designation is made.”¹⁶⁹ Of course, the import of this requirement depends on what “terms of designation” encompasses. In other words, if Congress defined the phrase narrowly or not at all, DOC might have considerable leeway to eliminate a sanctuary or alter one in such a way as to rollback protections in order to advance President Trump’s offshore energy strategy.

But, Congress spoke clearly as to what it intended when it used the phrase the “terms of designation.” In section 1434(a)(4), it established the “terms of designation”:

shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics.¹⁷⁰

As the definition states, Congress considers the geographic area of the sanctuary a “term of designation.”¹⁷¹ Thus, a future attempt to curtail the size of an existing sanctuary, such as trying to reverse the expansions of the Channel Islands National Marine Sanctuary, Cordell Bank National Marine Sanctuary, Greater Farallones National Marine Sanctuary, and Monterey Bay National Marine Sanctuary, must follow “the same procedures by which the original designation is made.”¹⁷² And the MPRSA contains an extremely detailed and labor-intensive process for DOC to follow when designating a sanctuary, including the establishment of specific findings, determinations, and consultations. The agency must also follow the layered procedural requirements under the MPRSA, as well as the National Environmental Policy Act.¹⁷³

Therefore, as set forth in detail below, the substantive and procedural steps that DOC must undertake demonstrate DOC’s uphill climb to “un-designate” (other otherwise modify) a marine sanctuary.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ NEPA, 42 U.S.C. §§ 4321–70 (2018).

1. The Substantive Designation Factors That DOC Must Consider Will Complicate Attempts to Eliminate or Modify a Sanctuary

Because DOC must follow the same procedures as it does when designating a sanctuary, an analysis of these requirements demonstrates how difficult it will be for DOC to modify or rescind the sanctuary expansions currently under review. Beyond the specific, congressional standards DOC must meet to designate a sanctuary, Congress specified factors that DOC “shall” consider to determine whether a marine environment meets such standards.¹⁷⁴ In other words, if DOC wanted to alter a designation, it would have to revisit its previous consideration of such factors.¹⁷⁵

The first factor that DOC must consider is “the area’s natural resource and ecological qualities.”¹⁷⁶ These qualities include the area’s “contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site.”¹⁷⁷

The next factor is “the area’s historical, cultural, archaeological, or paleontological significance.”¹⁷⁸ Also, consideration is required of “the present and potential uses of the area that depend on maintenance of the area’s resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education.”¹⁷⁹ Related to these three factors, DOC must consider “the present and potential activities that may adversely affect” such factors.¹⁸⁰ It is likely that DOC previously determined many of these factors to militate in favor of designating or expanding an existing sanctuary. In a subsequent rulemaking, it would be incumbent on DOC to explain a reversal of its view or, on balance, why its previous conclusions no longer carried the same force to support the prior designation or expansion.

Another factor DOC must consider is the “the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development.”¹⁸¹ Here, the new administration might more easily and adequately explain why conditions

¹⁷⁴ 16 U.S.C. § 1433(b)(1) (2018).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 1433(b)(1)(A).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 1433(b)(1)(B).

¹⁷⁹ *Id.* § 1433(b)(1)(C).

¹⁸⁰ 16 U.S.C. § 1433(b)(1)(D).

¹⁸¹ *Id.* § 1433(b)(1)(H).

(such as energy considerations) now weigh against a designation of a marine sanctuary and regulatory prohibition against energy development. But, DOC must consider "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."¹⁸² Of course, DOC could then deem a state capable of adequately protecting an area, but without a measurable change in state efforts or resources, its new conclusion might be subject to challenge.

DOC must also weigh "the manageability of the area," broadly defined 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."¹⁸³ Similarly, "the area's scientific value and value for monitoring the resources and natural processes that occur there" must be analyzed.¹⁸⁴ Another factor looks to "the feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses."¹⁸⁵ Because these factors implicate scientific evaluations and federal management expertise, they provide more room for DOC to change positions based on a reasonable interpretation and consideration of congressionally mandated factors.

Another consideration is the benefit to the public if the area were to be designated "with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism."¹⁸⁶ Related to this, DOC must consider "the socioeconomic effects of sanctuary designation," giving it broad discretion to consider both protection and development.¹⁸⁷ Finally, DOC must weigh "the value of the area as an addition to the [National Sanctuary] System."¹⁸⁸

To be sure, the requirement that DOC simply "consider" these factors without allocating a particular weight to each might seem hollow. Most, after all, are subjective factors allowing policy or scientific judgments that permit discretion for DOC to find a designation or expansion no longer warranted. But, for DOC to make a modification to an existing sanctuary, it must revisit and reconsider its original findings during a new administrative process to accomplish such a change. This is a resource-intensive and time-consuming endeavor that might not be worth the

¹⁸² *Id.* § 1433(b)(1)(E).

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 1433(b)(1)(J).

¹⁸⁵ *Id.* § 1433(b)(1)(K).

¹⁸⁶ 16 U.S.C. § 1433(b)(1)(G).

¹⁸⁷ *Id.* § 1433(b)(1)(I).

¹⁸⁸ *Id.* § 1433(b)(1)(L).

effort—especially, as set forth below, in light of the consultation requirements that DOC must engage in weighing the factors.

2. DOC Must Make “Consultations,” Which Will Constrain DOC’s Ability to Eliminate or Modify a Sanctuary

Congress also mandated “consultations” by DOC when making the required determinations and findings during sanctuary actions.¹⁸⁹ This added layer, which one commentator calls “procedurally ineffective,” takes additional time, spends limited resources, and more importantly requires DOC to attempt to achieve a reasonable consensus with disparate parties.¹⁹⁰ Thus, such consultations will constrain DOC’s ability to modify a sanctuary.

First, Congress wanted to ensure its involvement in sanctuary actions. Therefore, it required that DOC consult with both the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate in making the required determinations during a sanctuary action.¹⁹¹ This represents a significant restraint on DOC’s independence during a sanctuary modification or elimination because these “consults” allow Congress to intercede in a proposed action.

As part of this process, MPRSA authorizes the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate to hold hearings on the proposed designation “and on the matters set forth in the documents.”¹⁹² If, within a prescribed time period, either Committee issues a report addressing the proposed sanctuary action, DOC “shall consider this report before publishing a notice to designate the national marine sanctuary.”¹⁹³ And, under section 1434(b)(1), DOC cannot publish a notice of designation until the expiration of this time period.¹⁹⁴

Likewise, DOC must consult with other federal agencies when making determinations and findings on a sanctuary such as “the Secretaries of State, Defense, Transportation, and the Interior, the Administrator, and the heads of other interested Federal agencies.”¹⁹⁵ Related to

¹⁸⁹ *Id.* §§ 1433(b)(2)(A)–(E).

¹⁹⁰ Morris, *supra* note 30, at 206–07; Chandler & Gillelan, *supra* note 1, at 10562 (stating that the MPRSA “is now so constrained by its own architecture”).

¹⁹¹ 16 U.S.C. § 1433(b)(2)(A).

¹⁹² *Id.* § 1434(a)(6).

¹⁹³ *See id.* To issue a report, the committee’s deadline is a “forty-five day period of continuous session of Congress beginning on the date of submission of the documents.” *Id.*

¹⁹⁴ *Id.* § 1434(b)(1).

¹⁹⁵ *Id.* § 1433(b)(2)(B).

this requirement, Congress similarly expected MPRSA to work hand-in-hand with other federal acts, as it relates to compatible uses of designated sanctuaries. It therefore mandated DOC to consult with “the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson-Stevens Act [] that may be affected by the proposed designation.”¹⁹⁶

Congress also explicitly intended MPRSA to complement efforts by state and local governments to protect resources. Congress therefore required DOC to consult with “the responsible officials or relevant agency heads of the appropriate State and local government entities, including coastal zone management agencies [] that will or are likely to be affected by the establishment of the area as a national marine sanctuary.”¹⁹⁷ This consultation requirement is not a hollow one. MPRSA prevents a designation (including an action involving an expansion or change in designation terms) for a national marine sanctuary located “partially or entirely within the seaward boundary of any State” if the Governor affected certifies to the Secretary the designation or any of its terms as unacceptable.¹⁹⁸ If this occurs, the designation or the unacceptable term or terms, as the case may be, do not go into effect for the sanctuary area within the seaward boundary of the State.¹⁹⁹ While this provision would not affect the outer continental shelf, which lies beyond the seaward boundary, it nonetheless is a significant opportunity for states, such as California, to safeguard their interests.

Finally, Congress included a “catch-all” whereby DOC must consult with “other interested persons.”²⁰⁰ This requirement provides yet another avenue for a future challenge alleging insufficient consultation to support a sanctuary action.²⁰¹ All told, these required consultations require DOC to spend time, resources, and political capital to modify a sanctuary in furtherance of President Trump’s new energy policy.

3. The Layered Administrative Process Further Complicates Elimination or Modification of a Sanctuary

In addition to the substantive factors DOC must evaluate and consider, MPRSA mandates detailed procedural steps for DOC proposal of

¹⁹⁶ 16 U.S.C. § 1433(b)(2)(D); Magnuson-Stevens Act, 16 U.S.C. § 1852 (2018).

¹⁹⁷ 16 U.S.C. § 1433(b)(2)(C).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* §§ 1433(b)(2)(A)–(E).

²⁰¹ *Id.* § 1433(b)(2)(E).

sanctuary designation, modification, and elimination.²⁰² This process implicates not only detailed procedures under MPRSA, but also procedures under other federal statutes—most notably the National Environmental Policy Act (“NEPA”).²⁰³ Given these layered and interrelated administrative procedures, it is no surprise that “a designation of a sanctuary can take close to a decade.”²⁰⁴

The process to designate a sanctuary starts with the “scoping” phase, whereby DOC must indicate its intention to designate a national marine sanctuary or modify an existing one.²⁰⁵ As set forth in more detail below, this step involves following provisions in both the MPRSA and NEPA. In its notice, DOC generally requests comments from the public and interested parties on “potential boundaries, resources that could be protected,” and other issues and information that DOC should consider during the action.²⁰⁶ Second, DOC publishes draft designation documents including a draft management plan for the sanctuary, a draft Environmental Impact Statement under NEPA, which includes possible alternatives to the actions, as well as proposed regulations and proposed boundaries.²⁰⁷

Upon publication of these documents in the Federal Register, DOC receives stakeholder input from the “public, agency partners, tribes, and other[s].”²⁰⁸ This stage also includes formal consultations required by the MPRSA (as discussed previously) as well as other acts.²⁰⁹ After the comment period closes, DOC reviews and considers submissions and makes appropriate changes to the documents.²¹⁰ The final steps are

²⁰² 16 U.S.C. § 1434.

²⁰³ NEPA, 42 U.S.C. §§ 4321–70 (2018). These statutes include Coastal Zone Management, Executive Order 12866 (Regulatory Impact), Executive Order 13132 (Federalism Assessment), National Historic Preservation Act, Regulatory Flexibility Act, and Paperwork Reduction Act; *see, e.g.*, Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2260–61.

²⁰⁴ Mahaney, *supra* note 29, at 25; *see also* Owen, *supra* note 31, at 721, 736.

²⁰⁵ 16 U.S.C. § 1434; Implementation of the National Environmental Protection Act, 43 C.F.R. § 46.235 (2017); Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256.

²⁰⁶ 16 U.S.C. § 1434; Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256.

²⁰⁷ 16 U.S.C. § 1434; Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256; *see also* 43 C.F.R. § 46(E) (outlining specific requirements and procedures for environmental impact statements).

²⁰⁸ Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256.

²⁰⁹ *See* U.S.C. § 1433(b)(2) (outlining consultation requirements).

²¹⁰ Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256.

DOC's issuance of its final decision and publication of the final designation and supporting material in the Federal Register.²¹¹

Although this may seem straightforward succinct, a careful look at the specific statutory requirements involved in the process demonstrates how intensive and involved the procedures are in practice. As stated above, when DOC preliminarily identifies a marine environment that it intends to designate as a marine sanctuary, it must first give notice as prescribed in the MPRSA.²¹² This notice requirement begins by issuing not only a formal "notice of the proposal," but also "proposed regulations that may be necessary and reasonable to implement the proposal," as well as a "summary of the draft management plan" in the Federal Register.²¹³ Thus, before even proceeding with the action, DOC must draft detailed proposed regulations on management and changes to the proposed sanctuary, and must include such regulations with its notice.

Contemporaneous with the submission of the notice and related documents to the Office of the Federal Register, DOC must submit the notice documents (including an executive summary) to "the Committee on Resources of the House of Representatives, the Committee on Commerce, Science, and Transportation of the Senate, and the Governor of each State in which any part of the proposed sanctuary would be located."²¹⁴ As explained in Section III.B.2, Congress and affected states have significant voices during the process.

In addition to these documents, DOC must also include and make available to the general public "draft sanctuary designation documents."²¹⁵ The draft sanctuary documents must include a "draft environmental impact statement" prepared under the National Environmental Policy Act.²¹⁶ Thus, while the MSPRA's procedures are cumbersome unto themselves, intertwined in this are the requirements established by NEPA.

Although DOC completes its NEPA requirements concurrently with its procedural requirements under the MSPRA, the preparation of the NEPA documents, although similar those required by the MSPRA, add

²¹¹ See 16 U.S.C. § 143(b)(1); Mallows Bay—Potomac River National Marine Sanctuary, 82 Fed. Reg. at 2256.

²¹² 16 U.S.C. § 1434(a)(1).

²¹³ *Id.* § 1434(a)(1)(A). It must also reach out directly to the local communities that may be affected by the designation by providing notice of the proposal in local "newspapers of general circulation or electronic media." *Id.*

²¹⁴ *Id.* § 1434(a)(1). In addition, after receiving the documents, the committees can "each hold hearings on the proposed designation and on the matters set forth in the documents." *Id.* § 1434(a)(6).

²¹⁵ *Id.* §§ 1434(a)(1)(A), (a)(2).

²¹⁶ 16 U.S.C. § 1434(a)(2)(A); NEPA, 42 U.S.C. §§ 4321–70.

a new level to the process.²¹⁷ Because a full NEPA review, called an Environmental Impact Statement (“EIS”), is necessary for all “major Federal actions significantly affecting the quality of the human environment,” this administrative rulemaking can take years.²¹⁸

With respect to the MPRSA, DOC must also include a detailed “resource assessment.”²¹⁹ The assessment must inventory:

the “present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial, governmental, or recreational uses; . . . any commercial, governmental, or recreational resource uses in the areas that are subject to the primary jurisdiction of the Department of the Interior; as well as information on any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary, which is prepared in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator of the Environmental Protection Agency.”²²⁰

Upon completion of the resource assessment, DOC also must prepare a draft management plan for the proposed sanctuary, as well as a map of the proposed sanctuary.²²¹ This plan must include:

- (i) The terms²²² of the proposed designation;
- (ii) Proposed mechanisms to coordinate existing regulatory and management authorities within the area.

²¹⁷ David Pettit & David Newman, *Federal Public Law & the Future of Oil and Gas Drilling on the Outer Continental Shelf*, 17 ROGER WILLIAMS U. L. REV. 184, 190–91, 196–97 (2012). NEPA’s mandate to federal agencies is to “the fullest extent possible” consider the environmental effects of their actions. 42 U.S.C. § 4332(2).

²¹⁸ 42 U.S.C. § 4332(2)(C).

²¹⁹ 16 U.S.C. § 1434(a)(2)(B).

²²⁰ *Id.* § 1434(a)(2)(B). In performing this inventory, DOC must consult with the Secretary of the Interior. *Id.* § 1434(a)(2)(B)(ii). Public disclosure of information under this subsection “shall be consistent with national security regulations.” *Id.* § 1434(a)(2)(B).

²²¹ *Id.* §§ 1434(a)(2)(C)–(D).

²²² The “terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics.” *Id.* § 1434(a)(4).

- (iii) The proposed goals and objectives, management responsibilities, resource studies, and appropriate strategies for managing sanctuary resources of the proposed sanctuary, including interpretation and education, innovative management strategies, research, monitoring and assessment, resource protection, restoration, enforcement, and surveillance activities.
- (iv) An evaluation of the advantages of cooperative State and Federal management if all or part of the proposed sanctuary is within the territorial limits of any State or is superjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 et seq.).
- (v) An estimate of the annual cost to the Federal Government of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education.
- (vi) The proposed regulations [to manage the proposed sanctuary.]²²³

DOC must also document the “basis for the determinations made under section 1433(a) of this title with respect to the area” and an “assessment of the considerations under section 1433(b)(1).”²²⁴ As discussed in Section III.B.1, this involves a comprehensive assessment of factors set forth in the statute to determine whether the action meets the substantive standards.

The procedural requirements continue with a mandatory public hearing to take place thirty days from the date notice is given of DOC's action.²²⁵ And, such a hearing must be held “in the coastal area or areas that will be most affected by the proposed designation of the area as a national marine sanctuary for the purpose of receiving the views of interested parties.”²²⁶ Once DOC finishes this process, reviews comments, and is ready to designate a national marine sanctuary, it must publish

²²³ 16 U.S.C. §§ 1434(a)(2)(C)(i)–(vi).

²²⁴ *Id.* §§ 1434(a)(2)(E)–(F).

²²⁵ *See id.* § 1434(a)(3).

²²⁶ *Id.*

in the Federal Register a notice of the designation (or modification as the case may be), along with regulations to implement the final action.²²⁷

This recitation of procedural steps required under MPRSA and NEPA is intended to highlight why modifying a national marine sanctuary is no easy task. Especially given the limited budget that DOC receives for the sanctuary program, the reduction in staff proposed for DOC in the future, strategic considerations with state-federal dynamics, the agency's tenuous relationship with Congress, as well as the likely potential for litigation throughout this process, a decision to undertake this process for a particular sanctuary would have to be carefully weighed against the putative benefits.

CONCLUSION

To be sure, Executive Order 13795 represents a dramatic departure from the energy policy of President Obama. Its renewed focus on domestic oil and gas development is inconsistent with the realities of our predicted energy markets. Even more troubling, however, is the risk the Executive Order brings to our marine environment. Its moratorium on designation of marine sanctuaries and, more ominously, its command to DOC to review recent designations, expansion of national marine sanctuaries, and monuments leave sensitive ecosystems vulnerable.

But, a thorough analysis of the executive order yields some hope, as well as some lessons for future challengers to its policies. The order's temporal limit to DOC's review helps to mitigate future oil and gas development. Moreover, the MPRSA's requirement that any modification of an existing sanctuary must be accomplished by following the same procedures used in the first instance will surely insulate targeted areas from attempts to open them to oil and gas development. The layered, expensive, and time-consuming process involving significant public input and cost to the agency's valuable political capital once represented a major shortcoming of the national marine sanctuary program. Now, this former hindrance might become the sanctuary program's savior.

²²⁷ *Id.* § 1434(b)(1).

