National Headquarters
1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

Submitted via regulations.gov

July 10, 2017

Honorable Ryan Zinke
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Monument Review, MS-1530
Washington, DC 20240

Re: Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016 (May 11, 2017)

Dear Secretary Zinke:

Defenders of Wildlife submits the following comments on Northeast Canyons and Seamounts Marine National Monument to inform the Department's review of this and twenty-six other national monuments designated or expanded since 1996 under the Antiquities Act of 1906, as required by Executive Order 13792.[1]

Founded in 1947, Defenders of Wildlife is a national non-profit conservation organization dedicated to conserving and restoring native species and the habitats on which they depend. Based in Washington, DC, the organization maintains six regional field offices around the country. Defenders is deeply involved in the conservation of marine species and ocean habitats, including the protection and recovery of species that occur in U.S. waters in the Atlantic Ocean. We submit these comments on behalf of our almost 1.2 million members and supporters nationwide.

Executive Order 13792 directs you to review national monuments designated or expanded pursuant to the Antiquities Act of 1906 since January 1, 1996.[2] Section 1 of the order, "Policy," states in pertinent part: "[d]should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."

Section 2 of Executive Order 13792 establishes seven criteria for reviewing national monument designations or expansions since January 1, 1996, either 1) where the designation or the designation after expansion exceeded 100,000 acres or 2) "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders." The review is to determine whether each designation or expansion "conforms to the

[1] Executive Order 13792 of April 26, 2017, "Review of Designations Under the Antiquities Act," 82 Fed. Reg. 20429 (May 1, 2017).
[2] Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 54 U.S.C. ch. 3203.

policy set forth in section 1 of the order." At the conclusion of this review, you are to "formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy."[3]

Twenty-seven national monuments are listed in the Notice of Opportunity for Public Comment, including Northeast Canyons and Seamounts and four other marine national monuments that are also subject to separate review under Executive Order 13795.[4] Defenders firmly believes that none of the national monuments under review, including the Northeast Canyons and Seamounts Marine National Monument, should be revoked, reduced in size, or opened to nonconforming uses through presidential, legislative, or other action.

Northeast Canyons and Seamounts Marine National Monument is the first and only marine national monument designated in the Atlantic Ocean. Home to a tremendous diversity and richness of ocean life, including deep-sea cold-water coral reefs, seabirds such as the Atlantic puffin, imperiled sea turtles and whales, and breeding stocks of fish that sustain commercial and recreational fisheries, this marine national monument protects invaluable scientific resources. These unique federal submerged lands and waters merit the protections of the marine national monument designation, a designation that was undertaken fully consistent with the Antiquities Act of 1906 and the policy articulated in Executive Order 13792.

The president lacks the legal authority to revoke or reduce the size of a national monument. Further, legislative proposals or other actions to carry out the policy of Executive Order 13792 are unnecessary and inappropriate. Defenders of Wildlife therefore urges that your report should not include any recommendations to alter the size or status of the Northeast Canyons and Seamounts Marine National Monument in any respect.

Thank you for your attention to these comments.

Sincerely,

Robert G. Dreher
Senior Vice President, Conservation Programs

[3] 82 Fed. Reg. 22,016 (May 11, 2017).
[4] Executive Order 13795, "Implementing an America-First Offshore Energy Strategy," 82 Fed. Reg. 20815 (May 3, 2017); *see also* 82 Fed. Reg. 28827 (June 26, 2017) (Review of National Marine Sanctuaries and Marine National Monuments Designated or Expanded Since April 28, 2007; Notice of Opportunity for Public Comment).

THE DESIGNATION OF NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT WAS LAWFUL AND APPROPRIATE UNDER THE ANTIQUITIES ACT

The Antiquities Act Imposes Few Requirements Restricting the President's Authority to Designate National Monuments

In the Antiquities Act of 1906, Congress chose to implement the general policy of protecting "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal lands by affording the president broad power to designate national monuments by proclamation.[5]

In designating national monuments under Antiquities Act, the only limits on the president's authority are that: (1) the area must contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest"; (2) the area must be "situated on land owned or controlled by the Federal Government"; and (3) "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[6]

Beyond these requirements, the president is afforded extensive discretion to protect federal lands and waters under the Antiquities Act. If Congress had sought to limit the type or size of objects that could be reserved under the Antiquities Act, the text of the statute would have reflected that limitation. Instead, as federal courts have repeatedly held, the plain language of the Antiquities Act bestows vast discretionary authority upon the president to select both the type and size of an object to be protected. For example, in rejecting a challenge to President Clinton's designation of Grand Staircase-Escalante National Monument premised on the argument that the legislative history of the Act demonstrated Congress' intent to protect only man-made objects, the reviewing court stated:

> This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since the plain language of the Antiquities Act empowers the President to set aside "objects of historic or scientific interest." 16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute *only when the language of a statute is ambiguous*.[7]

Before passing the Antiquities Act of 1906, Congress had considered other antiquities bills that set forth a clearly defined list of qualifying "antiquities."[8] An earlier version of the Antiquities Act—considered immediately before the final Act—also would have made reservations larger than 640

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[5] 54 U.S.C. § 320301(a) (2012).
[6] *Id.* § 320301(a), (b).
[7] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 n.8 (D. Utah 2004) (emphasis added) (citation omitted); *see also Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (affirming the president's broad discretionary authority to designate natural, landscape-scale objects of historic or scientific interest).
[8] H.R. 12447, 58th Cong. § 3 (1904), *reprinted in* National Park Service, History of Legislation Relating to The National Park System Through the 82d Congress: Antiquities Act App. A (Edmund B. Rogers, comp., 1958) [hereinafter History of Legis.].

acres only temporary.[9] Rather than place limitations on the president's authority, however, the final version of the Act expanded executive discretion by adding the phrase "other objects of historic or scientific interest" to the list of interests that may be protected as national monuments.[10]

The addition of this language to the Act has significant implications for how it is administered. Former National Park Service Chief Historian Ronald Lee recognized that "the single word 'scientific' in the Antiquities Act proved sufficient basis to establish the entire system of … national monuments preserving many kinds of natural areas."[11] By the time the Federal Lands Policy and Management Act of 1976 ("FLPMA") was enacted, 51 of the 88 national monuments that had been established "were set aside by successive Presidents … primarily though not exclusively for their scientific value."[12]

"Scientific Interests" Have Included Biological Features Since the Earliest National Monument Designations

The designation of national monuments for scientific interests is not a recent phenomenon. For more than 100 years, national monuments have been established for the "scientific interests" they preserve. These values have included plants, animals, and other ecological concerns. In 1908, for instance, President Theodore Roosevelt designated Muir Woods National Monument because the "extensive growth of redwood trees (*Sequoia sempervirens*) … is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age and size of the trees."[13] President Roosevelt also established Mount Olympus National Monument because it "embrace[d] certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed summer range and breeding grounds of the Olympic Elk (*Cervus roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers."[14]

President Roosevelt was not alone in utilizing the Antiquities Act's broad authority to protect ecological marvels. For example, Presidents Harding, Roosevelt, Truman, and Eisenhower all subsequently expanded Muir Woods National Monument for the same reasons it was originally designated.[15] Likewise, in designating Papago Saguaro National Monument in 1914, President Wilson's proclamation highlighted that the "splendid examples of the giant and many other species of cacti and the yucca palm, with many additional forms of characteristic desert flora [that] grow to great size and perfection . . . are of great scientific interest, and should, therefore, be preserved."[16]

Further, in 1925, President Coolidge designated nearly 1.4 million acres as Glacier Bay National Monument because

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[9] *See* S. 5603, 58th Cong. § 2 (1905), *reprinted in* History of Legis.
[10] S. 4698, 59th Cong. § 2 (1906), *reprinted in* History of Legis.
[11] Ronald F. Lee, The Antiquities Act of 1906 (1970), *reprinted in* Raymond H. Thompson, *An Old and Reliable Authority*, 42 J. OF THE S.W. 197, 240 (2000).
[12] *Id.*
[13] Proclamation No. 793, 35 Stat. 2174 (1908).
[14] Proclamation No. 896, 35 Stat. 2247 (1909).
[15] Proclamation No. 1608, 42 Stat. 2249 (1921); Proclamation No. 2122, 49 Stat. 3443 (1935); Proclamation No. 2932, 65 Stat. c20 (1951); Proclamation No. 3311, 73 Stat. c76 (1959).
[16] Proclamation No. 1262, 38 Stat. 1991 (1914).

> the region [was] said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century.[17]

Similarly, President Hoover enlarged Katmai National Monument "for the purpose of including within said monument additional lands on which there are located features of historical and scientific interest and for the protection of the brown bear, moose, and other wild animals."[18] President Franklin D. Roosevelt designated Channel Islands National Monument, in part, for the "ancient trees" it contained.[19] President Kennedy expanded Craters of the Moon National Monument to include "an island of vegetation completely surrounded by lava, that is scientifically valuable for ecological studies because it contains a mature, native sagebrush-grassland association which has been undisturbed by man or domestic livestock."[20]

Federal Courts Have Confirmed the President's Authority to Determine the Meaning of "Scientific Interests"

The broad objectives of the Antiquities Act, coupled with the vast deference afforded to the president in specifying a monument's purpose, compel courts to uphold presidential determinations of what constitute "objects" and "scientific interests" when those findings are challenged.[21] Beginning with a challenge to the designation of the Grand Canyon National Monument in 1920, the Supreme Court has promoted an expansive reading of the president's discretion to determine which "scientific interests" may be protected. In its analysis, the Supreme Court simply quoted from President Roosevelt's proclamation to uphold the presidential finding that the Canyon "is an object of unusual scientific interest."[22]

In *Cappaert v. United States*, the Supreme Court upheld President Truman's exercise of authority to add Devil's Hole to the Death Valley National Monument by relying upon the designation's objective of preserving a "remarkable underground pool," which contained "unusual features of scenic, scientific, and educational interest."[23] In his proclamation, President Truman's noted "that the pool contains 'a peculiar race of desert fish … which is found nowhere else in the world' and that the 'pool is of … outstanding scientific importance …'"[24] In its analysis, the Supreme Court acknowledged that "the language of the Act . . . is not so limited" as to preclude the president from exercising his broad discretion to protect such unique "features of scientific interest."[25] As a result,

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[17] Proclamation No. 1733, 43 Stat. 1988 (1925).
[18] Proclamation No. 1950, 47 Stat. 2453 (1931).
[19] Proclamation No. 2281, 52 Stat. 1541 (1938).
[20] Proclamation No. 3506, 77 Stat. 960 (1962).
[21] *See Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1179 (D. Utah 2004) ("[T]here have been several legal challenges to presidential monument designations … Every challenge to date has been unsuccessful.").
[22] *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (quoting Proclamation No. 794, 34 Stat. 225 (1908)).
[23] *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (internal quotations omitted) (quoting Proclamation No. 2961, 3 C.F.R. § 147 (1949-1953 Comp.)).
[24] *Id.*
[25] *Id.*

the Supreme Court ultimately held that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"[26]

Similarly, in upholding the designation of Jackson Hole National Monument, the district court of Wyoming found that

> plant life indigenous to the particular area, a biological field for research of wild life in its particular habitat within the area, involving a study of the origin, life, habits and perpetuation of the different species of wild animals …[all] constitute matters of scientific interest within the scope and contemplation of the Antiquities Act.[27]

Likewise, when ruling on a challenge to the millions of acres that President Carter set aside as national monuments in Alaska, the district court of Alaska concluded that "[o]bviously, matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."[28] The court also found that the Act protected a broad range of natural features, including the ecosystems of plant and animal communities relied upon by the Western Arctic Caribou herd.[29]

Recently, Giant Sequoia National Monument was challenged on grounds that it protects objects that do not qualify under the Act.[30] In rejecting that argument, the circuit court noted that "other objects of historic or scientific interest may qualify, at the President's discretion, for protection as monuments. Inclusion of *such items as ecosystems and scenic vistas* in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features."[31]

In addition, one court found that the designation of the Cascade-Siskiyou National Monument legitimately protects "scientific interests" within the meaning of the Act, because the Monument is

> a "biological crossroads" in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions … the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin … and … the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources.[32]

There Are No Restrictions on the Size of the Objects That May be Designated as National Monuments

As the court in *Wyoming v. Franke* recognized: "What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected."[33] In other words,

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[26] *Id.* at 142 (emphasis added) (citing *Cameron v. U.S.*, 252 U.S. 450, 455–56 (1920)).
[27] *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).
[28] *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980).
[29] *Id.*
[30] *Tulare County v. Bush*, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002).
[31] *Id.* at 1142 (emphasis added) (internal quotations omitted).
[32] *Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1133–34 (D.C. Cir. 2002) (citations omitted).
[33] 58 F. Supp. 890, 896 (D. Wyo. 1945).

the determination of "the smallest area compatible with the proper care and management of the objects to be protected" is almost entirely within the president's authority.

The Supreme Court honored this principle in *Cameron v. United States* by finding that President Theodore Roosevelt was authorized to establish the 800,000-acre Grand Canyon National Monument.[34] Since then, courts have been exceedingly hesitant to infringe upon the president's broad discretion in determining the "smallest area" possible encompassed by a monument—including the 1.7 million-acre Grand Staircase-Escalante National Monument.[35]

Courts, moreover, are even less likely to disturb the president's factual determinations when a proclamation contains the statement that the monument "is the smallest area compatible with the proper care and management of the objects to be protected."[36] Beginning in 1978, presidents have included this declaration in all proclamations establishing or enlarging national monuments.[37]

Designating National Monuments in U.S. Waters is Well Within the President's Discretionary Authority Under the Antiquities Act

The Antiquities Act does not limit the president's authority to designate only those lands owned by the United States in its capacity as sovereign; rather, the Act allows the president to reserve as national monuments "objects of historic or scientific interest that are situated on land owned *or controlled* by the Federal Government . . . ."[38] "Although the Antiquities Act refers to 'lands,'" the Supreme Court has consistently "recognized that it also authorizes the reservation of waters located on or over federal lands."[39] Further, as discussed above, the Supreme Court has specifically rejected the argument that the Antiquities Act cannot be utilized to protect wildlife or its habitat on federally controlled lands.[40]

Thus, the question of whether the president may designate as national monuments those lands and waters within either the territorial seas (from three to 12 miles offshore) or the exclusive economic zone (EEZ) (from 12 to 200 miles offshore) turns only upon whether the United States exercises a quantum of "control" sufficient to satisfy the Antiquities Act's plain language. Although no court has addressed the question of the requisite measure of "control" necessary under the Antiquities

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[34] 252 U.S. 450, 455–56 (1920).
[35] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.").
[36] *See*, *e.g.*, *Mt. States Leg. Found.*, 306 F.3d at 1137; *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).
[37] Including the determination that each national monument is confined to "the smallest area compatible with the proper care and management of the objects to be protected" began with President Carter (Proc. Nos. 4611–4627), and was continued by Presidents Clinton (Proc. Nos. 6920, 7263–66, 7317–20, 7329, 7373–74, 7392–7401), G.W. Bush (Proc. Nos. 7647, 7984, 8031), and Obama (Proc. Nos. 8750, 8803, 8868, 8884, 8943–47, 8089, 9131, 9173, 9194, 9232–34, 9297–99, 9394–96, 9423, 9465, 9476, 9478, 9496, 9558–59, 9563–67).
[38] 54 U.S.C. § 320301(a) (2012) (emphasis added).
[39] *United States v. California*, 436 U.S. 32, 36 n.9 (1978); *see also Cappaert v. United States*, 426 U.S. 128, 138–42 (1976) (holding that a monument designation implicitly includes a reservation of those waters necessary to effectuate the monument's purposes).
[40] *Cappaert*, 426 U.S. at 141 (stating that protection "of a peculiar race of desert fish," and the habitat upon which it depends, is a valid exercise of the President's authority under the Antiquities Act).

Act's plain language, Black's Law Dictionary defines "control" as "to exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern."[41] Under this plain meaning of "control," it becomes clear that the jurisdiction exercised by the United States over its waters is more than sufficient to support the designation of marine national monuments under the Antiquities Act.

A. The President Has Ample Authority to Establish National Monuments in the United States' Territorial Seas

1. *Jurisdictional Framework in the Territorial Seas*

In its plainest terms, the territorial sea is a narrow band of ocean that parallels the length of a nation's coastline (or, "baseline").[42] According to the United Nation's Convention on the Law of the Sea ("UNCLOS"), "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[43] Subject only to exceptions touching upon 'innocent passage,' "the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."[44] As a concomitant to that sovereignty, "the coastal State may extend the reach of its domestic legislation to the limits of its territorial sea and enforce provisions of that legislation against its own citizens and foreigners."[45]

Domestically, "[t]he President has the authority to extend or contract the territorial sea pursuant to his constitutionally delegated power over foreign relations."[46] Under customary international law, every coastal nation "has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from [its] baselines."[47] Up until recent history, however, the United States claimed only a three-mile territorial sea.[48] In 1988, President Ronald Reagan

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[41] *Control*, Black's Law Dictionary (4th ed. 1951).

[42] Baselines may be defined in several ways depending upon *in situ* coastal features, however, "the normal baseline for measuring the breadth of the territorial sea [and exclusive economic zone] is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." United Nations Convention on the Law of the Sea Art. 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], https://treaties.un.org/doc/publication/unts/volume%201833/volume-1833-a-31363-english.pdf/.

[43] *Id.* at Art. 2(1).

[44] Restatement (Third) of The Foreign Relations Laws of the United States § 512.

[45] Michael Reed, *National and International Jurisdiction and Boundaries*, *in* Ocean and Coastal Law and Policy 10 (Donald C. Baur *et al.* eds., 2d ed., 2015).

[46] *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 993 (9th Cir. 2011).

[47] UNCLOS, *supra* note 42, at Art. 2. Although the United States is not a signatory to UNCLOS, "[a] treaty can constitute evidence of customary international law 'if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles.'" *United States v. Salad*, 908 F. Supp. 2d 730, 734 (E.D. Va. 2012) (alteration in original) (quoting *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003)). Further, "with the exception of its deep seabed mining provisions, the United States has consistently accepted UNCLOS as customary international law for more than 25 years." *Id.* (quoting *United States v. Hasan*, 747 F. Supp. 2d 599, 635 (E.D. Va. 2010)). *See also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .").

[48] *See, e.g.*, Carol Elizabeth Remy, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 Fordham Int'l L.J. 1208, 1219–20 (1992) (discussing the state of U.S. jurisdiction in the territorial seas prior to Proclamation No. 5928).

proclaimed that "[t]he territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law."[49] In extending the nation's territorial sea "to the limits permitted by international law," President Reagan sought to "advance the national security and other significant interests of the United States."[50]

In 1954, Congress passed the Submerged Lands Act ("SLA").[51] The relevant portion of the SLA conveyed to the various states all federal title in lands beneath navigable waters up to three miles seaward of the baseline.[52] In addition, the SLA also "confirmed" that all "natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward" of the three miles granted to the various states fell squarely under the control of "the jurisdiction and control" of the United States.[53] Thus, as a general matter, the United States remains sovereign in the portion of its territorial sea between three and twelve miles as measured from the baseline.

2. *The 'Control' Exercised by the United States in Its Territorial Seas is More Than Sufficient to Support the Designation of Marine Monuments*

As highlighted above, the U.S. retains the same sovereignty "over its territorial seas, and the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."[54] Indeed, the Supreme Court has consistently recognized that "the United States has paramount sovereign authority over submerged lands beneath the territorial sea."[55] With respect to national monument designations specifically, the Supreme Court has also held that "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands."[56]

In addition to these express holdings by the Supreme Court, federal legislation also demonstrates the expansive control exercised by the U.S. over its territorial seas. For instance, in 1998, Congress passed the Coast Guard Authorization Act, which explicitly adopted President Reagan's 1988 Proclamation and extended federal shipping and safety regulations into the U.S.'s territorial seas.[57] These regulations, amplified by the U.S.'s attendant sovereign authority over its territorial seas, serves to demonstrate that Congress exercises sufficient—if not exclusive—"restraining or directing influence" under the Antiquities Act's plain meaning. Consequently, there cannot be any serious doubt as to the president's authority to "establish a national monument under the Antiquities Act within the territorial sea from 3–12 miles seaward from the baseline."[58]

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[49] Proclamation No. 5928, 3 C.F.R. § 547 (1989).
[50] *Id.*
[51] 43 U.S.C. §§ 1301–1315 (2012).
[52] *Id.* § 1311.
[53] *Id.* § 1302.
[54] Restatement (Third) of The Foreign Relations Laws of the United States § 512.
[55] *United States v. Alaska*, 521 U.S. 1, 35 (1997) (citing *United States v. California*, 332 U.S. 19, 35–36 (1947); *United States v. Louisiana*, 339 U.S. 699, 704 (1950); *United States v. Texas*, 339 U.S. 707, 719 (1950)).
[56] *State of Alaska v. United States*, 545 U.S. 75, 103 (2005) (citing *United States v. California*, 436 U.S. 32, 36 (1978)).
[57] *See* Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, § 301, 112 Stat. 3411 (1998) (amending multiple U.S. Code provisions to provide that: "'Navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988").
[58] Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 192 (2000).

3. *The 1988 Proclamation Savings Clause Does Not Limit the U.S.'s Sovereign Authority to Protect Marine Resources in Its Territorial Seas*

Some commentators have argued that a savings clause in the 1988 Proclamation, stating that it did not "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom,"[59] limits the Antiquities Act's applicability within the territorial seas.[60] However, this argument is legally flawed because, as set forth in an Opinion by the Department of Justice's Office of Legal Counsel ("OLC"), the broad and unqualified terms of the Antiquities Act are precisely the kind that remain unaffected by the Proclamation's savings clause.[61]

As counseled by the OLC, the relevant consideration in determining whether the Proclamation's savings clause applies to a given statute turns on "whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea."[62] Of course, any analysis of congressional intent in this context must begin with an examination of the plain language of the statute in question.[63] Yet where the geographical reach of "territorial sea" is left undefined, "further inquiry into the purpose and structure of a particular statute" is required to determine whether Congress "intended the term to refer to the three miles that history and existing practice had defined" or whether it "intended the statute's jurisdiction to always track the extent of the United States' assertion of territorial sea under international law."[64] Notably, this analytical framework has been endorsed and adopted by two separate U.S. Circuit Courts of Appeal.[65]

Although no court has addressed the issue with respect to the Antiquities Act specifically, its expansive terms support the proposition that Congress did not intend to leave the statute frozen in time. Rather than utilizing cabined terms such as "territorial sea," the Antiquities Act paints with a broad brush by granting the president the authority to designate any "lands owned or controlled" by the United States.[66] Accordingly, the OLC found that, based on the principal conservation purposes, straightforward structure, and unqualified language of the Statute,

> Congress intended for the reach of the Antiquities Act to extend to any area that at the particular time the monument is being established is in fact "owned or controlled" by the U.S. Government, even if it means that the area covered by the Act might

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[59] Proclamation No. 5928, 3 C.F.R. § 547 (1989).
[60] John Yoo & Todd Gaziano, Am. Enter. Inst., Presidential Authority to Revoke or Reduce National Monument Designations 12-14 (2017).
[61] 24 Op. O.L.C. at 191.
[62] *Id.* at 188 (internal quotations omitted) (quoting Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea, 12 Op. O.L.C. 238, 253 (1988)).
[63] *Id.*
[64] *Id.* at 188, 189 (internal quotations omitted) (quoting Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea, 12 Op. O.L.C. 238, 253–54 (1988)).
[65] *See In re Air Crash off Long Island*, 209 F.3d 200 (2d Cir. 2000) (utilizing OLC's analysis to determine that the Death on the High Seas Act, 46 U.S.C. §§ 30301–30308, remained unaffected by the 1988 Proclamation's savings clause); *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 992 (9th Cir. 2011) ("According to the OLC, in determining whether a Presidential Proclamation affects a particular statute, one must determine whether Congress 'intended' the statute to be so affected.").
[66] 54 U.S.C. § 320301(a) (2012).

> change over time as new lands and areas become subject to the sovereignty of the nation.[67]

In sum, Congress' broad intent to allow the president to designate as national monuments *any* lands controlled by the federal government necessarily extends to those lands beneath the territorial sea.[68]

Empirically, the OLC's conclusion finds historical precedent in President Kennedy's designation of Buck Island Reef National Monument in 1961.[69] Although the monument was established within three miles of the U.S. Virgin Islands' baseline, it nonetheless reserved lands that were not owned by the U.S. in 1906 when the Antiquities Act was enacted.[70] Consequently, the Buck Island Reef National Monument stands "for the underlying principle that when the United States gains control over lands and areas that it did not control in 1906, that land is nonetheless covered by the Antiquities Act."[71]

B. Under the Antiquities Act's Plain Language, the President May Establish National Monuments in the United States' Exclusive Economic Zone

The question of whether the president may lawfully designate national monuments within its EEZ again turns on whether the U.S. exercises a sufficient quantum of control necessary to satisfy the Antiquities Act's broad language. Here, the inescapable conclusion is that certain sovereign rights, coupled with exclusive jurisdiction and the concomitant authority to protect against environmental degradation, affords the U.S. the requisite measure of "directing influence" necessary to support the designation of a marine monument in its EEZ.

1. *Jurisdictional Framework in the Exclusive Economic Zone*

The EEZ represents a compromise between traditionally maritime nations, which sought extensive freedom of navigation on the oceans, and those nations interested in protecting their coastal resources from intrusive exploration.[72] As defined by UNCLOS, "[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea," which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." [73] Within the EEZ, "the coastal State has [exclusive] *sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoils . . . ."[74] Subject to de minimis limitations, UNCLOS also confers exclusive jurisdiction in the EEZ on coastal nations to regulate "marine scientific research . . . [and] the protection and preservation of the marine environment."[75]

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[67] Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 191 (2000).
[68] *Id.* at 191–92.
[69] Proclamation No. 3443, 3 C.F.R. § 152 (1959–1963).
[70] 24 Op. O.L.C. at 191.
[71] *Id.*
[72] *See* Reed, *supra* note 45, at 11.
[73] UNCLOS, *supra* note 42, at Arts. 55., 57.
[74] *Id.* at Art. 56 (emphasis added).
[75] *Id.*

Acting "in accordance with the rules of international law," President Reagan established the United States' current 200-mile EEZ in 1983.[76] In claiming that EEZ, the U.S. endeavored to "advance the development of ocean resources and *promote the protection of the marine environment*, while not affecting other [States'] lawful uses of the zone . . . ."[77] The "lawful uses" specifically identified by UNCLOS and President Reagan's proclamation were limited to "freedom[] of navigation, overflight" and "the laying of submarine cables and pipelines . . . ."[78] Thus, absent interference with these identified uses, "[w]ithin the Exclusive Economic Zone, the United States has . . . sovereign rights for the purpose of . . . conserving and managing natural resources, both living and non-living," as well as exclusive "jurisdiction with regard to . . . protection and preservation of the marine environment."[79]

2. *The United States Exercises a Quantum of Control Over Its Exclusive Economic Zone Sufficient to Support Reservations Under the Antiquities Act*

In its EEZ, the United States exerts the requisite quantum of control necessary to support the designation of national monuments under the Antiquities Act for several reasons. First, by the plain terms of UNCLOS, the United States retains sovereign and exclusive rights over the exploration, exploitation, conservation, and management of all natural resources found within its declared EEZ.[80] Indeed, Congress exercises those rights with respect to fisheries through the Magnuson-Stevens Fishery Conservation and Management Act, which explicitly provides that "the United States claims, and will exercise . . . sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."[81]

Likewise, certain sovereign rights afforded by customary international law also entitle the U.S. to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with" international law.[82] Here too, Congress exerts these jurisdictional controls over the U.S. EEZ through domestic legislation such as the Jones Act, which places certain ownership and operating restrictions on vessels engaged in coastwise trade.[83]

Second, the United States controls its EEZ through the exercise of a species of the right-to-exclude under customary international law. UNCLOS provides that coastal nations may contract with others to grant excess fishing rights in the coastal State's EEZ *only after* "the coastal State does not have the capacity to harvest the entire allowable catch . . . ."[84] The coastal State's contractual fishing rights, combined with its sovereign right to conserve living marine resources, imply a unique measure of exclusionary control over economic endeavors within a given EEZ.

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[76] Proclamation No. 5030, 3 C.F.R. § 22 (1984).
[77] *Id.* (emphasis added).
[78] *Id.*
[79] *Id.*
[80] UNCLOS, *supra* note 42, at Art. 56.
[81] 16 U.S.C. § 1811(a) (2012).
[82] UNCLOS, *supra* note 42, at Art. 73.
[83] 46 U.S.C. § 55102 (2012); *see also id.* § 55110 (providing that § 55102 "applies to the transportation of valueless material or dredged material, regardless of whether it has commercial value, from a point in the United States or on the high seas within the exclusive economic zone, to another point in the United States or on the high seas within the exclusive economic zone").
[84] UNCLOS, *supra* note 42, at Art. 62.

Third, as a practical matter, a coastal State's expansive control over its own EEZ is generally defined by exclusion. In this context, the freedom of navigation and overflight and the freedom to lay submarine cables are the only definitive freedoms beyond a coastal State's "control."[85] While these exclusions leave a coastal State with something less than total sovereignty in its EEZ, the residual authority is nevertheless extensive. Importantly, absolute sovereignty over a given tract of land is not a necessary predicate to the designation of a national monument. As evidenced by the relevant presidential proclamations, marine national monuments may accomplish the purposes for which they were created without abrogating the control exercised by the United States.[86]

Fourth, under UNCLOS and customary international law, the United States possesses broad—and in certain cases, obligatory—authority to protect the marine environment within its EEZ. For instance, one identified purpose of UNCLOS is provide for the conservation of "natural resources of the sea-bed and subsoil of the super-adjacent waters."[87] To that end, "coastal state[s are] obligated to ensure, through proper conservation and management measures, that living resources in the exclusive economic zone are not endangered by over-exploitation."[88] As a result, the United States is afforded the requisite power and control necessary to protect the natural marine resources within its EEZ against exploitation and extraction. Consistent with that authority, the Antiquities Act—and its focus on curbing over-exploitation—is a valid exercise of the U.S.'s jurisdiction under international law.

Beyond concerns regarding over-exploitation, UNCLOS also grants additional authority to coastal States "to prevent, reduce and control pollution of the marine environment by dumping."[89] Accordingly, UNCLOS provides that "[d]umping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping . . . ."[90] As a result, Congress exercises this authority through the Act to Prevent Pollution from Ships, which subjects all vessels to certain environmental controls "while in the navigable waters or the exclusive economic zone of the United States."[91]

Finally, Congress has tacitly approved the establishment of national monuments in the U.S. EEZ through recurring appropriations and legislative silence. As the Supreme Court counseled in *Alaska S.S. Co. v. United States*, courts should be "slow to disturb the settled administrative construction of a

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[85] UNCLOS, *supra* note 42, at Art. 58 ("In the exclusive economic zone, all States . . . enjoy . . . the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . . .").

[86] Each presidential proclamation designating national monuments in U.S. waters includes a provision explicitly integrating applicable international law. *See* Proc. No. 8335, 74 Fed. Reg. 1,557, 1,560 (Jan. 6, 2009) (Marianas Trench Marine National Monument); Proc. No. 8336, 74 Fed. Reg. 1,565, 1,569 (Jan. 6, 2009) (Pacific Remote Islands Marine National Monument); Proc. No. 8337, 74 Fed. Reg. 1,577, 1,579 (Jan. 6, 2009) (Rose Atoll Marine National Monument); Proc. No. 9496, 81 Fed. Reg. 65,159, 65,164 (Sept. 21, 2016) (Northeast Canyons and Seamounts Marine National Monument); Proc. No. 9478, 81 Fed. Reg. 60,227, 60,231 (Aug. 26, 2016) (Papahānaumokuākea Marine National Monument).

[87] UNCLOS, *supra* note 42, at Art. 61.

[88] Restatement (Third) § 514 cmt. f.

[89] UNCLOS, *supra* note 42, at Art. 210.

[90] *Id.*

[91] 33 U.S.C. § 1902 (2012).

statute," particularly where "it has received congressional approval, implicit in the annual appropriations over a period of [several] years."[92]

Likewise, in the context of the executive's power over the public domain, congressional silence has long been understood to equate to tacit approval of executive action. For instance, in analyzing the propriety of federal land withdrawals made by President Taft in response to dwindling oil reserves, the Supreme Court—without citing explicit statutory authority—found that:

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in lieu of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.[93]

In contradistinction to the withdrawals made by President Taft, however, the designation at issue here is made under the color of an explicit congressional grant of authority. Consequently, where Congress has not acted to limit the president's authority to designate national monuments in the U.S. EEZ, such designations must be considered to bear a congressional seal of approval.

Only Congress Has the Authority to Revoke or Reduce the Size of a National Monument Designation

Executive Order 13792 instructs the Interior Secretary to "review" national monuments designated or expanded under the Antiquities Act and "include recommendations for Presidential actions."[94] In a press briefing on this order, Secretary Zinke stated that the it "directs the Department of Interior to make recommendations to the President on whether a monument should be rescinded, resized, [or][95] modified." However, any such actions taken by the president would be unlawful: only Congress has the authority to rescind, reduce, or substantially modify a national monument.

The president's powers regarding management of public lands are limited to those delegated to him by Congress. While the Antiquities Act of 1906 provides the president the power to "declare" and "reserve" national monuments, it does not grant him authority to rescind, resize, modify, or otherwise diminish designated national monuments.[96]

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92 290 U.S. 256, 262 (1933).
93 *United States vs. Midwest Oil Co.*, 236 U.S. 459, 475 (1915).
94 Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).
95 Press Briefing on the Executive Order to Review Designations Under the Antiquities Act, Ryan Zinke, Sec'y of the Interior (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/press-briefing-secretary-interior-ryan-zinke-executive-order-review.
96 54 U.S.C. § 320301(a), (b).

The Property Clause of the U.S. Constitution[97] gives Congress "exclusive" authority over federal property,[98] in effect making "Congress[] trustee of public lands for all the people."[99] "The Clause must be given an expansive reading, for '(t)he power over the public lands thus entrusted to Congress is without limitations.' "[100] Congress may, of course, delegate its authority to manage these lands to executive agencies or the president,[101] as it did in the Antiquities Act.

In the Antiquities Act, Congress only delegated to the president the broad authority to *designate* as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest"—an authority limited only by the requirement that such reservations be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[102] Conspicuously absent from the Act, however, is language authorizing *any* substantive changes to national monuments once they have been established.

The omission of language granting the president the authority to rescind, reduce, or modify national monuments is intentional. Without it, an implicit congressional grant of these authorities cannot be read into the Antiquities Act.[103] If Congress intended to allow future presidents to rescind or reduce existing national monument designations, it would have included express language to that effect in the Act. Congress had done just that in many of the other public land reservation bills of the era.[104]

Furthermore, Congress considered a bill that would have authorized the president to restore future national monuments to the public domain, which passed the House in 1925, but was never enacted.[105] Logically, that effort would have been redundant if such authority already existed under the Act. The Antiquities Act thus demonstrates that Congress chose to constrain the president's authority not by limiting his ability to designate or expand national monuments, but by withholding the power to rescind, reduce, or modify monuments once designated or expanded.

For nearly eighty years, the federal government's position has been that the president lacks the authority to rescind, repeal, or revoke national monuments. Of course, if the president lacks such authority, it follows that the secretary lacks the authority to rescind, repeal, or revoke national

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97 U.S. Const. art. IV, § 3, cl. 2.
98 *See, e.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).
99 *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 28 (1940).
100 *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (quoting *San Francisco*, 310 U.S. at 29).
101 *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Cameron v. United States*, 252 U.S. 450, 459–60 (1920); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (upholding Grand Staircase–Escalante National Monument) (citing *Yakus v. United States*, 321 U.S. 414 (1944)).
102 54 U.S.C. § 320301(a)–(b) (2012).
103 *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (refusing "once again, to presume a delegation of power merely because Congress has not expressly withheld such power.").
104 *See* National Forest Organic Act of 1897, Act of June 4, 1897, 30 Stat. 1, 34, 36 (authorizing President "to *modify* any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may *reduce* the area or *change the boundary lines* of such reserve, *or may vacate altogether* any order creating such reserve.") (emphasis added) (repealed in part by Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, Title VII, § 704(a), Oct. 21, 1976; National Forest Management Act of 1976, 16 U.S.C. § 1609(a)); Pickett Act, Act of June 25, 1910, c. 421, § 1, 36 Stat. 847 (executive withdrawals were "temporary," only to "remain in effect until revoked by him or by an Act of Congress.") (repealed by FLPMA § 704(a)).
105 H.R. 11357, 68th Cong. (1925).

monuments as well.[106] In 1938, U.S. Attorney General Homer Cummings concluded that "[t]he Antiquities Act … authorizing the President to establish national monuments, does not authorize him to abolish them after they have been established."[107] The Attorney General Opinion went on to state:

> The grant of power to execute a trust, even discretionally, *by no means* implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.[108]

Despite the apparent contradiction to this passage, and without addressing its legality or providing much discussion, this Attorney General's Opinion also recognized that "the President from time to time has diminished the area of national monuments established under the Antiquities Act."[109] However, none of these Presidential actions that reduced the size of national monuments has ever been challenged in court. Perhaps more importantly, there have been no attempts by the president or the secretary to rescind, resize, modify, or otherwise diminish designated national monuments since the enactment of FLPMA.[110]

In FLPMA, Congress not only repealed nearly all sources of executive authority to make withdrawals except for the Antiquities Act,[111] but also overturned the implied executive authority to withdraw public lands that the Supreme Court had recognized in 1915 as well.[112] FLPMA's treatment of the Antiquities Act was designed, moreover, to "specifically *reserve to the Congress the authority to modify and revoke withdrawals* for national monuments created under the Antiquities Act."[113]

Consequently, the authority Congress delegated to the president in the Antiquities Act is limited to the designation or expansion of national monuments. Where a President acts in accordance with that power, the designation is "in effect a reservation by Congress itself, and . . . the President thereafter [i]s without power to revoke or rescind the reservation . . . ."[114] Thus, as the district court in *Wyoming v. Franke* summarized, where "Congress presumes to delegate its inherent authority to [the president], . . . the burden is on the Congress to pass such remedial legislation as may obviate

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[106] *Cf. Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1197 (D. Utah 2004) ("Because Congress only authorized the withdrawal of land for national monuments to be done in the president's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion.").
[107] Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 185.
[108] *Id.* at 187 (emphasis added) (quoting 10 Op. Atty. Gen. at 364).
[109] *Id.* at 188. *See also* National Monuments, 60 Interior Dec. 9 (1947) (concluding that the president is authorized to reduce the area of national monuments by virtue of the same provision of Act).
[110] Pub. L. 94-579 (Oct. 21, 1976), codified at 43 U.S.C. § 1701 *et seq.*
[111] *Id.* at Title II, § 204, Title VII, §704(a).
[112] *Id.*; *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).
[113] H.R. REP. 94-1163, 9, 1976 U.S.C.C.A.N. 6175, 6183 (emphasis added).
[114] Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 187 (1938) (citing 10 Op. Atty. Gen. 359, 364 (1862)).

any injustice brought about [because] the power and control over and disposition of government lands inherently rests in its Legislative branch."[115]

The Designation of Northeast Canyons and Seamounts Marine National Monument Protects and Provides for the Proper Care and Management of Significant and Rare Marine Ecosystem Objects and Values

President Barack Obama established the Northeast Canyons and Seamounts Marine National Monument on September 15, 2016, under Proclamation 9496.[116] The importance of the Northeast Canyons and Seamounts Marine National Monument (Monument) as a biodiversity hotspot, as habitat for many rare and imperiled marine species, and for its deep-sea cold-water corals cannot be overstated. President Obama was well within his discretion to determine that the Monument should be designated to protect the objects of scientific interest contained within its boundaries.

The Monument consists of two distinct areas located within waters of the United States offshore of New England and the mid-Atlantic region, 130 miles southeast of Cape Cod, Massachusetts, and covers a total area of 4,913 square miles in Georges Bank within the U.S. EEZ. One area of 3,961 square miles covers four underwater seamounts (Bear, Mytilus, Physalia, and Retriever) that rise as high as 7,000 feet above the ocean floor and reach nearly to the ocean's surface. These seamounts (extinct volcanoes), higher than any mountain peak east of the Rockies, are the only ones found in U.S. Atlantic waters. The other area of 941 square miles covers three submarine canyons on the edge of the continental shelf (Oceanographer, Lydonia, and Gilbert), all deeper than the Grand Canyon.

The Monument will be jointly managed by the National Oceanic and Atmospheric Administration utilizing its authorities under the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act, and the Marine Mammal Protection Act, and other appropriate authorities, and the U.S. Fish and Wildlife Service, utilizing its authorities under the National Wildlife Refuge System Administration Act, the Refuge Recreation Act, the Endangered Species Act, and other appropriate authorities. The agencies are charged with preparing a joint management plan within three years of the Proclamation, in consultation where appropriate with the Departments of Defense and State.

A. <u>The Unique Marine Ecosystems of the Monument Constitute Objects of Scientific Interest</u>

According to the Proclamation, "The canyon and seamount area contains objects of historic and scientific interest . . . . the canyons and seamounts themselves, and the natural resources and ecosystems in and around them."[117] The Monument was appropriately designated to protect objects of scientific interest in the submerged lands and waters of the areas, as per criterion (iii) of Exectuve Order 13792. Both the seamounts, which function as oases of life in the deep sea, as well as the canyons, teem with a rich diversity of marine life. Oceanographic conditions concentrate pelagic and highly migratory species. Rich upwellings of deep-sea nutrients support a large food web, from microscopic phyto- and zooplankton at the bottom, schools of forage fish, krill, and squid in the middle, and sharks, sea turtles, tuna, swordfish, and massive whales at the top. Many seabird species,

[115] 58 F. Supp. 890, 896 (D. Wyo. 1945).
[116] The text of Proclamation 9496 of September 15, 2016 is reprinted at 81 Fed. Reg. 65,161 (Sept. 21, 2016).
[117] *Id.*

including the iconic Atlantic puffin also rely on this area for foraging and overwintering. In all, the Monument includes eight different major and interconnected marine habitat types from the continental shelf edge down to the abyssal plain.[118]

Both areas have been the subject of intense scientific interest from oceanographic researchers for decades. Scientists from government and academic institutions have studied these areas from research vessels, submarines, and remotely operated underwater vehicles. Recent technological advances in underwater exploration technologies have yielded new information about these unique, isolated environments and the ecological and biological resources they contain. Beyond the scientific community, these expeditions have engaged the interest of the general public as well; when NOAA's Office of Ocean Exploration and Research undertook the 36-day Northeast U.S. Canyons Expedition in 2013 with NOAA Ship *Okeanos Explorer* and its remote-operated underwater vehicle *Deep Discoverer*, more than half a million people tuned in to the live video feeds documenting the incredible diversity of marine life in never-before seen underwater landscapes.[119] These videos, photos, and other information continue to educate the public through NOAA's Ocean Explorer website.[120]

Much research remains to be conducted to fully explore and understand the lifeforms, ecological relationships, and oceanographic and geological phenomena of the Monument. The Monument provides a unique scientific opportunity to determine benchmarks and scientific references for comparing protected and unprotected areas in terms of climate change, and resource development impacts. The Monument also provides an important buffer for ocean resilience and fisheries recovery.

1. *The Monument's Deep-Sea Corals are Objects of Great Scientific Interest*

To date, more than 70 species of deep-sea corals have been discovered in the monument, growing on the canyon walls. Scientific expeditions have found at least two dozen species of coral found nowhere else on earth. Unlike their tropical cousins, cold-water coral species do not rely on symbiotic algae for food and do not require sunlight; rather, their polyps collect tiny organisms from the surrounding nutrient-rich waters. These corals grow only millimeters per year over hundreds, or thousands, of years, and can grow as big as small trees. Specimens of deep-water black corals have been determined to be more than four thousand years old, the oldest marine organisms detected to date.

The centuries-old cold-water coral complexes and associated structure-forming fauna such as sponges and anemones are the foundation of this deep-sea ecosystem. They provide food, spawning and nursery habitat, and shelter for innumerable invertebrates such as worms, starfish, and lobsters,

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[118] Kraus, S.D. *et al.* (2016), *Scientific Assessment of a Proposed Marine National Monument off the Northeast United States.*
https://www.researchgate.net/publication/299559963_Scientific_Assessment_of_a_Proposed_Marine_National_Monument_off_the_Northeast_United_States.
[119] Peter Baker, Pew Charitable Trusts, "The Case for a Marine National Monument Off New England," September 12, 2016, http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/09/12/the-case-for-a-marine-national-monument-off-new-england.
[120] Northeast U.S. Canyons Expedition 2013,
http://oceanexplorer.noaa.gov/okeanos/explorations/ex1304/welcome.html.

as well as vertebrate species such as fish. Many commercially valuable species of fish and shellfish depend on deep-sea coral habitats.

Deep-sea corals are invaluable objects of scientific interest. Because they are so long-lived, scientists can analyze trace elements and isotopes incorporated into their calcium-based skeletons to learn about historic changes in global climate and ocean current systems. Research into coral and sponge communities has yielded advances in cancer treatments, human bone synthesis, and optic cables. Scientists are currently investigating compounds discovered in deep-sea coral ecosystems for their potential use in new medicines.

Because deep-sea corals are fragile and slow-growing, they are highly vulnerable to human disturbance. A bottom-trawl fishing net can destroy in mere seconds coral colonies that took hundreds or thousands of years to grow. Deep-sea corals are also extremely vulnerable to oil and gas exploration and development. Climate change, and the resulting ocean acidification, are changing the ocean's chemistry, causing slower growth and weaker skeletons in corals. Because of these species' high sensitivity to disturbance, long recovery times if damaged, and low ecological resilience, it is critical to protect them from all extractive industry impacts through the monument designation.

2. *The Monument's Diversity and Abundance of Marine Wildlife are Objects of Great Scientific Interest*

Fish and wildlife qualify for protection as objects of historic and scientific interest under the Antiquities Act. The Monument provides important three-dimensional habitat for a large diversity of endemic and migratory marine wildlife species, offering food, shelter, and nursery habitats otherwise unavailable in the surrounding marine environment. To date, more than 320 marine species have been identified in the canyons area, while another 630 species have been described in the seamounts area. Whales and dolphins, including humpback whales and endangered North Atlantic right whales, sperm whales, fin whales, and sei whales, are known to concentrate in the Monument. Similarly, the Monument provides important habitat for sea turtles, including the Kemp's ridley, the smallest and most endangered of the world's sea turtle species, as well as loggerheads and leatherbacks. Because of the rich foraging grounds, highly migratory fish species, such as tuna, billfish, mahi mahi, and ten species of sharks (including great white sharks), are attracted to the Monument. The Monument is also an important feeding ground for myriad seabird species, including the vulnerable Atlantic puffin as well as gulls, shearwaters, storm petrels, gannets, skuas, and terns, among others.

Monument waters are habitat for many species protected by federal law. All marine mammal species occurring within the Monument are protected by the MMPA. ESA-listed species occurring in Monument waters include:

Common Name	Scientific Name	ESA Status
Kemp's ridley sea turtle	*Lepidochelys kempii*	Endangered
Leatherback sea turtle	*Dermochelys coriacea*	Endangered
Loggerhead sea turtle	*Caretta caretta*	Threatened (NW Atlantic DPS)
North Atlantic right whale	*Eubalaena glacialis*	Endangered
Sperm whale	*Physeter microcephalus*	Endangered
Sei whale	*Balaenoptera borealis*	Endangered
Fin whale	*Balaenoptera physalus*	Endangered

B. The Designation is Situated Only on Submerged Lands and Waters Owned or Controlled by the United States

Both Monument areas consist solely of waters of the United States and underlying submerged lands, lands owned or controlled by the federal government within the U.S. EEZ. As demonstrated above, it is entirely within the president's discretionary authority under the Antiquities Act to designate national monuments consisting of submerged lands and the overlying waters within the U.S. EEZ. The Monument encompasses only about 1.5 percent of U.S. waters along the Atlantic coast.

C. The Monument Designation Was Narrowly Tailored to the Smallest Area Compatible with Its Proper Care and Management

The Monument's size was narrowly tailored not to exceed the smallest area compatible with the proper care and management of the objects to be protected. In response to fishing industry pressure and in order to exclude areas more actively fished, the final designation contained only 40% of the total canyon and inter-canyon area originally proposed. President Obama explicitly determined that the final designation "constitutes the smallest area compatible with the proper care and management of the objects to be protected."[121] Thus, there is no justification under criterion (i) of Executive Order 13792 to recommend any changes to the Monument.

The biological requirements and function of species and habitats within the Monument require the size and protections designated by President Obama. The Monument proclamation provides for the proper care and management of these exceptionally important and unique resources. Altering its configuration or management would remove lawful protections for the wildlife species and fragile ecosystems—objects of historic and scientific interest—that the Monument was established to conserve.

Scientists recommend protecting 30 percent of the world's oceans to fulfill an intergenerational legacy of ocean resource sustainability; at present, less than three percent of the world's oceans are protected.[122] Protecting the Monument as designated will not only provide essential research for understanding comparatively little known marine ecosystems, but also ensure the area serves as a marine reserve for conserving and restoring fish stocks for the benefit of current and future generations.

[121] 81 Fed. Reg. at 65,163.

[122] O'Leary B.C., M. Winther-Janson, J.M. Bainbridge, J. Aitken, J.P. Hawkins, C. M. Roberts. 2016. Effective coverage targets for ocean protection. *Conservation Letters* 9(6):1–6.

Numerous scientific studies demonstrate that well-designed and strictly enforced marine reserves increase the density, diversity and size of fish, invertebrates and other organisms vital to wildlife conservation, as well as to recreational and commercial fishing.[123] Growth of fish biomass in fully protected areas on average increases to four times than in fished areas. Reserves also safeguard more apex predators, many of which are rare or absent from unprotected areas.[124] The Monument's ability to conserve and restore highly fished or overfished species (e.g., sharks, lobster, etc.) restores key ecological functions and species interactions that can have strong cascading effects on lower trophic levels.[125]

D. The Monument Was Designated Only After an Extensive Public Process and Stakeholder Engagement

The monument designation process was characterized by extensive stakeholder engagement for more than a full year, particularly with local communities and fishermen. A public town-hall-style meeting and several rounds of regional stakeholder meetings were convened. A year-long public comment process generated comments submitted by more than 300,000 individuals and organizations. The monument designation was strongly supported by New England political officials at the local, state, and federal levels (including the entire Connecticut federal congressional delegation, which formally petitioned for the Monument's designation), as well as the New England and Mystic Aquariums, coastal businesses, recreational fishermen,[126] national, regional, and local conservation organizations, and other members of the public. The monument designation enjoyed widespread public support in New England: a poll of Rhode Island and Massachusetts residents demonstrated that 78% supported the permanent protection of the canyons and seamounts areas. Thus, the Monument designation was made with adequate public outreach and coordination with relevant stakeholders, as per Executive Order 13792. Accordingly, no justification exists pursuant to criterion (v) of Executive Order 13792 to recommend any changes to the Monument.

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123 Edgar G.J., R.D. Stuart-Smith, T.J. Willis, *et al.* 2014. Global conservation outcomes depend on marine protected areas with five key features. *Nature* 506(7487): 216–220; B.S. Halpern and R.R. Warner. 2002. Marine reserves have rapid and lasting effects. *Ecological Letters* 5(3): 361–366; S. Lester and B. Halpern. 2008. Biological responses in marine no-take reserves versus partially protected areas. *Marine Ecology Progress Series* 367: 49–56; S.E. Lester, B.S. Halpern, K. Grorud-colvert, et al. 2009. Biological effects within no-take marine reserves : a global synthesis. *Marine Ecology Progress Series* 384: 33–46.

124 Halpern, B.S. 2003. The impact of marine reserves: do reserves work and does reserve size matter? *Ecological Applications* 13(1 SUPPL.).

125 Myers R., J.K. Baum, T.D. Shepherd, S.P. Powers and C.H. Peterson. 2007. Cascading effects of the loss of apex predatory sharks from a coastal ocean. *Science* 315(5820): 1846– 1850; P.J. Mumby, A.R. Harborne, J. Williams, et al. 2007. Trophic cascade facilitates coral recruitment in a marine reserve. *Proc. Nat'l Acad. Sci.* 104(20): 8362-8367; G.J. Edgar, N.S. Barrett, R.D. Stuart-Smith. 2009. Exploited reefs protected from fishing transform over decades into conservation features otherwise absent from seascapes. *Ecological Applications* 19(8): 1967-1974.

126 *See, e.g.*, American Sportfishing Association, Sept. 15, 2016, OnTheWater.com, "Recreational Fishing Will Be Allowed in New England Marine Monument," http://www.onthewater.com/recreational-fishing-will-allowed-new-england-marine-monument/; Capt. John McMurray, Mar. 21, 2017, Reel-Time.com, "Why Wouldn't We Support the New England Marine Monument?" http://www.reel-time.com/articles/why-wouldnt-we-support-the-new-england-marine-monument/.

E. The Monument Will Have Only Minimal Effects on Commercial Fisheries

The Monument's deep and rugged canyon and seamount areas historically have been some of the least fished in U.S. Atlantic waters, and were not of significant importance for any federal fishery.[127] Only between six and eight commercial red crab and/or lobster vessels actively fish in the Monument area for at least part of the year. To put these numbers in perspective, more than 3000 vessels hold federal permits to fish for lobster in U.S. waters (and more than 10,000 vessels are state-licensed). Although the Monument will eventually be closed to commercial fishing for red crab and lobster, these fisheries were provided with a seven-year transition period to exit the monument area.

Other commercial fisheries were given 60 days to transition out of the Monument area. However, the impacts of the closure to these fisheries are not significant. For example, for the pelagic longline fishery, primarily targeting swordfish and tuna, the Monument area constitutes much less than one percent of the total area actively fished by the longliners, and provided less than one-half of one percent of the fleet's average annual revenues between 2006 and 2012. Conversely, as a marine protected area, the Monument may ultimately benefit regional fisheries by increasing the yield of commercially important species in areas adjacent to the Monument.[128] The monument remains open to all recreational fishing and military activity. Thus, no justification exists pursuant to criteria (iii) and (iv) of Executive Order 13792 to recommend any changes to the Monument.

Conclusion

The Northeast Canyons and Seamounts Marine National Monument is the only marine national monument in U.S. Atlantic waters, and protects unique and invaluable objects of scientific interest for the benefit of citizens across the United States. Its designation was fully consistent with the Antiquities Act as well as the policy set forth in Executive Order 13792. Accordingly, we urge that your report refrain from making any recommendations to implement, via presidential action, legislative action, or otherwise, any changes to reduce the size of or to revoke the designation.

[127] Natural Resources Defense Council, March 2017 "Northeast Canyons and Seamounts Marine National Monument: Impacts on Commercial Fishing," https://www.nrdc.org/sites/default/files/ne-canyons-seamounts-monument-fishing.pdf.

[128] National Marine Protected Areas Center, "MPA Science Brief: What Does the Science Say? Do 'No-Take' Marine Reserves Benefit Adjacent Fisheries?" http://marineprotectedareas.noaa.gov/pdf/helpful-resources/do_no_take_reserves_benefit_adjacent_fisheries.pdf.