

Marine Resources Committee Newsletter

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CHAIR'S MESSAGE

Mike Wascom
*2008-2009 Marine Resources
Committee Chair*

The Marine Resources Committee is finishing another ABA year. I am pleased and grateful that our current newsletter editor and past chair Robin Craig will succeed me, becoming 2009–2010 Marine Resources Committee chair. If you've ever met or corresponded with Robin, you know that she is the consummate professional.

I would like to thank this year's vice chairs for their excellent work, and I am pleased to see that several will be continuing under Robin. I would also like to thank our continuing committee members and the twenty-six new members who joined the committee this year. The committee has many opportunities for service, including several opportunities to publish.

This issue of the Marine Resources Committee Newsletter is indicative of the kinds of issues that continue to make our committee so valuable. James P. Walsh and Gwen Fanger discuss issues of Executive and congressional power to regulate fisheries in a marine protected area. Jeff Vivo discusses management implications of regulating catch of the goliath grouper. Finally, committee vice chair Francine Ffolkes details the Marine Resources Committee program, Ocean Protection vs. Energy Development, at the

17th Section Fall Meeting in Baltimore, Friday, September 25, 2009, from 1:30-3:00 p.m. If you are attending the Fall Meeting, I encourage you to attend this informative program.

I urge you to remain a committee member as we head into the new ABA year under Chair Robin Craig. Issues such as those mentioned, plus ocean aquaculture, ratification of UNCLOS III, regulating existing and new ocean energy sources, and reviewing how the U.S. government has responded to the 2004 U.S. Ocean Commission Report recommendations are just a few of the issues we will follow.

Best wishes to each of you.

PRESIDENTIAL BANS ON COMMERCIAL FISHING IN PACIFIC MARINE PROTECTED AREAS: A POLITICALLY POPULAR BUT UNLAWFUL REGULATORY ACTION?

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Introduction

Former President George H.W. Bush was not normally considered much of a friend to America's environmental movement. Notably, his administration was resistant to government action to address the human release of greenhouse gases that contributes to

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the now-acknowledged problem of global warming, which also threatens the health of the marine environment.

In an attempt to create a more positive environmental legacy, President Bush issued in his last term of office four sweeping proclamations that created what are commonly referred to as Marine Protected Areas (MPAs) in huge swaths of the Pacific Ocean (the “Proclamations”). Just before he left office, on Jan. 6, 2009, President Bush created the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument (collectively, the “2009 MPAs”). Presidential Proclamations 8335, 8336, and 8337, 74 Fed. Reg. 1557-1581 (Jan. 6, 2009). The 2009 MPAs include the ocean areas around the Commonwealth of the Northern Mariana Islands; the remote islands of Wake, Howland, Baker, Jarvis, Johnson Atoll, Kingman Reef, and Palmyra Atoll; and Rose Atoll near American Samoa.

The president created these 2009 MPAs by fiat, using his authority to issue Proclamations under a very brief 1906 land-oriented statute, called the Antiquities Act, 16 U.S.C. §§ 431-433m, by simply publishing his decisions in the Federal Register. The Antiquities Act is the apex example of top-down federal governance.

The 2009 MPAs were not the president’s first foray into the use of the Presidential Proclamation to create an MPA. Earlier in his presidency, in 2006, President Bush created the Northwestern Hawaiian Islands Marine National Monument (the “Northwestern Hawaiian Islands MPA”; together with the 2009 MPAs, the “Pacific MPAs”). Presidential Proclamation 8031, 71 Fed. Reg. 36,442 (June 26, 2006). Regulations to “codify” this Proclamation were issued by the National Oceanic and Atmospheric Administration (NOAA) on Aug. 29, 2006. 71 Fed. Reg. 51,134-42. Not unlike the process for creating the 2009 MPAs, prior public notice and comment on the regulations for the Northwestern Hawaiian Islands MPA were waived because “these regulations do not expand on the action already taken by the President in the Proclamation.” 71 Fed. Reg. at 51,135. No environmental impact statement was prepared to accompany any of the Proclamations.

The Antiquities Act was an interesting choice for the president's authority to create the Pacific MPAs, particularly because two other federal marine resource statutes directly apply in the 50-mile "no commercial fishing" zones created for the Pacific MPAs: the Magnuson-Stevens Fishery Management and Conservation Act (Magnuson-Stevens Act), 16 U.S.C. § 1801 et seq., and the National Marine Sanctuaries Act (NMSA), 16 U.S.C. § 1431 et seq. The Magnuson-Stevens Act and the NMSA are examples of bottom-up federal governance. Under the Magnuson-Stevens Act, there is an elaborate fishery management system that applies in the waters included within the Pacific MPAs. The NMSA authorizes the establishment of marine sanctuaries, within which fishing may be banned if deemed necessary to protect a special characteristic of the sanctuary, in the same ocean areas covered by the Pacific MPAs. The President's Proclamations creating the Pacific MPAs purport to bypass and supersede these legislative authorities with respect to marine fish management.

The question briefly addressed in this article is whether the president has legal authority under the Antiquities Act to manage fishing activity in waters beyond the traditional three-mile territorial limit but within the U.S. Exclusive Economic Zone (EEZ), which generally extends 200 miles out to sea. The conclusion is that President Bush did not have this authority for two primary legal reasons: first, the Antiquities Act contains no congressional authority to unilaterally create monuments beyond the three-mile territorial limit traditionally applied to domestic statutes, particularly with respect to fishing activities in the water column that are not related to "lands," submerged or otherwise; and, second, the Magnuson-Stevens Act and the NMSA, being more specific statutes on the subject at hand, trump the vague authority of the Antiquities Act with respect to management of free-swimming fish outside U.S. territorial jurisdiction but within the EEZ. The regulatory process outlined in those statutes must be followed in order for binding fishing regulations to be promulgated and enforced in the Pacific MPAs.

Creating the Pacific MPAs: No Science Required

Despite the lack of public comment and congressional authorization for the Pacific MPAs, the Pacific MPAs nevertheless cover a significant geographic area. The total geographic area of the Pacific MPAs comprises 335,348 square miles of "emergent and submerged lands and waters," mostly made up of ocean waters surrounding islands areas with either very small or no resident populations. Most of these areas are island atolls sitting on underwater pinnacles. As such, no abutting submerged lands of any meaningful extent append to these island areas, except for the coral reefs in the Northwest Hawaiian Islands. *See generally*, Fishery Ecosystem Plan for the Pacific Remote Island Areas, Western Pacific Fishery Management Council, December 2005. The ocean area covered by the Pacific MPAs is larger than the land mass of the Pacific states of California (158,648 square miles), Oregon (97,052 square miles), Washington (68,126), and Hawaii (6,559 square miles), combined.

By issuing the Proclamations under the questionable authority of the Antiquities Act, the president was able to designate the huge swaths of ocean area in the Pacific MPAs without undertaking any scientific evaluation of the areas included in the MPAs or providing a notice and comment period. Despite the alleged need to protect the marine areas because of environmental concerns, none of the Pacific MPAs were accompanied by any scientific analysis regarding the actual threat of fishing activity to the health of the marine ecosystems in the Pacific MPAs.

For the Pacific MPAs, President Bush established boundaries for each new monument reaching out to 50 nautical miles from the mean low water mark of the islands included within each MPA, or 47 miles beyond the traditional three-mile territorial limits of the United States with respect to each island. Within each MPA, the president has banned, or will ban, commercial fishing in its entirety. For example, in the Northwestern Hawaiian Islands MPA, commercial fishing is to be limited in volume for two types of species (bottomfish and pelagic) for 5 years, then banned. In all of the 2009 MPAs, commercial fishing was immediately

banned. However, authority to allow and regulate recreational and indigenous fishing activity was preserved.

Had scientific analysis been undertaken, a different picture of the alleged need for such protection of the areas included in the Pacific MPAs may have been shown. According to NOAA, no major fish stocks that are resident in the Pacific MPAs are overfished or subject to overfishing. 2008 Status of U.S. Fisheries, May 2009. In addition, even the scale of fishing activity in the 2009 MPAs created in January was not discussed, although their waters are not known for concentrated fish harvests. For example, a 2006 Fisheries Statistics Report by the Commonwealth of the Northern Mariana Islands said: “The chief domestic commercial fishery of the CNMI is a small boat, one-day troll fishery, and most of the boats are 12 to 24-foot outboard-powered runabout-type vessels.”

Thus, without scientific analysis or public comment to support the creation of a particular MPA, defining MPAs by Antiquities Act proclamations that contain restrictions on fishing appears to result in inconsistencies that may not reflect the reality of the marine area being protected. The question then arises as to whether declaring MPAs by Proclamation is the most effective tool for balancing environmental protections with the actual threats to resident marine resources.

Marine Protected Areas: What Are They, Really

The concept of MPAs suffers from a definitional crisis and lacks any statutory basis in federal law. The only reference to MPAs in federal statutes is the Coral Reef Conservation Act, 16 U.S.C. §§ 6402 and 6409, but the term is not defined. Thus, the guiding federal definition is found in Executive Order 13158 issued by President William Clinton on May 26, 2000 (the “Clinton Proclamation”). 65 Fed. Reg. 34,909-34,911 (May 31, 2000). Drawn by the desire to take action to protect marine ecosystems and resources, President Clinton issued the Clinton Proclamation to “develop a scientifically based, comprehensive national system of MPAs representing diverse U.S. marine ecosystems,

and the Nation’s natural and cultural resources.” *Id.* The Clinton Proclamation, however, created no new law but was merely a management directive promulgated under existing legal authorities, to begin a formal MPA program in the federal government. The Clinton Proclamation defined MPAs broadly as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”

Despite the lack of definitional clarity and uncertain legal authority, the creation of MPAs has become a centerpiece of renewed interest in the nation’s ocean policy over the last several years. In concept, the notion of wilderness areas in the world’s oceans, where nature is left to thrive without human interference, is superficially very attractive, as we struggle with the implications of more evident limits to the sustainability of our planet’s resources. In fact, the pressure is now on to significantly expand MPAs worldwide and make them no-take as a buffer against climate change and to enhance fish stocks.

The desire to preserve the world’s ocean resources through dramatic reductions in fishing activities is often at odds with the use of such resources to feed the world’s ever increasing population. A professor of Marine Conservation at York University in England recently called for banning fishing in a third of the world’s oceans through creation of many more no-take MPAs. Andrew Purvis, *Call for Fishing Ban in a Third of Oceans*, THE GUARDIAN, Apr. 26, 2009. However, the professor did not identify which third of the world should lose its access to marine fish harvests. A recent statement by the U.N. Food and Agriculture Organization said that over 520 million people around the world—or 8 percent of the world population—depend on fisheries and aquaculture as a source of protein, income, or family stability. *See Fisheries and Aquaculture in a Changing Climate*, Policy Brief issued by the FAO and other U.N. organizations, June 1, 2009, available at www.fao.org/news/en/item/20188/icode/. This undeniable human need creates strong pressures to fish for, and consume, the world’s fishery resources in an unsustainable manner, particularly in countries where governments lack strong

ocean management capabilities. Each report on Oceans and the Law of the Sea by the Secretary General of the United Nations repeatedly refers to the need for “capacity building” by some member states, shorthand for their inability to address pressing ocean issues. Report of the Secretary General, Sixty-fourth Session, A/64/66, 45-50, 13 March 2009. The pressure to harvest begs the essential question: Can we satisfy these very real human demands and, at the same time, use the ocean’s resources sustainably?

The theory behind the creation of MPAs to help balance human needs and foster sustainability is that fully protected ocean MPAs will ensure ocean biodiversity and enhance biological resources such that fishery resources will “spill out over the edges,” increasing the prospects for both sustainability and more productive fish stocks. *See generally* NATIONAL RESEARCH COUNCIL, *MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS* (Academy Press 2001). To some, the use of MPAs is also more attractive because of the immediacy of perceived threats to the world’s oceans and because of impatience with the plodding regulatory procedures under more specific ocean statutes, such as the Magnuson-Stevens Act, the NMSA, and even the National Environmental Policy Act. 42 U.S.C. § 4321, et seq.; Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in the America*, 29 *ECOLOGY L.Q.* 71 -130 (2002).

The obvious implication for MPA “campaigners” is that our existing regulatory system does not work adequately—despite (or because of) numerous special purpose statutes, the careful analysis required for environmental impact statements, the need for thoughtful scientific input where uncertainty may still abound, and the mandate for an open and participatory rulemaking process. Others, most notably active environmental groups well funded by large private trusts, demand instant, sweeping results and want only to “just do it, and do it now.” One highly respected fisheries scientist, Professor Ray Hilborn of the University of Washington, has referred to the clamor for immediate creation of no-take MPAs, without

sound scientific analysis, as “faith-based” fishery management. Dr. Ray Hilborn, *Faith Based-Fisheries*, 31 *FISHERIES* 554-555 (Nov. 2006). However, the demand for immediate results often ignores the reality of scientific evidence to the contrary. For example, on June 9, 2009, the *New York Times* quoted Professor Hilborn as saying that “the best data available at present suggest that most [world] fish stocks are either now healthy or recovering from historical overfishing.”

Despite the intended environmental benefit of the Pacific MPAs, the restrictions on fishing activities within the Pacific MPAs are extensive in comparison to other MPAs and have been promulgated without any opportunity for public comment. According to the NOAA’s Office of Ocean and Coastal Resource Management, the United States currently has nearly 1,700 MPAs, covering one-third of U.S. waters, and that nearly all MPAs provide some restrictions but most are multiple use. In 2008, NOAA estimated that less than 3 percent of the water areas in existing MPAs are no-take, meaning no fishing is allowed. See NOAA’s MPA Web site at www.mpa.gov. Nevertheless, the Pacific MPAs are intended to ban any commercial or industrial activity within their confines, reserving them for complete natural resource protection and research, with very limited exceptions.

The Antiquities Act and the EEZ: Illusory Authority for MPAs?

President Bush based his authority for the creation of the Pacific MPAs by Proclamation on the Antiquities Act. 16 U.S.C. §§ 431-433m. The Antiquities Act authorizes the president, at his discretion, to declare by public proclamation “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on the lands owned or controlled by the Government of the United States.” 16 U.S.C. §431. The Antiquities Act has been previously used primarily to protect land monuments (such as the Grand Canyon) by almost every president, except for Richard Nixon, Ronald Reagan, and George W. Bush. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 2003 *GA. L. REV.* 473, 488-490. However, all of

these monuments were located within the long-established territorial limits of the United States, *i.e.*, within 3 nautical miles, except for the California Coastal National Monument created by President William Clinton. Proclamation 7264 of January 11, 2000; 65 Fed. Reg. 2821-2823 (Jan. 18, 2000).

The Antiquities Act contains no specific text authorizing presidential action beyond the traditional 3-mile territorial limit. In contrast, other federal statutes, for example the Magnuson-Stevens Act, established a national fishery management system within a 200-mile Exclusive Economic Zone (EEZ) and beyond the traditional 3-mile limit. 16 U.S.C. § 1811(a). The inner limit of the EEZ is a line coterminous with the seaward boundaries of each of the coastal states (*i.e.*, 3 nautical miles). The term “state” means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States. 16 U.S.C. § 1802(40). Similarly, the geographic scope of the NMSA is expansive and includes the “marine environment,” which by definition includes coastal and ocean waters, the Great Lakes, and connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone. 16 U.S.C. § 1432(3).

As a general rule, a domestic statute such as the Antiquities Act is presumed to apply only within the territorial jurisdiction of the United States unless Congress has clearly expressed otherwise. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 440 (1989). Nothing in the Antiquities Act indicates any intent that it be applied outside the 3-mile territorial limits of the United States.

The Supreme Court confirmed that the Antiquities Act, under the Supremacy Clause, allowed the president to declare national monuments within the 3-mile coastal boundaries of the states, including with respect to submerged lands and waters owned by the State of California. *United States v. California*, 436 U.S. 32 (1978). At issue was the effect of a Presidential Proclamation that set aside the Channel Islands off

Santa Barbara, and marine waters and submerged land out to 1 nautical mile of the coastline, as a monument. The Supreme Court ruled that the State of California still owned these submerged lands but the area was now under the regulatory control of the National Park Service.

In 1988, President Ronald Reagan issued a Proclamation establishing a 12-mile territorial sea as a matter of foreign policy and sovereignty, but domestic legislation was not thereby amended and the Proclamation was not intended to change the traditional 3-nautical-mile rule for purposes of domestic law (the “Reagan Proclamation”). Presidential Proclamation 5928 of December 27, 1988, 54 Fed. Reg. 777. The president’s power to assert this expansion of the territorial sea was based on his constitutional power over foreign affairs. Office of Legal Counsel, Department of Justice, Memorandum Re: Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea (Oct. 4, 1988), at 6-12; Testimony of Rear Admiral Joseph Vorbach, Chief Counsel, U.S. Coast Guard, Committee on Merchant Marine and Fisheries (Mar. 21, 1989), at 3-4. *See also* Buck, Federal-State Boundary Issues, Congressional Research Service (May 5, 2005). The Reagan Proclamation therefore was not intended to change existing state or federal law. Nevertheless, the question of whether presidential authority under the Antiquities Act applies beyond the U.S. territorial jurisdiction has not been addressed head-on. On Sept. 15, 2000, the Department of Justice’s Office of Legal Counsel generated a legal opinion (OLC Opinion) for the Solicitor of the Department of the Interior, the General Counsel of NOAA, and the General Counsel of the Council on Environmental Quality to address the question of whether the president may use his authority under the Antiquities Act to establish a national monument in the EEZ “to protect marine resources.” Office of Legal Counsel, Department of Justice; available at www.usdoj.gov/olc/coralreef.htm. After reviewing the international legal authority relevant to the question, the legal opinion concluded “the quantum of U.S. ‘control’ over the EEZ is sufficient to allow the President to establish a national monument in the EEZ under the Antiquities Act to protect the marine environment.” *Id.*

This conclusion, based on customary international law, was called a “closer question” than that relating to application of the Antiquities Act in the U.S. territorial sea. *Id.*

The OLC Opinion is seriously deficient in its failure to address the domestic law question of whether the Antiquities Act can be applied beyond the 3-mile territorial limit without an express statement of intent by Congress to that effect. The general presumption is that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Overcoming this presumption requires a “clear expression” of congressional intent. *Steele v. Bulova Watch*, 344 U.S. 280, 285 (1952). The OLC Opinion contains no analysis of this pivotal issue under domestic law. There is really no doubt as to the ability of the Congress to take legislative action in the EEZ, such as for fishery management or marine environmental protection, consistent with customary international law. However, the precise domestic law question is whether the president unilaterally can invoke his powers under the Antiquities Act in water areas beyond three nautical miles without clear congressional authorization to do so. Application of well-established statutory interpretation principles indicates that he may not. Nevertheless, President Bush’s use of the Antiquities Act to assert regulatory jurisdiction over fishing activities beyond three miles in the recently created Pacific MPAs was beyond his legal authority and, arguably, an abuse of his executive powers. *See generally Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that presidentially-created military commissions were unlawful where not expressly authorized by Congress). Congress has provided no express authority to apply the unilateral presidential powers in the Antiquities Act to ocean activities outside the 3-mile limit.

The Role of Private Charitable Trusts: Democracy at Work?

The activism of certain private trusts provided a strong force behind President Bush’s Proclamations. The influential role played by representatives of, and

moneys provided by, trust funds created by America’s industrialists are a recent phenomenon in ocean policy. Immediately after the issuance of the Stratton Commission Report on Ocean Policy in 1969, the main impetus to ocean policy was broad-based—including ocean industries, scientists, and environmental groups—and relied on strong bipartisan Congressional leadership. Today, pressures for change in ocean policy seem to emanate primarily from a few private trust funds, their administrators, and trust family leaders who are pursuing aggressive programs to influence specific outcomes through public “campaigns.”

One such trust is the Pew Charitable Trusts, a non-profit organization that, among other things, has actively supported the expansion of MPAs. In fact, the Pew Charitable Trusts created a Pew Oceans Commission, led by its own hand-picked commissioners, as a rival to the U.S. Commission on Ocean Policy, whose members were picked in a more democratic manner (*i.e.*, by elected officials), to champion revision of national ocean policy, including creation of MPAs.

The Pew Charitable Trusts supported President Bush’s issuance of the Proclamations. When the three new 2009 MPAs were created in January, Joshua Reichert, managing director of the Pew Environmental Group, applauded the “historic action” and said President Bush now has a “Blue Legacy.” *See*, Press Release, Jan. 5, 2009 by the Pew Charitable Trusts. Given the Pew Charitable Trusts’ environmental views, particularly on global warming, Mr. Reichert’s support for President Bush seems like a Faustian bargain. But much of the push for the Marianas Trench Monument MPA was publicly associated with the Pew Charitable Trusts. *See Pew to Press Advocacy for NMI Monument*, SAIPAN TIMES, Mar. 23, 2008.

Although President Bush enjoyed the support shown by private interest groups like the Pew Charitable Trusts for the creation of the Pacific MPAs, local government representatives were not so supportive of the new Pacific MPAs. Congresswoman Madeline Z. Bordallo (D-Guam), chair of the House Resources Subcommittee on Insular Affairs, Oceans and Wildlife, strongly protested creation of Pacific marine national

monuments in a letter to the lame-duck President Bush dated Nov. 21, 2008. The local debate over the Marianas Trench Monument MPA was particularly intense. Elected representatives in the Commonwealth of the Northern Mariana Islands also protested the president's action by passing resolutions of disapproval. The governor of the Commonwealth of the Northern Mariana Islands, Benigno R. Fitial, initially opposed the proposal in a letter to President Bush dated April 29, 2008, calling it the "Pew Proposal." Nevertheless, Gov. Fitial ultimately supported the creation of the monument, apparently because the Bush administration promised to cede ownership and control to the Commonwealth of submerged lands within three miles of the islands. *See*, Testimony of Governor Benigno R. Fitial before the House Subcommittee on Insular Affairs, Oceans and Wildlife on H.R. 934. A bill was therefore introduced to give the Commonwealth the same benefits in its submerged lands as Guam, the Virgin Islands, and American Samoa. The bill was recently reported out of the House Natural Resources Committee.

In summary, this particular exercise in ocean policy, using the president's most powerful top-down regulatory tool, the Antiquities Act, was in large part due to the MPA "campaign" of a private charitable trust and its environmental allies. It was not the impetus from wide-spread local grass roots support and public official interest. In response to the pressure for environmental action, President Bush responded by accommodating the private interest groups by a political tool that disregarded any opportunity for public comment and scientific support.

The Magnuson-Stevens Act Process for Creating an MPA: A More Direct Route to Protecting Fishery Resources

The Magnuson-Stevens Act provides sufficient authority to institute any possible fishing regulatory restrictions that could apply in the areas covered by the Pacific MPAs, subject of course to that statute's internal standards, such as the requirement that any such restriction must be based on the best scientific information available. 16 U.S.C. § 1851(a)(2). Recent amendments have made clear that a fishery management plan may "designate zones where, and

periods when, fishing shall be limited, or shall not be permitted." 16 U.S.C. § 1853(b)(2). If such a zone of limited or no fishing is created, it would fit the definition of an MPA. Unlike the model for designating an MPA, the Magnuson-Stevens Act requires the development of a fishery management plan through the normal regional fishery management council process, approval that plan by the Secretary of Commerce, and promulgation of implementing regulations, after notice and comment, before designating a similarly protected ocean area.

Such authority is now being used, for example, by the North Pacific Fishery Management Council to gain approval of fishery management plan for the Arctic Ocean that would close the Arctic to commercial fishing until there is sufficient information to ensure that any fishing can be conducted sustainably and with proper concern for the Arctic ecosystem. 74 Fed. Reg. 24,757-24,761 (May 26, 2009). The covered area includes all marine waters in the EEZ of the Chukchi and Beaufort Seas from 3 nautical miles offshore the coast of Alaska or its baseline to 200 nautical miles offshore, north of the Bering Strait (from Cape Prince of Wales to Cape Dezhneva), westward to the U.S./Russia Convention Line of 1867 and eastward to the U.S./Canada maritime boundary. The proposed plan is now under review by the Secretary of Commerce and is accompanied by a 287-page Environmental Assessment/Regulatory Impact Review/Regulatory Flexibility Analysis of the proposed plan and related regulations. All known environmental information is summarized in the document and the proposed policy is spelled out in detail for public comment. Unlike President Bush's Proclamations for the Pacific MPAs, in this process the public is given a formal opportunity to comment on the proposed fishing restrictions in the Arctic, before they are implemented and become effective.

The National Marine Sanctuaries Act: Yet Another Option for Protecting Fishery Resources

Similarly, the NMSA provides a congressionally authorized mechanism for creating protected ocean areas. Congress enacted the NMSA to create a system for designating special marine areas in the

United States' territorial waters and the EEZ as marine sanctuaries. The scope of the NMSA is far broader and more focused than that found in the Antiquities Act and applies to the limit of the U.S. EEZ, consistent with customary international law.

Under the NMSA, thirteen marine sanctuaries have been designed that comprise about 18,000 square miles of coastal and ocean waters. For each sanctuary, the Secretary of Commerce initiated the process by designating discrete areas for sanctuary status and recommending a management plan, to be backed by enforcement of regulations adopted through normal rulemaking. 16 U.S.C. §§ 1433(a), 1434. The NMSA mandates that NOAA consult with all affected parties, in particular coastal states and local governments, as well as members of Congress and other federal agencies, prior to designating a sanctuary and implementing the supporting regulations. Upon designation, a proposed marine sanctuary is then considered by Congress for a 45-day period. If Congress does not reject the proposal in that time, the Secretary of Commerce moves to implement the designated sanctuary and implement regulations to carry out its purposes.

Marine sanctuaries may enjoy similar protections and limitations on fishing activities as do the MPAs, if found necessary. However, unlike the MPAs, the limits on activities in marine sanctuaries may be adopted only after consultation with the regional fishery management council responsible for the affected area. 16 U.S.C. § 1434(a)(5). If there is a disagreement as to the need for fishing regulations, the Secretary of Commerce may still prepare such regulations if he/she finds that proposals by the regional council involved fail to fulfill the purposes and policies of the NMSA and the goals and objectives of the sanctuary designation.

Restricted activities in marine sanctuaries are not limited to fishing. Implementing regulations for a marine sanctuary can also limit or prohibit other ocean uses. For example, oil drilling may be prohibited outright. Other activities may be allowed, if compatible with the mission of the sanctuary, by special permit, which are limited in duration. *See* "Marine Protected Areas," chap. 17, OCEAN AND COASTAL LAW AND POLICY 540-

552 (Donald C. Baur, Tim Eichenberg & Michael Sutton, eds., A.B.A. 2008).

Again, despite the availability of a transparent mechanism to protect marine resources under the NMSA, President Bush used the Antiquities Act to create his legacy.

Conclusion

Despite President Bush's apparent intentions for creating the Pacific MPAs, he achieved the purpose under the arguable authority of the Antiquities Act, without in-depth scientific and environmental analysis, and without formal public comment. Both the Magnuson-Stevens Act and the NMSA have clear procedures for crafting the protections necessary for MPAs within the EEZ, with full public participation and transparency, which is lacking in the Antiquities Act Proclamation process. While the general objective of protecting the oceans is commendable, disregarding applicable law to achieve that objective is not. The ends, no matter how politically correct, do not justify ignoring and sidestepping established law. The other option, of course, is to ask Congress to change the law. Bypassing the Magnuson-Stevens Act and NMSA, as well as the National Environmental Policy Act, while acceptable to some zealous advocates, should give no comfort to those who believe that federal regulations should be enacted by complying with applicable law, even in the face of environmental exigency.

On the policy side, questions about the true purpose and effectiveness of the Pacific MPAs abound. First, the open ocean is a constantly moving and changing fluid mass, which respects no boundaries. How the creation on paper of the static Pacific MPAs can possibly "protect" these mobile ocean waters, or the biological systems living within them, as an ecosystem is quite unclear. For example, what will the creation of the Pacific MPAs really do to combat global warming or prevent ocean acidification? Although the case is strong for protecting the unique coral environment of the Northwest Hawaiian Islands Monument, the case is not so clear for the other Pacific MPAs.

Second, the only real new constraint on human activity in the Pacific MPAs is with respect to fishing, which has not been shown to be causing a serious adverse impact. For local inhabitants, access to fish resources now must concentrate on other accessible areas or be provided by imported fish from perhaps more troubled fishing grounds.

Finally, there is the question of adequate enforcement and research, in terms of both cost and resources, given the enormous size of the area to be protected. It is probably likely that much of it will not be given much attention.

Creation of the Pacific MPAs also says a lot about how some political decisions on ocean policy are made from the top-down, rather than the bottom-up; about how local interests sometimes lose and aggressive, well-funded single-issue advocates win when a president decides to create a legacy under the Antiquities Act; and about the role of trust fund money in the nation's ocean policy process. For certain, the general impression is that President Bush did a good thing by his unilateral actions. But there is a lingering concern that he did it in a manner that disregarded existing law and procedure and prevailing local sentiment in order to make a symbolic statement of questionable environmental effect.

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ONE MILLION TREES PROJECT

To learn about the Section's nationwide public service project "One Million Trees Project — Right Tree for the Right Place at the Right Time," please visit http://www.abanet.org/environ/projects/million_trees/home.shtml.

DIFFERENT LENS, SAME FISH: AN ANALYTICAL LOOK AT THE GOLIATH GROUPEL AND ITS ROAD TO RECOVERY

Jeffrey Vivo

When is a fish species recovered enough for fishing—even limited recreational fishing—to resume after a long-term ban? This is the issue facing the National Marine Fisheries Service (NMFS) with respect to goliath grouper in Florida.

The goliath grouper, *Epinephelus itajara*, is one of the largest species of grouper in the world and the largest in the Atlantic Ocean. It can live up to 37 years and can reach up to 800 pounds. Its life begins in the protective shelter of mangrove tree roots and estuaries. After five to seven years, the goliath grouper seeks greener pastures and moves out to offshore reefs, where it will begin to spawn. The goliath grouper can be found from the southeastern part of the United States all the way to Western coast of Brazil, including the Caribbean. It has been found off the west coast of Africa and off the coast of Mexico in the eastern Pacific, ranging from the Gulf of California to Peru.

Nevertheless, the goliath grouper is a species in trouble. The decline of goliath grouper was noticed in the mid-1950s and was mainly attributed to overfishing facilitated by the advancement in fishing technology. With the advent of the Loran locating electronic system, commercial and recreational fisherman could repeatedly fish the same productive reefs and wrecks. The goliath grouper population continued to decline in the 1980s, when spearfishermen began using spears tipped with an explosive device called a powerhead. The powerhead allowed divers to harvest 600-pound goliath grouper without much difficulty. During this decade, 41 to 42 percent of all goliath grouper harvested were caught by divers.

During the 1980s, the goliath grouper fishery grew exponentially, which required the introduction of management and conservation measures. In 1983, the South Atlantic Marine Fisheries Council (SAMFC) prohibited the harvest of goliath grouper by spearfishermen, and in 1985, the SAMFC