

CHARTING OFF COURSE: NATIONAL MARINE PLANNING WITHOUT LEGAL AUTHORITY TO PRESERVE MARINE RESOURCES

ALLISON R. MAHANEY

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INTRODUCTION

Protection of ocean ecosystems has reached a pinnacle of importance. Approximately 100,000 commercial ships and countless small vessels sail around the globe daily,¹ releasing 1,245,200 metric tonnes of oil pollution into the ocean annually.² At the same time, the world's oceans produce about 80 million metric tonnes of seafood each year to feed Earth's growing population.³ Critical marine resources demand protection to support population growth and economic development.

Not all human uses of common space are compatible, and people recognize the importance of spatial planning for health, environmental sustainability, and economic development.⁴ That's why parents often fight to keep adult businesses away from their children's schools,⁵ federal laws discourage building highways near public parks,⁶ and communities go to court over proposed sites for garbage dumps and airports.⁷ Unfortunately, this concern for spatial planning has not carried over to marine resource management until recently. Similar to spatial planning on land, marine planning identifies conflicting uses of marine space and organizes them to promote ocean health and sustainable use, and to protect maritime commerce. In his first term, President Barack Obama outlined protection, maintenance, and restoration of ocean resources as his goals for the first ever National Ocean Policy, which

¹ MAR. KNOWLEDGE CENTRE, INTERNATIONAL SHIPPING FACTS AND FIGURES—INFORMATION RESOURCES ON TRADE, SAFETY, SECURITY, ENVIRONMENT 9 (2012), *available at* www.imo.org/knowledgeCentre/ShipsAndShippingFactsandFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20Facts%20and%20Figures.pdf.

² *Id.* at 27.

³ FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, WORLD REVIEW OF FISHERIES AND AQUACULTURE 3 (2012), *available at* <http://www.fao.org/docrep/016/i2727e/i2727e01.pdf>.

⁴ *See* CITIES ALLIANCE, LIVEABLE CITIES: THE BENEFITS OF URBAN ENVIRONMENTAL PLANNING 45 (2007), *available at* http://www.citiesalliance.org/sites/citiesalliance.org/files/CA_Docs/resources/cds/liveable/liveablecities_web_7dec07.pdf.

⁵ *See, e.g.,* R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004) (challenging a city ordinance requiring non-nude nightclubs to obtain special use permits, and precluding issuance of permits to clubs located within one thousand feet of churches, schools, residential districts or other such nightclubs).

⁶ *See* Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (2012).

⁷ *See* Allison v. Dep't of Transp., 908 F.2d 1024 (D.C. Cir. 1990) (challenging the Federal Aviation Administration's determination that siting for a new airport would not impact a state park and wildlife refuge).

identified the need for comprehensive ocean management, established the National Ocean Council,⁸ and offered recommendations for the Nation's first large-scale marine plans.⁹

Marine resource managers developed marine plans as non-regulatory tools¹⁰ that provide spatial assignments for specific uses.¹¹ Most marine plans include areas designated for navigational use, commercial interests, and various types of resource protection;¹² they function like regional land use plans that provide areas for industry, community activity, and environmental protection. Ideally, several marine protected areas (MPAs) work together within a single marine plan to form a system that incorporates a broad array of uses and resources¹³ by assigning specific areas that provide for strict resource protection and other areas that accommodate community uses.¹⁴

Since resource protection can mean reduced access to or use of resources, proposals for new MPAs frequently face more resistance than do other portions of marine plans.¹⁵ No single federal law gives lawmakers authority to establish MPAs; therefore, resource managers are left to advocate for designation under existing

⁸ Exec. Order No. 13,547, 3 C.F.R. 227 (2010).

⁹ THE WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE 2 (2010), available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

¹⁰ As of the writing of this article, marine plans are guides for resource management planning. They lack any legal means of enforcement.

¹¹ *Coastal and Marine Spatial Planning*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.msp.noaa.gov/> (last visited Oct. 18, 2013).

¹² *Id.*

¹³ See *National Framework*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.msp.noaa.gov/framework/index.html> (last visited Oct. 14, 2014) (arguing that coordinated planning increases effectiveness and produces better outcomes).

¹⁴ This theory is exemplified throughout the federal land management system. For instance, the Bob Marshall Wilderness Complex in Montana incorporates multiple federal management areas including wilderness lands and national forests. The Complex includes primitive areas for habitat protection and day use hiking trails that serve users of all skill levels, and lands used for forest product harvesting. See, e.g., *Special Places: Bob Marshall Wilderness Complex*, U.S. FOREST SERV., <http://www.fs.usda.gov/attmain/flathead/specialplaces> (last visited May 30, 2014); *Forest Products Permits*, U.S. FOREST SERV., <http://www.fs.usda.gov/attmain/flathead/passes-permits/forestproducts> (last visited May 30, 2014).

¹⁵ See HAROLD R. UPTON & EUGENE H. BUCK, CONG. RESEARCH SERV., RL32154, CRS REPORT FOR CONGRESS: MARINE PROTECTED AREAS: AN OVERVIEW 9 (2010).

statutes that originally focused on land-based resource management.¹⁶ Resource managers must evaluate the compatibility of proposed activity with the language and goals of the specific, often land-oriented,¹⁷ environmental protection statute that applies to the MPA in question.¹⁸ While several agencies have developed management tools for evaluating compatibility of multiple uses (such as the Limits of Acceptable Change protocol¹⁹ used by the U.S. Forest Service), others have endeavored to determine the compatibility of each use individually based on specific statutory language.²⁰ Since federal marine protection falls under six major pieces of legislation today,²¹ the confusing, often politicized, application of management and protection mechanisms complicates the development of a unified system of MPAs for marine planning purposes.²² In cooperation with the President's goals of protection, maintenance, and restoration of ocean resources,²³ Congress should develop a comprehensive system of MPAs to both conserve and preserve marine ecosystems.

This Article distinguishes between marine resource protection statutes available to either conserve or preserve resources.²⁴ Con-

¹⁶ *Id.* at 20–23.

¹⁷ See NAT'L OCEAN COUNCIL, LEGAL AUTHORITIES RELATING TO THE IMPLEMENTATION OF COASTAL AND MARINE SPATIAL PLANNING (2011), available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/cmsp_legal_compendium_2-14-11.pdf (explaining how specific environmental protection statutes relate directly to marine planning despite being drafted prior to an awareness for federal marine resource protection).

¹⁸ See *Refuge Planning*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/northeast/planning/cd.html> (last updated Dec. 21, 2011).

¹⁹ See *infra* text accompanying note 123–125.

²⁰ See GERRY E. STUDDS, STELLWAGEN BANK NATIONAL MARINE SANCTUARY, COMPATIBILITY DETERMINATION ACTION PLAN, at CD-15 (2005), http://stellwagen.noaa.gov/management/workinggroups/wgpdf/CD_AP_06_01_2005.pdf [hereinafter COMPATIBILITY DETERMINATION ACTION PLAN].

²¹ This article discusses each piece of legislation in detail below. See also NATIONAL OCEAN COUNCIL, *supra* note 17, at 17–22 (discussing several federal laws related to marine protection and five specifically designed to set aside areas for resource protection); Donald C. Baur et al., *Putting "Protection" into Marine Protected Areas*, 28 VT. L. REV. 497, 508 (2004).

²² Baur, *supra* note 21, at 521–24.

²³ See Exec. Order No. 13,547, *supra* note 8 and accompanying text.

²⁴ For information about the historical distinction between the two practices in American environmental protection, see *Conservation, Preservation, and Environmental Activism*, NAT'L. PARK SERV., <http://www.cr.nps.gov/history/hisnps/NPSThinking/nps-oah.htm> (last visited June 1, 2014).

ervation seeks appropriate use of nature²⁵ as such; conservation protects resources for human or economic benefit.²⁶ Alternatively, preservation means protecting nature from human use.²⁷ Thus, preservation seeks to protect the resource for its own benefit.²⁸ Conservation-focused marine resource managers must determine the most beneficial use for people, consumptive or not.²⁹ By contrast, preservation-oriented management requires that managers prioritize activities with the least impact on the resource, commonly non-consumptive.³⁰

By reviewing the most important federal statutes that relate to marine protection, this Article focuses on how well these statutes address the twin goals of preserving resources and providing public participation in lawmaking. These factors are key to the successful implementation of the National Ocean Policy.³¹ Current resource protection statutes lack provisions to preserve sensitive marine ecosystems. Therefore, very few examples of statutory marine resource preservation exist³² due to the development of conservation-friendly compatibility determinations and the limited nature of preservation-oriented federal marine protection statutes. The future of marine resource preservation requires swift response to this inadequacy because regional marine planning, by its definition, reduces the number of prospective areas available for sensitive resource preservation due to allocation of alternative uses.³³

²⁵ *Conservation vs. Preservation and the National Park Service*, NAT'L. PARK SERV, <http://www.nps.gov/klgo/forteachers/classrooms/conservation-vs-preservation.htm> (last visited June 1, 2014) [hereinafter *Conservation vs Preservation*].

²⁶ CAL. FISH & GAME, MASTER PLAN FOR MARINE PROTECTED AREAS 50 (2008), available at <http://www.dfg.ca.gov/marine/pdfs/revisedmp0108.pdf>.

²⁷ *Conservation vs. Preservation*, *supra* note 25.

²⁸ *Id.*

²⁹ *Id.*

³⁰ AMERICAN FISHERIES SOC'Y, AFS POLICY STATEMENT #18: REPORT ON THE CONCEPT OF MARINE WILDERNESS, available at http://fisheries.org/docs/policy_statements/policy_18f.pdf [hereinafter AFS POLICY STATEMENT].

³¹ See *infra* note 106 and accompanying text.

³² Marine preserves, as described by this article, do not currently exist. However, several states have instituted marine preserve programs within state waters. See *infra* text accompanying notes 61–70; EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS OCEAN MANAGEMENT PLAN (2009), available at <http://www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf> [hereinafter MASSACHUSETTS OCEAN MANAGEMENT PLAN].

³³ While rezoning ocean areas may seem as simple as rezoning land-based railway corridors to green space, the realities of designating ocean space with a

Section I provides a brief background of the current state of the oceans. Section II addresses the importance of MPAs and the distinction between conservation- and preservation-oriented legislation. Section III discusses the development of the National Ocean Policy from fragmented agency management through its current implementation and its integration of regional marine planning. Section IV reviews current application of statutory marine protection via specific compatible use doctrine and discusses each law's resulting capacity for marine protection. Section V recommends that Congress either enact new legislation mandating preservation of marine resources and participation of regional marine planning bodies or expand the National Marine Sanctuaries Act and the Wilderness Act. Section V recommends that the president aggressively use the Antiquities Act to preserve marine resources. A brief conclusion follows.

I. STATE OF THE OCEAN

Marine resources are under attack. The International Programme on the State of the Ocean released synopsis papers from their 2011 and 2012 workshops that identified several major contributors, called stressors, to the decline in ocean health.³⁴ The stressors include overexploitation of resources, climate change, ocean warming, ocean acidification, hypoxia, anoxia, and pollution.³⁵ These stressors threaten to erode the Earth's vast ocean wilderness, with disastrous effects for all of the planet's inhabit-

prior defined purpose may be more complex. The premise of MPA designation under every federal statute is protection of unique marine resources; if an area is already designated for alternative uses this serves as an argument against protection. Further, areas zoned for commercial activity will become politically difficult to rezone for marine protection due to heavy industry support. Because marine planning is just beginning, it is difficult to know whether rezoning is possible under current legislation. The Great Barrier Reef Marine Park, one of the oldest marine spatial plans in the world, underwent rezoning after a decade of research revealed insufficient preservation of key species. This rezoning occurred courtesy of extensive adaptive management mandates and environmental monitoring which are not common in American marine protection. See Jon Day, *The Need and Practice of Monitoring, Evaluating and Adapting Marine Planning and Management—Lessons from the Great Barrier Reef*, 32 MARINE POL'Y 823, 827 (2008).

³⁴ Alex D. Rogers & Dan Laffoley, *Introduction to the Special Issue: The Global State of the Ocean; Interactions Between Stresses, Impacts and Some Potential Solutions. Synthesis Papers from the International Programme on the State of the Ocean 2011 and 2012 Workshops*, 74 MARINE POLLUTION BULL. 491, 493 (2013).

³⁵ *Id.*

ants.³⁶ The current combination of stressors produces a perfect storm of impacts on global ocean resources.³⁷ Because oceans are not confined within political borders, ocean health is a global issue. As a result, U.S. ocean resources suffer from the same stressors discussed above. Thus, nations like the United States must increase efforts to react to growing scientific evidence of global ocean ecosystem decline.³⁸

II. THE BASICS OF MARINE PROTECTION

Large-scale protection of vital ocean resources requires development of strategic shields and shelters, such as marine plans and MPAs, to insulate the marine environment from pollution, overuse, and other anthropogenic onslaughts while encouraging sustainable utilization of resources beneficial to human life. Just as municipalities around the country recognize the benefits of separating conflicting uses and land use planning becomes increasingly commonplace,³⁹ so too will marine plans serve this important role in planning and zoning the oceans by allowing only certain uses in discreet areas.⁴⁰ For example, a marine plan might establish a nav-

³⁶ See *Effects of Climate Change and Ocean Acidification on Living Marine Resources: Hearing Before the Subcomm. on Oceans, Atmosphere, Fisheries & Coast Guard of the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2007) (statement of Scott Doney, Senior Scientist Marine Chemistry & Geochemistry Department, Woods Hole Oceanographic Institution), available at <http://www.whoi.edu/page.do?pid=8916&tid=282&cid=27206>; *Marine Debris Program*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <http://marinedebris.noaa.gov/marinedebris101> (last updated Feb. 6, 2015); *2004 10 Stories the World Should Hear More About: Overfishing: a Threat to Marine Biodiversity*, UNITED NATIONS, <http://www.un.org/events/tenstories/06/story.asp?storyID=800> (last visited Oct. 21, 2013).

³⁷ Rogers & Laffoley, *supra* note 34, at 493.

³⁸ See *Marine Environment*, U.S. DEP'T ST., <http://www.state.gov/e/oes/ocns/opa/marine/index.htm> (last visited May 30, 2014) ("to help protect the marine environment from pollution and other anthropogenic threats"); *Marine and Coastal Ecosystems*, UNITED NATIONS ENV'T PROGRAMME, <http://www.unep.org/ecosystemmanagement/UNEPsWork/MarineandCoastalEcosystems/tabid/513/Default.aspx> (last visited Oct. 14, 2014) ("UNEP promotes the use of sound science to apply ecosystem management to address factors causing decline of ecosystem services in marine and coastal areas.").

³⁹ See PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 1:2 (5th ed. 2009). For more information on land use planning, see generally *Planning and Sustainability*, CITY OF PORTLAND, OR., <http://www.portlandoregon.gov/bps/> (last visited Sept. 23, 2014); N.Y.C. DEP'T CITY PLAN., <http://www.nyc.gov/html/dcp/> (last updated Feb. 6, 2015); *Planning Commission*, CITY OF LARAMIE, WYO., <http://www.ci.laramie.wy.us/index.aspx?NID=218> (last visited Sept. 23, 2014).

⁴⁰ See UPTON & BUCK, *supra* note 15, at 12.

igation channel to direct commercial maritime traffic, but prohibit commercial traffic in another area that includes sensitive marine resources or valuable community heritage resources such as ceremonial fishing grounds or historic shipwrecks.

Similar to land use designations, marine plans facilitate management of resources to achieve the most benefit for society.⁴¹ Driven by user demands, every marine plan differs in features covered, area included, and priority uses addressed.⁴² To organize and prioritize differing uses, managers rely on extensive data, such as habitat maps, navigational charts, user surveys, and permitting records.⁴³ After an initial analysis, managers implement a plan that assigns uses to a given space.⁴⁴ This can simply involve designating an already established navigation channel for primarily navigational use or may involve more controversial decisions, such as designating an area for limited use to preserve artifacts of a shipwreck.⁴⁵

Marine plans address multiple management goals, such as reducing user conflicts, improving protection of environmental resources, increasing economic development, and bolstering regulatory efficiency.⁴⁶ For example, marine planning in the Boston Harbor recently resulted in dramatic reductions of right whale ship strikes.⁴⁷ Managers in the Stellwagen Bank National Marine Sanctuary used decades of right whale sighting data overlaid on navigational charts and realized that the navigational channel leading to Boston Harbor ran through an area with relatively higher numbers of whale sightings.⁴⁸ Through a minor modification to the shipping

⁴¹ *Overview, Data & Tools*, NAT. OCEANIC & ATMOSPHERIC ADMIN., <http://www.msp.noaa.gov/framework/index.html> (last visited Mar. 12, 2013).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Tools for Marine Spatial Planning*, ECOSYSTEM-BASED MGMT. TOOLS NETWORK, <http://www.ebmttools.org/msptools.html> (last visited Feb. 19, 2013).

⁴⁵ See generally *Washington State Marine Planner*, MARINE PLAN., http://www.marineplanning.org/Policy/USA_WA_MarinePlanner.html (last visited June 1, 2014); *Massachusetts Ocean Plan*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://msp.noaa.gov/examples/massachusetts.html> (last visited June 1, 2014).

⁴⁶ *National Framework*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.msp.noaa.gov/framework/index.html> (last visited Feb. 19, 2013).

⁴⁷ ROBERT A. SWETT, COASTAL AND MARINE SPATIAL PLANNING, (2013), available at <http://edis.ifas.ufl.edu/pdf/SG/SG11100.pdf>.

⁴⁸ See *id.*

channel,⁴⁹ managers cut the number of ship strikes in the Sanctuary by more than half.⁵⁰ Thanks to the alteration, whales are able to safely traverse the area, and shipping firms avoid the hassle of reporting marine mammal incidents as well as damage to their ships and public perceptions; the example illustrates that commonly competing interests can benefit from marine planning.

Arguably, marine planning's most critical function entails identifying areas for resource protection. Proposals for MPAs frequently spark some of the most hotly contested debates during marine planning.⁵¹ While the definition of MPAs has evolved over time,⁵² contemporary descriptions, including the White House's,⁵³ center on three criteria: (1) a geographically defined and bound area; (2) ecosystem-based management over resource-based management; and (3) a programmatic focus on long-term management.⁵⁴ Effective institution of an MPA system to protect both marine resources and uses requires a zonal approach similar to the method applied in land-based resource management.⁵⁵ Essentially, marine protected area zoning allows assignment of different levels of protection or priority uses to each geographic area much like the designation of national forests, national parks, and wilderness areas on land.⁵⁶

Marine protected area managers struggle to achieve appropriate levels of conservation and preservation to benefit fragile ma-

⁴⁹ This adjustment in course added only about fifteen minutes to ship transit times. *See id.*

⁵⁰ *Id.*

⁵¹ *See* UPTON & BUCK, *supra* note 15, at 9.

⁵² *Compare* Exec. Order No. 13,158, 3 C.F.R. 273, (2000) (defining MPAs 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"), with INT'L UNION FOR THE CONSERVATION OF NATURE AND NATURAL RES., GUIDELINES FOR PROTECTED AREA MANAGEMENT CATEGORIES 8 (2008), available at <http://data.iucn.org/dbtw-wpd/edocs/paps-016.pdf> (defining protected area as "[a] clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.").

⁵³ Exec. Order No. 13,158, 3 C.F.R. 273 (2000) ("[A]ny 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.").

⁵⁴ UPTON & BUCK, *supra* note 15, at 2.

⁵⁵ *See id.* at 12.

⁵⁶ *Id.*

rine resources and stakeholders.⁵⁷ While some marine-based industry groups have questioned MPA designations and whether the designations strike an adequate balance between resource protection and economically beneficial activities,⁵⁸ others have recognized that identification and protection of sensitive resources do not always conflict with commercial uses.⁵⁹ When executed in concert, preservation and conservation serve each other by sustaining growth, productivity, and public support for resource protection.⁶⁰

Ideally, federal marine plans will protect marine resources through integrated MPA development with cooperative interplay of both conservation and preservation practices to strictly prohibit degradation of the most sensitive resources while allowing sustainable use of others. The California Marine Life Protection Act (CMLPA),⁶¹ for example, establishes a system of state marine managed areas⁶² that work together to both conserve and preserve marine resources in statewide marine planning regions.⁶³ Within each regional plan are areas characterized as MPAs (marine reserves, marine parks, and marine conservation areas), marine recreation management areas, and special closure areas.⁶⁴ Under the CMLPA, marine reserves and special closure areas provide preservation-oriented resource protection because these areas are “maintained to the extent practicable in an undisturbed and unpolluted state. Access and use for activities . . . may be restricted to protect marine resources.”⁶⁵ Additionally the CMLPA encourages

⁵⁷ *Id.* at 10–11.

⁵⁸ *Id.* at 9.

⁵⁹ See Bryce D. Beukers-Stewart et al., *Benefits of Closed Area Protection for a Population of Scallops*, 208 MARINE ECOLOGICAL PROGRESS SERIES 189, 200–01 (2005) (explaining the regulations preventing trawling off Ireland recently resulted in growth of the local shellfishery); AFS POLICY STATEMENT, *supra* note 30.

⁶⁰ *Id.*

⁶¹ CAL. FISH & GAME CODE §§ 2850–2863 (West 2013).

⁶² See CAL. FISH & GAME CODE § 2853 (West 2013); see also *Introduction to the Marine Life Protection Act*, CAL. DEP’T. OF FISH & WILDLIFE, <http://www.dfg.ca.gov/marine/mpa/intro.asp> (last visited Sept. 1, 2014).

⁶³ CAL. FISH & GAME CODE § 2853(b) (West 2013); see also *California Marine Protected Areas Overview*, CAL. DEP’T. OF FISH & WILDLIFE, <http://www.dfg.ca.gov/marine/mpa/overview.asp> (last visited Sept. 1, 2014).

⁶⁴ CAL. CODE REGS. tit. 14 § 632 (2014); see also *California Marine Protected Areas Overview*, CAL. DEP’T. OF FISH & WILDLIFE, <http://www.dfg.ca.gov/marine/mpa/overview.asp> (last visited Sept. 1, 2014).

⁶⁵ CAL. PUB. RES. CODE § 36710 (West 2013).

conservation-oriented management in state marine parks and marine conservation areas that allow consumption activities such as resource harvesting for commercial and recreational purposes.⁶⁶ As of the writing of this article, California has established sixty-three preservation-oriented MPAs under the CMLPA.⁶⁷ These areas set aside 8.82% of state waters for preservation of sensitive marine resources.⁶⁸ Although preliminary evidence suggests these preservation areas will benefit local natural resources, these areas are too new to have undergone thorough scientific monitoring.⁶⁹ Congress could mirror the California framework⁷⁰ by enabling both preservation and conservation of resources. This would ultimately benefit both the resources and the users while serving the President's National Ocean Policy goals to protect American ocean resources with a comprehensive system that addresses modern resource management concerns and statutory shortcomings.

Federal public land management programs have unwittingly evolved into a series of different levels of protections working together to allow various compatible uses and strict preservation programs similar to that of the California MPAs.⁷¹ However, the current California system has the advantage of coordinated development and organization of legislation, while federal lands suffer under uncoordinated, piecemeal application of multiple pieces of legislation.⁷² The President's National Ocean Policy calls for co-

⁶⁶ *Id.*

⁶⁷ *Regional MPA Statistics*, CAL. DEP'T FISH & WILDLIFE, <http://www.dfg.ca.gov/marine/mpa/statistics.asp> (last visited Aug. 26, 2014).

⁶⁸ *Id.*

⁶⁹ *Marine Protected Areas*, SANCTUARY INTEGRATED MONITORING NETWORK, <http://www.sanctuariesimon.org/monterey/sections/reserves/> (last visited Aug. 26, 2014).

⁷⁰ California's MPA framework is, arguably, the most advanced in the nation. However, it is notable that as of the writing of this article several other states are in the process of developing ocean management frameworks. *See, e.g.*, MASSACHUSETTS OCEAN MANAGEMENT PLAN, *supra* note 32 (Massachusetts); *Oregon Marine Reserves*, OR. DEP'T FISH & WILDLIFE, <http://www.dfw.state.or.us/MRP/marinereserves.asp> (last visited Aug. 26, 2014) (Oregon).

⁷¹ *See River of No Return: National Parks, National Forests, and U.S. Wildernesses*, PBS (Apr. 18, 2014), <http://www.pbs.org/wnet/nature/episodes/river-of-no-return/national-parks-national-forests-and-u-s-wildernesses/7667/>.

⁷² *See* Evan Fox et al., *Enabling Conditions to Support Marine Protected Area Network Planning: California's Marine Life Protection Act Initiative as a Case Study*, 74 OCEAN & COASTAL MANAGEMENT 14, (2013) (characterizing MLPA as a "strong, legislative mandate for redesigning California's inventory of MPAs to form a network," but acknowledging that the statute was only one of six enabling conditions for a successful program); Michael Osmond et al, *Les-*

ordinated resource protection⁷³ that is currently unavailable under the patchwork of statutes that underlie federal MPAs.

III. THE EVOLUTION OF THE NATIONAL OCEAN POLICY

Marine resource managers face many differing government priorities and policies in their attempts to protect ocean habitats. Until recently, the United States did not even have a comprehensive policy to manage marine resources.⁷⁴ The President's initiative to adopt a National Ocean Policy and integrate marine planning into the existing system of MPAs signified a landmark change in federal marine resource management practice.⁷⁵ This Section outlines the birth of the National Ocean Policy from fragmented agency management through implementation of marine planning.

A. Fragmentation as a Baseline

As a result of the fragmented compilation of resource management statutes and varied organizational mandates of multiple government agencies, U.S. marine policy evolved into a decentralized series of agency initiatives and programs aimed at resource-specific management.⁷⁶ By contrast, the biologically preferred resource protection approach involves broad, ecosystem-based management to improve understanding the interdependent resources within the whole system.⁷⁷ Further, ecosystem-based management will allow agencies to collaborate during data acquisition and op-

sons for Marine Conservation Planning: A Comparison of Three Marine Protected Area Planning Processes, 53 OCEAN & COASTAL MGMT. 41, 43 (2010); Deborah A. Sivas & Margaret R. Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning*, 27 STAN. ENVTL. L.J. 209, 250–51 (2008) (explaining the need for increased coordination under the pre-revision California Marine Life Protection Act and national system).

⁷³ See Exec. Order No. 13,547, 3 C.F.R. 227 (2010).

⁷⁴ See *National Ocean Policy Implementation Plan*, WHITE HOUSE COUNCIL ON ENVTL. QUALITY, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans> (last visited Oct. 21, 2013).

⁷⁵ See generally NATURAL RES. DEF. COUNCIL, *SAVING OUR SEAS: PROTECTING OUR OCEANS FOR THE FUTURE* (2013), available at <http://www.nrdc.org/oceans/files/savingourseas.pdf>.

⁷⁶ NAT'L OCEAN COUNCIL, *NATIONAL OCEAN POLICY IMPLEMENTATION PLAN 2* (2013), available at http://www.whitehouse.gov/sites/default/files/national_ocean_policy_implementation_plan.pdf [hereinafter IMPLEMENTATION PLAN].

⁷⁷ *Id.* at 15.

timize utilization of expensive ocean research.⁷⁸ Funding multiple agencies to work in the same areas can waste fiscal resources, overlook broad management needs and dissuade Congress from authorizing competing programs due to a lack of understanding about each program's focus.⁷⁹

Currently, several federal agencies manage marine and coastal resources, and each agency operates under its own policy and statutory regimes. At least seven agencies manage various federal marine protected areas.⁸⁰ For example, the Department of the Interior manages marine protected areas, mineral leases on the seabed, data acquisition for ocean research, and protection of historically tribal fishing areas.⁸¹ In his 2011 State of the Union address, President Obama even remarked about this disjointed approach to ocean resource management when he pointed out that a single salmon falls under at least two agencies' authority during its lifespan.⁸² Recent awareness of the nation's disjointed marine resource management approach highlights the need for cohesive ocean policy to address the lack of centralized, ecosystem-based management.⁸³

B. *Development of the National Ocean Policy*

In 2009, President Obama acknowledged the need for com-

⁷⁸ See generally *id.* at 26–28.

⁷⁹ See *id.* at 4 (“The Implementation Plan better aligns multiple agency priorities and activities to promote greater synergies and efficiencies in Federal spending.”); *id.* at 24–28; cf. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-279SP, ANNUAL REPORT: ACTIONS NEEDED TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE OTHER FINANCIAL BENEFITS 9–10 (2013).

⁸⁰ NAT'L MARINE PROTECTED AREAS CTR., FRAMEWORK FOR THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS FOR THE UNITED STATES OF AMERICA, app. B at ii–iii (2008), available at http://marineprotectedareas.noaa.gov/pdf/national-system/finalframework_full.pdf.

⁸¹ DEP'T OF THE INTERIOR, STRATEGIC PLAN FOR FISCAL YEARS 2014–2018 10–11 (2013), available at <http://www.doi.gov/pmb/ppp/upload/DOI-Strategic-Plan-for-FY-2014-2018-POSTED-ON-WEBSITE.pdf> (last visited Oct. 16, 2014).

⁸² President Barack Obama, Remarks by the President in State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>) (“The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked.”).

⁸³ IMPLEMENTATION PLAN, *supra* note 76; S. REP. NO 106-301, at 2 (2000), available at <https://www.congress.gov/106/crpt/srpt301/CRPT-106srpt301.pdf>.

prehensive management of national ocean resources and established the Interagency Ocean Policy Task Force (Task Force).⁸⁴ Led by the White House Council on Environmental Quality (Council), the Task Force created recommendations to enhance stewardship of the Nation's marine environment and promote conservation and use of marine resources.⁸⁵ The Task Force generated the foundational document for the protection of America's ocean resources.⁸⁶ Although the Task Force created the recommendations for more specific policy objectives,⁸⁷ the inclusion of marine planning instruments in the implementation of integrated ocean policy marks a major first step toward effective management of the Nation's marine ecosystems.⁸⁸

In the wake of the 2010 Deepwater Horizon oil spill, President Obama issued an Executive Order again emphasizing the significance of America's marine resources by formally adopting the recommendations of the Task Force and establishing the National Ocean Council.⁸⁹ The President tasked the Council with formalizing federal policy based on the findings of the Task Force and constructing a national ocean policy to "ensure the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources."⁹⁰ President Obama also ordered the development of coastal and marine spatial plans (also known simply as marine plans) to allow a "more integrated, comprehensive, ecosystem-based, flexible, and proactive approach to planning and managing sustainable multiple uses . . ." of marine resources.⁹¹ After two years of drafts and commenting, the White

⁸⁴ *National Ocean Policy Implementation Plan*, *supra* note 74.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Priority objectives include: ecosystem-based management, informed decision making and improved public understanding, better coordination and support, enhanced resiliency and adaptation to climate change and ocean acidification, regional ecosystem protection and restoration, enhanced water quality protection, increased environmental stewardship in the Arctic, and improved data acquisition and data sharing accompanied by coastal marine spatial planning. THE WHITE HOUSE COUNCIL ON ENVTL. QUALITY, *supra* note 9, at 6.

⁸⁸ Press Release, Nat'l Oceanic and Atmospheric Admin., Obama Administration Officials Release Interagency Ocean Policy Task Force Interim Report (Sept. 18, 2009), *available at* http://www.noaanews.noaa.gov/stories2009/20090918_ceq2.html.

⁸⁹ See Exec. Order No. 13,547, 3 C.F.R. 227 (2010).

⁹⁰ *Id.* at 43,023.

⁹¹ *Id.*

House released the National Ocean Policy Implementation Plan in April 2013. The Plan identifies sensitive habitats and emphasizes sustainability and protection of marine ecosystems through implementation of marine plans.⁹²

C. Implementation of the National Ocean Policy

The Implementation Plan proposes that regional planning bodies address the creation of marine plans.⁹³ Each planning body should consist of federal, state, and tribal representatives as well as the Regional Fishery Management Council⁹⁴ and stakeholder groups.⁹⁵ Ideally, each regional planning body will develop a marine plan to serve the goals of the local community and the President's Executive Order.⁹⁶ "protection, maintenance and restoration of the health of the ocean."⁹⁷ The Implementation Plan underscores the importance of stakeholder engagement and public participation in marine planning.⁹⁸ By integrating public, scientific, technical, and commercial interests, regional marine planning allows variation in management of resources to accommodate geo-

⁹² IMPLEMENTATION PLAN, *supra* note 76, at 21–23.

⁹³ *Id.*

⁹⁴ Under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1851 (2013), eight regional fishery management councils conserve and manage fisheries in their region. Each council is composed of members from commercial and recreational fishing interests as well as environmental, academic, and government entities. The Act requires councils to maintain Fishery Management Plans through committees, advisory panels, and public meetings; steer regional research; implement management practices and catch limits; and develop restoration plans for at risk fisheries. 16 U.S.C. § 1852 (2013); *Regional Fisheries Management Councils*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/sfa/management/councils/> (last visited Aug. 29, 2014).

⁹⁵ IMPLEMENTATION PLAN, *supra* note 76, at 21–23.

⁹⁶ *Id.*

⁹⁷ Exec. Order No. 13,547, 3 C.F.R. 227 (2010). The restoration prong of President's Executive Order is broad. It could be construed to encompass anything from pollution recovery and restoration to dam removal for salmon ecosystem restoration and water quality improvement. Unlike the protection and management prongs, restoration likely has little application to the development of marine plans and marine protected areas. *See, e.g., About the Gulf Coast Ecosystem Restoration Council*, GULF COAST ECOSYSTEM RESTORATION COUNCIL, <http://www.restorethegulf.gov/council/about-gulf-coast-ecosystem-restoration-council> (last visited Aug. 29, 2014); *Dam Removal—Overview*, NAT'L PARK SERV., <http://www.nps.gov/olym/naturescience/dam-removal-overview.htm> (last visited Aug. 29, 2014); *The Last Dam Blog Post*, NAT'L PARK SERV., (Oct. 2, 2014), <http://www.nps.gov/olym/naturescience/damremovalblog.htm>.

⁹⁸ IMPLEMENTATION PLAN, *supra* note 76, at 23.

graphically specific needs while still achieving the National Ocean Policy goals.⁹⁹

With marine planning underway around the country,¹⁰⁰ areas available for sensitive resource protection may become difficult to find and assign for preservation.¹⁰¹ Planners rely on specific statutory provisions related to security, maritime transportation, research, education, and marine resource protection for guidance in MPA management.¹⁰² Ultimately, six major pieces of legislation¹⁰³ provide legal authority for federal marine resource protection.¹⁰⁴ While they currently work together to conserve America's marine resources, as the next Section describes, these laws lack the necessary preservation mandates or mechanisms to achieve the President's fundamental goals.¹⁰⁵

IV. MARINE PROTECTED AREA DESIGNATION AND MANAGEMENT UNDER EXISTING STATUTES

The National Ocean Policy Implementation Plan identifies several important aspects of functional marine planning, including the importance of public participation in marine planning to reflect user interests and the need for focused protection of ecologically significant areas to ensure sustainability of marine resources.¹⁰⁶ However, the Plan's reliance on existing laws¹⁰⁷ as designation mechanisms falls short of these goals because existing legislation inconsistently incorporates public participation, favors application

⁹⁹ *Id.*

¹⁰⁰ See *Regional Activities*, COASTAL & MARINE SPATIAL PLAN., <http://cmsp.noaa.gov/activities/> (last visited Aug. 29, 2014).

¹⁰¹ See *supra* note 33.

¹⁰² See generally NAT'L OCEAN COUNCIL, *supra* note 17, at 1, 18–21 (identifying various legal authorities which relate to the implementation of marine planning in the United States).

¹⁰³ See e.g. National Park Service Act, 16 U.S.C. § 1 (2013); Antiquities Act, 16 U.S.C. § 431 (2012); National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd (2013); National Wilderness Preservation System Act, 16 U.S.C. § 1131 (2012); National Marine Sanctuaries Act, 16 U.S.C. § 1431 (2012); Clean Water Act, 33 U.S.C. § 1330 (2012).

¹⁰⁴ NAT'L OCEAN COUNCIL, *supra* note 17, at 18–21.

¹⁰⁵ Exec. Order No. 13,547, 3 C.F.R. 227 (2010) and accompanying text (outlining the President's marine policy goals).

¹⁰⁶ IMPLEMENTATION PLAN, *supra* note 76, at 18–23.

¹⁰⁷ Although the Plan avoids implicating specific statutes, it does read, "implementation of ecosystem approaches to management based on existing statutes and regulations." *Id.* at 18.

of conservation-friendly compatible use doctrine, and lacks the legal authority for preservation of marine resources. The language of each statute determines both the level of community involvement and the orientation—conservation or preservation—of the statutory protections.

While legal scholars debate the value of public participation in lawmaking,¹⁰⁸ the National Ocean Council has identified public participation as valuable and integral to the development of functional National Ocean Policy.¹⁰⁹ To effectively analyze the costs and benefits of public participation in lawmaking, an important distinction must be drawn between types of community decision making.¹¹⁰ Synopticism—decision making through government expertise—and pluralism—decision making through public input—are two of the most common forms of environmental decision-making practice.¹¹¹ Synoptic decision making relies on government employees to make decisions through application of the scientific process.¹¹² In this way, public involvement in decision making is only allowable if it conforms to the result indicated in appropriate data.¹¹³ Thus, alternatives addressing social or economic interests have a limited voice in synoptic practice.¹¹⁴ Pluralistic citizen participation in lawmaking draws on the idealistic belief that every voice could, or should, be heard at an equal volume.¹¹⁵ Under this theory of public participation, government can garner broad support and community input early in the planning process.¹¹⁶ Further, citizen participation through pluralistic practice fosters an environment where non-governmental stakeholders have a forum to produce information acquired in the private sector.¹¹⁷ Consideration of private research can conserve pub-

¹⁰⁸ See e.g., Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 309, 313–17 (2012); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 56–57 (1996).

¹⁰⁹ IMPLEMENTATION PLAN, *supra* note 76, at 23.

¹¹⁰ Poisner, *supra* note 108, at 56.

¹¹¹ *Id.* at 56–57.

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *See id.* at 57.

¹¹⁵ *Id.* at 56–57.

¹¹⁶ Dellinger, *supra* note 108, at 313–14.

¹¹⁷ *Id.*

lic funding and reveal possible areas of conflict early in the planning process.¹¹⁸ However, political posturing and strategic bargaining can devolve pluralistic decision-making practice into a battle of private interests trying to maximize their own advantages.¹¹⁹ Each form of decision-making practice has utility in development of marine planning outlined by the National Ocean Council.¹²⁰ As this Section highlights, decision-making practice under current legislation for marine protection leaves room for improvement.

Statutory language with specific provisions requiring compatibility determinations or approval of compatible uses¹²¹ requires that resource managers evaluate a specific activity's appropriateness under each statute's stated purpose.¹²² Compatibility determinations under different legal authorities have varied over time, but the U.S. Forest Service and National Park Service incorporate the concepts developed by the Forest Service called "Limits of Acceptable Change" (LAC).¹²³ Through long-term studies, LAC tracks change in resources as a result of use and identifies acceptable change within the limits of the overarching statute.¹²⁴ Because conservation areas are managed for use, conservation-oriented statutes allow more change within an ecosystem and, as a result, more user activity than does preservation-oriented legislation. Hence, there is more stakeholder pressure for conservation-oriented legislation, which results in increased findings of use compatibility.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 316–17.

¹²⁰ IMPLEMENTATION PLAN, *supra* note 76, at 23. In the marine planning process, synopticism lends expert knowledge and broad governmental participation in the planning process, while pluralism elevates valuable stakeholder interest and knowledge to augment government data sets.

¹²¹ See National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd(a)(3)(D) (2012); National Marine Sanctuaries Act, 16 U.S.C. § 1431(b)(6) (2012).

¹²² See *Refuge Planning*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/northeast/planning/cd.html> (last updated Dec. 21, 2011).

¹²³ COMPATIBILITY DETERMINATION ACTION PLAN, *supra* note 20, at CD-3, CD-15.

¹²⁴ See *id.* at CD-15.

¹²⁵ See Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 *ECOLOGY L.Q.* 71, 115–117 (2002) (describing the process by which stakeholder pressure results in increased findings of compatible uses and less restrictive marine reserve creation).

Since both resource conservation and preservation practices are important, this Section discusses several effective, conservation-oriented marine protection statutes. Exploration of each statute and its application in the MPA management framework informs how current laws can work toward the President's goals of protection, maintenance, and restoration of America's marine ecosystems.

A. *Deployable Preservation-Oriented Statutes: Heavy on Political Opposition and Light on Democratic Process*

The Antiquities Act of 1906 (Antiquities Act)¹²⁶ and National Wilderness Preservation System Act (Wilderness Act)¹²⁷ both have provisions that could allow designation of preservation-oriented MPAs. Unfortunately, no ocean resource preservation areas exist under either authority to date. This Section discusses each statute's possibilities for the future.

1. *Antiquities Act of 1906*

The Antiquities Act endures as a highly adaptable environmental protection tool today. The statute establishes a right of the President to declare "objects of historic or scientific interest" as national monuments.¹²⁸ In recent years, the Antiquities Act has grown in popularity with Presidents as it allows them to designate monuments without consulting Congress.¹²⁹ Further, because the President, not an agency, designates national monuments, the process eludes public review, the provisions of the National Environmental Policy Act¹³⁰ (NEPA), other environmental regulations, and statutes.¹³¹

While President Bill Clinton remains one of the most well-known users of the Antiquities Act,¹³² President George W. Bush

¹²⁶ Antiquities Act, 16 U.S.C. §§ 431–433 (2012).

¹²⁷ National Wilderness Preservation System Act, 16 U.S.C. §§ 1131–1136 (2012).

¹²⁸ 16 U.S.C. § 431 (2012).

¹²⁹ Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 539 (2001).

¹³⁰ 42 U.S.C. § 4321 (2013).

¹³¹ Ranchod, *supra* note 129, at 540 (review under other statutes may be required after designation for actions such as development of a management plan).

¹³² *See id.* at 536–37 (detailing President Clinton's significant use of the Act which "created 19 of the 123 national monuments established by presidential

also used the act to designate one of the world's largest marine conservation areas, Papāhānaumokuākea Marine National Monument in the northern Hawaiian Islands.¹³³ President Bush also established the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument.¹³⁴ The use of the Antiquities Act allowed President Bush to set aside 335,000 square miles of U.S. Exclusive Economic Zone (EEZ) for marine resource protection.¹³⁵ In July 2013, President Barack Obama proposed to expand some of the marine national monuments established by President Bush.¹³⁶ While not official as of the writing of this article, the expansion could extend the area protected under the Antiquities Act by almost 700,000 square miles.¹³⁷

The language of the statute allows faster protection of resources than does any other statute, and it does not include a compatibility requirement.¹³⁸ Not limited to a conservation orientation and not subject to public review, the Antiquities Act circumvents the long, complex process of priority use determination and provides a legal vehicle for preservation-oriented marine resource protection.¹³⁹

However, the Antiquities Act suffers from some weaknesses. Other branches of government can check the Executive power to designate marine national monuments. Congress can withhold funding or amend the monument's designation after enactment.¹⁴⁰

decree since 1906, more than any other president.”).

¹³³ NAT'L OCEAN COUNCIL, *supra* note 17, at 20.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Juliet Eilperin, *Obama Proposes Vast Expansion of Pacific Ocean Marine Sanctuary*, WASH. POST, June 17, 2014, http://www.washingtonpost.com/politics/obama-will-propose-vast-expansion-of-pacific-ocean-marine-sanctuary/2014/06/16/f8689972-f0c6-11e3-bf76-447a5df6411f_story.html.

¹³⁷ *Id.*

¹³⁸ See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477–86 (2003).

¹³⁹ Joseph Brigggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in The Outer Continental Shelf*, 22 TUL. ENVTL. L.J. 403, 408 (2009).

¹⁴⁰ For example, as a response to the 1943 designation of Jackson Hole National Monument, Congress prohibited expenditure on the site and amended the Antiquities Act in 1950 to require consent for creation or enlargement of National Monuments in Wyoming. Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906 Congress*, W. HIST. Q. (295-96) (August 1989), available at <http://www.cr.nps.gov/history/hisnps/>

Although the Supreme Court has never ruled on the constitutionality of the Antiquities Act, a Supreme Court determination could potentially hamper Presidential Antiquities Act powers.¹⁴¹ Yet congressional attempts to modify Presidential Antiquities Act powers are ongoing.¹⁴² The Act also limits the size of designated marine protected areas to the “smallest area compatible with proper care and management” of the protected resources.¹⁴³ This size limitation prevents protection of buffer areas and areas that sensitive ecosystems depend upon, such as adjacent estuaries.¹⁴⁴ Finally, the lack of pluralistic citizen participation in lawmaking is perhaps the largest hurdle to the Act’s fulfillment of National Ocean Policy goals.¹⁴⁵ The public’s participation in resource protection increases popular support for conservation and preservation efforts¹⁴⁶ and illustrates the priorities of the National Ocean Policy Implementation Plan.¹⁴⁷ Further, public commenting during NEPA review of agency decisions is an important procedural step in establishing standing to sue for harms that result for decisions made contrary to commenting.¹⁴⁸ Thus, without an opportunity to comment on agency decision-making practice, citizens lose their most obvious chance to establish interest in the issue and may struggle later to demonstrate standing to contest adverse actions.

Despite these shortcomings, under the current marine resource protection framework, the Antiquities Act remains a reliable method of marine preservation.

npshistory/righter.htm (last modified Mar. 5, 2005).

¹⁴¹ Briggett, *supra* note 139, at 409.

¹⁴² Max Greenberg, *House Attempts to Gut Antiquities Act—and the Future of National Monuments and Parks*, WILDERNESS SOC’Y (Mar. 26, 2014), <http://wilderness.org/blog/house-attempts-gut-antiquities-act-and-future-national-monuments-and-parks>.

¹⁴³ 16 U.S.C. § 431 (2012).

¹⁴⁴ CAROL HARDY VINCENT & KRISTINA ALEXANDER, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 4 (2010).

¹⁴⁵ Briggett, *supra* note 139, at 422 (“Ultimately, a plan to protect natural resources must respect fundamental principles of democratic governance. When government action impacts the environment, people should have an opportunity to voice their opinions before the plan is implemented.”).

¹⁴⁶ *Id.*

¹⁴⁷ IMPLEMENTATION PLAN, *supra* note 76, at 23.

¹⁴⁸ See *Holy Cross Wilderness Def. Fund v. Madigan*, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) (“We have held that “[w]e will not review information that [a party] failed to include in the administrative record or present before [the agency].”).

2. *The Wilderness Act of 1964*

Congress enacted the National Wilderness Preservation System to fully protect areas “where the earth and its community of life are untrammelled by man”¹⁴⁹ The Wilderness Act seeks to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”¹⁵⁰ The Act strives to protect all natural processes and accommodate only those human uses that do not overtly impact the natural environment, such as primitive recreation.¹⁵¹ The Act prohibits most commercial activity, use of motorized equipment and establishment of permanent facilities.¹⁵² Congress can authorize activities beyond the prohibitions in the Act when deemed necessary “for realizing the recreational or other wilderness purposes of the area”¹⁵³

The Wilderness Act provides for the protection of designated wilderness areas and their unique character, but also establishes a commitment to limited human uses compatible with wilderness preservation,¹⁵⁴ such as backcountry hiking and wildlife viewing. Thus, wilderness managers face a seemingly contradictory purpose: preservation of resources while providing for public use.¹⁵⁵ In the 1980s, the U.S. Forest Service (USFS) informally adopted the LAC process to address compatibility determinations within terrestrial wilderness areas under USFS management.¹⁵⁶ Although

¹⁴⁹ 16 U.S.C. § 1131(c) (2012).

¹⁵⁰ 16 U.S.C. § 1131(a) (2012).

¹⁵¹ See UPTON & BUCK, *supra* note 15, at 20.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 16 U.S.C. § 1131(a) (2012).

¹⁵⁵ See *e.g.*, GEORGE H. STANKEY ET AL., U.S. DEPARTMENT OF AGRICULTURE, GEN. TECHNICAL REPORT NO. INT-176, THE LIMITS OF ACCEPTABLE CHANGE (LAC) SYSTEM FOR WILDERNESS PLANNING 2 (1985), available at http://www.fs.fed.us/cdt/carrying_capacity/lac_system_for_wilderness_planning_1985_GTR_INT_176.pdf.

¹⁵⁶ The management decision making process helps highlight areas of concern. The LAC decision-making framework was the first to utilize what are now known as LAC concepts. These concepts include identifying management goals in conflict, weighting each goal, determining how much to comprise each weighted goal, and monitoring conditions to align with the new weighted goals. U.S. DEP'T OF THE INTERIOR, THE VISITOR EXPERIENCE AND RESOURCE PROTECTION (VERP) FRAMEWORK: A HANDBOOK FOR PLANNERS AND MANAGERS, 5–7 (1997), available at <http://planning.nps.gov/document/verphandbook.pdf>; COMPATIBILITY DETERMINATION ACTION PLAN, *supra* note 20, at CD-15.

USFS manages only a portion of federal wilderness areas, application of LAC or similar frameworks to the Wilderness Act occurs commonly across the agencies due to management by other services under the Department of the Interior.¹⁵⁷ While the LAC process for determining use compatibility within a wilderness area can be very technical and data-focused, the USFS acknowledged the value of and need for public participation in the process.¹⁵⁸ Ultimately, managers integrate statutory objectives, resource conditions, and use opportunities to determine feasible standards that protect the wilderness environment.¹⁵⁹

Due to the focus on measured change in resources, implementation of the LAC for compatibility determinations has evolved into a primarily synoptic, data-driven process.¹⁶⁰ This means that during evaluation of LAC concepts, managers lose out on valuable, pluralistic input from agency planners, scientists, and the public regarding past experiences and community goals.¹⁶¹ The Wilderness Act's primary purpose requires preservation of wilderness for present and future generations.¹⁶² Without input and support from the people as guidance, wilderness managers risk preservation of resources for purposes that do not align with public desires. For better or worse, if data alone drives preservation focus, management practices may fail to serve their intended beneficiaries by preserving resources not valued by the community or, worse yet, failing to preserve valued community resources.

Supporters of ocean preserves have increasingly explored the

¹⁵⁷ See Brian Glaspell, et al., *Selecting Indicators and Understanding Their Role in Wilderness Experience: Stewardship at Gates of the Arctic National Park and Preserve*, 20 *GEORGE WRIGHT SOC'Y FORUM* 59, 61–63 (2003), available at <http://www.georgewright.org/203glaspell.pdf>; Alan E. Watson & Joseph W. Roggenbuck, *Selecting Human Experience Indicators for Wilderness: Different Approaches Provide Different Results*, 348 *ALDO LEOPOLD WILDERNESS RESEARCH INST.* 264, 265–68 (1998), available at <http://leopold.wilderness.net/pubs/348.pdf>.

¹⁵⁸ As early as 1985, U.S. Forest Service publications began identifying a lack of public participation in the LAC process. See STANKEY ET AL., *supra* note 155, at 21 (“Success is also tied to continued public participation. There is much expertise among public groups, and at each step in the process planners should seek to involve the public, both as a way of obtaining important information and as a way of developing support for and understanding of the process.”).

¹⁵⁹ *Id.* at 34.

¹⁶⁰ *Id.* at 3–4.

¹⁶¹ *Id.*

¹⁶² 16 U.S.C. § 1131(a) (2012).

possibility of “marine wilderness areas” in recent years.¹⁶³ Parties favoring the strongest possible protection for marine areas claim that the Wilderness Act creates a starting point for preservation-oriented marine protected area management, because the legislation allows too many uses incompatible with preservation.¹⁶⁴ However, others contend that the application of the Wilderness Act results in too much limitation on use.¹⁶⁵ Unfortunately, the debate around the Act’s compatibility to the marine world is purely theoretical because the Wilderness Act remains untested for MPA preservation to date.¹⁶⁶

B. *Implemented Conservation-Oriented Statutes: Preservation Possibilities*

The National Marine Sanctuary System Act (Sanctuaries Act)¹⁶⁷ and National Park Service Organic Act (Park Service Act)¹⁶⁸ both provide designation authority for conservation-oriented MPAs. However, preservation-oriented MPAs do not currently flow from either statute. This Section discusses each act and its possibility for future resource preservation.

1. *National Marine Sanctuaries Act*

Initially passed in 1972, the Sanctuaries Act provides that the Secretary of Commerce may designate an area of the marine environment, within the U.S. EEZ, as a marine sanctuary of “national significance due to its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities, the communities of living marine resources within it, or its resource or human-use values”¹⁶⁹ The Sanctuaries Act allows the Secretary of Commerce to create regulations delegating the administration of the National Marine Sanctuaries to the National Ocean and Atmospheric Administration (NOAA).¹⁷⁰

¹⁶³ UPTON & BUCK, *supra* note 15, at 20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445 (2012).

¹⁶⁸ National Park Service Act, 16 U.S.C. §§ 1–18 (2013).

¹⁶⁹ 16 U.S.C. § 1433(a)(2) (2012).

¹⁷⁰ 16 U.S.C. § 1433(a) (2012); 15 C.F.R. § 922.106 (2012) (“The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act.”).

NOAA manages thirteen national marine sanctuaries and one marine national monument.¹⁷¹ The Act allows NOAA to authorize regulations for each sanctuary and for the sanctuary system as a whole that specify the permitted activities within sanctuary bounds.¹⁷² While Congress intended the Sanctuaries Act to serve as a tool for protection of sensitive marine resources, history has proven that the Act lacks the practical backing needed to support a strong system of sanctuaries.¹⁷³

Despite the aims of a progressive Congress, the National Marine Sanctuaries have struggled politically and economically to gain traction.¹⁷⁴ Underscoring the policy argument that pluralist public participation complicates lawmaking,¹⁷⁵ the highly politicized, Congressional designation of a sanctuary can take close to a decade, and, upon designation, managers encounter political roadblocks to management plan implementation and programmatic funding.¹⁷⁶ The legislative history of the Sanctuaries Act clearly established Congress's intent to create MPAs for the benefit of a broad array of users.¹⁷⁷ Although the statute prioritizes the preservation of resources over economic development by announcing a "primary objective of resource protection" in the Purpose section,¹⁷⁸ the Sanctuaries Act goes on to describe a balancing of economic impacts, human-use values, and conservation.¹⁷⁹ Because

¹⁷¹ 16 U.S.C. § 1439 (2012); *see also* 15 C.F.R. §§ 922.1–922.198 (2012).

¹⁷² National Marine Sanctuaries Act, 16 U.S.C. § 1439 (2012); *see, e.g.*, 15 C.F.R. § 922.61 (2012) (prohibiting several types of bottom disturbances in Monitor National Marine Sanctuary); 15 C.F.R. § 922.72(a)(1)(2014) (prohibiting exploration for hydrocarbons in Channel Islands National Marine Sanctuary); 15 C.F.R. § 922.92(a)(6) (2014) (limiting allowable fishing gear to rod and reel in Gray's Reef National Marine Sanctuary).

¹⁷³ Susan E. Farady, "Compatible Use" Within National Marine Sanctuaries: *Determining Meaningful Implementation*, 12 OCEAN & COASTAL L.J. 1, 12 (2006).

¹⁷⁴ Brax, *supra* note 125, at 90.

¹⁷⁵ Poisner, *supra* note 108, at 89.

¹⁷⁶ NAT'L OCEAN COUNCIL, *supra* note 17, at 19 (describing the length of designation proceedings); Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 751–55 (2003) (explaining the political and budgetary hurdles faced in sanctuary designation and management).

¹⁷⁷ Brax, *supra* note 125, at 82–83 (construing John Epting, *National Marine Sanctuary Program: Balancing Resource Protection with Multiple Use*, 18 HOUS. L. REV. 1037 (1981)).

¹⁷⁸ 16 U.S.C. § 1431(b)(6) (2012).

¹⁷⁹ Brax, *supra* note 125, at 86 (construing 16 U.S.C. §§ 1433(a)(2)(A), (B) (1994)).

adequate *protection* of natural resources requires both conservation and preservation practices,¹⁸⁰ the language of the Sanctuaries Act falls short of a preservation-orientation by effectively instituting an environmental cost-benefit analysis and providing only conservation-oriented resource protection.¹⁸¹

Although the legislative history outlines a sanctuary's purpose as resource protection through both preservation and conservation,¹⁸² the additional requirement to facilitate public and private use compatible with that purpose across the program complicates, if not contradicts, the this goal.¹⁸³ The conflicts of the compatible use doctrine in the Sanctuaries Act raise serious questions about how managers can simultaneously protect and allow uses of marine resources.¹⁸⁴ Ultimately, the Sanctuaries Act has only designated conservation-oriented MPAs since its enactment, despite its primary objective.¹⁸⁵ Without significant amendment to the Act, preservation-oriented sanctuaries remain unlikely due to the requirement for balancing consumptive, non-preservationist uses.

2. *National Park Service Organic Act*

The 1916 passage of the Park Service Act is, arguably, one of the most notable environmental protection events in American history.¹⁸⁶ The Act and its amendments provide that the Department of the Interior shall promote the use and protection of national parks to “increase[] national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for

¹⁸⁰ See *supra* text accompanying notes 60–63.

¹⁸¹ Brax, *supra* note 125, at 86.

¹⁸² It is entirely possible that the original drafters did not foresee the necessity for preservation as defined in this Article. However, use of the term in the legislation is complicating in light of the definition which must be construed as distinct from the definition of “conservation” otherwise it would serve no statutory purpose. Representative Keith stated, “[i]ts purpose is to assure the preservation of our coastal areas and fisheries.” 117 CONG. REC. 30,858 (1971); see also Owen, *supra* note 176, at 714–21.

¹⁸³ William Chandler & Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 ENVTL. L. REP. 10, 505, at 10,505–06 (2004) (construing the original statutory goals written by the Johnson administration and published in a 1966 report titled *Effective Use of the Sea*).

¹⁸⁴ Farady, *supra* note 173, at 9.

¹⁸⁵ Brax, *supra* note 125, at 83 (construing Epting, *supra* note 177).

¹⁸⁶ See National Park Service Act, 16 U.S.C. § 1 (2012); *Organic Act of 1916*, NAT'L PARK SERV., <http://www.nps.gov/grba/parkmgmt/organic-act-of-1916.htm> (last visited Oct. 19, 2014).

the benefit and inspiration of all the people of the United States.”¹⁸⁷ Since enactment, the Department of the Interior, through the National Park Service, has incorporated vast areas of marine and freshwater environments,¹⁸⁸ including over 4.5 million acres of ocean and freshwater resources¹⁸⁹ and 43,000 miles of American shoreline.¹⁹⁰

The statutory purpose of the Park Service Act and its amendments bind the National Park Service to both provide for the enjoyment of natural resources and protect those resources for future generations.¹⁹¹ The dual mission of the Park Service Act creates tension between comprehensive resource protection and providing for human activities.¹⁹² Essentially, if a proposed use impacts park resources in a way that exceeds the designated acceptable level as determined by relevant scientific study and the NEPA process, the LAC review deems the activity incompatible with the National Park Service mandate and therefore not allowed within the park.¹⁹³ While the Park Service Act does an outstanding job of conserving natural resources for future generations, its language and application through LAC-influenced management practices leave little room for preservation of resources because of the embedded acceptance of human impacts on natural resources.¹⁹⁴ However, the Park Service Act may partner with one of the preservation-oriented statutes discussed above to provide a conservation area buffer to sensitive marine ecosystems similar to the placement of tertiary wilderness areas adjacent to national parks and forests.¹⁹⁵ This buffer area could prove particularly valuable in light of the

¹⁸⁷ 16 U.S.C. § 1a-1 (2012).

¹⁸⁸ *About Us*, NAT'L PARK SERV., <http://www.nps.gov/aboutus/index.htm> (last visited Mar. 1, 2013).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 16 U.S.C. § 1a-1 (2012).

¹⁹² Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 855–56 (2009).

¹⁹³ COMPATIBILITY DETERMINATION ACTION PLAN, *supra* note 20, at CD-21. The National Park Service employs the LAC concept in its compatibility determination framework. *Id.* at CD-19 to CD-21.

¹⁹⁴ Farady, *supra* note 173, at 9.

¹⁹⁵ See *Special Places: Bob Marshall Wilderness Complex*, U.S. FOREST SERV., <http://www.fs.usda.gov/attmain/flathead/specialplaces> (last visited May 30, 2014).

size limitation referenced in the Antiquities Act discussion.¹⁹⁶ Ultimately, the Park Service Act has considerable value as a conservation-oriented marine protection statute, but without amendment for preservation activities it can only serve as a complementary law to marine preservation.

C. *Implemented Conservation-Oriented Statutes:
Light on Preservation Possibilities,
Heavy on Public Support*

This Section discusses the National Wildlife Refuge System Administration Act (Wildlife Refuge Act)¹⁹⁷ and Clean Water Act's National Estuary Program (Estuary Program).¹⁹⁸ Although neither piece of legislation has significant potential for preservation-oriented resource protection, both statutes provide authority for the creation of conservation-oriented MPAs that could work in concert with preservation-oriented MPAs within larger, regional marine plans.¹⁹⁹ Further, both statutes incorporate public participation and are examples of pluralistic natural resource protection mechanisms.²⁰⁰

1. *National Wildlife Refuge System Administration Act of 1966*

The Wildlife Refuge Act and its amendments serve as the authority for the National Wildlife Refuge System (NWRS) to focus, quite simply, on wildlife and its habitat.²⁰¹ The U.S. Fish and Wildlife Service (FWS) manages national wildlife refuges through delegation from the Department of the Interior.²⁰² The NWRS operates more than 140 national wildlife refuges in marine and coastal environments.²⁰³ The Act requires that the Secretary of the Interior ensure that the "biological integrity, diversity and environmental health of the NWRS is maintained for the benefit of present and future generations of Americans."²⁰⁴ Under NWRS

¹⁹⁶ See *supra* text accompanying note 144.

¹⁹⁷ National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd (2012).

¹⁹⁸ Clean Water Act, 33 U.S.C. § 1330 (2012).

¹⁹⁹ See *supra* text accompanying note 24–30

²⁰⁰ See *supra* text accompanying note 118–23.

²⁰¹ 16 U.S.C. § 668dd (2012).

²⁰² *Id.*

²⁰³ UPTON & BUCK, *supra* note 15, at 21.

²⁰⁴ 16 U.S.C. § 668dd(a)(4)(B) (2012).

regulations, areas remain closed to all activities unless approved by the FWS following application of a compatibility test.²⁰⁵

Similar to the National Marine Sanctuaries Act and the National Park Service Organic Act, the Wildlife Refuge Act authorizes national wildlife refuges to establish their own levels of protection and priority uses by determining compatibility with System legislation and regulation.²⁰⁶ Despite the statutory requirement that refuges initially remain closed to all uses until specifically opened to each use, a wide array of wildlife-dependent activities are presumptively compatible with the Wildlife Refuge Act.²⁰⁷ These wildlife-dependent, priority public uses, include wildlife observation, hunting, fishing, photography, interpretation, and environmental education.²⁰⁸ As evidence of the heavy conservation-orientation of the Wildlife Refuge Act, these priority public uses will be allowed, despite potential impacts, as long as they align with site purpose, staffing, and funding.²⁰⁹ The NWRS's definition of compatible use includes "a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the [NWRS] mission or the purpose of the national wildlife refuge."²¹⁰ In line with the Act's singular focus, it provides that wildlife-dependent activities take priority over non-wildlife dependent activities.²¹¹

To determine a proposed use's compatibility with statutory language and agency policy, the U.S. Fish and Wildlife Service follows a series of questions highlighting the application of statutory language, site purpose, management policy, staffing levels, and funding.²¹² Further, if a conflict between two compatible uses

²⁰⁵ 16 U.S.C. § 668dd(d)(3)(A)(i) (2012).

²⁰⁶ NAT'L OCEAN COUNCIL, *supra* note 17, at 20–22.

²⁰⁷ Exec. Order No. 12,996, 61 Fed. Reg. 13,647 (March 25, 1996).

²⁰⁸ *Id.* at 13,647.

²⁰⁹ COMPATIBILITY DETERMINATION ACTION PLAN, *supra* note 20, at CD-18 to CD-19.

²¹⁰ Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,486 (Oct. 18, 2000).

²¹¹ 16 U.S.C. § 668dd(a)(3)(c)(A) (2012).

²¹² COMPATIBILITY DETERMINATION ACTION PLAN, *supra* note 20, at CD-17 ("Is the use a 'refuge use'?" "Does the use conflict with any Executive Order, or Department or Service policy?" "Is the use consistent with public safety?" "For uses other than wildlife-dependent activity, is the use manageable within the available budget and staff?" "Does the use conflict with other resource management objectives?").

arises, the FWS allows the use with the most positive effect on refuge purpose and management goals.²¹³ In light of the Act's broad purpose statement and priority public uses compatibility determination, statutory interpretation to allow for resource preservation remains unlikely under the Wildlife Refuge Act. Ultimately, the NWRS serves a valuable purpose by providing conservation-oriented recreational marine sites for people. However, without significant amendment, the Wildlife Refuge Act lacks the authority to preserve marine resources.

2. *The Clean Water Act's National Estuary Program*

Passed in 1987, Section 320 of the Clean Water Act established the National Estuary Program, which allows states to work with the Environmental Protection Agency to manage water quality for the protection of public water supplies and environmental health.²¹⁴ Once a state nominates an estuary, a management conference convenes with federal, state, and local stakeholders to develop a comprehensive conservation and management plan (CCMP) for the site.²¹⁵ Under the Program, EPA helped develop twenty-eight CCMPs.²¹⁶ The protection of critical estuaries—some of the most sensitive and productive zones along the coast—benefits marine resources far beyond the area boundaries.²¹⁷

Perhaps the most obviously conservation-oriented marine protection law, the Estuary Program enables cooperative, community-based drafting of a CCMP to establish compatible uses and management practices based on the statutory goals of protection and restoration of water quality and ecological integrity at Program sites.²¹⁸ However, the voluntary, community-based nature of the Estuary Program leaves compliance open to public disregard and misuse²¹⁹ because of an inherent lack of enforcement authority for

²¹³ *Id.* at CD-19.

²¹⁴ 33 U.S.C. § 1330(2)(A) (2012).

²¹⁵ NAT'L OCEAN COUNCIL, *supra* note 17, at 18–19.

²¹⁶ *Id.*

²¹⁷ Estuaries are considered some of the most productive zones in the world. They provide a habitat for a multitude of juvenile species as well as filtering for the larger ocean ecosystems. *Why Are Estuaries Important? The Economy and Environment*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://oceanservice.noaa.gov/education/kits/estuaries/estuaries02_economy.html (last updated March 25, 2008).

²¹⁸ 33 U.S.C. § 1330(b)(4) (2012).

²¹⁹ Estuary Program sites have difficulty engaging public support and control

non-point source polluters and recreational users.²²⁰ While the Estuary Program lacks preservation capacity, it provides an important tool in the marine planning belt. The Program provides conservation authority for estuarine resources in highly developed areas with a complimentary community participation aspect that reinforces public support for marine protection.

As this Section discusses, current federal marine protection statutes do not adequately preserve marine resources. Compliance with President Obama's goals of protection, maintenance, and restoration of sensitive marine ecosystems requires both conservation- and preservation-oriented MPAs. Although federal statutes exist to preserve marine resources, very few instances of marine resource preservation exist due to the limited nature of preservation-oriented federal marine resource protection law. The existence of multiple, successful legal devices enacted to designate conservation-oriented marine protected areas tips the balance away from resource preservation and falls short of the President's goals.

V. RECOMMENDATIONS: CONGRESSIONAL RESPONSE AND PRESIDENTIAL ACTION

This Section recommends changes to the current marine resource protection legal framework to correct the incomplete protection, maintenance, and restoration of marine resources and provide an adequate basis for construction of the President's National Ocean Policy and system of regional marine plans.

A. *Essential Congressional Action*

Congress possesses the requisite authority and process to address the marine protection statutory shortfalls. Congressional lawmaking triggers NEPA requirements that integrate public notice and comment and, theoretically, allow community involve-

discharges of non-point sources because they have little enforcement authority. ENVTL. PROT. AGENCY, NATIONAL ESTUARY PROGRAM 2004–2006 IMPLEMENTATION REVIEW REPORT (2008), *available at* http://water.epa.gov/type/oceb/nep/upload/2008_07_09_estuaries_pdf_2004-2005_irreportfinal_6_19_08.pdf.

²²⁰ 33 U.S.C. § 1330 (2012). The Clean Water Act authorizes NOAA and EPA to approve site plans with “voluntary or incentive-based compliance.” This provides the sites no ability to compel compliance. Eric A. DeGroff, *Environmental Law*, 34 U. Rich. L. Rev. 799, 821 (2000).

ment in lawmaking.²²¹ Further, the democratic legislative process subjects Congressional lawmakers to the reaction of their constituency and the fear of losing re-election. The Sections below discuss actions Congress must take to correct the current deficiencies in marine protection legislation.

1. *Enact Marine Protection System Legislation*

Given the inherent drawbacks in each existing piece of legislation, Congress could most effectively implement the National Ocean Policy through new legislation that provides a broad framework for marine resource protection similar to the California Marine Life Protection Act.²²² Ideal legislation would implement the effective management strategies of each of the current land management statutes²²³ and integrate sites already designated under the Sanctuaries Act and National Estuary Program. The new legislation should incorporate the functions of each existing program along with a provision for marine resource preservation. Ideally, the statute would integrate all aspects of comprehensive marine resource management through marine-specific, conservation and preservation practices that accommodate users in certain areas and provide strict protection for sensitive resources in other areas. Such an act would require that Congress address current issues like public participation, designation, and management as well as conservation-friendly compatible use doctrine.

To directly address the current lack of preservation-oriented marine protection, the legislation should mandate preservation areas within each regional marine plan. Further, new legislation could require a minimum amount of preservation-oriented area, either by number or area percentage, to fully support each plan with an integrated MPA system. Ideally, regional planning bodies retain the flexibility to accommodate geographic variations in resources and economies, but would also comply with mandated preservation minimums.

New legislation would also give Congress an opportunity to address effective decision-making practice through both synoptic and pluralistic forms. Applied correctly, both practices have utili-

²²¹ ALBERT M. FERLO ET AL., THE NEPA LITIGATION GUIDE 65–66 (2012).

²²² See *supra* text accompanying note 62–66.

²²³ The majority of the statutes discussed in this article were originally intended for land management. However, the Sanctuaries Act and Estuary Program are not land management statutes, as they were drafted specifically as marine and estuarine protection laws.

ty; however, current legislation provides examples of areas in which pluralism confounds and delays resource management, while synopticism disregards social or economic needs and fails to develop community support for resource protection.²²⁴ Careful analysis of when management decisions require data-driven responses as opposed to pluralistic, community-based choices could help Congress construct a functional framework that incorporates valuable public participation.

2. *Enact Alternative Preservation-Only Legislation*

Alternatively, Congress could enact a single piece of preservation-specific legislation (the Marine Wilderness Act, perhaps) specifically constructed to allow preservation of sensitive marine resources. This act would not provide a comprehensive marine protection framework to serve the President's overarching goals, but it would provide legislation to preserve marine resources and work in tandem with conservation-oriented statutes already in effect to address current marine protection shortfalls. As the present patchwork of statutes is full of holes and provides users with successively more lenient compatible use determinations to allow their activities, the preservation-only alternative remains less desirable. Given the age and controversy around many of the statutes, enacting a new comprehensive piece of legislation is preferable. Further, enactment of the theoretical Marine Wilderness Act would not foreclose future enactments of a comprehensive federal marine protection act. It would simply provide another piece of legislation for integration into the larger framework.

3. *Amend Current Resource Protection Statutes*

In the absence of new legislation, Congress should expand existing legislation and establish preservation-friendly boundaries to current compatible use doctrine. By expanding statutory language related to compatibility determinations, Congress would allow agencies room for preservation practices in MPA management. A few possibilities exist for legislative growth, including expansion of the Sanctuaries Act to mandate preservation of Sanctuary resources similar to those in the Wilderness Act.²²⁵ The expansion, would however, still fall prey to many of the designation and implementation pitfalls, such as prolonged Congressional inaction

²²⁴ See *supra* text accompanying notes 108–120.

²²⁵ See *supra* text accompanying notes 150–151.

and limited funding, experienced throughout the life of the Sanctuaries Act.²²⁶

Alternatively, Congress could expand the Wilderness Act to expressly include marine wilderness areas on the outer continental shelf, thereby quieting arguments that the Act does not extend to the marine environment. Amendment of the Wilderness Act would also allow Congress to address issues around lack of public input in the designation process. Ultimately, expansion of either the Sanctuaries Act or Wilderness Act to include preservation-oriented compatibility determinations anywhere in the U.S. EEZ would provide an important starting point for marine resource preservation.

B. *The Immediate Presidential Solution*

In an era of reduced congressional productivity,²²⁷ the most effective short-term method for preservation of marine resources remains aggressive Antiquities Act implementation. President Obama could designate marine national monuments for management by NOAA under the Antiquities Act and circumvent the problems of inertia on Capitol Hill. He would have to define the protected resource broadly so as to incorporate sufficient area to provide adequate protection and still withstand critique under the statute's area-limiting provision.²²⁸ The President could likely justify his decision to preserve marine resources before they suffer immediate damage from continued Congressional inaction regarding preservation-oriented legislation, increasing ecosystem degradation, and loss of area for preservation due to development of regional marine plans dedicating areas to alternative uses. Ultimately, he should set aside marine preserves while opportuni-

²²⁶ See *supra* text accompanying notes 174–176.

²²⁷ During the writing of this article Congress was experiencing unprecedented levels of low productivity. See Chris Cillizza, *Yes, President Obama Is Right: the 113th Congress Will Be the Least Productive in History*, WASH. POST, April 10, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/10/president-obama-said-the-113th-congress-is-the-least-productive-ever-is-he-right/>; Matt Viser, *This Congress Going Down as Least Productive*, BOSTON GLOBE, Dec. 4, 2014, <http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html>.

²²⁸ Antiquities Act, 16 U.S.C. § 431 (2012). Defining the resource broadly to encompass a wide geographic area will include an adequate buffer zone to provide biological benefits to the targeted resources. See *supra* text accompanying note 144.

ties still exist and protect sensitive marine ecosystems from commercial exploitation, potentially harmful recreational activities, and application of lenient compatible use doctrine, which prevent adequate preservation of resources.²²⁹

CONCLUSION

Current federal marine protection statutes lack provisions to preserve sensitive marine ecosystems. Just as land use planning allows designation of open space for conservation and preservation of forestlands and green space, so should marine plans create areas for both conservation and preservation of ocean resources. The success of President Obama's plan to protect, maintain, and restore sensitive ocean resources relies on conservation and preservation of marine resources, but few instances of marine resource preservation exist due to the development of the conservation-friendly compatible use doctrine and the limited nature of preservation-oriented federal laws. With regional marine planning underway around the country, correction of this shortfall must happen quickly to prevent areas available for sensitive resource preservation from dwindling.

²²⁹ See *supra* note 33.