



**TRANSATLANTIC PLATFORM FOR ACTION  
ON THE GLOBAL ENVIRONMENT (T-PAGE)<sup>1</sup>**

**Background Paper on US Marine Protected Areas (MPAs)**

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# T-PAGE Background Paper on US Marine Protected Areas

## 1. INTRODUCTION

NRDC has prepared this brief overview of the diverse legal mechanisms that are used to create and administer marine protected areas (MPAs) and the ongoing effort to develop a national system of MPAs to provide background for a transatlantic dialogue that we are co-organizing with the Institute for European Environmental Policy. The paper is not an NRDC policy document; and the views expressed or implied herein do not necessarily conform to the position taken by NRDC on any particular issue. This document, along with a companion review of EU policies prepared by IEEP, is being provided to participants in our initial teleconference on June 13, 2007. The goal for the dialogue is to enable environmental leaders in the US and Europe to identify, discuss, and analyze the perceived priorities in the US and EU on marine protected areas, how they compare and contrast, and where there is potential for collaboration on both sides of the Atlantic on advancing this issue.

## 2. ESTABLISHING MPAs IN THE US

To further ecological and economic goals, local, state, and federal governments in the US have created place-based conservation tools called marine protected areas (MPAs). An MPA is commonly defined 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.”<sup>2</sup> According to the National Oceanic and Atmospheric Administration (NOAA), in 2006 there were at least 1,500 place-based conservation areas established by hundreds of federal and state authorities.<sup>3</sup>

MPAs in the US are diverse; they differ with respect to jurisdiction, purpose, size, and level of protection. The US asserts jurisdiction over two hundred nautical miles of ocean extending from its shores. However, jurisdiction and regulatory authority for this area is split. The outermost 197 nautical miles exclusively federal and the first three nautical miles of ocean from the coastline are within the state’s authority.<sup>4</sup> Under the Submerged Lands Act of 1953<sup>5</sup>, coastal states have title to – and may regulate water above<sup>6</sup> – submerged lands of the first three nautical miles of ocean extending from their shores.<sup>7</sup>

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<sup>2</sup> Exec. Order No. 13,158 § 2(a), 65 Fed. Reg. 34,909 § 2 (a) (May 26, 2000).

<sup>3</sup> National Marine Protected Areas Center (NMPAC), “Draft Framework for Developing the National System of Marine Protected Areas” at iv (2006), available at <http://mpa.gov/pdf/national-system/final-framework-draft.pdf>; see also *id.* at iii (“roughly 85% of the nation’s existing place-based conservation areas are under the jurisdiction of non-federal governments.”).

<sup>4</sup> Craig, Robin Kundis, “Are Marine National Monuments Better than National Marine Sanctuaries? US Ocean Policy, Marine Protected Areas, and the Northwest Hawaiian Islands,” *Sustainable Development Law & Policy*, Vol. 81, pp. 27, 29 (2006), available at

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=940614#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940614#PaperDownload).

<sup>5</sup> Submerged Lands Act of 1953, 43 USC. §§ 1301-1303, 1311-1315 (2000).

Most MPAs allow multiple uses and less than one percent of the total area under management is part of no-take reserves.<sup>8</sup> The conservation benefits provided by MPAs are supplemented by other regulatory measures such as pollution controls and fishery regulations. As one commentator has noted, the ocean areas under the jurisdiction of the United States are governed by an “uncoordinated patchwork of laws and regulatory programs.”<sup>9</sup>

### 3. FEDERAL MARINE PROTECTED AREAS

Federal MPAs have been established in many forms, including national marine sanctuaries, national parks, national wildlife refuge areas, national monuments, national estuarine research reserves, fishery management zones, and critical habitat. Each of these programs is described below.

#### a. Federal Programs

There are currently thirteen **national marine sanctuaries**,<sup>10</sup> each of which is managed according to a site-specific management plan prepared by NOAA pursuant to the Marine Protection, Research, and Sanctuaries Act (MPRSA)<sup>11</sup>. The primary purposes of the MPRSA are “to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance” and “to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities.”<sup>12</sup> Under the MPRSA, it is illegal to “destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary” or to possess or trade in illegally-obtained sanctuary resources.<sup>13</sup> However, public and private uses of sanctuaries that are compatible with the primary objective of resource protection are facilitated by NOAA.<sup>14</sup> Despite the “sanctuary” nomenclature, very few National Marine Sanctuaries include marine reserves.<sup>15</sup>

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<sup>6</sup> State regulation is subject to the federal government’s authority to regulate “commerce, navigation, national defense, and international affairs.” *Id.* at § 1314(a).

<sup>7</sup> *Id.* at §§ 1301(a) (2), 1311.

<sup>8</sup> NMPAC, *supra* note 2 at iv; *see also* Pew Oceans Commission, “America’s Living Oceans: Charting a Course for Sea Change, Summary Report,” at 15 (2003), *available at* [http://www.sml.cornell.edu/forms/oceans\\_summary.pdf](http://www.sml.cornell.edu/forms/oceans_summary.pdf) (“While 4.6 percent of the land area of the United States is preserved as wilderness, the area of ocean under US jurisdiction that is protected in marine reserves is a small fraction of one percent.”).

<sup>9</sup> Craig, *supra* note 3, at 28.

<sup>10</sup> National Marine Sanctuaries Program webpage, *available at* <http://sanctuaries.noaa.gov/visit/welcome.html>. Combined, the sanctuaries cover more than 18,000 square miles of ocean. Craig, *supra* note 3, at 30.

<sup>11</sup> 16 USC. §§ 1431-1434 (1972).

<sup>12</sup> *Id.* §§ 1431(b)(1), (2).

<sup>13</sup> *Id.* at §§ 1436(1), (2). A “sanctuary resource” is “any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary.” *Id.* § 1432(8).

<sup>14</sup> 16 USC. § 1431(b)(6) (2000) (the Secretary of Commerce should “facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine

The Coastal Zone Management Act of 1972<sup>16</sup> established the **National Estuarine Research Reserve** system, a federal-state partnership program which is currently made up of 27 reserves.<sup>17</sup> The mission of the system is “to promote stewardship of the nation’s estuaries through science and education using a system of protected areas.”<sup>18</sup> Each reserve in the system receives funding, national guidance, and technical assistance from NOAA. Day-to-day management is provided by a lead state agency or university.

**Fishery Management Zones** are areas where NOAA restricts fishing for some or all species to protect critical habitats, rebuild fish stocks, or enhance fishery yield.<sup>19</sup>

The mission of the **National Park System** is “to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment for the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>20</sup> The National Park System is managed by the Department of Interior. In 2006, the National Park System contained 72 ocean and Great Lakes parks.<sup>21</sup>

The **National Wildlife Refuge System** includes coastal wetlands, marshes, coastal beaches, rocky shorelines, estuaries, mangroves, seagrass beds, and coral reefs.<sup>22</sup> Under authority provided by the National Wildlife Refuge System Administration Act (NWRSA) of 1966,<sup>23</sup> the Department of Interior manages the refuge system. NWRSA provides that all human uses in each wildlife refuge must be compatible and cannot interfere with the System’s mission – wildlife conservation – and the individual refuge’s specific purposes.<sup>24</sup>

**National Monuments**, including “objects of scientific interest” like MPAs, may be designated by the President pursuant to authority provided by the Antiquities Act of 1906.<sup>25</sup> The level of protection provided by a national monument varies, depending on the language of the President’s proclamation establishing the monument. In 2006, President Bush created the Northwest Hawaiian Islands Marine National Monument,

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areas not prohibited pursuant to other authorities”). *See also* Craig, Robin Kundis, “Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii,” 34 *McGeorge L. Rev.* 155, 204 (2003) (“Most, but not all, sanctuaries prohibit oil development. Beyond that prohibition almost anything goes. Sanctuaries are dredged, trawled, mowed for kelp, crisscrossed with oil pipelines and fiber-optic cables, and swept through with fishing nets.”).

<sup>15</sup> Craig, *supra* note 3, at 30.

<sup>16</sup> 16 USC. §§ 1451-1456.

<sup>17</sup> National Estuarine Research Reserve System webpage, <http://www.nerrs.noaa.gov/Reserves.html>.

<sup>18</sup> NMPAC, *supra* note 2, at 8.

<sup>19</sup> Marine Protected Areas of the United States Glossary, *available at* <http://mpa.gov/glossary.html>.

<sup>20</sup> 16 USC. § 1.

<sup>21</sup> NMPAC, *supra* note 2, at 7.

<sup>22</sup> Connections: Newsletter of the National Marine Protected Areas Center, April 2003, *available at* [http://mpa.gov/pdf/helpful-resources/connections/connections\\_apr03.pdf](http://mpa.gov/pdf/helpful-resources/connections/connections_apr03.pdf).

<sup>23</sup> 16 USC. §§ 668dd-668ee.

<sup>24</sup> *Id.* § 668dd(a).

<sup>25</sup> 16 USC. §§ 431-433. Challenges to national monument designations on the basis that the President’s authority is restricted to discrete man-made objects have been unsuccessful. *See, e.g., Mountain States Legal Found v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).

which covers 140,000 square nautical miles of ocean, making it the largest MPA in the world.<sup>26</sup>

Under authority provided by the Endangered Species Act,<sup>27</sup> the Department of Commerce may designate **Critical Habitats** for species listed as endangered or threatened. Areas of the ocean designated as critical habitat are subject to restricted uses under the ESA.

#### **b. Executive Order 13158 and the Draft Framework for Developing the National System of MPAs**

In May, 2000, President Clinton issued Executive Order (E.O.) 13158 to “(a) strengthen the management, protection, and conservation of existing marine protected areas and establish new or expanded MPAs; (b) develop a scientifically based, comprehensive national system of MPAs representing diverse US marine ecosystems, and the Nation’s natural and cultural resources; and (c) avoid causing harm to MPAs through federally conducted, approved, or funded activities.”<sup>28</sup> The Bush administration retained that executive order and in July 2006, in response to E.O. 13158, NOAA issued its Draft Framework for Developing the National System of Marine Protected Areas (Draft Framework). The Draft Framework “provides overarching guidance for collaborative efforts among federal, state, tribal, and local governments and MPA stakeholders to develop an effective National System of Marine Protected Areas . . . from existing sites, enhance [MPA] coordination and stewardship, and identify ecosystem-based gaps in the protection of important natural and cultural resources for possible future action by governmental MPA programs.”<sup>29</sup> The National System, as now envisioned, will “achieve conservation and management objectives that could not be accomplished by individual MPAs or MPA systems working independently.”<sup>30</sup>

#### **4. STATE MARINE PROTECTED AREAS**

Many coastal states have exercised their authority to regulate the first three nautical miles from their shores, including California and Florida. The California legislature has enacted the Marine Life Protection Act (MLPA), which provided policy guidance for siting and design of MPAs in the state.<sup>31</sup> The Act provides for a team of experts to develop a comprehensive, coordinated state MPA program.<sup>32</sup> The MLPA also authorizes the state agency to establish “wilderness waters” in which all extractive activities, including the taking of marine species, are prohibited.<sup>33</sup>

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<sup>26</sup> Craig, *supra* note 3, at 28. The monument provides habitat for more than seven thousand marine species, twenty-five percent of which are found nowhere else, *id.*, and “effectively will become a marine reserve,” *id.* at 31.

<sup>27</sup> 16 USC. §§ 1531-1544.

<sup>28</sup> 65 Fed. Reg. 34,909 § 1 (May 26, 2000).

<sup>29</sup> NMPAC, *supra* note 2, at iii.

<sup>30</sup> NMPA, *supra* note 2, at 2.

<sup>31</sup> NRDC, “California’s Marine Life Protection Act,” *available at* <http://www.nrdc.org/wildlife/fish/acaleg.asp>

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

In 1975, the Florida legislature passed the Aquatic Preserve Act<sup>34</sup> which provides protection for submerged aquatic marine areas holding “exceptional biological, aesthetic, and scientific value.”<sup>35</sup> The 41 preserves currently in the system are managed in a way that prohibits development, leases, and sale of submerged lands in the system unless a proposal is clearly in the public interest.<sup>36</sup>

## 5. CHALLENGES IN THE US

According to an article, in Science magazine, by several experts on US MPAs, there are several challenges to ocean governance in the US and this section highlights a few of them to provide a starting point for further discussion.<sup>37</sup>

One such challenge is the fragmentation of management between state and Federal authorities. This separation of the first three nautical miles and the subsequent 197 makes certain types of management, such as an ecosystem approach, more complex. And in cases where conflicts arise between these areas, determining the authority to resolve them can also be difficult.<sup>38</sup>

Similarly, the variety of competing interests among stakeholders within the first three nautical miles presents additional governance problems because at times these stakeholders operate under different legal mandates. This opens the door to additional gaps and overlaps in management authority.<sup>39</sup>

Lastly, the lack of a truly integrated approach to ocean and fisheries management in the US presents a challenge to the implementation and effective use of MPAs. This is particularly true in light of the gap in the Magnuson-Stevens Act, the law which governs fisheries, to adequately address biodiversity issues.<sup>40</sup> However, the US is continuing to work towards more collaborative approaches, a summary of this progress can be found in the Joint Ocean Commission Initiative’s 2006 Report Card.<sup>41</sup>

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<sup>34</sup> F.S. § 258.35-258.46

<sup>35</sup> *Id.* § 258.36.

<sup>36</sup> Marine Protected Areas of the US “Florida,” [http://mpa.gov/helpful\\_resources/states/florida.html](http://mpa.gov/helpful_resources/states/florida.html)

<sup>37</sup> Crowder, L. B., G. Osherenko, et al. (2006). "Resolving mismatches in US ocean governance." Science 313: 617-618.

<sup>38</sup> *Id.* at 617.

<sup>39</sup> *Id.* at 617.

<sup>40</sup> *Id.*

<sup>41</sup> For a summary of the progress in ocean management, see the Joint Ocean Commission Initiative’s 2006 Report Card available at <http://www.jointoceancommission.org/images/report-card-06.pdf>.