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September 14, 2016

Christina W. Goldfuss, Managing Director
Council on Environmental Quality
722 Jackson Place NW
Washington, D.C. 20503

Dear Ms. Goldfuss:

On behalf of participants in the Southern Georges Bank Coalition ("SGBC"), we are writing to oppose the White House's decision to designate a marine national monument in the Northwest Atlantic Ocean, which we understand to encompass Oceanographer, Lydonia, and Gilbert Canyons and adjacent sea mounts, starting at a depth of one hundred meters. The SGBC, moreover, opposes the designation of such marine protected areas pursuant to the Antiquities Act more generally. The SGBC's founding participants include: Dennis Colbert, Colbert Seafood Inc. & Trebloc Seafood Inc., Sandwich, MA; Charles Raymond, Fair Wind, Inc., Gloucester, MA; J. Grant Moore, Broadbill Fishing Inc., Westport, MA; Jon Williams, Atlantic Red Crab Co., New Bedford, MA; William Palombo, Palombo Fishing Corp., Newport, RI; Glenn Goodwin, Seafreeze Ltd., Davisville, RI; David Spencer, Spencer Fish & Lobster Inc., Newport, RI; Edward McCaffrey, Silver Fox Fisheries Inc., Point Judith, RI; John Peabody, Lady Clare Inc., Point Judith, RI; Jonathan Shafmaster, Little Bay Lobster Co. & Shafmaster Fishing, Newington, NH; Daniel Farnham, Silver Dollar Seafood Inc., Montauk, NY; and Beth Casoni, Massachusetts Lobstermen's Association. The above-described fishermen and fishing organizations are directly affected by the monument description, as it includes their fishing grounds. Millions of dollars of lost revenue are at stake.

We explained in our letter dated May 4, 2016, on behalf of another client, that the President lacks the unilateral authority to use the Antiquities Act to designate marine monuments offshore. The SGBC concurs, and submits the following additional information. Extending the Antiquities Act's application into the Exclusive Economic Zone ("EEZ") represents an illegal and illegitimate use of presidential authority. Moreover, by enacting what was then called the Magnuson Fishery Conservation and Management Act, Congress explicitly granted regional fishery management councils authority over fishery management activities in what has since become the EEZ. Furthermore, this law governs executive authority, rather than the prior-enacted and more general Antiquities Act, and controls over the subsequently–implemented presidential proclamation

regarding the United States EEZ more generally. Finally, the Antiquities Act does not allow for designation of any part of the water column as a monument.

To be clear, the SGBC and its participants support sound, science-based fisheries conservation and management. They have participated—actively and constructively—in regional fishery management council and Atlantic interstate fishery compact processes for decades. What they request is that the Administration observe the limits of its authority and honor well-developed statutory and regulatory processes.

I. THE ANTIQUITIES ACT DOES NOT ALLOW FOR MARINE MONUMENT DESIGNATION IN THE EXCLUSIVE ECONOMIC ZONE

In 1906, Congress enacted the Antiquities Act,[1] specifically with reference to terrestrial areas of unique value. Far later, in what is now called the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"),[2] Congress in 1976 staked a brand new claim to an exclusive fisheries zone seaward of the United States territorial sea, and established a unique, quasi-legislative governance structure, administered under the auspices of the Department of Commerce.[3] The conflict between these two laws is evident from the circumstances of each law's enactment.

In 1906, no such exclusive fisheries zone or EEZ yet existed. Rather, it was not until 1976 when Congress declared an exclusive U.S. fishing zone—consistent with emerging trends in international law of the sea—which it ultimately in 1986 MSA amendments redefined as "the zone established by Proclamation Numbered 5030, dated March 10, 1983."[4] Tellingly, Congress extended U.S. fisheries jurisdiction via legislation, in a manner entirely distinct from the manner in which the U.S. Constitution provides for the addition of the terrestrial states of the union.[5] Notably, the MSA did not incorporate pre-existing terrestrial management processes but created an entirely new, fully unique, process of regional representative government for this newly claimed fishery zone. This newly enacted, purpose-designed MSA thus governs the management of U.S. fisheries in the EEZ.

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[1] 16 U.S.C. §§ 431-433.

[2] 16 U.S.C. §§ 1801 *et seq.*

[3] *See generally J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1143 (E.D.Va. 1995).

[4] 16 U.S.C. § 1802(11). Under the United Nations Convention on the Law of the Sea, the EEZ is merely a zone and not a territory. It is specifically defined as "an area *beyond and adjacent to* the territorial sea." United Nations Convention on the Law of the Sea, art. 55, 1833 UNTS 3 (1982) (entered into force Nov. 16, 1994) (emphasis added). The Reagan Proclamation, *infra* note 7, later incorporated the United Nations definition.

[5] *See* U.S. CONST. art. IV, § 3.

The Antiquities Act did not apply to areas to which Congress staked its MSA-based claims, moreover, because the United States had never claimed any right or authority to manage the area for fisheries, natural resource protection, or anything else, prior to 1976. As explained above, the MSA literally invented and applied a novel system of governance—the regional fishery management council system—to this newly-claimed fisheries zone. Indeed, the MSA provides that it is "to maintain without change the existing territorial or other ocean jurisdiction of the United States *for all purposes other than the conservation and management of fishery resources*."[6]

Seven years after the MSA's adoption, the President proclaimed, as a matter of international relations, an EEZ substantively more broad than an exclusive fisheries zone.[7] By its terms, however, the EEZ remains "an area beyond and adjacent to the territorial sea" of the United States. Indeed, Proclamation 5030 further stated it "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries…" This condition makes sense; a presidential proclamation, simply put, lacks the authority to amend an Act of Congress.[8] In relation to the issue of domestic fisheries management, the MSA created a specific governance structure that cannot be simply overruled by presidential decree.

In 2000, in the Clinton Administration's waning days, the Department of Justice's Office of Legal Counsel ("OLC") issued a memorandum in response to a request from the National Oceanic and Atmospheric Administration ("NOAA"). NOAA demonstrated, among other claims, that the President could not establish a national monument in the EEZ.[9] OLC did concede the question was "closer" than one of whether the President could establish a monument within the territorial sea.[10] It also stated that, because regulations implemented under the MSA must comply with all other applicable law,[11] there was no conflict between the MSA and the Antiquities Act.[12]

In summary, while the Justice Department's OLC not surprisingly rationalized an expansive envisioning of presidential authority, the experts at NOAA who understood the MSA's nature and intent have the better of the argument. The Antiquities Act explicitly states that the President may declare as national monuments "objects of historic or scientific interest that are

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[6] 16 U.S.C. § 1801(c)(1) (emphasis added).

[7] Presidential Proclamation No. 5030 (March 10, 1983).

[8] *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating an Executive Order that conflicted with provisions of the National Labor Relations Act).

[9] Randolph Moss, Assistant Attorney General, *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, Memorandum Opinion (Sept. 15, 2000), at 197 ("Mem. Op.").

[10] *Id.* at 196.

[11] 16 U.S.C. § 1853(a)(1)(c).

[12] Mem. Op. at 208.

situated upon the lands owned or controlled by the Government of the United States."[13] In *Alaska v. United States*,[14] the Supreme Court delimited the Act's scope to include submerged lands, and other judicial precedent has established that the Antiquities Act can be applied in the United States territorial sea.[15] This conclusion is satisfactory, as the territorial sea is clearly "controlled by" the government in a comprehensive sense. However, in this instance, the question presented is not whether the Secretary of Commerce can implement a fishery management plan with provisions that conflict with a pre-existing, legally-authorized monument designation. The question is, rather, whether the MSA and its unique role in the EEZ represents an exercise of federal management authority beyond the scope of the Antiquities Act. We contend that it does.

Nor, moreover, does the OLC memorandum address the issue of a monument designation within the water column. A plain reading of the statutory language referenced above—authorizing monument designation for objects of scientific interest "situated *upon the lands* owned or controlled by" the United States government—excludes the water column from eligibility for monument designation, and does not allow presidential authority to manage activities therein. The Antiquities Act does not confer unilateral authority on the President to create what amounts to a marine protected area extending up through the water column.

II. FISHERIES ARE BEST MANAGED UNDER THE MSA

As stated above, the MSA established a specific statutory process for managing our nation's fisheries in the U.S. EEZ. This regional fishery management council system has existed and evolved over forty years. The Mid-Atlantic Fishery Management Council has taken, and the New England Fishery Management Council is in the process of taking, actions to protect the types of deep sea areas subject to the monument designation, using public transparent processes prescribed in detail by law.[16]

The council process provides a series of major important benefits totally absent from the monument designation process. First, as noted directly above, for instance, the council process is, by law, open and transparent. The Mid-Atlantic deep sea coral protection areas represent just how cooperative such public management processes can be. In fact, some of the same organizations advocating for these monuments praised the Mid-Atlantic Council's collaborative action. Second, the MSA requires decisions to be made based on the best scientific information available. In complete and total contrast, the monument ultimately designated in the Atlantic was largely the

[13] 16 U.S.C. § 431 (emphasis added).

[14] 545 U.S. 75, 103 (2005).

[15] *See United States v. California*, 436 U.S. 32 (1978); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 512 (1987) ("…the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory").

[16] *See generally* 16 U.S.C. §§ 1852-1853.

result of a series of political compromises layered with a thin veneer of public outreach. Significantly, courts invalidate management actions made under the MSA that are the result of such political compromise rather than the product of the best scientific information available.[17]

III. THE PROPOSAL IS NOT NARROWLY TAILORED AS REQUIRED UNDER THE ANTIQUITIES ACT

The Antiquities Act requires the limits of national monuments to be "confined to the smallest area compatible with proper care and management of the objects to be protected."[18] As we understand it,[19] however, the proposal for a monument designation in the Northwest Atlantic canyons is not narrowly tailored to achieve its objectives. Unlike the deliberative, scientifically-based fishery management council activities to protect habitat based on the presence of or suitability for corals, a restricted fishing area based solely on geographic location and depth contour is neither narrowly tailored, nor practically defensible.

* * * * *

In conclusion, we urge you to reconsider the White House's position on designating a marine monument in the Northwest Atlantic. Such a designation by an imperial stroke of the pen would be contrary to controlling law and principles of sound fisheries management.

Respectfully submitted,

David E. Frulla
Andrew E. Minkiewicz
Anne E. Hawkins

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[17] *See Parravano v. Babbitt,* 837 F. Supp. 1034, 1047 (N.D. Cal. 1993) ("...the purpose of the Magnuson Act is to ensure that such compromise decisions are adequately explained and based on the best scientific evidence available—and not simply a matter of political compromise"); s*ee also Midwater Trawlers Co-op. v. Dept. of Commerce*, 282 F. 3d 710, 720-21 (9th Cir. 2002) (stating that while the National Marine Fisheries Service's allocation of Pacific whiting between tribes and industry groups "may well be eminently fair, the Act requires that it be founded on science and law, not pure diplomacy").

[18] 16 U.S.C. § 431.

[19] Significantly, there has been no proposed monument designation that in any way would resemble a notice of proposed rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 553(b). Rather, the monument designation process has more resembled a shadow-boxing exercise, largely best characterized as an *ad hoc* combination of media events, hastily-arranged "stakeholder" sessions, and often secretive bargaining. This is no way to administer a public resource in a democracy.