

Legal Mechanisms and Opportunities to Advance Ocean Habitat Protection in the Mid-Atlantic

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Abstract: There is valuable ocean habitat in the Mid-Atlantic that would benefit from protection. There are a number of federal laws that could provide such protection, depending on the type of habitat and activity involved. This Article discusses those federal laws and the opportunities they offer.

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I. Introduction

The offshore waters of the Mid-Atlantic² are home to extraordinary submarine canyons, fragile cold-water corals, productive fish and crustacean habitat, and important migratory pathways for marine mammals, sea turtles, and fish. There are many laws and programs that

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² In this Article, the term “Mid-Atlantic” refers to the ocean region off the states that make up the Mid-Atlantic Regional Council on the Ocean (MARCO), namely New York, New Jersey, Delaware, Maryland and Virginia. See *What is the Mid-Atlantic Regional Council on the Ocean?*, MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN, <http://www.midatlanticocean.org/> (last visited July 23, 2013). This region is similar to the Mid-Atlantic regional planning area identified in the Final Recommendations of the Interagency Ocean Policy Task Force. See COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE 51-54 (2010), available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf. This article focuses on federal waters in the Mid-Atlantic region.

may be brought to bear to advance the protection of these important ocean habitats and sensitive unique offshore areas. This Article explores a number of these legal mechanisms, the types of protections they may afford, and some examples of how they have been used.

The Natural Resources Defense Council's (NRDC) 2001 report, *Priority Ocean Areas for Protection in the Mid-Atlantic*, summarizes the results of a workshop that brought together scientists to identify priority ocean areas in the Mid-Atlantic for protection. The scientists identified a number of important habitat areas deserving protection, including offshore submarine canyons, the continental shelf/slope break area, a 35-kilometer corridor of nearshore waters, and tilefish habitat.³

According to the Mid-Atlantic Regional Council on the Ocean (MARCO),⁴ some of the Mid-Atlantic's most remarkable ocean habitats are its submarine canyons which are located approximately 70-100 miles offshore.

Of particular interest to the five Mid-Atlantic States are the following ten major canyons: Norfolk, Washington, Poor Mans, Baltimore, Wilmington, Spencer, Linden Kohl, Carteret, Toms, and Hudson. These canyons are physically complex with outcrops, steep slopes, and diverse sediments. They provide a high flux of fine-particle nutrients and often have areas of upwelling associated with high biological productivity. The rocks and boulders exposed at the heads of the canyons and along their steep walls provide habitat for sponges, corals and anemones that require hard surfaces for attachment – a rare commodity in the mostly sandy Mid-Atlantic Ocean. *The sensitive coral dominated communities found within the submarine canyons and seamounts have individual colonies that are likely over 1,000 years old, and are among the oldest animals on the planet. They are slow-growing and sensitive to disturbance.* The Mid-Atlantic's canyon habitats provide a refuge for juveniles and adults of many commercially important fish and shellfish such as tilefish and summer flounder. All of the canyons are located along the shelf slope break which is known for high concentrations of tunas, swordfish, marine mammals, sea turtles, and seabirds in addition to diverse bottom dwelling fauna.⁵

Another key ocean habitat identified by MARCO is a wide migration corridor located closer to shore that provides for the safe passage of marine mammals, sea turtles, and fish as they move

³ See *Priority Ocean Areas for Protection in the Mid-Atlantic: Findings of NRDC's Marine Habitat Workshop*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/water/oceans/priority/poainx.asp> (last visited July 24, 2013). The workshop also identified the waters off Cape Hatteras as important marine habitat for protection; however, this area is not in the Mid-Atlantic regional planning area.

⁴ MARCO is a regional partnership among the states of New York, New Jersey, Delaware, Maryland and Virginia formed with the goal of maintaining and improving the health of the region's ocean and coastal resources. See *What is the Mid-Atlantic Regional Council on the Ocean?*, *supra* note 2.

⁵ Mid-Atlantic Regional Council on the Ocean, *Actions, Timelines, and Leadership to Advance The Mid-Atlantic Governors' Agreement on Ocean Conservation 3* (2009), available at <http://www.midatlanticocean.org/summary-actions.pdf> (footnotes omitted, emphasis supplied).

between their summer and winter habitats.⁶ This nearshore corridor is also an important foraging area for seabirds and nursery ground for important crab and fish species.⁷

These offshore habitats can be impacted by a range of human activities including commercial fishing (e.g., bottom trawling), offshore oil and gas drilling and seismic exploration, shipping, offshore wind development, sand and gravel mining, and sonar testing (Navy). For example, deep sea corals are fragile and slow-growing animals,⁸ and as such are highly vulnerable to disturbance by bottom-tending fishing gear. One pass of a bottom trawl can knock down and destroy centuries-old corals.⁹ Offshore drilling can result in a massive oil spill affecting a wide swath of both deep-sea and nearshore habitats, as the Gulf of Mexico oil disaster showed.¹⁰ Noise from seismic exploration, sonar testing and shipping can affect fisheries and marine mammals.¹¹ Sand and gravel mining and construction of offshore wind projects may affect fish habitat.¹²

II. Tools to Protect Offshore Habitats in the Mid-Atlantic

Despite the extent of valuable offshore habitat in the region, only one offshore habitat area in the Mid-Atlantic has been set aside for protection and that protection is limited to only one activity (bottom fishing with mobile gear). The area is the Norfolk submarine canyon which is closed to bottom-tending mobile fishing gear under Amendment 1 to the Golden Tilefish Fishery Management Plan (2009).¹³ The area is referred to as a tilefish “gear-restricted area” (GRA) closure and is protected under the Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (see discussion of EFH below).¹⁴ There are no other designated protected areas—no national marine sanctuaries (Norfolk

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.* at 3.

⁹ Rhian Waller, *Clear Cutting the Seafloor: Deep-Sea Trawling*, NATIONAL GEOGRAPHIC, June 24, 2013, <http://newswatch.nationalgeographic.com/2013/06/24/clear-cutting-the-seafloor/> (last visited Sept. 19, 2013).

¹⁰ See NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 173-88 (2011), available at www.oilspillcommission.gov.

¹¹ CONVENTION ON BIOLOGICAL DIVERSITY, SCIENTIFIC SYNTHESIS ON THE IMPACTS OF UNDERWATER NOISE ON MARINE AND COASTAL BIODIVERSITY AND HABITATS, Doc. UNEP/CBD/SBSTTA/16/INF/12 (2012), available at <http://www.cbd.int/doc/meetings/sbstta/sbstta-16/information/sbstta-16-inf-12-en.pdf>; see also, MICHAEL JASNY ET AL., NATURAL RESOURCES DEFENSE COUNCIL, SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING, AND INDUSTRIAL NOISE ON MARINE LIFE (2005), available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf>.

¹² See, e.g., 50 C.F.R. § 600.815(a)(4) (Non-fishing related activities that may adversely affect EFH).

¹³ See NATIONAL MARINE FISHERIES SERVICE, SMALL ENTITY COMPLIANCE GUIDE: AMENDMENT 1 TO THE GOLDEN TILEFISH FISHERY MANAGEMENT PLAN (2009), available at <http://www.nero.noaa.gov/nero/nr/nrdoc/og/ogtileGRAclose.pdf> [hereinafter AMENDMENT 1].

¹⁴ Veatch, Lydonia, and Oceanographer canyons, off the southern New England coast, have similar protections under this amendment; however, these canyons are part of the Northeast regional planning area, not the Mid-Atlantic.

Canyon was nominated in 1975 but never designated), no national monuments, and no critical habitat designations for the protection and recovery of endangered or threatened species.

There are a number of existing federal laws that may be utilized to protect the Mid-Atlantic's important offshore habitats from various threats. Some federal tools may be used to protect against only a single threat. Others may protect against a number of different threats. As regional ocean planning proceeds in the Mid-Atlantic, it is important to be aware of these different statutory tools and their potential applicability to habitats of concern.

A. *Magnuson-Stevens Fishery and Conservation Management Act*

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) establishes a legal regime to conserve and manage fishery resources found off the coasts of the United States.¹⁵ Pursuant to the framework established by the Magnuson-Stevens Act, eight regional fishery management councils develop fishery management plans (FMPs) and management measures, which are approved and implemented by NOAA Fisheries, also known as the National Marine Fisheries Service (NMFS), within the U.S. Department of Commerce. The Mid-Atlantic Fishery Management Council (MAFMC) includes the states of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina.¹⁶ The following provisions of the Magnuson-Stevens Act spell out the responsibilities of the MAFMC to protect ocean habitat.

1. Essential Fish Habitat

The Magnuson-Stevens Act requires that the Fishery Management Councils identify and describe EFH in FMPs.¹⁷ EFH is broadly defined to include "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity."¹⁸ The Act requires the Councils to describe and identify the essential habitat for the managed species, minimize to the extent practicable adverse effects on EFH caused by fishing, and identify other actions to encourage the conservation and enhancement of EFH.

The Secretary of Commerce has promulgated regulations to assist Councils in identifying EFH. Using "the best scientific information available,"¹⁹

¹⁵ 16 U.S.C. § 1801(b)(1).

¹⁶ *Id.* § 1852(a)(1)(B). The Council has 21 voting representatives: one Federal member (from the National Marine Fisheries Service); 7 from each of the constituent states' fish and wildlife agencies; and 13 private citizens knowledgeable about recreational or commercial fishing or marine conservation who are nominated by the governors of their respective states and appointed by the Secretary of Commerce. The region covered by MAFMC is similar to the Mid-Atlantic region discussed in this Article, except MAFMC's jurisdiction extends further south to include the federal waters off North Carolina.

¹⁷ *Id.* § 1853(a)(7). EFH must be identified and described according to the Secretary's guidelines under 16 U.S.C. § 1855(b)(1)(A).

¹⁸ *Id.* § 1802(10).

¹⁹ 50 C.F.R. § 600.815(a)(ii)(B).

FMPs must describe and identify EFH in text that clearly states the habitats or habitat types determined to be EFH for each life stage of the managed species. FMPs should explain the physical, biological, and chemical characteristics of EFH and, if known, how these characteristics influence the use of EFH by the species/life stage. FMPs must identify the specific geographic location or extent of habitats described as EFH. FMPs must include maps of the geographic locations of EFH or the geographic boundaries within which EFH for each species and life stage is found.²⁰

The MAFMC has designated EFH for 12 different species.²¹ The EFH designations cover broad swaths of the Mid-Atlantic, including the submarine canyons and nearshore migratory corridors.

Once designated, FMPs must “minimize to the extent practicable adverse effects on [Essential Fish Habitat] caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.”²² The Secretary’s guidance defines adverse effects broadly, including “direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, ... site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions” that reduce the quality or quantity of EFH.²³

Any federal agency action that “may adversely affect any essential fish habitat identified under this Act” requires consultation with the Secretary of Commerce,²⁴ and the Council may comment on such actions.²⁵ The other federal agency is not required to follow the Secretary’s or Council’s recommendations, but, if it does not, it must explain its reasoning.²⁶

In sum, the MAFMC may use the Magnuson-Stevens Act to protect designated EFH from the adverse effects of fishing and also may use the Act to influence federal agency actions involving other types of activities that may affect EFH. The specific actions that the MAFMC has taken to minimize EFH from the adverse effects of fishing are discussed next in the context of Habitat Areas of Particular Concern, a subset of EFH.

2. Habitat Areas of Particular Concern

According to the federal regulations, FMPs should identify Habitat Areas of Particular Concern (HAPCs), a subset of EFH, that provide important ecological functions or are especially vulnerable to degradation.²⁷ HAPCs should be designated “based on one or more of the

²⁰ *Id.* § 600.815(a).

²¹ See *Guide to Essential Fish Habitat Descriptions*, NOAA FISHERIES NORTHEAST REGIONAL OFFICE, <http://www.nero.noaa.gov/hcd/list.htm> (last visited July 24, 2013).

²² 16 U.S.C. § 1853(a)(7).

²³ 50 C.F.R. § 600.810(a).

²⁴ 16 U.S.C. § 1855(b)(2).

²⁵ *Id.* § 1855(b)(3).

²⁶ *Id.* § 1855(b)(4)(B).

²⁷ See 50 C.F.R. § 600.815(a)(8); *Habitat Areas of Particular Concern*, NOAA FISHERIES SOUTHWEST REGIONAL OFFICE, http://swr.nmfs.noaa.gov/hcd/hcd_webcontent/socal/hapc.htm (last visited July 24, 2013).

following considerations: (i) The importance of the ecological function provided by the habitat; (ii) The extent to which the habitat is sensitive to human-induced environmental degradation; (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type; and (iv) The rarity of the habitat type."²⁸ HAPCs should be clearly indicated on FMP maps.²⁹

The FMP "should give special attention to adverse effects [of fishing] on habitat areas of particular concern and should identify for possible designation as habitat areas of particular concern any EFH that is particularly vulnerable to fishing activities."³⁰ HAPC designation can provide a signal to decision-makers to give the area greater protections than other EFH.³¹ "FMPs must identify ... recommended options to avoid, minimize, or compensate for [identified] adverse effects ..., especially in habitat areas of particular concern."³²

The MAFMC has designated and protected four offshore areas as HAPCs: Veatch, Oceanographer, Lydonia and Norfolk Canyons.³³ The four canyons are closed to all bottom trawl fishing under the Tilefish Fishery Management Plan resulting in the protection of 113,000 acres of deep-sea corals, sponges, and clay outcroppings.³⁴ As noted earlier, of the four canyons, only Norfolk is located within the Mid-Atlantic regional planning area.³⁵

3. Deep Sea Coral Protection Zones

In addition to the more general EFH provisions of the Magnuson Act, there are provisions specifically focused on the protection of deep sea corals. Through the deep sea coral research and technology program,³⁶ the Secretary of Commerce must give special attention to researching and protecting "areas where deep sea corals are known to occur, and ... areas where scientific modeling or other methods predict deep sea corals are likely to be present."³⁷ The Secretary is responsible for submitting biennial reports on the state of deep sea coral

²⁸ 50 C.F.R. § 600.815(a)(8). Identification of HAPCs is one of several mandatory components of a FMP. The notice and comment requirements for HAPC designations are thus the same as for any other component of a FMP. These requirements are found in 16 U.S.C. § 1854(a).

²⁹ 50 C.F.R. § 600.815(a)(1)(v)(C).

³⁰ *Id.* § 600.815(a)(2)(i).

³¹ *Habitat Areas of Particular Concern*, *supra* note 27 ("HAPC designation does not necessarily confer additional protection or restrictions upon an area, but they help prioritize and focus conservation efforts.").

³² 50 C.F.R. § 600.815(a)(6).

³³ The MAFMC also has designated some nearshore areas as HAPC for summer flounder: "All native species of macroalgae, seagrasses, and freshwater and tidal macrophytes ... within adult and juvenile summer flounder EFH..." See *Summer Flounder*, NOAA FISHERIES NORTHEAST REGIONAL OFFICE, <http://www.nero.noaa.gov/hcd/summerflounder.htm> (last visited July 24, 2013).

³⁴ AMENDMENT 1, *supra* note 13. Lydonia and Oceanographer are also closed to fishing under the squid, mackerel, butterfish plan and the monkfish plan.

³⁵ See text, *supra* note 5.

³⁶ 16 U.S.C. § 1884.

³⁷ *Id.* § 1884(a)(6).

habitat and protections.³⁸ When corals have been identified under this program, the Councils may designate deep sea coral protection zones where fishing is limited or not allowed in order to protect the corals from physical damage.³⁹ The MAFMC is currently developing Amendment 16 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan to consider fishery management measures to protect deep sea corals in the region.⁴⁰

B. *Outer Continental Shelf Lands Act*

The Outer Continental Shelf Lands Act (OCSLA) governs the leasing, exploration and development of offshore resources such as offshore oil and gas, sand and gravel mining, and offshore wind.⁴¹ It is administered by the U.S. Department of the Interior (DOI).⁴² Each of these activities has been carried out or proposed in the Mid-Atlantic, often in multiple locations.

1. Leasing Process

The OCSLA creates a 4-stage process for oil and gas leasing. The first stage is the creation of a 5-Year leasing program, describing what areas of the outer continental shelf will be eligible for leasing over the 5-year period.⁴³ The next stage consists of individual lease sales, wherein the agency sells the lease for a particular area to the highest bidder.⁴⁴ At the third stage, the leaseholder applies for approval of an exploration plan and permit to drill an exploration well.⁴⁵ Finally, in the fourth stage, the leaseholder applies for a development and production plan approval, to drill additional wells and produce the resource.⁴⁶ There are opportunities for public review and comment during this process.⁴⁷ DOI also has to comply with the National Environmental Policy Act (NEPA)⁴⁸ and prepares NEPA documents for each of the major stages

³⁸*Id.* § 1884(b). The latest report to Congress is from 2012. See NOAA, DEEP SEA CORAL RESEARCH AND TECHNOLOGY PROGRAM: 2012 REPORT TO CONGRESS (2012), available at http://www.habitat.noaa.gov/protection/corals/deepseacorals/report/deep-sea_coral_research_and_technology_program/index.html.

³⁹ 16 U.S.C. § 1853(b)(2)(B).

⁴⁰ See *Council Actions: Amendment 16 – Deep Sea Coral Protections*, MID-ATLANTIC FISHERY MANAGEMENT COUNCIL, <http://www.mafmc.org/actions/msb/am16> (last visited July 24, 2013).

⁴¹ 43 U.S.C. §§ 1331-1356a.

⁴² The OCSLA was administered for many years by the Minerals Management Service (MMS), an office within the U.S. Department of Interior. In 2010, MMS was reorganized and renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement. Subsequently, the Bureau of Ocean Energy Management, Regulation, and Enforcement was split into BOEM (Bureau of Ocean Energy Management) and BSEE (Bureau of Safety and Environmental Enforcement).

⁴³ *Id.* § 1344(a).

⁴⁴ *Id.* § 1337(a).

⁴⁵ *Id.* § 1340.

⁴⁶ *Id.* § 1351.

⁴⁷ See, e.g., *id.* §§ 1351(a)(3), (f), and (g) (development and production plans) and 30 C.F.R. § 556.16 (proposed 5-year leasing program).

⁴⁸ 42 U.S.C. §§ 4321-4347.

of the leasing process.⁴⁹ There are opportunities for public review and comment on these NEPA documents.

The periodic development of a 5-Year leasing program, as required by OCSLA, offers an important opportunity to protect habitat in the Mid-Atlantic, including the submarine canyons and nearshore migratory corridor, since lease sales of drilling rights may not occur unless the sales are listed on the 5-Year program. For example, the 5-Year Leasing Program for the period 2012-2017, developed pursuant to OCSLA Section 18, does not include lease sales anywhere in the Atlantic, including the Mid-Atlantic.⁵⁰

It should be noted, however, that a programmatic Environmental Impact Statement (EIS) has been prepared that proposes opening up the Atlantic Ocean from Florida to New Jersey to high-intensity seismic exploration for offshore oil and gas.⁵¹ Therefore, even though no offshore lease sales are proposed in the Mid-Atlantic under the current 5-Year Plan, seismic exploration could occur in the area prior to 2017. The proposal, which involves the use of seismic impulses to locate and estimate the size of offshore oil and gas reserves, could injure up to *138,500 marine mammals and disrupt marine mammal feeding, calving, breeding, and other vital activities more than 13.5 million times*, according to the DOI's own draft Programmatic EIS.⁵² The proposed action also threatens ocean fish populations. Because of concerns about the potential impacts on the fish populations, the Mid-Atlantic Fishery Management Council sent a letter to the Bureau of Ocean Energy Management (BOEM) opposing the seismic testing.⁵³ Many others weighed in as well raising serious concerns about the adverse impacts to ocean wildlife and fisheries and to coastal communities.

⁴⁹ DOI's description of the NEPA process as applied to the leasing stages is available at *BOEM and the National Environmental Policy Act (NEPA)*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/Index.aspx> (last visited July 24, 2013).

⁵⁰ See *2012-2017 Lease Sale Schedule*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/Lease-Sale-Schedule/2012---2017-Lease-Sale-Schedule.aspx> (last visited July 24, 2013). The 5-Year Leasing Program defines the Mid-Atlantic Planning as extending south from the New Jersey/Delaware border to the North Carolina/South Carolina border. See U.S. Dep't of Interior, *Outer Continental Shelf Oil and Gas Strategy* (2011), available at http://www.doi.gov/news/pressreleases/upload/OCS_Lower_48_Strategy_20111129_V1.pdf.

⁵¹ See Bureau of Ocean Energy Management, *Geological and Geophysical Exploration on the Atlantic Outer Continental Shelf (OCS)*, 77 Fed. Reg. 19,321 (Mar. 30, 2012); *Atlantic Geological and Geophysical (G&G) Activities Programmatic Environmental Impact Statement (PEIS)*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/oil-and-gas-energy-program/GOMR/GandG.aspx> (last visited July 24, 2013) [hereinafter *Atlantic G&G PEIS*].

⁵² *Atlantic G&G PEIS*, *supra* note 51, at Supplemental Seismic Take Tables A-2 and A-3.

⁵³ See *Mid-Atlantic Fishery Management Council Opposes BOEM Seismic Testing on the US East Coast*, SAVING SEAFOOD, <http://www.savingseafood.org/council-actions/mid-atlantic-fishery-management-council-opposes-boem-seismic-testing-on-the-us-east-3.html> (last visited Aug. 28, 2013).

2. Section 12: Presidential Withdrawals

The President may protect Outer Continental Shelf lands from these activities by withdrawing any unleased lands from disposition.⁵⁴ President George H.W. Bush exercised this authority in June 1990.⁵⁵ He announced a 10-year moratorium on offshore oil and gas leasing off the coast of California, parts of Florida, and off the New England coast. President Clinton expanded the withdrawal of offshore lands to other areas including the Mid-Atlantic, extended the moratorium on leasing until 2012 and placed a permanent ban on all leasing in areas designated Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972.⁵⁶ In 2008, President George W. Bush rescinded most of the Bush/Clinton withdrawals, thus making these areas vulnerable to future leasing.⁵⁷ He made an exception for marine sanctuaries, which he protected from leasing indefinitely. Currently, there is no offshore habitat within the Mid-Atlantic protected through a presidential withdrawal; however, there is nothing to stop states or members of the public from requesting a Presidential withdrawal in order to protect an area from future leasing.⁵⁸

C. *Endangered Species Act*

The Endangered Species Act is administered by both the Fish and Wildlife Service and NOAA Fisheries (or NMFS). NMFS has responsibility for marine species and anadromous fish. Under the Endangered Species Act, the Secretary of Commerce must determine whether marine and anadromous species are endangered or threatened, and list endangered and threatened species in the federal register. Upon designation of any species as endangered or threatened, the Act and its implementing regulations require designation of critical habitat.⁵⁹

⁵⁴ 43 U.S.C. § 1341(a).

⁵⁵ President George H.W. Bush, Statement on Outer Continental Shelf Oil and Gas Development, June 26, 2009, available at <http://www.presidency.ucsb.edu/ws/?pid=18638>.

⁵⁶ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Doc. 1111 (June 12, 1998); see also, Tammy L. Shaw, *President Clinton Extends Ban on Offshore Leasing*, 18(3) WATER LOG 4 (1998), available at <http://masglp.olemiss.edu/Water%2oLog%2oPDF/18-3.pdf>.

⁵⁷ Memorandum on Modification of the Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Doc. 986 (July 14, 2008).

⁵⁸ There is no formal process for petitioning the President for such withdrawals. Sometimes the decision can come in the context of the review of the 5-Year offshore oil and gas leasing program. For example, President Obama reinstated protection for Bristol Bay, Alaska, through 2017 by way of a presidential withdrawal that occurred as DOI was considering revising the 5-Year Leasing Program. See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition (Mar. 31, 2010), available at <http://www.doi.gov/whatwedo/energy/ocs/upload/2010alaska-mem-rel.pdf>.

⁵⁹ 16 U.S.C. § 1533(a)(3)(A)(i). Critical habitat is defined as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the

Critical habitat designations can be updated,⁶⁰ and must use the best scientific data available.⁶¹

Although there are endangered and threatened marine and anadromous species that occur in the Mid-Atlantic, no critical habitat has yet been designated in the Mid-Atlantic.⁶² For example, critical habitat for the severely endangered North Atlantic Right Whale has been designated off Massachusetts and off Georgia and Florida for feeding and calving respectively.⁶³ However, there is no critical habitat designation in the Mid-Atlantic for this species, even though it is an important migratory pathway both south in the late fall/winter for right whale pregnant females and north in the spring for mothers and their calves, arguably the most vulnerable component of the population.⁶⁴ In addition to the North Atlantic Right Whale, the Atlantic Sturgeon has recently been listed, with four populations of the fish listed as endangered and one as threatened. Under the statute, this listing should trigger the designation of critical habitat.

The ESA's citizen suit provision provides a legal avenue by which non-governmental entities may force an agency to designate critical habitat when the agency has missed the deadline to do so.⁶⁵ The ESA citizen suit provision grants courts the authority to issue injunctions to force agencies to designate habitat.⁶⁶ This provision potentially could be used to secure critical habitat designation of an important migratory pathway or other important endangered species' habitat in the Mid-Atlantic.

1. Section 7: Protection of Critical Habitat from Adverse Modification

Once critical habitat is designated, that habitat is protected under Section 7 of the ESA.⁶⁷ Section 7 requires that federal actions must not "result in the destruction or adverse

provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A).

⁶⁰ 16 U.S.C. § 1533(a)(3)(A)(ii). Critical habitat updates must follow the procedures and criteria in 50 C.F.R. § 424.12.

⁶¹ 16 U.S.C. § 1533(b)(2).

⁶² See *Fisheries Data: Critical Habitat*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/gis/data/critical.htm> (last visited July 24, 2013).

⁶³ See NOAA, *Designated Critical Habitat; Northern Right Whale*, 59 Fed. Reg. 28,805 (June 3, 1994).

⁶⁴ A petition to Revise Critical Habitat Designation for the North Atlantic Right Whale, including the Mid-Atlantic migratory corridor, was filed in 2009 but has not been acted upon. See Center for Biological Diversity et al., *Petition to Revise the Critical Habitat Designation for the Northern Atlantic Right Whale (Eubalaena Glacialis) under the Endangered Species Act* (Sept. 16, 2009), available at http://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/E_glacialis_CH_petition.pdf.

⁶⁵ 16 U.S.C. § 1540(g).

⁶⁶ *Id.* § 1540(e)(2); see also, *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 25 (D. D.C. 2002) (enjoining FWS to designate critical habitat pursuant to 16 U.S.C. § 1540(g)(1)(c)).

⁶⁷ It should be noted that, if modification of a listed species' habitat would likely jeopardize the continued existence of the species, that modification would be prohibited by Section 7's jeopardy prohibition, whether or not the habitat had been designated as critical.

modification of" critical habitat designated for any endangered or threatened species.⁶⁸ In making this determination, the Act requires the action agency to consult with NMFS for impacts on listed marine and anadromous species.⁶⁹ If NMFS concludes that the project may adversely modify a listed species' critical habitat, NMFS prepares a "biological opinion." The biological opinion may recommend "reasonable and prudent alternatives" to the proposed action to avoid destruction or adverse modification of the critical habitat. These so-called reasonable and prudent alternatives carry substantial weight with the action agency.⁷⁰

2. Section 9: Takings Prohibition

Section 9 of the Endangered Species Act prohibits the "take" of endangered species. To "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁷¹ The term "harm" includes habitat modification that results in actual injury or death to endangered or threatened species.⁷²

The Section 9 takings prohibition applies to "any person subject to the jurisdiction of the United States."⁷³ The Endangered Species Act definitions section defines "person" broadly as "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States."⁷⁴ The prohibition on "take" applies to both public and private actions and to actions on private as well as federally managed land.

Section 9 expands on the protections afforded habitat by Section 7 in that it applies to private parties, as well as government entities. Even absent a critical habitat designation, actions by government agencies or private parties in the Mid-Atlantic that would modify endangered species habitat in a way that would result in injury or death of the species also would be prohibited.

Section 10 of the ESA allows the Secretary of Interior and the Secretary of Commerce to permit a taking that would otherwise be prohibited if the taking is incidental to the carrying out of an otherwise lawful activity and the person submits a conservation plan that satisfies the

⁶⁸ 16 U.S.C. § 1536(a)(2). It is possible for a federal agency action to receive an exemption under 16 U.S.C. § 1536(e), if approved by the Endangered Species Committee ("God Squad").

⁶⁹ *Id.*

⁷⁰ The action agency is to adopt one of NMFS' reasonable and prudent alternatives, not undertake or permit the proposed action, seek an exemption from the "God Squad," reinstate consultation or adopt another action that does not destroy or adversely modify the critical habitat. *See, e.g.,* U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, ENDANGERED SPECIES CONSULTATION HANDBOOK 2-11 – 2-12 (1998), available at http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf.

⁷¹ 16 U.S.C. § 1532(19).

⁷² *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 701 (1995).

⁷³ 16 U.S.C. § 1538(a). Liability only attaches to a party that is a proximate, but for cause of the take. *See generally Babbitt*, 515 U.S. 687.

⁷⁴ 16 U.S.C. § 1532(13).

statutory requirements.⁷⁵ This section also allows the Secretary to issue a permit to “take” an endangered species to a person who will undergo “undue economic hardship” as a result of a particular listing.⁷⁶ However, this exemption may last no longer than one year after publication of the proposed rule to list the species.

D. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) is administered by the National Oceanic and Atmospheric Administration (NOAA), a part of the U.S. Department of Commerce. The objectives of the CZMA are to “preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone.” The principal mechanism for accomplishing this under the statute is through encouragement and support for the development and implementation of state coastal zone management programs.

One of the principal mechanisms for encouraging states to develop and implement a federally approved coastal zone management program is the federal consistency provision of the statute.⁷⁷ Once a coastal state has a federally approved coastal zone management program, federal agency activities, including those outside the coastal zone (e.g., in federal waters), that affect land or water uses or natural resources of the coastal zone, must be carried out in a manner that is consistent to the maximum extent practicable with the enforceable policies of the state’s federally approved coastal management program.⁷⁸ All the Mid-Atlantic states currently have federally approved coastal management programs that they could potentially use in this way to protect offshore habitat.

In addition, any applicant for a federal license or permit to conduct an activity, including activities outside the coastal zone (e.g., in federal offshore waters) affecting any land or water use or natural resource of the state’s coastal zone, must provide in its application to the federal licensing or permitting agency a certification that the activity is consistent with the enforceable policies of the state’s federally approved program.⁷⁹ The state has the right to concur or object to the applicant’s certification. The federal agency may not grant the license or permit until the state has concurred or the state’s failure to act is conclusively presumed, *unless* the Secretary of Commerce determines that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.⁸⁰

This authority is a powerful tool for states to use to protect offshore habitats that support or link to valuable uses or resources of the state’s coastal zone. In a recent example, the State of New York used its consistency authority under the CZMA to object to a proposed LNG terminal

⁷⁵ *Id.* § 1539(a).

⁷⁶ *Id.* § 1539(b).

⁷⁷ *Id.* § 1456(c).

⁷⁸ *Id.* §1456(c)(1)(A). The President may in certain circumstances exempt those elements of a federal agency’s activity if he determines the activity is in the “paramount interest of the United States.” *Id.* § 1456(c)(1)(B).

⁷⁹ *Id.* § 1456(c)(3)(A).

⁸⁰ *Id.* There is a similar provision that applies to approval by the Secretary of Interior of an exploration, development, or production plan under the OCSLA. *Id.* § 1456(c)(3)(B).

in Long Island Sound. Broadwater Energy LLC, a joint venture between the Shell Oil Company and TransCanada Corporation, had proposed building a floating LNG terminal 11 miles from the Connecticut shore and 9 miles from New York's Long Island shore. The Secretary of Commerce upheld New York's objection in the consistency appeal by Broadwater.⁸¹

E. Antiquities Act

The Antiquities Act can be a useful tool for protecting significant habitat within areas under federal jurisdiction and imposes relatively few procedural hurdles. The Act enables the President to designate National Monuments by Presidential Proclamation, and direct which federal agency or agencies will be responsible for their management.⁸² The President may also offer direction in terms of management goals for the National Monument, and establish additional procedures or actions to be undertaken by the designated federal agency or agencies.

According to the Act, areas eligible for protection under the Antiquities Act are "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States[.]"⁸³ The Act's language ("other objects of historic or scientific interest") has consistently been interpreted broadly by the courts.⁸⁴ When an area is designated a National Monument under the Antiquities Act, the Proclamation may direct one or more specific agencies to prepare a Monument Management Plan (MMP) for the new National Monument. The public may have the opportunity to comment on the MMP before it is finalized.⁸⁵

It is now clear that the President's designation authority extends to the marine environment, as "waters located on or over federal lands" are eligible.⁸⁶ The Antiquities Act was first used to protect the marine environment in 1938, when President Roosevelt designated Channel Islands National Monument.⁸⁷ President George W. Bush made use of the Antiquities Act to protect marine environments such as Papahānaumokuākea, Rose Atoll, and the

⁸¹ DECISIONS AND FINDINGS BY THE U.S. SECRETARY OF COMMERCE IN THE CONSISTENCY APPEAL OF BROADWATER ENERGY LLC AND BROADWATER PIPELINE LLC FROM AN OBJECTION BY THE STATE OF NEW YORK (Apr. 13, 2009), available at <http://coastalmanagement.noaa.gov/consistency/mediadecisions/broadwaterenergy.pdf>.

⁸² National Monuments may also be designated by an Act of Congress.

⁸³ 16 U.S.C. § 431

⁸⁴ See, e.g., *Cappaert v. United States*, 426 U.S. 128 (1978) (determining that Devil's Hole limestone cavern and the unique fish inhabiting it were properly regarded as "objects of historic and scientific interest.").

⁸⁵ See, e.g., Presidential Proclamation 8335: Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557 (Jan. 12, 2009), available at <https://www.federalregister.gov/articles/2009/01/12/E9-496/establishment-of-the-marianas-trench-marine-national-monument>.

⁸⁶ Mark Laemmler, *Monumentally Inadequate: Conservation at Any Cost under the Antiquities Act*, 21 VILL. ENVTL. L. J. 111, 143 (2010).

⁸⁷ *Id.* at 111.

Marianas Trench.⁸⁸ National Monuments must be “confined to the smallest possible area compatible with the proper care and management of the objects to be protected.”⁸⁹ Nevertheless, a National Monument need not be small in absolute terms; Papahānaumokuākea Marine National Monument covers approximately 139,793 square miles.⁹⁰

Because National Monuments are designated on a case-by-case basis, it is possible to use the Antiquities Act to mandate a specific management scheme based on what is best suited to the particular prospective National Monument. For example, Presidential Proclamation 8335, which establishes the Marianas Trench Marine National Monument, gives the Secretary of the Interior lead responsibility for management of the Monument, in cooperation with the Secretary of Commerce who has primary responsibility for management of fishery-related activities.⁹¹ The proclamation directs that the Secretary of Commerce shall prohibit commercial fishing in the monument’s Island Units, and other fishing⁹² shall be managed sustainably. The proclamation also directs that the Secretary of Commerce and the Secretary of the Interior establish an advisory council for the monument; the advisory council’s composition and members’ terms of service are specified in the proclamation.⁹³

In addition to whatever the initial protections contained in the National Monument designation may be, designation as a National Monument can serve as an important step toward other protections. For example, Channel Islands National Monument evolved into an expanded Channel Islands National Park and the Channel Islands National Marine Sanctuary in 1980.⁹⁴ Similarly, the Presidential Proclamation that created Rose Atoll Marine National Monument directed that the Secretary of Commerce should take action to incorporate the marine portions of Rose Atoll Marine National Monument into Fagatele Bay National Marine Sanctuary.⁹⁵ In 2010, Papahānaumokuākea Marine National Monument received global

⁸⁸ CAROL HARDY VINCENT & KRISTINA ALEXANDER, CONGRESSIONAL RESEARCH SERVICE, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 4 (2012). See also Presidential Proclamation 8335, *supra* note 85 (protecting “all lands and interests in lands owned or controlled by the Government of the United States within the boundaries described below and depicted on the accompanying map.”).

⁸⁹ 16 U.S.C. § 431

⁹⁰ Presidential Proclamation 8031: Establishment of the Northwestern Hawaiian Island National Marine Monument, 71 Fed. Reg. 36,443 (June 26, 2006).

⁹¹ See Presidential Proclamation 8335, *supra* note 85; see also U.S. FISH AND WILDLIFE SERVICE & NOAA, MARIANAS TRENCH MARINE NATIONAL MONUMENT: PLANNING UPDATE NUMBER 1 (May 2011), available at <http://www.fpir.noaa.gov/Library/MNM/MT%20PlanningUpdate1.pdf>.

⁹² Other fishing includes “sustenance, recreational, and traditional indigenous fishing.” See Presidential Proclamation 8335, *supra* note 85.

⁹³ *Id.*

⁹⁴ *Channel Islands National Park: Park History*, PARK VISION, <http://www.shannontech.com/ParkVision/ChannellIslands/ChannellIslands.html#parkhistory> (last visited July 24, 2013); J. Emmett Duffy, *Channel Islands National Marine Sanctuary*, THE ENCYCLOPEDIA OF EARTH, Aug. 3, 2007, http://www.eoearth.org/article/Channel_Islands_National_Marine_Sanctuary (last visited July 24, 2013).

⁹⁵ *Rose Atoll Marine National Monument*, U.S. FISH AND WILDLIFE SERVICE, <http://www.fws.gov/roseatollmarinemonument/> (last visited July 24, 2013).

recognition through designation as a UNESCO World Heritage Site.⁹⁶ A President could use the Antiquities Act to designate an important offshore habitat area in the Mid-Atlantic as a national monument and include in the designation direction about how the area is to be protected and by what federal agency or agencies.

F. *National Marine Sanctuaries Act*

The National Marine Sanctuaries Act is another tool for protecting marine habitat; it may be especially useful where areas to be protected are complex, so that areas in need of varying levels of protection can be managed differently within the sanctuary. There are currently 13 National Marine Sanctuaries within the National Marine Sanctuary System, but none is in the Mid-Atlantic region.⁹⁷ The two closest to the Mid-Atlantic are Stellwagen Bank National Marine Sanctuary (off Massachusetts) and Monitor National Marine Sanctuary (off North Carolina).⁹⁸ The Mid-Atlantic represents a hole in coverage by the sanctuary program of marine resources along the Atlantic seaboard.

The process of becoming a National Marine Sanctuary proceeds in stages. The first step is placement on the Site Evaluation List (SEL).⁹⁹ The Secretary selects and places on the list natural and historical resource sites that qualify for further evaluation for possible designation as National Marine Sanctuaries.¹⁰⁰

After placement on the SEL, the next step toward sanctuary designation is to become an Active Candidate. An Active Candidate is a site selected by the Secretary for further consideration for possible sanctuary designation.¹⁰¹ As an Active Candidate, a site undergoes a "formal Sanctuary designation-evaluation process"¹⁰² including preparation of a draft EIS under NEPA. An Active Candidate is judged against the standards in the National Marine Sanctuaries Act.¹⁰³ The Secretary of Commerce prepares designation materials as directed by Section 304 of the Act.¹⁰⁴ If the Active Candidate includes waters in the Exclusive Economic Zone, Regional Fishery Management Councils would have 120 days to make recommendations and/or draft fishery regulations.¹⁰⁵ In preparing its recommendations and/or draft regulations, the Council

⁹⁶ Press Release, Papahānaumokuākea Marine National Monument becomes first mixed (natural and cultural) UNESCO World Heritage Site in the U.S., July 30, 2010, available at <http://www.papahanaumokuakea.gov/wheritage/>.

⁹⁷ The current National Marine Sanctuaries are: Channel Islands, Cordell Bank, Fagatele Bay, Florida Keys, Flower Garden Banks, Gray's Reef, Gulf of the Farallones, Hawaiian Islands Humpback Whale, Monitor, Monterey Bay, Olympic Coast, Stellwagen Bank, and Thunder Bay.

⁹⁸ The Visitor's Center is located in Virginia.

⁹⁹ There is a proposal to delete the requirement in the regulations that the SEL be the only method to evaluate potential new sanctuaries. See NOAA, Amendments to National Marine Sanctuary Regulations: Proposed Rule, 78 Fed. Reg. 5999 (Jan. 28, 2013).

¹⁰⁰ 15 C.F.R. § 922.10.

¹⁰¹ *Id.* § 922.3.

¹⁰² *Id.* § 922.21

¹⁰³ 16 U.S.C. § 1433.

¹⁰⁴ 15 C.F.R. § 922.22

¹⁰⁵ *Id.*

shall use as guidance the national standards of Section 301(a) of the Magnuson-Stevens Act to the extent that they are consistent and compatible with the goals and objectives of the proposed Sanctuary designation.¹⁰⁶ After clearing the above-described hurdles, the Active Candidate would be formally designated a National Marine Sanctuary.

Once a Sanctuary is designated, a Sanctuary Advisory Council¹⁰⁷ with up to 15 members¹⁰⁸ may be formed to enhance involvement of local stakeholders in the Sanctuary's management. Each of the 13 National Marine Sanctuaries currently has a Sanctuary Advisory Council.¹⁰⁹ If a Sanctuary were designated in the Mid-Atlantic, Mid-Atlantic stakeholders could use a Sanctuary Advisory Council to influence habitat protection policies within the Sanctuary.

The implementation of habitat protective measures is Sanctuary-specific. Each Sanctuary has its own management plan¹¹⁰ and its own regulations,¹¹¹ and protections can vary significantly by Sanctuary.¹¹²

The SEL has been inactive since at least 1995.¹¹³ Additionally, Congress has imposed a restriction on the designation of new sanctuaries.¹¹⁴ The deactivation of the SEL and the congressional restriction together have, practically-speaking, created a moratorium on the designation of new sanctuaries. However, the effective moratorium on designation of new Sanctuaries has not completely prevented the growth of the National Marine Sanctuary System. Over the past several years, NOAA has expanded the boundaries of some National Marine Sanctuaries, thereby providing marine habitat protections to a greater area.¹¹⁵

Recently, discussion about reactivating the SEL has been underway. President Obama issued Executive Order 13,547 in 2010, establishing ocean protection as a priority and creating

¹⁰⁶ *Id.* § 922.22(b)

¹⁰⁷ Authorized by 16 U.S.C. § 1445a(a).

¹⁰⁸ 16 U.S.C. § 1445a(c). Sanctuary Advisory Councils for Sanctuaries designated prior to November 4, 1992, may have more than 15 members; for example, Channel Islands Sanctuary Advisory Council has 21 voting and 21 alternate members. See *Sanctuary Advisory Council Overview*, CHANNEL ISLANDS NATIONAL MARINE SANCTUARY, <http://channelislands.noaa.gov/sac/main.html> (last visited July 24, 2013).

¹⁰⁹ Papahānaumokuākea Marine National Monument also has an advisory council. See *Sanctuary Advisory Council Overview*, NOAA NATIONAL MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/management/ac/welcome.html> (last visited July 24, 2013).

¹¹⁰ Sanctuary Management Plans are available at *Ongoing Management Plan Reviews*, NOAA NATIONAL MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/management/mpr/welcome.html> (last visited July 24, 2013). NMFS reviews these plans for compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

¹¹¹ 15 C.F.R. Part 922.

¹¹² For summaries of protections at each sanctuary, see *National Marine Sanctuaries*, MARINE CONSERVATION INSTITUTE, <http://www.marine-conservation.org/what-we-do/program-areas/mpas/national-marine-sanctuaries/> (last visited July 24, 2013).

¹¹³ 15 C.F.R. § 922.10(b); see also, NOAA, National Marine Sanctuary Program, 60 Fed. Reg. 66,875 (Dec. 27, 1995).

¹¹⁴ 16 U.S.C. § 1434(f).

¹¹⁵ Sanctuaries with recent expansions include: Fagatele Bay in 2012, Monterey Bay in 2009, and Florida Keys in 2001. See *About Your Sanctuaries*, NOAA NATIONAL MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/about/> (last visited July 24, 2013).

the National Ocean Council to advance the nation's ocean policy.¹¹⁶ In 2012, the National Ocean Council released a draft National Ocean Policy Implementation Plan, which "describes specific actions Federal agencies will take to address key ocean challenges, give states and communities greater input in Federal decisions, streamline Federal operations, save taxpayer dollars, and promote economic growth."¹¹⁷ After a public comment period, the final National Ocean Policy Implementation Plan was released on April 16, 2013.¹¹⁸ As one of the actions to protect natural and cultural areas, the final National Ocean Policy Implementation Plan identifies the reactivation and repopulation of the SEL "with marine areas that have been identified as nationally significant due to their conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or aesthetic qualities."¹¹⁹

NOAA recently announced that it is re-establishing the sanctuary nomination process and is proposing to amend its regulations governing the process for nominating and evaluating sites for eligibility as a national marine sanctuary.¹²⁰ To implement this process, the agency is seeking public comment on the proposed changes to the sanctuary nomination and designation procedures, and on the criteria by which the agency would analyze nominations for potential new national marine sanctuaries. Once these criteria have been made final, NOAA states that it intends to solicit nominations for areas of the marine and Great Lakes environments that satisfy those criteria for possible designation as a national marine sanctuary. This nomination solicitation process, once final, could afford an important opportunity to propose important offshore habitat in the Mid-Atlantic for consideration as a marine sanctuary.

III. Conclusion

There are important and valuable offshore habitats in the Mid-Atlantic that need to be protected, especially as the region experiences increasing industrial development in offshore marine areas. There are many legal authorities and programs that may be used to protect offshore habitat from one or more types of impacts. Which authority will be the most appropriate will depend on the area or resource to be protected and the activities that may

¹¹⁶ Executive Order 13,547: Stewardship of the Ocean, Our Coasts and the Great Lakes, Section 5(a), 75 Fed. Reg. 43,023, 43,025 (July 22, 2010). Executive Order 13,158, issued by the Clinton administration in 2000 to enhance the national network of marine protected areas, similarly furthers national ocean policy by mandating that all federal agencies "shall avoid harm to the national and cultural resources that are protected by an MPA" to the "maximum extent practicable" and permitted by law. Executive Order 13,158: Marine Protected Areas, 65 Fed. Reg. 34,909 (May 31, 2000). Executive Order 13,158 defines Marine Protected Area 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." *Id.* at Section 2(a).

¹¹⁷ *National Ocean Policy Implementation Plan*, NATIONAL OCEAN COUNCIL, <http://www.whitehouse.gov/administration/eop/oceans/implementationplan> (last visited July 24, 2013).

¹¹⁸ NATIONAL OCEAN COUNCIL, NATIONAL OCEAN POLICY IMPLEMENTATION PLAN (2013), available at http://www.whitehouse.gov/sites/default/files/national_ocean_policy_implementation_plan.pdf.

¹¹⁹ *Id.* at 18; NATIONAL OCEAN COUNCIL, NATIONAL OCEAN POLICY IMPLEMENTATION PLAN APPENDIX 21 (2013), available at http://www.whitehouse.gov/sites/default/files/national_ocean_policy_ip_appendix.pdf.

¹²⁰ See NOAA, Re-establishing the Sanctuary Nomination Process, 78 Fed. Reg. 38,848 (June 28, 2013).

affect it. As regional ocean planning goes forward in the Mid-Atlantic, protection of valuable offshore habitat should be a high priority and these legal authorities should be brought to bear to accomplish needed protections.