Center for Regulatory Effectiveness

Comments on NOAA's Proposed National System of Marine Protected Areas (MPAs) (April 2009)

INTRODUCTION

Center for Regulatory Effectiveness (CRE) is a regulatory watchdog which acts to ensure compliance with õGood Governmentö laws, including the Data Quality Act, the Paperwork Reduction Act, and the Regulatory Flexibility Act.

CRE supports a National Network of Marine Protected Areas (MPAs) focused on research and public education. CRE has identified several regulatory issues inherent in the proposed National System of MPAs that must be addressed prior to committing undue federal resources to MPAs with no federal lineage at the expense of other important federal programs in this period of economic scarcity.

EXECUTIVE SUMMARY

While we wholeheartedly support the preservation of valuable ecological and cultural marine resource, we recommend a more detailed procedure to identify and target only the most qualified Marine Protection Areas (MPAs). This Comment will focus on three flaws in the plan to create a National System of Marine Protection Areas (National System). First, the nomination process is insufficient and should be more thorough, mirroring the procedures in its federal counterpartô the National Marine Sanctuaries Act. *See* National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1431 *et seq*., as amended by Public Law 106-513 (November 2000). Second, we believe that implementation of Section 5 of Executive Order 13158 is dangerously broad and vague, leaving federal agencies susceptible to a variety of undefined and potentially harmful responsibilities. Third, the U.S. Department of Commerce, National Ocean and Atmospheric Administrationøs (NOAA) MPA inventory and other information dissemination do not meet NOAAøs information quality and pre-dissemination guidelines. For these reasons, we object to the proposed list of sites contained in the *Nomination of Existing Marine Protected Areas to the National System of Marine Protected Areas*, 74 Fed. Reg. 9798 (March 6, 2009).

Due to the lack of institutional guidance and transparency for the National System, this Comment presents three recommendations. First, the National System should adopt a procedural framework similar to the NMSA, because the NMSA provides the well-defined procedures necessary for an effective National System of MPAs. Second, the language which implements Section 5 of Executive Order 13158 must be clarified and revised to restrict the õavoid harmö requirement to only those MPAs created pursuant to federal statutes like the NMSA. Third, NOAA should document on its website that it will not use or rely on any MPA data until NOAA determines that the data comply with NOAAøs Information Quality Act (IQA) guidelines. Until these recommendations are implemented, we cannot concur with the list of sites selected for nomination.

Section I of this Comment compares the strict procedural requirements for the creation of a National Marine Sanctuary under the NMSA with the lax requirements for inclusion of MPAs into the National System. Section II discusses the problems posed by NOAAøs current interpretation of Section 5 of Executive Order 13158, which requires federal agencies to õavoid harmö to all National System MPAs regardless of their non-federal lineage. Section III discusses problems associated with the use of data that does not comply with NOAAøs IQA guidelines. Section IV presents a program which would result in NOAA publishing its current plan but with different rules of governance.

I.
THE CRITERIA IN THE NATIONAL MARINE SANCTUARIES ACT (NMSA) SHOULD GOVERN ELIGIBILITY FOR INCLUSION OF MARINE PROTECTED AREAS IN THE NATIONAL SYSTEM

On May 26, 2000, President Clinton signed Executive Order 13158 (the Order) establishing a coordinated National System to protect õsignificant natural and cultural resources within the marine environment.ö Executive Order 13158, 65 Fed. Reg. 34909 (May 31, 2000). The Order focuses on Marine Protected Areas or MPAs which are defined as õany 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.ö *Id.* at § 2. The prospective MPAs undergo a simple nomination process, and, if qualified, according to the requirements of the Framework for the National System of Marine Protected Areas, are included in the National System of MPAs. *See generally,* National Marine Protected Areas Center, *Framework for the National System of Marine Protected Areas of the United States of America* (November 2008) (hereinafter *Framework*), available at http://www.mpa.gov/pdf/national-system/finalframework_full.pdf (articulating the procedures and guidelines for the creation of the National System of MPAs).

Despite its laudable goals, the National System fails to incorporate adequate procedural safeguards. It is our position that the procedures by which these MPAs are selected should be standardized, transparent, and more rigorous than those outlined by the *Framework*. As a source of comparison we will use the procedures and requirements articulated in the National Marine Sanctuaries Act (NMSA).[1] We believe that the NMSA, and similar federal marine protection statutes, contain reasonable procedures, and we would like to see a similar process imposed for the nomination and inclusion of MPAs in the National System.

As currently drafted, the National System creates a two-tier MPA designation. The first tier consists of those MPAs with adequate procedural oversight, i.e., those created by the NMSA or federal

[1] We are using the NMSA as the template for proper marine protected area designation because it is widely considered the preeminent marine protection legislation. *See,* Aaron M. Flynn, *Marine Protected Areas: Federal Authority*, Congressional Research Service (2004), *available at* http://ncseonline.org/NLE/CRSreports/04Jul/RL32486.pdf. It permits the federal government to create Marine Protected Areas under a specific set of procedural guidelines. We consider the procedural requirements for designation under the NMSA to be both fair and transparent, and thorough enough to ensure the designation of only the most biologically significant marine systems.

statutes with comparable eligibility requirements. The second tier consists of MPAs that have been given national status under the National System without undergoing the same type of procedural oversight. Thus, while the second tier MPAøs have not been subject to consistent administrative processes and public scrutiny, under the current articulation of the National System, they are afforded many of the same rights and protections as those that have met stringent eligibility requirements. We believe that it is essential for *all* MPAs included in the National System to undergo a series of detailed procedures, so that only the best and most qualified MPAs are chosen.

A. The Structure of the NMSA Creates a Well-Defined Process by Which Marine Areas are Designated and Protected

The NMSA defines a õNational Marine Sanctuaryö as õan area of the marine environment of special national significance due to its resource or human-use values, which is designated as such to ensure its conservation and management.ö 15 C.F.R. 922.3. The NMSA authorizes the Secretary of Commerce to designate certain areas of the marine environment for protection. 16 U.S.C. § 1433(a). However, the designation process may only begin after the Secretary has made an initial determination that five qualifying conditions are met. The Secretary must show that: (1) the designation will help fulfill the stated purposes of the NMSA; (2) the area is of special national significance due to (a) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities; (b) the communities of living marine resources it harbors; or (c) its resource or human-use values; (3) existing state and federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; (4) designation of the area as a National Marine Sanctuary will facilitate the objectives stated in paragraph (3); and (5) the area is of a size and nature that will permit comprehensive and coordinated conservation and management. 16 U.S.C. § 1433(a)(1)ó(5).

The designation process can only be triggered after the Secretary has made an initial determination that these five qualifying criteria are met *and* if the area is currently listed on the Site Evaluation List (SEL). The National Marine Sanctuary Program (NMSP) regulations promulgated by the Secretary, and codified at 15 C.F.R. Part 922 (2008), established the SEL as a comprehensive list of marine sites with high natural resource values and with historical qualities of special national significance that are highly qualified for further evaluation for possible designation as National Marine Sanctuaries. 15 C.F.R. 922.10(a). The SEL is currently inactive, but NOAA has pledged to issue criteria for inclusion of marine sites on a revised SEL, with public notice and opportunity to comment, when NOAAøs Director of the Office of Ocean and Coastal Resource Management, determines that the SEL should be reactivated. 15 C.F.R. 922.10(b). Under the NMSP regulations, *only* sites on the SEL may be considered for subsequent review as active candidates for designation as a National Marine Sanctuary; and once designated as a Sanctuary, a site is subject to regulatory controls under the NMSA. 15 C.F.R. 922.10(c)-(d). Therefore, the NMSP regulations contemplate thatô when the SEL is reactivatedô the actual number of potential Sanctuary sites will be controlled not only by the baseline statutory requirements in the NMSA, but also, by the NMSP regulations, which narrow the focus of the NMSA to only sites listed in the SEL.

The NMSA also includes a list of twelve factors the Secretary of Commerce must use to determine whether a site meets the five qualifying conditions. 16 U.S.C. § 1433 (b)(1). These factors include: (1) the areaøs natural resource and ecological qualities; (2) the areaøs historical, cultural, archaeological, or paleontological significance; (3) the present and potential uses of the area that depend on maintenance of the areaøs resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education; (4) the present and potential activities that may adversely affect the factors identified in (1), (2), and (3); (5) the existing state and federal regulatory and management authorities applicable to the area, and the adequacy of those authorities to fulfill the purposes and policies of the NMSA; (6) the manageability of the area, including factors such as size, ability to be identified as a discrete ecological unit with definable boundaries, accessibility, and suitability for monitoring and enforcement; (7) the public benefit to be derived from sanctuary status; (8) the negative impacts produced by management restrictions on income-generating activities, such as living and nonliving resources development; (9) the socioeconomic effects of sanctuary designation; (10) the areaøs scientific value and value for monitoring the resources and natural processes that occur there; (11) the feasibility, where appropriate, of employing innovative management; and (12) the value of the area as an addition to the National Marine Sanctuary System. 16 U.S.C. § 1433(b)(1).[2]

In considering these twelve factors to determine whether the five qualifying criteria (for designating a Sanctuary) are met, the Secretary must consult with a number of federal, state and local officials, including the relevant Committees in the House of Representatives and the Senate; officials and relevant agency heads at the appropriate state and local government entities that will, or are likely to be, affected by the establishment of an area as a National Marine Sanctuary. 16 U.S.C. § 1433(b)(2). The Secretary is required to cooperate and consult with affected States throughout the sanctuary designation processô particularly, before selecting any site on the SELô concerning the relationship of the site to a Stateøs waters, and also, develop proposed regulations relating to activities under the jurisdiction of one or more other federal agencies in consultation with those agencies. 15 C.F.R. 922.23. Only after considering the listed factors and consulting with the required officials may the Secretary begin the designation process.[3]

In order to designate a National Marine Sanctuary, the Secretary must, first, issue a õsanctuary proposal.ö This is done by issuance in the Federal Register of (1) a notice of the proposal, (2) proposed regulations that may be necessary and reasonable to implement the proposal, and (3) a summary of the draft management plan. 16 U.S.C. § 1434(a)(1)(A).[4] The Secretary must also

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[2] *See also*, the comparison chart following Section I of this Comment.

[3] Here it is important to note the mandatory language used in the statute. The NMSA states that the Secretary õshallö consider these factors. The use of the mandatory language leaves very little discretion in the hands of the Secretary and guides the decision making according to congressionally mandated procedure.

[4] Under the NMSA, the draft management plan must include the terms of the proposed designation; proposed mechanisms to coordinate existing regulatory and management authorities within the area; the proposed goals and objectives, management responsibilities, resource studies, and appropriate strategies for managing resources of the proposed sanctuary; an evaluation of the advantages of cooperative state and federal management if all or part of the proposed sanctuary is within the territorial limits of any State; an estimate of the annual cost to the federal government of the proposed designation; and the proposed regulations. 16 U.S.C. § 1434(a)(2)(C).

provide notice of the proposal in newspapers of general circulation and electronic media in the communities that may be affected by the proposal. 16 U.S.C. § 1434(a)(1)(B). Then, no later than the day on which notice is submitted to the Office of Federal Register, the Secretary submit a copy of the notice and the draft sanctuary designation documents to the Committee on Resources of the House of Representatives, the Committee on Commerce, Science and Transportation of the Senate, and the Governor of each State in which any part of the proposed sanctuary would be located. 16 U.S.C. § 1434(a)(1)(C).

Second, the Secretary must make available to the public õsanctuary designation documentsö on the proposal that include: the draft Environmental Impact Statement required under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*); a resource assessment containing the present and potential uses of the area, any commercial, governmental, or recreational resource uses in the areas that are subject to the primary jurisdiction of the Department of the Interior (DOI); and information preparedô in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator of the Environmental Protection Agencyô on any past, present or potential future disposal or discharge of materials in the vicinity of the proposed sanctuary. 16 U.S.C. §1434(a)(2)(A)-(B). The Secretary must also make public the draft management plan for the proposed National Marine Sanctuary that includes the terms of the proposed designation; proposed mechanisms to coordinate existing regulatory and management authorities; proposed goals and objectives, management responsibilities, resource studies, and appropriate strategies for managing sanctuary resources of the proposed sanctuary; an evaluation of the advantages of cooperative state and federal management if all or part of the proposed sanctuary is within the territorial limits of any State; an estimate of the annual cost to the federal government of the proposed designation; and the proposed regulations. 16 U.S.C. § 1434(a)(2)(C.

Third, the NMSA requires the Secretary to hold at least one public hearing no sooner than thirty days after issuing the public notice in the coastal area or areas that will be most affected by the proposed designation. 16 U.S.C. § 1434(a)(3). Additionally, Committees in both the House of Representatives and the Senate may each hold hearings on the proposed designation and on matters set forth in the documents. 16 U.S.C. § 1434(a).[5] The Secretary will also allow the appropriate Regional Fishery Management Council the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone (i.e., between 3 and 200 miles offshore of the U.S coastline) as the Council may deem necessary to implement the proposed designation. 16 U.S.C. § 1434(a)(5). Only after maneuvering through all of these procedural hurdles may the Secretary designate an area as a National Marine Sanctuary.

It is also worthy to note that even after granting the authority to make a sanctuary designation, the NMSA immediately limits the Secretaryøs authority to designate any new sanctuary until the Secretary has published a finding that, (1) the addition of a new Sanctuary will not have a negative

[5] After receiving the sanctuary proposal the relevant House and Senate Committees may hold hearings on the proposed designation. If within a 45 day period of continuous session of Congress, either Committee issues a report concerning the designation the Secretary must consider this report before continuing the designation process. Thus, the NMSA includes an institutional mechanism whereby both the House and the Senate can comment on the proposed designation, a factor lacking in the National System nomination process. 16 U.S.C. §1434 (a)(6).

impact on the entire National Marine Sanctuary System, and (2) sufficient resources were available in the fiscal year in which the finding is made to effectively implement sanctuary management plans for each Sanctuary in the System, and complete site characterization studies and inventory known sanctuary resources for a ten-year period. 16 U.S.C. § 1433(f).

Keeping the key procedural requirements of the NMSA in mind, we turn to the *Framework.* The comparison between NMSA and the *Framework* will illuminate a stark absence of procedural guidance and a lack of sufficient transparency in the latter.[6] The *Framework's* criteria for choosing MPAs for inclusion in the National System are ill-defined and raise questions as to the legitimacy of the *Framework's* entire procedural requirements.

B. <u>The *Framework* Does Not Contain the Type of Structural and Procedural Detail that Leads to Sound Decision-Making</u>

The first point of contrast is the lack of defined criteria for the nomination of sites for inclusion into the National System. As discussed above, the NMSA authorizes the designation of sites that meet the five qualifying conditions set out in the NMSA *and* which will be on the SEL (when it is reactivated). In contrast, the National System authorizes the nomination of *any* site that meets only three eligibility criteria. *Framework* at 17. These criteria are (1) the area meets the definition of an MPA, (2) the area has a management plan, and (3) the area supports at least one priority goal and conservation objective of the National System. If the National MPA Center finds that an MPA meets these three criteria then the site is automatically eligible for nomination. *Framework* at 17-21. We will show through a simple comparison, these criteria lack procedural consistency, which leaves too much discretion in the hands of the Center.

The first criterion is that the site meets the definition of an MPA. *Framework* at 17. A close examination of the definition of MPA displays surprising imprecision. To quote the Executive Order again, an MPA is õany area of the marine environment that has been reserved by the Federal, State, territorial, tribal or local laws or regulations that provide lasting protection for part or all of the natural and cultural resources therein.ö Exec. Order 13158, § 2. In fairness, the *Framework* attempts to define the terms contained in the Order. *See Framework* at 19ó20 (providing definitions for the key terms). However, even after defining the key terms, the potential breadth of the definition is staggering. The MPA definition is too vague and it is so over inclusive that it will allow sitesô ineligible under more rigorous review proceduresô to be nominated for inclusion in the National System. The problem with the broad definition becomes more pronounced when we consider how the *Framework* undermines the effective application of the second and third criteria, leaving the definition of an MPA the *only* workable criteria.

Even thought the second and third criteria were included to focus the nomination process, their broad interpretation undermines that intention. For example, the management plan criterion was included only after the MPA Center received comments to the *Revised Framework* voicing concerns that the

[6] For the ease of the reader we have also included a comparison chart that lays out the procedural differences between the National System and the NMSA.

existing criteria for inclusion were too broad. National Marine Protected Areas Center, *Revised Draft Framework for Developing the National System of Marine Protected Areas* (March 2008) (hereinafter, *Revised Draft Framework*), available at http://www.mpa.gov/pdf/national-system/revise_draft_frmwk_0308.pdf. To assuage these concerns, the Center included the management plan requirement, claiming it would drastically limit the number of eligible MPAøs. *Id.* However, the definition of a management plan in the final *Framework* is far from well-defined. In addition, the application of the criterion is still subject to the discretion of the Center applying the case-by-case exception. *See Framework* at 18 (articulating the conditions required for a management plan).[7]

The conservation objective criterion fails for the same reasonô its definition is vague and its application is essentially discretionary. While the *Framework* tries to create a workable definition, it admits the exact conservation objectives will be in a constant state of flux. *Framework* at 14ó15. Thus, the conservation objective criterion is not set in stone, but will evolve as the needs of the National System change. *Id.* While the ability to adjust conservation plans is necessary for applied ecosystem management, qualifying criteria cannot be subject to the whims of the MPA Centerøs decision makers. In addition, as will be discussed below, the case-by-case exception clause undermines both the management plan and the conservation objective criteria by granting the Center absolute authority to create exceptions to circumvent the qualifying criteria requirements. Hence, by default, the vague definition of MPA is the defining criterion because it is the only one that is not subject to fluctuation, and is not completely subject to the discretion of the Center; and, as discussed above, the MPA definition gives little guidance, thus undermining both its effectiveness and its credibility as a decision-making tool.

The problems associated with the lack of consistently applied criteria are compounded by the sheer volume of MPAøs from which the MPA Center may choose. While the Executive Order only applies to the federal government, the scope of the National System will necessarily include many MPAs created by state and local governments. *Framework* at 8.[8] Unlike the NMSA, the National System does not have an SEL but culls the potential nominations from an over inclusive list.[9] The problem is that it is difficult to determine the ecological or cultural significance of the area, the institutional legitimacy of the entity that created the MPA, and what standards were used in the original designation. While the decision-making processes by state and local government authorities are not necessarily flawed, there is no way of determining the procedural or scientific legitimacy of their decisions. For example, while the NMSA sets forth a systematic process for designation of a

[7] This will be discussed below in the context of the MPA Centerøs ability include MPAs lacking a management plan in the National System on a case-by-case basis.

[8] The Framework estimates that U.S. MPAs have been established by over 100 legal authorities, presumably, with different levels of oversight. The *Framework* approximates that there are upwards of 1,700 existing MPAs in the United States. *Framework* at 2. It is precisely the breadth of the existing MPAs that we find so troubling. Those created by state, local, or tribal governments have simply not gone through the same or similar procedures as the MPAs created by their federal counterparts.

[9] The List used is the National Marine Protected Areas Inventory. Information from the now archived National Marine Managed Areas Inventory, for sites that meet the criteria for MPAs, was included in the National MPA Inventory. The MPA Inventory is a refinement of the earlier National Marine Managed Areas Inventory, which was a broader collection of place-based management areas in U.S. waters. *See Framework* at 26.

National Marine Sanctuary, including consultation and external review, an MPA may be created by a small town council with little scientific or professional review of the decision. In addition, while the document disclosure requirements in the NMSA create a transparent decision-making process, there is no such transparency in the initial creation of state or local MPAs. It is essential that the procedure by which all of the areas that are qualified for nomination are chosen is standardized so that only the most qualified areas with sufficient scientific qualifications are included in the final List.[10]

Equally problematic is the provision in the *Framework* that permits the MPA Center to consider MPAs that do not currently meet the management plan criterion on a õcase-by-case basis.ö Specifically, the *Framework* states that: õAdditional sites not currently meeting the management plan criterion can be evaluated for eligibility to be nominated to the system on a case-by-case basis based on their ability to fill gaps in national system coverage of the priority conservation objectives and design principles . . . . To the extent practicable, the MPA Center intends to assist otherwise qualified sites that do not meet the management plan criterion to develop or strengthen their management plans.ö *Framework* at 17. Even if proponents argue that a three-criteria system is sufficient for purposes of identifying potential MPAs, the loophole created by this case-by-case evaluation of sites lacking management plans allows the Center to circumvent the little procedure that does exist, in some cases. The NMSA does not explicitly permit a similar circumvention of its procedures for designation of an area as a National Marine Sanctuary, neither should the *Framework*.

C. The *Framework* Lacks the Proper Amount of Transparency that is Essential for Regulatory Systems

The actual process by which the MPAs are nominated for inclusion in the National System comes closer to the procedures outlined in the NMSA, but is still inadequate because it does not contain the same type of detailed designation and transparency processes present in the NMSA and its implementing regulations. The nomination process begins with a MPA Center review of all sites in the National MPA Inventory to identify a set of sites that meet the three eligibility criteria. The MPA Center then sends the managing entity or entities for those sites a letter of invitation to nominate the site.[11] The managing entity or entities are asked to nominate some or all of the identified sites for inclusion in the National System, and to provide additional information required

[10] We do not wish to open the old argument over the legality of the Executive Order, however, the fact remains that the National System was created unilaterally by the President while federal programs like the NMSA were created through act of Congress. To emphasize this point, the latitude of the Secretary of Commerce to create a National Marine Sanctuary is controlled not only by statute, but also by federal regulations promulgated according to the Administrative Procedures Act. Meanwhile, the decision makers at the MPA Center are inhibited by no such statutory requirements. *See* 15 C.F.R. 922 *et seq*. Regardless of the different legal origins of federal programs like the NMSA versus the National System, the National System should still be required to follow the same procedures as all the other federal programs and agencies that protect valuable marine resources. While the origins of the National System alone may not be enough to condemn the program, it illustrates the systemic lack of procedural legitimacy that pervades the entire program.

[11] The letter explains to the managing entity or entities the MPA Centerøs rationale for eligibility. *Framework* at 26.

to evaluate the siteøs eligibility relative to meeting priority conservation objectives. *Framework* at 26. The MPA Center then reviews the set of nominated sites to ensure that the nominations are sufficiently justified. The public is notified via the *Federal Register* of the set of nominated sites, and is provided an opportunity to comment. The MPA Center receives, evaluates, and forwards the public comments to the relevant managing entity or entities, which reaffirms or withdraws the nomination based on the public comments received or any other relevant factors. Finally, the MPA Center reviews the final determination for each nomination, consults as necessary with the managing entity or entities should there be any discrepancies, and accepts mutually agreed upon MPAs into the National System. MPAs that are accepted into the National System are listed in the official List of National System MPAs, which is made available to the public via the *Federal Register* and the website http://www.mpa.gov. *Framework* at 26-29. Notably absent from this process is concrete rules or processes by which the Center makes its final determination and a consistent amount of public input and institutional transparency.

For example, while the *Framework* requires public notification of the set of nominated sites via the *Federal Register*, the NMSA requires public notification of the sanctuary proposal, proposed regulations necessary and reasonable to implement the proposal, and a summary of the draft management plan. The NMSA also requires certain sanctuary designation documents be made available to the public. As described above, the documents include, the draft Environmental Impact Statement, a resource assessment document, a draft management plan, maps depicting the boundaries of the proposed sanctuary, the basis for determining how the area met the five qualifying conditions for designation as a Sanctuary, and an assessment of how the area satisfies the twelve factors considered in making a determination. By contrast, the *Framework* has none of these requirements. Thus, while the list of nominated MPAs is made available to the public, there is no requirement that additional substantive or scientific information accompanies the list.[12] Illustrating this problem is the *List of MPAs Nominated to the National System* (74 Fed. Reg. 9798 (March 6, 2009), which was the catalyst for this Comment. The *Federal Register* contains a list of countless sites without any additional information. How are normal citizens supposed to effectively comment on innumerable MPAs without detailed information about their ecological or cultural worth?

Moreover, under the *Framework*, the MPA Center is required to take public comments, but it is not required to hold a public hearing in the affected areas, as is required under the NMSA.[13] õThe MPA Center will work with the managing entities to ensure adequate public involvement, including public meetings, as appropriate.ö *Framework* at 28. This is insufficient. Public involvement in the

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[12] Interestingly, the Framework does provide for the publication of substantive information about the MPAs *after* they are listed in the National System. *See Framework* at 29 (requiring the publication of post-nomination information, including the location of the site, the ecological or cultural signification, and the nominating entity). This type of information should be available before the decision is made to include an MPA in the National System.

[13] Note here that the public comment requirements have been drastically reduced from those considered in the first *Draft Framework*. The *Draft Framework* required a full summary of the sites nominated including the name, location, and a summary of the way in which the site fit into the National System. The public was then allowed to comment during a period of no fewer than 30 days. *See Draft Framework for Developing the National System of Marine Protected Areas* (July 2006) at 25ó26, http://www.mpa.gov/pdf/national-system/final-framework-draft.pdf. In the current *Framework*, the MPA Center must only notify the public of õthe set of sites nominated for inclusion.ö *Framework* at 28. A list of sites with no more, does not contain enough information to allow an average citizen to make an informed choice.

nomination process is essential because the communities that may be affected deserve a forum to voice their support or opposition for the inclusion of a local MPA in the National System. The public hearing requirement permits members of affected communities to voice their opinion on the record for the Secretary. Supporters of the National System may argue that taking public comments fills the same role. However, public comment lacks the same structure and face-to-face communication and does not target the communities who have the most at stake in the designation process.

As clearly illustrated above, the processes used to nominate and include MPAs into the National System is woefully inadequate. The qualifying criteria allows for too broad a spectrum of eligible MPAs. The lack of concrete criteria to judge the merits of the individual state and local MPAs leaves far too much discretion in the hands of the MPA Center. There is limited public oversight and transparency. Statutes like the NMSA include public hearings and detailed public disclosure, but the National System does not. This failure to create and maintain transparency should be fatal to the actual implementation of the National System. For these reasons, we strongly urge that the nomination process be delayed until a more detailed and transparent system is created for the inclusion of MPAs in the National System.

Comparison of the Procedural Requirements in the National Marine Sanctuaries Act with the National System of MPAs

Procedural Requirements	National Marine Sanctuaries Act	National System of MPAs
Eligibility Criteria for Creation of Protected Areas.	1. Designation will fulfill the purposes and policies of the chapter; 2. The area is of special national significance; 3. Existing state and federal authorities are inadequate to ensure coordinated and comprehensive conservation and management; 4. Designation will facilitate the NMSAøs objectives; and 5. The area is of size and nature that will permit comprehensive and coordinated management. National Marine Sanctuaries Act, 16 U.S.C. § 1433(b) (2000)	1. Area is an MPA as defined by the *Framework*; 2. Area has a management plan; 3. Supports at least one priority goal and conservation objective of the National System. National Marine Protected Areas Center, *Framework for the National System of Marine Protected Areas of the United States* (November 2008) (hereinafter, *Framework*).
Factors Guiding Eligibility Criteria Determination	1. Areas natural resource and ecological qualities; 2. Areas historical, cultural, archaeological, or paleontological significance;	1. Definition of MPA; 2. Management plan criteria a. Has been developed according to a definite scale

	3. Present and potential uses that depend on maintenance of the areaøs resources; 4. Present and potential activities that may adversely affect the above factors; 5. The existing state and federal regulations ; 6. The manageability of the area; 7. The public benefits to be derived from the sanctuary status; 8. The negative impacts produced by management restrictions on income-generating activities; 9. The socioeconomic effects of sanctuary designation; 10. The areas scientific value ; 11. The feasibility of employing innovative management approaches to protect sanctuary resources; and 12. The value of the area as an addition to the system 16 U.S.C. § 1433 (a)	b. Includes both õspecified conservation goalsö and õa process of monitoring and evaluation of goalsö; 3. Table of outlining conservation objectives. *Framework* at 17
Exceptions to the Application of the Eligibility Criteria	1. None	1. The MPA Center is authorized to review sites that do not currently meet the management plan criterion on a case-by-case basis if they fit into one of the identified conservation gaps. *Framework* at 17
Entities Consulted When Applying Eligibility Criteria	1. Committee on Resources of the House of Representatives; 2. Committee on Commerce, Science, and Transportation of the Senate; 3. Secretary of Defense; 4. Secretary of Transportation; 5. Secretary of Interior; 6. Administrators and heads of other interested agencies; 7. Responsible state and local officials; 8. Appropriate officials of any Regional Fishery Management Council; and 9. Other interested persons. 16 U.S.C. §1433(b)(2)	1. The managers of potential MPAs. *Framework* at 28.
Pre-designation/induction Notice Requirements	1. Publication in the *Federal Register* the following: a. notice of the proposal, proposed regulations that may be necessary and reasonable b. summary of the draft management	1. Notice in the *Federal Register* of set of sites being considered for inclusion.

	plan; 2. Provide notice in newspapers of general circulation or electronic media in the communities that may be affected; 3. Submit a copy of the notice to the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Resources in the House of Representatives, and to the Governor of each State where the proposed sanctuary is located. 16 U.S.C. § 1434(a)(1)	*Framework* at 28.
Pre-designation/induction Documents Made Available to the Public	1. Draft Environmental Impact Statement; 2. Resources assessment documents, including the present and potential uses of the area, commercial, governmental or recreational uses of the area and any non-classified information concerning any past, present or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary; 3. A draft management plan including the terms of the proposed designation, proposed mechanisms to coordinate existing regulatory and management authorities; 4. An evaluation of the advantages of cooperative state and federal management; 5. An estimation of the annual costs to the federal government; and 6. The proposed regulations 16 U.S.C. § 1434(a)(2)	1. The list of eligible sites *Framework* at 28.
Public Hearing Requirement	1. No sooner than thirty days after issuing a notice, the Secretary must hold at least one public hearing in the coastal area or areas that will be most effected. 16 U.S.C. § 1434(a)(3)	1. No public hearing requirement
Potential Congressional Input	1. Either the Senate or the House Committee may hold hearings on the proposed designation, and if within 45 day of receiving the documents, either Committee receives a report concerning any matter in the document the Secretary must consider the report before publishing notice to designate the National Marine Sanctuary. 16 U.S.C § 1434(a)(6)	1. None

Limitation on Designation	1. The Secretary may not designate a new Sanctuary if the addition of the Sanctuary will have a negative impact on the system and there are insufficient resources available to implement the management plan and complete site characterization studies. 16 U.S.C. § 1434(f)	1. None
Reexamination Requirement	1. Not more than five years after the date of designation, the Secretary shall evaluate the progress toward implementing the management plan and goals. 16 U.S.C. § 1434(e)	1. No structured requirement for reexamination of MPAs in the National System to determine compliance with the eligibility criteria. *See Framework* at 29 (permitting the managing entity or entities to change the size, scope and protection of the MPA).

II:
Utilization of Section 5 of the Executive Order Creates Improper Restrictions and Adds Responsibilities on Federal Agencies by Making Them Subject to the Requirements Created by Non-Federal Entities

Section 5 of the Executive Order states: õEach Federal Agency whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent practicable, each Federal agency, in taking such actions shall avoid harm to the natural or cultural resources that are protected by an MPAí .ö Exec. Order 13158, § 5. The problem with this language is clearô it governs the actions and determinations of federal agencies with respect to all MPAs, even those protected and designated by non-federal entities. This creates three distinct problems that will be discussed below. First, the reporting requirements of Sections 5 and 6 of the Order will expose many federal agencies to unwarranted and unnecessary political pressure , which may have detrimental effects on qualified federal MPAøs (i.e., MPAs created by federal statutes and programs); second, the definition of õavoid harmö is too vague to be workable; third, the *Framework* seems to suggest that federal agencies would be subject to the procedures created by non-federal entities in order to adhere to the requirements of Section 5. To avoid these problems, we recommend that the language of the *Framework* be altered so that the õavoid harmö clause is only applied to MPAs created by existing federal statutes with eligibility requirements comparable to those in the NMSA.

A. The Reporting and Comment Requirements of Sections 5 and 6 Create the Possibility That Federal Agencies Will be Subject to Unnecessary Political Pressure

Section 6 of the Executive Order states:

> Each Federal agency that is required to take actions under this order shall prepare and make public annually a concise description of actions taken by it in the previous year to implement the order, including a description of written comments by any person or organization stating that the agency has not complied with this order and a response to such comments by the agency.

Exec. Order 13158, § 6.

The *Framework* attempts to clarify this requirement by stating that the contents of the annual reports will be posted on the MPA Centerøs website, and then, consolidated in a biennial õState of the National System of MPAsö report.[14] *Framework* at 45. The combination of the reporting and comment requirements of Sections 5 and 6 of the Order may force federal agencies to make political decisions that will have a negative impact on federal MPAs.

Regrettably, federal agencies are political entities that sometimes make political decisions based on external pressure and not science or professional experience. The Orderøs reporting requirements have the potential to create undeserved political pressure. A very basic hypothetical will illustrate our concerns. Consider a federal agency that makes a decision which may affect a small MPA (a bay) created by a town council. Now imagine that a local community group believes the action will affect the bay in violation of Section 5. As we understand Section 5, the group would be permitted to engage in a massive media and public opinion campaign, dedicated to writing comments about the perceived violation of Section 5. Additionally, as we understand the Orderøs requirements, in this scenario, the deciding agency is required to post and respond to all of the comments submitted about their decision affecting the bay *regardless* of the accuracy of the alleged Section 5 violations. Thus, the reporting requirements make it possible for outside parties to generate an avalanche of comments to create political pressure and force the agency to act regardless of the wisdom of the action. It is not unlikely that after considering the possibility of a public opinion campaign, and after receiving thousand of comments about a complaint, that an agency will yield to public pressure and takes an action which is not science-based.

We believe it is essential that government decisions are transparent and open to comment or criticism. Our aim is not to discourage open dialogue between citizen groups and the government. The problem is the possibility that some citizen groups will level groundless accusations of Section 5 violations that will explode into a public opinion battle of attrition which the agency cannot win. To some, this concern may seem unusual. However, if we considered the volume of comments received for the first *Draft Framework*, the possibility of improper political pressure becomes less

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[14] The *Framework* further states that the biennial report will contain õa summary of the actions taken to implement Section 5 of the Orderö and õa description of public comments received and responses sent during the period.ö

remote. The final *Framework* states that they received over 11,000 comment submissions from approximately 100 commenterøs and 11,000 petitioners. *Framework* at 2. While extreme, it is possible to imagine a similar volume inundating an individual agency in response to an action that may or may not affect an MPA. What is less easily determined is the effect of this volume of submissions.

Because of the imprecise scope of Sections 5 and 6, it is difficult to surmise the type of agency decisions that would be most susceptible to this type of public pressure, but we can theorize the possible effects of compelling agencies to respond to inaccurate accusations. For example, we believe that it is evident that such actions will waste an agencyøs already strained budget, harm the agencyøs goodwill among the community, possibly adversely affect the very area the instigating group was trying to protect, and perhaps, even divert resources from an area of greater ecological or cultural significance. In considering the possible effects, it is also important to remember that the MPA protected in this hypothetical was created by a non-federal, local entity by unknown procedures. We believe Section 5 may create a chilling effect on federal agency actions where they fear negative public opinion based on the perceived negative effect on an MPA. We believe that the scope of Section 5 should be relegated to only those areas that were created by federal programs, with procedures akin to the NMSA. In addition to the problems posed by the Orderøs reporting requirements, Section 5 is too vague to enforce.

B. The Terms of Section 5 are Undefined and Leave Federal Agencies Without Proper Guidance

While the *Framework* tries to clarify the scope and intent of Section 5, there is still precious little guidance to determine the full regulatory implications of the section. The *Framework* states that the õavoid harmö rule requires that federal agencies: (1) identify their activities that affect the natural or cultural resources protected by individual National System MPAs, and (2) to the extent permitted by law and to the maximum extent practicable, avoid harm to those resources. *Framework* at 43. However, in practice, the õavoid harmö section of the Order is impossible to implement because the terms are vague and ill-defined. In fact, the *Framework* states, õthere is no single definition for the key terms used to describe the requirements under Section 5, including by not limited to õavoid harm,ö õaffect,ö or õto the extent permitted by law and to the maximum extent possible.ö Instead, the meaning of any of these terms, as applied to an agencyøs requirements under Section 5, is dependent on the agencyøs interpretation. *Framework* at 44.

Because neither the Order nor the *Framework* give any guidance for agency interpretation of õavoid harm,ö õaffectö or õto the extent permitted by law and to the maximum extent practicable,ö it is impossible for an agency to carry out their new mandate. The decision not to define the terms and to defer to agency interpretation destroys any hope of consistent implementation of Section 5, undermining any of the possible positive effects of the rule. Some will argue that federal agencies are more than capable of interpreting and applying the õavoid harmö requirement of Section 5. They will doubtlessly point to the myriad of other rules that federal agencies are required to interpret on a daily basis. However, they will miss the point. Even if federal agencies are capable of interpreting

and applying the Section 5 requirements, in the absence of well-defined guidelines, they will not be able to do so consistently. The inconsistent application of Section 5 not only makes it ineffective, but also undermines the intent and spirit of the Order.

C. Section 5 Improperly Requires Federal Agencies to Follow Procedures Created by Non-Federal Entities

The next problem with the õavoid harmö requirement is that it imposes additional oversight requirements on federal agencies. As discussed above, one of the shortcomings of the *Framework* is that it relies on non-federal entities to create the MPAs whose decision-making processes are at best unknown, and at worst, hopelessly flawed. While the *Framework* neither creates new federal oversight authority nor alters existing standards for review, it does require federal agencies to ensure that their actions avoid harm to the natural and cultural resources contained within *any* MPA in the National System. *Framework* at 44. In effect, this requires a federal agency to take avoidance measures if its action might have a negative effect on even the smallest MPA created by a local entity for any reason regardless of its ecological or cultural legitimacy. Under the current formulation of the *Framework*, there are two possible interpretations of the new Section 5 requirements.

The first interpretation is that a federal agency will use the existing federal legal framework to determine the application of the õavoid harmö requirement. This interpretation is based on the directive in the *Framework* that states: õ[t]he determination of whether an agency in taking such actions is avoiding harm to those resources, to the extent permitted by law and to the maximum extent practicable, will be made by the individual agency using its existing natural and cultural resource review processes and/or authorities.ö *Framework* at 45. The *Framework* then lists examples of those existing federal review processes and/or authorities, including the National Environmental Policy Act, the Endangered Species Act, the National Park Service Organic Act, and the National Marine Sanctuaries Act. *Framework* at 43-44. All of the statutes listed and their procedures are extremely detailed and would consume an uncertain amount of the agencyøs time, and would tax already stretched budgets. To illustrate the burden of the review procedures, we will return to the NMSA.

When reviewing the NMSA procedures, it is important to remember that under the *Framework*, the review process can be triggered because of actions affecting local, state, tribal, or territorial MPAs. As our recommendations will demonstrate, we would not dispute the application of Section 5 applied to federally designated MPAs. We do dispute, however, requiring federal agencies to complete complex review procedures for non-federally designated MPAs. It is unacceptable if every federal agency had to follow a NMSA procedure for potential harm to any site listed in the National System regardless of its lineage.

The NMSA requires that federal agency actions that are õlikely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary. 16 U.S.C. § 1443(d)(1)(A). The agency must provide the Secretary with a written statement describing the action and its potential effects on sanctuary resources at the earliest practicable time, but in no case

later than 45 days before the final approval of the action. 16 U.S.C. § 1443(d)(1)(B). If the Secretary finds that the federal agency action will likely destroy, cause the loss of, or injure any sanctuary resource, then the Secretary must recommend reasonable and prudent alternatives. 16 U.S.C. § 1443(d)(2). The head of the federal agency proposing the action must then consult with the Secretary about the alternatives, and if the agency head decides not to follow the recommended alternatives, he must explain his decision in a written statement. 16 U.S.C. § 1443(d)(3). Additionally, if the agency head undertakes an action other than the recommended alternatives, and if the action results in the loss of, destruction of, or injury to a sanctuary resource, the head of the agency must õpromptly prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the Secretary.ö 16 U.S.C. § 1443(d)(4). This is an extensive review process that should only be required if the area to be affected was created by similarly detailed federal procedures.

The second way of interpreting the õavoid harmö language is that a federal agency is required to follow avoidance procedures dictated by a non-federal entity. The *Framework* states that õthe meaning of any of the terms, as applied to an agencyøs requirements under Section 5, is dependent on the agencyøs interpretation, consistent with any requirements of the legal framework used to protect the resources of the MPA and *any* other applicable natural or cultural resource review or protection authorities or procedures.ö *Framework* at 44. This suggests that not only would a federal agency be required to follow a federal, NMSA-like procedure, it might also have to follow any procedures created by the non-federal managing entity of the MPA. Again, this superimposes non-federal requirements on a federal agency for the protection of a non-federal MPA. The problem is self-evidentô a federal agency would be required to undergo an õavoid harmö analysis according to both strict federal requirements, as well as unknown non-federal entity requirements. We do believe that if a federal agency proposes to take action that would negatively impact a federally protected marine environment, the agency should have to follow federal avoidance guidelines. However, we cannot support a program that would impose non-federal requirements and procedures on a federal agency.

D. NOAA/DOI Should Consider Incorporating the Successful Nominees into a National Networkô But Not into a National Systemô Whose Components Must Meet the Requirements of the NMSA and are Subject to Section 5 of the Executive Order

We conclude that Section 5 of the Executive Order should apply to only those MPAs which have been subject to eligibility requirements comparable to the requirements set forth in the NMSA. We also conclude that that MPAs contained in a National System should meet eligibility requirements comparable to those in the NMSA.

We recommend that NOAA/DOI give consideration to incorporating those nominees which are considered to have met the eligibility criteria articulated in the *Framework* into a National *Network* of MPAs. The National *Network* would focus on research, education and public outreach, and Section 5 of the Order would not apply to any elements in the Network. The National *System* would

be limited to those MPAs which meet the requirements set forth in the NMSA, and Section 5 of the Order would apply to components of the National *System.*

III:
COMPLIANCE WITH THE FEDERAL INFORMATION QUALITY ACT

A. NOAAøS MPA Inventory and Related Information Dissemination Do Not Meet NOAAøS Information Quality and Pre-dissemination Review Requirements

NOAA is using a large data base to compile the MPA Inventory, and to implement the other provisions of Executive Order 13158 and the MPA *Framework.*[15] Some of these data come from National Marine Sanctuary sites, which are administered by NOAA through its Office of National Marine Sanctuaries.[16] Other data come from third parties outside NOAA, e.g., territories and states who maintain MPAs. [17]

NOAA makes the following õDisclaimersö about its MPA Inventory:

> "The MPA Center gives no warranty, expressed or implied, as to the accuracy, reliability, or completeness of these data. Although these data have been processed by staff of the MPA Center, no warranty, expressed or implied, is made regarding the utility for general or scientific purposes; nor shall the act of distribution constitute any such warranty. This disclaimer applies both to individual use of the data and aggregate use with other data.ö
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> õThe MPA Center makes no claims, promises, or guarantees about the accuracy, completeness, or adequacy of the contents of this website; and expressly disclaims liability for errors and omissions in the contents of this website. It is recommended that careful attention is paid to the contents of any metadata associated with a file, and that the originator of the data be contacted with any questions regarding appropriate use. No warranty of any kind, implied, expressed or statutory, is given with respect to the contents of this database, website or its hyperlinks to other Internet resources.ö [18]

In other words, the public, to whom NOAA disseminates its MPA Inventory and related information, has no reason to believe that any of these data are accurate, reliable , and complete, or that they have

[15] *See* http://mpa.gov/helpful_resources/inventory.html (website for NOAAøs MPA Inventory databases).
[16] *See* http://sanctuaries.noaa.gov/about/faqs/welcome.html (background discussion of National Marine Sanctuary); and http://mpa.gov/pdf/national-system/nomsites3_23_09.pdf (MPA inventory of nominated sites includes National Marine Sanctuary sites).
[17] See http://mpa.gov/pdf/national-system/nomsites3_23_09.pdf (MPA Inventory of nominated sites, including state and territorial MPAs).
[18] NOAA disclaimers are available online at http://mpa.gov/helpful_resources/disclaimers.html.

any utility. There is also no reason to believe that NOAA determined the data to be accurate, reliable, complete, and to have utility before NOAA used and disseminated the data to the public. Consequently, NOAAøs MPA Inventory and related information dissemination violate the Information Quality Act (õIQAö) and NOAAøs IQA guidelines, because the IQA and NOAAøs guidelines require that NOAA ensure that the MPA Inventory and related information dissemination meet IQA quality standards before NOAA uses and disseminates the data to the public.[19]

NOAAøs relevant IQA guidelines are set forth below:

"PART II: INFORMATION QUALITY STANDARDS AND PRE-DISSEMINATION REVIEW

> õInformation quality is composed of three elements: utility, integrity and objectivity. Quality will be ensured and established at levels appropriate to the nature and timeliness of the information to be disseminated. NOAA will conduct a pre-dissemination review of information it disseminates to verify quality. Information quality is an integral part of the pre-dissemination review....ö[20]
>
> ***
>
> **"Quality** is an encompassing term comprising utility, objectivity, and integrity. Therefore, the guidelines sometimes refer to these four statutory terms, collectively, as ÷quality.ø
>
> **Utility** refers to the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the agency disseminates to the public, NOAA considers the uses of the information not only from its own perspective but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, NOAA takes care to ensure that transparency has been addressed in its review of the information.
>
> **Objectivity** consists of two distinct elements: presentation and substance. The presentation element includes whether disseminated information is presented in an accurate, clear, complete, and unbiased manner and in a proper context. The substance element involves a focus on ensuring accurate, reliable, and unbiased information....ö[21]

[19] The Information Quality Act (õIQAö) is codified at 44 U.S.C.§ 3501 *et seq.* (P.L. 106ó554 Section 515, FY 2001 Treasury and General Government Appropriations Act); NOAAøs IQA guidelines are available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html.

[20] NOAA IQA Guidelines, Part II, available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html.

[21] NOAA IQA Guidelines, Definitions, available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html.

These quality standards are not limited to the MPA data from NOAAøs own National Marine Sanctuary sites. These quality standards also apply to third-party information that NOAA uses or relies on, such as the state, local, territorial, and tribal MPA Inventory information that NOAA is using and publicly disseminating in various media:

> "**Third-party Information.** Use of third-party information from both domestic and international sources, such as states, municipalities, agencies and private entities, is a common practice in NOAA. Collaboration on interjurisdictional studies and monitoring programs, incorporation of on-site observations into NOAA products, and utilization of global observation systems are just a few examples of when third-party information is used. NOAA's information quality guidelines are reality-based, i.e., not intended to prevent use of reliable outside information or full utilization of the best scientific information available. Although third-party sources may not be directly subject to Section 515 [of the IQA], information from such sources, when used by NOAA to develop information products or to form the basis of a decision or policy, must be of known quality and consistent with NOAA's information quality guidelines. When such information is used, any limitations, assumptions, collection methods, or uncertainties concerning it will be taken into account and disclosed.ö[22]

NOAA confirmed in a letter to CRE that:

> õThe NOAA IQ guidelines recognize the use of third party information from both domestic and international sources is a common practice at NOAA. Although third party sources may not be directly subject to the IQA, information from such sources, when used by NOAA to develop information products or to form the basis of a decision or policy, must be of known quality and consistent with NOAAøs IQ guidelines.ö

June 7, 2006, letter from NOAA Assistant Administrator for Fisheries, to Jim J. Tozzi, CRE, available online at http://www.thecre.com/pdf/NOAA-IWC_Letter.pdf.

NOAAøs IQA guidelines specifically address the quality standards for õNatural Resource Plans,ö a term which includes õNational Marine Sanctuary Management Plans,ö such as the National Marine Sanctuary Management Plans included in the MPA Inventory. NOAAøs IQA guidelines state that:

> õObjectivity of Natural Resource Plans will be achieved by adhering to published standards, using information of known quality or from sources acceptable to the relevant scientific and technical communities, presenting the information in the proper context, and reviewing the products before dissemination.

[22] NOAA IQA Guidelines, Part II, available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html

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> õPlans will be presented in an accurate, clear, complete and unbiased manner. Natural Resource Plans often rely upon scientific information, analyses and conclusions for the development of management policy. Clear distinctions will be drawn between policy choices and the supporting science upon which they are based. Supporting materials, information, data and analyses used within the Plan will be properly referenced to ensure transparency. Plans will be reviewed by technically qualified individuals to ensure that they are valid, complete, unbiased, objective, and relevantö[23]

NOAA has repeatedly emphasized that it must meet IQA quality standards with regard to the National Marine Sanctuaries which NOAA administers. For example, NOAA emphasizes that itøs National Marine Sanctuary

> õreports will also need to undergo a review process standardized for all sites. We [NOAA] are required to meet the requirements of the Data Quality Act and the Peer Review Guidelines for Influential Scientific Information (ISI). All comments must be posted on the Department of Commerce website.ö[24]

NOAA must also meet the IQA quality standards for third-party management plans and the other related third-party data which NOAA uses õto develop information products or to form the basis of a decision or policy.ö[25] In this case, the information products, decisions and policies include NOAAøs MPA Inventory and *Framework*.
Finally, NOAA must certify that the NOAA and third-party MPA Inventory meet IQA quality standards **before** NOAA disseminates this and related information to the public on NOAA websites and through other media. [26]

B. Coverage of õThird Partyö Information Under The Guidelines

The preamble to the Office of Management and Budget (OMB) guidelines states: "If an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably

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[23] NOAA IQA Guidelines, Part II. F, available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html.
[24] National Sanctuary Program Research Coordinators Meeting 2006, available online at http://sanctuaries.noaa.gov/library/national/2006_rc_meeting.pdf.
[25] NOAA Letter to CRE, available online at http://www.thecre.com/pdf/NOAA-IWC_Letter.pdf.
[26] NOAA IQA Guidelines, Part II, available online at http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html;
NOAAøs National Marines Fisheries Service has developed specific certification procedures to ensure IQA pre-dissemination review compliance: http://www.sefsc.noaa.gov/iqa/iqa.jsp,
and https://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/04-108-02.pdf.

suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines." (67 Fed. Reg. 8454, February 22, 2002).

Reinforcing this statement of policy, OMB also provides an example in its preamble concerning the applicability of the OMB and agency information quality standards to third-party studies relied upon by an agency, even if the third-party studies were published before the agency's use of them (67 Fed. Reg. 8457, February 22, 2002). In summary, if an agency relies on non-agency ("third-party") information when disseminating information, under the controlling OMB guidance, that outside information is subject to the same quality standards as if the agency had developed the information itself.

NOAAøs dissemination of the National System of Marine Protected Areas meets both the õthird-partyö criterion and the direct dissemination provisions of the IQA, because NOAA clearly states that it, and DOI, are taking affirmative action to include non-federal MPAs in the National System.

With respect to õthird-partyö information, NOAA has made its position very clear:

> õThe NOAA IQA guidelines recognize the use of third party information from both domestic and an international sources is a common practice at NOAA. Although third party information may not be directly subject to the IQA, information from such sources, when used by NOAA to develop information products or to form the basis of a decision policy, must be of known quality and consistent with NOAAøs IQ Guidelines. When such information is used, any limitations, assumptions, collection methods, or uncertainties concerning it will be taken into account and disclosed.ö (*See* fn. 24)

C. Recommendations to Assure Compliance with the IQA

NOAA is a leader in IQA implementation and compliance. Consequently, we did not expect NOAA to confine its concern about the accuracy of the MPA information simply by publishing õDisclaimers.ö The MPA Inventory includes data from NOAAøs own National Marine Sanctuaries, and NOAA has repeatedly stated that this data must meet IQA quality standards. Is NOAA now saying that it cannot guarantee the accuracy, reliability, completeness, and utility of its own National Marine Sanctuary data? Does this mean that NOAA has no idea of the accuracy, reliability, completeness, and utility of its own National Marine Sanctuary data, or in the alternative, are these disclaimers restricted to third-party data?

NOAAøs MPA Inventory includes a significant amount of third-party data. NOAA states in its IQA guidelines that third-party data used by the agency must meet the same quality standards as data generated by the agency. NOAA cannot apply a double standard by disseminating its own data which meets the IQA guidelines, and at the same time disseminating third-party data which is

inaccurate, unreliable, incomplete, and of little if any utility. For both sets of data, NOAA must determine and certify IQA compliance before NOAA disseminates and uses this data. NOAA has not done this.

Under these circumstances, we recommend that NOAA prominently state on its MPA Inventory website that NOAA will not use or rely on any MPA Inventory data unless and until NOAA determines that the data complies with NOAAøs IQA guidelines. Any such compliance determination, and the record underlying it, should be published in the *Federal Register* and on NOAAøs MPA Inventory website in its proposed form, and the public should be allowed to comment on it.

In addition, NOAA should modify the *Framework* to ensure that Executive Order 13158, and all resultant guidance related to the Order, is applicable only to National Marine Sanctuaries under the National Marine Sanctuaries Act. Only those sanctuaries can currently be assumed to be in compliance with the IQA. Use of this approach should be accompanied by NOAAøs public disclosure of its pre-dissemination review determinations and records supporting the IQA compliance of NOAAøs National Marine Sanctuaries data.

IV.
RECOMMENDATIONS

NOAAøs MPA Center is to be complimented for conducting a very transparent and interactive process for formulating the *Framework for the National System of Marine Protected Areas*. As a result of NOAA's outreach program, CRE has had the opportunity to review, for the first time, the proposed National System in its entirety, including the *Framework* and the site specific nominations, and recommends:

(1) The document for which NOAA requests public comments, if promulgated, should be issued under the title, National Network of Marine Protected Areas, not the National System of Marine Protected Areas and should adopt recommendation (3) below. A National Network is opinion-based; a National System is science-based. (The International Union for Conservation of Nature (IUCN), the foundation for the NOAA report, uses the term õnetwork.ö

(2) If a National System of Marine Protected Areas is to be promulgated, eligibility should be limited to those sites which have been (1) designated as a National Marine Sanctuary, or (2) subjected to comparable designation criteria delineated in other federal statutes.

(3) The *Framework* should be modified to ensure that Section 5 of the Executive Order, and all resultant guidance in the *Framework* related to Section 5, is applicable to only those sites in a National System (as defined in (2) above), not in a National Network.

(4) NOAA, prior to promulgating either a National Network or a National System, should issue a notice of proposed rulemaking, followed by a final rule, which would codify, in the Code of Federal Regulations, recommendations #2 and #3 above.

(5) NOAA should prominently state on its MPA Inventory website that NOAA, or any other federal agency, will not use or rely on any MPA Inventory data unless and until NOAA and other federal agencies determine that the data complies with NOAA's IQA guidelines and the IQA guidelines of the other federal agencies, and that entry to a National System, as opposed to a National Network, is contingent upon compliance with the Information Quality Act.

(6) NOAA should announce that actions to implement recommendation #3 above must be taken, in part, because only National Marine Sanctuaries, so designated under the National Marine Sanctuaries Act, can currently be assumed to be in compliance with the Information Quality Act.

(7) NOAA should post all comments received pursuant to the March 6, 2009, *Federal Register* notice on a website managed by NOAA and request continual updates from the public on generic issues dealing with the implementation of the *Framework*.

(8) NOAA, because the recommendations expressed herein affect the operations of other federal agencies, should distribute these recommendations to the Federal Interagency MPA Working Group for comment.

Respectfully,

Jim Tozzi
Member, Board of Advisors
Center for Regulatory Effectiveness

http://www.thecre.com/emerging/Jim_Tozzi_Bio.html