

PETITION FOR RULEMAKING TO STRENGTHEN  
NATIONAL MARINE SANCTUARIES ACT PROGRAM REGULATIONS



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BEFORE THE U.S. DEPARTMENT OF COMMERCE, ACTING THROUGH THE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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**Right to Petition**

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553(e) and the National Marine Sanctuaries Act (“Sanctuaries Act”), 16 U.S.C. § 1431 *et seq.*, NRDC (the Natural Resources Defense Council) and co-petitioners respectfully petition the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), for a rulemaking to strengthen and update NOAA’s regulations at 15 C.F.R. Part 922.

Under the APA, any interested party may request that an agency issue, amend, or repeal a rule. 5 U.S.C. § 553(e). A “rule” is the “whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* § 551(4). Such petitions are sometimes referred to as 553(e) petitions, petitions for rulemaking, petitions for reconsideration, administrative petitions, or citizens’ petitions.

Petitioners seek amendment and strengthening of the Sanctuaries Act program regulations, 15 C.F.R. Part 922. Management of the national marine sanctuaries system is delegated from the

Secretary of Commerce to NOAA’s Office of National Marine Sanctuaries (ONMS).<sup>1</sup> NOAA has the authority to take the requested actions under the Sanctuaries Act, which calls for designation, management, and regulation of national marine sanctuaries. 16 U.S.C. § 1434(a)-(e); *see id.* §§ 1431–1445c.

When an agency receives a rulemaking petition, the agency must consider the petition and respond “within a reasonable time.” 5 U.S.C. § 555(b).

## **Petitioners**

NRDC is an international, non-profit environmental and public health membership organization with hundreds of thousands of members and online activists. NRDC works to protect ocean habitats and marine species and to fight ocean pollution and degradation. NRDC submits this petition on its own behalf and on behalf of its members and staff with an interest in protecting the ocean environment.

Azul is an environmental justice organization working with Latinxs to protect the ocean and coasts. It was founded in 2011 to bring Latinxs perspectives and participation to ocean conservation and has long advocated for environmental justice and equity in the state of California, across the nation and at international levels.

Conservation Law Foundation (CLF) protects New England’s environment for the benefit of all people. CLF uses the law, science, and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF’s Ocean Conservation Program is dedicated to restoring and conserving the rich diversity of ocean wildlife and the health of the ocean.

Creation Justice Ministries (formerly the National Council of Churches Eco-Justice Program) represents the creation care and environmental justice policies of major Christian denominations throughout the United States. We work in cooperation with 38 national faith bodies including Protestant denominations and Orthodox communions as well as regional faith groups, and congregants to protect and restore God’s Creation.

Earthjustice is the nation’s largest nonprofit public interest environmental law organization. Earthjustice’s Oceans Program uses the power of law and the strength of partnership to safeguard imperiled marine life, reform fisheries management, stop the expansion of offshore oil and gas drilling, and increase the resiliency of ocean ecosystems to climate change.

Environment America is a national network of 30 state environmental groups. Our staff work together for clean air, clean water, clean energy, wildlife, open spaces and a livable climate. Our members across the United States put grassroots support behind our research and advocacy.

Marine Conservation Institute brings over 25 years of marine science and conservation experience to our mission to secure permanent and effective protection of our ocean. We engage in strategic partnerships across local, regional, and global geographies to create MPAs. The

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<sup>1</sup> *E.g.*, Amendments to National Marine Sanctuary Regulations, 87 Fed. Reg. 29,606 (May 13, 2022).

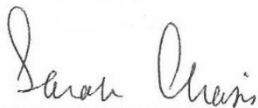
Institute has a track record of innovating and implementing unique and impactful programs for ocean resilience, including our Blue Parks Initiative and the Marine Protection Atlas. We recognize the need to dramatically accelerate the *quantity* and *quality* of effectively conserved places and view our role as catalyzing this future through science and advocacy that increases both of these aspects throughout our global ocean.

The National Marine Sanctuary Foundation is a leading voice for U.S. protected waters and directly supports America's national marine sanctuaries through its mission to protect species, ecosystems and cultural and maritime heritage. We accomplish our mission through community stewardship and engagement programs, on-the-water conservation projects, public education and outreach programs, and scientific research and exploration.

The National Ocean Protection Coalition (NOPC) mission is to convene people and organizations to strategically activate our collective power to create and enhance equitable and effective U.S. marine protected areas. NOPC believes that a vibrant ocean, filled with thriving and flourishing habitats, and resilient to the effects of climate change will allow nature to sustain all people, communities, and life on earth. Our coalition includes groups representing national, regional and local perspectives from across the U.S. and includes Tribal leaders, racial justice advocates, scientists, faith leaders, conservations, outdoor enthusiasts, fishers and more.

National Parks Conservation Association is the only independent, nonprofit organization working to protect and defend America's national parks for present and future generations on behalf of our over 1.6 million members and supporters. NPCA works to conserve America's most valuable underwater treasures in parks and connected aquatic ecosystems to preserve biodiversity, enhance habitat connectivity, protect endangered species, provide recreational and economic opportunities, build resilience against the impacts of climate change, and strengthen the deep connections between our communities and maritime heritage.

Respectfully submitted,



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## I. Introduction

Our national marine sanctuary system covers 620,000 square miles of ocean and Great Lakes waters rich with marine life and cultural history. Under the National Marine Sanctuaries Act (“Sanctuaries Act” or “the Act”), areas are selected for sanctuary designation based on their “special national significance.” 16 U.S.C. § 1431(b)(1). The Act was designed to elevate conservation and management of vital marine areas and to “maintain for future generations” their rich habitats and ecological services. *Id.* § 1431(a)(4)(C).

These special marine environments, however, face immense and mounting pressures from fishing, shipping traffic, pollution, climate change, and a range of other threats.<sup>2</sup> The sanctuary management system must respond effectively to these impacts to meet its primary objective. The Act calls for protection, restoration, and enhancement of the wildlife, habitat, and ecosystems found within marine sanctuaries, 16 U.S.C. § 1431(b)(3); however, National Oceanic and Atmospheric Administration (NOAA) reports show that many sanctuary resources are suffering widespread or severe impacts and/or are in a declining condition.<sup>3</sup>

The Sanctuaries Act provides a framework for managing national marine sanctuaries, requiring NOAA to prepare and periodically revise each sanctuary’s management plan and associated regulations for the protection of sanctuary resources and to fulfill other goals of the Act. 16 U.S.C. § 1434(2)(C); *id.* § 1434(e). In advance of management plan reviews, NOAA prepares condition reports that assess the health of sanctuary resources and highlight key stressors.<sup>4</sup> As presented below, the most recent condition reports across sanctuaries show that the natural resources of many sanctuaries are not doing well. Because the Act’s “primary objective” is resource protection, *id.* § 1431(b)(6), management procedures must prioritize protecting sanctuary ecosystems and wildlife. This petition calls for NOAA to take prompt and effective action to improve the management of national marine sanctuaries.

NOAA recently released its five-year strategic plan for the National Marine Sanctuary program entitled *Our Vision for America’s Treasured Ocean Places*.<sup>5</sup> The plan sets as its first goal: “[e]nsure healthy and resilient sanctuaries and other protected areas.”<sup>6</sup> As objectives under that goal, the plan calls for protection of sanctuary ecosystems and restoration of key habitats and species to ensure long-term resilience and ecosystem benefits. Another plan goal is to: “[d]eepen

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<sup>2</sup> C.C. O’Hara, M. Frazier & B.S. Halpern, *At-risk marine biodiversity faces extensive, expanding, and intensifying human impacts*, 372 *Science* 84 (2021).

<sup>3</sup> S.R. Gittings, M. Tartt & K. Broughton, *National Marine Sanctuary System Condition Report 2013*, NOAA Office of National Marine Sanctuaries (2013), <https://sanctuaries.noaa.gov/science/condition/ncr/>; Z. Mirza, A. Carter, A. Kenney & M. Goldstein, *To Protect 30 Percent of the Ocean, the United States Must Invest in the National Marine Sanctuaries Program*, Center for American Progress (Dec. 16, 2021), <https://www.americanprogress.org/article/to-protect-30-percent-of-the-ocean-the-united-states-must-invest-in-the-national-marine-sanctuaries-program/#:~:text=The%20Biden%20administration%20has%20cited,MPA%20systems%20in%20the%20country.>

<sup>4</sup> See NOAA Office of National Marine Sanctuaries, *Guide for Developing National Marine Sanctuary Condition Reports* (Sept. 2018) [hereinafter, “*Guide for Developing National Marine Sanctuary Condition Reports*”], <https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/docs/2018-condition-report-guidance.pdf>.

<sup>5</sup> NOAA Office of National Marine Sanctuaries, *Our Vision for America’s Treasured Ocean Places: A five-year strategy for the National Marine Sanctuary System* (Sept. 2022), <https://sanctuaries.noaa.gov/about/2022-2027-five-year-strategy.html>.

<sup>6</sup> *Id.* at 11.

understanding of sanctuaries.”<sup>7</sup> This goal includes as explicit objectives increasing and sharing an understanding of sanctuary resources and tracking and predicting conditions, trends, and threats across the National Marine Sanctuary System. The petition we file today seeks changes to agency regulations that would enhance the chances of these important goals being brought to fruition.

## II. Actions Requested

The above-listed organizations formally petition the Secretary of Commerce, acting through NOAA, to amend the Sanctuaries Act program regulations by adding regulations that:

- (1) Detail agency procedures for reviewing and revising management plans by making the changes called for in items (2)-(5) below;**
- (2) Formally adopt condition report preparation as part of the management plan review process and update requirements relating to key aspects of these reports;**
- (3) In response to condition report findings, require the adoption of revised management plans and sanctuary-specific regulations that effectively protect sanctuary resources;**
- (4) Require amendment of the sanctuary designation documents when necessary to address threats to sanctuary resources; and,**
- (5) Require collaboration with other agencies when factors outside of sanctuaries impact sanctuary resources.**

It is NOAA’s duty under the Sanctuaries Act to manage and protect the health of our marine sanctuaries. 16 U.S.C. § 1431(b)(3). NOAA should take immediate action to implement the petitioned-for regulatory changes and safeguard marine sanctuaries.

## III. Background

### a. National marine sanctuaries need stronger management and protection.

Under the Sanctuaries Act, the Secretary of Commerce (“the Secretary”) through NOAA is authorized to designate areas of the marine environment that possess special qualities as national marine sanctuaries.<sup>8</sup> 16 U.S.C. §§ 1431-1445c. To protect the ecological and cultural resources of national marine sanctuaries, NOAA establishes management plans, *id.* § 1434(a)(2)(C), and regulates potentially harmful activities in sanctuary areas, *id.* § 1434(a)(4).

The Act’s primary purpose is protecting sanctuary resources, including marine habitats, populations, and ecosystems, 16 U.S.C. §§ 1431(b)(3),(6); however agency reports show that the conditions of natural resources of many sanctuaries are not doing well. NOAA prepares periodic condition reports for each sanctuary, evaluating sanctuary resources using a standardized set of monitoring questions.<sup>9</sup> Resource ratings address various issues, including water quality, impact

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<sup>7</sup> *Id.* at 17.

<sup>8</sup> These qualities may be “conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic.” 16 U.S.C. § 1431(a)(2).

<sup>9</sup> *Guide for Developing National Marine Sanctuary Condition Reports*, *supra* note 4.



of human activities, habitat conditions, and species health.<sup>10</sup> The agency assigns a rating of good, good/fair, fair, fair/poor, poor, or undetermined in response to each question. Trends are also assigned based on external research and observed changes from the period since the most recent condition report (unless otherwise specified by the agency).<sup>11</sup> Thus, “declining” resources are those whose condition has worsened over this period, whereas “improving” conditions are those whose condition has become better.

The ratings from the most recent sanctuary-specific condition reports show an alarmingly high incidence of resources in fair, fair/poor, or poor condition. Although the term “fair” generally connotes average or adequate condition to the layperson,<sup>12</sup> for the purpose of sanctuary condition assessment NOAA assigns a value of “fair” to conditions for which “[s]elected drivers are influencing pressures in ways that cause measurable resource impacts.”<sup>13</sup> Fair/poor conditions are those experiencing “pressures...that result in *severe* impacts that are either widespread or persistent,” and poor conditions are those experiencing “pressures...that result in *severe, persistent, and widespread* impacts.”<sup>14</sup>

Last year, the Center for American Progress (CAP) analyzed the most recent NOAA condition reports for fourteen national marine sanctuaries<sup>15</sup> and found that 37 percent of resource conditions were characterized as fair, fair/poor, or poor.<sup>16</sup> Put another way, 37 percent of the indicators used to measure the health of the sanctuaries showed measurable, severe, or widespread adverse impacts to sanctuary resources.<sup>17</sup>

NRDC conducted a similar but more targeted analysis, examining the condition of habitats and species in California’s four marine sanctuaries: Cordell Bank, Greater Farallones, Monterey Bay, and Channel Islands. Over two-thirds of the resource conditions (25 of 37) relating to habitat and

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<sup>10</sup> *Id.* app. A.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Merriam Webster definition of “fair,” <https://www.merriam-webster.com/dictionary/fair> (last visited Aug. 10, 2022).

<sup>13</sup> NOAA, *Rating Scheme for System-Wide Monitoring Questions*, <https://sanctuaries.noaa.gov/science/condition/rating.html> (emphasis added) (last accessed August 10, 2022).

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> Mirza et al., *supra* note 3. CAP examined the most recent condition reports for thirteen national marine sanctuaries and one proposed sanctuary. This included all national marine sanctuaries except Malloes Bay-Potomac River and Wisconsin Shipwreck Coast, for which condition reports have not yet been prepared. Additionally, CAP included the condition report for Papahānaumokuākea Marine National Monument in its analysis.

Papahānaumokuākea Marine National Monument is currently under consideration for designation as a national marine sanctuary. Notice of Intent to Conduct Scoping and To Prepare an Environmental Impact Statement for the Proposed Designation of a National Marine Sanctuary Within Papahānaumokuākea Marine National Monument, 86 Fed. Reg. 64,904 (Nov. 19, 2021).

<sup>16</sup> Mirza et al., *supra* note 3. The CAP analysis included all national marine sanctuaries and marine national monuments for which a condition report is available.

<sup>17</sup> Similar to CAP’s analysis, NOAA’s most recent sanctuary system-wide condition report describes a variety of significant pressures on sanctuaries, including fishing, ship strikes, climate change, and ocean acidification. This report was published in 2013. Gittings et al., *supra* note 3, at 15-23. Given the age of this analysis, NOAA should release an update to this report.



wildlife<sup>18</sup> from the most recent condition reports received a poor, fair/poor, or fair rating.<sup>19</sup> These results indicate that the majority of habitat and wildlife resources in California’s marine sanctuaries are showing measurable, severe, or widespread impacts.<sup>20</sup>

Further, many sanctuary resources are declining in condition over time. CAP’s analysis found that 41 percent of condition report trends across all sanctuaries and monuments were classified as declining.<sup>21</sup> These trends are particularly alarming for resources that are already impaired. For example, the 2020 Condition Report for Stellwagen Bank National Marine Sanctuary, located offshore Massachusetts, identified four condition categories as declining, six as not changing, five as having an undetermined trend, and only one as improving.<sup>22</sup> Of the condition categories rated as fair, fair/poor, or poor, only one showed an improving trend, while four showed a declining trend since the prior condition report in 2007.<sup>23</sup>

The analysis of condition reports reveals that fair, fair/poor, poor, and declining resource conditions in sanctuaries are caused by a variety of drivers. According to NOAA’s most recent synthesis of condition report findings, “[a]ll sanctuaries with management responsibility for the protection of natural resources reported fishing as a significant pressure.”<sup>24</sup> Other notable pressures on marine sanctuaries include climate change, marine debris entanglement, wildlife disturbance, ship strikes, noise, and degraded water quality.<sup>25</sup> The need for stronger protections for our national marine sanctuaries was recently highlighted by a study that found seven of the nation’s ten largest national marine sanctuaries are only minimally protected, one is lightly protected, and just two are fully or highly protected.<sup>26</sup>

## **b. Marine sanctuary management practices and regulations fail to address poor and declining conditions.**

### **i. Overview of management requirements under the Sanctuaries Act.**

To protect nationally significant marine areas, the Sanctuaries Act calls for the designation of marine sanctuaries and the “comprehensive and coordinated conservation and management of

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<sup>18</sup> The eleven resource conditions reviewed are: abundance and distribution of major habitat types; condition of biologically structured habitats; contaminant concentrations in sanctuary habitats; human activity influence on habitat quality; biodiversity; environmentally sustainable fishing; non-indigenous species; status of key species; status of other focal species; condition/health of key species; and levels of human activity influencing living resource quality. *E.g.*, NOAA, *Cordell Bank National Marine Sanctuary: 2009 Condition Report* (resource conditions in the habitat and living resources categories), <https://sanctuaries.noaa.gov/science/condition/cbnms/welcome.html>.

<sup>19</sup> There were only 37 total ratings because not all condition reports assigned a rating for each category.

<sup>20</sup> Analysis by authors.

<sup>21</sup> Mirza et al., *supra* note 3.

<sup>22</sup> NOAA Office of National Marine Sanctuaries, *Stellwagen 2020 Condition Report: Findings of Status and Trends, 2007-2018*, at 17-25 (2020), <https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/docs/2020-stellwagen-condition-report.pdf>.

<sup>23</sup> *Id.* at 17-25.

<sup>24</sup> Gittings et al., *supra* note 3, at 15-23.

<sup>25</sup> *Id.* at 15-23.

<sup>26</sup> Jenna Sullivan-Stack et al., *A Scientific Synthesis of Marine Protected Areas in the United States: Status and Recommendations*, *Front. Mar. Sci.*, supp. tbl. 4 (2022), <https://doi.org/10.3389/fmars.2022.849927>.

these marine areas.” 16 U.S.C. § 1431(b)(1)-(2). The statute establishes several tools for management and conservation, including a requirement that NOAA prepare a management plan for each national marine sanctuary upon designation. *Id.* § 1434(a)(2)(C). These plans must detail the strategies that the government will use to manage and protect sanctuary resources. *Id.* § 1434(a)(2)(C)(iii).

At the time of designation, NOAA must also promulgate regulations for managing the sanctuary. 16 U.S.C. § 1434(a)(1)(A); *id.* § 1434(a)(2)(C)(vi); *id.* § 1434(a)(4). In addition to establishing the size and boundaries of the sanctuary, these regulations must specify the types of activities that will be prohibited, otherwise regulated, or subject to regulation within the sanctuary for the purpose of protecting its ecological, historical, and aesthetic characteristics. *Id.* § 1434(a)(4).

If fishing is included in the designation document as an activity that is subject to regulation, the Sanctuaries Act provides a procedure for establishing fishing regulations. NOAA first allows the local regional Fishery Management Council (FMC) the opportunity to propose draft regulations for fishing activities within the sanctuary pursuant to the Magnuson-Stevens Act. 16 U.S.C. § 1434(a)(5). NOAA must accept these measures unless they fail to fulfill the objectives of sanctuary designation or the purposes of the Sanctuaries Act. *Id.* In such an event, the Act authorizes NOAA to issue regulations governing fishing under the Sanctuaries Act. *Id.* When establishing fishing regulations, the agency must also cooperate with other fishery management authorities who have “rights or responsibilities within a proposed sanctuary.” *Id.* § 1434(a)(5).

After the sanctuary has been officially established, NOAA may only modify the list of regulated activities by re-initiating the procedures required for sanctuary designation. 16 U.S.C. § 1434(a)(4). These include providing notice, preparing sanctuary designation documents including a draft environmental impact statement, conducting a public hearing, and providing opportunity for congressional input. 16 U.S.C. § 1434(a).

The Sanctuaries Act requires that NOAA review management plans every five years to evaluate progress in fulfilling the goals of the sanctuary and implementing the management plan. 16 U.S.C. § 1434(e). Based on this review, NOAA must revise management plans and sanctuary-specific regulations “as necessary to fulfill the purposes and policies of [the Act].” *Id.* The Act’s “primary objective” is protecting sanctuary resources. *Id.* § 1431(b)(6). The Act’s policies and purposes also call for “where appropriate, restor[ing] and enhanc[ing] natural habitats, populations, and ecological processes.” *Id.* § 1431(b)(3).

**ii. NOAA’s management plan revision practices fail to adequately address threats facing national marine sanctuaries.**

The Sanctuaries Act’s mandate is to regularly revise management plans and regulations to protect, restore, and enhance the environments of national marine sanctuaries, however, as noted above, recent condition reports across multiple sanctuaries show that many environmental markers remain in fair, fair/poor, or poor condition and some sanctuary resources are failing to improve or seeing declines over time.<sup>27</sup>

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<sup>27</sup> See *supra* section III(a).

Notably, in some cases there has been a failure to institute new management actions and regulations that would help improve conditions or reduce stressors in marine sanctuaries. For example, NOAA’s 2020 Condition Report for Stellwagen Bank explained that human activities continue to adversely impact habitat, wildlife, and maritime heritage resources in the sanctuary and have caused “severe, widespread, and/or persistent impacts to some species.”<sup>28</sup> North Atlantic right whales, which are on the verge of extinction,<sup>29</sup> and humpback whales are especially at risk. NOAA rated the conditions of both whale populations in the Sanctuary as “poor.”<sup>30</sup>

A revision of Stellwagen Bank’s management plan is currently in progress, and NOAA released a new draft management plan in 2021.<sup>31</sup> The proposed management changes or proposed regulations fail to address the decline in sanctuary resources. The draft plan’s proposal for study and assessment are not sufficient to address the issues identified in the condition report.<sup>32</sup> Research, monitoring, and assessment are important components of management plans; however, these actions alone are not sufficient for managing sanctuary resources, particularly in circumstances where sanctuary resources are in poor condition or declining. Rather, the Sanctuaries Act requires management plans to include “innovative management strategies,” “resource protection,” and “restoration” activities. 16 U.S.C. § 1434(a)(2)(C)(iii).<sup>33</sup> In other words, “management” under the Act calls for the use of active strategies and actions to protect and restore sanctuary resources.

New management strategies and actions must effectively address negative condition report findings to achieve the purpose of the Act’s management plan review and revision process. The Sanctuaries Act requires NOAA to revise management plans to fulfill the Act’s purposes, 16 U.S.C. § 1434(e), which include protecting, restoring, and enhancing habitats, wildlife, and ecological processes, *id.* § 1431(b)(3). NOAA must adopt management changes to address the

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<sup>28</sup> NOAA Office of National Marine Sanctuaries, *Stellwagen 2020 Condition Report: Findings of Status and Trends, 2007-2018*, at 9-10, 12 (2020).

<sup>29</sup> There are fewer than 400 North Atlantic right whales left. NOAA declared an Unusual Mortality Event for the species in 2017. Since then, 34 North Atlantic right whale deaths and 20 serious injuries have been documented, the majority of which were caused by vessel strikes and entanglements. North Atlantic right whale deaths currently outpace births. NOAA Fisheries, *North Atlantic Right Whale*, available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Sept. 5, 2022).

<sup>30</sup> NOAA Office of National Marine Sanctuaries, *Stellwagen 2020 Condition Report: Findings of Status and Trends, 2007-2018*, at 12-13 (2020).

<sup>31</sup> NOAA, Stellwagen Bank National Marine Sanctuary, *Management Plan Revision*, <https://stellwagen.noaa.gov/management/2020-management-plan-review/#:~:text=The%20draft%20management%20plan%20supports,ocean%20stewardship%20among%20diverse%20communities> (last visited July 29, 2022).

<sup>32</sup> For example, the Stellwagen Bank draft plan includes five strategies for marine mammal protection: investigate ship strike, entanglement, and noise response; support entanglement prevention research; collaborate with other federal and state agencies on ship strike; study top predator ecology; and expand the Boater Outreach for Whale Watching program. NOAA Office of National Marine Sanctuaries, *Stellwagen Bank National Marine Sanctuary Draft Management Plan and Environmental Assessment*, at 17-18 (2021), <https://nmsstellwagen.blob.core.windows.net/stellwagen-prod/media/docs/2021-draft-management-plan-and-environmental-assessment.pdf>. None of these strategies proposes new management actions or regulations to protect large whales within sanctuary boundaries from adverse impacts caused by human activities.

<sup>33</sup> Requiring management plans to include, *inter alia*, “interpretation and education, innovative management strategies, research, monitoring and assessment, resource protection.” 16 U.S.C. § 1434(a)(2)(C)(iii).

decline or continued poor condition of sanctuary resources, as documented in the sanctuary condition reports.

**iii. Marine sanctuary management plan regulations fail to codify NOAA procedures and implement Sanctuaries Act requirements.**

In their current form, Sanctuaries Act program regulations provide little detail on NOAA’s procedures for reviewing and revising management plans, 15 C.F.R. pt. 922,<sup>34</sup> a process required by the Act, 16 U.S.C. § 1434(e); *see* section III(b)(ii) above. The regulations simply state that the Secretary is required to implement management plans and applicable sanctuary regulations “to carry out the purposes and policies of the Act.” 15 C.F.R. § 922.30. A few sanctuary-specific regulations make brief reference to the Act’s requirement to update management plans and regulations every five years. *E.g., id.* § 922.160(b) (Florida Keys National Marine Sanctuary); *id.* § 922.180(c) (Hawaiian Islands Humpback Whale National Marine Sanctuary).

As a matter of practice, NOAA prepares condition reports for each sanctuary before beginning the management plan’s review and revision process.<sup>35</sup> However, the program regulations make no mention of condition reports, despite their importance in national marine sanctuary resource management. Condition reports offer a standardized overview of sanctuary resources and trends (e.g., whether resource conditions are improving or declining, whether sanctuary resources are severely or severely and persistently impacted) and discuss the factors that drive sanctuary resource conditions, including human activities and climate change.<sup>36</sup> According to the agency, these reports guide the management plan review and revision process.<sup>37</sup>

NOAA should therefore update the Sanctuaries Act program regulations to illuminate the agency’s procedures for preparing condition reports and reviewing and revising sanctuary management plans and regulations.

**IV. NOAA Must Take Action to Strengthen the Program Regulations for Management Plans Under the National Marine Sanctuaries Act.**

To meet the requirements of the Sanctuaries Act, we formally request that NOAA revise the Act’s program regulations to require: 1) preparation of condition reports as part of the management plan review process; 2) updates to key aspects of the condition reports; 3) management plan and regulatory revisions that include actions that will effectively protect sanctuary resources from threats identified in condition reports; 4) revision of the sanctuary

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<sup>34</sup> NOAA recently amended the Sanctuaries Act regulations, which will become effective on January 24, 2023. Delay of Effective Rule, 87 Fed. Reg. 56,268 (Sept. 14, 2022). The amendments do not add any detail regarding condition report procedures or management plan review and revision procedures. 87 Fed. Reg. 29,606 (May 13, 2022).

<sup>35</sup> NOAA Office of National Marine Sanctuaries, *Frequently Asked Questions* (Condition Reports), <https://sanctuaries.noaa.gov/science/condition/faq.html> (last visited July 29, 2022).

<sup>36</sup> *Guide for Developing National Marine Sanctuary Condition Reports*, *supra* note 4, at 2.

<sup>37</sup> *E.g.*, NOAA Office of National Marine Sanctuaries, *Stellwagen Bank National Marine Sanctuary Draft Management Plan and Environmental Assessment*, at v (2021) (“The results from the condition report have guided the development of this draft management plan.”)

designation document when needed to address threats to sanctuary resources; and 5) collaboration with other agencies when factors outside of sanctuaries impact sanctuary resources.

**a. NOAA should amend the Sanctuaries Act regulations to detail agency procedures for reviewing and revising management plans by making the changes called for in sections (b), (c), and (d) below.**

Every five years, NOAA must review and revise sanctuary management plans. 16 U.S.C. § 1434(e). As part of this process, the agency is required to evaluate “progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques and strategies.” *Id.* The agency must “revise the management plan and regulations as necessary to fulfill the purposes and policies of [the Act],” of which resource protection is the primary goal. *Id.* The clear objectives of management program review—to evaluate current management techniques and revise them to better align with the Act’s purposes—demand a robust review process that informs revisions to the management plan.

However, as described above, program regulations provide no detail about how NOAA conducts these reviews. 15 C.F.R. § 922.30. Accordingly, NOAA should update the Sanctuaries Act regulations as proposed below and include details about the review and revision process that address how the agency evaluates management plan implementation and decides upon appropriate revisions to fulfill the Act’s purposes. *See* 16 U.S.C. § 1434(e). Codifying this information in the regulations would increase transparency around the management plan review process for stakeholders and the public, which is especially important given the Sanctuaries Act’s policy of enhancing public awareness and understanding of the marine environment. *Id.* § 1431(b)(4). By clarifying the review process, these regulatory amendments would also facilitate coordination with federal and state agencies on sanctuary management and protection, another Sanctuaries Act policy. *Id.* § 1431(b)(7). Finally, these regulatory amendments would help NOAA ensure that all management plan reviews are carried out in a consistent and efficacious manner.

**b. NOAA should amend the Sanctuaries Act regulations to formally adopt condition report preparation as part of the management plan review process and should update key aspects of these reports.**

NOAA developed condition reports in the mid-2000s as a tool for assessing conditions at marine sanctuaries and informing sanctuary management.<sup>38</sup> Today, NOAA prepares condition reports to inform the management plan review and revision process, preparing a report for each sanctuary at the start of this process.<sup>39</sup> Condition reports are structured around sixteen overarching

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<sup>38</sup> *See* NOAA National Marine Sanctuary Program, *A Monitoring Framework for the National Marine Sanctuary System*, at 3 (2004), <https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/archive/library/national/swim04.pdf>; NOAA Office of National Marine Sanctuaries, *Frequently Asked Questions* (Condition Reports), <https://sanctuaries.noaa.gov/science/condition/faq.html> (last visited July 29, 2022).

<sup>39</sup> NOAA Office of National Marine Sanctuaries, *Frequently Asked Questions* (Condition Reports), <https://sanctuaries.noaa.gov/science/condition/faq.html> (last visited July 29, 2022); *see* NOAA Office of National Marine Sanctuaries, *Channel Islands National Marine Sanctuary: Management plan frequently asked questions*, <https://channelislands.noaa.gov/manage/plan/faq.html> (last visited Oct. 3, 2022) (“What are the key steps for

questions (e.g., what is the integrity of major habitat types and how is it changing), each aimed at assessing the status of sanctuary resources and/or the impacts of specific drivers on sanctuary conditions.<sup>40</sup> NOAA’s ONMS answers each question using scientific research and consultations with experts.<sup>41</sup> Based on these answers, the condition report assigns a ranking (e.g., good, fair, fair/poor, poor) to each condition category. NOAA also determines whether each condition category is improving, declining, or staying the same over time. Condition reports help NOAA determine whether sanctuaries are achieving their goals of “protect[ing], and, where appropriate, restor[ing] and enhance[ing] natural habitats, populations, and ecological processes.”<sup>42</sup> 16 U.S.C. § 1431(b)(3).

NOAA should amend the Sanctuaries Act regulations to formally adopt the practice of preparing condition reports to inform the management plan review and revision process. Currently, the regulations make no mention of this practice, though condition report procedures are detailed in an agency guidance document.<sup>43</sup> This omission belies the critical role that condition reports play in informing management plan revisions and, ultimately, sanctuary management. Adding condition reports to the regulations will provide increased transparency for stakeholders and the public on national marine sanctuary management procedures.

In addition, NOAA’s condition report preparation procedures should be updated in the following five ways, and all five of these updates should be codified in the Sanctuaries Act program regulations:

First, condition reports should use the best available data sets to assess the condition of marine sanctuary resources. NOAA’s current guidelines for condition report preparation use a set of ecological attributes to assess the health of marine sanctuaries.<sup>44</sup> In addition to using information that conforms to these attributes, condition reports should consider additional available and relevant data. This is especially true when data relating to the ecological attributes is qualitative data with a high degree of uncertainty. By accounting for all available information, condition reports will portray a more complete picture of the status of national marine sanctuaries.

Second, as part of facilitating the best use of available data and associated information, NOAA should also convene an external review body of scientific experts to assess the available data sources, analyses, and links to management needs for each sanctuary. Currently, the condition report process primarily relies on reviews that are internal to NOAA. Adding an external review body would ensure the best approaches are used for condition report assessments. In addition, NOAA should make better use of National Marine Fisheries Service (NMFS) and National

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updating the management plan at Channel Islands National Marine Sanctuary?...The process began with the release of a new condition report to inform the management plan update process.”)

<sup>40</sup> NOAA Office of National Marine Sanctuaries, *Rating Scheme for System-Wide Monitoring Questions*, <https://sanctuaries.noaa.gov/science/condition/rating.html> (last visited July 20, 2022).

<sup>41</sup> NOAA Office of National Marine Sanctuaries, *Frequently Asked Questions* (Condition Reports), <https://sanctuaries.noaa.gov/science/condition/faq.html> (last visited July 29, 2022).

<sup>42</sup> *See id.* (“What is the goal of a Condition Report?...condition reports...ultimately serv[] as a tool to determine if sanctuaries are achieving their resource protection and improvement goals.”)

<sup>43</sup> *Guide for Developing National Marine Sanctuary Condition Reports*, *supra* note 4, at 2.

<sup>44</sup> *Id.*



Estuarine Research Reserve (NERR) data sets, and potentially identify long-term collaborations with these bodies. Data used for condition report analyses should also be available to the public.

Third, NOAA should modify the current condition rating system. NOAA rates each condition topic as good, good/fair, fair, fair/poor, poor, or undetermined. The compound terms used in this rating system—“good/fair” and “fair/poor”—are confusing. Likewise, NOAA’s current definition of “fair” is confusing. In colloquial use, “fair” means average or adequate.<sup>45</sup> However, as noted above, for the purpose of sanctuary condition assessment, NOAA assigns “fair” to situations in which “[s]elected drivers are influencing pressures in ways that cause measurable resource impacts.”<sup>46</sup> NOAA should modify its rating system by using terms that more accurately describe the condition of sanctuary resources. These terms should be clear to members of the public, such that a rating matches its commonly understood meaning.

Fourth, each sanctuary condition report should include a section that explicitly links condition report results (i.e., the state of health indicators within the sanctuary) to past management objectives, or identifies the need for new objectives, for use by ONMS staff, the respective Sanctuary Advisory Committee (SAC), and the public. This would provide a transparent record for assessing ONMS actions and alternatives to conservation and management needs.

Finally, as it is difficult to protect and restore sanctuary resources without up-to-date information on their health and condition, condition reports should be produced on a five-year cycle and then management plan revisions should be proposed within a year of the completion of the condition report. Every five years, NOAA is required to review management plans and revise them as necessary to fulfill the Act’s policies. 16 U.S.C. § 1434(e). Preparing condition reports every five years and issuing proposed management plan revisions within a year of the condition report ensures that plan revisions rely on current information and are updated on a regular basis.

**c. NOAA should amend Sanctuaries Act regulations to require management plan revisions that will effectively protect sanctuary resources from the threats identified in the condition reports through new management actions and revisions to sanctuary-specific regulations.**

Recent condition reports show that 37 percent of national marine sanctuary resources are in fair, fair/poor, or poor condition, and 41 percent of resource conditions are worsening over time.<sup>47</sup> Even a “fair” rating means that resources are exhibiting “measurable” impacts from adverse drivers and pressures such as human activities and climate change.<sup>48</sup> The Sanctuaries Act requires NOAA to regularly revise management plans and regulations to protect, restore, and enhance the environments of national marine sanctuaries, 16 U.S.C. § 1434(e); *id.* § 1431(b)(3).

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<sup>45</sup> Merriam Webster definition of “fair,” <https://www.merriam-webster.com/dictionary/fair> (last visited Aug. 10, 2022).

<sup>46</sup> NOAA, *Rating Scheme for System-Wide Monitoring Questions*, <https://sanctuaries.noaa.gov/science/condition/rating.html> (last accessed August 10, 2022).

<sup>47</sup> Mirza et al., *supra* note 3.

<sup>48</sup> NOAA, *Rating Scheme for System-Wide Monitoring Questions*, <https://sanctuaries.noaa.gov/science/condition/rating.html> (emphasis added) (last accessed August 10, 2022).



Despite this mandate, NOAA has failed to create actionable strategies for addressing fair, fair/poor, poor, and declining resource conditions in recent management plan revisions.<sup>49</sup>

The Sanctuaries Act program regulations should require that management plans and sanctuary specific regulations be revised to include management actions (not just studies or assessments) that will effectively protect sanctuary resources from threats identified in the condition reports. Specifically, NOAA should amend the regulations to require management plan revisions that include management actions to stop the degradation of resources as shown by condition reports. Similarly, the regulations should require NOAA to adopt or revise sanctuary specific regulations to place new or more effective controls on activities subject to regulation within the sanctuary in order to address adverse impacts to resource conditions. Where appropriate, NOAA should coordinate with other federal agencies responsible for resource management. *See* 16 U.S.C. § 1431(b)(7). By codifying this requirement in the Sanctuaries Act regulations, NOAA can ensure that the information provided by condition reports is used to “restore and enhance natural habitats, populations, and ecological processes,” as required by the Act. *Id.* § 1431(b)(3).

**d. NOAA should amend Sanctuaries Act regulations to require revision of the sanctuary designation document when necessary to address threats to sanctuary resources.**

When NOAA designates a national marine sanctuary, the agency must specify the types of activities that will be regulated or subject to regulation inside the sanctuary for the purpose of protecting its ecological, historical, and aesthetic characteristics. 16 U.S.C. § 1434(a)(4). After sanctuary designation, NOAA may not amend the list of activities subject to regulation without undertaking the procedures required for sanctuary designation, including providing notice, preparing sanctuary designation documents such as a draft environmental impact statement, conducting a public hearing, and providing opportunity for congressional input. *Id.* § 1434(a). NOAA lists prohibited and otherwise regulated activities in sanctuary-specific regulations, *e.g.*, 15 C.F.R. § 922.142, and lists activities subject to regulation in the sanctuary designation document itself, *e.g.*, 58 Fed. Reg. 53872, 53873 (October 19, 1993).

While NOAA may address many threats to sanctuary resources through management plan revisions and coordination with other federal agencies, some management strategies may require changes to a sanctuary’s list of activities subject to regulation. NOAA should amend the Act’s program regulations to require initiation of procedures to add new activities to the sanctuary’s list of regulated activities, 16 U.S.C. § 1434(a), when condition reports show that sanctuary resources are threatened and cannot be protected without regulating those activities.

By adding this requirement to the Sanctuaries Act regulations, NOAA can ensure that sanctuary resources will be protected and restored—as required by the Act, 16 U.S.C. § 1431(b)(3)—using all available tools under the Act.

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<sup>49</sup> *E.g.*, NOAA Office of National Marine Sanctuaries, *Stellwagen Bank National Marine Sanctuary Draft Management Plan and Environmental Assessment*; *see* discussion *supra* section III(b)(ii).

**e. NOAA should amend Sanctuaries Act regulations to require collaboration with other agencies when factors outside of sanctuaries impact sanctuary resources.**

In some cases, drivers outside of national marine sanctuaries adversely affect sanctuary resource conditions. For example, NOAA’s most recent system-wide condition report stated that urban runoff and point source pollution reduce water quality and place pressure on habitat in nearshore sanctuary areas.<sup>50</sup> However, NOAA is limited in its ability to implement management actions or regulations to directly reduce sanctuary stressors that originate onshore.

When there is no possible management action or regulatory revision that can be taken by NOAA within a sanctuary to mitigate a stressor or improve resource conditions, program regulations should require the agency to reach out and work with agencies that have authority over such activities that are outside the sanctuary and document these efforts in the management plan revision. This requirement is consistent with the Act’s policies, which include “develop[ing] and implement[ing] coordinated plans for the protection and management of [sanctuary] areas with appropriate Federal agencies.” 43 U.S.C. § 1431(b)(7).

**V. Conclusion**

Established to safeguard important American ecological, historic, and aesthetic areas and features in our ocean and Great Lakes waters, the sanctuary system frequently comes short of meeting this mandate. For the reasons and as set forth herein, NOAA should take immediate action to strengthen the Sanctuaries Act program regulations by incorporating details on the agency’s management plan review and revision procedures, improving and formally adopting the condition report preparation process, and creating a trigger for revising management plans and regulated activities when necessary. NOAA must use its full authority under the Act to protect, restore, and enhance national marine sanctuaries to fulfill the purposes of the Act. NOAA must promptly respond to this petition and initiate the petitioned-for rulemaking.

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<sup>50</sup> Gittings et al., *supra* note 3, at 12.

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