UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVATION LAW FOUNDATION, *et al.*,

Plaintiff,

v.

DONALD J. TRUMP, *et al*.,

Defendants.

Civ. No. 1:20-cv-01589-JEB

MEMORANDUM IN SUPPORT OF [PROPOSED] MOTION TO DISMISS

David Frulla
D.C. Bar # 414170

Andrew Minkiewicz
D.C. Bar # 981552

Bezalel A. Stern
D.C. Bar # 1025745

Bret Sparks
D.C. Bar # 1617199

KELLEY DRYE & WARREN LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
Tel.: (202) 342-8400
dfrulla@kelleydrye.com
aminkiewicz@kelleydrye.com
bstern@kelleydrye.com
bsparks@kelleydrye.com

Counsel for Proposed Defendant-Intervenor Jonathan Williams

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Proposed Defendant-Intervenor, Mr. Jonathan Williams, through undersigned counsel, submits this Memorandum in Support of his [Proposed] Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, Federal Rule of Civil Procedure 12(b)(6). In support thereof, Mr. Williams states as follows:

I. Introduction

This is a case about the limits of Executive authority under the Antiquities Act, 54 U.S.C. § 320301, *et seq*. The Antiquities Act allows the president to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). The Antiquities Act thereby "give[s] the Executive substantial, though not unlimited, discretion to designate American lands as national monuments." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 52 (D.D.C. 2018), *aff'd*, 945 F.3d 535 (D.C. Cir. 2019) ("*Mass. Lobstermen*").

On September 15, 2016, relying on the authority provided to him by the Antiquities Act, President Barack Obama issued a Proclamation creating a new National Monument, the Northeast Canyons and Seamounts Marine National Monument ("Northeast Canyons Monument" or "the Monument"). *See* Pres. Proc. No. 9496, 81 Fed. Reg. 65161, 2016 WL 5083930 (the "Obama Proclamation"). The Obama Proclamation designated the Monument as consisting of "approximately 4,913 square miles" within the Atlantic Ocean off the Massachusetts coast. 81 Fed. Reg. 65163. This Court has already determined that President Obama had the authority to designate this monument. *See generally Mass. Lobstermen*. That determination was affirmed by the D.C. Circuit and is not at issue here.

The Antiquities Act expressly allows the Executive to designate monuments. *See* 54 U.S.C. § 320301; *see also Mass. Lobstermen*, 349 F. Supp. 3d at 52 ("The Act works in three parts. First,

it authorizes the President, in his discretion, to declare 'objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.' Second, it empowers her to 'reserve parcels of land as a part of the national monuments.' . . . Third, it allows privately held land to be voluntarily given to the federal government if the land is "necessary for the proper care and management" of the national monument." (Citations omitted)). In so doing, the Antiquities Act specifically provides statutory standards delimiting a president's discretion to reserve lands for monuments. "The limits of parcels shall be confined to the smallest area compatible with the proper care and management of the object to be protected." 54 U.S.C. § 320301(b) (emphasis added). This provision expressly establishes a president's discretion regarding the permissible areal size of a monument reservation. In contrast, the Antiquities Act does not specifically authorize a president to impose conditions of use for a monument; nor does it establish any express standards for a president's exercise of discretion in managing the uses of a designated monument area.[1]

For its part, the Obama Proclamation not only designated a new monument (which the Antiquities Act expressly authorizes), but also established a regime to regulate it (which the Antiquities Act does not so authorize). Specifically, the Obama Proclamation directed the Secretaries of Commerce and the Interior (together, the "Secretaries") to:

> [P]repare a joint management plan, within their respective authorities, for the monument within 3 years of the date of this proclamation, and [to] promulgate as appropriate implementing regulations, within their respective authorities, that address any further specific actions necessary for the proper care and management of the objects and area identified in this proclamation.

81 Fed. Reg. 65161. Those regulations have not yet been adopted, or even begun to make their

[1] The Act provides limited regulatory authority to the Secretaries of the Interior, Army and Agriculture to prescribe "uniform regulations," 54 U.S.C. § 320303, but that authority is not applicable because it does not provide for non-uniform, monument-specific regulations.

way through the Administrative Procedure Act ("APA") process.

The Obama Proclamation further directed the Secretaries to "prohibit, to the extent consistent with international law, any person from conducting or causing to be conducted" a number of activities specified in the Proclamation. *Id.* Those activities included, with certain exceptions, "[f]ishing commercially or possessing commercial fishing gear except when stowed and not available for immediate use during passage without interruption through the monument," and, "[a]fter 7 years, red crab and American lobster commercial fishing." *Id.* These conditions of use are what is at issue in this proceeding, not the monument designation or submerged lands reservation.

On June 5, 2020, President Donald Trump issued a second Proclamation regarding the Northeast Canyons Monument. Pres. Proc. No. 10049, 85 Fed. Reg. 35793, 2020 WL 3074344 (the "Trump Proclamation"). The Trump Proclamation did not change the boundaries of the Northeast Canyons Monument. Both before and subsequent to the Trump Proclamation, the Northeast Canyons Monument consists of "approximately 4,913 square miles." 85 Fed. Reg. 35795. Instead, the Trump Proclamation changes one condition of use that the Obama Proclamation had announced—the Trump Proclamation places commercial fishing on the same footing as recreational fishing, that is, commercial fishing is now permitted subject to otherwise applicable statutory and regulatory regimes.

Plaintiffs argue that the Trump Proclamation is legally deficient. Boiled down, Plaintiffs' Complaint rests on the faulty foundation that the Antiquities Act expressly authorizes the Executive to establish irreversible conditions for a monument's use. However, the Antiquities Act does not authorize conditions of use, let alone make them irreversible. Plaintiffs' Complaint (intentionally or not) erroneously conflates designating with regulating. The Antiquities Act only

expressly authorizes the Executive to do the former. Simply put, that Act did not confer on President Obama the express authority to regulate the Northeast Canyons Monument by proclamation or to delegate the monument's regulation to subordinates.

It is unclear under what authority (if any) the Executive may direct cabinet secretaries to promulgate specific conditions of monument use via proclamation. Any such authority can only be implied from the Act, and a pattern of Executive and Legislative Branch practice. *See Mass. Lobstermen*, 349 F. Supp. 3d at 57. Because the President's exercise of discretion in creating monument conditions of use is not subject to any statutory limit, it is not reviewable.

Likewise, nothing in the Antiquities Act—or in any other law—prevents an Executive from changing monument conditions of use. To the extent presidents have any right at all to issue monument conditions of use by proclamation, they have similar rights to withdraw those issuances. And such revisions are, likewise, not subject to review. None of Plaintiffs' legal claims can surmount these fundamental legal issues.

Plaintiffs also fail to address in their Complaint, whatsoever, the vast amount of existing and forthcoming deep-sea coral protections, including regulations that will prohibit almost all commercial fishing in an area over five times larger than the existing Monument (which incidentally includes 82% of the Monument itself). These protections are either currently implemented or in late-stage rulemaking under the comprehensive ocean conservation and management regime that exists outside of and apart from the Antiquities Act. In exercising his discretion, President Trump specifically relied on those pre-existing conservation regimes and the extensive regulatory schemes they provide (and are authorized to provide).

Because the Executive's regulatory decisions regarding monuments are not reviewable, this Court does not have subject matter jurisdiction to adjudicate Plaintiffs' Complaint. Further,

even if the Court did have such jurisdiction, Plaintiffs have failed to state a claim under which relief can be granted. For these reasons, examined in more detail below, Plaintiffs' Complaint should be dismissed.

II. Proposed Intervenor's Interests

Proposed Defendant-Intervenor Mr. Jonathan Williams is a career commercial fisherman with over 40 years of experience, including 25 years in the red crab fishery. Williams Decl., ¶ 1.[2] He is the owner of the only fishing vessels that are licensed to operate in the red crab fishery, which includes areas within the Northeast Canyons Monument. *Id.* Four of his vessels are homeported in New Bedford, Massachusetts, and the fifth is homeported in Newport News, Virginia. *Id.* Only four of these vessels actively fish in a given year. *Id.*, ¶ 2. Mr. Williams is also the owner of the Benthic Fishing Corporation and the Atlantic Red Crab Company, LLC, both organized in Maine and based in New Bedford. *Id.*, ¶ 1. The Benthic Fishing Corporation was formed in 1996, and all of Mr. Williams' vessels operate under this entity. *Id.* The Atlantic Red Crab Company, LLC, was formed in 2009 to serve as a vertically-integrated processor and distributor of red crabs. *Id.* Between these two entities and his fishing vessels, Mr. Williams currently employs over 150 workers. *Id.* Mr. Williams is also personally active in the fishery, and just recently piloted his Virginia-based vessel on a red crab fishing trip to Norfolk Canyon. *Id.*

The red crab fishery is a model for sustainable and environmentally-sensitive fishing. *Id.*, ¶ 3. It was the first crab fishery in the Western Hemisphere to be certified by the Marine Stewardship Council, and to-date his red crab vessels have not recorded a single interaction with whales, marine mammals, or other endangered species. *Id.*, ¶ 8. The fishery also experiences little

[2] The Williams Declaration is appended to Proposed Defendant-Intervenor's Motion to Intervene, filed simultaneously herewith.

to no bycatch of non-target fish species on a consistent basis. *Id.*, ¶ 9. Mr. Williams has invested over $10 million into the fishery and has funded all of the scientific research efforts over the past fifteen years to study red crab populations, including tagging studies to monitor red crab growth and migration patterns, mortality studies to assess the impacts of catch-and-release on juvenile crabs, and DNA research for medical testing purposes. *Id.*, ¶ 4. He also sponsors Ph.D. candidates and other graduate students to accompany his vessels on fishing trips to conduct research for their dissertations. *Id.* Many of these findings have been published in peer-reviewed science journals that are utilized by the New England Fishery Management Council's ("NEFMC") Scientific and Statistical Committee in making fishery management recommendations. *Id.*

Were Plaintiffs' challenge of the Trump Proclamation successful, Mr. Williams' businesses would suffer significant negative impacts. *See id.*, ¶¶ 13-15. If the Trump Proclamation is overturned and the regulating instructions in the Obama Proclamation are re-implemented (thus closing the Northeast Canyons Monument to commercial fishing and crabbing), Mr. Williams will lose access to a significant portion of his fishing grounds, including an additional 40 miles of fishing grounds east of the Monument due to the added safety risks, lost fishing time, and associated fuel and labor costs from transiting around the Monument. *Id.*, ¶ 15. Closure of the Northeast Canyons Monument would also negatively affect the sustainability of the overall red crab fishery by increasing fishing effort in other areas, which heightens the risk of depleting the resource in these other areas and reducing future quotas. *Id.*, ¶¶ 13-14.

The complete closure of the Monument to commercial fishing, which Plaintiffs hope to obtain in this action, could force Mr. Williams to terminate dozens of employees due to reduced fishing effort. *Id.*, ¶ 14. Mr. Williams thereby has a tangible, economic and personal interest in

defending this lawsuit as an intervenor. As explained herein, this Court should conclude that Mr. Williams' defense is meritorious and dismiss Plaintiffs' Complaint with prejudice.

III. Legal Standards

Federal Rule of Civil Procedure 12(b)(6) provides that an action should be dismissed where a complaint fails "to state a claim upon which relief can be granted." In order to overcome a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). For a plaintiff to survive a Rule 12(b)(6) motion, a complaint must allege facts which "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). In evaluating a plaintiff's facts, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quotation omitted).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed where a court lacks subject matter jurisdiction to adjudicate it. "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Due to the Court's heightened obligation "[u]nder this Rule, Plaintiffs bear the burden of proving that the Court has subject-matter jurisdiction to hear their claims." *Mass. Lobstermen*, 349 F. Supp. 3d at 54 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (emphasis in original). In evaluating a 12(b)(1) motion, "the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for

failure to state a claim." *Hi-Tech Pharm., Inc. v. Hahn*, No. CV 19-1268 (RBW), 2020 WL 3498588, at *3 (D.D.C. June 29, 2020) (quotation omitted).[3]

IV. Argument

A. The Trump Proclamation Rested Squarely Within the President's Discretion

1. The Trump Proclamation alters no designation of monument purposes, nor any reservation of monument lands, but rather amends one specific condition of use

While this case involves a presidential proclamation regarding a monument, the Trump Proclamation does not provide for, nor does it alter, any reservation of monument lands, submerged or otherwise. Nor does it eliminate or alter any objects of monument designation. Rather, it involves a change in one condition of the Northeast Canyons Monument's use. However, the area remains a monument, one that will still be subject to a host of restrictions. Those restrictions include, *inter alia*, prohibitions against:

- "Exploring for, developing, or producing oil and gas or minerals, or undertaking any other energy exploration or development activities within the monument";
- "Using or attempting to use poisons, electrical charges, or explosives in the collection or harvest of a monument resource";
- "Introducing or otherwise releasing an introduced species from within or into the monument";

[3] In largely affirming this Court in *Mass. Lobstermen*, the D.C. Circuit noted that where "plaintiffs fail to make out legally sufficient claims challenging national monument designations, those claims should be dismissed pursuant to Rule 12(b)(6)." 945 F.3d 535, 545 (D.C. Cir. 2019). In this case, unlike in *Mass. Lobstermen*, Plaintiffs' claims are not "challenging national monument designations." Plaintiffs instead have brought claims regarding prospective conditions of use for a national monument. Because, as explained herein, Plaintiffs' claims are not reviewable, Plaintiffs' claims lack subject-matter jurisdiction and are subject to dismissal pursuant to Rule 12(b)(1), as well. *Cf. Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 24 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) ("the court deems it highly logical that presidential decisions, made pursuant to a statute that provides the President with discretion, are also not reviewable.").

- "Drilling into, anchoring, dredging, or otherwise altering the submerged lands"; and
- "[C]onstructing, placing, or abandoning any structure, material, or other matter on the submerged lands."

81 Fed. Reg. 65164-65.

For its part, the Trump Proclamation concludes: "following further consideration of the nature of the objects identified in the Proclamation 9496 and the protection of those objects already provided by relevant law, I find that appropriately managed commercial fishing would not put the objects of scientific and historic interest that the monument protects at risk." 85 Fed. Reg. 35793. The Proclamation provides a detailed rationale for the President's discretionary determination. *See* 85 Fed. Reg. 35794. Nothing in the Antiquities Act or in any other statute restrains the President from utilizing his discretion in this manner.

Notably, the President identified existing laws, highlighting other conservation and management protections by name, that co-exist within the monument and provide protections relating to commercial fishing, including the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* ("MSA"). As explained below, current and impending protections for coral and other sensitive habitat and ecosystem areas within the monument (and beyond) are being established, pursuant to the MSA and other laws. These are "overlapping sources of protection" that the President has authority to administer in a monument. *Mass. Lobstermen*, 349 F. Supp. 3d at 58.

2. The Trump Proclamation specifically considered the overlay of other laws that provide habitat protections within the Northeast Canyons Monument

President Trump specifically recognized the MSA processes and protections in his Proclamation. The Court can, and should, take judicial notice of exactly the protections the

President was referencing at the motion to dismiss stage. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67 (D.D.C. 2014) ("A court may take judicial notice of facts contained in public records of other proceedings, and of historical, political, or statistical facts, and any other facts that are verifiable with certainty. Also, a court generally may take judicial notice of materials published in the Federal Register. Further, judicial notice may be taken of public records and government documents available from reliable sources." (citations omitted)). Notwithstanding, and beginning even prior to, the monument designation, the regional fishery management councils all along the East Coast began rulemaking processes to protect vast and unrivaled amounts of deep-sea coral habitat pursuant to the MSA.

As this Court knows, the MSA created eight regional Fishery Management Councils ("Councils"), charged with creating Fishery Management Plans ("FMP") for the species that exist within their geographic authority. In developing FMPs, the councils are required by the MSA to consider and comply with the requirements of, among others, the National Environmental Policy Act ("NEPA"), the Marine Mammal Protection Act ("MMPA"), the Endangered Species Act ("ESA"), the APA, the Regulatory Flexibility Act ("RFA"), and the Coastal Zone Management Act ("CZMA"). Councils are also required to designate essential fish habitat ("EFH") within their boundaries and take steps to minimize the impacts of fishing on EFH to the extent practicable. Fishery Management Plans and amendments developed under the MSA specifically address these other laws.

For instance, the New England Fishery Management Council ("NEFMC") manages EFH via a separate Habitat Management Plan, which designates EFH for all species that are managed by the NEFMC. As this Court is well aware, in 2004, the NEFMC initiated the Omnibus EFH Amendment 2 ("OHA2") to the Habitat Management Plan. *See Conservation Law Foundation v.*

Ross, 374 F. Supp. 3d 77 (D.D.C. 2019). Crafting OHA2 was an extensive process that involved significant public input to, among other things, update all EFH designations for the NEFMC's 28 managed species. On April 9, 2018, OHA2 went into effect after receiving final approval from the National Marine Fisheries Service ("NMFS"). 83 Fed. Reg. 15240.

In 2007, Congress reauthorized the MSA and provided express, discretionary authority to the Councils to implement and amend FMPs to protect and prevent loss of deep-sea corals from physical damage via fishing gear throughout the full range of the Exclusive Economic Zone ("EEZ"). 16 U.S.C. § 1853(b)(2)(B). This reauthorization further implemented a deep sea coral research and technology program, which requires NMFS and the Councils to research, locate, and monitor deep sea coral habitats, as well as to develop technologies and methods for commercial fishing industry participants to reduce interactions between fishing gear and deep sea corals. 16 U.S.C. § 1884(a).

Under this new authority (and long before the Obama Proclamation), in June 2013, the NEFMC signed a Memorandum of Understanding ("MOU") with the Mid-Atlantic Fishery Management Council ("MAFMC") and the South Atlantic Fishery Management Council ("SAFMC"). The MOU required the Councils "to establish a framework for coordination and cooperation toward the protection of deep sea coral ecosystems and to clarify and explain each Council's role and geographic areas of authority and responsibility with regard to deep sea coral management."[4] These are the same types of corals, and coral ecosystems the Monument designated as its objects.

As part of its obligations under the MOU, the NEFMC developed an Omnibus Deep-Sea Coral Amendment ("NEFMC Coral Amendment") to designate coral management zones and

[4] Available at https://s3.amazonaws.com/nefmc.org/June-2013-Final-DSC-MOU.pdf (last accessed Aug. 31, 2020).

implement significant fishing gear restrictions in these designated areas. The NEFMC Coral Amendment was approved by NMFS late last year. On January 3, 2020, NMFS published a proposed rule for its implementation. 85 Fed. Reg. 285.

The NEFMC Coral Amendment is far, far more expansive than the Monument, and in fact, includes nearly all of the Monument. The NEFMC Coral Amendment will protect deep-water corals that exist across a 25,153 square mile area, including 82% of the Northeast Canyons Monument. *Id*.; *see also* Figure 1. Further, the amendment will prohibit the use of bottom-tending commercial fishing gear within designated deep-sea coral areas, including otter trawls, beam trawls, hydraulic dredges, non-hydraulic dredges, bottom-tending seines, bottom longlines, pots and traps, and sink or anchored gillnets. 85 Fed. Reg. 285. The amendment will, however, exempt the use of red crab pots, as "[t]he small-scale deep-sea red crab fishery has only four active vessels, and the canyons and slope are vital to its operation." *Id.*

The NEFMC Coral Amendment will complement the MAFMC's existing deep sea corals amendment, which went into effect on December 14, 2016, as part of the MAFMC's Mackerel, Squid, and Butterfish FMP. 81 Fed. Reg. 90246. The MAFMC's coral amendment established a broad coral zone that starts at the 450 meter depth contour and extends to the U.S. EEZ. *Id.*; *see* Figure 2. The broad coral zone "is precautionary in nature and is intended to freeze the footprint of fishing to protect corals from future expansion of fishing effort into deeper waters." *Id*. at 90247. The broad coral zone abuts the NEFMC's deep-sea coral protection area at the Council regional boundary. *See* Figure 3. The amendment also designated fifteen discrete coral zones within the broad coral zone that outline deep-sea canyons on the OCS. 81 Fed. Reg. 90247. These areas were identified as locations "with observed coral presence or highly likely coral presence indicated by modeled suitable habitat." *Id.*

Like the NEFMC protection area, the MAFMC's broad coral zone and discrete coral zones prohibit the use of most types of bottom-tending commercial fishing gear, including both mobile and stationary/passive gear types. *Id.* Likewise, it provides an exemption for the red crab fishery indefinitely in the broad zone and for a period of at least two years within the discrete zones (at which time the MAFMC has discretion to review the closed areas' performances subject to these exemptions). *Id.* Taken together, these amendments protect a broad swath of deep-sea corals and coral habitat from the U.S.-Canada maritime border to the North Carolina-South Carolina state line.

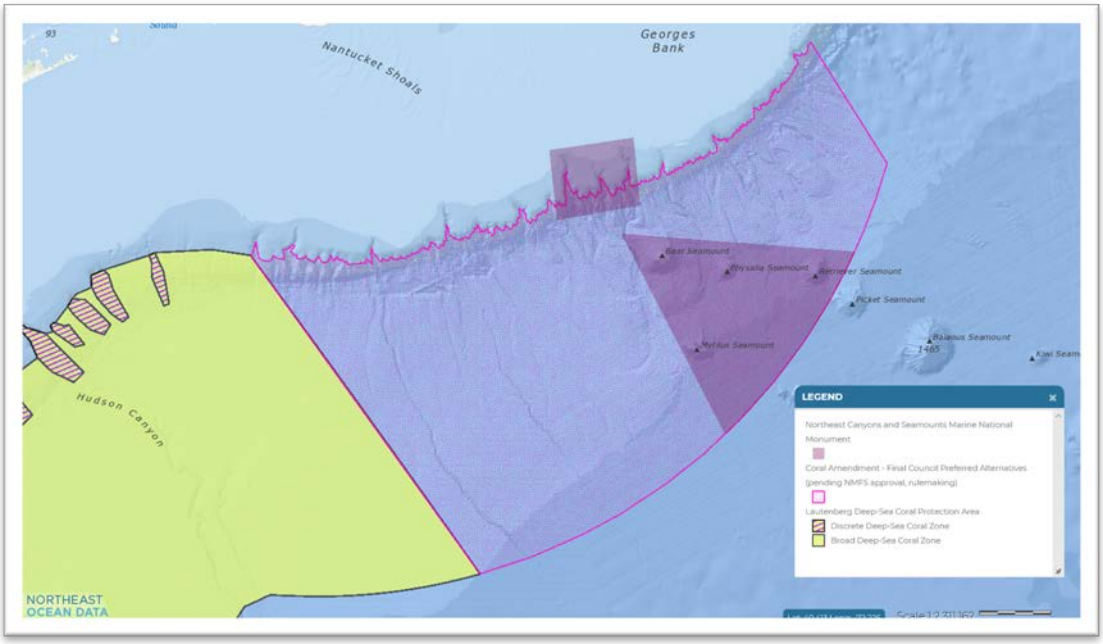

Figure 1: Map of NEFMC Deep-Sea Coral Amendment protected zone with Northeast Canyons Monument overlaid.[5]

[5] Credit: Northeast Ocean Data Portal, http://www.northeastoceandata.org/.

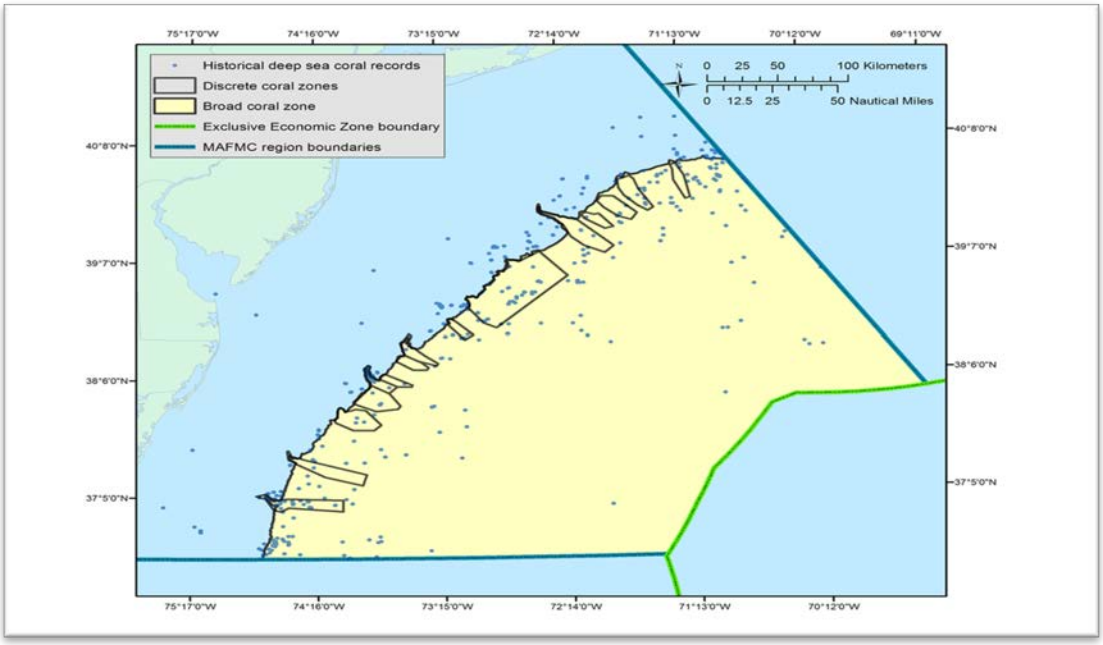

Figure 2: Map of MAFMC Coral Protection Zones.[6]

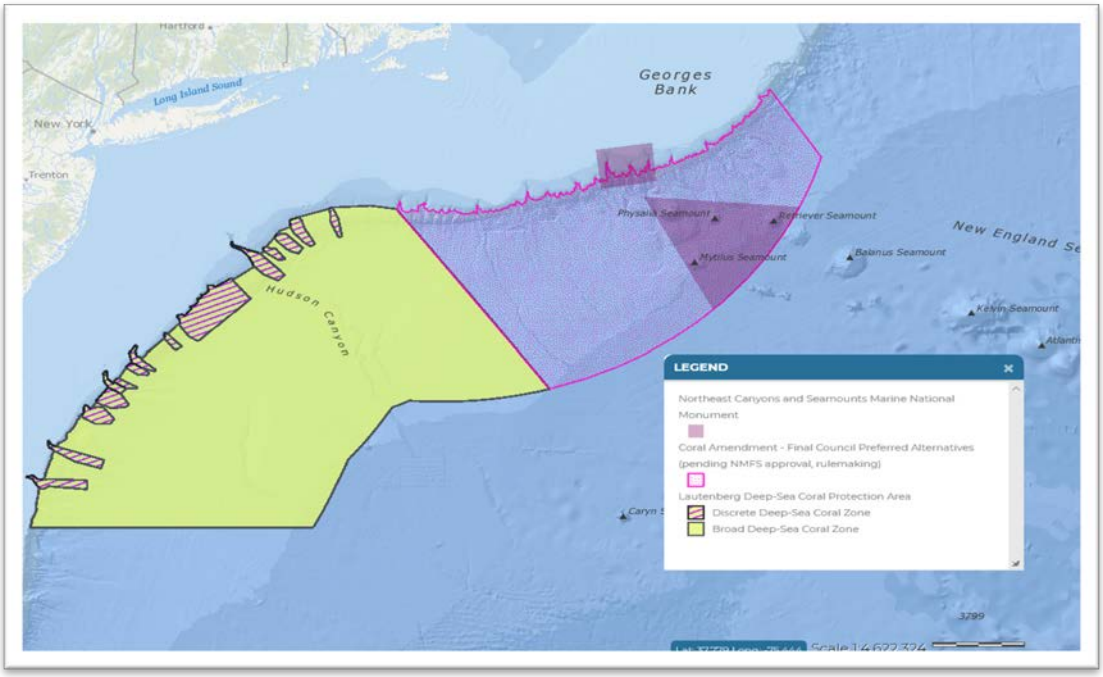

Figure 3: Overview of NEFMC Deep-Sea Coral Amendment protected zone and MAFMC Coral Protection Area with Northeast Canyons Monument overlaid.[7]

[6] Credit: MAFMC website; available at https://www.mafmc.org/actions/msb-am16.

[7] Credit: Northeast Ocean Data Portal, http://www.northeastoceandata.org/.

3. Past proclamations have changed the use and management of National Monuments

Neither extractive uses nor changes of conditions of use in a monument are unprecedented. In fact, past presidents have, as an exercise of their inherent discretion, instructed the Secretary of the Interior (among others) to establish certain continuing uses within monuments. Indeed, presidents have instructed the establishment and management of conditions of use and care of individual monuments since the very first monument designation. They have set these instructions in monument designations; they have delegated the setting of conditions to executive branch subordinates, most often the Interior Department; and especially for offshore monuments, they have delegated the authority to develop and implement management conditions to the Secretary of Commerce, all outside the four corners of the Antiquities Act. *See, e.g.*, 68 Fed. Reg. 16432 (April 4, 2003) (National Park Service interim rule prohibiting extractive uses within the Virgin Islands Coral Reef National Monument subject to several exceptions, including "bait fishing at Hurricane Hole and blue runner (hardnose) line fishing in the areas south of St. John."). But these instructions do not stem from any authority explicitly provided to the Executive under the statutory framework of the Antiquities Act.

Moreover, monument designations have been amended to, for instance, allow for the building of roads and hence the added presence of cars and trucks. *See* Pres. Proc. No. 2295 (August 29, 1938); 53 Stat. 2465 (in which President F.D. Roosevelt amended the White Sands National Monument in New Mexico to exclude sections of the area for road right-of-ways). A terrestrial monument with a road through it is no less a monument, just as a marine monument with regulated commercial fishing in it is no less a monument.

4. Congress has acquiesced to the Presidential imposition of monument conditions of use

Congress has never objected to how a president has chosen to exercise his discretion to instruct for the establishment of management conditions for monument use. Indeed, in the Federal Land Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701, *et seq.*, Congress retracted a wide range of express and implied delegations of authority to the president and federal agencies to reserve Federal lands for a variety of purposes and a variety of temporal durations. Significant for present purposes, Congress did not revoke presidential authority under the Antiquities Act; to the contrary, the FLPMA specifically reserved that authority. *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) ("[B]y specifically exempting the Antiquities Act from the reach of FLPMA in 1976, for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower-level executive officials.").

This Court has previously recognized the development of presidential Antiquities Act authority via presidential action and congressional inaction. Further "[a]ccentuating the persuasiveness of the Executive's longstanding interpretation, Congress re-codified the Antiquities Act with minor changes in 2014 without modifying the Act's reach." *Mass. Lobstermen*, 349 F. Supp. 3d at 57 (citing *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) and *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 513 535 (1982)). Such congressional acquiescence bespeaks acceptance of how the executive has exercised its delegated authority. *Id.*

B. The Trump Proclamation Is Not Judicially Reviewable

The Antiquities Act specifically provides statutory standards delimiting a president's discretion to reserve lands for monuments. In stark contrast, the Antiquities Act does not specifically authorize a president to impose conditions of use for a monument; nor does it establish

any express standards for a president's exercise of discretion in managing the uses of a designated monument area.

Plaintiffs' Complaint improperly attempts to extend the statute's reach. The Complaint asserts that the Antiquities Act allows a president to "impose specific use restrictions that are necessary for the 'proper care and management of the objects to be protected.'" Complaint, ¶ 45 (partially quoting 54 U.S.C. § 320301(b)). In fact, the statute says no such thing. The full quote makes it clear that the only *explicit* management authority the Executive is provided under the Antiquities Act is the authority to "reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b).[8]

When a president's exercise of discretion is subject to no express statutory parameters, such an exercise of discretion is not open to judicial scrutiny. *See, e.g., United States v. George S. Bush & Co.*, 310 U.S. 371, 377 (1940) ("The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by s 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President . . . ."). *See also Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1135-36 (D.C. Cir. 2002).

In this regard, the Supreme Court's opinion in *Dalton v. Specter*, 511 U.S. 462 (1994), is instructive. There, the Court was charged with exploring whether President Bush exceeded his

[8] The Complaint states, as a matter of fact, "When [] use restrictions are imposed in a President's designating proclamation, they are part of the monument reservation and have the force of law." Complaint, ¶ 47. This statement is a legal conclusion, that has never (until now) been tested by the courts. While an Executive's instructions to impose use restrictions may (or may not) "have the force of law," nothing in the Antiquities Act allows them to become "part of the monument reservation."

authority in choosing to close a naval base. The Court found that the President clearly had such authority. In doing so, the *Dalton* Court explained,

> The Third Circuit seemed to believe that the President's authority to close bases depended on the Secretary's and Commission's compliance with statutory procedures. This view of the statute, however, incorrectly conflates the duties of the Secretary and Commission with the authority of the President. The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in § 2903(e) requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does § 2903(e) prohibit the President from approving recommendations that are procedurally flawed. Indeed, nothing in § 2903(e) prevents the President from approving or disapproving the recommendations for whatever reason he sees fit. How the President chooses to exercise the discretion Congress has granted him is not a matter for our review.

511 U.S. at 476 (emphasis added).

For its part, the Antiquities Act does not explicitly allow the president to regulate the monuments she designates according to any statutorily-prescribed standards. In the face of that silence, presidents have instructed Executive Branch subordinates to regulate monuments in the manner in which they see fit.[9] There is no statutory basis preventing a later executive from changing a former president's instructions.

This issue of presidential authority is "justiciable on the face of the proclamation." *Mass. Lobstermen's Ass'n*, 945 F.3d at 540. Because the Antiquities Act provides no standard for review of a president's instructions to establish or revise monument use conditions, as a matter of the separation of powers under authority of *George S. Bush* and *Dalton*, Plaintiffs' Complaint has failed to state a claim upon which relief can be granted under both Federal Rules of Civil Procedure

[9] The alternative suggestion, that Congress's silence has *not* provided the Executive with such authority, would mean that the Obama Proclamation's instructions to the Secretaries to regulate the Northeast Canyons Monument were void and of no effect. *See generally* 81 Fed. Reg. 65161.

12(b)(1) and 12(b)(6).[10] *Id.* at 545 (articulating the appropriate basis for motions to dismiss Antiquities Act claims).

C. Each Count of Plaintiffs' Complaint is Legally Deficient

Plaintiffs' claims are not new. They were alleged in almost the exact same manner, by some of the same Plaintiffs' counsel, in another case brought against another Executive Order more directly related to the text of the Antiquities Act. *Compare* Plaintiff's Amended Complaint in *Hopi Tribe v. Trump*, No. 17-CV-2590 (TSC), Doc. 144 (D.D.C. Nov. 7, 2019), with Plaintiffs' Complaint here. *Hopi Tribe* deals with an Executive Order reducing the areal size of a monument, an issue at the heart of the Antiquities Act.[11] By contrast, the issues in this case do not implicate the express text of the Antiquities Act *at all*. Plaintiffs' virtual copying and pasting of large swaths of the *Hopi Tribe* complaint here simply does not fit the situation where a monument retains the same dimensions.

1. Count I of Plaintiffs' Complaint Fails to State a Claim

Plaintiffs' First Count alleges that the Trump Proclamation was issued "without authority under the Antiquities Act." Complaint, ¶ 175. Plaintiffs claim that "[u]nder the Act, Congress authorized the President to designate national monuments and to reserve lands and waters for the protection of objects of historic or scientific interest, but not to undo such designations or to abolish such reservations, in whole or in part." *Id*. This Count alleges that President Trump's issuance of the Trump Proclamation was "*ultra vires* and unlawful" because the Trump Proclamation undid

[10] Pres. Proc. 10049 does "find that appropriately managed commercial fishing would not put the objects of scientific and historic interest that the monument protects at risk." (For their part, Plaintiffs allege to the contrary. *See* Complaint, Count III.) As explained above, the President applied this parameter for his exercise of authority as a matter of implied discretion and as an explanation of his Proclamation's rationale, but not as a statutory requirement under the Antiquities Act. While the arguments set forth in Section B should resolve the case, in the alternative, Defendant-Intervenor proceeds in Section C to address the Counts of Plaintiffs' Complaint individually.

[11] Proposed Intervenor-Defendant takes no position on the merits of that case.

the Obama Proclamation's Northeast Canyons Monument designation and abolished its reservation. Complaint, ¶ 176.

Even if Plaintiffs' allegations regarding the Antiquities Act were true, Plaintiffs have not stated a claim under the Antiquities Act. The Trump Proclamation did not "undo" the Northeast Canyons Monument designation or "abolish" the reservation, "in whole or in part." *Id.* Before and after the Trump Proclamation, the Northeast Canyons Monument retains the exact same designation of objects and reserves the exact same parcel of submerged land. Plaintiffs' claim can therefore be "judged on the face of the proclamation." *Mass. Lobstermen*, 349 F. Supp. 3d at 54.

All the Trump Proclamation did was amend one condition of use. The Trump Proclamation was clear in this regard, stating that, other than withdrawing those instructions, "this proclamation does not modify the monument in any other respect." 85 Fed. Reg. 35793. Nothing in the Antiquities Act prevents a president from taking such action; indeed, nothing in the statute speaks to this at all. *See Mass. Lobstermen*, 349 F. Supp. 3d at 52 (explaining that the provisions of the Antiquities Act "give the Executive substantial, though not unlimited, discretion to designate American lands as national monuments.").

Plaintiffs' general claims about "abolishing" the monument, lifted directly from the complaint in *Hopi Tribe*,[12] do not amount to "plausible factual allegations identifying an aspect of the designation that exceeds the President's statutory authority." *Mass. Lobstermen's Ass'n*, 945 F.3d at 540 (citing *Mountain States*, 306 F.3d at 1133). Accordingly, Plaintiffs' Complaint—which does not challenge anything about the monument designation or reservation, but instead challenges

[12] *Compare Hopi Tribe v. Trump*, D.D.C. No. 17-CV-2590 (TSC), Doc. 144, at ¶ 72 ("Congress did not authorize the President to abolish national monuments, in whole or in part, once they have been designated. That power belongs to Congress alone.") with Complaint, ¶ 175 ("Under the Act, Congress authorized the President to designate national monuments and to reserve lands and waters for the protection of objects of historic or scientific interest, but not to undo such designations or to abolish such reservations, in whole or in part.").

a changed condition of use that takes place in an extant and unchanged monument—fails to state a claim under the Antiquities Act.

Moreover, there is nothing unique about the condition of use, or its revision, that would warrant any sort of factual inquiry by the Court. The President has discretion under the Antiquities Act to allow for existing (and even new) extractive uses in a monument. Congress specifically contemplated the continuation of valid claims in monument areas. *Cf.* 54 U.S.C. § 320301(c). Indeed, in the very first monument case the Supreme Court heard, *Cameron v. United States*, 252 U.S. 450 (1920), the Court was not asked whether the President could allow for an existing mining claim. That authority was clear. *See id*. at 455. Rather, the question was whether a valid mining claim existed at all. *See id*. at 455-56.[13] Likewise, the High Court in *Cappaert v. United States*, 426 U.S. 128 (1976), considered the extractive use of an ancient natural underground pool in which a rare prehistoric fish species was found, via pumping the aquifer that supplied the pool. The Court affirmed the lower court's injunction allowing the water to be extracted from the monument's pool so long as it did not lower the pool's level by more than three feet. *See id.* at 141. Similarly, in *Tulare County v. Bush*, President Clinton's Proclamation of the Giant Sequoia National Monument confirmed the monument's establishment was "subject to valid existing rights," provided for continuing timber sales under contract, and stated the monument would not affect "existing special use authorizations." 185 F. Supp. 2d 18, 22 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) (citing and quoting 65 Fed. Reg. 24095, 24097-98).

Many monuments whose designations were not involved in litigation likewise allow for pre-existing uses, including extractive uses. The Papahānaumokuākea Marine National Monument (formerly the Northwestern Hawaiian Islands Marine National Monument), created by President

[13] In *Cameron*, the Supreme Court determined a valid claim did not exist.

George W. Bush in 2006, provided for the continued practice of both Native Hawaiian fishing and sustenance fishing, as well as a five-year continuance of commercial bottom-fishing and pelagic fishing. *See* Pres. Proc. No. 8031 (June 15, 2006).

For its part, the Northeast Canyons Monument already allowed multiple extractive and damaging uses prior to the Trump Proclamation's issuance. Recreational fishing, expressly permitted by the Obama Proclamation, represents an extractive use. The Obama Proclamation also expressly permits the "[c]onstruction and maintenance of submarine cables," a practice which involves significant excavation of the seafloor through the use of subsea cable jet plows. 81 Fed. Reg. 65161, 65165. Unlike, for instance, crab pots, jet plows tear up the ocean bottom and any corals in their way.

The Antiquities Act does not bar the President from altering a former President's national monument management plan. Indeed, the regularity of such modifications by succeeding Presidents led the Congressional Research Service to conclude that the authority of "a President [to] modify a previous Presidentially-created monument seems clear." Pamela Baldwin, Cong. Research Serv., RS20647, *Authority of a President to Modify or Eliminate a National Monument*, p. 5 (August 3, 2000).[14] *See also* Pres. Proc. No. 1167 (1911) (in which President William Taft reduced the size of the Petrified Forest National Monument by more than 40%); Pres. Proc. No. 2393 (1940) (in which President Franklin Delano Roosevelt reduced the size of the Grand Canyon National Monument); Pres Proc. No. 2499 (1941) (in which President F.D. Roosevelt reduced the

[14] *Cf.* Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 U.S. Op. Atty. Gen. 185, 188 (1938) ("While the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,' it does not follow from his power so to confine that area that he has the power to abolish a monument entirely."). Defendant-Intervenor does not concede a president does not have authority to revoke a monument designation; however, such authority is not at issue in this case.

size of the Craters of the Moon National Monument); Pres. Proc. No. 3089 (1955) (in which President Dwight D. Eisenhower reduced the size of the Glacier Bay National Monument); Pres. Proc. No. 3539 (1963) (in which President John F. Kennedy reduced the size of the Bandelier National Monument).

The monument modifications discussed above go to the heart of the Antiquities Act's purpose. Each of those prior executive actions changed the size (sometimes substantially) of statutorily-authorized monument parcels. Those types of monument areal modifications are not at issue in this case. Instead, the issue before the Court here involves only the change in an impliedly-authorized condition of use. That change—which does nothing to the monument itself—is certainly consistent with past presidential actions and monuments case law.

2. Count III of Plaintiffs' Complaint Fails to State a Claim

Count III of Plaintiffs' Complaint, like Count I, is premised on a fundamental misreading of the Antiquities Act. In Count III Plaintiffs allege, "President Trump's action is based on considerations outside the Antiquities Act, lacks any adequate legal or factual justification, and is inconsistent with the proper care and management of the objects to be protected in the Monument." Complaint, ¶ 186. These allegations all fail as a facial legal matter.

First, the Court can quickly dispose of Plaintiffs' claim that the President's actions are "based on considerations outside the Antiquities Act." *Id.* This is not an APA case. The Court has no need or authority to look into the reasoning behind President Trump's actions in executing the proclamation at issue. The Supreme Court concluded in 1992 that the executive is not bound by the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."). A president has statutory discretion to proclaim monuments and their conditions of use. Plaintiffs have no

cognizable legal basis to question the President's motivations in exercising that discretion.[15]

Federal courts long ago eschewed examining a president's motives in monument proclamations. With respect to the Jackson Hole National Monument (now National Park), the district court explained:

> [I]ndeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power.

State of Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945). It is by now settled law that, where a statute does not provide a standard of review of a presidential action,

> "[t]he President's findings of fact and the motivations for his action are not subject to review." Although the President must state reasons for his decision, those reasons are not to be reviewed in this court under the "abuse of discretion" standard of 5 U.S.C. § 706(2)(A), nor are the underlying findings of fact to be subjected to a standard such as the "substantial evidence" standard described in 5 U.S.C. § 706(2)(E).

Motion Sys. Corp. v. Bush, 342 F. Supp. 2d 1247 (Ct. Int'l Trade 2004), *aff'd*, 437 F.3d 1356 (Fed. Cir. 2006) (quoting *Florsheim Shoe Co., Div. of Interco v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984)).

Even if the Trump Proclamation were somehow authorized under and governed by the Antiquities Act, the Act provides no statutory standard governing the judicial review of the reasoning behind an executive's monument decision. "Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go." *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d at

[15] In the same vein, Plaintiffs attempts to embarrass President Trump by claiming the President "demonstrated a general lack of awareness about the Monument's designation under the Antiquities Act," Complaint ¶ 120, have no bearing on this case at all. Because the Court may not look behind the Trump Proclamation for unseen motivation, what President Trump was or was not aware of in promulgating the Trump Proclamation is of no import.

1183 (citing *Dalton v. Specter*, 511 U.S. 462 (1994); *Franklin v. Massachusetts*, 505 U.S. 788 (1992)). Thus, the Court should conclude that the motivations behind the Trump Proclamation are not subject to judicial review as a matter of law.

Correspondingly, Count III of Plaintiffs' Complaint, which alleges that "President Trump's action is based on considerations outside the Antiquities Act," Complaint, ¶ 186, is not justiciable. As explained above, any "considerations" behind the Trump Proclamation are beyond the purview of this, or any, Court.

Plaintiffs' related claim that the Trump Proclamation "lacks any adequate legal or factual justification," Complaint ¶ 186, also lacks justiciability, for similar reasons. The D.C. Circuit has already considered and disposed of this issue in a prior Antiquities Act case, *Tulare County v. Bush*. In that case, the first count of the "complaint [wa]s premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation." 306 F.3d 1138, 1141 (D.C. Cir. 2002). The D.C. Circuit flatly rejected that assumption, stating: "No such requirement exists." *Id.* Therefore, the count "fail[ed] as a matter of law." *Id.* The same result, for the same reasons, should hold true here.

Finally, Count III alleges that the Trump Proclamation is "inconsistent with the proper care and management of the objects to be protected in the Monument." Complaint, ¶ 186.

As explained above, there is no decisional standard in the Antiquities Act to review a president's establishment or modification of a condition of use in a designated monument; the "proper care and management" standard applies by law to areal reservations of land. Therefore, the Executive has complete discretion to create or modify such conditions. That discretion is unreviewable. *See also Dalton v. Specter*, 511 U.S. at 476 ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."); *United States v. George*

S. Bush & Co., 310 U.S. at 377 ("Whatever may be the scope of appellate jurisdiction conferred by s 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President.").

This Court should, moreover, be "necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented." *Mountain States*, 306 F.3d at 1137. In *Mountain States*, the D.C. Circuit found that "[e]ach proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation that comport with the Act's policies and requirements." *Id*. In the case at bar, President Trump has, as a rationale, explained how other sources of authority and regulatory regimes, most notably the MSA, provide adequate protections for corals and other ecosystems in the Northeast Canyons Monument.[16] While Plaintiffs claim in expansive terms that fishing is destructive, they never address the regulatory protections derived from these overlapping sources of authority. As a factual matter, the Trump Proclamation's factual rationale and the Plaintiffs' factual claims are ships passing in the night. Under Fed. R. Civ. P. 8(a) and supporting caselaw, Plaintiffs "would have to allege facts to support the claim that the President acted beyond his authority." *Mountain States*, 306 F.3d at 1137.

Plaintiffs cannot adequately plead that the Trump Proclamation takes away substantial protections without engaging with the protections the Trump Proclamation is actually relying upon. Even if the Court were to find that it has jurisdiction to review the Trump Proclamation, the text of the Proclamation provides a more than adequate basis for the Executive's decision. Because Plaintiffs' claims do not address the Trump Proclamation's underlying rationale, as a pleading

[16] Proposed Defendant-Intervenor provided further detail regarding the MSA-based coral and canyon ecosystem protection measures, not to provoke a factual issue at the Rule 12(b)(6) stage, but to identify for the Court more specifically the protections the Trump Proclamation invoked and relied upon.

matter, "the inadequacy of . . . [their] assertions thus precludes" them from seeking a "factual inquiry to ensure the President has complied with the statutory standard." *Id*.

Plaintiffs begrudgingly acknowledge the existence of the MSA, but argue that those protections are irrelevant, because "the Magnuson Stevens Act is not primarily a preservation statute. Its goal is not to protect ocean biodiversity, ecosystem health or objects of historic or scientific interest, but to promote sustainable fisheries." Complaint, ¶ 70. This allegation is a legal conclusion couched as a factual allegation, and a court is not bound to accept it as true, even at the Motion to Dismiss stage. *See, e.g.*, *Tulare County*, 306 F.3d at 1142. And, finally, the MSA's EFH and deep sea coral protections discussed, *supra*, at 10-11, are, in fact, designed to protect ocean biodiversity and ecosystem health. Especially the deep-sea coral protections have no underlying fishery management-related goal.

Plaintiffs' argument fails as a legal matter. As the D.C. Circuit has held, the Antiquities Act need not provide the only source of protection for a monument's objects. Other laws can "protect scenic beauty, natural wonders, or wilderness values." *Mountain States*, 306 F.3d at 1138. The Trump Proclamation consistently invokes and brings into service a wide range of ocean conservation and management laws (MSA, ESA, MMPA, and others) to protect the Northeast Canyons Monument. *See* 85 Fed. Reg. 35793. This, President Trump is permitted to do.

Indeed, as this Court has previously acknowledged, "[t]he Antiquities Act provides presidents with a blunt tool aimed at preserving objects of scientific or historic value," while other statutory provisions (in that case, the Sanctuaries Act) "gives the President an important, but more targeted, implement to achieve an overlapping, but not identical, set of goals." *Mass. Lobstermen*, 349 F. Supp. 3d at 59. Here, the Antiquities Act identifies the objects, namely, "[t]he canyon and seamount area, which will constitute the [Northeast Canyons] monument as set forth in this

proclamation." Obama Proclamation, 81 Fed. Reg. 65161. President Trump has determined, in his discretion, that the MSA (among other statutes and regulations) provides sufficient protections regarding the limited amount of commercial fishing conducted, and permitted to be conducted, within the Northeast Canyons Monument.

As the D.C. Circuit has explained, "when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996). The Antiquities Act imposes no limitations on the executive in making her decision on how to instruct her subordinates in their management. Plaintiffs have no authority to second-guess this Executive's decisions. The Trump Proclamation found "that appropriately managed commercial fishing would not put the objects of scientific and historic interest that the monument protects at risk." Trump Proclamation, 85 Fed. Reg. 35793. That written finding should be the beginning and the end of the matter, as it was in *Mountain States*, 306 F.3d at 1137, *Tulare County*, 306 F.3d at 1141, and *Mass. Lobstermen*, 945 F.3d at 544.

3. The Property Clause Is Not At Issue Here, As the President Exercised His Delegated Authority Under the Antiquities Act

Plaintiffs in Count II allege a violation of the separation of powers doctrine based on the premise that the Trump Proclamation exceeds the President's delegated authority under the U.S. Constitution's Property Clause, U.S. Const., Art. IV, § 3, Cl. 2. The Property Clause provides, in pertinent part: "The Congress shall have Power to dispose and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Courts have long recognized Congress has authority to delegate its powers under the Property Clause to the Executive Branch. *See*, *e.g.*, *Marouf v. Azar*, 391 F. Supp. 3d 23, 30 (D.D.C. 2019) ("[T]he law enabling the Executive Branch to make the challenged property transfer was passed pursuant

to Congress's power under the Property Clause.") (Citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc*., 454 U.S. 464, 511 (1982)).

In short, Plaintiffs contend that "Congress has not delegated authority to the President to revoke protections for the proper care and management of monument objects or to abolish a monument reservation, in whole or in part." Complaint, ¶ 180. First, as explained with respect to Count One, the Trump Proclamation does not abolish a monument reservation. The monument's objects and area have not changed in the slightest. Second, and fundamentally, Congress has not delegated authority to the President to impose protections for the proper care and management of monument objects, beyond the authority Congress conferred in the Antiquities Act to reserve parcels of land themselves. Congress has not conferred authority on the President to establish these protections, so a president's rescinding any one such protection does not implicate any congressional delegation of authority. As explained above, any authority that exists to establish conditions of monument use is based on implied authority. *See Mass. Lobstermen*, 349 F. Supp. 3d at 57. In fact, presidents have changed monuments in manifold ways since the Antiquities Act was enacted, yet Congress chose not limit such actions when it passed the FLPMA in 1976. *See supra* at p. 16.

Further, to the extent that Plaintiffs might be correct that the Antiquities Act requires a president to consider the "proper care and management" of a monument's objects in altering its conditions of use, the D.C. Circuit's decision in *Mountain States* dismissing the plaintiff's constitutional Property Clause claim becomes controlling:

> Mountain States alleges in its complaint merely that the six Proclamations at issue exceed the President's authority under The Property Clause and are therefore "unconstitutional and ultra vires." No constitutional Property Clause claim is before us, as the President exercised his delegated authority under the Antiquities Act, and that statute includes intelligible principles to guide the President's action.

Mountain States, 306 F.3d at 1136-37 (emphasis added).

For their part, Plaintiffs allege (and thus in this instance concede), that as a part of a monument reservation, the President "may impose specific use restrictions that are necessary for the 'proper care and management of the objects to be protected.'" Complaint, ¶ 45 (quoting 54 U.S.C. §320301(b)). By alleging the existence of an "intelligible" statutory standard in the manner that they do, the Plaintiffs' arguments relating to the Property Clause collapse as a legal matter under Fed. R. Civ. P. 12(b)(6), for the reasons the plaintiffs' arguments did in *Mountain States*.

4. Plaintiffs' Administrative Procedure Act Count Fails to State a Claim

Plaintiffs' Fourth Count—a violation of the APA—fundamentally fails the Motion to Dismiss test, too. Plaintiffs' claim that "the Agency Defendants have decided no longer to enforce the 2016 Proclamation's prohibition on commercial fishing within the Monument," Complaint ¶ 190, does not implicate the APA as a legal matter.

APA standards apply when an agency rescinds a rule the agency developed through rulemaking. 5 U.S.C. § 551(5) ("'rule making' means agency process for formulating, amending, or repealing a rule."). However, the Secretaries undertook no rulemaking to implement the Northeast Canyons Monument commercial fishing prohibition. Rather, the Secretary of Commerce's designees at the National Oceanic and Atmospheric Administration's ("NOAA") Greater Atlantic Regional Office merely announced the prohibition via a NOAA Fisheries Greater Atlantic Regional Bulletin.[17]

The "APA [] mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). The restrictions NOAA issued pursuant to the Obama Proclamation (such as they

[17] *See* web.archive.org/20161210080259/https://www.greateratlantic.fisheries.noaa.gov/nr/2016/November/monumentphl.html (last accessed on Aug. 31, 2020).

are) did not go through the APA notice and comment period. They were simply posted to NOAA's website. The revisions to those rules issued pursuant to the Trump Proclamation may therefore be accomplished in a similar manner.

Further, and as also explained above, any other APA-based obligation would not be justiciable as an agency's authority to issue regulations under the Antiquities Act is based on delegated authority directly from the President. Any authority of the Secretary of Commerce or the Interior in this instance is fully derivative from underlying presidential Antiquities Act authority. As noted *supra*, p. 23, the Supreme Court has definitively held that there is no APA review of a president's exercise of discretion. *Franklin v. Massachusetts*, 505 U.S. at 800–01.

Actions performed at the Executive's behest are not reviewable under the APA. *See Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 28–29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) ("the Forest Service is merely carrying out directives of the President, and the APA does not apply to presidential action. Any argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action. The court refuses to give the term 'presidential action' such a confusing and illogical interpretation.") (citing *Franklin v. Massachusetts*, 505 U.S. at 800-01). See also *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 801 F. Supp. 2d 383, 402 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012) ("[W]here an agency acts on behalf of the President, those acts remain those of the President for APA purposes; they do not become reviewable as actions of an 'agency.'"). In this case, of course, any actions the Secretaries will take in accordance with the Trump Proclamation (as was the case with the Obama Proclamation, for that matter) will be performed "on behalf of the President." *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 402.

Plaintiffs' APA claim therefore fails as both a legal and a practical matter, and must be dismissed.

V. Conclusion

The Court should grant the Motion, dismissing Plaintiffs' Complaint with prejudice.

DATED: August 31, 2020

Respectfully submitted,

/s/ David Frulla
David Frulla (D.C. Bar # 414170)
Andrew Minkiewicz (D.C. Bar # 981552)
Bezalel A. Stern (D.C. Bar # 1025745)
Bret Sparks (D.C. Bar # 1617199)
KELLEY DRYE & WARREN LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
Tel.: (202) 342-8400
dfrulla@kelleydrye.com
aminkiewicz@kelleydrye.com
bstern@kelleydrye.com
bsparks@kelleydrye.com

Counsel for Proposed Defendant-Intervenor Jonathan Williams