

**AMERICAN OCEANS CAMPAIGN • EARTHJUSTICE • ENVIRONMENTAL
DEFENSE • HAWAII FISHING AND BOATING ASSOCIATION • KAHEA:
THE HAWAIIAN ENVIRONMENTAL ALLIANCE • MARINE
CONSERVATION BIOLOGY INSTITUTE • NATIONAL ENVIRONMENTAL
TRUST • NATURAL RESOURCES DEFENSE COUNCIL • OCEANA • SIERRA
CLUB • SURFRIDER FOUNDATION • THE OCEAN CONSERVANCY**

November 21, 2001

Honorable Donald L. Evans, Secretary
United States Department of Commerce
14th Street and Constitution Ave., NW, Room 5851
Washington, D.C. 20230

Dear Secretary Evans:

We write on behalf of the undersigned local and national organizations, representing over 1.5 million citizens, to express our significant concerns about your Department's inordinate delay in implementing Congress's mandate in the National Marine Sanctuaries Amendments Act of 2000, Pub. L. 106-513 ("NMSA Amendments Act"). That statute, enacted over a year ago, requires your agency to manage the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve consistently with the conservation purposes and policies of the National Marine Sanctuaries Act pending the Reserve's designation as a national marine sanctuary. In addition, Executive Order 13178, as amended by Executive Order 13196, directs your agency to manage the Reserve following specific conservation mandates.

To date, your agency has not fulfilled the requirements of either the statute or the Executive Orders. We respectfully reiterate our request of July 13, 2001, that you release the Draft Reserve Operations Plan for public comment immediately, as a first step towards ensuring that your agency fulfills its obligations under existing law. In addition, we request that the Reserve Operations Plan be adopted and implemented for a sufficient time to evaluate its effectiveness prior to the initiation of the sanctuary designation process.

As you are aware, in the NMSA Amendments Act, Congress authorized the President to designate any Northwestern Hawaiian Islands coral reef or coral reef ecosystem as a reserve to be managed by the Secretary of Commerce. Pub. L. 106-513, § 6(g)(1). After an extensive public review process that included 12 open hearings, over 9,000 written comments, and overwhelming local and national support, President Clinton designated certain waters and submerged lands around the Northwestern Hawaiian Islands as a coral reef reserve. Exec. Order No. 13178, 65 Fed. Reg. 76,903 (Dec. 4, 2000).

The NMSA Amendments Act further requires, upon Presidential designation of the Reserve, that the Secretary of Commerce *shall* take action (1) to initiate designation

of the Reserve as a national marine sanctuary; (2) to establish a Reserve Advisory Council; and (3) “until the reserve is designated as a National Marine Sanctuary, manage the reserve in a manner consistent with the purposes and policies of that Act.” Pub. L. 106-513, § 6(g)(2). The purposes and policies of the National Marine Sanctuaries Act (“NMSA”) are to protect and conserve marine environments of special national significance. *See* 16 U.S.C. § 1431(b). Further, the NMSA specifically states that the primary objective of national marine sanctuaries is resource protection and that other public and private uses may be permitted only to the extent they are compatible with this primary objective and are not prohibited under other authorities. 16 U.S.C. § 1431(b)(6).

In Executive Order 13178, the President provided specific management principles for your agency to manage the Reserve, including: the principal purpose of the Reserve is the long-term conservation and protection of the coral reef ecosystem and related marine resources; the Reserve shall be managed using available science and applying a precautionary approach favoring resource protection; cultural and religious uses compatible with conservation and resource protection should be allowed; and the Reserve should be managed to prevent degradation, to promote scientific research and public understanding, and to promote coordination among federal and state agencies. E.O. 13178, § 4. The Executive Order further required that your Department develop a Reserve Operations Plan that includes specific conservation measures (such as capping all existing commercial and recreational levels of fishing effort and take and prohibiting destructive mining or polluting activities) and reserve preservation areas (restricting certain fishing activities in designated areas). *Id.* at §§ 7-8. Following further public comment, as provided by the NMSA Amendments Act, the President modified and made permanent the areas closed to fishing in the reserve. Exec. Order No. 13196, 66 Fed. Reg. 7395 (Jan. 23, 2001); Pub. L. 106-513, § 6(g)(3).

Thus, both the statute and the Executive Orders require the Department of Commerce to manage the Reserve with conservation as the primary objective. Because Executive Orders that are issued pursuant to express Congressional authority have the force and effect of law,¹ the Department also must manage the Reserve under a Reserve Operations Plan that follows the conservation measures and prohibitions set forth in the Executive Orders. Congress expressly authorized the President to designate the Reserve, as well as to close areas around the Northwestern Hawaiian Islands, *see* Pub. L. 105-513, §§ 6(g)(1), (3); therefore, Executive Orders 13178 and 13196 impose legal obligations that your agency may not ignore.²

¹ *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J. concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. . . . [Such an executive action] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (same); *Ass’n for Women in Science v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977) (Presidential action with distinct statutory foundation is to be accorded the force and effect of a statute).

² The Executive Orders are not preempted by other statutes such as the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). The Office of Legal Counsel of the U.S. Department of Justice has opined that the MSFCMA does not override other management authorities; in fact, fishery

In addition, when your agency begins the sanctuary designation process, the Executive Orders' conservation mandates must be incorporated into proposed sanctuary management plans and regulations. In particular, any fishing regulations that the regional fishery management council proposes must be "consistent and compatible with the goals and objectives of the proposed designation," or the Secretary must reject them. 16 U.S.C. § 1434(a)(5). As noted above, the Executive Orders clearly set forth the goals and objectives of the Northwestern Hawaiian Islands coral reef ecosystem sanctuary designation. Moreover, under the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the Secretary may not approve any proposed fishery management plan, amendment or proposed regulations that are inconsistent with the National Standards, the other provisions of the MSFCMA, and any other applicable law. 16 U.S.C. §§ 1854(a)(1)(A), (3), (b)(1). Executive Orders 13178 and 13196, issued pursuant to express Congressional authorization, are such other applicable law.

Executive Order 13178 requires that you provide a progress report on the implementation of the Order to the Chair of the Council on Environmental Quality within one year, or by December 7, 2001. E.O. 13178, § 5(g). In addition, the NMSA Amendments Act required a report describing implementation of the coral reef ecosystem reserve by May 2001 to certain Senate and House committees. Pub. L. 106-513, § 6(g)(6). Please provide a copy of both reports to the undersigned groups at the addresses provided below.

We also look forward to the imminent publication of the Draft Reserve Operations Plan and to its implementation for a sufficient period to evaluate its effectiveness prior to initiation of a sanctuary designation process. If the draft will be delayed significantly, or if the sanctuary designation process is to begin prior to an evaluation of the effectiveness of the Reserve Operations Plan, we respectfully request a written response with an explanation. Please direct your response to the first two groups listed below, KAHEA and the Hawaii office of Environmental Defense.

Sincerely,

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Craig O'Connor, Acting General Counsel, NOAA
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James Connaughton, Chair, White House Council on Environmental Quality