



February 21, 2012

The Honorable Ken Salazar, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable John Bryson, Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Petition for Rulemaking Prohibiting Commercial Fishing in the Pacific Remote Islands, Rose Atoll, and Marianas Trench Marine National Monuments

Dear Secretaries Salazar and Bryson:

The Marine Conservation Institute hereby petitions the Department of the Interior (“DOI”), through the U.S. Fish and Wildlife Service (“FWS”), and the Department of Commerce (“Commerce”), through the National Oceanic and Atmospheric Administration (“NOAA”), under the Administrative Procedure Act (“APA”), and DOI’s implementing regulations at 43 C.F.R. Pt. 14, for a rulemaking prohibiting commercial fishing in the Pacific Remote Islands Marine National Monument, Rose Atoll Marine National Monument, and the Marianas Trench Marine National Monument (collectively, the “Pacific Monuments”). FWS and NOAA should jointly issue an interim final rule that prohibits commercial fishing in the Pacific Monuments, pursuant to the unambiguous mandate of the January 2009 Presidential Proclamations establishing the Pacific Monuments.

Petitioner, Marine Conservation Institute, actively supported the designation of the Pacific Remote Islands National Monument (the “PRIM”) and has remained an advocate for conservation of natural resources within the Pacific Monuments. We appreciate the opportunity to participate in the development of management plans that will permanently protect, restore, and



maintain these treasured natural areas, as required by the Presidential Proclamations. Indeed, we recognize that FWS and NOAA, in coordination with the Western Pacific Fishery Management Council (“WESPAC”), have already undertaken to prepare a draft monument management plan (“MMP”) for each of the Pacific Monuments. We look forward to commenting on the draft plans when they become available. Even under the most expeditious timetable, however, the MMPs will take significant time to develop and promulgate. ***Therefore, we hereby petition, and urge, FWS and NOAA to issue interim final regulations, separate and apart from the Monument MMPs, that acknowledge the prohibition of commercial fishing in the Presidential Proclamations, ban such prohibited commercial fishing within the Pacific Monuments, and establish a penalty schedule to deter and prosecute violators.***

Unfortunately, today—over three years after the Monuments’ designation—unlawful commercial fishing continues to occur within the Pacific Monuments. Moreover, the U.S. Coast Guard has informed Marine Conservation Institute and others of its belief that enforcement of the Proclamations’ bans on commercial fishing should not proceed absent regulations establishing a penalty schedule to deter and prosecute violators. Unlawful fishing within the Pacific Monuments threatens their ecological integrity, violates the Proclamations, and necessitates swift action. Enforcement of the prohibition against commercial fishing is consistent with the clear language of the Proclamations and is in the public interest. Indeed, the Agencies acknowledge that commercial fishing is prohibited within these areas, but have not promulgated regulations to that effect. We urge FWS and NOAA to fulfill their mandate—now three years old—to ban commercial fishing, and to grant this petition for rulemaking promptly but not later than 60 days from submission.

FWS and NOAA Should Grant This Petition and Issue an Interim Final Rule Prohibiting Commercial Fishing in the Pacific Monuments

I. Background

On January 6, 2009, President George W. Bush proclaimed the PRIM, Rose Atoll Marine National Monument, and Marianas Trench Marine National Monument to be Marine National Monuments with Presidential Proclamations 8335, 8336 and 8337 (collectively, “the

Proclamations”).¹ This designation of the three Pacific Monuments extended protection to nearly 200,000 square miles of unique natural resources and was the largest act of marine conservation in history.² The President’s designation of the Pacific Monuments recognized their ecological, scientific and cultural importance, biological diversity and other unique characteristics, and the need to protect them.

Marine Conservation Institute actively supported the designation and protection of the PRIM and is committed to supporting the best possible management plan to protect the PRIM and other Pacific Monuments. To that end, Marine Conservation Institute has engaged in an ongoing dialogue with FWS and NOAA to ensure comprehensive management of these monuments. It is worth noting that in our comments on the agencies’ notices of intent (“NOI”) to prepare MMPs for both the PRIM and the Marianas Trench, Marine Conservation Institute highlighted the need to address illegal fishing within the Monuments and requested that FWS and NOAA promulgate interim emergency regulations to enforce the Proclamations’ ban on commercial fishing within the Monuments.³ Those comments and other submissions are attached hereto as Attachments A-D. Regrettably, FWS and NOAA have not yet adopted regulations to enforce the ban on commercial fishing and, instead, have only just published a notice of their intent to jointly prepare an MMP.

¹ 74 Fed. Reg. 1,557, 1,565 and 1,577 (Jan. 6, 2009).

² NMFS Website, *Marine National Monument Program FAQs*, at www.fpir.noaa.gov/MNM/mnm_faq.html (last visited Jan. 31, 2012).

³ Letter from W. Chandler, VP Government Affairs, Marine Conservation Institute, to S. White, Project Leader, Pacific Reefs National Wildlife Refuge Complex, re PRIM, at 3 (April 29, 2011) (attached hereto as Attachment A); Letter from W. Chandler, VP Government Affairs Marine Conservation Institute, to H. Hirsh, Natural Resource Management Specialist, NOAA NMFS, re Marianas Trench, at 3 (May 5, 2011) (attached hereto as Attachment B). Other MCI submissions include: Letter from W. Chandler, VP Government Affairs Marine Conservation Institute, and A. Leland, National Policy Director Environmental Defense Fund, to Dr. J. Lubchenco, NOAA Administrator and Undersecretary of Commerce (Jan. 28, 2010) (attached hereto as Attachment C); and Letter from W. Chandler, VP Government Affairs Marine Conservation Institute, to D. Ashe, Director FWS (July 29, 2011) (attached hereto as Attachment D).

II. FWS and NOAA Have More Than Sufficient Authority to Grant This Petition

The APA authorizes petitions from interested citizens which propose new regulations, deregulation or modifications to existing regulations that are in the public interest.⁴ DOI regulations implementing the APA also provide for any person to petition DOI “for the issuance, amendment, or repeal of a rule.”⁵ The issuance of final regulations requested in this Petition is decidedly within the public interest—as the interim final rules requested herein merely recognize the prohibition of commercial fishing mandated by the Proclamations—and consistent with the authority provided by the APA. Moreover, FWS and NOAA have authority to grant this Petition pursuant to the Proclamations themselves, as well as the authorities cited therein.

Specifically, the Proclamations invoke the authority of the Antiquities Act of 1906,⁶ which authorizes the President of the United States to designate lands and waters of the United States as National Monuments. Exercising this authority, President Bush established the Pacific Monuments, prohibited commercial fishing, and delegated management authority to the Departments of the Interior and Commerce. Subsequently, FWS and NOAA have affirmed their management authority for the Monuments.

For the PRIM, DOI, through FWS, has responsibility for management of the Monument (including out to 12 nautical miles (“nmi”) from the mean low water lines of Baker, Howland, and Jarvis Islands, Johnston, Palmyra, and Wake Atolls, and Kingman Reef) and the National Wildlife Refuges contained therein, pursuant to the Proclamation, the National Wildlife Refuge System Administration Act, as amended (16 U.S.C. § 668dd-668ee) (“National Wildlife Refuge System Act”), and other applicable legal authorities. Commerce, through NOAA, has primary management responsibility seaward of 12 to 50 nmi with respect to fishery-related activities pursuant to the Proclamation, the Magnuson-Stevens Fishery Conservation and

⁴ The APA provides that: “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). DOI has regulations implementing this statutory mandate, which require DOI (or in this case, FWS) to promptly consider petitions that are submitted. *See* 43 C.F.R. § 14.3 (“The petition will be given prompt consideration and the petitioner will be notified promptly of action taken.”). To our knowledge NOAA does not have specific regulations or procedures governing petitions for rulemaking. If NOAA chooses to deny this petition, however, it must do so promptly and provide a “statement of the grounds for denial.” *WHHT v. FCC*, 656 F.2d 807, 813 n.10 (D.C. Cir. 1981).

⁵ 43 C.F.R. § 14.2 (citing 5 U.S.C. § 553(e)).

⁶ 16 U.S.C. § 431.

Management Act (“MSA”), and other applicable legal authorities.⁷

For the Rose Atoll Marine National Monument, management responsibility was assigned to the Secretary of the Interior, in consultation with the Secretary of Commerce. NOAA was assigned primary management responsibility for fishery-related activities in the Monument’s marine areas located seaward of the mean low water line of Rose Atoll, pursuant to the MSA and other applicable authority.⁸

Finally, for the Marianas Trench Marine National Monument, the Secretary of the Interior, in consultation with the Secretary of Commerce, has responsibility for management of the Monument; except that the Secretary of Commerce, in consultation with the Secretary of the Interior, has primary responsibility for management with respect to fishery-related activities regulated pursuant to the MSA, the Proclamation, and other applicable legal authorities.⁹ While Marine Conservation Institute implores FWS and NOAA to expedite the development and release of the MMPs as described above (and encourages WESPAC to develop consistent fishery management plan amendments and related regulations), the development of the management plans is a secondary directive of the Proclamations. The primary, and most immediate, directive to FWS and NOAA in the Proclamations is the prohibition of commercial fishing within the Pacific Monuments. Pursuant to the unambiguous language of the Proclamations, as well as more general authority developed under the Antiquities Act, the National Wildlife Refuge System Act, MSA and other applicable laws, FWS and NOAA have sufficient authority to immediately carry out this non-discretionary mandate of the Proclamations.

A. The Proclamations Unambiguously Prohibit Commercial Fishing

Most importantly, the Proclamations explicitly and unambiguously **require** the Secretaries of Commerce and the Interior to **prohibit commercial fishing** within the Pacific Monuments. The language of the respective Proclamations is as follows:

“The Secretaries of Commerce and the Interior shall not allow or permit any appropriate, injury, destruction, or removal of any feature of this monument except as provided for by this proclamation and **shall prohibit commercial fishing** within boundaries of the monument.”

⁷ 76 Fed. Reg. 18,775, 18,775 (Apr. 5, 2011).

⁸ 74 Fed. Reg. 57,701, 57,701 (Nov. 9, 2009).

⁹ 76 Fed. Reg. 18,773, 18,773 (Apr. 5, 2011).



(PRIM Proclamation 8336).¹⁰

“The Secretaries *shall prohibit commercial fishing* within the monument.”
(Rose Atoll Proclamation 8337).¹¹

“Within the Islands Unit of the monument, the Secretary of Commerce *shall prohibit commercial fishing.*”
(Marianas Trench Proclamation 8335).¹²

The President’s directives could not be more clear. Moreover, the President acted well within his authority under the Antiquities Act—to protect the resources within the designated Monuments—in directing that commercial fishing be prohibited within them.¹³ The Secretaries of the Interior and Commerce, through FWS and NOAA respectively, must simply carry out these directives. And since “commercial fishing” is already defined by the MSA—as described below—the MMPs that FWS and NOAA are developing, and the fishery management plan amendments and related regulations that WESPAC is developing, are not necessary to interpret the Proclamations’ ban on “commercial fishing.”

Additionally, Marine Conservation Institute asserts that pursuant to the clear directives of the Proclamations, commercial fishing within the Pacific Monuments is *already* prohibited. FWS, NOAA, and even WESPAC, support this position. Indeed, shortly after the Proclamations were issued, William L. Robinson, NOAA Regional Administrator, sent a letter to the Chair of WESPAC, Mr. Sean Martin, informing him:

“[T]he commercial fishing prohibitions and other terms set out in the Presidential Proclamations become immediately effective upon issuance of the Proclamations on January 6th [2009]. Accordingly, all commercial fishing within the waters of the three Marine National Monuments (except in the Trench and Volcanic Units of the Marianas Trench Monument) is now prohibited.”

See Letter from William L. Robinson, NOAA Regional Administrator, to Sean Martin, WESPAC Chairman, re Prohibition of Commercial Fishing within the Monuments, at 1

¹⁰ 74 Fed. Reg. at 1,568.

¹¹ 74 Fed. Reg. at 1,579.

¹² The Marianas Monument consists of three units: the Island; Volcanic; and Trench Units. No waters are included in the Volcanic and Trench Units. Accordingly, commercial fishing is only prohibited in the Island Unit. 74 Fed. Reg. at 1,559.

¹³ *See, e.g., Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (judicial review of President’s lawful exercise of discretion pursuant to Antiquities Act was unavailable).



(February 9, 2009) (attached hereto as Attachment E). It is Marine Conservation Institute's understanding that in early 2009 commercial fishing permit holders received a letter from Mr. Robinson indicating that commercial fishing was banned within the newly enacted monuments. A template of this letter is attached hereto as Attachment F. Several more recent Agency documents refer to commercial fishing in the various Monuments as *already* prohibited,¹⁴ indicating that the Agencies view the Proclamations' mandate as clear and non-discretionary. A rulemaking recognizing, and enforcing, the prohibition on commercial fishing would be consistent with the Proclamations' unambiguous mandate and with FWS's and NOAA's authority under the Proclamation and other applicable law.

B. FWS's Authority to Promulgate the Regulations Requested

FWS has authority to promulgate regulations in the Refuge areas within the Pacific Monuments under the National Wildlife Refuge System Act.¹⁵ Although the current refuge regulations applicable to refuge areas within the Pacific Monuments arguably already prohibit commercial fishing, FWS should make clear that commercial fishing is prohibited within these areas, and establish appropriate penalties for violating that mandate. Moreover, 16 U.S.C. §§ 460k-3 & 742f also provide FWS with the authority to promulgate regulations both within existing refuges and areas outside of existing refuges (or in areas where FWS and NOAA disagree on whether a refuge exists). Indeed, these authorities were cited as a basis for the joint

¹⁴ See, e.g., NOAA Notice, Proposed Information Collection, 76 Fed. Reg. 12,714 (Mar. 8, 2011) ("Within the Islands Unit of the [Marianas Trench] monument, *commercial fishing is prohibited* but sustenance, recreational, and traditional indigenous fishing can be allowed on a sustainable basis."); NOAA, Submission for OMB Review, 76 Fed. Reg. 50,453 (Aug. 15, 2011) ("Within the Islands Unit, *commercial fishing is prohibited* but sustenance, recreational, and traditional indigenous fishing can be allowed on a sustainable basis."). See also FWS Website, Pacific Remote Islands Marine National Monument, available at <http://www.fws.gov/pacificremotelandsmarinemonument/> (last visited Jan. 31, 2012) ("The Proclamation *prohibits* commercial fishing within the monument . . ."); FWS Website, Marianas Trench Marine National Monument, available at <http://www.fws.gov/marianastrenchmarinemonument/> (last visited Jan. 31, 2012) ("[The Proclamation] *prohibits* commercial fishing within the monument . . ."); FWS Website, Marianas Trench Marine National Monument, available at <http://www.fws.gov/roseatollmarinemonument/> (last visited Jan. 31, 2012) ("[The Proclamation] *prohibits* commercial fishing within the monument . . ."). See also WESPAC Press Release, March 20, 2010, available at <http://www.wpcouncil.org/press/2010/2010.03.20%20SSC%20&%20CM%20press%20release.pdf> ("When President George W. Bush created three large Marine National Monuments (MNM) in the US Pacific Islands in January 2009, he ended commercial fishing operations in these areas but made allowances for non-commercial fishing to be permitted.").

¹⁵ 16 U.S.C. § 668dd-ee.

regulations promulgated by FWS and NOAA regarding the Papahānaumokuākea Marine National Monument, found at found at 50 CFR Part 404.¹⁶

C. NOAA’s Authority to Promulgate the Regulations Requested

The MSA charges the Secretary of Commerce, through NOAA and the National Marine Fisheries Service (“NMFS”), to regulate marine fisheries within the United States exclusive economic zone (“EEZ”) when “necessary and appropriate.”¹⁷ Under the framework of the MSA, eight regional councils—including WESPAC—are responsible for developing fishery management plans (“FMPs”), implementing regulations, and FMP amendments, which the Secretary then has the responsibility to approve, disapprove or partially approve and establish as regulations. Although the MSA envisions that the councils will prepare the FMPs, implementing regulations, and amendments, the Secretary is authorized to establish FMPs, regulations, and FMP amendments, when a council has failed to act¹⁸ or when necessary and appropriate.¹⁹ The Secretary also is authorized to issue emergency regulations, pursuant to MSA Section 305(c), when an emergency exists and immediate regulations are justified to prevent serious damage to a fishery resource or habitat.²⁰ Thus, the MSA provides NOAA with sufficient authority to regulate commercial fishing within the Pacific Monuments to protect the resources and habitat consistent with the purposes and policies of the MSA,²¹ together with the directives in the Proclamations as described above.

¹⁶ See 71 Fed. Reg. 51,134 (Aug. 29, 2006); see also 43 Fed. Reg. 60,255 (Dec. 26, 1978) (FWS citing 16 U.S.C. § 742f as a basis for the Final Interim Rule for the Becharof and Yukon Flats National Monuments).

¹⁷ 16 U.S.C. §§ 1811; 1853.

¹⁸ If the councils fail to develop an FMP, implementing regulation, or FMP amendment, then the Secretary may prepare it. 16 U.S.C. § 1854(c)(1). Fisheries that are currently managed by the Secretary include the “Atlantic swordfish, Atlantic sharks, and Atlantic billfish”; “the Western Atlantic bluefin tuna fishery is managed under the [MSA] and the Atlantic Tunas Convention Act.” DENNIS W. NIXON, ET AL., *MARINE AND COASTAL LAW* 305, 306 (2d ed. 2010).

¹⁹ See, e.g., 16 U.S.C. § 1854(c); and 1855(d).

²⁰ 16 U.S.C. § 1855(c). See also *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921 (E.D.N.C. 1995).

²¹ See, e.g., 16 U.S.C. § 1801(a)(6), (a)(9).

D. Need for Regulations Banning Commercial Fishing and Establishing Penalty Schedules

To be clear, the prohibition of commercial fishing within the Pacific Monuments, does not require the development of an MMP or FMP. Rather, FWS and NOAA are urged to implement an interim final rule that recognizes the ban on “commercial fishing” as already defined by the MSA.²² While there may be areas within the Pacific Monuments that have some measures in place to prohibit or deter commercial fishing—for instance, in refuge areas—a clear statement from FWS and NOAA banning commercial fishing and establishing a penalty schedule would provide the U.S. Coast Guard and other agencies with clear authority to enforce the Proclamation’s ban on commercial fishing within the *entire* area of the Pacific Monuments, as mandated by the Proclamations.²³

Moreover, precedent exists for issuing interim final regulations or emergency regulations pending completion of a comprehensive management plan.²⁴ Such approach has been utilized before by FWS and would protect the Pacific Monuments from illegal commercial fishing during the preparation of the MMPs by FWS and NOAA, and FMPs by WESPAC.

III.A Rulemaking Recognizing the Prohibition of Commercial Fishing Is Necessary to Protect the Pacific Monuments

Despite the clear prohibition in the Proclamations, unlawful commercial fishing still occurs within the Pacific Monuments. In the absence of express regulations, the U.S. Coast Guard has suggested that enforcement of the prohibition against commercial fishing in the protected waters within the Monuments cannot proceed. As described in previous submissions by Marine Conservation Institute, the unique and biologically diverse ecosystems of the Pacific

²² “The term ‘commercial fishing’ means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.” 16 U.S.C. § 1802(4).

²³ Marine Conservation Institute continues to believe that the U.S. Coast Guard already has sufficient authority to enforce the prohibition of commercial fishing in the Proclamations. Unfortunately, the Coast Guard disagrees and has expressed reluctance to enforce the prohibition on commercial fishing vessels within the Monuments absent a clear penalty schedule.

²⁴ *See, e.g.*, 45 Fed. Reg. 14,192 (1980) (FWS emergency regulations for National Wildlife Refuges in Alaska during the preparation of a comprehensive management plan). *See also* 43 Fed. Reg. 60,255 (Dec. 26, 1978) (Final Interim Rule for the Becharof and Yukon Flats National Monuments).

Monuments are harmed by illegal commercial fishing and the vessel traffic associated with it.²⁵ FWS and NOAA have delayed too long in fulfilling the President’s mandate—issued over 3 years ago—to issue regulations prohibiting commercial fishing in the Pacific Monuments.

A. The Ecosystems of the Pacific Monuments are Vulnerable to Irreparable Harm from Fishing Vessel Traffic

The singularity and inherent value of the pristine ecosystems within the Pacific Monuments is beyond dispute. The seven atolls and islands within the PRIM, for example, “. . . represent one of the last frontiers and havens for wildlife in the world, and comprise the most widespread collection of coral reef, seabird, and shorebird protected areas on the planet”²⁶ Rose Atoll, similarly, “supports the largest populations of giant clams, nesting sea turtles, nesting seabirds, and rare species of reef fish in American Samoa.”²⁷ Likewise, the reefs and waters of the Islands Unit of the Marianas Trench Monument “are among the most biologically diverse in the Western Pacific and include the greatest diversity of seamount and hydrothermal vent life yet discovered.”²⁸

As recognized by the President’s prohibition of commercial fishing in the 2009 Proclamations, these unique ecosystems and their diverse species are vulnerable to the harmful impacts of marine vessel traffic, including commercial fishing vessels. Due to their remote locations, portions of the Pacific Monuments are particularly vulnerable to the harmful impacts of commercial fishing vessels, because damaging activities may go unnoticed for substantial periods of time. In addition to the impacts of vessel traffic, commercial fishing threatens several endangered and globally depleted species that inhabit the Pacific Monuments. Other threats associated with commercial fishing include:

- Marine mammal strikes;
- Damage to bottom habitat and introduction of marine and terrestrial invasive species by ship grounding;

²⁵ See Attachment D.

²⁶ U.S. Fish and Wildlife Service Pacific Remote Islands Fact Sheet, available at www.fws.gov/pacificremoteislandsmarinemonument/PRIMNM_brief.pdf (last visited Jan. 31, 2012).

²⁷ FWS.gov, *Rose Atoll National Wildlife Refuge*, available at <http://www.fws.gov/roseatoll/wildlife.html>.

²⁸ FWS, NOAA, *Marianas Trench Marine National Monument, Planning Update No. 1* (May 2011), available at <http://www.fpir.noaa.gov/Library/MNM/MT%20PlanningUpdate1.pdf> (last visited Jan. 31, 2012).

- Contamination of coral reefs and injury and/or death to marine species and seabirds caused by oil spills;
- Negative effects of anchoring on sensitive bottom structures;
- Release of marine debris such as discarded fishing gear or plastic bags that can entangle or choke marine mammals, sea turtles, seabirds, and fish;
- Pollution emissions and discharges from ships, both intentional and unintentional; and
- Ancillary effects of fishing, such as bird bycatch and interactions with threatened and endangered species.

Unfortunately, the reality of these threats is demonstrated by the lingering and devastating effects of recent-era groundings that resulted in significant physical damage to the Pacific Monuments. Two fishing vessel groundings in the PRIM have had lasting effects on the Pacific Remote Islands' fragile reef ecosystems. In 1991, a 121-foot Taiwanese fishing vessel sank at Palmyra Atoll. In 2007, an 85-foot fishing vessel sank at Kingman Reef. Both of these groundings caused immediate and ongoing damage to the coral resources of the PRIM, as iron leaching from the grounded ships has led to the rapid growth of an invasive corallimorph that is smothering the reef ecosystem.²⁹ An elevated growth of blue-green algae is also occurring at the Kingman Reef wreck site, which could eventually lead to algal blooms that block out sunlight to the coral reefs below, and cause weakening or death of the corals.³⁰

A third fishing-vessel grounding in the Rose Atoll Monument demonstrates yet another real and devastating threat: oil spills. In 1993 a 135-foot long Taiwanese long line fishing vessel grounded within the Rose Atoll Monument, releasing 100,000 gallons of diesel and 500 gallons of oil into the monument's waters. These contaminants were carried across the reef by ocean currents into the lagoon, killing giant clams, sea cucumbers, urchins, and a large area of the reef-forming organisms. The grounding also physically damaged the coral reef when the ship hit. While the last of the remains of the wreck were removed in 2007, residual effects persist.³¹ The reef continues to suffer the effects of dissolved iron released from the decaying ship before its

²⁹ Linda W. Kelly, *et al.*, *Black reefs: iron-induced phase shifts on coral reefs*, *The ISME Journal* doi:10.1038/ismej.2011.114, at 6-9 (2011) (attached hereto as Attachment G).

³⁰ *Id.*; see also Marine Conservation Institute, *National Wildlife Refuge: Palmyra Atoll Shipwreck*, 1-2 (Emily Douce ed., 2012) (attached hereto as Attachment H).

³¹ FWS, Personal Communication with James Maragos, 2008.

removal, which has led to algal blooms that inhibit the repopulation of coralline algae and filter feeding marine organisms.³²

Similar devastating effects could occur within the Pacific Monuments if another illegal fishing vessel, particularly a large commercial vessel, were to ground within the Monuments. The first step toward the prevention of such damage is to issue a regulation recognizing and enforcing the Proclamations' ban on commercial fishing within the Monuments. At Marine Conservation Institute's request, FWS also is instituting a parallel process to protect the PRIM, proposing that the US Government request the International Maritime Organization to establish a Ship Reporting and Routing System and designate Areas to be Avoided within the Monument. Combined, these measures will provide important protections to the PRIM and other Pacific Monuments.

B. FWS's and NOAA's Failure to Prohibit Commercial Fishing Constitutes Agency Action Unlawfully Withheld and Unreasonably Delayed

The Proclamations banning commercial fishing in the Pacific Monuments were issued in January 2009. As described above, each of the Proclamations issued a clear and non-discretionary mandate to FWS and NOAA to prohibit commercial fishing. This mandate is separate and apart from the Proclamations' charge to issue MMPs for the Pacific Monuments. Since January 2009, however, FWS and NOAA have not issued any rulemaking prohibiting commercial fishing, and have only recently issued NOIs to prepare environmental assessments and MMPs for the Monuments.³³ FWS's and NOAA's failure to prohibit commercial fishing in the Pacific Monuments is agency action unlawfully withheld, as well as arbitrary and capricious, and is reviewable under the APA.

The APA provides for judicial review of agency actions and allows a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," as well as hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³⁴ The failure to prohibit commercial fishing constitutes agency action unlawfully withheld and unreasonably delayed under the APA standard because it is a

³² FWS, ROSE ATOLL NATIONAL WILDLIFE REFUGE (Susan White, 2010).

³³ See 76 Fed. Reg. 18,775 (PRIM); 76 Fed. Reg. 18,773 (Marianas Trench). See also 74 Fed. Reg. 57,701 (Rose Atoll).

³⁴ 5 U.S.C. §§ 706(1); 706(2)(a).

discrete action that the Secretaries were *required to take*.³⁵ And, the delay of over three years in implementing the President’s Proclamations is unreasonable under the APA standard.³⁶ Indeed, the United States Court of Appeals for the District of Columbia has indicated that “a reasonable time for agency action is typically counted in weeks or months, not years.”³⁷ Accordingly, the prohibition on commercial fishing mandated by the Proclamations³⁸—and unlawfully withheld and unreasonably delayed by FWS and NOAA—could be compelled by the U.S. federal courts under the APA.

Moreover, the Agencies’ intent to prepare an environmental assessment and implement the final MMP does not alleviate the non-discretionary duty to prohibit commercial fishing.³⁹ This mandate issued in the January 2009 Proclamations is separate and distinct from the development of the MMPs. In addition to requiring that the Secretaries “shall prohibit commercial fishing,” the Proclamations separately addressed “marine monument planning” and

³⁵ See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (a claim may proceed “where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*”); *Hells Canyon Preserv. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010); *Nat’l Parks Conservation Ass’n v. Norton*, 324 F.3d 1229, 1239 (11th Cir. 2003) (“[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers ‘final agency action’ review.”); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (explaining that an agency’s failure to act when required by law to do so, either by an implicit refusal to act or simply by an unreasonable bureaucratic delay, is reviewable under the APA).

³⁶ See, e.g., *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009) (nearly two-and-one-half year delay in deciding petition seeking promulgation of regulations to govern conditions in immigration detention facilities was unreasonable as matter of law); *Sharadanant v. U.S. Citizenship & Immigration Servs. (USCIS)*, 543 F. Supp. 2d 1071 (D.N.D. 2008) (delay of more than two years in adjudicating aliens’ applications for permanent residence status was unreasonable within meaning of APA, such that District Court had jurisdiction in aliens’ action to compel adjudication of their applications; USCIS had a nondiscretionary duty to act on the applications within a reasonable time).

³⁷ *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004); *Midwest Gas Users Ass’n v. F.E.R.C.*, 833 F.2d 341, 359 (D.C. Cir. 1987) (“...a reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade’”) (quoting *MCI Telecomm. Corp. v. F.C.C.*, 627 F.2d 322, 340 (D.C. Cir. 1980)).

³⁸ It is worth noting that agency directives in Proclamations issued by the President pursuant to the authority of the Antiquities Act are sufficient to subject an agency action or inaction taken in violation of the Proclamation to judicial review under the APA. See, e.g., *Western Watersheds Project v. BLM*, 629 F. Supp. 2d 951 (D. Ariz. 2009).

³⁹ See, e.g., *In re Bluewater Network*, 234 F.3d 1305, 1313 (D.C. Cir. 2000) (“agency’s pronouncement of its intent to defer or to engage in future rulemaking generally does not constitute final agency action reviewable” by the courts); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996) (“An announcement of an agency’s intent to establish law and policy in future is not the equivalent of the actual promulgation of a final regulation.”).

required that the Secretaries prepare MMPs *within 2 years*, as well as promulgate implementing regulations to address “any *further* specific actions necessary” for the care and management of the Pacific Monuments.⁴⁰ The Proclamations further provided that the Secretaries “may permit” *noncommercial* fishing in specified circumstances.⁴¹ The treatment of these directives regarding the MMPs and noncommercial fishing activities *as separate and apart* from the clear directive to prohibit commercial fishing, indicates the President’s intention that the prohibition of commercial fishing be (1) immediate; and (2) distinct from, and not contingent on, the MMPs and regulation of noncommercial fishing. FWS and NOAA have unlawfully and unreasonably declined to meet this mandate. In fact, shortly after the Proclamations were issued, William Robinson, NOAA Regional Director, sent two letters to the Chair of WESPAC: the first indicated that commercial fishing was banned immediately, the second indicated that NOAA looked forward to working with WESPAC to develop regulation of non-commercial fishing permitted by the Proclamations. *See* Attachment E at 1; Letter from William L. Robinson, NOAA Regional Administrator, to Sean Martin, WESPAC Chairman, re Regulation of Non-Commercial Fishing within the Monuments, at 1 (February 23, 2009) (attached hereto as Attachment I).

Regardless of whether FWS and NOAA agree the prohibition of commercial fishing is a mandate distinct from the MMPs, the Proclamations’ two-year deadline on the MMP still applies. FWS’s and NOAA’s delay in implementing regulations recognizing and enforcing the prohibition of commercial fishing is unreasonable and unlawful. FWS and NOAA must grant this Petition and must promptly issue regulations expressly prohibiting commercial fishing within the Pacific Monuments.

⁴⁰ 74 Fed. Reg. at 1,569 (PRIM).

⁴¹ For example, the Marianas Trench Proclamation requires NOAA to “prohibit commercial fishing” and to regulate “sustenance, recreational, and traditional indigenous fishing” as a “sustainable activity.” 74 Fed. Reg. at 1,559. The Rose Atoll Proclamation allows NOAA to “permit noncommercial and sustenance fishing or...traditional indigenous fishing within the monument.” 74 Fed. Reg. at 1,579. NOAA must also “ensure that recreational fishing [be] managed as a sustainable activity” at this Monument. *Id.* Finally, the PRIM Proclamation allows NOAA to permit “noncommercial fishing” so long as NOAA manages “recreational fishing” as a “sustainable activity.” 74 Fed. Reg. at 1,568.

IV. Proposed Regulatory Language

Marine Conservation Institute sets forth the following proposed regulatory language prohibiting commercial fishing within the Pacific Monuments and establishing penalty schedule to deter and prosecute violators.

A. The PRIM

i. Section 1 – Scope and Purpose

The regulations in this part codify the provisions of Presidential Proclamation 8336 banning commercial fishing within the Pacific Remote Islands Marine National Monument. These regulations are jointly implemented by the Secretaries of the Interior, through the U.S. Fish and Wildlife Service (USFWS), and Commerce, through the National Oceanic and Atmospheric Administration (NOAA).

ii. Section 2 – Boundary

The Pacific Remote Islands Marine National Monument consists of all lands and interest in lands owned or controlled by the Government of the United States within the boundaries of the Monument, including the waters and submerged and emergent lands of the Pacific Remote Islands to the lines of latitude and longitude depicted on the map in Appendix A to this part ___, which lie approximately 50 nautical miles from the mean low water lines of Wake, Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll.

iii. Section 3 – Definitions

The following definitions are applicable only to this Part.

Commercial Fishing means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade, as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(4).

Monument means the Pacific Remote Islands Marine National Monument.

Proclamation means Presidential Proclamation 8336, dated January 6, 2009 (76 FR 1,565).

iv. Section 4 – Commercial Fishing Prohibition

Commercial fishing within the Monument is prohibited.

v. Section 5 – Penalty for Violating the Commercial Fishing Prohibition

A violation of this regulation shall be a misdemeanor with maximum penalties of imprisonment for not more than six months, or a fine of not more than \$100,000, or both. *See* 16 U.S.C. §§ 1858-59; 16 U.S.C. § 460k-3; 18 U.S.C. § 3571.

B. Rose Atoll

i. Section 1 – Scope and Purpose

The regulations in this part codify the provisions of Presidential Proclamation 8337 banning commercial fishing within the Rose Atoll Marine National Monument. These regulations are jointly implemented by the Secretaries of the Interior, through the U.S. Fish and Wildlife Service (USFWS), and Commerce, through the National Oceanic and Atmospheric Administration (NOAA).

ii. Section 2 – Boundary

The Rose Atoll Marine National Monument consists of emergent and submerged lands and waters, with an outer boundary that is approximately 50 nautical miles from the mean low water line of Rose Atoll, the Rose Atoll Marine National Monument's center. The map in Appendix A to this part ___ depicts the outer boundary of the Monument.

iii. Section 3 – Definitions

The following definitions are applicable only to this Part.

Commercial Fishing means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade, as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(4).

Monument means the Rose Atoll Marine National Monument.

Proclamation means Presidential Proclamation 8337, dated January 6, 2009 (76 FR 1,577).

iv. Section 4 – Commercial Fishing Prohibition

Commercial fishing within the Monument is prohibited.

v. Section 5 – Penalty for Violating the Commercial Fishing Prohibition

A violation of this regulation shall be a misdemeanor with maximum penalties of imprisonment for not more than six months, or a fine of not more than \$100,000, or both. *See* 16 U.S.C. §§ 1858-59; 16 U.S.C. § 460k-3; 18 U.S.C. § 3571.

C. Marianas Trench

i. Section 1 – Scope and Purpose

The regulations in this part codify the provisions of Presidential Proclamation 8335 banning commercial fishing within the Island Units of the Marianas Trench Marine National Monument. These regulations are jointly implemented by the Secretaries of the Interior, through the U.S. Fish and Wildlife Service (USFWS), and Commerce, through the National Oceanic and Atmospheric Administration (NOAA).

ii. Section 2 – Boundary

The Islands Unit of the Marianas Trench Marine National Monument consists of the waters and submerged lands of the three northernmost Mariana Islands from the mean low water line out approximately 50 nautical miles. The map in Appendix A to this part __ depicts the outer boundary of the Monument.

iii. Section 3 – Definitions

The following definitions are applicable only to this Part.

Commercial Fishing means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade, as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(4).

Monument means the Marianas Trench Marine National Monument.

Proclamation means Presidential Proclamation 8335, dated January 6, 2009 (76 FR 1,557).

iv. Section 4 – Commercial Fishing Prohibition

Commercial fishing within the Islands Unit of the Monument is prohibited.

v. Section 5 – Penalty for Violating the Commercial Fishing Prohibition

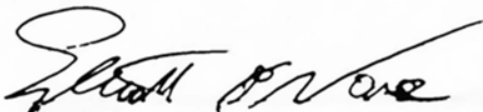
A violation of this regulation shall be a misdemeanor with maximum penalties of imprisonment for not more than six months, or a fine of not more than \$100,000, or both. *See* 16 U.S.C. §§ 1858-59; 16 U.S.C. § 460k-3; 18 U.S.C. § 3571.

V. Conclusion

Unlawful commercial fishing within the Pacific Monuments threatens their ecological integrity, violates the Proclamations designating the Monuments, and demands swift action.

Marine Conservation Institute urges FWS and NOAA to fulfill their mandate—now three years old—to ban commercial fishing, and to grant this Petition for rulemaking promptly but not later than 60 days from submission.

Sincerely,



Elliott A. Norse

Cc: Rachel Jacobson—Acting Assistant Secretary for Fish, Wildlife and Parks, U.S.
Department of the Interior
Dr. Jane Lubchenco—NOAA Administrator and Undersecretary of Commerce
Nancy Sutley—Chair, White House Council on Environmental Quality
Lois J. Schiffer—General Counsel, NOAA
Hilary Tompkins—Solicitor, U.S. Department of the Interior
Samuel D. Rauch—Acting Assistant Administrator, National Marine Fisheries Service
Michael Tosatto—Pacific Islands Regional Administrator, NOAA National Marine
Fisheries Service
Dan Ashe—Director, United States Fish and Wildlife Service
Doug Wheeler, Hogan Lovells US LLP—Pro Bono Counsel for Marine Conservation
Institute