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Papahānaumokuākea Marine National Monument

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Re: RAC comments on the Draft EIS and Management Plan for the proposed National Marine Sanctuary for the marine areas of Papahānaumokuākea, the Northwestern Hawaiian Islands

April 29, 2024

Aloha mai Director Armor,

After careful review and deliberation of the Draft EIS and Management Plan for the proposed sanctuary, the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council (RAC) offers the enclosed comments and recommendations. These comments and recommendations were drafted by the RAC's Comment Writing Team, with input from the Research Subcommittee, and were thoroughly discussed and approved by the full RAC at its April 29th meeting.

The RAC previously indicated its support for proceeding with the sanctuary designation process, and we wish to reaffirm that we endorse the designation of a National Marine Sanctuary in the Northwestern Hawaiian Islands. Among the sanctuary boundary alternatives analyzed in the Draft EIS, we the RAC unanimously support the preferred alternative (#1) which includes all waters of the existing monument and monument expansion area.

The RAC's specific recommendations on the framework and content for the Final EIS, Management Plan, and regulations are as follows:

1. The RAC did not reach consensus on the consideration of an alternative Boundary alignment such as one that Encompasses all of Middle Bank in the final EIS

2.

The RAC did not reach consensus that the final EIS either fully analyze the biological/ecological, economic, social, and cultural impacts of a sanctuary boundary alternative that encompasses all of Middle Bank or provide a detailed explanation of why this alternative is not analyzed or is inconsistent with the stated purpose and need of sanctuary designation and the National Marine Sanctuary Act (NMSA). As you are aware, in a letter dated January 28, 2022, the RAC recommended to ONMS that the EIS include a sanctuary boundary alternative that includes “some larger portion of Middle Bank, that is, incorporate an area that is presently outside of the eastern PMNM boundary.”

NEPA regulations require that an EIS consider a range of alternatives to the proposed action, including all "reasonable alternatives", which are defined as alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action" (43 CFR § 46.420). The Draft EIS states that the purpose of the proposed action is to provide comprehensive and coordinated management of the marine areas of Papahānaumokuākea to protect nationally significant biological, cultural, and historical resources through a sanctuary designation. As stated in the Draft EIS, the term Papahānaumokuākea, when used alone, refers to the place, also historically known as the Northwestern Hawaiian Islands, including the land and all waters to 200 nm from shore. Moreover, the Draft EIS affirms that this area is not necessarily the same as the area of the PMNM. Therefore, it is apparent that the purpose and need statement does not preclude an analysis of the impacts of a sanctuary boundary alternative that encompasses all of Middle Bank.

According to the Draft EIS, NOAA eliminated from detailed study a sanctuary boundary that extends eastward of the Monument boundary because it would not fulfill the purposes and policies of the NMSA, and therefore not meet the purpose and need for the proposed sanctuary designation. Specifically, the Draft EIS states that because of the State of Hawai‘i’s opposition to expanding towards the Main Hawaiian Islands, a boundary alternative that encompasses all of Middle Bank would be inconsistent with the particular purpose and policy of the NMSA that states that ONMS “develop and implement coordinated plans for the protection and management of these areas with appropriate federal agencies, state and local governments, etc.”

The RAC recognizes the importance of the referenced purpose and policy of the NMSA. However, in basing its decision to eliminate the Middle Bank alternative solely on that one purpose and policy NOAA fails to take into account a number of other important purposes and

policies set forth in the NMSA, including the third purpose and policy, which is “to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes.” Furthermore, as stated in the sixth purpose and policy, any public and private uses of sanctuary resources must be “compatible with the *primary objective of resource protection*“ (emphasis added). The decision to eliminate the Middle Bank alternative also did not consider what the Draft EIS reports to be the guiding questions that directed NOAA’s analysis, including the question: How does the spatial extent of the proposed sanctuary affect the resources, natural environment, cultural heritage, and human uses in and around the proposed sanctuary?

Finally, the elimination of a Middle Bank alternative from detailed study because of State of Hawai‘i opposition is inconsistent with the guidance in response to Question 2A in the *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations* (46 Fed. Reg. 18026):¹

Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is “reasonable” rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.

With respect to the sanctuary EIS, these NEPA guidelines make it clear that while the State of Hawai‘i’s preferences may be considered in shaping the alternatives analysis, the alternatives considered may not be entirely driven by those preferences. In doing so, some of the RAC members believe that NOAA may have eliminated a sanctuary boundary alternative that is environmentally preferable and better meets the full range of purposes and policies of the NMSA as well as the sanctuary’s vision, mission, and guiding principles.

In order to provide NOAA with a better understanding of how the omission of a Middle Bank alternative from detailed study could potentially place biological/ecological resources important to the proposed sanctuary at risk, the Research Subcommittee submitted to the RAC an extensive literature review that synthesizes information on the conservation value of Middle Bank and the implications for a sanctuary boundary decision, including a discussion of the sanctuary uses, resources, and qualities that could potentially be at risk by not considering a Middle Bank

¹ Since the issuance of the Forty Questions guidance, the Council on Environmental Quality has routinely identified it as an invaluable tool for Federal, state, Tribal, and local governments and officials, and members of the public, who have questions about NEPA implementation (87 Fed. Reg. 23453).

alternative (see attached literature review *Middle Bank: Conservation Concerns and Sanctuary Boundary Implications*). This review is provided as an attachment, and includes information that was not available during the Monument Expansion in 2016. It is intended to provide the authors of the FEIS with fuller documentation of data relevant to potential alternatives. . As noted in the Federal Register notice, “The EIS process also serves to enrich the understanding of the ecological systems and natural resources important to the Nation and helps guide sound decision making, including development, in line with the best available science and data.” The RAC recommends that a summary of the attached literature review be incorporated in the main text of the Final EIS, and that the entire document be included as an appendix. For the purposes of the administrative record, PDFs of all the literature cited in the document have been made available to NOAA staff.

The RAC further recommends that NOAA periodically evaluate the effect on sanctuary resources of fishing activities in the portion of Middle Bank currently open to fishing. In a letter to ONMS dated July 12, 2016, the RAC made a similar recommendation, but no action was taken. Therefore, the RAC once more requests that periodic evaluations of fishing effects at Middle Bank be conducted, similarly to how NOAA has proposed conducting evaluations of fishing effects in the Outer Sanctuary Zone (see Sec. I. Part J In the “Supplementary Information” part of 89 Fed. Reg. 15272). As NOAA states, “Such evaluations would take into consideration the best scientific information available and evaluate whether additional actions are necessary for the proper care and management of Sanctuary resources, including fishery resources, consistent with goals and objectives of the Sanctuary.”

In addition, some members of the RAC provide the following recommendations and comments on specific text in Section 3.7 of the Draft EIS (the italicized items are excerpts from the Draft EIS; RAC recommendations and comments are in plain text):

During outreach for this sanctuary designation process, there was significant opposition, including from fishers, to expand the boundary and include all of Middle Bank. State government officials indicated that the State would not support any expansion towards the Main Hawaiian Islands due to the lack of support in the community.

As stated in the Draft EIS, there were also comments suggesting “that sanctuary boundaries should extend beyond the footprint of the Monument to adjacent areas, including nearby seamounts and the entirety of Middle Bank.” The RAC acknowledges that this public support for the inclusion of all of Middle Bank within the proposed sanctuary was also “significant.”

Furthermore, the Final EIS should note that only three of the 25 individuals consulted for the Cultural Impact Assessment in *E Ho‘i i ke Au a Kanaloa* expressed opposition to the inclusion of all of Middle Bank within the sanctuary (Nohopapa 2023). Two other consultees expressed preference for the sanctuary designation to encompass the largest area possible, although the incorporation of all of Middle Bank was not specifically mentioned (Nohopapa 2023). Moreover, there was widespread agreement among consultees that the health of Papahānaumokuākea and its ecosystems are connected to and affect the Main Hawaiian Islands. As detailed in the attached *Middle Bank: Conservation Concerns and Sanctuary Boundary Implications*, information in the scientific literature suggests that Middle Bank may play a key role in the maintenance of those connections.

The State of Hawai‘i manages fishing activity at Middle Bank and has repeatedly acknowledged the importance of this area for Kaua‘i fishers.

The RAC notes that the statement that the State manages fishing activity at Middle Bank is currently incorrect. Although the State has historically taken the lead in managing the Main Hawaiian Islands bottomfish fishery, Middle Bank is located entirely within federal waters, and management of fishing activity at the seamount is ultimately the responsibility of the federal government. Fishing regulations for this area do not require support from the State of Hawaii. This point was made by the Western Pacific Regional Fishery Management Council in Amendment 14 to the Bottomfish and Seamount Groundfish Fisheries Management Plan (dated December 19, 2007), which proposed to close the waters of Middle Bank to fishing for bottomfish in order to end the overfishing that was occurring within the Hawaiian Archipelago at that time. The Council recommended the closure of Middle Bank and other areas in the MHI within federal waters as “their closure would not require complementary State regulations” (see p. viii of document at <https://www.fisheries.noaa.gov/resource/document/final-amendment-14-fishery-management-plan-bottomfish-and-seamount-groundfish>).

The RAC notes that data to support the statement that Middle Bank is important to Kaua‘i fishers is currently incomplete in the draft. The Final EIS should include a summary of the economic, social, and cultural benefits of maintaining access to the fishery resources in the portion of Middle Bank currently open to fishing. This analysis should be based on published literature (e.g., see references in *Middle Bank: Conservation Concerns and Sanctuary Boundary Implications*), interviews with fishery participants, observations of fishing practices, comments collected during the public scoping and public review processes, and other qualitative and quantitative social science data.

Decisions that could potentially affect the health of biological resources important to the sanctuary should also be based on quantitative data systematically collected by the state and federal agencies responsible for fisheries management. Data on the level of fishing effort at Middle Bank over the past several years are important for predicting the likelihood and extent to which fishing could have an adverse impact on these biological resources. The only fishing occurring on the portion of Middle Bank outside the Monument that is not subject to federal or state permitting and reporting requirements is non-commercial (i.e., recreational and subsistence) fishing for pelagic species. The Hawai'i Division of Aquatic Resources administers a mandatory permitting/reporting program for the commercial bottomfish fishery and commercial small boat pelagic (i.e., non-longline) fishery in both the state and federal waters around the MHI. In addition, there is a federal permitting/reporting program for the non-commercial deepwater bottomfish fishery in the federal waters around the MHI, including the waters over Middle Bank. It is possible that some non-commercial bottomfish fishermen have opted to obtain a state commercial marine license rather than the federal non-commercial permit. However, non-commercial catch and effort logbooks are still required for catches of bottomfish made in federal waters around Hawaii. Updated annual data on the number of fishing trips made to Middle Bank and the number of unique vessels that fished Middle Bank can be made publicly available. These data are not confidential, as shown in the tables on p. 3-39 and 3-40 of the document at <https://www.fisheries.noaa.gov/resource/document/final-amendment-14-fishery-management-plan-bottomfish-and-seamount-groundfish>.

Arguments against inclusion focused on socio-cultural and political/jurisdiction aspects, including assurances from NOAA to Kaua'i fishers during public meetings regarding the 2016 Monument Expansion that the Monument boundary would not extend further towards Kaua'i.

Some of the RAC suggest that the Final EIS delete the reference to assurances from NOAA to Kaua'i fishers during public meetings regarding the 2016 Monument Expansion. The statement implies that the sanctuary boundary vis-à-vis Middle Bank was determined by NOAA before the sanctuary designation process began. Such a pre-determination would be inconsistent with the Notice of Intent published on November 19, 2021, and the subsequent public scoping process, during which NOAA specifically requested comments on the spatial extent of the proposed sanctuary and boundary alternatives. No restrictions were placed on the boundary alternatives NOAA would consider. In particular, the RAC was not informed of the reported assurances and their determining effects on the sanctuary boundary when it recommended to ONMS that the EIS include a sanctuary boundary alternative that encompasses "some larger portion of Middle Bank,

that is, incorporate an area that is presently outside of the eastern PMNM boundary” (letter dated January 28, 2022).

With respect to the socio-cultural aspects of including all of Middle Bank within the proposed sanctuary, some of the RAC note that a boundary alternative that encompasses Middle Bank could include fishing regulations that leaves at least some segments of the fishing community better off. In particular, the EIS analysis during the sanctuary designation process offers NOAA an unique opportunity to identify and assess alternative ways to enhance subsistence and indigenous access to the area of Middle Bank currently open to fishing, thereby helping protect Native Hawaiian traditional and customary fishing practices. For example, it has been recommended by the Western Pacific Regional Fishery Management Council that commercial fishing in the Monument expansion area be prohibited, but the removal of fish for Native Hawaiian cultural practices be allowed in the Monument expansion area by permit. If an alternative boundary encompasses all of Middle Bank, similar fishing regulations could be applied to the portion of the seamount currently outside the Monument. This alternative would be consistent with the Cultural Impact Assessment in *E Ho‘i i ke Au a Kanaloa* in which consultees advocated for protecting Papahānaumokuākea from commercial fishing, while ensuring that resources are available for Native Hawaiian subsistence fishing (Nohopapa 2023). Furthermore, this fishing regime would have the added biological and sociocultural advantages of bringing the entirety of Middle Bank under the management guidance of *Mai Ka Pō Mai*. Additional information on how the sanctuary could preserve Native Hawaiian fishing practices is provided in *Middle Bank: Conservation Concerns and Sanctuary Boundary Implications*.

2. Replace the acronyms “MEA” and “OSZ” with full text

3. Innocent Passage

Although the United States has not yet ratified the United Nations Convention on the Law of the Sea of 10 December 1982, it recognizes and follows it as customary international law. Of particular concern to the RAC are those activities that take place in the Northwestern Hawaiian Islands under claims of innocent passage. (See *inter alia* UNCLOS Articles 17 to 32.) The RAC urges ONMS to ensure that all activities in the proposed national marine sanctuary in the Northwestern Hawaiian Islands fully comply with UNCLOS and all other applicable international treaties.

4. Socioeconomic Analysis

The RAC requests additional research and information about the social, cultural, and economic impacts of the proposed sanctuary for Native Hawaiian communities and residents of Hawai‘i. We find there is a lack of data to help inform our decisions, particularly regarding the potential effects of the inclusion of Middle Bank in the proposed sanctuary on the traditional practices and livelihoods of local fishers.

5. Glossary of Acronyms and Terms

We suggest adding a glossary to the Draft Management Plan. Although a list of Abbreviations and Acronyms are included on page vi of the Draft EIS, it is less accessible to anyone who is reviewing the management plan alone.

The RAC is an advisory body to the Reserve/NOAA Monument superintendent. The opinions and findings of this document do not necessarily reflect the position of the Reserve, the Monument, or the National Oceanic and Atmospheric Administration.

Mahalo for the opportunity to provide this additional input on a sanctuary designation for Papahānaumokuākea Marine National Monument. In summary, the RAC supports the preferred alternative (#1) which is consistent with current MEA boundaries. The RAC did not reach consensus that the final EIS either fully analyze the biological/ecological, economic, social, and cultural impacts of a sanctuary boundary alternative that encompasses all of Middle Bank or provide a detailed explanation of why this alternative is inconsistent with the stated purpose and need of sanctuary designation and the NMSA. Thus, no RAC recommendation to do so has been made. We recognize that the inclusion of the Middle Bank in the proposed sanctuary boundary is a controversial issue, and its inclusion as an alternative in the FEIS would be problematic, but we provide an attachment including considerations of that option for your information.

Do not hesitate to contact us if you have questions.

Sincerely,