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VIA E-MAIL

March 16, 2017

Dave Blazer
Director, Fishing and Boating Service
Maryland Department of Natural Resources
580 Taylor Avenue, B-2
Annapolis, MD 21401

Dear Mr. Blazer:

I am writing in response to the January 31, 2017 letter you forwarded to the Maryland Office of the Attorney General. In that letter, Michael C. Mayo, counsel to the Potomac River Fisheries Commission (PRFC or the Commission), requested advice on the proposal by the National Oceanic and Atmospheric Administration (NOAA) to establish the Mallows Bay-Potomac River National Marine Sanctuary (MPNMS). Specifically, Mr. Mayo requested that this office:

- Ensure that the authority of the Commission not be impacted in any way nor the rights of its licensees and users of its resources be restricted from the taking or catching of finfish, crabs, oysters, clams or other shellfish by any and all means prescribed by the Commission; and
- Ensure through appropriate legal means that the livelihoods and individual rights of licensees and users of the resources of the Commission be protected in any designated marine sanctuaries if such sanctuaries are deemed necessary to preserve marine cultural heritage resources.

The PRFC appears to be asking for an analysis of the National Marine Sanctuaries Act and what effect that Act may or may not have on the PRFC's authority to regulate fishing in the main stem of the Potomac River. While I have provided some explanation of NOAA's proposed sanctuary designation, I suggest that the PRFC contact NOAA's legal counsel for the Office of Marine Sanctuaries or the Department of Justice, who have expertise in this subject matter.

Background

The National Marine Sanctuaries Act (16 U.S.C. 1431-1445) (the Act) authorizes the Secretary of Commerce to designate and protect any discrete area of the marine environment as a national marine sanctuary if the Secretary determines that the area is of special national significance due to its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or aesthetic qualities. 16 U.S.C. 1433(a). The primary objective of the Act is to protect the sanctuary system's biological and cultural resources, such as coral reefs, marine animals, historical shipwrecks, historic structures, and archaeological sites. 82 Fed. Reg. 2255 (January 9, 2017). Under the Act, the Secretary has discretionary authority to promulgate any regulations necessary to manage the Marine Sanctuaries Program. 16 U.S.C. 1433(a).

NOAA is proposing to designate an area of approximately 52 square miles of the Potomac River as the MPNMS. The proposed MPNMS would include a diverse collection of historic shipwrecks that date back to the Civil War and potentially date to the American Revolutionary War, totaling nearly 200 known vessels including the remains of the largest "Ghost Fleet" of World War I, wooden steamships built for the U.S. Emergency Fleet. 82 Fed. Reg. 2255 (January 9, 2017).

Analysis

First, this proposed designation does not regulate fishing. The proposed rule explicitly states that fishing in the Sanctuary will "not be regulated as part of the Sanctuary management regime authorized by the Act." It also states – again, explicitly – that "designation of the Sanctuary shall have no effect on any regulation, permit, or license issued" by any federal, State, tribal, or local authorities. 82 Fed. Reg. 2268 (January 9, 2017) (to be codified at Appendix B, Article V.1). Therefore, by its very terms, this proposed rule would seem to have no effect on validly-issued PRFC authorizations.

Second, as explained in the proposed rule, the proposed sanctuary "would concentrate on the protection, access and interpretation of the maritime cultural features of the area, including the Ghost Fleet, other vessels of historic significance, and related maritime infrastructure." 82 Fed. Reg. 2256 (January 9, 2017). Because Maryland already has a comprehensive set of laws and regulations focused on the protection of the natural environment, including wildlife, fish, birds, water quality, and habitat, "NOAA's proposed sanctuary regulations would focus only on the protection of the shipwrecks and associated maritime cultural heritage resources." *Id.*

By contrast, the proposed rule excludes fish and fishing activities. NOAA is proposing to narrowly define "sanctuary resource" for the MPNMS to include only the maritime cultural heritage resources of the sanctuary and to prohibit only those activities that have an effect on those maritime cultural heritage resources. Whereas the national definition of "sanctuary resource" includes fish and other living resources,¹ the proposed definition of "sanctuary resource" for the MPNMS is much narrower and does not include any living resources:

¹ Under the national definition, "sanctuary resource" means "any living or non-living resource of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic

Sanctuary resource means any historical resource within the Sanctuary boundaries, as defined in §922.3. This includes, but is not limited to, any sunken watercraft and any associated rigging, gear, fittings, trappings, and equipment; the personal property of the officers, crew, and passengers, and any cargo; and any submerged or partially submerged prehistoric, historic cultural remains, such as docks, piers, fishing-related remains (e.g., wiers, fish-traps) or other cultural heritage materials. Sanctuary resource also means any archaeological, historical, and cultural remains associated with or representative of historic or prehistoric American Indians and historic groups or peoples and their activities.

82 Fed. Reg. 2264 (January 9, 2017) (to be codified at 15 C.F.R § 922.201(a)(1)).

Third, none of the three proposed regulations prohibit any fishing activities. NOAA is proposing to protect the sanctuary resources by: (1) prohibiting damaging a sanctuary resource; (2) prohibiting damaging sanctuary signs; and (3) prohibiting interfering with sanctuary enforcement activities. 82 Fed. Reg. 2264-2265 (January 9, 2017) (to be codified at 15 C.F.R. § 922.203). The definition of “sanctuary resource” is significant because NOAA’s proposed regulations apply only to activities involving a “sanctuary resource.” If the activity is not listed in the proposed regulations, it cannot be regulated through the current proposed rulemaking. As provided in the Terms of Designation, the Act:

authorizes the issuance of such regulations as are necessary and reasonable to implement the designation, including managing and protecting the historical resources and recreational, research, and educational qualities of the ... Sanctuary. . . . Listing an activity does not necessarily mean that it will be regulated; however, if an activity is not listed it may not be regulated, except on an emergency basis, unless Section 1 of Article IV is amended by the same procedures by which the original Sanctuary designation was made.

82 Fed. Reg. 2268 (January 9, 2017) (to be codified at Appendix B, Article I). Furthermore, any changes to the sanctuary designation and its impact on fishing could not be enacted without further involvement of the State of Maryland and the public. For example, any emergency regulations that may purport to affect fish or fishing activities in the Sanctuary would not become effective without the approval of the Governor of Maryland (or his designee or designated agency). 82 Fed. Reg. 2265 (January 9, 2017) (to be codified at 15 C.F.R. § 922.204(a)). And any future proposed changes to the regulations are subject to the same notice and public comment process as the currently proposed designation. 82 Fed. Reg. 2258 (January 9, 2017); 16 U.S.C. 1434.

Fourth, none of these regulations are expected to have any impact on commercial or recreational fishing activities. NOAA evaluated the potential impact of the three regulations on small businesses including commercial fishing, recreational for-hire fishing operations, dive

value of the Sanctuary, including, but not limited to, the substratum of the area of the Sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals, and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources.” (16 U.S.C. 922.3).

operations and other water recreated based operators and concluded that there would be no impact. 82 Fed. Reg. 2261 (January 9, 2017). “The gear likely to be used to commercially fish or recreationally fish in the sanctuary will not be impacted by this regulation [prohibiting damaging a sanctuary resource]. Therefore, commercial fishing operations and for-hire operations are not expected to be impacted. Education and outreach will be used to educate user groups about the location of the sanctuary resources to prevent anchor damages.” *Id.* Further, NOAA proposes to co-manage the Sanctuary in collaboration with the State of Maryland and Charles County in order to protect the sanctuary resources and work together to address any concerns that may arise in the future. NOAA, Maryland, and the County will enter into a Memorandum of Understanding “regarding this collaboration that shall address, but not be limited to, such aspects as areas of mutual concern, including Sanctuary programs, permitting, activities, development, and threats to Sanctuary resources.” 82 Fed. Reg. 2264 (January 9, 2017) (to be codified at 15 C.F.R. § 922.202).

Conclusion

The proposed designation of MPNMS does not regulate fishing. The proposed rule is focused on protecting the shipwrecks and associated maritime cultural heritage resources. The three proposed regulations do not prohibit any fishing activities. Any future changes to the scope of the designation or prohibited activities are subject to the federal public notice and rulemaking process.

I hope this response sufficiently addresses your concerns. Please feel free to call me should you have any additional questions.

Very Truly Yours,



Emily A. Vainieri
Assistant Attorney General

cc: Adam Snyder (Chief Counsel, Opinions & Advice)

**ADVICE OF COUNSEL
NOT AN OPINION OF THE ATTORNEY GENERAL**