



COMMONWEALTH of VIRGINIA

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The Honorable John M.R. Bull
Commissioner, Virginia Marine Resources Commission
2600 Washington Avenue, Third Floor
Newport News, Virginia 23607

Dear Commissioner Bull:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire about the effect of the designation of an area of the Potomac River as a national marine sanctuary. Specifically, you ask whether the sanctuary designation could displace the authority of the Potomac River Fisheries Commission (the “Commission”) to regulate fisheries in the area; if so, whether the proposal does, in fact, do so; and, if the proposal does not displace the Commission’s authority, whether the federal government could be bound by an agreement not to do so in the future.

Background

The National Oceanic and Atmospheric Administration (“NOAA”) has proposed to designate a part of the Potomac River as the Mallow Bay-Potomac River National Marine Sanctuary (the “Potomac Sanctuary”).¹ By designating the area as a sanctuary, NOAA aims to protect the cultural heritage resources found in the area—principally, historic shipwrecks potentially dating back to the American Revolution and the remains of the largest “ghost fleet” of wooden steamships built for the United States Emergency Fleet during World War I.² Fishermen and other interested parties have expressed concern that the proposal will interfere with the regulatory authority of the Potomac River Fisheries Commission (“Commission”) over fisheries in the river.

The Commission was created by the Potomac River Compact of 1958, an agreement between the State of Maryland and the Commonwealth approved by Congress in 1962.³ It has the authority to

¹ Notice of Proposed Rulemaking to Establish Mallow Bay Potomac River National Marine Sanctuary, 82 Fed. Reg. 2254, 2255 (Jan. 9, 2017) (to be codified at 15 C.F.R. pt. 922) [hereinafter Notice of Proposed Sanctuary].

² *Id.* at 2255-56.

³ VA. CODE ANN. § 28.2-1001, art. I, § 1 (2016); Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962).

regulate the taking of fish and shellfish in designated tidal waters of the Potomac River.⁴ The law enforcement agencies of both Maryland and Virginia are responsible for the enforcement of the Commission's regulations, and each state's courts have jurisdiction to hear cases involving a regulatory violation.⁵

Applicable Law and Discussion

The National Marine Sanctuaries Act⁶ ("NMSA") establishes NOAA's authority to designate marine sanctuaries. NMSA enables NOAA to provide for more stringent fishing regulations in a sanctuary than are provided by existing authorities. In this instance, however, NOAA is not proposing to exercise that authority. Although NOAA cannot enter into a binding agreement to restrict its ability to exercise that authority in the future, NMSA establishes certain checks on NOAA that could stop any future effort to regulate fishing.

1. NOAA may regulate fishing within a national marine sanctuary.

NOAA has the authority to regulate fishing activity in an area it properly designates as a sanctuary.⁷ When it enacted NMSA, Congress recognized that certain areas of the marine environment possess important conservation, historical, scientific, cultural, or other qualities that give them national significance.⁸ It further recognized that the kind of resource-specific legislation that had been enacted up to that time had failed to adequately protect those resources.⁹ To remedy that problem, Congress enacted NMSA "to provide authority for comprehensive and coordinated conservation and management of [sanctuaries], and activities affecting them, in a manner which complements existing regulatory authorities."¹⁰ In other words, NMSA was designed to provide for a single federal agency to coordinate the efforts of other regulators and, if the efforts of those regulators were insufficient, to provide comprehensive regulations to manage all activities in, and features of, a marine sanctuary, including

⁴ VA. CODE ANN. § 28.2-1001, art. II & art. III, § 2.

⁵ Section 28.2-1001, art. V, §§ 1, 3.

⁶ See generally 16 U.S.C. §§ 1431 to 1445c-1 (LexisNexis, current through Pub. L. No. 114-328).

⁷ There is little doubt that the Potomac Sanctuary is an area that may be designated as a sanctuary. Under NMSA, NOAA "may designate any discrete area of the marine environment as a national marine sanctuary" 16 U.S.C. § 1433(a). The term "marine environment" is defined as including, among other things, coastal waters. *Id.* § 1432(3). The term "coastal waters," in turn, is defined in the Coastal Zone Management Act as "those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of seawater, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries." *Id.* § 1453(3). A water quality monitoring station near the downstream extremity of NOAA's preferred boundary reflects a mean surface water salinity ranging between 1 part per thousand ("ppt") to 4 ppt. MARYLAND DEPARTMENT OF NATURAL RESOURCES, *Fixed Station Monthly Monitoring Data, Lower Potomac River – Maryland Point*, EYES ON THE BAY, available at http://eyesonthebay.dnr.maryland.gov/bay_cond/bay_cond.cfm?param=sal&station=RET22 (last visited Feb. 28, 2017). A monitoring station near the upstream limit of the Potomac Sanctuary shows a much lower, albeit still measurable, mean salinity. MARYLAND DEPARTMENT OF NATURAL RESOURCES, *Fixed Station Monthly Monitoring Data, Lower Potomac River – Quantico*, EYES ON THE BAY, available at http://eyesonthebay.dnr.maryland.gov/bay_cond/bay_cond.cfm?param=sal&station=TF24 (last visited Feb. 28, 2017). Thus, the waters that will ultimately comprise the Potomac Sanctuary are coastal waters subject to designation under NMSA.

⁸ 16 U.S.C. § 1431(a)(2).

⁹ *Id.* § 1431(a)(3).

¹⁰ *Id.* § 1431(b)(2).

recreational and commercial fishing.¹¹ Thus, NMSA provides NOAA with the authority to supplement or displace the Commission's fishing regulations in the Potomac Sanctuary.

2. NOAA is not proposing to exercise that authority in the Potomac Sanctuary.

While NOAA has the authority to regulate fishing in a sanctuary, it has not proposed to exercise that authority in the Potomac Sanctuary and has not taken the necessary predicate steps to do so. In fact, NOAA has disclaimed any intent to regulate fishing at all.¹² The proposed regulations for the Potomac Sanctuary only apply to historical resources,¹³ which are defined as “any resource possessing historical, cultural, archaeological or paleontological significance, including sites, contextual information, structures, districts, and objects significantly associated with or representative of earlier people, cultures, maritime heritage, and human activities and events.”¹⁴ Notably, other resources included as protected resources in other sanctuaries, such as fish, marine mammals, and seabirds, are not defined as sanctuary resources in the Potomac Sanctuary.¹⁵ Because the proposed regulations apply only to designated historical resources,¹⁶ fishing, which does not involve exploiting historical resources, is not regulated.¹⁷

Furthermore, NOAA is not proposing to take the necessary predicate steps to directly regulate fishing in the Potomac Sanctuary. Under NMSA, NOAA must include, among other things not relevant here, the types of activities that will be subject to regulation in the proposed sanctuary in the designation document that establishes the sanctuary.¹⁸ The proposal for the designation document establishing the

¹¹ See *id.* § 1434(a)(5) (providing NOAA with the ability to promulgate fishing regulations applicable in sanctuaries in cooperation with other fishery management authorities).

¹² Notice of Proposed Sanctuary, *supra* note 1, at 2268 (“Fishing in the Sanctuary shall not be regulated as part of the Sanctuary management regime authorized by the Act.”).

¹³ *Id.* at 2264.

¹⁴ 15 C.F.R. § 922.3 (2017).

¹⁵ Notice of Proposed Sanctuary, *supra* note 1, at 2261-62, 64.

¹⁶ *Id.* at 2264 (forbidding the “moving, removing, recovering, altering, destroying, possessing, or otherwise injuring” historical resources within the Potomac Sanctuary). The proposed regulations would also prohibit attempting to do any of the prohibited actions toward historical resources, damaging or displacing any signs or other markers related to the sanctuary, and obstructing investigations related to the enforcement of the regulations or of NMSA. *Id.* at 2264-65.

¹⁷ Of course, this does not mean that commercial and recreational fishing will not be impacted at all by the designation of the Potomac Sanctuary. While NOAA has said that it does not expect the designation to impact any commercial or recreational fishing activity, *id.* at 2261, some fishing gear is anchored to, or disturbs, submerged land and could damage the historical resources in the river. A fisherman is unlikely to use such gear in such a way that it would damage a historical resource for fear of damaging or destroying his gear. Nevertheless, a fisherman may mistakenly do so and, in so doing, violate the strict liability provisions of NMSA. See *United States v. Great Lakes Dredge & Dock Co.*, 259 F.3d 1300, 1304 (11th Cir. 2001) (“In this case, the United States seeks damages from defendants for a violation of § 1443 of the NMSA, which imposes strict liability for damage or injury to any sanctuary resource.”). As NOAA notes, perhaps the best way to limit the danger of such an occurrence is to provide education to fishermen in the area so that they can avoid the protected resources. OFFICE OF NATIONAL MARINE SANCTUARIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, *Proposed Mallow Bay – Potomac River National Marine Sanctuary Designation: Draft Environmental Impact Statement and Draft Management Plan*, 32 (2016), available at <http://sanctuaries.noaa.gov/mallows-bay/mallows-proposed-deis-dmp.pdf>.

¹⁸ 16 U.S.C. § 1434(a)(4).

Potomac Sanctuary does not list either commercial or recreational fishing among the activities that will be subject to regulation.¹⁹

3. NOAA cannot enter into a binding agreement not to regulate fisheries, but Maryland has effective checks on NOAA's authority to stop any future effort to do so.

NOAA cannot be stopped from exercising its authority over fisheries in the future through a binding agreement, but it would be unable to regulate fishing in the Potomac Sanctuary in the future absent Maryland's concurrence. As with any other administrative agency, NOAA has only the authority delegated to it by Congress.²⁰ While NMSA authorizes NOAA to enter into cooperative agreements and other contracts with, among other entities, states and regional agencies, such agreements must be entered into to aid in carrying out the purposes and policies set forth in NMSA.²¹ Given that one of the policies of NMSA is to provide for comprehensive management of sanctuaries and the activities occurring in them,²² an agreement in which the entity responsible for managing the Potomac Sanctuary agrees not to exercise its authority to regulate a particular activity occurring therein would not be authorized and would be unenforceable. Of course, the Commission could still enter into a cooperative agreement with NOAA to set forth each party's understanding of the proper regulation of fishing in the Potomac Sanctuary, but it may not insist that NOAA bargain away its regulatory authority in that agreement.

This inability to contractually limit NOAA's authority over fishing must be considered in the larger legal context. Specifically, should NOAA decide in the future to regulate fishing within the Potomac Sanctuary, it would need the concurrence of Maryland to proceed. As noted above, NOAA has not included commercial or recreational fishing as activities subject to regulation in the designation document.²³ It cannot regulate those activities until they are added to the designation document, and the designation document cannot be amended without going through the same process that NOAA went through to promulgate it in the first place.²⁴ Thus, the modification would have to be published for public comment, a public hearing would have to be held in the area of the Potomac Sanctuary, and the proposal would have to be submitted to certain committees of Congress and the governor of Maryland.²⁵ Because the Potomac Sanctuary is entirely within Maryland waters, the governor of Maryland could eliminate any proposed amendment to the designation document to provide for NOAA regulation of fishing by certifying to the Secretary of Commerce that the proposed amendment is unacceptable.²⁶

¹⁹ See Notice of Proposed Sanctuary, *supra* note 1, at 2268 (stating that the activities that will be subject to regulation in the Potomac Sanctuary are damaging sanctuary resources, damaging sanctuary property, and interfering with or otherwise obstructing an investigation or law enforcement measure in the Potomac Sanctuary).

²⁰ See *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("Thus, if there is no statute conferring authority, a federal agency has none.").

²¹ 16 U.S.C. § 1442(a).

²² *Id.* § 1431(b)(2).

²³ See *supra* note 19 and accompanying text.

²⁴ 16 U.S.C. § 1434(a)(4) ("The terms of designation of a sanctuary shall include . . . the types of activities that will be subject to regulations by [NOAA] to protect [the characteristics of the sanctuary]. The terms of the designation may be modified only by the same procedures by which the original designation is made.").

²⁵ *Id.* § 1434(a)(1), (3), (6), (b)(1).

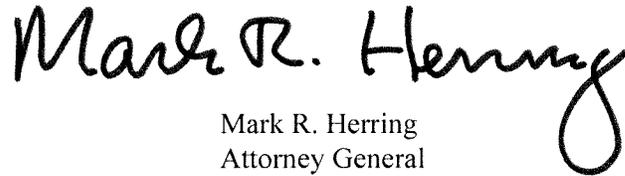
²⁶ See *id.* § 1434(b)(1) ("The designation . . . shall take effect and become final . . . unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.").

Conclusion

Accordingly, it is my opinion that NOAA has the authority to regulate fishing in the Potomac Sanctuary but has not chosen to exercise that authority in this instance. While NOAA cannot enter into a binding agreement in which it bargains away its authority, the Governor of Maryland is empowered under NMSA to effectively veto any attempt by NOAA to directly regulate fishing in the Potomac Sanctuary.

With kindest regards, I am

Very truly yours,

Handwritten signature of Mark R. Herring in black ink.

Mark R. Herring
Attorney General