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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**15 CFR Part 922**

**[Docket No. 160907827-7832-02]**

**RIN 0648-BG02**

**Mallows Bay-Potomac River National Marine Sanctuary Designation**

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Final rule.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) issues final regulations to implement the designation of the Mallows Bay-Potomac River National Marine Sanctuary (MPNMS or sanctuary). The area is 18 square miles of waters and submerged lands encompassing and surrounding the Mallows Bay area of the tidal Potomac River. The area is located entirely within Maryland state waters, adjacent to the Nanjemoy Peninsula of Charles County, Maryland. The sanctuary protects nationally-significant maritime cultural heritage resources, including the

fragile, historic remains of more than 100 World War I (WWI)-era U.S. Emergency Fleet Corporation (USEFC) wooden steamships known as the "Ghost Fleet," vessels related to the historic ship-breaking operations, other non-USEFC vessels of historic significance, and related maritime debris fields. The area also includes Native American sites, remains of historic fisheries operations, and Revolutionary and Civil War battlescapes. The significance of the area is recognized through its listing on the National Register of Historic Places (National Register Listing Number 15000173, April 24, 2015). NOAA, the State of Maryland, and Charles County, Maryland, will jointly manage MPNMS.

**DATES:** Effective Date: Pursuant to section 304(b) of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1434(b)), the designation and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress, beginning on the date on which this document is published, unless the Governor of the State of Maryland certifies to the Secretary of Commerce during that same review period that the designation or any of its terms is unacceptable, in which case the designation or any unacceptable term shall not take effect. The public can track the days of Congressional session at the following website:

<https://www.congress.gov/days-in-session>. After the close of the forty-five days of continuous session of Congress, NOAA will publish a document announcing the effective date of the final regulations in the Federal Register.

**ADDRESSES:** Copies of the final environmental impact statement and final management plan (FEIS/FMP) described in this rule and the record of decision (ROD) are available upon request to: Mallows Bay-Potomac River National Marine Sanctuary, c/o NOAA Office of National Marine Sanctuaries, 1305 East West Hwy., 11th Floor, Silver Spring, MD 20910., Attention: Paul Orlando, Regional Coordinator. The FEIS/FMP is also available for viewing and download at <https://sanctuaries.noaa.gov/mallows-potomac/>.

**FOR FURTHER INFORMATION CONTACT:** Paul Orlando, Regional Coordinator, Office of National Marine Sanctuaries at 240-460-1978, [paul.orlando@noaa.gov](mailto:paul.orlando@noaa.gov), or Mallows Bay-Potomac River National Marine Sanctuary, c/o NOAA Office of National Marine Sanctuaries, 1305 East West Hwy., 11th Floor, Silver Spring, MD 20910., Attention: Paul Orlando, Regional Coordinator.

**SUPPLEMENTARY INFORMATION:**

**I. BACKGROUND**

The National Marine Sanctuaries Act (NMSA; 16 U.S.C. 1431 et seq.) authorizes the Secretary of Commerce (Secretary) to designate and protect as national marine sanctuaries areas of the marine environment that are of special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or aesthetic qualities. Day-to-day management of national marine sanctuaries has been delegated by the Secretary to NOAA's Office of National Marine Sanctuaries (ONMS). The primary objective of the NMSA is to protect the sanctuary system's biological and cultural resources, such as coral reefs, marine animals, historic shipwrecks, historic structures, and archaeological sites.

**1. Mallows Bay-Potomac River National Marine Sanctuary**

The Mallows Bay-Potomac River National Marine Sanctuary is an 18-square-mile area of the tidal Potomac River located 40 miles south of Washington, D.C., off the Nanjemoy Peninsula of Charles County, Maryland. It is an area of national significance featuring unique historical, archaeological, cultural, ecological, and aesthetic resources and qualities, and offers opportunities for conservation, education, recreation, and research. Its maritime landscape is home to a diverse collection of historic shipwrecks that date back to the Civil War, and potentially to the American Revolutionary War, totaling more

than 100 known vessels. Included among these vessels are the sunken remains of the largest "Ghost Fleet", wooden steamships built for the U.S. Emergency Fleet during World War I (WWI). The fleet was constructed at more than 40 shipyards in 17 states as part of a massive national wartime mobilization. The sanctuary's archaeological and cultural resources cover centuries of history dating back from the earliest American Indian presence in the region approximately 12,000 years ago to the Revolutionary, Civil and two World Wars, as well as successive regimes of Potomac fishing industries. The significance of this area is recognized through its listing on the National Register of Historic Places (National Register Listing Number 15000173, April 24, 2015).

The Maryland Department of Natural Resources (DNR), Maryland Historical Trust (MHT), Maryland Department of Tourism, and Charles County, MD, collaborated with community partners to implement conservation and compatible public access strategies in and around Mallows Bay, consistent with numerous planning and implementation documents. In 2010, DNR purchased a portion of land adjacent to Mallows Bay and made it available by a lease agreement to Charles County for the creation and management of Mallows Bay County Park, the main launch point for access to the historic shipwrecks. Pursuant to the National Historic

Preservation Act (NHPA), the MHT has stewardship and oversight responsibility for the shipwrecks, along with hundreds of other historic non-shipwreck sites around the state. DNR manages the waterbody and associated ecosystem resources, including land use, resource conservation and extraction activities. The lands on either side of Mallows Bay County Park are held by the U.S. Department of Interior, Bureau of Land Management, and a private citizen.

## **2. Need for Action**

The designation would allow NOAA to complement current state-led efforts to conserve and manage the nationally significant maritime cultural heritage resources in the sanctuary while enhancing public awareness and appreciation. The designation would also facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses (including recreation and tourism), as directed by the NMSA. The threats to these resources are related to actions or conditions that result in the damage or loss of the historic resources. Over time, both intentional and unintentional direct damage has occurred from breaking, relocation of artifacts, defacing and physical alteration, burning, and removal of historic artifacts from the area. Additionally, indirect damage to the resources has occurred from the accumulation and entanglement of marine

debris and from weather-related processes such as wind, flood, and ice events.

NOAA will 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. The State of Maryland currently has a comprehensive set of management measures for the protection of the natural environment, including wildlife, fish, birds, water quality, and habitat. As such, NOAA's sanctuary regulations will focus only on the protection of the shipwrecks and associated maritime cultural heritage resources.

Although the Maryland Submerged Archaeological Historic Property Act (Md. Code Ann., State Fin. & Proc. sections 5A-333 et seq.) provides a basic level of protection for maritime cultural heritage resources in Mallow's Bay and adjacent areas of the Potomac River, the sanctuary will allow NOAA's management under the NMSA to supplement and complement the existing authority and the current management framework in the area. The sanctuary will address ongoing threats to the maritime cultural heritage resources while providing opportunities for research, education, recreation, and tourism through coordinated and comprehensive

management and conservation of the resources in collaboration with the State of Maryland and Charles County. NOAA will also carry out education, science, and interpretative programs that describe the relationship between the shipwreck structures and the natural ecosystem.

### **3. Procedural History**

#### **a. Sanctuary Nomination and Public Scoping**

On September 16, 2014, pursuant to section 304 of the NMSA and the Sanctuary Nomination Process (SNP; 79 FR 33851), the former Governor of Maryland, Charles County, and a coalition of community groups submitted a nomination to NOAA seeking designation of Mallows Bay-Potomac River as a national marine sanctuary. The nomination cited conservation goals to protect and conserve the fragile, historic remains of the Nation's cultural heritage as well as the opportunities to expand public access, recreation, tourism, research, and education to the area. The nomination was endorsed by a diverse coalition of organizations and individuals at local, state, regional, and national levels including elected officials, businesses, Native American, environmental, recreation, conservation, fishing, tourism, museums, historical societies, and education groups. The nomination identified opportunities for NOAA to protect, study, interpret, and manage the area's unique resources,

including by building on existing local, county, and State of Maryland efforts to manage the area for the protection of shipwrecks. NOAA's review of the nomination against the criteria and considerations of the SNP, including the requirement for broad-based community support indicated strong merit in proposing this area as a national marine sanctuary.

NOAA completed its review of the nomination and, on January 12, 2015, added the area to the inventory of nominations that are eligible for designation. All nominations submitted to NOAA can be found at: <https://www.nominate.noaa.gov/nominations/>.

On October 7, 2015, NOAA initiated the public scoping process with the publication of a Notice of Intent in the Federal Register (NOI; 80 FR 60634). The NOI solicited public input on the proposed designation and informing the public of the Agency's intentions to prepare a draft environmental impact statement (DEIS) evaluating alternatives related to the proposed designation of MPNMS under the NMSA. That announcement initiated a 90-day public comment period during which NOAA solicited additional input on the scale and scope of the proposed sanctuary, including ideas presented in the community nomination. The NOI also announced NOAA's intent to fulfill its

responsibilities under the requirements of the National Historic Preservation Act (NHPA).

In November 2015, NOAA held two public meetings and provided additional opportunities for public comments by mail and through a web portal (<https://www.regulations.gov/docket?D=NOAA-NOS-2015-0111>). The comment period closed on January 15, 2016. All comments received, through any of these methods, are posted on the [www.regulations.gov](http://www.regulations.gov) web portal. These public scoping comments were used by NOAA in preparing the proposed sanctuary regulations and draft environmental impact statement and draft management plan (DEIS/DMP) associated with the proposed sanctuary designation.

#### b. Designation Process

On January 9, 2017, NOAA published a document in the Federal Register announcing the proposed designation of approximately 52 square miles of waters of the tidal Potomac River as a national marine sanctuary (82 FR 2254). NOAA also provided public notice of the availability of the related DEIS/DMP (82 FR 2254; 82 FR 1733). All three documents (proposed rule, DEIS, and DMP) were prepared in close consultation with the State of Maryland and Charles County, Maryland. NOAA opened an 81-day public comment period on the proposed rule, DEIS, and DMP, which closed on

March 31, 2017. During the comment period, NOAA also held two separate public meetings in La Plata, Maryland and in Arnold, Maryland.

All written comments are available at <https://www.regulations.gov/docket?D=NOAA-NOS-2016-0149>. NOAA's responses to public comments are included in Appendix C of the final environmental impact statement (FEIS) and final management plan (FMP), which was made available on May 31, 2019 (84 FR 25257), and in Section IV of this document.

## **II. CHANGES FROM PROPOSED TO FINAL REGULATIONS**

Based on public comments received between January and March 2017, internal deliberations, interagency consultations, discussions with state-recognized Indian tribes, consultation with the Department of Navy (DoN) (as a cooperating agency in the preparation of the environmental impact statement), meetings with constituent groups, and evaluation of this input with the State of Maryland and Charles County, NOAA has made the following changes to the proposed rule. NOAA has also made conforming changes to the FEIS/FMP.

### **1. Sanctuary Boundary**

In response to public comments and discussions with the State of Maryland, Charles County, Maryland, the DoN, NOAA decided to adopt Alternative B in the FEIS and designate 18 square miles of waters and submerged lands encompassing and surrounding the Mallows Bay area of the tidal Potomac River. The boundary begins at the mean high tide level on the Maryland side, extends across the Potomac River to the Virginia-Maryland state boundary lines, and follows the boundary of the Mallows Bay-Widewater Historic and Archeological District in the National Register of Historic Places. The area also closely matches the boundary submitted to NOAA by the Governor of Maryland in the sanctuary nomination package. The area contains a concentration of 142 historic USEFC vessels, vessels related to historic ship-breaking activities, other non-USEFC vessels of historic significance, and related maritime debris fields. The area also includes Native American sites, remains of historic fisheries operations such as sturgeon and caviar industries, and Revolutionary and Civil War battlescapes.

## **2. Department of Defense Activities**

NOAA, in consultation with the DoN, has established a framework for MPNMS and DoD to co-exist. In developing the proposed rules, NOAA did not anticipate that many, if any, current DoD activities would adversely impact sanctuary resources. However,

following interagency consultation with DoD components (including DoN, the Marine Corps, and the U.S. Army), NOAA revised §§ 922.203(c) and 922.204 and the terms of designation set forth in appendix B to the MPNMS regulations at 15 CFR part 922, subpart S. In the final regulations, NOAA: a) clarifies the extent to which the sanctuary prohibitions may apply to DoD activities; b) clarifies the requirement for DoD to engage in NMSA section 304(d) consultation; and c) exempts DoD from the application of emergency regulations issued by NOAA pursuant to § 922.204.

### **III. SUMMARY OF FINAL REGULATIONS FOR MPNMS**

With this final rule, NOAA is implementing the following regulations for MPNMS.

#### **1. Add New Subpart S to Existing National Marine Sanctuary**

##### **Program Regulations**

NOAA amends 15 CFR part 922 by adding a new subpart (subpart S) that contains site-specific regulations for MPNMS. This subpart includes the boundary, contains definitions of common terms used in the new subpart, provides a framework for joint management of the sanctuary, identifies prohibited activities and exceptions, and establishes procedures for certification of existing uses,

permitting otherwise prohibited activities, and emergency regulations. Several conforming changes are also made to the national regulations as described in detail below.

NOAA is concurrently working on designating a separate new national marine sanctuary in Wisconsin's Lake Michigan waters as part of a separate rulemaking process (82 FR 2269). The regulations implementing the designation of Wisconsin - Lake Michigan National Marine Sanctuary would be published in subpart T.

## **2. Sanctuary Name**

The name of the sanctuary is "Mallows Bay-Potomac River National Marine Sanctuary" and is abbreviated as MPNMS. The name is based on the nomination submitted by the community.

## **3. Sanctuary Boundary**

The Mallows Bay-Potomac River National Marine Sanctuary consists of an area of approximately 18 square miles of waters of the State of Maryland and the submerged lands thereunder associated with the underwater cultural resources in the Potomac River. The western boundary of the sanctuary approximates the border between the Commonwealth of Virginia and the State of Maryland along the western side of the Potomac River and begins at Point

1 north of the mouth of Aquia Creek in Stafford County, Virginia, near Brent Point. From this point the boundary continues to the north approximating the border between Virginia and Maryland cutting across the mouths of streams and creeks passing through the points in numerical order until it reaches Point 40 north of Tank Creek. From this point the sanctuary boundary continues east across the Potomac River in a straight line towards Point 41 until it intersects the Maryland shoreline just north of Sandy Point in Charles County, MD. From this intersection the sanctuary boundary then follows the Maryland shoreline south around Mallows Bay, Blue Banks, and Wades Bay cutting across the mouths of creeks and streams along the eastern shoreline of the Potomac River until it intersects the line formed between Point 42 and Point 43 just south of Smith Point. Finally, from this intersection the sanctuary boundary crosses the Potomac River to the west in a straight line until it reaches Point 43 north of the mouth of Aquia Creek in Stafford County, Virginia, near Brent Point.

The detailed legal boundary description is included in § 922.200 and the coordinates are located in 15 CFR part 922, subpart S, appendix A. A map of the area is shown in the FEIS (Chapter 3.2), and can also be found at <https://sanctuaries.noaa.gov/mallows-potomac/>.

#### **4. Definitions**

NOAA narrowly defines "sanctuary resources" for MPNMS to include only the maritime cultural heritage resources of the sanctuary in accordance with the purpose of the designation. The definition does not include biological and ecological resources of the area already managed by the State of Maryland. Creating this site-specific definition requires NOAA to modify the national definition of "sanctuary resource" in the national regulations at § 922.3 to add an additional sentence that defines the site-specific definition for MPNMS at § 922.201(a). This is similar to the approach taken for other national marine sanctuaries that do not share the full national "sanctuary resource" definition, such as Thunder Bay National Marine Sanctuary.

NOAA also adds a definition in the MPNMS regulations at § 922.201(a) for sanctuary resource that uses the national definition for "historical resources" set forth in § 922.3 and expands the site-specific definition of sanctuary resource to specifically provide examples of the types of resources in MPNMS that fall within that definition. The national definition of "historical resources" at § 922.3 includes resources that possess historical, cultural, archaeological or paleontological

significance, such as sites, contextual information, structures, districts, and objects significantly associated with or representative of earlier people, cultures, maritime heritage, and human activities and events. These historical resources also include "cultural resources," "submerged cultural resources," and also include "historical properties," as defined in the National Historic Preservation Act.

The MPNMS definition of sanctuary resources is then defined in § 922.201 to include historical resources as defined by § 922.3. This includes any sunken watercraft and any associated rigging, gear, fittings, trappings, and equipment. It also includes personal property of the officers, crew, and passengers, and any cargo, as well as any submerged or partially submerged prehistoric, historic, cultural remains, such as docks, piers, fishing-related remains (e.g. weirs, fish-traps) or other cultural heritage materials. For MPNMS, 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.

This final rule incorporates and adopts other common terms defined in the existing national regulations at § 922.3; some of

those terms include: "Cultural resources," which means any historical or cultural feature, including archaeological sites, historic structures, shipwrecks, and artifacts; and "National Marine Sanctuary" or "Sanctuary," which means an area of the marine environment of special national significance due to its resource or human-use values, which is designated as such to ensure its conservation and management.

Based on public comments and consultation with partners, the final rule adds a definition in the MPNMS regulations at § 922.201 providing that "traditional fishing" means those commercial, recreational, and subsistence fishing activities that were customarily conducted within the Sanctuary prior to its designation or expansion, as identified in the relevant Final Environmental Impact Statement and Management Plan for this Sanctuary.

## **5. Joint Management of the Sanctuary**

NOAA, the State of Maryland, and Charles County, Maryland, will jointly manage MPNMS. NOAA established the framework for joint management at § 922.202 and memorialized the operational details to coordinate sanctuary management in a Memorandum of Agreement (MOA). Any significant changes to the regulations or management

plan would be jointly coordinated. The draft MOA is found in Appendix D in the FEIS.

## **6. Prohibited and Regulated Activities**

NOAA will regulate three activities for MPNMS, found in § 922.203(a), and summarized below.

### a. Damaging Sanctuary Resources

MPNMS regulations prohibit any person from conducting or causing to be conducted the moving, removing, recovering, altering, destroying, possessing, or otherwise injuring, or attempting to move, remove, recover, alter, destroy, possess or otherwise injure a sanctuary resource, except as an incidental result of traditional fishing. This sanctuary prohibition on possessing sanctuary resources does not apply retroactively to historical resources removed from the sanctuary prior to designation.

Maryland State regulations related to the limited removal of historical resources, which have been in effect since July 1, 1988, currently do not apply to these resources as limited removal is not allowed within the boundaries of National Register of Historic Places listed sites. Collection, excavation, or other comparable activities within the Mallows Bay-Widewater Archeological District, require permission through

a permit from the state of Maryland. In the case of sanctuary resources that are covered under the Sunken Military Craft Act (SMCA; Pub. L. 108-375, Tit. XIV; 10 U.S.C. 113 note), NOAA and the DoN would cooperate on protecting those resources using the policy and procedures described in the 2015 Memorandum of Agreement (MOA). A copy of the MOA is available at: [www.gc.noaa.gov/moa-2014-navy-signed.pdf](http://www.gc.noaa.gov/moa-2014-navy-signed.pdf).

Additionally, NOAA adopted the traditional fishing exemption to minimize or otherwise eliminate potentially adverse economic impacts of sanctuary designation experienced by the fishing industry and to address concerns raised by the Potomac River Fisheries Commission. The terms of designation (found in appendix B of subpart S) clarifies that fishing shall not be regulated as part of the Sanctuary management regime, but may be regulated by other Federal, State, Tribal and local authorities of competent jurisdiction. As an additional non-regulatory measure, NOAA, the State, and Charles County agreed to review, consider, and address measurable, negative impacts of sanctuary designation on fishing particularly during the 5- and 10-year periodic review conducted under the NMSA.

b. Damaging Sanctuary Signs and Infrastructure

NOAA prohibits damage to sanctuary signs, notices, placards, monuments, stakes, posts, buoys, or boundary markers. These materials are Federal property and part of the education and outreach programs in support of sanctuary management. This regulation prohibits damage from marking, defacing or altering these materials in any way.

c. Interfering With Investigations

NOAA prohibits interfering with sanctuary enforcement activities. This regulation will assist in NOAA's enforcement of the sanctuary regulations and strengthen sanctuary management.

d. Exemption for Emergencies and Law Enforcement

NOAA exempts from the three regulations activities that respond to emergencies that threaten lives, property or the environment, or are necessary for law enforcement purposes.

e. Department of Defense Activities

NOAA and DoD agree that all military activities will be carried out in a manner that avoids, to the maximum extent practicable, any adverse impacts on sanctuary resources and qualities.

Based on information provided by DoD on its activities in the area, and analyzed by NOAA in its FEIS, the three prohibitions

will not apply to existing military activities as described in the FEIS, or to the following activities:

- i) Low-level overflight of military aircraft operated by DoD;
- ii) The designation of new units of special use airspace;
- iii) The use or establishment of military flight training routes;
- iv) Air or ground access to existing or new electronic tracking communications sites associated with special use airspace or military flight training routes; or
- v) Activities to reduce or eliminate a threat to human life or property presented by unexploded ordnances or munitions.

New military activities that do not violate the three prohibitions are allowed in the sanctuary. Any new military activity that is likely to violate sanctuary prohibitions may become exempt from the prohibitions through consultation between the Director and DoD pursuant to section 304(d) of the NMSA. The term "new military activity" includes but is not limited to, any existing military activity that is modified in any way (including change in location, frequency, duration, or technology used) that is likely to destroy, cause the loss of, or injure a sanctuary resource, or is likely to destroy, cause the loss of, or injure a sanctuary resource in a manner or to an

extent that was not considered in a previous consultation under section 304(d) of the NMSA.

## **7. Emergency Regulations**

As part of this designation, NOAA will have the authority to issue emergency regulations. Emergency regulations are used in limited cases and under specific conditions when there is an imminent risk to sanctuary resources and a temporary prohibition on a specific activity would prevent the destruction or loss of those resources. Under the NMSA, NOAA only issues emergency regulations for a maximum of six months, and can only extend any single emergency regulation once. A full rulemaking process must be undertaken, including a public comment period, to consider making an emergency regulation permanent. NOAA modifies the national regulations at § 922.44 to include MPNMS in the list of sanctuaries that have site-specific regulations related to emergency regulations, and adds detailed site-specific emergency regulations to the MPNMS regulations at § 922.204. DoD activities are not subject to emergency regulations.

## **8. General Permits, Certifications, Authorizations, and Special Use Permits**

### **a. General Permits**

NOAA has authority to issue permits to allow certain activities that would otherwise violate the prohibitions in MPNMS regulations. Similar to other national marine sanctuaries, NOAA considers these permits for the purposes of education, research, or management.

To include this permit authority for MPNMS, NOAA amends national regulations in part 922, subpart E, to add references to subpart S, as appropriate, and adds a new § 922.205 in subpart S titled "Permit procedures and review criteria" that would address site-specific permit procedures for MPNMS.

#### b. Certifications

NOAA adds language at § 922.206 describing the process by which NOAA may certify pre-existing authorizations or rights within MPNMS. Here, the term "pre-existing authorizations or rights" refers to any leases, permits, licenses, or rights of subsistence use or access in existence on the date of sanctuary designation (see 16 U.S.C. 1434(c); 15 CFR 922.47). Consistent with this, MPNMS regulations at § 922.206 states that certification is the process by which these pre-existing authorizations or rights that violate sanctuary prohibitions may be allowed to continue, and the sanctuary may regulate the exercise of the pre-existing authorizations or rights consistent

with the purposes for which the sanctuary was designated. Applications for certifying pre-existing authorizations or rights must be received by NOAA within 180 days of the Federal Register notification announcing of effective date of the designation.

#### c. Authorizations

With this designation, NOAA also assumes authority to allow an otherwise prohibited activity to occur in MPNMS, if such activity is specifically authorized by any valid Federal, state, or local lease, permit, license, approval, or other authorization issued after sanctuary designation. "Authorization authority" is intended to streamline regulatory requirements by reducing the need for multiple permits and would apply to all prohibitions at § 922.203. As such, NOAA amends the regulatory text at § 922.49 to add reference to subpart S.

#### d. Special Use Permits

NOAA has the authority under the NMSA to issue special use permits (SUPs) at national marine sanctuaries as established by section 310 of the NMSA. SUPs can be used to authorize specific activities in a sanctuary if such authorization is necessary (1) to establish conditions of access to and use of any sanctuary resource; or (2) to promote public use and understanding of a

sanctuary resource. The activities that qualify for a SUP are set forth in the Federal Register (78 FR 25957; May 3, 2013). Categories of SUPs may be changed or amended through public notice and comment. NOAA will not apply SUP authority to activities in existence at the time of MPNMS designation.

NOAA reviews SUP applications to ensure that a proposed activity is compatible with the purposes for which the sanctuary is designated and that the activities carried out under the SUP will be conducted in a manner that do not destroy, cause the loss of, or injure sanctuary resources. NOAA also requires SUP permittees to purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit. The NMSA allows NOAA to assess and collect fees for the conduct of any activity under a SUP. The fees collected could be used to recover the administrative costs of issuing the permit, the cost of implementing the permit, monitoring costs associated with the conduct of the activity, and the fair market value of the use of sanctuary resources.

#### **9. Other Conforming Amendments**

The general regulations in part 922, subpart A, and part 922, subpart E, for regulations of general applicability would also

have to be amended so that the regulations are accurate and up-to-date. The following 10 sections are updated to reflect the increased number of sanctuaries or to add subpart S to the list of sanctuaries:

- Section 922.1 Applicability of regulations
- Section 922.40 Purpose
- Section 922.41 Boundaries
- Section 922.42 Allowed activities
- Section 922.43 Prohibited or otherwise regulated activities
- Section 922.44 Emergency regulations
- Section 922.47 Pre-existing authorizations or rights and certifications of pre-existing authorizations or rights
- Section 922.48 National Marine Sanctuary permits—application procedures and issuance criteria
- Section 922.49 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity
- Section 922.50 Appeals of administrative action

NOAA intends to make additional system-wide regulation updates when NOAA finalizes elements of a national review of regulations that was proposed on January 28, 2013 (78 FR 5998). Of relevance to MPNMS, the final rule for the national review of regulations would consolidate general permit regulations and

permitting procedures from site-specific subparts into the system-wide regulations. No substantive changes to MPNMS permit categories or permit requirements would be included as part of the national regulation review. NOAA will finalize elements of the national regulation review in a separate rulemaking action.

#### **10. Terms of Designation**

Section 304(a)(4) of the NMSA requires that the terms of designation include: the geographic area of the sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or aesthetic value; and the types of activities that may be subject to regulation by the Secretary of Commerce to protect these characteristics. Section 304(a)(4) also specifies that the terms of designation may be modified only by the same procedures by which the original designation was made. NOAA is adding the terms of designation as appendix B to the MPNMS regulations at 15 CFR part 922, subpart S.

#### **IV. RESPONSE TO COMMENTS**

When designating a national marine sanctuary, section 304 of the NMSA (16 U.S.C. 1434) requires the preparation of an environmental impact statement (EIS), as provided by the

National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and that the EIS be made available to the public. In preparing the final EIS, the CEQ regulations further require that agencies respond to all "substantive" comments on a draft EIS (40 CFR 1503.4).

The MPNMS DMP, DEIS and proposed sanctuary regulations were released for public review on January 9, 2017 (82 FR 2256). The public comment period ended on March 31, 2017. During this period, NOAA received over 1,450 comments, including written comments, oral comments, and group letters. Of those, 1120 comments were received through the eRulemaking Portal [www.regulations.gov](http://www.regulations.gov). NOAA also hosted two public hearings on March 7, 2017 in La Plata, MD, and March 9, 2017 in Arnold, MD. Over 170 people attended the meetings with 73 people providing oral public comment. Additionally, through the National Marine Sanctuary Foundation (NMSF), NOAA received two letters signed on behalf of multiple organizations; one was signed by 133 individuals in support of designation of NOAA's preferred alternative and the second was signed by 128 organizations in support of designation for MPNMS and a separate action relating to the proposed designation of Wisconsin - Lake Michigan National Marine Sanctuary.

The majority of comments expressed support for the proposed sanctuary, several expressed opposition, and a few did not take a position. Of those people who spoke at the public meetings, more than half expressed support, several were opposed, and a few expressed conditional support. In addition, of the nearly 1000 comments that specified a boundary alternative, relatively few favored Alternative A (i.e., no action/no sanctuary), while most favored Alternative B (18 square miles, which closely matches with the Mallows Bay-Widewater Historical and Archeological District on the National Register of Historic Places), Alternative C (52 square miles of the tidal Potomac River, which includes all of the known WWI-era historic vessel remains) or Alternative D (100 square miles of the tidal Potomac River which may contain other maritime cultural heritage assets and potentially expands recreational use opportunities). The majority of comments supported Alternative D for purposes of public access and protection for any potential additional maritime cultural assets. Supporters of this alternative also cited its increased protection of natural resources, although natural resource management is not proposed or being implemented for this sanctuary. Several comments supported NOAA's draft preferred alternative (Alternative C) as did those who signed a letter of support through the NMSF. Of the comments that did not specify a boundary alternative, the majority supported a

sanctuary designation. Through the NMSF, many organizations expressed support for MPNMS and the separate Wisconsin designation without reference to a specific alternative.

As a cooperating agency, the DoN provided NOAA with comments on behalf of four military installations adjacent to the proposed sanctuary boundary alternatives. DoN also submitted a public comment stating support for the proposed sanctuary designation and expressing a desire to work cooperatively with NOAA to ensure that the designation does not adversely impact military operations in the area.

Additional input on the proposal were provided to NOAA through consultation with Federal and state agencies as well as discussions with three state-recognized Tribes: Piscataway Conoy Confederacy and Sub-Tribes (MD), Piscataway Indian Nation (MD), and the Patawomeck Indian Tribe of Virginia (VA).

For the purposes of managing responses to public comments, NOAA grouped similar comments by theme. These themes align with the content of the proposed rule that identified the purposes and needs for a national marine sanctuary, and the draft management plan that identified the proposed non-regulatory programs and

sanctuary operations. The themes are summarized below, followed by NOAA's response.

## **COMMENTS on the PURPOSES and NEED for the SANCTUARY**

### **Purpose and Need 1: Resource Protection for Maritime and Cultural Heritage Assets**

**1. Comment:** The majority of comments NOAA received expressed support for the sanctuary designation because it will have a positive impact on cultural resource protection of known and potential shipwreck sites through increased public awareness, education, interpretation and related programs.

**Response:** NOAA agrees with these comments and, in partnership with the State of Maryland and Charles County, MD, is moving forward with the sanctuary designation process which cites protection and interpretation of nationally-significant maritime cultural heritage resources as one of two purposes and needs for the sanctuary.

**2. Comment:** NOAA received many comments highlighting that the WWI - era ship remains and related maritime assets are an important component of United States history and maritime cultural heritage.

**Response:** NOAA agrees with these comments. These vessels were built at more than 40 shipyards throughout the coastal United States and helped to transform the United States shipbuilding capacity. In addition, the demand for workers, materials and industry services provided significant economic and social benefit to local economies and communities.

**3. Comment:** NOAA received some comments stating that as the Nation commemorates the Centennial of United States' entry into WWI, sanctuary designation would be a fitting tribute to those citizens who served our country during that period.

**Response:** NOAA agrees that the sanctuary could help to interpret the stories of sacrifice and commitment of those who served during WWI, including our war veterans, the expansion of the U.S. Merchant Marines, and communities associated with more than 40 shipyards in the construction of the Ghost Fleet vessels. NOAA will continue to participate alongside other local, state and federal programs and non-profit organizations throughout the WWI Centennial Commemoration period and beyond.

**4. Comment:** NOAA received several comments expressing opposition to the proposed designation because commenters expressed mistrust with the Federal Government, argued the

proposed sanctuary is not needed, and felt designation would not be a good use of taxpayer money.

**Response:** Through the NMSA, NOAA as a Federal agency carries out its mission through transparent public processes and community-based programs that involve extensive and continuous public engagement and input. This holds true for nominating and potentially designating new sanctuaries. The concept for this proposed sanctuary originated with a nomination from the Governor of Maryland to NOAA. That nomination also included the request for joint management with the State of Maryland and Charles County, MD. The designation process has included public scoping and public comment periods as well as numerous meetings with community organizations. Post-designation, NOAA and the joint managers of the sanctuary will continue their partnership and transparency with the community through sanctuary advisory councils, working groups, volunteer opportunities, and a diversity of partnerships.

The justification for the sanctuary is addressed in the final environmental impact statement. Specifically, Section 3.2 "Description of Alternatives" describes Alternative B in terms of the Mallows Bay-Widewater Historical Archeological District which codifies the national significance of the Ghost Fleet and related maritime assets and provides opportunity for Federal

protection. Section 2.2 "Purpose and Need for Action" describes how the NMSA would complement and supplement existing Federal and State authorities to enhance resource protection for maritime assets and facilitate public access and recreation through regulatory and non-regulatory actions.

In the final management plan for this sanctuary, NOAA describes sanctuary activities that could be completed at several funding levels (see FMP Appendix 3). As a federal agency, NOAA's budget is passed by Congress and is signed into law by the President. NOAA's budget includes an annual allocation for the management of all national marine sanctuaries under the NMSA. NOAA makes funding decisions for each sanctuary based on the Congressional appropriation to the Agency, Office of National Marine Sanctuaries priorities, and the particular needs of individual national marine sanctuaries. As a result, funding can vary from year to year, which may affect the level of activities completed in the management plan. NOAA also anticipates a varying level of in-kind contributions from joint managers from the State of Maryland and Charles County, MD, as well as other partners, will contribute to the overall sanctuary goals.

**5. Comment:** NOAA received a few comments that sanctuary designation is unnecessary because the historic resources are

managed by the State of Maryland already and the area was recently added to the National Register of Historic Places (NRHP).

**Response:** NOAA disagrees that sanctuary designation is unnecessary. While the State of Maryland is the trustee and manager of the historic resources, there remain gaps in the State's authority to provide full protection, as defined in Section 2.4 of the FEIS. The listing of the Ghost Fleet on the National Register of Historic Places (NRHP) in 2015 deemed their value as nationally significant due to its historical, cultural or archaeological qualities and, therefore, eligible for additional Federal protection.

Section 2.4 of the FEIS defines the role of the NMSA to complement and supplement existing authorities. For example, the NHPA only applies to Federal undertakings and does not address actions taken by the public. As such, the NMSA would supplement existing state authorities by closing gaps related to the collection of historic artifacts, by strengthening the requirement for the public to report discovery of historic artifacts, by increasing enforcement capacity, and by increasing the penalty for violation of these prohibitions. Additionally, NOAA's non-regulatory programs (e.g., education, public outreach, citizen science) make significant contributions to the

ongoing and long-term management of historic resources and are important tools to help raise public awareness and deter impacts to the historic and maritime cultural heritage resources of the area.

**6. Comment:** NOAA received some comments expressing support for the proposed sanctuary designation because the sanctuary would help protect and interpret important Civil War heritage resources.

**Response:** NOAA agrees with these comments. In addition to protecting and interpreting WWI-era assets, the waters of the Potomac River potentially include historic assets from other eras, including the Civil War, which would also be protected. Additionally, the surrounding maritime landscape is associated with Civil War-era history, including the Underground Railroad. NOAA expects that sanctuary research, education, and outreach efforts have potential to expand the understanding, protection and interpretation of these histories and resources.

**7. Comment:** NOAA received several comments that the sanctuary would serve as an important and permanent memorial to those citizens who have served and sacrificed their lives to defend our country, from the Revolutionary War through modern times.

**Response:** NOAA agrees that an opportunity may potentially exist. As these assets cannot reside in museums or other land-based venues, the resting place of the WWI-era Ghost Fleet and maritime assets from other war eras within sanctuary waters offer a unique opportunity to commemorate commitment and service. For example, NOAA and its partners have initiated preliminary dialog with the Maryland Veterans Museum at Patriot Park about the potential for the sanctuary's water-based perspective to complement the experience of visitors to their venue. NOAA intends to continue to work with a variety of organizations to promote and interpret histories and stories of personal commitment associated with the sanctuary.

8. **Comment:** NOAA received several comments that the shipwrecks are not nationally significant and that NOAA did not provide adequate justification for designation.

**Response:** NOAA disagrees with these comments. The WWI-era Ghost Fleet is a national asset that has been adequately documented and validated by nationally-recognized authorities.

Specifically, in 2015, the Department of the Interior placed a section (called a "district") of the Potomac River containing the Ghost Fleet on the National Register of Historic Places. This district listing recognizes the area as "nationally-significant" and is consistent with the criteria described in

the Federal Register notice for the Sanctuary Nomination Process to qualify the resources for consideration as a national marine sanctuary.

**9. Comment:** NOAA received some comments that the sanctuary should recognize and interpret the historical fisheries of the region as well as the generations of local watermen.

**Response:** NOAA agrees with these comments. While the WWI-era vessels and assets are the dominant maritime feature of the proposed sanctuary, NOAA recognizes that there are other significant cultural resources within and/or associated with the sanctuary (see Section 3.2 of FEIS p.52), including the history of fishing and the heritage of local watermen. The sanctuary will work with partners to conduct research and to provide education and outreach materials to help document and interpret these histories (see FMP Action Plan 5, Research, Science and Technology).

**10. Comment:** NOAA received a few comments that the sanctuary should include the history and heritage of the four DoD facilities that are within or nearby the proposed sanctuary alternatives.

**Response:** NOAA agrees with these comments. The DoD mission, facilities, and assets are critical to national security. DoD

heritage is an integral part of the history and heritage of this region. The sanctuary management plan includes strategies to partner with these facilities to develop education, outreach and interpretative materials.

**11. Comment:** NOAA received several comments that the sanctuary should address Native American heritage.

**Response:** NOAA agrees with these comments. In 2014, the community who developed the original sanctuary nomination recognized Tribal culture as integral to the history and heritage of the Potomac River. The Piscataway Conoy Confederacy and Sub-Tribes (MD) served as a member of the nominating group and helped to guide the information content. There are two state-recognized tribes in Maryland (Piscataway Conoy Confederacy and Sub-Tribes and Piscataway Indian Nation) and one in Virginia (Patawomeck Indian Tribe of VA) who claim this area as their aboriginal territory. NOAA anticipates working alongside partners to expand understanding and interpretation of the heritage of all local Native American cultures.

**12. Comment:** NOAA received a few comments that the sanctuary will provide an important opportunity to document African American culture and heritage in the area, including possible Underground Railroad sites as well as the contributions of

African Americans to local shipbuilding and fisheries industries.

**Response:** NOAA agrees with these comments. Limited information exists on the direct role of African Americans in shipbuilding and related services during WWI and their role in subsequent ship breaking operations. Thus, the management plan identifies significant opportunity to research, document and interpret this history.

**13. Comment:** NOAA received a few comments questioning why the sanctuary boundary extends beyond the boundary of Mallows Bay Park since most of the ships are clustered in that area.

**Response:** While many of the known WWI-era vessel remains reside in an area adjacent to Mallows Bay Park, other known vessel remains are located near Widewater, VA, as well as other locations in the middle Potomac River. In addition, research indicates that other maritime and cultural assets from several time periods have yet to be discovered. As such, the proposed sanctuary boundary (Alternative B) encompasses these assets and is purposefully aligned with an area defined on the National Register of Historic Places. This entire area contains important cultural and maritime resources, including the remains of the WWI-era Ghost Fleet, vessels and assets associated with the three shipbreaking periods, vessels from other historical

periods, and other cultural features. In response to public comments and consultations associated with the proposed sanctuary, NOAA, alongside partners from the State of Maryland and Charles County, MD, chose to adopt Alternative B, a management area that would include these potential historic sites and facilitate resource management as potential new sites are discovered. This would ensure that newly discovered sites are protected and managed at the time of discovery.

**14. Comment:** NOAA received a few comments that the sanctuary as proposed provides a good balance through its focus on maritime cultural heritage resources while continuing to leave the management of natural resources under existing state and local authorities.

**Response:** NOAA agrees with this comment. For the purposes of this designation, sanctuary resource protection and management is exclusive to the maritime and cultural assets of the area. NOAA has developed a Memorandum of Agreement (MOA) with the State of Maryland and Charles County, MD, that, in part, reiterates the authority and responsibility for natural resource management within the sanctuary remains with the State of Maryland and the Potomac River Fisheries Commission. In addition, the terms of designation (found in appendix B of subpart S) clarifies that fishing shall not be regulated as part

of the Sanctuary management regime, but may be regulated by other Federal, State, Tribal and local authorities of competent jurisdiction.

**15. Comment:** NOAA received many comments regarding the probable existence of maritime artifacts throughout the areas identified in Alternatives C and D as rationale for expanding the sanctuary boundaries.

**Response:** NOAA agrees that significant maritime assets exist outside of sanctuary boundaries. For example, the remains of two WWI-era vessels, the remains of the steamship Wawaset, and the remains of a Civil War-era vessel are known to reside in the areas defined by Alternative C. As such, NOAA based Alternative C on the premise of including all of the known WWI-era vessels and other significant maritime assets in addition to those which research indicates have the potential to exist. Although NOAA is not aware of any documented vessels or maritime assets in Alternative D, NOAA agrees there is credible research to suggest they may exist and, therefore, the rationale for resource protection that was explored through Alternative D. NOAA believes there are substantial scientific and educational opportunities to explore and document additional assets and artifacts throughout the sanctuary and adjacent waters.

**16. Comment:** NOAA received one comment regarding NOAA's inability to enact management strategies that protect the maritime resources from "sea level rise, marine debris, erosion and other impacts from the sea".

**Response:** NOAA agrees that management strategies to protect maritime resources from forces of nature cannot be developed or implemented. These forces will continue to influence the condition of the maritime cultural heritage resources and the extent to which they are being reclaimed by nature. The sanctuary management plan proposes science and research activities that monitor and document changes to the maritime resources over time and, as practical, to better understand the potential impacts associated with these natural events.

NOAA also agrees that marine debris has potential to impact sanctuary resources. The management plan includes a number of non-regulatory strategies that raise public awareness and promote responsible use of the sanctuary resources as important methods for mitigating human impacts such as marine debris.

Additionally, since 2014, NOAA and its partners have participated in an annual trash clean up at Mallows Bay Park hosted by the Alice Ferguson Foundation. Those events have attracted hundreds of community volunteers who have collected several tons of trash and marine debris in and around the

historic and natural resources. Following designation, NOAA intends to expand partnerships with other programs in response to marine debris.

## **Purpose and Need 2: Public Access, Recreation and Heritage**

### **Tourism**

**17. Comment:** NOAA received several comments that the Mallows Bay sanctuary nomination and designation processes have already increased public awareness of and visitation to the area, which has resulted in overcrowding at Mallows Bay Park and conflicts among users, and which threatens the protection of sanctuary resources.

**Response:** NOAA agrees that the designation process has increased awareness of Mallows Bay Park and adjacent maritime cultural heritage resources, but data are not available to interpret changes to visitation. As outlined in the proposed management plan, NOAA will work in cooperation with partners to understand visitor use, understand carrying capacity of the site and, if/as necessary, help mitigate overcrowding (see FMP Resource Protection Action Plan, Strategy RP-3) and reduce potential threats to sanctuary resources (see FMP Resource Protection Action Plan, Strategy RP-1 and RP-3). For example, proposed activities related to visitor information, signage, marketing,

public outreach and water trails are expected to help disperse or separate visitors.

**18. Comment:** NOAA received many comments that NOAA should work with partners to help facilitate additional public access, enhance capacity at existing access sites, and enhance visitor services.

**Response:** NOAA agrees with this comment. Facilitating public access and recreational opportunity is one of two purposes and needs identified for the sanctuary. NOAA will continue to work with partners in Maryland and Virginia to consider public use and demand and, as appropriate, to expand access and services that enhance visitor experiences.

**19. Comment:** NOAA received several comments that sanctuary designation is an opportunity to network recreational opportunities among multiple public parks and access points in MD and VA, and one comment providing specific recommendations for the types of amenities at these locations.

**Response:** NOAA agrees with this comment and recognizes the social and economic benefits associated with enhancing partnerships among these sites. Mallow's Bay Park is one of several local, state and Federal parks in MD and VA along this stretch of the Potomac River. Additionally, these parks are

adjacent to and provide public access to three national water trails in this portion of the river. The sanctuary management plan identifies activities to support recreational access, water trails and interpretation, as well as education and public outreach of the area on both sides of the Potomac River.

**20. Comment:** NOAA received a few comments that NOAA should protect the areas of importance but keep the river open and available to all.

**Response:** NOAA agrees with this comment. The purpose of the designation is to protect the nationally-significant maritime cultural heritage resources. In carrying out this purpose, NOAA has no plans to limit access to the Potomac River. Many of the action plans in the management plan encourage use of the river, including Resource Protection Strategy 3 (enhancing user access, developing trail maps, certification programs for local outfitters). Additionally, the Recreation and Tourism Action Plan (FMP Section 3) focuses on ways to increase sustainable use of the sanctuary and adjacent river, preparing and distributing outreach and education materials to visitors, and working with state and local governments to develop and/or enhance tourism infrastructure.

**21. Comment:** NOAA received one comment expressing concern about the safety of bicyclists on local roads and objections to using local taxes to fund the activities of visitors.

**Response:** Through the proposed designation, NOAA cannot manage or regulate local roads, vehicle traffic, or cyclist use of the roadways. Local land use planning, taxes and related infrastructure remain under the authority of County and State agencies. If or when changes to the use of local use of roadways is related to the sanctuary, any actions or amenities will be addressed by the County or State, as appropriate, and as a joint managers of the sanctuary.

**22. Comment:** NOAA received one comment expressing concern that NOAA would charge a fee for commercial and recreational uses of the Potomac River.

**Response:** Facilitating public access and recreational use of the Potomac River is one of the two purposes for establishing the sanctuary. The States and County may already charge fees for use of parks or recreational activities (i.e., fishing licenses), but those fees are not associated with nor are the fees imposed by the sanctuary. Generally, NOAA does not charge fees for public access to national marine sanctuaries. However, pursuant to Section 310 of the NMSA, NOAA may issue special use permits (SUPs) to establish conditions of access and use of

sanctuary resources, or to promote public use and understanding of a sanctuary resources. Special use permits are generally issued for a narrow category of concessionary or commercial activities. Those activities are set forth in the Federal Register (78 FR 25957; May 3, 2013 and 82 FR 42298; September 7, 2017), and include:

1. The placement and recovery of objects associated with public or private events on non-living substrate of the submerged lands of any national marine sanctuary.
2. The placement and recovery of objects related to commercial filming.
3. The continued presence of commercial submarine cables on or within the submerged lands of any national marine sanctuary.
4. The disposal of cremated human remains within or into any national marine sanctuary.
5. Recreational diving near the USS Monitor.
6. Fireworks displays.
7. The operation of aircraft below the minimum altitude in restricted zones of national marine sanctuaries.
8. The continued presence of a pipeline transporting seawater to or from a desalination facility.

The NMSA allows NOAA to assess and collect fees for activities conducted under an SUP. The fees are collected in order to

recover the administrative costs of issuing the permit, the cost of implementing the permit, monitoring costs associated with the conduct of the activity, and the fair market value of the use of sanctuary resources. NOAA will not apply the SUP to activities in place at the time of the MPNMS designation.

**23. Comment:** NOAA received one comment expressing concern that fossil hunting would be restricted.

**Response:** NOAA does not propose to restrict casual collection of fossils along the shoreline. NOAA will continue to work with partners to develop public education and outreach materials that interpret the resources of the area, including fossils, to help encourage respect and stewardship of any artifacts which may have unique cultural significance. Some commercial methods of collection may require permitting under the NMSA and through other authorities, such as the U.S. Army Corps of Engineers, if the activity is expected to cause significant bottom disturbance or damage to the historic resources.

**24. Comment:** NOAA received one comment that there should be an emphasis on encouraging recreational activity in the area, specifically related to recreational boating, and that the sanctuary must provide recreational access for boaters.

**Response:** Facilitating public access and recreational use of the Potomac River is one of the two purposes for establishing the sanctuary. NOAA encourages a variety of responsible recreational uses within the sanctuary and will continue to work with partners to explore opportunities to enhance services important to all users, including recreational boating.

**25. Comment:** NOAA received one comment asking NOAA to confirm that Alternatives C and D would not impact construction/maintenance of marinas and piers along the Prince William County, VA, shoreline or the operation of passenger ferry service and transport of commercial goods to ports on the Potomac River.

**Response:** Because NOAA's preferred alternative (Alternative B) does not include the Prince William County, VA, shoreline, the facilities referenced in the comment are not included in the sanctuary boundaries and thus will not be impacted by sanctuary regulations. In the case of any future construction projects that may have the potential to indirectly impact the sanctuary, NOAA would consult with other Federal, state and local agencies to evaluate potential impacts. The sanctuary regulations do not prohibit or otherwise limit vessel traffic on the Potomac River, and thus NOAA does not expect that this action would affect the operation of passenger ferry service or other commercial uses of

the river. NOAA is committed to ensuring that the creation of the sanctuary supports businesses and organizations that use the river and surrounding marinas, ports and other waterfront facilities and recognizes that commercial and recreational uses of the Potomac River are important activities that support the nation's economy.

### **Impact on Sovereignty and Rights**

**26. Comment:** NOAA received several comments concerned that sanctuary designation will result in the loss of State control of the Potomac River, and is a takeover of both management, regulation and permitting of the area by the Federal government.

**Response:** NOAA disagrees with this comment. The NMSA recognizes the sovereignty of the State of Maryland. As stated in the NMSA (16 U.S.C. 1431(b)(2)), one of the purposes and policies of sanctuary designation is "to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities." Similarly, section 1434 provides the Governor with authority to certify that the designation or terms thereof is unacceptable, and preclude the designation or terms thereof from taking effect in state waters.

NOAA, the State of Maryland, and Charles County, MD, will enter into a Memorandum of Agreement (MOA) that specifies the terms of joint management of the sanctuary and reiterates that the State does not relinquish sovereignty or management control over any State-owned bottom lands and resources within the sanctuary boundaries. This document clearly lays out how sanctuary designation will supplement and complement, not replace, existing authorities. The draft MOA can be found in Appendix D of the FEIS.

**27. Comment:** NOAA received a few comments that the Potomac River Fisheries Commission (PRFC) has sole authority to manage fisheries within the mainstem tidal reach of the Potomac River and that sanctuary designation and any associated regulations will infringe on the PRFC authority.

**Response:** NOAA disagrees that the sanctuary will infringe on PRFC authority. NOAA narrowly defines sanctuary resources as "historical resources", which includes "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 cultural heritage, and human activities and events." The definition does

not including living resources, such as fish, marine mammals or seabirds. Instead, the proposed regulations seek only to protect the maritime and cultural resources of Mallow's Bay-Potomac River.

In Article IV, Section 2, of the Terms of Designation (found in appendix B of part 922, subpart S), NOAA clarifies that "NOAA will not exercise its authority under the NMSA to regulate fishing in the Sanctuary." NOAA has also added an exemption for traditional fishing in § 922.203(a), and "traditional fishing" is defined in § 922.201 as those commercial, recreational, and subsistence fishing activities that were customarily conducted within the Sanctuary prior to its designation or expansion, as identified in the relevant Final Environmental Impact Statement and Management Plan for this Sanctuary.

Furthermore, in Section VII of the Draft MOA (found in Appendix D of the FEIS/FMP), the parties intend to consider the potential impacts of sanctuary designation to commercial and recreational fishing activities during management plan review conducted under 304(e) of the NMSA. Specifically, within sixty days of the five- and ten-year anniversary date of the designation, the Governor of Maryland may submit findings demonstrating the manner and extent to which the designation of the sanctuary is

having measurable negative impacts on the State's commercial and/or recreational fishing industry, and provide NOAA with an opportunity to address the concerns.

Additionally and pursuant to the NMSA, any future changes to the activities subject to regulation would require public notice, a rulemaking process, and concurrence from the State of Maryland. As such, the authority and responsibility for natural resource management, including commercial and recreational fishing, remain with PRFC and MD Department of Natural Resources (DNR). In March 2017, Attorneys General from both Maryland and Virginia rendered opinions to PRFC and MD DNR which confirmed that the authorities of PRFC and DNR for natural resource management would not be impacted by sanctuary designation (See FEIS Appendix E).

**28. Comment:** NOAA received a few comments concerned that sanctuary designation will infringe upon the rights of local tribes.

**Response:** NOAA disagrees with this comment. Sanctuary designation and management will not infringe on Tribal rights. NOAA anticipates working alongside partners to expand understanding and interpretation of the heritage of all local Native American cultures. There are two state-recognized tribes

in Maryland (Piscataway Conoy Confederacy and Sub-Tribes and Piscataway Indian Nation) and one in Virginia (Patawomeck Indian Tribe of VA) who claim this area as their aboriginal territory. Consistent with section 106 of the National Historic Preservation Act, NOAA invited the three state-recognized tribes to be consulting parties in the designation process. Interaction with local Tribes has been on-going.

In 2014, the community who developed the original sanctuary nomination recognized Tribal culture as integral to the history and heritage of the Potomac River. The Piscataway Conoy Confederacy and Sub-Tribes (MD) served as a member of the nominating group and helped to guide the information content. Since then, members of the Piscataway Conoy Confederacy and Sub-Tribes participated in local community events related to Mallows Bay and, on March 7 and March 9, 2017, offered verbal comments related to the proposed sanctuary. One member questioned the historic value of the ships and expressed concern about increased taxes, while the Tribe's Chairman expressed support for the sanctuary and partnerships that share a common goal to protect the resources and ancestry of the Potomac River. On March 22, 2017, also as part of the public comment period, the Patawomeck Indian Tribe of VA submitted a written comment

expressing concern for Tribal sovereignty and Federal involvement that could affect livelihoods.

On March 2, 2017, NOAA sent letters to two Maryland Tribes - the Piscataway Conoy Confederacy and Sub-Tribes and Piscataway Indian Nation. The Piscataway Conoy Confederacy and Sub-Tribes provided oral comments during the public meetings on March 7 and March 9 as described above. On November 3, 2017, NOAA sent follow up emails to these same Tribes inviting them to discuss the proposed sanctuary and any concerns related to the Tribes. NOAA did not receive a reply from either.

On October 16, 2017, and November 20, 2017, NOAA sent invitations for consultation to the Patawomeck Indian Tribe of VA. NOAA did not receive a response. On November 29, 2017, NOAA phoned Chief John Lightner. During that conversation, Chief Lightner offered no present-day concerns relative to the proposed sanctuary, despite the initial concerns expressed during the public comment period in March 2017. Moreover, Chief Lightner expressed interest in learning more about opportunities to engage directly with the sanctuary on topics related to interpreting the heritage of the Patawomeck Tribe of VA.

**29. Comment:** NOAA received one comment that the sanctuary would cause property owners along the shoreline to lose their properties.

**Response:** As described in Section 3.2 of the FEIS, sanctuary resources are specific to the maritime and cultural resources within Maryland waters. The sanctuary boundary does not include land area, nor does it include private property. Following sanctuary designation, authority for local land use planning remains with local jurisdictions (e.g., Charles County, Maryland and VA counties). NOAA has been and will continue to work closely with state, county, and local authorities to understand land-based actions with the potential to negatively affect sanctuary resources.

#### **COMMENTS related to INDIRECT BENEFITS**

**30. Comment:** NOAA received many comments that sanctuary designation will be important to protect existing populations and habitats for striped bass and sturgeon, and will improve water quality for recreational and commercial fishing.

**Response:** The authority and responsibility for natural resource management, including commercial and recreational fishing, remains with the State of Maryland and the Potomac River Fisheries Commission. The management of the sanctuary is focused

on protections of maritime heritage resources. As such, to the extent that fish or other species rely on the maritime heritage resources as habitat, the sanctuary may have beneficial effects. The sanctuary management plan identifies opportunities for science and monitoring of maritime heritage resources, including their relationship with the local ecosystem. NOAA's Office of National Marine Sanctuaries consulted with NOAA Fisheries pursuant to ESA section 7 for sturgeon and pursuant to the EFH provisions of the MSA for summer flounder and bluefish. In both consultations, NOAA found that sanctuary designation would not have an adverse effect.

**31. Comment:** NOAA received many comments that the sub-estuaries represented by Alternative D are part of a connected ecosystem. As such, a sanctuary that includes this area could have additional benefit for species, habitat and water quality

**Response:** NOAA's consideration of Alternative D was related directly to the protection and management of maritime cultural heritage resources and enhancing recreational access and interpretation related to these resources. As such, NOAA did not consider this area from the perspective of ecosystem connectivity. Following sanctuary designation, natural resource management will remain under the jurisdiction of other existing State and Federal authorities.

**32. Comment:** NOAA received many comments that the proposed national marine sanctuary is an important component of the Chesapeake Bay and related programs

**Response:** NOAA agrees with this comment. The Chesapeake Bay Program is a regional partnership that leads and directs Chesapeake Bay restoration and protection through partnerships with federal and state agencies, local governments, nonprofit organizations and academic institutions. NOAA is represented and actively engages in partnerships throughout the Chesapeake Bay and in the Potomac River. The sanctuary presents additional opportunities to expand local and regional partnerships for public engagement, education, science and outdoor experiences.

**33. Comment:** NOAA received several comments that the proposed national marine sanctuary is an important component of the Potomac River and the Chesapeake Bay.

**Response:** NOAA agrees with this comment. The Potomac River, which is part of the Chesapeake Bay watershed, is an important natural resource in the region. The cultural resources within the sanctuary are an important watershed component that reflects the human history of the region. Through the sanctuary management plan, NOAA intends to further explore and interpret

the cultural and historic aspects of the greater Potomac River watershed and its relationship to the greater Chesapeake region.

**34. Comment:** NOAA received one comment stating that "Marine sanctuaries have been demonstrated to have huge net-positive benefits for economic growth. I think designation of Mallow's Bay as a marine sanctuary would be a critical advancement for the region. I think this is so important to the long-term future of this region, that if I were asked, I would support market-based compensation for individuals that are financially harmed by the designation. This would be an important step in the restoration and strengthening of our bay."

**Response:** NOAA agrees that national marine sanctuaries have potential to provide net positive economic benefit to communities, as described in the FEIS, Sections 5.3.2 and 5.3.4. Increased awareness of the area and its maritime resources has potential to increase heritage and recreational tourism and drive demand for enhancing visitor services. NOAA's evaluation does not include consideration of market-based compensation.

#### **Concern for Future Expansion of NOAA Authorities**

**35. Comment:** NOAA received a few comments expressing concern that in 5 years when NOAA is required to revise the management

plan, NOAA will change the rules, expand the boundaries, and put in stricter regulations.

**Response:** Section 304(e) of the NMSA requires NOAA to evaluate a national marine sanctuary's management plan every five years. However, NOAA is not required to revise the management plan and/or the regulations during the management plan review process. Should any changes to the sanctuary's management approach be required, they would be made only after the agency has engaged in a robust public process.

Additionally, any proposed changes to a national marine sanctuary boundary and its regulations are further subject to section 304(a)(4) of the NMSA, which identifies the sanctuary's "terms of designation" (i.e., its geographic boundaries, the characteristics that make it significant, and the broad types of activities that could be subject to regulation). These terms of designation may be modified only by the same procedures used for the original designation, meaning they must include public notice requirements. This provision also allows the Governor of any respective state within the sanctuary's boundaries to review any changes to the terms of designation, and to make a determination as to whether they are acceptable. Any term of designation the Governor determines as unacceptable shall not take effect in the state waters of the sanctuary.

In the case when a regulatory change does not require changes to a sanctuary's terms of designation, NOAA would have to follow the procedures of the Administrative Procedure Act (5 U.S.C. 553), which requires adequate public notice and opportunity for public comment on any proposed new regulations. The State of Maryland and Charles County, as the sanctuary joint-managers, would be involved in all considerations regarding any proposed changes to the sanctuary's terms of designation and regulations.

**36. Comment:** NOAA received a few comments expressing concern that, because NOAA has the authority to regulate fishing, once the sanctuary is designated NOAA is likely to begin regulating fishing within this sanctuary.

**Response:** NOAA's purpose in designating this national marine sanctuary is to protect maritime cultural heritage assets located in the Potomac River. While NOAA Office of National Marine Sanctuaries has authority to regulate fishing activities pursuant to the NMSA, NOAA has not exercised that authority for this sanctuary. The sanctuary regulations for MPNMS only apply to historical resources. Additionally, the terms of designation for MPNMS do not identify fishing as one the activities subject to regulations. Moreover, since the waters of the sanctuary are located entirely within the jurisdiction of the State of

Maryland, the PRFC (which includes commissioners from Maryland and Virginia) and the State of Maryland will retain the sole authority to publish and enforce rules, regulations and laws dealing with all fishing matters in the area. In the Article IV, Section 2 of the Terms of Designation (found in appendix B of part 922, subpart S), NOAA clarifies that "NOAA will not exercise its authority under the NMSA to regulate fishing in the Sanctuary."

**37. Comment:** NOAA received a few comments that designation could impact hunting and the permitting process. In addition, there is no mention of hunting as a recreational activity; current hunting regulations, licenses, and permitting should remain as is.

**Response:** NOAA's purpose in designating this national marine sanctuary is to protect maritime cultural heritage assets located in the Potomac River. The FEIS has been updated to include data on hunting activities in the area. NOAA's analysis of the resources has not found any threats from or impacts to these resources from hunting. Thus, the terms of designation does not identify hunting as one of the activities subject to regulation, so NOAA cannot impose restrictions on hunting unless new terms of designation are issued. All licensing and

permitting for hunting will remain under the jurisdiction of the Maryland DNR.

**COMMENTS related to the DRAFT MANAGEMENT PLAN**

**38. Comment:** NOAA received many comments that the sanctuary would enhance student education (K-12 and higher education), particularly through increased opportunity for field-based programs.

**Response:** NOAA agrees with this comment. The sanctuary offers students a unique experience in multi-disciplinary education. This area has recently become a magnet for educational field experiences at all levels, including several graduate studies from outside the local area. Additionally, through funding from NOAA, stewardship activities and outdoor educational opportunities have been expanded at two schools in Charles County, MD. The sanctuary will enable additional educational opportunities and partnerships, including those aimed at understanding and appreciation of both ecological characteristics and historic archaeological resources within the area. The site's proximity to Washington, DC, and several colleges and universities adds to the opportunities for learning and research at the highest level, often in conjunction with

state and federal agencies, and private educational institutions.

**39. Comment:** NOAA received comments that the sanctuary will be an important location for research, science and monitoring of historical resources as well as their interaction with the natural environment.

**Response:** NOAA agrees with this comment. The sanctuary is an excellent site to act as a living laboratory to understand changes to natural conditions, shipwrecks, and the interaction between them. Many opportunities for scientific, archaeological and environmental research exist through partnerships with non-profit maritime organizations, and universities and colleges with maritime archaeology programs being invited to work with NOAA and the State to undertake research and to encourage students to seek thesis and dissertation topics at Mallows Bay. The College of Southern Maryland in particular has expressed interest in integrating various components of its current and planned curriculum, such as studies in robotics and remote sensing technology, to partner with the archaeological research of submerged sites in the transect.

**40. Comment:** NOAA received many comments requesting that NOAA should consider a visitor center to support public awareness,

education, and interpretation. In addition, the comments suggest NOAA should consider the location of the visitor center to support tourism and possibly to enhance the local economy through visitation.

**Response:** NOAA agrees that connecting to the public through educational and interpretive programs, exhibits and interactive experiences, including visitor centers, is an important component of all national marine sanctuaries. Following sanctuary designation, NOAA will work with state and local partners to evaluate the types and locations of educational and interpretive programs and/or infrastructure (e.g., signs and exhibits) needed to support sanctuary management. Visitation and potential economic benefit are among numerous other considerations regarding the potential for a visitor center. If a visitor center is determined to be appropriate and feasible, NOAA will work in partnership the county, state and/or other local authorities with jurisdiction for land use planning and funding options.

**41. Comment:** NOAA received some comments that sanctuary designation would increase tourism, which would benefit the local economy. Sanctuary designation would help to create or support jobs and small business opportunities especially those associated with visitor services.

**Response:** NOAA agrees that the designation has potential to increase public interest and visitation to the area as described in the FEIS, Sections 5.3.2 and 5.3.4. No recent economic studies exist to document visitation, although the need for one is identified in the sanctuary management plan. Charles County initiated a method to track visitation to Mallow's Bay Park in Spring 2017. However, public access also originates from other nearby sites. As such, the potential for visitation and demand for services is not known. Should it occur, this demand may aid the local economies of the surrounding area, particularly for small businesses that cater to nature-based tourism, heritage tourism, recreational fishing, wildlife viewing, kayaking and boating.

**42. Comment:** NOAA received several comments that sanctuary designation will have negative economic impacts to local watermen.

**Response:** NOAA disagrees with this comment. The principal purpose of the sanctuary is to protect, study, interpret and manage the extensive archaeological and historical resources of the area. Because the authorities for managing fishery resources will remain with the PRFC and MD DNR, sanctuary designation will not regulate, alter or negatively impact commercial or recreational fishing.

**43. Comment:** NOAA received a few comments expressing concern that placing any new restrictions on the Potomac River will adversely impact the ability of DoD to carry out critical mission training and operations. In addition, MPNMS tourism will result in increased boat traffic on the river, which would interfere with military training and operations.

**Response:** NOAA disagrees with this comment. In September 2016, the Department of Navy (DoN) signed on as a cooperating agency to participate in the development of the sanctuary designation documents, including the sanctuary regulations, management plan, and environmental impact statement. DoN coordinated interactions and information exchange between NOAA, Marine Corps Base Quantico, Naval Support Facility Indian Head, Naval Support Facility Dahlgren, and Blossom Point Research Facility (collectively referred to as Department of Defense (DoD)). NOAA, in consultation with the DoN, has established a framework for MPNMS and DoD to co-exist. In developing the proposed rule, NOAA did not anticipate that many, if any, current DoD activities would adversely impact sanctuary resources. However, following interagency consultation with DoD components (including DoN, the Marine Corps, and the U.S. Army), NOAA revised §§ 922.203(c) and 922.204 and the terms of designation set forth in appendix B to the MPNMS regulations at 15 CFR part

922, subpart S. In the final regulations, NOAA: a) clarifies the extent to which the sanctuary prohibitions may apply to DoD activities; b) clarifies the requirement for DoD to engage in NMSA section 304(d) consultation; and c) exempts DoD from the application of emergency regulations issued by NOAA pursuant to § 922.204. Additionally, the discussions with DoD identified benefits that would be provided to DoD through sanctuary education, public outreach, interpretation and management.

**44. Comment:** NOAA received a few comments expressing concern that sanctuary designation will have negative impacts to local businesses and will restrict local development opportunities.

**Response:** As is the case at other national marine sanctuaries around the country, NOAA believes that the sanctuary will have a positive impact on local businesses and the economies of the surrounding area. No recent economic studies exist to document visitation, although the need for such studies is identified in the sanctuary management plan. Charles County initiated a method to track visitation to Mallow's Bay Park in Spring 2017, however, public access also originates from other nearby sites. As such, the potential for visitation and demand for services is not known. Should it occur, this demand may aid the local economies of the surrounding area particularly for small businesses that

cater to nature-based tourism, heritage tourism, recreational fishing, wildlife viewing, kayaking and boating.

**45. Comment:** NOAA received a few comments that water quality conditions in the Potomac River may pose a risk to public health.

**Response:** NOAA does not define water quality as a sanctuary resource and, as such, will not manage water quality conditions nor contributing factors. However, NOAA is interested in water quality as it may affect the wrecks. Therefore, NOAA may monitor water quality through deployment of monitoring buoys or other methods, and may participate in relevant community activities such as trash clean-ups.

**46. Comment:** NOAA received one comment concerned that special conservation areas that are identified on aeronautical charts would restrict aviation primarily through altitude restrictions and landing requirements

**Response:** NOAA's purpose in designating this national marine sanctuary is to protect maritime cultural heritage assets located in the Potomac River. NOAA's analysis of the resources has not found any threats from or impacts to these resources from aircraft. Thus, air space/altitude of aircraft is not identified in the terms of designation as an activity that is

subject to regulation. NOAA is precluded from regulating airspace unless change in the terms of designation is issued.

**47. Comment:** NOAA received one comment expressing concern that NOAA would have insufficient capacity for day-to-day enforcement of the rules of the sanctuary.

**Response:** Upon designation, NOAA will continue to work with agency co-managers and partners to evaluate the need for enforcement specific to the maritime and cultural assets defined as sanctuary resources. Enforcement of natural resources and other activities that are not related to sanctuary resources will remain with the existing authorities. NOAA often employs "interpretative" enforcement, through education, public outreach, docents and similar non-regulatory means, to help inform users and encourage stewardship of the resources.

**48. Comment:** NOAA received a few comments related to the cost of designating a national marine sanctuary, including a question related to the source of funding for the sanctuary, a concern that Federal funds are insufficient for sanctuary enforcement and another asking about funding sources for a visitor center.

**Response:** As a federal agency, NOAA's budget is passed by Congress and signed into law by the President. NOAA's budget includes an annual allocation for the management of all national

marine sanctuaries. The NMSA directs NOAA to protect these nationally significant ecological and historic resources. NOAA makes funding decisions for each sanctuary based on the annual funding level, program priorities, and site needs. As a result, site funding can vary from year to year which may affect the level of activities completed in the management plan each year. As part of the management plan for this sanctuary, NOAA includes a table that described the sanctuary activities that could be completed at several funding levels. NOAA also anticipates a varying level of in-kind contributions from co-managers and partners to help support sanctuary goals.

**49. Comment:** NOAA received one comment from a non-governmental organization requesting opportunity to review the Memorandum of Agreement (MOA) for joint management of the sanctuary between NOAA, the State of Maryland and Charles County, MD.

**Response:** NOAA, the State of Maryland, and Charles County, MD, have agreed to enter into a formal agreement, referred to as a MOA. This agreement establishes the framework for joint management and operation of Mallow's Bay-Potomac River National Marine Sanctuary, and will be based on language contained in the draft MOA available in Appendix D of the FEIS/FMP.

**50. Comment:** NOAA received a few comments from organizations requesting to have seats on the sanctuary advisory council (SAC).

**Response:** NOAA appreciates the interest from members of the public who want to participate with the SAC. Following designation and pursuant to NMSA section 315, NOAA will establish and manage a SAC to advise and make recommendations regarding the management of the sanctuary. The SAC may be composed of up to fifteen (15) members and, per NMSA section 315, may include: a) persons employed by Federal and/or state agencies with expertise in management of sanctuary resources and b) representatives of local user groups (such local user groups may include, but are not limited to, local fishing interests), conservation and other public interest organizations, scientific organizations, educational organizations, or others interested in the protection and multiple use and management of sanctuary resources. In its establishment, NOAA will strive to achieve a balanced advisory council composition that best represents the primary sanctuary users and interests. In determining the composition of the advisory council, NOAA may consult with the State of Maryland and/or Charles County.

**COMMENT on the PROPOSED REGULATIONS**

**51. Comment:** NOAA received one comment expressing concern about giving the Sanctuary Superintendent the power to issue emergency regulations.

**Response:** As part of the designation, NOAA will have the authority to issue emergency regulations. As described in the proposed rule (82 FR 2254) and in this final rule, emergency regulations are used in limited cases and under specific conditions when there is an imminent risk to sanctuary resources and a temporary prohibition would prevent the destruction or loss of those resources. Under the regulations at 15 CFR 922.204, NOAA only issues emergency regulations that address an imminent risk for a fixed amount of time with a maximum of 6 months that can only be extended a single time. The emergency regulation also cannot take effect without the approval of the Governor of Maryland, or his/her designee. Moreover, a full rulemaking process must be undertaken, including a public comment period, to consider making an emergency regulation permanent.

#### **COMMENTS on the NEPA PROCESS**

**52. Comment:** NOAA received two comments requesting NOAA to extend the public comment period beyond March 31, 2017.

**Response:** NOAA considered these comments during the comment period and declined to extend the comment period. NOAA fully complied with the requirements of the NMSA (16 U.S.C. 1434(a)(1)) and Administrative Procedures Act (5 U.S.C. 553) to provide adequate opportunity for public comment. From January 9 to March 31, 2017, NOAA held an 81-day public comment period, which exceeds the 30-day comment period requirement under APA, to allow the public time to review the proposal and provide comments. NOAA also hosted two public meetings to discuss the proposal and gather comments. In addition to posting a Federal Register notice, NOAA broadcasted the proposed action through extensive national and local media and social media outlets and targeted communications to Congressional members and staff as well as stakeholders including local/regional conservation NGOs, local tourism agencies and other business interests, local/regional elected officials, university and academic researchers, recreational divers, commercial and recreational fishing interests, and federal/state/local partners.

**53. Comment:** NOAA received one comment requesting that NOAA coordinate actions under the Endangered Species Act related to the Atlantic sturgeon critical habitat prior to sanctuary designation.

**Response:** In compliance with requirements under NEPA and the Endangered Species Act (ESA; Section 7(c)), ONMS requested consultation with NOAA's National Marine Fisheries Service (NMFS) to assess whether sanctuary designation might have impacts to Atlantic sturgeon. NMFS determined that due to the lack of identifiable stressors, sanctuary designation would have no effect on any ESA-listed species or critical habitat; see section 6.1.1 of the FEIS for discussion.

**54. Comment:** NOAA received a few comments that NOAA needs to conduct additional consultations.

**Response:** NOAA conducted all required consultations during the preparation of the FEIS. Chapter 6 of the FEIS describes the required Federal, state, and other consultations with state-recognized tribes that NOAA undertook under the requirements of the NMSA, National Historic Preservation Act, Endangered Species Act, Magnuson-Stevens Fishery Management and Conservation Act, Coastal Zone Management Act, and relevant Executive Orders, and the results of those actions.

## **V. Classification**

National Marine Sanctuaries Act

NOAA has determined that the designation of the Mallow's Bay-Potomac River National Marine Sanctuary will not have a negative impact on the National Marine Sanctuary System and that sufficient resources exist to effectively implement sanctuary management plans. NOAA also determined that the requirement to complete site characterizations has been met. The final findings for NMSA section 304(f) are published on the ONMS web page for the Mallow's Bay-Potomac River designation at <https://sanctuaries.noaa.gov/mallows-potomac/>.

#### National Environmental Policy Act

NOAA has prepared a final environmental impact statement to evaluate the environmental effects of the rulemaking and alternatives as required by NEPA (42 U.S.C. 4321 et seq.) and the NMSA. The Notice of Availability (84 FR 25257) is available at <https://sanctuaries.noaa.gov/mallows-potomac/>. NOAA has also prepared a Record of Decision (ROD). Copies of the ROD and FEIS are available at the address and website listed in the ADDRESSES section of this rule.

#### Coastal Zone Management Act

Section 307 of the Coastal Zone Management Act (CZMA; 16 U.S.C. 1456) requires federal agencies to consult with a state's coastal program on potential federal regulations having an

effect on state waters. Because MPNMS encompasses a portion of the Maryland state waters and is adjacent to the Commonwealth of Virginia lands and waters, NOAA provided a copy of the proposed rule and supporting documents to the Maryland Department of the Environment, (MDE) Coastal Zone Management (CZM) Program and Virginia Coastal Zone Management Program within the Department of Environmental Quality (DEQ) for evaluation of Federal consistency under the CZMA. On April 19, 2018, the MDE concurred with NOAA's consistency determination that the proposed action was consistent with the enforceable policies of the Maryland CZM program. That same day, DEQ sent a separate concurrence letter to NOAA concluding that the project is consistent to the maximum extent practicable with the enforceable policies of the Virginia CZM program, provided that all applicable permits and approvals are obtained, and the project is operated in accordance with all applicable federal, state, and local laws and regulations. No federal or state permits are required for sanctuary designation, and NOAA has consulted and obtained all other required approvals. MPNMS will be operated in accordance with applicable laws and regulations.

#### Executive Order 12866: Regulatory Impact

This rule has been determined to be not significant for purposes of Executive Order 12866.

### Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132. These sanctuary regulations are intended only to supplement and complement existing state and local laws under the NMSA.

### Executive Order 13795: Implementing an America-First Offshore Energy Strategy

On April 28, 2017, Executive Order 13795 - Implementing an America-First Offshore Energy Strategy was signed by the President. Section 4(a) of E.O. 13795 requires the Secretary of Commerce (acting through NOAA) to receive from the Department of the Interior (DOI) a full accounting of the energy or mineral resource potential of any area proposed for sanctuary designation or expansion, including information on the potential impact the proposed designation or expansion will have on the development of those resources.

On December 22, 2016, NOAA sent DOI a letter providing notice of the NOAA's proposal to designate two new national marine sanctuaries in Wisconsin and Maryland pursuant to the NMSA (16 U.S.C. 1431 et seq.). Although NOAA believed that neither of

these proposed sanctuaries were within DOI's leasing authorities pursuant to the Outer Continental Shelf Lands Act, NOAA requested in a subsequent letter on April 11, 2018 that DOI evaluate these designations pursuant to E.O. 13795 (4)(b). On May 7, 2018, DOI responded to NOAA's letter confirming that lands underlying the proposed sanctuary are state lands and thus are not managed by DOI and that DOI has no plans for energy or mineral resource development in the area.

#### National Historic Preservation Act

The National Historic Preservation Act (NHPA; 16 U.S.C. 470 et seq.) is intended to preserve historical and archaeological sites in the United States of America. The act created the National Register of Historic Places, the list of National Historic Landmarks, and State Historic Preservation Offices. Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by ACHP (36 CFR parts 800 through 812). In fulfilling its responsibilities under the NHPA, NOAA consulted with the Maryland State Historic Preservation Officer (SHPO), and completed the identification of historic properties

and the assessment of the effects of the undertaking on such properties in scheduled consultations with those identified parties and the SHPO. Pursuant to 36 CFR 800.16(1)(1), historic properties includes any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. The term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria. NOAA does not believe this action will cause any adverse impacts to historic or cultural resources as a result of any of the alternatives presented in the FEIS. In March 2017, ONMS sent a letter to the SHPO requesting concurrence on that finding. In a June 19, 2017, letter to ONMS, the SHPO concurred that sanctuary designation would have no adverse effect on historic properties.

NOAA invited state recognized tribes to be consulting parties under Section 106 of the NHPA (54 U.S.C. 306108), pursuant to 36 CFR 800.2. On January 3, 2017, NOAA sent a letter to the Piscataway Conoy Confederacy and Sub-Tribes and the Piscataway

Indian Nation, both located in Maryland, inviting them to consult on the proposed designation. NOAA contacted each of the tribes again on March 2, 2017, and on November 3, 2017. Although NOAA received no written response to these communications, members of the Piscataway Conoy Confederacy and Sub-Tribes participated in local community events related to the proposed sanctuary and on March 7 and March 9, 2017, offered verbal comments related to the proposed sanctuary. On March 22, 2017, the secretary of the Patawomeck Tribe of Virginia submitted written comments on the proposed designation. On October 16, and November 20, 2017, ONMS contacted the Patawomeck Tribe of Virginia and invited them to discuss their relationship to the proposed sanctuary. During a phone conversation on November 29, 2017, Chief John Lightner offered no present-day concerns relative to the proposed sanctuary and expressed interests in learning more about opportunities to engage directly with the sanctuary on topics related to interpreting the heritage of the Patawomeck Tribe of Virginia. ONMS contacted Chief Lightner again via email and phone on March 9, 2018, via email on April 17, 2018, and via phone on April 23, 2018, soliciting additional written comments. However, NOAA received no additional written response to these communications. ONMS looks forward to working with the Piscataway Conoy Confederacy and Sub-Tribes, the Piscataway Indian Nation, and the Patawomeck Tribe of Virginia.

## Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended and codified at 5 U.S.C. 601 et seq., requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, if the head of an agency (or his or her designee) certifies that a rule will not have a significant impact on a substantial number of small entities, the agency is not required to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that original proposed rule would not have a significant impact on a substantial number of small entities. The rationale for that certification was set forth in the preamble of that rule (82 FR 2254).

Although NOAA has made a few changes to the regulations from the proposed rule to the final rule, none of the changes alter the initial determination that this rule will not have an impact on

small businesses included in the original analysis. NOAA also did not receive any comments on the certification or conclusions. Therefore, the determination that this rule will not have a significant economic impact on a substantial number small entities remains unchanged. As a result, a final regulatory flexibility analysis is not required and has not been prepared.

#### Paperwork Reduction Act

ONMS has a valid Office of Management and Budget (OMB) control number (0648-0141) for the collection of public information related to the processing of ONMS permits across the National Marine Sanctuary System. NOAA's designation of MPNMS would likely result in an increase in the number of requests for ONMS general permits, special use permits, certifications, and authorizations because this action proposes to add general permits and special use permits, certifications, appeals, and the authority to authorize other valid federal, state, or local leases, permits, licenses, approvals, or other authorizations. An increase in the number of ONMS permit requests would require a change to the reporting burden certified for OMB control number 0648-0141.

Nationwide, NOAA issues approximately 555 national marine sanctuary permits each year. MPNMS is expected to issue an additional 4 to 5 permit requests per year. This is between 0.7% and 0.9% increase in number of permits annually. NOAA estimates there are on average three responses per permit each, averaging a public reporting burden for national marine sanctuaries permits of 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information. NOAA renewed the existing OMB control number for ONMS permits in July 2018 (through 2021). Therefore, we estimate that the minimal amount of additional permits falls within the total estimated for the 2018 renewal. The form and application process for Mallows Bay permits would be identical to the one approved in 2018.

Comments on this determination were solicited in the proposed rule but no public comments were received. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Historic preservation, Intergovernmental relations, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife.

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Nicole R. LeBoeuf,  
Acting Assistant Administrator,  
National Ocean Service.

Accordingly, for the reasons discussed in the preamble, the National Oceanic and Atmospheric Administration amends 15 CFR part 922 as follows:

**PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS**

1. The authority citation for 15 CFR part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 et seq.

2. Revise § 922.1 to read as follows:

§ 922.1 Applicability of regulations in this part.

Unless noted otherwise, the regulations in subparts A, D, and E of this part apply to all National Marine Sanctuaries and related site-specific regulations set forth in this part. Subparts B and C of this part apply to the sanctuary nomination process and to the designation of future Sanctuaries.

3. Amend § 922.3 by revising the definition of "Sanctuary resource" to read as follows:

§ 922.3 Definitions.

\* \* \* \* \*

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 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. For Thunder Bay National Marine Sanctuary and Underwater Preserve, Sanctuary resource means an

underwater cultural resource as defined at § 922.191.

For Mallows Bay-Potomac River National Marine

Sanctuary, Sanctuary resource is defined at

§ 922.201(a).

\* \* \* \* \*

4. Revise § 922.40 to read as follows:

§ 922.40 Purpose.

The purpose of the regulations in this subpart and in the site-specific subparts in this part is to implement the designations of the National Marine Sanctuaries by regulating activities affecting them, consistent with their respective terms of designation in order to protect, preserve and manage and thereby ensure the health, integrity and continued availability of the conservation, ecological, recreational, research, educational, historical and aesthetic resources and qualities of these areas. Additional purposes of the regulations implementing the designation of the Florida Keys and Hawaiian Islands Humpback Whale National Marine Sanctuaries are found at §§ 922.160 and 922.180, respectively.

5. Revise § 922.41 to read as follows:

§ 922.41 Boundaries.

The boundary for each of the National Marine Sanctuaries is set forth in the site-specific regulations covered by this part.

6. Revise § 922.42 to read as follows:

§ 922.42 Allowed activities.

All activities (e.g., fishing, boating, diving, research, education) may be conducted unless prohibited or otherwise regulated in the site-specific regulations covered by this part, subject to any emergency regulations promulgated under this part, subject to all prohibitions, regulations, restrictions, and conditions validly imposed by any Federal, State, or local authority of competent jurisdiction, including but not limited to, Federal, Tribal, and State fishery management authorities, and subject to the provisions of section 312 of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1431 et seq.). The Assistant Administrator may only directly regulate fishing activities pursuant to the procedure set forth in section 304(a)(5) of the NMSA.

7. Revise § 922.43 to read as follows:

§ 922.43 Prohibited or otherwise regulated activities.

The site-specific regulations applicable to the activities specified therein are set forth in the subparts covered by this part.

8. Revise § 922.44 to read as follows:

§ 922.44 Emergency regulations.

(a) Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all such activities are subject to immediate temporary regulation, including prohibition.

(b) The provisions of this section do not apply to the following national marine sanctuaries with site-specific regulations that establish procedures for issuing emergency regulations:

(1) Cordell Bank National Marine Sanctuary, § 922.112(e).

(2) Florida Keys National Marine Sanctuary, § 922.165.

(3) Hawaiian Islands Humpback Whale National Marine Sanctuary, § 922.185.

(4) Thunder Bay National Marine Sanctuary, § 922.196.

(5) Mallow's Bay-Potomac River National Marine Sanctuary, § 922.204.

(6) [Reserved]

§ 922.47 [Amended]

9. Amend § 922.47(b) by removing "subparts F through P, and subpart R" and adding "subparts F through P and R through T of this part" in its place.

10. Revise § 922.48 to read as follows:

§ 922.48 National Marine Sanctuary permits—application procedures and issuance criteria.

(a) A person may conduct an activity prohibited by subparts F through O and S and T of this part, if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under this section and subparts F through O and S and T, as appropriate. For the Florida Keys National Marine Sanctuary, a person may conduct an activity prohibited by subpart P of this part if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under § 922.166. For the Thunder Bay National Marine Sanctuary and Underwater Preserve, a person may conduct an activity prohibited by subpart R of this part in accordance with the scope, purpose, terms and conditions of a permit issued under § 922.195.

(b) Applications for permits to conduct activities otherwise prohibited by subparts F through O and S and T of this part, should be addressed to the Director and sent to the address specified in subparts F through O of this part, or subparts R through T of this part, as appropriate. An application must include:

(1) A detailed description of the proposed activity including a timetable for completion;

- (2) The equipment, personnel and methodology to be employed;
- (3) The qualifications and experience of all personnel;
- (4) The potential effects of the activity, if any, on Sanctuary resources and qualities; and
- (5) Copies of all other required licenses, permits, approvals or other authorizations.

(c) Upon receipt of an application, the Director may request such additional information from the applicant as he or she deems necessary to act on the application and may seek the views of any persons or entity, within or outside the Federal government, and may hold a public hearing, as deemed appropriate.

(d) The Director, at his or her discretion, may issue a permit, subject to such terms and conditions as he or she deems appropriate, to conduct a prohibited activity, in accordance with the criteria found in subparts F through O of this part, or subparts R through T of this part, as appropriate. The Director shall further impose, at a minimum, the conditions set forth in the relevant subpart.

(e) A permit granted pursuant to this section is nontransferable.

(f) The Director may amend, suspend, or revoke a permit issued pursuant to this section for good cause. The Director may deny a permit application pursuant to this section, in whole or in

part, if it is determined that the permittee or applicant has acted in violation of the terms and conditions of a permit or of the regulations set forth in this section or subparts F through O of this part, or subparts R through T of this part or for other good cause. Any such action shall be communicated in writing to the permittee or applicant by certified mail and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in subpart D of 15 CFR part 904.

11. Amend § 922.49 as follows:

- a. In paragraph (a) introductory text, remove "subparts L through P, or subpart R" and add "subparts L through P of this part, or subparts R through T of this part" in its place;
- b. Revise paragraphs (a)(2), (b), (c), and (g).

The revisions read as follows:

§ 922.49 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity.

(a) \* \* \*

(2) The applicant complies with the other provisions of this section;

\* \* \* \* \*

(b) Any potential applicant for an authorization described in paragraph (a) of this section may request the Director to issue a finding as to whether the activity for which an application is intended to be made is prohibited by subparts L through P of this part, or subparts R through T of this part, as appropriate.

(c) Notification of filings of applications should be sent to the Director, Office of National Marine Sanctuaries at the address specified in subparts L through P of this part, or subparts R through T of this part, as appropriate. A copy of the application must accompany the notification.

\* \* \* \* \*

(g) Any time limit prescribed in or established under this section may be extended by the Director for good cause.

\* \* \* \* \*

12. Revise § 922.50 to read as follows:

§ 922.50 Appeals of administrative action.

(a) (1) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a National Marine Sanctuary permit; an applicant for, or a holder of, a Special Use permit issued pursuant to section 310 of the Act; a person requesting certification of an existing lease, permit, license or right of subsistence use or access under § 922.47; or, for those

Sanctuaries described in subparts L through P and R through T of this part, an applicant for a lease, permit, license or other authorization issued by any Federal, State, or local authority of competent jurisdiction (hereinafter appellant) may appeal to the Assistant Administrator:

(i) The granting, denial, conditioning, amendment, suspension or revocation by the Director of a National Marine Sanctuary or Special Use permit;

(ii) The conditioning, amendment, suspension or revocation of a certification under § 922.47; or

(iii) For those Sanctuaries described in subparts L through P and R through T of this part, the objection to issuance of or the imposition of terms and conditions on a lease, permit, license or other authorization issued by any Federal, State, or local authority of competent jurisdiction.

(2) For those National Marine Sanctuaries described in subparts F through K and S and T of this part, any interested person may also appeal the same actions described in paragraphs (a)(1)(i) and (ii) of this section. For appeals arising from actions taken with respect to these National Marine Sanctuaries, the term "appellant" includes any such interested persons.

(b) An appeal under paragraph (a) of this section must be in writing, state the action(s) by the Director appealed and the reason(s) for the appeal, and be received within 30 days of

receipt of notice of the action by the Director. Appeals should be addressed to the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA 1305 East-West Highway, 13th Floor, Silver Spring, MD 20910.

(c) (1) The Assistant Administrator may request the appellant to submit such information as the Assistant Administrator deems necessary in order for him or her to decide the appeal. The information requested must be received by the Assistant Administrator within 45 days of the postmark date of the request. The Assistant Administrator may seek the views of any other persons. For the Monitor National Marine Sanctuary, if the appellant has requested a hearing, the Assistant Administrator shall grant an informal hearing. For all other National Marine Sanctuaries, the Assistant Administrator may determine whether to hold an informal hearing on the appeal. If the Assistant Administrator determines that an informal hearing should be held, the Assistant Administrator may designate an officer before whom the hearing shall be held.

(2) The hearing officer shall give notice in the Federal Register of the time, place and subject matter of the hearing. The appellant and the Director may appear personally or by counsel at the hearing and submit such material and present such arguments as deemed appropriate by the hearing officer.

Within 60 days after the record for the hearing closes, the hearing officer shall recommend a decision in writing to the Assistant Administrator.

(d) The Assistant Administrator shall decide the appeal using the same regulatory criteria as for the initial decision and shall base the appeal decision on the record before the Director and any information submitted regarding the appeal, and, if a hearing has been held, on the record before the hearing officer and the hearing officer's recommended decision. The Assistant Administrator shall notify the appellant of the final decision and the reason(s) therefore in writing. The Assistant Administrator's decision shall constitute final agency action for the purpose of the Administrative Procedure Act.

(e) Any time limit prescribed in or established under this section other than the 30-day limit for filing an appeal may be extended by the Assistant Administrator or hearing office for good cause.

13. Add subpart S to read as follows:

**SUBPART S - MALLOWS BAY-POTOMAC RIVER NATIONAL MARINE SANCTUARY**

Sec.

922.200 Boundary.

922.201 Definitions.

922.202 Joint management.

922.203 Prohibited or otherwise regulated activities.

922.204 Emergency regulations.

922.205 Permit procedures and review criteria.

922.206 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

Appendix A to Subpart S of Part 922—Mallows Bay-Potomac River Marine Sanctuary Boundary Description and Coordinates of the Lateral Boundary Closures and Excluded Areas

Appendix B to Subpart S of Part 922—Mallows Bay-Potomac River Marine Sanctuary Terms of Designation

§ 922.200 Boundary.

The Mallows Bay-Potomac River National Marine Sanctuary consists of an area of approximately 18 square miles of waters of the state of Maryland and the submerged lands thereunder, over, around, and under the underwater cultural resources in the Potomac River. The precise boundary coordinates are listed in appendix A to this subpart. The western boundary of the sanctuary approximates the border between the Commonwealth of Virginia and the State of Maryland along the western side of the Potomac River and begins at Point 1 north of the mouth of

Aquia Creek in Stafford County, Virginia, near Brent Point. From this point the boundary continues to the north approximating the border between Virginia and Maryland cutting across the mouths of streams and creeks passing through the points in numerical order until it reaches Point 40 north of Tank Creek. From this point the sanctuary boundary continues east across the Potomac River in a straight line towards Point 41 until it intersects the Maryland shoreline just north of Sandy Point in Charles County, Maryland. From this intersection the sanctuary boundary then follows the Maryland shoreline south around Mallows Bay, Blue Banks, and Wades Bay cutting across the mouths of creeks and streams along the eastern shoreline of the Potomac River until it intersects the line formed between Point 42 and Point 43 just south of Smith Point. Finally, from this intersection the sanctuary boundary crosses the Potomac River to the west in a straight line until it reaches Point 43 north of the mouth of Aquia Creek in Stafford County, Virginia, near Brent Point.

§ 922.201 Definitions.

(a) The following terms are defined for purposes of this subpart:

- (1) Sanctuary resource means any historical resource with 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., weirs, 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.

- (2) Traditional fishing means those commercial, recreational, and subsistence fishing activities that were customarily conducted within the Sanctuary prior to its designation or expansion, as identified in the relevant Final Environmental Impact Statement and Management Plan for this Sanctuary.

(b) All other terms appearing in the regulations in this subpart are defined at 15 CFR 922.3, and/or in the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. 1401 et seq., and 16 U.S.C. 1431 et seq.

§ 922.202 Joint management.

NOAA has primary responsibility for the management of the Sanctuary pursuant to the Act. However, NOAA shall co-manage the Sanctuary in collaboration with the State of Maryland and Charles County. The Director shall enter into a Memorandum of Agreement 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.

§ 922.203 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraphs (b) and (c) of this section, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:

(1) Moving, removing, recovering, altering, destroying, possessing, or otherwise injuring, or attempting to move, remove, recover, alter, destroy, possess or otherwise injure a Sanctuary resource, except as an incidental result of traditional fishing. This prohibition does not apply to possessing historical resources removed from the Sanctuary area before the effective date of the Sanctuary designation.

(2) Marking, defacing, or damaging in any way, or displacing or removing or tampering with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes,

posts, buoys, or other boundary markers related to the Sanctuary.

(3) Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of the Act or any regulation or any permit issued under the Act.

(b) The prohibitions in paragraphs (a) (1) through (3) of this section do not apply to any activity necessary to respond to an emergency threatening life, property or the environment; or to activities necessary for valid law enforcement purposes.

(c)(1) All military activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impact on sanctuary resources and qualities.

(2) Any existing military activity conducted by DoD prior to the effective date of the regulations in this subpart and as specifically identified in the Final Environmental Impact Statement and Final Management Plan for the Sanctuary (FEIS/FMP) is allowed to continue in the Sanctuary. The prohibitions in paragraphs (a) (1) through (3) of this section do not apply to those existing military activities or to the following military activities conducted by DoD:

- (i) Low-level overflight of military aircraft operated by DoD;

- (ii) The designation of new units of special use airspace;
- (iii) The use or establishment of military flight training routes;
- (iv) Air or ground access to existing or new electronic tracking communications sites associated with special use airspace or military flight training routes; or
- (v) Activities to reduce or eliminate a threat to human life or property presented by unexploded ordnances or munitions.

(3) New military activities that do not violate the prohibitions in paragraphs (a) (1) through (3) of this section are allowed. Any new military activity that is likely to violate sanctuary prohibitions may become exempt through consultation between the Director and DoD pursuant to section 304(d) of the NMSA. For purposes of this paragraph (c) (3), the term "new military activity" includes but is not limited to, any existing military activity that is modified in any way (including change in location, frequency, duration, or technology used) that is likely to destroy, cause the loss of, or injure a sanctuary resource, or is likely to destroy, cause the loss of, or injure a sanctuary resource in a manner or to an extent that was not considered in a previous consultation under section 304(d) of the NMSA.

(4) In the event of destruction of, loss of, or injury to a sanctuary resource or quality resulting from an incident, including but not limited to spills and groundings caused by DoD, the cognizant component shall promptly coordinate with the Director for the purpose of taking appropriate actions to prevent, respond to or mitigate the harm and, if possible, restore or replace the sanctuary resource or quality.

§ 922.204 Emergency regulations.

(a) Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities, other than DoD activities, are subject to immediate temporary regulation, including prohibition. An emergency regulation shall not take effect without the approval of the Governor of Maryland or her/his designee or designated agency.

(b) Emergency regulations remain in effect until a date fixed in the rule or six months after the effective date, whichever is earlier. The rule may be extended once for not more than six months.

§ 922.205 Permit procedures and review criteria.

(a) *Authority to issue general permits.* The Director may allow a person to conduct an activity that would otherwise be prohibited by this subpart, through issuance of a general permit, provided the applicant complies with:

- (1) The provisions of subpart E of this part; and
- (2) The relevant site-specific regulations appearing in this subpart.

(b) *Sanctuary general permit categories.* The Director may issue a sanctuary general permit under this subpart, subject to such terms and conditions as he or she deems appropriate, if the Director finds that the proposed activity falls within one of the following categories:

- (1) Research—activities that constitute scientific research on or scientific monitoring of national marine sanctuary resources or qualities;
- (2) Education—activities that enhance public awareness, understanding, or appreciation of a national marine sanctuary or national marine sanctuary resources or qualities; or
- (3) Management—activities that assist in managing a national marine sanctuary.

(c) *Review criteria.* The Director shall not issue a permit under this subpart, unless he or she also finds that:

- (1) The proposed activity will be conducted in a manner compatible with the primary objective of protection of national

marine sanctuary resources and qualities, taking into account the following factors:

(i) The extent to which the conduct of the activity may diminish or enhance national marine sanctuary resources and qualities; and

(ii) Any indirect, secondary or cumulative effects of the activity.

(2) It is necessary to conduct the proposed activity within the national marine sanctuary to achieve its stated purpose.

(3) The methods and procedures proposed by the applicant are appropriate to achieve the proposed activity's stated purpose and eliminate, minimize, or mitigate adverse effects on sanctuary resources and qualities as much as possible.

(4) The duration of the proposed activity and its effects are no longer than necessary to achieve the activity's stated purpose.

(5) The expected end value of the activity to the furtherance of national marine sanctuary goals and purposes outweighs any potential adverse impacts on sanctuary resources and qualities from the conduct of the activity.

(6) The applicant is professionally qualified to conduct and complete the proposed activity.

(7) The applicant has adequate financial resources available to conduct and complete the proposed activity and terms and conditions of the permit.

(8) There are no other factors that would make the issuance of a permit for the activity inappropriate.

§ 922.206 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

(a) A person may conduct an activity prohibited by § 922.203(a)(1) through (3) if such activity is specifically authorized by a valid Federal, state, or local lease, permit, license, approval, or other authorization, or tribal right of subsistence use or access in existence prior to the effective date of sanctuary designation and within the sanctuary designated area and complies with § 922.49 and provided that the holder of the lease, permit, license, approval, or other authorization complies with the requirements of paragraph (e) of this section.

(b) In considering whether to make the certifications called for in this section, the Director may seek and consider the views of any other person or entity, within or outside the Federal government, and may hold a public hearing as deemed appropriate.

(c) The Director may amend, suspend, or revoke any certification made under this section whenever continued operation would otherwise be inconsistent with any terms or conditions of the certification. Any such action shall be forwarded in writing to

both the holder of the certified permit, license, or other authorization and the issuing agency and shall set forth reason(s) for the action taken.

(d) Requests for findings or certifications should be addressed to the Director, Office of National Marine Sanctuaries; ATTN: Sanctuary Superintendent, Mallow's Bay-Potomac National Marine Sanctuary, 1305 East West Hwy., 11th Floor, Silver Spring, MD 20910. A copy of the lease, permit, license, approval, or other authorization must accompany the request.

(e) For an activity described in paragraph (a) of this section, the holder of the authorization or right may conduct the activity prohibited by § 922.203(a) (1) through (3) provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 180 days of the Federal Register notification announcing of effective date of the Sanctuary designation, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of this section; and

(3) The holder complies with any terms and conditions on the exercise of such authorization or right imposed as a condition of certification, by the Director, to achieve the purposes for which the Sanctuary was designated.

(f) The holder of an authorization or right described in paragraph (a) of this section authorizing an activity prohibited by § 922.203 may conduct the activity without being in violation of applicable provisions of § 922.203, pending final agency action on his or her certification request, provided the holder is otherwise in compliance with this section.

(g) The Director may request additional information from the certification requester as he or she deems reasonably necessary to condition appropriately the exercise of the certified authorization or right to achieve the purposes for which the Sanctuary was designated. The Director must receive the information requested within 45 days of the postmark date of the request. The Director may seek the views of any persons on the certification request.

(h) The Director may amend any certification made under this section whenever additional information becomes available that he/she determines justifies such an amendment.

(i) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing, any decision on a certification request or any action taken with respect to any certification made under this section, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right,

and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(j) The holder may appeal any action conditioning, amending, suspending, or revoking any certification in accordance with the procedures set forth in § 922.50.

(k) Any time limit prescribed in or established under this section may be extended by the Director for good cause.

Appendix A to Subpart S of Part 922—Mallows Bay-Potomac River Marine Sanctuary Boundary Description and Coordinates of the Lateral Boundary Closures and Excluded Areas

Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Table 1—Coordinates for Sanctuary

Point ID	Latitude	Longitude
1	38.39731	-77.31008
2	38.39823	-77.31030
3	38.39856	-77.31059

4	38.39886	-77.31074
5	38.39917	-77.31067
6	38.40014	-77.31074
7	38.40090	-77.31145
8	38.40138	-77.31215
9	38.40197	-77.31236
10	38.40314	-77.31278
11	38.40658	-77.31377
12	38.40984	-77.31465
13	38.41388	-77.31692
14	38.41831	-77.31913
15	38.41974	-77.31930
16	38.42352	-77.31971
17	38.42548	-77.32030
18	38.42737	-77.32081
19	38.43091	-77.32240
20	38.43163	-77.32242

21	38.43350	-77.32263
22	38.43384	-77.32269
23	38.43430	-77.32265
24	38.43461	-77.32229
25	38.43498	-77.32146
26	38.43526	-77.32057
27	38.43522	-77.32040
28	38.47321	-77.31845
29	38.47434	-77.31874
30	38.47560	-77.31752
31	38.47655	-77.31686
32	38.47748	-77.31666
33	38.47821	-77.31604
34	38.47871	-77.31554
35	38.47885	-77.31563
36	38.47905	-77.31559
37	38.47921	-77.31578

38	38.47943	-77.31592
39	38.47985	-77.31592
40	38.48493	-77.31335
41*	38.48554	-77.27298
42*	38.39793	-77.25704
43	38.39731	-77.31008

Note 1 to table 1 of this appendix: The coordinates in the table above marked with an asterisk (\*) are not a part of the sanctuary boundary. These coordinates are landward reference points used to draw a line segment that intersects with the shoreline.

Appendix B to Subpart S of Part 922 – Mallows Bay-Potomac River  
Marine Sanctuary Terms of Designation

Terms of Designation for the Mallows Bay-Potomac River National  
Marine Sanctuary

Under the authority of the National Marine Sanctuaries Act, as amended (the "Act" or "NMSA"), 16 U.S.C. 1431 et seq., certain waters and submerged lands located off the Nanjemoy Peninsula of

Charles County, Maryland, and along the tidal Potomac River and its surrounding waters are hereby designated as a National Marine Sanctuary for the purposes of providing long-term protection and management of the historical resources and recreational, research, educational, and aesthetic qualities of the area.

#### Article I: Effect of Designation

The NMSA 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 Mallow's Bay-Potomac River National Marine Sanctuary (the "Sanctuary"). Section 1 of Article IV of this appendix lists those activities that may have to be regulated on the effective date of designation, or at some later date, in order to protect Sanctuary resources and qualities. 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.

#### Article II: Description of the Area

The Mallow's Bay-Potomac River National Marine Sanctuary consists of an area of approximately 18 square miles of waters of the State of Maryland and the submerged lands thereunder, over, around, and under the underwater cultural resources in the Potomac River between Stafford County, Virginia, and Charles County, Maryland. The western boundary of the sanctuary approximates the border between the Commonwealth of Virginia and the State of Maryland for roughly 6 miles along the Potomac River, beginning north of the mouth of Aquia Creek in Stafford County, Virginia, near Brent Point and continuing north past Widewater, VA, and Clifton Point to a point north of Tank Creek. From this point the sanctuary boundary crosses the Potomac to the east until it intersects the Maryland shoreline just north of Sandy Point in Charles County, MD. From this point the eastern boundary of the sanctuary, approximately 8 miles in total length, follows the Maryland shoreline south past Mallow's Bay, Blue Banks, and Wades Bay to a point just south of Smith Point. From this location the sanctuary boundary crosses the Potomac River to the west back to its point of origin north of the mouth of Aquia Creek near Brent Point on the Virginia side of the river.

Article III: Special Characteristics of the Area

Mallows Bay-Potomac River National Marine Sanctuary and its surrounding waters contain a diverse collection more than 100 known historic shipwreck vessels dating back to the Civil War and potentially dating back to the Revolutionary War, as well as archaeological artifacts dating back 12,000 years indicating the presence of some of the region's earliest American Indian cultures, including the Piscataway Indian Nation and the Piscataway Conoy Confederacy and Sub-Tribes of Maryland. The area is most renowned for the remains of over 100 wooden steamships, known as the "Ghost Fleet," that were built for the U.S. Emergency Fleet between 1917-1919 as part of U.S. engagement in WWI. Their construction at more than 40 shipyards in 17 states reflects the massive national wartime effort that drove the expansion and economic development of communities and related maritime service industries including the present-day Merchant Marines. The area is contiguous to the Captain John Smith Chesapeake National Historic Trail, the Star Spangled Banner National Historic Trail, the Potomac Heritage National Scenic Trail and the Lower Potomac Water Trail which offer meaningful educational and recreational opportunities centered on the region's culture, heritage and history. Additionally, the structure provided by the vessels and related infrastructure serve as important habitat to thriving populations of recreational fisheries, bald eagles, and other aquatic species.

The area's listing on the National Historical Register of Places in 2015 codifies the historical, archaeological and recreational significance of the Ghost Fleet and related maritime cultural heritage sites in and around Mallow's Bay—Potomac River National Marine Sanctuary.

#### Article IV: Scope of Regulations

Section 1. Activities Subject to Regulation. The following activities are subject to regulation, including prohibition, to the extent necessary and reasonable to ensure the protection and management of the historical resources and recreational, research and educational qualities of the area:

- a. Moving, removing, recovering, altering, destroying, possessing, or otherwise injuring, or attempting to move, remove, recover, alter, destroy, possess or otherwise injure a Sanctuary resource, except as an incidental result of traditional fishing (as defined in the regulations).
- b. Marking, defacing, or damaging in any way, or displacing or removing or tampering with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts, buoys, or other boundary markers related to the Sanctuary.

c. Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of the Act or any regulation issued under the Act.

Section 2. NOAA will not exercise its authority under the NMSA to regulate fishing in the Sanctuary.

Section 3. Emergencies. Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource; or minimize the imminent risk of such destruction, loss, or injury, any activity, including those not listed in Section 1, is subject to immediate temporary regulation. An emergency regulation shall not take effect without the approval of the Governor of Maryland or her/his designee or designated agency.

#### Article V: Relation to Other Regulatory Program

Section 1. Fishing Regulations, Licenses, and Permits. Fishing in the Sanctuary shall not be regulated as part of the Sanctuary management regime authorized by the Act. However, fishing in the Sanctuary may be regulated by other Federal, State, Tribal and local authorities of competent jurisdiction, and designation of the Sanctuary shall have no effect on any regulation, permit, or license issued thereunder.

Section 2. Other Regulations, Licenses, and Permits. If any valid regulation issued by any federal, state, Tribal, or local authority of competent jurisdiction, regardless of when issued, conflicts with a Sanctuary regulation, the regulation deemed by the Director of the Office of National Marine Sanctuaries, National Oceanic and Atmospheric Administration, or designee, in consultation with the State of Maryland, to be more protective of Sanctuary resources and qualities shall govern. Pursuant to section 304(c) (1) of the Act, 16 U.S.C. 1434(c) (1), no valid lease, permit, license, approval, or other authorization issued by any federal, state, Tribal, or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce, or designee, as a result of this designation, or as a result of any Sanctuary regulation, if such lease, permit, license, approval, or other authorization, or right of subsistence use or access was issued or in existence as of the effective date of this designation. However, the Secretary of Commerce or designee, in consultation with the State of Maryland, may regulate the exercise of such authorization or right consistent with the purposes for which the Sanctuary is designated.

Section 3. Department of Defense Activities.

DoD activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on sanctuary resources and qualities. Any existing military activity conducted by DoD prior to the effective date of the regulations in this subpart and as specifically identified in the Final Environmental Impact Statement and Final Management Plan for the Sanctuary (FEIS/FMP) is allowed to continue in the Sanctuary. The prohibitions in § 922.203(a) (1) through (3) do not apply to those existing military activities listed in the FEIS/FMP or the military activities conducted by DoD listed in § 922.203(c) (2). New military activities that do not violate the prohibitions in paragraphs (a) (1) through (3) of this section are allowed. Any new military activity that is likely to violate sanctuary prohibitions may become exempt through consultation between the Director and DoD pursuant to section 304(d) of the NMSA. The term "new military activity" includes but is not limited to, any existing military activity that is modified in any way (including change in location, frequency, duration, or technology used) that is likely to destroy, cause the loss of, or injure a sanctuary resource, or is likely to destroy, cause the loss of, or injure a sanctuary resource in a manner or to an extent that was not considered in a previous consultation under section 304(d) of the NMSA. In the event of destruction of, loss of, or injury to a sanctuary resource or quality resulting

from an incident, including but not limited to spills and groundings caused by DoD, the cognizant component shall promptly coordinate with the Director for the purpose of taking appropriate actions to prevent, respond to or mitigate the harm and, if possible, restore or replace the sanctuary resource or quality.

#### Article VI. Alteration of This Designation

The terms of designation may be modified only by the same procedures by which the original designation is made, including public meetings, consultation according to the NMSA.

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