

**PART 39—AIRWORTHINESS  
DIRECTIVES**

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**2011–21–51 Cessna Aircraft Company:**  
Amendment 39–16850; Docket No.  
FAA–2011–1161; Directorate Identifier  
2011–CE–036–AD.

**(a) Effective Date**

This AD is effective November 1, 2011 to all persons except those persons to whom it was made immediately effective by Emergency AD 2011–21–51, issued on October 6, 2011, which contained the requirements of this amendment.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Cessna Aircraft Company (Cessna) Model 525C airplanes, serial numbers 0001 through 0052, that:

- (1) Have a lithium-ion battery, Cessna part number (P/N) 9914788–1, installed as the main aircraft battery; and
- (2) are certificated in any category.

**(d) Subject**

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 2432; Battery/Charger.

**(e) Unsafe Condition**

This AD was prompted by a report of a battery fire that resulted after an energized ground power unit was connected to one of the affected airplanes equipped with a lithium-ion battery as the main aircraft battery. We are issuing this AD to prevent a potential battery fault that could lead to an aircraft fire.

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.

**(g) Replace the Lithium-Ion Main Aircraft Battery, Cessna P/N 9914788–1**

(1) Within the next 10 hours time-in-service after November 1, 2011 (the effective date of this AD) or within the next 7 days after November 1, 2011 (the effective date of this AD), whichever occurs first, replace the lithium-ion main aircraft battery, Cessna P/N 9914788–1, following Cessna Citation Service Bulletin SB525C–24–05, dated September 29, 2011.

(2) As of November 1, 2011 (the effective date of this AD), do not install a lithium-ion battery, Cessna P/N 9914788–1, on any of the affected airplanes.

**(h) Special Flight Permits**

Special flight permits under 14 CFR 39.23 are allowed with the following limitation: "Single and non-revenue flights only."

**(i) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

**(j) Related Information**

For further information about this AD, contact: Richard Rejniak, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4128; fax: (316) 946–4107; email: richard.rejniak@faa.gov.

**(k) Material Incorporated by Reference**

(1) You must use Cessna Citation Service Bulletin SB525C–24–05, dated September 29, 2011, to do the actions required by this AD, unless the AD specifies otherwise. The Director of the **Federal Register** approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 on November 1, 2011.

(2) For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, KS 67277; telephone: (316) 517–6000; fax: (316) 517–8500; email: [Customercare@cessna.textron.com](mailto:Customercare@cessna.textron.com); Internet: <http://www.cessna.com>.

(3) You may review copies of the service information at the FAA, FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call (202) 741–6030, or go to [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

Issued in Kansas City, Missouri, on October 19, 2011.

**James E. Jackson,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–27596 Filed 10–31–11; 8:45 am]

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric  
Administration****15 CFR Part 922**

[Docket No. 100827401–1597–02]

RIN 0648–BA20

**Olympic Coast National Marine  
Sanctuary Regulations Revisions**

**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:** Pursuant to the National Marine Sanctuaries Act (NMSA), the National Oceanic and Atmospheric Administration (NOAA) has conducted a review of the management plan and regulations for Olympic Coast National Marine Sanctuary (OCNMS or sanctuary), located off the outer coast of the Olympic Peninsula in the State of Washington. As a result of the review, NOAA determined that it was necessary to revise the sanctuary's management plan and implementing regulations. NOAA is revising the OCNMS regulations to: Prohibit wastewater discharges from cruise ships; clarify the language referring to consideration of the objectives of the governing bodies of Indian tribes when issuing permits; correct the size of the sanctuary based on new area estimates (without revising the sanctuary's actual boundaries); update of definitions; and update information such as office location. NOAA also makes additional changes to the grammar and wording of several sections of the regulations to ensure clarity and consistency with the NMSA and other sanctuaries in the National Marine Sanctuary System.

**DATES:** *Effective date:* December 1, 2011.

**ADDRESSES:** Copies of the final management plan (FMP) and environmental assessment (EA) described in this rule and the Finding of No Significant Impact (FONSI) are available upon request to Olympic Coast National Marine Sanctuary, 115 East Railroad Avenue, Suite 301, Port Angeles, WA 98362, *Attn:* George Galasso. The FMP and EA can also be viewed on the Web and downloaded at <http://olympiccoast.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** George Galasso at (360) 457–6622, extension 12.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

### A. Olympic Coast National Marine Sanctuary

Designated in 1994, OCNMS is a place of regional, national and global significance. Connected to both the Juan de Fuca Eddy Ecosystem and the California Current Large Marine Ecosystem, OCNMS is home to one of North America's most productive marine ecosystems and to spectacular, undeveloped shorelines. OCNMS's mission is to protect the Olympic Coast's natural and cultural resources through responsible stewardship, to conduct and apply research to preserve the area's ecological integrity and maritime heritage, and to promote understanding through public outreach and education.

The sanctuary encompasses 2,408 square nautical miles of marine waters off Washington State's rugged Olympic Peninsula. OCNMS is a highly productive ocean and coastal environment important to the continued survival of many ecologically valuable species of fish, seabirds and marine mammals and commercially valuable fisheries. Abundant and diverse biological communities are supported by several types of habitat that comprise the sanctuary, including: Offshore islands; dense, sheltering kelp beds; numerous and diverse intertidal pools; rocky headlands; seastacks and arches; exposed sand and cobble beaches; submarine canyons and ridges; and the continental shelf. The sanctuary adjoins significant historical resources including American Indian village sites, ancient canoe runs, petroglyphs, American Indian artifacts and numerous shipwrecks. In addition, OCNMS is encompassed by the usual and accustomed fishing grounds of four American Indian tribes who exercise treaty reserved rights, and are co-managers of their treaty-protected resources, within the sanctuary.

### B. Need for Action

Section 304(e) of the NMSA requires NOAA to review the management plan of each national marine sanctuary at regular intervals. NOAA has conducted a review of the OCNMS management plan and determined that it was necessary to revise the management plan and regulations for the sanctuary. Therefore, NOAA is now publishing final regulations, as well as a final management plan (FMP) and environmental assessment (EA).

The final management plan for the sanctuary contains a series of action plans outlining activities to better achieve resource protection, research,

education, operations, and evaluation objectives for the next five to ten years. The action plans are designed to address specific issues facing the sanctuary and, in doing so, to achieve the NMSA's primary objective of resource protection (16 U.S.C. 1431(b)(6)) and fulfill the sanctuary's terms of designation (59 FR 24586, May 11, 1994). The final management plan can be downloaded at: <http://olympiccoast.noaa.gov/protection/mpr/welcome.html>.

### C. Background on This Action and Public Involvement

This final rule revises the OCNMS regulations as described below in Section II: "Summary of the Regulatory Amendments." The environmental effects of these final revisions are analyzed in the EA. NOAA first provided notice of this action when it announced the beginning of the OCNMS management plan review process (73 FR 53161; September 15, 2008). The public was invited to comment on the proposed rule, draft EA, which includes the draft management plan, from late January to late March 2011 (76 FR 2611 and 76 FR 6368). Comments were received electronically, by fax, by mail and at public hearings held in Port Angeles and in Forks, Washington. More than thirty comments were received on the draft management plan and proposed rule from individuals, non-governmental conservation organizations, government agencies, and special interest groups. All comments received are part of the public record and are posted at <http://www.regulations.gov>. NOAA's responses to the public comments received during that period are included below.

## II. Summary of the Regulatory Amendments

This section describes the changes to the OCNMS regulations.

### A. Clarify Size of the Sanctuary

The size of the sanctuary has been recalculated using improved area estimation techniques and technology, resulting in a new estimate of the size of the sanctuary. There is no change to the boundaries of the sanctuary. This change does not affect physical, biological, or socioeconomic resources because it does not alter the sanctuary's original size or boundaries.

The original OCNMS regulations estimated the sanctuary's area as approximately 2,500 square nautical miles (59 FR 24586; May 11, 1994). However, current techniques allow for more accurate area calculations. Without altering the sanctuary's existing

boundaries (as defined in the OCNMS terms of designation), NOAA recalculated the area within sanctuary boundaries and found it to be 2,408 square nautical miles (approximately 8,259 square kilometers). This change is solely the result of the improved accuracy of area measurement techniques since the sanctuary's size was first estimated in 1994.

### B. Clarify and Update the Use of the Term "Submerged Lands"

This final rule replaces the term "seabed" with the term "submerged lands" that was used in the original regulatory language prohibiting "drilling into, dredging or otherwise altering the seabed of the sanctuary" (59 FR 24586; May 11, 1994). The previous definition of the sanctuary boundary in the OCNMS terms of designation (59 FR 24586; May 11, 1994) recognizes submerged lands as part of the sanctuary. This rule change makes the regulations, which previously used the term "seabed," consistent with the description of the sanctuary in the terms of designation. This change also makes the regulations consistent with language used in the NMSA (16 U.S.C. 1432(3)). Additionally, using the term "submerged lands" uniformly among the NMSA, OCNMS terms of designation, and OCNMS regulations improves consistency with the regulatory language for the other national marine sanctuaries, which all use the term "submerged lands." The use of the term "submerged lands" will not alter NOAA's current jurisdiction in OCNMS in any way. This regulatory change does not affect physical, biological, or socioeconomic resources because it does not alter the original boundaries or designation of the sanctuary.

### C. Substitute the Term "Traditional Fishing" With "Lawful Fishing"

OCNMS regulations previously provided an exception for "traditional fishing" operations to three of the regulatory prohibitions. The term "traditional fishing" was defined as "using a fishing method that has been used in the sanctuary before the effective date of sanctuary designation (July 22, 1994), including the retrieval of fishing gear" (59 FR 24586; May 11, 1994). This OCNMS regulation allowed fishing operations that existed before sanctuary designation to discharge certain fishing-related materials, disturb historical resources, and disturb the seabed. The precise language of these three exceptions from the original OCNMS regulations is as follows (emphasis added):

- “Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter except \* \* \* fish, fish parts, chumming materials or bait used in or resulting from *traditional fishing* operations in the Sanctuary;” (15 CFR 922.152(2)(i))

- “Moving, removing or injuring, or attempting to move, remove or injure, a Sanctuary historical resource. This prohibition does not apply to moving, removing or injury resulting incidentally from *traditional fishing operations*.” (15 CFR 922.152(3))

- “Drilling into, dredging or otherwise altering the seabed of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary, except as an incidental result of \* \* \* *Traditional fishing operations*.” (15 CFR 922.152(4)(ii))

In addition to replacing “seabed” with “submerged lands,” as described earlier, NOAA replaces the term “traditional fishing” with the term “lawful fishing” in these three places to: (1) Use a term that is more clearly understood; and (2) ensure that there is no distinction between current and future fishing operations. “Lawful fishing” is defined as follows: “Lawful fishing means fishing authorized by a tribal, state or federal entity with jurisdiction over the activity.”

Despite the definition provided in the regulation, and because of its varied connotation, the term “traditional” in OCNMS regulations may have been incorrectly interpreted (e.g., equating traditional fishing with Native American fishing techniques). By replacing the word “traditional” with “lawful” NOAA unambiguously recognizes fishing activities authorized by fisheries management authorities. This change is also consistent with terms used in the regulations for other national marine sanctuaries on the West Coast.

In addition to being more widely understood and consistent, this change makes clear that fishing activities authorized by regulations lawfully adopted by fishery management agencies are not subject to the prohibitions in the OCNMS regulations. Since the time of sanctuary designation, NOAA has refrained from directly regulating fishing through the OCNMS regulations, and the adoption of the “lawful fishing” terminology will not alter this approach. (See, generally, Final Environmental Impact Statement (NOAA 1993) and the final rule adopting regulations for OCNMS, 59 FR 24597 (May 11, 1994)), which can be viewed on the Web and downloaded at <http://olympiccoast.noaa.gov>.

#### *D. Revise Regulations on Discharge/Deposit*

This rule modifies the regulations prohibiting discharging or depositing any material or other matter as follows:

##### 1. Prohibit Discharges/Deposits of Treated and Untreated Sewage and Graywater From Cruise Ships

These revisions address NOAA’s concerns about possible impacts from large volumes of sewage and graywater discharges in the sanctuary, whether treated or not, from cruise ships. Currently, legal discharges from vessels, including cruise ships, transiting or engaging in activities in OCMNS have the potential to negatively impact water quality, as well as pose health risks to humans who use the area. The discharges of highest concern in OCNMS based on volume and potential contaminant loading are sewage, graywater, and bilge water. These modifications to OCNMS regulations will also make OCNMS discharge/deposit prohibitions consistent with the prohibitions for cruise ship discharge/deposit already in effect within the other four West Coast national marine sanctuaries.

Analysis of the actual time cruise ships transited OCNMS in 2009 and estimated wastewater generation rates provides a range of potential annual discharge volumes from 0.2 to 1.3 million gallons of treated sewage and from 1.5 to 5.0 million gallons of graywater. Evaluation of potential environmental impacts of these discharges is complicated. The nutrient and chemical concentrations in wastewater discharges varies depending on both the type of wastewater treatment system being used as well as the ongoing functional performance of individual systems. Also, the volume of wastewater actually discharged from cruise ships in the sanctuary is uncertain. While industry representatives have stated that cruise ships currently avoid all discharges in the sanctuary, this has not been verified. Thus, it is difficult to quantify specific reductions in individual nutrients or chemicals that would be achieved under this final rule.

Additional analysis of the potential impacts to biological, physical and socioeconomic resources from sewage, graywater, and bilge water discharges/deposits are provided in Section 8 of the EA.

#### *Sewage*

Sewage, also referred to as blackwater, is defined as human body wastes and the wastes from toilets and other

receptacles intended to receive or retain body wastes (40 CFR 140.1). Sewage from vessels is generally more concentrated than sewage from land-based sources, as it is diluted with less water when flushed (e.g., 0.75 versus 1.5–5 gallons), and on many vessels sewage is not further diluted with graywater. Sewage generated on vessels is usually directed to a marine sanitation device (MSD).

The CWA requires that any vessel with installed toilet facilities must have an operable MSD. Three general types of MSDs are available and in use. Type I MSDs rely on maceration and chemical disinfection for treatment of the waste prior to its discharge into the water, and are only legal in vessels under 65 feet in length. Type II MSDs utilize aeration and aerobic bacteria in addition to maceration for the breakdown of solids. As with Type I MSDs, the waste is chemically disinfected, typically with chlorine, ammonia or formaldehyde, prior to discharge. Type II MSDs are legal in any size class of vessel, and there are a variety of different types. Type III MSDs are storage tanks, may contain deodorizers and other chemicals, predominantly chlorine, and are used to retain waste until it can be disposed of at an appropriate pump-out facility or at sea. Most MSDs do not have the same nutrient removal capability as land-based treatment plants. Thus, even treated vessel wastewater can have elevated nutrient concentrations.

Advanced wastewater treatment systems (AWTS) are a complex form of Type II MSD that meet a higher standards and testing regime as set out in Federal law, and utilize techniques such as reverse osmosis, ultrafiltration and ultra violet (UV) sterilization to provide more effective treatment. AWTS have been installed on more than half (9 of 15) larger passenger vessels that will transit the sanctuary in 2011 and on these vessels blackwater and graywater are combined. Some of the remaining 6 vessels may have installed AWTS; however, due to equipment and operating challenges, they are not functioning properly and are not being used. These vessels are therefore currently using traditional (Type II) MSDs. The treatment capabilities of AWTS for certain constituents (e.g. nutrients and metals) vary by design and manufacturer, but overall, the performance of these units far surpasses the performance of traditional (Type II) MSDs. For example, suspended solids, residual chlorine, and fecal coliform concentrations in AWTS effluent are typically zero.

Discharges from AWTs may introduce disease-causing microorganisms (pathogens), such as bacteria, protozoans, and viruses, into the marine environment. In addition, sewage discharges from ships, particularly those not using AWTs, contain nutrients that create biological and chemical oxygen demand and could contribute to algae blooms that, in turn, could intensify low dissolved oxygen levels known to occur in the sanctuary. Pathogens from sewage have the potential to contaminate commercial or recreational shellfish beds (a human health risk) and to harm wildlife and humans directly. They may also yield unpleasant esthetic impacts to the sanctuary (diminishing sanctuary resources and its ecological, conservation, esthetic, recreational and other qualities).

#### *Graywater*

Like sewage, graywater discharges also have the potential to degrade water quality. Graywater can contain a variety of substances including (but not limited to) detergents, oil and grease, pesticides, and food wastes. Graywater discharges from cruise ships can have constituent levels in a range similar to that of untreated domestic waste water, and levels for nutrients, biological oxygen demand, fecal coliforms, and food pulper wastes may be many times higher than typical domestic graywater. Nutrients in graywater could negatively impact water quality in the same manner and in combination with discharges of treated sewage from cruise ships. At least three of the cruise ships that transit the sanctuary have no graywater treatment system. These ships constitute over 30% of transits in 2010 and 25% of the transits scheduled for 2011. Fecal coliform concentrations in graywater often exceed the 200 fecal coliforms/100 ml performance standard for MSDs.

#### *Bilge Water*

Bilgewater is the mixture of fresh water and seawater, oily fluids, lubricants, cleaning fluids and other wastes that accumulate in the bilge, or lowest part of a vessel hull, from a variety of sources including leaks, engines and other parts of the propulsion system, and other mechanical and operational sources found throughout the vessel. All vessels accumulate bilgewater through their normal operation, but the generation rates depend on a variety of factors including hull integrity, vessel size, engine room design, preventative maintenance, and the age of the vessel. In addition to oil and grease, bilgewater may also contain a variety of other solid

and liquid contaminants, such as rags, metal shavings, soaps, detergents, dispersants, and degreasers. Estimates of bilgewater discharges to the sanctuary are not available for most classes of vessels. Data for bilgewater generation from cruise ships were available, with an estimated volume of 25,000 gallons produced per week (3,500 gallons per day) on vessels with 3000 passenger/crew capacity (EPA 2008b).

Several national and international regulations govern allowable discharges of bilgewater in an effort to reduce oil contamination of the oceans. These regulations require that ships have operational oil-water separating equipment and that discharges may not exceed 15 parts per million oil. An EPA Vessel General Permit (VGP) prohibits discharge of treated or untreated bilgewater from vessels 400 gross tons or more within 3 mi of shore in a national marine sanctuary. OCNMS regulations prohibit all discharge of oily waste from bilge pumping. Because sanctuary regulations do not specify a limit, this has been interpreted by ONMS as prohibiting any detectable amount of oil as evidenced by a visible sheen. Under current OCNMS regulations discharge of bilgewater that does not leave a visible sheen is allowed.

Discharge of bilge water from cruise ships has the potential to introduce oils, detergents, degreasers, solvents, and other harmful chemicals into the marine environment that can harm water quality and generate oxygen demand.

#### **2. Adopt a Definition of "Cruise Ship"**

A definition of "cruise ship" is added to OCNMS regulations as follows: "Cruise ship means a vessel with 250 or more passenger berths for hire." This definition is consistent with the vessel discharge regulations governing the other four national marine sanctuaries on the West Coast. This definition includes cruise ships where berths are offered for sale or are marketed as condominiums.

#### **3. Adopt a Definition of "Clean"**

The definition of "clean" is added to OCNMS regulations as follows: "Clean means not containing detectable levels of harmful matter." This definition is consistent with the vessel discharge regulations governing the other four national marine sanctuaries on the West Coast.

#### **4. Adopt a Definition of "Harmful Matter"**

The definition of "harmful matter" is added to OCNMS regulations as follows: "Harmful matter means any substance,

or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities. Such substance or combination of substances include but are not limited to: Fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C. 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act at 40 CFR 302.4." This definition is consistent with the vessel discharge regulations governing the other four national marine sanctuaries on the West Coast.

#### *E. Revise Permit Regulations in Relation to Tribal Welfare*

Under the previous regulations, ONMS could issue a permit to conduct an activity otherwise prohibited if it found that the activity qualifies for one of the approved purposes listed in the regulations. One of the purposes listed for permit issuance for OCNMS was to "promote the welfare of any Indian tribe adjacent to the sanctuary." This provision was ambiguous and could be interpreted as allowing an entity not affiliated with a tribe to apply for a permit that it alleges could promote the welfare of an American Indian tribe adjacent to the sanctuary without the explicit agreement or participation of the American Indian tribe. The concept of "promote the welfare of any Indian tribe" was not defined or explained further in the original regulations, the terms of sanctuary designation, or the 1993 Final EIS. As a result, it could be difficult to evaluate permits relative to this purpose.

NOAA modifies the regulation to clarify that a permit under this provision is available only to American Indian tribes adjacent to the sanctuary (*i.e.*, Hoh, Makah, and Quileute Tribes and the Quinault Indian Nation) or its designee. To this end, NOAA replaces the phrase "or promote the welfare of any Indian tribe adjacent to the Sanctuary" with a more descriptive basis for permit issuance. NOAA intends to consider permit applications made by an adjacent American Indian Tribe, or its designee as certified by the governing body of the tribe, "to promote or enhance tribal self-determination, tribal government functions, the exercise of treaty rights, the economic development of the tribe, subsistence, ceremonial and spiritual activities, or the education or training of tribal members."

### *F. Make Other Minor Changes to Regulatory Text*

1. NOAA deletes the definition for the term “Federal project”. The original OCNMS regulations used this term to refer to “Federal projects in existence on July 22, 1994.” However, there is only one project that fits this definition: The Quillayute River Navigation Project. For clarity, NOAA revises the OCNMS regulations to reference the Quillayute River project specifically. The definition for “Federal Project” is deleted because the term will no longer be used in the regulations. The term “Quillayute River Navigation Project” is used in § 922.152(a)(1)(E) and § 922.152(h).

2. The mailing address for permit applications in § 922.153 is updated to reflect the current OCNMS office location.

### **III. Classification**

#### *National Environmental Policy Act*

NOAA has prepared a final environmental assessment to evaluate the environmental effects of this rulemaking. Copies are available at the address and Web site listed in the **ADDRESSES** section of this final rule. Responses to comments received on the proposed rule are published in the final environmental assessment and preamble to this final 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 an affected state’s coastal program on potential Federal regulations having an effect on state waters. Because the sanctuary encompasses a portion of the Washington State waters, NOAA submitted a copy of the proposed rule and supporting documents to the State of Washington Coastal Zone Management Program for evaluation of Federal consistency under the CZMA. Washington State agreed with NOAA’s determination that the draft management plan, draft environmental assessment and the proposed rule were consistent to the maximum extent practicable with the applicable enforceable policies of Washington’s Coastal Zone Management Program and will not result in any significant impacts to the State’s coastal resources.

#### *Executive Order 12866: Regulatory Impact*

This final 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. Members of the OCNMS Advisory Council, Olympic Coast Intergovernmental Policy Council, the Washington Department of Ecology, the Washington Department of Fish and Wildlife, the Washington Department of Natural Resources, the Washington State Ocean Caucus, and Pacific Fishery Management Council have been closely involved with the development of the final management plan for OCNMS and this rule. In addition, OCNMS staff has consulted with staff from all of the previously mentioned state agencies, along with the Washington State Historic Preservation Office, on development of the EA that supports the final rule. The State of Washington Governor’s Office, as a member of the Olympic Coast Intergovernmental Policy Council, has also been involved in developing the final management plan, EA, and the final rule.

#### *Executive Order 13175: Tribal Consultation and Collaboration*

This final rule was developed after consultation and collaboration with representatives from the Makah, Hoh, and Quileute Tribes and the Quinault Indian Nation through their membership on the Olympic Coast Intergovernmental Policy Council (IPC) and the OCNMS Advisory Council. In addition to discussions with the IPC, NOAA sought direct government to government consultations with the Hoh, Makah, and Quileute Tribes and the Quinault Indian Nation. NOAA and the Makah Tribe consulted on a government to government basis to respond to the Makah Tribe’s concerns related to the proposed rule. This final rule takes that consultation into consideration.

#### *Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chief Counsel for Regulation at the Department of Commerce certified to the Chief Counsel for Advocacy, Small Business Administration that this action will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this rule. As a result, a final regulatory flexibility

analysis is not required and none was prepared.

#### *Paperwork Reduction Act*

This rule does not contain any new information collection requirements or revisions to the existing information collection requirement that was approved by OMB (OMB Control Number 0648–0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

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.

### **IV. Changes From the Proposed Rule**

The following changes have been made to the regulatory changes proposed in the proposed rule (76 FR 2611; January 14, 2011) as a response to public comments received during the public comment period and a government to government consultation with the Makah Tribe.

#### *(1) Improve the Description of the Purpose and Procedures for the Tribal Welfare Permit*

The proposed rule identified a need to improve the specificity for the issuance of a permit to “promote the welfare of a tribe.” The proposed rule explained the purpose of the permit as follows: “To promote or enhance tribal self-determination, tribal governmental functions, the exercise of treaty rights or the economic development” of an American Indian tribe adjacent to the sanctuary.

Comments received from the Makah Indian Tribe, and elaborated upon by the Tribe during government-to-government consultation, identified three important concerns with the proposal. First, the language of the proposed rule and its accompanying explanation suggest that a tribe must be the sole applicant for this type of permit. Second, that issuance of a permit to a tribe is inappropriate given the tribe’s status as a co-equal sovereign. Third, the list of eligible activities which are substituted for “welfare of a tribe” in the proposed rule is too limiting and additional language was suggested by the Makah Tribe.

NOAA has carefully considered each of these concerns, and related recommendations from the Makah Tribe and finds that the final rule should be modified to reflect some of the improvements proposed by the Tribe.

First, to clarify the ambiguity created by language in the proposed rule, NOAA has modified the final rule to make clear that either a Coastal Treaty Tribe (*i.e.* Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation) or its designee may apply for or be a co-applicant for a permit to promote or enhance tribal self-determination. The final rule language further clarifies that the governing body of the tribe must certify the tribal designee as applicant or co-applicant for a permit, but the tribe need not itself be the applicant or co-applicant. It is not the intent of this language to limit the persons or entities who may apply for a permit under this provision or to require an agency relationship between a tribe and its designee. Rather, it is the intent of this language to create a procedure for NOAA to be assured that at least one person or entity among the co-applicants, or the applicant itself, has been formally designated by the tribe to apply for the permit as a means to advance the interests of the tribe. This language also allows for less direct involvement by the tribe in the permitting process as long as either an applicant or co-applicant is formally designated by the governing body of the tribe. In addition, any issues regarding the interests of a tribe in a project or permit application or the tribe's designee as the permit applicant or co-applicant may be a topic of government to government consultation between NOAA and the tribe.

Certification from the governing body of the tribe that the person or entity, whether an applicant or co-applicant, has been formally designated by the tribe to apply for the permit could be provided in various forms, the most obvious of which is a resolution adopted by the governing body of the tribe. There may be other forms of providing the official position of the tribal government depending upon the practices of each tribe.

The final rule incorporates the Makah Tribe's suggestion of additional tribal self-determination activities. NOAA did not, however, include the "but not limited to" language because it believes that nearly all activities eligible for a permit to promote tribal self-determination are either specifically described in the rule language or would be so closely related to one of the enumerated activities that they would be eligible for the permit even though not specifically described. NOAA's intent in substituting for the "welfare" language of the original rule is not to limit the broad range of activities eligible for a permit, but rather to describe common ways in which

activities in the sanctuary may promote the well-being of the Coastal Treaty Tribes and their members.

*(2) Adding a Definition for "Harmful Matter" in the Context of Vessel Discharges*

The proposed changes to the OCNMS regulations (76 FR 2611) included a new definition of "clean", a term that appears in the prohibition on vessel discharges in § 922.152(a)(3). This definition of "clean" was adopted in an effort to increase consistency for regulations among national marine sanctuaries on the West Coast. The definition for "clean" includes the term "harmful matter," which was not explicitly defined in the proposed rule. One of the comments NOAA received during the public comment period mentioned that the definition of "clean" was not meaningful or enforceable because of the ambiguity of the term "harmful matter" contained within it. NOAA agrees with that opinion, and in fact the regulations for the other national marine sanctuaries on the West Coast include a definition for "harmful matter" to complement the definition for "clean." The omission of a definition for "harmful matter" was unintentional. Therefore, NOAA is adding the definition of "harmful matter" to the final rule, consistent with the regulations for the other national marine sanctuaries on the West Coast. This change between the proposed and final rule does not change the intent of the regulation and only serves to clarify the new definition of "clean" presented in the proposed rule.

*(3) Remove an Obsolete Reference to Authorizations for Discharging Primary-Treated Sewage in the Sanctuary in Section 922.152(h)*

The regulations in § 922.152(h) describe instances of activities prohibited in the sanctuary for which the Director may not issue a National Marine Sanctuary permit. One of those instances is the discharge of primary-treated sewage in the sanctuary. The previously effective regulatory text mentioned an exception to this prohibition if there was a "certification, pursuant to § 922.47, of valid authorizations in existence on July 22, 1994 and issued by other authorities of competent jurisdiction (15 CFR 922.152(h))." However, the exception is unnecessary since no such certification has ever been pursued and no primary-treated sewage is currently being discharged in the sanctuary. NOAA did not realize until after the publication of the proposed rule that this exception could be removed to simplify the

regulatory text. Since no activity, past or current, matches the description in the exception, the deletion of this text has no substantive impact on users of the sanctuary.

**V. Response to Comments**

The National Oceanic and Atmospheric Administration (NOAA) conducted 2 public hearings to gather input on the Olympic Coast National Marine Sanctuary (OCNMS) draft management plan/environmental assessment and proposed rule during the public comment period from January 14 through March 25, 2011. All written and verbal comments received during the public comment period were compiled and grouped into twelve general topics. Similar comments from multiple submissions have been treated as one comment for purposes of response. NOAA considered all of these comments and, where appropriate, made changes to the final management plan (FMP) and environmental assessment (EA) in response to the comments. Editorial comments on the FMP/EA were also taken under consideration by NOAA and, where appropriate, applied to the EA or FMP. These comments are not included in the list below due to their editorial nature. Substantive comments received are summarized below, followed by NOAA's response.

*General Comments*

*Comment:* The collaborative nature of the OCNMS management plan review (MPR) process is appreciated. The 20 action plans in the management plan and the regulatory actions presented as Alternative B in the environmental assessment appropriately and thoroughly represent the highest priorities for OCNMS.

*Response:* NOAA appreciates the support it received from the OCNMS Advisory Council (SAC), Olympic Coast Intergovernmental Policy Council (IPC), interested groups, organizations and individuals in developing the DMP, and in particular the 20 action plans. NOAA also appreciates the support for Alternative B and has selected it as the basis for the final management plan.

*Comment:* NOAA should prioritize particular action plans, strategies, or activities and develop appropriate staffing strategies to implement the final management plan (FMP).

*Response:* The action plans in the FMP comprise an ambitious body of work. For that reason, prioritization of action plans and strategies in the FMP is essential. NOAA worked with the SAC and the IPC in order to develop the implementation strategy provided in

Table 5 in the FMP. This implementation table categorizes strategies as high, medium and low priorities for OCNMS under three different, hypothetical budget scenarios. NOAA will use the implementation table to consider priorities for operations on an annual basis. Future organizational structure and staffing decisions will be based on this prioritization of the strategies in the FMP, as well as the skills needed to implement the FMP. Because there is uncertainty about how future funding levels will influence prioritization, NOAA did not include a specific organizational structure or staffing plan in the FMP.

*Comment:* The final management plan should clarify and specify that the highest priority management goal of the Olympic Coast National Marine Sanctuary continues to be, “the protection of the marine environment and resources and qualities of the Sanctuary.”

*Response:* Resource protection is the primary objective identified in the National Marine Sanctuaries Act (NMSA) and is, therefore, the highest priority for OCNMS. The six priority management needs and the goals and objectives for OCNMS outlined in the FMP were developed collaboratively through a public process with the SAC and the IPC. The OCNMS goals and objectives are not presented in an explicitly prioritized order; they are all considered important to OCNMS in the context of resource protection.

*Comment:* To avoid confusion among members of the public, NOAA should make clear that there are other, ongoing NOAA regulatory actions separate from the OCNMS management plan review process.

*Response:* At any given time, NOAA may have a number of regulatory actions in progress, some of which may affect OCNMS. For example, the ONMS has recently proposed a rule addressing disturbances of wildlife by aircraft flying over national marine sanctuaries (75 FR 76319). Other NOAA regulatory actions include fishery management actions under the Magnuson-Stevens Conservation and Management Act, authorizations under the Marine Mammal Protection Act, or permits under the Endangered Species Act.

*Comment:* NOAA’s regulatory reach in managing OCNMS has expanded beyond the original goal of providing greater protection to tribal treaty fisheries and subsistence resources from the harmful effects of offshore oil development and oils spills.

*Response:* The 1994 terms of designation for OCNMS states that the

sanctuary was established for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical and aesthetic resources and qualities of the area. The scope of regulations, as defined in the OCNMS terms of designation, and the regulations for OCNMS have not changed since 1994. The few changes to OCNMS regulations identified in this rule are within the scope of regulations defined in the OCNMS terms of designation.

*Comment:* NOAA should release an annual report to the public summarizing the progress made with implementation of the OCNMS management plan.

*Response:* NOAA agrees and plans to produce such a report.

*Comment:* NOAA should continue its efforts to build and strengthen its relationships with communities on the outer coast of the Olympic Peninsula, as well as collaborate with the Lake Ozette Sockeye Committee (LOSC) to assist in reducing risk factors for sockeye salmon survival. Since collaboration among groups can at times be contentious or volatile, NOAA should enlist the assistance of a professional facilitator at meetings to strengthen collaboration among key partners.

*Response:* NOAA agrees and intends to continue efforts in this area, as identified in multiple strategies and activities in the Community Involvement in Sanctuary Management and Community Outreach action plans included in the FMP. While not an active participant, OCNMS staff have been monitoring the work of the LOSC. The Lake Ozette Sockeye Recovery Plan is focused on terrestrial and freshwater management options. Improved understanding of marine habitat use by sockeye salmon, particularly juveniles, is important to effective management and, perhaps, recovery of this ESA listed species, and NOAA supports collaboration on related research within the boundaries of the sanctuary. Several strategies in the FMP provide flexibility to consider such collaborations over the 5–10 year implementation period for the FMP. In addition, NOAA utilizes professional facilitators on occasion, when appropriate. It is not possible, nor necessary, to use professional facilitation at all meetings.

*Comment:* Electronic submission should not be the primary method used for the public to submit comments on these documents because many people living on the West end of the Olympic Peninsula do not have internet access. In addition, the products and actions of the IPC and the SAC are not sufficiently transparent to the public.

*Response:* NOAA accepted comments by several means, including: In writing, orally at public hearings, electronic submissions, and by fax. All OCNMS SAC meetings are open to the public, as were all the SAC working group meetings and workshops that resulted in preliminary draft action plans. These meetings and workshops were announced on the OCNMS Web site and periodically advertised to the email listserve developed for OCNMS MPR. One of the reasons Sanctuary Advisory Councils are an integral part of the management plan review process for all sites within the National Marine Sanctuary System is to ensure that management plans are reviewed and revised in a public forum. While the IPC meetings themselves are not required to be public, in all cases where the IPC provided recommendations for the draft management plan, these recommendations were discussed at SAC meetings, which are open to the public. Each step of the OCNMS MPR process, including meeting notes of all the SAC meetings, has been documented and is publically available on the OCNMS Web site.

*Comment:* The Environmental Assessment frequently confuses Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and National Environmental Policy Act (NEPA) “effects” language and conclusions.

*Response:* The OCNMS EA is written in conformance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4332) and NEPA regulations (40 CFR part 1500) and does not contradict or conflict with language pertaining to adverse impacts or effects contained in either the Endangered Species Act or Marine Mammal Protection Act. Phrasing similar to threshold language of the ESA and MMPA was used in the EA but was not used in the context of characterizing impacts.

*Comment:* The Desired Outcome stated at the beginning of each sub-plan in the OCNMS management plan should be more specifically tailored to a five- or ten-year goal statement where one could measure progress or success, and direct efforts for OCNMS, as well as for partners and collaborators, as future funding becomes available.

*Response:* The Desired Outcome statements are intended to be a broader characterization of the end result that OCNMS hopes to achieve with each action plan. The desired outcomes are intended to tie each action plan to the goals and objectives outlined at the beginning of the management plan. The performance measures identified in the



FMP are intended to be the specific measures of progress or success.

*Comment:* NOAA should pursue inter-governmental agreements or memoranda of agreement (MOAs) to declassify appropriate U.S. Navy maps and bathymetric data.

*Response:* NOAA agrees and has edited two strategies to address the issue of U.S. Navy bathymetric data acquisition: Collaborative and Coordinated Sanctuary Management Action Plan Strategy, Strategy CCM7: United States Navy, Activity B; and Habitat Mapping and Classification Action Plan, Strategy MAP1: Regional Coordination, Activity C.

#### *Oil Spill Planning and Prevention*

*Comment:* NOAA should develop a marine nearshore assessment to determine if sockeye populate the region, and improve the regional Geographic Response Plans that direct initial response to oil spills.

*Response:* While conducting a nearshore assessment of sockeye salmon populations is beyond its current capacity, NOAA is interested in participating in a collaborative effort to conduct such a study. The Spills Prevention, Preparedness, Response and Restoration Action Plan, Strategy SPILL3: Regional Planning and Training Exercises, Activity E has been modified to seek improvements to geographic response plans in the area of threatened and endangered species protection.

*Comment:* NOAA should remove the activity in the management plan that requests that U.S. Coast Guard (USCG) conduct a vessel traffic risk study of the western Strait of Juan de Fuca. USCG has reviewed this issue and found aids to navigation adequate in this area.

*Response:* The recommendation for NOAA to encourage the USCG to conduct a vessel traffic study was made by consensus by the Spills Prevention, Preparedness, Response and Restoration Working Group. NOAA considers the review of maritime safety within and adjacent to sanctuary boundaries to be an ongoing priority. The frequency at which specific reviews and studies should be undertaken will be a subject of ongoing discussions between NOAA and USCG.

*Comment:* NOAA should/should not make the Area to be Avoided (ATBA) mandatory.

*Response:* The ATBA is currently a voluntary vessel traffic measure with a high compliance rate (98.9% compliance in 2009) that is routinely monitored by NOAA. Based on the high level of compliance, NOAA elected to not support the alternative in the EA (alternative C) that would pursue a

mandatory ATBA. If compliance rates were to decrease significantly, NOAA would revisit this issue after consulting with the USCG and other partners. NOAA supports alternative B, which would maintain the voluntary status of the ATBA based on high compliance rates.

#### *Sanctuary Science*

*Comment:* NOAA should archive regularly collected satellite data on sea surface temperature and primary productivity.

*Response:* The collection and archiving of satellite data is the responsibility of NOAA's National Environmental Satellite, Data, and Information Service (NESDIS). Satellite data products including SST and primary productivity indicators (chlorophyll a) are currently archived at NESDIS. Most archival data are found in the CLASS system. (Comprehensive Large Array-data Stewardship System) at <http://www.class.ncdc.noaa.gov/saa/products/welcome>.

*Comment:* NOAA should utilize backpackers to help with monitoring efforts in the sanctuary (e.g., pass out marine mammal stranding cards, where backpackers could report information).

*Response:* NOAA believes in the value of citizen science and is a partner in the Coastal Observation and Seabird Survey Team (COASST), through which volunteers survey designated segments of the coast on a monthly basis. COASST volunteers receive training in the monitoring methods to ensure the accuracy and utility of data to resource managers and scientists. NOAA does work with Olympic National Park (ONP) staff to provide information at trail heads that provides information on how to report marine mammal strandings. NOAA is a partner in the Northwest Marine Mammal Stranding Network, which documents and coordinates response to marine mammal strandings. NOAA participates in stranding network trainings that are provided to ONP's coastal rangers and are open to all interested parties.

*Comment:* NOAA should include a representative from the Northwest Fishery Science Center in the efforts to develop a list of indicator species for OCNMS.

*Response:* NOAA agrees. In strategy ECO9: Ecosystem Processes in the FMP, Northwest Fisheries Science Center is identified as a key partner in efforts to identify indicator species for the sanctuary area.

#### *Natural Resource Management*

*Comment:* The management plan should focus less on collection of more

data and should contain more explanation of how NOAA will implement ecosystem based management in OCNMS in the context of the Coastal and Marine Spatial Planning.

*Response:* During development of the management plan, NOAA determined that data collection is a priority to support EBM implementation because data on natural resources in the sanctuary is still scarce. The FMP directs NOAA to work with its partners over the coming years to determine how to implement EBM in the sanctuary region. Collection and analysis of data on sanctuary resources are important steps in that direction. Implementation of EBM needs to occur on a scale larger than the sanctuary and will require collaboration between NOAA, the Coastal Treaty Tribes, the State of Washington, and other partners. Coastal and marine spatial planning (CMSP), as discussed in the FMP, is being implemented on a statewide and regional scale. CMSP is a data-dependent process that will be improved by more comprehensive characterization of natural resource distribution, condition, and use.

*Comment:* NOAA should consider measures such as time/area closures, take limits on prey species, and restrictions on fishing activities specifically during the EFH groundfish 5-year review.

*Response:* In the FMP, NOAA does recognize the ecological importance, sensitivity to disturbance, and slow recovery potential of biogenic habitats, such as deep sea corals and sponges, and is committed to their protection. The Habitat Mapping and Classification Action Plan in the FMP supports seafloor habitat mapping, including identifying where biogenic habitats occur and sharing these data with other natural resource managers. The Habitat Protection Action Plan in the FMP supports OCNMS staff participation in the Pacific Fishery Management Council (PFMC) process to identify and review essential fish habitat (EFH) and habitat areas of particular concern (HAPC) for Pacific Coast groundfish. This action plan also supports collaborative development and evaluation of recommendations for HAPC sites and EFH conservation areas.

*Comment:* NOAA should define essential fish habitat. Where is it for each species and what are the limitations of use within it?

*Response:* Essential fish habitat (EFH) is defined in the Magnuson-Stevens Fishery Conservation and Management Act as 'those waters and substrate necessary to fish for spawning,



breeding, feeding or growth to maturity' (16 U.S.C. 1802(10)). This Act requires NMFS to assist the regional fishery management councils in the implementation of EFH in their respective fishery management plans. This Act also requires Federal agencies to consult with NMFS on any federal action that may have an adverse effect on EFH. A designated groundfish EFH area in OCNMS, named Olympic 2, is identified in the FMP, and non-tribal bottom trawlers are prohibited from fishing within Olympic 2. The water column in the sanctuary is also designated EFH for Chinook, Coho, and Pink salmon and some coastal pelagic species (anchovies, sardines, squid, and mackerel). There are no specific fishery management limitations associated with these water column EFH designations.

*Comment:* Conservation issues, including any national ONMS initiatives, that may require modification of fisheries regulations should be referred to the Pacific Fishery Management Council for appropriate action.

*Response:* In the event modification to Federal fishery regulations is necessary, NOAA will bring the issue to the PFMC's attention through established processes. At this time, there are no national initiatives by the ONMS that would impact Pacific Fisheries Management Council-managed species.

*Comment:* NOAA should address in the management plan how the access to fishing and shellfishing (in this case, the intertidal zone that was deeded to the Federal government) might be regulated to adhere to state of Washington requirements.

*Response:* NOAA is not proposing to alter fisheries management through this FMP, therefore this issue is beyond the scope of this rulemaking.

*Comment:* OCNMS's goals of protecting, conserving, and enhancing sanctuary resources should include the seascape, lightscape and soundscape of OCNMS for this and future generations as it relates to the overall recreational hiking experience along that portion of the Washington Coast Trail adjacent to the sanctuary.

*Response:* As part of the original OCNMS designation in 1994, NOAA described the characteristics of the sanctuary that made it an area of special national significance. One such characteristic was "its rugged and undeveloped coastline". In addition, the National Marine Sanctuaries Act identifies both recreational and esthetic qualities as important characteristics of national marine sanctuaries. NOAA will consider impacts on these characteristics in its review of permit

applications for activities in OCNMS. The coastal wilderness of Olympic National Park and the Washington Islands National Wildlife Refuges are additional federal designations that recognize and protect the Olympic Coast as a special and unique area in the continental United States.

#### *Visitation and Recreation*

*Comment:* NOAA should increase public awareness of the Sanctuary resources by making use of the natural beauty found above and below the water in a newsletter or a Web site.

*Response:* The desired outcomes of the Visitor Services Action Plan are to improve awareness of the sanctuary and ocean issues, and to provide an enriched and extended coastal travel experience. This action plan supports an update of the OCNMS Web site and use of additional appropriate technologies, such as social networking, webcasts, and smartphone applications.

*Comment:* NOAA should develop a southern information center in Aberdeen.

*Response:* The Visitor Services Action Plan outlines efforts to assess locations for additional visitor information centers. Planning efforts proposed under this action plan will include market feasibility, assessment of potential visitor traffic, and a survey of education and interpretation thematic opportunities.

#### *Military Activities in the Sanctuary*

*Comment:* The U.S. Navy is committed to considering the use of biodegradable components for military expendable materials during training and RDT&E activities to the extent that such materials are available, will meet mission requirements, and are practicable.

*Response:* NOAA appreciates the U.S. Navy's efforts in this area. NOAA has agreed to participate in a U.S. Navy-led initiative to develop biodegradable alternatives for expendable materials used in marine environments.

*Comment:* No summary of Navy research, development, testing and evaluation, and fleet training activities is provided in the document, and NOAA does not set out any position on the activities of the U.S. Navy.

*Response:* The Navy EISs for the Northwest Training Range Complex and the Keyport Range Complex Extension were under development simultaneously with the OCNMS DMP/DEA. Both Navy EIS documents were finalized in 2010 and they provide the most detailed information publicly available on Navy activities and their impacts on resources in the sanctuary.

NOAA does not have additional information on Navy activities in the sanctuary beyond what has been presented to the public in these documents. The characterization of Navy activities in the sanctuary was expanded in the OCNMS FMP/EA, and references were updated. In addition, the issues that NOAA raised with the Navy, primarily focused on potential impacts to biogenic seafloor habitats and discharge of expendable materials, were noted in the FMP/EA. NOAA supports the mission of the U.S. Navy and understands the importance of their research and training activities. NOAA believes that, when possible, it is preferable that these activities take place outside of national marine sanctuaries. In cases where this is not feasible, NOAA seeks to work with the Navy to ensure that their activities are carried out in a manner that avoids to the maximum extent practicable any adverse impacts on sanctuary resources and qualities.

*Comment:* Section 6.4.5 of the EA should explain that the proposed action evaluated in the EIS for the Northwest Training Range Complex (NWTRC) did not trigger the consultation requirements of Section 304(d) of the National Marine Sanctuaries Act.

*Response:* NOAA recognizes that the Navy prepared a detailed Environmental Impact Statement (EIS) addressing its activities within the NWTRC, and during the process to develop this EIS, the Navy responded to written comments submitted by NOAA.

Section 304(d) of the National Marine Sanctuaries Act (NMSA) requires federal agencies whose actions are "likely to destroy, cause the loss of, or injure a sanctuary resource" to consult with NOAA before taking action. NOAA found that the Navy's proposed activities within the NWTRC increased in scope and intensity the activities previously undertaken by the Navy and represented increased adverse impacts to sanctuary resources. NOAA recognizes that despite differing opinions of the applicability of section 304(d), the Navy has been willing to meet with NOAA to discuss the effects of Navy activities on sanctuary resources, and has responded in writing to reasonable and prudent alternatives recommended by NOAA.

*Comment:* NOAA should express concern regarding the significant expansion of activities of the U.S. Navy in the sanctuary in order to fulfill its public trust responsibilities.

*Response:* Both the Navy and NOAA have public trust duties to public resources. NOAA commented on the Navy EISs through interagency

consultation. Throughout development of the Navy's documents NOAA worked with the Navy to ensure the protection of sanctuary resources. NOAA recognizes the Navy's cooperation during consultation with NOAA pursuant to section 304(d) of the NMSA on the Navy's proposed expansion of the Keyport Range Complex.

*Comment:* The rule should be amended to reflect the fact that authorized Navy activities occur in all of the areas described in the Navy's comment letter as authorized by 15 CFR 922.152(d).

*Response:* 15 CFR 922.152(d) references geographically specific areas and identifies a suite of Department of Defense activities that are exempt from sanctuary regulations. These exceptions do not apply to the entire sanctuary. If the Department of Defense has a need to extend the geographic extent of these exceptions or wishes to add new activities to the identified list in the regulations, NOAA would consider such changes per the provisions in 15 CFR 922.152(d)(1)(ii).

#### Acoustics

*Comment:* The EA's conclusion that there would be a very low likelihood of adverse effects to marine life from use of the common echo sounder does not reflect the best available science.

*Response:* NOAA reassessed its analysis, corrected inaccuracies, and provided additional information in the FMP/EA and still stands by its initial conclusions. Whereas sound produced by hydrographic survey equipment is detectable by some marine mammals, NOAA concluded there is very low likelihood of adverse effects to marine life from use of this equipment based on the low intensity level and rapid attenuation of the sounds, limited area of sonification, and use of frequencies that are beyond peak hearing ranges for most marine mammals.

*Comment:* The EA, in particular Table 17, which does not identify its source of data, does not agree with the best scientific data available in Southall *et al.* 2007.

*Response:* NOAA reassessed its analysis, corrected inaccuracies, and provided additional information in the FMP/EA and stands by its initial conclusions. Southall *et al.* (2007) does not provide hearing range limits for individual species but combines cetaceans into three functional hearing groups: Low-frequency, mid-frequency, and high-frequency cetaceans. The revised EA incorporates analysis based on functional hearing groups identified in Southall *et al.* (2007) and does not

include Table 17 or statements on the hearing ranges of individual species.

#### Overflight Regulation

*Comment:* Any mandate or requirement on overflights must be enacted by the FAA following the standard rulemaking process.

*Response:* The existing overflight regulation for OCNMS has been in place since the sanctuary's creation in 1994. NOAA is not making any changes to the overflight regulation in the rulemaking associated with the OCNMS FMP/EA. The purpose of the overflight restriction zone is to minimize disturbance to wildlife from low flying aircraft. Conservation of wildlife populations is within the authorities of the NMSA. This regulation is consistent with the FAA Advisory that applies to Department of the Interior lands on the outer coast of Washington, but it is not redundant with any FAA regulation. There is a separate rulemaking associated with West Coast sanctuaries overflight regulations (75 FR 76319) that was developed by NOAA in collaboration with the FAA. NOAA has worked with the FAA to ensure that the West Coast sanctuaries regulations are consistent with FAA regulations and can be included on FAA aeronautical charts. FAA has supported this effort.

*Comment:* The Olympic National Park (ONP) should be afforded the same exemption to the overflight regulation that is afforded to local Indian tribes.

*Response:* The current exception in 15 CFR 922.152(a)(6) was placed in the original 1994 OCNMS regulations at the request of the Indian Tribes adjacent to the sanctuary to ensure that the Indian Tribes have access to reservation lands. The overflight regulation does not prevent staff of the Olympic National Park to access park land; therefore, NOAA does not believe that an exception for the ONP is necessary. It is important to note that the OCNMS overflight restriction zone does not apply to activities necessary to respond to emergencies threatening life, property or the environment (15 CFR 922.152(b)) or to activities necessary for valid law enforcement purposes (15 CFR 922.152(c)).

#### Vessel Discharge Regulation

*Comment:* Cruise ship discharges should be banned in OCNMS, as proposed under alternative B.

*Response:* NOAA has selected alternative B as the preferred alternative, which includes a ban on cruise ship discharges, but has modified its analysis in the FMP/EA based upon comments received.

*Comment:* The proposed regulation unfairly targets cruise ships and not other large vessels.

*Response:* Cruise ships are a unique class of vessels that generate wastewater effluents in very large volumes and types that are unique in the maritime industry. There is widespread precedent for discharge regulation of cruise ships as a distinct vessel class on the West Coast of the U.S. (*i.e.*, states of California, Washington, and Alaska) and nationally (*i.e.*, in the Environmental Protection Agency Vessel General Permit).

*Comment:* NOAA should select the vessel discharge regulation proposed under alternative C, which extended the discharge ban to all large vessels traveling through OCNMS.

*Response:* Alternative C considered a broader prohibition of discharges from additional vessel classes. While a discharge ban on all large vessels would reduce the volume of wastewater discharged to the sanctuary and would avoid singling out one industry (*i.e.*, cruise ships) for regulation, alternative C was not selected as the preferred alternative for addressing vessel discharges because vessels other than cruise ships generate a significantly smaller effluent discharge volume in comparison to cruise ships. Cruise ships carry numerous passengers, whereas most other large vessels traversing or working in the sanctuary have few passengers, if any, and small crews. Additionally, there are specific, non-regulatory actions proposed in the action plans that would address discharges from other types of vessels. NOAA plans to continue to assess potential impacts of vessel discharges and will reevaluate OCNMS regulations during the next review of its management plan and regulations, or sooner if significant issues associated with vessel discharges are identified.

*Comment:* The analysis of effects of cruise ship discharge on the sanctuary environment that is provided in the draft EA and proposed rule is inadequate, inaccurate and overlooks several major issues related to dilution, the use of Advanced Wastewater Treatment Systems (AWTS), and the level of current research available on the environmental impacts of cruise ship discharges.

*Response:* NOAA corrected inaccuracies and revised the analysis of cruise ship discharges to incorporate additional information and research findings in the EA. Changes were also incorporated into the preamble to the final rule but NOAA has retained the cruise ship discharge prohibition in the final rule. NOAA agrees that properly

functioning AWTS produce effluent with lower contaminant loads than effluent from traditional marine sanitation devices (MSDs). NOAA's analysis revealed, however, that AWTS are not always functioning properly and are not consistently used on cruise ships where they are installed. NOAA contends that the most effective protection for water quality in the sanctuary is achieved through the cruise ship discharge prohibition included in the proposed rule. Analysis in the EA indicates that this prohibition has a negligible effect on the industry, given the average transit time of 1.2 hours through the sanctuary and current industry practice to avoid discharges into sanctuary waters.

*Comment:* The proposed rule is inconsistent with Executive Order 13563 because the cost/benefit analysis of the proposed cruise ship discharge regulation is inadequate.

*Response:* In the FMP/EA, NOAA modified the analysis of environmental and socioeconomic impacts and costs of the proposed ban on cruise ship discharges in OCNMS and has complied with applicable cost-benefit analysis requirements. There is essentially no operational cost to the industry from the implementation of this regulation. The regulation generates the benefits of regulatory clarity, regulatory consistency among marine sanctuaries on the west coast, and a more precautionary management approach to a marine protected area of national significance. The regulation is consistent with Executive Order 13563.

*Comment:* The qualifier "clean" as defined in section 922.151 effectively establishes an unattainable "non-detect limit" for any constituent discharged by a cruise ship.

*Response:* NOAA agrees that the term "clean" needs to be better explained and has therefore added a definition of "harmful matter" in the final rule. The definition of "harmful matter" is consistent with the definitions used at other national marine sanctuaries. NOAA believes that this additional clarification addresses the concern regarding the feasibility of the proposed regulation.

*Comment:* NOAA should consider an approach that provides for black water and gray water discharges that are treated to levels that are scientifically acceptable.

*Response:* Establishment of performance standards for cruise ship discharges in OCNMS would create an impractical level of regulatory enforcement complexity applying to a minor portion of the vessels' operating area. For example, performance

standards, in the form of effluent limitations, have been established by the state of Alaska. Alaska regulations allow discharge only from AWTS, not traditional MSDs, and include differing limits (maximum values for a variety of effluent parameters) based on the type (manufacturer) of AWTS and operation of the vessel (in transit > knots or not). These regulations also define differing sampling/analysis frequencies for various parameters. Because cruise ships have an average transit time of 1.2 hours in OCNMS, performance standards for discharges to sanctuary waters are not warranted. The EPA and the state of Washington set water quality standards that apply to sanctuary waters within the state's waters. However, there are currently no standards that apply to sanctuary waters beyond 3 miles which are federal waters.

*Comment:* NOAA should make sure that this regulation, including the definition of cruise ship, is consistent with other regulations, including the EPA's Vessel General Permit.

*Response:* National marine sanctuaries are marine protected areas of national significance and often have regulations that are more restrictive than other areas. This is consistent with the mandate of the NMSA. The FMP/EA identifies a complex set of international, federal, and state vessel discharge regulations with inconsistent requirements that differ based on various factors, including country of registration, wastewater stream, treatment systems used, monitoring implemented, operation of the vessel, and location of the discharge. Various definitions for cruise ship are used in federal and state regulations. The EPA in the Vessel General Permit (VGP) provides definitions for medium cruise ships (authorized to carry 100 to 499 people for hire) and large cruise ships (authorized to carry 500 people or more for hire). VGP provisions cover only portions of the sanctuary within 3 miles from shore. U.S. Coast Guard regulates cruise ships as passenger vessels over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours. Given the inconsistency among the various definitions, NOAA will continue to use the definition of cruise ships established in the regulations of the four national marine sanctuaries off the coast of California.

*Comment:* The description of allowed discharges in the proposed cruise ship discharge regulation does not account for all non-discretionary discharges, which ban discharges that cannot be terminated from vessels (e.g. leachate

from anti-fouling hull coatings, cathodic protection, etc.)

*Response:* The cruise ship discharge regulation does not prohibit leachate from anti-fouling hull coatings or discharges from cathodic protection. Anti-fouling hull coatings are regulated as pesticides by the EPA. NOAA considers such leachates to be water generated by routine vessel operations, and as such they are an allowable discharge in OCNMS regulations (922.152(a)(2)(i)(C)).

*Comment:* NOAA should not prohibit discharging or depositing material from beyond the boundary of the sanctuary that subsequently enters the sanctuary and injures a sanctuary resource or quality.

*Response:* Activities taking place beyond sanctuary boundaries are subject to this regulation only if the discharge injures a sanctuary resource or quality within the sanctuary. This is not a new regulation and has been in place since 1994.

*Comment:* NOAA should stay abreast to the routes of cruise ships and if an area of the sanctuary is scheduled to receive an immense amount of traffic, NOAA should intervene and attempt to redirect the routes.

*Response:* NOAA is aware of cruise ship traffic patterns within the sanctuary and monitors them routinely through the Area To Be Avoided (ATBA) compliance monitoring. Assuming that cruise ships continue their high rate of compliance with the voluntary ATBA, cruise ship routes will remain well offshore where deep and dynamic marine waters will mitigate impacts of discharges. As they transit through the northern waters of the sanctuary at the western entrance to the Strait of Juan de Fuca, cruise ships follow established vessel traffic lanes that are designed to facilitate safe passage of large commercial vessels. NOAA will continue to monitor cruise ship traffic patterns, to evaluate practices, and to assess impacts on the environment.

#### *Cultural and Historical Resources*

*Comment:* NOAA should commit to a programmatic agreement (PA) to address Section 106 of the NHPA compliance in the management plan.

*Response:* NOAA has committed to developing a programmatic agreement in the FMP (Maritime Heritage Action Plan; Strategy MH1: Cultural Resource Conservation; Activity C). NOAA agrees that the components identified in the comment should be incorporated into this programmatic agreement. NOAA has met requirements under Section 106 to ensure that its FMP is in compliance

with the National Historic Preservation Act.

*Comment:* The protection of cultural resources needs to be incorporated into oil spill response planning, training and GRPs.

*Response:* These issues are addressed within the context of the Northwest Regional Response Team and the Northwest Area Contingency Plan. NOAA supports consideration of additional approaches to ensure the protection of cultural resources during oil spill response, planning and geographic response plans.

*Comment:* NOAA needs to assure that cultural resources data is conveyed to the Washington State Department of Archaeology and Historic Preservation (DAHP) and other consulting tribal governments in a format that is compatible with DAHP GIS standards.

*Response:* NOAA concurs and has edited Maritime Heritage Action Plan, Strategy MH1: Cultural Resource Conservation, Activity B to address the need to develop uniform guidelines/protocols for cultural resource data collection and sharing.

#### *Treaty Trust Responsibility*

*Comment:* NOAA should develop work protocols for government-to-government consultation.

*Response:* While general tribal consultation procedures are documented in section 2.4 of the FMP/EA, NOAA also looks forward to working with individual Coastal Treaty Tribes to develop more specific, individually defined tribal consultation procedures beyond those outlined in the FMP. To support this effort, NOAA added an activity under the Collaborative and Coordinated Sanctuary Management Action Plan, Strategy CCM2: Coastal Treaty Tribes.

*Comment:* The DMP section on Treaty Trust Responsibility is too heavily focused on treaty rights and the protection of natural resources co-managed by the Tribes and the United States, at the expense of other important tribal interests.

*Response:* Section 2 focuses on treaty rights and NOAA's fulfillment of U.S. treaty obligations within its statutory mandate and as recommended by the Olympic Coast Intergovernmental Policy Council and OCNMS Advisory Council. This chapter was based on substantial work by members from the four Coastal Treaty Tribes and NOAA. Thus, NOAA did not alter the focus or scope of this chapter because specific guidance was not provided by the Coastal Treaty Tribes.

*Comment:* The regulation requiring consultation with the tribes should

formalize the co-management status of the coast tribes. The Makah Tribal Council proposes that 922.154 be modified.

*Response:* NOAA recognizes our responsibilities to consult with each Coastal Treaty Tribe on a government-to-government basis. This responsibility is documented in several places in the OCNMS FMP and exists regardless of language in OCNMS regulations. Editing the regulations would not substantively change the requirement to consult. NOAA did not modify this clause in OCNMS regulations.

*Comment:* When a Coastal Treaty Tribe is involved in a project permitted by another agency, NOAA should be required to consider its fiduciary obligations when deciding whether and how to object or condition that project. The Makah Tribal Council proposes that 922.152(g) be modified.

*Response:* NOAA did not propose changes to this provision in the January 2011 proposed rulemaking; therefore, a separate rulemaking process would be required to modify this section of OCNMS regulations. Because case law supports the protection of treaty rights and resources when a Federal agency is issuing or authorizing permits, as a matter of policy, NOAA will consider and respond to a tribal government's recommendations when evaluating permit authorizations. NOAA will consider this change during a future review of regulations.

#### *Permitting*

*Comment:* Requiring a tribe to be an applicant for a permit from NOAA does not adequately reflect its sovereign status.

*Response:* NOAA does not agree that the requirement to apply for a permit to conduct a prohibited activity does not adequately reflect the sovereign status of an American Indian Tribe. All governmental entities and agencies, federal, state and tribal, are required to obtain a permit to conduct an activity within the sanctuary that would otherwise be prohibited. NOAA issues permits to the sanctuary superintendent to conduct research and other activities that involve prohibited activities such as seafloor disturbance or anchoring. Being an applicant for a permit does not reflect upon the sovereignty of a tribal government and does in fact reflect an equal footing with federal and state agencies including NOAA. It is also important to note that 15 CFR 922.152 (f) specifically recognizes that the prohibited activities in sanctuary regulations do not apply to the exercise of treaty-secured rights.

*Comment:* Requiring a tribe to be the sole applicant for a sanctuary permit would effectively eliminate projects that require partners with technical expertise and greater financial resources.

*Response:* NOAA agrees that language in the preamble to the proposed rule created the inappropriate impression that a tribe had to be the sole applicant for a permit in this category. For the final rule, preamble language was edited to reflect that a permit can be issued to the designee of a tribe as certified by the governing body of that tribe, or with a tribe as the sole applicant or a co-applicant. In addition, NOAA expanded the list of activities eligible for this permit category to include those proposed by the Makah Tribal Council.

*Comment:* The need for the proposed change to the tribal welfare provision of the sanctuary regulations is not adequately explained. The FMP/EA should address the Makah Bay wave energy project or recognize that the coast tribes may prefer jointly sponsored projects that require resources from outside the tribes.

*Response:* NOAA has modified the preamble to the final rule to more clearly reflect the basis for this regulatory change, a concern that an entity other than a tribal government could apply for a tribal welfare permit without an explicit agreement with or participation of the American Indian tribe. NOAA also added information regarding the Makah Bay wave energy project in Section 6.4.4 of the EA.

## **VI. References**

A complete list of all references cited herein is available upon request (see ADDRESSES section).

### **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.

Dated: October 24, 2011.

**David M. Kennedy,**

*Assistant Administrator, for Ocean Services and Coastal Zone Management.*

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 part 922 continues to read as follows:

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

■ 2. Amend § 922.150 by revising paragraph (a) to read as follows:

**§ 922.150 Boundary.**

(a) The Olympic Coast National Marine Sanctuary (Sanctuary) consists of an area of approximately 2,408 square nautical miles (nmi) of coastal and ocean waters, and the submerged lands thereunder, off the central and northern coast of the State of Washington.

\* \* \* \* \*

■ 3. Section § 922.151 is revised to read as follows:

**§ 922.151 Definitions.**

In addition to those definitions found at § 922.3, the following definitions apply to this subpart:

*Clean* means not containing detectable levels of harmful matter.

*Cruise ship* means a vessel with 250 or more passenger berths for hire.

*Harmful matter* means any substance, or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities, including but not limited to: Fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C. 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act at 40 CFR 302.4.

*Indian reservation* means a tract of land set aside by the Federal Government for use by a federally recognized American Indian tribe and includes, but is not limited to, the Makah, Quileute, Hoh, and Quinault Reservations.

*Lawful fishing* means fishing authorized by a tribal, State or Federal entity with jurisdiction over the activity.

*Treaty* means a formal agreement between the United States Government and an Indian tribe.

■ 4. Section 922.152 is revised to read as follows:

**§ 922.152 Prohibited or otherwise regulated activities.**

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

(1) Exploring for, developing or producing oil, gas or minerals within the Sanctuary.

(2)(i) Discharging or depositing, from within or into the Sanctuary, other than from a cruise ship, any material or other matter except:

(A) Fish, fish parts, chumming materials or bait used in or resulting from lawful fishing operations in the Sanctuary;

(B) Biodegradable effluent incidental to vessel use and generated by marine sanitation devices approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. 1322 *et seq.*;

(C) Water generated by routine vessel operations (e.g., cooling water, deck wash down, and graywater as defined by section 312 of the FWPCA) excluding oily wastes from bilge pumping;

(D) Engine exhaust; or

(E) Dredge spoil in connection with beach nourishment projects related to the Quillayute River Navigation Project.

(ii) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter, except those listed in paragraphs (a)(2)(i)(A) through (E) of this section, that subsequently enters the Sanctuary and injures a Sanctuary resource or quality.

(3) Discharging or depositing, from within or into the Sanctuary, any materials or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, engine exhaust, or anchor wash.

(4) Moving, removing or injuring, or attempting to move, remove or injure, a Sanctuary historical resource. This prohibition does not apply to moving, removing or injury resulting incidentally from lawful fishing operations.

(5) Drilling into, dredging or otherwise altering the submerged lands of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the submerged lands of the Sanctuary, except as an incidental result of:

(i) Anchoring vessels;

(ii) Lawful fishing operations;

(iii) Installation of navigation aids;

(iv) Harbor maintenance in the areas

necessarily associated with the Quillayute River Navigation Project, including dredging of entrance channels and repair, replacement or rehabilitation of breakwaters and jetties, and related beach nourishment;

(v) Construction, repair, replacement or rehabilitation of boat launches, docks or piers, and associated breakwaters and jetties; or

(vi) Beach nourishment projects related to harbor maintenance activities.

(6) Taking any marine mammal, sea turtle or seabird in or above the Sanctuary, except as authorized by the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et*

*seq.*, the Endangered Species Act, as amended, (ESA), 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.*, or pursuant to any Indian treaty with an Indian tribe to which the United States is a party, provided that the Indian treaty right is exercised in accordance with the MMPA, ESA, and MBTA, to the extent that they apply.

(7) Flying motorized aircraft at less than 2,000 feet both above the Sanctuary within one NM of the Flattery Rocks, Quillayute Needles, or Copalis National Wildlife Refuge, or within one nmi seaward from the coastal boundary of the Sanctuary, except for activities related to tribal timber operations conducted on reservation lands, or to transport persons or supplies to or from reservation lands as authorized by a governing body of an Indian tribe.

(8) Possessing within the Sanctuary (regardless of where taken, moved or removed from) any historical resource, or any marine mammal, sea turtle, or seabird taken in violation of the MMPA, ESA, or MBTA, to the extent that they apply.

(9) 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 permit issued under the Act.

(b) The prohibitions in paragraph (a)(2) through (5), (7), and (8) of this section do not apply to activities necessary to respond to emergencies threatening life, property, or the environment.

(c) The prohibitions in paragraphs (a)(2) through (5), (7), and (8) of this section do not apply to activities necessary for valid law enforcement purposes.

(d)(1) All Department of Defense military activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities.

(i) Except as provided in paragraph (d)(2) of this section, the prohibitions in paragraphs (a)(2) through (8) of this section do not apply to the following military activities performed by the Department of Defense in W-237A, W-237B, and Military Operating Areas Olympic A and B in the Sanctuary:

(A) Hull integrity tests and other deep water tests;

(B) Live firing of guns, missiles, torpedoes, and chaff;

(C) Activities associated with the Quinault Range including the in-water testing of non-explosive torpedoes; and

(D) Anti-submarine warfare operations.

(ii) New activities may be exempted from the prohibitions in paragraphs (a)(2) through (8) of this section by the Director after consultation between the Director and the Department of Defense. If it is determined that an activity may be carried out such activity shall be carried out in a manner that avoids to the maximum extent practicable any adverse impact on Sanctuary resources and qualities. Civil engineering and other civil works projects conducted by the U.S. Army Corps of Engineers are excluded from the scope of this paragraph (d).

(2) The Department of Defense is prohibited from conducting bombing activities within the Sanctuary.

(3) In the event of threatened or actual destruction of, loss of, or injury to a Sanctuary resource or quality resulting from an untoward incident, including but not limited to spills and groundings caused by the Department of Defense, the Department of Defense shall promptly coordinate with the Director for the purpose of taking appropriate actions to respond to and mitigate the harm and, if possible, restore or replace the Sanctuary resource or quality.

(e) The prohibitions in paragraphs (a)(2) through (8) of this section do not apply to any activity executed in accordance with the scope, purpose, terms and conditions of a National Marine Sanctuary permit issued pursuant to §§ 922.48 and 922.153 or a Special Use permit issued pursuant to section 310 of the Act.

(f) Members of a federally recognized Indian tribe may exercise aboriginal and treaty-secured rights, subject to the requirements of other applicable law, without regard to the requirements of this part. The Director may consult with the governing body of a tribe regarding ways the tribe may exercise such rights consistent with the purposes of the Sanctuary.

(g) The prohibitions in paragraphs (a)(2) through (8) of this section do not apply to any activity authorized by any lease, permit, license, or other authorization issued after July 22, 1994, and issued by any Federal, State or local authority of competent jurisdiction, provided that the applicant complies with § 922.49, the Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities. Amendments, renewals and extensions of authorizations in existence on the effective date of designation constitute authorizations issued after the effective date.

(h) Notwithstanding paragraphs (e) and (g) of this section, in no event may the Director issue a National Marine Sanctuary permit under §§ 922.48 and 922.153 or a Special Use permit under section 310 of the Act authorizing, or otherwise approve: The exploration for, development or production of oil, gas or minerals within the Sanctuary; the discharge of primary-treated sewage within the Sanctuary; the disposal of dredged material within the Sanctuary other than in connection with beach nourishment projects related to the Quillayute River Navigation Project; or bombing activities within the Sanctuary. Any purported authorizations issued by other authorities after July 22, 1994 for any of these activities within the Sanctuary shall be invalid.

■ 5. Section 922.153 is revised to read as follows:

**§ 922.153 Permit procedures and criteria.**

(a) A person may conduct an activity prohibited by § 922.152(a)(2) through (8) if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under this section and § 922.48.

(b) Applications for such permits should be addressed to the Director, Office of National Marine Sanctuaries; *Attn:* Superintendent, Olympic Coast National Marine Sanctuary, 115 East Railroad Avenue, Suite 301, Port Angeles, WA 98362–2925.

(c) 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 an activity prohibited by § 922.152(a)(2) through (8), if the Director finds that the activity will not substantially injure Sanctuary resources and qualities and will: Further research related to Sanctuary resources and qualities; further the educational, natural or historical resource value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; assist in managing the Sanctuary; further salvage or recovery operations in connections with an abandoned shipwreck in the Sanctuary title to which is held by the State of Washington; or be issued to an American Indian tribe adjacent to the Sanctuary, and/or its designee as certified by the governing body of the tribe, to promote or enhance tribal self-determination, tribal government functions, the exercise of treaty rights, the economic development of the tribe, subsistence, ceremonial and spiritual activities, or the education or training of tribal members. For the purpose of this part, American Indian tribes adjacent to

the sanctuary mean the Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation. In deciding whether to issue a permit, the Director may consider such factors as: The professional qualifications and financial ability of the applicant as related to the proposed activity; the duration of the activity and the duration of its effects; the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity; the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities; the cumulative effects of the activity; the end value of the activity; and the impacts of the activity on adjacent American Indian tribes. Where the issuance or denial of a permit is requested by the governing body of an American Indian tribe, the Director shall consider and protect the interests of the tribe to the fullest extent practicable in keeping with the purposes of the Sanctuary and his or her fiduciary duties to the tribe. The Director may also 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 or conditions of a permit or of these regulations. In addition, the Director may consider such other factors as he or she deems appropriate.

\* \* \* \* \*

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## DEPARTMENT OF STATE

### 22 CFR Part 42

[Public Notice 7391]

RIN 1400–AC86

### Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended

**AGENCY:** State Department.

**ACTION:** Interim final rule.

**SUMMARY:** This rule amends the Department of State's regulations relating to adoptions in countries party to The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, to include new adoption provisions from the International Adoption Simplification Act. This legislation provides for sibling adoption to include certain children who are under the age of 18 at the time the petition is filed on their behalf, and also certain children who attained the age of 18 on or after April 1, 2008 and who are the