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Subtitle B—Regulations Relating to Commerce and Foreign Trade (Continued)

CHAPTER VIII—BUREAU OF ECONOMIC ANALYSIS, DEPARTMENT OF COMMERCE

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PART 801—SURVEY OF INTERNATIONAL TRADE IN SERVICES BETWEEN U.S. AND FOREIGN PERSONS

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AUTHORITY: 5 U.S.C. 301; 15 U.S.C. 4908; 22 U.S.C. 3101–3108; E.O. 11961, 3 CFR, 1977 Comp., p. 86, as amended by E.O. 12318, 3 CFR, 1981 Comp. p. 173, and E.O. 12518, 3 CFR, 1985 Comp. p. 348.

SOURCE: 51 FR 7772, Mar. 6, 1986, unless otherwise noted.

§ 801.1 Purpose.

The purpose of this part is to set forth the rules and regulations necessary to carry out the data collection program concerning international trade in services that is required by, or provided for in, the International Investment and Trade in Services Survey Act (Pub. L. 94–472, 90 Stat. 2059, 22 U.S.C. 3101 to 3108, as amended by section 306 of Pub. L. 98–573), hereafter ''the Act.'' The overall purpose of the Act with respect to services trade is to provide comprehensive and reliable information pertaining to international trade in services, and to do so with the minimum burden on respondents and with no unnecessary duplication of effort. The data are needed for policymaking purposes, for conducting international negotiations on trade in services, and for improving the recording of services transactions in the U.S. balance of payments accounts.

§ 801.2 Recordkeeping requirements.

In accordance with section 5(b)(1) of the Act (22 U.S.C 3104), persons subject to the jurisdiction of the United States shall maintain any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which is essential for carrying out the surveys and studies provided for by the Act.

§ 801.3 General reporting requirements.

(a) In accordance with section 5(b)(2) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall furnish, under oath, any report containing information which is determined to be necessary to carry out the surveys and studies provided for by the Act.

(b) Such reports may be required from any U.S. person, other than the U.S. Government, engaged in international trade in services. Specific reporting requirements for a given report form are set forth below and, in more detail, on the form itself.

§ 801.4 Response required.

Reports, as specified below, are required from all U.S. persons coming within the reporting requirements, whether or not they are contacted by BEA. In addition, any person BEA contacts by sending them report forms must respond in writing. The response must be made by the due date of the report, either by filing the properly completed report form or by certifying in writing on the form that the person has no international services transactions within the purview of the Act or the regulations contained herein. The latter requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act.

§ 801.5 Confidentiality.

Information collected pursuant to § 801.3 is confidential (see section 5(c) of the Act, 22 U.S.C. 3104).

(a) Access to this information shall be available only to officials and employees (including consultants and contractors and their employees) of agencies designated by the President to perform functions under the Act.

(b) Subject to paragraph (d) of this section, the President may authorize

the exchange of information between agencies or officials designated to perform functions under the Act.

(c) Nothing in this part shall be construed to require any Federal agency to disclose information otherwise protected by law.

(d) This information shall be used solely for analytical or statistical purposes or for a proceeding under § 801.6.

(e) No official or employee (including consultants and contractors and their employees) shall publish or make available to any other person any information collected under the Act in such a manner that the person to whom the information relates can be specifically identified.

(f) Reports and copies of reports prepared pursuant to the Act are confidential and their submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied it identifiable as being derived from the records of such customer.

§ 801.6 Penalties.

(a) Whoever fails to furnish any information required by the Act or by § 801.3, or to comply with any other rule, regulation, order or instruction promulgated under the Act, may be subject to a civil penalty not exceeding $10,000 in a proceeding brought in an appropriate United States court and to injunctive relief commanding such person to comply, or both (see section 6 (a) and (b) of the Act, 22 U.S.C. 3105).

(b) Whoever willfully fails to submit any information required by the Act or by § 801.3, or willfully violates any other rule, regulation, order or instruction promulgated under the Act, upon conviction, shall be fined not more than $10,000 and, if an individual, may be imprisoned for not more than one year, or both. Any officer, director, employee, or agent or any corporation who knowingly participates in such violation, upon conviction, may be punished by a like fine, imprisonment, or both (see section 6(c) of the Act, 22 U.S.C. 3105).

(c) Any person who willfully violates § 801.5 relating to confidentially, shall, upon conviction, be fined not more than $10,000, in addition to any other penalty imposed by law (see section 5(d) of the Act, 22 U.S.C. 3104).

§ 801.7 General definitions.

(a) *Services* means economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design, engineering, management consulting, real estate, professional services, entertainment, education, and health care.

(b) *United States,* when used in a geographic sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and all territories and possessions of the United States.

(c) *Foreign,* when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States.

(d) *Person* means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government sponsored agency).

(e) *United States person* means any person resident in the United States or subject to the jurisdiction of the United States.

(f) *Foreign person* means any person resident outside the United States or subject to the jurisdiction of a country other than the United States.

(g) *Business enterprise* means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage, and any ownership of any real estate.

(h) *Unaffiliated foreign person* means, with respect to a given U.S. person, any foreign person that is not an ''affiliated foreign person'' as defined in paragraph (i) of this section.

(i) *Affiliated foreign person* means, with respect to a given U.S. person—

(1) A foreign affiliate of which the U.S. person is a U.S. parent; or

(2) The foreign parent or other member of the affiliated foreign group of which the U.S. person is a U.S. affiliate.

(j) *Parent* means a person of one country who directly or indirectly, owns or controls 10 per centum or more of the voting stock of an incorporated business enterprise, or an equivalent ownership interest in an unincorporated business enterprise, which is located outside that country.

(k) *Affiliate* means a business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 per centum or more of its voting stock for an incorporated business or an equivalent interest for an unincorported business, including a branch.

(l) *U.S. parent* means the U.S. person that has direct investment in a foreign business enterprise.

(m) *Foreign affiliate* means an affiliate located outside the United States in which a U.S. person has direct investment.

(n) *Foreign parent* means the foreign person, or the first person outside the United States in a foreign chain of ownership, which has direct investment in a U.S. business enterprise, including a branch.

(o) *U.S. affiliate* means an affiliate located in the United States in which a foreign person has a direct investment.

(p) *Affiliated foreign group* means—

(1) The foreign parent;

(2) Any foreign person, proceeding up the foreign parent's ownership chain, which owns more than 50 per centum of the person below it up to and including that person which is not owned more than 50 per centum by another foreign person; and

(3) Any foreign person, proceeding down the ownership chain(s) of each of these members, which is owned more than 50 per centum by the person above it.

§801.8 Miscellaneous.

(a) *Required information not available.* All reasonable efforts should be made to obtain information required for reporting. Every applicable question on each form or schedule should be answered. When only partial information is available, an appropriate indication should be given.

(b) *Estimates.* If actual figures are not available, estimates should be supplied and labeled as such. When a data item cannot be fully subdivided as required, a total and an estimated breakdown of the total should be supplied.

(c) *Specify.* When ''specify'' is included in certain data items, the type and dollar amount of the major items included must be given for at least the items mentioned in the line or column instruction.

(d) *Space on form insufficient.* When space on a form is insufficient to permit a full answer to any item, the required information should be submitted on supplementary sheets, appropriately labeled and referenced to the item of column number and the form.

(e) *Extensions.* Requests for an extension of a reporting deadline will not normally be granted. However, in a hardship case, a written request for an extension will be considered provided it is received at least 15 days prior to the due date of the report and enumerates substantive reasons necessitating the extension.

(f) *Number of copies.* A single original copy of each form or schedule shall be filed with the Bureau of Economic Analysis. This should be the copy with the address label if such a labeled copy has been provided. In addition, each respondent must retain a copy of its report to facilitate resolution of problems. Both copies are protected by law; see §801.5.

(g) *Other.* Instructions concerning filing dates, where to send reports, and whom to contact concerning a given report are contained on each form.

§801.9 Reports required.

(a) *Benchmark surveys.* Section 4(a)(4) of the Act (22 U.S.C. 3103) provides that benchmark surveys of trade in services between U.S. and unaffiliated foreign persons be conducted, but not more frequently than every 5 years. General reporting requirements, exemption levels, and the year of coverage of the BE–

20 survey may be found in § 801.10, and general reporting requirements, exemption levels, and the year of coverage of the BE–80 survey may be found in § 801.11. More detailed instructions are given on the forms themselves.

(b) *Annual surveys.* (1) BE–29, Foreign Ocean Carriers' Expenses in the United States:

(i) *Who must report.* A BE–29 report is required from U.S. agents on behalf of foreign ocean carriers transporting freight or passengers to or from the United States. U.S. agents are steamship agents and other persons representing foreign carriers in arranging ocean transportation of freight and cargo between U.S. and foreign ports and in arranging port services in the United States. Foreign carriers are foreign persons that own or operate ocean going vessels calling at U.S. ports, including VLCC tankers discharging petroleum offshore to pipelines and lighter vessels destined for U.S. ports. They include carriers who own or who operate their own or chartered (United States or foreign-flag) vessels. They also include foreign subsidiaries of U.S. companies operating their own or chartered vessels as carriers for their own accounts. Where the vessels under foreign registry are operated directly by a U.S. carrier for its own account, the operations of such vessels should be reported on Form BE–30, Ocean Freight Revenues and Foreign Expenses of United States Carriers. The Bureau of Economic Analysis may, in lieu of BE–29 reports required from foreign carriers' U.S. agents, accept consolidated reports from foreign governments covering the operations of their national shipping concerns when, in the Bureau's discretion, such consolidated reports would provide the required information. Where such reports are accepted, the individual reports from foreign carriers' U.S. agents will not be required.

(ii) *Exemption.* Any U.S. person otherwise required to report is exempted from reporting if the total number of port calls by foreign vessels handled in the reporting period is less than forty or total covered expenses are less than $250,000. For example, if an agent handled less than 40 port calls in a calendar year, the agent is exempted from reporting. If the agent handled 40 or more calls, the agent must report unless covered expenses for all foreign carriers handled by the agent were less than $250,000. The determination of whether a U.S. person is exempt may be based on the judgment of knowledgeable persons who can identify reportable transactions without conducting a detailed manual records search.

(2) BE–22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons:

(i) *Who must report*—(A) *Mandatory reporting.* A BE–22 report is required from each U.S. person who had transactions (either sales or purchases) in excess of $1,000,000 with unaffiliated foreign persons in any of the covered services during the U.S. person's fiscal year. The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty without conducting a detailed manual records search.

(B) *Voluntary reporting.* If, during the U.S. person's fiscal year, the U.S. person's total transactions (either sales or purchases) in any of the covered services is $1,000,000 or less, the U.S. person is requested to provide an estimate of the total for each type of service. Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed manual records search.

(C) Any U.S. person receiving a BE–22 survey form from BEA must complete all relevant parts of the form and return the form to BEA. A person that is not subject to the mandatory reporting requirement in paragraph (b)(2)(i)(A) of this section and is not filing information on a voluntary basis must only complete the ''Determination of reporting status'' and the ''Certification'' sections of the survey. This requirement is necessary to ensure compliance with the reporting requirements and efficient administration of the survey by eliminating unnecessary followup contact.

(ii) *Covered services.* The covered services are: Advertising services; auxiliary

insurance services (by non-insurance companies only); educational and training services; financial services (purchases only by non-financial services providers); medical services, inpatient (receipts only); medical services, other than inpatient (receipts only); merchanting services (receipts only); mining services; disbursements to fund news-gathering costs of broadcasters; disbursements to fund news-gathering costs of print media; disbursements to fund productions costs of motion pictures; disbursements to fund production costs of broadcast program material other than news; disbursements to maintain government tourism and business promotion offices; disbursements for sales promotion and representation; disbursements to participate in foreign trade shows (purchases only); other trade-related services; performing arts, sports, and other live performances, presentations, and events; primary insurance premiums (payments only); primary insurance losses recovered; sale or purchase of rights to natural resources, and lease bonus payments; use or lease of rights to natural resources, excluding lease bonus payments; waste treatment and depollution services; and other private services (language translation services; salvage services; security services; account collection services; satellite photography and remote sensing/satellite imagery services; space transport (includes satellite launches, transport of goods and people for scientific experiments, and space passenger transport); and transcription services).

(c) *Quarterly surveys.* (1) BE–30, Ocean Freight Revenues and Foreign Expenses of United States Carriers:

(i) *Who must report.* A BE–30 report is required from U.S. carriers, *i.e.*, from U.S. persons that own or operate dry cargo, passenger (including combination), and tanker vessels regardless of whether the vessels are registered in the United States or in foreign countries. Operators are persons who enter into any form of transportation contract with shippers of merchandise (or their agents) for the transportation of freight and cargo between U.S. and foreign ports or between foreign ports, whether on the operators' own vessels or chartered vessels.

(ii) *Exemption.* A U.S. person otherwise required to report is exempted from reporting if total annual covered revenues (*i.e.*, revenues on outbound, cross-trade, and inbound cargoes and charter hire received) and total annual covered expenses (*i.e.*, charter hire paid and expenses in foreign countries) are, or are expected to be, each less than $500,000. If either total annual covered revenues or total annual covered expenses are, or are expected to be, $500,000 or more, a report must be filed.

(2) BE–37, U.S. Airline Operators' Foreign Revenues and Expenses:

(i) *Who must report.* A BE–37 report is required from all U.S. airline operators engaged in transportation of passengers and freight to and from the United States or between foreign points.

(ii) *Exemption.* A U.S. person otherwise required to report is exempted from reporting if total annual covered revenues (*i.e.*, revenues from carrying U.S. export freight to foreign countries) and total annual covered expenses (*i.e.*, expenses incurred outside the United States and aircraft leasing expenses) are, or are expected to be, each less than $500,000. If either total annual covered revenues or total annual covered expenses are, or are expected to be, $500,000 or more, a report must be filed.

(3) BE–9, Quarterly Survey of Foreign Airline Operators' Revenues and Expenses in the United States:

(i) *Who must report.* A BE–9 report is required from U.S. offices, agents, or other representatives of foreign airlines that are engaged in transporting passengers or freight and express to or from the United States. If the U.S. office, agent, or other representative does not have all the information required, it must obtain the additional information from the foreign airline operator.

(ii) *Exemption.* A U.S. person otherwise required to report is exempt from reporting if total annual covered revenues and total annual covered expenses incurred in the United States were each less than $5 million during the previous year and are expected to be less than $5 million during the current year. If either total annual covered

revenues or total annual covered expenses were or are expected to be $5 million or more, a report must be filed.

(4) BE–85, Quarterly Survey of Financial Services Transactions Between U.S. Financial Services Providers and Unaffiliated Foreign Persons:

(i) A BE–85, Quarterly Survey of Financial Services Transactions Between U.S. Financial Services Providers and Unaffiliated Foreign Persons, will be conducted covering the first quarter of the 2004 calendar year and every quarter thereafter.

(A) *Who must report*—(*1*) *Mandatory reporting.* Reports are required from each U.S. person who is a financial services provider or intermediary, or whose consolidated U.S. enterprise includes a separately organized subsidiary or part that is a financial services provider or intermediary, and that had sales of covered services to unaffiliated foreign persons that exceeded $20 million for the previous fiscal year or expects sales to exceed that amount during the current fiscal year, or had purchases of covered services from unaffiliated foreign persons that exceeded $15 million for the previous fiscal year or expects purchases to exceed that amount during the current fiscal year. These thresholds should be applied to financial services transactions with unaffiliated foreign persons by all parts of the consolidated U.S. enterprise combined that are financial services providers or intermediaries. Because the thresholds are applied separately to sales and purchases, the mandatory reporting requirement may apply only to sales, only to purchases, or to both sales and purchases.

(*i*) The determination of whether a U.S. financial services provider or intermediary is subject to this mandatory reporting requirement may be based on the judgement of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty, without conducting a detailed manual records search.

(*ii*) Reporters who file pursuant to this mandatory reporting requirement must provide data on total sales and/or purchases of each of the covered types of financial services transactions and must disaggregate the totals by country.

(*2*) *Voluntary reporting.* If a financial services provider or intermediary, or all of a firm's subsidiaries or parts combined that are financial services providers or intermediaries, had covered sales of $20 million or less, or covered purchases of $15 million or less during the previous fiscal year, and if covered sales or purchases are not expected to exceed these amounts in the current fiscal year, a person is requested to provide an estimate of the total for each type of service for the most recent quarter. Provision of this information is voluntary. The estimates may be based on the reasoned judgement of the reporting entity. Because these thresholds apply separately to sales and purchases, voluntary reporting may apply only to sales, only to purchases, or to both.

(B) *BE–85 definition of financial services provider.* The definition of financial services provider used for this survey is identical in coverage to Sector 52—Finance and Insurance—of the North American Industry Classification System, United States, 2002. For example, companies and/or subsidiaries and other separable parts of companies in the following industries are defined as financial services providers: Depository credit intermediation and related activities (including commercial banking, holding companies, savings institutions, check cashing, and debit card issuing); nondepository credit intermediation (including credit card issuing, sales financing, and consumer lending); securities, commodity contracts, and other financial investments and related activities (including security and commodity futures brokers, dealers, exchanges, traders, underwriters, investment bankers, and providers of securities custody services); insurance carriers and related activities (including agents, brokers, and services providers); investment advisors and managers and funds, trusts, and other financial vehicles (including mutual funds, pension funds, real estate investment trusts, investors, stock quotation services, etc.).

(C) *Covered types of services.* The BE–85 survey covers the following types of

financial services transactions (purchases and/or sales) between U.S. financial services providers and unaffiliated foreign persons: Brokerage services, including foreign exchange brokerage services; underwriting and private placement services; financial management services; credit-related services, except credit card services; credit card services; financial advisory and custody services; security lending services; electronic funds transfers; and other financial services.

(ii) [Reserved]

(5) BE–45, Quarterly Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons:

(i) A BE–45, Quarterly Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons, will be conducted covering the first quarter of the 2004 calendar year and every quarter thereafter.

(A) *Who must report*—(*1*) *Mandatory reporting.* Reports are required from each U.S. insurance company whose covered transactions with foreign persons exceeded $8 million for the previous fiscal year or are expected to exceed that amount during the current fiscal year. This threshold is applied separately to each of the eight individual types of transactions covered by the survey rather than to the sum of the data for all eight types combined. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(*2*) *Voluntary reporting.* Reports are requested from each U.S. insurance company whose covered transactions with foreign persons were $8 million or less for the previous fiscal year and are not expected to exceed the $8 million amount during the current fiscal year. Provision of this information is voluntary. The estimates may be based on recall, without conducting a detailed records search.

(B) Any person receiving a BE–45 survey form from BEA must complete all relevant parts of the form and return the form to BEA. A person not subject to the mandatory reporting requirement in paragraph (c)(5)(i)(A) of this section and is not filing information on a voluntary basis must only complete the ''Determination of reporting status'' and the ''Certification'' sections of the survey. This requirement is necessary to ensure compliance with the reporting requirements and efficient administration of the survey by eliminating unnecessary followup contact.

(C) *Covered insurance transactions.* The transactions covered by this survey are: reinsurance premiums received, reinsurance premiums paid, reinsurance losses paid, reinsurance losses recovered, primary insurance premiums received, primary insurance losses paid, auxiliary insurance services receipts, and auxiliary insurance services payments. (Auxiliary insurance services include agent's commissions, insurance brokering and agency services, insurance consulting services, evaluation and adjustment services, actuarial services, salvage administration services, and regulatory and monitoring services on indemnities and recovery services.)

(ii) [Reserved]

(6) BE–25, Quarterly Survey of Transactions with Unaffiliated Foreign Persons in Selected Services and in Intangible Assets:

(i) A BE–25, Quarterly Survey of Transactions with Unaffiliated Foreign Persons in Selected Services and in Intangible Assets, will be conducted covering the first quarter of the 2004 calendar year and every quarter thereafter.

(A) *Who must report*—(*1*) *Mandatory reporting.* Reports are required from each U.S. person that:

(*a*) Had sales of covered services to unaffiliated foreign persons that exceeded $6 million for the previous fiscal year or are expected to exceed that amount during the current fiscal year; or (*b*) had purchases of covered services from unaffiliated foreign persons that exceeded $4 million for the previous fiscal year or are expected to exceed that amount during the current fiscal year. Because the thresholds are applied separately to sales and purchases, the mandatory reporting requirement may apply only to sales, only to purchases, or to both sales and purchases. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(*2*) *Voluntary reporting.* Reports are requested from each U.S. person that had sales of covered services to unaffiliated foreign persons that were $6 million or less for the previous fiscal year and are expected to be less than or equal to that amount during the current fiscal year, or had purchases of covered services from unaffiliated foreign persons that were $4 million or less for the previous fiscal year and are expected to be less than or equal to that amount during the current fiscal year. Provision of this information is voluntary. The estimates may be based on recall, without conducting a detailed records search. Because these thresholds apply separately to sales and purchases, voluntary reporting may apply only to sales, only to purchases, or to both.

(B) Any person receiving a BE–25 survey form from BEA must complete all relevant parts of the form and return the form to BEA. A person that is not subject to the mandatory reporting requirement in paragraph (c)(6)(i)(A) of this section and is not filing information on a voluntary basis must only complete the ''Determination of reporting status'' and the ''Certification'' sections of the survey. This requirement is necessary to ensure compliance with the reporting requirements and efficient administration of the survey by eliminating unnecessary followup contact.

(C) *Covered services and intangible assets.* The services covered by this survey are: Accounting, auditing, and bookkeeping services; computer and data processing services; construction services; foreign expenses related to construction projects; data base and other information services; engineering, architectural, and surveying services; industrial engineering services; industrial-type maintenance, installation, alteration, and training services; legal services; management, consulting, and public relations services; operational leasing services; research, development, and testing services; and telecommunication services. The intangible assets covered by this survey are rights related to: industrial processes and products; books, compact discs, audio tapes and other copyrighted material and intellectual property; trademarks, brand names, and signatures; performances and events pre-recorded on motion picture film and television tape, including digital recording; broadcast and recording of live performances and events; general use computer software; business format franchising fees; and other intangible assets, including indefeasible rights of users.

(ii) [Reserved]

[51 FR 7772, Mar. 6, 1986, as amended at 59 FR 53935, Oct. 27, 1994; 68 FR 69956, Dec. 16, 2003; 68 FR 75409, 75411, Dec. 31, 2003; 69 FR 50064, Aug. 13, 2004; 70 FR 48271, Aug. 17, 2005]

§ 801.10, Note Rules and regulations for the BE–20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons.

The BE–20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons, will be conducted covering companies' 2001 fiscal year and every fifth year thereafter. All legal authorities, provisions, definitions, and requirements contained in §§ 801.1 through 801.9(a) are applicable to this survey. Additional rules and regulations for the BE–20 survey are given in this section. More detailed instructions and descriptions of the individual types of services covered are given on the report form itself.

(a) The BE–20 survey consists of two parts and seven schedules. Part I requests information needed to determine whether a report is required and which schedules apply. Part II requests information about the reporting entity. Each of the seven schedules covers one or more types of services and is to be completed only if the U.S. Reporter has transactions of the type(s) covered by the particular schedule.

(b) *Who must report*—(1) *Mandatory reporting.* A BE–20 report is required from each person who had transactions (either sales or purchases) in excess of $1 million with unaffiliated foreign persons in any of the services listed in paragraph (c) of this section during its fiscal year covered by the survey.

(i) The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgement of knowledgeable persons in a company who can identify reportable

transactions on a recall basis, with a reasonable degree of certainty, without conducting a detailed records search. Because the $1 million threshold applies separately to sales and purchases, the mandatory reporting requirement may apply only to sales, only to purchases, or to both sales and purchases.

(ii) Reporters who file pursuant to this mandatory reporting requirement must complete Parts I and II of form BE–20 and all applicable schedules. The total amounts of transactions applicable to a particular schedule are to be entered in the appropriate column(s) on line 1 of the schedule. In addition, except for sales of merchanting services, these amounts must be distributed below line 1 to the country(ies) involved in the transaction(s). For sales of merchanting services, the data by individual foreign country are not required to be reported, although these data may be reported voluntarily.

(iii) Application of the $1 million exemption level to each covered service is indicated on the schedule for that particular service. It should be noted that an item other than sales or purchases may be used as the measure of a given service for purposes of determining whether the threshold for mandatory reporting of the service is exceeded.

(2) *Voluntary reporting.* If, during the fiscal year covered, the U.S. person's total transactions (either sales or purchases) in any of the types of services listed in paragraph (c) of this section are $1 million or less, the U.S. person is requested to provide an estimate of the total for each type of service.

(i) Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed manual records search. Because the $1 million threshold applies separately to sales and purchases, the voluntary reporting option may apply only to sales, only to purchases, or to both sales and purchases.

(ii) The amounts of transactions reportable on a particular schedule are to be entered in the appropriate column(s) in the voluntary reporting section of the schedule; they are not required to be disaggregated by country. Reporters filing voluntary information only should also complete Parts I and II of the form.

(3) Any U.S. person that receives the BE–20 survey form from BEA, but is not reporting data in either the mandatory or voluntary section of the form, must nevertheless complete and return the Exemption claim included with the form to BEA. This requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act by eliminating unnecessary followup contact.

(c) *Covered types of services.* Only the services listed in this paragraph are covered by the BE–20 survey. Other services, such as transportation and reinsurance, are not covered. Covered services are Agricultural services; research, development, and testing services; management, consulting, and public relations services; management of health care facilities; accounting auditing, and bookkeeping services; legal services; educational and training services; mailing, reproduction, and commercial art; employment agencies and temporary help supply services; industrial engineering services; industrial-type maintenance, installation, alteration, and training services; performing arts, sports, and other live performances, presentations, and events; sale and purchase of rights to natural resources, and lease bonus payments; use or lease of rights to natural resources, excluding lease bonus payments; disbursements to fund news-gathering costs of broadcasters; disbursements to fund news-gathering costs of print media; disbursements to fund production costs of motion pictures; disbursements to fund production costs of broadcast program material other than news; disbursements to maintain government tourism and business promotion offices; disbursements for sales promotion and representation; disbursements to participate in foreign trade shows (purchases only); premiums paid on purchases of primary insurance; losses recovered on purchases of primary insurance; construction services (purchases only); engineering, architectural, and surveying services (purchases only); mining services (purchases only); merchanting services (sales only); financial services (purchases only, by companies or parts

of companies that are not financial services providers); advertising services; computer and data processing services; data base and other information services; telecommunications services; operational leasing services; other trade-related services; auxiliary insurance services; waste treatment and depollution services; and ''other'' private services. ''Other'' private services covers transactions in the following types of services: Language translation services, salvage services, security services account collection services, satellite photograph and remote sensing/satellite imagery services, space transport (includes satellite launches, transport of goods and people for scientific experiments, and space passenger transport), and transcription services.

[66 FR 63919, Dec. 11, 2001]

EFFECTIVE DATE NOTE: At 71 FR 75419, Dec. 15, 2006, § 801.10 was revised, effective Jan. 16, 2007. For the convenience of the user, the revised text is set forth as follows:

§ 801.10 Rules and regulations for the BE–120, Benchmark Survey of Transactions in Selected Services and Intangible Assets with Foreign Persons.

The BE–120, Benchmark Survey of Transactions in Selected Services and Intangible Assets with Foreign Persons, will be conducted covering fiscal year 2006 and every fifth year thereafter. All legal authorities, provisions, definitions, and requirements contained in § 801.1 through 801.9(a) are applicable to this survey. Additional rules and regulations for the BE–120 survey are given in paragraphs (a) through (c) of this section. More detailed instructions and descriptions of the individual types of transactions covered are given on the report form itself.

(a) The BE–120 survey consists of two parts and three schedules. Part I requests information needed to determine whether a report is required and which schedules apply. Part II requests information about the reporting entity. Each of the three schedules covers one or more types of transactions and is to be completed only if the U.S. reporter has transactions of the type(s) covered by the particular schedule.

(b) *Who must report*—(1) *Mandatory reporting.* A BE–120 report is required from each U.S. person that had sales to foreign persons that exceeded $2 million during the fiscal year covered of any of the types of services or intangible assets listed in paragraph (c) of this section, or had purchases from foreign persons that exceeded $1 million during the fiscal year covered of any of the types of services or intangible assets listed in paragraph (c) of this section.

(i) The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty, without conducting a detailed records search. Because the reporting threshold ($2 million for sales and $1 million for purchases) applies separately to sales and purchases, the mandatory reporting requirement may apply only to sales, only to purchases, or to both sales and purchases.

(ii) U.S. persons that file pursuant to this mandatory reporting requirement must complete Parts I and II of Form BE–120 and all applicable schedules. The total amounts of transactions applicable to a particular schedule are to be entered in the appropriate column(s) and, except for sales of merchanting services, these amounts must be distributed among the countries involved in the transactions. For sales of merchanting services, the data are not required to be reported by individual foreign country, although this information may be provided voluntarily.

(iii) Application of the exemption levels to each covered transaction is indicated on the schedule for that particular type of transaction. It should be noted that an item other than sales or purchases may be used as the measure of a given type of transaction for purposes of determining whether the threshold for mandatory reporting of the transaction is exceeded.

(2) *Voluntary reporting.* If, during the fiscal year covered, the U.S. person's total transactions (either sales or purchases) in any of the types of transactions listed in paragraph (c) of this section are $2 million or less for sales or $1 million or less for purchases, the U.S. person is requested to provide an estimate of the total for each type of transaction. Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed records search. Because the exemption threshold applies separately to sales and purchases, the voluntary reporting option may apply only to sales, only to purchases, or to both sales and purchases.

(3) Any U.S. person that receives the BE–120 survey form from BEA, but is not reporting data in either the mandatory or voluntary section of the form, must nevertheless provide information on the reason for not reporting. This requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act by eliminating unnecessary follow-up contact.

(c) *Covered types of services and intangible assets.* The BE–120 survey is intended to collect information on U.S. international trade in all types of services and intangible assets for which information is not collected in other BEA surveys and is not available to BEA from other sources. The major types of services transactions not covered by the BE–120 survey are travel, transportation, insurance (except for purchases of primary insurance), financial services (except for purchases by non-financial firms), and expenditures by students and medical patients who are studying or seeking treatment in a country different from their country of residence. Covered services are: Advertising services; accounting, auditing, and bookkeeping services; auxiliary insurance services; computer and data processing services; construction services; data base and other information services; educational and training services; engineering, architectural, and surveying services; financial services (purchases only, by companies or parts of companies that are not financial services providers); industrial engineering services; industrial-type maintenance, installation, alteration, and training services; legal services; management, consulting, and public relations services (including allocated expenses); merchanting services (sales only); mining services; operational leasing services; other trade-related services; performing arts, sports, and other live performances, presentations, and events; premiums paid on purchases of primary insurance; losses recovered on purchases of primary insurance; research, development, and testing services; telecommunications services; and other selected services. ''Other selected services'' includes, but is not limited to: Account collection services; disbursements to fund news-gathering costs of broadcasters; disbursements to fund news-gathering costs of print media; disbursements to fund production costs of motion pictures; disbursements to fund production costs of broadcast program material other than news; disbursements to maintain government tourism and business promotion offices; disbursements for sales promotion and representation; disbursements to participate in foreign trade shows (purchases only); employment agencies and temporary help supply services; language translation services; mailing, reproduction, and commercial art; medical services (non-patient—e.g., laboratory or diagnostic services); salvage services; satellite photography and remote sensing/satellite imagery services; security services; space transport (includes satellite launches, transport of goods and people for scientific experiments, and space passenger transport); transcription services; and waste treatment and depollution services. The intangible assets covered by the BE–120 survey are rights related to: Industrial processes and products; books, compact discs, audio tapes and other copyrighted material and intellectual property; trademarks, brand names, and signatures; performances and events pre-recorded on motion picture film and television tape, including digital recording; broadcast and recording of live performances and events; general use computer software; business format franchising fees; and other intangible assets, including indefeasible rights of users.

§ 801.11 Rules and regulations for the BE–80, Benchmark Survey of Financial Services Transactions Between U.S. Financial Services Providers and Unaffiliated Foreign Persons.

A BE–80, Benchmark Survey of Financial Services Transactions Between U.S. Financial Services Providers and Unaffiliated Foreign Persons, will be conducted covering 1999 and every fifth year thereafter. All legal authorities, provisions, definitions, and requirements contained in §§ 801.1 through 801.9 are applicable to this survey. Additional rules and regulations for the BE–80 survey are given in paragraphs (a) through (d) of this section. More detailed instructions are given on the report forms and instructions.

(a) *Who must report*—(1) *Mandatory reporting.* Reports are required from each U.S. person who is a financial services provider or intermediary, or whose consolidated U.S. enterprise includes a separately organized subsidiary, or part, that is a financial services provider or intermediary, and who had transactions (either sales or purchases) directly with unaffiliated foreign persons in all financial services combined in excess of $3,000,000 during its fiscal year covered by the survey. The $3,000,000 threshold should be applied to financial services transactions with unaffiliated foreign persons by all part of the consolidated U.S. enterprise combined that are financial services providers or intermediaries. Because the $3,000,000 threshold applies separately to sales and purchases, the mandatory reporting requirement may apply only to sales, only to purchases, or to both.

(i) The determination of whether a U.S. financial services provider or intermediary is subject to this mandatory reporting requirement may be based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree

of certainty, without conducting a detailed manual records search.

(ii) Reporters who file pursuant to this mandatory reporting requirement must provide data on total sales and/or purchases of each of the covered types of financial services transactions and must disaggregate the totals by country.

(2) *Voluntary reporting.* If during the fiscal year covered, sales or purchases of financial services by a firm that is a financial services provider or intermediary, or by a firm's subsidiaries, or parts, combined that are financial services providers or intermediaries, are $3,000,000 or less, the U.S. person is requested to provide an estimate of the total for each type of service. Provision of this information is voluntary. Because the $3,000,000 threshold applies separately to sales and purchases, this voluntary reporting option may apply only to sales, only to purchases, or to both.

(b) *BE–80 definition of financial services provider.* The definition of financial services provider used for this survey is identical in coverage to Sector 52—Finance and Insurance, and holding companies that own or influence, and are principally engaged in making management decisions for these firms (part of Sector 55—Management of Companies and Enterprises, of the North American Industry Classification System, United States, 2002). For example, companies and/or subsidiaries and other separable parts of companies in the following industries are defined as financial services providers: Depository credit intermediation and related activities (including commercial banking, savings institutions, credit unions, and other depository credit intermediation); nondepository credit intermediation (including credit card issuing, sales financing, and other nondepository credit intermediation); activities related to credit intermediation (including mortgage and nonmortgage loan brokers, financial transactions processing, reserve, and clearinghouse activities, and other activities related to credit intermediation); securities and commodity contracts intermediation and brokerage (including investment banking and securities dealing, securities brokerage, commodity contracts dealing, and commodity contracts brokerage); securities and commodity exchanges; other financial investment activities (including miscellaneous intermediation, portfolio management, investment advice, and all other financial investment activities); insurance carriers; insurance agencies, brokerages, and other insurance related activities; insurance and employee benefit funds (including pension funds, health and welfare funds, and other insurance funds); other investment pools and funds (including open-end investment funds, trusts, estates, and agency accounts, real estate investment trusts, and other financial vehicles); and holding companies that own, or influence the management decisions of, firms principally engaged in the aforementioned activities.

(c) *Covered types of services.* The BE–80 survey covers the following types of financial services transactions (purchases and/or sales) between U.S. financial services providers and unaffiliated foreign persons: Brokerage services related to equities transactions; other brokerage services; underwriting and private placement services; financial management services; credit-related services, except credit card services; credit card services; financial advisory and custody services; securities lending services; electronic funds transfer services; and other financial services. The BE–80 also covers total receipts and total payments for the above-listed types of financial services transactions with affiliated foreign parties (foreign affiliates and foreign parents).

(d) *What to file.* (1) The BE–80 survey consists of Forms BE–80 (A) and BE–80(B). Before completing a form BE–80 (B), a consolidated U.S. enterprise (including the top U.S. parent and all of its subsidiaries and parts combined) must complete Form BE–80(A) to determine its reporting status. If the enterprise is subject to the mandatory reporting requirement, or if it is exempt from the mandatory reporting requirement but chooses to report data voluntarily, it should either:

(i) File a separate Form BE–80(B) for each separately organized financial services subsidiary or part of a consolidated U.S. enterprise; or

(ii) File a single BE–80(B) representing the sum of all covered transactions by all financial services subsidiaries or parts of the enterprise combined.

(2) Reporters who receive the BE–80 survey from BEA but are not subject to the mandatory reporting requirements and choose not to report data voluntarily must complete and return to BEA the Exemption Claim.

[64 FR 59121, Nov. 2, 1999, as amended at 69 FR 69510, Nov. 30, 2004]

PART 806—DIRECT INVESTMENT SURVEYS

Sec.

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AUTHORITY: 5 U.S.C. 301; 22 U.S.C. 3101–3108; E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12318 (3 CFR, 1981 Comp., p. 173); E.O. 12518 (3 CFR, 1985 Comp., p. 348).

SOURCE: 42 FR 64315, Dec. 22, 1977, unless otherwise noted.

§ 806.1 Purpose.

The purpose of this part is to set forth the rules and regulations necessary to carry out the data collection program and analyses concerning direct investment as required by, or provided for in, the International Investment Survey Act of 1976 (Pub. L. 94–472, 90 Stat. 2059, 22 U.S.C. 3101 to 3108), hereinafter ''the Act''. The overall purpose of the Act is to provide comprehensive and reliable information pertaining to international investment, including direct investment, and to do so with a minimum of burden on respondents and with no unnecessary duplication of effort.

§ 806.2 Recordkeeping requirements.

In accordance with section 5(b)(1) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall maintain any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which is essential for carrying out the surveys and studies provided for by the Act.

§ 806.3 Reporting requirements.

(a) In accordance with section 5 (b)(2) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall furnish, under oath, any report containing information which is determined to be necessary to carry out the surveys and studies provided for by the Act.

(b) Such reports may be required from among others, U.S. persons which have direct investment abroad, U.S. persons in which foreign persons have direct investment, U.S. intermediaries, and U.S. persons which assist or intervene in the purchase or sale of direct investment interests, such as real estate brokers and brokerage houses acting as managers of tender offers.

§ 806.4 Response required.

Reports, as specified below, are required from all persons coming within the reporting requirements, whether or not they are contacted by BEA. In addition, any person BEA contacts, either by sending them report forms or buy written inquiry concerning the person's being subject to the reporting requirements of a survey conducted pursuant to this part must respond in writing. The reponse must be made by filing the properly completed report form, or by submitting in writing, or within 30 days of being contacted, a valid exemption claim (including the situation where the statistical data requested on the form are not applicable) or by certifying in writing to the fact

that the person has no direct investments within the purview of the Act or the regulations contained herein. This requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act.

§ 806.5 Confidentiality.

Information collected pursuant to § 806.3 is confidential (see section 5(c) of the Act, 22 U.S.C. 3104).

(a) Access to this information shall be available only to officials and employees (including consultants and contractors and their employees) of agencies designated by the President to perform functions under the Act.

(b) Subject to paragraph (d) of this section, the President may authorize the exchange of information between agencies or officials designated to perform functions under the Act.

(c) Nothing in this part shall be construed to require any Federal Agency to disclose information otherwise protected by law.

(d) This information shall be used solely for analytical or statistical purposes or for a proceeding under § 806.6.

(e) No official or employee (including consultants and contractors and their employees) shall publish or make available to any other person any information collected under the Act in such a manner that the person to whom the information relates can be specifically identified.

(f) Reports and copies of reports prepared pursuant to the Act are confidential and their submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied is identifiable as being derived from the records of such customer.

§ 806.6 Penalties.

(a) Whoever fails to furnish any information required by the Act or required by § 806.3 or to comply with any other rule, regulation, order or instruction promulgated under the Act may be subject to a civil penalty not exceeding $10,000 in a proceeding brought in an appropriate United States court and to injunctive relief commanding such person to comply, or both (see section 6(a) and (b) of the Act, 22 U.S.C. 3105).

(b) Whoever willfully fails to submit any information required by the Act or required by § 806.3 or willfully violates any other rule, regulation, order or instruction promulgated under the Act, upon conviction, shall be fined not more than $10,000 and, if an individual, may be imprisioned for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in such violation, upon conviction, may be punished by a like fine, imprisonment, or both (see section 6(c) of the Act, 22 U.S.C. 3105).

(c) Any person who willfully violates § 806.5 relating to confidentiality, shall, upon conviction, be fined not more than $10,000, in addition to any other penalty imposed by law (see section 5(d) of the Act, 22 U.S.C. 3104).

§ 806.7 General definitions.

(a) *United States,* when used in a geographic sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and all territories and possessions of the United States.

(b) *Foreign,* when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States;

(c) *Person* means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government sponsored agency);

(d) *United States person* means any person resident in the United States or subject to the jurisdiction of the United States;

(e) *Foreign person* means any person resident outside the United States or subject to the jurisdiction of a country other than the United States;

(f) *Business enterprise* means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage, and any ownership of any real estate;

(g) *Parent* means a person of one country who, directly or indirectly, owns or controls 10 per centum or more of the voting stock of an incorporated business enterprise, or an equivalent ownership interest in an unincorporated business enterprise, which is located outside that country;

(h) *Affiliate* means a business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 per centum or more of its voting stock for an incorporated business or an equivalent interest for an unincorporated business, including a branch;

(i) *International investment* means (1) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by foreign persons of any interest in property in the United States, or of stock, other securities, or short- and long-term debt obligations of a United States person, and (2) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by United States persons of any interest in property outside the United States, or of stock, other securities, or short- and long-term debt obligations of a foreign person;

(j) *Direct investment* means the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise;

(k) *Portfolio investment* means any international investment which is not direct investment;

(l) *Associated group* means two or more persons who, by the appearance of their actions, by agreement, or by an understanding, exercise their voting privileges in a concerted manner to influence the management of a business enterprise. Each of the following are deemed to be an associated group:

(1) Members of the same family,

(2) A business enterprise and one or more of its officers and directors,

(3) Members of a syndicate or joint venture, or

(4) A corporation and its domestic subsidiaries;

(m) *Branch* means the operations or activities conducted by a person in a different location in its own name rather than through an incorporated entity; and

(n) *Intermediary* means an agent, nominee, manager, custodian, trust, or any person acting in a similar capacity.

[42 FR 64315, Dec. 22, 1977, as amended at 43 FR 54624, Nov. 22, 1978; 46 FR 23226, Apr. 24, 1981]

§ 806.8 Real estate.

Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements of this part. A residence which was an owner's primary residence that is then leased by the owner while outside his/her country of usual residence but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate held for personal use. If a business enterprise, otherwise required to report, is in the form of real property not identifiable by name, reports are required to be filed by and in the name of the beneficial owner, or in the name of such beneficial owner by the intermediary of such beneficial owner.

[46 FR 23226, Apr. 24, 1981]

§ 806.9 Airlines and ship operators.

Foreign stations, ticket offices, and terminal and port facilities of U.S. airlines and ship operators; and U.S. stations, ticket offices, and terminal and port facilities of foreign airlines and ship operators; which provide services only to their own operations are exempted from being reported. Reports are required when such affiliates produce significant revenues from services provided to unaffiliated persons.

§ 806.10 Determining place of residence and country of jurisdiction of individuals.

An individual will be considered a resident of, and subject to the jurisdiction of, the country in which physically located, subject to the following qualifications:

(a) Individuals who reside, or expect to reside, outside their country of citizenship for less than one year are considered to be residents of their country of citizenship.

(b) Individuals who reside, or expect to reside, outside their country of citizenship for one year or more are considered to be residents of the country in which they are residing, except as provided in paragraph (c) of this section.

(c) Notwithstanding paragraph (b) of this section, if an owner or employee of a business enterprise resides outside the country of location of the enterprise for one year or more for the purpose of furthering the business of the enterprise, and the country of the business enterprise is the country of citizenship of the owner then such owner or employee shall nevertheless be considered a resident of the country of citizenship provided there is the intent to return within a reasonable period of time.

(d) Individuals and members of their immediate families who are residing outside their country of citizenship as a result of employment by the government of that country—diplomats, consular officials, members of the armed forces, etc.—are considered to be residents of their country of citizenship.

§ 806.11 Estates, trusts, and intermediaries.

(a) An estate, either U.S. or foreign, is a person and therefore may have direct investment, and the estate, not the beneficiary, is considered to be the owner.

(b) A trust, either U.S. or foreign, is a person, but is not a business enterprise. The trust shall be considered the same as an intermediary and reporting should be as outlined in paragraph (c) of this section. For reporting purposes, the beneficiary(ies) of the trust, or the creator(s) of the trust in the situation detailed below or if there is, or may be, a reversionary interest, shall be considered to be the owner(s) of the investments of the trust for determining the existence of direct investment. Where a corporation or other organization creates a trust designating its shareholders or members as beneficiaries, the creating corporation or organization shall be deemed to be the owner of the investments of the trust, or succeeding trusts where the presently existing trust has evolved out of a prior trust, for the purposes of determining the existence and reporting of direct investment.

This procedure is adopted in order to fulfill the statistical purposes of this part and does not imply that control over an enterprise owned or controlled by a trust is, or can be, exercised by the beneficiary(ies) or creator(s).

(c) *Intermediary*. (1) If a particular U.S. direct investment abroad is held, administered, or managed by a U.S. intermediary, such intermediary shall be responsible for reporting the required information for, and in the name of, its principal or shall instruct the principal to submit the required information. Upon instructing the principal, the intermediary shall be released from further liability to report provided it has informed this bureau of the date such instructions were given and the name and address of the principal, and has supplied the principal with any information in the possession of, or which can be secured by, the intermediary, that is necessary to permit the principal to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with the foreign affiliate shall be considered as accounts or transactions of the U.S. principal with the foreign affiliate. To the extent such transactions or accounts are unavailable to the principal, they may be required to be reported by the intermediary.

(2) If a U.S. person holds a foreign affiliate through a foreign intermediary, the U.S. person will be considered to own the foreign affiliate directly and all accounts or transactions of the U.S. person with the intermediary will be considered to be with the foreign affiliate.

(3) If a particular foreign direct investment in the United States is held, exercised, administered, or managed by a U.S. intermediary for the foreign beneficial owner, such intermediary shall be responsible for reporting the required information for, and in the name of, the U.S. affiliate, and shall report on behalf of the U.S. affiliate or shall instruct the U.S. affiliate to submit the required information. Upon so instructing the U.S. affiliate, the intermediary shall be released from further liability to report provided it has informed this Bureau of the date such instructions were given and the name and address of the U.S. affiliate, and has supplied the U.S. affiliate with any information in the possession of, or which can be secured by, the intermediary that is necessary to permit the U.S. affiliate to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with a foreign beneficial owner shall be considered as accounts or transactions of the U.S. affiliate with the foreign beneficial owner. To the extent such transactions or accounts are unavailable to the U.S. affiliiate, they may be required to be reported by the intermediary.

(4) If a foreign beneficial owner holds a U.S. affiliate through a foreign intermediary, the U.S. affiliate may report the intermediary as its foreign parent but, when requested, must also identify and furnish information concerning the foreign beneficial owner, if known, or if such information can be secured. Accounts or transactions of the U.S. affiliate with the foreign intermediary shall be considered as accounts or transactions of the U.S. affiliate with the foreign beneficial owner.

[42 FR 64315, Dec. 22, 1977, as amended at 43 FR 54624, Nov. 22, 1978]

§ 806.12 Partnerships.

Limited partners do not have voting rights in a partnership and therefore cannot have a direct investment in a partnership; their investment is considered to be portfolio investment. Determination of the existence of direct investment in a partnership shall be based on the country of residence of, and the percentage control exercised by, the general partner(s), although the latter may differ from the financial interest of the general partners.

§ 806.13 Miscellaneous.

(a) *Accounting methods and records.* Generally accepted U.S. accounting principles should be followed. Corporations should generally use the same methods and records that are used to generate reports to stockholders, unless otherwise specified in the reporting instructions for a given report form. Reports for unincorporated persons must be generated on an equivalent basis.

(b) *Annual stockholder's report.* Business enterprises issuing annual reports to stockholders are requested to furnish a copy of their annual reports to this Bureau.

(c) *Required information not available.* All reasonable efforts should be made to obtain information required for reporting. Every question on each form should be answered, except where specifically exempted. When only partial information is available, an appropriate indication should be given.

(d) *Estimates.* If actual figures are not available, estimates should be supplied and labeled as such. When a data item cannot be fully subdivided as required, a total and an estimated breakdown of the total should be supplied.

(e) *Specify.* When ''specify'' is included in certain data items, the type and dollar amount of the major items included must be given for at least the items mentioned in the line instruction.

(f) *Space on form insufficient.* When space on a form is insufficient to permit a full answer to any item, the required information should be submitted on supplementary sheets, appropriately labeled and referenced to the item number and the form.

(g) *Extensions.* Requests for an extension of a reporting deadline will not normally be granted. However, in hardship cases, written requests for an extension will be considered provided they are received 15 days prior to the date of the report and enumerate substantive reasons necessitating the extension.

(h) *Number of copies.* A single original copy of each report shall be filed with

the Bureau of Economic Analysis; this should be the copy with the address label if such a labeled copy has been provided. In addition, each respondent must retain a copy of its report. Both copies are protected by law; see § 806.5.

(i) *Other.* Instructions concerning filing dates, where to send reports, and whom to contact concerning a given report are contained on each form. General inquiries should be directed to the:

U.S. Department of Commerce, Bureau of Economic Analysis, International Investment Division (BE–50), Washington, DC 20230.

§ 806.14 U.S. direct investment abroad.

(a) *Specific definitions*—(1) *U.S. direct investment abroad* means the ownership or control, directly or indirectly, by one U.S. person of 10 per centum or more of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, including a branch.

(2) *U.S. Reporter* means the U.S. person which has direct investment in a foreign business enterprise, including a branch. If the U.S. person is an incorporated business enterprise, the U.S. Reporter is the fully consolidated U.S. domestic enterprise consisting of (i) the U.S. corporation whose voting securities are not owned more than 50 percent by another U.S. corporation, and (ii) proceeding down each ownership chain from that U.S. corporation, any U.S. corporation (including Domestic International Sales Corporations) whose voting securities are more than 50 percent owned by the U.S. corporation above it.

(3) *Foreign affiliate* means an affiliate located outside the United States in which a U.S. person has direct investment.

(4) *Majority-owned foreign affiliate* means a foreign affiliate in which the combined ''direct investment interest'' of all U.S. Reporters of the affiliate exceeds 50 per centum.

(b) *Foreign affiliate consolidation.* In cases where the recordkeeping system of foreign affiliates makes it impossible or extremely difficult to file a separate report for each foreign affiliate, a U.S. Reporter may consolidate affiliates in the same country when the following conditions apply:

(1) The affiliates are in the same BEA 3-digit industry as defined in the industry Classifications and Export and Import Trade Classifications Booklet; or

(2) The affiliates are integral parts of the same business operation. For example, if German affiliate A manufactures tires and a majority of its sales are to German affiliate B which produces autos, then affiliates A and B may be consolidated.

Any affiliates consolidated shall thereafter be considered to be one affiliate and should be consolidated in the same manner for all reports required to be filed pursuant to this section.

(c) *Reports required.* The place and time for filing, and specific instructions and definitions relating to, a given report form are given on the form. Reports are required even though a foreign affiliate may have been established, acquired, seized, liquidated, sold, expropriated, or inactivated during the reporting period.

(d) *Exemption levels.* Exemption levels for individual report forms will normally be stated in terms of total assets, net sales or gross operating revenues excluding sales taxes, and net income after income taxes, whether positive or negative, although different or special criteria may be specified for a given report form. If any one of the three items exceeds the exemption level and if the statistical data requested in the report are applicable to the entity being reported, then a report must be filed. Since these items may not have to be reported on a given form, a U.S. Reporter claiming exemption from filing a given form must furnish a certification as to the levels of the items on which the exemption is based or must certify that the data requested are not applicable. The exemption-level tests shall be applied as outlined below.

(1) For quarterly report forms, as to the assets test reports are required beginning with the quarter in which total assets exceed the exemption level; as to the test for sales (revenues) and net income after income taxes, reports are required for each quarter of a year in which the annual amount of these

items exceeds or can be expected to exceed, the exemption level. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(2) For report forms requesting annual data after the close of the year in question, the test shall be whether any one of the three items exceeded the exemption level during that year.

(3) For the semi-annual plant and equipment expenditures survey, which requests actual data for the past year and/or annual projections for the current and following year, the test will be made for each year as to whether any one of the three items exceeded, or is expected to exceed, the exemption level; data must be reported only for the year or years in which the exemption level is, or is expected to be, exceeded.

If total assets, sales or net income exceed the exemption level in a given year, it is deemed that the exemption level will also be exceeded in the following year.

The number and title of each report form, its exemption level, and other reporting criteria, if any, pertaining to it, are given below.

(e) *Quarterly report form.* BE–577—Transactions of U.S. Reporter with Foreign Affiliate: One report is required for each foreign affiliate exceeding an exemption level of $40,000,000 except that a report need not be filed by a U.S. Reporter to report direct transactions with one of its foreign affiliates in which it does not hold a direct equity interest unless an intercompany balance or fee and royalty receipts or payments for the quarter exceed $1,000,000.

(f) *Annual report forms.* (1) BE–133B—Follow-up Schedule of Expenditures for property, Plant, and Equipment of U.S. Direct Investment Abroad: This is a schedule-type report form on which each majority-owned foreign affiliate exceeding an exemption level of $10,000,000 must be listed and the requested data given for each.

(2) BE–133C—Schedule of Expenditures for Property, Plant, and Equipment of U.S. Direct Investment Abroad: This is a schedule-type report form on which each majority-owned foreign affiliate exceeding an exemption level of $10,000,000 must be listed and the requested data given for each.

(3) BE–11—Annual survey of U.S. Direct Investment Abroad: A report, consisting of Form BE–11A and Form(s) BE–11B(LF) (Long Form), BE–11B(SF) (Short Form), BE–11B(EZ), and/or BE–11C, is required of each nonbank U.S. Reporter that, at the end of the Reporter's fiscal year, had a nonbank foreign affiliate reportable on Form BE–11B(LF), (SF), (EZ), or BE–11C. Forms required and the criteria for reporting on each are as follows:

(i) Form BE–11A (Report for U.S. Reporter) must be filed by each nonbank U.S. person having a foreign affiliate reportable on Form BE–11B(LF), (SF), (EZ), or BE–11C. If the U.S. Reporter is a corporation, Form BE–11A is required to cover the fully consolidated U.S. domestic business enterprise. However, where a U.S. Reporter's primary line of business is not in banking (or related financial activities), but the Reporter also has ownership in a bank, banking activities should be included on the BE–11A using the equity method of accounting.

(A) If for a nonbank U.S. Reporter any one of the following three items total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes was greater than $150 million (positive or negative) at the end of, or for, the Reporter's fiscal year, the U.S. Reporter must file a complete Form BE–11A. It must also file a Form BE–11B(LF), (SF), (EZ), or BE–11C as applicable, for each nonexempt foreign affiliate.

(B) If for a nonbank U.S. Reporter no one of the three items listed in paragraph (f)(3)(i)(A) of this section was greater than $150 million (positive or negative) at the end of, or for, the Reporters fiscal year, the U.S. Reporter is required to file on Form BE–11A only items 1 through 27 and Part IV. It must also file a Form BE–11B(LF), (SF), (EZ), or BE–11C as applicable, for each nonexempt foreign affiliate.

(ii) Forms BE–11B(LF), (SF), and (EZ) (Report for Majority-owned Foreign Affiliate).

(A) A BE–11B(LF) (Long Form) is required to be filed for each majority-

owned nonbank foreign affiliate of a nonbank U.S. Reporter for which any one of the three items total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes was greater than $150 million (positive or negative) at the end of, or for, the affiliate's fiscal year, unless the nonbank foreign affiliate is selected to be reported on Form BE–11B(EZ).

(B) BE–11B(SF) (Short Form) is required to be filed for each majority-owned nonbank foreign affiliate of a nonbank U.S. Reporter for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $40 million (positive or negative), but for which no one of these items was greater than $150 million (positive or negative), at the end of, or for, the affiliate's fiscal year, unless the nonbank foreign affiliate is selected to be reported on Form BE–11B(EZ).

(C) A BE–11B(EZ) is required be filed for each nonbank foreign affiliate that is selected to be reported on this form in lieu of Form BE–11B(LF) or Form BE–11B(SF).

(iii) Form BE–11C (Report for Minority-owned Foreign Affiliate) must be filed for each minority-owned nonbank foreign affiliate that is owned at least 20 percent, but not more than 50 percent, directly and/or indirectly, by all U.S. Reporters of the affiliate combined, and for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $40 million (positive or negative) at the end of, or for, the affiliate's fiscal year. In addition, for the report covering fiscal year 2007 only, a Form BE–11C must be filed for each minority-owned nonbank foreign affiliate that is owned, directly or indirectly, at least 10 percent by one U.S. Reporter, but less than 20 percent by all U.S. Reporters of the affiliate combined, and for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $100 million (positive or negative) at the end of, or for, the affiliate's fiscal year.

(iv) Based on the preceding, an affiliate is exempt from being reported if it meets any one of the following criteria:

(A) None of the three items listed in paragraph (f)(3)(ii)(A) of this section exceeds $40 million (positive or negative). (However, affiliates that were established or acquired during the year and for which at least one of these items was greater than $10 million but not over $40 million must be listed, and key data items reported, on a supplement schedule on Form BE–11A.)

(B) For fiscal year 2007 only, it is less than 20 percent owned, directly or indirectly, by all U.S. Reporters of the affiliate combined and none of the three items listed in paragraph (f)(3)(ii)(A) of this section exceeds $100 million (positive or negative).

(C) For fiscal years other than 2007, it is less than 20 percent owned, directly or indirectly, by all U.S. Reporters of the affiliate combined.

(D) Its U.S. parent (U.S. Reporter) is a bank.

(E) It is itself a bank.

(v) Notwithstanding paragraph (f)(3)(iv) of this section, a Form BE–11B(LF), (SF), (EZ) or BE–11C must be filed for a foreign affiliate of the U.S. Reporter that owns another non-exempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt. That is, all affiliates upward in the chain of ownership must be reported.

(g) *Other report forms.* (1) BE–507—Industry Classification Questionnaire: In general, U.S. Reporters and their foreign affiliates will each be assigned a BEA 3-digit industry code in the BE–10 Benchmark Surveys required by the Act to be conducted in 1982, 1989, and every fifth year thereafter. However, interim reports on Form BE–507 are required:

(i) For each foreign affiliate newly established or acquired by a U.S. person on or after January 1, 1978; or

(ii) For each U.S. person who becomes a U.S. Reporter on or after January 1, 1978 by virtue of establishing or acquiring a foreign affiliate; or

(iii) For an existing foreign affiliate or U.S. Reporter whose industry classification changes on or after January 1, 1978 so that a previous BE–507 report or the BE–10 report required to be filed for 1977 does not accurately reflect the current industry classification of the entity.

For new U.S. Reporters or foreign affiliates, the BE–507 report must be filed only if one of the other reports must be filed and shall be submitted with the initial filing of the related report. For a change in an existing U.S. Reporter or foreign affiliate which is currently filing one of the other reports, the BE–507 report must be filed whenever it is determined that change from one 3-digit industry classification to another has occurred.

(2) BE–10-Benchmark Survey of U.S. Direct Investment Abroad: Section 4(b) of the Act (22 U.S.C. 3103) provides that a comprehensive benchmark survey of U.S. direct investment abroad will be conducted in 1982, 1989, and every fifth year thereafter. The survey, referred to as the ''BE–10,'' consists of a Form BE–10A or BE–10A BANK for reporting information concerning the U.S. Reporter and Form(s) BE–10B(LF), BE–10B(SF), or BE–10B BANK for reporting information concerning each foreign affiliate. Exemption levels, specific requirements for, and the year of coverage of, a given BE–10 survey may be found in § 806.16.

[42 FR 64315, Dec. 22, 1977; 43 FR 2169, Jan. 16, 1978, as amended at 46 FR 23226, Apr. 24, 1981; 47 FR 13139, Mar. 29, 1982; 48 FR 8993, Mar. 3, 1983; 49 FR 30059, July 26, 1984; 51 FR 11012, Apr. 1, 1986; 52 FR 8446, Mar. 18, 1987; 52 FR 42276, Nov. 4, 1987; 54 FR 51879, Dec. 19, 1989; 55 FR 49879, Dec. 3, 1990; 60 FR 10490, Feb. 27, 1995; 60 FR 54591, Oct. 25, 1995; 65 FR 78920, 78922, Dec. 18, 2000; 70 FR 71239, Nov. 28, 2005; 71 FR 35389, June 20, 2006]

§ 806.15 Foreign direct investment in the United States.

(a) *Specific definitions*—(1) *Foreign direct investment in the United States* means the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.

(2) *U.S. affiliate* means an affiliate located in the United States in which a foreign person has a direct investment.

(3) *Foreign parent* means the foreign person, or the first person outside the United States in a foreign chain of ownership, which has direct investment in a U.S. business enterprise, including a branch.

(4) *Affiliated foreign group* means (i) the foreign parent, (ii) any foreign person, proceeding up the foreign parent's ownership chain, which owns more than 50 per centum of the person below it up to and including that person which is not owned more than 50 per centum by another foreign person, and (iii) any foreign person, proceeding down the ownership chain(s) of each of these members, which is owned more than 50 per centum by the person above it.

(5) *Foreign affiliate of foreign parent* means, with reference to a given U.S. affiliate, any member of the affiliated foreign group owning the affiliate that is not a foreign parent of the affiliate.

(6) *Ultimate beneficial owner (UBO)* is that person, proceeding up the ownership chain beginning with and including the foreign parent, that is not more than 50 percent owned or controlled by another person. (An owner who creates a trust, proxy, power of attorney, arrangement, or device with the purpose or effect of divesting such owner of the ownership of an equity interest as part of a plan or scheme to avoid reporting information, is deemed to be the owner of the equity interest.)

(b) *Beneficial, not record, ownership is the basis of the reporting criteria.* In those cases where a U.S. affiliate is also required to identify the ultimate beneficial owner (UBO) of the foreign investment, if the UBO is an individual, only the country of location of the individual must be given.

(c) *Bearer shares.* If the ownership in a U.S. affiliate by any owner in the ownership chain from the U.S. affiliate up to and including the ultimate beneficial owner (UBO) is represented by bearer shares, the requirement to disclose the information regarding the UBO remains with the reporting U.S. affiliate, except where a company in the ownership chain has publicly traded bearer shares. In that case, identification of the UBO may stop with the identification of the company whose capital stock is represented by the publicly traded bearer shares. For closely held companies with nonpublicly traded bearer shares, identifying the foreign parent or the UBO as ''bearer shares'' is not an acceptable response. The U.S. affiliate must pursue the

identification of the UBO through managing directors or any other official or intermediary.

(d) *Aggregation of real estate investments.* A foreign person holding real estate investments that are foreign direct investments in the United States must aggregate all such holdings for the purpose of applying the exemption level tests. If the aggregate of such holdings exceeds one or more of the exemption levels, then the holdings must be reported even if they individually would be exempt.

(e) *Consolidated reporting by U.S. affiliates.* A U.S. affiliate shall file on a fully consolidated basis, including in the consolidation all other U.S. affiliates in which it directly or indirectly owns more than 50 per centum of the outstanding voting stock, unless the instructions for a given report form specifically provide otherwise. However, separate reports may be filed where a given U.S. affiliate is not normally consolidated due to unrelated operations or lack of control, provided written permission has been requested from and granted by BEA.

(f) The place and time for filing, and specific instructions and definitions relating to, a given report form will be given on the report form. Reports are required even though the foreign person's equity interest in the U.S. business enterprise may have been established, acquired, liquidated, or sold during the reporting period.

(g) *Exemption levels.* Exemption levels for individual report forms will normally be stated in terms of total assets, sales or gross operating revenues excluding sales taxes, and net income after income taxes, whether positive or negative, although different or special criteria may be specified for a given report form. If any one of the three items exceeds the exemption level and if the statistical data requested in the report are applicable to the entity being reported, then a report must be filed. Since these items may not have to be reported on a given form, a person claiming exemption from filing a given report form must furnish a certification as to the levels of the items on which the exemption is based or must certify that the data requested are not applicable. The exemption level tests shall be applied as outlined below.

(1) For quarterly report forms, as to the assets test, reports are required beginning with the quarter in which total assets exceed the exemption level; as to the test for sales (revenues) and net income after income taxes, reports are required for each quarter of a year in which the annual amount of these items exceeds or can be expected to exceed the exemption level. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(2) For report forms requesting annual data after the close of the year in question, the test shall be whether any one of the three items exceeded the exemption level during that year.

If total assets, sales or net income exceed the exemption level in a given year, it is deemed that the exemption level will also be exceeded in the following year.

The number and title of each report form, its exemption level and other reporting criteria, if any, pertaining to it, are given below.

(h) *Quarterly report forms.* (1) BE–605—Transactions of U.S. Affiliate, Except a U.S. Banking Affiliate, With Foreign Parent: One report is required for each U.S. affiliate exceeding an exemption level of $30,000,000, that does not qualify for reporting on form BE–605 Bank.

(2) BE–605 Bank—Transactions of U.S. Banking Affiliate with Foreign Parent: One report is required for each U.S. banking affiliate or U.S. bank holding company affiliate, including all of the subsidiaries and units of the bank holding company, exceeding an exemption level of $30,000,000.

(i) *Annual report form.* BE–15–Annual Survey of Foreign Direct Investment in the United States: One report is required for each consolidated U.S. affiliate, except a U.S. banking affiliate or U.S. bank holding company affiliate (including all of the subsidiaries and units of the bank holding company), exceeding an exemption level of $30 million. A long form, BE–15(LF), must be filed by each nonbank majority-owned U.S. affiliate (a ''majority-owned'' U.S. affiliate is one in which the combined direct and indirect ownership interests of all foreign parents

of the U.S. affiliate exceed 50 percent) for which at least one of the three items-total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes-exceeds $125 million (positive or negative), unless the nonbank majority-owned U.S. affiliate is selected to file a BE–15(EZ) form. A short form, BE–15(SF), must be filed by each nonbank majority-owned U.S. affiliate for which at least one of the three items-total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes-exceeds $30 million but no one item exceeds $125 million (positive or negative), and by each nonbank minority-owned U.S. affiliate (a ''minority-owned'' U.S. affiliate is one in which the combined direct and indirect ownership interest of all foreign parents of the U.S. affiliate is 50 percent or less) for which at least one of the three items-total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes-exceeds $30 million (positive or negative), unless the nonbank U.S. affiliate is selected to file a BE–15(EZ) form. A BE–15(EZ) form must be filed by each nonbank U.S. affiliate that is selected to file this form in lieu of filing the BE–15(LF) or BE–15(SF). A BE–15 Supplement C (Exemption Claim) must be filed by each nonbank U.S. affiliate to claim exemption from filing a BE–15(LF), BE–15(SF), or BE–15(EZ). Following an initial filing, the BE–15 Supplement C is not required annually from those nonbank U.S. affiliates that meet the stated exemption criteria from year to year.

(j) *Other report forms.* (1) BE–607—Industry Classification Questionnaire: In general, a U.S. affiliate will be assigned a BEA 3-digit industry code in the BE–12 Benchmark Surveys required by the Act to be conducted in 1980, 1987, and every fifth year thereafter. However, interim reports on Form BE–607 are required:

(i) For each U.S. affiliate newly established or acquired by a foreign person; or

(ii) For an existing U.S. affiliate whose industry classification changes so that either a previous BE–607 report or the last BE–12 report required to be filed does not accurately reflect the current industry classification of the U.S. affiliate.

For new U.S. affiliates, the BE–607 report must be filed only if the affiliate must file one of the other reports and shall be submitted with the initial filing of the related report. For a change in an existing U.S. affiliate which is currently filing one of the other reports, the BE–607 report must be filed whenever it is determined that a change from one BEA 3-digit industry classification to another has occurred.

(2) BE–12—Benchmark Survey of Foreign Direct Investment in the United States: Section 4b of the Act (22 U.S.C. 3103) provides that a comprehensive benchmark survey of foreign direct investment in the United States shall be conducted in 1980, 1987, and every fifth year thereafter. The survey is referred to as the ''BE–12''. Exemption levels, specific requirements for, and the year of coverage of, a given BE–12 Survey may be found in § 806.17.

(3) BE–13—Initial Report on a Foreign Person's Direct or Indirect Acquisition, Establishment, or Purchase of the Operating Assets, of a U.S. Business Enterprise, Including Real Estate. This report is to be filed either:

(i) By a U.S. business enterprise when a foreign person establishes or acquires directly, or indirectly through an existing U.S. affiliate, a 10 percent or more voting interest in that enterprise, including an enterprise that results from the direct or indirect acquisition by a foreign person of a business segment or operating unit of an existing U.S. business enterprise that is then organized as a separate legal entity; or

(ii) By the existing U.S. affiliate of a foreign person when it acquires a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that the existing U.S. affiliate merges into its own operations rather than continuing or organizing as a separate legal entity.

A separate report must be filed for each foreign parent or existing U.S. affiliate that is a party to the transaction.

EXCLUSIONS AND EXEMPTIONS

(a) Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements. A residence which is an owner's primary residence that is then leased by the owner while outside the United States but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate held for personal use.

(b) An existing U.S. affiliate is exempt from reporting the acquisition of either a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that it then merges into its own operations, if the total cost of the acquisition was $3,000,000 or less and does not involve the purchase of 200 acres or more of U.S. land. (If the acquisition involves the purchase of 200 acres or more of U.S. land, it must be reported regardless of the total cost of the acquisition.)

(c) An established or acquired U.S. business enterprise, as consolidated, is exempt if its total assets (not the foreign parent's or existing U.S. affiliate's share) at the time of acquisition or immediately after being established were $3,000,000 or less and it does not own 200 acres or more of U.S. land. (If it owns 200 acres or more of U.S. land, it must report regardless of the value of total assets.)

If exempt under (b) or (c), the existing U.S. affiliate or the established or acquired U.S. business enterprise must, nevertheless, file an ''Exemption Claim, Form BE–13'' to validate the exemption.

(4) Form BE–14—Report by a U.S. Person Who Assists or Intervenes in the Acquisition of a U.S. Business Enterprise by, or Who Enters into a Joint Venture With, a Foreign Person—to be completed either by:

(i) A U.S. person—including, but not limited to, an intermediary, a real estate broker, business broker, and a brokerage house—who assists or intervenes in the sale to, or purchase by, a foreign person or a U.S. affiliate of a foreign person, of a 10 percent or more voting interest in a U.S. business enterprise, including real estate; or

(ii) A U.S. person who enters into a joint venture with a foreign person to create a U.S. business enterprise.

A U.S. person is required to report only when such a foreign involvement is known; it is not incumbent upon the U.S. person to ascertain the foreign status of a person involved in an acquisition unless the U.S. person has reason to believe the acquiring party may be a foreign person. If a U.S. person required to file a Form BE–14 files Form BE–13 relating to the acquisition of the U.S. business enterprise by a foreign person, then Form BE–14 is not required.

Total Exemptions—(a) Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements. A residence which is an owner's primary residence that is then leased by the owner while outside the United States but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate for personal use.

(b) If the U.S. business enterprise acquired has total assets of, or if the capitalization (including loans from the joint venturers) of the joint venture to be established is, $3,000,000 or less, than no report is required, provided the enterprise does not own 200 acres or more of U.S. land. (If it owns 200 acres or more of U.S. land, a report is required regardless of the value of total assets.)

(5) BE–21—Survey of Foreign Direct Investment in U.S. Business Enterprises Engaged in the Processing, Packaging, or Wholesale Distribution of Fish or Seafoods. Reporting consists of:

(i) Form BE–21P—Identification Questionnaire. A completed questionnaire is required from (*a*) each U.S. business enterprise that is a U.S. affiliate of a foreign person and that engaged in the processing, packaging, or wholesale distribution of fish or seafoods, and (*b*) any person to whom a questionnaire is sent by BEA.

(ii) Form BE–21A—Report for a U.S. Business Enterprise that is a U.S. Affiliate of a Foreign Person. A completed report is required from each U.S. business enterprise that is a U.S. affiliate of a foreign person and that engaged in the processing, packaging, or wholesale distribution of fish or seafoods.

(iii) Form BE–21B—Report for each Establishment of a U.S. Business Enterprise that is a U.S. Affiliate of a Foreign Person. A completed report is

required for each establishment, of the U.S. affiliate, that engaged in the processing, packaging, or wholesale distribution of fish or seafoods.

[42 FR 64315, Dec. 22, 1977; 43 FR 2169, Jan. 16, 1978, as amended at 44 FR 32586, June 6, 1979; 46 FR 23226, Apr. 24, 1981; 46 FR 60191, Dec. 9, 1981; 47 FR 13139, Mar. 29, 1982; 47 FR 14138, Apr. 2, 1982; 49 FR 3174, Jan. 26, 1984; 53 FR 1016, Jan. 15, 1988; 63 FR 16892, Apr. 7, 1998; 68 FR 3813, Jan. 27, 2003; 68 FR 67940, Dec. 5, 2003]

§ 806.16 Rules and regulations for BE–10, Benchmark Survey of U.S. Direct Investment Abroad—2004.

A BE–10, Benchmark Survey of U.S. Direct Investment Abroad will be conducted covering 2004. All legal authorities, provisions, definitions, and requirements contained in § 806.1 through § 806.13 and § 806.14(a) through (d) are applicable to this survey. Specific additional rules and regulations for the BE–10 survey are given in paragraphs (a) through (e) of this section. More detailed instructions are given on the report forms and instructions.

(a) *Response required.* A response is required from persons subject to the reporting requirements of the BE–10, Benchmark Survey of U.S. Direct Investment Abroad—2004, contained in this section, whether or not they are contacted by BEA. Also, a person, or their agent, that is contacted by BEA about reporting in this survey, either by sending them a report form or by written inquiry, must respond in writing pursuant to § 806.4. This may be accomplished by:

(1) Certifying in writing, by the due date of the survey, to the fact that the person had no direct investment within the purview of the reporting requirements of the BE–10 survey;

(2) Completing and returning the ''BE–10 Claim for Not Filing'' by the due date of the survey; or

(3) Filing the properly completed BE–10 report (comprising Form BE–10A or BE–10A BANK and Forms BE–10B(LF), BE–10B(SF), BE–10B Mini and/or BE–10B BANK) by May 31, 2005, or June 30, 2005, as required.

(b) *Who must report.* (1) A BE–10 report is required of any U.S. person that had a foreign affiliate—that is, that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise—at any time during the U.S. person's 2004 fiscal year.

(2) If the U.S. person had no foreign affiliates during its 2004 fiscal year, a ''BE–10 Claim for Not Filing'' must be filed by the due date of the survey; no other forms in the survey are required. If the U.S. person had any foreign affiliates during its 2004 fiscal year, a BE–10 report is required and the U.S. person is a U.S. Reporter in this survey.

(3) Reports are required even if the foreign business enterprise was established, acquired, seized, liquidated, sold, expropriated, or inactivated during the U.S. person's 2004 fiscal year.

(4) The amount and type of data required to be reported vary according to the size of the U.S. Reporters or foreign affiliates, whether they are banks or nonbanks, and, for foreign affiliates, whether they are majority-owned or minority-owned by U.S. direct investors. For purposes of the BE–10 survey, a ''majority-owned'' foreign affiliate is one in which the combined direct and indirect ownership interest of all U.S. parents of the foreign affiliate exceeds 50 percent; all other affiliates are referred to as ''minority-owned'' affiliates. In addition, a ''bank'' is a business entity engaged in deposit banking or closely related functions, including commercial banks, Edge Act corporations, foreign branches and agencies of U.S. banks whether or not they accept deposits abroad, savings and loans, savings banks, bank holding companies, and financial holding companies. Elsewhere in this section, when ''bank'' is used, it refers to all such organizations.

(c) *Forms for nonbank U.S. Reporters and foreign affiliates*—(1) *Form BE–10A (Report for nonbank U.S. Reporter).* A BE–10A report must be completed by a U.S. Reporter that is not a bank. If the U.S. Reporter is a corporation, Form BE–10A is required to cover the fully consolidated U.S. domestic business enterprise. However, where a U.S. Reporter's primary line of business is not in banking (or related financial activities), but the Reporter also has ownership in a bank, the bank, including all

of its domestic subsidiaries or units, must file on the BE–10A BANK form and the nonbanking U.S. operations not owned by the bank must file on the BE–10A.

(i) If for a nonbank U.S. Reporter any one of the following three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes—was greater than $150 million (positive or negative) at any time during the Reporter's 2004 fiscal year, the U.S. Reporter must file a complete Form BE–10A and, as applicable, a BE–10A SUPPLEMENT A listing each, if any, foreign affiliate that is exempt from being reported on Form BE–10B(LF), BE–10B(SF), BE–10B Mini, or BE–10B BANK. It must also file a Form BE–10B(LF), BE–10B(SF), BE–10B Mini, or BE–10B BANK, as appropriate, for each nonexempt foreign affiliate.

(ii) If for a nonbank U.S. Reporter none of the three items listed in paragraph (c)(1)(i) of this section was greater than $150 million (positive or negative) at any time during the Reporter's 2004 fiscal year, the U.S. Reporter is required to file on Form BE–10A only certain items as designated on the form and, as applicable, a BE–10A SUPPLEMENT A listing each, if any, foreign affiliate that is exempt from being reported on Form BE–10B(LF), BE–10B(SF), BE–10B Mini, or BE–10B BANK. It must also file a Form BE–10B(LF), BE–10B(SF), BE–10B Mini, or BE–10B BANK, as appropriate, for each nonexempt foreign affiliate.

(2) *Form BE–1OB(LF), (SF), or Mini (Report for nonbank foreign affiliate).* (i) A BE–10B(LF) (Long Form) must be filed for each majority-owned nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which any one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $150 million (positive or negative) at any time during the affiliate's 2004 fiscal year.

(ii) A BE–10B(SF) (Short Form) must be filed:

(A) For each majority-owned nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which any one of the three items listed in paragraph (c)(2)(i) of this section was greater than $25 million but for which none of these items was greater than $150 million (positive or negative), at any time during the affiliate's 2004 fiscal year, and

(B) For each minority-owned nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which any one of the three items listed in paragraph (c)(2)(i) of this section was greater than $25 million (positive or negative), at any time during the affiliate's 2004 fiscal year, and

(C) For each nonbank foreign affiliate of a U.S. bank Reporter, whether held directly or indirectly, for which any one of the three items listed in paragraph (c)(2)(i) of this section was greater than $25 million (positive or negative), at any time during the affiliate's 2004 fiscal year.

(iii) A BE–10B Mini must be filed for each nonbank foreign affiliate, whether held directly or indirectly, for which any one of the three items listed in paragraph (c)(2)(i) of this section was greater than $10 million but for which none of these items was greater than $25 million (positive or negative), at any time during the affiliate's 2004 fiscal year.

(iv) Notwithstanding paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this section, a Form BE–10B(LF), (SF), or Mini must be filed for a foreign affiliate of the U.S. Reporter that owns another nonexempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, *i.e.*, a Form BE–10B(LF), (SF), Mini, or BANK must be filed for all affiliates upward in a chain of ownership.

(d) *Forms for U.S. Reporters and foreign affiliates that are banks, bank holding companies, or financial holding companies*—(1) *Form BE–10A BANK (Report for a U.S. Reporter that is a bank).* A BE–10A BANK report must be completed by a U.S. Reporter that is a bank. For purposes of filing Form BE–10A BANK, the U.S. Reporter is deemed to be the fully consolidated U.S. domestic business enterprise and all required data on the form shall be for the fully consolidated domestic entity.

(i) If a U.S. bank had any foreign affiliates at any time during its 2004 fiscal year, whether a bank or nonbank and whether held directly or indirectly, for which any one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $10 million (positive or negative) at any time during the affiliate's 2004 fiscal year, the U.S. Reporter must file a Form BE–10A BANK and, as applicable, a BE–10A BANK SUPPLEMENT A listing each, if any, foreign affiliate, whether bank or nonbank, that is exempt from being reported on Form BE–10B(SF), BE–10B Mini, or BE–10B BANK. It must also file a Form BE–10B(SF) or BE–10B Mini for each nonexempt nonbank foreign affiliate and a Form BE–10B BANK for each nonexempt bank foreign affiliate.

(ii) If the U.S. bank Reporter had no foreign affiliates for which any one of the three items listed in paragraph (d)(2)(i) of this section was greater than $10 million (positive or negative) at any time during the affiliate's 2004 fiscal year, the U.S. Reporter must file a Form BE–10A BANK and a BE–10A BANK SUPPLEMENT A, listing all foreign affiliates exempt from being reported on Form BE–10B(SF), BE–10B Mini, or BE–10B BANK.

(2) *Form BE–10B BANK (Report for a foreign affiliate that is a bank).* (i) A BE–10B BANK report must be filed for each foreign bank affiliate of a bank or nonbank U.S. Reporter, whether directly or indirectly held, for which any one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $10 million (positive or negative) at any time during the affiliate's 2004 fiscal year.

(ii) Notwithstanding paragraph (d)(3)(i) of this section, a Form BE–10B BANK must be filed for a foreign bank affiliate of the U.S. Reporter that owns another nonexempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, *i.e.*, a Form BE–10B(LF), (SF), Mini, or BANK must be filed for all affiliates upward in a chain of ownership. However, a Form BE–10B BANK is not required to be filed for a foreign bank affiliate in which the U.S. Reporter holds only an indirect ownership interest of 50 percent or less and that does not own a reportable nonbank foreign affiliate, but the indirectly owned bank affiliate must be listed on the BE–10A BANK SUPPLEMENT A.

(e) *Due date.* A fully completed and certified BE–10 report comprising Form BE–10A or 10A BANK and Form(s) BE–10B(LF), (SF), Mini, or BANK (as required) is due to be filed with BEA not later than May 31, 2005 for those U.S. Reporters filing fewer than 50, and June 30, 2005 for those U.S. Reporters filing 50 or more, Forms BE–10B(LF), (SF), Mini, or BANK.

[69 FR 70545, Dec. 7, 2004]

§ 806.17 Rules and regulations for BE–12, Benchmark Survey of Foreign Direct Investment in the United States—2002

A BE–12, Benchmark Survey of Foreign Direct Investment in the United States will be conducted covering 2002. All legal authorities, provisions, definitions, and requirements contained in §§ 806.1 through 806.13 and § 806.15(a) through (g) are applicable to this survey. Specific additional rules and regulations for the BE–12 survey are given in this section.

(a) *Response required.* A response is required from persons subject to the reporting requirements of the BE–12, Benchmark Survey of Foreign Direct Investment in the United States—2002, contained in this section, whether or not they are contacted by BEA. Also, a person, or their agent, contacted by BEA concerning their being subject to reporting, either by sending them a report form or by written inquiry, must respond in writing pursuant to § 806.4, or electronically using BEA's Automated Survey Transmission and Retrieval (ASTAR) system. This may be accomplished by completing and returning either Form BE–12(X) within 30 days of the date it was received, if Form BE–12(LF), Form BE–12(SF), or Form BE–12 Bank do not apply, or by completing and returning Form BE–12(LF), Form BE–12(SF), or Form BE–12 Bank, whichever is applicable, by May 31, 2003.

(b) *Who must report.* A BE–12 report is required for each U.S. affiliate, *i.e.*, for

each U.S. business enterprise in which a foreign person (foreign parent) owned or controlled, directly or indirectly, 10 percent or more of the voting securities if an incorporated U.S. business enterprise, or an equivalent interest if an unincorporated U.S. business enterprise, at the end of the business enterprise's 2002 fiscal year. A report is required even though the foreign person's ownership interest in the U.S. business enterprise may have been established or acquired during the reporting period. Beneficial, not record, ownership is the basis of the reporting criteria.

(c) *Forms to be filed.* (1) Form BE–12(LF)—Benchmark Survey of Foreign Direct Investment in the United States—2002 (Long Form) must be completed and filed by May 31, 2003, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 2002 fiscal year and that was majority-owned by one or more foreign parents (a ''majority-owned'' U.S. affiliate is one in which the combined direct and indirect ownership interest of all foreign parents of the U.S. affiliate exceeds 50 percent), if:

(i) It is not a bank or a bank holding company, and is not owned directly or indirectly by a U.S. bank holding company, and

(ii) On a fully consolidated basis, or, in the case of real estate investment, on an aggregated basis, one or more of the following three items for the U.S. affiliate (not just the foreign parent's share) exceeded $125 million (positive or negative) at the end of, or for, its 2002 fiscal year:

(A) Total assets (do not net out liabilities);

(B) Sales or gross operating revenues, excluding sales taxes;

(C) Net income after provision for U.S. income taxes.

(2) Form BE–12(SF)—Benchmark Survey of Foreign Direct Investment in the United States—2002 (Short Form) must be completed and filed by May 31, 2003 by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 2002 fiscal year, if:

(i) It is not a bank or a bank holding company, and is not owned directly or indirectly by a U.S. bank holding company, and

(ii) On a fully consolidated basis, or, in the case of real estate investment, on an aggregated basis, one or more of the following three items for a majority-owned U.S. affiliate (not just the foreign parent's share) exceeded $10 million, but no one item exceeded $125 million (positive or negative) at the end of, or for, its 2002 fiscal year:

(A) Total assets (do not net out liabilities);

(B) Sales or gross operating revenues, excluding sales taxes;

(C) Net income after provision for U.S. income taxes, or

(iii) On a fully consolidated basis, or, in the case of real estate investment, on an aggregated basis, one or more of the following three items for a minority-owned U.S. affiliate (not just the foreign parent's share) exceeded $10 million (positive or negative) at the end of, or for, its 2002 fiscal year (a ''minority-owned'' U.S. affiliate is one in which the combined direct and indirect ownership interest of all foreign parents of the U.S. affiliate is 50 percent or less):

(A) Total assets (do not net out liabilities);

(B) Sales or gross operating revenues, excluding sales taxes;

(C) Net income after provision for U.S. income taxes.

(3) Form BE–12 Bank—Benchmark Survey of Foreign Direct Investment in the United States—2002 BANK must be completed and filed by May 31, 2003, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 2002 fiscal year, if:

(i) The U.S. affiliate is in ''banking'', which, for purposes of the BE–12 survey, covers business enterprises engaged in deposit banking or closely related functions, including commercial banks, Edge Act corporations engaged in international or foreign banking, U.S. branches and agencies of foreign banks whether or not they accept domestic deposits, savings and loans, savings banks, and bank holding companies, including all subsidiaries or units of a bank holding company and

(ii) On a fully consolidated basis, one or more of the following three items

for the U.S. affiliate (not just the foreign parent's share) exceeded $10 million (positive or negative) at the end of, or for, its 2002 fiscal year:

(A) Total assets (do not net out liabilities);

(B) Sales or gross operating revenues, excluding sales taxes;

(C) Net income after provision for U.S. income taxes.

(4) Form BE–12(X)—Benchmark Survey of Foreign Direct Investment in the United States—2002 Claim for Exemption from Filing BE–12(LF), BE–12(SF), or BE–12 Bank must be completed and filed within 30 days of the date it was received by:

(i) Each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 2002 fiscal year (whether or not the U.S. affiliate, or its agent, is contacted by BEA concerning its being subject to reporting in the 2002 benchmark survey), but is exempt from filing Form BE–12(LF), Form BE–12(SF), and Form BE–12 Bank; and

(ii) Each U.S. business enterprise, or its agent, that is contacted, in writing, by BEA concerning its being subject to reporting in the 2002 benchmark survey but that is not otherwise required to file the Form BE–12(LF), Form BE–12(SF), or Form BE–12 Bank.

(d) *Aggregation of real estate investments.* All real estate investments of a foreign person must be aggregated for the purpose of applying the reporting criteria. A single report form must be filed to report the aggregate holdings, unless written permission has been received from BEA to do otherwise. Those holdings not aggregated must be reported separately.

(e) *Exemption.* (1) A U.S. affiliate as consolidated, or aggregated in the case of real estate investments, is not required to file form BE–12(LF), BE–12(SF), or Form BE–12 Bank if each of the following three items for the U.S. affiliate (not just the foreign parent's share) did not exceed $10 million (positive or negative) at the end of, or for, its 2002 fiscal year:

(i) Total assets (do not net out liabilities);

(ii) Sales or gross operating revenues, excluding sales taxes; and

(iii) Net income after provision for U.S. income taxes.

(2) If a U.S. business enterprise was a U.S. affiliate at the end of its 2002 fiscal year but is exempt from filing a completed Form BE–12(LF), BE–12(SF), or Form BE–12 Bank, it must nevertheless file a completed and certified Form BE–12(X).

(f) *Due date.* A fully completed and certified Form BE–12(LF), Form BE–12(SF), or Form BE–12 Bank is due to be filed with BEA not later than May 31, 2003. A fully completed and certified Form BE–12(X) is due to be filed with BEA within 30 days of the date it was received.

[68 FR 1532, Jan. 13, 2003]

§ 806.18 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This section will comply with the requirements of section 3507 (f) of the Paperwork Reduction Act (PRA) which require agencies to display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

15 CFR section where identified and described	Current OMB control No.
806.1 through 806.17	0608–0020 0024 0032 0004 0035 0030 0009 0023 0034 0053

[48 FR 56944, Dec. 27, 1983, as amended at 51 FR 41476, Nov. 17, 1986]

PART 807—PUBLIC INFORMATION

Sec.

807.1 Public Reference Facility.
807.2 Department of Commerce rules applicable.

§ 807.1 Public Reference Facility.

The Public Reference Facility of the Bureau of Economic Analysis is located in room B7 of the Tower Building. 1401 K Street NW., Washington, DC 20230. The telephone number is 202–523–0595. The facility is open to the public from

8:30 a.m. to 5 p.m., Monday through Friday, except legal holidays.

(5 U.S.C. 552 as amended by Pub. L. 93–502; 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and 15 CFR part 4 of Subtitle A)

[42 FR 38574, July 29, 1977]

§ 807.2 Department of Commerce rules applicable.

The rules applicable to the services provided in the facility and procedures to be followed for public inspection and copying of materials are found in part 4 of subtitle A of title 15 CFR.

(5 U.S.C. 552 as amended by Pub. L. 93–502; 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and 15 CFR Part 4 of Subtitle A)

[42 FR 38574, July 29, 1977]

CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

SUBCHAPTER A—GENERAL REGULATIONS

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SUBCHAPTER A—GENERAL REGULATIONS

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

AUTHORITY: 44 U.S.C. 3501 *et seq.*

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This part collects and displays the control numbers assigned to information collection requirements of the National Oceanic and Atmospheric Administration (NOAA) by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA). NOAA intends that this part comply with the requirements of section 3507(c)(B)(i) of the PRA, which requires that agencies inventory and display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
15 CFR	
Part 908	–0025
Part 911	–0157
917.11	–0008, –0019, and –0034
917.22	–0008, –0019, and –0034
917.30(b)	–0008, –0019, and –0034
917.41	–0008, –0019, and –0034
917.43(c)	–0119
918.7	–0147
Part 921, subpart B	–0121
Part 923	–0119
924.6	–0141
928.3	–0119
929.10	–0141
935.9	–0141
936.8	–0141
937.8	–0141
938.8	–0141
941.11	–0141
942.8	–0141
943.10	–0141
944.9	–0141
Part 960, subpart B	–0174
Part 970	–0145
Part 971	–0170
Part 981	–0144
50 CFR	
216.22	–0178
216.23	–0179
216.24	–0387
216.26	–0084
216.27	–0084
216.33	–0084
216.37	–0084
216.38	–0084
216.39	–0084
216.41	–0084
216.45	–0084
216.104	–0151
216.106	–0151
216.108	–0151
216.145	–0151
222.301(i)	–0084
222.307	–0230
222.308	–0084
223.203(b)	–0399
223.206(a)	–0230
223.206(b) and (c)	–0178
223.207(e)	–0309
229.4	–0293
229.5	–0292
229.6	–0292
230.8	–0311
253.15	–0012
259.30	–0090
259.35	–0041
260.15	–0266
260.36	–0266
260.37	–0266
260.96	–0266
260.97	–0266
260.103	–0266
296.5	–0082
300.13	–0304
300.14	–0348
300.17	–0349
300.22	–0148
300.24	–0202
300.25	–0239
300.26(c)	–0239
300.26(d)	–0239
300.27	–0040
300.32	–0218
300.34	–0218
300.35	–0361
300.103(a)	–0194
300.104(d)	–0194
300.104(e)	–0194
300.105(c)	–0194
300.106(e)	–0194
300.107	–0194
300.108(a)	–0368
300.108(c)	–0367
300.112	–0194
300.113	–0194
300.123	–0205
300.124(b)	–0016
300.125	–0358
300.152	–0228
300.153(b)	–0228
300.154(b)	–0228
300.154(c)	–0228
300.154(d)	–0228
600.205	–0314
600.215	–0314
600.235	–0192
600.501	–0089
600.502	–0075
600.503	–0354 and –0356

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
600.504	–0075
600.506	–0075
600.507	–0075
600.508	–0329
600.510	–0075
600.512	–0309
600.520	–0075
600.630	–0314
600.725	–0346
600.745	–0309
600.747	–0346
600.1001	–0376
600.1003	–0376
600.1005	–0376
600.1006	–0376
600.1009	–0376
600.1010	–0376 and –0413
600.1011	–0376
600.1012	–0376
600.1013	–0376
600.1014	–0376
622.4	–0205
622.5	–0013, –0016, and –0392
622.6	–0358 and –0359
622.8	–0205
622.9	–0205
622.15	–0013 and –0262
622.16	–0551
622.18	–0205
622.19	–0205
622.40(a)(2)	–0205
622.40(d)(2)	–0013
622.41	–0345
622.41(a)	–0016 and –0305
622.41(g)(3)	–0345
622.45	–0365
622.45(a)	–0013
635.4(b)	–0327
635.4(d)	–0327
635.4(g)	–0202 and –0205
635.5(a)	–0371, –0328, and –0452
635.5(b)	–0013 and –0239
635.5(c)	–0328
635.5(d)	–0323
635.5(f)	–0380
635.6(c)	–0373
635.7(c)	–0374
635.21(d)	–0202
635.26	–0247
635.31(b)	–0216
635.32	–0309
635.33	–0338
635.42	–0040
635.43	–0040
635.44	–0040
635.46	–0363
640.4	–0205
640.6	–0358 and –0359
648.4	–0202, –0212, –0489, and –0529
648.5	–0202
648.6	–0202
648.7	–0018, –0202, –0212, and –0229
648.8	–0350
648.9	–0202, –0404, –0489, –0501, and –0529
648.10	–0202, –0489, –0501, and –0529
648.11	–0202
648.13	–0391 and –0481
648.14	–0202, –0212, –0469, –0489, –0501, and –0502
648.15	–0202
648.17	–0202
648.53	–0202 and –0491
648.54	–0202
648.56	–0321
648.58	–0202 and –0416
648.60	–0491 and –0541
648.70	–0238
648.74	–0240
648.76	–0202
648.80	–0202, –0422, –0489, and –0521
648.81	–0202, –0412, and –0489
648.82	–0202, –0457, –0489, and –0521
648.84	–0202 and –0351
648.85	–0212, –0489, –0501, and –0502
648.86	–0202, –0391, –0457, and –0489
648.87	–0489
648.88	–0489
648.89	–0412 and –0489
648.91	–0202
648.92	–0202
648.93	–0202
648.94	–0202 and –0489
648.95	–0202
648.96	–0202
648.100	–0202
648.106	–0202
648.122	–0469
648.123	–0305
648.144	–0305
648.160	–0202
648.205	–0404
648.262	–0202
648.264	–0351
648.322	–0480 and –0489
654.6	–0358 and –0359
660.303	–0271
660.305	–0355
660.322	–0352
660.323	–0243
660.333	–0203
660.504	–0361
660.512	–0204
660.704	–0361
660.707	–0204
660.708	–0498
660.712(d) and (f)	–0498
661.4	–0222
661.20	–0222
663.4	–0271
663.10	–0203
663.11	–0203
663.22	–0305
663.33	–0203
665.13	–0490
665.14	–0214
665.16	–0360
665.17	–0214 and –0490
665.21(k)	–0490
665.23	–0214
665.24	–0360
665.25	–0441
665.27	–0490
665.28	–0214
665.35	–0456
665.41	–0490
665.43	–0214
665.48	–0360

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
665.61	–0490
665.63	–0214
665.65	–0214
665.81	–0490
665.602	–0463
665.604	–0462
665.606	–0360
679.4(b), (f), (h), and (i)	–0206
679.4(d) and (e)	–0272
679.4(g) and (k)	–0334 and –0545
679.4(l)	–0393
679.4(m)(2)	–0513
679.4(m)(4)	–0513
679.4(n)	–0545
679.5(a)	–0213, –0269, –0272, and –0401
679.5(b), (c), (d), (g), (h), (i), (j), (k) and (m).	–0213
679.5(e), (f), and (o)	–0401
679.5(l)(1), (l)(2), (l)(3), and (l)(5).	–0272
679.5(l)(3)(i), (l)(4)	–0272, –0517
679.5(l)(7)	–0398
679.5(n)	–0269
679.5(p)	–0428
679.5(q)	–0513
679.5(r)	–0213, –0401, –0445, and –0545
679.6	–0206
679.20(a)(8)(iii)	–0206
679.24(a)	–0353
679.24(e)	–0454
679.26	–0316
679.28(b) and (d)	–0330
679.28(f)	–0445
679.28(g)	–0330
679.30	–0269
679.32(c)	–0269 and –0330
679.32(d)	–0269
679.32(f)	–0269 and –0272
679.40	–0272
679.41	–0272
679.42	–0272
679.43	–0272 and –0398
679.45	–0398
679.50	–0318
679.61(c) and (f)	–0401
679.61(d) and (e)	–0393
679.62(b)(3) and (c)	–0401
679.63(a)(2)	–0330
679.80	–0545
679.81	–0545
679.82	–0545
679.83	–0545
679.84	–0213, –0330, and –0545
680.4	–0514
680.5	–0515
680.6	–0518
680.20	–0516
680.21	–0514
680.23(d)(1) and (d)(2)	–0445
680.23(e), (f), (g) and (h)	–0330
680.40(f), (g), (h), (i), (j), (k), (l), and (m).	–0514
680.41	–0514
680.43	–0514
680.44(a), (b), (c), (d), (e)	–0515
680.44(f)	–0514
697.4(a), (d) and (e)	–0202
697.5	–0202
697.6	–0202
697.8	–0350
697.12	–0202
697.21	–0351
697.22	–0309

[1] And –0305.

[60 FR 39248, Aug. 2, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §902.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

PART 903—PUBLIC INFORMATION

AUTHORITY: 5 U.S.C. 552 as amended by Pub. L. 93–502; 5 U.S.C. 553; Reorg. Plan No. 2 of 1965, 15 U.S.C. 311 note; 32 FR 9734, 31 FR 10752.

§903.1 Access to information.

The rules and procedures regarding public access to the records of the National Oceanic and Atmospheric Administration are found at 15 CFR part 4.

[57 FR 35749, Aug. 11, 1992]

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AUTHORITY: 16 U.S.C. 1801–1882; 16 U.S.C. 1531–1543; 16 U.S.C. 1361–1407; 16 U.S.C. 3371–3378; 16 U.S.C. 1431–1439; 16 U.S.C. 773–773k; 16 U.S.C. 951–961; 16 U.S.C. 5001–5012; 16 U.S.C. 3631–3644; 42 U.S.C. 9101 *et seq.*; 30 U.S.C. 1401 *et seq.*; 16 U.S.C. 971–971k; 16 U.S.C. 781 *et seq.*; 16 U.S.C. 2401–2413; 16 U.S.C. 2431–2444; 16 U.S.C. 972–972h; 16 U.S.C. 916–916*l*; 16 U.S.C. 1151–1175; 16 U.S.C. 3601–3608; 16 U.S.C. 1851 note; 15 U.S.C. 5601 *et seq.*; Pub. L. 105–277; 16 U.S.C. 1822 note, Section 801(f); 16 U.S.C. 2465(a); 16 U.S.C. 5103(b); 16 U.S.C. 1385 *et seq.*; 16 U.S.C. 1822 note (Section 4006); 16 U.S.C. 4001–4017; 22 U.S.C. 1980(g); 16 U.S.C. 5506(a); 16 U.S.C. 5601–5612; 16 U.S.C. 1822; 16 U.S.C. 973–973(r); 15 U.S.C. 330–330(e).

SOURCE: 71 FR 12448, Mar. 10, 2006, unless otherwise noted.

Subpart A—General

§ 904.1 Purpose and scope.

(a) This part sets forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property.

(b) This subpart defines terms appearing in this part and sets forth rules for the filing and service of documents in administrative proceedings covered by this part.

(c) The following statutes authorize NOAA to assess civil penalties, impose

permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes:

(1) American Fisheries Act of 1998, Public Law 105–277;

(2) Anadromous Fish Products Act, 16 U.S.C. 1822 note, Section 801(f);

(3) Antarctic Conservation Act of 1978, 16 U.S.C. 2401–2413;

(4) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431–2444;

(5) Antarctic Protection Act of 1990, 16 U.S.C. 2465(a);

(6) Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5103(b);

(7) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601–3608;

(8) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 note;

(9) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971–971k;

(10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.*;

(11) Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 *et seq.*;

(12) Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. 1822 note (Section 4006);

(13) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972–972h;

(14) Endangered Species Act of 1973, 16 U.S.C. 1531–1543;

(15) Fish and Seafood Promotion Act of 1986, 16 U.S.C. 4001–4017;

(16) Fisherman's Protective Act of 1967, 22 U.S.C. 1980(g);

(17) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151–1175;

(18) High Seas Fishing Compliance Act, 16 U.S.C. 5506(a);

(19) Lacey Act Amendments of 1981, 16 U.S.C. 3371–3378;

(20) Land Remote-Sensing Policy Act of 1992, 15 U.S.C. 5601 *et seq.*;

(21) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1882;

(22) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361–1407;

(23) National Marine Sanctuaries Act, 16 U.S.C. 1431–1439;

(24) North Pacific Anadromous Stocks Convention Act of 1992, 16 U.S.C. 5001–5012;

(25) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773–773k;

(26) Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601–5612;

(27) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*;

(28) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631–3644;

(29) Shark Finning Prohibition Act, 16 U.S.C. 1822;

(30) South Pacific Tuna Act of 1988, 16 U.S.C. 973–973(r);

(31) Sponge Act, 16 U.S.C. 781 *et seq.*;

(32) Tuna Conventions Act of 1950, 16 U.S.C. 951–961;

(33) Weather Modification Reporting Act, 15 U.S.C. 330–330e; and

(34) Whaling Convention Act of 1949, 16 U.S.C. 916–916l.

(d) The procedures set forth in this part are intended to apply to administrative proceedings under these and any other statutes or authorities administered by NOAA.

§904.2 Definitions and acronyms.

Unless the context otherwise requires, or as otherwise noted, terms in this Part have the meanings prescribed in the applicable statute or regulation. In addition, the following definitions apply:

Administrator means the Administrator of NOAA or a designee.

Agency means the National Oceanic and Atmospheric Administration (NOAA).

ALJ Docketing Center means the Docketing Center of the Office of Administrative Law Judges.

Applicable statute means a statute cited in §904.1(c), and any regulations issued by NOAA to implement it.

Authorized officer means:

(1) Any commissioned, warrant, or petty officer of the USCG;

(2) Any special agent or fishery enforcement officer of NMFS;

(3) Any officer designated by the head of any Federal or state agency that has entered into an agreement with the Secretary to enforce the provisions of any statute administered by NOAA; or

(4) Any USCG personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Citation means a written warning (see section 311(c) of the Magnuson-Stevens Fishery Conservation and Management

Act, 16 U.S.C. 1861(c), and section 11(c) of the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773i(c)).

Civil penalty means a civil administrative monetary penalty assessed under the civil administrative process described in this part.

Decision means an initial or final administrative decision of the Judge.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include inquiries regarding procedures, scheduling, and status.

Final administrative decision means an order or decision of NOAA assessing a civil penalty or permit sanction which is not subject to further Agency review under this part, and which is subject to collection proceedings or judicial review in an appropriate Federal district court as authorized by law.

Forfeiture includes, but is not limited to, surrender or relinquishment of any claim to an item by written agreement, or otherwise; or extinguishment of any claim to, and transfer of title to an item to the U.S. Government by court order or by order of the Administrator under a statute.

Hearing means a civil administrative hearing on a NOVA, NOPS and/or NIDP.

Initial decision means a decision of the Judge that, under applicable statute and regulation, is subject to review by the Administrator.

Judge means Administrative Law Judge.

NIDP means Notice of Intent to Deny Permit.

NMFS means the National Marine Fisheries Service.

NOAA (see *Agency*) means either the Administrator or a designee acting on behalf of the Administrator.

NOPS means Notice of Permit Sanction.

NOVA means Notice of Violation and Assessment of civil penalty.

Party means the respondent and the Agency; a joint and several respondent, vessel owner, or permit holder, if they enter an appearance; and any other person allowed to participate under § 904.204(b).

Permit means any license, permit, certificate, or other approval issued by NOAA under an applicable statute.

Permit holder means the holder of a permit or any agent or employee of the holder, and includes the owner and operator of a vessel for which the permit was issued.

Permit sanction means suspension, revocation, or modification of a permit (see § 904.320).

PPIP means Preliminary Position on Issues and Procedures.

Respondent means a person issued a written warning, NOVA, NOPS, NIDP or other notice.

Settlement agreement means any agreement resolving all or part of an administrative or judicial action. The terms of such an agreement may include, but are not limited to, payment of a civil penalty, and/or imposition of a permit sanction.

USCG means the U.S. Coast Guard.

Vessel owner means the owner of any vessel that may be liable in rem for any civil penalty, or whose permit may be subject to sanction in proceedings under this part.

Written warning means a notice in writing to a person that a violation has been documented against the person or against the vessel which is owned or operated by the person, where no civil penalty or permit sanction is imposed or assessed.

§ 904.3 Filing and service of notices, documents, and other papers.

(a) Service of a NOVA (§ 904.101), NOPS (§ 904.302), NIDP (§ 904.303), Notice of Proposed Forfeiture (§ 904.504), Notice of Seizure (§ 904.501), Notice of Summary Sale (§ 904.505) or Written Warning (§ 904.402) may be made by certified mail (return receipt requested), facsimile, electronic transmission, or third party commercial carrier to an addressee's last known address or by personal delivery. Service of a notice under this subpart will be considered effective upon receipt.

(b) Service of documents and papers, other than such Notices as described in paragraph (a) of this section, may be made by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee's last known

address or by personal delivery. Service of documents and papers will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery.

(c) Whenever this part requires service of a NOVA, NOPS, NIDP, document, or other paper, such service may effectively be made on the agent for service of process, on the attorney for the person to be served, or other representative. Refusal by the person to be served (including an agent, attorney, or representative) of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal. In cases where certified notification is returned unclaimed, service will be considered effective if the U.S. Postal Service provides an affidavit stating that the party was receiving mail at the same address during the period when certified service was attempted.

(d) Any documents or pleadings filed or served must be signed:

(1) By the person or persons filing the same,

(2) By an officer thereof if a corporation,

(3) By an officer or authorized employee if a government instrumentality, or

(4) By an attorney or other person having authority to sign.

§904.4 Computation of time periods.

For a NOVA, NOPS or NIDP, the 30 day response period begins to run on the date the notice is received. All other time periods begin to run on the day following the service date of the document, paper, or event that begins the time period. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, in which event such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty, required by this part to take place within a specified period of time. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays will be excluded in the computation.

§904.5 Appearances.

(a) A party may appear in person or by or with counsel or other representative.

(b) Whenever an attorney or other representative contacts the Agency on behalf of another person with regard to any matter that has resulted in, or may result in, a written warning, a NOVA, NOPS, NIDP, or a forfeiture proceeding, that attorney or other representative shall file a Notice of Appearance with the Agency. Such notice shall indicate the name of the person on whose behalf the appearance is made.

(c) Each attorney or other representative who represents a party in any hearing shall file a written Notice of Appearance with the Judge. Such notice shall indicate the name of the case, the docket number, and the party on whose behalf the appearance is made.

Subpart B—Civil Penalties

§904.100 General.

This subpart sets forth the procedures governing NOAA administrative proceedings for the assessment of civil penalties under the statutes cited in §904.1(c).

§904.101 Notice of violation and assessment (NOVA).

(a) A NOVA will be issued by NOAA and served upon the respondent(s). The NOVA will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, license, permit, agreement, or order allegedly violated;

(3) The findings and conclusions upon which NOAA bases the assessment;

(4) The amount of the civil penalty assessed; and

(5) Information concerning the respondent's rights upon receipt of the NOVA, and will be accompanied by a copy of the regulations in this part governing the proceedings.

(b) In assessing a civil penalty, NOAA will take into account information available to the Agency concerning any factor to be considered under the applicable statute, and any other information that justice or the purposes of the statute require.

(c) The NOVA may also contain a proposal for compromise or settlement of the case. NOAA may also attach documents that illuminate the facts believed to show a violation.

§ 904.102 Procedures upon receipt of a NOVA.

(a) The respondent has 30 days from receipt of the NOVA in which to respond. During this time the respondent may:

(1) Accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended, modified, or rescinded under paragraph (b) of this section;

(3) Request a hearing under § 904.201(a);

(4) Request an extension of time to respond under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes a final administrative decision in accordance with § 904.104.

(b) The respondent may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying Agency counsel at the telephone number or address specified in the NOVA. If amendment or modification is sought, Agency counsel will either amend the NOVA or decline to amend it, and so notify the respondent.

(c) The respondent may, within the 30 day period specified in paragraph (a) of this section, request an extension of time to respond. Agency counsel may grant an extension of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 30 day period. If Agency counsel does not respond to the request within 48 hours of its receipt, the request is granted automatically for the extension requested, up to a maximum of 30 days. A telephonic response to the request within the 48 hour period is considered an effective response, and will be followed by written confirmation.

(d) Agency counsel may, for good cause, grant an additional extension beyond the 30 day period specified in paragraph (c) of this section.

§ 904.103 Hearing.

(a) Any hearing request under § 904.102(a)(3) is governed by the hearing and review procedures set forth in subpart C of this part.

(b) [Reserved]

§ 904.104 Final administrative decision.

(a) If no request for hearing is timely filed as provided in § 904.201(a), the NOVA becomes effective as the final administrative decision and order of NOAA 30 days after service of the NOVA or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with § 904.201(a), the date of the final administrative decision is as provided in subpart C of this part.

§ 904.105 Payment of final civil penalty.

(a) Respondent must make full payment of the civil penalty within 30 days of the date upon which the NOVA becomes effective as the final administrative decision and order of NOAA under § 904.104 or the date of the final administrative decision as provided in subpart C of this part. Payment must be made by mailing or delivering to NOAA at the address specified in the NOVA a check or money order made payable in U.S. currency in the amount of the assessment to the ''Department of Commerce/NOAA,'' by credit card, or as otherwise directed.

(b) Upon any failure to pay the civil penalty assessed, NOAA may request the U.S. Department of Justice to recover the amount assessed in any appropriate district court of the United States, may act under § 904.106, or may commence any other lawful action.

§ 904.106 Compromise of civil penalty.

(a) NOAA, in its sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any

civil penalty assessed, or which is subject to assessment, except as stated in paragraph (d) of this section.

(b) The compromise authority of NOAA under this section may be exercised either upon the initiative of NOAA or in response to a request by the respondent or a representative subject to the requirements of §904.5. Any such request should be sent to Agency counsel at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which a NOVA becomes final.

(d) NOAA will not compromise, modify, or remit a civil penalty assessed, or subject to assessment, under the Deep Seabed Hard Mineral Resources Act while an action to review or recover the civil penalty is pending in a court of the United States.

§904.107 Joint and several respondents.

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.

(b) A hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s). Agency counsel, having received a hearing request from one joint and several respondent, will send a copy of it to the other joint and several respondent(s) in the case. However, if the requesting joint and several respondent settles with the Agency prior to the hearing, upon notification by the Agency, any remaining joint and several respondent(s) must affirmatively request a hearing within the time period specified or the case will be removed from the court's docket as provided in §904.213.

(c) A final administrative decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

§904.108 Factors considered in assessing civil penalties.

(a) Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

(b) NOAA may, in consideration of a respondent's ability to pay, increase or decrease a civil penalty from an amount that would otherwise be warranted by the other relevant factors. A civil penalty may be increased if a respondent's ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. A civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.

(c) Except as provided in paragraph (g) of this section, if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the civil penalty.

(d) Financial information relevant to a respondent's ability to pay includes

but is not limited to, the value of respondent's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA's consideration of a respondent's ability to pay does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(e) Financial information regarding respondent's ability to pay should be submitted to Agency counsel as soon as possible after the receipt of the NOVA. If a respondent has requested a hearing on the violation alleged in the NOVA and wants the initial decision of the Judge to consider his or her inability to pay, verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing, except where the applicable statute expressly provides for a different time period. No information regarding the respondent's ability to pay submitted by the respondent less than 30 days in advance of the hearing will be admitted at the hearing or considered in the initial decision of the Judge, unless the Judge rules otherwise. If the Judge decides to admit any information related to the respondent's ability to pay submitted less than 30 days in advance of the hearing, Agency Counsel will have 30 days to respond to the submission from the date of admission. In deciding whether to submit such information, the respondent should keep in mind that the Judge may assess *de novo* a civil penalty either greater or smaller than that assessed in the NOVA.

(f) Issues regarding ability to pay will not be considered in an administrative review of an initial decision if the financial information was not previously presented by the respondent to the Judge prior to or at the hearing.

(g) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a civil penalty, NOAA will take into consideration information available to it concerning a respondent's ability to pay. In all cases, the NOVA will advise, in accordance with § 904.102, that the respondent may seek to have the civil penalty amount modified by Agency counsel on the basis that he or she does not have the ability to pay the civil penalty assessed. A request to have the civil penalty amount modified on this basis must be made in accordance with § 904.102 and should be accompanied by supporting financial information. Agency counsel may request that the respondent submit such additional verifiable, complete and accurate financial information as Agency counsel determines is necessary to evaluate the respondent's financial condition (such as by responding to a financial information request form or written interrogatories, or by authorizing independent verification of respondent's financial condition). A respondent's failure to provide the requested information may serve as the basis for inferring that such information would not have supported the respondent's assertion of inability to pay the civil penalty assessed in the NOVA.

(h) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a civil penalty and the respondent has requested a hearing on the violation alleged in the NOVA, the Agency must submit information on the respondent's financial condition so that the Judge may consider that information, along with any other factors required to be considered, in the Judge's *de novo* assessment of a civil penalty. Agency counsel may obtain such financial information through discovery procedures under § 904.240, or otherwise. A respondent's refusal or failure to respond to such discovery requests may serve as the basis for inferring that such information would have been adverse to any claim by respondent of inability to pay the assessed civil penalty, or result in respondent being barred from asserting financial hardship.

Subpart C—Hearing and Appeal Procedures

GENERAL

§904.200 Scope and applicability.

(a) This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final administrative decisions of NOAA involving alleged violations of the laws cited in §904.1(c) and regulations implementing these laws, including civil penalty assessments and permit sanctions and denials. By separate regulation, these rules may be applied to other proceedings.

(b) The Judge is delegated authority to make the initial or final administrative decision of the Agency in proceedings subject to the provisions of this subpart, and to take actions to promote the efficient and fair conduct of hearings as set out in this subpart. The Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.

(c) This subpart is not an independent basis for claiming the right to a hearing but, instead, prescribes procedures for the conduct of hearings, the right to which is provided by other authority.

§904.201 Hearing requests and case docketing.

(a) If the respondent wishes a hearing on a NOVA, NOPS or NIDP, the request must be dated and in writing, and must be served either in person or mailed to the Agency counsel specified in the notice. The respondent must either attach a copy of the NOVA, NOPS or NIDP or refer to the relevant NOAA case number. Agency counsel will promptly forward the request for hearing to the ALJ Docketing Center.

(b) If a written application is made to NOAA after the expiration of the time period established in this part for the required filing of hearing requests, Agency counsel will promptly forward the request for hearing along with a motion in opposition, documentation of service and any other relevant materials to the ALJ Docketing Center for a determination on whether such request shall be considered timely filed. Determinations by the ALJ regarding untimely hearing requests under this section shall be in writing.

(c) Upon its receipt for filing in the ALJ Docketing Center, each request for hearing will be promptly assigned a docket number and thereafter the proceeding will be referred to by such number. Written notice of the assignment of hearing to a Judge will promptly be given to the parties.

§904.202 Filing of documents.

(a) Pleadings, papers, and other documents in the proceeding must be filed in conformance with §904.3 directly with the Judge, with copies served on the ALJ Docketing Center and all other parties.

(b) Unless otherwise ordered by the Judge, discovery requests and answers will be served on the opposing party and need not be filed with the Judge.

§904.203 [Reserved]

§904.204 Duties and powers of Judge.

The Judge has all powers and responsibilities necessary to preside over the parties and the hearing, to hold prehearing conferences, to conduct the hearing, and to render decisions in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

(a) Rule on timeliness of hearing requests pursuant to §904.201(b);

(b) Rule on a request to participate as a party in the hearing by allowing, denying, or limiting such participation (such ruling will consider views of the parties and be based on whether the requester could be directly and adversely affected by the determination and whether the requester can be expected to contribute materially to the disposition of the proceedings);

(c) Schedule the time, place, and manner of conducting the pre-hearing conference or hearing, continue the hearing from day to day, adjourn the hearing to a later date or a different place, and reopen the hearing at any time before issuance of the decision, all in the Judge's discretion, having due regard for the convenience and necessity of the parties and witnesses;

(d) Schedule and regulate the course of the hearing and the conduct of the participants and the media, including the power to rule on motions to close the hearing in the interests of justice; seal the record from public scrutiny to protect privileged information, trade secrets, and confidential commercial or financial information; and strike testimony of a witness who refuses to answer a question ruled to be proper;

(e) Administer oaths and affirmations to witnesses;

(f) Rule on contested discovery requests, establish discovery schedules, and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under § 904.240(d);

(g) Rule on motions, procedural requests, and similar matters;

(h) Receive, exclude, limit, and otherwise rule on offers of proof and evidence;

(i) Examine and cross-examine witnesses and introduce into the record on the Judge's own initiative documentary or other evidence;

(j) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

(k) Require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position;

(l) Take official notice of any matter not appearing in evidence that is among traditional matters of judicial notice; or of a non-privileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; provided that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

(m) For stated good reason(s), assess a civil penalty *de novo* without being bound by the civil penalty assessed in the NOVA;

(n) Prepare and submit a decision or other appropriate disposition document and certify the record;

(o) Award attorney fees and expenses as provided by applicable statute or regulation;

(p) Grant preliminary or interim relief; or

(q) Impose, upon the motion of any party, or *sua sponte*, appropriate sanctions.

(1) Sanctions may be imposed when any party, or any person representing a party, in an administrative proceeding under this part has failed to comply with this part, or any order issued under this part, and such failure to comply:

(i) Materially injures or prejudices another party by causing additional expenses; prejudicial delay; or other injury or prejudice;

(ii) Is a clear and unexcused violation of this part, or any order issued under this part; or

(iii) Unduly delays the administrative proceeding.

(2) Sanctions that may be imposed include, but are not limited to, one or more of the following:

(i) Issuing an order against the party;

(ii) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(iii) Expelling the party from the administrative proceedings;

(iv) Precluding the party from contesting specific issues or findings;

(v) Precluding the party from making a late filing or conditioning a late filing on any terms that are just;

(vi) Assessing reasonable expenses, incurred by any other party as a result of the improper action or failure to act; and

(vii) Taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation, deemed appropriate by the Judge.

(3) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the

Judge directs and may be limited to an opportunity for a party or a party's representative to respond orally immediately after the act or inaction is noted by the Judge.

(4) The imposition of sanctions is subject to interlocutory review pursuant to §904.254 in the same manner as any other ruling.

(5) Nothing in this section shall be read as precluding the Judge from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§904.205 Disqualification of Judge.

(a) The Judge may withdraw voluntarily from an administrative proceeding when the Judge deems himself/herself disqualified.

(b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification must file with the Judge a timely affidavit or statement setting forth in detail the facts alleged to constitute the grounds for disqualification, and the Judge will rule on the matter. If the Judge rules against disqualification, the Judge will place all matters relating to such claims of disqualification in the record.

§904.206 Pleadings, motions, and service.

(a) The original of all pleadings and documents must be filed with the Judge and a copy served upon the ALJ Docketing Center and each party. All pleadings or documents when submitted for filing must show that service has been made upon all parties. Such service must be made in accordance with §904.3(b).

(b) Pleadings and documents to be filed may be reproduced by printing or any other process, provided the copies are clear and legible; must be dated, the original signed in ink or as otherwise verified for electronic mail; and must show the docket description and title of the proceeding, and the title, if any, address, and telephone number of the signatory. If typewritten, the impression may be on only one side of the paper and must be double spaced, if possible, except that quotations may be single spaced and indented.

(c) Motions must normally be made in writing and must state clearly and concisely the purpose of and relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested.

(d) Unless otherwise provided, the answer to any written motion, pleading, or petition must be served within 20 days after service of the motion. If a motion states that opposing counsel has no objection, it may be acted upon as soon as practicable, without awaiting the expiration of the 20 day period. Answers must be in writing, unless made in response to an oral motion made at a hearing; must fully and completely advise the parties and the Judge concerning the nature of the opposition; must admit or deny specifically and in detail each material allegation of the pleading answered; and must state clearly and concisely the facts and matters of law relied upon. Any new matter raised in an answer will be deemed controverted.

(e) A response to an answer will be called a reply. A short reply restricted to new matters raised in the answer may be served within 15 days after service of an answer. The Judge has discretion to dispense with the reply. No further responses are permitted.

§904.207 Amendment of pleading or record.

(a) A party may amend its pleading as a matter of course at least 20 days prior to a hearing. Within 20 days prior to a hearing a party may amend its pleading only by leave of the Judge or by written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period is longer, unless the Judge otherwise orders.

(b) The Judge, upon his or her own initiative or upon application by a party, may order a party to make a more definite statement of any pleading.

(c) Harmless errors in pleadings or elsewhere in the record may be corrected (by deletion or substitution of

words or figures), and broad discretion will be exercised by the Judge in permitting such corrections.

§ 904.208 Extensions of time.

If appropriate and justified, the Judge may grant any request for an extension of time. Requests for extensions of time must, except in extraordinary circumstances, be made in writing.

§ 904.209 Expedited administrative proceedings.

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite the administrative proceeding. A motion by a party to expedite the administrative proceeding may, at the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. Upon granting a motion to expedite the scheduling of an administrative proceeding, the Judge may expedite pleading schedules, prehearing conferences and the hearing, as appropriate. If a motion for an expedited administrative proceeding is granted, a hearing on the merits may not be scheduled with less than 5 business days notice, unless all parties consent to an earlier hearing.

§ 904.210 Summary decision.

The Judge may render a summary decision disposing of all or part of the administrative proceeding if:

(a) Jointly requested by every party to the administrative proceeding; and

(b) There is no genuine issue as to any material fact and a party is entitled to summary decision as a matter of law.

§ 904.211 Failure to appear.

(a) If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to:

(1) Dismiss the case with prejudice, where the Agency is a non-appearing party; or

(2) Where the respondents have failed to appear, find the facts as alleged in the NOVA, NOPS and/or NIDP and enter a default judgment against the respondents.

(b) Following an order of default judgment, a non-appearing party may file a petition for reconsideration, in accordance with § 904.272. Only petitions citing reasons for non-appearance, as opposed to arguing the merits of the case, will be considered.

(c) The Judge will place in the record all the facts concerning the issuance and service of the notice of time and place of hearing.

(d) The Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.

(e) Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision.

§ 904.212 Failure to prosecute or defend.

(a) Whenever the record discloses the failure of any party to file documents, respond to orders or notices from the Judge, or otherwise indicates an intention on the part of any party not to participate further in the administrative proceeding, the Judge may issue:

(1) An order requiring any party to show why the matter that is the subject of the failure to respond should not be disposed of adversely to that party's interest;

(2) An order requiring any party to certify intent to appear at any scheduled hearing; or

(3) Any order, except dismissal, as is necessary for the just and expeditious resolution of the case.

(b) [Reserved]

§ 904.213 Settlements.

If settlement is reached before the Judge has certified the record, the Judge shall remove the case from the docket upon notification by the Agency.

§ 904.214 Stipulations.

The parties may, by stipulation, agree upon any matters involved in the administrative proceeding and include such stipulations in the record with the consent of the Judge. Written stipulations must be signed and served upon all parties.

§904.215 Consolidation.

The Chief Administrative Law Judge may order that two or more administrative proceedings that involve substantially the same parties or the same issues be consolidated and/or heard together, either upon request of a party or *sua sponte*.

§904.216 Prehearing conferences.

(a) Prior to any hearing or at any other time deemed appropriate, the Judge may, upon his or her own initiative, or upon the application of any party, direct the parties to appear for a conference or arrange a telephone conference. The Judge shall provide at least 24 hours notice of the conference to the parties, and shall record such conference by audio recording or court reporter, to consider:

(1) Simplification or clarification of the issues or settlement of the case by consent;

(2) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate the discovery process;

(4) Limitation of the number of expert witnesses or other avoidance of cumulative evidence;

(5) The procedure, course, and conduct of the administrative proceeding;

(6) The distribution to the parties and the Judge prior to the hearing of written testimony and exhibits in order to expedite the hearing; or

(7) Such other matters as may aid in the disposition of the administrative proceeding, including the status of settlement discussions.

(b) The Judge in his or her discretion may issue an order showing the matters disposed of in such conference, and shall provide a transcript of the conference upon the request of a party.

DISCOVERY

§904.240 Discovery generally.

(a) *Preliminary position on issues and procedures (PPIP).* Prior to hearing the Judge will ordinarily require the parties to submit a written PPIP. Except for information regarding a respondent's ability to pay an assessed civil penalty, this PPIP will normally obviate the need for further discovery.

(1) The PPIP shall include the following information: A factual summary of the case; a summary of all factual and legal issues in dispute; a list of all defenses that will be asserted, together with a summary of all factual and legal bases supporting each defense; a list of all potential witnesses, together with a summary of their anticipated testimony; and a list of all potential exhibits.

(2) The PPIP shall be signed by the party and by an attorney, if one is retained. The PPIP shall be served upon all parties, along with a copy of each potential exhibit listed in the PPIP.

(3) A party has the affirmative obligation to supplement the PPIP as available information or documentation relevant to the stated charges or defenses becomes known to the party.

(b) *Additional discovery.* Upon written motion by a party, the Judge may allow additional discovery only upon a showing of relevance, need, and reasonable scope of the evidence sought, by one or more of the following methods: Deposition upon oral examination or written questions, written interrogatories, production of documents or things for inspection and other purposes, and requests for admission. With respect to information regarding a respondent's ability to pay an assessed civil penalty, the Agency may serve any discovery request (*i.e.*, deposition, interrogatories, admissions, production of documents) directly upon the respondent without first seeking an order from the Judge.

(c) *Time limits.* Motions for depositions, interrogatories, admissions, or production of documents or things may not be filed within 20 days of the hearing except on order of the Judge for good cause shown. Oppositions to a discovery motion must be filed within 10 days of service unless otherwise provided in these rules or by the Judge.

(d) *Oppositions.* Oppositions to any discovery motion or portion thereof must state with particularity the grounds relied upon. Failure to object in a timely fashion constitutes waiver of the objection.

(e) *Scope of discovery*. The Judge may limit the scope, subject matter, method, time, or place of discovery. Unless otherwise limited by order of the Judge, the scope of discovery is as follows:

(1) *In general*. As allowed under paragraph (b) of this section, parties may obtain discovery of any matter, not privileged, that is relevant to the allegations of the charging document, to the proposed relief, or to the defenses of any respondent, or that appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Hearing preparation: Materials*. A party may not obtain discovery of materials prepared in anticipation of litigation except upon a showing that the party seeking discovery has a substantial need for the materials in preparation of his or her case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party are not discoverable under this section.

(3) *Hearing preparation: Experts*. A party may discover the substance of the facts and opinions to which an expert witness is expected to testify and a summary of the grounds for each opinion. A party may also discover facts known or opinions held by an expert consulted by another party in anticipation of litigation but not expected to be called as a witness upon a showing of exceptional circumstances making it impracticable for the party seeking discovery to obtain such facts or opinions by other means.

(f) *Failure to comply*. If a party fails to comply with any provision of this section, including any PPIP, subpoena or order concerning discovery, the Judge may, in the interest of justice:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that the matter or matters covered by the order or subpoena are established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or

(5) Strike part or all of a pleading (except a request for hearing), a motion or other submission by the party, concerning the matter or matters covered by the order or subpoena.

§ 904.241 Depositions.

(a) *Notice*. If a motion for deposition is granted, and unless otherwise ordered by the Judge, the party taking the deposition of any person must serve on that person and on any other party written notice at least 15 days before the deposition would be taken (or 25 days if the deposition is to be taken outside the United States). The notice must state the name and address of each person to be examined, the time and place where the examination would be held, the name and mailing address of the person before whom the deposition would be taken, and the subject matter about which each person would be examined.

(b) *Taking the deposition*. Depositions may be taken before any officer authorized to administer oaths by the law of the United States or of the place where the examination is to be held, or before a person appointed by the Judge. Each deponent will be sworn, and any party has the right to cross-examine. Objections are not waived by failure to make them during the deposition unless the ground of the objection is one that might have been removed if presented at that time. The deposition will be recorded, transcribed, signed by the deponent, unless waived, and certified by the officer before whom the deposition was taken. All transcription costs associated with the testimony of a deponent will be borne by the party seeking the deposition. Each party will bear its own expense for any copies of the transcript. See also § 904.252(a).

(c) *Alternative deposition methods*. By order of the Judge, the parties may use other methods of deposing parties or

witnesses, such as telephonic depositions or depositions upon written questions. Objections to the form of written questions are waived unless made within 5 days of service of the questions.

(d) *Use of depositions at hearing.* (1) At hearing, part or all of any deposition, so far as admissible under the rules of evidence applied as though the witness were then testifying, may be used against any party who was present or represented at the taking of the deposition or had reasonable notice.

(2) The deposition of a witness may be used by any party for any purpose if the Judge finds:

(i) That the witness is unable to attend due to death, age, health, imprisonment, disappearance or distance from the hearing site; or

(ii) That exceptional circumstances make it desirable, in the interest of justice, to allow the deposition to be used.

(3) If only part of a deposition is offered in evidence by a party, any party may introduce any other part.

§ 904.242 Interrogatories.

(a) *Use at hearing.* If ordered by the Judge, any party may serve upon any other party written interrogatories. Answers may be used at hearing in the same manner as depositions under § 904.241(d).

(b) *Answers and objections.* Answers and objections must be made in writing under oath, and reasons for the objections must be stated. Answers must be signed by the person making them and objections must be signed by the party or attorney making them. Unless otherwise ordered, answers and objections must be served on all parties within 20 days after service of the interrogatories.

(c) *Option to produce records.* Where the answer to an interrogatory may be ascertained from the records of the party upon whom the interrogatory is served, it is sufficient to specify such records and afford the party serving the interrogatories an opportunity to examine them.

§ 904.243 Admissions.

(a) *Request.* If ordered by the Judge, any party may serve on any other party a written request for admission of the truth of any relevant matter of fact set forth in the request, including the genuineness of any relevant document described in the request. Copies of documents must be served with the request. Each matter of which an admission is requested must be separately stated.

(b) *Response.* Each matter is admitted unless a written answer or objection is served within 20 days of service of the request, or within such other time as the Judge may allow. The answering party must specifically admit or deny each matter, or state the reasons why he or she cannot truthfully admit or deny it.

(c) *Effect of admission.* Any matter admitted is conclusively established unless the Judge on motion permits withdrawal or amendment of it for good cause shown.

§ 904.244 Production of documents and inspection.

(a) *Scope.* If ordered by the Judge, any party may serve on any other party a request to produce a copy of any document or specifically designated category of documents, or to inspect, copy, photograph, or test any such document or tangible thing in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request must set forth:

(1) The items to be produced or inspected by item or by category, described with reasonable particularity, and

(2) A reasonable time, place, and manner for inspection. The party upon whom the request is served must serve within 20 days a response or objections, which must address each item or category and include copies of the requested documents.

§ 904.245 Subpoenas.

(a) *In general.* Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence for the purpose of discovery or hearing may be issued as authorized by the statute under which the proceeding is conducted.

(b) *Timing.* Applications for subpoenas must be submitted at least 15

days before the scheduled hearing or deposition.

(c) *Motions to quash.* Any person to whom a subpoena is directed or any party may move to quash or limit the subpoena within 10 days of its service or on or before the time specified for compliance, whichever is shorter. The Judge may quash or modify the subpoena.

(d) *Enforcement.* In case of disobedience to a subpoena, the requesting party may request the U.S. Department of Justice to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

HEARINGS

§ 904.250 Notice of time and place of hearing.

(a) The Judge shall be responsible for scheduling the hearing. With due regard for the convenience of the parties, their representatives, or witnesses, the Judge shall fix the time, place and date for the hearing and shall notify all parties of the same. The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not be held less than 20 days after service of the notice of hearing unless the hearing is expedited as provided under paragraph (c) of this section.

(b) A request for a change in the time, place, or date of the hearing may be granted by the Judge.

(c) Upon the consent of each party to the administrative proceeding, the Judge may order that one or more issues be heard on submissions or affidavits if it appears that such issues may be resolved by means of written materials and that efficient disposition of those issues can be made without an in-person hearing.

(d) At any time after commencement of an administrative proceeding, any party may move to expedite the scheduling of the administrative proceeding as provided in § 904.209.

§ 904.251 Evidence.

(a) *In general.* (1) At the hearing, every party has the right to present oral or documentary evidence in support of its case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph may not be interpreted to diminish the powers and duties of the Judge under § 904.204.

(2) All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such.

(3) In any case involving a charged violation of law in which the respondent has admitted an allegation, evidence may be taken to establish matters of aggravation or mitigation.

(b) *Objections and offers of proof.* (1) A party shall state the grounds for objection to the admission or exclusion of evidence. Rulings on all objections shall appear in the record. Only objections made before the Judge may be raised on appeal.

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record.

(c) *Testimony.* (1) Testimony may be received into evidence by the following means:

(i) Oral presentation; and

(ii) Subject to the discretion of the Judge, written affidavit, telephone, video or other electronic media.

(2) Regardless of form, all testimony shall be under oath or affirmation requiring the witness to declare that the witness will testify truthfully, and subject to cross examination.

(d) *Exhibits and documents.* (1) All exhibits shall be numbered and marked with a designation identifying the sponsor. To prove the content of an exhibit, the original writing, recording or photograph is required except that a duplicate or copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or, given the circumstances, it would be unfair to admit the duplicate in lieu of the original. The original is not required, and other evidence of the contents of a

writing, recording, or photograph is admissible if the original is lost or destroyed, not obtainable, in the possession of the opponent, or not closely related to a controlling issue. Each exhibit offered in evidence or marked for identification shall be filed and retained in the record of decision, unless the Judge permits the substitution of copies for the original document.

(2) In addition to the requirements set forth in §904.240(a)(2), parties shall exchange all remaining exhibits that will be offered at hearing prior to the beginning of the hearing, except for good cause or as otherwise directed by the Judge. Exhibits that are not exchanged as required may be denied admission into evidence. This requirement does not apply to demonstrative evidence.

(e) *Physical evidence.* (1) Photographs or videos or other electronic media may be substituted for physical evidence at the discretion of the Judge.

(2) Except upon the Judge's order, or upon request by a party, physical evidence will be retained after the hearing by the Agency.

(f) *Stipulations.* The parties may, by written stipulation at any stage of the administrative proceeding or orally at the hearing, agree upon any matters. Stipulations may be received in evidence before or during the hearing and, when received in evidence, shall be binding on the parties to the stipulation.

(g) *Official notice.* The Judge may take official notice of such matters as might be judicially noticed by the courts or of other facts within the specialized knowledge of the agency as an expert body. Where a decision or part thereof rests on official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

(h) *Confidential and sensitive information.* (1) The Judge may limit introduction of evidence or issue protective orders that are required to prevent undue disclosure of classified, confidential, or sensitive matters, which include, but are not limited to, matters of a national security, business, personal, or proprietary nature. Where the Judge determines that information in documents containing classified, confidential, or sensitive matters should be made available to another party, the Judge may direct the offering party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(2) If the Judge determines that the procedure described in paragraph (h)(1) of this section is inadequate and that classified or otherwise sensitive matters must form part of the record in order to avoid prejudice to a party, the Judge may advise the parties and provide opportunity for arrangements to permit a party or representative to have access to such matters.

(i) *Foreign law.* (1) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

(2) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name and qualifications of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

§904.252 Witnesses.

(a) *Fees.* Witnesses, other than employees of a Federal agency, summoned in an administrative proceeding, including discovery, shall receive the same fees and mileage as witnesses in the courts of the United States.

(b) *Witness counsel.* Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(c) *Witness exclusion.* Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony. An authorized officer is considered a party for the purposes of this subsection.

(d) *Oath or affirmation.* Witnesses shall testify under oath or affirmation

requiring the witness to declare that the witness will testify truthfully.

(e) *Failure or refusal to testify.* If a witness fails or refuses to testify, the failure or refusal to answer any question found by the Judge to be proper may be grounds for striking all or part of the testimony given by the witness, or any other action deemed appropriate by the Judge.

(f) *Testimony in a foreign language.* If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter should be court certified under 28 U.S.C. 1827.

§ 904.253 Closing of record.

At the conclusion of the hearing, the evidentiary record shall be closed unless the Judge directs otherwise. Once the record is closed, no additional evidence shall be accepted except upon a showing that the evidence is material and that there was good cause for failure to produce it in a timely fashion. The Judge shall reflect in the record, however, any approved correction to the transcript.

§ 904.254 Interlocutory review.

(a) Application for interlocutory review shall be made to the Judge. The application shall not be certified to the Administrator except when the Judge determines that:

(1) The ruling involves a dispositive question of law or policy about which there is substantial ground for difference of opinion; or

(2) An immediate ruling will materially advance the completion of the proceeding; or

(3) The denial of an immediate ruling will cause irreparable harm to a party or the public.

(b) Any application for interlocutory review shall:

(1) Be filed with the Judge within 30 days after the Judge's ruling;

(2) Designate the ruling or part thereof from which appeal is being taken;

(3) Set forth the ground on which the appeal lies; and

(4) Present the points of fact and law relied upon in support of the position taken.

(c) Any party that opposes the application may file a response within 20 days after service of the application.

(d) The certification to the Administrator by the Judge shall stay proceedings before the Judge until the matter under interlocutory review is decided.

§ 904.255 *Ex parte* communications.

(a) Except to the extent required for disposition of *ex parte* matters as authorized by law, the Judge may not consult a person or party on any matter relevant to the merits of the administrative proceeding, unless there has been notice and opportunity for all parties to participate.

(b) Except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No interested person outside the Agency shall make or knowingly cause to be made to the Judge, the Administrator, or any Agency employee who is or may reasonably be expected to be involved in the decisional process of the administrative proceeding an *ex parte* communication relevant to the merits of the adjudication; and

(2) Neither the Administrator, the Judge, nor any Agency employee who is or may reasonably be expected to be involved in the decisional process of the administrative proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the administrative proceeding.

(c) The Administrator, the Judge, or any Agency employee who is or may reasonably be expected to be involved in the decisional process who receives, makes, or knowingly causes to be made a communication prohibited by this rule shall place in the record of decision:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in

paragraphs (c)(1) and (c)(2) of this section.

(d)(1) Paragraphs (a), (b) and (c) of this section do not apply to communications concerning national defense or foreign policy matters. Such *ex parte* communications to or from an Agency employee on national defense or foreign policy matters, or from employees of the U.S. Government involving intergovernmental negotiations, are allowed if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) *Ex parte* communications subject to this paragraph will be made a part of the record to the extent that they do not include information classified under an Executive order. Classified information will be included in a classified portion of the record that will be available for review only in accordance with applicable law.

(e) Upon receipt of a communication made, or knowingly caused to be made, by a party in violation of this section the Judge may, to the extent consistent with the interests of justice, national security, the policy of underlying statutes, require the party to show cause why its claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such violation.

(f) The prohibitions of this rule shall apply beginning after issuance of a NOVA, NOPS, NIDP or any other notice and until a final administrative decision is rendered, but in no event shall they begin to apply later than the time at which an administrative proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of her/his acquisition of such knowledge.

POST-HEARING

§904.260 Recordation of hearing.

(a) All hearings shall be recorded.

(b) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the ALJ Docketing Center. Transcripts of testimony will be available in any hearing and will be supplied to the parties at the cost of the Agency.

(c) The Judge may determine whether ''ordinary copy'', ''daily copy'', or other copy (as those terms are defined by contract) will be necessary and required for the proper conduct of the administrative proceeding.

§904.261 Post-hearing briefs.

(a) The parties may file post-hearing briefs that include proposed findings of fact and conclusions of law within 30 days from service of the hearing transcript. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond.

(b) The Judge, in his or her discretion, may establish a different date for filing either initial briefs or reply briefs with the court.

(c) In cases involving few parties, limited issues, and short hearings, the Judge may require or a party may request that any proposed findings and conclusions and reasons in support be presented orally at the close of a hearing. In granting such cases, the Judge will advise the parties in advance of hearing.

DECISION

§904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of testimony and administrative proceedings; exhibits admitted into evidence; briefs, pleadings, and other documents filed in the administrative proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the administrative proceeding. Any other exhibits and records of any *ex parte* communications will accompany the record of decision.

(b) The Judge will arrange for appropriate storage of the records of any administrative proceeding, which place of storage need not necessarily be located physically within the ALJ Docketing Center.

§904.271 Initial decision.

(a) After expiration of the period provided in §904.261 for the filing of reply

briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision

is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's

decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.

Subpart D—Permit Sanctions and Denials

GENERAL

§ 904.300 Scope and applicability.

(a) This subpart sets forth procedures governing the suspension, revocation, modification, and denial of permits for reasons relating to enforcement of the statutes cited in § 904.1(c), except for the statutes listed in paragraph (b) of this section. Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement. As appropriate, and unless otherwise specified in this subpart, the provisions of subparts A, B, and C of this part apply to this subpart.

(b) Regulations governing sanctions and denials of permits issued under the Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401 *et seq.*) appear at 15 CFR part 970.

§ 904.301 Bases for permit sanctions or denials.

(a) Unless otherwise specified in a settlement agreement, or otherwise provided in this subpart, NOAA may take action under this subpart with respect to any permit issued under the statutes cited in § 904.1(c). The bases for an action to sanction or deny a permit include but are not limited to the following:

(1) The commission of any violation prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder, by the permit holder or with the use of a permitted vessel;

(2) The failure to pay a civil penalty assessed under subparts B and C of this part;

(3) The failure to pay a criminal fine imposed or to satisfy any other liability incurred in a judicial proceeding under any of the statutes administered by NOAA; or

(4) The failure to comply with any term of a settlement agreement.

(b) A permit sanction may be imposed, or a permit denied, under this subpart with respect to the particular permit pertaining to the violation or nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder or successor in interest to the permit, including permits for other activities or for other vessels. Examples of the application of this policy are the following:

(1) NOAA suspends Vessel A's fishing permit for nonpayment of a civil penalty pertaining to Vessel A. The owner of Vessel A buys Vessel B and applies for a permit for Vessel B to participate in the same or a different fishery. NOAA may withhold that permit until the sanction against Vessel A is lifted.

(2) NOAA revokes a Marine Mammal Protection Act permit for violation of its conditions. The permit holder subsequently applies for a permit under the Endangered Species Act. NOAA may deny the ESA application.

(3) Captain X, an officer in Country Y's fishing fleet, is found guilty of assaulting an enforcement officer. NOAA

may impose a condition on the permits of Country Y's vessels that they may not fish in the Exclusive Economic Zone with Captain X aboard. (See §904.320(c)).

(c) A permit sanction may not be extinguished by sale or transfer. A vessel's permit sanction is not extinguished by sale or transfer of the vessel, nor by dissolution or reincorporation of a vessel owner corporation, and shall remain with the vessel until lifted by NOAA.

§904.302 Notice of permit sanction (NOPS).

(a) A NOPS will be served on the permit holder as provided in §904.3. When a foreign fishing vessel is involved, service will be made on the agent authorized to receive and respond to any legal process for vessels of that country.

(b) The NOPS will set forth the permit sanction to be imposed, the bases for the permit sanction, and any opportunity for a hearing. It will state the effective date of the permit sanction, which will ordinarily not be earlier than 30 days after the date of receipt of the NOPS (see §904.322).

(c) Upon demand by an authorized enforcement officer, a permit holder must surrender a permit against which a permit sanction has taken effect. The effectiveness of the permit sanction, however, does not depend on surrender of the permit.

§904.303 Notice of intent to deny permit (NIDP).

(a) NOAA may issue a NIDP if the permit applicant has been charged with a violation of a statute, regulation, or permit administered by NOAA, for failure to pay a civil penalty or criminal fine, or for failure to comply with any term of a settlement agreement.

(b) The NIDP will set forth the basis for its issuance and any opportunity for a hearing, and will be served in accordance with §904.3.

(c) NOAA will not refund any fee(s) submitted with a permit application if a NIDP is issued.

(d) A NIDP may be issued in conjunction with or independent of a NOPS. Nothing in this section should be interpreted to preclude NOAA from initiating a permit sanction action following issuance of the permit, or from withholding a permit under §904.310(c) or §904.320.

§904.304 Opportunity for hearing.

(a) Except as provided in paragraph (b) of this section, the recipient of a NOPS or NIDP will be provided an opportunity for a hearing, as governed by §904.201.

(b) There will be no opportunity for a hearing if, with respect to the violation that forms the basis for the NOPS or NIDP, the permit holder had a previous opportunity to participate as a party in an administrative or judicial proceeding, whether or not the permit holder did participate, and whether or not such a hearing was held.

§904.305 Final administrative decision.

(a) If no request for hearing is timely filed as provided in §904.201(a), the NOPS or NIDP becomes effective as the final administrative decision and order of NOAA 30 days after service of the NOPS or NIDP or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with §904.201(a), the date of the final administrative decision is as provided in subpart C of this part.

PERMIT SANCTIONS FOR NONCOMPLIANCE

§904.310 Nature of permit sanctions.

(a) NOAA may suspend, modify, or deny a permit if:

(1) A civil penalty has been assessed against the permit holder under subparts B and C of this part, but the permit holder has failed to pay the civil penalty, or has failed to comply with any term of a settlement agreement; or

(2) A criminal fine or other liability for violation of any of the statutes administered by NOAA has been imposed against the permit holder in a judicial proceeding, but payment has not been made.

(b) NOAA will suspend any permit issued to a foreign fishing vessel under section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act under the circumstances set forth in paragraph (a) of this section.

(c) NOAA will withhold any other permit for which the permit holder applies if either of the conditions in paragraph (a) of this section is applicable.

§ 904.311 Compliance.

If the permit holder pays the criminal fine or civil penalty in full or agrees to terms satisfactory to NOAA for payment:

(a) The suspension will not take effect;

(b) Any permit suspended under § 904.310 will be reinstated by order of NOAA; or

(c) Any application by the permit holder may be granted if the permit holder is otherwise qualified to receive the permit.

PERMIT SANCTION FOR VIOLATIONS

§ 904.320 Nature of permit sanctions.

Subject to the requirements of this subpart, NOAA may take any of the following actions or combination of actions if a permit holder or permitted vessel violates a statute administered by NOAA, or any regulation promulgated or permit condition prescribed thereunder:

(a) *Revocation*. A permit may be cancelled, with or without prejudice to issuance of the permit in the future. Additional requirements for issuance of any future permit may be imposed.

(b) *Suspension*. A permit may be suspended either for a specified period of time or until stated requirements are met, or both. If contingent on stated requirements being met, the suspension is with prejudice to issuance of any permit until the requirements are met.

(c) *Modification*. A permit may be modified, as by imposing additional conditions and restrictions. If the permit was issued for a foreign fishing vessel under section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, additional conditions and restrictions may be imposed on the application of the foreign nation involved and on any permits issued under such application.

§ 904.321 Reinstatement of permit.

(a) A permit suspended for a specified period of time will be reinstated automatically at the end of the period.

(b) A permit suspended until stated requirements are met will be reinstated only by order of NOAA.

§ 904.322 Interim action.

(a) To protect marine resources during the pendency of an action under this subpart, in cases of willfulness, or as otherwise required in the interest of public health, welfare, or safety, a Judge may order immediate suspension, modification, or withholding of a permit until a decision is made on the action proposed in a NOPS or NIDP.

(b) The Judge will order interim action under paragraph (a) of this section, only after finding that there exists probable cause to believe that the violation charged in the NOPS or NIDP was committed. The Judge's finding of probable cause, which will be summarized in the order, may be made:

(1) After review of the factual basis of the alleged violation, following an opportunity for the parties to submit their views (orally or in writing, in the Judge's discretion); or

(2) By adoption of an equivalent finding of probable cause or an admission in any administrative or judicial proceeding to which the recipient of the NOPS or NIDP was a party, including, but not limited to, a hearing to arrest or set bond for a vessel in a civil forfeiture action or an arraignment or other hearing in a criminal action. Adoption of a finding or admission under this paragraph may be made only after the Judge reviews pertinent portions of the transcript or other records, documents, or pleadings from the other proceeding.

(c) An order for interim action under paragraph (a) of this section is unappealable and will remain in effect until a decision is made on the NOPS or NIDP. Where such interim action has been taken, the Judge will expedite any hearing requested under § 904.304.

Subpart E—Written Warnings

§904.400 Purpose and scope.

This subpart sets forth the policy and procedures governing the issuance and use of written warnings by persons authorized to enforce the statutes administered by NOAA, and the review of such warnings. A written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for violation of any of the laws cited in §904.1(c).

§904.401 Written warning as a prior violation.

A written warning may be used as a basis for dealing more severely with a subsequent violation, including, but not limited to, a violation of the same statute or a violation involving an activity that is related to the prior violation.

§904.402 Procedures.

(a) Any person authorized to enforce the laws listed in §904.1(c) or Agency counsel may issue a written warning to a respondent as provided in §904.3.

(b) The written warning will:

(1) State that it is a ''written warning'';

(2) State the factual and statutory or regulatory basis for its issuance;

(3) Advise the respondent of its effect in the event of a future violation; and

(4) Inform the respondent of the right of review and appeal under §904.403.

(c) NOAA will maintain a record of written warnings that are issued.

(d) If, within 120 days of the date of the written warning, further investigation indicates that the violation is more serious than realized at the time the written warning was issued, or that the respondent previously committed a similar violation for which a written warning was issued or other enforcement action was taken, NOAA may withdraw the warning and commence other administrative or judicial proceedings.

§904.403 Review and appeal of a written warning.

(a) If a respondent receives a written warning from an authorized officer, the respondent may seek review by Agency counsel. The request for review must be in writing and must present the facts and circumstances that explain or deny the violation described in the written warning. The request for review must be filed at the NOAA Office of the Assistant General Counsel for Enforcement and Litigation, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910, within 60 days of receipt of the written warning. Agency counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the respondent of his or her determination. The Agency counsel's determination constitutes the final agency action, unless it is appealed pursuant to paragraph (b) of this section.

(b) If a respondent receives a written warning from Agency counsel, or receives a determination from Agency counsel affirming a written warning issued by an authorized officer, the respondent may appeal to the NOAA Deputy General Counsel. The appeal must be filed at the NOAA Office of the General Counsel, Herbert Hoover Office Building, 14th & Constitution Avenue, NW., Washington, DC 20230, within 60 days of receipt of the written warning issued by Agency counsel, or the determination from Agency counsel affirming a written warning issued by an authorized officer.

(1) An appeal from an Agency counsel issued written warning must be in writing and must present the facts and circumstances that explain or deny the violation described in the written warning.

(2) An appeal from an Agency counsel's determination affirming a written warning issued by an authorized officer must be in writing and include a copy of the Agency counsel's determination affirming the written warning.

(c) The NOAA Deputy General Counsel may, in his or her discretion, affirm, vacate, or modify the written warning and will notify the respondent of the determination. The NOAA Deputy General Counsel's determination constitutes the final agency action.

Subpart F—Seizure and Forfeiture Procedures

§ 904.500 Purpose and scope.

(a) This subpart sets forth procedures governing the release, abandonment, forfeiture, remission of forfeiture, or return of seized property (including property seized and held solely as evidence) that is subject to forfeiture under the various statutes administered by NOAA.

(b) Except as provided in this subpart, these regulations apply to all seized property subject to forfeiture under the statutes listed in subpart A of this part. This subpart is in addition to, and not in contradiction of, any special rules regarding seizure, holding or disposition of property seized under these statutes.

§ 904.501 Notice of seizure.

Within 60 days from the date of the seizure, NOAA will serve the Notice of Seizure as provided in § 904.3 to the owner or consignee, if known or easily ascertainable, or other party that the facts of record indicate has an interest in the seized property. In cases where the property is seized by a state or local law enforcement agency; a Notice of Seizure will be given in the above manner within 90 days from the date of the seizure. The Notice will describe the seized property and state the time, place and reason for the seizure, including the provisions of law alleged to have been violated. The Notice will inform each interested party of his or her right to file a claim to the seized property, and state a date by which a claim must be filed, which may not be less than 35 days after service of the Notice. The Notice may be combined with a Notice of the sale of perishable fish issued under § 904.505. If a claim is filed the case will be referred promptly to the U.S. Department of Justice for institution of judicial proceedings.

§ 904.502 Bonded release of seized property.

(a) As authorized by applicable statute, at any time after seizure of any property, NOAA may, in its sole discretion, release any seized property upon deposit with NOAA of the full value of the property or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. In addition, NOAA may, in its sole discretion, accept a bond or other security in place of fish, wildlife, or other property seized. The bond will contain such conditions as NOAA deems appropriate.

(b) Property may be released under this section only if possession thereof will not violate or frustrate the purpose or policy of any applicable law or regulation. Property that will not be released includes, but is not limited to:

(1) Property in which NOAA is not satisfied that the requester has a substantial interest;

(2) Property whose entry into the commerce of the United States is prohibited;

(3) Live animals, except in the interest of the animals' welfare; or

(4) Property whose release appears to NOAA not to be in the best interest of the United States or serve the purposes of the applicable statute.

(c) If NOAA grants the request, the amount paid by the requester will be deposited in a NOAA expense account. The amount so deposited will for all purposes be considered to represent the property seized and subject to forfeiture, and payment of the amount by requester constitutes a waiver by requester of any claim rising from the seizure and custody of the property. NOAA will maintain the money so deposited pending further order of NOAA, order of a court, or disposition by applicable administrative proceedings.

(d) A request for release need not be in any particular form, but must set forth the following:

(1) A description of the property seized;

(2) The date and place of the seizure;

(3) The requester's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(4) The facts and circumstances relied upon by the requester to justify the remission or mitigation;

(5) An offer of payment to protect the United States' interest that requester makes in return for release;

(6) The signature of the requester, his or her attorney, or other authorized agent; and

(7) A request to defer administrative or judicial forfeiture proceedings until completion of all other related judicial or administrative proceedings (including any associated civil penalty or permit sanction proceedings).

§904.503 Appraisement.

NOAA will appraise seized property to determine its domestic value. Domestic value means the price at which such or similar property is offered for sale at the time and place of appraisement in the ordinary course of trade. If there is no market for the seized property at the place of appraisement, the value in the principal market nearest the place of appraisement will be used. If the seized property may not lawfully be sold in the United States, its domestic value will be determined by other reasonable means.

§904.504 Administrative forfeiture proceedings.

(a) *When authorized.* This section applies to property that is determined under §904.503 to have a value of $500,000 or less, and that is subject to administrative forfeiture under the applicable statute. This section does not apply to conveyances seized in connection with criminal proceedings.

(b) *Procedure.* (1) NOAA will publish a Notice of Proposed Forfeiture once a week for at least three successive weeks in a newspaper of general circulation in the Federal judicial district in which the property was seized. However, if the value of the seized property does not exceed $1,000, the Notice may be published by posting for at least three successive weeks in a conspicuous place accessible to the public at the National Marine Fisheries Service Enforcement Office, U.S. District Court, or the U.S. Customs House nearest the place of seizure, with the date of posting indicated on the Notice. In addition, a reasonable effort will be made to serve the Notice, as provided in §904.3, on each person whose identity, address and interest in the property are known or easily ascertainable.

(2) The Notice of Proposed Forfeiture will:

(i) Describe the seized property, including any applicable registration or serial numbers;

(ii) State the time, place and reason for the seizure, including the provisions of law allegedly violated; and

(iii) Describe the rights of an interested person to file a claim to the property (including the right to petition to remit or mitigate the forfeiture).

(3)(i) Except as provided in paragraph (b)(4) of this section, any person claiming the seized property may file a claim with NOAA, at the address indicated in the Notice, within 30 days of the date the final Notice was published or posted. The claim must state the claimant's interest in the property.

(ii) Filing a claim does not entitle the claimant to possession of the property. However, it does stop administrative forfeiture proceedings.

(iii) If the claim is timely filed in accordance with this section, NOAA will refer the matter to the U.S. Department of Justice to institute forfeiture proceedings in the appropriate U.S. District Court.

(4) If a claim is not filed within 30 days of the date the final Notice is published or posted in accordance with this section, NOAA will declare the property forfeited. The Declaration of Forfeiture will be in writing and will be served as provided in §904.3, on each person whose identity and address and prior interest in the seized property are known or easily ascertainable. The Declaration will describe the property and state the time, place, and reason for its seizure, including the provisions of law violated. The Declaration will identify the Notice of Proposed Forfeiture, describing the dates and manner of publication of the Notice and any efforts made to serve the Notice as provided in §904.3. The Declaration will state that in response to the Notice a proper claim was not timely received by the proper office from any claimant, and that therefore all potential claimants are deemed to admit the truth of the allegations of the Notice. The Declaration shall conclude with an order of condemnation and forfeiture of the property to the United States for disposition according to law. All forfeited property will be subject to disposition as authorized by law and regulations of NOAA.

(5) If the appraised value of the property is more than $500,000, or a timely

and satisfactory claim for property appraised at $500,000 or less is submitted to NOAA, the matter will be referred to the U.S. Department of Justice to institute *in rem* proceedings in the appropriate U.S. District Court.

§ 904.505 Summary sale.

(a) In view of the perishable nature of fish, any person authorized to enforce a statute administered by NOAA may, as authorized by law, sell or cause to be sold, and any person may purchase, for not less than its domestic fair market value, fish seized under such statute.

(b) Any person purchasing fish subject to this section must deliver the proceeds of the sale to a person authorized to enforce a statute administered by NOAA immediately upon request of such authorized person. Anyone who does not so deliver the proceeds may be subject to penalties under the applicable statute or statutes.

(c) NOAA will give Notice of the Sale as provided under § 904.3, to the owner or consignee, if known or easily ascertainable, or to any other party that the facts of record indicate has an interest in the seized fish, unless the owner or consignee or other interested party has otherwise been personally notified. Notice will be sent either prior to the sale, or as soon thereafter as practicable.

(d) The proceeds of the sale, after deducting any reasonable costs of the sale, will be subject to any administrative or judicial proceedings in the same manner as the seized fish would have been, including an action in rem for the forfeiture of the proceeds. Pending disposition of such proceedings, the proceeds will, as appropriate, either be deposited in a NOAA suspense account or submitted to the appropriate court.

(e) Seizure and sale of fish is without prejudice to any other remedy or sanction authorized by law.

§ 904.506 Remission of forfeiture and restoration of proceeds of sale.

(a) *Application of this section.* (1) This section establishes procedures for filing with NOAA a petition for relief from forfeitures incurred, or alleged to have been incurred, and from potential forfeiture of seized property, under any statute administered by NOAA that authorizes the remission or mitigation of forfeitures.

(2) Although NOAA may properly consider a petition for remission or mitigation of forfeiture and restoration of proceeds of sale along with other consequences of a violation, the remission or mitigation of a forfeiture and restoration of proceeds is not dispositive of any criminal charge filed, civil penalty assessed, or permit sanction proposed, unless NOAA expressly so states. Remission or mitigation of forfeiture and restoration of proceeds is in the nature of executive clemency and is granted in the sole discretion of NOAA only when consistent with the purposes of the particular statute involved and this section.

(3) If no petition is timely filed, or if the petition is denied, prior to depositing the proceeds NOAA may use the proceeds of sale to reimburse the U.S. Government for any costs that by law may be paid from such sums.

(4) If NOAA remits the forfeiture and the forfeited property has not been sold, then restoration may be conditioned upon payment of any applicable costs as defined in this subpart.

(b) *Petition for relief from forfeiture.* (1) Any person claiming an interest in any property which has been or may be administratively forfeited under the provisions of this section may, at any time after seizure of the property, but no later than 90 days after the date of forfeiture, petition the Assistant General Counsel for Enforcement and Litigation, NOAA/GCEL, 8484 Georgia Avenue, Suite 400, Silver Spring, Maryland 20910, for a remission or mitigation of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by the petitioner.

(2) The petition need not be in any particular form, but must set forth the following:

(i) A description of the property seized;

(ii) The date and place of the seizure;

(iii) The petitioner's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(iv) The facts and circumstances relied upon by the petitioner to justify

the remission or mitigation of forfeiture and restoration of proceeds. If the claim is made after the property is forfeited, the petitioner must provide satisfactory proof that the petitioner did not know of the seizure prior to the declaration or condemnation of forfeiture, was in such circumstances as prevented him or her from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to violate the applicable statute on the part of the petitioner; and

(v) The signature of the petitioner, his or her attorney, or other authorized agent.

(3) NOAA will not consider a petition for remission or mitigation of forfeiture and restoration of proceeds while a forfeiture proceeding is pending in Federal court. Once such a case is referred to the U.S. Department of Justice for institution of judicial proceedings, and until the proceedings are completed, any petition received by NOAA will be forwarded to the U.S. Department of Justice for consideration.

(4) A false statement in a petition will subject petitioner to prosecution under 18 U.S.C. 1001.

(c) *Investigation.* NOAA will investigate the facts and circumstances shown by the petition and seizure, and may in this respect appoint an investigator to examine the facts and prepare a report of investigation.

(d) *Determination of petition.* (1) After investigation under paragraph (c) of this section, NOAA will make a determination on the matter and notify the petitioner. NOAA may remit or mitigate the forfeiture, on such terms and conditions as are deemed reasonable and just under the applicable statute and the circumstances.

(2) Unless NOAA determines no valid purpose would be served, NOAA will condition a determination to remit or mitigate a forfeiture upon the petitioner's submission of an agreement, in a form satisfactory to NOAA, to hold the United States and its officers or agents harmless from any and all claims based on loss of or damage to the seized property or that might result from grant of remission or mitigation and restoration of proceeds. If the petitioner is not the beneficial owner of the property, or if there are others with a proprietary interest in the property, NOAA may require the petitioner to submit such an agreement executed by the beneficial owner or other interested party. NOAA may also require that the property be promptly exported from the United States.

(e) *Compliance with the determination.* A determination by NOAA to remit or mitigate the forfeiture and restore the proceeds upon stated conditions, as upon payment of a specified amount, will be effective for 60 days after the date of the determination. If the petitioner does not comply with the conditions within that period in a manner prescribed by the determination, or make arrangements satisfactory to NOAA for later compliance, the remission or mitigation and restoration of proceeds will be void, and judicial or administrative forfeiture proceedings will be instituted or resumed.

(f) *Appropriated property.* If forfeited property that is the subject of a claim for restoration of proceeds has been appropriated for official use, retention by the U.S. Government will be regarded as a sale for the purposes of this section.

§ 904.507 Recovery of certain storage costs.

If any fish, wildlife, or evidentiary property is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 through 1543, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling or storage of such property. If any fish or wildlife is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 through 3378, or any property is seized in connection with a violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 through 1882, any person convicted thereof, or assessed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, NOAA will send to such person by registered or certified mail, return receipt

requested, a bill for such fee. The bill will contain an itemized statement of the applicable costs, and instructions on the time and manner of payment. Payment must be made in accordance with the bill. If the recipient of the bill objects to the reasonableness of the costs assessed he or she may, within 30 days of receipt, file written objections with NOAA at the address stated in the bill. NOAA will promptly review the written objections and within 30 days mail the final determination to the party who filed them. NOAA's determination will constitute final agency action on the matter.

§ 904.508 Voluntary forfeiture by abandonment.

(a) The owner of seized property may voluntarily forfeit all right, title, and interest in the property by abandoning it to NOAA. Voluntary forfeiture by abandonment under this section may be accomplished by various means, including, but not limited to: expressly waiving any claim to the property by voluntarily relinquishing any right, title, and interest by written agreement or otherwise; or refusing or otherwise avoiding delivery of returned property; or failing to respond within 90 days of service of any certified or registered notice regarding a return of seized property issued under § 904.510(b).

(b) Property will be declared finally forfeited by abandonment, without recourse, upon a finding of abandonment by NOAA.

§ 904.509 Disposal of forfeited property.

(a) *Delivery to Administrator.* Upon forfeiture of any fish, wildlife, parts or products thereof, or other property to the United States, including the abandonment or waiver of any claim to any such property, it will be delivered to NOAA for storage or disposal according to the provisions of this section.

(b) *Disposal.* Disposal may be accomplished by one of the following means unless the property is the subject of a petition for remission or mitigation of forfeiture or disposed of by court order:

(1) Return to the wild;

(2) Use by NOAA or transfer to another government agency for official use;

(3) Donation or loan;

(4) Sale; or

(5) Destruction.

(c) *Purposes of disposal.* Disposal procedures may be used to alleviate overcrowding of evidence storage facilities; to avoid the accumulation of seized property where disposal is not otherwise accomplished by court order; to address the needs of governmental agencies and other institutions and organizations for such property for scientific, educational, and public display purposes; and for other valid reasons. In no case will property be used for personal purposes, either by loan recipients or government personnel.

(d) *Disposal of evidence.* Property that is evidence may be disposed of only after authorization by the NOAA Office of General Counsel. Disposal approval usually will not be given until the case involving the evidence is closed, except that perishable property may be authorized for disposal sooner.

(e) *Loans*—(1) *To institutions.* Property approved for disposal may be loaned to institutions or organizations requesting such property for scientific, educational, or public display purposes. Property will be loaned only after execution of a loan agreement which provides, among other things, that the loaned property will be used only for noncommercial scientific, educational, or public display purposes, and that it will remain the property of the U.S. Government, which may demand its return at any time. Parties requesting the loan of property must demonstrate the ability to provide adequate care and security for the property. Loans may be made to responsible agencies of foreign governments in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(2) *To individuals.* Property generally will not be loaned to individuals not affiliated with an institution or organization unless it is clear that the property will be used in a noncommercial manner, and for scientific, educational, or public display purposes which are in the public interest.

(3) *Selection of loan recipients.* Recipients of property will be chosen so as to

assure a wide distribution of the property throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first refusal of any property offered for disposal. The Administrator may solicit applications, by publication of a notice in the FEDERAL REGISTER, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific property for which transferees are being sought, and instructions on how and where to make application. Applications will be granted in the following order: other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

(4) *Loan agreement.* Property will be transferred under a loan agreement executed by the Administrator and the borrower. Any attempt on the part of the borrower to retransfer property, even to another institution for related purposes, will violate and invalidate the loan agreement, and entitle the United States to immediate repossession of the property, unless the prior approval of the Administrator has been obtained under §904.510(d)(5). Violation of the loan agreement may also subject the violator to the civil penalties provided by the laws governing possession and transfer of the property.

(5) *Temporary reloans; documents to accompany property.* Temporary reloans by the borrower to another qualified borrower (as for temporary exhibition) may be made if the Administrator is advised in advance by the borrowers. Temporary loans for more than thirty days must be approved in advance in writing by the Administrator. A copy of the original loan agreement, and a copy of the written approval for reloan, if any, must accompany the property whenever it is temporarily reloaned or is shipped or transported across state or international boundaries.

(f) *Sale.* (1) Any fish, wildlife, parts or products thereof, and other property which has been voluntarily forfeited by abandonment to NOAA may be sold or offered for sale, with the exception of any species or property which is otherwise prohibited from being sold at the time it is to be sold or offered for sale.

(2) Property will be sold in accordance with current Federal Property Management Regulations (41 CFR chapter 101) or U.S. Customs laws and regulations, except that NOAA may:

(i) Sell at fair market value perishable fish pursuant to the summary sales provisions of 15 CFR 904.505; and

(ii) Sell, destroy, or otherwise dispose of property for which it is determined the expense of keeping it is disproportionate to the value thereof.

(3) The proceeds of sale may be used to reimburse NOAA for any costs which by law NOAA is authorized to recover or to pay any rewards which by law may be paid from sums that NOAA receives.

(g) *Destruction.* (1) Property not otherwise disposed of may be destroyed.

(2) Destruction will be accomplished in accordance with the requirements of 41 CFR parts 101 through 145.

(3) When destroyed, the fact, manner, and date of destruction and the type and quantity destroyed must be certified by the official actually destroying the property.

(4) No duly authorized officer of NOAA shall be liable for the destruction or other disposition of property made pursuant to this section.

(h) *Recordkeeping.* A disposal form will be completed each time property is disposed of pursuant to the policy and procedure established herein, and will be retained in the case file for the property. These forms will be available to the public.

§904.510 Return of seized property.

(a) *Return.* In cases where NOAA, in its sole discretion, determines that forfeiture of seized property would not be in the best interest of the U.S. Government, NOAA will make a reasonable attempt to determine the party that the facts of record indicate has a predominant ownership interest in the seized property and, provided such a determination can be made, will arrange for return of the seized property to that party by appropriate means.

(b) *Notice.* NOAA will serve a Notice of the Return of property as provided by §904.3, to the owner, consignee, or other party the facts of record indicate has an interest in the seized property. The Notice will describe the seized property, state the time, place, and reason for the seizure and return, and will identify the owner or consignee, and if appropriate, the bailee of the seized property. The Notice of the return also will state that the party to whom the property is being returned is responsible for any distribution of the property to any party who holds a valid claim, right, title or interest in receiving the property, in whole or in part. The Notice also will provide that on presentation of the Notice and proper identification, and the signing of a receipt provided by NOAA, the seized property is authorized to be released.

PART 905—USE IN ENFORCEMENT PROCEEDINGS OF INFORMATION COLLECTED BY VOLUNTARY FISHERY DATA COLLECTORS

Sec.
905.1 Scope.
905.2 Definitions.
905.3 Access to information.
905.4 Use of information.
905.5 Exceptions.

AUTHORITY: 16 U.S.C. 1853(f).

SOURCE: 60 FR 39251, Aug. 2, 1995, unless otherwise noted.

§905.1 Scope.

This part applies to the use, in enforcement proceedings conducted pursuant to the Magnuson Act, the MMPA, and the ESA, of information collected by voluntary fishery data collectors.

§905.2 Definitions.

When used in this part:

Consenting owner means the owner, operator, or crewmember of a vessel carrying a voluntary fishery data collector.

Enforcement proceeding means any judicial or administrative trial or hearing, initiated for the purpose of imposing any civil or criminal penalty authorized under the Magnuson Act, MMPA, or ESA, including but not limited to, any proceeding initiated to: Impose a monetary penalty; modify, sanction, suspend or revoke a lease, license or permit; secure forfeiture of seized property; or incarcerate an individual.

ESA means the Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*, and implementing regulations.

Information means all observations, data, statistics, photographs, film, or recordings collected by a voluntary fishery data collector for conservation and management purposes, as defined by the Magnuson Act, MMPA, or ESA, while onboard the vessel of a consenting owner.

Magnuson Act means the Magnuson Fishery Conservation and Management Act, as amended, 16 U.S.C. 1801 *et seq.*, and implementing regulations.

MMPA means the Marine Mammal Protection Act, as amended, 16 U.S.C. 1361 *et seq.*, and implementing regulations.

Secretary means the Secretary of Commerce, the Secretary of the Interior, their chosen designees, or any other Federal agency authorized to enforce the provisions of the Magnuson Act, MMPA, or ESA.

Vessel means any vessel as defined at 16 U.S.C. 1802(31).

Voluntary fishery data collector means:

(1) Any person, including an observer or a sea sampler;

(2) Placed aboard a vessel by the Secretary;

(3) For the purpose of collecting information; and

(4) Whose presence aboard that vessel is not required by the Secretary pursuant to provisions of the Magnuson Act, MMPA, or ESA, or their implementing regulations.

§905.3 Access to information.

Information collected by a voluntary fishery data collector:

(a) Is subject to disclosure to both the Secretary and the public, to the extent required or authorized by law; and

(b) Is subject to discovery by any party to an enforcement proceeding, to the extent required or authorized by law.

§905.4 Use of information.

(a) Except as provided for in paragraph (b) of this section, information collected by a voluntary fishery data collector may not be introduced by the Secretary as evidence against any consenting owner that is a party to an enforcement proceeding.

(b) Provided that all applicable evidentiary requirements are satisfied:

(1) Information collected by a voluntary fishery data collector may be introduced in an enforcement proceeding by any party except the Secretary;

(2) If information is introduced pursuant to paragraph (b)(1) of this section, all information collected by a voluntary fishery data collector may be introduced by any other party, including the Secretary.

(c) Independent evidence derived from information collected by a voluntary fishery data collector may be introduced by any party, including the Secretary, in an enforcement proceeding.

§905.5 Exceptions.

The provisions of this part shall not apply in any enforcement proceeding against a consenting owner that alleges the actual or attempted:

(a) Assault, intimidation, or harassment (including sexual harassment) of any person; or

(b) Impairment or interference with the duties of a voluntary fishery data collector.

PART 908—MAINTAINING RECORDS AND SUBMITTING REPORTS ON WEATHER MODIFICATION ACTIVITIES

Sec.

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AUTHORITY: Pub. L. 92–305, 85 Stat. 735, December 18, 1971.

SOURCE: 41 FR 23394, June 10, 1976, unless otherwise noted.

§908.1 Definitions.

As used in this part, terms shall have the meaning ascribed in this section.

(a) *Administrator.* The Administrator of the National Oceanic and Atmospheric Administration.

(b) *Person.* Any individual, corporation, company, association, firm, partnership, society, joint stock company, any State or local government or any agency thereof, or any other organization, whether commercial or nonprofit, except where acting solely as an employee, agent, or independent contractor of the Federal government.

(c) *Weather modification activity.* Any activity performed with the intention of producing artificial changes in the composition, behavior, or dynamics of the atmosphere.

(d) *United States.* The several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or insular possession of the United States.

(e) *Persons whose activities relate to weather modification.* Persons engaged in weather modification activities or engaged in the distribution or sale of weather modification apparatus or materials known by them to be destined for use in weather modification activities.

(f) *Project.* A related series of weather modification activities having a common objective.

(g) *Target area.* The ground area within which the effects of the weather modification activity are expected to be found.

(h) *Control area.* A preselected, untreated ground area used for comparison with a target area.

(i) *Weather modification apparatus.* Any apparatus used with the intention of producing artificial changes in the composition, behavior, or dynamics of the atmosphere. For example: Seeding generators, propane devices, flares, rockets, artillery projectiles, jet engines, etc.

(j) *Sponsor.* The primary person for whom the weather modification activity is performed.

(k) *Operator.* The person who is primarily responsible for carrying out the weather modification activity.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.2 Persons subject to reporting.

Any person engaged or intending to engage in any weather modification activity in the United States shall be subject to the reporting provisions of this part.

§ 908.3 Activities subject to reporting.

(a) The following, when conducted as weather modification activities, shall be subject to reporting:

(1) Seeding or dispersing of any substance into clouds or fog, to alter drop size distribution, produce ice crystals or coagulation of droplets, alter the development of hail or lightning, or influence in any way the natural development cycle of clouds or their environment;

(2) Using fires or heat sources to influence convective circulation or to evaporate fog;

(3) Modifying the solar radiation exchange of the earth or clouds, through the release of gases, dusts, liquids, or aerosols into the atmosphere;

(4) Modifying the characteristics of land or water surfaces by dusting or treating with powders, liquid sprays, dyes, or other materials;

(5) Releasing electrically charged or radioactive particles, or ions, into the atmosphere;

(6) Applying shock waves, sonic energy sources, or other explosive or acoustic sources to the atmosphere;

(7) Using aircraft propeller downwash, jet wash, or other sources of artificial wind generation; or

(8) Using lasers or other sources of electromagnetic radiation.

(b) In addition to the activities listed above, other similar activities falling within the definition of weather modification as set forth in § 908.1 are also subject to reporting.

(c) The requirement for reporting shall not apply to activities of a purely local nature that can reasonably be expected not to modify the weather outside of the area of operation. This exception is presently restricted to the use of lightning deflection or static discharge devices in aircraft, boats, or buildings, and to the use of small heat sources, fans, fogging devices, aircraft downwash, or sprays to prevent the occurrence of frost in tracts or fields planted with crops susceptible to frost or freeze damage. Also expected from the requirement for reporting are religious activities or other ceremonies, rites and rituals intended to modify the weather.

(d) All activities noted in paragraphs (a) and (b) of this section are subject to initial reporting. However, after the Administrator has received initial notification of a planned activity, he may waive some of the subsequent reporting requirements. This decision to waive certain reporting requirements will be based on the general acceptability, from a technical or scientific viewpoint, of the apparatus and techniques to be used.

(e) Other reporting exceptions may be made in the future by rule of the Administrator.

§ 908.4 Initial report.

(a) Any person intending to engage in any weather modification project or activity in the United States shall provide a report of his intention, to be received by the Administrator at least 10 days before the commencement of such project or activity. This report shall contain at least the following:

(1) The designation, if any, used by the operator for the project or activity;

(2) The following dates for weather modification activities:

(i) The date the first actual weather modification activity is to be undertaken;

(ii) The date on which the final modification activity is expected to occur;

(3) The following information on persons involved with the project or activity:

(i) The name, affiliation, and address of the sponsor;

(ii) The name, affiliation, and address of the operator;

(4) The purpose of the project or activity;

(5) A map showing the approximate size and location of the target and control areas, and the location of each item of ground-based weather modification apparatus, precipitation measuring device, and, for airborne operations, the airport;

(6) A description of the weather modification apparatus, modification agents, and the techniques to be employed;

(7) The name and address of the responsible individual from whom log books or other records of the project or activity may be obtained;

(8) Answers to the following questions on project safeguards:

(i) Has an Environmental Impact Statement, Federal or State, been filed: Yes___ No ___. If Yes, please furnish a copy as applicable.

(ii) Have provisions been made to acquire the latest forecasts, advisories, warnings, etc. of the National Weather Service, Forest Service, or others when issued prior to and during operations? Yes ___ No ___. If Yes, please specify on a separate sheet.

(iii) Have any safety procedures (operational contraints, provisions for suspension of operations, monitoring methods, etc.) and any environmental guidelines (related to the possible effects of the operations) been included in the operational plans? Yes ___ No ___. If Yes, please furnish copies or a description of the specific procedures and guidelines; and

(9) Optional remarks, to include any additional items which the person deems significant or of interest and such other information as the Administrator may request the person to submit.

(b) If circumstances prevent the signing of a contract or agreement to perform, or receipt of an authorization to proceed with, a weather modification activity at a date early enough to comply with paragraph (a) of this section, the initial report shall be provided so as to be received by the Administrator within 10 days of the date of signing of the contract or agreement, or receipt of authorization to proceed. In such cases, the report shall be accompanied by an explanation as to why it was not submitted at least 10 days prior to the commencement of the activity.

(c) In the event that circumstances beyond the control of the person liable to report under these regulations prevent the submission of the initial report in a timely manner as described above, the report shall be forwarded as early as possible, accompanied by an explanation as to why a timely report has not been provided. If such explanation is deemed adequate, the Administrator will consider the report as timely filed.

§908.5 Interim reports.

(a) Any person engaged in a weather modification project or activity in the United States on January 1 in any year shall submit to the Administrator, not later than 45 days thereafter, an interim report setting forth as of such date the information required below with respect to any such continuing project or activity not previously furnished to the Administrator in a prior interim report; provided that the January 1 date shall not apply if other arrangements have previously been made with the written approval of the Administrator.

(b) The interim report shall include the file number assigned by the Administrator and shall provide a summary of the project or activity containing at least the following information for each month:

(1) Number of days on which actual modification activities took place;

(2) Number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities;

(3) Total number of hours of operation of each type of weather modification apparatus (*i.e.*, net hours of agent release);

(4) Total amount of agent used. If more than one agent was used, each should be totaled separately (e.g., carbon dioxide, sodium chloride, urea, silver iodide).

(c) The totals for the items in paragraph (b) of this section shall be provided for the period covered by the interim report.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.6 Final report.

Upon completion of a weather modification project or activity the person who performed the same shall submit a report to the Administrator not later than 45 days after completion of the project or activity. The report shall include the file number assigned by the Administrator and the following items:

(a) Information required for the interim reports (to the extent not previously reported).

(b) The total number of days on which actual modification activities took place during the project or activity.

(c) The total number of days during the project or activity on which weather modification activities were conducted, segregated by each of the major purposes of the activities.

(d) The total number of hours of operation of each type of weather modification apparatus during the project or activity (*i.e.*, net hours of agent release).

(e) The total amount of modification agent(s) dispensed during the project or activity. If more than one agent was used, each should be totaled separately (e.g., carbon dioxide, sodium chloride, urea, silver iodide).

(f) The date on which the final weather modification activity occurred.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.7 Supplemental reports.

Notwithstanding other regulations, a supplemental report in letter form referring to the appropriate NOAA file number, if assigned, must be made to the Administrator immediately if any report of weather modification activities submitted under § 908.4, § 908.5, or § 908.6 is found to contain any material inaccuracies, misstatements, and omissions. A supplemental report must also be made if there are changes in plans for the project or activity.

§ 908.8 Maintenance of records.

(a) Any person engaging in a weather modification activity in the United States shall maintain a record of such activity. This record shall contain at least the following, when applicable:

(1) A chronological record of activities carried on, preferably in the form of a daily log, which shall include the NOAA file number assigned to the project, the designation of each unit of weather modification apparatus, and at least the following information for each unit:

(i) Date of the weather modification activity.

(ii) Position of each aircraft or location of each item of weather modification apparatus during each modification mission. Maps may be used.

(iii) Time when weather modification activity began and ended.

(iv) Total duration of operation of each unit of weather modification apparatus (*i.e.*, net hours of agent release).

(v) Type of each modification agent used.

(vi) Rate of dispersal of each agent during the period of actual operation of weather modification apparatus.

(vii) Total amount of agent used. If more than one agent was used, report total for each type separately.

(viii) Number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities.

(2) The monthly totals of hours of modification activity, the amount of modification agent used, and the number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities, shall be shown on the daily log sheet for the last day of each month.

(b) When the activity involves ground-based weather modification apparatus, records of the following shall also be maintained, when applicable, but need not be made part of the daily log:

(1) The location of each item of weather modification apparatus in use and its identification such as type and manufacturer's model number. If the

apparatus is not commercially available, a brief description of the apparatus and the method of operation should be recorded.

(2) The name and address of the person responsible for operating each weather modification apparatus.

(3) The altitude and type of weather phenomenon subjected to weather modification activity during each operational period (e.g., cumulus clouds between 10,000 and 30,000 feet m.s.l.; ground fog).

(c) When the activity involves airborne weather modification apparatus, records of the following shall also be maintained, when applicable, but need not be made a part of the daily log: For each airborne weather modification apparatus run: Altitude, air speed; release points of modification agents, method of modification and characteristics of flares, rockets, or other delivery systems employed; temperature at release altitude; and, for aircraft: The type of aircraft, its identification number, the airport or airports used, and the names and addresses of crew members and the person responsible for operating the weather modification apparatus; and the altitude and type of weather phenomenon subjected to weather modification activity during each operational period (e.g., cumulus clouds between 10,000 and 30,000 feet m.s.l.; ground fog).

(d) The following records shall also be maintained, whenever applicable, but need not be made a part of the daily log. Only data specifically collected for the reported activity need be retained; data available from other sources need not be included.

(1) Any descriptions that were recorded of meteorological condiitons in target and control areas during the periods of operation; for example: Percent of cloud cover, temperature, humidity, the presence of lightning, hail, funnel clouds, heavy rain or snow, and unusual radar patterns.

(2) All measurements made of precipitation in target and control areas.

(3) Any unusual results.

§ 908.9 Retention of records.

Records required under § 908.8 shall be retained and available for inspection by the Administrator or his designated representatives for 3 years after completion of the activity to which they relate. Such records shall be required to be produced for inspection only at the place where normally kept. The Administrator shall have the right to make copies of such records, if he or she deems necessary.

[52 FR 4896, Feb. 18, 1987]

§ 908.10 Penalties.

Knowing and willful violation of any rule adopted under the authority of section 2 of Public Law 92–205 shall subject the person violating such rule to a fine of not more than $10,000, upon conviction thereof.

§ 908.11 Maintenance of records of related activities.

(a) Persons whose activities relate to weather modification activities, other than persons engaged in weather modification activities, shall maintain records concerning the identities of purchasers or users of weather modification apparatus or materials, the quantities or numbers of items purchased, and the times of such purchases. Such information shall be retained for at least 3 years.

(b) In addition, persons whose activities relate to weather modification shall be required, under the authority of section 4 of Public Law 92–205, to provide the Administrator, on his request, with information he deems necessary to carry out the purposes of this act.

[41 FR 23394, June 10, 1976, as amended at 52 FR 4896, Feb. 18, 1987]

§ 908.12 Public disclosure of information.

(a) Any records or other information obtained by the Administrator under these rules or otherwise under the authority of Public Law 92–205 shall be made publicly available to the fullest practicable extent. Such records or information may be inspected on written request to the Administrator. However, the Administrator will not disclose any information referred to in section 1905 of title 18, United States Code, and that is otherwise unavailable to the public, except that such information shall be disclosed:

(1) To other Federal government departments, agencies, and officials for official use upon request;

(2) In any judicial proceeding under a court order formulated to preserve the confidentiality of such information without impairing the proceeding; and

(3) To the public, if necessary to protect their health and safety.

(b) Certified copies of such reports and information, to the extent publicly disclosable, may be obtained from the Administrator at cost in accordance with the Department of Commerce implementation of the Freedom of Information Act.

(c) Persons reporting on weather modification projects or related activities shall specifically identify all information that they consider not to be subject to public disclosure under the terms of Public Law 92–205 and provide reasons in support thereof. A determination as to whether or not reported information is subject to public dissemination shall be made by the Administrator.

(d) When consideration of a weather modification activity report and related information indicates that a proposed project may significantly depart from the practices or procedures generally employed in similar circumstances to avoid danger to persons, property, or the environment, or indicates that success of Federal research projects may be adversely affected if the proposed project is carried out as described, the Administrator will notify the operator(s) and State officials of such possibility and make recommendations where appropriate. The purpose of such notification shall be to inform those notified of existing practices and procedures or Federal research projects known to NOAA. Notification or recommendation, or failure to notify or recommend, shall not be construed as approval or disapproval of a proposed project or as an indication that, if carried out as proposed or recommended it may, in any way, protect or endanger persons, property, or the environment or affect the success of any Federal research project. Any advisory notification issued by the Administrator shall be available to the public and be included in the pertinent activity report file.

§ 908.13 Address of letters.

Letters and other communications intended for the Administrator, in connection with weather modification reporting or activities, shall be addressed to: The Administrator, National Oceanic and Atmospheric Administration, Environmental Modification Office, Rockville, Md. 20852.

§ 908.14 Business to be transacted in writing.

All business transacted with the National Oceanic and Atmospheric Administration with regard to reports of weather modification activities should be transacted in writing. Actions of the National Oceanic and Atmospheric Administration will be based exclusively on the written record.

§ 908.15 Times for taking action; expiration on Saturday, Sunday, or holiday.

Whenever periods of time are specified in these rules in days, calendar days are intended. When the day, or the last day, fixed under these rules for taking any action falls on a Saturday, Sunday, or on a Federal holiday, the action may be taken on the next succeeding day which is not a Saturday, Sunday, or Federal holiday.

§ 908.16 Signature.

All reports filed with the National Oceanic and Atmospheric Administration must be dated and signed by or on behalf of the person conducting or intending to conduct the weather modification activities referred to therein by such person, individually or, in the case of a person other than an individual, by a partner, officer, or other person having corresponding functions and authority. For this purpose ''officer'' means a president, vice president, treasurer, secretary, or comptroller. Notwithstanding the foregoing, such reports may also be signed by the duly authorized agent or attorney of the person whose activities are being reported. Proof of such authorization shall be furnished to the Administrator when filing a report, unless previously furnished.

§ 908.17 Suspension or waiver of rules.

In an extraordinary situation, any requirement of these rules may be suspended or waived by the Administrator on request of the interested party, to the extent such waiver is consistent with the provisions of Public Law 92–205 and subject to such other requirements as may be imposed.

§ 908.18 Matters not specifically provided for in rules.

All matters not specifically provided for or situations not specifically addressed in these rules will be decided in accordance with the merits of each case by or under the authority of the Administrator, and such decision will be communicated in writing to all parties involved in the case.

§ 908.19 Publication of notice of proposed amendments.

Whenever required by law, and in other cases whenever practicable, notice of proposed amendments to these rules will be published in the FEDERAL REGISTER. If not published with the notice, copies of the text of proposed amendments will be furnished to any person requesting the same. All comments, suggestions, and briefs received within the time specified in the notice will be considered before adoption of the proposed amendments, which may be modified in the light thereof. Informal hearings may be held at the discretion of the Administrator.

§ 908.20 Effective date.

These rules are effective on June 10, 1976.

§ 908.21 Report form.

Public Law 92–205 and these rules should be studied carefully prior to reporting. Reports required by these rules shall be submitted on forms obtainable on request from the Administrator, or on an equivalent format.[1] In special situations, such alterations to the forms as the circumstances thereto may render necessary may be made, provided they do not depart from the requirements of these rules or of Public Law 92–205.

[1] Filed as part of the original document.

PART 909 [RESERVED]

PART 911—POLICIES AND PROCEDURES CONCERNING USE OF THE NOAA SPACE-BASED DATA COLLECTION SYSTEMS

Sec.

911.1 Purpose.
911.2 Scope.
911.3 Definitions.
911.4 Use of the NOAA Data Collection Systems.
911.5 NOAA Data Collection Systems Use Agreements.
911.6 Treatment of data.
911.7 Continuation of the NOAA Data Collection Systems.
911.8 Technical requirements.
APPENDIX A TO PART 911—ARGOS DCS USE POLICY DIAGRAM
APPENDIX B TO PART 911—GOES DCS USE POLICY DIAGRAM

AUTHORITY: 15 U.S.C. 313, 49 U.S.C. 44720; 15 U.S.C. 1525; 7 U.S.C. 450b; 5 U.S.C. 552.

SOURCE: 63 FR 24922, May 6, 1998, unless otherwise noted.

§ 911.1 Purpose.

These regulations set forth the procedural, informational and technical requirements for use of the NOAA Data Collection Systems (DCS). In addition, they establish the criteria NOAA will employ when making determinations as to whether to authorize the use of its space-based DCS. The regulations are intended to facilitate the collection of environmental data as well as other such data which the Government is interested in collecting. In those instances where space-based commercial systems do not meet users' requirements, the intent is to not disadvantage the development of the commercial space-based services in this sector. Obtaining a system use agreement to operate data collection platforms pursuant to these regulations does not affect related licensing requirements of other Federal agencies such as the Federal Communications Commission.

§ 911.2 Scope.

(a) These regulations apply to any person subject to the jurisdiction or control of the United States who operates or proposes to operate data collection platforms to be used with the

NOAA DCS either directly or through an affiliate or subsidiary. For the purposes of these regulations a person is subject to the jurisdiction or control of the United States if such person is:

(1) An individual who is a U.S. citizen; or

(2) A corporation, partnership, association, or other entity organized or existing under the laws of any state, territory, or possession of the United States.

(b) These regulations apply to all existing Geostationary Operational Environmental Satellite (GOES) and Argos DCS users as well as all future applications for NOAA DCS use.

§ 911.3 Definitions.

For purposes of this part:

(a) *Approving authority* means NOAA for the GOES DCS; and it means the Argos Participating Agencies, via the Argos Operations Committee, for the Argos DCS.

(b) *Argos DCS* means the system which collects data from fixed and moving platforms and provides platform location data. This system consists of platforms, the Argos French instrument on the Polar-orbiting Operational Environmental Satellites (POES) and other international satellites; a ground processing system; and telemetry ground stations.

(c) *Argos participating agencies* means those agencies of the United States and other countries that participate in the management of the Argos DCS.

(d) *Assistant Administrator* means the Assistant Administrator for Satellite and Information Services, NOAA, or his/her designee.

(e) *Director* means the Director of the Office of Satellite Data Processing and Distribution for the National Environmental Satellite, Data, and Information Service of NOAA.

(f) *Environmental data* means environmental measurement data for the purpose of using the GOES DCS; and it means environmental measurement and environmental protection data for the purpose of using the Argos DCS.

(g) *Environmental measurement data* means data that relate to the characteristics of the Earth and its natural phenomena by helping to better understand, evaluate, or monitor its natural resources.

(h) *Environmental protection data* means data that relate to the characteristics of the Earth and its environment (including its ecosystems and the species which inhabit them) by helping to protect against any unreasonable adverse effects thereto.

(i) *Episodic use* means the use of the system for short events where there is a significant possibility of loss of life, such as for Arctic expeditions or scientific campaigns into remote areas.

(j) *Government interest* means that the use is determined in advance to be of interest to one or more governmental entities of the United States, France or, once they have become an Argos Participating Agency, Japan or a European Organization for the Exploitation of Meteorological Satellites (EUMETSAT) member state; or also, in the case of the GOES DCS, a state or local government.

(k) *Government user* means agencies of international governmental organizations, national government or any subdivision thereof, or any of those agencies' contractors or grantees, so long as the contractor is using the data collected by the NOAA DCS to fulfill its contractual obligations to the government agency or in the case of a grantee that these data are being used in accordance with the statement of work for the award.

(l) *NOAA DCS* means the GOES and Argos space-based DCS.

(m) *Non-profit user* means a not-for-profit academic, research, or other non-governmental organization, which is using these data, for education and/or scientific, non-commercial purposes.

(n) *Operational use* means the use of data in a situation where the utility of the data are significantly reduced if not collected or delivered in a specific time window. This includes situations where extensive preparation work is in place and a delay in acquisition of data would jeopardize the project.

(o) *Platform compatibility* means the compatibility of the platform with the space segment of the system, and includes elements such as message length and composition, signal strength, and transmission protocol (e.g., continuous versus event drive).

(p) *Sensitive use* means the use of the NOAA DCS where the users' requirements dictate the use of a governmental system such as National security, homeland security, law enforcement and humanitarian operations.

(q) *Testing use* means the use of the NOAA DCS by manufacturers of platforms for use in conjunction with the NOAA DCS, for the limited purpose of testing and certifying the compatibility of new platforms with the technical requirements of the NOAA DCS.

(r) *User* means the entity and/or organization that owns or operates user platforms for the purpose of collecting and transmitting data through the NOAA DCS, or the organization requiring the collection of the data.

(s) *User platform* means device designed in accordance with the specifications delineated and approved by the Approving Authority used for the in-situ collection and subsequent transmission of data via the NOAA DCS. Those devices which are used in conjunction with the GOES DCS are referred to as data collection platforms (DCP) and those which are used in conjunction with the Argos DCS are referred to as Platform Transmitter Terminals (PTT). For purposes of these regulations, the terms ''user platform,'' ''DCP'', and ''PTT'' are interchangeable.

(t) *User requirement* means the requirement expressed and explained in the System Use Agreement.

[63 FR 24922, May 6, 1998, as amended at 68 FR 45161, Aug. 1, 2003]

§911.4 Use of the NOAA Data Collection Systems.

(a) Use of the NOAA DCS will only be authorized in accordance with the conditions and requirements set forth in paragraphs (b), (c), (d), (e), and (f) of this section.

(b)(1) Use of the NOAA DCS will only be authorized where it is determined that there are no commercial space-based services available that meet the user's requirements.

(2) A determination under paragraph (b)(1) of this section must be based on such factors as satellite coverage, accuracy, data throughput, platform power consumption, size and weight, service continuity and reliability, platform compatibility, system access mode, and, in the case of government agencies, cost-effectiveness.

(c)(1) Except as provided in paragraphs (c)(2), (3), (4), and (5) of this section, NOAA DCS shall only be used for the collection of environmental data by governmental and/or non-profit users.

(2) Non-governmental, environmental use of the NOAA DCS is only authorized where there is a Government interest in the collection and/or receipt of the data.

(3) Except as provided in paragraph (c)(4) of this section, non-environmental use of the NOAA DCS is only authorized for government use and non-profit users where there is a government interest. The NOAA DCS will continue to be predominantly used for environmental applications. Non-environmental use of the system shall be limited to sensitive use, and to episodic use as defined below in paragraph (c)(4) of this section.

(4) Episodic use of the NOAA DCS may also be authorized in specific instances where there is a significant possibility for loss of life. Such use shall be closely monitored.

(5) Testing use of the NOAA DCS will only be authorized for manufacturers of NOAA DCS platforms, that require access to the system in order to test and certify prototype and production models.

(d) Because of capacity limitations on the GOES DCS, system applicants will be admitted to use the GOES system in accordance with the following priority:

(1) NOAA programs or users whose data are required for implementation of NOAA programs, as determined by the Assistant Administrator, will be accorded first priority.

(2) Users whose data are desired to support NOAA programs will be accorded second priority.

(3) Users whose data and/or use of the GOES DCS will further a program of an agency or department of the U.S. Government, other than NOAA, will be accorded third priority.

(4) Users whose data are required by a state or local Government of the United States will be accorded fourth priority.

(5) Testing users of the system will be accorded fifth priority.

(6) No other usage will be authorized for the GOES DCS.

(e) In the event that Argos DCS capacity limitations require that priority determinations be made, priority will be given to those platforms that provide environmental data of broad international interest, especially of an operational nature, and to those requiring the unique capabilities of the Argos DCS, such as platform location or polar coverage.

[63 FR 24922, May 6, 1998, as amended at 68 FR 45161, Aug. 1, 2003]

§ 911.5 NOAA Data Collection Systems Use Agreements.

(a)(1) In order to use a NOAA DCS, each user must have an agreement with the approving authority for that system.

(2) Persons interested in entering into a system use agreement should contact the Director.

(b) These agreements will address, but may not be limited to, the following matters:

(1) The period of time the agreement is valid and procedures for its termination,

(2) The authorized use(s), and its priorities for use,

(3) The extent of the availability of commercial space-based services which meet the user's requirements and the reasons for necessitating the use of the Government system,

(4) Any applicable government interest in the data,

(5) Required equipment standards,

(6) Standards of operation,

(7) Conformance with applicable ITU and FCC agreements and regulations,

(8) Reporting time and frequencies,

(9) Data formats,

(10) Data delivery systems and schedules, and

(11) User-borne costs.

(c) The Director shall evaluate user requests for System Use Agreements and renewals and conclude agreements for use of the NOAA DCS.

(d)(1) Agreements for the collection, via the Argos DCS, of environmental data by government agencies or non-profit institutions shall be valid for 3 years from the date of initial in-situ deployment of the platforms, and may be renewed for additional 3-year periods.

(2) Agreements for the collection of environmental data, via the Argos DCS, by non-government users shall be valid for 1 year from the date of initial in-situ deployment of the platforms, and may be renewed for additional 1-year periods, but only for so long as there exists a governmental interest in the receipt of these data.

(3) Agreements for the collection of non-environmental data, via the Argos DCS, by government agencies, or non-profit institutions where there is a government interest, shall be valid for 1 year from the date of initial in-situ deployment of the platforms, and may be renewed for additional 1-year periods.

(4) Agreements for the episodic collection of non-environmental data, via the Argos DCS under § 911.4(c)(4), shall be of short, finite duration not to exceed 1 year without exception, and usually shall not exceed 6 months. These agreements shall be closely monitored and shall not be renewed.

(5) Agreements for the testing use of the Argos DCS by equipment manufacturers shall be valid for 1 year from the date of initial testing, and may be renewed for additional 1-year periods.

(e)(1) Agreements for the collection of environmental data, by the GOES DCS, shall be valid for 5 years from the date of initial in-situ deployment, and may be renewed for additional 5-year periods.

(2) Agreements for the testing use of the GOES DCS, by equipment manufacturers, shall be valid for 1 year from the date of initial testing, and may be renewed for additional 1-year periods.

(3) Agreements for the collection of non-environmental data, via the GOES DCS, by government agencies, or non-profit institutions where there is a government interest, shall be valid for 1 year from the date of initial *in-situ* deployment of the platforms, and may be renewed for additional 1-year periods.

(4) Agreements for the episodic collection of non-environmental data, via the GOES DCS under § 911.4(c)(4), shall be of short, finite duration not to exceed 1 year without exception, and usually shall not exceed 6 months. These

agreements shall be closely monitored and shall not be renewed.

[63 FR 24922, May 6, 1998, as amended at 68 FR 45161, Aug. 1, 2003]

§911.6 Treatment of data.

(a) All NOAA DCS users must agree to permit NOAA and other agencies of the U.S. Government the full, open, timely, and appropriate use as determined by NOAA, of all environmental data collected from their platforms; this may include the international distribution of environmental data under the auspices of the World Meteorological Organization.

(b) Raw data from the NOAA space segment is openly transmitted and accessible.

(c) Accessibility of the NOAA DCS processed data from the ground segment is handled in accordance with the users specifications and system design limitations, subject to the provisions stated in paragraph (a) of this section.

[68 FR 45161, Aug. 1, 2003]

§911.7 Continuation of the NOAA Data Collection Systems.

(a) NOAA expects to continue to operate DCS on its geostationary and polar-orbiting satellites, subject to the availability of future appropriations. However, viable commercial space-based alternatives may eventually obviate the need for NOAA to operate its own space-based DCS.

(b) If use of the system in support of NOAA programs increases, it eventually may be necessary to the further restrict system usage by other users. If such restrictions on use become necessary, or in the event that NOAA discontinues operation of GOES and/or POES, NOAA will provide, to the maximum extent practicable, advance notice and an orderly transition.

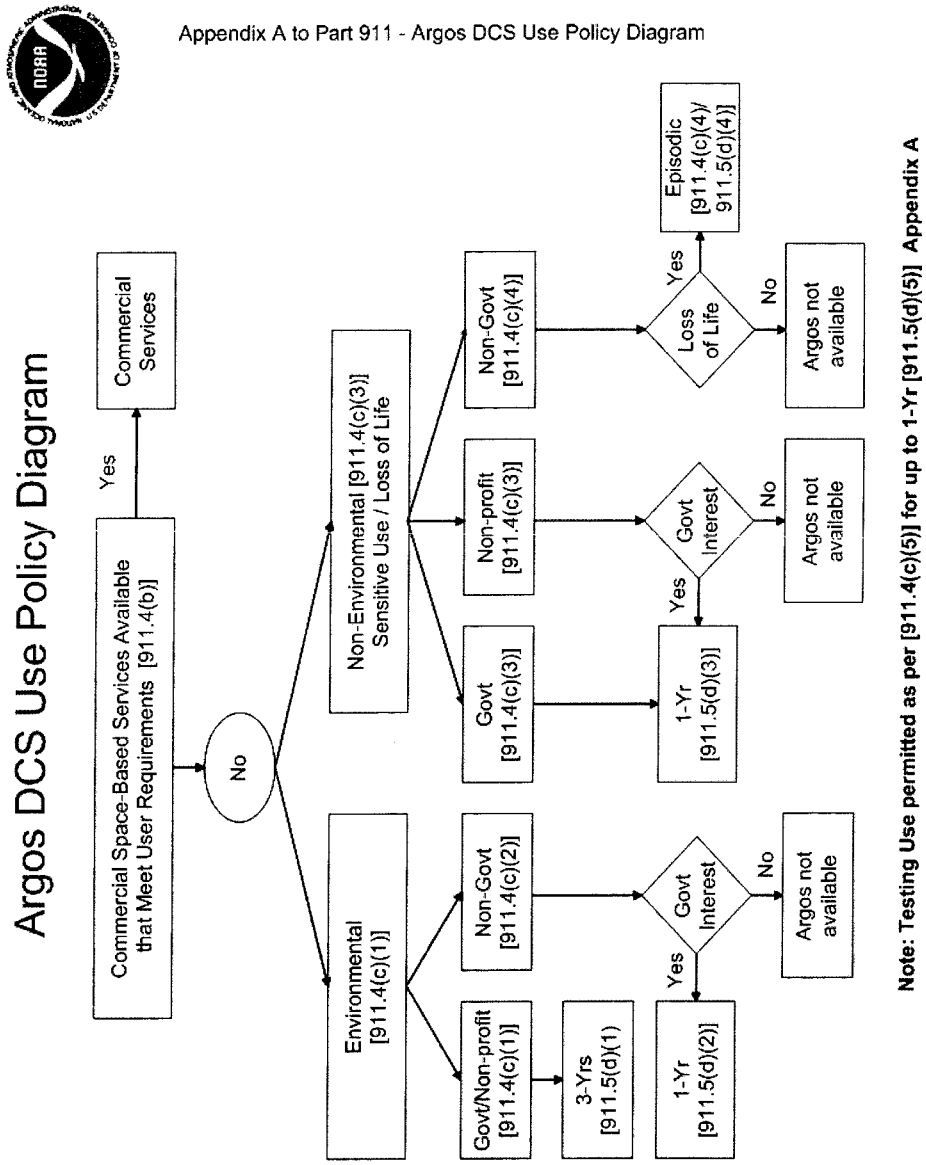
(c) NOAA will not be responsible for any losses resulting from the nonavailability of the NOAA DCS.

§911.8 Technical requirements.

(a) All platform operators of the NOAA DCS must use a data collection platform radio set whose technical and design characteristics are certified to conform to applicable specifications and regulations.

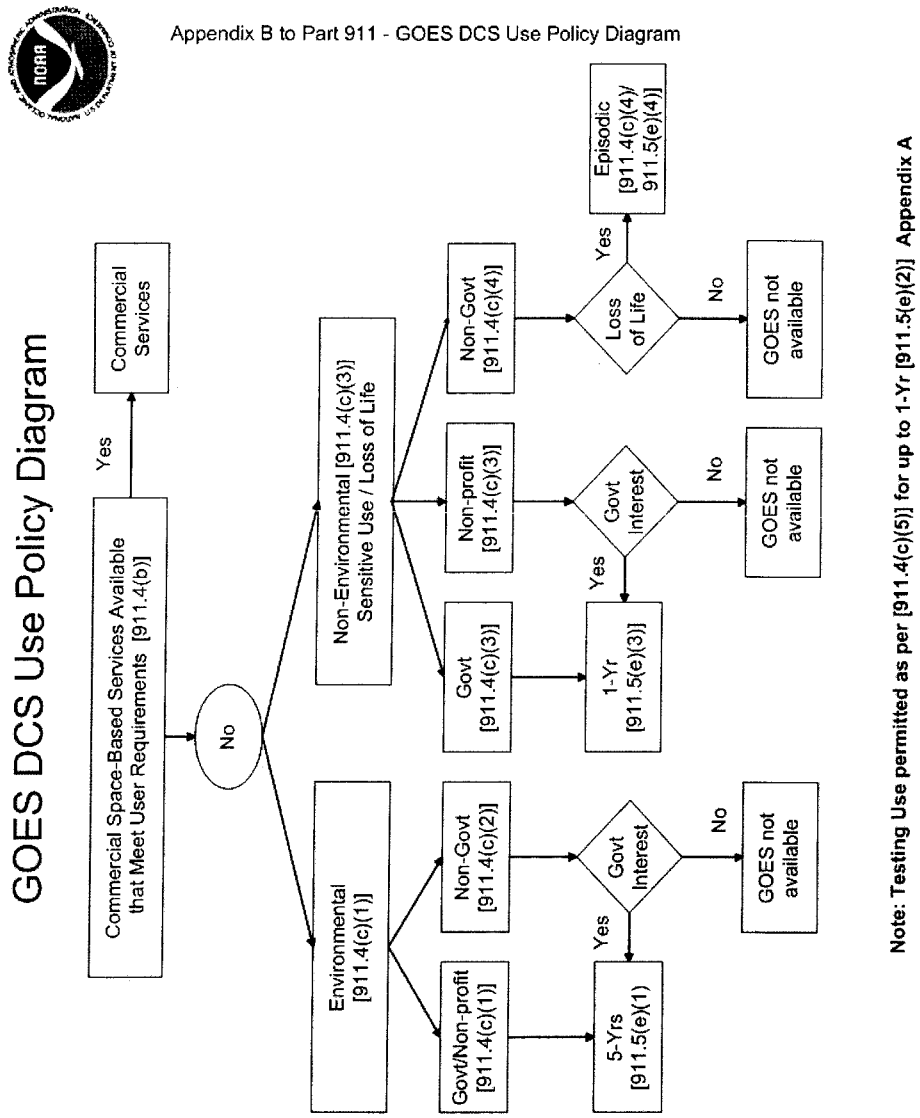
(b) All platform operators are responsible for all costs associated with the procurement and operation of the platforms, and for the acquisition of data from those platforms, either directly from the satellite or from the applicable data processing center.

APPENDIX A TO PART 911—ARGOS DCS USE POLICY DIAGRAM



[68 FR 45161, Aug. 1, 2003]

APPENDIX B TO PART 911—GOES DCS USE POLICY DIAGRAM



[68 FR 45162, Aug. 1, 2003]

PART 917—NATIONAL SEA GRANT PROGRAM FUNDING REGULATIONS

Subpart A—General

Sec.
917.1 Basic provisions.
917.2 Definitions.

Subpart B—Sea Grant Matched Funding Program

917.10 General.
917.11 Guidelines for Sea Grant Fellowships.

Subpart C—National Projects

917.20 General.
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Subpart D—International Cooperation Assistance

917.30 General.

Subpart E—General Considerations Pertaining to Sea Grant Funding

917.40 General.
917.41 Application guidance for Sea Grant funding.
917.42 Categories of support available for the conducting of Sea Grant activities.
917.43 Terms and conditions of Sea Grant funding.

AUTHORITY: Pub. L. 94–461, 90 Stat. 1961 (33 U.S.C. 1121 *et seq.*).

SOURCE: 43 FR 15307, Apr. 11, 1978, unless otherwise noted.

Subpart A—General

§ 917.1 Basic provisions.

(a) This section sets forth the basic purposes for which Sea Grant funding may be made pursuant to the following sections of the Act: 33 U.S.C. 1124, 1127, 1125 and 1124a. These sections provide for the funding of programs and projects in fields related to ocean and coastal resources that involve marine research, marine education and training, and marine advisory services. However, there is a significant difference in focus among these sections since section 1124(a) is concerned chiefly with regional and state needs relative to ocean and coastal resources (including the funding of Sea Grant Fellowships under section 1127) while section 1125 is concerned with national needs and problems relative to ocean and coastal resources, and section 1124a is concerned with programs of international cooperation assistance with respect to those resources.

(b) *Comment:* Statutory citation 33 U.S.C. 1124(a):

> In General. The Secretary may make grants and enter into contracts under this subsection to assist any Sea Grant program or project if the Secretary finds that such program or project will—
>
> (1) Implement the objective set forth in Section 202(b); and
>
> (2) Be responsive to the needs or problems of individual states or regions.
>
> The total amount paid pursuant to any such grant or contract may equal 66⅔ percent, or any lesser percent, of the total cost of the Sea Grant program or project involved.

(c) *Comment:* Statutory citation 33 U.S.C. 1127(a):

> In General. The Secretary may enter into contracts and make grants under this section to—
>
> (1) Enhance the research and development capability of developing foreign nations with respect to ocean and coastal resources.
>
> (2) Promote the international exchange of information and data with respect to the assessment, development, utilization, and conservation of such resources.

§ 917.2 Definitions.

(a) The term *Act* means the Sea Grant Program Improvement Act of 1976, as amended (33 U.S.C. 1121 *et seq.*).

(b) The term *Secretary* means the Secretary of Commerce.

(c) The term *Administrator* means the Administrator of the National Oceanic and Atmospheric Administration.

(d) The term *Office of Sea Grant* means the National Oceanic and Atmospheric Administration's Office of Sea Grant, which administers the National Sea Grant Program provided for in the Act.

(e) The term *objective of the Act* means the objective set forth at 33 U.S.C. 1121(b) and is ''is to increase the understanding, assessment, development, utilization, and conservation of the Nation's ocean and coastal resources by providing assistance to promote a strong educational base, responsive research and training activities, and broad and prompt dissemination of knowledge and techniques.''

(f) The term *ocean and coastal resource(s)* is as defined at 33 U.S.C. 1122(7) and means:

any resource (whether living, nonliving, manmade, tangible, intangible, actual, or potential) which is located in, derived from, or traceable to, the marine environment.

Such term includes the habitat of any such living resource, the coastal space, the ecosystems, the nutrient rich areas, and the other components of the marine environment which contribute to or provide (or which are capable of contributing to or providing) recreational, scenic, esthetic, biological, habitational, commercial, economic, or conservation values. Living resources include natural and cultured plant life, fish, shellfish, marine mammals, and wildlife. Nonliving resources include energy sources, minerals, and chemical substances.

(g) The term *marine environment* used in the definition for ''ocean and coastal resources'' in §917.2(e) and used elsewhere in these regulations is as defined at 33 U.S.C. 1122(6) and means:

the coastal zone, as defined in Section 304(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453(1)); the seabed, subsoil, and waters of the territorial sea of the United States; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas; and the seabed and subsoil of and beyond the outer Continental Shelf.

(h) The term *person* is as defined at 33 U.S.C. 1122(9) and means: ''any individual; any public or private corporation, partnership, or other association or entity (including any Sea Grant College, Sea Grant Regional Consortium, education, institute, or laboratory); or any state, political subdivision of a state, or agency or officer thereof.''

(i) The term *Sea Grant College* is as defined at 33 U.S.C. 1122(10) and means: ''any public or private institution of higher education which is designated as such by the Secretary . . .'' pursuant to regulations promulgated at 15 CFR part 918.

(j) The term *Sea Grant Program* is as defined at 33 U.S.C. 1122(11) and means: ''any program which'' (1) is administered by a Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, laboratory, or state or local agency; and (2) includes two or more projects involving one or more of the following activities in fields related to ocean and coastal resources:

(i) Research,

(ii) Education,

(iii) Training, or

(iv) Advisory services.

(k) The term *Sea Grant Program Directors* means the local Directors of the Sea Grant coherent area programs, insititutional programs, Sea Grant Colleges, and Sea Grant Regional Consortia.

(l) The term *Sea Grant Regional Consortium* is as defined at 33 U.S.C. 1122(12) and means: ''any association or alliance which is designated as such by the Secretary . . .'' pursuant to regulations promulgated at 15 CFR part 918.

(m) The term *state* is as defined at 33 U.S.C. 1122 (14) and means: ''any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Mariana Islands, or any other territory or possession of the United States.''

(n) The term *developing foreign nations* includes any foreign nation other than a foreign nation that is ineligible for designation under section 502(b) of the Trade Act of 1974, (19 U.S.C. 2462(b)) as a benificiary developing country under Title of that Act.

Subpart B—Sea Grant Matched Funding Program

§917.10 General.

(a) 33 U.S.C. 1124(a) establishes a program for the funding of Sea Grant Programs and projects dealing with marine research, marine education and training, and/or marine advisory services, that are designed to achieve the objective of the Act and that generally respond to the needs of individual states or regions. Included as a part of this program is the Sea Grant Fellowship Program, established by 33 U.S.C. 1127. Any person may apply to the Office of Sea Grant for Sea Grant Matched Funding Program Monies, except for Sea Grant Fellowship funding. Sea Grant Fellowship funding may be granted only to Sea Grant Colleges, Sea Grant Regional Consortia, institutions of higher education, and professional associations and institutions.

(b) Federal Sea Grant funding for the section 1124(a) Matched Funding Program cannot exceed 66⅔ percent of the total cost of the project involved.

§ 917.11 Guidelines for Sea Grant Fellowships.

(a) Sea Grant Fellowships are designed to provide educational and training assistance to qualified individuals at the undergraduate and graduate levels of education in fields related to ocean and coastal resources. The objective of the program is to increase the national supply of individuals educated and trained in the assessment, development, utilization, and conservation of ocean and coastal resources. The purpose of this section is to provide guidelines regarding the content of applications for Sea Grant Fellowship funding.

(b) Funding will be made to eligible entities (see § 917.10 of this part) that are selected to award and administer Sea Grant Fellowships. Fellowships will not be awarded directly to students by the Office of Sea Grant. The entity receiving Fellowship funding will select the students to be awarded the Fellowships and will handle the administration of the Fellowships.

(c) Proposals for Fellowship funding will be expected to address (1) the nature and focus of the proposed Fellowship Program, (2) the utilization of institutional or other appropriate resources in the education and training of Sea Grant Fellows, (3) the method of advertising availability of the Fellowships, (4) the method of selection of recipients, and (5) the terms of tenure and method of determining continuity of tenure.

(d) Innovation and uniqueness will be significant factors in the determination of which proposals will be funded. Another factor considered will be the potential of the proposed program to stimulate interest in marine related careers among those individuals; for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest.

(e) The total amount that may be provided for grants under the Sea Grant Fellowship Program during any fiscal year cannot exceed an amount equal to five percent of the total funds appropriated for the Matched Funding Program for that year. Fellowship programs are subject to the requirement of a minimum of 33⅓ percent matching funds from non-Federal sources to which all Matched Funding Program projects are subject. Indirect costs are not allowable for either the Fellowships or for any costs associated with the Fellowships.

Considering the variations in the cost-of-living and the differences in tuition, fees, etc., between one college or university and another, the amount of money requested and awarded per Fellowship may vary.

Subpart C—National Projects

§ 917.20 General.

(a) 33 U.S.C. 1125 requires the Secretary to identify specific national needs and problems relative to ocean and coastal resources. This responsibility has been delegated to the Administrator. The designation is intended to focus public attention on needs and problems of the marine environment that are considered to be of particular national importance at a given point in time.

(b) 33 U.S.C. 1125 provides for the funding of national projects in marine research, marine education and training, and marine advisory services that are designed to deal with the national needs and problems concerning ocean and coastal resources identified by the Administrator.

(c) The Administrator will identify the national needs and problems apart from considerations of Office of Sea Grant funding for ''National Projects'' responsive to national needs and problems that are identified.

§ 917.21 National needs and problems.

(a) The Administrator will, periodically, publish in the FEDERAL REGISTER the identified national needs and problems with respect to ocean and coastal resources at a given point in time.

(b) Suggestions from the general public as to the identity of national needs and problems may be submitted to the Office of Sea Grant at any time. These suggestions will be reviewed by the Office of Sea Grant and the Sea Grant Review Panel, and those receiving a

positive critique will be forwarded to the Administrator. In addition, suggestions concerning the identification of national needs and problems will be requested from the Sea Grant Program Directors.

(c) The Administrator has identified the following as currently being national needs and problems with respect to ocean and coastal resources:global and regional climate and primary productivity.

(1) Improve the prediction of extreme natural events and their effects on ocean coastal and continental shelf locations as well as analogous regions of the Great Lakes.

(2) Improve the predictability of global sea-level change and determine the impact of this change on coastal areas.

(3) Define the processes that determine ocean variability on the time scale of a few weeks to a few years, and the relationship to fluctuations in global and regional climate, primary productivity, and fisheries production.

(4) Improve understanding of the flow fields and mixing processes on the continental shelves of the United States.

(5) Develop an increased understanding of the arctic and antarctic environment and a capability to predict the special hazards posed to transportation and resource development.

(6) Develop and increased capability to characterize the engineering properties of ocean botton sediments.

(7) Reduce the recurring economic loss due to corrosion of structures, vessels, and other devices in the marine environment.

(8) Gain a fundamental understanding of the processes by which biological fouling and associated corrosion are initiated upon material surfaces exposed to seawater.

(9) Investigate methods to improve man's underwater capability to conduct undersea research and perform useful work.

(10) Investigate the wider application of remotely operated and artificial intelligence techniques for vehicles for undersea activities.

(11) Expand/improve remote sensing technologies for use on the ocean and Great Lakes.

(12) Advance knowledge of acoustics in the ocean and ocean bottom in order to exploit the burgeoning acoustics technologies.

(13) Develop techniques for in-situ monitoring of biological, chemical, and physical processes in the Great Lakes, oceans, and their connecting waterways which are cost effective and provide data in real time.

(14) Improve the position of the U.S. seafood industry in world seafood markets.

(15) Design more efficient mechanisms to allocate U.S. fish resources to achieve optimum yield and minimize industry dislocations.

(16) Gain a fundamental understanding of the biological productivity of estuarine and coastal waters.

(17) Conduct research leading to the restoration and/or enhancement of heavily exploited fishery stocks.

(18) Improve the capability for stock assessment, predicting yield, age-class strength, and long-term population status of important fisheries.

(19) Conduct research to increase the economic potential of low-value, high-volume fish products.

(20) Develop productive and profitable aquaculture industries in the United States and technology that can be exported to less developed nations of the world with different climate, cultural, and economic constraints.

(21) Explore marine biochemicals as source of chemical feedstocks, enzymes, pharmacological substance, and other bioactive agents such as pesticides.

(22) Apply modern biotechnology to exploiting marine plants, animals, and microorganisms for good and services.

(23) Develop rapid, efficient, and specific methods for assaying the potential of marine organisms to communicate disease to humans.

(24) Develop innovations that would promote safe, nondestructive, recreational access to and use of marine and Great Lakes water.

(25) Re-examine the ocean as an appropriate place for the disposal of wastes from land-based society.

(26) Develop an increased understanding of the impacts of low density, nonbiodegradable, solid wastes on marine and Great Lakes species.

(27) Conduct research for realizing the economic potential of the non-living resources of the U.S. 200-mile Exclusive Economic Zone.

(28) Investigate the effect of seafloor hydrothermal systems on the seafloor, oceans, and atmosphere.

(29) Develop a better understanding of the value the marine sector contributes to the U.S. economy and culture.

(30) Improve the competitive position of American ports in the face of rapid technological and social change.

(31) Improve the capability of developing nations to address their marine resource needs.

(32) Develop eductional programs to increase application of marine sector research.

(33) Develop syntheses of and better access to existing multidisciplinary marine and Great Lakes information.

[43 FR 15307, Apr. 11, 1978, as amended at 51 FR 35210, Oct. 2, 1986]

§ 917.22 National Projects funding.

(a) National Projects funding proposals will be expected to address: (1) The relevance of the proposed project to a national need or problem that has been identified by the Administrator; (2) the nature and focus of the proposed project; (3) a demonstrated capacity to carry out the proposed project in a competent and cost-effective manner; and (4) the utilization of existing capability and coordination with other relevant projects. Innovation and uniqueness will be significant factors in determining whether to fund a proposed project.

(b) Any person may apply to the Office of Sea Grant for National Project funding. In addition, the Office of Sea Grant may invite applications for National Project funding.

(c) The total amount provided for National Projects' funding during any fiscal year can never exceed an amount equal to 10 percent of the total funds appropriated for the Matched Funding Program. Federal Sea Grant funding for National Projects can be up to 100 percent of the total cost of the project involved.

Subpart D—International Cooperation Assistance

§ 917.30 General.

(a) 33 U.S.C. 1124a sets up a program of International Cooperation Assistance in marine reseach, marine education and training, and marine advisory services designed to enhance the research and technical capability of developing foreign nations with respect to ocean and coastal resources and to promote the international exchange of information and data with respect to the assessment, development, utilization, and conservation of such resources. Any Sea Grant College or Sea Grant Regional Consortium or any institution of higher education, laboratory, or institute (if such institution, laboratory or institute is located within any state) may apply for and receive International Cooperation Assistance funding.

(b) International Cooperation Assistance funding proposals will be expected to address: (1) The nature and focus of the proposed project, (2) the utilization of institutional and other appropriate resources in the implementation of the project, (3) a clear indication of the foreign participant's (individual or institution) commitment to the project, (4) identification of accomplishments expected from a single granting interval, (5) implicit or explicit out-year commitment of resources, and (6) the impact of the proposed project on the institution receiving funding.

(c) The projects supported by International Cooperation Assistance funding are intended to be genuinely cooperative. Innovation and uniqueness will be significant factors in the determination of proposals to be funded. In the case of a proposed international project that is submitted from an institution where a Sea Grant program is in existence, the extent to which the proposed project takes advantage of the Sea Grant institutional capability existing at that institution and thereby strengthening it, as opposed to being a mere appendage to the ongoing Sea Grant program, will also be an important evaluation factor. The U.S. Department of State will be given the opportunity to review all International Cooperation Assistance projects and

none will be funded without this consultation. Because the United Nations Educational, Scientific, and Cultural Organization (UNESCO) also funds international projects of the kind that can be funded under the Sea Grant International Cooperation Assistance program, and, to effect coordination in this area between Sea Grant and UNESCO, the Division of Marine Sciences (UNESCO) will be informed of all International Cooperation Assistance projects funded.

Subpart E—General Considerations Pertaining to Sea Grant Funding

§917.40 General.

This subpart sets forth general considerations pertaining to Sea Grant funding.

§917.41 Application guidance for Sea Grant funding.

(a) Detailed guidance for submission of applications for National Sea Grant Program Funding is given in the publication, ''The National Sea Grant Program: Program Description and Suggestions for Preparing Proposals,'' available on request from: Office of Sea Grant Program, 3300 Whitehaven Street NW., Washington, DC 20235.

(b) It is noted here that application for Sea Grant funding shall be made pursuant to the following Federal provisions:

(1) OMB Circular A–110 ''Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.''

(2) OMB Circular A–111, ''Designation of Federal Programs Suitable for Joint Funding Purposes.''

(3) GSA FMC 73–6, ''Coordinating Indirect Cost Rates and Audit at Educational Institutions.''

(4) GSA FMC 73–7, ''Administration of College and University Research Grants.''

(5) GSA FMC 73–8, ''Cost Principles for Educational Institutions.''

(6) GSA FMC 74–4, ''Cost Principles Applicable to Grants and Contracts with State and Local Governments.''

(7) OMB Circular A–102, ''Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.''

(8) NOAA General Provisions implementing OMB Circular A–110, ''Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.''

§917.42 Categories of support available for the conducting of Sea Grant activities.

(a) Three categories of support are available for the conducting of Sea Grant activities: Projects; coherent area programs; and institutional programs. In general, funding for institutional programs and coherent area programs are made with expectation of renewal, as long as the funding recipient maintains a high level of quality and relevance in its activities. Project funding is made generally for a single item of research, education and training, or advisory service, but may be renewed under certain conditions; each renewal is negotiated individually.

(b) Project support is for a clearly defined activity to be conducted over a definite period of time to achieve a specified goal. The project may be in research, education, training, or advisory services. Support for a project is made to an individual investigator or project director through his organization.

(c) Intermediate between the institutional programs and individual projects are coherent area programs. These have two main purposes:

(1) To bring into the National Sea Grant Program institutions of higher education that have a strong core of capability in some aspects of marine affairs, but which do not qualify or do not wish to qualify for institutional program support at this time. The purpose of support in such cases is to enable the institution to apply its existing competence to its regional problems and opportunities while developing the broader base of capability and the internal organization that will lead to institutional support. This program category requires a definite commitment on the part of the institution to develop an institutional program and to present a multiproject, multidisciplinary program involving the existing competence of an institution in

a unified or coherent attack on well-defined local or regional problems. Such a coherent area program should include research, education and training, and advisory services, to the extent of the institution's capability.

(2) To bring into the National Sea Grant Program (on a more or less continuing basis) qualified entities that have rare or unique capability in a specialized field of marine affairs. Such entities need not be institutions of higher education.

(d) Institutional grants are made to institutions of higher education or to a combination of institutions that have an existing broad base of competence in marine affairs. To qualify, an institution must make a positive, long-range commitment to objectives of the National Sea Grant Program as evidence by committing the institution's own resources in the form of matching funds, creation of the organization necessary for management of the Sea Grant Program, quality education programs in marine areas, establishment of interdisciplinary research teams, and development of advisory service mechanisms for strong interaction with marine communities in its region. A Sea Grant institutional program is expected to provide intellectual leadership in assisting its region to solve problems and to realize opportunities of its marine environment. To the extent possible, an institutional program should involve all appropriate elements of the institution, whether colleges or departments, and devise cooperative or mutally supporting programs with other institutions of higher education, and with Federal and state agencies, local agencies, and industry. An institutional program should have substantial strength in the three basic Sea Grant activities: research, education and training, and advisory services. Sea Grant institutional programs that meet the qualifications for Sea Grant College or Sea Grant Regional Consortium status set forth at 15 CFR part 918 will be so designated by the Secretary.

§ 917.43 Terms and conditions of Sea Grant funding.

No Sea Grant funding may be applied to:

(a)(1) the purchase or rental of any land or (2) the purchase, rental, construction, preservation, or repair of any building, dock, or vessel, except that payment under any such grant or contract may (if approved by the Assistant Administrator for Administration of the National Oceanic and Atmospheric Administration or designee) be applied to the purchase, rental, construction, preservation, or repair of non-self-propelled habitats, buoys, platforms, and other similar devices or structures, or to the rental of any research vessel which is used in direct support of activities under any Sea Grant program or project.

(b) In addition, Sea Grant funding under the Sea Grant Matched Funding Program will be subject to the limitation that the total amount which may be obligated within any one state to persons under the Sea Grant Matched Funding Program in any fiscal year shall not exceed an amount equal to 15 percent of the funds appropriated for the Sea Grant Matched Funding Program.

(c) Any person who receives or utilizes Sea Grant funding shall keep the records required by OMB Circular A–110, ''Grant and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' and by NOAA General Provision, implementing OMB Circular A–110, by OMB Circular A–102, ''Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments,'' including records that fully disclose the amount and disposition by the recipient of such proceeds, the total cost of the program or project in which such proceeds were used, and the amount, if any, of such cost which was provided through other sources. Such records shall be maintained for three years after the completion of such a program or project. The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and evaulation, to any books, documents, papers, and records of receipt which, in the opinion of the Secretary or the Comptroller General, may be related or pertinent to such grants and contracts.

PART 918—SEA GRANTS

Sec.
918.1 Introduction.
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918.7 Application for designation.

AUTHORITY: Sec. 207, National Sea Grant College Program Act, as amended (Pub. L. 94–461, 33 U.S.C. 1121, *et seq.*).

SOURCE: 44 FR 75054, Dec. 18, 1979, unless otherwise noted.

§918.1 Introduction.

Pursuant to section 207 of the National Sea Grant College Program Act, as amended (Pub. L. 94–461, 33 U.S.C. 1121 *et seq.*), herein referred to as the Act, the following guidelines establish the procedures by which organizations can qualify for designation as Sea Grant Colleges or Sea Grant Regional Consortia, and the responsibilities required of organizations so designated.

§918.2 Definitions.

(a) *Marine environment.* The term *Marine Environment* means any or all of the following: the coastal zone, as defined in section 304(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453(1)); the seabed, subsoil and waters of the territorial sea of the United States, including the Great Lakes; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas; and the seabed and subsoil of and beyond the Outer Continental Shelf.

(b) *Ocean, Great Lakes, and coastal resources.* The term *ocean, Great Lakes, and coastal resources* means any resource (whether living, nonliving, manmade, tangible, intangible, actual, or potential) which is located in, derived from, or traceable to, the marine environment. Such term includes the habitat of any such living resource, the coastal space, the ecosystems, the nutrient-rich areas, and the other components of the marine environment which contribute to or provide (or which are capable of contributing to or providing) recreational, scenic, aesthetic, biological, habitational, commercial, economic, or conservation values. Living resources include natural and cultured plant life, fish, shellfish, marine mammals, and wildlife. Nonliving resources include energy sources, minerals, and chemical substances.

(c) *Person.* The term *Person* means any public or private corporation, partnership, or other association or entity (including any Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, or laboratory); or any State, political subdivision of a State, or agency or officer thereof.

(d) *Sea Grant College.* The term *Sea Grant College* means any public or private institution of higher education or confederation of such institutions which is designated as such by the Secretary under section 207 of the National Sea Grant Program Act. Included in this term are all campuses (or other administrative entities) of a designated Sea Grant College, working through the established management structure of the Sea Grant College.

(e) *Sea Grant Program.* The term *Sea Grant Program* means any program which:

(1) Is administered by a Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, laboratory, or State or local agency; and

(2) Includes two or more Sea Grant projects involving one or more of the following activities in fields related to ocean, Great Lakes, and coastal resources:

(i) Research,

(ii) Education and training, and

(iii) Advisory services.

(f) *Sea Grant project.* A Sea Grant project is any separately described activity which has been proposed to the National Sea Grant College Program, and has subsequently been approved.

(g) *Sea Grant Regional Consortium.* The term *Sea Grant Regional Consortium* means any association or other alliance of two or more persons as defined above (other than individuals) established for the purpose of pursuing programs in marine research education,

training, and advisory services on a regional basis (*i.e.*, beyond the boundaries of a single state) and which is designated as a consortium by the Secretary under section 207 of the National Sea Grant Program Act.

(h) *Field related to Ocean, Great Lakes, and coastal resources.* The term *field related to Ocean, Great Lakes, and coastal resources* means any discipline or field (including marine sciences and the physical, natural, and biological sciences, and engineering, included therein, marine technology, education, economics, sociology, communications, planning law, international affairs, public administration, humanities, and the arts) which is concerned with, or likely to improve the understanding, assessment, development, utilization, or conservation of, ocean, Great Lakes, and coastal resources.

§ 918.3 Eligibility, qualifications, and responsibility of a Sea Grant College.

(a) To be eligible for designation as a Sea Grant College, the institution of higher education or confederation of such institutions must have demonstrated a capability to maintain a high quality and balanced program of research, education, training, and advisory services in fields related to ocean, Great Lakes, and coastal resources for a minimum of three years, and have received financial assistance as an Institutional program under either section 205 of the National Sea Grant College Program Act or under section 204(c) of the earlier National Sea Grant College and Program Act of 1966.

(b) To be eligible for designation as a Sea Grant College, the candidate institution or confederation of institutions must meet the qualifications set forth above as evaluated by a site review team composed of members of the Sea Grant Review Panel, NOAA's Office of Sea Grant, and other experts named by NOAA. As a result of this review, the candidate must be rated highly in all of the following qualifying areas:

(1) *Leadership.* The Sea Grant College candidate must have achieved recognition as an intellectual and practical leader in marine science, engineering, education, and advisory service in its state and region.

(2) *Organization.* The Sea Grant College candidate must have created the management organization to carry on a viable and productive Sea Grant Program, and must have the backing of its administration at a sufficiently high level to fulfill its multidisciplinary and multifaceted mandate.

(3) *Relevance.* The Sea Grant College candidate's program must be relevant to local, State, regional, or National opportunities and problems in the marine environment. Important factors in evaluating relevance are the need for marine resource emphasis and the extent to which capabilities have been developed to be responsive to that need.

(4) *Programmed team approach.* The Sea Grant College candidate must have a programmed team approach to the solution of marine problems which includes relevant, high quality, multidisciplinary research with associated educational and advisory services capable of producing identifiable results.

(5) *Education and training.* Education and training must be clearly relevant to National, regional, State and local needs in fields related to ocean, Great Lakes, and coastal resources. As appropriate, education may include pre-college, college, post-graduate, public and adult levels.

(6) *Advisory services.* The Sea Grant College candidate must have a strong program through which information, techniques,and research results from any reliable source, domestic or international, may be communicated to and utilized by user communities. In addition to the educational and information dissemination role, the advisory service program must aid in the identification and communication of user communities' research and educational needs.

(7) *Relationships.* The Sea Grant College candidate must have close ties with Federal agencies. State agencies and administrations, local authorities, business and industry, and other educational institutions. These ties are: (i) To ensure the relevance of its programs, (ii) to give assistance to the

broadest possible audience, (iii) to involve a broad pool of talent in providing this assistance (including universities and other administrative entities outside the Sea Grant College), and (iv) to assist others in developing research and management competence. The extent and quality of an institution's relationships are critical factors in evaluating the institutional program.

(8) *Productivity*. The Sea Grant College candidate must have demonstrated the degree of productivity (of research results, reports, employed students, service to State agencies and industry, etc.) commensurate with the length of its Sea Grant operations and the level of funding under which it has worked.

(9) *Support*. The Sea Grant College candidate must have the ability to obtain matching funds from non-Federal sources, such as state legislatures, university management, state agencies, business, and industry. A diversity of matching fund sources is encouraged as a sign of program vitality and the ability to meet the Sea Grant requirement that funds for the general programs be matched with at least one non-Federal dollar for every two Federal dollars.

(c) Finally, it must be found that the Sea Grant College candidate will act in accordance with the following standards relating to its continuing responsibilities if it should be designated a Sea Grant College:

(1) Continue pursuit of excellence and high performance in marine research, education, training, and advisory services.

(2) Provide leadership in marine activities including coordinated planning and cooperative work with local, state, regional, and Federal agencies, other Sea Grant Programs, and non-Sea Grant universities.

(3) Maintain an effective management framework and application of institutional resources to the achievement of Sea Grant objectives.

(4) Develop and implement long-term plans for research, education, training, and advisory services consistent with Sea Grant goals and objectives.

(5) Advocate and further the Sea Grant concept and the full development of its potential within the institution and the state.

(6) Provide adequate and stable matching financial support for the program from non-Federal sources.

(7) Establish and operate an effective system to control the quality of its Sea Grant programs.

§918.4 Duration of Sea Grant College designation.

Designation will be made on the basis of merit and the determination by the Secretary of Commerce that such a designation is consistent with the goals of the Act. Continuation of the Sea Grant College designation is contingent upon the institution's ability to maintain a high quality performance consistent with the requirements outlined above. The Secretary may, for cause and after an opportunity for hearing, suspend or terminate a designation as a Sea Grant College.

§918.5 Eligibility, qualifications, and responsibilities—Sea Grant Regional Consortia.

(a) To be eligible for designation as a Sea Grant Regional Consortium, the candidate association or alliance of organizations must provide, in significant breadth and quality, one or more services in the areas of research, education, and training, or advisory service in fields related to ocean, Great Lakes, and coastal resources. Further, it is essential that the candidate Sea Grant Consortium be required to provide all three services as soon as possible after designation. Further, such association or alliance must demonstrate that:

(1) It has been established for the purpose of sharing expertise, research, educational facilities, or training facilities, and other capabilities in order to facilitate research, education, training, and advisory services in any field related to ocean, Great Lakes, and coastal resources; and

(2) It will encourage and follow a regional multi-State approach to solving problems or meeting needs relating to ocean, Great Lakes, and coastal resources, in cooperation with appropriate Sea Grant Colleges, Sea Grant Programs and other persons in the region.

(b) Although it is recognized that the distribution of effort between research,

education, training, and advisory services to achieve appropriate balance in a Sea Grant Regional Consortium may differ from a Sea Grant College, sustained effort in all of these areas is, nonetheless, an essential requirement for retention of such designation. To be eligible for designation as a Sea Grant Regional Consortium, the candidate association or alliance of organizations must meet the qualifications set forth above as evaluated by a site review team composed of members of the Sea Grant Review Panel, the Office of Sea Grant, and other experts. Further, the candidate must be rated highly in all of the following qualifying areas which are pertinent to the Consortium's program:

(1) *Leadership.* The Sea Grant Regional Consortium candidate must have achieved recognition as an intellectual and practical leader in marine science, engineering, education, and advisory service in its region.

(2) *Organization.* The Sea Grant Regional Consortium candidate must have created the management organization to carry on a viable and productive multidisciplinary Sea Grant Program and have the backing of the administrations of its component organizations at a sufficiently high level to fulfill its multidisciplinary and multifaceted mandate.

(3) *Relevance.* The Sea Grant Regional Consortium candidate's Sea Grant Program must be relevant to regional opportunities and problems in the marine environment. Important factors in evaluating relevance are the extent and depth of the need of a region for a focused marine resource emphasis and the degree to which the candidate has developed its capability to be responsive to that need.

(4) *Education and training.* Education and training must be clearly relevant to regional needs and must be of high quality in fields related to ocean, Great Lakes, and coastal resources. As appropriate, education may include precollege, college, post-graduate, public and adult levels.

(5) *Advisory services.* The Sea Grant Regional Consortium candidate must have a strong program through which information techniques, and research results from any reliable source, domestic or international, may be communicated to and utilized by user communities. In addition to the educational and information dissemination role, the advisory service program must aid in the identification and communication of user communities' research and educational needs.

(6) *Relationships.* The Sea Grant Regional Consortium candidate must have close ties with federal agencies, state agencies and administrations, regional authorities, regional business and industry, and other regional educational institutions. These regional ties are: (i) To ensure the relevance of programs, (ii) to generate requests for such assistance as the consortium may offer, and (iii) to assist others in developing research and management competence. The extent and quality of a candidate's relationships are critical factors in evaluating the proposed designation.

(7) *Productivity.* The Sea Grant Regional Consortium candidate must have demonstrated a degree of productivity (of research results, reports, employed students, service to regional agencies, industry, etc.) commensurate with the length of its Sea Grant operations and the level of funding under which it has worked.

(8) *Support.* The Sea Grant Regional Consortium candidate must have the ability to obtain matching funds from non-Federal sources, such as State legislatures, university management, State agencies, and business and industry. A diversity of matching funds sources is encouraged as a sign of program vitality and the ability to meet the Sea Grant requirement that funds for the general programs be matched with at least one non-Federal dollar for every two Federal dollars.

(c) Finally, it must be found that the Sea Grant Regional Consortium candidate will act in accordance with the following standards relating to its continuing responsibilities as a Sea Grant Regional Consortium:

(1) Continue pursuit of excellence and high performance in marine research education, training, and advisory services.

(2) Provide regional leadership in marine activities including coordinated planning and cooperative work with

local, State, regional, and Federal agencies, other Sea Grant Programs, and non-Sea Grant organizations.

(3) Maintain an effective management framework and application of organizational resources to the achievement of Sea Grant objectives.

(4) Develop and implement long-term plans for research, education, training, and advisory services consistent with Sea Grant goals and objectives.

(5) Advocate and further the Sea Grant concept and the full development of its potential within the consortium and the region.

(6) Provide adequate and stable matching financial support for the program from non-Federal sources.

(7) Establish and operate an effective system to control the quality of its Sea Grant program.

§918.6 Duration of Sea Grant Regional Consortium designation.

Designation will be made on the basis of merit and the determination by the Secretary of Commerce that such a designation is consistent with the goals of the Act. Continuation of the Sea Grant Regional Consortium designation is contingent upon the alliance's ability to maintain a high quality performance consistent with the standards outlined above. The Secretary may, for cause and after an opportunity for hearing, suspend or terminate the designation as a Sea Grant Regional Consortium.

§918.7 Application for designation.

(a) All applications for initial designation as a Sea Grant College or a Regional Consortium should be addressed to the Secretary of Commerce and submitted to the Director, National Sea Grant College Program, National Oceanic and Atmospheric Administration. The application should contain an outline of the capabilities of the applicant and the reasons why the applicant believes that it merits designation under the guidelines contained in this regulation. Upon receipt of the application, the Director will present the institution's case to the Sea Grant Review Panel for evaluation. The Panel's recommendation will be forwarded to the Secretary for final action.

(b) An existing Sea Grant College or Regional Consortium may also apply as in paragraph (a) of this section, for a change in the scope of designation to include or exclude other administrative entities of the institution or association. If approved by the Secretary such included (excluded) administrative entities shall share (lose) the full rights and responsibilities of a Sea Grant College or Regional Consortium.

SUBCHAPTER B—OCEAN AND COASTAL RESOURCE MANAGEMENT

PART 921—NATIONAL ESTUARINE RESEARCH RESERVE SYSTEM REGULATIONS

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APPENDIX I TO PART 921—BIOGEOGRAPHIC CLASSIFICATION SCHEME
APPENDIX II TO PART 921—TYPOLOGY OF NATIONAL ESTUARINE RESEARCH RESERVES

AUTHORITY: Section 315 of the Coastal Zone Management Act, as amended (16 U.S.C. 1461).

SOURCE: 58 FR 38215, July 15, 1993, unless otherwise noted.

Subpart A—General

§ 921.1 Mission, goals and general provisions.

(a) The mission of the National Estuarine Research Reserve Program is the establishment and management, through Federal-state cooperation, of a national system (National Estuarine Research Reserve System or System) of estuarine research reserves (National Estuarine Research Reserves or Reserves) representative of the various regions and estuarine types in the United States. National Estuarine Research Reserves are established to provide opportunities for long-term research, education, and interpretation.

(b) The goals of the Program are to:

(1) Ensure a stable environment for research through long-term protection of National Estuarine Research Reserve resources;

(2) Address coastal management issues identified as significant through coordinated estuarine research within the System;

(3) Enhance public awareness and understanding of estuarine areas and provide suitable opportunities for public education and interpretation;

(4) Promote Federal, state, public and private use of one or more Reserves within the System when such entities conduct estuarine research; and

(5) Conduct and coordinate estuarine research within the System, gathering and making available information necessary for improved understanding and management of estuarine areas.

(c) National Estuarine Research Reserves shall be open to the public to the extent permitted under state and Federal law. Multiple uses are allowed to the degree compatible with each Reserve's overall purpose as provided in the management plan (see §921.13) and consistent with paragraphs (a) and (b) of this section. Use levels are set by the state where the Reserve is located and analyzed in the management plan. The Reserve management plan shall describe the uses and establish priorities among these uses. The plan shall identify uses requiring a state permit, as well as areas where uses are encouraged or prohibited. Consistent with resource protection and research objectives, public access and use may be restricted to certain areas or components within a Reserve.

(d) Habitat manipulation for research purposes is allowed consistent with the following limitations. Manipulative research activities must be specified in the management plan, be consistent with the mission and goals of the program (see paragraphs (a) and (b) of this section) and the goals and objectives set forth in the Reserve's management plan, and be limited in nature and extent to the minimum manipulative activity necessary to accomplish the stated research objective. Manipulative research activities with a significant or long-term impact on Reserve resources require the prior approval of the state and the National Oceanic and Atmospheric Administration (NOAA). Manipulative research activities which can reasonably be expected to have a significant adverse impact on the estuarine resources and habitat of a Reserve, such that the activities themselves or their resulting short- and long-term consequences compromise the representative character and integrity of a Reserve, are prohibited. Habitat manipulation for resource management purposes is prohibited except as specifically approved by NOAA as: (1) A restoration activity consistent with paragraph (e) of this section; or (2) an activity necessary for the protection of public health or the preservation of other sensitive resources which have been listed or are eligible for protection under relevant Federal or state authority (e.g., threatened/endangered species or significant historical or cultural resources) or if the manipulative activity is a long-term pre-existing use (*i.e.,* has occurred prior to designation) occurring in a buffer area. If habitat manipulation is determined to be necessary for the protection of public health, the preservation of sensitive resources, or if the manipulation is a long-term pre-existing use in a buffer area, then these activities shall be specified in the Reserve management plan in accordance with §921.13(a)(10) and shall be limited to the reasonable alternative which has the least adverse and shortest term impact on the representative and ecological integrity of the Reserve.

(e) Under the Act an area may be designated as an estuarine Reserve only if the area is a representative estuarine ecosystem that is suitable for long-term research. Many estuarine areas have undergone some ecological change as a result of human activities (e.g., hydrological changes, intentional/unintentional species composition changes—introduced and exotic species). In those areas proposed or designated as National Estuarine Research Reserves, such changes may have diminished the representative character and integrity of the site. Although restoration of degraded areas is not a primary purpose of the System, such activities may be permitted to improve the representative character and integrity of a Reserve. Restoration activities must be carefully planned and approved by NOAA through the Reserve management plan. Historical research may be necessary to determine the ''natural'' representative state of an estuarine area (*i.e.,* an estuarine ecosystem minimally affected by

human activity or influence). Frequently, restoration of a degraded estuarine area will provide an excellent opportunity for management oriented research.

(f) NOAA may provide financial assistance to coastal states, not to exceed, per Reserve, 50 percent of all actual costs or $5 million whichever amount is less, to assist in the acquisition of land and waters, or interests therein. NOAA may provide financial assistance to coastal states not to exceed 70 percent of all actual costs for the management and operation of, the development and construction of facilities, and the conduct of educational or interpretive activities concerning Reserves (see subpart I). NOAA may provide financial assistance to any coastal state or public or private person, not to exceed 70 percent of all actual costs, to support research and monitoring within a Reserve. Notwithstanding any financial assistance limits established by this Part, when financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, such assistance may be used to pay 100 percent of all actual costs of activities carrier out with this assistance, as long as such funds are available. Predesignation, acquisition and development, operation and management, special research and monitoring, and special education and interpretation awards are available under the National Estuarine Reserve Program. Predesignation awards are for site selection/feasibility, draft management plan preparation and conduct of basic characterization studies. Acquisition and development awards are intended primarily for acquisition of interests in land, facility construction and to develop and/or upgrade research, monitoring and education programs. Operation and management awards provide funds to assist in implementing, operating and managing the administrative, and basic research, monitoring and education programs, outlined in the Reserve management plan. Special research and monitoring awards provide funds to conduct estuarine research and monitoring projects with the System. Special educational and interpretive awards provide funds to conduct estuarine educational and interpretive projects within the System.

(g) Lands already in protected status managed by other Federal agencies, state or local governments, or private organizations may be included within National Estuarine Research Reserves only if the managing entity commits to long-term management consistent with paragraphs (d) and (e) of this section in the Reserve management plan. Federal lands already in protected status may not comprise a majority of the key land and water areas of a Reserve (see § 921.11(c)(3)).

(h) To assist the states in carrying out the Program's goals in an effective manner, NOAA will coordinate a research and education information exchange throughout the National Estuarine Research Reserve System. As part of this role, NOAA will ensure that information and ideas from one Reserve are made available to others in the System. The network will enable Reserves to exchange information and research data with each other, with universities engaged in estuarine research, and with Federal, state, and local agencies. NOAA's objective is a system-wide program of research and monitoring capable of addressing the management issues that affect long-term productivity of our Nation's estuaries.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12540, Mar. 17, 1997; 63 FR 26717, May 14, 1998]

§ 921.2 Definitions.

(a) *Act* means the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*

(b) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management or delegee.

(c) *Coastal state* means a state of the United States, in or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of these regulations the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Marianas Islands, the Trust Territories of the Pacific Islands, and American Samoa (see 16 U.S.C. 1453(4)).

(d) *State agency* means an instrumentality of a coastal state to whom the coastal state has delegated the authority and responsibility for the creation and/or management/operation of a National Estuarine Research Reserve. Factors indicative of this authority may include the power to receive and expend funds on behalf of the Reserve, acquire and sell or convey real and personal property interests, adopt rules for the protection of the Reserve, enforce rules applicable to the Reserve, or develop and implement research and education programs for the reserve. For the purposes of these regulations, the terms ''coastal state'' and ''State agency'' shall be synonymous.

(e) *Estuary* means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term also includes estuary-type areas with measurable freshwater influence and having unimpaired connections with the open sea, and estuary-type areas of the Great Lakes and their connecting waters (see 16 U.S.C. 1453(7)).

(f) *National Estuarine Research Reserve* means an area that is a representative estuarine ecosystem suitable for long-term research, which may include all of the key land and water portion of an estuary, and adjacent transitional areas and uplands constituting to the extent feasible a natural unit, and which is set aside as a natural field laboratory to provide long-term opportunities for research, education, and interpretation on the ecological relationships within the area (see 16 U.S.C. 1453(8)) and meets the requirements of 16 U.S.C. 1461(b). This includes those areas designated as National Estuarine Sanctuaries or Reserves under section 315 of the Act prior to enactment of the Coastal Zone Act Reauthorization Amendments of 1990 and each area subsequently designated as a National Estuarine Research Reserve.

§921.3 National Estuarine Research Reserve System biogeographic classification scheme and estuarine typologies.

(a) National Estuarine Research Reserves are chosen to reflect regional differences and to include a variety of ecosystem types. A biogeographic classification scheme based on regional variations in the nation's coastal zone has been developed. The biogeographic classification scheme is used to ensure that the National Estuarine Research Reserve System includes at least one site from each region. The estuarine typology system is utilized to ensure that sites in the System reflect the wide range of estuarine types within the United States.

(b) The biogeographic classification scheme, presented in appendix I, contains 29 regions. Figure 1 graphically depicts the biogeographic regions of the United States.

(c) The typology system is presented in appendix II.

§921.4 Relationship to other provisions of the Coastal Zone Management Act, and to the Marine Protection, Research and Sanctuaries Act.

(a) The National Estuarine Research Reserve System is intended to provide information to state agencies and other entities involved in addressing coastal management issues. Any coastal state, including those that do not have approved coastal management programs under section 306 of the Act, is eligible for an award under the National Estuarine Research Reserve Program (see §921.2(c)).

(b) For purposes of consistency review by states with a federally approved coastal management program, the designation of a National Estuarine Research Reserve is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal management program as provided by section 1456(c)(1) of the Act, and implementing regulations at 15 CFR part 930, subpart C. In accordance with section 1456(c)(1) of the Act and the applicable regulations NOAA will be responsible for certifying that designation of the Reserve is consistent with the state's approved coastal management program. The state must concur with or object to the certification. It is recommended that the lead state agency for Reserve designation consult, at the

earliest practicable time, with the appropriate state officials concerning the consistency of a proposed National Estuarine Research Reserve.

(c) The National Estuarine Research Reserve Program will be administered in close coordination with the National Marine Sanctuary Program (Title III of the Marine Protection, Research and Sanctuaries Act, as amended, 16 U.S.C. 1431–1445), also administered by NOAA. Title III authorizes the Secretary of Commerce to designate discrete areas of the marine environment as National Marine Sanctuaries to protect or restore such areas for their conservation, recreational, ecological, historical, research, educational or esthetic values. National Marine Sanctuaries and Estuarine Research Reserves may not overlap, but may be adjacent.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

§ 921.10 General.

(a) A coastal state may apply for Federal financial assistance for the purpose of site selection, preparation of documents specified in § 921.13 (draft management plan (DMP) and environmental impact statement (EIS)), and the conduct of limited basic characterization studies. The total Federal share of this assistance may not exceed $100,000. Federal financial assistance for preacquisition activities under § 921.11 and § 921.12 is subject to the total $5 million for which each Reserve is eligible for land acquisition. Notwithstanding the above, when financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, such assistance may be used to pay 100 percent of all actual costs of activities carried out with this assistance, as long as such funds are available. In the case of a biogeographic region (see appendix I) shared by two or more coastal states, each state is eligible for Federal financial assistance to establish a separate National Estuarine Research Reserve within their respective portion of the shared biogeographic region. Each separate National Estuarine Research Reserve is eligible for the full complement of funding. Financial assistance application procedures are specified in subpart I.

(b) In developing a Reserve program, a state may choose to develop a multiple-site Reserve reflecting a diversity of habitats in a single biogeographic region. A multiple-site Reserve allows the state to develop complementary research and educational programs within the individual components of its multi-site Reserve. Multiple-site Reserves are treated as one Reserve in terms of financial assistance and development of an overall management framework and plan. Each individual site of a proposed multiple-site Reserve shall be evaluated both separately under § 921.11(c) and collectively as part of the site selection process. A coastal state may propose to establish a multiple-site Reserve at the time of the initial site selection, or at any point in the development or operation of the Reserve. If the state decides to develop a multiple-site National Estuarine Research Reserve after the initial acquisition and development award is made for a single site, the proposal is subject to the requirements set forth in § 921.33(b). However, a state may not propose to add one or more sites to an already designated Reserve if the operation and management of such Reserve has been found deficient and uncorrected or the research conducted is not consistent with the Estuarine Research Guidelines referenced in § 921.51. In addition, Federal funds for the acquisition of a multiple-site Reserve remain limited to $5,000,000 (see § 921.20). The funding for operation of a multiple-site Reserve is limited to the maximum allowed for any one Reserve per year (see § 921.32(c)) and preacquisition funds are limited to $100,000 per Reserve. Notwithstanding the above, when financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, such assistance may be used to pay 100 percent of all actual costs of activities carrier out with this assistance, as long as such funds are available.

[58 FR 38215, July 15, 1993, as amended at 63 FR 26717, May 14, 1998]

§921.11 Site selection and feasibility.

(a) A coastal state may use Federal funds to establish and implement a site selection process which is approved by NOAA.

(b) In addition to the requirements set forth in subpart I, a request for Federal funds for site selection must contain the following programmatic information:

(1) A description of the proposed site selection process and how it will be implemented in conformance with the biogeographic classification scheme and typology (§921.3);

(2) An identification of the site selection agency and the potential management agency; and

(3) A description of how public participation will be incorporated into the process (see §921.11(d)).

(c) As part of the site selection process, the state and NOAA shall evaluate and select the final site(s). NOAA has final authority in approving such sites. Site selection shall be guided by the following principles:

(1) The site's contribution to the biogeographical and typological balance of the National Estuarine Research Reserve System. NOAA will give priority consideration to proposals to establish Reserves in biogeographic regions or subregions or incorporating types that are not represented in the system. (see the biogeographic classification scheme and typology set forth in §921.3 and appendices I and II);

(2) The site's ecological characteristics, including its biological productivity, diversity of flora and fauna, and capacity to attract a broad range of research and educational interests. The proposed site must be a representative estuarine ecosystem and should, to the maximum extent possible, be an estuarine ecosystem minimally affected by human activity or influence (see §921.1(e)).

(3) Assurance that the site's boundaries encompass an adequate portion of the key land and water areas of the natural system to approximate an ecological unit and to ensure effective conservation. Boundary size will vary greatly depending on the nature of the ecosystem. Reserve boundaries must encompass the area within which adequate control has or will be established by the managing entity over human activities occurring within the Reserve. Generally, Reserve boundaries will encompass two areas: Key land and water areas (or ''core area'') and a buffer zone. Key land and water areas and a buffer zone will likely require significantly different levels of control (see §921.13(a)(7)). The term ''key land and water areas'' refers to that core area within the Reserve that is so vital to the functioning of the estuarine ecosystem that it must be under a level of control sufficient to ensure the long-term viability of the Reserve for research on natural processes. Key land and water areas, which comprise the core area, are those ecological units of a natural estuarine system which preserve, for research purposes, a full range of significant physical, chemical and biological factors contributing to the diversity of fauna, flora and natural processes occurring within the estuary. The determination of which land and water areas are ''key'' to a particular Reserve must be based on specific scientific knowledge of the area. A basic principle to follow when deciding upon key land and water areas is that they should encompass resources representative of the total ecosystem, and which if compromised could endanger the research objectives of the Reserve. The term *buffer zone* refers to an area adjacent to or surrounding key land and water areas and essential to their integrity. Buffer zones protect the core area and provide additional protection for estuarine-dependent species, including those that are rare or endangered. When determined appropriate by the state and approved by NOAA, the buffer zone may also include an area necessary for facilities required for research and interpretation. Additionally, buffer zones should be established sufficient to accommodate a shift of the core area as a result of biological, ecological or geomorphological change which reasonably could be expected to occur. National Estuarine Research Reserves may include existing Federal or state lands already in a protected status where mutual benefit can be enhanced. However, NOAA will not approve a site

for potential National Estuarine Research Reserve status that is dependent primarily upon the inclusion of currently protected Federal lands in order to meet the requirements for Reserve status (such as key land and water areas). Such lands generally will be included within a Reserve to serve as a buffer or for other ancillary purposes; and may be included, subject to NOAA approval, as a limited portion of the core area;

(4) The site's suitability for long-term estuarine research, including ecological factors and proximity to existing research facilities and educational institutions;

(5) The site's compatibility with existing and potential land and water uses in contiguous areas as well as approved coastal and estuarine management plans; and

(6) The site's importance to education and interpretive efforts, consistent with the need for continued protection of the natural system.

(d) Early in the site selection process the state must seek the views of affected landowners, local governments, other state and Federal agencies and other parties who are interested in the area(s) being considered for selection as a potential National Estuarine Research Reserve. After the local government(s) and affected landowner(s) have been contacted, at least one public meeting shall be held in the vicinity of the proposed site. Notice of such a meeting, including the time, place, and relevant subject matter, shall be announced by the state through the area's principal newspaper at least 15 days prior to the date of the meeting and by NOAA in the FEDERAL REGISTER.

(e) A state request for NOAA approval of a proposed site (or sites in the case of a multi-site Reserve) must contain a description of the proposed site(s) in relationship to each of the site selection principals (§ 921.11(c)) and the following information:

(1) An analysis of the proposed site(s) based on the biogeographical scheme/typology discussed in § 921.3 and set forth in appendices I and II;

(2) A description of the proposed site(s) and its (their) major resources, including location, proposed boundaries, and adjacent land uses. Maps are required;

(3) A description of the public participation process used by the state to solicit the views of interested parties, a summary of comments, and, if interstate issues are involved, documentation that the Governor(s) of the other affected state(s) has been contacted. Copies of all correspondence, including contact letters to all affected landowners must be appended;

(4) A list of all sites considered and a brief statement of the reasons why a site was not preferred; and

(5) A nomination of the proposed site(s) for designation as a National Estuarine Research Reserve by the Governor of the coastal state in which the state is located.

(f) A state proposing to reactivate an inactive site, previously approved by NOAA for development as an Estuarine Sanctuary or Reserve, may apply for those funds remaining, if any, provided for site selection and feasibility (§ 921.11a)) to determine the feasibility of reactivation. This feasibility study must comply with the requirements set forth in § 921.11 (c) through (e).

§ 921.12 Post site selection.

(a) At the time of the coastal state's request for NOAA approval of a proposed site, the state may submit a request for funds to develop the draft management plan and for preparation of the EIS. At this time, the state may also submit a request for the remainder of the predesignation funds to perform a limited basic characterization of the physical, chemical and biological characteristics of the site approved by NOAA necessary for providing EIS information to NOAA. The state's request for these post site selection funds must be accompanied by the information specified in subpart I and, for draft management plan development and EIS information collection, the following programmatic information:

(1) A draft management plan outline (see § 921.13(a) below); and

(2) An outline of a draft memorandum of understanding (MOU) between the state and NOAA detailing the Federal-state role in Reserve management during the initial period of Federal funding and expressing the

state's long-term commitment to operate and manage the Reserve.

(b) The state is eligible to use the funds referenced in §921.12(a) after the proposed site is approved by NOAA under the terms of §921.11.

§921.13 Management plan and environmental impact statement development.

(a) After NOAA approves the state's proposed site and application for funds submitted pursuant to §921.12, the state may begin draft management plan development and the collection of information necessary for the preparation by NOAA of an EIS. The state shall develop a draft management plan, including an MOU. The plan shall set out in detail:

(1) Reserve goals and objectives, management issues, and strategies or actions for meeting the goals and objectives;

(2) An administrative plan including staff roles in administration, research, education/interpretation, and surveillance and enforcement;

(3) A research plan, including a monitoring design;

(4) An education/interpretive plan;

(5) A plan for public access to the Reserve;

(6) A construction plan, including a proposed construction schedule, general descriptions of proposed developments and general cost estimates. Information should be provided for proposed minor construction projects in sufficient detail to allow these projects to begin in the initial phase of acquisition and development. A categorical exclusion, environmental assessment, or EIS may be required prior to construction;

(7)(i) An acquisition plan identifying the ecologically key land and water areas of the Reserve, ranking these areas according to their relative importance, and including a strategy for establishing adequate long-term state control over these areas sufficient to provide protection for Reserve resources to ensure a stable environment for research. This plan must include an identification of ownership within the proposed Reserve boundaries, including land already in the public domain; the method(s) of acquisition which the state proposes to use—acquisition (including less-than-fee simple options) to establish adequate long-term state control; an estimate of the fair market value of any property interest—which is proposed for acquisition; a schedule estimating the time required to complete the process of establishing adequate state control of the proposed research reserve; and a discussion of any anticipated problems. In selecting a preferred method(s) for establishing adequate state control over areas within the proposed boundaries of the Reserve, the state shall perform the following steps for each parcel determined to be part of the key land and water areas (control over which is necessary to protect the integrity of the Reserve for research purposes), and for those parcels required for research and interpretive support facilities or buffer purposes:

(A) Determine, with appropriate justification, the minimum level of control(s) required [e.g., management agreement, regulation, less-than-fee simple property interest (e.g., conservation easement), fee simple property acquisition, or a combination of these approaches]. This does not preclude the future necessity of increasing the level of state control;

(B) Identify the level of existing state control(s);

(C) Identify the level of additional state control(s), if any, necessary to meet the minimum requirements identified in paragraph (a)(7)(i)(A) of this section;

(D) Examine all reasonable alternatives for attaining the level of control identified in paragraph (a)(7)(i)(C) of this section, and perform a cost analysis of each; and

(E) Rank, in order of cost, the methods (including acquisition) identified in paragraph (a)(7)(i)(D) of this section.

(ii) An assessment of the relative cost-effectiveness of control alternatives shall include a reasonable estimate of both short-term costs (e.g., acquisition of property interests, regulatory program development including associated enforcement costs, negotiation, adjudication, etc.) and long-term costs (e.g., monitoring, enforcement,

adjudication, management and coordination). In selecting a preferred method(s) for establishing adequate state control over each parcel examined under the process described above, the state shall give priority consideration to the least costly method(s) of attaining the minimum level of long-term control required. Generally, with the possible exception of buffer areas required for support facilities, the level of control(s) required for buffer areas will be considerably less than that required for key land and water areas. This acquisition plan, after receiving the approval of NOAA, shall serve as a guide for negotiations with landowners. A final boundary for the reserve shall be delineated as a part of the final management plan;

(8) A resource protection plan detailing applicable authorities, including allowable uses, uses requiring a permit and permit requirements, any restrictions on use of the research reserve, and a strategy for research reserve surveillance and enforcement of such use restrictions, including appropriate government enforcement agencies;

(9) If applicable, a restoration plan describing those portions of the site that may require habitat modification to restore natural conditions;

(10) If applicable, a resource manipulation plan, describing those portions of the Reserve buffer in which long-term pre-existing (prior to designation) manipulation for reasons not related to research or restoration is occurring. The plan shall explain in detail the nature of such activities, shall justify why such manipulation should be permitted to continue within the reserve buffer; and shall describe possible effects of this manipulation on key land and water areas and their resources;

(11) A proposed memorandum of understanding (MOU) between the state and NOAA regarding the Federal-state relationship during the establishment and development of the National Estuarine Research Reserve, and expressing a long-term commitment by the state to maintain and manage the Reserve in accordance with section 315 of the Act, 16 U.S.C. 1461, and applicable regulations. In conjunction with the MOU, and where possible under state law, the state will consider taking appropriate administrative or legislative action to ensure the long-term protection and operation of the National Estuarine Research Reserve. If other MOUs are necessary (such as with a Federal agency, another state agency or private organization), drafts of such MOUs must be included in the plan. All necessary MOU's shall be signed prior to Reserve designation; and

(12) If the state has a federally approved coastal management program, a certification that the National Estuarine Research Reserve is consistent to the maximum extent practicable with that program. See §§921.4(b) and 921.30(b).

(b) Regarding the preparation of an EIS under the National Environmental Policy Act on a National Estuarine Research Reserve proposal, the state and NOAA shall collect all necessary information concerning the socioeconomic and environmental impacts associated with implementing the draft management plan and feasible alternatives to the plan. Based on this information, the state will draft and provide NOAA with a preliminary EIS.

(c) Early in the development of the draft management plan and the draft EIS, the state and NOAA shall hold a scoping meeting (pursuant to NEPA) in the area or areas most affected to solicit public and government comments on the significant issues related to the proposed action. NOAA will publish a notice of the meeting in the FEDERAL REGISTER at least 15 days prior to the meeting. The state shall be responsible for publishing a similar notice in the local media.

(d) NOAA will publish a FEDERAL REGISTER notice of intent to prepare a draft EIS. After the draft EIS is prepared and filed with the Environmental Protection Agency (EPA), a Notice of Availability of the draft EIS will appear in the FEDERAL REGISTER. Not less than 30 days after publication of the notice, NOAA will hold at least one public hearing in the area or areas most affected by the proposed national estuarine research reserve. The hearing will be held no sooner than 15 days after appropriate notice of the meeting has been given in the principal news media by the state and in the FEDERAL REGISTER by NOAA. After a 45-day

comment period, a final EIS will be prepared by the state and NOAA.

Subpart C—Acquisition, Development and Preparation of the Final Management Plan

§921.20 General.

The acquisition and development period is separated into two major phases. After NOAA approval of the site, draft management plan and draft MOU, and completion of the final EIS, a coastal state is eligible for an initial acquisition and development award(s). In this initial phase, the state should work to meet the criteria required for formal research reserve designation; e.g., establishing adequate state control over the key land and water areas as specified in the draft management plan and preparing the final management plan. These requirements are specified in §921.30. Minor construction in accordance with the draft management plan may also be conducted during this initial phase. The initial acquisition and development phase is expected to last no longer than three years. If necessary, a longer time period may be negotiated between the state and NOAA. After Reserve designation, a state is eligible for a supplemental acquisition and development award(s) in accordance with §921.31. In this post-designation acquisition and development phase, funds may be used in accordance with the final management plan to construct research and educational facilities, complete any remaining land acquisition, for program development, and for restorative activities identified in the final management plan. In any case, the amount of Federal financial assistance provided to a coastal state with respect to the acquisition of lands and waters, or interests therein, for any one National Estuarine Research Reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein or $5,000,000, whichever amount is less, except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of all actual costs of activities carrier out with this assistance, as long as such funds are available.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12540, Mar. 17, 1997; 63 FR 26717, May 14, 1998]

§921.21 Initial acquisition and development awards.

(a) Assistance is provided to aid the recipient prior to designation in:

(1) Acquiring a fee simple or less-than-fee simple real property interest in land and water areas to be included in the Reserve boundaries (see §921.13(a)(7); §921.30(d));

(2) Minor construction, as provided in paragraphs (b) and (c) of this section;

(3) Preparing the final management plan; and

(4) Initial management costs, e.g., for implementing the NOAA approved draft management plan, hiring a Reserve manager and other staff as necessary and for other management-related activities. Application procedures are specified in subpart I.

(b) The expenditure of Federal and state funds on major construction activities is not allowed during the initial acquisition and development phase. The preparation of architectural and engineering plans, including specifications, for any proposed construction, or for proposed restorative activities, is permitted. In addition, minor construction activities, consistent with paragraph (c) of this section also are allowed. The NOAA-approved draft management plan must, however, include a construction plan and a public access plan before any award funds can be spent on construction activities.

(c) Only minor construction activities that aid in implementing portions of the management plan (such as boat ramps and nature trails) are permitted during the initial acquisition and development phase. No more than five (5) percent of the initial acquisition and development award may be expended on such activities. NOAA must make a specific determination, based on the final EIS, that the construction activity will not be detrimental to the environment.

(d) Except as specifically provided in paragraphs (a) through (c) of this section, construction projects, to be funded in whole or in part under an acquisition and development award(s), may not be initiated until the Reserve receives formal designation (see § 921.30). This requirement has been adopted to ensure that substantial progress in establishing adequate state control over key land and water areas has been made and that a final management plan is completed before major sums are spent on construction. Once substantial progress in establishing adequate state control/acquisition has been made, as defined by the state in the management plan, other activities guided by the final management plan may begin with NOAA's approval.

(e) For any real property acquired in whole or part with Federal funds for the Reserve, the state shall execute suitable title documents to include substantially the following provisions, or otherwise append the following provisions in a manner acceptable under applicable state law to the official land record(s):

(1) Title to the property conveyed by this deed shall vest in the [recipient of the award granted pursuant to section 315 of the Act, 16 U.S.C. 1461 or other NOAA approved state agency] subject to the condition that the designation of the [name of National Estuarine Reserve] is not withdrawn and the property remains part of the federally designated [name of National Estuarine Research Reserve]; and

(2) In the event that the property is no longer included as part of the Reserve, or if the designation of the Reserve of which it is part is withdrawn, then NOAA or its successor agency, after full and reasonable consultation with the State, may exercise the following rights regarding the disposition of the property:

(i) The recipient may retain title after paying the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the current fair market value of the property;

(ii) If the recipient does not elect to retain title, the Federal Government may either direct the recipient to sell the property and pay the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the proceeds from the sale (after deducting actual and reasonable selling and repair or renovation expenses, if any, from the sale proceeds), or direct the recipient to transfer title to the Federal Government. If directed to transfer title to the Federal Government, the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the original project to the current fair market value of the property; and

(iii) Fair market value of the property must be determined by an independent appraiser and certified by a responsible official of the state, as provided by Department of Commerce regulations at 15 CFR part 24, and Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally assisted programs at 15 CFR part 11.

(f) Upon instruction by NOAA, provisions analogous to those of § 921.21(e) shall be included in the documentation underlying less-then-fee-simple interests acquired in whole or part with Federal funds.

(g) Federal funds or non-Federal matching share funds shall not be spent to acquire a real property interest in which the state will own the land concurrently with another entity unless the property interest has been identified as a part of an acquisition strategy pursuant to § 921.13(7) which has been approved by NOAA prior to the effective date of these regulations.

(h) Prior to submitting the final management plan to NOAA for review and approval, the state shall hold a public meeting to receive comment on the plan in the area affected by the estuarine research reserve. NOAA will publish a notice of the meeting in the FEDERAL REGISTER at least 15 days prior to the public meeting. The state shall be responsible for having a similar notice published in the local newspaper(s).

Subpart D—Reserve Designation and Subsequent Operation

§921.30 Designation of National Estuarine Research Reserves.

(a) The Under Secretary may designate an area proposed for designation by the Governor of the state in which it is located, as a National Esturaine Research Reserve if the Under Secretary finds:

(1) The area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System;

(2) Key land and water areas of the proposed Reserve, as identified in the management plan, are under adequate state control sufficient to provide long-term protection for reserve resources to ensure a stable environment for research;

(3) Designation of the area as a Reserve will serve to enhance public awareness and understanding of estuarine areas, and provide suitable opportunities for public education and interpretation;

(4) A final management plan has been approved by NOAA;

(5) An MOU has been signed between the state and NOAA ensuring a long-term commitment by the state to the effective operation and implementation of the area as a National Estuarine Research Reserve;

(6) All MOU's necessary for reserve management (*i.e.*, with relevant Federal, state, and local agencies and/or private organizations) have been signed; and

(7) The coastal state in which the area is located has complied with the requirements of subpart B.

(b) NOAA will determine whether the designation of a National Estuarine Research Reserve in a state with a federally approved coastal zone management program directly affects the coastal zone. If the designation is found to directly affect the coastal zone, NOAA will make a consistency determination pursuant to §307(c)(1) of the Act, 16 U.S.C. 1456, and 15 CFR part 930, subpart C. See §921.4(b). The results of this consistency determination will be published in the FEDERAL REGISTER when the notice of designation is published. See §921.30(c).

(c) NOAA will publish the notice of designation of a National Estuarine Research Reserve in the FEDERAL REGISTER. The state shall be responsible for having a similar notice published in the local media.

(d) The term *state control* in §921.30(a)(3) does not necessarily require that key land and water areas be owned by the state in fee simple. Acquisition of less-than-fee simple interests e.g., conservation easements) and utilization of existing state regulatory measures are encouraged where the state can demonstrate that these interests and measures assure adequate long-term state control consistent with the purposes of the research reserve (see also §§921.13(a)(7); 921.21(g)). Should the state later elect to purchase an interest in such lands using NOAA funds, adequate justification as to the need for such acquisition must be provided to NOAA.

§921.31 Supplemental acquisition and development awards.

After National Estuarine Research Reserve designation, and as specified in the approved management plan, a coastal state may request a supplemental acquisition and/or development award(s) for acquiring additional property interests identified in the management plan as necessary to strengthen protection of key land and water areas and to enhance long-term protection of the area for research and education, for facility and exhibit construction, for restorative activities identified in the approved management plan, for administrative purposes related to acquisition and/or facility construction and to develop and/or upgrade research, monitoring and education/interpretive programs. Federal financial assistance provided to a National Estuarine Research Reserve for supplemental development costs directly associated with facility construction (*i.e.*, major construction activities) may not exceed 70 percent of the total project cost, except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100

percent of the costs. NOAA must make a specific determination that the construction activity will not be detrimental to the environment. Acquisition awards for the acquisition of lands or waters, or interests therein, for any one reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein of $5,000,000, whichever amount is less, except when the financial assistance is provided from amounts recovered as result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of all actual costs of activities carrier out with this assistance, as long as such funds are available. In the case of a biogeographic region (see appendix I) shared by two or more states, each state is eligible independently for Federal financial assistance to establish a separate National Estuarine Research Reserve within their respective portion of the shared biogeographic region. Application procedures are specified in subpart I. Land acquisition must follow the procedures specified in §§921.13(a)(7), 921.21(e) and (f) and 921.81.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12540, Mar. 17, 1997; 63 FR 26717, May 14, 1998]

§ 921.32 Operation and management: Implementation of the management plan.

(a) After the Reserve is formally designated, a coastal state is eligible to receive Federal funds to assist the state in the operation and management of the Reserve including the management of research, monitoring, education, and interpretive programs. The purpose of this Federally funded operation and management phase is to implement the approved final management plan and to take the necessary steps to ensure the continued effective operation of the Reserve.

(b) State operation and management of the Reserves shall be consistent with the mission, and shall further the goals of the National Estuarine Research Reserve program (see §921.1).

(c) Federal funds are available for the operation and management of the Reserve. Federal funds provided pursuant to this section may not exceed 70 percent of the total cost of operating and managing the Reserve for any one year, except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of the costs. In the case of a biogeographic region (see Appendix I) shared by two or more states, each state is eligible for Federal financial assistance to establish a separate Reserve within their respective portion of the shared biogeographic region (see §921.10).

(d) Operation and management funds are subject to the following limitations:

(1) Eligible coastal state agencies may apply for up to the maximum share available per Reserve for that fiscal year. Share amounts will be announced annually by letter from the Sanctuary and Reserves Division to all participating states. This letter will be provided as soon as practicable following approval of the Federal budget for that fiscal year.

(2) No more than ten percent of the total amount (state and Federal shares) of each operation and management award may be used for construction-type activities.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12541, Mar. 17, 1997]

§ 921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

(a) Changes in the boundary of a Reserve and major changes to the final management plan, including state laws or regulations promulgated specifically for the Reserve, may be made only after written approval by NOAA. NOAA may require public notice, including notice in the FEDERAL REGISTER and an opportunity for public comment before approving a boundary or management plan change. Changes in the boundary of a Reserve involving the acquisition of properties not listed in the management plan or final EIS require public notice and the opportunity for comment; in certain cases, a categorical exclusion, an environmental assessment and possibly an environmental impact statement may be required.

NOAA will place a notice in the FEDERAL REGISTER of any proposed changes in Reserve boundaries or proposed major changes to the final management plan. The state shall be responsible for publishing an equivalent notice in the local media. See also requirements of §§921.4(b) and 921.13(a)(11).

(b) As discussed in §921.10(b), a state may choose to develop a multiple-site National Estuarine Research Reserve after the initial acquisition and development award for a single site has been made. NOAA will publish notice of the proposed new site including an invitation for comments from the public in the FEDERAL REGISTER. The state shall be responsible for publishing an equivalent notice in the local newspaper(s). An EIS, if required, shall be prepared in accordance with section §921.13 and shall include an administrative framework for the multiple-site Reserve and a description of the complementary research and educational programs within the Reserve. If NOAA determines, based on the scope of the project and the issues associated with the additional site(s), that an environmental assessment is sufficient to establish a multiple-site Reserve, then the state shall develop a revised management plan which, concerning the additional component, incorporates each of the elements described in §921.13(a). The revised management plan shall address goals and objectives for all components of the multi-site Reserve and the additional component's relationship to the original site(s).

(c) The state shall revise the management plan for a Reserve at least every five years, or more often if necessary. Management plan revisions are subject to (a) above.

(d) NOAA will approve boundary changes, amendments to management plans, or the addition of multiple-site components, by notice in the FEDERAL REGISTER. If necessary NOAA will revise the designation document (findings) for the site.

Subpart E—Ongoing Oversight, Performance Evaluation and Withdrawal of Designation

§ 921.40 Ongoing oversight and evaluations of designated National Estuarine Research Reserves.

(a) The Sanctuaries and Reserve Division shall conduct, in accordance with section 312 of the Act and procedures set forth in 15 CFR part 928, ongoing oversight and evaluations of Reserves. Interim sanctions may be imposed in accordance with regulations promulgated under 15 CFR part 928.

(b) The Assistant Administrator may consider the following indicators of non-adherence in determining whether to invoke interim sanctions:

(1) Inadequate implementation of required staff roles in administration, research, education/interpretation, and surveillance and enforcement. Indicators of inadequate implementation could include: No Reserve Manager, or no staff or insufficient staff to carry out the required functions.

(2) Inadequate implementation of the required research plan, including the monitoring design. Indicators of inadequate implementation could include: Not carrying out research or monitoring that is required by the plan, or carrying out research or monitoring that is inconsistent with the plan.

(3) Inadequate implementation of the required education/interpretation plan. Indicators of inadequate implementation could include: Not carrying out education or interpretation that is required by the plan, or carrying out education/interpretation that is inconsistent with the plan.

(4) Inadequate implementation of public access to the Reserve. Indicators of inadequate implementation of public access could include: Not providing necessary access, giving full consideration to the need to keep some areas off limits to the public in order to protect fragile resources.

(5) Inadequate implementation of facility development plan. Indicators of inadequate implementation could include: Not taking action to propose and budget for necessary facilities, or not undertaking necessary construction in a timely manner when funds are available.

(6) Inadequate implementation of acquisition plan. Indicators of inadequate implementation could include: Not pursuing an aggressive acquisition program with all available funds for that purpose, not requesting promptly additional funds when necessary, and evidence that adequate long-term state control has not been established over some core or buffer areas, thus jeopardizing the ability to protect the Reserve site and resources from offsite impacts.

(7) Inadequate implementation of Reserve protection plan. Indicators of inadequate implementation could include: Evidence of non-compliance with Reserve restrictions, insufficient surveillance and enforcement to assure that restrictions on use of the Reserve are adhered to, or evidence that Reserve resources are being damaged or destroyed as a result of the above.

(8) Failure to carry out the terms of the signed Memorandum of Understanding (MOU) between the state and NOAA, which establishes a long-term state commitment to maintain and manage the Reserve in accordance with section 315 of the Act. Indicators of failure could include: State action to allow incompatible uses of state-controlled lands or waters in the Reserve, failure of the state to bear its fair share of costs associated with long-term operation and management of the Reserve, or failure to initiate timely updates of the MOU when necessary.

§ 921.41 Withdrawal of designation.

The Assistant Administrator may withdraw designation of an estuarine area as a National Estuarine Research Reserve pursuant to and in accordance with the procedures of section 312 and 315 of the Act and regulations promulgated thereunder.

Subpart F—Special Research Projects

§ 921.50 General.

(a) To stimulate high quality research within designated National Estuarine Research Reserves, NOAA may provide financial support for research projects which are consistent with the Estuarine Research Guidelines referenced in § 921.51. Research awards may be awarded under this subpart to only those designated Reserves with approved final management plans. Although research may be conducted within the immediate watershed of the Reserve, the majority of research activities of any single research project funded under this subpart may be conducted within Reserve boundaries. Funds provided under this subpart are primarily used to support management-related research projects that will enhance scientific understanding of the Reserve ecosystem, provide information needed by Reserve management and coastal management decision-makers, and improve public awareness and understanding of estuarine ecosystems and estuarine management issues. Special research projects may be oriented to specific Reserves; however, research projects that would benefit more than one Reserve in the National Estuarine Reserve Research System are encouraged.

(b) Funds provided under this subpart are available on a competitive basis to any coastal state or qualified public or private person. A notice of available funds will be published in the FEDERAL REGISTER. Special research project funds are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70 percent of the total cost of the project, consistent with § 921.81(e)(4) (''allowable costs''), except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of the costs.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12541, Mar. 17, 1997]

§ 921.51 Estuarine research guidelines.

(a) Research within the National Estuarine Research Reserve System shall be conducted in a manner consistent with Estuarine Research Guidelines developed by NOAA.

(b) A summary of the Estuarine Research Guidelines is published in the FEDERAL REGISTER as a part of the notice of available funds discussed in § 921.50(c).

(c) The Estuarine Research Guidelines are reviewed annually by NOAA. This review will include an opportunity

for comment by the estuarine research community.

§921.52 Promotion and coordination of estuarine research.

(a) NOAA will promote and coordinate the use of the National Estuarine Research Reserve System for research purposes.

(b) NOAA will, in conducting or supporting estuarine research other than that authorized under section 315 of the Act, give priority consideration to research that make use of the National Estuarine Research Reserve System.

(c) NOAA will consult with other Federal and state agencies to promote use of one or more research reserves within the National Estuarine Research Reserve System when such agencies conduct estuarine research.

Subpart G—Special Monitoring Projects

§921.60 General.

(a) To provide a systematic basis for developing a high quality estuarine resource and ecosystem information base for National Estuarine Research Reserves and, as a result, for the System, NOAA may provide financial support for basic monitoring programs as part of operations and management under §921.32. Monitoring funds are used to support three major phases of a monitoring program:

(1) Studies necessary to collect data for a comprehensive site description/characterization;

(2) Development of a site profile; and

(3) Formulation and implementation of a monitoring program.

(b) Additional monitoring funds may be available on a competitive basis to the state agency responsible for Reserve management or a qualified public or private person or entity. However, if the applicant is other than the managing entity of a Reserve that applicant must submit as a part of the application a letter from the Reserve manager indicating formal support of the application by the managing entity of the Reserve. Funds provided under this subpart for special monitoring projects are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70 percent of the total cost of the project, consistent with §921.81(e)(4) (''allowable costs''), except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of the costs.

(c) Monitoring projects funded under this subpart must focus on the resources within the boundaries of the Reserve and must be consistent with the applicable sections of the Estuarine Research Guidelines referenced in §921.51. Portions of the project may occur within the immediate watershed of the Reserve beyond the site boundaries. However, the monitoring proposal must demonstrate why this is necessary for the success of the project.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12541, Mar. 17, 1997]

Subpart H—Special Interpretation and Education Projects

§921.70 General.

(a) To stimulate the development of innovative or creative interpretive and educational projects and materials to enhance public awareness and understanding of estuarine areas, NOAA may fund special interpretive and educational projects in addition to those activities provided for in operations and management under §921.32. Special interpretive and educational awards may be awarded under this subpart to only those designated Reserves with approved final management plans.

(b) Funds provided under this subpart may be available on a competitive basis to any state agency. However, if the applicant is other than the managing entity of a Reserve, that applicant must submit as a part of the application a letter from the Reserve manager indicating formal support of the application by the managing entity of the Reserve. These funds are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70 percent of the total cost of the project, consistent with §921.81(e)(4) (''allowable costs''),

except when the financial assistance is provided from amounts recovered as a result of damage to natural resources located in the coastal zone, in which case the assistance may be used to pay 100 percent of the costs.

(c) Applicants for education/interpretive projects that NOAA determines benefit the entire National Estuarine Research Reserve System may receive Federal assistance of up to 100% of project costs.

[58 FR 38215, July 15, 1993, as amended at 62 FR 12541, Mar. 17, 1997]

Subpart I—General Financial Assistance Provisions

§ 921.80 Application information.

(a) Only a coastal state may apply for Federal financial assistance awards for preacquisition, acquisition and development, operation and management, and special education and interpretation projects under subpart H. Any coastal state or public or private person may apply for Federal financial assistance awards for special estuarine research or monitoring projects under subpart G. The announcement of opportunities to conduct research in the System appears on an annual basis in the FEDERAL REGISTER. If a state is participating in the national Coastal Zone Management Program, the applicant for an award under section 315 of the Act shall notify the state coastal management agency regarding the application.

(b) An original and two copies of the formal application must be submitted at least 120 working days prior to the proposed beginning of the project to the following address: Sanctuaries and Reserves Division Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235. Application for Federal Assistance Standard Form 424 (Non-construction Program) constitutes the formal application for site selection, post-site selection, operation and management, research, and education and interpretive awards. The Application for Federal Financial Assistance Standard Form 424 (Construction Program) constitutes the formal application for land acquisition and development awards. The application must be accompanied by the information required in subpart B (predesignation), subpart C and § 921.31 (acquisition and development), and § 921.32 (operation and management) as applicable. Applications for development awards for construction projects, or restorative activities involving construction, must include a preliminary engineering report, a detailed construction plan, a site plan, a budget and categorical exclusion check list or environmental assessment. All applications must contain back up data for budget estimates (Federal and non-Federal shares), and evidence that the application complies with the Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' In addition, applications for acquisition and development awards must contain:

(1) State Historic Preservation Office comments;

(2) Written approval from NOAA of the draft management plan for initial acquisition and development award(s); and

(3) A preliminary engineering report for construction activities.

§ 921.81 Allowable costs.

(a) Allowable costs will be determined in accordance with applicable OMB Circulars and guidance for Federal financial assistance, the financial assistant agreement, these regulations, and other Department of Commerce and NOAA directives. The term ''costs'' applies to both the Federal and non-Federal shares.

(b) Costs claimed as charges to the award must be reasonable, beneficial and necessary for the proper and efficient administration of the financial assistance award and must be incurred during the award period.

(c) Costs must not be allocable to or included as a cost of any other Federally-financed program in either the current or a prior award period.

(d) General guidelines for the non-Federal share are contained in Department of Commerce Regulations at 15 CFR part 24 and OMB Circular A–110.

Copies of Circular A–110 can be obtained from the Sanctuaries and Reserves Division; 1825 Connecticut Avenue, NW., suite 714; Washington, DC 20235. The following may be used in satisfying the matching requirement:

(1) *Site selection and post site selection awards.* Cash and in-kind contributions (value of goods and services directly benefiting and specifically identifiable to this part of the project) are allowable. Land may not be used as match.

(2) *Acquisition and development awards.* Cash and in-kind contributions are allowable. In general, the fair market value of lands to be included within the Reserve boundaries and acquired pursuant to the Act, with other than Federal funds, may be used as match. However, the fair market value of real property allowable as match is limited to the fair market value of a real property interest equivalent to, or required to attain, the level of control over such land(s) identified by the state and approved by the Federal Government as that necessary for the protection and management of the National Estuarine Research Reserve. Appraisals must be performed according to Federal appraisal standards as detailed in Department of Commerce regulations at 15 CFR part 24 and the Uniform Relocation Assistance and Real Property Acquisition for Federal land Federally assisted programs in 15 CFR part 11. The fair market value of privately donated land, at the time of donation, as established by an independent appraiser and certified by a responsible official of the state, pursuant to 15 CFR part 11, may also be used as match. Land, including submerged lands already in the state's possession, may be used as match to establish a National Estuarine Research Reserve. The value of match for these state lands will be calculated by determining the value of the benefits foregone by the state, in the use of the land, as a result of new restrictions that may be imposed by Reserve designation. The appraisal of the benefits foregone must be made by an independent appraiser in accordance with Federal appraisal standards pursuant to 15 CFR part 24 and 15 CFR part 11. A state may initially use as match land valued at greater than the Federal share of the acquisition and development award. The value in excess of the amount required as match for the initial award may be used to match subsequent supplemental acquisition and development awards for the National Estuarine Research Reserve (see also §921.20). Costs related to land acquisition, such as appraisals, legal fees and surveys, may also be used as match.

(3) *Operation and management awards.* Generally, cash and in-kind contributions (directly benefiting and specifically identifiable to operations and management), except land, are allowable.

(4) *Research, monitoring, education and interpretive awards.* Cash and in-kind contributions (directly benefiting and specifically identifiable to the scope of work), except land, are allowable.

§921.82 Amendments to financial assistance awards.

Actions requiring an amendment to the financial assistance award, such as a request for additional Federal funds, revisions of the approved project budget or original scope of work, or extension of the performance period must be submitted to NOAA on Standard Form 424 and approved in writing.

APPENDIX I TO PART 921—BIOGEOGRAPHIC CLASSIFICATION SCHEME

Acadian

1. Northern of Maine (Eastport to the Sheepscot River.)
2. Southern Gulf of Maine (Sheepscot River to Cape Cod.)

Virginian

3. Southern New England (Cape Cod to Sandy Hook.)
4. Middle Atlantic (Sandy Hook to Cape Hatteras.)
5. Chesapeake Bay.

Carolinian

6. North Carolinas (Cape Hatteras to Santee River.)
7. South Atlantic (Santee River to St. John's River.)
8. East Florida (St. John's River to Cape Canaveral.)

West Indian

9. Caribbean (Cape Canaveral to Ft. Jefferson and south.)
10. West Florida (Ft. Jefferson to Cedar Key.)

Louisianian

11. Panhandle Coast (Cedar Key to Mobile Bay.)
12. Mississippi Delta (Mobile Bay to Galveston.)
13. Western Gulf (Galveston to Mexican border.)

Californian

14. Southern California (Mexican border to Point Conception.)
15. Central California (Point Conception to Cape Mendocino.)
16. San Francisco Bay.

Columbian

17. Middle Pacific (Cape Mendocino to the Columbia River.)
18. Washington Coast (Columbia River to Vancouver Island.)
19. Puget Sound.

Great Lakes

20. Lake Superior (including St. Mary's River.)
21. Lakes Michigan and Huron (including Straits of Mackinac, St. Clair River, and Lake St. Clair.)
22. Lake Erie (including Detroit River and Niagara Falls.)
23. Lake Ontario (including St. Lawrence River.)

Fjord

24. Southern Alaska (Prince of Wales Island to Cook Inlet.)
25. Aleutian Island (Cook Inlet Bristol Bay.)

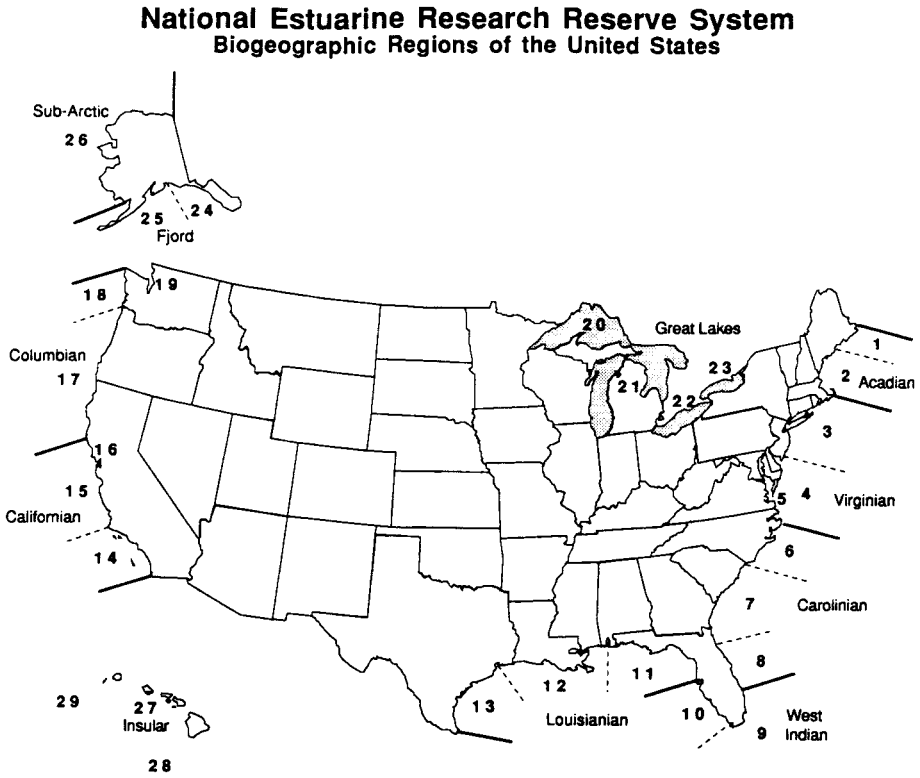
Sub-Arctic

26. Northern Alaska (Bristol Bay to Damarcation Point.)

Insular

27. Hawaiian Islands.
28. Western Pacific Island.
29. Eastern Pacific Island.

FIGURE 1



APPENDIX II TO PART 921—TYPOLOGY OF NATIONAL ESTUARINE RESEARCH RESERVES

This typology system reflects significant differences in estuarine characteristics that are not necessarily related to regional location. The purpose of this type of classification is to maximize ecosystem variety in the selection of national estuarine reserves. Priority will be given to important ecosystem types as yet unrepresented in the reserve system. It should be noted that any one site may represent several ecosystem types or physical characteristics.

Class I—Ecosystem Types

Group I—Shorelands

A. Maritime Forest-Woodland. That have developed under the influence of salt spray. It can be found on coastal uplands or recent features such as barrier islands and beaches, and may be divided into the following biomes:

1. Northern coniferous forest biome: This is an area of predominantly evergreens such as the sitka spruce (Picea), grand fir (Abies), and white cedar (Thuja), with poor development of the shrub and herb leyera, but high annual productivity and pronounced seasonal periodicity.

2. Moist temperate (Mesothermal) coniferous forest biome: Found along the west coast of North America from California to Alaska, this area is dominated by conifers, has relatively small seasonal range, high humidity with rainfall ranging from 30 to 150 inches, and a well-developed understory of vegetation with an abundance of mosses and other moisture-tolerant plants.

3. Temperate deciduous forest biome: This biome is characterized by abundant, evenly distributed rainfall, moderate temperatures which exhibit a distinct seasonal pattern,

well-developed soil biota and herb and shrub layers, and numerous plants which produce pulpy fruits and nuts. A distinct subdivision of this biome is the pine edible forest of the southeastern coastal plain, in which only a small portion of the area is occupied by climax vegetation, although it has large areas covered by edaphic climax pines.

4. Broad-leaved evergreen subtropical forest biome: The main characteristic of this biome is high moisture with less pronounced differences between winter and summer. Examples are the hammocks of Florida and the live oak forests of the Gulf and South Atlantic coasts. Floral dominants include pines, magnolias, bays, hollies, wild tamarine, strangler fig, gumbo limbo, and palms.

B. Coast shrublands. This is a transitional area between the coastal grasslands and woodlands and is characterized by woody species with multiple stems and a few centimeters to several meters above the ground developing under the influence of salt spray and occasional sand burial. This includes thickets, scrub, scrub savanna, heathlands, and coastal chaparral. There is a great variety of shrubland vegetation exhibiting regional specificity:

1. Northern areas: Characterized by Hudsonia, various erinaceous species, and thickets of Myricu, prunus, and Rosa.
2. Southeast areas: Floral dominants include Myrica, Baccharis, and Iles.
3. Western areas: Adenostoma, arcotyphylos, and eucalyptus are the dominant floral species.

C. Coastal grasslands. This area, which possesses sand dunes and coastal flats, has low rainfall (10 to 30 inches per year) and large amounts of humus in the soil. Ecological succession is slow, resulting in the presence of a number of seral stages of community development. Dominant vegetation includes mid-grasses (5 to 8 feet tall), such as Spartina, and trees such as willow (Salix sp.), cherry (Prunus sp.), and cottonwood (Pupulus deltoides.) This area is divided into four regions with the following typical strand vegetation:

1. Arctic/Boreal: Elymus;
2. Northeast/West: Ammophla;
3. Southeast Gulf: Uniola; and
4. Mid-Atlantic/Gulf: Spartina patens.

D. Coastal tundra. This ecosystem, which is found along the Arctic and Boreal coasts of North America, is characterized by low temperatures, a short growing season, and some permafrost, producing a low, treeless mat community made up of mosses, lichens, heath, shrubs, grasses, sedges, rushes, and herbaceous and dwarf woody plants. Common species include arctic/alpine plants such as Empetrum nigrum and Betula nana, the lichens Cetraria and Cladonia, and herbaceous plants such as Potentilla tridentata and Rubus chamaemorus. Common species on the coastal beach ridges of the high arctic desert include Bryas intergrifolia and Saxifrage oppositifolia. This area can be divided into two main subdivisions:

1. Low tundra: Characterized by a thick, spongy mat of living and undecayed vegetation, often with water and dotted with ponds when not frozen; and
2. High Tundra: A bare area except for a scanty growth of lichens and grasses, with underlaying ice wedges forming raised polygonal areas.

E. Coastal cliffs. This ecosystem is an important nesting site for many sea and shore birds. It consists of communities of herbaceous, graminoid, or low woody plants (shrubs, heath, etc.) on the top or along rocky faces exposed to salt spray. There is a diversity of plant species including mosses, lichens, liverworts, and ''higher'' plant representatives.

GROUP II—TRANSITION AREAS

A. Coastal marshes. These are wetland areas dominated by grasses (Poacea), sedges (Cyperaceae), rushes (Juncaceae), cattails (Typhaceae), and other graminoid species and is subject to periodic flooding by either salt or freshwater. This ecosystem may be subdivided into: (a) Tidal, which is periodically flooded by either salt or brackish water; (b) nontidal (freshwater); or (c) tidal freshwater. These are essential habitats for many important estuarine species of fish and invertebrates as well as shorebirds and waterfowl and serve important roles in shore stabilization, flood control, water purification, and nutrient transport and storage.

B. Coastal swamps. These are wet lowland areas that support mosses and shrubs together with large trees such as cypress or gum.

C. Coastal mangroves. This ecosystem experiences regular flooding on either a daily, monthly, or seasonal basis, has low wave action, and is dominated by a variety of salt-tolerant trees, such as the red mangrove (Rhizophora mangle), black mangrove (Avicennia Nitida), and the white mangrove (Laguncularia racemosa.) It is also an important habitat for large populations of fish, invertebrates, and birds. This type of ecosystem can be found from central Florida to extreme south Texas to the islands of the Western Pacific.

D. Intertidal beaches. This ecosystem has a distinct biota of microscopic animals, bacteria, and unicellular algae along with macroscopic crustaceans, mollusks, and worms with a detritus-based nutrient cycle. This area also includes the driftline communities found at high tide levels on the beach. The dominant organisms in this ecosystem include crustaceans such as the mole crab (Emerita), amphipods (Gammeridae), ghost crabs (Ocypode), and bivalve mollusks such

as the coquina (Donax) and surf clams (Spisula and Mactra.)

E. Intertidal mud and sand flats. These areas are composed of unconsolidated, high organic content sediments that function as a short-term storage area for nutrients and organic carbons. Macrophytes are nearly absent in this ecosystem, although it may be heavily colonized by benthic diatoms, dinoflaggellates, filamintous blue-green and green algae, and chaemosynthetic purple sulfur bacteria. This system may support a considerable population of gastropods, bivalves, and polychaetes, and may serve as a feeding area for a variety of fish and wading birds. In sand, the dominant fauna include the wedge shell Donax, the scallop Pecten, tellin shells Tellina, the heart urchin Echinocardium, the lug worm Arenicola, sand dollar Dendraster, and the sea pansy Renilla. In mud, faunal dominants adapted to low oxygen levels include the terebellid Amphitrite, the boring clam Playdon, the deep sea scallop Placopecten, the Quahog Mercenaria, the echiurid worm Urechis, the mud snail Nassarius, and the sea cucumber Thyone.

F. Intertidal algal beds. These are hard substrates along the marine edge that are dominated by macroscopic algae, usually thalloid, but also filamentous or unicellular in growth form. This also includes the rocky coast tidepools that fall within the intertidal zone. Dominant fauna of these areas are barnacles, mussels, periwinkles, anemones, and chitons. Three regions are apparent:

1. Northern latitude rocky shores: It is in this region that the community structure is best developed. The dominant algal species include Chondrus at the low tide level, Fucus and Ascophylium at the mid-tidal level, and Laminaria and other kelplike algae just beyond the intertidal, although they can be exposed at extremely low tides or found in very deep tidepools.

2. Southern latitudes: The communities in this region are reduced in comparison to those of the northern latitudes and possesses algae consisting mostly of single-celled or filamentour green, blue-green, and red algae, and small thalloid brown algae.

3. Tropical and subtropical latitudes: The intertidal in this region is very reduced and contains numerous calcareous algae such as Porolithon and Lithothamnion, as well and green algae with calcareous particles such as Halimeda, and numerous other green, red, and brown algae.

GROUP III—SUBMERGED BOTTOMS

A. Subtidal hardbottoms. This system is characterized by a consolidated layer of solid rock or large pieces of rock (neither of biotic origin) and is found in association with geomorphological features such as submarine canyons and fjords and is usually covered with assemblages of sponges, sea fans, bivalves, hard corals, tunicates, and other attached organisms. A significant feature of estuaries in many parts of the world is the oyster reef, a type of subtidal hardbottom. Composed of assemblages of organisms (usually bivalves), it is usually found near an estuary's mouth in a zone of moderate wave action, salt content, and turbidity. If light levels are sufficient, a covering of microscopic and attached macroscopic algae, such as keep, may also be found.

B. Subtidal softbottoms. Major characteristics of this ecosystem are an unconsolidated layer of fine particles of silt, sand, clay, and gravel, high hydrogen sulfide levels, and anaerobic conditions often existing below the surface. Macrophytes are either sparse or absent, although a layer of benthic microalgae may be present if light levels are sufficient. The faunal community is dominated by a diverse population of deposit feeders including polychaetes, bivalves, and burrowing crustaceans.

C. Subtidal plants. This system is found in relatively shallow water (less than 8 to 10 meters) below mean low tide. It is an area of extremely high primary production that provides food and refuge for a diversity of faunal groups, especially juvenile and adult fish, and in some regions, manatees and sea turtles. Along the North Atlantic and Pacific coasts, the seagrass Zostera marina predominates. In the South Atlantic and Gulf coast areas, Thalassia and Diplanthera predominate. The grasses in both areas support a number of epiphytic organisms.

Class II—Physical Characteristics

GROUP I—GEOLOGIC

A. Basin type. Coastal water basins occur in a variety of shapes, sizes, depths, and appearances. The eight basic types discussed below will cover most of the cases:

1. Exposed coast: Solid rock formations or heavy sand deposits characterize exposed ocean shore fronts, which are subject to the full force of ocean storms. The sand beaches are very resilient, although the dunes lying just behind the beaches are fragile and easily damaged. The dunes serve as a sand storage area making them chief stabilizers of the ocean shorefront.

2. Sheltered coast: Sand or coral barriers, built up by natural forces, provide sheltered areas inside a bar or reef where the ecosystem takes on many characteristics of confined waters-abundant marine grasses, shellfish, and juvenile fish. Water movement is reduced, with the consequent effects pollution being more severe in this area than in exposed coastal areas.

3. Bay: Bays are larger confined bodies of water that are open to the sea and receive strong tidal flow. When stratification is pronounced the flushing action is augmented by

river discharge. Bays vary in size and in type of shorefront.

4. Embayment: A confined coastal water body with narrow, restricted inlets and with a significant freshwater inflow can be classified as an embayment. These areas have more restricted inlets than bays, are usually smaller and shallower, have low tidal action, and are subject to sedimentation.

5. Tidal river: The lower reach of a coastal river is referred to as a tidal river. The coastal water segment extends from the sea or estuary into which the river discharges to a point as far upstream as there is significant salt content in the water, forming a salt front. A combination of tidal action and freshwater outflow makes tidal rivers well-flushed. The tidal river basin may be a simple channel or a complex of tributaries, small associated embayments, marshfronts, tidal flats, and a variety of others.

6. Lagoon: Lagoons are confined coastal bodies of water with restricted inlets to the sea and without significant freshwater inflow. Water circulation is limited, resulting in a poorly flushed, relatively stagnant body of water. Sedimentation is rapid with a great potential for basin shoaling. Shores are often gently sloping and marshy.

7. Perched coastal wetlands: Unique to Pacific islands, this wetland type found above sea level in volcanic crater remnants forms as a result of poor drainage characteristics of the crater rather than from sedimentation. Floral assemblages exhibit distinct zonation while the faunal constituents may include freshwater, brackish, and/or marine species. EXAMPLE: Aunu's Island, American Samoa.

8. Anchialine systems: These small coastal exposures of brackish water form in lava depressions or elevated fossil reefs have only a subsurface connection in the ocean, but show tidal fluctuations. Differing from true estuaries in having no surface continuity with streams or ocean, this system is characterized by a distinct biotic community dominated by benthis algae such as Rhizoclonium, the mineral encrusting Schiuzothrix, and the vascular plant Ruppia maritima. Characteristic fauna which exhibit a high degree of endemicity, include the mollusks Theosoxus neglectus and Tcariosus. Although found throughout the world, the high islands of the Pacific are the only areas within the U.S. where this system can be found.

B. Basin structure. Estuary basins may result from the drowning of a river valley (coastal plains estuary), the drowning of a glacial valley (fjord), the occurrence of an offshore barrier (bar-bounded estuary), some tectonic process (tectonic estuary), or volcanic activity (volcanic estuary).

1. Coastal plains estuary: Where a drowned valley consists mainly of a single channel, the form of the basin is fairly regular forming a simple coastal plains estuary. When a channel is flooded with numerous tributaries an irregular estuary results. Many estuaries of the eastern United States are of this type.

2. Fjord: Estuaries that form in elongated steep headlands that alternate with deep U-shaped valleys resulting from glacial scouring are called fjords. They generally possess rocky floors or very thin veneers of sediment, with deposition generally being restricted to the head where the main river enters. Compared to total fjord volume river discharge is small. But many fjords have restricted tidal ranges at their mouths due to sills, or upreaching sections of the bottom which limit free movement of water, often making river flow large with respect to the tidal prism. The deepest portions are in the upstream reaches, where maximum depths can range from 800m to 1200m while sill depths usually range from 40m to 150m.

3. Bar-bounded estuary: These result from the development of an offshore barrier such as a beach strand, a line of barrier islands, reef formations a line of moraine debris, or the subsiding remnants of a deltaic lobe. The basin is often partially exposed at low tide and is enclosed by a chain of offshore bars of barrier islands broken at intervals by inlets. These bars may be either deposited offshore or may be coastal dunes that have become isolated by recent seal level rises.

4. Tectonic estuary: These are coastal indentures that have formed through tectonic processes such as slippage along a fault line (San Francisco Bay), folding or movement of the earth's bedrock often with a large inflow of freshwater.

5. Volcanic estuary: These coastal bodies of open water, a result of volcanic processes are depressions or craters that have direct and/or subsurface connections with the ocean and may or may not have surface continuity with streams. These formations are unique to island areas of volcanic orgin.

C. Inlet type. Inlets in various forms are an integral part of the estuarine environment as they regulate to a certain extent, the velocity and magnitude of tidal exchange, the degree of mixing, and volume of discharge to the sea.

1. Unrestricted: An estuary with a wide unrestricted inlet typically has slow currents, no significant turbulence, and receives the full effect of ocean waves and local disturbances which serve to modify the shoreline. These estuaries are partially mixed, as the open mouth permits the incursion of marine waters to considerable distances upstream, depending on the tidal amplitude and stream gradient.

2. Restricted: Restrictions of estuaries can exist in many forms: Bars, barrier islands, spits, sills, and more. Restricted inlets result in decreased circulation, more pronounced longitudinal and vertical salinity gradients, and more rapid sedimentation. However, if

the estuary mouth is restricted by depositional features or land closures, the incoming tide may be held back until it suddenly breaks forth into the basin as a tidal wave, or bore. Such currents exert profound effects on the nature of the subtrate, turbidity, and biota of the estuary.

3. Permanent: Permanent inlets are usually opposite the mouths of major rivers and permit river water to flow into the sea.

4. Temporary (Intermittent): Temporary inlets are formed by storms and frequently shift position, depending on tidal flow, the depth of the sea, and sound waters, the frequency of storms, and the amount of littoral transport.

D. Bottom composition. The bottom composition of estuaries attests to the vigorous, rapid, and complex sedimentation processes characteristic of most coastal regions with low relief. Sediments are derived through the hydrologic processes of erosion, transport, and deposition carried on by the sea and the stream.

1. Sand: Near estuary mouths, where the predominating forces of the sea build spits or other depositional features, the shore and substrates of the estuary are sandy. The bottom sediments in this area are usually coarse, with a graduation toward finer particles in the head region and other zones of reduced flow, fine silty sands are deposited. Sand deposition occurs only in wider or deeper regions where velocity is reduced.

2. Mud: At the base level of a stream near its mouth, the bottom is typically composed of loose muds, silts, and organic detritus as a result of erosion and transport from the upper stream reaches and organic decomposition. Just inside the estuary entrance, the bottom contains considerable quantities of sand and mud, which support a rich fauna. Mud flats, commonly built up in estuarine basins, are composed of loose, coarse, and fine mud and sand, often dividing the original channel.

3. Rock: Rocks usually occur in areas where the stream runs rapidly over a steep gradient with its coarse materials being derived from the higher elevations where the stream slope is greater. The larger fragments are usually found in shallow areas near the stream mouth.

4. Oyster shell: Throughout a major portion of the world, the oyster reef is one of the most significant features of estuaries, usually being found near the mouth of the estuary in a zone of moderate wave action, salt content, and turbidity. It is often a major factor in modifying estuarine current systems and sedimentation, and may occur as an elongated island or peninsula oriented across the main current, or may develop parallel to the direction of the current.

GROUP II—HYDROGRAPHIC

A. Circulation. Circulation patterns are the result of combined influences of freshwater inflow, tidal action, wind and oceanic forces, and serve many functions: Nutrient transport, plankton dispersal, ecosystem flushing, salinity control, water mixing, and more.

1. Stratified: This is typical of estuaries with a strong freshwater influx and is commonly found in bays formed from ''drowned'' river valleys, fjords, and other deep basins. There is a net movement of freshwater outward at the top layer and saltwater at the bottom layer, resulting in a net outward transport of surface organisms and net inward transport of bottom organisms.

2. Non-stratified: Estuaries of this type are found where water movement is sluggish and flushing rate is low, although there may be sufficient circulation to provide the basis for a high carrying capacity. This is common to shallow embayments and bays lacking a good supply of freshwater from land drainage.

3. Lagoonal: An estuary of this type is characterized by low rates of water movement resulting from a lack of significant freshwater influx and a lack of strong tidal exchange because of the typically narrow inlet connecting the lagoon to the sea. Circulation whose major driving force is wind, is the major limiting factor in biological productivity within lagoons.

B. Tides. This is the most important ecological factor in an estuary as it affects water exchange and its vertical range determines the extent of tidal flats which may be exposed and submerged with each tidal cycle. Tidal action against the volume of river water discharged into an estuary results in a complex system whose properties vary according to estuary structure as well as the magnitude of river flow and tidal range. Tides are usually described in terms of the cycle and their relative heights. In the United States, tide height is reckoned on the basis of average low tide, which is referred to as datum. The tides, although complex, fall into three main categories:

1. Diurnal: This refers to a daily change in water level that can be observed along the shoreline. There is one high tide and one low tide per day.

2. Semidiurnal: This refers to a twice daily rise and fall in water that can be observed along the shoreline.

3. Wind/Storm tides: This refers to fluctuations in water elevation to wind and storm events, where influence of lunar tides is less.

C. Freshwater. According to nearly all the definitions advanced, it is inherent that all estuaries need freshwater, which is drained from the land and measurably dilutes seawater to create a brackish condition. Freshwater enters an estuary as runoff from the

land either from a surface and/or subsurface source.

1. Surface water: This is water flowing over the ground in the form of streams. Local variation in runoff is dependent upon the nature of the soil (porosity and solubility), degree of surface slope, vegetational type and development, local climatic conditions, and volume and intensity of precipitation.

2. Subsurface water: This refers to the precipitation that has been absorbed by the soil and stored below the surface. The distribution of subsurface water depends on local climate, topography, and the porosity and permeability of the underlying soils and rocks. There are two main subtypes of surface water:

a. Vadose water: This is water in the soil above the water table. Its volume with respect to the soil is subject to considerable fluctuation.

b. Groundwater: This is water contained in the rocks below the water table, is usually of more uniform volume than vadose water, and generally follows the topographic relief of the land being high hills and sloping into valleys.

GROUP III—CHEMICAL

A. Salinity. This reflects a complex mixture of salts, the most abundant being sodium chloride, and is a very critical factor in the distribution and maintenance of many estuarine organisms. Based on salinity, there are two basic estuarine types and eight different salinity zones (expressed in parts per thousand-ppt.)

1. Positive estuary: This is an estuary in which the freshwater influx is sufficient to maintain mixing, resulting in a pattern of increasing salinity toward the estuary mouth. It is characterized by low oxygen concentration in the deeper waters and considerable organic content in bottom sediments.

2. Negative estuary: This is found in particularly arid regions, where estuary evaporation may exceed freshwater inflow, resulting in increased salinity in the upper part of the basin, especially if the estuary mouth is restricted so that tidal flow is inhibited. These are typically very salty (hyperhaline), moderately oxygenated at depth, and possess bottom sediments that are poor in organic content.

3. Salinity zones (expressed in ppt):

a. Hyperhaline—greater than 40 ppt.

b. Euhaline—40 ppt to 30 ppt.

c. Mixhaline—30 ppt to 0.5 ppt.

(1) Mixoeuhaline—greater than 30 ppt but less than the adjacent euhaline sea.

(2) Polyhaline—30 ppt to 18 ppt.

(3) Mesohaline—18 ppt to 5 ppt.

(4) Oligohaline—5 ppt to 0.5 ppt.

d. Limnetic: Less than 0.5 ppt.

B. pH Regime: This is indicative of the mineral richness of estuarine waters and falls into three main categories:

1. Acid: Waters with a pH of less than 5.5.

2. Circumneutral: A condition where the pH ranges from 5.5 to 7.4.

3. Alkaline: Waters with a pH greater than 7.4.

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

SOURCE: 60 FR 66877, Dec. 27, 1995, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 922 appear at 62 FR 3789, Jan. 27, 1997 and at 62 FR 67724, Dec. 30, 1997.

Subpart A—General

§ 922.1 Applicability of regulations.

Unless noted otherwise, the regulations in Subparts A, D and E apply to all thirteen National Marine Sanctuaries for which site-specific regulations appear in Subparts F through R, respectively. Subparts B and C apply to the site evaluation list and to the designation of future Sanctuaries.

[65 FR 39055, June 22, 2000]

§ 922.2 Mission, goals, and special policies.

(a) In accordance with the standards set forth in title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, also known as the National Marine Sanctuaries Act (Act) the mission of the National Marine Sanctuary program (Program) is to identify, designate and manage areas of the marine environment of special national, and in some cases international, significance due to their conservation,

recreational, ecological, historical, research, educational, or aesthetic qualities.

(b) The goals of the Program are to carry out the mission to:

(1) Identify and designate as National Marine Sanctuaries areas of the marine environment which are of special national significance;

(2) Provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities;

(3) Support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas, especially long-term monitoring and research of these areas;

(4) Enhance public awareness, understanding, appreciation, and wise use of the marine environment;

(5) Facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities;

(6) Develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas;

(7) Create models of, and incentives for, ways to conserve and manage these areas;

(8) Cooperate with global programs encouraging conservation of marine resources; and

(9) Maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate.

(c) To the extent consistent with the policies set forth in the Act, in carrying out the Program's mission and goals:

(1) Particular attention will be given to the establishment and management of marine areas as National Marine Sanctuaries for the protection of the area's natural resource and ecosystem values; particularly for ecologically or economically important or threatened species or species assemblages, and for offshore areas where there are no existing special area protection mechanisms;

(2) The size of a National Marine Sanctuary, while highly dependent on the nature of the site's resources, will be no larger than necessary to ensure effective management;

(d) Management efforts will be coordinated to the extent practicable with other countries managing marine protected areas;

(e) Program regulations, policies, standards, guidelines, and procedures under the Act concerning the identification, evaluation, registration, and treatment of historical resources shall be consistent, to the extent practicable, with the declared national policy for the protection and preservation of these resources as stated in the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*, the Archeological and Historical Preservation Act of 1974, 16 U.S.C. 469 *et seq.*, and the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. 470aa *et seq.* The same degree of regulatory protection and preservation planning policy extended to historical resources on land shall be extended, to the extent practicable, to historical resources in the marine environment within the boundaries of designated National Marine Sanctuaries. The management of historical resources under the authority of the Act shall be consistent, to the extent practicable, with the Federal archeological program by consulting the Uniform Regulations, ARPA (43 CFR part 7) and other relevant Federal regulations. The Secretary of the Interior's Standards and Guidelines for Archeology may also be consulted for guidance. These guidelines are available from the Office of Ocean and Coastal Management at (301) 713–3125.

§922.3 Definitions.

Act means title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*, also known as the National Marine Sanctuaries Act.

Active Candidate means a site selected by the Secretary from the Site Evaluation List for further consideration for possible designation as a National Marine Sanctuary.

Assistant Administrator means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration (NOAA), or designee.

Benthic community means the assemblage of organisms, substrate, and structural formations found at or near the bottom that is periodically or permanently covered by water.

Commercial fishing means any activity that results in the sale or trade for intended profit of fish, shellfish, algae, or corals.

Conventional hook and line gear means any fishing apparatus operated aboard a vessel and composed of a single line terminated by a combination of sinkers and hooks or lures and spooled upon a reel that may be hind- or electrically operated, hand-held or mounted. This term does not include bottom longlines.

Cultural resources means any historical or cultural feature, including archaeological sites, historic structures, shipwrecks, and artifacts.

Director means, except where otherwise specified, the Director of the Office of Ocean and Coastal Resource Management, NOAA, or designee.

Exclusive economic zone means the exclusive economic zone as defined in the Magnuson Fishery Conservation and Management Act, 16 U.S. 1801 *et seq.*

Fish wastes means waste materials resulting from commercial fish processing operations.

Historical resource means any resource possessing historical, cultural, archaeological or paleontological significance, including sites, contextual information, structures, districts, and objects significantly associated with or representative of earlier people, cultures, maritime heritage, and human activities and events. Historical resources include ''submerged cultural resources'', and also include ''historical properties,'' as defined in the National Historic Preservation Act, as amended, and its implementing regulations, as amended.

Indian tribe means any American Indian tribe, band, group, or community recognized as such by the Secretary of the Interior.

Injure means to change adversely, either in the short or long term, a chemical, biological or physical attribute of, or the viability of. This includes, but is not limited to, to cause the loss of or destroy.

Lightering means at-sea transfer of petroleum-based products, materials, or other matter from vessel to vessel.

Marine means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law.

Mineral means clay, stone, sand, gravel, metalliferous ore, non-metalliferous ore, or any other solid material or other matter of commercial value.

National historic landmark means a district, site, building, structure or object designated as such by the Secretary of the Interior under the National Historic Landmarks Program (36 CFR part 65).

National Marine Sanctuary means an area of the marine environment of special national significance due to its resource or human-use values, which is designated as such to ensure its conservation and management.

Person means any private individual, partnership, corporation or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, of any State or local unit of government, or of any foreign government.

Regional Fishery Management Council means any fishery council established under section 302 of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

Sanctuary quality means any of those ambient conditions, physical-chemical characteristics and natural processes, the maintenance of which is essential to the ecological health of the Sanctuary, including, but not limited to, water quality, sediment quality and air quality.

Sanctuary resource means any living or non-living resource of a National Marine Sanctuary that contributes to

the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary, including, but not limited to, the substratum of the area of the Sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources. For Thunder Bay National Marine Sanctuary and Underwater Preserve, Sanctuary resource means an underwater cultural resource as defined at §922.191.

Secretary means the Secretary of the United States Department of Commerce, or designee.

Shunt means to discharge expended drilling cuttings and fluids near the ocean seafloor.

Site Evaluation List (SEL) means a list of selected natural and historical resource sites selected by the Secretary as qualifying for further evaluation for possible designation as National Marine Sanctuaries.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, the United States Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States.

Subsistence use means the customary and traditional use by rural residents of areas near or in the marine environment for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles; and for barter, if for food or non-edible items other than money, if the exchange is of a limited and non-commercial nature.

Take or taking means: (1) For any marine mammal, sea turtle, or seabird listed as either endangered or threatened pursuant to the Endangered Species Act, to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or injure, or to attempt to engage in any such conduct; (2) For any other marine mammal, sea turtle, or seabird, to harass, hunt, capture, kill, collect or injure, or to attempt to engage in any such conduct. For the purposes of both (1) and (2) of this definition, this includes, but is not limited to, to collect any dead or injured marine mammal, sea turtle or seabird, or any part thereof; to restrain or detain any marine mammal, sea turtle or seabird, or any part thereof, no matter how temporarily; to tag any sea turtle, marine mammal or seabird; to operate a vessel or aircraft or to do any other act that results in the disturbance or molestation of any marine mammal, sea turtle or seabird.

Tropical fish means fish or minimal sport and food value, usually brightly colored, often used for aquaria purposes and which lives in a direct relationship with live bottom communities.

Vessel means a watercraft of any description capable of being used as a means of transportation in/on the waters of a Sanctuary.

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 4607, Jan. 30, 1997; 65 FR 39055, June 22, 2000]

§922.4 Effect of National Marine Sanctuary designation.

The designation of a National Marine Sanctuary, and the regulations implementing it, are binding on any person subject to the jurisdiction of the United States. Designation does not constitute any claim to territorial jurisdiction on the part of the United States for designated sites beyond the U.S. territorial sea, and the regulations implementing the designation shall be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with:

(a) Generally recognized principles of international law;

(b) An agreement between the United States and the foreign state of which the person is a citizen; or

(c) An agreement between the United States and the flag state of the foreign

vessel, if the person is a crew member of the vessel.

Subpart B—Site Evaluation List (SEL)

§ 922.10 General.

(a) The Site Evaluation List (SEL) was established as a comprehensive list of marine sites with high natural resource values and with historical qualities of special national significance that are highly qualified for further evaluation for possible designation as National Marine Sanctuaries.

(b) The SEL is currently inactive. Criteria for inclusion of marine sites on a revised SEL will be issued, with public notice and opportunity to comment, when the Director determines that the SEL should be reactivated.

(c) Only sites on the SEL may be considered for subsequent review as active candidates for designation.

(d) Placement of a site on the SEL, or selection of a site from the SEL as an active candidate for designation as provided for in § 922.21, by itself shall not subject the site to any regulatory control under the Act. Such controls may only be imposed after designation.

Subpart C—Designation of National Marine Sanctuaries

§ 922.20 Standards and procedures for designation.

In designating a National Marine Sanctuary, the Secretary shall apply the standards and procedures set forth in section 303 and section 304 of the Act.

§ 922.21 Selection of active candidates.

(a) The Secretary shall, from time to time, select a limited number of sites from the SEL for Active Candidate consideration based on a preliminary assessment of the designation standards set forth in section 303 of the Act.

(b) Selection of a site as an Active Candidate shall begin the formal Sanctuary designation-evaluation process. A notice of intent to prepare a draft environmental impact statement shall be published in the FEDERAL REGISTER and in newspapers in the area(s) of local concern. A brief written analysis describing the site shall be provided. The Secretary, at any time, may drop a site from consideration if the Secretary determines that the site does not meet the designation standards and criteria set forth in the Act.

§ 922.22 Development of designation materials.

(a) In designating a National Marine Sanctuary, the Secretary shall prepare the designation materials described in section 304 of the Act.

(b) If a proposed Sanctuary includes waters within the exclusive economic zone, the Secretary shall notify the appropriate Regional Fishery Management Council(s) which shall have one hundred and twenty (120) days from the date of such notification to make recommendations and, if appropriate, prepare draft fishery regulations and to submit them to the Secretary. In preparing its recommendations and draft regulations, the Council(s) shall use as guidance the national standards of section 301(a) of the Magnuson Act (16 U.S.C. 1851) to the extent that they are consistent and compatible with the goals and objectives of the proposed Sanctuary designation. Fishery activities not proposed for regulation under section 304(a)(5) of the Act may be listed in the draft Sanctuary designation document as potentially subject to regulation, without following the procedures specified in section 304(a)(5) of the Act. If the Secretary subsequently determines that regulation of any such fishery activity is necessary, then the procedures specified in section 304(a)(5) of the Act shall be followed.

§ 922.23 Coordination with States and other Federal agencies.

(a) The Secretary shall consult and cooperate with affected States throughout the National Marine Sanctuary designation process. In particular the Secretary shall:

(1) Consult with the relevant State officials prior to selecting any site on the SEL as an Active Candidate pursuant to § 922.21, especially concerning the relationship of any site to State waters and the consistency of the proposed designation with a federally approved State coastal zone management

program. For the purposes of a consistency review by States with federally approved coastal zone management programs, designation of a National Marine Sanctuary is deemed to be a Federal activity, which, if affecting the State's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved State coastal zone program as provided by section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended, and implementing regulations at 15 CFR part 930, subpart.

(2) Ensure that relevant State agencies are consulted prior to holding any public hearings pursuant to section 304(a)(3) of the Act.

(3) Provide the Governor(s) of any State(s) in which a proposed Sanctuary would be located an opportunity to certify the designation or any of its terms as unacceptable as specified in section 304(b)(1) of the Act.

(b) The Secretary shall develop proposed regulations relating to activities under the jurisdiction of one or more other Federal agencies in consultation with those agencies.

§ 922.24 Congressional documents.

In designating a National Marine Sanctuary, the Secretary shall prepare and submit to Congress those documents described in section 304 of the Act.

§ 922.25 Designation determination and findings.

(a) In designating a National Marine Sanctuary, the Secretary shall prepare a written Designation Determination and Findings which shall include those findings and determinations described in section 303 of the Act.

(b) In addition to those factors set forth in section 303 of the Act, the Secretary, when making a designation determination, shall consider the Program's fiscal capability to manage the area as a National Marine Sanctuary.

Subpart D—Management Plan Development and Implementation

§ 922.30 General.

(a) The Secretary shall implement each management plan, and applicable regulations, including carrying out surveillance and enforcement activities and conducting such research, monitoring, evaluation, and education programs as are necessary and reasonable to carry out the purposes and policies of the Act.

(b) Consistent with Sanctuary management plans, the Secretary shall develop and implement site-specific contingency and emergency-response plans designed to protect Sanctuary resources. The plans shall contain alert procedures and actions to be taken in the event of an emergency such as a shipwreck or an oil spill.

§ 922.31 Promotion and coordination of Sanctuary use.

The Secretary shall take such action as is necessary and reasonable to promote and coordinate the use of National Marine Sanctuaries for research, monitoring, and education purposes. Such action may include consulting with Federal agencies, or other persons to promote use of one or more Sanctuaries for research, monitoring and education, including coordination with the National Estuarine Research Reserve System.

Subpart E—Regulations of General Applicability

§ 922.40 Purpose.

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

[65 FR 39055, June 22, 2000]

§ 922.41 Boundaries.

The boundary for each of the thirteen National Marine Sanctuaries covered by this part is described in Subparts F through R, respectively.

[65 FR 39055, June 22, 2000]

§ 922.42 Allowed activities.

All activities (e.g., fishing, boating, diving, research, education) may be conducted unless prohibited or otherwise regulated in Subparts F through R, subject to any emergency regulations promulgated pursuant to §§ 922.44, 922.111(c), 922.165, 922.186, or 922.196, subject to all prohibitions, regulations, restrictions, and conditions validly imposed by any Federal, State, or local authority of competent jurisdiction, including Federal and State fishery management authorities, and subject to the provisions of section 312 of the National Marine Sanctuaries Act (NMSA), (16 U.S.C. 1431 *et seq.*). The Assistant Administrator may only directly regulate fishing activities pursuant to the procedure set forth in section 304(a)(5) of the NMSA.

[65 FR 39055, June 22, 2000]

§ 922.43 Prohibited or otherwise regulated activities.

Subparts F through R set forth site-specific regulations applicable to the activities specified therein.

[65 FR 39055, June 22, 2000]

§ 922.44 Emergency regulations.

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all such activities are subject to immediate temporary regulation, including prohibition. The provisions of this section do not apply to the Cordell Bank, Florida Keys, Hawaiian Islands Humpback Whale, and Thunder Bay National Marine Sanctuaries. See §§ 922.111(c), 922.165, and 922.186, 922.196, respectively, for the authority to issue emergency regulations with respect to those sanctuaries.

[65 FR 39055, June 22, 2000]

§ 922.45 Penalties.

(a) Each violation of the NMSA or FKNMSPA, any regulation in this part, or any permit issued pursuant thereto, is subject to a civil penalty of not more than $ 100,000. Each day of a continuing violation constitutes a separate violation.

(b) Regulations setting forth the procedures governing administrative proceedings for assessment of civil penalties, permit sanctions, and denials for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR part 904.

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 4607, Jan. 30, 1997]

§ 922.46 Response costs and damages.

Under section 312 of the Act, any person who destroys, causes the loss of, or injures any Sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss or injury, and any vessel used to destroy, cause the loss of, or injure any Sanctuary resource is liable *in rem* to the United States for response costs and damages resulting from such destruction, loss or injury.

§ 922.47 Pre-existing authorizations or rights and certifications of pre-existing authorizations or rights.

(a) Leases, permits, licenses, or rights of subsistence use or access in existence on the date of designation of any National Marine Sanctuary shall not be terminated by the Director. The Director may, however, regulate the exercise of such leases, permits, licenses, or rights consistent with the purposes for which the Sanctuary was designated.

(b) The prohibitions listed in Subparts F through P, and Subpart R do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation, or in the case of the Florida Keys National Marine Sanctuary the effective date of the regulations in Subpart P, and issued by any Federal, State or local authority of competent jurisdiction, or by any valid right of subsistence use or access in existence

on the effective date of Sanctuary designation, or in the case of the Florida Keys National Marine Sanctuary the effective date of the regulations in Subpart P, provided that the holder of such authorization or right complies with certification procedures and criteria promulgated at the time of Sanctuary designation, or in the case of the Florida Keys National Marine Sanctuary the effective date of the regulations in Subpart P, and with any terms and conditions on the exercise of such authorization or right imposed by the Director as a condition of certification as the Director deems necessary to achieve the purposes for which the Sanctuary was designated.

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 4607, Jan. 30, 1997; 65 FR 39055, June 22, 2000]

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

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

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

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

(2) The equipment, personnel and methodology to be employed;

(3) The qualifications and experience of all personnel;

(4) The potential effects of the activity, if any, on Sanctuary resources and qualities; and (5) Copies of all other required licenses, permits, approvals or other authorizations.

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

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

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

(f) The Director may amend, suspend, or revoke a permit issued pursuant to this section for good cause. The Director may deny a permit application pursuant to this section, in whole or in part, if it is determined that the permittee or applicant has acted in violation of the terms and conditions of a permit or of the regulations set forth in this section or Subparts F through O, Subpart R or for other good cause. Any such action shall be communicated in writing to the permittee or applicant by certified mail and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in subpart D of 15 CFR part 904.

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 4607, Jan. 30, 1997; 65 FR 39056, June 22, 2000]

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

(a) A person may conduct an activity prohibited by Subparts L through P, or Subpart R, if such activity is specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary

designation, or in the case of the Florida Keys National Marine Sanctuary after the effective date of the regulations in Subpart P, provided that:

(1) The applicant notifies the Director, in writing, of the application for such authorization (and of any application for an amendment, renewal, or extension of such authorization) within fifteen (15) days of the date of filing of the application or the effective date of Sanctuary designation, or in the case of the Florida Keys National Marine Sanctuary the effective date of the regulations in Subpart P, whichever is later;

(2) The applicant complies with the other provisions of this § 922.49;

(3) The Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization (or amendment, renewal, or extension); and

(4) The applicant complies with any terms and conditions the Director deems reasonably necessary to protect Sanctuary resources and qualities.

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

(c) Notification of filings of applications should be sent to the Director, Office of Ocean and Coastal Resource Management at the address specified in Subparts L through P, or Subpart R, as appropriate. A copy of the application must accompany the notification.

(d) The Director may request additional information from the applicant as he or she deems reasonably necessary to determine whether to object to issuance of an authorization described in paragraph (a) of this section, or what terms and conditions are reasonably necessary to protect Sanctuary resources and qualities. The information requested must be received by the Director within 45 days of the postmark date of the request. The Director may seek the views of any persons on the application.

(e) The Director shall notify, in writing, the agency to which application has been made of his or her pending review of the application and possible objection to issuance. Upon completion of review of the application and information received with respect thereto, the Director shall notify both the agency and applicant, in writing, whether he or she has an objection to issuance and what terms and conditions he or she deems reasonably necessary to protect Sanctuary resources and qualities, and reasons therefor.

(f) The Director may amend the terms and conditions deemed reasonably necessary to protect Sanctuary resources and qualities whenever additional information becomes available justifying such an amendment.

(g) Any time limit prescribed in or established under this § 922.49 may be extended by the Director for good cause.

(h) The applicant may appeal any objection by, or terms or conditions imposed by, the Director to the Assistant Administrator or designee in accordance with the provisions of § 922.50.

[62 FR 4608, Jan. 30, 1997, as amended at 65 FR 39056, June 22, 2000]

§ 922.50 Appeals of administrative action.

(a)(1) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a National Marine Sanctuary permit; an applicant for, or a holder of, a Special Use permit issued pursuant to section 310 of the Act; a person requesting certification of an existing lease, permit, license or right of subsistence use or access under § 922.47; or, for those Sanctuaries described in Subparts L through P and Subpart R, an applicant for a lease, permit, license or other authorization issued by any Federal, State, or local authority of competent jurisdiction (hereinafter appellant) may appeal to the Assistant Administrator:

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

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

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

(2) For those National Marine Sanctuaries described in Subparts F through K, any interested person may also appeal the same actions described in § 922.50(a)(1)(i) and (ii). For appeals arising from actions taken with respect to these National Marine Sanctuaries, the term ''appellant'' includes any such interested persons.

(b) An appeal under paragraph (a) of this section must be in writing, state the action(s) by the Director appealed and the reason(s) for the appeal, and be received within 30 days of receipt of notice of the action by the Director. Appeals should be addressed to the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA 1305 East-West Highway, 13th Floor, Silver Spring, MD 20910.

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

(2) The hearing officer shall give notice in the FEDERAL REGISTER of the time, place and subject matter of the hearing. The appellant and the Director may appear personally or by counsel at the hearing and submit such material and present such arguments as deemed appropriate by the hearing officer. Within 60 days after the record for the hearing closes, the hearing officer shall recommend a decision in writing to the Assistant Administrator.

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

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

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 4608, Jan. 30, 1997; 65 FR 39056, June 22, 2000; 65 FR 60097, Oct. 10, 2000]

Subpart F—Monitor National Marine Sanctuary

§ 922.60 Boundary.

The Monitor National Marine Sanctuary (Sanctuary) consists of a vertical water column in the Atlantic Ocean one mile in diameter extending from the surface to the seabed, the center of which is at 35°00′23″ north latitude and 75°24′32″ west longitude.

§ 922.61 Prohibited or otherwise regulated activities.

Except as may be permitted by the Director, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(a) Anchoring in any manner, stopping, remaining, or drifting without power at any time;

(b) Any type of subsurface salvage or recovery operation;

(c) Diving of any type, whether by an individual or by a submersible;

(d) Lowering below the surface of the water any grappling, suction, conveyor, dredging or wrecking device;

(e) Detonating below the surface of the water any explosive or explosive mechanism;

(f) Drilling or coring the seabed;

(g) Lowering, laying, positioning or raising any type of seabed cable or cable-laying device;

(h) Trawling; or

(i) Discharging waster material into the water in violation of any Federal statute or regulation.

§ 922.62 Permit procedure and criteria.

(a) Any person or entity may conduct in the Sanctuary any activity listed in § 922.61 if such activity is either:

(1) For the purpose of research related to the Monitor, or

(2) Pertains to salvage or recovery operations in connection with an air or marine casualty and such person or entity is in possession of a valid permit issued by the Director authorizing the conduct of such activity; except that, no permit is required for the conduct of any activity immediately and urgently necessary for the protection of life, property or the environment.

(b) Any person or entity who wishes to conduct in the Sanctuary an activity for which a permit is authorized by this section (hereafter a permitted activity) may apply in writing to the Director for a permit to conduct such activity citing this section as the basis for the application. Such application should be made to: Director, Office of Ocean and Coastal Resource Management; ATTN: Manager, Monitor National Marine Sanctuary, Building 1519, NOAA, Fort Eustis, VA 23604–5544.

(c) In considering whether to grant a permit for the conduct of a permitted activity for the purpose of research related to the Monitor, the Secretary shall evaluate such matters as:

(1) The general professional and financial responsibility of the applicant;

(2) The appropriateness of the research method(s) envisioned to the purpose(s) of the research;

(3) The extent to which the conduct of any permitted activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information;

(4) The end value of the research envisioned; and

(5) Such other matters as the Director deems appropriate.

(d) In considering whether to grant a permit for the conduct of a permitted activity in the Sanctuary in relation to an air or marine casualty, the Director shall consider such matters as:

(1) The fitness of the applicant to do the work envisioned;

(2) The necessity of conducting such activity;

(3) The appropriateness of any activity envisioned to the purpose of the entry into the Sanctuary;

(4) The extent to which the conduct of any such activity may diminish the value of the Monitor as a source of historic, cultural, aesthetic and/or maritime information; and

(5) Such other matters as the Director deems appropriate.

(e) In considering any application submitted pursuant to this section, the Director shall seek and consider the views of the Advisory Council on Historic Preservation.

(f) The Director may observe any activity permitted by this section; and/or may require the submission of one or more reports of the status or progress of such activity.

Subpart G—Channel Islands National Marine Sanctuary

§ 922.70 Boundary.

The Channel Islands National Marine Sanctuary (Sanctuary) consists of an area of the waters off the coast of California of approximately 1252.5 square nautical miles (NM) adjacent to the following islands and offshore rocks: San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock (collectively the Islands) extending seaward to a distance of six NM. The boundary coordinates are listed in appendix A to this subpart.

§ 922.71 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for the national defense (subject to the terms and conditions of Article 5, Section 2 of the Designation Document) or

to respond to an emergency threatening life, property, or the environment, or except as may be permitted by the Director in accordance with §§922.48 and 922.72, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Exploring for, developing, and producing hydrocarbons except pursuant to leases executed prior to March 30, 1981, and except the laying of pipeline, if the following oil spill contingency equipment is available at the site of such operations:

(i) 1500 feet of open ocean containment boom and a boat capable of deploying the boom;

(ii) One oil skimming device capable of open ocean use; and

(iii) Fifteen bales of oil sorbent material, and subject to all prohibitions, restrictions and conditions imposed by applicable regulations, permits, licenses or other authorizations and consistency reviews including those issued by the Department of the Interior, the Coast Guard, the Corps of Engineers, the Environmental Protection Agency and under the California Coastal Management Program and its implementing regulations.

(2) Discharging or depositing any material or other matter except:

(i) Fish or fish parts and chumming materials (bait);

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the Sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g., deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels;

(iii) Effluents incidental to hydrocarbon exploration and exploitation activities allowed by paragraph (a)(1) of this section.

(3) Except in connection with the laying of any pipeline as allowed by paragraph (a)(1) of this section, within 2 NM of any Island:

(i) Constructing any structure other than a navigation aid,

(ii) Drilling through the seabed, or

(iii) Dredging or otherwise altering the seabed in any way, other than

(A) To anchor vessels, or

(B) To bottom trawl from a commercial fishing vessel.

(4) Except to transport persons or supplies to or from an Island, operating within one NM of an Island any vessel engaged in the trade of carrying cargo, including, but not limited to, tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing (including kelp harvesting), recreational, or research vessels.

(5) Disturbing seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one NM of any Island except:

(i) For enforcement purposes;

(ii) To engage in kelp bed surveys; or

(iii) To transport persons or supplies to or from an Island.

(6) Removing or damaging any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities having significant impact shall be determined in consultation between the Director and the Department of Defense.

§922.72 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Director in accordance with this section and §922.48 may conduct any activity in the Sanctuary prohibited under §922.71 if such activity is either:

(1) Research related to the resources of the Sanctuary,

(2) To further the educational value of the Sanctuary; or

(3) For salvage or recovery operations.

(b) Permit applications shall be addressed to: Director, Office of Ocean and Coastal Resource Management, ATTN: Manager, Channel Islands National Marine Sanctuary, 113 Harbor Way, Santa Barbara, CA 93109.

(c) In considering whether to grant a permit the Director shall evaluate such matters as:

(1) The general professional, and financial responsibility of the applicant;

(2) The appropriateness of the methods envisioned to the purpose(s) of the activity;

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information;

(4) The end value of the activity and

(5) Such other matters as may be deemed appropriate.

(d) The Director may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained shall be available to the public.

APPENDIX A TO SUBPART G OF PART 922—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

Point No.	Latitude north	Longitude west
Northern Channel Islands Section		
01	33°56′28.959″	119°16′23.800″
02	33°58′03.919″	119°14′56.964″
03	34°01′33.846″	119°14′07.740″
04	34°04′24.203″	119°15′21.308″
05	34°06′06.653″	119°17′27.002″
06	34°06′54.809″	119°19′46.046″
07	34°06′57.988″	119°23′24.905″
08	34°06′51.627″	119°24′04.198″
09	34°07′01.640″	119°25′40.819″′
10	34°06′59.904″	119°26′50.959″
11	34°08′02.002″	119°28′47.501″
12	34°08′17.693″	119°29′27.698″
13	34°08′52.234″	119°30′39.562″
14	34°09′16.780″	119°35′22.667″
15	34°09′05.106″	119°36′41.694″
16	34°08′02.782″	119°39′33.421″
17	34°08′46.870″	119°41′48.621″
18	34°09′35.563″	119°45′57.284″
19	34°09′32.627″	119°46′37.335″
20	34°09′33.396″	119°47′32.285″
21	34°09′43.668″	119°48′09.018″
22	34°10′10.616″	119°50′07.659″
23	34°10′21.586″	119°51′05.146″
24	34°10′33.161″	119°53′17.044″
25	34°10′36.545″	119°55′57.373″
26	34°10′21.283″	119°57′26.403″
27	34°08′07.255″	120°01′07.233″
28	34°08′13.144″	120°02′27.930″
29	34°07′47.772″	120°05′05.449″
30	34°07′29.314″	120°06′36.262″
31	34°07′30.691″	120°09′35.238″
32	34°06′36.285″	120°12′39.335″
33	34°06′40.634″	120°13′33.940″
34	34°08′10.759″	120°15′07.017″
35	34°09′12.290″	120°17′07.046″
35A	34°09′50.706″	120°17′31.649″
36	34°10′56.346″	120°18′40.520″
36B	34°11′28.249″	120°19′29.213″
37	34°12′08.078″	120°21′00.835″
37C	34°12′25.468″	120°25′01.261″
38	34°12′18.754″	120°25′39.373″
38D	34°11′33.184″	120°27′33.921″
39	34°12′19.470″	120°30′22.620″
39E	34°12′17.540″	120°32′19.959″
40	34°10′54.592″	120°35′57.887″
40F	34°06′07.491″	120°38′27.883″
41	34°04′53.454″	120°38′16.602″
41G	34°03′30.539″	120°37′39.442″
42	34°01′09.860″	120°35′04.808″
42H	34°00′48.573″	120°34′25.106″
43	33°59′13.122″	120°33′53.385″
44	33°57′01.427″	120°31′54.590″
45	33°55′36.973″	120°27′37.188″
46	33°55′30.037″	120°25′14.587″
47	33°54′50.522″	120°22′29.536″
48	33°55′01.640″	120°19′26.722″
49	33°54′34.409″	120°18′27.344″
50	33°53′23.129″	120°17′39.927″
51	33°50′39.990″	120°15′13.874″
52	33°49′53.260″	120°13′41.904″
53	33°49′03.437″	120°12′06.750″
54	33°48′36.087″	120°11′10.821″
55	33°47′39.280″	120°07′59.707″
56	33°47′37.617″	120°06′04.002″
57	33°47′59.351″	120°04′08.370″
58	33°48′38.700″	120°02′33.188″
59	33°48′52.167″	120°01′50.244″
60	33°50′28.486″	119°57′50.820″
61	33°50′55.128″	119°55′19.934″
62	33°52′13.338″	119°52′53.439″
63	33°52′04.900″	119°52′10.719″
64	33°51′39.919″	119°47′21.152″
65	33°51′48.592″	119°46′13.213″
66	33°51′35.798″	119°44′34.589″
67	33°51′44.374″	119°41′12.738″
68	33°52′23.857″	119°39′14.708″
69	33°53′09.365″	119°37′30.784″
70	33°53′12.754″	119°35′35.793″
71	33°53′17.114″	119°34′54.567″
72	33°53′38.865″	119°32′51.578″
73	33°54′02.277″	119°31′06.274″
74	33°54′56.444″	119°28′54.052″
75	33°54′39.349″	119°27′37.512″
76	33°54′15.236″	119°25′23.779″
77	33°54′07.847″	119°24′22.849″
78	33°54′04.682″	119°22′58.006″
79	33°54′14.311″	119°21′44.573″
80	33°54′22.824″	119°21′09.003″
81	33°54′46.904″	119°19′54.677″
82	33°55′05.834″	119°19′16.027″
Santa Barbara Island Section		
83	33°28′56.904″	119°10′04.092″
84	33°26′32.364″	119°10′01.328″
85	33°24′19.904″	119°08′52.236″
86	33°23′26.019″	119°07′54.826″
87	33°22′04.836″	119°05′16.716″
88	33°21′49.387″	119°04′01.551″
89	33°21′44.594″	119°02′49.887″
90	33°21′49.556″	119°01′37.839″
91	33°22′07.538″	118°59′49.357″
92	33°22′27.774″	118°58′51.623″
93	33°22′47.957″	118°58′07.633″
94	33°23′20.805″	118°57′14.375″
95	33°24′18.458″	118°56′08.450″
96	33°26′24.130″	118°54′51.352″
97	33°29′02.820″	118°54′22.276″
98	33°31′27.917″	118°54′50.367″
99	33°32′17.935″	118°55′18.396″
100	33°35′10.090″	118°59′40.091″
101	33°35′24.575″	119°01′22.108″
102	33°35′06.497″	119°03′59.463″
103	33°34′48.322″	119°05′03.374″
104	33°32′37.151″	119°08′37.201″

Point No.	Latitude north	Longitude west
105	33°30′41.731″	119°09′45.845″

Subpart H—Gulf of the Farallones National Marine Sanctuary

§922.80 Boundary.

(a) The Gulf of the Farallones National Marine Sanctuary (Sanctuary) consists of an area of the waters adjacent to the coast of California north and south of the Point Reyes Headlands, between Bodega Head and Rocky Point and the Farallon Islands (including Noonday Rock), and includes approximately 948 square nautical miles (NM). The boundary coordinates are listed in Appendix A to this subpart.

(b) The shoreward boundary follows the mean high tide line and the seaward limit of Point Reyes National Seashore. Between Bodega Head and Point Reyes Headlands, the Sanctuary extends seaward 3 NM beyond State waters. The Sanctuary also includes the waters within 12 NM of the Farallon Islands, and between the Islands and the mainland from Point Reyes Headlands to Rocky Point. The Sanctuary includes Bodega Bay, but not Bodega Harbor.

§922.81 Definitions.

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

Areas of Special Biological Significance (ASBS) means those areas established by the State of California prior to the designation of the Sanctuary except that for purposes of the regulations in this subpart, the area established around the Farallon Islands shall not be included.

Motorized personal watercraft means a vessel which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than the conventional manner of sitting or standing inside the vessel.

[60 FR 66877, Dec. 27, 1995, as amended at 66 FR 46951, Sept. 10, 2001]

§922.82 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for national defense (subject to the terms and conditions of Article 5, Section 2 of the Designation Document) or to respond to an emergency threatening life, property or the environment, or except as may be permitted by the Director in accordance with §922.48 and §922.83, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Exploring for, developing and producing oil or gas except that pipelines related to hydrocarbon operations outside the Sanctuary may be placed at a distance greater than 2 NM from the Farallon Islands, Bolinas Lagoon, and ASBS where certified to have no significant effect on Sanctuary resources in accordance with §922.84.

(2) Discharging or depositing any material or other matter except:

(i) Fish or fish parts and chumming materials (bait).

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the Sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g., deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels.

(iii) Dredge material disposed of at the interim dumpsite now established approximately 10 NM south of the southeast Farallon Island and municipal sewage provided such discharges are certified in accordance with §922.84.

(3) Except in connection with the laying of pipelines or construction of an outfall if certified in accordance with §922.84:

(i) Constructing any structure other than a navigation aid,

(ii) Drilling through the seabed, and

(iii) Dredging or otherwise altering the seabed in any way other than by anchoring vessels or bottom trawling from a commercial fishing vessel, except for routine maintenance and navigation, ecological maintenance, mariculture, and the construction of docks and piers in Tomales Bay.

(4) Except to transport persons or supplies to or from islands or mainland

areas adjacent to Sanctuary waters, within an area extending 2 NM from the Farallon Islands, Bolinas Lagoon, or any ASBS, operating any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing, recreational or research vessels.

(5) Disturbing seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one NM of the Farallon Islands, Bolinas Lagoon, or any ASBS except to transport persons or supplies to or from the Islands or for enforcement purposes.

(6) Removing or damaging any historical or cultural resource.

(7) Operation of motorized personal watercraft, except for the operation of motorized personal watercraft for emergency search and rescue mission or law enforcement operations (other than routine training activities) carried out by National Park Service, U.S. Coast Guard, Fire or Police Departments or other Federal, State or local jurisdictions.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities having significant impacts shall be determined in consultation between the Director and the Department of Defense.

[60 FR 66877, Dec. 27, 1995, as amended at 66 FR 46951, Sept. 10, 2001]

§ 922.83 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Director in accordance with this section and § 922.48 may conduct any activity in the Sanctuary, prohibited user § 922.82, if such an activity is

(1) Research related to the resources of the Sanctuary,

(2) To further the educational value of the Sanctuary, or

(3) For salvage or recovery operations.

(b) Permit applications shall be addressed to the Director, Office of Ocean and Coastal Resource Management, ATTN: Manager, Gulf of the Farallones National Marine Sanctuary, Fort Mason, building #201, San Francisco, CA 94123.

(c) In considering whether to grant a permit, the Director shall evaluate

(1) The general professional and financial responsibility of the applicant,

(2) The appropriateness of the methods envisioned to the purpose(s) of the activity,

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary,

(4) The end value of the activity, and

(5) Other matters as deemed appropriate.

(d) The Director may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

§ 922.84 Certification of other permits.

(a) A permit, license, or other authorization allowing the discharge of municipal sewage, the laying of any pipeline outside 2 NM from the Farallon Islands, Bolinas Lagoon and ASBS, or the disposal of dredge material at the interim dumpsite now established approximately 10 NM south of the Southeast Farallon Island prior to the selection of a permanent dumpsite shall be valid if certified by the Director as consistent with the purpose of the Sanctuary and having no significant effect on Sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency.

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

(c) Any certification called for in this section shall be presumed unless the Director acts to deny or condition certification within 60 days from the date that the Director receives notice of the

proposed permit and the necessary supporting data.

(d) The Director may amend, suspend, or revoke any certification made under this section whenever continued operation would violate any terms or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken.

APPENDIX A TO SUBPART H OF PART 922—GULF OF THE FARALLONES NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

Point No.	Latitude north	Longitude west
1	38°15′50.349″	123°10′48.933″
2	38°12′36.338″	123°07′04.846″
3	38°09′57.033″	123°05′27.435″
4	38°08′26.872″	123°04′52.524″
5	38°07′42.125″	123°05′10.714″
6	38°06′08.017″	123°05′48.920″
7	38°05′26.765″	123°06′09.922″
8	38°04′44.587″	123°06′29.251″
9	38°03′54.439″	123°06′57.591″
10	38°03′07.527″	123°07′37.755″
11	37°59′32.425″	123°08′24.905″
12	37°59′22.344″	123°14′06.127″
13	37°57′31.931″	123°19′19.187″
14	37°54′16.943″	123°23′18.456″
15	37°50′05.522″	123°25′28.791″
16	37°45′33.799″	123°25′32.666″
17	37°41′20.351″	123°23′29.811″
18	37°38′01.053″	123°19′37.445″
19	37°36′04.665″	123°14′30.483″
20	37°35′30.191″	123°13′31.060″
21	37°33′47.197″	123°11′50.904″
22	37°31′12.270″	123°07′39.618″
23	37°30′29.706″	123°05′42.221″
24	37°29′39.287″	123°00′23.711″
25	37°30′34.337″	122°54′18.139″
26	37°31′47.784″	122°51′31.592″
27	37°34′17.533″	122°48′10.415″
28	37°36′58.627″	122°46′05.779″
29	37°39′59.303″	122°44′59.838″
30	37°52′56.355″	122°37′35.195″

Subpart I—Gray's Reef National Marine Sanctuary

EFFECTIVE DATE NOTE: At 71 FR 60063, Oct. 12, 2006, subpart I was revised, effective after the close of a review period of 45 days of continuous session of Congress beginning on Oct. 12, 2006. Announcement of the effective date will be published in the FEDERAL REGISTER. For the convenience of the user, the revised text is set forth following the text currently in effect.

§922.90 Boundary.

The Gray's Reef National Marine Sanctuary (Sanctuary) consists of 16.68 square nautical miles (NM) of high sea waters off the coast of Georgia. The Sanctuary boundary includes all waters within a rectangle starting at coordinate 31°21′45″N, 80°55′17″W, commencing to coordinate 31°25′15″N, 80°55′17″W, thence to coordinate 31°25′15″N, 80°49′42″W, thence to coordinate 31°21′45″N, 80°49′42″W, thence back to the point of origin.

§922.91 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for national defense (subject to the terms and conditions of Article 5, Section 2 of the Designation Document) or to respond to an emergency threatening life, property, or the environment, or except as may be permitted by the Director in accordance with §922.48 and §922.92, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Dredging, drilling, or otherwise altering the seabed in any way nor constructing any structure other than a navigation aid.

(2) Discharging or depositing any material or other matter except:

(i) Fish or parts, bait, and chumming materials;

(ii) Effluent from marine sanitation devices; and

(iii) Vessel cooling waters.

(3) Operating a watercraft other than in accordance with the Federal rules and regulations that would apply if there were no Sanctuary.

(4) Using, placing, or possessing wire fish traps.

(5) Using a bottom trawl, specimen dredge, or similar vessel-towed bottom sampling device.

(6)(i)(A) Breaking, cutting, or similarly damaging, taking, or removing any bottom formation, marine invertebrate, or marine plant.

(B) Taking any tropical fish.

(C) Using poisons, electric charges, explosives, or similar methods to take any marine animal not otherwise prohibited to be taken.

(ii) There shall be a rebuttable presumption that any bottom formation, marine invertebrate, tropical fish, marine plant, or marine animal found in the possession of a person within the

Sanctuary have been collected within or removed from the Sanctuary.

(7) Tampering with, damaging, or removing any historic or cultural resources.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities having significant impacts shall be determined in consultation between the Director and the Department of Defense.

§ 922.92, Note Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Director in accordance with this section and § 922.48 may conduct the specific activity in the Sanctuary including any activity specifically prohibited under § 922.91, if such activity is

(1) Research related to the resources of the Sanctuary,

(2) To further the educational value of the Sanctuary, or

(3) For salvage or recovery operations.

(b) Permit applications shall be addressed to the Director, Office of Ocean and Coastal Resource Management, ATTN: Manager, Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411.

(c) In considering whether to grant a permit, the Director shall evaluate

(1) The general professional and financial responsibility of the applicant,

(2) The appropriateness of the methods envisioned to the purpose(s) of the activity,

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary,

(4) The end value of the activity, and

(5) Other matters as deemed appropriate.

(d) The Director may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

EFFECTIVE DATE NOTE: At 71 FR 60063, Oct. 12, 2006, subpart I was revised, effective after the close of a review period of 45 days of continuous session of Congress beginning on Oct. 12, 2006. Announcement of the effective date will be published in the FEDERAL REGISTER. For the convenience of the user, the revised text is set forth as follows:

Subpart I—Gray's Reef National Marine Sanctuary

§ 922.90 Boundary.

The Gray's Reef National Marine Sanctuary (Sanctuary) consists of approximately 16.68 square nautical miles of ocean waters and the submerged lands thereunder, off the coast of Georgia. The Sanctuary boundary includes all waters and submerged lands within the geodetic lines connecting the following coordinates:

Datum: NAD83

Geographic Coordinate System

(1) N 31.362732 degrees W 80.921200 degrees
(2) N 31.421064 degrees W 80.921201 degrees
(3) N 31.421064 degrees W 80.828145 degrees
(4) N 31.362732 degrees W 80.828145 degrees
(5) N 31.362732 degrees W 80.921200 degrees

§ 922.91 Definitions.

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

Handline means fishing gear that is set and pulled by hand and consists of one vertical line to which may be attached leader lines with hooks.

Rod and reel means a rod and reel unit that is not attached to a vessel, or, if attached, is readily removable, from which a line and attached hook(s) are deployed. The line is payed out from and retrieved on the reel manually or electrically.

Stowed and not available for immediate use means not readily accessible for immediate use, e.g., by being securely covered and lashed to a deck or bulkhead, tied down, unbaited, unloaded, partially disassembled, or stowed for transit.

§ 922.92 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for national defense (subject to the terms and conditions of Article 5, Section 2 of the Designation Document) or to respond to an emergency threatening life, property, or the environment, or except as may be permitted by the Director in accordance with § 922.48 and § 922.93, the following activities are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Dredging, drilling into, or otherwise altering in any way the submerged lands of the Sanctuary (including bottom formations).

(2) Constructing any structure other than a navigation aid, or constructing, placing, or abandoning any structure, material, or other

matter on the submerged lands of the Sanctuary.

(3) Discharging or depositing any material or other matter except:

(i) Fish or fish parts, bait, or chumming materials;

(ii) Effluent from marine sanitation devices; and

(iii) Vessel cooling water.

(4) Operating a watercraft other than in accordance with the Federal rules and regulations that would apply if there were no Sanctuary.

(5)(i) Injuring, catching, harvesting, or collecting, or attempting to injure, catch, harvest, or collect, any marine organism, or any part thereof, living or dead, within the Sanctuary by any means except by use of rod and reel, handline, or spearfishing gear without powerheads. (ii) There shall be a rebuttable presumption that any marine organism or part thereof referenced in this paragraph found in the possession of a person within the Sanctuary has been collected from the Sanctuary.

(6) Except for possessing fishing gear stowed and not available for immediate use, possessing or using within the Sanctuary any fishing gear or means except rod and reel, handline, or spearfishing gear without powerheads.

(7) Using underwater any explosives, or devices that produce electric charges underwater.

(8) Breaking, cutting, damaging, taking, or removing any bottom formation.

(9) Moving, removing, damaging, or possessing, or attempting to move, remove, damage, or possess, any Sanctuary historical resource.

(10) Anchoring any vessel in the Sanctuary, except as provided in §922.92 when responding to an emergency threatening life, property, or the environment.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities having significant impacts shall be determined in consultation between the Director and the Department of Defense.

§922.93 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by §922.92(a)(1) through (10) if conducted in accordance within the scope, purpose, manner, terms and conditions of a permit issued under this section and §922.48.

(b) Applications for such permits should be addressed to the Director, National Marine Sanctuary Program, ATTN: Manager, Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411.

(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 §922.92(a)(1) through (10). The Director must also find that the activity will:

(1) Further research related to the resources and qualities of the Sanctuary;

(2) Further the educational, natural, or historical resource value of the Sanctuary;

(3) Further salvage or recovery operations in connection with a recent air or marine casualty; or

(4) Assist in managing the Sanctuary.

(d) The Director shall not issue a permit unless the Director also finds that:

(1) The applicant is professionally qualified to conduct and complete the proposed activity;

(2) The applicant has adequate financial resources available to conduct and complete the proposed activity;

(3) The duration of the proposed activity is no longer than necessary to achieve its stated purpose;

(4) The methods and procedures proposed by the applicant are appropriate to achieve the proposed activity's goals in relation to the activity's impacts on Sanctuary resources and qualities;

(5) The proposed activity will be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any indirect, secondary or cumulative effects of the activity, and the duration of such effects;

(6) The proposed activity will be conducted in a manner compatible with the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information considering the extent to which the conduct of the activity may result in conflicts between different users of the Sanctuary, and the duration of such effects;

(7) It is necessary to conduct the proposed activity within the Sanctuary to achieve its purposes;

(8) The reasonably expected end value of the activity to the furtherance of Sanctuary goals and purposes outweighs any potential adverse impacts on Sanctuary resources and qualities from the conduct of the activity; and

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

(e) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(f) The Director shall, inter alia, make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(g) The Director may, inter alia, make it a condition of any permit issued to require the

submission of one or more reports of the status and progress of such activity.

(h) The Director may, inter alia, make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

Subpart J—Fagatele Bay National Marine Sanctuary

§ 922.100 Scope of regulations.

The provisions of this subpart J apply only to the area of the Territory of American Samoa within the boundary of the Fagatele Bay National Marine Sanctuary (Sanctuary). Neither the provisions of this subpart J nor any permit issued under their authority shall be construed to relieve a person from any other requirements imposed by statute or regulation of the Territory of American Samoa or of the United States. In addition, no statute or regulation of the Territory of American Samoa shall be construed to relieve a person from the restrictions, conditions, and requirements contained in this subpart J.

§ 922.101 Boundary.

The Sanctuary is a 163-acre (0.25 sq. mi.) coastal embayment formed by a collapsed volcanic crater on the island of Tutuila, Territory of American Samoa and includes Fagatele Bay in its entirety. The landward boundary is defined by the mean high high water (MHHW) line between Fagatele Point (14°22′15″ S, 170°46′5″ W) and Steps Point (14°22′44″ S, 170°45′27″ W). The seaward boundary of the Sanctuary is defined by a straight line between Fagatele Point and Steps Point.

§ 922.102 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for national defense or to respond to an emergency threatening life, property, or the environment, or as may be permitted by the Director in accordance with § 922.48 and § 922.104, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1)(i)(A) Gathering, taking, breaking, cutting, damaging, destroying, or possessing any invertebrate, coral, bottom formation, or marine plant.

(B) Taking, gathering, cutting, damaging, destroying, or possessing any crown-of-thorns starfish (*Acanthaster planci*).

(C) Possessing or using poisons, electrical charges, explosives, or similar environmentally destructive methods.

(D) Possessing or using spearguns, including such devices known as Hawaiian slings, pole spears, arbalettes, pneumatic and spring-loaded spearguns, bows and arrows, bang sticks, or any similar taking device.

(E) Possessing or using a seine, trammel net, or any type of fixed net.

(ii) There shall be a rebuttable presumption that any items listed in this paragraph (a)(1) found in the possession of a person within the Sanctuary have been used, collected, or removed within or from the Sanctuary.

(2)(i) Operating a vessel closer than 200 feet (60.96 meters) from another vessel displaying a dive flag at a speed exceeding three knots.

(ii) Operating a vessel in a manner which causes the vessel to strike or otherwise cause damage to the natural features of the Sanctuary.

(3) Diving or conducting diving operations from a vessel not flying in a conspicuous manner the international code flag alpha ‘‘A.’’

(4) Littering, depositing, or discharging, into the waters of the Sanctuary, any material or other matter.

(5) Disturbing the benthic community by dredging, filling, dynamiting, bottom trawling, or otherwise altering the seabed.

(6) Removing, damaging, or tampering with any historical or cultural resource within the boundary of the Sanctuary.

(7) Ensnaring, entrapping, or fishing for any sea turtle listed as a threatened or endangered species under the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

(8) Except for law enforcement purposes, using or discharging explosives or weapons of any description. Distress signaling devices, necessary and proper for safe vessel operation, and knives

generally used by fishermen and swimmers shall not be considered weapons for purposes of this section.

(9) Marking, defacing, or damaging in any way, or displacing or removing or tampering with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts, or other boundary markers related to the Sanctuary.

(b) In addition to those activities prohibited or otherwise regulated under paragraph (a) of this section, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted landward of the straight line connecting Fagatele Point (14°22′15″ S, 170°46′5″ W) and Matautuloa Benchmark (14°22′18″ S, 170°45′35″ W).

(1) Possessing or using fishing poles, handlines, or trawls.

(2) Fishing commercially.

§922.103 Management and enforcement.

The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act. The American Samoa Economic and Development Planning Office (EDPO) will assist NOAA in the administration of the Sanctuary, and act as the lead agency, in conformance with the Designation Document, these regulations, and the terms and provisions of any grant or cooperative agreement. NOAA may act to deputize enforcement agents of the American Samoa Government (ASG) to enforce the regulations in this subpart in accordance with existing law. If NOAA chooses to exercise this provision, a memorandum of understanding shall be executed between NOAA and the ASG or the person(s) or entity authorized to act on their behalf.

§922.104 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Director, in consultation with the EDPO, in accordance with this section and §922.48, may conduct an activity otherwise prohibited by §922.102 in the Sanctuary if such activity is judged not to cause long-term or irreparable harm to the resources of the Sanctuary, and is:

(1) Related to research involving Sanctuary resources designed to enhance understanding of the Sanctuary environment or to improve resource management decisionmaking;

(2) Intended to further the educational value of the Sanctuary and thereby enhance understanding of the Sanctuary environmental or improve resource management decisionmaking; or

(3) For salvage or recovery operations.

(b) Permit applications shall be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuary Coordinator, Fagatele Bay National Marine Sanctuary, P.O. Box 4318, Pago Pago, AS 96799.

(c) In considering whether to grant a permit, the Director shall evaluate such matters as:

(1) The general professional and financial responsibility of the applicant;

(2) The appropriateness of the methods being proposed for the purpose(s) of the activity;

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, education, or scientific information; and

(4) The end value of the activity.

(d) In addition to meeting the criteria in this section and §922.48, the applicant also must demonstrate to the Director that:

(1) The activity shall be conducted with adequate safeguards for the environment; and

(2) The environment shall be returned to, or will regenerate to, the condition which existed before the activity occurred.

(e) The Director may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject the permit to such condition(s) as he or she deems necessary. A permit granted for research related to the Sanctuary may include, but is not limited to, the following conditions:

(1) The Director may observe any activity permitted by this section;

(2) any information obtained in the research site shall be made available to the public; and

(3) The submission of one or more reports of the status of such research activity may be required.

Subpart K—Cordell Bank National Marine Sanctuary

§ 922.110 Boundary

The Cordell Bank National Marine Sanctuary (Sanctuary) consists of a 397.05 square nautical mile (NM) area of marine waters approximately 50 miles west-northwest of San Francisco, California extending at 180° from the northernmost boundary of the Gulf of the Farallones National Marine Sanctuary (GFNMS) to the 1,000 fathom isobath northwest of the Bank, then south along this isobath to the GFNMS boundary and back to the northwest along this boundary to the beginning point. The boundary coordinates are listed in appendix A to this subpart.

§ 922.111 Prohibited or otherwise regulated activities.

(a) Except as necessary for national defense or to respond to an emergency threatening life, property or the environment, or except as permitted in accordance with §§ 922.48 and 922.112 or certified in accordance with § 922.47, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:

(1)(i) Depositing or discharging, from any location within the boundary of the Sanctuary, material or other matter of any kind except:

(A) Fish, fish parts, chumming materials (bait) produced and discarded during routine fishing activities conducted in the Sanctuary; and

(B) Water (including cooling water) and other biodegradable effluents incidental to use of a vessel in the Sanctuary and generated by: Marine sanitation devices approved by the United States Coast Guard; routine vessel maintenance, e.g., deck wash down; engine exhaust; or meals on board vessels.

(ii) Depositing or discharging, from any location beyond the boundaries of the Sanctuary, material or other matter of any kind, except for the exclusions listed in paragraph (a)(1)(i) of this section, which enter the Sanctuary and injure a Sanctuary resource.

(2) Removing, taking, or injuring or attempting to remove, take, or injure benthic invertebrates or algae located on Cordell Bank or within the 50 fathom isobath surrounding the Bank. There is a rebuttable presumption that any such resource found in the possession of a person within the Sanctuary was taken or removed by that person. This prohibition does not apply to accidental removal, injury, or takings during normal fishing operations.

(3) Exploring for, or developing or producing, oil, gas, or minerals in any area of the Sanctuary.

(b) All activities being carried out by the Department of Defense (DOD) within the Sanctuary on the effective date of designation that are necessary for national defense are exempt from the prohibitions contained in the regulations in this subpart. Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted by the Director after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, are subject to all prohibitions contained in the regulations in this subpart.

(c) Where necessary to prevent immediate, serious, and irreversible damage to a Sanctuary resource, any activity may be regulated within the limits of the Act on an emergency basis for no more than 120 days.

§ 922.112 Permit procedures and criteria.

(a) If a person wishes to conduct an activity prohibited under § 922.111, that person must apply for, receive, and have in possession on board any vessel used a valid permit issued pursuant to this section and § 922.48 authorizing that person to conduct that activity.

(b) Permit applications shall be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Manager, Cordell Bank National Marine Sanctuary, Fort Mason, Building #201, San Francisco, CA 94123.

(c) The Director, at his or her discretion, may issue a permit subject to

such terms and conditions as deemed appropriate, to conduct an activity otherwise prohibited by §922.111, if the Director finds that the activity will further research related to Sanctuary resources; further the educational or historical value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; or assist in the management of the Sanctuary. 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 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 the values for which the Sanctuary was designated; and the end value of the applicant's overall activity.

APPENDIX A TO SUBPART K OF PART 922—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

Point No.	Latitude	Longitude
1	38°15′51.72″	123°10′52.44″
2	38°07′55.88″	123°38′33.53″
3	38°06′45.21″	123°38′00.40″
4	38°04′58.41″	123°37′14.34″
5	38°04′28.22″	123°37′17.83″
6	38°03′42.75″	123°36′55.66″
7	38°03′11.10″	123°36′19.78″
8	38°02′46.12″	123°36′21.98″
9	38°02′02.74″	123°35′56.56″
10	38°01′27.10″	123°35′55.12″
11	38°01′22.28″	123°36′55.13″
12	38°01′11.54″	123°37′28.21″
13	38°00′49.16″	123°37′29.77″
14	37°59′54.49″	123°36′47.90″
15	37°59′12.39″	123°35′59.55″
16	37°58′39.40″	123°35′14.85″
17	37°58′00.57″	123°34′42.93″
18	37°57′18.99″	123°33′43.15″
19	37°56′56.42″	123°32′51.97″
20	37°56′18.90″	123°32′49.24″
21	37°55′22.37″	123°32′36.96″
22	37°54′26.10″	123°32′21.73″
23	37°53′07.46″	123°31′46.81″
24	37°52′34.93″	123°31′18.90″
25	37°51′42.81″	123°31′19.10″
26	37°50′59.58″	123°31′02.96″
27	37°49′22.64″	123°29′34.07″
28	37°48′49.14″	123°28′44.61″
29	37°48′36.95″	123°28′08.29″
30	37°48′03.37″	123°28′23.27″
31	37°47′41.54″	123°28′01.97″
32	37°47′01.78″	123°27′16.78″
33	37°46′51.92″	123°26′48.98″
34	37°46′13.20″	123°26′04.79″
35	37°46′00.73″	123°25′36.99″
36	37°50′25.31″	123°25′26.53″
37	37°54′32.28″	123°23′16.49″
38	37°57′45.71″	123°19′17.72″
39	37°59′29.27″	123°14′12.16″
40	37°59′43.71″	123°08′27.55″
41	38°03′10.20″	123°07′44.35″
42	38°04′01.64″	123°06′58.92″
43	38°08′33.32″	123°04′56.24″
44	38°12′42.06″	123°07′10.21″

[61 FR 51577, Oct. 3, 1996]

Subpart L—Flower Garden Banks National Marine Sanctuary

§922.120 Boundary.

The Flower Garden Banks National Marine Sanctuary (the Sanctuary) consists of three separate areas of ocean waters over and surrounding the East and West Flower Garden Banks and Stetson Bank, and the submerged lands thereunder including the Banks, in the northwestern Gulf of Mexico. The area designated at the East Bank is located approximately 120 nautical miles (nmi) south-southwest of Cameron, Louisiana, and encompasses 19.20 nmi2. The area designated at the West Bank is located approximately 110 nmi southeast of Galveston, Texas, and encompasses 22.50 nmi2. The area designated at Stetson Bank is located approximately 70 nmi southeast of Galveston, Texas, and encompasses 0.64 nmi2. The three areas encompass a total of 42.34 nmi2 (145.09 square kilometers). The boundary coordinates for each area are listed in appendix A to this subpart.

[65 FR 81178, Dec. 22, 2000]

§922.121 Definitions.

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

No-activity zone means the two geographic areas delineated by the Department of the Interior in stipulations for OCS lease sale 112 over and surrounding the East and West Flower Garden Banks, and the geographic area delineated by the Department of the Interior in stipulations for OCS lease sale 171 over and surrounding Stetson Bank, as areas in which activities associated with exploration for, development of, or production of hydrocarbons

are prohibited. The precise aliquot part description of these areas around the East and West Flower Garden Banks are provided in appendix B of this subpart; the no-activity zone around Stetson Bank is defined as the 52 meter isobath. These particular aliquot part descriptions for the East and West Flower Garden Banks, and the 52 meter isobath around Stetson Bank, define the geographic scope of the ''no-activity zones'' for purposes of the regulations in this subpart. The descriptions for the East and West Flower Garden Banks no-activity zones are based on the ''¼ ¼ ¼'' system formerly used by the Department of the Interior, a method that delineates a specific portion of a block rather than the actual underlying isobath.

[65 FR 81178, Dec. 22, 2000]

§ 922.122 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraphs (c) through (h) 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 except outside of all no-activity zones and provided all drilling cuttings and drilling fluids are shunted to the seabed through a downpipe that terminates an appropriate distance, but no more than ten meters, from the seabed.

(2)(i) Anchoring any vessel within the Sanctuary.

(ii) Mooring any vessel within the Sanctuary, except that vessels 100 feet (30.48 meters) or less in registered length may moor on a Sanctuary mooring buoy.

(3)(i) Discharging or depositing, from within the boundaries of the Sanctuary, any material or other matter except:

(A) Fish, fish parts, chumming materials or bait used in or resulting from fishing with conventional hook and line gear in the Sanctuary;

(B) Biodegradable effluents 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, 33 U.S.C. 1322;

(C) Water generated by routine vessel operations (e.g., cooling water, deck wash down, and graywater as defined by section 312 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1322) excluding oily wastes from bilge pumping;

(D) Engine exhaust; or

(E) In areas of the Sanctuary outside the no-activity zones, drilling cuttings and drilling fluids necessarily discharged incidental to the exploration for, development of, or production of oil or gas in those areas and in accordance with the shunting requirements of paragraph (a)(1) unless such discharge injures a Sanctuary resource or quality.

(ii) Discharging or depositing, from beyond the boundaries of the Sanctuary, any material or other matter, except those listed in paragraphs (a)(3)(i) (A) through (D) of this section, that subsequently enters the Sanctuary and injures a Sanctuary resource or quality.

(4) Drilling into, dredging or otherwise altering the seabed of the Sanctuary (except by anchoring); or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary.

(5) Injuring or removing, or attempting to injure or remove, any coral or other bottom formation, coralline algae or other plant, marine invertebrate, brine-seep biota or carbonate rock within the Sanctuary.

(6) Taking any marine mammal or turtle within the Sanctuary, except as permitted by regulations, as amended, promulgated under the Marine Mammal Protection Act, as amended, 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*

(7) Injuring, catching, harvesting, collecting or feeding, or attempting to injure, catch, harvest, collect or feed, any fish within the Sanctuary by use of bottom longlines, traps, nets, bottom trawls or any other gear, device, equipment or means except by use of conventional hook and line gear.

(8) Possessing within the Sanctuary (regardless of where collected, caught, harvested or removed), except for valid

law enforcement purposes, any carbonate rock, coral or other bottom formation, coralline algae or other plant, marine invertebrate, brine-seep biota or fish (except for fish caught by use of conventional hook and line gear).

(9) Possessing or using within the Sanctuary, except possessing while passing without interruption through it or for valid law enforcement purposes, any fishing gear, device, equipment or means except conventional hook and line gear.

(10) Possessing, except for valid law enforcement purposes, or using explosives or releasing electrical charges within the Sanctuary.

(b) If any valid regulation issued by any Federal authority of competent jurisdiction, regardless of when issued, conflicts with a Sanctuary regulation, the regulation deemed by the Director as more protective of Sanctuary resources and qualities shall govern.

(c) The prohibitions in paragraphs (a)(2) (i), (iii), and (iv), (4) and (10) of this section do not apply to necessary activities conducted in areas of the Sanctuary outside the no-activity zones and incidental to exploration for, development of, or production of oil or gas in those areas.

(d) The prohibitions in paragraphs (a) (2) through (10) of this section do not apply to activities necessary to respond to emergencies threatening life, property, or the environment.

(e)(1) The prohibitions in paragraphs (a) (2) through (10) of this section do not apply to activities being carried out by the Department of Defense as of the effective date of Sanctuary designation (January 18, 1994). Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities. The prohibitions in paragraphs (a) (2) through (10) of this section do not apply to any new activities carried out by the Department of Defense that do not have the potential for any significant adverse impacts on Sanctuary resources or qualities. Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities. New activities with the potential for significant adverse impacts on Sanctuary resources or qualities may be exempted from the prohibitions in paragraphs (a) (2) through (10) 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 minimizes any adverse impact on Sanctuary resources and qualities.

(2) 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 a component of the Department of Defense, the cognizant component 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.

(f) The prohibitions in paragraphs (a) (2) through (10) 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 §922.123 or a Special Use permit issued pursuant to section 310 of the Act.

(g) The prohibitions in paragraphs (a) (2) through (10) of this section do not apply to any activity authorized by any lease, permit, license, approval or other authorization issued after January 18, 1994, 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.

(h) Notwithstanding paragraphs (f) and (g) of this section, in no event may the Director issue a National Marine Sanctuary permit under §922.48 and §922.123 or a Special Use permit under section 10 of the Act authorizing, or otherwise approve, the exploration for, development of, or production of oil, gas or minerals in a no-activity zone. Any leases, permits, approvals, or other authorizations authorizing the exploration for, development of, or production of oil, gas or minerals in a no-

activity zone and issued after the January 18, 1994 shall be invalid.

[60 FR 66877, Dec. 27, 1995, as amended at 66 FR 58371, Nov. 21, 2001]

§ 922.123 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by § 922.122(a) (2) through (10) 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 Ocean and Coastal Resource Management; ATTN: Manager, Flower Garden Banks National Marine Sanctuary, 216 West 26th Street, Suite 104, Bryan, TX 77803.

(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 § 922.122(a) (2) through (10), if the Director finds that the activity will: further research related to Sanctuary resources; 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; or assist in managing the Sanctuary. In deciding whether to issue a permit, the Director shall 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; and the end value of the activity. In addition, the Director may consider such other factors as he or she deems appropriate.

(d) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(e) The Director may, *inter alia,* make it a condition of any permit issued that any information obtained under the permit be made available to the public.

(f) The Director may, *inter alia,* make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress, or results of any activity authorized by the permit.

[60 FR 66877, Dec. 27, 1995, as amended at 65 FR 81178, Dec. 22, 2000]

APPENDIX A TO SUBPART L OF PART 922—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

This appendix contains a second set of boundary coordinates using the geographic positions of the North American Datum of 1983 (NAD 83). FGBNMS coordinates are now provided in both North American Datum of 1927 (NAD 27) and NAD 83.

Point	Latitude (N)	Longitude (W)
East Flower Garden Bank: (NAD 27)		
E–1	27 deg. 52′ 53.82718″	93 deg. 37′ 41.30310″
E–2	27 deg. 53′ 34.83434″	93 deg. 38′ 23.35445″
E–3	27 deg. 55′ 13.64286″	93 deg. 38′ 40.34368″
E–4	27 deg. 57′ 30.71927″	93 deg. 38′ 33.26982″
E–5	27 deg. 58′ 27.66896″	93 deg. 37′ 46.12447″
E–6	27 deg. 59′ 01.41554″	93 deg. 35′ 31.74954″
E–7	27 deg. 59′ 00.50888″	93 deg. 35′ 09.69198″
E–8	27 deg. 55′ 22.38258″	93 deg. 34′ 14.79162″
E–9	27 deg. 54′ 04.05605″	93 deg. 34′ 18.88720″
E–10	27 deg. 53′ 26.70972″	93 deg. 35′ 05.00978″
E–11	27 deg. 52′ 52.06998″	93 deg. 36′ 57.23078″
West Flower Garden Bank: (NAD 27)		
W–1	27 deg. 49′ 10.16324″	93 deg. 50′ 45.27154″
W–2	27 deg. 50′ 12.35976″	93 deg. 52′ 10.47158″

Point	Latitude (N)	Longitude (W)
W–3	27 deg. 51′ 12.82777″	93 deg. 52′ 51.63488″
W–4	27 deg. 51′ 32.41145″	93 deg. 52′ 50.66983″
W–5	27 deg. 52′ 49.88791″	93 deg. 52′ 24.77053″
W–6	27 deg. 55′ 00.93450″	93 deg. 49′ 43.68090″
W–7	27 deg. 54′ 58.33040″	93 deg. 48′ 37.54501″
W–8	27 deg. 54′ 35.26067″	93 deg. 47′ 10.34866″
W–9	27 deg. 54′ 14.80334″	93 deg. 46′ 49.28963″
W–10	27 deg. 53′ 35.63704″	93 deg. 46′ 51.25825″
W–11	27 deg. 52′ 57.34474″	93 deg. 47′ 15.26428″
W–12	27 deg. 50′ 40.26361″	93 deg. 47′ 22.14179″
W–13	27 deg. 49′ 10.89894″	93 deg. 48′ 42.72307″
Stetson Bank: (NAD 27)		
S–1	28 deg. 09′ 30.06738″	94 deg. 18′ 31.34461″
S–2	28 deg. 10′ 09.24374″	94 deg. 18′ 29.57042″
S–3	28 deg. 10′ 06.88036″	94 deg. 17′ 23.26201″
S–4	28 deg. 09′ 27.70425″	94 deg. 17′ 25.04315″
East Flower Garden Bank: (NAD 83)		
E–1	27 deg. 52′ 54.84288″	93 deg. 37′ 41.84187″
E–2	27 deg. 53′ 35.80428″	93 deg. 38′ 23.89520″
E–3	27 deg. 55′ 14.61048″	93 deg. 38′ 40.88638″
E–4	27 deg. 57′ 31.68349″	93 deg. 38′ 33.81421″
E–5	27 deg. 58′ 28.63153″	93 deg. 37′ 46.66809″
E–6	27 deg. 59′ 02.37658″	93 deg. 35′ 32.28918″
E–7	27 deg. 59′ 01.46983″	93 deg. 35′ 10.23088″
E–8	27 deg. 55′ 23.34849″	93 deg. 34′ 15.32560″
E–9	27 deg. 54′ 05.02387″	93 deg. 34′ 19.42020″
E–10	27 deg. 53′ 27.67871″	93 deg. 35′ 05.54379″
E–11	27 deg. 52′ 53.04047″	93 deg. 36′ 57.76805″
West Flower Garden Bank: (NAD 83)		
W–1	27 deg. 49′ 11.14452″	93 deg. 50′ 45.83401″
W–2	27 deg. 50′ 13.34001″	93 deg. 52′ 11.03791″
W–3	27 deg. 51′ 13.80672″	93 deg. 52′ 52.20349″
W–4	27 deg. 51′ 33.38988″	93 deg. 52′ 51.23867″
W–5	27 deg. 52′ 50.86415″	93 deg. 52′ 25.33954″
W–6	27 deg. 55′ 01.90633″	93 deg. 49′ 44.24605″
W–7	27 deg. 54′ 59.30189″	93 deg. 48′ 38.10780″
W–8	27 deg. 54′ 36.23221″	93 deg. 47′ 10.90806″
W–9	27 deg. 54′ 15.77527″	93 deg. 46′ 49.84801″
W–10	27 deg. 53′ 36.60997″	93 deg. 46′ 51.81616″
W–11	27 deg. 52′ 58.31880″	93 deg. 47′ 15.82251″
W–12	27 deg. 50′ 41.24120″	93 deg. 47′ 22.69837″
W–13	27 deg. 49′ 11.87936″	93 deg. 48′ 43.28125″
Stetson Bank: (NAD 83)		
S–1	28 deg. 09′ 31.02671″	94 deg. 18′ 31.98164″
S–2	28 deg. 10′ 10.20196″	94 deg. 18′ 30.20776″
S–3	28 deg. 10′ 07.83821″	94 deg. 17′ 23.89688″
S–4	28 deg. 09′ 28.66320″	94 deg. 17′ 25.67770″

[65 FR 81178, Dec. 22, 2000]

APPENDIX B TO SUBPART L OF PART 922—COORDINATES FOR THE DEPARTMENT OF THE INTERIOR TOPOGRAPHIC LEASE STIPULATIONS FOR OCS LEASE SALE 171

ALIQUOT PART DESCRIPTION OF BIOLOGICAL STIPULATION AREA EAST GARDEN BANK

Block A–366 Texas Leasing Map No. 7C (High Island Area East Addition South Extension)

SE¼, SW¼; S½, NE¼, SE¼; SE¼, NW¼, SE¼; S½, SE¼.

Block A–376

W½, NW¼, SW¼; SW¼, SW¼, SW¼.

Block A–374

W½, NW¼, NW¼; W½, SW¼, NW¼; SE¼, SW¼, NW¼; SW¼,
NE¼, SW¼, W½, SW¼; W½, SE¼, SW¼; SE¼, SE¼, SW¼.

Block A–375

E½; E½, NW¼; E½, NW¼, NW¼; SW¼, NW¼, NW¼; E½,
SW¼, NW¼; NW¼, SW¼, NW¼; SW¼.

Block A–388

NE¼; E½, NW¼; E½, NW¼, NW¼; NE¼, SW¼, NW¼; E½,
NE¼, SW¼; NW¼, NE¼, SW¼; NE¼, NW¼, SW¼; NE¼,
SE¼, SW¼, NE¼; NE¼, NE¼, SE¼; W½, NE¼, SE¼; NW¼,

Block A–389

NE¼, NW¼; NW¼, NW¼; SW¼, NW¼; NE¼, SE¼, NW¼; W½,
SE¼, NW¼; N½, NW¼, SW¼.

ALIQUOT PART DESCRIPTION OF BIOLOGICAL STIPULATION AREA WEST GARDEN BANK

Block A–383 Texas Leasing Map No. 7C (High Island Area East Addition South Extension)

E½, SE¼, SE¼; SW¼, SE¼, SE¼.

Block A–384

W½, SW¼, NE¼; SE¼, SW¼, NE¼; S½, SE¼, NE¼;
SE¼, NW¼; E½, SW¼; E½, NW¼, SW¼, SW¼, NW¼,
SW¼; SW¼, SW¼; SE¼.

Block A–385

SW¼, SW¼, NW¼; NW¼, SW¼; NW¼, SW¼, SW¼.

Block A–397

W½, W½, NW¼; W½, NW¼, SW¼; NW¼; SW¼, SW¼.

Block A–398

Entire block.

Block A–399

E½, SE¼, NE¼, NW¼; E½, SE¼, NW¼; E½, NE¼, SW¼;
SW¼, NE¼, SW¼; NE¼, SE¼, SW¼.

Block A–401

NE¼, NE¼; N½, NW¼, NE¼; NE¼, SE¼, NE¼.

Block 134 Official Protraction Diagram NG15–02 (Garden Banks)

That portion of the block north of a line connecting a point on the east boundary of Block 134, X=1,378,080.00′, Y=10,096,183.00′, with a point on the west boundary of Block 134, X=1,367,079,385′, Y=10,096,183.000′, defined under the Universal Transverse Mercator grid system.

Block 135 Official Protraction Diagram NG15–02 (Garden Banks)

That portion of the block northwest of a line connecting the southeast corner of Texas Leasing Map No. 7C, Block A–398, X=1,383,293.840′, Y=10,103,281.930′, with a point on the west boundary of Official Protraction Diagram NG15–02, Block 135, X=1,378,080.000′, Y=10,096,183.000′, defined under the Universal Transverse Mercator grid system.

[65 FR 81180, Dec. 22, 2000]

Subpart M—Monterey Bay National Marine Sanctuary

§ 922.130 Boundary.

(a) The Monterey Bay National Marine Sanctuary (Sanctuary) consists of an area of approximately 4,024 square nautical miles of coastal and ocean waters, and the submerged lands thereunder, in and surrounding Monterey Bay, off the central coast of California.

(b) The northern terminus of the boundary is located along the southern boundary of the Gulf of the Farallones National Marine Sanctuary (GFNMS) and runs westward to approximately 123°07′W. The boundary then extends south in an arc which generally follows the 500 fathom isobath. At approximately 37°03′N, the boundary arcs south to 122°25′W, 36°10′N, due west of Partington Point. The boundary again follows the 500 fathom isobath south to 121°41′W, 35°33′N, due west of Cambria. The boundary then extends shoreward towards the mean high-water line. The landward boundary is defined by the

mean high-water line between the GFNMS and Cambria, exclusive of a small area off the north coast of San Mateo County and the City and County of San Francisco between Point Bonita and Point San Pedro. Pillar Point, Santa Cruz, Moss Landing and Monterey harbors are excluded from the Sanctuary boundary shoreward from their respective International Collision at Sea regulation (Colreg.) demarcation lines except for Moss Landing Harbor, where all of Elkhorn Slough east of the Highway One bridge is included within the Sanctuary boundary. The boundary coordinates are listed in appendix A to this subpart.

§922.131 Definitions.

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

Attract or *attracting* means the conduct of any activity that lures or may lure white sharks by using food, bait, chum, dyes, acoustics or any other means, except the mere presence of human beings (e.g., swimmers, divers, boaters, kayakers, surfers).

Federal Project means any water resources development project conducted by the U.S. Army Corps of Engineers or operating under a permit or other authorization issued by the Corps of Engineers and authorized by Federal law.

Hand tool means a hand-held implement, utilized for the collection of jade pursuant to §922.132(a)(1), that is no greater than 36 inches in length and has no moving parts (e.g., dive knife, pry bar or abalone iron). Pneumatic, mechanical, electrical, hydraulic or explosive tools are, therefore, examples of what does not meet this definition.

Motorized personal water craft means any motorized vessel that is less than fifteen feet in length as manufactured, is capable of exceeding a speed of fifteen knots, and has the capacity to carry not more than the operator and one other person while in operation. The term includes, but is not limited to, jet skis, wet bikes, surf jets, miniature speed boats, air boats, and hovercraft.

[60 FR 66877, Dec. 27, 1995, as amended at 61 FR 66917, Dec. 19, 1996; 63 FR 15087, Mar. 30, 1998]

§922.132 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraphs (b) through (f) 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 except: jade may be collected (meaning removed) from the area bounded by the 35°55′20″ N latitude parallel (coastal reference point: beach access stairway at south Sand Dollar Beach), the 35°53′20″ N latitude parallel (coastal reference point: westernmost tip of Cape San Martin), and from the mean high tide line seaward to the 90-foot isobath (depth line) (the ''authorized area'') *provided that*:

(i) Only jade already loose from the seabed may be collected;

(ii) No tool may be used to collect jade except:

(A) A hand tool (as defined in §922.131) to maneuver or lift the jade or scratch the surface of a stone as necessary to determine if it is jade;

(B) A lift bag or multiple lift bags with a combined lift capacity of no more than two hundred pounds; or

(C) A vessel (except for motorized personal watercraft) (see paragraph (a)(7) of this section) to provide access to the authorized area;

(iii) Each person may collect only what that person individually carries; and

(iv) For any loose piece of jade that cannot be collected under paragraphs (a)(1) (ii) and (iii) of this section, any person may apply for a permit to collect such a loose piece by following the procedures in §922.133.

(2)(i) Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter except:

(A) Fish, fish parts, chumming materials or bait used in or resulting from traditional 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) Dredged material deposited at disposal sites authorized by the U.S. Environmental Protection Agency (EPA) (in consultation with the U.S. Army Corps of Engineers (COE)) prior to the effective date of Sanctuary designation (January 1, 1993), provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on January 1, 1993.

(ii) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except those listed in paragraphs (a)(2)(i) (A) through (D) of this section and dredged material deposited at the authorized disposal sites described in appendix B to this subpart, provided that the dredged material disposal is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval.

(3) 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 kelp harvesting, aquaculture or traditional fishing operations.

(4) 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:

(i) Anchoring vessels;

(ii) Aquaculture, kelp harvesting or traditional fishing operations;

(iii) Installation of navigation aids;

(iv) Harbor maintenance in the areas necessarily associated with Federal Projects in existence on January 1, 1993, including dredging of entrance channels and repair, replacement or rehabilitation of breakwaters and jetties;

(v) Construction, repair, replacement or rehabilitation of docks or piers; or

(vi) Collection of jade pursuant to paragraph (a)(1) of this section, provided that there is no constructing, placing, or abandoning any structure, material, or other matter on the seabed of the Sanctuary.

(5) Taking any marine mammal, sea turtle or seabird in or above the Sanctuary, except as permitted by regulations, as amended, promulgated under 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.*

(6) Flying motorized aircraft, except as necessary for valid law enforcement purposes, at less than 1000 feet above any of the four zones within the Sanctuary described in appendix C to this subpart.

(7) Operating motorized personal water craft within the Sanctuary except within the four designated zones and access routes within the Sanctuary described in appendix D to this subpart.

(8) Possessing within the Sanctuary (regardless of where taken, moved or removed from), except as necessary for valid law enforcement purposes, any historical resource, or any marine mammal, sea turtle or seabird taken in violation of regulations, as amended, promulgated under the MMPA, ESA or MBTA.

(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.

(10) Attracting any white shark in that part of the Sanctuary out to the seaward limit of State waters. For the purposes of this prohibition, the seaward limit of State waters is a line three nautical miles distant from the coastline of the State, where the coastline is the line of ordinary low water along the portion of the coast in direct contact with the open sea. The coastline for Monterey Bay, which is inland waters, is the straight line marking the seaward limit of the Bay, determined by connecting the following two points: 36°57′6″ N, 122°01′45″ W and 36°38′16″ N, 121°56′3″ W.

(b) The prohibitions in paragraphs (a)(2) through (9) of this section do not apply to activities necessary to respond to emergencies threatening life, property or the environment.

(c)(1) All Department of Defense activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. The prohibitions in paragraphs (a) (2) through (9) of this section do not apply to existing military activities carried out by the Department of Defense, as specifically identified in the Final environmental Impact Statement and Management Plan for the Proposed Monterey Bay National Marine Sanctuary (NOAA, 1992). (Copies of the FEIS/MP are available from the Monterey Bay National Marine Sanctuary, 299 Foam Street, Suite D, Monterey, CA 93940). New activities may be exempted from the prohibitions in paragraphs (a) (2) through (9) of this section by the Director after consultation between the Director and the Department of Defense.

(2) 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 cognizant component 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.

(d) The prohibitions in paragraph (a)(1) of this section as it pertains to jade collection in the Sanctuary, paragraphs (a) (2) and (8) of this section, and paragraph (a)(10) 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 922.133 or a Special Use permit issued pursuant to section 310 of the Act.

(e) The prohibitions in paragraphs (a) (2) through (8) of this section do not apply to any activity authorized by any lease, permit, license, approval or other authorization issued after January 1, 1993 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.

(f) Notwithstanding paragraphs (d) and (e) of this section, in no event may the Director issue a National Marine Sanctuary permit under §§922.48 and 922.133 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, except for the collection of jade pursuant to paragraph (a)(1) of this section; the discharge of primary-treated sewage within the Sanctuary (except by certification, pursuant to §922.47, of valid authorizations in existence on January 1, 1993 and issued by other authorities of competent jurisdiction); or the disposal of dredged material within the Sanctuary other than at sites authorized by EPA (in consultation with COE) prior to January 1, 1993. Any purported authorizations issued by other authorities within the Sanctuary shall be invalid.

[60 FR 66877, Dec. 27, 1995, as amended at 61 FR 66917, Dec. 19, 1996; 62 FR 35338, July 1, 1997; 63 FR 15087, Mar. 30, 1998]

§922.133 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by §922.132(a)(1) as it pertains to jade collection in the Sanctuary, §922.132(a) (2) through (8), and §922.132(a) (10), 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 Ocean and Coastal Resource Management; ATTN: Manager, Monterey Bay National Marine Sanctuary, 299 Foam Street, Suite D, Monterey, CA 93940.

(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 § 922.132(a)(1) as it pertains to jade collection in the Sanctuary, § 922.132(a) (2) through (8), and § 922.132(a)(10) if the Director finds the activity will have only negligible short-term adverse effects on 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; allow the removal, without the use of pneumatic, mechanical, electrical, hydraulic or explosive tools, of loose jade from the Jade Cove area under § 922.132(a)(1)(iv); assist in managing the Sanctuary; or further salvage or recovery operations in connection with an abandoned shipwreck in the Sanctuary title to which is held by the State of California. In deciding whether to issue a permit, the Director shall 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 extend to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities; the cumulative effects of the activity; and the end value of the activity. For jade collection, preference will be given for applications proposing to collect loose pieces of jade for research or educational purposes. In addition, the Director may consider such other factors as he or she deems appropriate.

(d) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(e) The Director may, *inter alia,* make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(f) The Director may, *inter alia,* make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

[60 FR 66877, Dec. 27, 1995, as amended at 63 FR 15088, Mar. 30, 1998]

§ 922.134 Notification and review.

(a) [Reserved]

(b)(1) NOAA has entered into a Memorandum of Agreement (MOA) with the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary. With regard to permits, the MOA encompasses:

(i) National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California under § 13377 of the California Water Code; and

(ii) Waste Discharge Requirements issued by the State of California under § 13263 of the California Water Code.

(2) The MOA specifies how the process of § 922.49 will be administered within State waters within the Sanctuary in coordination with the State permit program.

[60 FR 66877, Dec. 27, 1995, as amended at 62 FR 62694, Nov. 25, 1997]

APPENDIX A TO SUBPART M OF PART 922—MONTEREY BAY NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

[Appendix based on North American datum of 1983.]

Point	Latitude	Longitude
1	37°52′56.09055″	122°37′39.12564″
2	37°39′59.06176″	122°45′ 3.79307″
3	37°36′58.39164″	122°46′ 9.73871″
4	37°34′17.30224″	122°48′14.38141″
5	37°31′47.55649″	122°51′35.56769″
6	37°30′34.11030″	122°54′22.12170″
7	37°29′39.05866″	123°00′27.70792″
8	37°30′29.47603″	123°05′46.22767″
9	37°31′17.66945″	123°07′47.63363″
10	37°27′10.93594″	123°08′24.32210″
11	37°20′35.37491″	123°07′54.12763″
12	37°13′50.21805″	123°06′15.50600″
13	37°07′48.76810″	123°01′43.10994″
14	37°03′46.60999″	122°54′45.39513″
15	37°02′06.30955″	122°46′35.02125″
16	36°55′17.56782″	122°48′21.41121″
17	36°48′22.74244″	122°48′56.29007″

[Appendix based on North American datum of 1983.]

Point	Latitude	Longitude
18	36°41′30.91516″	122°48′19.40739″
19	36°34′45.76070″	122°46′26.96772″
20	36°28′24.18076″	122°43′32.43527″
21	36°22′20.70312″	122°39′28.42026″
22	36°16′43.93588″	122°34′26.77255″
23	36°11′44.53838″	122°28′37.16141″
24	36°07′26.88988″	122°21′54.97541″
25	36°04′07.08898″	122°14′39.75924″
26	36°01′28.22233″	122°07′00.19068″
27	35°59′45.46381″	121°58′56.36189″
28	35°58′59.12170″	121°50′26.47931″
29	35°58′53.63866″	121°45′22.82363″
30	35°55′45.60623″	121°42′40.28540″
31	35°50′15.84256″	121°43′09.20193″
32	35°43′14.26690″	121°42′43.79121″
33	35°35′41.88635″	121°41′25.07414″
34	35°33′11.75999″	121°37′49.74192″
35	35°33′17.45869″	121°05′52.89891″
36	37°35′39.73180″	122°31′14.96033″
37	37°36′49.21739″	122°37′00.22577″
38	37°46′00.98983″	122°39′00.40466″
39	37°49′05.69080″	122°31′46.30542″

APPENDIX B TO SUBPART M OF PART 922—DREDGED MATERIAL DISPOSAL SITES ADJACENT TO THE MONTEREY BAY NATIONAL MARINE SANCTUARY

(Appendix based on North American Datum of 1983.)

As of January 1, 1993, the U.S. Army Corps of Engineers operates the following dredged material disposal site adjacent to the Sanctuary off of the Golden Gate:

Point	Latitude	Longitude
1	37°45.875′	122°34.140′
2	37°44.978′	122°37.369′
3	37°44.491′	122°37.159′
4	37°45.406′	122°33.889′
5	37°45.875′	122°34.140′

In addition, the U.S. Environmental Protection Agency, as of January 1, 1993, is (in consultation with the U.S. Army Corps of Engineers) in the process of establishing a dredged material disposal site outside the northern boundary of the Monterey Bay National Marine Sanctuary and within one of three study areas described in 57 FR 43310, Sept. 18, 1992. When that disposal site is authorized, this appendix will be updated to incorporate its precise location.

APPENDIX C TO SUBPART M OF PART 922—ZONES WITHIN THE SANCTUARY WHERE OVERFLIGHTS BELOW 1000 FEET ARE PROHIBITED

The four zones are:

(1) From mean high water out to three nautical miles (NM) between a line extending from Point Santa Cruz on a southwesterly heading of 220° and a line extending from 2.0 NM north of Pescadero Point on a southwesterly heading of 240°;

(2) From mean high water out to three NM between a line extending from the Carmel River mouth on a westerly heading of 270° and a line extending due west along latitude 35°33′17.5612″ off of Cambria;

(3) From mean high water and within a five NM arc drawn from a center point at the end of Moss Landing Pier; and

(4) Over the waters of Elkhorn Slough east of the Highway On bridge to Elkhorn Road.

APPENDIX D TO SUBPART M OF PART 922—ZONES AND ACCESS ROUTES WITHIN THE SANCTURARY WHERE THE OPERATION OF MOTORIZED PERSONAL WATERCRAFT IS ALLOWED

The four zones and access routes are:

(1) The approximately one [1.0] NM^2 area off Pillar Point Harbor from harbor launch ramps, through harbor entrance to the northern boundary of Zone One bounded by (a) 37°29.6′ N (flashing 5-second breakwater entrance light and horn located at the seaward end of the outer west breakwater), 122°29.1′ W; (b) 37°28.9′ N (bell buoy), 122°29.0′ W; (c) 37°28.8′ N, 122°28′ W; and (d) 37°29.6′ N, 122°28′ W;

(2) The approximately five [5.0] NM^2 area off of Santa Cruz Small Craft Harbor from harbor launch ramps, through harbor entrance, and then along a 100 yard wide access route southwest along a true bearing of approximately 196° (180° magnetic) to the whistle buoy at 36°56.3′ N, 122°00.6′ W. Zone Two is bounded by (a) 36°55′ N, 122°02′ W; (b) 36°55′ N, 121°58′ W; (c) 36°56.5′ N, 121°58′ W; and (d) 36°56.5′ N, 122°02′ W;

(3) The approximately six [6.0] NM^2 area off of Moss Landing Harbor from harbor launch ramps, through harbor entrance, and then along a 100 yard wide access route due west to the eastern boundary of Zone Three bounded by (a) 36°50′ N, 121°49.3′ W; (b) 36°50′ N, 121°50.8′ W; (c) 36°46.7′ N, 121°50.8′ W; (d) 36°46.7′ N, 121°49′ W; (e) 36°47.9′ N (bell buoy), 121°48.1′ W; and (f) 36°48.9′ N, 121°48.2′ W; and

(4) The approximately five [5.0] NM^2 area off of Monterey Harbor from harbor launch ramps to the seaward end of the U.S. Coast Guard Pier, and then along a 100 yard wide access route due north to the southern boundary of Zone Four bounded by (a) 36°38.7′ N, 121°55.4′ W; (b) 36°36.9′ N, 121°52.5′ W; (c) 36°38.3′ N, 121°51.3′ W; and (d) 36°40′ N, 121°54.4′ W.

[60 FR 66877, Dec. 27, 1995, as amended at 61 FR 14964, Apr. 4, 1996]

Subpart N—Stellwagen Bank National Marine Sanctuary

§922.140 Boundary.

(a) The Stellwagen Bank National Marine Sanctuary (Sanctuary) consists

of an area of approximately 638 square nautical miles (NM) of Federal marine waters and the submerged lands thereunder, over and around Stellwagen Bank and other submerged features off the coast of Massachusetts. The boundary encompasses the entirety of Stellwagen Bank; Tillies Bank, to the northeast of Stellwagen Bank; and portions of Jeffreys Ledge, to the north of Stellwagen Bank.

(b) The Sanctuary boundary is identified by the following coordinates, indicating the most northeast, southeast, southwest, west-northwest, and north-northwest points: 42°45′59.83″N×70°13′01.77″W (NE); 42°05′35.51″N×70°02′08.14″W (SE); 42°07′44.89″W×70°28′15.44″W (SW); 42°32′53.52″N×70°35′52.38″W (WNW); and 42°39′04.08″N×70°30′11.29″W (NNW). The western border is formed by a straight line connecting the most southwest and the west-northwest points of the Sanctuary. At the most west-northwest point, the Sanctuary border follows a line contiguous with the three-mile jurisdictional boundary of Massachusetts to the most north-northwest point. From this point, the northern border is formed by a straight line connecting the most north-northwest point and the most northeast point. The eastern border is formed by a straight line connecting the most northeast and the most southeast points of the Sanctuary. The southern border follows a straight line between the most southwest point and a point located at 42°06′54.57″N × 70°16′42.7″ W. From that point, the southern border then continues in a west-to-east direction along a line contiguous with the three-mile jurisdictional boundary of Massachusetts until reaching the most southeast point of the Sanctuary. The boundary coordinates are listed in appendix A to this subpart.

§ 922.141 Definitions.

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

Industrial material means mineral, as defined in § 922.3.

Traditional fishing means those commercial or recreational fishing methods which have been conducted in the past within the Sanctuary.

§ 922.142 Prohibited or otherwise regulated activities.

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

(1)(i) Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter except:

(A) Fish, fish parts, chumming materials or bait used in or resulting from traditional 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; or

(D) Engine exhaust.

(ii) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter, except those listed in paragraphs (a)(1)(i) (A) through (D) of this section, that subsequently enters the Sanctuary and injures a Sanctuary resource or quality.

(2) Exploring for, developing or producing industrial materials within the Sanctuary.

(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:

(i) Anchoring vessels;

(ii) Traditional fishing operations; or

(iii) Installation of navigation aids.

(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 traditional fishing operations.

(5) Taking any marine reptile, marine mammal or seabird in or above the Sanctuary, except as permitted 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.*

(6) Lightering in the Sanctuary.

(7) Possessing within the Sanctuary (regardless of where taken, moved or removed from), except as necessary for valid law enforcement purposes, any historical resource, or any marine mammal, marine reptile or seabird taken in violation of the MMPA, ESA or MBTA.

(8) 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 paragraphs (a)(1), and (3) through (8) of this section do not apply to any activity necessary to respond to an emergency threatening life, property or the environment.

(c)(1)(i) 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.

(ii) Department of Defense military activities may be exempted from the prohibitions in paragraphs (a) (1) and (3) through (7) of this section by the Director after consultation between the Director and the Department of Defense.

(iii) 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 advance 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(c).

(2) 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.

(d) The prohibitions in paragraphs (a)(1) and (3) through (7) 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 §922.143 or a Special Use permit issued pursuant to section 310 of the Act.

(e) The prohibitions in paragraphs (a)(1) and (3) through (7) of this section do not apply any activity authorized by any lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation (November 4, 1992) 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.

(f) Notwithstanding paragraphs (d) and (e) of this section, in no event may the Director issue a permit under §922.48 and §922.143, or under section 310 of the act, authorizing, or otherwise approving, the exploration for, development or production of industrial materials within the Sanctuary, or the disposal of dredged materials within the Sanctuary (except by a certification, pursuant to §922.47, of valid authorizations in existence on November 4, 1992) and any leases, licenses, permits, approvals or other authorizations authorizing the exploration for, development or production of industrial materials in the Sanctuary issued by other authorities after November 4, 1992, shall be invalid.

§922.143 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by §922.142 (a) (1) and (3) through (7) if conducted in accordance with scope, purpose, manner, 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 Ocean and Coastal Resource Management; ATTN: Manager, Stellwagen Bank National Marine Sanctuary, 14 Union Street, Plymouth, MA 02360.

(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 §922.142(a) (1) and (3) through (7), if the Director finds that the activity will have only negligible short-term adverse effects on 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; or assist in managing the Sanctuary. 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; and the end value of the activity. In addition, the Director may consider such other factors as he or she deems appropriate.

(d) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(e) The Director may, *inter alia,* make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(f) The Director may, *inter alia,* make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

APPENDIX A TO SUBPART N OF PART 922—STELLWAGEN BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

[Appendix Based on North American Datum of 1927]

Pt.	Latitude	Longitude	Loran	
			9960W	9960X
E1	42°45′59.83″	70°13′01.77″	13,607.19	25,728.57
E2	42°05′35.51″	70°02′08.14″	13,753.39	25,401.78
E3	42°06′8.25″	70°03′17.55″	13,756.72	25,412.46
E4	42°06′2.53″	70°04′03.36″	13,760.30	25,417.53
E5	42°07′02.70″	70°05′13.61″	13,764.52	25,427.27
E6	42°07′13.0″	70°06′23.75″	13,770.54	25,434.45
E7	42°07′35.95″	70°07′27.89″	13,775.08	25,442.51
E8	42°07′42.33″	70°08′26.07″	13,780.35	25,448.27
E9	42°07′59.94″	70°09′19.78″	13,784.24	25,455.02
E10	42°08′04.95″	70°10′24.40″	13,790.27	25,461.28
E11	42°07′55.19″	70°11′47.67″	13,799.38	25,467.56
E12	42°07′59.84″	70°13′03.35″	13,806.58	25,474.95
E13	42°07′46.55″	70°14′21.91″	13,815.52	25,480.62
E14	42°07′27.29″	70°15′22.95″	13,823.21	25,484.05
E15	42°06′54.57″	70°16′42.71″	13,833.88	25,487.79
E16	42°07′44.89″	70°28′15.44″	13,900.14	25,563.22
E17	42°32′53.52″	70°35′52.38″	13,821.60	25,773.51
E18	42°33′30.24″	70°35′14.96″	13,814.43	25,773.54
E19	42°33′48.14″	70°35′03.81″	13,811.68	25,774.28
E20	42°34′30.45″	70°34′22.98″	13,803.64	25,774.59
E21	42°34′50.37″	70°33′21.93″	13,795.43	25,770.55
E22	42°35′16.08″	70°32′32.29″	13,787.92	25,768.31
E23	42°35′41.80″	70°31′44.20″	13,780.57	25,766.25
E24	42°36′23.08″	70°30′58.98″	13,772.14	25,766.14
E25	42°37′15.51″	70°30′23.01″	13,763.69	25,768.12
E26	42°37′58.88″	70°30′06.60″	13,758.09	25,771.07
E27	42°38′32.46″	70°30′06.54″	13,755.07	25,774.58
E28	42°39′04.08″	70°30′11.29″	13,752.75	25,778.35

Subpart O—Olympic Coast National Marine Sanctuary

§922.150 Boundary.

(a) The Olympic Coast National Marine Sanctuary (Sanctuary) consists of an area of approximately 2500 square nautical miles (NM) (approximately 8577 sq. kilometers) of coastal and ocean waters, and the submerged lands thereunder, off the central and northern coast of the State of Washington.

(b) The Sanctuary boundary extends from Koitlah Point due north to the United States/Canada international boundary. The Sanctuary boundary then follows the U.S./Canada international boundary seaward to the 100 fathom isobath. The seaward boundary of the Sanctuary approximates the 100 fathom isobath in a southerly direction from the U.S./Canada international boundary to a point due west of the mouth of the Copalis River cutting

across the heads of Nitnat, Juan de Fuca and Quinault Canyons. The coastal boundary of the Sanctuary is the mean higher high water line when adjacent to Federally managed lands cutting across the mouths of all rivers and streams, except where adjacent to Indian reservations, State and county owned lands; in such case, the coastal boundary is the mean lower low water line. La Push harbor is excluded from the Sanctuary boundary shoreward of the International Collision at Sea regulation (Colreg.) demarcation lines. The boundary coordinates are listed in appendix A to this subpart.

§922.151 Definitions.

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

Federal Project means any water resources development project conducted by the U.S. Army Corps of Engineers or operating under a permit or other authorization issued by the Corps of Engineers and authorized by Federal law.

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.

Traditional fishing means fishing using a commercial or recreational 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.

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

§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 the boundary of the Sanctuary, any material or other matter except:

(A) Fish, fish parts, chumming materials or bait used in or resulting from traditional 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 harbor maintenance activities.

(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) 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.

(4) 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:

(i) Anchoring vessels;

(ii) Traditional fishing operations;

(iii) Installation of navigation aids;

(iv) Harbor maintenance in the areas necessarily associated with Federal Projects in existence on July 22, 1994, including dredging of entrance channels and repair, replacement or rehabilitation of breakwaters and jetties;

(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.

(5) 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.

(6) 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 NM 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.

(7) 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.

(8) 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 (4), (6) and (7) 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 (4), (6) and (7) 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 (7) 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 (7) 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 (7) 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 (7) 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 (except by certification, pursuant to §922.47, of valid authorizations in existence on July 22, 1994 and issued by other authorities of competent jurisdiction); the disposal of dredged material within the Sanctuary other than in connection with beach nourishment projects related to harbor maintenance activities; 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.

§922.153 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by paragraphs (a)(2) through (7) of §922.152 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 Ocean and Coastal Resource Management; ATTN: Manager, Olympic Coast National Marine Sanctuary, 138 West First Street, Port Angeles, WA 98362.

(c) The Director, at his or her discretion, may issue a permit, subject to such terms and conditions as he or her deems appropriate, to conduct an activity prohibited by paragraphs (a)(2) through (7) of §922.152, 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 connection with an abandoned shipwreck in the Sanctuary title to which is held by the State of Washington; or promote the welfare of any Indian tribe adjacent to the Sanctuary. 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 Indian tribes. Where the issuance or denial of a permit is requested by the governing body of an 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 the regulations in this subpart. In addition,

the Director may consider such other factors as he or she deems appropriate.

(d) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(e) The Director may, *inter alia,* make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(f) The Director may, *inter alia,* make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

(g) The Director shall obtain the express written consent of the governing body of an Indian tribe prior to issuing a permit, if the proposed activity involves or affects resources of cultural or historical significance to the tribe.

(h) Removal, or attempted removal of any Indian cultural resource or artifact may only occur with the express written consent of the governing body of the tribe or tribes to which such resource or artifact pertains, and certification by the Director that such activities occur in a manner that minimizes damage to the biological and archeological resources. Prior to permitting entry onto a significant cultural site designated by a tribal governing body, the Director shall require the express written consent of the governing body of the tribe or tribes to which such cultural site pertains.

§ 922.154 Consultation with the State of Washington, affected Indian tribes, and adjacent county governments.

(a) The Director shall regularly consult with the State of Washington, the governing bodies of tribes with reservations adjacent to the Sanctuary, and adjacent county governments regarding areas of mutual concern, including Sanctuary programs, permitting, activities, development, and threats to Sanctuary resources.

(b) The Director shall, when requested by such governments, enter into a memorandum of understanding regarding such consultations.

APPENDIX A TO SUBPART O OF PART 922—OLYMPIC COAST NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

[Based on North American Datum of 1983]

Point	Latitude	Longitude
1	47°07′45″	124°11′02″
2	47°07′45″	124°58′12″
3	47°35′05″	125°00′00″
4	47°40′05″	125°04′44″
5	47°50′01″	125°05′42″
6	47°57′13″	125°29′13″
7	48°07′33″	125°38′20″
8	48°15′00″	125°40′54″
9	48°18′21.2″	125°30′02.9″
10	48°20′15.2″	125°22′52.9″
11	48°26′46.2″	125°09′16.9″
12	48°27′09.2″	125°08′29.9″
13	48°28′08.2″	125°05′51.9″
14	48°29′43.2″	125°00′10.9″
15	48°29′56.2″	124°59′19.9″
16	48°30′13.2″	124°54′56.9″
17	48°30′21.2″	124°50′25.9″
18	48°30′10.2″	124°47′17.9″
19	48°29′36.4″	124°43′38.1″
20	48°28′08″	124°38′13″
21	48°23′17″	124°38′13″

Subpart P—Florida Keys National Marine Sanctuary

SOURCE: 62 FR 32161, June 12, 1997, unless otherwise noted.

§ 922.160 Purpose.

(a) The purpose of the regulations in this subpart is to implement the comprehensive management plan for the Florida Keys National Marine Sanctuary by regulating activities affecting the resources of the Sanctuary or any of the qualities, values, or purposes for which the Sanctuary is designated, in order to protect, preserve and manage the conservation, ecological, recreational, research, educational, historical, and aesthetic resources and qualities of the area. In particular, the regulations in this part are intended to protect, restore, and enhance the living resources of the Sanctuary, to contribute to the maintenance of natural assemblages of living resources for future generations, to provide places for species dependent on such living resources to survive and propagate, to facilitate to the extent compatible with the primary objective of resource protection all public and private uses of

the resources of the Sanctuary not prohibited pursuant to other authorities, to reduce conflicts between such compatible uses, and to achieve the other policies and purposes of the Florida Keys National Marine Sanctuary and Protection Act and the National Marine Sanctuaries Act.

(b) Section 304(e) of the NMSA requires the Secretary to review management plans and regulations every five years, and make necessary revisions. Upon completion of the five year review of the Sanctuary management plan and regulations, the Secretary will repropose the regulations in their entirety with any proposed changes thereto, including those regulations in subparts A and E of this part that apply to the Sanctuary. The Governor of the State of Florida will have the opportunity to review the re-proposed regulations before they take effect and if the Governor certifies such regulations as unacceptable, they will not take effect in State waters of the Sanctuary.

§922.161 Boundary.

The Sanctuary consists of an area of approximately 2900 square nautical miles (9,800 square kilometers) of coastal and ocean waters, and the submerged lands thereunder, surrounding the Florida Keys in Florida. Appendix I to this subpart sets forth the precise Sanctuary boundary.

[66 FR 4369, Jan. 17, 2001]

§922.162 Definitions.

(a) The following definitions apply to the Florida Keys National Marine Sanctuary regulations. To the extent that a definition appears in §922.3 and this section, the definition in this section governs.

Acts means the Florida Keys National Marine Sanctuary and Protection Act, as amended, (FKNMSPA) (Pub. L. 101–605), and the National Marine Sanctuaries Act (NMSA), also known as Title III of the Marine Protection, Research, and Sanctuaries Act, as amended, (MPRSA) (16 U.S.C. 1431 *et seq.*).

Adverse effect means any factor, force, or action that independently or cumulatively damages, diminishes, degrades, impairs, destroys, or otherwise harms any Sanctuary resource, as defined in section 302(8) of the NMSA (16 U.S.C. 1432(8)) and in this section, or any of the qualities, values, or purposes for which the Sanctuary is designated.

Airboat means a vessel operated by means of a motor driven propeller that pushes air for momentum.

Areas To Be Avoided means the areas in which vessel operations are prohibited pursuant to section 6(a)(1) of the FKNMSPA (see §922.164(a)). Appendix VII to this subpart sets forth the geographic coordinates of these areas, including any modifications thereto made in accordance with section 6(a)(3) of the FKNMSPA.

Closed means all entry or use is prohibited.

Coral means the corals of the Class Hydrozoa (stinging and hydrocorals); the Class Anthozoa, Subclass Hexacorallia, Order Scleractinia (stony corals) and Antipatharia (black corals).

Coral area means marine habitat where coral growth abounds including patch reefs, outer bank reefs, deep-water banks, and hardbottoms.

Coral reefs means the hard bottoms, deep-water banks, patch reefs, and outer bank reefs.

Ecological Reserve means an area of the Sanctuary consisting of contiguous, diverse habitats, within which uses are subject to conditions, restrictions and prohibitions, including access restrictions, intended to minimize human influences, to provide natural spawning, nursery, and permanent residence areas for the replenishment and genetic protection of marine life, and also to protect and preserve natural assemblages of habitats and species within areas representing a broad diversity of resources and habitats found within the Sanctuary. Appendix IV to this subpart sets forth the geographic coordinates of these areas.

Existing Management Area means an area of the Sanctuary that is within or is a resource management area established by NOAA or by another Federal authority of competent jurisdiction as of the effective date of these regulations where protections above and beyond those provided by Sanctuary-wide prohibitions and restrictions are needed to adequately protect resources. Appendix II to this subpart sets forth the geographic coordinates of these areas.

Exotic species means a species of plant, invertebrate, fish, amphibian, reptile or mammal whose natural zoogeographic range would not have included the waters of the Atlantic Ocean, Caribbean, or Gulf of Mexico without passive or active introduction to such area through anthropogenic means.

Fish means finfish, mollusks, crustaceans, and all forms of marine animal and plant life other than marine mammals and birds.

Fishing means:

(1) The catching, taking, or harvesting of fish; the attempted catching, taking, or harvesting of fish; any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or any operation at sea in support of, or in preparation for, any activity described in this subparagraph (1).

(2) Such term does not include any scientific research activity which is conducted by a scientific research vessel.

Hardbottom means a submerged marine community comprised of organisms attached to exposed solid rock substrate. Hardbottom is the substrate to which corals may attach but does not include the corals themselves.

Idle speed only/no-wake means a speed at which a boat is operated that is no greater than 4 knots or does not produce a wake.

Idle speed only/no-wake zone means a portion of the Sanctuary where the speed at which a boat is operated may be no greater than 4 knots or may not produce a wake.

Length overall (LOA) or *length* means, as used in § 922.167 with respect to a vessel, the horizontal distance, rounded to the nearest foot (with 0.5 ft and above rounded upward), between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, rudders, outboard motor brackets, and similar fittings or attachments.

Live rock means any living marine organism or an assemblage thereof attached to a hard substrate, including dead coral or rock but not individual mollusk shells (e.g., scallops, clams, oysters). Living marine organisms associated with hard bottoms, banks, reefs, and live rock may include, but are not limited to: sea anemones (Phylum Cnidaria: Class Anthozoa: Order Actinaria); sponges (Phylum Porifera); tube worms (Phylum Annelida), including fan worms, feather duster worms, and Christmas tree worms; bryozoans (Phylum Bryzoa); sea squirts (Phylum Chordata); and marine algae, including Mermaid's fan and cups (Udotea spp.), corraline algae, green feather, green grape algae (Caulerpa spp.) and watercress (Halimeda spp.).

Marine life species means any species of fish, invertebrate, or plant included in sections (2), (3), or (4) of Rule 46–42.001, Florida Administrative Code, reprinted in Appendix VIII to this subpart.

Military activity means an activity conducted by the Department of Defense with or without participation by foreign forces, other than civil engineering and other civil works projects conducted by the U.S. Army Corps of Engineers.

No-access buffer zone means a portion of the Sanctuary where vessels are prohibited from entering regardless of the method of propulsion.

No motor zone means an area of the Sanctuary where the use of internal combustion motors is prohibited. A vessel with an internal combustion motor may access a no motor zone only through the use of a push pole, paddle, sail, electric motor or similar means of operation but is prohibited from using it's internal combustion motor.

Not available for immediate use means not readily accessible for immediate use, e.g., by being stowed unbaited in a cabin, locker, rod holder, or similar storage area, or by being securely covered and lashed to a deck or bulkhead.

Officially marked channel means a channel marked by Federal, State of Florida, or Monroe County officials of competent jurisdiction with navigational aids except for channels marked idle speed only/no wake.

Personal watercraft means any jet or air-powered watercraft operated by standing, sitting, or kneeling on or behind the vessel, in contrast to a conventional boat, where the operator stands or sits inside the vessel, and that uses an inboard engine to power a water jet pump for propulsion, instead

of a propeller as in a conventional boat.

Prop dredging means the use of a vessel's propulsion wash to dredge or otherwise alter the seabed of the Sanctuary. Prop dredging includes, but is not limited to, the use of propulsion wash deflectors or similar means of dredging or otherwise altering the seabed of the Sanctuary. Prop dredging does not include the disturbance to bottom sediments resulting from normal vessel propulsion.

Prop scarring means the injury to seagrasses or other immobile organisms attached to the seabed of the Sanctuary caused by operation of a vessel in a manner that allows its propeller or other running gear, or any part thereof, to cause such injury (e.g., cutting seagrass rhizomes). Prop scarring does not include minor disturbances to bottom sediments or seagrass blades resulting from normal vessel propulsion.

Residential shoreline means any manmade or natural:

(1) Shoreline,

(2) Canal mouth,

(3) Basin, or

(4) Cove adjacent to any residential land use district, including improved subdivision, suburban residential or suburban residential limited, sparsely settled, urban residential, and urban residential mobile home under the Monroe County land development regulations.

Sanctuary means the Florida Keys National Marine Sanctuary.

Sanctuary Preservation Area means an area of the Sanctuary that encompasses a discrete, biologically important area, within which uses are subject to conditions, restrictions and prohibitions, including access restrictions, to avoid concentrations of uses that could result in significant declines in species populations or habitat, to reduce conflicts between uses, to protect areas that are critical for sustaining important marine species or habitats, or to provide opportunities for scientific research. Appendix V to this subpart sets forth the geographic coordinates of these areas.

Sanctuary wildlife means any species of fauna, including avifauna, that occupy or utilize the submerged resources of the Sanctuary as nursery areas, feeding grounds, nesting sites, shelter, or other habitat during any portion of their life cycles.

Seagrass means any species of marine angiosperms (flowering plants) that inhabit portions of the seabed in the Sanctuary. Those species include, but are not limited to: Thalassia testudinum (turtle grass); Syringodium filiforme (manatee grass); Halodule wrightii (shoal grass); Halophila decipiens, H. engelmannii, H. johnsonii; and Ruppia maritima.

Special-use Area means an area of the Sanctuary set aside for scientific research and educational purposes, recovery or restoration of Sanctuary resources, monitoring, to prevent use or user conflicts, to facilitate access and use, or to promote public use and understanding of Sanctuary resources. Appendix VI to this subpart sets forth the geographic coordinates of these areas.

Stem means the foremost part of a vessel, consisting of a section of timber or fiberglass, or cast, forged, or rolled metal, to which the sides of the vessel are united at the fore end, with the lower end united to the keel, and with the bowsprit, if one is present, resting on the upper end.

Stern means the aftermost part of the vessel.

Tank vessel means any vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—

(1) Is a United States flag vessel;

(2) Operates on the navigable waters of the United States; or

(3) Transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States [46 U.S.C. 2101].

Traditional fishing means those commercial or recreational fishing activities that were customarily conducted within the Sanctuary prior to its designation as identified in the Environmental Impact Statement and Management Plan for this Sanctuary.

Tropical fish means any species included in section (2) of Rule 46–42.001, Florida Administrative Code, reproduced in Appendix VIII to this subpart, or any part thereof.

Vessel means a watercraft of any description, including, but not limited to, motorized and non-motorized watercraft, personal watercraft, airboats, and float planes while maneuvering on the water, capable of being used as a means of transportation in/on the waters of the Sanctuary. For purposes of this part, the terms ''vessel,'' ''watercraft,'' and ''boat'' have the same meaning.

Wildlife Management Area means an area of the Sanctuary established for the management, protection, and preservation of Sanctuary wildlife resources, including such an area established for the protection and preservation of endangered or threatened species or their habitats, within which access is restricted to minimize disturbances to Sanctuary wildlife; to ensure protection and preservation consistent with the Sanctuary designation and other applicable law governing the protection and preservation of wildlife resources in the Sanctuary. Appendix III to this subpart lists these areas and their access restrictions.

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

[62 FR 32161, June 12, 1997, as amended at 66 FR 4369, Jan. 17, 2001]

§ 922.163 Prohibited activities—Sanctuary-wide.

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

(1) *Mineral and hydrocarbon exploration, development and production.* Exploring for, developing, or producing minerals or hydrocarbons within the Sanctuary.

(2) *Removal of, injury to, or possession of coral or live rock.* (i) Moving, removing, taking, harvesting, damaging, disturbing, breaking, cutting, or otherwise injuring, or possessing (regardless of where taken from) any living or dead coral, or coral formation, or attempting any of these activities, except as permitted under 50 CFR part 638.

(ii) Harvesting, or attempting to harvest, any live rock from the Sanctuary, or possessing (regardless of where taken from) any live rock within the Sanctuary, except as authorized by a permit for the possession or harvest from aquaculture operations in the Exclusive Economic Zone, issued by the National Marine Fisheries Service pursuant to applicable regulations under the appropriate Fishery Management Plan, or as authorized by the applicable State authority of competent jurisdiction within the Sanctuary for live rock cultured on State submerged lands leased from the State of Florida, pursuant to applicable State law. *See* § 370.027, Florida Statutes and implementing regulations.

(3) *Alteration of, or construction on, the seabed.* Drilling into, dredging, or otherwise altering the seabed of the Sanctuary, or engaging in prop-dredging; or constructing, placing or abandoning any structure, material, or other matter on the seabed of the Sanctuary, except as an incidental result of:

(i) Anchoring vessels in a manner not otherwise prohibited by this part (see §§ 922.163(a)(5)(ii) and 922.164(d)(1)(v));

(ii) Traditional fishing activities not otherwise prohibited by this part;

(iii) Installation and maintenance of navigational aids by, or pursuant to valid authorization by, any Federal, State, or local authority of competent jurisdiction;

(iv) Harbor maintenance in areas necessarily associated with Federal water resource development projects in existence on July 1, 1997, including maintenance dredging of entrance channels and repair, replacement, or rehabilitation of breakwaters or jetties;

(v) Construction, repair, replacement, or rehabilitation of docks, seawalls, breakwaters, piers, or marinas with less than ten slips authorized by any valid lease, permit, license, approval, or other authorization issued by any Federal, State, or local authority of competent jurisdiction.

(4) *Discharge or deposit of materials or other matter.* (i) Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter, except:

(A) Fish, fish parts, chumming materials, or bait used or produced incidental to and while conducting a traditional fishing activity in the Sanctuary;

(B) Biodegradable effluent incidental to vessel use and generated by a marine sanitation device 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., deck wash down and graywater as defined in section 312 of the FWPCA), excluding oily wastes from bilge pumping; or

(D) Cooling water from vessels or engine exhaust;

(ii) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except those listed in paragraph (a)(4)(i) (A) through (D) of this section and those authorized under Monroe County land use permits or under State permits.

(5) *Operation of vessels.* (i) Operating a vessel in such a manner as to strike or otherwise injure coral, seagrass, or any other immobile organism attached to the seabed, including, but not limited to, operating a vessel in such a manner as to cause prop-scarring.

(ii) Having a vessel anchored on living coral other than hardbottom in water depths less than 40 feet when visibility is such that the seabed can be seen.

(iii) Except in officially marked channels, operating a vessel at a speed greater than 4 knots or in manner which creates a wake:

(A) Within an area designated idle speed only/no wake;

(B) Within 100 yards of navigational aids indicating emergent or shallow reefs (international diamond warning symbol);

(C) Within 100 feet of the red and white ''divers down'' flag (or the blue and white ''alpha'' flag in Federal waters);

(D) Within 100 yards of residential shorelines; or

(E) Within 100 yards of stationary vessels.

(iv) Operating a vessel in such a manner as to injure or take wading, roosting, or nesting birds or marine mammals.

(v) Operating a vessel in a manner which endangers life, limb, marine resources, or property.

(6) *Conduct of diving/snorkeling without flag.* Diving or snorkeling without flying in a conspicuous manner the red and white ''divers down'' flag (or the blue and white ''alpha'' flag in Federal waters).

(7) *Release of exotic species.* Introducing or releasing an exotic species of plant, invertebrate, fish, amphibian, or mammals into the Sanctuary.

(8) *Damage or removal of markers.* Marking, defacing, or damaging in any way or displacing, removing, or tampering with any official signs, notices, or placards, whether temporary or permanent, or with any navigational aids, monuments, stakes, posts, mooring buoys, boundary buoys, trap buoys, or scientific equipment.

(9) *Movement of, removal of, injury to, or possession of Sanctuary historical resources.* Moving, removing, injuring, or possessing, or attempting to move, remove, injure, or possess, a Sanctuary historical resource.

(10) *Take or possession of protected wildlife.* 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.*

(11) *Possession or use of explosives or electrical charges.* Possessing, or using explosives, except powerheads, or releasing electrical charges within the Sanctuary.

(12) *Harvest or possession of marine life species.* Harvesting, possessing, or landing any marine life species, or part thereof, within the Sanctuary, except in accordance with rules 46–42.001 through 46–42.003, 46–42.0035, and 46–42.004 through 46–42.007, and 46.42.009 of the Florida Administrative Code, reproduced in Appendix VIII to this subpart, and such rules shall apply mutatis mutandis (with necessary editorial

changes) to all Federal and State waters within the Sanctuary.

(13) *Interference with law enforcement.* Interfering with, obstructing, delaying or preventing an investigation, search, seizure, or disposition of seized property in connection with enforcement of the Acts or any regulation or permit issued under the Acts.

(b) Notwithstanding the prohibitions in this section and in § 922.164, and any access and use restrictions imposed pursuant thereto, a person may conduct an activity specifically authorized by, and conducted in accordance with the scope, purpose, terms, and conditions of, a National Marine Sanctuary permit issued pursuant to § 922.166.

(c) Notwithstanding the prohibitions in this section and in § 922.164, and any access and use restrictions imposed pursuant thereto, a person may conduct an activity specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on the effective date of these regulations, or by any valid right of subsistence use or access in existence on the effective date of these regulations, provided that the holder of such authorization or right complies with § 922.167 and with any terms and conditions on the exercise of such authorization or right imposed by the Director as a condition of certification as he or she deems reasonably necessary to achieve the purposes for which the Sanctuary was designated.

(d) Notwithstanding the prohibitions in this section and in § 922.164, and any access and use restrictions imposed pursuant thereto, a person may conduct an activity specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of these regulations, provided that the applicant complies with § 922.168, 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 reasonably necessary to protect Sanctuary resources and qualities. Amendments, renewals and extensions of authorizations in existence on the effective date of these regulations constitute authorizations issued after the effective date of these regulations.

(e)(1) All military activities shall be carried out in a manner that avoids to the maximum extent practical any adverse impacts on Sanctuary resources and qualities. The prohibitions in paragraph (a) of this section and § 922.164 do not apply to existing classes of military activities which were conducted prior to the effective date of these regulations, as identified in the Environmental Impact Statement and Management Plan for the Sanctuary. New military activities in the Sanctuary are allowed and may be exempted from the prohibitions in paragraph (a) of this section and in § 922.164 by the Director after consultation between the Director and the Department of Defense pursuant to section 304(d) of the NMSA. When a military activity is modified such that it is likely to destroy, cause the loss of, or injure a Sanctuary resource or quality in a manner significantly greater than was considered in a previous consultation under section 304(d) of the NMSA, or it is likely to destroy, cause the loss of, or injure a Sanctuary resource or quality not previously considered in a previous consultation under section 304(d) of the NMSA, the activity is considered a new activity for purposes of this paragraph. 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 practical any adverse impact on Sanctuary resources and qualities.

(2) 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 cognizant component shall promptly coordinate with the Director for the purpose of taking appropriate actions to prevent, respond to or mitigate the harm and, if possible, restore or replace the Sanctuary resource or quality.

(f) The prohibitions contained in paragraph (a)(5) of this section do not apply to Federal, State and local officers while performing enforcement duties and/or responding to emergencies

that threaten life, property, or the environment in their official capacity.

(g) Notwithstanding paragraph (b) of this section and paragraph (a) of §922.168, in no event may the Director issue a permit under §922.166 authorizing, or otherwise approve, the exploration for, leasing, development, or production of minerals or hydrocarbons within the Sanctuary, the disposal of dredged material within the Sanctuary other than in connection with beach renourishment or Sanctuary restoration projects, or the discharge of untreated or primary treated sewage (except by a certification, pursuant to §922.167, of a valid authorization in existence on the effective date of these regulations), and any purported authorizations issued by other authorities after the effective date of these regulations for any of these activities within the Sanctuary shall be invalid.

(h) Any amendment to these regulations shall not take effect in Florida State waters until approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida. Any fishery regulations in the Sanctuary shall not take effect in Florida State waters until established by the Florida Marine Fisheries Commission.

§922.164 Additional activity regulations by Sanctuary area.

In addition to the prohibitions set forth in §922.163, which apply throughout the Sanctuary, the following regulations apply with respect to activities conducted within the Sanctuary areas described in this section and in Appendix (II) through (VII) to this subpart. Activities located within two or more overlapping Sanctuary areas are concurrently subject to the regulations applicable to each overlapping area.

(a) *Areas to be avoided.* Operating a tank vessel or a vessel greater than 50 meters in registered length is prohibited in all areas to be avoided, except if such vessel is a public vessel and its operation is essential for national defense, law enforcement, or responses to emergencies that threaten life, property, or the environment. Appendix VII to this subpart sets forth the geographic coordinates of these areas.

(b) *Existing management areas*—(1) *Key Largo and Looe Key Management Areas.* The following activities are prohibited within the Key Largo and Looe Key Management Areas (also known as the Key Largo and Looe Key National Marine Sanctuaries) described in Appendix II to this subpart:

(i) Removing, taking, damaging, harmfully disturbing, breaking, cutting, spearing or similarly injuring any coral or other marine invertebrate, or any plant, soil, rock, or other material, except commercial taking of spiny lobster and stone crab by trap and recreational taking of spiny lobster by hand or by hand gear which is consistent with these regulations and the applicable regulations implementing the applicable Fishery Management Plan.

(ii) Taking any tropical fish.

(iii) Fishing with wire fish traps, bottom trawls, dredges, fish sleds, or similar vessel-towed or anchored bottom fishing gear or nets.

(iv) Fishing with, carrying or possessing, except while passing through without interruption or for law enforcement purposes: pole spears, air rifles, bows and arrows, slings, Hawaiian slings, rubber powered arbaletes, pneumatic and spring-loaded guns or similar devices known as spearguns.

(2) *Great White Heron and Key West National Wildlife Refuge Management Areas.* Operating a personal watercraft, operating an airboat, or water skiing except within Township 66 South, Range 29 East, Sections 5, 11, 12 and 14; Township 66 South, Range 28 East, Section 2; Township 67 South, Range 26 East, Sections 16 and 20, all Tallahassee Meridian, are prohibited within the marine portions of the Great White Heron and Key West National Wildlife Refuge Management Areas described in Appendix II to this subpart.

(c) *Wildlife management areas.* (1) Marine portions of the Wildlife Management Areas listed in Appendix III to this subpart or portions thereof may be designated ''idle speed only/no-wake,'' ''no-motor'' or ''no-access buffer'' zones or ''closed''. The Director, in cooperation with other Federal, State, or local resource management authorities, as appropriate, shall post signs conspicuously, using mounting posts, buoys, or

other means according to location and purpose, at appropriate intervals and locations, clearly delineating an area as an ''idle speed only/no wake'', a ''no-motor'', or a ''no-access buffer'' zone or as ''closed'', and allowing instant, long-range recognition by boaters. Such signs shall display the official logo of the Sanctuary.

(2) The following activities are prohibited within the marine portions of the Wildlife Management Areas listed in Appendix III to this subpart:

(i) In those marine portions of any Wildlife Management Area designated an ''idle speed only/no wake'' zone in Appendix III to this subpart, operating a vessel at a speed greater that idle speed only/no wake.

(ii) In those marine portions of any Wildlife Management Area designated a ''no-motor'' zone in Appendix III to this subpart, using internal combustion motors or engines for any purposes. A vessel with an internal combustion motor or engine may access a ''no-motor'' zone only through the use of a push pole, paddle, sail, electric motor or similar means of propulsion.

(iii) In those marine portions of any Wildlife Management Area designated a ''no-access buffer'' zone in Appendix III of this subpart, entering the area by vessel.

(iv) In those marine portions of any Wildlife Management Area designated as closed in Appendix III of this subpart, entering or using the area.

(3) The Director shall coordinate with other Federal, State, or local resource management authorities, as appropriate, in the establishment and enforcement of access restrictions described in paragraph (c)(2) (i)–(iv) of this section in the marine portions of Wildlife Management Areas.

(4) The Director may modify the number and location of access restrictions described in paragraph (c)(2) (i)–(iv) of this section within the marine portions of a Wildlife Management Area if the Director finds that such action is reasonably necessary to minimize disturbances to Sanctuary wildlife, or to ensure protection and preservation of Sanctuary wildlife consistent with the purposes of the Sanctuary designation and other applicable law governing the protection and preservation of wildlife resources in the Sanctuary. The Director will effect such modification by:

(i) Publishing in the FEDERAL REGISTER, after notice and an opportunity for public comments in accordance, an amendment to the list of such areas set forth in Appendix III to this subpart, and a notice regarding the time and place where maps depicting the precise locations of such restrictions will be made available for public inspection, and

(ii) Posting official signs delineating such restrictions in accordance with paragraph (c)(1) of this section.

(d) *Ecological Reserves and Sanctuary Preservation Areas.* (1) The following activities are prohibited within the Ecological Reserves described in Appendix IV to this subpart, and within the Sanctuary Preservation Areas, described in Appendix V to this subpart:

(i) Discharging or depositing any material or other matter except cooling water or engine exhaust.

(ii) Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral, marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities. However, fish, invertebrates, and marine plants may be possessed aboard a vessel in an Ecological Reserve or Sanctuary Preservation Area, provided such resources can be shown not to have been harvested within, removed from, or taken within, the Ecological Reserve or Sanctuary Preservation Area, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through such reserves or areas, provided further that in an Ecological Reserve or Sanctuary Preservation Area located in Florida State waters, such vessel is in continuous transit through the Ecological Reserve or Sanctuary Preservation Area.

(iii) Except for catch and release fishing by trolling in the Conch Reef, Alligator Reef, Sombrero Reef, and Sand Key SPAs, fishing by any means. However, gear capable of harvesting fish may be aboard a vessel in an Ecological Reserve or Sanctuary Preservation

Area, provided such gear is not available for immediate use when entering and during transit through such Ecological Reserve or Sanctuary Preservation Area, and no presumption of fishing activity shall be drawn therefrom.

(iv) Touching living or dead coral, including but not limited to, standing on a living or dead coral formation.

(v) *Anchoring in the Tortugas Ecological Reserve.* In all other Ecological Reserves and Sanctuary Preservation Areas, placing any anchor in a way that allows the anchor or any portion of the anchor apparatus (including the anchor, chain or rope) to touch living or dead coral, or any attached living organism. When anchoring dive boats, the first diver down must inspect the anchor to ensure that it is not touching living or dead coral, and will not shift in such a way as to touch such coral or other attached organism. No further diving shall take place until the anchor is placed in accordance with these requirements.

(vi) Except in the Tortugas Ecological Reserve where mooring buoys must be used, anchoring instead of mooring when a mooring buoy is available or anchoring in other than a designated anchoring area when such areas have been designated and are available.

(vii) Except for passage without interruption through the area, for law enforcement purposes, or for purposes of monitoring pursuant to paragraph (d)(2) of this section, violating a temporary access restriction imposed by the Director pursuant to paragraph (d)(2) of this section.

(viii) Except for passage without interruption through the area, for law enforcement purposes, or for purposes of monitoring pursuant to paragraph (d)(2) of this section: entering the Tortugas South area of the Tortugas Ecological Reserve; or entering the Tortugas North area of the Tortugas Ecological Reserve without a valid access permit issued pursuant to §922.167 or entering or leaving the Tortugas North area with a valid access permit issued pursuant to §922.167 without notifying FKNMS staff at the Dry Tortugas National Park office by telephone or radio no less than 30 minutes and no more than 6 hours, before entering and upon leaving the Tortugas Ecological Reserve.

(ix) Tying a vessel greater than 100 feet (30.48 meters) LOA, or tying more than one vessel (other than vessels carried on board a vessel) if the combined lengths would exceed 100 feet (30.48 meters) LOA, to a mooring buoy or to a vessel tied to a mooring buoy in the Tortugas Ecological Reserve.

(2) The Director may temporarily restrict access to any portion of any Sanctuary Preservation Area or Ecological Reserve if the Director, on the basis of the best available data, information and studies, determines that a concentration of use appears to be causing or contributing to significant degradation of the living resources of the area and that such action is reasonably necessary to allow for recovery of the living resources of such area. The Director will provide for continuous monitoring of the area during the pendency of the restriction. The Director will provide public notice of the restriction by publishing a notice in the FEDERAL REGISTER, and by such other means as the Director may deem appropriate. The Director may only restrict access to an area for a period of 60 days, with one additional 60 day renewal. The Director may restrict access to an area for a longer period pursuant to a notice and opportunity for public comment rulemaking under the Administrative Procedure Act. Such restriction will be kept to the minimum amount of area necessary to achieve the purposes thereof.

(e) *Special-use Areas.* (1) The Director may set aside discrete areas of the Sanctuary as Special-use Areas, and, by designation pursuant to this paragraph, impose the access and use restrictions specified in paragraph (e)(3) of this section. Special-use Areas are described in Appendix VI to this subpart, in accordance with the following designations and corresponding objectives:

(i) ''Recovery area'' to provide for the recovery of Sanctuary resources from degradation or other injury attributable to human uses;

(ii) ''Restoration area'' to provide for restoration of degraded or otherwise injured Sanctuary resources;

(iii) ''Research-only area'' to provide for scientific research or education relating to protection and management, through the issuance of a Sanctuary General permit for research pursuant to § 922.166 of these regulations; and

(iv) ''Facilitated-use area'' to provide for the prevention of use or user conflicts or the facilitation of access and use, or to promote public use and understanding, of Sanctuary resources through the issuance of special-use permits.

(2) A Special-use Area shall be no larger than the size the Director deems reasonably necessary to accomplish the applicable objective.

(3) Persons conducting activities within any Special-use Area shall comply with the access and use restrictions specified in this paragraph and made applicable to such area by means of its designation as a ''recovery area,'' ''restoration area,'' ''research-only area,'' or ''facilitated-use area.'' Except for passage without interruption through the area or for law enforcement purposes, no person may enter a Special-use Area except to conduct or cause to be conducted the following activities:

(i) In such area designated as a ''recovery area'' or a ''restoration area'', habitat manipulation related to restoration of degraded or otherwise injured Sanctuary resources, or activities reasonably necessary to monitor recovery of degraded or otherwise injured Sanctuary resources;

(ii) In such area designated as a ''research only area'', scientific research or educational use specifically authorized by and conducted in accordance with the scope, purpose, terms and conditions of a valid National Marine Sanctuary General or Historical Resources permit, or

(iii) In such area designated as a ''facilitated-use area'', activities specified by the Director or specifically authorized by and conducted in accordance with the scope, purpose, terms, and conditions of a valid Special-use permit.

(4)(i) The Director may modify the number of, location of, or designations applicable to, Special-use Areas by publishing in the FEDERAL REGISTER, after notice and an opportunity for public comment in accordance with the Administrative Procedure Act, an amendment to Appendix VI to this subpart, except that, with respect to such areas designated as a ''recovery area,'' ''restoration area,'' or ''research only area,'' the Director may modify the number of, location of, or designation applicable to, such areas by publishing a notice of such action in the FEDERAL REGISTER if the Director determines that immediate action is reasonably necessary to:

(A) Prevent significant injury to Sanctuary resources where circumstances create an imminent risk to such resources;

(B) Initiate restoration activity where a delay in time would significantly impair the ability of such restoration activity to succeed;

(C) Initiate research activity where an unforeseen natural event produces an opportunity for scientific research that may be lost if research is not initiated immediately.

(ii) If the Director determines that a notice of modification must be promulgated immediately in accordance with paragraph (e)(4)(i) of this section, the Director will, as part of the same notice, invite public comment and specify that comments will be received for 15 days after the effective date of the notice. As soon as practicable after the end of the comment period, the Director will either rescind, modify or allow the modification to remain unchanged through notice in the FEDERAL REGISTER.

(f) Additional Wildlife Management Areas, Ecological Reserves, Sanctuary Preservation Areas, or Special-use Areas, and additional restrictions in such areas, shall not take effect in Florida State waters unless first approved by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida.

(g) *Anchoring on Tortugas Bank*. Vessels 50 meters or greater in registered length, are prohibited from anchoring on the portion of Tortugas Bank within the Florida Keys National Marine Sanctuary west of the Dry Tortugas National Park that is outside of the Tortugas Ecological Reserve. The boundary of the area closed to anchoring by vessels 50 meters or greater in

registered length is formed by connecting in succession the points at the following coordinates (based on the North American Datum of 1983):
(1) 24 deg. 32.00′ N 83 deg. 00.05′ W
(2) 24 deg. 37.00′ N 83 deg. 06.00′ W
(3) 24 deg. 39.00′ N 83 deg. 06.00′ W
(4) 24 deg. 39.00′ N 83 deg. 00.05′ W
(5) 24 deg. 32.00′ N 83 deg. 00.05′ W

[62 FR 32161, June 12, 1997, as amended at 63 FR 43873, Aug. 17, 1998; 66 FR 4369, Jan. 17, 2001]

§922.165 Emergency regulations.

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all activities are subject to immediate temporary regulation, including prohibition. Emergency regulations shall not take effect in Florida territorial waters until approved by the Governor of the State of Florida. Any temporary regulation may be in effect for up to 60 days, with one 60-day extension. Additional or extended action will require notice and comment rulemaking under the Administrative Procedure Act, notice in local newspapers, notice to Mariners, and press releases.

§922.166 Permits other than for access to the Tortugas Ecological Reserve—application procedures and issuance criteria.

(a) *National Marine Sanctuary General Permit.* (1) A person may conduct an activity prohibited by §§922.163 or 922.164, other than an activity involving the survey/inventory, research/recovery, or deaccession/transfer of Sanctuary historical resources, if such activity is specifically authorized by, and provided such activity is conducted in accordance with the scope, purpose, terms and conditions of, a National Marine Sanctuary General permit issued under this paragraph (a).

(2) The Director, at his or her discretion, may issue a General permit under this paragraph (a), subject to such terms and conditions as he or she deems appropriate, if the Director finds that the activity will:

(i) Further research or monitoring related to Sanctuary resources and qualities;

(ii) Further the educational value of the Sanctuary;

(iii) Further the natural or historical resource value of the Sanctuary;

(iv) Further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty;

(v) Assist in managing the Sanctuary; or

(vi) Otherwise further Sanctuary purposes, including facilitating multiple use of the Sanctuary, to the extent compatible with the primary objective of resource protection.

(3) The Director shall not issue a General permit under this paragraph (a), unless the Director also finds that:

(i) The applicant is professionally qualified to conduct and complete the proposed activity;

(ii) The applicant has adequate financial resources available to conduct and complete the proposed activity;

(iii) The duration of the proposed activity is no longer than necessary to achieve its stated purpose;

(iv) The methods and procedures proposed by the applicant are appropriate to achieve the proposed activity's goals in relation to the activity's impacts on Sanctuary resources and qualities;

(v) The proposed activity will be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any indirect, secondary or cumulative effects of the activity, and the duration of such effects;

(vi) It is necessary to conduct the proposed activity within the Sanctuary to achieve its purposes; and

(vii) The reasonably expected end value of the activity to the furtherance of Sanctuary goals and purposes outweighs any potential adverse impacts on Sanctuary resources and qualities from the conduct of the activity.

(4) For activities proposed to be conducted within any of the areas described in §922.164 (b)–(e), the Director shall not issue a permit unless he or she further finds that such activities will further and are consistent with the purposes for which such area was established, as described in §§922.162 and

922.164 and in the management plan for the Sanctuary.

(b) *National Marine Sanctuary Survey/Inventory of Historical Resources Permit.* (1) A person may conduct an activity prohibited by §§ 922.163 or 922.164 involving the survey/inventory of Sanctuary historical resources if such activity is specifically authorized by, and is conducted in accordance with the scope, purpose, terms and conditions of, a Survey/Inventory of Historical Resources permit issued under this paragraph (b). Such permit is not required if such survey/inventory activity does not involve any activity prohibited by §§ 922.163 or 922.164. Thus, survey/inventory activities that are non-intrusive, do not include any excavation, removal, or recovery of historical resources, and do not result in destruction of, loss of, or injury to Sanctuary resources or qualities do not require a permit. However, if a survey/inventory activity will involve test excavations or removal of artifacts or materials for evaluative purposes, a Survey/Inventory of Historical Resources permit is required. Regardless of whether a Survey/Inventory permit is required, a person may request such permit. Persons who have demonstrated their professional abilities under a Survey/Inventory permit will be given preference over other persons in consideration of the issuance of a Research/Recovery permit. While a Survey/Inventory permit does not grant any rights with regards to areas subject to pre-existing rights of access which are still valid, once a permit is issued for an area, other survey/inventory permits will not be issued for the same area during the period for which the permit is valid.

(2) The Director, at his or her discretion, may issue a Survey/Inventory permit under this paragraph (b), subject to such terms and conditions as he or she deems appropriate, if the Director finds that such activity:

(i) Satisfies the requirements for a permit issued under paragraph (a)(3) of this section;

(ii) Either will be non-intrusive, not include any excavation, removal, or recovery of historical resources, and not result in destruction of, loss of, or injury to Sanctuary resources or qualities, or if intrusive, will involve no more than the minimum manual alteration of the seabed and/or the removal of artifacts or other material necessary for evaluative purposes and will cause no significant adverse impacts on Sanctuary resources or qualities; and

(iii) That such activity will be conducted in accordance with all requirements of the Programmatic Agreement for the Management of Submerged Cultural Resources in the Florida Keys National Marine Sanctuary among NOAA, the Advisory Council on Historic Preservation, and the State of Florida (hereinafter SCR Agreement), and that such permit issuance is in accordance with such SCR Agreement. Copies of the SCR Agreement may also be examined at, and obtained from, the Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1305 East-West Highway, 12th floor, Silver Spring, MD 20910; or from the Florida Keys National Marine Sanctuary Office, P.O. Box 500368, Marathon, FL 33050.

(c) *National Marine Sanctuary Research/Recovery of Sanctuary Historical Resources Permit.* (1) A person may conduct any activity prohibited by §§ 922.163 or 922.164 involving the research/recovery of Sanctuary historical resources if such activity is specifically authorized by, and is conducted in accordance with the scope, purpose, terms and conditions of, a Research/Recovery of Historical Resources permit issued under this paragraph (c).

(2) The Director, at his or her discretion, may issue a Research/Recovery of Historical Resources permit, under this paragraph (c), and subject to such terms and conditions as he or she deems appropriate, if the Director finds that:

(i) Such activity satisfies the requirements for a permit issued under paragraph (a)(3) of this section;

(ii) The recovery of the resource is in the public interest as described in the SCR Agreement;

(iii) Recovery of the resource is part of research to preserve historic information for public use; and

(iv) Recovery of the resource is necessary or appropriate to protect the resource, preserve historical information, and/or further the policies and purposes of the NMSA and the FKNMSPA, and that such permit issuance is in accordance with, and that the activity will be conducted in accordance with, all requirements of the SCR Agreement.

(d) *National Marine Sanctuary Special-use Permit.* (1) A person may conduct any commercial or concession-type activity prohibited by §§922.163 or 922.164, if such activity is specifically authorized by, and is conducted in accordance with the scope, purpose, terms and conditions of, a Special-use permit issued under this paragraph (d). A Special-use permit is required for the deaccession/transfer of Sanctuary historical resources.

(2) The Director, at his or her discretion, may issue a Special-use permit in accordance with this paragraph (d), and subject to such terms and conditions as he or she deems appropriate and the mandatory terms and conditions of section 310 of the NMSA, if the Director finds that issuance of such permit is reasonably necessary to: establish conditions of access to and use of any Sanctuary resource; or promote public use and understanding of any Sanctuary resources. No permit may be issued unless the activity is compatible with the purposes for which the Sanctuary was designated and can be conducted in a manner that does not destroy, cause the loss of, or injure any Sanctuary resource, and if for the deaccession/transfer of Sanctuary Historical Resources, unless such permit issuance is in accordance with, and that the activity will be conducted in accordance with, all requirements of the SCR Agreement.

(3) The Director may assess and collect fees for the conduct of any activity authorized by a Special-use permit issued pursuant to this paragraph (d). No Special-use permit shall be effective until all assessed fees are paid, unless otherwise provided by the Director by a fee schedule set forth as a permit condition. In assessing a fee, the Director shall include:

(i) All costs incurred, or expected to be incurred, in reviewing and processing the permit application, including, but not limited to, costs for:

(A) Number of personnel;

(B) Personnel hours;

(C) Equipment;

(D) Biological assessments;

(E) Copying; and

(F) Overhead directly related to reviewing and processing the permit application;

(ii) All costs incurred, or expected to be incurred, as a direct result of the conduct of the activity for which the Special-use permit is being issued, including, but not limited to:

(A) The cost of monitoring the conduct both during the activity and after the activity is completed in order to assess the impacts to Sanctuary resources and qualities;

(B) The use of an official NOAA observer, including travel and expenses and personnel hours; and

(C) Overhead costs directly related to the permitted activity; and

(iii) An amount which represents the fair market value of the use of the Sanctuary resource and a reasonable return to the United States Government.

(4) Nothing in this paragraph (d) shall be considered to require a person to obtain a permit under this paragraph for the conduct of any fishing activities within the Sanctuary.

(e) *Applications.* (1) Applications for permits should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuary Superintendent, Florida Keys National Marine Sanctuary, P.O. Box 500368, Marathon, FL 33050. All applications must include:

(i) A detailed description of the proposed activity including a timetable for completion of the activity and the equipment, personnel and methodology to be employed;

(ii) The qualifications and experience of all personnel;

(iii) The financial resources available to the applicant to conduct and complete the proposed activity;

(iv) A statement as to why it is necessary to conduct the activity within the Sanctuary;

(v) The potential impacts of the activity, if any, on Sanctuary resources and qualities;

(vi) The benefit to be derived from the activity; and

(vii) Such other information as the Director may request depending on the type of activity. Copies of all other required licenses, permits, approvals, or other authorizations must be attached to the application.

(2) Upon receipt of an application, the Director may request such additional information from the applicant as he or she deems reasonably necessary to act on the application and may seek the views of any persons. The Director may require a site visit as part of the permit evaluation. Unless otherwise specified, the information requested must be received by the Director within 30 days of the postmark date of the request. Failure to provide such additional information on a timely basis may be deemed by the Director to constitute abandonment or withdrawal of the permit application.

(f) A permit may be issued for a period not exceeding five years. All permits will be reviewed annually to determine the permittee's compliance with permit scope, purpose, terms and conditions and progress toward reaching the stated goals and appropriate action taken under paragraph (g) of this section if warranted. A permittee may request permit renewal pursuant to the same procedures for applying for a new permit. Upon the permittee's request for renewal, the Director shall review all reports submitted by the permittee as required by the permit conditions. In order to renew the permit, the Director must find that the:

(1) Activity will continue to further the purposes for which the Sanctuary was designated in accordance with the criteria applicable to the initial issuance of the permit;

(2) Permittee has at no time violated the permit, or these regulations; and

(3) The activity has not resulted in any unforeseen adverse impacts to Sanctuary resources or qualities.

(g) The Director may amend, suspend, or revoke a permit for good cause. The Director may deny a permit application, in whole or in part, if it is determined that the permittee or applicant has acted in violation of a previous permit, of these regulations, of the NMSA or FKNMSPA, or for other good cause. Any such action shall be communicated in writing to the permittee or applicant by certified mail and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in Subpart D of 15 CFR part 904.

(h) The applicant for or holder of a National Marine Sanctuary permit may appeal the denial, conditioning, amendment, suspension or revocation of the permit in accordance with the procedures set forth in § 922.50.

(i) A permit issued pursuant to this section other than a Special-use permit is nontransferable. Special-use permits may be transferred, sold, or assigned with the written approval of the Director. The permittee shall provide the Director with written notice of any proposed transfer, sale, or assignment no less than 30 days prior to its proposed consummation. Transfers, sales, or assignments consummated in violation of this requirement shall be considered a material breach of the Special-use permit, and the permit shall be considered void as of the consummation of any such transfer, sale, or assignment.

(j) The permit or a copy thereof shall be maintained in legible condition on board all vessels or aircraft used in the conduct of the permitted activity and be displayed for inspection upon the request of any authorized officer.

(k) Any permit issued pursuant to this section shall be subject to the following terms and conditions:

(1) All permitted activities shall be conducted in a manner that does not destroy, cause the loss of, or injure Sanctuary resources or qualities, except to the extent that such may be specifically authorized.

(2) The permittee agrees to hold the United States harmless against any claims arising out of the conduct of the permitted activities.

(3) All necessary Federal, State, and local permits from all agencies with jurisdiction over the proposed activities shall be secured before commencing field operations.

(l) In addition to the terms and conditions listed in paragraph (k) of this section, any permit authorizing the research/recovery of historical resources

shall be subject to the following terms and conditions:

(1) A professional archaeologist shall be in charge of planning, field recovery operations, and research analysis.

(2) An agreement with a conservation laboratory shall be in place before field recovery operations are begun, and an approved nautical conservator shall be in charge of planning, conducting, and supervising the conservation of any artifacts and other materials recovered.

(3) A curation agreement with a museum or facility for curation, public access and periodic public display, and maintenance of the recovered historical resources shall be in place before commencing field operations (such agreement for the curation and display of recovered historical resources may provide for the release of public artifacts for deaccession/transfer if such deaccession/transfer is consistent with preservation, research, education, or other purposes of the designation and management of the Sanctuary. Deaccession/transfer of historical resources requires a Special-use permit issued pursuant to paragraph (d) and such deaccession/transfer shall be executed in accordance with the requirements of the SCR Agreement).

(4) The site's archaeological information is fully documented, including measured drawings, site maps drawn to professional standards, and photographic records.

(m) In addition to the terms and conditions listed in paragraph (k) and (l) of this section, any permit issued pursuant to this section is subject to such other terms and conditions, including conditions governing access to, or use of, Sanctuary resources, as the Director deems reasonably necessary or appropriate and in furtherance of the purposes for which the Sanctuary is designated. Such terms and conditions may include, but are not limited to:

(1) Any data or information obtained under the permit shall be made available to the public.

(2) A NOAA official shall be allowed to observe any activity conducted under the permit.

(3) The permittee shall submit one or more reports on the status, progress, or results of any activity authorized by the permit.

(4) The permittee shall submit an annual report to the Director not later than December 31 of each year on activities conducted pursuant to the permit. The report shall describe all activities conducted under the permit and all revenues derived from such activities during the year and/or term of the permit.

(5) The permittee shall purchase and maintain general liability insurance or other acceptable security against potential claims for destruction, loss of, or injury to Sanctuary resources arising out of the permitted activities. The amount of insurance or security should be commensurate with an estimated value of the Sanctuary resources in the permitted area. A copy of the insurance policy or security instrument shall be submitted to the Director.

§922.167 Permits for access to the Tortugas Ecological Reserve.

(a) A person may enter the Tortugas North area of the Tortugas Ecological Reserve other than for passage without interruption through the reserve, for law enforcement purposes, or for purposes of monitoring pursuant to paragraph (d)(2) of §922.164 , if authorized by a valid access permit issued pursuant to §922.167.

(b)(1) Access permits must be requested at least 72 hours but no longer than one month before the date the permit is desired to be effective. Access permits do not require written applications or the payment of any fee. Permits may be requested via telephone or radio by contacting FKNMS at any of the following numbers:

Key West office: telephone: (305) 292–0311
Marathon office: telephone: (305) 743–2437

(2) The following information must be provided, as applicable:

(i) Vessel name.

(ii) Name, address, and telephone number of owner and operator.

(iii) Name, address, and telephone number of applicant.

(iv) USCG documentation, state license, or registration number.

(v) Home port.

(vi) Length of vessel and propulsion type (*i.e.*, motor or sail).

(vii) Number of divers.

(viii) Requested effective date and duration of permit (2 weeks, maximum).

(c) The Sanctuary Superintendent will issue a permit to the owner or to the owner's representative for the vessel when all applicable information has been provided. The Sanctuary Superintendent will provide a permit number to the applicant and confirm the effective date and duration period of the permit. Written confirmation of permit issuance will be provided upon request.

[66 FR 4370, Jan. 17, 2001]

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

(a) A person may conduct an activity prohibited by §§ 922.163 or 922.164 if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on July 1, 1997, or by any valid right of subsistence use or access in existence on July 1, 1997, provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of July 1, 1997, of the existence of such authorization or right and requests certification of such authorization or right; for the area added to the Sanctuary by the boundary expansion for the Tortugas Ecological Reserve, the holder of such authorization or right notifies the Director, in writing, within 90 days of the effective date of the boundary expansion, of the existence of such authorization or right and requests certification of such authorization or right.

(2) The holder complies with the other provisions of this § 922.168; and

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

(b) The holder of an authorization or right described in paragraph (a) of this section authorizing an activity prohibited by Secs. 922.163 or 922.164 may conduct the activity without being in violation of applicable provisions of Secs. 922.163 or 922.164, pending final agency action on his or her certification request, provided the holder is in compliance with this § 922.168.

(c) Any holder of an authorization or right described in paragraph (a) of this section may request the Director to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited by Secs. 922.163 or 922.164, thus requiring certification under this section.

(d) Requests for findings or certifications should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuary Superintendent, Florida Keys National Marine Sanctuary, P.O. Box 500368, Marathon, FL 33050. A copy of the lease, permit, license, approval, or other authorization must accompany the request.

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

(f) The Director may amend any certification made under this § 922.168 whenever additional information becomes available justifying such an amendment.

(g) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing, any decision on a certification request or any action taken with respect to any certification made under this § 922.168, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(h) Any time limit prescribed in or established under this § 922.168 may be extended by the Director for good cause.

(i) The holder may appeal any action conditioning, amending, suspending, or

revoking any certification in accordance with the procedures set forth in § 922.50.

(j) Any amendment, renewal, or extension made after July 1, 1997, to a lease, permit, license, approval, other authorization or right is subject to the provisions of § 922.49.

[66 FR 4369, Jan. 17, 2001]

APPENDIX I TO SUBPART P OF PART 922—FLORIDA KEYS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

(APPENDIX BASED ON NORTH AMERICAN DATUM OF 1983)

(1) The boundary of the Florida Keys National Marine Sanctuary—

(a) Begins at the northeasternmost point of Biscayne National Park located at approximately 25 degrees 39 minutes north latitude, 80 degrees 05 minutes west longitude, then runs eastward to the point at 25 degrees 39 minutes north latitude, 80 degrees 04 minutes west longitude; and

(b) Then runs southward and connects in succession the points at the following coordinates:

(i) 25 degrees 34 minutes north latitude, 80 degrees 04 minutes west longitude,

(ii) 25 degrees 28 minutes north latitude, 80 degrees 05 minutes west longitude, and

(iii) 25 degrees 21 minutes north latitude, 80 degrees 07 minutes west longitude;

(iv) 25 degrees 16 minutes north latitude, 80 degrees 08 minutes west longitude;

(c) Then runs southwesterly approximating the 300-foot isobath and connects in succession the points at the following coordinates:

(i) 25 degrees 07 minutes north latitude, 80 degrees 13 minutes west longitude,

(ii) 24 degrees 57 minutes north latitude, 80 degrees 21 minutes west longitude,

(iii) 24 degrees 39 minutes north latitude, 80 degrees 52 minutes west longitude,

(iv) 24 degrees 30 minutes north latitude, 81 degrees 23 minutes west longitude,

(v) 24 degrees 25 minutes north latitude, 81 degrees 50 minutes west longitude,

(vi) 24 degrees 22 minutes north latitude, 82 degrees 48 minutes west longitude,

(vii) 24 degrees 37 minutes north latitude, 83 degrees 06 minutes west longitude,

(viii) 24 degrees 46 minutes north latitude, 83 degrees 06 minutes west longitude,

(ix) 24 degrees 46 minutes north latitude, 82 degrees 54 minutes west longitude,

(x) 24 degrees 44 minutes north latitude, 81 degrees 55 minutes west longitude,

(xi) 24 degrees 51 minutes north latitude, 81 degrees 26 minutes west longitude, and

(xii) 24 degrees 55 minutes north latitude, 80 degrees 56 minutes west longitude;

(d) Then follows the boundary of Everglades National Park in a southerly then northeasterly direction through Florida Bay, Buttonwood Sound, Tarpon Basin, and Blackwater Sound;

(e) After Division Point, then departs from the boundary of Everglades National Park and follows the western shoreline of Manatee Bay, Barnes Sound, and Card Sound;

(f) then follows the southern boundary of Biscayne National Park to the southeasternmost point of Biscayne National Park; and

(g) then follows the eastern boundary of Biscayne National Park to the beginning point specified in paragraph (a).

(2) The shoreward boundary of the Florida Keys National Marine Sanctuary is the mean high-water mark except around the Dry Tortugas where the boundary is coterminous with that of the Dry Tortugas National Park, formed by connecting in succession the points at the following coordinates:

(a) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;

(b) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 second west longitude;

(c) 24 degrees 39 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 seconds west longitude;

(d) 24 degrees 43 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;

(e) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 52 minutes 0 seconds west longitude;

(f) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude;

(g) 24 degrees 42 minutes 0 seconds north latitude, 82 degrees 46 minutes, 0 seconds west longitude;

(h) 24 degrees 40 minutes 0 seconds north latitude, 82 degrees 46 minutes 0 seconds west longitude;

(i) 24 degrees 37 minutes 0 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude; and

(j) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude.

(3) The Florida Keys National Marine Sanctuary also includes the area located within the boundary formed by connecting in succession the points at the following coordinates:

(a) 24 degrees 33 minutes north latitude, 83 degrees 09 minutes west longitude,

(b) 24 degrees 33 minutes north latitude, 83 degrees 05 minutes west longitude, and

(c) 24 degrees 18 minutes north latitude, 83 degrees 05 minutes west longitude;

(d) 24 degrees 18 minutes north latitude, 83 degrees 09 minutes west longitude; and

(e) 24 degrees 33 minutes north latitude, 83 degrees 09 minutes west longitude.

[66 FR 4370, Jan. 17, 2001]

APPENDIX II TO SUBPART P OF PART 922—EXISTING MANAGEMENT AREAS BOUNDARY COORDINATES

(1) The boundary of each of the Existing Management Areas is formed by connecting in succession the points at the following coordinates:

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

KEY LARGO-MANAGEMENT AREA

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.19′45″ N	80 deg.12′00″ W.
2	25 deg.16′02″ N	80 deg.08′07″ W.
3	25 deg.07′05″ N	80 deg.12′05″ W.
4	24 deg.58′03″ N	80 deg.19′08″ W.
5	25 deg.02′02″ N	80 deg.25′25″ W.
6	25 deg.19′45″ N	80 deg.12′00″ W.

LOOE KEY MANAGEMENT AREA

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.31′62″ N	81 deg.26′00″ W.
2	24 deg.33′57″ N	81 deg.26′00″ W.
3	24 deg.34′15″ N	81 deg.23′00″ W.
4	24 deg.32′20″ N	81 deg.23′00″ W.
5	24 deg.31′62″ N	81 deg.26′00″ W.

UNITED STATES FISH AND WILDLIFE SERVICE

GREAT WHITE HERON NATIONAL WILDLIFE REFUGE

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
1	24 deg.43.8′ N	81 deg.48.6′ W.
2	24 deg.43.8′ N	81 deg.37.2′ W.
3	24 deg.49.2′ N	81 deg.37.2′ W.
4	24 deg.49.2′ N	81 deg.19.8′ W.
5	24 deg.48.0′ N	81 deg.19.8′ W.
6	24 deg.48.0′ N	81 deg.14.4′ W.
7	24 deg.49.2′ N	81 deg.14.4′ W.
8	24 deg.49.2′ N	81 deg.08.4′ W.
9	24 deg.43.8′ N	81 deg.08.4′ W.
10	24 deg.43.8′ N	81 deg.14.4′ W.
11	24 deg.43.2′ N	81 deg.14.4′ W.
12	24 deg.43.2′ N	81 deg.16.2′ W.
13	24 deg.42.6′ N	81 deg.16.2′ W.
14	24 deg.42.6′ N	81 deg.21.0′ W.

GREAT WHITE HERON NATIONAL WILDLIFE REFUGE—Continued

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
15	24 deg.41.4′ N	81 deg.21.0′ W.
16	24 deg.41.4′ N	81 deg.22.2′ W.
17	24 deg.43.2′ N	81 deg.22.2′ W.
18	24 deg.43.2′ N	81 deg.22.8′ W.
19	24 deg.43.8′ N	81 deg.22.8′ W.
20	24 deg.43.8′ N	81 deg.24.0′ W.
21	24 deg.43.2′ N	81 deg.24.0′ W.
22	24 deg.43.2′ N	81 deg.26.4′ W.
23	24 deg.43.8′ N	81 deg.26.4′ W.
24	24 deg.43.8′ N	81 deg.27.0′ W.
25	24 deg.43.2′ N	81 deg.27.0′ W.
26	24 deg.43.2′ N	81 deg.29.4′ W.
27	24 deg.42.6′ N	81 deg.29.4′ W.
28	24 deg.42.6′ N	81 deg.30.6′ W.
29	24 deg.41.4′ N	81 deg.30.6′ W.
30	24 deg.41.4′ N	81 deg.31.2′ W.
31	24 deg.40.8′ N	81 deg.31.2′ W.
32	24 deg.40.8′ N	81 deg.32.4′ W.
33	24 deg.41.4′ N	81 deg.32.4′ W.
34	24 deg.41.4′ N	81 deg.34.2′ W.
35	24 deg.40.8′ N	81 deg.34.2′ W.
36	24 deg.48.0′ N	81 deg.35.4′ W.
37	24 deg.39.6′ N	81 deg.35.4′ W.
38	24 deg.39.6′ N	81 deg.36.0′ W.
39	24 deg.39.0′ N	81 deg.36.0′ W.
40	24 deg.39.0′ N	81 deg.37.2′ W.
41	24 deg.37.8′ N	81 deg.37.2′ W.
42	24 deg.37.8′ N	81 deg.37.8′ W.
43	24 deg.37.2′ N	81 deg.37.8′ W.
44	24 deg.37.2′ N	81 deg.40.2′ W.
45	24 deg.36.0′ N	81 deg.40.2′ W.
46	24 deg.36.0′ N	81 deg.40.8′ W.
47	24 deg.35.4′ N	81 deg.40.8′ W.
48	24 deg.35.4′ N	81 deg.42.0′ W.
49	24 deg.36.0′ N	81 deg.42.0′ W.
50	24 deg.36.0′ N	81 deg.48.6′ W.
51	24 deg.43.8′ N	81 deg.48.6′ W.

KEY WEST NATIONAL WILDLIFE REFUGE

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
1	24 deg.40.0′ N	81 deg.49.0′ W.
2	24 deg.40.0′ N	82 deg.10.0′ W.
3	24 deg.27.0′ N	82 deg.10.0′ W.
4	24 deg.27.0′ N	81 deg.49.0′ W.
5	24 deg.40.0′ N	81 deg.49.0′ W.

(2) When differential Global Positioning Systems data becomes available, these coordinates may be publication in the FEDERAL REGISTER to reflect the increased accuracy of such data.

[66 FR 4371, Jan. 17, 2001]

APPENDIX III TO SUBPART P OF PART 922—WILDLIFE MANAGEMENT AREAS ACCESS RESTRICTIONS

Area	Access restrictions
Bay Keys	No-motor zone (300 feet) around one key; idle speed only/no-wake zones in tidal creeks.

Area	Access restrictions
Boca Grande Key	South one-half of beach closed (beach above mean high water closed by Department of the Interior).
Woman Key	One-half of beach and sand spit on southeast side closed (beach and sand spit above mean high water closed by Department of the Interior).
Cayo Agua Keys	Idle speed only/no-wake zones in all navigable tidal creeks.
Cotton Key	No-motor zone on tidal flat.
Snake Creek	No-motor zone on tidal flat.
Cottrell Key	No-motor zone (300 feet) around entire key.
Little Mullet Key	No-access buffer zone (300 feet) around entire key.
Big Mullet Key	No-motor zone (300 feet) around entire key.
Crocodile Lake	No-access buffer zone (100 feet) along shoreline between March 1 and October 1.
East Harbor Key	No-access buffer zone (300 feet) around northernmost island.
Lower Harbor Keys	Idle speed only/no-wake zones in selected tidal creeks.
Eastern Lake Surprise	Idle speed only/no-wake zone east of highway U.S. 1.
Horseshoe Key	No-access buffer zone (300 feet) around main island (main island closed by Department of the Interior).
Marquesas Keys	(i) No-motor zones (300 feet) around three smallest keys on western side of chain; (ii) no-access buffer zone (300 feet) around one island at western side of chain; (iii) idle speed only/no-wake zone in southwest tidal creek.
Tidal flat south of Marvin Key	No-access buffer zone on tidal flat.
Mud Keys	(i) Idle speed only/no-wake zones in the two main tidal creeks; (ii) two smaller creeks on west side closed.
Pelican Shoal	No-access buffer zone out to 50 meters from shore between April 1 and August 31 (shoal closed by the Florida Game and Freshwater Fish Commission).
Rodriguez Key	No-motor zone on tidal flats.
Dove Key	No-motor zone on tidal flats; area around the two small islands closed.
Tavernier Key	No-motor zone on tidal flats.
Sawyer Keys	Tidal creeks on south side closed.
Snipe Keys	(i) Idle speed only/no-wake zone in main tidal creek; (ii) no-motor zone in all other tidal creeks.
Upper Harbor Key	No-access buffer zone (300 feet) around entire key.
East Content Keys	Idle speed only/no-wake zones in tidal creeks between southwesternmost keys.
West Content Keys	Idle speed only/no-wake zones in selected tidal creeks; no-access buffer zone in one cove.
Little Crane Key	No-access buffer zone (300 feet) around entire key.

APPENDIX IV TO SUBPART P OF PART 922—ECOLOGICAL RESERVES BOUNDARY

Coordinates

(1) The boundary of the Western Sambo Ecological Reserve is formed by connecting in succession the points at the following coordinates:

WESTERN SAMBO

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.33.70′ N	81 deg.40.80′ W.
2	24 deg.28.85′ N	81 deg.41.90′ W.
3	24 deg.28.50′ N	81 deg.43.70′ W.
4	24 deg.33.50′ N	81 deg.43.10′ W.
5	24 deg.33.70′ N	81 deg.40.80′ W.

(2) The Tortugas Ecological Reserve consists of two discrete areas, Tortugas North and Tortugas South.

(3) The boundary of Tortugas North is formed by connecting in succession the points at the following coordinates:

TORTUGAS NORTH

Point	Latitude	Longitude
1	24 deg.46.00′ N	83 deg.06.00′ W.

TORTUGAS NORTH—Continued

Point	Latitude	Longitude
2	24 deg.46.00′ N	82 deg.54.00′ W.
3	24 deg.45.80′ N	82 deg.48.00′ W.
4	24 deg.43.53′ N	82 deg.48.00′ W.
5	24 deg.43.53′ N	82 deg.52.00′ W.
6	24 deg.43.00′ N	82 deg.54.00′ W.
7	24 deg.39.00′ N	82 deg.58.00′ W.
8	24 deg.39.00′ N	83 deg.06.00′ W.
9	24 deg.46.00′ N	83 deg.06.00′ W.

(4) The boundary of Tortugas South is formed by connecting in succession the points at the following coordinates:

TORTUGAS SOUTH

Point	Latitude	Longitude
1	24 deg.33.00′ N	83 deg.09.00′ W.
2	24 deg.33.00′ N	83 deg.05.00′ W.
3	24 deg.18.00′ N	83 deg.05.00′ W.
4	24 deg.18.00′ N	83 deg.09.00′ W.
5	24 deg.33.00′ N	83 deg.09.00′ W.

[66 FR 4372, Jan. 17, 2001]

APPENDIX V TO SUBPART P OF PART 922—SANCTUARY PRESERVATION AREAS BOUNDARY COORDINATES

The boundary of each of the Sanctuary Preservation Areas (SPAs) is formed by connecting in succession the points at the following coordinates:

ALLIGATOR REEF

[Based on differential Global Positioning Systems data]

Point	Latitute	Longitude
1	24 deg.50.98′ N	80 deg.36.84′ W.
2	24 deg.50.51′ N	80 deg.37.35′ W.
3	24 deg.50.81′ N	80 deg.37.63′ W.
4	24 deg.51.23′ N	80 deg.37.17′ W.
5	24 deg.50.98′ N	80 deg.36.84′ W.

Catch and release fishing by trolling only is allowed in this SPA.

CARYSFORT/SOUTH CARYSFORT REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.13.78′ N	80 deg.12.00′ W.
2	25 deg.12.03′ N	80 deg.12.98′ W.
3	25 deg.12.24′ N	80 deg.13.77′ W.
4	25 deg.14.13′ N	80 deg.12.78′ W.
5	25 deg.13.78′ N	80 deg.12.00′ W.

CHEECA ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.54.42′ N	80 deg.36.91′ W.
2	24 deg.54.25′ N	80 deg.36.77′ W.
3	24 deg.54.10′ N	80 deg.37.00′ W.
4	24 deg.54.22′ N	80 deg.37.15′ W.
5	24 deg.54.42′ N	80 deg.36.91′ W.

COFFINS PATCH

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.41.47′ N	80 deg.57.68′ W.
2	24 deg.41.12′ N	80 deg.57.53′ W.
3	24 deg.40.75′ N	80 deg.58.33′ W.
4	24 deg.41.06′ N	80 deg.58.48′ W.
5	24 deg.41.47′ N	80 deg.57.68′ W.

CONCH REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.57.48′ N	80 deg.27.47′ W.
2	24 deg.57.34′ N	80 deg.27.26′ W.
3	24 deg.56.78′ N	80 deg.27.52′ W.
4	24 deg.56.96′ N	80 deg.27.73′ W.
5	24 deg.57.48′ N	80 deg.27.47′ W.

Catch and release fishing by trolling only is allowed in this SPA.

DAVIS REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.55.61′ N	80 deg.30.27′ W.
2	24 deg.55.41′ N	80 deg.30.05′ W.
3	24 deg.55.11′ N	80 deg.30.35′ W.
4	24 deg.55.34′ N	80 deg.30.52′ W.
5	24 deg.55.61′ N	80 deg.30.27′ W.

DRY ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.07.59′ N	80 deg.17.91′ W.
2	25 deg.07.41′ N	80 deg.17.70′ W.
3	25 deg.07.25′ N	80 deg.17.82′ W.
4	25 deg.07.41′ N	80 deg.18.09′ W.
5	25 deg.07.59′ N	80 deg.17.91′ W.

GRECIAN ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.06.91′ N	80 deg.18.20′ W.
2	25 deg.06.67′ N	80 deg.18.06′ W.
3	25 deg.06.39′ N	80 deg.18.32′ W.
4	25 deg.06.42′ N	80 deg.18.48′ W.
5	25 deg.06.81′ N	80 deg.18.44′ W.
6	25 deg.06.91′ N	80 deg.18.20′ W.

EASTERN DRY ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.92′ N	81 deg.50.55′ W.
2	24 deg.27.73′ N	81 deg.50.33′ W.
3	24 deg.27.47′ N	81 deg.50.80′ W.
4	24 deg.27.72′ N	81 deg.50.86′ W.
5	24 deg.27.92′ N	81 deg.50.55′ W.

THE ELBOW

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.08.97′ N	80 deg.15.63′ W.
2	25 deg.08.95′ N	80 deg.15.22′ W.
3	25 deg.08.18′ N	80 deg.15.64′ W.
4	25 deg.08.50′ N	80 deg.16.07′ W.
5	25 deg.08.97′ N	80 deg.15.63′ W.

FRENCH REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.02.20′ N	80 deg.20.63′ W.
2	25 deg.01.81′ N	80 deg.21.02′ W.
3	25 deg.02.36′ N	80 deg.21.27′ W.
4	25 deg.02.20′ N	80 deg.20.63′ W.

HEN AND CHICKENS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.56.38′ N	80 deg.32.86′ W.
2	24 deg.56.21′ N	80 deg.32.63′ W.
3	24 deg.55.86′ N	80 deg.32.95′ W.
4	24 deg.56.04′ N	80 deg.33.19′ W.
5	24 deg.56.38′ N	80 deg.32.86′ W.

LOOE KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.33.24′ N	81 deg.24.03′ W.
2	24 deg.32.70′ N	81 deg.23.85′ W.
3	24 deg.32.52′ N	81 deg.24.70′ W.
4	24 deg.33.12′ N	81 deg.24.81′ W.
5	24 deg.33.24′ N	81 deg.24.03′ W.

MOLASSES REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.01.00′ N	80 deg.22.53′ W.
2	25 deg.01.06′ N	80 deg.21.84′ W.
3	25 deg.00.29′ N	80 deg.22.70′ W.
4	25 deg.00.72′ N	80 deg.22.83′ W.
5	25 deg.01.00′ N	80 deg.22.53′ W.

NEWFOUND HARBOR KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.37.10′ N	81 deg.23.34′ W.
2	24 deg.36.85′ N	81 deg.23.28′ W.
3	24 deg.36.74′ N	81 deg.23.80′ W.
4	24 deg.37.00′ N	81 deg.23.86′ W.
5	24 deg.37.10′ N	81 deg.23.34′ W.

ROCK KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.48′ N	81 deg.51.35′ W.
2	24 deg.27.30′ N	81 deg.51.15′ W.
3	24 deg.27.21′ N	81 deg.51.60′ W.
4	24 deg.27.45′ N	81 deg.51.65′ W.
5	24 deg.27.48′ N	81 deg.51.35′ W.

SAND KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.58′ N	81 deg.52.29′ W.
2	24 deg.27.01′ N	81 deg.52.32′ W.
3	24 deg.27.02′ N	81 deg.52.95′ W.
4	24 deg.27.61′ N	81 deg.52.94′ W.
5	24 deg.27.58′ N	81 deg.52.29′ W.

Catch and release fishing by trolling only is allowed in this SPA.

SOMBRERO KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.37.91′ N	81 deg.06.78′ W.
2	24 deg.37.50′ N	81 deg.06.19′ W.
3	24 deg.37.25′ N	81 deg.06.89′ W.
4	24 deg.37.91′ N	81 deg.06.78′ W.

Catch and release fishing by trolling only is allowed in this SPA.

[66 FR 4373, Jan. 17, 2001]

APPENDIX VI TO SUBPART P OF PART 922—SPECIAL-USE AREAS BOUNDARY COORDINATES AND USE DESIGNATIONS

The boundary of each of the Special-Use is formed by connecting in succession the points at the following coordinates:

CONCH REEF

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.56.83′ N	80 deg.27.26′ W.
2	24 deg.57.10′ N	80 deg.26.93′ W.
3	24 deg.56.99′ N	80 deg.27.42′ W.
4	24 deg.57.34′ N	80 deg.27.26′ W.
5	24 deg.56.83′ N	80 deg.27.26′ W.

EASTERN SAMBO

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.29.84′ N	81 deg.39.59′ W.
2	24 deg.29.55′ N	81 deg.39.35′ W.
3	24 deg.29.37′ N	81 deg.39.96′ W.
4	24 deg.29.77′ N	81 deg.40.03′ W.
5	24 deg.29.84′ N	81 deg.39.59′ W.

LOOE KEY

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.34.17′ N	81 deg.23.01′ W.
2	24 deg.33.98′ N	81 deg.22.96′ W.
3	24 deg.33.84′ N	81 deg.23.60′ W.
4	24 deg.34.23′ N	81 deg.23.68′ W.
5	24 deg.34.17′ N	81 deg.23.01′ W.

TENNESSEE REEF

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.44.77′ N	80 deg.47.12′ W.
2	24 deg.44.57′ N	80 deg.46.98′ W.
3	24 deg.44.68′ N	80 deg.46.59′ W.
4	24 deg.44.95′ N	80 deg.46.74′ W.

TENNESSEE REEF—Continued

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
5	24 deg.44.77′ N	80 deg.47.12′ W.

[66 FR 4376, Jan. 17, 2001]

APPENDIX VII TO SUBPART P OF PART 922—AREAS TO BE AVOIDED BOUNDARY COORDINATES

IN THE VICINITY OF THE FLORIDA KEYS

[Reference Charts: United States 11466, 27th Edition—September 1, 1990 and United States 11450, 4th Edition—August 11, 1990]

Point	Latitude	Longitude
1	25°45.00′N	80°06.10′W
2	25°38.70′N	80°02.70′W
3	25°22.00′N	80°03.00′W
4	25°06.38′N	80°10.48′W
5	24°56.37′N	80°19.26′W
6	24°37.90′N	80°47.30′W
7	24°29.20′N	81°17.30′W
8	24°22.30′N	81°43.17′W
9	24°28.00′N	81°43.17′W
10	24°28.70′N	81°43.50′W
11	24°29.80′N	81°43.17′W
12	24°33.10′N	81°35.15′W
13	24°33.60′N	81°26.00′W
14	24°38.20′N	81°07.00′W
15	24°43.20′N	80°53.20′W
16	24°46.10′N	80°46.15′W
17	24°51.10′N	80°37.10′W
18	24°57.50′N	80°27.50′W
19	25°09.90′N	80°16.20′W
20	25°24.00′N	80°09.10′W
21	25°31.50′N	80°07.00′W
22	25°39.70′N	80°06.85′W
23	25°45.00′N	80°06.10′W

IN THE VICINITY OF KEY WEST HARBOR

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
24	24 deg.27.95' N	81 deg.48.65' W.
25	24 deg.23.00' N	81 deg.53.50' W.
26	24 deg.26.60' N	81 deg.58.50' W.
27	24 deg.27.75' N	81 deg.55.70' W.
28	24 deg.29.35' N	81 deg.53.40' W.
29	24 deg.29.35' N	81 deg.50.00' W.
30	24 deg.27.95' N	81 deg.48.65' W.

AREA SURROUNDING THE MARQUESAS KEYS

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
31	24 deg.26.60' N	81 deg.59.55' W.
32	24 deg.23.00' N	82 deg.03.50' W.
33	24 deg.23.60' N	82 deg.27.80' W.
34	24 deg.34.50' N	82 deg.37.50' W.
35	24 deg.43.00' N	82 deg.26.50' W.
36	24 deg.38.31' N	81 deg.54.06' W.
37	24 deg.37.91' N	81 deg.53.40' W.

AREA SURROUNDING THE MARQUESAS KEYS—Continued

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
38	24 deg.36.15' N	81 deg.51.78' W.
39	24 deg.34.40' N	81 deg.50.60' W.
40	24 deg.33.44' N	81 deg.49.73' W.
41	24 deg.31.20' N	81 deg.52.10' W.
42	24 deg.28.70' N	81 deg.56.80' W.
43	24 deg.26.60' N	81 deg.59.55' W.

AREA SURROUNDING THE DRY TORTUGAS ISLANDS

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
44	24 deg.32.00' N	82 deg.53.50' W.
45	24 deg.32.00' N	83 deg.00.05' W.
46	24 deg.39.70' N	83 deg.00.05' W.
47	24 deg.45.60' N	82 deg.54.40' W.
48	24 deg.45.60' N	82 deg.47.02' W.
49	24 deg.42.80' N	82 deg.43.90' W.
50	24 deg.39.50' N	82 deg.43.90' W.
51	24 deg.35.60' N	82 deg.46.40' W.
52	24 deg.32.00' N	82 deg.53.50' W.

[66 FR 4377, Jan. 17, 2001, as amended at 66 FR 34534, June 29, 2001]

APPENDIX VIII TO SUBPART P OF PART 922—MARINE LIFE RULE [AS EXCERPTED FROM CHAPTER 46–42 OF THE FLORIDA ADMINISTRATIVE CODE]

46–42.001 Purpose and Intent; Designation of Restricted Species; Definition of ''Marine Life Species.''
46–42.002 Definitions.
46–42.003 Prohibition of Harvest: Longspine Urchin, Bahama Starfish.
46–42.0035 Live Landing and Live Well Requirements.
46–42.0036 Harvest in Biscayne National Park.*
46–42.004 Size Limits.
46–42.005 Bag Limits.
46–42.006 Commercial Season, Harvest Limits.
46–42.007 Gear Specifications and Prohibited Gear.
46–42.008 Live Rock.*
46–42.009 Prohibition on the Taking, Destruction, or Sale of Marine Corals and Sea Fans.

*—Part 42.0036 was not reproduced because it does not apply to the Sanctuary.

*—Part 42.008 was not reproduced because it is regulated pursuant to this Part 922.163(2)(ii).

46–42.001 Purpose and Intent; Designation of Restricted Species; Definition of ''Marine Life Species''.—

(1)(a) The purpose and intent of this chapter are to protect and conserve Florida's tropical marine life resources and assure the continuing health and abundance of these species. The further intent of this chapter is to assure that harvesters in this fishery use nonlethal methods of harvest and that the fish, invertebrates, and plants so harvested be maintained alive for the maximum possible conservation and economic benefits.

(b) It is the express intent of the Marine Fisheries Commission that landing of live rock propagated through aquaculture will be allowed pursuant to the provisions of this chapter.

(2) The following fish species, as they occur in waters of the state and in federal Exclusive Economic Zone (EEZ) waters adjacent to state waters, are hereby designated as restricted species pursuant to Section 370.01(20), Florida Statutes:

(a) Moray eels—Any species of the Family Muraenidae.

(b) Snake eels—Any species of the Genera Myrichthys and Myrophis of the Family Ophichthidae.

(c) Toadfish—Any species of the Family Batrachoididae.

(d) Frogfish—Any species of the Family Antennariidae.

(e) Batfish—Any species of the Family Ogcocephalidae.

(f) Clingfish—Any species of the Family Gobiesocidae.

(g) Trumpetfish—Any species of the Family Aulostomidae.

(h) Cornetfish—Any species of the Family Fistulariidae.

(i) Pipefish/seahorses—Any species of the Family Syngnathidae.

(j) Hamlet/seabass—Any species of the Family Serranidae, except groupers of the genera Epinephalus and Mycteroperca, and seabass of the genus Centropristis.

(k) Basslets—Any species of the Family Grammistidae.

(l) Cardinalfish—Any species of the Family Apogonidae.

(m) High-hat, Jackknife-fish, Spotted drum, Cubbyu—Any species of the genus Equetus of the Family Sciaenidae.

(n) Reef Croakers—Any of the species Odontocion dentex.

(o) Sweepers—Any species of the Family Pempherididae.

(p) Butterflyfish—Any species of the Family Chaetodontidae.

(q) Angelfish—Any species of the Family Pomacanthidae.

(r) Damselfish—Any species of the Family Pomacentridae.

(s) Hawkfish—Any species of the Family Cirrhitidae.

(t) Wrasse/hogfish/razorfish—Any species of the Family Labridae, except hogfish, Lachnolaimus maximus.

(u) Parrotfish—Any species of the Family Scaridae.

(v) Jawfish—Any species of the Family Opistognathidae.

(w) Blennies—Any species of the Families Clinidae or Blenniidae.

(x) Sleepers—Any species of the Family Eleotrididae.

(y) Gobies—Any species of the Family Gobiidae.

(z) Tangs and surgeonfish—Any species of the Family Acanthuridae.

(aa) Filefish/triggerfish—Any species of the Family Balistes, except gray triggerfish, Balistidae capriscus.

(bb) Trunkfish/cowfish—Any species of the Family Ostraciidae.

(cc) Pufferfish/burrfish/balloonfish—Any of the following species:

1. Balloonfish—Diodon holocanthus.

2. Sharpnose puffer—Canthigaster rostrata.

3. Striped burrfish—Chilomycterus schoepfi.

(3) The following invertebrate species, as they occur in waters of the state and in federal Exclusive Economic Zone (EEZ) waters adjacent to state waters, are hereby designated as restricted species pursuant to Section 370.01(20), Florida Statutes:

(a) Sponges—Any species of the Class Demospongia, except sheepswool, yellow, grass, glove, finger, wire, reef, and velvet sponges, Order Dictyoceratida.

(b) Upside-down jellyfish—Any species of the Genus Cassiopeia.

(c) Siphonophores/hydroids—Any species of the Class Hydrozoa, except fire corals, Order Milleporina.

(d) Soft corals—Any species of the Subclass Octocorallia, except sea fans Gorgonia flabellum and Gorgonia ventalina.

(e) Sea anemones—Any species of the Orders Actinaria, Zoanthidea, Corallimorpharia, and Ceriantharia.

(f) Featherduster worms/calcareous tubeworms—Any species of the Families Sabellidae and Serpulidae.

(g) Star-shells—Any of the species Astraea americana or Astraea phoebia.

(h) Nudibranchs/sea slugs—Any species of the Subclass Opisthobranchia.

(i) Fileclams—Any species of the Genus Lima.

(j) Octopods—Any species of the Order Octopoda, except the common octopus, Octopodus vulgaris.

(k) Shrimp—Any of the following species:

1. Cleaner shrimp and peppermint shrimp—Any species of the Genera Periclimenes or Lysmata.

2. Coral shrimp—Any species of the Genus Stenopus.

3. Snapping shrimp—Any species of the Genus Alpheus.

(l) Crabs—Any of the following species:

1. Yellowline arrow crab—Stenorhynchus seticornis.

2. Furcate spider or decorator crab—Stenocionops furcata.

3. Thinstripe hermit crab—Clibanarius vittatus.

4. Polkadotted hermit crab—Phimochirus operculatus.

5. Spotted porcelain crab—Porcellana sayana.

6. Nimble spray or urchin crab—Percnon gibbesi.

7. False arrow crab—Metoporhaphis calcarata.

(m) Starfish—Any species of the Class Asteroidea, except the Bahama starfish, Oreaster reticulatus.

(n) Brittlestars—Any species of the Class Ophiuroidea.

(o) Sea urchins—Any species of the Class Echinoidea, except longspine urchin, Diadema antillarum, and sand dollars and sea biscuits, Order Clypeasteroida.

(p) Sea cucumbers—Any species of the Class Holothuroidea.

(q) Sea lillies—Any species of the Class Crinoidea.

(4) The following species of plants, as they occur in waters of the state and in federal Exclusive Economic Zone (EEZ) waters adjacent to state waters, are hereby designated as restricted species pursuant to Section 370.01(20), Florida Statutes:

(a) Caulerpa—Any species of the Family Caulerpaceae.

(b) Halimeda/mermaid's fan/mermaid's shaving brush—Any species of the Family Halimedaceae.

(c) Coralline red algae—Any species of the Family Corallinaceae.

(5) For the purposes of Section 370.06(2)(d), Florida Statutes, the term ''marine life species'' is defined to mean those species designated as restricted species in subsections (2), (3), and (4) of this rule.

Specific Authority 370.01(20), 370.027(2), 370.06(2)(d), F.S. Law Implemented 370.01(20), 370.025, 370.027, 370.06(2)(d), F.S. History—New 1–1–91, Amended 7–1–92, 1–1–95.

46–42.002 Definitions.—As used in this rule chapter:

(1) ''Barrier net,'' also known as a ''fence net,'' means a seine used beneath the surface of the water by a diver to enclose and concentrate tropical fish and which may be made of either nylon or monofilament.

(2) ''Drop net'' means a small, usually circular, net with weights attached along the outer edge and a single float in the center, used by a diver to enclose and concentrate tropical fish.

(3) ''Hand held net'' means a landing or dip net as defined in Rule 46–4.002(4), except that a portion of the bag may be constructed of clear plastic material, rather than mesh.

(4) ''Harvest'' means the catching or taking of a marine organism by any means whatsoever, followed by a reduction of such organism to possession. Marine organisms that are caught but immediately returned to the water free, alive, and unharmed are not harvested. In addition, temporary possession of a marine animal for the purpose of measuring it to determine compliance with the minimum or maximum size requirements of this chapter shall not constitute harvesting such animal, provided that it is measured immediately after taking, and immediately returned to the water free, alive, and unharmed if undersize or oversize.

(5) ''Harvest for commercial purposes'' means the taking or harvesting of any tropical ornamental marine life species or tropical ornamental marine plant for purposes of sale or with intent to sell. The harvest of tropical ornamental marine life species or tropical ornamental marine plants in excess of the bag limit shall constitute prima facie evidence of intent to sell.

(6) ''Land,'' when used in connection with the harvest of marine organisms, means the physical act of bringing the harvested organism ashore.

(7) ''Live rock'' means rock with living marine organisms attached to it.

(8) ''Octocoral'' means any erect, nonencrusting species of the Subclass Octocorallia, except the species Gorgonia flabellum and Gorgonia ventalina.

(9) ''Slurp gun'' means a self-contained, handheld device that captures tropical fish by rapidly drawing seawater containing such fish into a closed chamber.

(10) ''Total length'' means the length of a fish as measured from the tip of the snout to the tip of the tail.

(11) ''Trawl'' means a net in the form of an elongated bag with the mouth kept open by various means and fished by being towed or dragged on the bottom. ''Roller frame trawl'' means a trawl with all of the following features and specifications:

(a) A rectangular rigid frame to keep the mouth of the trawl open while being towed.

(b) The lower horizontal beam of the frame has rollers to allow the trawl to roll over the bottom and any obstructions while being towed.

(c) The trawl opening is shielded by a grid of vertical bars spaced no more than 3 inches apart.

(d) The trawl is towed by attaching a line or towing cable to a tongue located above yor at the center of the upper horizontal beam of the frame.

(e) The trawl has no doors attached to keep the mouth of the trawl open.

(12) ''Tropical fish'' means any species included in subsection (2) of Rule 46–42.001, or any part thereof.

(13) ''Tropical ornamental marine life species'' means any species included in subsections (2) or (3) of Rule 46–42.001, or any part thereof.

(14) ''Tropical ornamental marine plant'' means any species included in subsection (4) of Rule 46–42.001.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 7–1–92, 1–1–95.

46–42.003 Prohibition of Harvest: Longspine Urchin, Bahama Starfish.—No person shall harvest, possess while in or on the waters of the state, or land any of the following species:

(1) Longspine urchin, Diadema antillarum.

(2) Bahama starfish, Oreaster reticulatus.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 7–1–92.

46–42.0035 Live Landing and Live Well Requirements.—

(1) Each person harvesting any tropical ornamental marine life species or any tropical ornamental marine plant shall land such marine organism alive.

(2) Each person harvesting any tropical ornamental marine life species or any tropical ornamental marine plant shall have aboard the vessel being used for such harvest a continuously circulating live well or aeration or oxygenation system of adequate size and capacity to maintain such harvested marine organisms in a healthy condition.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 7–1–92.

46–42.004 Size Limits.—

(1) Angelfishes.—

(a) No person harvesting for commercial purposes shall harvest, possess while in or on the waters of the state, or land any of the following species of angelfish, of total length less than that set forth below:

1. One-and-one-half (1 1/2) inches for:

a. Gray angelfish (Pomacanthus arcuatus).

b. French angelfish (Pomacanthus paru).

2. One-and-three-quarters (1¾) inches for:

a. Blue angelfish (Holacanthus bermudensis).

b. Queen angelfish (Holacanthus ciliaris).

3. Two (2) inches for rock beauty (Holacanthus tricolor).

(b) No person shall harvest, possess while in or on the waters of the state, or land any angelfish (Family Pomacanthidae), of total length greater than that specified below:

1. Eight (8) inches for angelfish, except rock beauty (Holacanthus tricolor).

2. Five (5) inches for rock beauty.

(c) Except as provided herein, no person shall purchase, sell, or exchange any angelfish smaller than the limits specified in paragraph (a) or larger than the limits specified in paragraph (b). This prohibition shall not apply to angelfish legally harvested outside of state waters or federal Exclusive Economic Zone (EEZ) waters adjacent to state waters, which angelfish are entering Florida in interstate or international commerce. The burden shall be upon any person possessing such angelfish for sale or exchange to establish the chain of possession from the initial transaction after harvest, by appropriate receipt(s), bill(s) of sale, or bill(s) of lading, and any customs receipts, and to show that such angelfish originated from a point outside the waters of the State of Florida or federal Exclusive Economic Zone (EEZ) waters adjacent to Florida waters and entered the state in interstate or international commerce. Failure to maintain such documentation or to promptly produce same at the request of any duly authorized law enforcement officer shall constitute prima facie evidence that such angelfish were harvested from Florida waters or adjacent EEZ waters for purposes of this paragraph.

(2) Butterflyfishes.—

(a) No person harvesting for commercial purposes shall harvest, possess while in or on the waters of the state, or land any butterflyfish (Family Chaetodontidae) of total length less than one (1) inch.

(b) No person shall harvest, possess while in or on the waters of the state, or land any butterflyfish of total length greater than 4 inches.

(3) Gobies—No person shall harvest, possess while in or on the waters of the state, or land any gobie (Family Gobiidae) of total length greater than 2 inches.

(4) Jawfishes—No person shall harvest, possess while in or on the waters of the state, or land any jawfish (Family Opistognathidae) of total length greater than 4 inches.

(5) Spotfin and Spanish hogfish—

(a) No person shall harvest, possess while in or on the waters of this state, or land any Spanish hogfish (Bodianus rufus) of total length less than 2 inches.

(b) No person shall harvest, possess while in or on the waters of this state, or land any Spanish hogfish (Bodianus rufus) or spotfin hogfish (Bodianus pulchellus) of total length greater than 8 inches.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 7–1–92, 1–1–95.

46–42.005 Bag limit.—

(1) Except as provided in Rule 46–42.006 or subsections (3) or (4) of this rule, no person shall harvest, possess while in or on the waters of the state, or land more than 20 individuals per day of tropical ornamental marine life species, in any combination.

(2) Except as provided in Rule 46–42.006, no person shall harvest, possess while in or on the waters of the state, or land more than one (1) gallon per day of tropical ornamental marine plants, in any combination of species.

(3) Except as provided in Rule 46–42.006, no person shall harvest, possess while in or on the waters of the state, or land more than 5 angelfishes (Family Pomacanthidae) per day. Each angelfish shall be counted for purposes

of the 20 individual bag limit specified in subsection (1) of this rule.

(4)(a) Unless the season is closed pursuant to paragraph (b), no person shall harvest, possess while in or on the waters of the state, or land more than 6 colonies per day of octocorals. Each colony of octocoral or part thereof shall be considered an individual of the species for purposes of subsection (1) of this rule and shall be counted for purposes of the 20 individual bag limit specified therein. Each person harvesting any octocoral as authorized by this rule may also harvest substrate within 1 inch of the perimeter of the holdfast at the base of the octocoral, provided that such substrate remains attached to the octocoral.

(b) If the harvest of octocorals in federal Exclusive Economic Zone (EEZ) waters adjacent to state waters is closed to all harvesters prior to September 30 of any year, the season for harvest of octocorals in state waters shall also close until the following October 1, upon notice given by the Secretary of the Department of Environmental Protection, in the manner provided in s.120.52(16)(d), Florida Statutes.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 1–1–95.

46–42.006 Commercial Season, Harvest Limits.—

(1) Except as provided in Rule 46–42.008(7), no person shall harvest, possess while in or on the waters of the state, or land quantities of tropical ornamental marine life species or tropical ornamental marine plants in excess of the bag limits established in Rule 46–42.005 unless such person possesses a valid saltwater products license with both a marine life fishery endorsement and a restricted species endorsement issued by the Department of Environmental Protection.

(2) Persons harvesting tropical ornamental marine life species or tropical ornamental marine plants for commercial purposes shall have a season that begins on October 1 of each year and continues through September 30 of the following year. These persons shall not harvest, possess while in or on the waters of the state, or land tropical ornamental marine life species in excess of the following limits:

(a) A limit of 75 angelfish (Family Pomacanthidae) per person per day or 150 angelfish per vessel per day, whichever is less.

(b) A limit of 75 butterflyfishes (Family Chaetodontidae) per vessel per day.

(c) There shall be no limits on the harvest for commercial purposes of octocorals unless and until the season for all harvest of octocorals in federal Exclusive Economic Zone (EEZ) waters adjacent to state waters is closed. At such time, the season for harvest of octocorals in state waters shall also close until the following October 1, upon notice given by the Secretary of the Department of Environmental Protection, in the manner provided in Section 120.52(16)(d), Florida Statutes. Each person harvesting any octocoral as authorized by this rule may also harvest substrate within 1 inch of the perimeter of the holdfast at the base of the octocoral, provided that such substrate remains attached to the octocoral.

(d) A limit of 400 giant Caribbean or ''pink-tipped'' anemones (Genus Condylactus) per vessel per day.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 7–1–92, 1–1–95.

46–42.007 Gear Specifications and Prohibited Gear.—

(1) The following types of gear shall be the only types allowed for the harvest of any tropical fish, whether from state waters or from federal Exclusive Economic Zone (EEZ) waters adjacent to state waters:

(a) Hand held net.

(b) Barrier net, with a mesh size not exceeding ¾ inch stretched mesh.

(c) Drop net, with a mesh size not exceeding ¾ inch stretched mesh.

(d) Slurp gun.

(e) Quinaldine may be used for the harvest of tropical fish if the person using the chemical or possessing the chemical in or on the waters of the state meets each of the following conditions:

1. The person also possesses and maintains aboard any vessel used in the harvest of tropical fish with quinaldine a special activity license authorizing the use of quinaldine, issued by the Division of Marine Resources of the Department of Environmental Protection pursuant to Section 370.08(8), Florida Statutes.

2. The quinaldine possessed or applied while in or on the waters of the state is in a diluted form of no more than 2% concentration in solution with seawater. Prior to dilution in seawater, quinaldine shall only be mixed with isopropyl alcohol or ethanol.

(f) A roller frame trawl operated by a person possessing a valid live bait shrimping license issued by the Department of Environmental Protection pursuant to Section 370.15, Florida Statutes, if such tropical fish are taken as an incidental bycatch of shrimp lawfully harvested with such trawl.

(g) A trawl meeting the following specifications used to collect live specimens of the dwarf seahorse, Hippocampus zosterae, if towed by a vessel no greater than 15 feet in length at no greater than idle speed:

1. The trawl opening shall be no larger than 12 inches by 48 inches.

2. The trawl shall weigh no more than 5 pounds wet when weighed out of the water.

(2) This rule shall not be construed to prohibit the use of any bag or container used solely for storing collected specimens or the use of a single blunt rod in conjunction with

any allowable gear, which rod meets each of the following specifications:

(a) The rod shall be made of nonferrous metal, fiberglass, or wood.

(b) The rod shall be no longer than 36 inches and have a diameter no greater than ¾ inch at any point.

(3) No person shall harvest in or from state waters any tropical fish by or with the use of any gear other than those types specified in subsection (1); provided, however, that tropical fish harvested as an incidental bycatch of other species lawfully harvested for commercial purposes with other types of gear shall not be deemed to be harvested in violation of this rule, if the quantity of tropical fish so harvested does not exceed the bag limits established in Rule 46–42.005.

Specific Authority 370.027(2), F.S. Law Implemented 370.025, 370.027, F.S. History—New 1–1–91, Amended 7–1–92, 1–1–95.

46–42.009 Prohibition on the Taking, Destruction, or Sale of Marine Corals and Sea Fans; Exception; Repeal of Section 370.114, Florida Statutes.—

(1) Except as provided in subsection (2), no person shall take, attempt to take, or otherwise destroy, or sell, or attempt to sell, any sea fan of the species Gorgonia flabellum or of the species Gorgonia ventalina, or any hard or stony coral (Order Scleractinia) or any fire coral (Genus Millepora). No person shall possess any such fresh, uncleaned, or uncured sea fan, hard or stony coral, or fire coral.

(2) Subsection (1) shall not apply to:

(a) Any sea fan, hard or stony coral, or fire coral legally harvested outside of state waters or federal Exclusive Economic Zone (EEZ) waters adjacent to state waters and entering Florida in interstate or international commerce. The burden shall be upon any person possessing such species to establish the chain of possession from the initial transaction after harvest, by appropriate receipt(s), bill(s) of sale, or bill(s) of lading, and any customs receipts, and to show that such species originated from a point outside the waters of the State of Florida or federal Exclusive Economic Zone (EEZ) adjacent to state waters and entered the state in interstate or international commerce. Failure to maintain such documentation or to promptly produce same at the request of any duly authorized law enforcement officer shall constitute prima facie evidence that such species were harvested from Florida waters in violation of this rule.

(b) Any sea fan, hard or stony coral, or fire coral harvested and possessed pursuant to permit issued by the Department of Environmental Protection for scientific or educational purposes as authorized in Section 370.10(2), Florida Statutes.

(c) Any sea fan, hard or stony coral, or fire coral harvested and possessed pursuant to the aquacultured live rock provisions of Rule 46–42.008(3)(a) or pursuant to a Live Rock Aquaculture Permit issued by the National Marine Fisheries Service under 50 CFR Part 638 and meeting the following requirements:

(1) Persons possessing these species in or on the waters of the state shall also possess a state submerged lands lease for live rock aquaculture and a Department of Environmental Protection permit for live rock culture deposition and removal or a federal Live Rock Aquaculture Permit. If the person possessing these species is not the person named in the documents required herein, then the person in such possession shall also possess written permission from the person so named to transport aquacultured live rock pursuant to this exception.

(2) The nearest office of the Florida Marine Patrol shall be notified at least 24 hours in advance of any transport in or on state waters of aquacultured live rock pursuant to this exception.

(3) Persons possessing these species off the water shall maintain and produce upon the request of any duly authorized law enforcement officer sufficient documentation to establish the chain of possession from harvest on a state submerged land lease for live rock aquaculture or in adjacent Exclusive Economic Zone (EEZ) waters pursuant to a federal Live Rock Aquaculture Permit.

(4) Any sea fan, hard or stony coral, or fire coral harvested pursuant to Rule 46–42.008(3)(a) shall remain attached to the cultured rock.

Specific Authority 370.027(2), F.S.; Section 6, Chapter 83–134, Laws of Florida, as amended by Chapter 84–121, Laws of Florida. Law Implemented 370.025, 370.027, F.S.; Section 6, Chapter 83–134, Laws of Florida, as amended by Chapter 84–121, Laws of Florida. History—New 1–1–95.2222

Subpart Q—Hawaiian Islands Humpback Whale National Marine Sanctuary

AUTHORITY: 16 U.S.C. 1431 *et seq.* and subtitle C, title II, Pub. L. 102–587, 106 Stat. 5055.

SOURCE: 64 FR 66570, Nov. 29, 1999, unless otherwise noted.

§922.180 Purpose.

(a) The purpose of the regulations in this subpart is to implement the designation of the Hawaiian Islands Humpback Whale National Marine Sanctuary by regulating activities affecting the resources of the Sanctuary or any of the qualities, values, or purposes for which the Sanctuary was designated, in order to protect, preserve,

and manage the conservation, ecological, recreational, research, educational, historical, cultural, and aesthetic resources and qualities of the area. The regulations are intended to supplement and complement existing regulatory authorities; to facilitate to the extent compatible with the primary objective of protecting the humpback whale and its habitat, all public and private uses of the Sanctuary, including uses of Hawaiian natives customarily and traditionally exercised for subsistence, cultural, and religious purposes, as well as education, research, recreation, commercial and military activities; to reduce conflicts between compatible uses; to maintain, restore, and enhance the humpback whale and its habitat; to contribute to the maintenance of natural assemblages of humpback whales for future generations; to provide a place for humpback whales that are dependent on their Hawaiian Islands wintering habitat for reproductive activities, including breeding, calving, and nursing, and for the long-term survival of their species; and to achieve the other purposes and policies of the HINMSA and NMSA.

(b) These regulations may be modified to fulfill the Secretary's responsibilities for the Sanctuary, including the provision of additional protections for humpback whales and their habitat, if reasonably necessary, and the conservation and management of other marine resources, qualities and ecosystems of the Sanctuary determined to be of national significance. The Secretary shall consult with the Governor of the State of Hawaii on any modification to the regulations contained in this part. For any modification of the regulations contained in this part that would constitute a change in a term of the designation, as contained in the Designation Document for the Sanctuary, the Secretary shall follow the applicable requirements of sections 303 and 304 of the NMSA, and sections 2305 and 2306 of the HINMSA.

(c) Section 304(e) of the NMSA requires the Secretary to review management plans and regulations every five years, and make necessary revisions. Upon completion of the five year review of the Sanctuary management plan and regulations, the Secretary will repropose the Sanctuary management plan and regulations in their entirety with any proposed changes thereto. The Governor of the State of Hawaii will have the opportunity to review the re-proposed management plan and regulations before they take effect and if the Governor certifies any term or terms of such management plan or regulations as unacceptable, the unacceptable term or terms will not take effect in State waters of the Sanctuary.

§ 922.181 Boundary.

(a) Except for excluded areas described in paragraph (b) of this section, the Hawaiian Islands Humpback Whale National Marine Sanctuary consists of the submerged lands and waters off the coast of the Hawaiian Islands seaward from the shoreline, cutting across the mouths of rivers and streams:

(1) To the 100-fathom (183 meter) isobath from Kailiu Point eastward to Mokolea Point, Kauai;

(2) To the 100-fathom (183 meter) isobath from Puaena Point eastward to Mahie Point, and from the Kapahulu Groin in Waikiki eastward to Makapuu Point, Oahu;

(3) To the 100-fathom (183 meter) isobath from Cape Halawa, Molokai, south and westward to Ilio Point, Molokai; southwestward to include Penguin Banks; eastward along the east side of Lanai; to the waters seaward of the three nautical mile limit north of Kahoolawe, to the Hanamanoia Lighthouse on Maui, and northward along the shoreline to Lipoa Point, Maui;

(4) To the deep water area of Pailolo Channel from Cape Halawa, Molokai, to Lipoa Point, Maui, and southward;

(5) To the 100-fathom (183 meter) isobath from Upolu Point southward to Keahole Point, Hawaii.

(b) Excluded from the Sanctuary boundary are the following commercial ports and small boat harbors:

HAWAII (BIG ISLAND)

Kawaihae Boat Harbor & Small Boat Basin

LANAI

Kaumalapau Harbor, Manele Harbor

MAUI

Lahaina Boat Harbor
Maalaea Boat Harbor

MOLOKAI

Hale o Lono Harbor
Kaunakakai Harbor

OAHU

Kuapa Pond (Hawaii Kai)

(c) The coordinates of the lateral extents of each boundary area within the Sanctuary boundary appear in Appendix A of this subpart Q.

§922.182 Definitions.

(a) *Acts* means the Hawaiian Islands National Marine Sanctuary Act (HINMSA; sections 2301–2307 of Pub. L. 102–587), and the National Marine Sanctuaries Act (NMSA; also known as Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA), as amended, 16 U.S.C. 1431 *et seq.*).

Adverse impact means an impact that independently or cumulatively damages, diminishes, degrades, impairs, destroys, or otherwise harms.

Alteration of the seabed means drilling into, dredging, or otherwise altering a natural physical characteristic of the seabed of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on the seabed of the Sanctuary.

Habitat means those areas that provide space for individual and population growth and normal behavior of humpback whales, and include sites used for reproductive activities, including breeding, calving and nursing.

Military activities means those military activities conducted by or under the auspices of the Department of Defense and any combined military activities carried out by the Department of Defense and the military forces of a foreign nation.

Sanctuary means the Hawaiian Islands Humpback Whale National Marine Sanctuary.

Sanctuary resource means any humpback whale, or the humpback whale's habitat within the Sanctuary.

Shoreline means the upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

Take or taking a humpback whale means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or injure a humpback whale, or to attempt to engage in any such conduct. The term includes, but is not limited to, any of the following activities: collecting any dead or injured humpback whale, or any part thereof; restraining or detaining any humpback whale, or any part thereof, no matter how temporarily; tagging any humpback whale; operating a vessel or aircraft or doing any other act that results in the disturbing or molesting of any humpback whale.

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

§922.183 Allowed activities.

(a) All activities except those prohibited by §922.184 may be undertaken in the Sanctuary subject to any emergency regulations promulgated pursuant to §922.185, subject to the interagency cooperation provisions of section 304(d) of the NMSA [16 U.S.C. 1434(d)] and §922.187 of this subpart, and subject to the liability established by section 312 of the NMSA and §922.46 of this part. All activities are also subject to all prohibitions, restrictions, and conditions validly imposed by any other Federal, State, or county authority of competent jurisdiction.

(b) Included as activities allowed under the first sentence of paragraph (a) of this §922.183 are all classes of military activities, internal or external to the Sanctuary, that are being or have been conducted before the effective date of these regulations, as identified in the Final Environmental Impact Statement/Management Plan. Paragraphs (a)(1) through (a)(5) of §922.184 do not apply to these classes of activities, nor are these activities subject to further consultation under section 304(d) of the NMSA.

(c) Military activities proposed after the effective date of these regulations are also included as allowed activities

under the first sentence of paragraph (a) of this § 922.183. Paragraphs (a)(1) through (a)(5) of § 922.184 apply to these classes of activities unless—

(1) They are not subject to consultation under section 304(d) of the NMSA and § 922.187 of this subpart, or

(2) Upon consultation under section 304(d) of the NMSA and § 922.187 of this subpart, NOAA's findings and recommendations include a statement that paragraphs (a)(1) through (a)(5) of § 922.184 do not apply to the military activity.

(d) If a military activity described in paragraphs (b) or (c)(2) of this § 922.183 is modified such that it is likely to destroy, cause the loss of, or injure a Sanctuary resource in a manner significantly greater than was considered in a previous consultation under section 304(d) of the NMSA and § 922.187 of this subpart, or if the modified activity is likely to destroy, cause the loss of, or injure any Sanctuary resource not considered in a previous consultation under section 304(d) of the NMSA and § 922.187 of this subpart, the modified activity will be treated as a new military activity under paragraph (c) of this section.

(e) If a proposed military activity subject to section 304(d) of the NMSA and § 922.187 of this subpart is necessary to respond to an emergency situation and the Secretary of Defense determines in writing that failure to undertake the proposed activity during the period of consultation would impair the national defense, the Secretary of the military department concerned may request the Director that the activity proceed during consultation. If the Director denies such a request, the Secretary of the military department concerned may decide to proceed with the activity. In such case, the Secretary of the military department concerned shall provide the Director with a written statement describing the effects of the activity on Sanctuary resources once the activity is completed.

§ 922.184 Prohibited activities.

(a) The following activities are prohibited and thus unlawful for any person to conduct or cause to be conducted.

(1) Approaching, or causing a vessel or other object to approach, within the Sanctuary, by any means, within 100 yards of any humpback whale except as authorized under the Marine Mammal Protection Act, as amended (MMPA), 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 *et seq.*;

(2) Operating any aircraft above the Sanctuary within 1,000 feet of any humpback whale except as necessary for takeoff or landing from an airport or runway, or as authorized under the MMPA and the ESA;

(3) Taking any humpback whale in the Sanctuary except as authorized under the MMPA and the ESA;

(4) Possessing within the Sanctuary (regardless of where taken) any living or dead humpback whale or part thereof taken in violation of the MMPA or the ESA;

(5) Discharging or depositing any material or other matter in the Sanctuary; altering the seabed of the Sanctuary; or discharging or depositing any material or other matter outside the Sanctuary if the discharge or deposit subsequently enters and injures a humpback whale or humpback whale habitat, provided that such activity:

(i) Requires a Federal or State permit, license, lease, or other authorization; and

(ii) Is conducted:

(A) Without such permit, license, lease, or other authorization, or

(B) not in compliance with the terms or conditions of such permit, license, lease, or other authorization.

(6) Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of either of the Acts or any regulations issued under either of the Acts.

(b) The prohibitions in paragraphs (a)(1) through (a)(5) of this § 922.184 do not apply to activities necessary to respond to emergencies threatening life, property or the environment; or to activities necessary for valid law enforcement purposes. However, while such activities are not subject to paragraphs (a)(1) through (a)(5) of this § 922.184, this paragraph (b) does not exempt the

activity from the underlying prohibition or restriction under other applicable laws and regulations (e.g., MMPA, ESA, and CWA).

(c) Any Sanctuary fishery regulations shall not take effect in Hawaii State waters until established by the State Board of Land and Natural Resources.

§ 922.185 Emergency regulations.

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities are subject to immediate temporary regulation, including prohibition. Before issuance of such regulations the Director shall consult to the extent practicable with any relevant Federal agency and the Governor of the State of Hawaii. Emergency regulations shall not take effect in State waters of the Sanctuary until approved by the Governor of Hawaii.

§ 922.186 Penalties; appeals.

(a) Pursuant to section 307 of the NMSA, each violation of either of the Acts, or any regulation in this subpart is subject to a civil penalty of not more than $100,000. Each such violation is subject to forfeiture of property or Sanctuary resources seized in accordance with section 307 of the NMSA. Each day of a continuing violation constitutes a separate violation.

(b) Regulations setting forth the procedures governing the administrative proceedings for assessment of civil penalties for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR Part 904.

(c) A person subject to an action taken for enforcement reasons for violation of these regulations or either of the Acts may appeal pursuant to the applicable procedures in 15 CFR Part 904.

§ 922.187 Interagency Cooperation.

Under section 304(d) of the NMSA, Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Director. The Federal agency proposing an action shall determine whether the activity is likely to destroy, cause the loss of, or injure a Sanctuary resource. To the extent practicable, consultation procedures under section 304(d) of the NMSA may be consolidated with interagency cooperation procedures required by other statutes, such as the ESA. The Director will attempt to provide coordinated review and analysis of all environmental requirements.

APPENDIX A TO SUBPART Q OF PART 922—HAWAIIAN ISLANDS HUMPBACK WHALE, NATIONAL MARINE SANCTUARY BOUNDARY DESCRIPTION AND COORDINATES OF THE LATERAL BOUNDARY CLOSURES AND EXCLUDED AREAS.

Appendix A provides a text and pictoral (see Figures 1–3) description of the Sanctuary boundary with specific lateral closure points and exclusion areas. The lateral extents (bounds) of each boundary area are closed by straight lines defined by at least two points. It may be necessary to extend these lines beyond the defining points to intersect the actual 100 fathom contour or the shoreline. Each point corresponds to a bounds number indicated in Figure 2. Digital files of the Sanctuary boundary (available in three common formats, ESRI Shape File, MapInfo Table, and an ASCII Exchange Format) are available from the Sanctuary office in Kihei, Maui, at the address listed above or by calling (808) 879–2818. These digital geographies are the best available representation of the verbal legal delineation and were derived from: the Hawaiian shoreline as supplied by State of Hawaii through the Office of Planning GIS Office, the NOAA and State of Hawaii agreed upon lateral boundary and exclusion areas, and the 100 fathom isobath digitized from the following 1:80,000 scale NOAA nautical charts-19327—West Coast of Hawaii (9th ED, 4/29/89),

19347—Channels between Molokai, Maui, Lanai, and Kahoolawe (17th ED, 12/13/97),
19351—Channels between Oahu, Molokai, and Lanai (8th ED, 7/01/1989),
19357—Island of Oahu (20th ED, 9/21/1996), and
19381—Island of Kauai (8th ED, 7/17/1993)].

For the portion of the Lanai region of the HIHWNMS west of Chart 19351,[157°42.8′ west] the 100 fathom contour was derived from the 1:250,000 chart 19340—Hawaii to Oahu (24th ED, 1/09/1993).

All digital geography data have been referenced to WGS84 (NAD83) and have been

converted to geographic (latitude and longitude) coordinates.

SANCTUARY BOUNDARY

A. As defined by the specific lateral boundaries in B, and except for excluded areas described in paragraph C of this section, the Hawaiian Islands Humpback Whale National Marine Sanctuary consists of the submerged lands and waters off the coast of the Hawaiian Islands seaward from the shoreline, cutting across the mouths of rivers and streams (see Figure 1):

1. To the 100-fathom (183 meter) isobath from Kailiu Point eastward to Mokolea Point, Kauai;

2. To the 100-fathom (183 meter) isobath from Puaena Point eastward to Mahie Point, and from the Kapahulu Groin in Waikiki eastward to Makapuu Point, Oahu;

3. To the 100-fathom (183 meter) isobath from Cape Halawa, Molokai, south and westward to Ilio Point, Molokai; southwestward to include Penguin Banks; eastward along the east side of Lanai; to the waters seaward of the three nautical mile limit north of Kahoolawe, to the Hanamanoia Lighthouse on Maui, and northward along the shoreline to Lipoa Point, Maui;

4. To the deep water area of Pailolo Channel from Cape Halawa, Molokai, to Lipoa Point, Maui, and southward;

5. To the 100-fathom (183 meter) isobath from Upolu Point southward to Keahole Point, Hawaii.

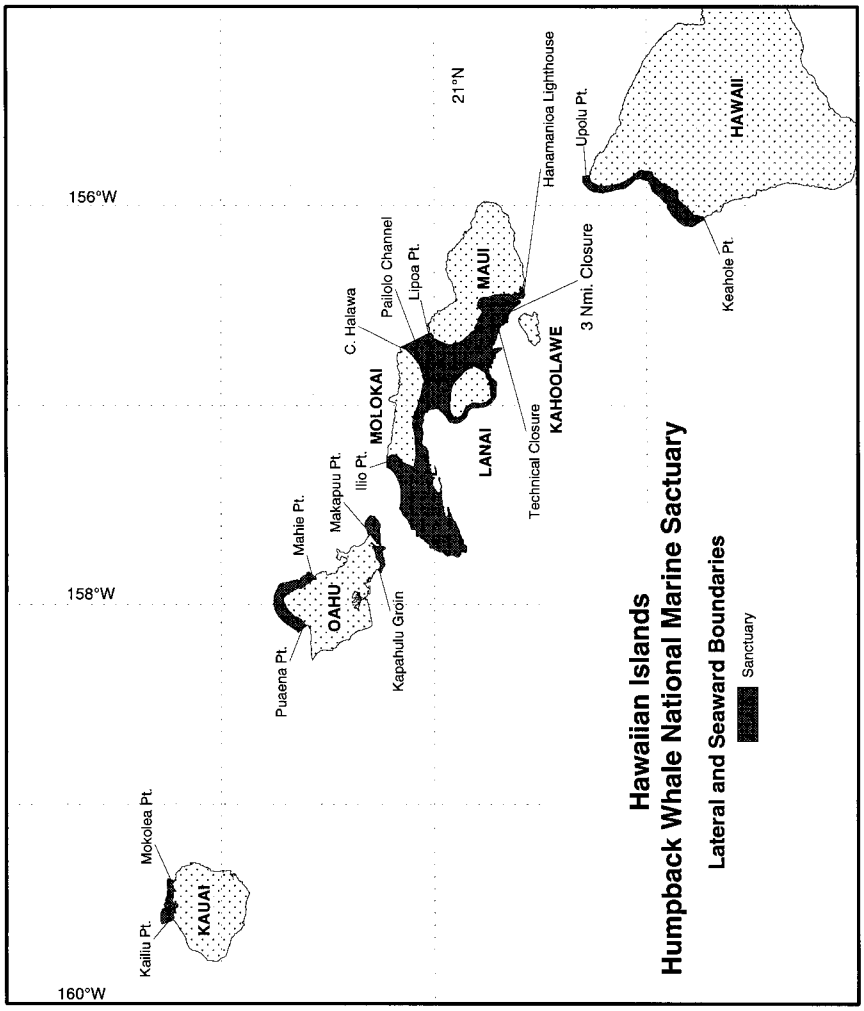

Figure 1

B. Lateral Closure Bounds for the Hawaiian Islands Humpback Whale National Marine Sanctuary Boundary (see Figure 2).

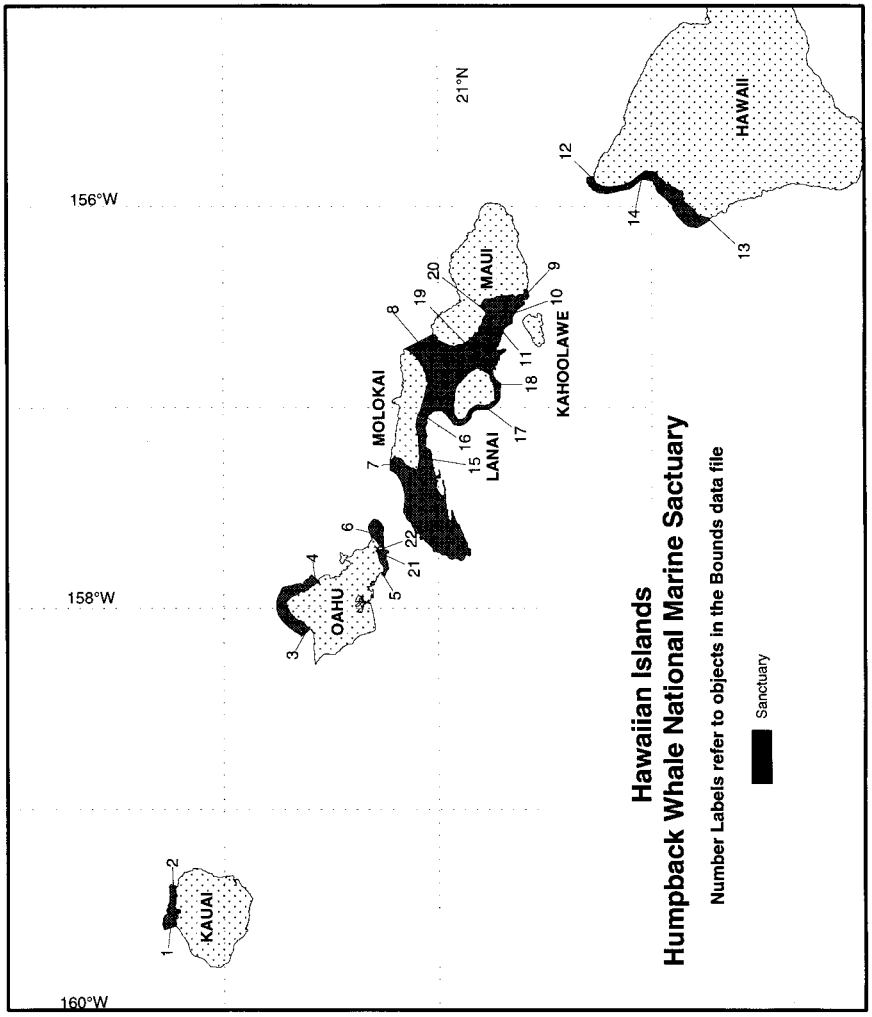

Figure 2

Bound No. (Fig. 2)	Geographic name	No. of points	Latitude	Longitude
1	Kailiu Pt., Kauai	2	22°13′24.7″ 22°16′33.5″	−159°34′52.2″ −159°35′59.4″
2	Mokolea Pt., Kauai	2	22°13′29.9″ 22°14′55.4″	−159°22′55.8″ –159°22′19.3″
3	Puaena Pt., N. Oahu	2	21°38′24.6″ 21°36′8.4″	−158°8′26.0″ −158°6′24.5″
4	Mahie Pt., N. Oahu	2	21°33′37.3″ 21°35′32.2″	−157°51′51.9″ −157°50′5.5″
5	Kapahulu Groin, S. Oahu	3	21°15′5.7″ 21°16′6.1″ 21°16′6.2″	−157°50′27.5″ −157°49′25.7″ −157°49′23.8″
6	Makapuu Pt., S. Oahu	2	21°18′39.6″ 21°19′44.7″	−157°38′56.7″ −157°35′46.1″
7	Ilio Pt, Molokai	2	21°13′25.7″ 21°13′27.0″	−157°18′45.8″ −157°15′14.4″
8	Pailolo Channel, C. Halawa to Lipoa Pt.	2	21°1′29.8″ 21°9′29.5″	−156°38′22.0″ −156°42′37.2″

Bound No. (Fig. 2)	Geographic name	No. of points	Latitude	Longitude
9	Hanamanoia Lighthouse, Maui	2	20°34′21.8″	−156°26′51.1″
			20°34′58.4″	−156°24′45.2″
10	3 Nmi. closure around Kahoolawe	51	20°35′58.1″	−156°29′32.0″
			20°35′59.9″	−156°29′33.0″
			20°36′3.9″	−156°29′35.5″
			20°36′6.6″	−156°29′36.9″
			20°36′16.3″	−156°29′43.1″
			20°36′25.7″	−156°29′49.9″
			20°36′34.6″	−156°29′57.3″
			20°36′39.9″	−156°30′2.2″
			20°36′43.8″	−156°30′5.5″
			20°36′50.8″	−156°30′12.1″
			20°36′59.0″	−156°30′16.5″
			20°37′58.7″	−156°30′22.7″
			20°37′18.1″	−156°30′29.5″
			20°37′27.0″	−156°30′36.8″
			20°37′35.5″	−156°30′44.8″
			20°37′43.4″	−156°30′53.4″
			20°37′50.9″	−156°31′2.4″
			20°37′56.4″	−156°31′10.0″
			20°37′59.0″	−156°31′13.2″
			20°38′6.0″	−156°31′22.7″
			20°38′8.6″	−156°31′26.8″
			20°38′10.8″	−156°31′29.9″
			20°38′17.2″	−156°31′39.9″
			20°38′18.9″	−156°31′43.0″
			20°38′23.4″	−156°31′48.4″
			20°38′30.3″	−156°31′58.0″
			20°38′36.6″	−156°32′7.9″
			20°38′42.4″	−156°32′18.3″
			20°38′43.4″	−156°32′20.5″
			20°38′46.4″	−156°32′25.9″
			20°38′51.5″	−156°32′36.7″
			20°38′56.0″	−156°32′47.7″
			20°38′59.8″	−156°32′59.1″
			20°39′3.0″	−156°33′10.7″
			20°39′4.0″	−156°33′15.7″
			20°39′4.4″	−156°33′17.0″
			20°39′5.3″	−156°33′21.1″
			20°39′6.8″	−156°33′28.7″
			20°39′8.6″	−156°33′40.7″
			20°39′8.9″	−156°33′44.4″
			20°39′9.7″	−156°33′49.6″
			20°39′10.1″	−156°33′53.8″
			20°39′11.0″	−156°34′0.3″
			20°39′12.1″	−156°34′12.4″
			20°39′12.5″	−156°34′24.4″
			20°39′12.4″	−156°34′25.4″
			20°39′12.6″	−156°34′30.5″
			20°39′12.2″	−156°34′42.6″
			20°39′11.8″	−156°34′47.7″
			20°39′11.7″	−156°34′48.9″
			20°39′11.3″	−156°34′55.8″
11	Technical Cosure	2	20°41′39.2″	−156°37′7.5″
			20°41′45.0″	−156°38′3.6″
	North of Kahoolawe.			
12	Upolu Pt., Hawaii (Big Island)	2	20°16′5.3″	−155°51′0.5″
			20°17′59.9″	−155°51′17.2″
13	Keahole Pt., Hawaii (Big Island)	2	19°43′39.6″	−156′3′42.7″
			19°43′41.5″	−156°4′14.5″

C. Excluded Ports and Harbors Bounds (see Figure 3).

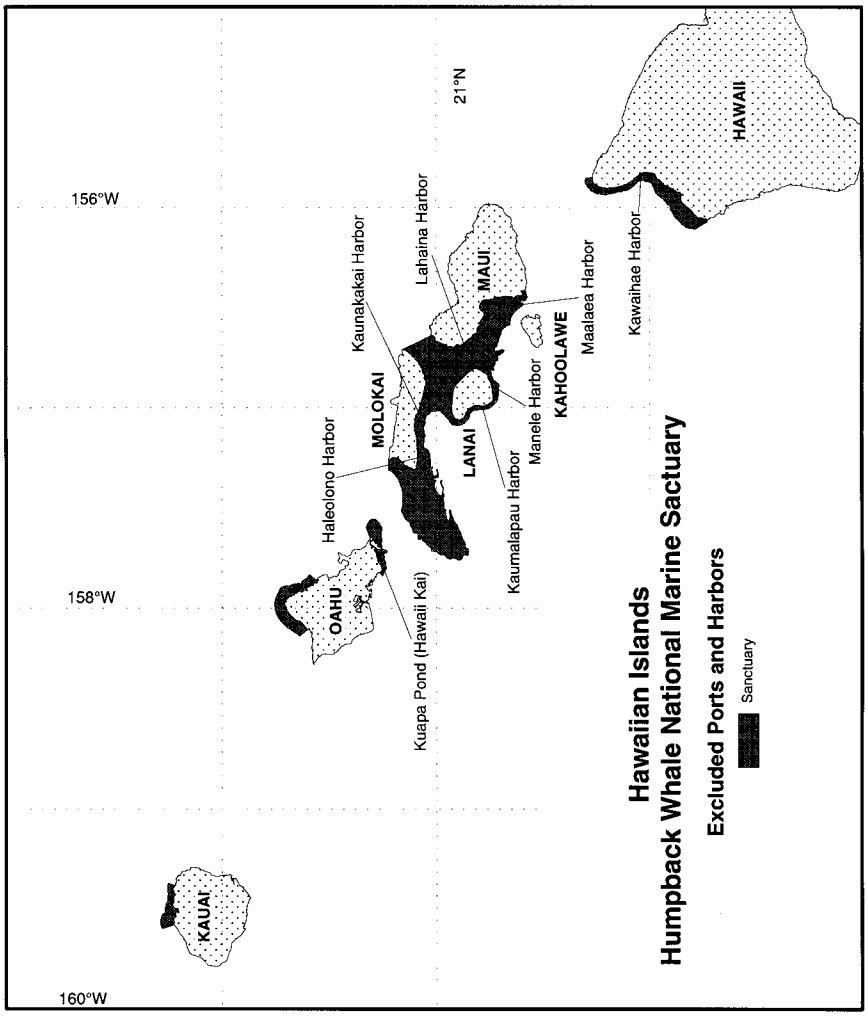

Figure 3

Bound No. (Fig.2)	Geographic Name	No. of Points	Latitude	Longitude
14	Kawaihae Harbor, Big Island exclusion	2	20°2′14.3″ 20°2′25.3″	−155°50′2.5″ −155°49′57.7″
15	Haleolono Harbor, Molokai exclusion	2	21°5′3.5″ 21°5′4.8″	−157°14′58.6″ −157°14′55.2″
16	Kaunakakai Harbor, Molokai exclusion	4	21°5′13.9″ 21°4′49.2″ 21°4′38.5″ 21°5′7.4″	−157°1′35.7″ −157°1′58.3″ −157°1′41.2″ −157°1′15.0″
17	Kaumalapau Harbor, Lanai exclusion	2	20°47′9.2″ 20°47′1.1″	−156°59′32.2″ −156°59′31.3″
18	Manele Harbor, Lanai exclusion	2	20°44′33.2″ 20°44′35.2″	−156°53′12.9″ −156°53′14.1″
19	Lahaina Harbor, Maui exclusion	2	20°52′18.3″ 20°52′18.8″	−156°40′45.0″ −156°40′44.0″
20	Maalaea Harbor, Maui exclusion	2	20°47′32.1″ 20°47′24.8″	−156°30′35.0″ −156°30′39.6″

Bound No. (Fig.2)	Geographic Name	No. of Points	Latitude	Longitude
21	Western closure Kuapa Pond (Hawaii Kai), Oahu	2	21°17′7.0″ 21°17′6.5″	−157°43′7.7″ −157°43′7.0″
22	Eastern closure Kuapa Pond (Hawaii Kai), Oahu	2	21°16′53.3″ 21°16′51.9″	−157°42′42.7″ −157°42′40.3″

Subpart R—Thunder Bay National Marine Sanctuary and Underwater Preserve

SOURCE: 65 FR 39056, June 22, 2000, unless otherwise noted.

§922.190 Boundary.

The Thunder Bay National Marine Sanctuary and Underwater Preserve (Sanctuary) consists of an area of approximately 448 square miles (1169 square kilometers) of waters of Lake Huron and the submerged lands thereunder, over, around, and under the underwater cultural resources in Thunder Bay. The boundary forms an approximately rectangular area by extending along the ordinary high water mark between the northern and southern boundaries of Alpena County, cutting across the mouths of rivers and streams, and lakeward from those points along latitude lines to longitude 83 degrees west. The coordinates of the boundary are set forth in Appendix A to this Subpart.

§922.191 Definitions.

(a) The following terms are defined for purposes of Subpart R:

Minor project means any project listed in Appendix B to this Subpart.

Programmatic Agreement means the agreement among NOAA, the Federal Advisory Council on Historic Preservation, and the State of Michigan, developed pursuant to the National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1431 *et seq.* and section 106 of the National Historic Preservation Act of 1966 as amended, 16 U.S.C. 470 *et seq.*, which, in part, sets forth the procedures for review and approval of State Permits that authorize activities prohibited by the Sanctuary regulations.

State Archaeologist means the State Archaeologist, Michigan Historical Center, Michigan Department of State.

State Permit means any lease, permit, license, approval, or other authorization issued by the State of Michigan for the conduct of activities or projects within the Thunder Bay National Marine Sanctuary and Underwater Preserve that are prohibited by the regulations at §922.193.

Traditional fishing means those commercial, recreational, and subsistence fishing activities that were customarily conducted within the Sanctuary prior to its designation, as identified in the Final Environmental Impact Statement and Management Plan for this Sanctuary. Copies of the Final Environmental Impact Statement/Management Plan (FEIS/MP) are available upon request to the Marine Sanctuaries Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910, (301) 713–3125.

Traditional fishing includes tribal fishing rights as provided for in the 1836 Treaty of Washington and subsequent court decisions related to the Treaty.

Underwater cultural resource means:

(1) Any sunken watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of any sunken watercraft; the personal property of the officers, crew, and passengers of any sunken watercraft; and the cargo of any sunken watercraft, that sank prior to the effective date of Sanctuary designation; and

(2) Any of the above that sinks on or after the date of Sanctuary designation determined to be an underwater cultural resource by the Director pursuant to §922.198. Underwater cultural resource also means any historical remnant of docks or piers or associated material, or materials resulting from activities of historic and prehistoric Native Americans.

(b) Other terms appearing in the regulations are defined at 15 CFR part 922 subpart A, and/or in the National Marine Sanctuaries Act, as amended, 16 U.S.C. 1431 *et seq.*

§ 922.192 Joint Management Committee.

(a) A state/federal Joint Management Committee shall be established to oversee and engage in decision-making authority for the Thunder Bay National Marine Sanctuary and Underwater Preserve.

(b) The Joint Management Committee shall be comprised of one Federal employee named by the NOAA Administrator and one state employee named by the Governor of Michigan. The Federal employee cannot be the sanctuary manager (the individual who exercises day-to-day management over the Sanctuary) and must have a civil service grade higher than that of the sanctuary manager.

(c) The Joint Management Committee shall:

(1) Develop a position description for, recruit prospective candidates for the position of, interview candidates for the position of, and take part in the annual performance evaluation of, the sanctuary manager;

(2) Approve revisions to the Management Plan;

(3) Approve annual work plans;

(4) Approve, on an annual basis, the expenditure of allocated state and federal funds and other sources of revenue for the Thunder Bay National Marine Sanctuary and Underwater Preserve, in accordance with the Management Plan and the annual work plans; and

(5) Make decisions on other key issues related to management of the Thunder Bay National Marine Sanctuary and Underwater Preserve.

(d) The Joint Management Committee shall meet as agreed to by the members but not less than once annually.

(e) If the Joint Management Committee is unable to reach agreement on an issue, the members shall follow the ''Consultation and Conflict Resolution'' procedures set forth in the Interlocal Agreement between NOAA and the State of Michigan.

(f) The Joint Management Committee may invite affected public parties to participate in selected aspects of Sanctuary management as:

(1) Parties to the Interlocal Agreement pursuant to the Michigan Urban Cooperation Act of 1967, MCL 124.501 *et seq.*; and/or

(2) Pursuant to the NMSA.

§ 922.193 Prohibited or otherwise regulated activities.

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

(1) Recovering, altering, destroying, possessing, or attempting to recover, alter, destroy, or possess an underwater cultural resource.

(2) Drilling into, dredging or otherwise altering the lakebottom associated with underwater cultural resources, including contextual information; or constructing, placing or abandoning any structure, material or other matter on the lakebottom associated with underwater cultural resources, except as an incidental result of:

(i) Anchoring vessels;

(ii) Traditional fishing operations; or

(iii) Minor projects (as defined in Appendix B of this subpart) that do not adversely affect underwater cultural resources.

(3) Using grappling hooks or other anchoring devices on underwater cultural resource sites that are marked with a mooring buoy.

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

(b) Members of a federally-recognized Indian tribe may exercise treaty-secured rights, subject to the requirements of other applicable law, without regard to the requirements of this subpart. 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, provided that the rights are authorized by the tribe by regulation, license, or permit.

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

(d) The prohibitions in paragraphs (a)(1) through (3) of this section do not apply to any activity:

(1) Specifically authorized by, and conducted in accordance with the scope, purpose, terms and conditions of, a permit issued pursuant to §922.195 or a Special Use Permit issued pursuant to section 310 of the NMSA.

(2) Specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on the effective date of these regulations, or by any valid right of subsistence use or access in existence on the effective date of these regulations, provided that the holder of such authorization or right complies with §922.194 and §922.47 and with any terms and conditions for the exercise of such authorization or right imposed by the Director as a condition of certification as he or she deems reasonably necessary to achieve the purposes for which the Sanctuary was designated.

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

(a) A person may conduct an activity prohibited by §922.193 (a)(1) through (3) if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on the effective date of Sanctuary designation, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, *provided that:*

(1) for any State or local lease, permit, license, approval, or other authorization, or any right of subsistence use, the State Archaeologist certifies to the Director, within 90 days of the effective date of designation, that the activity authorized under the State or local lease, permit, license, approval, or other authorization, or any right of subsistence use, is being conducted consistent with the Programmatic Agreement, in which case such activity shall be deemed to have met the requirements of this section and §922.47; or

(2) In the case where either:

(i) The State Archaeologist does not certify that the activity authorized under a State or local lease, permit, license, approval, or other authorization, or right of subsistence use is being conducted consistent with the Programmatic Agreement; or

(ii) The activity is conducted pursuant only to a Federal permit, the holder of the authorization or right complies with paragraphs (b) through (k) of this section.

(b) For an activity described in paragraph (a)(2) of this section, the holder of the authorization or right may conduct the activity prohibited by §922.193 (a)(1) through (3) *provided that:*

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of the effective date of Sanctuary designation, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of §922.194; and

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

(c) The holder of an authorization or right described in paragraph (a)(2) of this section authorizing an activity prohibited by §922.193 may conduct the activity without being in violation of applicable provisions of §922.193, pending final agency action on his or her certification request, provided the holder is in compliance with this §922.194.

(d) Any holder of an authorization or right described in paragraph (a)(2) of this section may request the Director to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited by §922.193, thus requiring certification under this section.

(e) Requests for findings or certifications should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuary

Manager, Thunder Bay National Marine Sanctuary and Underwater Preserve, 1305 East-West Highway, N/ORM, Silver Spring, Maryland, 20910. A copy of the lease, permit, license, approval, or other authorization must accompany the request.

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

(g) The Director may amend any certification made under this § 922.194 whenever additional information becomes available justifying such an amendment.

(h) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing, any decision on a certification request or any action taken with respect to any certification made under this § 922.194, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(i) Any time limit prescribed in or established under this § 922.194 may be extended by the Director for good cause.

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

(k) Any amendment, renewal, or extension made after the effective date of Sanctuary designation, to a lease, permit, license, approval, other authorization or right is subject to the provisions of § 922.195 and § 922.49.

(l) For any activity authorized pursuant to § 922.193 (b), the holder of such license or permit shall notify the Director, in writing, within 90 days of the effective date of Sanctuary designation, of the existence of such authorization or right.

§ 922.195 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by § 922.193 (a)(1) through (3), if conducted in accordance with the scope, purpose, terms and conditions of a State Permit *provided that*:

(1) The State Archaeologist certifies to NOAA that the activity authorized under the State Permit will be conducted consistent with the Programmatic Agreement, in which case such State Permit shall be deemed to have met the requirements of § 922.49; or

(2) In the case where the State Archaeologist does not certify that the activity to be authorized under a State Permit will be conducted consistent with the Programmatic Agreement, the person complies with the requirements of § 922.49 of this part.

(b) If no State Permit is required to conduct an activity prohibited by § 922.193 (a)(1) through (3) of this subpart, a person may conduct such activity if it is conducted in accordance with the scope, purpose, terms and conditions of a Federal permit, *provided that* the person complies with the provisions of § 922.49 of this part.

(c) In instances where the conduct of an activity is prohibited by § 922.193 (a)(1) through (3) of this subpart is not addressed under a State or other Federal lease, license, permit or other authorization, a person must obtain a Sanctuary permit from NOAA pursuant to § 922.48 (c) through (f) of this part and the Programmatic Agreement in order to conduct the activity.

(d) A permit for recovery of an underwater cultural resource may be issued if:

(1) The proposed activity satisfies the requirements for permits described under paragraphs (a) through (c) of this section;

(2) The recovery of the underwater cultural resource is in the public interest;

(3) Recovery of the underwater cultural resource is part of research to preserve historic information for public use; and

(4) Recovery of the underwater cultural resource is necessary or appropriate to protect the resource, preserve

historical information, or further the policies of the Sanctuary.

(e) A person shall file an application for a permit with the Michigan Department of Environmental Quality, Land and Water Management Division, P.O. Box 30458, Lansing, MI, 48909-7958. The application shall contain all of the following information:

(1) The name and address of the applicant;

(2) Research plan that describes in detail the specific research objectives and previous work done at the site. An archaeological survey must be conducted on a site before an archaeological permit allowing excavation can be issued;

(3) Description of significant previous work in the area of interest, how the proposed effort would enhance or contribute to improving the state of knowledge, why the proposed effort should be performed in the Sanctuary, and its potential benefits to the Sanctuary;

(4) An operational plan that describes the tasks required to accomplish the project's objectives and the professional qualifications of those conducting and supervising those tasks (see §922.195(e)(9) of this section). The plan must provide adequate description of methods to be used for excavation, recovery and the storage of artifacts and related materials on site, and describe the rationale for selecting the proposed methods over any alternative methods;

(5) Archaeological recording, including site maps, feature maps, scaled photographs, and field notes;

(6) An excavation plan describing the excavation, recovery and handling of artifacts;

(7)(i) A conservation plan documenting:

(A) The conservation facility's equipment;

(B) Ventilation temperature and humidity control; and

(C) storage space.

(ii) Documentation of intended conservation methods and processes must also be included;

(8) A curation and display plan for the curation of the conserved artifacts to ensure the maintenance and safety of the artifacts in keeping with the Sanctuary's federal stewardship responsibilities under the Federal Archaeology Program (36 CFR Part 79, Curation of Federally-Owned and Administered Archaeological Collections); and

(9) Documentation of the professional standards of an archaeologist supervising the archaeological recovery of historical artifacts. The minimum professional qualifications in archaeology are a graduate degree in archaeology, anthropology, or closely related field plus:

(i) At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;

(ii) At least four months of supervised field and analytic experience in general North American archaeology;

(iii) Demonstrated ability to carry research to completion; and

(iv) At least one year of full-time professional experience at a supervisory level in the study of archeological resources in the underwater environment.

§922.196 Emergency regulations.

(a) Where necessary to prevent or minimize the destruction of, loss of, or injury to an underwater cultural resource, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities are subject to immediate temporary regulation, including prohibition. An emergency regulation shall not take effect without the approval of the Governor of Michigan.

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

§922.197 Consultation with affected federally-recognized Indian tribes.

The Director shall regularly consult with the governing bodies of affected federally-recognized Indian tribes regarding areas of mutual concern.

§ 922.198 Procedures for determining watercraft and related items which sink on or after the date of Sanctuary designation to be an underwater cultural resource.

The Director, in consultation with the State of Michigan, appropriate federal agencies, and the governing body of any affected federally-recognized tribe, may determine, after providing 45 days for public comment, that any sunken watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of any sunken watercraft; the personal property of the officers, crew, and passengers of any sunken watercraft; and the cargo of any sunken watercraft, that sinks on or after the date of Sanctuary designation, to be an underwater cultural resource if such is determined by the Director to be 50 years or older and of special national significance due to architectural significance or association with individuals or events that are significant to local or national history.

APPENDIX A TO SUBPART R OF PART 922—THUNDER BAY NATIONAL MARINE SANCTUARY AND UNDERWATER PRESERVE BOUNDARY COORDINATES

[Based on North American Datum of 1983]

Point	Latitude	Longitude
1	45°12′25.5″	83°23′18.6″
2	45°12′25.5″	83°00′00″
3	44°51′30.5″	83°00′00″
4	44°51′30.5″	83°19′17.3″

APPENDIX B TO SUBPART R OF PART 922—MINOR PROJECTS FOR PURPOSES OF § 922.193(A)(2)(III)

Pursuant to Michigan State Administrative Rule R 322.1013 of Part 325, Great Lakes Submerged Lands of Public Act 451 (Michigan State Statute), the Michigan Department of Environmental Quality (Department) issues permits for projects that are of a minor nature which are not controversial, which have minimal adverse environmental impact, which will be constructed of clean, non-polluting materials, which do not impair the use of the adjacent bottomlands by the public, and which do not adversely affect riparian interests of adjacent owners. The following projects are minor projects:

(a) Noncommercial single piers, docks, and boat hoists which meet the following design criteria:

(i) are of a length or size not greater than the length or size of similar structures in the vicinity and on the watercourse involved; and

(ii) provide for the free littoral flow of water and drift material.

(b) Spring piles and pile clusters when their design and purpose is usual for such projects in the vicinity and on the watercourse involved.

(c) Seawalls, bulkheads, and other permanent revetment structures which meet all of the following purpose and design criteria:

(i) the proposed structure fulfills an identifiable need for erosion protection, bank stabilization, protection of uplands, or improvements on uplands;

(ii) the structure will be constructed of suitable materials free from pollutants, waste metal products, debris, or organic materials;

(iii) the structure is not more than 300 feet in length and is located in an area on the body of water where other similar structures already exist;

(iv) the placement of backfill or other fill associated with the construction does not exceed an average of 3 cubic yards per running foot along the shoreline and a maximum of 300 cubic yards; and

(v) the structure or any associated fill will not be placed in a wetland area or placed in any manner that impairs surface water flow into or out of any wetland area.

(d) Groins 50 feet or less in length, as measures from the toe to bluff, which meet all of the following criteria:

(i) the groin is low profile, with the lakeward end not more than 1 foot above the existing water level; and

(ii) the groin is placed at least ½ of the groin length from the adjacent property line or closer with written approval of the adjacent riparian.

(e) Filling for restoration of existing permitted fill, fills placed incidental to construction of other structures, and fills that do not exceed 300 cubic yards as a single and complete project, where the fill is of suitable material free from pollutants, waste metal products, debris, or organic materials.

(f) Dredging for the maintenance of previously dredged areas or dredging of not more than 300 cubic yards as a single and complete project when both of the following criteria are met:

(i) No reasonable expectation exists that the materials to be dredged are polluted; and

(ii) All dredging materials will be removed to an upland site exclusive of wetland areas.

(g) Structural repair of man-made structures, except as exempted by Michigan State Administrative Rule R 322.1008(3), when their design and purpose meet both of the following criteria:

(i) The repair does not alter the original use of a recently serviceable structure; and

(ii) The repair will not adversely affect public trust values or interests, including navigation and water quality.

(h) Fish or wildlife habitat structures which meet both of the following criteria:

(i) Are placed so the structures do not impede or create a navigational hazard; and

(ii) Are anchored to the bottomlands.

(i) Scientific structures such as staff gauges, water monitoring devices, water quality testing devices, survey devices, and core sampling devices, if the structures do not impede or create a navigational hazard.

(j) Navigational aids which meet both of the following criteria:

(i) Are approved by the United States Coast Guard; and

(ii) Are approved under Michigan State Act No. 303 of the Public Acts of 1967, as amended, being Section 281.1001 *et seq.* of the Michigan Compiled Laws, and known as the Marine Safety Act.

(k) Extension of a project where work is being performed under a current permit and which will result in no damage to natural resources.

(l) A sand trap wall which meets all of the following criteria:

(i) The wall is 300 feet or less in length along the shoreline;

(ii) The wall does not extend more than 30 feet lakeward of the toe of bluff;

(iii) The wall is low profile, that is, it is not more than 1 foot above the existing water level; and

(iv) The wall is constructed of wood or steel or other non-polluting material.

(m) Physical removal of man-made structures or natural obstructions which meet all of the following criteria:

(i) The debris and spoils shall be removed to an upland site, not in a wetland, in a manner which will not allow erosion into public waters;

(ii) The shoreline and bottom contours shall be restored to an acceptable condition; and

(iii) Upon completion of structure removal, the site does not constitute a safety or navigational hazard. Department staff shall consider fisheries and wildlife resource values when evaluating applications for natural obstruction removal.

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AUTHORITY: 16 U.S.C. 1451 *et seq.*; 31 U.S.C. 6506; 42 U.S.C. 3334; Sections 923.92 and 923.94 are also issued under E.O. 12372, July 14, 1982, 3 CFR 1982 Comp. p. 197, as amended by E.O. 12416, April 8, 1983, 3 CFR 1983 Comp. p. 186.

SOURCE: 44 FR 18595, Mar. 28, 1979, unless otherwise noted.

Subpart A—General

SOURCE: 61 FR 33805, June 28, 1996, unless otherwise noted.

§ 923.1 Purpose and scope.

(a) The regulations in this part set forth the requirements for State coastal management program approval by the Assistant Administrator for Ocean Services and Coastal Zone Management pursuant to the Coastal Zone Management Act of 1972, as amended (hereafter, the Act); the grant application procedures for program funds; conditions under which grants may be terminated; and requirements for review of approved management programs.

(b) Sections 306 and 307 of the Act set forth requirements which must be fulfilled as a condition of program approval. The specifics of these requirements are set forth below under the following headings: General Requirements; Uses Subject to Management; Special Management Areas; Boundaries; Authorities and Organization; and Coordination, Public Involvement and National Interest. All relevant sections of the Act are dealt with under one of these groupings, but not necessarily in the order in which they appear in the Act.

(c) In summary, the requirements for program approval are that a State develop a management program that:

(1) Identifies and evaluates those coastal resources recognized in the Act as requiring management or protection by the State;

(2) Reexamines existing policies or develops new policies to manage these resources. These policies must be specific, comprehensive, and enforceable;

(3) Determines specific use and special geographic areas that are to be subject to the management program, based on the nature of identified coastal concerns;

(4) Identifies the inland and seaward areas subject to the management program;

(5) Provides for the consideration of the national interest in the planning for and siting of facilities that meet more than local requirements;

(6) Includes sufficient legal authorities and organizational arrangements

to implement the program and to ensure conformance to it. In arriving at these elements of the management program, States are obliged to follow an open process which involves providing information to and considering the interests of the general public, special interest groups, local governments, and regional, State, interstate, and Federal agencies;

(7) Provides for public participation in permitting processes, consistency determinations, and other similar decisions;

(8) Provides a mechanism to ensure that all state agencies will adhere to the program; and

(9) Contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the state required by section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990.

§923.2 Definitions.

(a) The term *Act* means the Coastal Zone Management Act of 1972, as amended.

(b) The term *Secretary* means the Secretary of Commerce and his/her designee.

(c) The term *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration (NOAA), or designee.

(d)(1) The term *relevant Federal agencies* means those Federal agencies with programs, activities, projects, regulatory, financing, or other assistance responsibilities in the following fields which could impact or affect a State's coastal zone:

(i) Energy production or transmission,

(ii) Recreation of a more than local nature,

(iii) Transportation,

(iv) Production of food and fiber,

(v) Preservation of life and property,

(vi) National defense,

(vii) Historic, cultural, aesthetic, and conservation values,

(viii) Mineral resources and extraction, and

(ix) Pollution abatement and control.

(2) The following are defined as relevant Federal agencies: Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Transportation; Environmental Protection Agency; Federal Energy Regulatory Commission; General Services Administration, Nuclear Regulatory Commission; Federal Emergency Management Agency.

(e) The term *Federal agencies principally affected* means the same as ''relevant Federal agencies.'' The Assistant Administrator may include other agencies for purposes of reviewing the management program and environmental impact statement.

(f) The term *Coastal State* means a State of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. Pursuant to section 304(3) of the Act, the term also includes Puerto Rico, the Virgin Islands, Guam, and American Samoa. Pursuant to section 703 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, the term also includes the Northern Marianas.

(g) The term *management program* includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, including an articulation of enforceable policies and citation of authorities providing this enforceability, prepared and adopted by the State in accordance with the provisions of this Act and this part, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(h) The following terms, as used in these regulations, have the same definition as provided in section 304 of the Act:

(1) Coastal zone;

(2) Coastal waters;

(3) Enforceable policy;

(4) Estuary;

(5) Land use; and

(6) Water use.

(i) The term *grant* means a financial assistance instrument and refers to both grants and cooperative agreements.

§ 923.3 General requirements.

(a) The management program must be developed and adopted in accordance with the requirements of the Act and this part, after notice, and the opportunity for full participation by relevant Federal and State agencies, local governments, regional organizations, port authorities, and other interested parties and persons, and be adequate to carry out the purposes of the Act and be consistent with the national policy set forth in section 303 of the Act.

(b) The management program must provide for the management of those land and water uses having a direct and significant impact on coastal waters and those geographic areas which are likely to be affected by or vulnerable to sea level rise. The program must include provisions to assure the appropriate protection of those significant resources and areas, such as wetlands, beaches and dunes, and barrier islands, that make the State's coastal zone a unique, vulnerable, or valuable area.

(c) The management program must contain a broad class of policies for each of the following areas: resource protection, management of coastal development, and simplification of governmental processes. These three broad classes must include specific policies that provide the framework for the exercise of various management techniques and authorities governing coastal resources, uses, and areas. The three classes must include policies that address uses of or impacts on wetlands and floodplains within the State's coastal zone, and that minimize the destruction, loss or degradation of wetlands and preserve and enhance their natural values in accordance with the purposes of Executive Order 11990, pertaining to wetlands. These policies also must reduce risks of flood loss, minimize the impact of floods on human safety, health and welfare, and preserve the natural, beneficial values served by floodplains, in accordance with the purposes of Executive Order 11988, pertaining to floodplains.

(d) The policies in the program must be appropriate to the nature and degree of management needed for uses, areas, and resources identified as subject to the program.

(e) The policies, standards, objectives, criteria, and procedures by which program decisions will be made must provide:

(1) A clear understanding of the content of the program, especially in identifying who will be affected by the program and how, and

(2) A clear sense of direction and predictability for decisionmakers who must take actions pursuant to or consistent with the management program.

Subpart B—Uses Subject to Management

SOURCE: 61 FR 33806, June 28, 1996, unless otherwise noted.

§ 923.10 General.

This subpart sets forth the requirements for management program approvability with respect to land and water uses which, because of their direct and significant impacts on coastal waters or those geographic areas likely to be affected by or vulnerable to sea level rise, are subject to the terms of the management program. This subpart deals in full with the following subsections of the Act: 306(d)(1)(B), Uses Subject to the Management Program, 306(d)(2)(H), Energy Facility Planning, and 306(d)(12)(B), Uses of Regional Benefit.

§ 923.11 Uses subject to management.

(a)(1) The management program for each coastal state must include a definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(2) The management program must identify those land and water uses that will be subject to the terms of the management program. These uses shall be those with direct and significant impacts on coastal waters or on geographic areas likely to be affected by or vulnerable to sea level rise.

(3) The management program must explain how those uses identified in

paragraph (a)(2) of this section will be managed. The management program must also contain those enforceable policies, legal authorities, performance standards or other techniques or procedures that will govern whether and how uses will be allowed, conditioned, modified, encouraged or prohibited.

(b) In identifying uses and their appropriate management, a State should analyze the quality, location, distribution and demand for the natural and man-made resources of their coastal zone, and should consider potential individual and cumulative impacts of uses on coastal waters.

(c) States should utilize the following types of analyses:

(1) Capability and suitability of resources to support existing or projected uses;

(2) Environmental impacts on coastal resources;

(3) Compatibility of various uses with adjacent uses or resources;

(4) Evaluation of inland and other location alternatives; and

(5) Water dependency of various uses and other social and economic considerations.

(d) Examination of the following factors is suggested:

(1) Air and water quality;

(2) Historic, cultural and esthetic resources where coastal development is likely to affect these resources;

(3) Open space or recreational uses of the shoreline where increased access to the shorefront is a particularly important concern;

(4) Floral and faunal communities where loss of living marine resources or threats to endangered or threatened coastal species are particularly important concerns.

(5) Information on the impacts of global warming and resultant sea level rise on natural resources such as beaches, dunes, estuaries, and wetlands, on salinization of drinking water supplies, and on properties, infrastructure and public works.

§ 923.12 Uses of regional benefit.

The management program must contain a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit. To this end, the management program must:

(a) Identify what constitutes uses of regional benefit; and

(b) Identify and utilize any one or a combination of methods, consistent with the control techniques employed by the State, to assure local land and water use regulations do not unreasonably restrict or exclude uses of regional benefit.

[61 FR 33806, June 28, 1996; 61 FR 36965, July 15, 1996]

§ 923.13 Energy facility planning process.

The management program must contain a planning process for energy facilities likely to be located in or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities. (See subsection 304(5) of the Act.) This process must contain the following elements:

(a) Identification of energy facilities which are likely to locate in, or which may significantly affect, a State's coastal zone;

(b) Procedures for assessing the suitability of sites for such facilities designed to evaluate, to the extent practicable, the costs and benefits of proposed and alternative sites in terms of State and national interests as well as local concerns;

(c) Articulation and identification of enforceable State policies, authorities and techniques for managing energy facilities and their impacts; and

(d) Identification of how interested and affected public and private parties will be involved in the planning process.

[61 FR 33806, June 28, 1996; 61 FR 36965, July 15, 1996]

Subpart C—Special Management Areas

SOURCE: 61 FR 33806, June 28, 1996, unless otherwise noted.

§ 923.20 General.

(a) This subpart sets forth the requirements for management program approvability with respect to areas of

particular concern because of their coastal-related values or characteristics, or because they may face pressures which require detailed attention beyond the general planning and regulatory system which is part of the management program. As a result, these areas require special management attention within the terms of the State's overall coastal program. This special management may include regulatory or permit requirements applicable only to the area of particular concern. It also may include increased intergovernmental coordination, technical, assistance, enhanced public expenditures, or additional public services and maintenance to a designated area. This subpart deals with the following subsections of the Act: 306(d)(2)(C)—Geographic Areas of Particular Concern; 306(d)(2)(E)—Guidelines on Priorities of Uses; 306(d)(2)(G)—Shorefront Access and protection Planning; 306(d)(2)(I)—Shoreline Erosion/Mitigation Planning; and 306(d)(9)—Areas for Preservation and Restoration.

(b) The importance of designating areas of particular concern for management purposes and the number and type of areas that should be designated is directly related to the degree of comprehensive controls applied throughout a State's coastal zone. Where a State's general coastal management policies and authorities address state and national concerns comprehensively and are specific with respect to particular resources and uses, relatively less emphasis need be placed on designation of areas of particular concern. Where these policies are limited and non-specific, greater emphasis should be placed on areas of particular concern to assure effective management and an adequate degree of program specificity.

§ 923.21 Areas of particular concern.

(a) The management program must include an inventory and designation of areas of particular concern within the coastal zone, on a generic and/or site-specific basis, and broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(b) In developing criteria for inventorying and designating areas of particular concern. States must consider whether the following represent areas of concern requiring special management:

(1) Areas of unique, scarce, fragile or vulnerable natural habitat; unique or fragile, physical, figuration (as, for example, Niagara Falls); historical significance, cultural value or scenic importance (including resources on or determined to be eligible for the National Register of Historic Places.);

(2) Areas of high natural productivity or essential habitat for living resources, including fish, wildlife, and endangered species and the various trophic levels in the food web critical to their well-being;

(3) Areas of substantial recreational value and/or opportunity;

(4) Areas where developments and facilities are dependent upon the utilization of, or access to, coastal waters;

(5) Areas of unique hydrologic, geologic or topographic significance for industrial or commercial development or for dredge spoil disposal;

(6) Areas or urban concentration where shoreline utilization and water uses are highly competitive;

(7) Areas where, if development were permitted, it might be subject to significant hazard due to storms, slides, floods, erosion, settlement, salt water intrusion, and sea level rise;

(8) Areas needed to protect, maintain or replenish coastal lands or resources including coastal flood plains, aquifers and their recharge areas, estuaries, sand dunes, coral and other reefs, beaches, offshore sand deposits and mangrove stands.

(c) Where states will involve local governments, other state agencies, federal agencies and/or the public in the process of designating areas of particular concern, States must provide guidelines to those who will be involved in the designation process. These guidelines shall contain the purposes, criteria, and procedures for nominating areas of particular concern.

(d) In identifying areas of concern by location (if site specific) or category of coastal resources (if generic), the program must contain sufficient detail to

enable affected landowners, governmental entities and the public to determine with reasonable certainty whether a given area is designated.

(e) In identifying areas of concern, the program must describe the nature of the concern and the basis on which designations were made.

(f) The management program must describe how the management program addresses and resolves the concerns for which areas are designated; and

(g) The management program must provide guidelines regarding priorities of uses in these areas, including guidelines on uses of lowest priority.

§ 923.22 Areas for preservation or restoration.

The management program must include procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical or esthetic values, and the criteria for such designations.

§ 923.23 Other areas of particular concern.

(a) The management program may, but is not required to, designate specific areas known to require additional or special management, but for which additional management techniques have not been developed or necessary authorities have not been established at the time of program approval. If a management program includes such designations, the basis for designation must be clearly stated, and a reasonable time frame and procedures must be set forth for developing and implementing appropriate management techniques. These procedures must provide for the development of those items required in § 923.21. The management program must identify an agency (or agencies) capable of formulating the necessary management policies and techniques.

(b) The management program must meet the requirements of § 923.22 for containing procedures for designating areas for preservation or restoration. The management program may include procedures and criteria for designating areas of particular concern for other than preservation or restoration purposes after program approval.

§ 923.24 Shorefront access and protection planning.

(a) The management program must include a definition of the term ''beach'' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological or cultural value.

(b) The basic purpose in focusing special planning attention on shorefront access and protection is to provide public beaches and other public coastal areas of environmental, recreational, historic, esthetic, ecological or cultural value with special management attention within the purview of the State's management program. This special management attention may be achieved by designating public shorefront areas requiring additional access or protection as areas of particular concern pursuant to § 923.21 or areas for preservation or restoration pursuant to § 923.22.

(c) The management program must contain a procedure for assessing public beaches and other public areas, including State owned lands, tidelands and bottom lands, which require access or protection, and a description of appropriate types of access and protection.

(d) The management program must contain a definition of the term ''beach'' that is the broadest definition allowable under state law or constitutional provisions, and an identification of public areas meeting that definition.

(e) The management program must contain an identification and description of enforceable policies, legal authorities, funding program and other techniques that will be used to provide such shorefront access and protection that the State's planning process indicates is necessary.

§ 923.25 Shoreline erosion/mitigation planning.

(a) The management program must include a planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, including potential impacts of sea level rise, and to restore areas adversely affected by such erosion. This planning process

may be within the broader context of coastal hazard mitigation planning.

(b) The basic purpose in developing this planning process is to give special attention to erosion issues. This special management attention may be achieved by designating erosion areas as areas of particular concern pursuant to § 923.21 or as areas for preservation or restoration pursuant to § 923.22.

(c) The management program must include an identification and description of enforceable policies, legal authorities, funding techniques and other techniques that will be used to manage the effects of erosion, including potential impacts of sea level rise, as the state's planning process indicates is necessary.

[61 FR 33806, June 28, 1996; 61 FR 36965, July 15, 1996]

Subpart D—Boundaries

SOURCE: 61 FR 33808, June 28, 1996, unless otherwise noted.

§ 923.30 General.

This subpart sets forth the requirements for management program approvability with respect to boundaries of the coastal zone. There are four elements to a State's boundary: the inland boundary, the seaward boundary, areas excluded from the boundary, and, in most cases, interstate boundaries. Specific requirements with respect to procedures for determining and identifying these boundary elements are discussed in the sections of this subpart that follow.

§ 923.31 Inland boundary.

(a) The inland boundary of a State's coastal zone must include:

(1) Those areas the management of which is necessary to control uses which have direct and significant impacts on coastal waters, or are likely to be affected by or vulnerable to sea level rise, pursuant to section 923.11 of these regulations.

(2) Those special management areas identified pursuant to § 923.21;

(3) Waters under saline influence—waters containing a significant quantity of seawater, as defined by and uniformly applied by the State;

(4) Salt marshes and wetlands—Areas subject to regular inundation of tidal salt (or Great Lakes) waters which contain marsh flora typical of the region;

(5) Beaches—The area affected by wave action directly from the sea. Examples are sandy beaches and rocky areas usually to the vegetation line;

(6) Transitional and intertidal areas-Areas subject to coastal storm surge, and areas containing vegetation that is salt tolerant and survives because of conditions associated with proximity to coastal waters. Transitional and intertidal areas also include dunes and rocky shores to the point of upland vegetation;

(7) Islands—Bodies of land surrounded by water on all sides. Islands must be included in their entirety, except when uses of interior portions of islands do not cause direct and significant impacts.

(8) The inland boundary must be presented in a manner that is clear and exact enough to permit determination of whether property or an activity is located within the management area. States must be able to advise interested parties whether they are subject to the terms of the management program within, at a maximum, 30 days of receipt of an inquiry. An inland coastal zone boundary defined in terms of political jurisdiction (e.g., county, township or municipal lines) cultural features (e.g., highways, railroads), planning areas (e.g., regional agency jurisdictions, census enumeration districts), or a uniform setback line is acceptable so long as it includes the areas indentified.

(b) The inland boundary of a State's coastal zone may include:

(1) Watersheds—A state may determine some uses within entire watersheds which have direct and significant impact on coastal waters or are likely to be affected by or vulnerable to sea level rise. In such cases it may be appropriate to define the coastal zone as including these watersheds.

(2) Areas of tidal influence that extend further inland than waters under saline influence; particularly in estuaries, deltas and rivers where uses inland could have direct and significant impacts on coastal waters or areas that

are likely to be affected by or vulnerable to sea level rise.

(3) Indian lands not held in trust by the Federal Government.

(c) In many urban areas or where the shoreline has been modified extensively, natural system relationships between land and water may be extremely difficult, if not, impossible, to define in terms of direct and significant impacts. Two activities that States should consider as causing direct and significant impacts on coastal waters in urban areas are sewage discharges and urban runoff. In addition, States should consider dependency of uses on water access and visual relationships as factors appropriate for the determination of the inland boundary in highly urbanized areas.

§ 923.32 Lakeward or seaward boundary.

(a)(1) For states adjoining the Great Lakes, the lakeward boundary of the State's coastal zone is the international boundary with Canada or the boundaries with adjacent states. For states adjacent to the Atlantic or Pacific Ocean, or the Gulf of Mexico, the seaward boundary is the outer limit of state title and ownership under the Submerged Lands Act (48 U.S.C. 1301 *et seq.*), the Act of March 2, 1917 (48 U.S.C. 749), the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 (48 U.S.C. 1681 note) or section 1 of the Act of November 10, 1963, (48 U.S.C. 1705, as applicable).

(2) The requirement for defining the seaward boundary of a State's coastal zone can be met by a simple restatement of the limits defined in this section, unless there are water areas which require a more exact delineation because of site specific policies associated with these areas. Where States have site specific policies for particular water areas, these shall be mapped, described or referenced so that their location can be determined reasonably easily by any party affected by the policies.

(b) The seaward limits, as defined in this section, are for purposes of this program only and represent the area within which the State's management program may be authorized and financed. These limits are irrespective of any other claims States may have by virtue of other laws.

§ 923.33 Excluded lands.

(a) The boundary of a State's coastal zone must exclude lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government, its officers or agents. To meet this requirement, the program must describe, list or map lands or types of lands owned, leased, held in trust or otherwise used solely by Federal agencies.

(b) The exclusion of Federal lands does not remove Federal agencies from the obligation of complying with the consistency provisions of section 307 of the Act when Federal actions on these excluded lands have spillover impacts that affect any land or water use or natural resource of the coastal zone within the purview of a state's management program. In excluding Federal lands from a State's coastal zone for the purposes of this Act, a State does not impair any rights or authorities that it may have over Federal lands that exist separate from this program.

§ 923.34 Interstate boundary.

States must document that there has been consultation and coordination with adjoining coastal States regarding delineation of any adjacent inland and lateral seaward boundary.

Subpart E—Authorities and Organization

SOURCE: 61 FR 33809, June 28, 1996, unless otherwise noted.

§ 923.40 General.

(a) This subpart sets forth the requirements for management program approvability with respect to authorities and organization. The authorities and organizational structure on which a State will rely to administer its management program are the crucial underpinnings for enforcing the policies which guide the management of the uses and areas identified in its management program. There is a direct

relationship between the adequacy of authorities and the adequacy of the overall program. The authorities need to be broad enough in both geographic scope and subject matter to ensure implementation of the State's enforceable policies. These enforceable policies must be sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses in order to assure wise use of the coastal zone. (Issues relating to the adequate scope of the program are dealt with in § 923.3.)

(b) The entity or entities which will exercise the program's authorities is a matter of State determination. They may be the state agency designated pursuant to section 306(d)(6) of the Act, other state agencies, regional or interstate bodies, and local governments. The major approval criterion is a determination that such entity or entities are required to exercise their authorities in conformance with the policies of the management program. Accordingly, the essential requirement is that the State demonstrate that there is a means of ensuring such compliance. This demonstration will be in the context of one or a combination of the three control techniques specified in section 306(d)(11) of the Act. The requirements related to section 306(d)(12) of the Act are described in §§ 923.42 through 923.44 of this subchapter.

(c) In determining the adequacy of the authorities and organization of a state's programs, the Assistant Administrator will review and evaluate authorities and organizational arrangements in light of the requirements of this subpart and the finding of section 302(h) of the Act.

(d) The authorities requirements of the Act dealt with in this subpart are those contained in subsections 306(d)(2)(D)—Means of Control; 306(d)(10)-Authorities; 306(d)(10)(A)-Control Development and Resolve Conflicts; 306(d)(10)(B)-Powers of Acquisition; 306(d)(11)—Techniques of Control; and 307(f)—Air and Water Quality Control Requirements. The organization requirements of the Act dealt with in this subpart are those contained in sections 306(d)(2)(F)—Organizational Structure; 306(d)(6)—Designated State Agency; and 306(d)(7)—Organization.

§ 923.41 Identification of authorities.

(a)(1) The management program must identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters, including a listing of relevant state constitutional provisions, laws, regulations, and judicial decisions. These are the means by which the state will enforce its coastal management policies. (See section 304(6a) of the Act.)

(2) The state chosen agency or agencies (including local governments, area-wide agencies, regional agencies, or interstate agencies) must have the authority for the management of the coastal zone. Such authority includes the following powers:

(i) To administer land use and water use regulations to control development to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(ii) To acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(b) In order to meet these requirements, the program must identify relevant state constitutional provisions, statutes, regulations, case law and such other legal instruments (including executive orders and interagency agreements) that will be used to carry out the state's management program, including the authorities pursuant to sections 306(d)(10) and 306(d)(11) of the Act which require a state to have the ability to:

(1) Administer land and water use regulations in conformance with the policies of the management program;

(2) Control such development as is necessary to ensure compliance with the management program;

(3) Resolve conflicts among competing uses; and

(4) Acquire appropriate interest in lands, waters or other property as necessary to achieve management objectives. Where acquisition will be a necessary technique for accomplishing particular program policies and objectives, the management program must indicate for what purpose acquisition will be used (*i.e.*, what policies or objectives will be accomplished); the type of acquisition (e.g., fee simple, purchase of easements, condemnation); and what agency (or agencies) of government have the authority for the specified type of acquisition.

§ 923.42 State establishment of criteria and standards for local implementation—Technique A.

(a) The management program must provide for any one or a combination of general techniques specified in subsection 306(d)(11) of the Act for control of land uses and water uses within the coastal zone. The first such control technique, at subsection 306(d)(11)(A) of the Act, is state establishment of criteria and standards for local implementation, subject to administrative review and enforcement (control technique A).

(b) There are 5 principal requirements that control technique A must embody in order to be approved:

(1) The State must have developed and have in effect at the time of program approval enforceable policies that meet the requirements of § 923.3. These policies must serve as the standards and criteria for local program development or the State must have separate standards and criteria, related to these enforceable policies, that will guide local program development.

(2) During the period while local programs are being developed, a State must have sufficient authority to assure that land and water use decisions subject to the management program will comply with the program's enforceable policies. The adequacy of these authorities will be judged on the same basis as specified for direct State controls or case-by-case reviews.

(3) A State must be able to ensure that coastal programs will be developed pursuant to the State's standards and criteria, or failing this, that the management program can be implemented directly by the State. This requirement can be met if a State can exercise any one of the following techniques:

(i) Direct State enforcement of its standards and criteria in which case a State would need to meet the requirements of this section which address the direct State control technique;

(ii) Preparation of a local program by a State agency which the local government then would implement. To use this technique the State must have statutory authority to prepare and adopt a program for a local government, and a mechanism by which the State can cause the local government to enforce the State-created program. Where the mechanism to assure local enforcement will be judicial relief, the program must include the authority under which judicial relief can be sought;

(iii) State preparation and enforcement of a program on behalf of a local government. Here the State must have the authority to:

(A) Prepare and adopt a plan, regulations, and ordinances for the local government and

(B) Enforce such plans, regulations and ordinances;

(iv) State review of local government actions on a case-by-case basis or on appeal, and prevention of actions inconsistent with the standards and criteria. Under this technique, when a local government fails to adopt an approvable program, the State must have the ability to review activities in the coastal zone subject to the management program and the power to prohibit, modify or condition those activities based on the policies, standards and criteria of the management program; or

(v) If a locality fails to adopt a management program, the State may utilize a procedure whereby the responsibility for preparing a program shifts to an intermediate level government, such as a county. If this intermediate level of government fails to produce a program, then the State must have the ability to take one of the actions described above. This alternative cannot be used where the intermediate level of government lacks the legal authority to adopt and implement regulations

necessary to implement State policies, standards and criteria.

(4) A State must have a procedure whereby it reviews and certifies the local program's compliance with State standards and criteria. This procedure must include provisions for:

(i) Opportunity for the public and governmental entities (including Federal agencies) to participate in the development of local programs; and

(ii) Opportunity for the public and governmental entities (including Federal agencies) to make their views known (through public hearings or other means) to the State agency prior to approval of local programs; and

(iii) Review by the State of the adequacy of local programs consideration of facilities identified in a State's management program in which there is a national interest.

(5) A State must be able to assure implementation and enforcement of a local program once approved. To accomplish this a State must:

(i) Establish a monitoring system which defines what constitutes and detects patterns of non-compliance. In the case of uses of regional benefit and facilities in which there is a national interest, the monitoring system must be capable of detecting single instances of local actions affecting such uses or facilities in a manner contrary to the management program.

(ii) Be capable of assuring compliance when a pattern of deviation is detected or when a facility involving identified national interests or a use of regional benefit is affected in a manner contrary to the program's policies. When State action is required because of failure by a local government to enforce its program, the State must be able to do one or a combination of the following:

(A) Directly enforce the entire local program;

(B) Directly enforce that portion of the local program that is being enforced improperly. State intervention would be necessary only in those local government activities that are violating the policies, standards or criteria.

(C) Seek judicial relief against local government for failure to properly enforce;

(D) Review local government actions on a case-by-case basis or on appeal and have the power to prevent those actions inconsistent with the policies and standards.

(E) Provide a procedure whereby the responsibility for enforcing a program shifts to an intermediate level of government, assuming statutory authority exists to enable the immediate of government to assume this responsibility.

§ 923.43 Direct State land and water use planning and regulation—Technique B.

(a) The management program must provide for any one or a combination of general techniques specified in subsection 306(d)(11) of the Act for control of land and water uses within the coastal zone. The second such control technique, at subsection 306(d)(11)(B) of the Act, is direct state land and water use planning and regulation (control technique B).

(b) To have control technique B approved, the State must have the requisite direct authority to plan and regulate land and water uses subject to the management program. This authority can take the form of:

(1) Comprehensive legislation—A single piece of comprehensive legislation specific to coastal management and the requirements of this Act.

(2) Networking—The utilization of authorities which are compatible with and applied on the basis of coastal management policies developed pursuant to § 923.3.

(c) In order to apply the networking concept, the State must:

(1) Demonstrate that, taken together, existing authorities can and will be used to implement the full range of policies and management techniques identified as necessary for coastal management purposes; and

(2) Bind each party which exercises statutory authority that is part of the management program to conformance with relevant enforceable policies and management techniques. Parties may be bound to conformance through an executive order, administrative directive or a memorandum of understanding provided that:

(i) The management program authorities provide grounds for taking action to ensure compliance of networked agencies with the program. It will be sufficient if any of the following can act to ensure compliance: The State agency designated pursuant to subsection 306(d)(6) of the Act, the State's Attorney General, another State agency, a local government, or a citizen.

(ii) The executive order, administrative directive or memorandum of understanding establishes conformance requirements of other State agency activities or authorities to management program policies. A gubernatorial executive order will be acceptable if networked State agency heads are directly responsible to the Governor.

(3) Where networked State agencies can enforce the management program policies at the time of section 306 approval without first having to revise their operating rules and regulations, then any proposed revisions to such rules and regulations which would enhance or facilitate implementation need not be accomplished prior to program approval. Where State agencies cannot enforce coastal policies without first revising their rules and regulations, then these revisions must be made prior to approval of the State's program by the Assistant Administrator.

§ 923.44 State review on a case-by-case basis of actions affecting land and water uses subject to the management program—Technique C.

(a) The management program must provide for any one or a combination of general techniques specified in subsection 306(d)(11) of the Act for control of land and water uses within the coastal zone. The third such control technique, at subsection 306(d)(11)(C) of the Act, is state administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings (control technique C).

(b) Under case-by-case review, States have the power to review individual development plans, projects or land and water use regulations (including variances and exceptions thereto) proposed by any State or local authority or private developer which have been identified in the management program as being subject to review for consistency with the management program. This control technique requires the greatest degree of policy specificity because compliance with the program will not require any prior actions on the part of anyone affected by the program. Specificity also is needed to avoid challenges that decisions (made pursuant to the management program) are unfounded, arbitrary or capricious.

(c) To have control technique C approved, a State must:

(1) Identify the plans, projects or regulations subject to review, based on their significance in terms of impacts on coastal resources, potential for incompatibility with the State's coastal management program, and having greater than local significance;

(2) Identify the State agency that will conduct this review;

(3) Include the criteria by which identified plans, projects and regulations will be approved or disapproved;

(4) Have the power to approve or disapprove identified plans, projects or regulations that are inconsistent with the management program, or the power to seek court review thereof; and

(5) Provide public notice of reviews and the opportunity for public hearing prior to rendering a decision on each case-by-case review.

§ 923.45 Air and water pollution control requirements.

The program must incorporate, by reference or otherwise, all requirements established by the Federal Water Pollution Control Act, as amended (Clean Water Act or CWA), or the Clean Air Act, as amended (CAA), or established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements must be the water pollution control and air pollution control requirements applicable to such program. Incorporation of the air and water quality requirements pursuant

to the CWA and CAA should involve their consideration during program development, especially with respect to use determinations and designation of areas for special management. In addition, this incorporation will prove to be more meaningful if close coordination and working relationships between the State agency and the air and water quality agencies are developed and maintained throughout the program development process and after program approval.

§ 923.46 Organizational structure.

The State must be organized to implement the management program. The management program must describe the organizational structure that will be used to implement and administer the management program including a discussion of those state and other agencies, including local governments, that will have responsibility for administering, enforcing and/or monitoring those authorities or techniques required pursuant to the following subsections of the Act: 306(d)(3)(B); 306(d)(10); 306(d)(10) (A) and (B); 306(d)(11) and (12); and 307(f). The management program must also describe the relationship of these administering agencies to the state agency designated pursuant to subsection 306(d)(6) of the Act.

§ 923.47 Designated State agency.

(a) For program approval, the Governor of the state must designate a single state agency to receive and administer the grants for implementing the management program.

(1) This entity must have the fiscal and legal capability to accept and administer grant funds, to make contracts or other arrangements (such as passthrough grants) with participating agencies for the purpose of carrying out specific management tasks and to account for the expenditure of the implementation funds of any recipient of such monies, and

(2) This entity must have the administrative capability to monitor and evaluate the management of the State's coastal resources by the various agencies and/or local governments with specified responsibilities under the management program (irrespective of whether such entities receive section 306 funds); to make periodic reports to the Office of Ocean and Coastal Resource Management (OCRM), the Governor, or the State legislature, as appropriate, regarding the performance of all agencies involved in the program. The entity also must be capable of presenting evidence of adherence to the management program or justification for deviation as part of the review by OCRM of State performance required by section 312 of the Act.

(b)(1) The 306 agency designation is designed to establish a single point of accountability for prudent use of administrative funds in the furtherance of the management and for monitoring of management activities. Designation does not imply that this single agency need be a ''super agency'' or the principal implementation vehicle. It is, however, the focal point for proper administration and evaluation of the State's program and the entity to which OCRM will look when monitoring and reevaluating a State's program during program implementation.

(2) The requirement for the single designated agency should not be viewed as confining or otherwise limiting the role and responsibilities which may be assigned to this agency. It is up to the State to decide in what manner and to what extent the designated State agency will be involved in actual program implementation or enforcement. In determining the extent to which this agency should be involved in program implementation or enforcement, specific factors should be considered, such as the manner in which local and regional authorities are involved in program implementation, the administrative structure of the State, the authorities to be relied upon and the agencies administering such authorities. Because the designated State agency may be viewed as the best vehicle for increasing the unity and efficiency of a management program, the State may want to consider the following in selecting which agency to designate:

(i) Whether the designated State entity has a legislative mandate to coordinate other State or local programs, plans and/or policies within the coastal zone;

(ii) To what extent linkages already exist between the entity, other agencies, and local governments;

(iii) To what extent management or regulatory authorities affecting the coastal zone presently are administered by the agency; and

(iv) Whether the agency is equipped to handle monitoring, evaluation and enforcement responsibilities.

§ 923.48 Documentation.

A transmittal letter signed by the Governor is required for the submission of a management program for federal approval. The letter must state that the Governor:

(a) Has reviewed and approved as State policy, the management program, and any changes thereto, submitted for the approval of the Assistant Administrator.

(b) Has designated a single State agency to receive and administer implementation grants;

(c) Attests to the fact that the State has the authorities necessary to implement the management program; and

(d) Attests to the fact that the State is organized to implement the management program.

Subpart F—Coordination, Public Involvement and National Interest

SOURCE: 61 FR 33812, June 28, 1996, unless otherwise noted.

§ 923.50 General.

(a) Coordination with governmental agencies having interests and responsibilities affecting the coastal zone, and involvement of interest groups as well as the general public is essential to the development and administration of State coastal management programs. The coordination requirements of this subpart are intended to achieve a proper balancing of diverse interests in the coastal zone. The policies of section 303 of the Act require that there be a balancing of variety, sometimes conflicting, interests, including:

(1) The preservation, protection, development and, where possible, the restoration or enhancement of coastal resources;

(2) The achievement of wise use of coastal land and water resources with full consideration for ecological, cultural, historic, and aesthetic values and needs for compatible economic development;

(3) The involvement of the public, of Federal, state and local governments and of regional agencies in the development and implementation of coastal management programs;

(4) The management of coastal development to improve, safeguard, and restore coastal water quality; and

(5) The study and development of plans for addressing the adverse effects of coastal hazards, including erosion, flooding, land subsidence and sea level rise.

(b) In order to be meaningful, coordination with and participation by various units and levels of government including regional commissions, interest groups, and the general public should begin early in the process of program development and should continue throughout on a timely basis to assure that such efforts will result in substantive inputs into a State's management program. State efforts should be devoted not only to obtaining information necessary for developing the management program but also to obtaining reactions and recommendations regarding the content of the management program and to responding to concerns by interested parties. The requirements for intergovernmental cooperation and public participation continue after program approval.

(c) This subpart deals with requirements for coordination with governmental entities, interest groups and the general public to assure that their interests are fully expressed and considered during the program development process and that procedures are created to insure continued consideration of their views during program implementation. In addition, this subpart deals with mediation procedures for serious disagreements between States and Federal agencies that occur during program development and implementation. This subpart addresses the requirements of the following subsections of the Act: 306(d)(1)—Opportunity for Full Participation; 306(d)(3)(A)—Plan Coordination; 306(d)(3)(B)—Continued State-Local

Consultation; 306(d)(4)—Public Hearings; 306(d)(8)—Consideration of the National Interest in Facilities; 307(b)—Federal Consultation; and 307(h)—Mediation.

§ 923.51 Federal-State consultation.

(a) The management program must be developed and adopted with the opportunity of full participation by relevant Federal agencies and with adequate consideration of the views of Federal agencies principally affected by such program.

(b) By providing relevant Federal agencies with the opportunity for full participation during program development and for adequately considering the views of such agencies, States can effectuate the Federal consistency provisions of subsections 307 (c) and (d) of the Act once their programs are approved. (See 15 CFR part 930 for a full discussion of the Federal consistency provisions of the Act.)

(c) In addition to the consideration of relevant Federal agency views required during program development, Federal agencies have the opportunity to provide further comment during the program review and approval process. (See subpart G for details on this process.) Moreover, in the event of a serious disagreement between a relevant Federal agency and designated State agency during program development or during program implementation, the mediation provisions of subsection 307(h) of the Act are available. (See § 923.54 for details on mediation.)

(d) In order to provide an opportunity for participation by relevant Federal agencies and give adequate consideration to their views, each state must:

(1) Contact each relevant Federal Agency listed in § 923.2(d) and such other Federal agencies as may be relevant, owing to a State's particular circumstances, early in the development of its management program. The purpose of such contact is to develop mutual arrangements or understandings regarding that agency's participation during program development;

(2) Provide for Federal agency input on a timely basis as the program is developed. Such input shall be related both to information required to develop the management program and to evaluation of and recommendations concerning various elements of the management program;

(3) Solicit statements from the head of Federal agencies identified in Table 1 of § 923.52(c)(1) as to their interpretation of the national interest in the planning for and siting of facilities which are more than local in nature;

(4) Summarize the nature, frequency, and timing of contacts with relevant Federal agencies;

(5) Evaluate Federal comments received during the program development process and, where appropriate in the opinion of the State, accommodate the substance of pertinent comments in the management program. States must consider and evaluate relevant Federal agency views or comments about the following:

(i) Management of coastal resources for preservation, conservation, development, enhancement or restoration purposes;

(ii) Statements of the national interest in the planning for or siting of facilities which are more than local in nature;

(iii) Uses which are subject to the management program;

(iv) Areas which are of particular concern to the management program;

(v) Boundary determinations;

(vi) Shorefront access and protecting planning, energy facility planning and erosion planning processes; and

(vii) Federally developed or assisted plans that must be coordinated with the management program pursuant to subsection 306(d)(3) of the Act.

(6) Indicate the nature of major comments by Federal agencies provided during program development (either by including copies of comments or by summarizing comments) and discuss any major differences or conflicts between the management program and Federal views that have not been resolved at the time of program submission.

§ 923.52 Consideration of the national interest in facilities.

(a) The management program must provide for adequate consideration of the national interest involved in planning for, and managing the coastal

zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the State must have considered any applicable national or interstate energy plan or program.

(b) The primary purpose of this requirement is to assure adequate consideration by States of the national interest involved in the planning for and siting of facilities (which are necessary to meet other than local requirements) during:

(1) The development of the State's management program,

(2) The review and approval of the program by the Assistant Administrator, and

(3) The implementation of the program as such facilities are proposed.

(c) In order to fulfill this requirement, States must:

(1) Describe the national interest in the planning for and siting of facilities considered during program development.

(2) Indicate the sources relied upon for a description of the national interest in the planning for and siting of the facilities.

(3) Indicate how and where the consideration of the national interest is reflected in the substance of the management program. In the case of energy facilities in which there is a national interest, the program must indicate the consideration given any national or interstate energy plans or programs which are applicable to or affect a state's coastal zone.

(4) Describe the process for continued consideration of the national interest in the planning for and siting of facilities during program implementation, including a clear and detailed description of the administrative procedures and decisions points where such interest will be considered.

§ 923.53 Federal consistency procedures.

(a) A State must include in its management program submission, as part of the body of the submission an appendix or an attachment, the procedures it will use to implement the Federal consistency requirements of subsections 307 (c) and (d) of the Act. At a minimum, the following must be included:

(1) An indication of whether the state agency designated pursuant to subsection 306(d)(6) of the Act or a single other agency will handle consistency review (see 15 CFR 930.18);

(2) A list of Federal license and permit activities that will be subject to review (see 15 CFR 930.53);

(3) For States anticipating coastal zone effects from Outer Continental Shelf (OCS) activities, the license and permit list also must include OCS plans which describe in detail Federal license and permit activities (see 15 CFR 930.74); and

(4) The public notice procedures to be used for certifications submitted for Federal License and permit activities and, where appropriate, for OCS plans (see 15 CFR 930.61 through 930.62 and 930.78).

(b) Beyond the minimum requirements contained in paragraph (a) of this section, States have the option of including:

(1) A list of Federal activities, including development projects, which in the opinion of the State agency are likely to significantly affect the coastal zone and thereby will require a Federal agency consistency determination (see 15 CFR 930.35); and

(2) A description of the types of information and data necessary to assess the consistency of Federal license and permit activities and, where appropriate, those described in detail in OCS plans (see 15 CFR 930.56 and 930.75).

§ 923.54 Mediation.

(a) Section 307(h) of the Act provides for mediation of serious disagreement between any Federal agency and a coastal state in the development and implementation of a management program. In certain cases, mediation by the Secretary, with the assistance of the Executive Office of the President, may be an appropriate forum for conflict resolution.

(b) State-Federal differences should be addressed initially by the parties involved. Whenever a serious disagreement cannot be resolved between the parties concerned, either party may request the informal assistance of the Assistant Administrator in resolving

the disagreement. This request shall be in writing, stating the points of disagreement and the reason therefore. A copy of the request shall be sent to the other party to the disagreement.

(c) If a serious disagreement persists, the Secretary or other head of a relevant Federal agency, or the Governor or the head of the state agency designated by the Governor as administratively responsible for program development (if a state still is receiving section 305 program development grants) or for program implementation (if a state is receiving section 306 program implementation grants) may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the serious disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees and to the Assistant Administrator.

(d) Secretarial mediation efforts shall last only so long as the parties agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

(e) Mediation shall terminate:

(1) At any time the parties agree to a resolution of the serious disagreement,

(2) If one of the parties withdraws from mediation,

(3) In the event the parties fail to reach a resolution of the serious disagreement within 15 days following Secretarial mediation efforts, and the parties do not agree to extend mediation beyond that period, or

(4) For other good cause.

(f) The availability of the mediation services provided in this section is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided herein.

§ 923.55 Full participation by State and local governments, interested parties, and the general public.

The management program must be developed and adopted with the opportunity of full participation by state agencies, local governments, regional commissions and organizations, port authorities, and other interested public and private parties. To meet this requirement, a State must:

(a) Develop and make available general information regarding the program design, its content and its status throughout program development;

(b) Provide a listing, as comprehensive as possible, of all governmental agencies, regional organizations, port authorities and public and private organizations likely to be affected by or to have a direct interest in the development and implementation of the management program;

(c) Indicate the nature of major comments received from interested or affected parties, identified in paragraph (b)(2) of this section, and the nature of the State's response to these comments; and

(d) Hold public meetings, workshops, etc., during the course of program development at accessible locations and convenient times, with reasonable notice and availability of materials.

§ 923.56 Plan coordination.

(a) The management program must be coordinated with local, areawide, and interstate plans applicable to areas within the coastal zone—

(1) Existing on January 1 of the year in which the state's management program is submitted to the Secretary; and

(2) Which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency.

(b) A State must insure that the contents of its management program has been coordinated with local, areawide and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the State's management program is submitted to the Assistant Administrator for approval. To document this coordination, the management program must:

(1) Identify local governments, areawide agencies and regional or interstate agencies which have plans affecting the coastal zone in effect on January 1 of the year in which the management program is submitted;

(2) List or provide a summary of contacts with these entities for the purpose of coordinating the management program with plans adopted by a governmental entity as of January 1 of the year in which the management program is submitted. At a minimum, the following plans, affecting a State coastal zone, shall be reviewed: Land use plans prepared pursuant to section 701 of the Housing and Urban Development Act of 1968, as amended; State and areawide waste treatment facility or management plans prepared pursuant to sections 201 and 208 of the Clean Water Act, as amended; plans and designations made pursuant to the National Flood Insurance Act of 1968, as amended, and the Flood Disaster Protection Act of 1973, as amended; hazard mitigation plans prepared pursuant to section 409 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act; any applicable interstate energy plans or programs developed pursuant to section 309 of the Act; regional and interstate highway plans; plans developed by Regional Action Planning Commission; and fishery management plans developed pursuant to the Fisheries Conservation and Management Act.

(3) Identify conflicts with those plans of a regulatory nature that are unresolved at the time of program submission and the means that can be used to resolve these conflicts.

§ 923.57 Continuing consultation.

(a) As required by subsection 306(d)(3)(B) of the Act, a State must establish an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) of section 306(d) of the Act and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this Act.

(b) The management program must establish a procedure whereby local governments with zoning authority are notified of State management program decisions which would conflict with any local zoning ordinance decision.

(1) ''Management program decision'' refers to any major, discretionary policy decisions on the part of a management agency, such as the determination of permissible land and water uses, the designation of areas or particular concern or areas for preservation or restoration, or the decision to acquire property for public uses. Regulatory actions which are taken pursuant to these major decisions are not subject to the State-local consultation mechanisms. A State management program decision is in conflict with a local zoning ordinance if the decision is contradictory to that ordinance. A State management program decision that consists of additional but not contradictory requirements is not in conflict with a local zoning ordinance, decision or other action;

(2) ''Local government'' refers to these defined in section 304(11) of the Act which have some form of zoning authority.

(3) ''Local zoning ordinance, decision or other action'' refers to any local government land or water use action which regulates or restricts the construction, alteration of use of land, water or structures thereon or thereunder. These actions include zoning ordinances, master plans and official maps. A local government has the right to comment on a State management program decision when such decision conflicts with the above specified actions;

(4) Notification must be in writing and must inform the local government of its right to submit comments to the State management agency in the event the proposed State management program decision conflicts with a local zoning ordinance, decision or other action. The effect of providing such notice is to stay State action to implement its management decision for at least a 30-day period unless the local government waives its right to comment.

(5) ''Waiver'' of the right of local government to comment (thereby permitting a State agency to proceed immediately with implementation of the management program decision) shall result:

(i) Following State agency receipt of a written statement from a local government indicating that it either:

(A) Waives its right to comment; or

(B) Concurs with the management program decision; or

(C) Intends to take action which conflicts or interferes with the management program decision; or

(ii) Following a public statement by a local government to the same effect as paragraph (b)(5)(i) of this section; or

(iii) Following an action by a local government that conflicts or interferes with the management program decision.

(6) The management program shall include procedures to be followed by a management agency in considering a local government's comments. These procedures shall include, at a minimum, circumstances under which the agency will exercise its discretion to hold a public hearing. Where public hearings will be held, the program must set forth notice and other hearing procedures that will be followed. Following State agency consideration of local comments (when a discretionary public hearing is not held) or following public hearing, the management agency shall provide a written response to the affected local government, affected local government, within a reasonable period of time and prior to implementation of the management program decision, on the results of the agency's consideration of public comments.

§ 923.58 Public hearings.

The management program must be developed and adopted after the holding of public hearings. A State must:

(a) Hold a minimum of two public hearings during the course of program development, at least one of which will be on the total scope of the coastal management program. Hearings on the total management program do not have to be held on the actual document submitted to the Assistant Administrator for section 306 approval. However, such hearing(s) must cover the substance and content of the proposed management program in such a manner that the general public, and particularly affected parties, have a reasonable opportunity to understand the impacts of the management program. If the hearing(s) are not on the management document per se, all requests for such document must be honored and comments on the document received prior to submission of the document to the Assistant Administrator must be considered;

(b) Provide a minimum of 30 days public notice of hearing dates and locations;

(c) Make available for public review, at the time of public notice, all agency materials pertinent to the hearings; and

(d) Include a transcript or summary of the public hearing(s) with the State's program document or submit same within thirty (30) days following submittal of the program to the Assistant Administrator. At the same time this transcript or summary is submitted to the Assistant Administrator, it must be made available, upon request, to the public.

Subpart G—Review/Approval Procedures

SOURCE: 61 FR 33815, June 28, 1996, unless otherwise noted.

§ 923.60 Review/approval procedures.

(a) All state management program submissions must contain an environmental assessment at the time of submission of the management program to OCRM for threshold review. In accordance with regulations implementing the National Environmental Policy Act of 1969, as amended, OCRM will assist the State by outlining the types of information required. (See 40 CFR § 1506.5 (a) and (b).)

(b) Upon submission by a State of its draft management program, OCRM will determine if it adequately meets the requirements of the Act and this part. Assuming positive findings are made and major revisions to the State's draft management program are not required, OCRM will prepare draft and final environmental impact statements, in accordance with National Environmental Policy Act requirements. Because the review process involves preparation and dissemination of draft and final environmental impact statements and lengthy Federal agency review; states should anticipate that it will take at

least 7 months between the time a state first submits a draft management program to OCRM for threshold review and the point at which the Assistant Administrator makes a final decision on whether to approve the management program. Certain factors will contribute to lengthening or shortening this time table; these factors are discussed in OCRM guidance on the review/approval process. The OCRM guidance also recommends a format for the program document submitted to the Assistant Administrator for review and approval.

Subpart H—Amendments to and Termination of Approved Management Programs

SOURCE: 61 FR 33815, June 28, 1996, unless otherwise noted.

§ 923.80 General.

(a) This subpart establishes the criteria and procedures by which amendments, modifications or other changes to approved management programs may be made. This subpart also establishes the conditions and procedures by which administrative funding may be terminated for programmatic reasons.

(b) Any coastal state may amend or modify a management program which it has submitted and which has been approved by the Assistant Administrator under this subsection, subject to the conditions provided for subsection 306(e) of the Act.

(c) As required by subsection 312(d) of the Act, the Assistant Administrator shall withdraw approval of the management program of any coastal state and shall withdraw financial assistance available to that state under this title as well as any unexpended portion of such assistance, it the Assistant Administrator determines that the coastal state has failed to take the actions referred to in subsection 312(c)(2)(A) of the Act.

(d) For purposes of this subpart, amendments are defined as substantial changes in one or more of the following coastal management program areas:

(1) Uses subject to management;

(2) Special management areas;

(3) Boundaries;

(4) Authorities and organization; and

(5) Coordination, public involvement and the national interest.

(e) OCRM will provide guidance on program changes. The five program management areas identified in § 923.80(d) are also discussed in subpart B through F of this part.

§ 923.81 Requests for amendments.

(a) Requests for amendments shall be submitted to the Assistant Administrator by the Governor of a coastal state with an approved management program or by the head of the state agency (designated pursuant to subsection 306(d)(6) of the Act) if the Governor had delegated this responsibility and such delegation is part of the approved management program. Whenever possible, requests should be submitted prior to final State action to implement the amendment. At least one public hearing must be held on the proposed amendment, pursuant to subsection 306(d)(4) of the Act. Pursuant to section 311 of the Act, notice of such public hearing(s) must be announced at least 30 days prior to the hearing date. At the time of the announcement, relevant agency materials pertinent to the hearing must be made available to the public.

(b) Amendment requests must contain the following:

(1) A description of the proposed change, including specific pages and text of the management program that will be changed if the amendment is approved by the Assistant Administrator. This description shall also identify any enforceable policies to be added to the management program;

(2) An explanation of why the change is necessary and appropriate, including a discussion of the following factors, as relevant; changes in coastal zone needs, problems, issues, or priorities. This discussion also shall identify which findings, if any made by the Assistant Administrator in approving the management program may need to be modified if the amendment is approved;

(3) A copy of public notice(s) announcing the public hearing(s) on the proposed amendments;

(4) A summary of the hearing(s) comments:

(i) Where OCRM is providing Federal agency review concurrent with the notice period for the State's public hearing, this summary of hearing(s) comments may be submitted to the Assistant Administrator within 60 days after the hearing;

(ii) Where hearing(s) summaries are submitted as a supplement to the amendment request (as in the case described in paragraph (b)(1) of this section), the Assistant Administrator will not take final action to approve or disapprove an amendment request until the hearing(s) summaries have been received and reviewed; and

(5) Documentation of opportunities provided relevant Federal, State, regional and local agencies, port authorities and other interested public and private parties to participate in the development and approval at the State level of the proposed amendment.

[61 FR 33815, June 28, 1996; 61 FR 36965, July 15, 1996]

§ 923.82 Amendment review/approval procedures.

(a) Upon submission by a State of its amendment request, OCRM will review the request to determine preliminarily if the management program, if changed according to the amendment request, still will constitute an approvable program. In making this determination, OCRM will determine whether the state has satisfied the applicable program approvability criteria of subsection 306(d) of the Act.

(b) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would no longer constitute an approvable program, or if any of the procedural requirements of section 306(d) of the Act have not been met, the Assistant Administrator shall advise the state in writing of the reasons why the amendment request cannot be considered.

(c) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would still constitute an approvable program and that the procedural requirements of section 306(d) of the Act have been met, the Assistant Administrator will then determine, pursuant to the National Environmental Policy Act of 1969, as amended, whether an environmental impact statement (EIS) is required.

§ 923.83 Mediation of amendments.

(a) Section 307(h)(2) of the Act provides for mediation of ''serious disagreements'' between a Federal agency and a coastal State during administration of an approved management program. Accordingly mediation is available to states or federal agencies when a serious disagreement regarding a proposed amendment arises.

(b) Mediation may be requested by a Governor or head of a state agency designated pursuant to subsection 306(d)(6) or by the head of a relevant federal agency. Mediation is a voluntary process in which the Secretary of Commerce attempts to mediate between disagreeing parties over major problems. (See § 923.54).

§ 923.84 Routine program changes.

(a) Further detailing of a State's program that is the result of implementing provisions approved as part of a State's approved management program, that does not result in the type of action described in § 923.80(d), will be considered a routine program change. While a routine change is not subject to the amendment procedures contained in §§ 923.81 through 923.82, it is subject to mediation provisions of § 923.83.

(b)(1) States must notify OCRM of routine program change actions in order that OCRM may review the action to ensure it does not constitute an amendment. The state notification shall identify any enforceable policies to be added to the management program, and explain why the program change will not result in the type of action described in § 923.80(d).

(i) States have the option of notifying OCRM of routine changes on a case-by-case basis, periodically throughout the year, or annually.

(ii) In determining when and how often to notify OCRM of such actions, States should be aware that Federal consistency will apply only after the notice required by paragraph (b)(4) of this section has been provided.

(2) Concurrent with notifying OCRM, States must provide notice to the general public and affected parties, including local governments, other State agencies and regional offices of relevant federal agencies of the notification given OCRM.

(i) This notice must:

(A) Describe the nature of the routine program change and identify any enforceable policies to be added to the management program if the State's request is approved;

(B) Indicate that the State considers it to be a routine program change and has requested OCRM's concurrence in that determination; and

(C) Indicate that any comments on whether or not the action does or does not constitute a routine program change may be submitted to OCRM within 3 weeks of the date of issuance of the notice.

(ii) Where relevant Federal agencies do not maintain regional offices, notice must be provided to the headquarters office.

(3) Within 4 weeks of receipt of notice from a State, OCRM will inform the State whether it concurs that the action constitutes a routine program change. Failure to notify a State in writing within 4 weeks of receipt of notice shall be considered concurrence.

(4) Where OCRM concurs, a State then must provide notice of this fact to the general public and affected parties, including local governments, other State agencies and relevant Federal agencies.

(i) This notice must:

(A) Indicate the date on which the State received concurrence from OCRM that the action constitutes a routine program change;

(B) Reference the earlier notice (required in paragraph (b)(2) of this section) for a description of the content of the action; and

(C) Indicate if Federal consistency applies as of the date of the notice called for in this paragraph.

(ii) Federal consistency shall not be required until this notice has been provided.

(5) Where OCRM does not concur, a State will be advised to:

(i) submit the action as an amendment, subject to the provisions of §§ 923.81 through 923.82; or

(ii) resubmit the routine program change with additional information requested by OCRM concerning how the program will be changed as a result of the action.

[61 FR 33815, June 28, 1996; 61 FR 36965, July 15, 1996]

Subpart I—Applications for Program Development or Implementation Grants

SOURCE: 61 FR 33816, June 28, 1996, unless otherwise noted.

§ 923.90 General.

(a) The primary purpose of development grants made pursuant to section 305 of the Act is to assist coastal States in the development of comprehensive coastal management programs that can be approved by the Assistant Administrator. The primary purpose of implementation grants made pursuant to section 306 of the Act is to assist coastal States in implementing coastal management programs following their approval, including especially administrative actions to implement enforceable program policies, authorities and other management techniques. The purpose of the guidelines in this subpart is to define the procedures by which grantees apply for and administer grants under the Act. These guidelines shall be used and interpreted in conjunction with applicable Federal laws and policies, Department of Commerce grants management regulations, policies and procedures, and any other applicable directives from the NOAA Grants Management Division and OCRM program offices.

(b) Grants awarded to a State must be expended for the development or administration, as appropriate, of a management program that meets the requirements of the Act, and in accordance with the terms of the award.

(c) All applications for funding under section 305 or 306 of the Act, including proposed work programs, funding priorities and allocations are subject to the

discretion of the Assistant Administrator.

(d) For purposes of this subpart, the term *development grant* means a grant awarded pursuant to subsection 305(a) of the Act. ''Administrative grant'' and ''implementation grant'' are used interchangeably and mean grants awarded pursuant to subsection 306(a) of the Act.

(e) All application and preapplication forms are to be requested from and submitted to: National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, Coastal Programs Division, 1305 East-West Highway (N/ORM3), Silver Spring, MD 20910.

§ 923.91 State responsibility.

(a) Applications for program grants are required to be submitted by the Governor of a participating state or by the head of the state entity designated by the Governor pursuant to subsection 306(d)(6) of the Act.

(b) In the case of a section 305 grant, the application must designate a single state agency or entity to receive development grants and to be responsible for development of the State's coastal management program. The designee need not be that entity designated by the Governor pursuant to subsection 306(d)(6) of the Act as a single agency to receive and administer implementation grants.

(c) One State application will cover all program activities for which program development or implementation funds under this Act and matching State funds are provided, irrespective of whether these activities will be carried out by State agencies, areawide or regional agencies, local governments, or interstate entities.

(d) The designated state entity shall be fiscally responsible for all expenditures made under the grant, including expenditures by subgrantees and contractors.

§ 923.92 Allocation.

(a) Subsections 303(4), 306(d)(3)(B) and 306(d)(10) of the Act foster intergovernmental cooperation in that a state, in accordance with its coastal zone management program, may allocate some of its coastal zone management responsibilities to several agencies, including local governments, areawide agencies, regional agencies and interstate agencies. Such allocations provide for continuing consultation and more effective participation and cooperation among state and local governments, interstate, regional and areawide agencies.

(b) A State may allocate a portion or portions of its grant to other State agencies, local governments, areawide or regional agencies, interstate entities, or Indian tribes, if the work to result from such allocation(s) will contribute to the effective development or implementation of the State's management program.

(1) Local governments. Should a State desire to allocate a portion of its grant to a local government, units of general-purpose local government are preferred over special-purpose units of local government. Where a State will be relying on direct State controls as provided for in subsection 306(d)(11)(B) of the Act, pass-throughs to local governments for local planning, regulatory or administrative efforts under a section 306 grant cannot be made, unless they are subject to adequate State overview and are part of the approved management program. Where the approved management program provides for other specified local activities or one-time projects, again subject to adequate State overview, then a portion of administrative grant funds may be allocated to local governments.

(2) Indian Tribes. Tribal participation in coastal management efforts may be supported and encouraged through a State's program. Individual tribes or groups of tribes may be considered regional agencies and may be allocated a portion of a State's grant for the development of independent tribal coastal management programs or the implementation of specific management projects provided that:

(i) The State certifies that such tribal programs or projects are compatible with its approved coastal management policies; and

(ii) On excluded tribal lands, the State demonstrates that the tribal program or project would or could directly affect the State's coastal zone.

§ 923.93 Eligible implementation costs.

(a) Costs claimed must be beneficial and necessary to the objectives of the grant project. As used herein the terms cost and grant project pertain to both the Federal and the matching share. Allowability of costs will be determined in accordance with the provisions of OMB Circular A–87: Cost Principles for State, Local and Indian Tribal Governments.

(b) Federal funds awarded pursuant to section 306 of the Act may not be used for land acquisition purposes and may not be used for construction purposes. These costs may be eligible, however, pursuant to section 306A of the Act.

(c) The primary purpose for which implementation funds, pursuant to section 306 of the Act, are to be used is to assure effective implementation and administration of the management program, including especially administrative actions to implement enforceable program policies, authorities and other management techniques. Implementation activities should focus on achieving the policies of the Act.

(d) Section 306 funding in support of any of these purposes may be used to fund, among other things:

(1) Personnel costs,

(2) Supplies and overhead,

(3) Equipment, and

(4) Feasibility studies and preliminary engineering reports.

(e) States are encouraged to coordinate administrative funding requests with funding possibilities pursuant to sections 306A, 308, 309, 310 and 315 of the Act, as well as with funding possibilities pursuant to section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990. When in doubt as to the appropriate section of the Act under which to request funding, States should consult with OCRM. States should consult with OCRM on technical aspects of consolidating requests into a single application.

§ 923.94 Application for program development or implementation grants.

(a) OMB Standard Form 424 (4–92) and the NOAA Application Kit for Federal Assistance constitute the formal application. An original and two (2) copies must be submitted 45 days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with E.O. 12372 requirements including the resolution of any problems raised by the proposed project. The administrative requirements for grants and subawards, under this program, to state, local and Indian tribal governments are set out in 15 CFR part 24. The administrative requirements for other entities are prescribed under OMB Circular A–110: Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations.

(b) Costs claimed as charges to the grant project must be beneficial and necessary to the objectives of the grant project. As used herein, the terms ''cost'' and ''grant project'' pertain to both the Federal amount awarded and the non-federal matching share. Allowability of costs will be determined in accordance with the provisions of OMB Circular A–87: Cost Principles for State, Local and Indian Tribal Governments. Eligible implementation costs also shall be determined in accordance with § 923.93 of these regulations. Allowability of costs for non-profit organizations will be determined in accordance with OMB Circular A–122: Cost Principles for Non-Profit Organizations. Allowability of costs for institutions of higher education will be determined in accordance with OMB Circular A–21: Cost Principles for Educational Institutions.

(c) In the grant application, the applicant must describe clearly and briefly the activities that will be undertaken with grant funds in support of implementation and administration of the management program. This description must include:

(1) An identification of those elements of the approved management program that are to be supported in whole or in part by the Federal and the matching share,

(2) A clear statement of the major tasks required to implement each element,

(3) For each task the application must:

(i) Specify how it will be accomplished and by whom;

(ii) Identify any sub-awardees (other State agencies, local governments, individuals, etc.) that will be allocated responsibility for carrying out all or portions of the task, and indicate the estimated cost of the sub-awards for each allocation; and

(iii) Indicate the estimated total cost.

(4) The sum of all task costs in paragraph (c)(3) of this section should equal the total estimated grant project cost.

(d) For program development grants, when evaluating whether a State is making satisfactory progress toward completion of an approvable management program which is necessary to establish eligibility for subsequent grants, the Assistant Administrator will consider:

(1) The progress made toward meeting management program goals and objectives;

(2) The progress demonstrated in completing the past year's work program;

(3) The cumulative progress toward meeting the requirements for preliminary or final approval of a coastal management program;

(4) The applicability of the proposed work program to fulfillment of the requirements for final approval; and

(5) The effectiveness of mechanisms for insuring public participation and consultation with affected Federal, State, regional and local agencies in program development.

§ 923.95 Approval of applications.

(a) The application for a grant by any coastal State which complies with the policies and requirements of the Act and these guidelines shall be approved by the NOAA Grants Officer, upon recommendation by the Assistant Administrator, assuming available funding.

(b) Should an application be found deficient, the Assistant Administrator will notify the applicant in detail of any deficiency when an application fails to conform to the requirements of the Act or these regulations. Conferences may be held on these matters. Corrections or adjustments to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The NOAA Grants Officer, upon recommendation by the Assistant Administrator, may waive appropriate administrative requirements contained in this subpart, upon finding of extenuating circumstances relating to applications for assistance.

§ 923.96 Grant amendments.

(a) Actions that require an amendment to a grant award such as a request for additional Federal funds, changes in the amount of the non-Federal share, changes in the approved project budget as specified in 15 CFR part 24, or extension of the grant period must be submitted to the Assistant Administrator and approved in writing by the NOAA Grants Officer prior to initiation of the contemplated change. Such requests should be submitted at least 30 days prior to the proposed effective date of the change and, if appropriate, accompanied by evidence of compliance with E.O. 12372 requirements.

(b) NOAA shall acknowledge receipt of the grantee's request within the ten (10) working days of receipt of the correspondence. This notification shall indicate NOAA's decision regarding the request; or indicate a time-frame within which a decision will be made.

Subpart J—Allocation of Section 306 Program Administration Grants

§ 923.110 Allocation formula.

(a) As required by subsection 306(a), the Secretary may make grants to any coastal state for the purpose of administering that state's management program, if the state matches any such grant according to the following ratios of Federal-to-state contributions for the applicable fiscal year:

(1) For those states for which programs were approved prior to enactment of the Coastal Zone Act Reauthorization Amendments of 1990, 1 to 1 for any fiscal year.

(2) For programs approved after enactment of the Coastal Zone Act Reauthorization Amendments of 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

(3) As required by subsection 306(b), the Secretary may make a grant to a coastal state under subsection 306(a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this title and has been approved in accordance with subsection 306(d).

(4) As required by subsection 306(c), grants under this section shall be allocated to coastal states under approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

(b) *Minimum/maximum allocations.* The Assistant Administrator shall establish minimum and maximum state allocations annually, after consultation with the coastal states.

(c) *Allocation formula factors and weighting.* Each State eligible to receive a financial assistance award shall be allocated an amount of the total available Federal funding based on:

(1) A minimum share (established by the Assistant Administrator) of the total funding available for allocation to eligible State coastal management programs, plus

(2) A proportionate share of the remainder to be divided as follows:

(i) Sixty percent will be allocated based on each eligible State's proportionate share of the length of tidal shoreline and/or Great Lake shoreline mileage of all participating States based on the most recently available data from or accepted by the National Ocean Survey, and

(ii) Forty percent will be allocated on each eligible State's proportionate share of the aggregate population of all coastal counties contained in whole or in part within the designated coastal boundary of all eligible State coastal programs based on official data or the most recent U.S. census.

(3) Should any State's base allocation exceed the maximum established by the Assistant Administrator, the excess amount shall be subtracted from the established maximum and redistributed proportionately among those eligible States with allocations not exceeding the established maximum.

(d) *Use of the allocation formula.* The allocation formula shall be used to establish base level allocations for each State coastal management program eligible to receive Federal funding.

(e) *Adjustment for phase down of Federal funding.* The Assistant Administrator may adjust base level allocations as necessary to implement a phase down of Federal financial support. Any such adjustment shall be implemented in a manner which gives some priority to recently approved State coastal management programs. Options for implementation of a phase down will be submitted to the States for review and comment.

(f) *Calculation of financial assistance award levels.* Actual financial assistance award levels will be set from base level allocations, any adjustments under paragraph (e) above, and in accordance with the provisions of Section 312(c) and (d).

(Secs. 306 and 317 of the Coastal Zone Management Act)

[47 FR 21021, May 17, 1982, as amended at 59 FR 27985, May 31, 1994. Redesignated at 61 FR 33818, June 28, 1996]

Subpart K—Coastal Zone Enhancement Grants Program

AUTHORITY: Section 309 of the Coastal Zone Management Act, as amended (16 U.S.C. 1456).

SOURCE: 57 FR 31116, July 14, 1992, unless otherwise noted. Redesignated at 61 FR 33818, June 28, 1996.

§923.121 General.

(a) The purpose of this subpart is to set forth the criteria and procedures for awarding coastal zone enhancement grants under section 309 of the Coastal Zone Management Act, as amended (16 U.S.C. 1456). This subpart describes the criteria States must address in developing and implementing coastal zone enhancement objectives, the procedures for allocating section 309 funds between weighted formula and individual review of proposals of special

merit, how the amount of section 309 weighted formula grants will be determined, the criteria NOAA will use to evaluate and rank individual proposals of special merit, and the procedures for applying for financial assistance under section 309. This subpart also allows use of section 309 funds for implementation of program changes for up to 2 fiscal years following the fiscal year in which a program change was approved.

(b) A coastal State with an approved program under section 306 of the Coastal Zone Management Act (CZMA), as amended (16 U.S.C. 1455), is eligible for grants under this subpart if the State meets the following requirements:

(1) The State must have a NOAA approved Assessment and Strategy, submitted in accordance with NOAA guidance and 923.128;

(2) The State must be found to be adhering to its approved program and must be making satisfactory progress in performing grant tasks under section 306, as indicated by not being under interim or final sanctions; and

(3) The State must be making satisfactory progress in carrying out its previous year's award under section 309.

(c) If the Assistant Administrator finds that a State is not undertaking the actions committed to under the terms of a section 309 grant, the Assistant Administrator shall suspend the State's eligibility for future funding under this section for at least one year.

(d) A State's eligibility for future funding under this section will be restored after the State demonstrates, to the satisfaction of the Assistant Administrator, that it will conform with the requirements under this part.

(e) Funds awarded to States under section 309 are for the enhancement of existing coastal zone management programs. A State which reduces overall State financial support for its CZM program as a result of having been awarded section 309 funding may lose eligibility for funding under section 309 in subsequent years.

(f) All applications for funding under section 309 of the CZMA, as amended, including proposed work programs, funding priorities and funding awards, are subject to the administrative discretion of the Assistant Administrator and any additional NOAA guidance.

(g) Grants awarded under section 309 may be used:

(1) To support up to 100 percent of the allowable costs of approved projects under section 309 of the CZMA, as amended; or

(2) To implement program changes approved by the Secretary for up to two fiscal years following the fiscal year in which a program change was approved.

(h) All application forms are to be requested from and submitted to: National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, Coastal Programs Division, 1305 East-West Highway (N/ORM3), Silver Spring, MD 20910.

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, June 28, 1996; 62 FR 12541, Mar. 17, 1997]

§ 923.122 Objectives.

(a) The objective of assistance provided under this part is to encourage each State with a federally-approved coastal management program to continually improve its program in specified areas of national importance. The Secretary is authorized to make grants to a coastal State for the development and submission for Federal approval of program changes that support attainment of one or more coastal zone enhancement objectives.

(b) As required by section 309(a) of the Act, for purposes of this part, the term *coastal zone enhancement objective* means any of the following objectives:

(1) Protection, restoration, or enhancement of the existing coastal wetlands base, or creation of new coastal wetlands.

(2) Preventing or significantly reducing threats to life and destruction of property by eliminating development and redevelopment in high-hazard areas, managing development in other hazard areas, and anticipating and managing the effects of potential sea level rise and Great Lakes level rise.

(3) Attaining increased opportunities for public access, taking into account current and future public access needs,

to coastal areas of recreational, historical, aesthetic, ecological, or cultural value.

(4) Reducing marine debris entering the Nation's coastal and ocean environment by managing uses and activities that contribute to the entry of such debris.

(5) Development and adoption of procedures to assess, consider, and control cumulative and secondary impacts of coastal growth and development, including the collective effect on various individual uses or activities on coastal resources, such as coastal wetlands and fishery resources.

(6) Preparing and implementing special area management plans for important coastal areas.

(7) Planning for the use of ocean resources.

(8) Adoption of procedures and enforceable policies to help facilitate the siting of energy facilities and Government facilities and energy-related activities and Government activities which may be of greater than local significance.

(9) Adoption of procedures and policies to evaluate and facilitate the siting of public and private aquaculture facilities in the coastal zone, which will enable States to formulate, administer, and implement strategic plans for marine aquaculture.

[57 FR 31116, July 14, 1992. Redesignated at 61 FR 33818, June 28, 1996, as amended at 62 FR 12541, Mar. 17, 1997]

§923.123 Definitions.

(a) *Program change* means ''routine program change'' as defined in 15 CFR 923.84 and ''amendment'' as defined in 15 CFR 923.80, and includes the following:

(1) A change to coastal zone boundaries that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(2) New or revised authorities, including statutes, regulations, enforceable policies, administrative decisions, executive orders, and memoranda of agreement/understanding, that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(3) New or revised local coastal programs and implementing ordinances that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(4) New or revised coastal land acquisition, management and restoration programs that improve a State's ability to attain one or more of the coastal zone enhancement objectives.

(5) New or revised Special Area Management Plans or plans for Areas of Particular Concern (APC), including enforceable policies and other necessary implementing mechanisms or criteria and procedures for designating and managing APCs that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(6) New or revised guidelines, procedures and policy documents which are formally adopted by a State and provide specific interpretations of enforceable CZM policies to applicants, local governments and other agencies that will result in meaningful improvements in coastal resource management and that will improve a State's ability to attain one or more of the coastal zone enhancement objectives.

(b) *Assessment* means a public document, prepared by a State and approved by NOAA in accordance with guidance on Assessments and Strategies issued by NOAA (hereafter referred to as the guidance[1]), that identifies the State's priority needs for improvement with regard to the coastal zone enhancement objectives. The Assessment determines the extent to which problems and opportunities exist with regard to each of the coastal zone enhancement objectives and the effectiveness of efforts to address those problems. The Assessment includes the factual basis for NOAA and the States to determine the priority needs for improvement of management programs in accordance with this part.

(c) *Strategy* means a comprehensive, multi-year statement of goals and the methods for their attainment, prepared by a State in accordance with NOAA guidance and these regulations and approved by NOAA, that sets forth the

[1] NOAA guidance is available from the Office of Ocean and Coastal Resource Management, Coastal Programs Division, 1305 East-West Highway (N/ORM3), Silver Spring, MD 20910.

specific program changes the State will seek to achieve in one or more of the coastal zone enhancement objectives. The Strategy will address only the priority needs for improvement identified by the Assistant Administrator, after careful consultation with the State. The strategy will include specific task descriptions, cost estimates and milestones, as appropriate.

(d) *Weighted Formula Project* means a project or task for which NOAA awards funding based on the criteria at § 923.125(a). Such tasks are essential to meeting the milestones and objectives of each state's strategy. As funding for weighted formula tasks is more predictable than for projects of special merit, basic functions necessary to achieve the objectives of the strategy, such as hiring of full time staff should be included in weighted formula tasks.

(e) *Projects of Special Merit (PSM)* means a project or task that NOAA will rank and evaluate based on criteria at § 923.125(b). As PSM funds will be awarded competitively on an annual basis, these projects should further the objectives of the strategy but may not be essential to meeting specific benchmarks in the strategy. PSM projects should not be dependent on long term levels of funding to succeed.

(f) *Fiscal needs* means the extent to which a State must rely solely on Federal funds to complete a project under section 309 because State funds are not otherwise available.

(g) *Technical needs* means the extent to which a State lacks trained personnel or equipment or access to trained personnel or equipment to complete a project under section 309.

(h) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, or the NOAA Official responsible for directing the Federal Coastal Zone Management Program.

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, 33819, June 28, 1996]

§ 923.124 Allocation of section 309 funds.

(a)(1) As required by section 309(e) of the Act, a State will not be required to contribute any portion of the cost of any proposal for which funding is awarded under this section.

(2) As required by section 309(f) of the Act, beginning in fiscal year 1991, not less than 10 percent and not more than 20 percent of the amounts appropriated to implement sections 306 and 306A of the Act shall be retained by the Secretary for use in implementing this section, up to a maximum of $10,000,000 annually.

(b) The Assistant Administrator will annually determine the amount of funds to be devoted to section 309, which shall be not less than 10 percent nor more than 20 percent of the total amount appropriated under section 318(a)(2) of the Coastal Zone Management Act, as amended (16 U.S.C. 1464), taking into account the total amount appropriated under section 318(a)(2). The total amount of funds to be devoted to section 309 shall not exceed $10,000,000 annually.

(c) Of the total amount determined in paragraph (b) of this section, the Assistant Administrator will annually determine the proportion to be awarded to eligible coastal States by weighted formula and the proportion to be awarded to eligible coastal States for projects of special merit. This determination will take into account the total amount appropriated under section 318(a)(2) of the CZMA, as amended.

(d) *Weighted formula funding.* (1)(i) A weighted formula funding target will be determined for each State that meets the eligibility requirements at § 923.121(b). The weighted formula funding target will be the State base allocation determined by the application of the formula at § 923.110(c), multiplied by a weighting factor derived from the Assistant Administrator's evaluation and ranking of the quality of the State's Strategy (as described in (d)(1) of this section), as supported by the State's Assessment.

(ii) The application of the weighting factor may result in a weighted formula funding target that is higher or lower than the State's base allocation. Each State's weighted formula funding target will be adjusted to reflect the funds available.

(iii) The Assistant Administrator may establish minimum and maximum weighted formula funding targets under § 923.124(d).

(2) The Assistant Administrator will determine each State's weighting factor based on an evaluation and ranking of the State's Strategy that takes into consideration the following:

(i) The scope and value of the proposed program change(s) contained in the Strategy in terms of improved coastal resource management;

(ii) The technical merits of the Strategy in terms of project design and cost effectiveness;

(iii) The likelihood of success that the State will have in attaining the proposed program change(s), including an evaluation of the State's past performance and support for the Strategy; and,

(iv) The fiscal and technical needs of the State.

(3) Each State will be notified individually of its weighting factor, the reasons for assigning this weighting factor, and any changes thereto. In consultation with the Assistant Administrator, a State may choose to make substantive changes to its approved Assessment and Strategy to improve its weighting factor, in accordance with the procedures at §923.128.

(e) *Funding for projects of special merit.* The Assistant Administrator will award the remaining section 309 funds, which are not awarded under §923.124(d), to States based on an annual evaluation and ranking of projects of special merit, as defined in §923.123(d). Funding of projects of special merit will be limited to the highest ranked projects based on the criteria at §923.125(b).

(f) The Assistant Administrator will notify each State annually of the total amount of funds to be devoted to section 309 pursuant to §923.124(b), the proportion to be awarded by weighted formula pursuant to §923.124(c), the State's weighted formula funding target pursuant to §923.124(d), and the total amount of funds available for funding for projects of special merit pursuant to §923.124(e).

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, 33819, June 28, 1996]

§923.125 Criteria for section 309 project selection.

(a) *Section 309 criteria for weighted formula funding.* (1) For those projects that will be funded by weighted formula, the Assistant Administrator will determine that:

(i) The project is consistent with the State's approved Assessment and Strategy and advances the attainment of the objectives of the Strategy;

(ii) Costs are reasonable and necessary to achieve the objectives of both the project and the Strategy. Allowability of costs will be determined in accordance with the provisions of OMB Circular A–87: Cost Principles for State and Local Governments

(iii) The project is technically sound;

(iv) The State has an effective plan to ensure proper and efficient administration of the project; and

(v) The State has submitted the required project information as specified in §923.126(b)(1).

(2) In reviewing projects that will be considered under the weighted formula, the Assistant Administrator will take into consideration the fiscal and technical needs of proposing States and the overall merit of each proposal in terms of benefits to the public.

(b) *Section 309 criteria for evaluation and ranking of projects of special merit.* (1) After determining those projects that will be funded under weighted formula funding, the Assistant Administrator will evaluate and rank State funding proposals of special merit which may be funded under 15 CFR 932.4(e).

(2) In addition to meeting the criteria in paragraph (a)(1) of this section, proposals will be evaluated and ranked under this subsection using the following criteria:

(i) *Merit.* (90 points) The Assistant Administrator will review each application to determine the following:

(A) Degree to which the project significantly advances the program improvements and leads to a program change identified in the State's Strategy. In making this determination, the Assistant Administrator shall consider the weighting factor derived from the evaluation of the quality of the State's Strategy, as supported by the State's Assessment, relative to the weighting factors assigned to other eligible States;

(B) Overall benefit of the project to the public relative to the project's cost;

(C) Innovativeness of the proposal;

(D) Transferability of the results to problems in other coastal States; and

(E) The State's past performance under section 309.

(ii) *Fiscal needs.* (5 points) The Assistant Administrator will review each application to determine the ''fiscal needs'' of a State as defined in § 923.123(e).

(iii) *Technical needs.* (5 points) The Assistant Administrator will review each application to determine the ''technical needs'' of a State as defined in § 923.123(f).

(c) Section 309 funds not awarded to States under § 923.125(a) will be awarded to States under § 923.125(b).

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, 33819, June 28, 1996]

§ 923.126 Pre-application procedures.

(a) *Pre-submission consultation.* Each State is strongly encouraged to consult with the Assistant Administrator prior to the submission of its draft proposal (see § 923.126(b)) and formal application for section 309 funding. The purpose of the consultation will be to determine whether the proposed projects are consistent with the purposes and objectives of section 309 and with the State's approved Strategy, to resolve any questions concerning eligibility for funding under section 309 (see § 923.121(b)), and to discuss preliminarily the State's recommendations regarding which projects should be funded by weighted formula and which projects should be individually evaluated and ranked as projects of special merit.

(b) *Draft proposals.* States shall submit draft proposals for section 309 funding annually on a schedule to be determined by the Assistant Administrator. These draft proposals shall contain all of the information needed for final application, including the following:

(1) A clear and concise description of the projects that the State proposes to be funded under section 309. This description shall explain the relationship of each proposed project to the State's approved Assessment and Strategy and how each proposed project will accomplish all or part of a program change that the State has identified in its Strategy. In addition, each project description shall include:

(i) A specific timetable for completion of each project;

(ii) A description of the activities that will be undertaken to complete each project and by whom;

(iii) The identification of any subawardees, pursuant to § 923.94(d)(3)(ii); and

(iv) The estimated total cost for each project.

(2) Section 309 funds may be used for any of the following allowable uses which support the attainment of a program change:

(i) Personnel costs;

(ii) Supplies and overhead;

(iii) Travel;

(iv) Equipment (pursuant to 15 CFR part 24);

(v) Projects, studies and reports; and

(vi) Contractual costs including subcontracts, subawards, personal service contracts with individuals, memoranda of agreement/understanding, and other forms of passthrough funding for the purpose of carrying out the provisions of section 309.

(3) Funds may not be used for land acquisition or low cost construction projects.

(4) The State may recommend which projects should be funded by weighted formula under § 923.125(a) and which projects should be funded as projects of special merit under § 923.125(b).

(5) The draft proposal shall contain documentation of fiscal needs and technical needs, if any. This documentation shall include:

(i) For fiscal needs, information on the current State budget (surplus or deficit), the budget of the applying agency (increase or decrease over previous fiscal year), future budget projections, and what efforts have been made by the applying agency, if any, to secure additional State funds from the Legislature and/or from off-budget sources such as user fees; and

(ii) For technical needs, identification of the technical knowledge, skills and equipment that are needed to carry out proposed projects and that are not available to the applying agency, and what efforts the applying agency has

made, if any, to obtain the trained personnel and equipment it needs (for example, through agreements with other State agencies).

(6) The Assistant Administrator may request additional documentation of fiscal and technical needs.

(7) Following the first year of funding under section 309, the draft proposal shall describe how the past year's work contributed to the attainment of a program change as defined in §923.123(a) in one or more of the coastal zone enhancement objectives.

(8) If the sum of estimated project costs for projects the State recommends be funded under §923.125(a) exceeds the State's weighted formula funding target pursuant to §923.124(d), NOAA shall determine, in consultation with the State, which projects are appropriate for funding with weighted formula funds.

(c) *Review of draft proposals.* (1) The Assistant Administrator will make the final determination of which projects should be funded by weighted formula and which projects should be funded as projects of special merit, taking into account the State's recommendations.

(2) The Assistant Administrator may seek advice from technical experts in the fields of the coastal zone enhancement objectives as to the technical soundness and overall merit of section 309 project proposals.

(3) The Assistant Administrator will make the final determinations on project selection using the criteria at §923.125(a) and evaluate and rank projects of special merit based on the criteria at §923.125(b).

(4) If the Assistant Administrator determines that a State's project proposal(s) for weighted formula funding fails to meet the criteria at §923.125(a), the Assistant Administrator may either reduce or deny the amount available to the State under §923.124(d).

(5) Each state will be notified of the results of the review of draft proposals, as described in paragraphs (c) (3) and (4) of this section, in time to include approved section 309 projects in their applications for financial assistance pursuant to subpart I of 15 CFR part 923.

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, 33819, June 28, 1996]

§923.127 Formal application for financial assistance and application review and approval procedures.

(a) Applications for financial assistance under this part must be developed and submitted on the same schedule as applications for financial assistance under subpart I of 15 CFR part 923.

(b) Applications for financial assistance under this part must be in a separate section of the application and must contain the information specified at §923.126(b)(1) for each approved section 309 project.

(c) Applications will be reviewed for conformance with the regulations at subpart I of 15 CFR part 923.

(d) States will be notified of their section 309 awards at the time they are notified of their section 306/306A awards.

(e) If the Assistant Administrator seeks technical advice pursuant to §923.126(c)(2), anonymous copies of the project reviews provided to the Assistant Administrator on projects proposed by a State will be made available to the State upon request after October 1 of each year.

[57 FR 31116, July 14, 1992. Redesignated and amended at 61 FR 33818, 33819, June 28, 1996]

§923.128 Revisions to assessments and strategies.

(a) A State, in consultation with the Assistant Administrator, may propose to revise its approved Strategy. Revision(s) to an approved Strategy must be submitted to and approved by the Assistant Administrator prior to the initiation of the contemplated change.

(b) The Assistant Administrator will review such proposed revision(s) and determine if public review and comment is required. This determination will be based on the extent to which the proposed revision(s) changes the original scope of the State's Strategy.

(c) If the Assistant Administrator determines that public review and comment is necessary, he/she will notify the State of his/her determination. The State will be required to provide public review and comment in accordance with NOAA guidance.

(d) A State that wants to revise substantively the program changes identified in its approved Strategy or to address new enhancement objectives not

identified as a priority in the original Assessment, also must revise the Assessment through a public process as described in NOAA's guidance.

(e) The Assistant Administrator, in consultation with the State, may reduce a state's weighting factor assigned to its Strategy as a result of failure to meet the milestones in its Strategy.

(f) The Assistant Administrator will notify the State of his/her decision to approve or deny the proposed revision(s) to the Strategy, and any change in the weighting factor assigned to its Strategy.

Subpart L—Review of Performance

AUTHORITY: Section 312 of the Coastal Zone Management Act, as amended (16 U.S.C. 1458).

§ 923.131 General.

This subpart sets forth the requirements for review of approved State coastal zone management (CZM) programs pursuant to section 312 of the Act (16 U.S.C. 1458). This subpart defines ''continuing review'' and other important terms, and sets forth the procedures for:

(a) Conducting continuing reviews of approved State CZM programs;

(b) Providing for public participation;

(c) Invoking interim sanctions for non-adherence to an approved coastal zone management program or a portion of such program; and

(d) Withdrawing program approval and financial assistance.

[57 FR 31113, July 14, 1992. Redesignated and amended at 61 FR 33818, June 28, 1996]

§ 923.132 Definitions.

(a) *Continuing review* means monitoring State performance on an ongoing basis. As part of the continuing review, evaluations of approved CZM programs will be conducted and written findings will be produced at least once every three years.

(b) *Adherence* means to comply with the approved CZM program and financial assistance award or work program.

(c) *Interim sanction* means suspension and redirection of any portion of financial assistance extended to any coastal State under this title, if the Secretary determines that the coastal State is failing to adhere to the management program or a State plan developed to manage a national estuarine reserve, or a portion of the program or plan approved by the Secretary, or the terms of any grant or cooperative agreement funded under this title.

(d) *Approved CZM program* means those elements of the program approved by the Secretary, under 15 CFR part 923 (Development and Approval Provisions), including any changes to those elements made by approved amendments and routine program implementation.

(e) *Financial assistance award* means a legal instrument that creates a relationship between the Federal government and another entity (recipient). The principal purpose of the award is the transfer of money or services in order to accomplish a public purpose authorized by Federal statute. The term ''financial assistance award'' encompasses grants, loans, and cooperative agreements. The following elements constitute the award:

(1) The work program described in the approved application;

(2) The budget;

(3) The standard terms and conditions of the award;

(4) Any special award conditions included with the award;

(5) The statutes and regulations under which the award is authorized; and

(6) Applicable OMB cost principles and administrative requirements.

(f) *Work program* means a description of the tasks to be undertaken by a State for a given time period for the purpose of implementing and enforcing an approved CZM program. The work program is submitted as a part of a Federal financial assistance application, or separately in the absence of Federal financial assistance.

(g) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, or the NOAA Official responsible

for directing the Federal Coastal Zone Management Program.

[47 FR 21021, May 17, 1982, as amended at 57 FR 31113, July 14, 1992. Redesignated at 61 FR 33818, June 28, 1996]

§923.133 Procedure for conducting continuing reviews of approved State CZM programs.

(a) As required by section 312(a), the Secretary shall conduct a continuing review of the performance of coastal States with respect to coastal management. Each review shall include a written evaluation with an assessment and detailed findings concerning the extent to which the State has implemented and enforced the program approved by the Secretary, addressed the coastal management needs identified in section 303(2)(A) through (K), and adhered to the terms of any grant, loan, or cooperative agreement funded under this title (16 U.S.C. 1451–1464).

(b) *Continuing review procedures.* (1) Each State will submit a financial assistance application or work program, whichever is applicable, on a timetable negotiated with the Assistant Administrator, describing the tasks to be undertaken by the State for the purpose of implementing and enforcing its approved CZM program.

(2) For the purpose of evaluation, the States will submit performance reports as specified in the Special Award Conditions, or, if the State is not receiving an award, as negotiated with the Assistant Administrator. The reports will address all areas identified in each State's Performance Report Guidelines.

(3) The Assistant Administrator will collect information on the State CZM programs on a continuing basis. At the beginning of each evaluation, the Assistant Administrator will analyze available information, identify information gaps, and formulate any additional information needs that will be the subject of a supplemental information request to the State.

(4) The Assistant Administrator may conduct a site visit as a part of the evaluation.

(5) Draft findings of the evaluation will be transmitted to the State. The State will have a minimum of two weeks from receipt of the draft findings to review them and provide comments to the Assistant Administrator. This review time may be extended upon request from the State.

(6) Within two weeks from receipt of the draft findings, a State may request a meeting with the Assistant Administrator to discuss the draft findings and the State's comments.

(7) The Assistant Administrator will issue final findings to the State CZM program manager and the head of the State CZM agency within 120 days of the last public meeting in the State. Copies of the final findings will be sent to all persons and organizations who participated in the evaluation. Participants may be asked to complete a card or sign-in sheet provided by the evaluation team indicating that they wish to receive the final findings. Notice of the availability of the final findings will also be published in the FEDERAL REGISTER.

(8) The final findings will contain a section entitled ''Response to Written Comments.'' This section will include a summary of all written comments received during the evaluation and NOAA's response to the comments. If appropriate, NOAA's response will indicate whether NOAA agrees or disagrees with the comment and how the comment has been addressed in the final findings.

(9) The Assistant Administrator may conduct issue or problem-specific evaluations between scheduled evaluations of approved State CZM programs. Such issue or problem-specific evaluations will be conducted to follow-up on potentially serious problems or issues identified in the most recent scheduled evaluation or to evaluate evidence of potentially serious problems or issues that may arise during day-to-day monitoring of State performance of grants tasks or other program implementation activities in the interim between scheduled evaluations. If the Assistant Administrator conducts an issue or problem specific evaluation, he/she will comply with the procedures and public participation requirements of §§923.133 and 923.134.

(c) Requirements for continuing review of approved State CZM programs.

(1) *Scope of continuing reviews.* The continuing review of a State's approved

CZM program will include an evaluation of the extent to which the State has:

(i) Implemented and enforced the program approved by the Secretary;

(ii) Addressed the coastal management needs identified in section 303(2) (A)–(K) (16 U.S.C. 1452); and

(iii) Adhered to the terms of financial assistance awards.

(2) *Procedure for assessing adherence to the approved CZM program.* (i) In reviewing adherence of a State to its approved CZM program, the Assistant Administrator will evaluate all aspects of the ''approved CZM program'' as defined in § 923.132(d). The evaluation will examine the extent to which:

(A) The State is implementing and enforcing its approved CZM program;

(B) The management agency is effectively playing a leadership role in coastal issues, monitoring the actions of appropriate State and local agencies for compliance with the approved CZM program, and assuring the opportunity for full participation of all interested entities in CZM program implementation; and

(C) The management agency is effectively carrying out the provisions of Federal consistency.

(ii) The findings concerning the State's adherence to its approved CZM program will be used in negotiating the next financial assistance award or work program, whichever is applicable.

(3) Procedure for assessing how the State has addressed the coastal management needs identified in section 303(2) (A)–(K). The assessment of the extent to which the State has addressed the coastal management needs identified in section 303(2) (A)–(K) will occur as follows:

(i) The State, in its performance report, will provide the Assistant Administrator with a listing of all actions it is taking during the performance report period to address the national coastal management needs and how these actions relate to conditions in the State and the objectives and priorities in the State CZM program.

(ii) The Assistant Administrator, in the evaluation findings, will assess the extent to which the State's actions are targeted to meeting identified ''needs'' and the effectiveness of the actions in addressing those needs. Based on this assessment, the Assistant Administrator will make findings and recommendations of the extent to which each State is addressing the coastal management needs identified in section 303.

(iii) The findings concerning how the State has addressed the coastal management needs of section 303 will be used by the Assistant Administrator in negotiating the next financial assistance award.

(4) *Procedure for assessing adherence to the terms of financial assistance awards.* (i) Adherence to financial and administrative terms of each financial assistance award will be determined by the NOAA Grants Office and the Department of Commerce Inspector General. Adherence to programmatic terms of each financial assistance award will be determined by the Assistant Administrator and the NOAA Grants Office. These determinations will be made in accordance with the requirements outlined in these regulations, the findings of a financial audit of the award, and the following criteria:

(A) Compliance with the statute, regulations, and applicable OMB circulars;

(B) Submission of required reports and satisfactory completion of work products as described in the approved application and within the timeframe specified;

(C) Compliance with Standard Terms and Conditions and Special Award Conditions within the specified timeframes;

(D) Use of award funds only for approved projects; and

(E) Substantive modification of approved projects only with the prior agreement of NOAA.

(ii) The findings concerning adherence to the terms of financial assistance awards will be used in negotiating the next financial assistance award, if any.

(d) Requirements for continuing review of State coastal energy impact programs.

(1) *Scope of continuing reviews.* The continuing review of State coastal energy impact programs will include the following elements:

(i) An evaluation of the State's adherence to the terms of financial assistance awards;

(ii) An evaluation of the relationship between coastal energy impact projects and the approved CZM program;

(iii) A description of energy activities in coastal areas and the impact resulting from these activities; and

(iv) An evaluation of the effectiveness of the coastal energy impact program in dealing with these consequences.

(2) *Procedure for assessing adherence to the terms of financial assistance awards.* See §923.133(c)(4).

[47 FR 21021, May 17, 1982, as amended at 57 FR 31114, July 14, 1992. Redesignated and amended at 61 FR 33818, June 28, 1996]

§923.134 Public participation.

(a) As required by section 312(b) of the Act, in evaluating a coastal State's performance, the Secretary shall conduct the evaluation in an open and public manner, and provide full opportunity for public participation, including holding public meetings in the State being evaluated and providing opportunities for the submission of written and oral comments by the public. The Secretary shall provide the public with at least 45 days notice of such public meetings by placing a notice in the FEDERAL REGISTER, by publication of timely notices in newspapers of general circulation within the State being evaluated, and by communications with persons and organizations known to be interested in the evaluation. Each evaluation shall be prepared in report form and shall include written responses to the written comments received during the evaluation process.

(b) *Requirements.* (1) The Assistant Administrator will publish a Notice of Intent to Evaluate in the FEDERAL REGISTER at least 45 days before the public meeting(s). The notice will include a Statement of the availability of the State's performance report and the supplemental information request.

(2) Each State will issue a notice of the public meeting(s) in its evaluation by placing a notice in the newspaper(s) of largest circulation in the coastal area where the meeting(s) is being held and by taking other reasonable action to communicate with persons and organizations known to be interested in the evaluation, such as sending a notice of the meeting(s) to persons on its mailing list and publishing a notice in its newsletter, at least 45 days before the date of the public meeting(s). The State will provide a copy of such notice to the Assistant Administrator. States are encouraged to republish the newspaper notice at least 15 days before the date of the public meeting(s). The State will inform the public that oral or written comments will be accepted and that attendance at the public meeting(s) is not necessary for submission of written comments.

(3) Notice of the availability of final findings will be published in the FEDERAL REGISTER. The notice will state that copies of the final findings will be available to the public upon written request. Copies of the final findings will be sent to persons and organizations who participated in the evaluation, in accordance with 923.133(b)(7).

[47 FR 21021, May 17, 1982, as amended at 57 FR 31114, July 14, 1992. Redesignated and amended at 61 FR 33818, June 28, 1996]

§923.135 Enforcement.

(a) *Procedures and criteria for invoking and lifting interim sanctions.* (1) As required by section 312(c) of the Act:

(i) The Secretary may suspend payment of any portion of financial assistance extended to any coastal State, and may withdraw any unexpended portion of such assistance, if the Secretary determines that the coastal State is failing to adhere to—

(A) The management program or a State plan developed to manage a national estuarine reserve established under section 315 of the Act (16 U.S.C. 1461), or a portion of the program or plan approved by the Secretary; or

(B) The terms of any grant or cooperative agreement funded under this title (16 U.S.C. 1451–1464).

(ii) Financial assistance may not be suspended under paragraph (a)(1)(i) of this section unless the Secretary provides the Governor of the coastal State with—

(A) Written specifications and a schedule for the actions that should be taken by the State in order that such

suspension of financial assistance may be withdrawn; and

(B) Written specifications stating how those funds from the suspended financial assistance shall be expended by the coastal State to take the actions referred to in paragraph (a)(1)(ii)(A) of this section.

(iii) The suspension of financial assistance may not last for less than 6 months or more than 36 months after the date of suspension.

(2) *Requirements.* (i) The Assistant Administrator will identify the need for interim sanctions through the continuing review process. The Assistant Administrator will use the criteria at § 923.135(a)(3) in determining when to invoke interim sanctions.

(ii) The Assistant Administrator will issue the State a preliminary finding of non-adherence with the approved CZM program, or a portion thereof, and/or with a term or terms of a grant or cooperative agreement. This preliminary finding of non-adherence may be contained in the draft evaluation findings, or in a preliminary notification letter to the State CZM program manager. If the preliminary finding is contained in a preliminary notification letter, the Assistant Administrator will comply with the applicable public participation requirements of section 312(b) and NOAA's regulations at § 923.134. The draft evaluation findings or preliminary notification letter containing a preliminary finding of non-adherence will explain that if the finding of non-adherence is issued, the State is subject to suspension of financial assistance and, if the State fails to take the actions specified pursuant to section 312(c) and this part, to withdrawal of program approval and financial assistance.

(iii) The State will be given 30 days from receipt of the draft evaluation findings or preliminary notification letter to comment on and rebut the preliminary finding of non-adherence. During this 30-day period, the State may request up to 15 additional days to respond, for a maximum of 45 days from receipt of the draft evaluation findings or preliminary notification letter.

(iv) After considering the State's comments, the Assistant Administrator will decide whether or not to issue a final finding of non-adherence. If the Assistant Administrator decides to issue a final finding of non-adherence, he/she will do so in the final evaluation findings issued pursuant to section 312(b) or in a final notification letter as provided by paragraph (a)(2)(ii) of this section. The Assistant Administrator may invoke interim sanctions provided by section 312(c) immediately or at any time after issuing the final evaluation findings or final notification letter containing the finding of non-adherence, but not later than the next regularly scheduled evaluation.

(v) If the Assistant Administrator decides to invoke interim sanctions, he/she will do so by sending the final evaluation findings or final notification letter to the Governor of the State and the State CZM program manager. The final evaluation findings or final notification letter will contain the information required in section 312(c)(2) (A) and (B). This information will include the amount of financial assistance to be suspended and redirected, the actions the State should take in order to have the suspension withdrawn, how the suspended funds shall be expended to take the required actions, and a schedule for taking the required actions. The final evaluation findings or final notification letter will also contain the length of the suspension, which may not last for less than 6 months or more than 36 months. The Assistant Administrator will establish the length of the suspension based on the amount of time that is reasonably necessary for the State to take the required actions. If the State can take the required actions faster than expected, the suspension can be withdrawn early (but not in less than six months).

(vi) The State must respond to the final evaluation findings or final notification letter by developing a proposed work program to accomplish the required actions on the schedule set forth in the final evaluation findings or final notification letter. The State may propose an alternative approach to accomplishing the required actions and/or an alternative schedule. The Assistant Administrator's approval of the State's work program will signify his/her

agreement with the approach and schedule for accomplishing the actions necessary to withdraw the suspension.

(vii) The Assistant Administrator will monitor State performance under the work program. This may involve additional direction to the State through the grant administration process and/or a visit to the State by appropriate NOAA program staff, evaluation staff and/or other experts to work with the State on a specific problem or issue. The Assistant Administrator will consider proposals to revise the work program on a case-by-case basis, providing that the State will still be able to accomplish the necessary actions within a maximum of 36 months.

(viii) The State must document that it has taken the required actions on the schedule established under this section. The State must provide its documentation in writing to the Assistant Administrator. The Assistant Administrator may conduct a follow-up evaluation or otherwise revisit the State at his/her discretion.

(ix) If the Assistant Administrator determines that the required actions have been taken, the Assistant Administrator will promptly notify the Governor and the State program manager, in writing, that NOAA has withdrawn the suspension of financial assistance. If, however, the State does not take the required actions, then the Assistant Administrator will invoke the final sanction provisions of section 312(d) on program termination and withdrawal of all financial assistance.

(3) *Criteria for invoking interim sanctions.* (i) The Assistant Administrator may consider the following indicators of non-adherence to an approved State CZM program in determining whether to invoke interim sanctions.

(A) Ineffective or inconsistent implementation of legally enforceable policies included in the CZM program. Indicators of ineffective or inconsistent implementation could include: evidence of non-compliance with core authorities by the regulated community; insufficient monitoring and inspecting of coastal development to ensure that it conforms to program requirements and applicable conditions; or inadequate enforcement action when development is found not to be in compliance with the program or permit under which it is authorized or is found to be an unpermitted activity. In applying this indicator, NOAA will consider any available evidence of the impacts of ineffective or inconsistent implementation on coastal resources.

(B) Inadequate monitoring of the actions of State and local agencies for compliance with the program. Indicators of inadequate monitoring of these agencies could include: evidence of non-compliance of networked agencies with the CZM program, unresolved conflicts between agencies regarding what constitutes compliance with the program, or lack of a mechanism to ensure that all State agencies will adhere to the program or to approved local coastal programs pursuant to NOAA's regulations at 15 CFR 923.40 (and pursuant to new section 306(d)(15), after November 5, 1993 and after states have been given reasonable opportunity to comply with NOAA's implementing guidance).

(C) Non-compliance of local coastal programs with the approved State program. Indicators of non-compliance could include: Local permitting or zoning decisions that are inconsistent with State standards or criteria, widespread granting of variances such as to render a zoning program ineffective in meeting State standards or criteria, changes to local comprehensive plans or zoning maps that are inconsistent with State standards or criteria, or inadequate monitoring and enforcement, as described in paragraph (a)(3)(i)(A) of this section.

(D) Ineffective implementation of Federal consistency authority. Indicators of ineffective implementation could include: Not reviewing Federal activities, Federal licenses and permits, including offshore oil and gas exploration and development, and Federal financial assistance to State and local governments for consistency with the approved CZM program or employing review procedures that are not in accordance with State and NOAA regulations.

(E) Inadequate opportunity for intergovernmental cooperation and public participation in management program implementation. Indicators of inadequate opportunity could include: not

carrying out procedures necessary to insure adequate consideration of the national interest in facilities which are necessary to meet requirements which are other than local in nature, not implementing effectively mechanisms for continuing consultation and coordination, not providing required notice that a management program decision would conflict with a local zoning ordinance, decision or other action pursuant to section 306(d)(3)(B)(i) and 15 CFR 923.57, or not providing opportunities for public participation in permitting processes, consistency determinations and other similar decisions pursuant to new section 306(d)(14) after November 5, 1993 and after states have been given reasonable opportunity to comply with NOAA's implementing guidance.

(F) Non-adherence to the terms of a grant or cooperative agreement, including the schedule for funded activities. The Assistant Administrator will also consider the extent to which priorities for expenditure of Federal funds reflect an appropriate priority for activities necessary to implement and enforce core program authorities effectively.

(G) Not submitting changes to the approved program for Federal approval on a schedule developed pursuant to 15 CFR 923.81(a) and 923.84(b)(1)(i) or developing and implementing changes to the approved program without Federal approval which are inconsistent with the Act or the approved program or which result in a reduced level of protection of coastal resources.

(ii) The Assistant Administrator may consider whether an indication of non-adherence is of recent origin (in which case the State may be given a reasonable opportunity to correct it) or has been repeatedly brought to the State's attention without corrective action in determining whether to invoke interim sanctions.

(b) *Withdrawal of program approval and financial assistance.* (1) As required by sections 312(d) and 312(e) of the Act:

(i) The Secretary shall withdraw approval of the management program of any coastal State and shall withdraw financial assistance available to that State under this title as well as any unexpended portion of such assistance, if the Secretary determines that the coastal State has failed to take the actions referred to in paragraph (a)(1)(ii)(A) of this section.

(ii) Management program approval and financial assistance may not be withdrawn under paragraph (b)(1)(i) of this section, unless the Secretary gives the coastal State notice of the proposed withdrawal and an opportunity for a public hearing on the proposed action. Upon the withdrawal of management program approval under paragraph (b)(1)(i) of this section, the Secretary shall provide the coastal State with written specifications of the actions that should be taken, or not engaged in, by the State in order that such withdrawal may be canceled by the Secretary.

(2) *Requirements.* (i) If the Assistant Administrator determines that the State has not taken the actions required in § 923.135(a)(2), the Assistant Administrator will provide the Governor and the State CZM program manager with written notice of this finding and NOAA's obligation to withdraw program approval and financial assistance under this title. The State will be given 30 days from receipt of this notice to respond with evidence that it has taken the actions specified pursuant to § 923.135(a)(2). During this 30-day period, the State may request up to 30 additional days to respond, for a maximum of 60 days from receipt of notice.

(ii) If the State does not respond satisfactorily within the time allowed, the agency will notify the State of intent to take the proposed action. This notice will be published in the FEDERAL REGISTER and will inform the State of its right to a public hearing.

(iii) If the State does not request a public hearing or submit satisfactory evidence that it has taken the actions specified pursuant to § 923.135(a)(2) within 30 days of publication of this notice, and the Assistant Administrator determines that the State has failed to take the actions specified pursuant to § 923.135(a)(2), the Assistant Administrator will withdraw program approval and financial assistance and will notify the State in writing of the decision and the reasons for it. The notification will set forth actions that must be taken by

the State which would cause the Assistant Administrator to cancel the withdrawal.

(iv) If the State requests a public hearing within 30 days of publication of the notice of intent to withdraw program approval and financial assistance, the Assistant Administrator will publish 30 days advance notice of the hearing in the FEDERAL REGISTER and the newspaper(s) of largest circulation in the State's coastal zone. The hearing will be held in a location convenient to the citizens of the State's coastal zone and a record of the hearing will be maintained. Within 30 days of the completion of the hearing, the agency will make the determination as set forth in paragraph (b)(2)(iii) of this section.

(3) If program approval and financial assistance are withdrawn pursuant to this section, a notice will be placed in the FEDERAL REGISTER and Federal consistency under section 307 of the Act will cease to apply to the State's CZM program.

[47 FR 21021, May 17, 1982, as amended at 57 FR 31114, July 14, 1992. Redesignated and amended at 61 FR 33818, June 28, 1996]

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

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AUTHORITY: 16 U.S.C. 1451 *et seq.*

SOURCE: 65 FR 77154, Dec. 8, 2000, unless otherwise noted.

Subpart A—General Information

§ 930.1 Overall objectives.

The objectives of this part are:

(a) To describe the obligations of all parties who are required to comply with the federal consistency requirement of the Coastal Zone Management Act;

(b) To implement the federal consistency requirement in a manner which strikes a balance between the need to ensure consistency for federal actions affecting any coastal use or resource with the enforceable policies of approved management programs and the importance of federal activities (the term ''federal action'' includes all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.);

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the federal consistency requirement of the Act are satisfied. Federal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, and

may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable policies are considered. State agencies should participate in the administrative processes of federal agencies concerning federal actions that may be subject to state review under subparts C, D, E, F and I of this part.

(d) To interpret significant terms in the Act and this part;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the enforceable policies of approved management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved management programs; and

(g) To provide procedures which permit the Secretary to review federal license or permit activities, or federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 826, Jan. 5, 2006]

§930.2 Public participation.

State management programs shall provide an opportunity for public participation in the State agency's review of a Federal agency's consistency determination or an applicant's or person's consistency certification.

§930.3 Review of the implementation of the federal consistency requirement.

As part of the responsibility to conduct a continuing review of approved management programs, the Director of the Office of Ocean and Coastal Resource Management (Director) shall review the performance of each State's implementation of the federal consistency requirement. The Director shall evaluate instances where a State agency is believed to have either failed to object to inconsistent federal actions, or improperly objected to consistent federal actions. This evaluation shall be incorporated within the Director's general efforts to ascertain instances where a State has not adhered to its approved management program and such lack of adherence is not justified.

§930.4 Conditional concurrences

(a) Federal agencies, applicants, persons and applicant agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under subpart C or in a Federal agency's approval under subparts D, E, F or I of this part, would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable subpart and notify, pursuant to §930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of the State agency's conditional concurrence/objection or 30 days after receiving notice from the Federal agency that the application will not be approved as amended by the State agency's conditions; and

(2) The Federal agency (for subpart C), applicant (for subparts D and I), person (for subpart E) or applicant agency (for subpart F) shall modify the applicable plan, project proposal, or application to the Federal agency pursuant to the State agency's conditions. The Federal agency, applicant, person or applicant agency shall immediately notify the State agency if the State

agency's conditions are not acceptable; and

(3) The Federal agency (for subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions.

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable subpart.

§ 930.5 State enforcement action.

The regulations in this part are not intended in any way to alter or limit other legal remedies, including judicial review or State enforcement, otherwise available. State agencies and Federal agencies should first use the various remedial action and mediation sections of this part to resolve their differences or to enforce State agency concurrences or objections.

§ 930.6 State agency responsibility.

(a) This section describes the responsibilities of the ''State agency'' described in § 930.11(o). A designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State's management program, efficiently coordinate all State coastal management requirements, and to provide a single point of contact for Federal agencies and the public to discuss consistency issues. Any appointment by the State agency of the State's consistency responsibilities to a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and federal assistance proposals shall be sent to and reviewed by the State agency. A State may have two State agencies designated pursuant to § 306(d)(6) of the Act where the State has two geographically separate federally-approved management programs.

(b) The State agency is responsible for commenting on and concurring with or objecting to Federal agency consistency determinations and negative determinations (*see* subpart C of this part), consistency certifications for federal licenses, permits, and Outer Continental Shelf plans (*see* subparts D, E and I of this part), and reviewing the consistency of federal assistance activities proposed by applicant agencies (*see* subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies, and, where applicable, the public. Thereafter, only the State agency is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination, a consistency certification, or determine the consistency of a proposed federal assistance activity.

(c) If described in a State's management program, the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met. The State agency shall monitor such permits issued by another State agency.

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Section	930.11(n)
State agency	930.11(o)

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 826, Jan. 5, 2006]

§930.11 Definitions.

(a) *Act.* The term ''Act'' means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451–1464).

(b) *Any coastal use or resource.* The phrase ''any coastal use or resource'' means any land or water use or natural resource of the coastal zone. Land and water uses, or coastal uses, are defined in sections 304(10) and (18) of the act, respectively, and include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance. Coastal uses and resources also includes uses and resources appropriately described in a management program.

(c) *Assistant Administrator.* The term ''Assistant Administrator'' means the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA.

(d) *Associated facilities.* The term ''associated facilities'' means all proposed facilities which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a federal action (e.g., activity, development project, license, permit, or assistance), and without which the federal action, as proposed, could not be conducted. The proponent of a federal action shall consider whether the federal action and its associated facilities affect any coastal use or resource and, if so, whether these interrelated activities satisfy the requirements of the applicable subpart (subparts C, D, E, F or I).

(e) *Coastal Zone.* The term ''coastal zone'' has the same definition as provided in §304(1) of the Act.

(f) *Director.* The term ''Director'' means the Director of the Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service, NOAA.

(g) *Effect on any coastal use or resource (coastal effect).* The term ''effect on any coastal use or resource'' means any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

(h) *Enforceable policy.* ''The term ''enforceable policy'' means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone,'' 16 USC 1453(6a), and which are incorporated in a management program as approved by OCRM either as

part of program approval or as a program change under 15 CFR part 923, subpart H. An enforceable policy shall contain standards of sufficient specificity to guide public and private uses. Enforceable policies need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency. State agencies may identify management measures which are based on enforceable policies, and, if implemented, would allow the activity to be conducted consistent with the enforceable policies of the program. A State agency, however, must base its objection on enforceable policies.

(i) *Executive Office of the President.* The term ''Executive Office of the President'' means the office, council, board, or other entity within the Executive Office of the President which shall participate with the Secretary in seeking to mediate serious disagreements which may arise between a Federal agency and a coastal State.

(j) *Federal agency.* The term ''Federal agency'' means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the federal government, or any wholly owned federal government corporation.

(k) *Management program.* The term ''management program'' has the same definition as provided in section 304(12) of the Act, except that for the purposes of this part the term is limited to those management programs adopted by a coastal State in accordance with the provisions of section 306 of the Act, and approved by the Assistant Administrator.

(l) *OCRM.* The term ''OCRM'' means the Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (''NOAA''), U.S. Department of Commerce.

(m) *Secretary.* The term ''Secretary'' means the Secretary of Commerce and/or designee.

(n) *Section.* The term ''Section'' means a section of the Coastal Zone Management Act of 1972, as amended.

(o) *State agency.* The term ''State agency'' means the agency of the State government designated pursuant to section 306(d)(6) of the Act to receive and administer grants for an approved management program, or a single designee State agency appointed by the 306(d)(6) State agency.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 826, Jan. 5, 2006]

Subpart C—Consistency for Federal Agency Activities

§ 930.30 Objectives.

The provisions of this subpart are intended to assure that all Federal agency activities including development projects affecting any coastal use or resource will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for Federal agency activities having interstate coastal effects.

§ 930.31 Federal agency activity.

(a) The term ''Federal agency activity'' means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term ''Federal agency activity'' includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. ''Federal agency activity'' does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

(b) The term federal ''development project'' means a Federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource.

(c) The Federal agency activity category is a residual category for federal

actions that are not covered under subparts D, E, or F of this part.

(d) A general permit proposed by a Federal agency is subject to this subpart if the general permit does not involve case-by-case or individual issuance of a license or permit by a Federal agency. When proposing a general permit, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions, based on specific enforceable policies, that would permit the State agency to concur with the Federal agency's consistency determination. State agency concurrence shall remove the need for the State agency to review individual uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, pursuant to the consistent to the maximum extent practicable standard in § 930.32, incorporate State conditions into the general permit. If the State agency's conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not available for use in that State unless an applicant under subpart D of this part or a person under subpart E of this part, who wants to use the general permit in that State provides the State agency with a consistency certification under subpart D of this part and the State agency concurs. When subpart D or E of this part applies, all provisions of the relevant subpart apply.

(e) The terms ''Federal agency activity'' and ''Federal development project'' also include modifications of any such activity or development project which affect any coastal use or resource, provided that, in the case of modifications of an activity or development project which the State agency has previously reviewed, the effect on any coastal use or resource is substantially different than those previously reviewed by the State agency.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 826, Jan. 5, 2006]

§ 930.32 Consistent to the maximum extent practicable.

(a)(1) The term ''consistent to the maximum extent practicable'' means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

(2) Section 307(e) of the Act does not relieve Federal agencies of the consistency requirements under the Act. The Act was intended to cause substantive changes in Federal agency decision-making within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates. If a Federal agency asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program.

(3) For the purpose of determining consistent to the maximum extent practicable under paragraphs (a)(1) and (2) of this section, federal legal authority includes Federal appropriation Acts if the appropriation Act includes language that specifically prohibits full consistency with specific enforceable policies of management programs. Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the Act (16 USC 1456(c)(1)(B)). In cases where the cost of being consistent with the enforceable policies of a management program was

not included in the Federal agency's budget and planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of an emergency or other similar unforeseen circumstance (''exigent circumstance''), which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Any deviation shall be the minimum necessary to address the exigent circumstance. Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the exigent circumstance allows. Federal agencies shall consult with State agencies to the extent that an exigent circumstance allows and shall attempt to seek State agency concurrence prior to addressing the exigent circumstance. Once the exigent circumstances have passed, and if the Federal agency is still carrying out an activity with coastal effects, Federal agencies shall comply with all applicable provisions of this subpart to ensure that the activity is consistent to the maximum extent practicable with the enforceable policies of management programs. Once the Federal agency has addressed the exigent circumstance or completed its emergency response activities, it shall provide the State agency with a description of its actions and their coastal effects.

(c) A classified activity that affects any coastal use or resource is not exempt from the requirements of this subpart, unless the activity is exempted by the President under section 307(c)(1)(B) of the Act. Under the consistent to the maximum extent practicable standard, the Federal agency shall provide to the State agency a description of the project and coastal effects that it is legally permitted to release or does not otherwise breach the classified nature of the activity. Even when a Federal agency may not be able to disclose project information, the Federal agency shall conduct the classified activity consistent to the maximum extent practicable with the enforceable policies of management programs. The term classified means to protect from disclosure national security information concerning the national defense or foreign policy, provided that the information has been properly classified in accordance with the substantive and procedural requirements of an executive order. Federal and State agencies are encouraged to agree on a qualified third party(ies) with appropriate security clearance(s) to review classified information and to provide non-classified comments regarding the activity's reasonably foreseeable coastal effects.

§ 930.33 Identifying Federal agency activities affecting any coastal use or resource.

(a) Federal agencies shall determine which of their activities affect any coastal use or resource of States with approved management programs.

(1) Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource. An action which has minimal or no environmental effects may still have effects on a coastal use (e.g., effects on public access and recreational opportunities, protection of historic property) or a coastal resource, if the activity initiates an event or series of events where coastal effects are reasonably foreseeable. Therefore, Federal agencies shall, in making a determination of effects, review relevant management program enforceable policies as part of determining effects on any coastal use or resource.

(2) If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource, and a negative determination under § 930.35 is not required, then the Federal agency is not required to coordinate with State agencies under section 307 of the Act.

(3)(i) *De minimis* Federal agency activities. Federal agencies are encouraged to review their activities, other than development projects within the coastal zone, to identify *de minimis* activities, and request State agency concurrence that these de minimis activities should not be subject to further State agency review. *De minimis* activities shall only be excluded from State agency review if a Federal agency and State agency have agreed. The State agency shall provide for public participation under section 306(d)(14) of the Act when reviewing the Federal agency's *de minimis* activity request. If the State agency objects to the Federal agency's *de minimis* finding then the Federal agency must provide the State agency with either a negative determination or a consistency determination pursuant to this subpart. OCRM is available to facilitate a Federal agency's request.

(ii) *De minimis* activities are activities that are expected to have insignificant direct or indirect (cumulative and secondary) coastal effects and which the State agency concurs are *de minimis*.

(4) *Environmentally beneficial activities.* The State agency and Federal agencies may agree to exclude environmentally beneficial Federal agency activities (either on a case-by-case basis or for a category of activities) from further State agency consistency review. Environmentally beneficial activity means an activity that protects, preserves, or restores the natural resources of the coastal zone. The State agency shall provide for public participation under section 306(d)(14) of the Act for the State agency's consideration of whether to exclude environmentally beneficial activities.

(5) General consistency determinations, phased consistency determinations, and national or regional consistency determinations under §930.36 are also available to facilitate federal-State coordination.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities affecting any coastal use or resource. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they affect any coastal use or resource.

(c) Federal agency activities and development projects outside of the coastal zone, are subject to Federal agency review to determine whether they affect any coastal use or resource.

(d) Federal agencies shall broadly construe the effects test to provide State agencies with a consistency determination under §930.34 and not a negative determination under §930.35 or other determinations of no effects. Early coordination and cooperation between a Federal agency and the State agency can enable the parties to focus their efforts on particular Federal agency activities of concern to the State agency.

§930.34 Federal and State agency coordination.

(a)(1) Federal agencies shall provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource. To facilitate State agency review, Federal agencies should coordinate with the State agency prior to providing the determination.

(2) *Use of existing procedures.* Federal agencies are encouraged to coordinate and consult with State agencies through use of existing procedures in order to avoid waste, duplication of effort, and to reduce Federal and State agency administrative burdens. Where necessary, these existing procedures should be modified to facilitate coordination and consultation under the Act.

(b) *Listed activities.* State agencies are strongly encouraged to list in their management programs Federal agency activities which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. Listed Federal agency activities shall be described in terms of the specific type of activity involved (e.g., federal reclamation projects). In the event the State agency chooses to describe Federal agency activities that occur outside of the coastal zone, which the State agency believes will have reasonably foreseeable coastal effects, it shall also describe the geographic location of such

activities (e.g., reclamation projects in coastal floodplains).

(c) *Unlisted activities.* State agencies should monitor unlisted Federal agency activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, and the FEDERAL REGISTER) and should notify Federal agencies of unlisted Federal agency activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. The provisions in paragraphs (b) and (c) of this section are recommended rather than mandatory procedures for facilitating federal-State coordination of Federal agency activities which affect any coastal use or resource. State agency notification to the Federal agency (by listed or unlisted notification) is neither a substitute for nor does it eliminate Federal agency responsibility to comply with the consistency requirement, and to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal agency activities which the Federal agency finds affect any coastal use or resource, regardless of whether the State agency has listed the activity or notified the Federal agency through case-by-case monitoring.

(d) *State guidance and assistance to Federal agencies.* As a preliminary matter, a decision that a Federal agency activity affects any coastal use or resource should lead to early consultation with the State agency (*i.e.,* before the required 90-day period). Federal agencies should obtain the views and assistance of the State agency regarding the means for determining that the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the enforceable policies of a management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document. Upon request by the Federal agency, the State agency shall identify any enforceable policies applicable to the proposed activity based upon the information provided to the State agency at the time of the request.

§ 930.35 Negative determinations for proposed activities.

(a) If a Federal agency determines that there will not be coastal effects, then the Federal agency shall provide the State agencies with a negative determination for a Federal agency activity:

(1) Identified by a State agency on its list, as described in § 930.34(b), or through case-by-case monitoring of unlisted activities; or

(2) Which is the same as or is similar to activities for which consistency determinations have been prepared in the past; or

(3) For which the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity.

(b) *Content of a negative determination.* A negative determination may be submitted to State agencies in any written form so long as it contains a brief description of the activity, the activity's location and the basis for the Federal agency's determination that the activity will not affect any coastal use or resource. In determining effects, Federal agencies shall follow § 930.33(a)(1), including an evaluation of the relevant enforceable policies of a management program and include the evaluation in the negative determination. The level of detail in the Federal agency's analysis may vary depending on the scope and complexity of the activity and issues raised by the State agency, but shall be sufficient for the State agency to evaluate whether coastal effects are reasonably foreseeable.

(c) A negative determination under paragraph (a) of this section shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule. A State agency is not obligated to respond to a negative determination. If a State agency does not respond to a Federal agency's negative determination within 60 days, State agency concurrence with the negative determination shall

be presumed. State agency concurrence shall not be presumed in cases where the State agency, within the 60-day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. If a State agency objects to a negative determination, asserting that coastal effects are reasonably foreseeable, the Federal agency shall consider submitting a consistency determination to the State agency or otherwise attempt to resolve any disagreement within the remainder of the 90-day period. If a Federal agency, in response to a State agency's objection to a negative determination, agrees that coastal effects are reasonably foreseeable, the State agency and Federal agency should attempt to agree to complete the consistency review within the 90-day period for the negative determination or consider an alternative schedule pursuant to §930.36(b)(1). Federal agencies should consider postponing final Federal agency action, beyond the 90-day period, until a disagreement has been resolved. State agencies are not required to provide public notice of the receipt of a negative determination or the resolution of an objection to a negative determination, unless a Federal agency submits a consistency determination pursuant to §930.34.

(d) *General negative determinations.* In cases where Federal agencies will be performing a repetitive activity that a Federal agency determines will not have reasonably foreseeable coastal effects, whether performed separately or cumulatively, a Federal agency may provide a State agency(ies) with a general negative determination, thereby avoiding the necessity of issuing separate negative determinations for each occurrence of the activity. A general negative determination must adhere to all requirements for negative determinations under §930.35. In addition, a general negative determination must describe in detail the activity covered by the general negative determination and the expected number of occurrences of the activity over a specific time period. If a Federal agency issues a general negative determination, it may periodically assess whether the general negative determination is still applicable.

(e) In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity affects any coastal use or resource, either party may seek the Secretarial mediation or OCRM mediation services provided for in subpart G.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 827, Jan. 5, 2006]

§930.36 Consistency determinations for proposed activities.

(a) Federal agencies shall review their proposed Federal agency activities which affect any coastal use or resource in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. Federal agencies should consult with State agencies at an early stage in the development of the proposed activity in order to assess whether such activities will be consistent to the maximum extent practicable with the enforceable policies of such programs.

(b) *Timing of consistency determinations.* (1) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to reasonably determine the consistency of the activity with the management program, but before the Federal agency reaches a significant point of decision-making in its review process, *i.e.*, while the Federal agency has the ability to modify the activity. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

(2) Federal and State agencies may mutually agree upon procedures for extending the notification requirement beyond 90 days for activities requiring a substantial review period, and for shortening the notification period for

activities requiring a less extensive review period, provided that public participation requirements are met.

(c) *General consistency determinations.* In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal) which cumulatively has an effect upon any coastal use or resource, the Federal agency may develop a general consistency determination, thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A Federal agency may provide a State agency with a general consistency determination only in situations where the incremental actions are repetitive and do not affect any coastal use or resource when performed separately. A Federal agency and State agency may mutually agree on a general consistency determination for de minimis activities (*see* § 930.33(a)(3)) or any other repetitive activity or category of activity(ies). If a Federal agency issues a general consistency determination, it shall thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(d) *Phased consistency determinations.* In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project or other activity from planning to completion, the Federal agency shall provide the State agency with one consistency determination for the entire activity or development project. In cases where federal decisions related to a proposed development project or other activity will be made in phases based upon developing information that was not available at the time of the original consistency determination, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project or other activity continues to be consistent to the maximum extent practicable with the management program.

(e) *National or regional consistency determinations.* (1) A Federal agency may provide States with consistency determinations for Federal agency activities that are national or regional in scope (e.g., rulemaking, national plans), and that affect any coastal use or resource of more than one State. Many States share common coastal management issues and have similar enforceable policies, e.g., protection of a particular coastal resource. The Federal agency's national or regional consistency determination should, at a minimum, address the common denominator of these policies, *i.e.*, the common coastal effects and management issues, and thereby address different States' policies with one discussion and determination. If a Federal agency decides not to use this section, it must issue consistency determinations to each State agency pursuant to § 930.39.

(2) Federal agency activities with coastal effects shall be consistent to the maximum extent practicable with the enforceable policies of each State's management program. Thus, the Federal agency's national or regional consistency determination shall contain sections that would apply to individual States to address coastal effects and enforceable policies unique to particular States, if common coastal effects and enforceable policies cannot be addressed under paragraph (e)(1). Early coordination with coastal States will enable the Federal agency to identify particular coastal management concerns and policies. In addition, the Federal agency could address the concerns of each affected State by providing for State conditions for the proposed activity. Further, the consistency determination could identify the coordination efforts and describe how the Federal agency responded to State agency concerns.

§ 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements.

A Federal agency may use its NEPA documents as a vehicle for its consistency determination or negative determination under this subpart. However, a Federal agency's federal consistency

obligations under the Act are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. State agencies shall not require Federal agencies to submit NEPA documents as information required pursuant to § 930.39. If a Federal agency includes its consistency determination or negative determination in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and adheres to the timeframes required by this subpart. Federal agencies and State agencies should mutually agree on how to best coordinate the requirements of NEPA and the Act.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 827, Jan. 5, 2006]

§ 930.38 Consistency determinations for activities initiated prior to management program approval.

(a) A consistency determination is required for ongoing Federal agency activities other than development projects initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or identifies through monitoring as subject to consistency with the management program.

(b) A consistency determination is required for major, phased federal development project decisions described in § 930.36(d) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider effects on any coastal use or resource not fully evaluated at the outset of the project. This provision shall not apply to phased federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to NEPA).

§ 930.39 Content of a consistency determination.

(a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document. Where a Federal agency is aware, prior to its submission of its consistency determination, that its activity is not fully consistent with a management program's enforceable policies, the Federal agency shall describe in its consistency determination the legal authority that prohibits full consistency as required by § 930.32(a)(2). Where the Federal agency is not aware of any inconsistency until after submission of its consistency determination, the Federal agency shall submit its description of the legal authority that prohibits full consistency to the State agency as soon as possible, or before the end of the 90-day period described in § 930.36(b)(1). The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity

its effects on any coastal use or resource, associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, and the effects of the associated facilities (e.g., erosion, wetlands, beach access impacts), must all be consistent to the maximum extent practicable with the enforceable policies of the management program.

(c) In making their consistency determinations, Federal agencies shall ensure that their activities are consistent to the maximum extent practicable with the enforceable, policies of the management program. However, Federal agencies should give consideration to management program provisions which are in the nature of recommendations.

(d) When Federal agency standards are more restrictive than standards or requirements contained in the management program, the Federal agency may continue to apply its stricter standards. In such cases the Federal agency shall inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

(e) *State permit requirements.* Federal law, other than the CZMA, may require a Federal agency to obtain a State permit. Even when Federal agencies are not required to obtain State permits, Federal agencies shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.

§ 930.40 Multiple Federal agency participation.

Whenever more than one Federal agency is involved in a Federal agency activity or its associated facilities affecting any coastal use or resource, or is involved in a group of Federal agency activities related to each other because of their geographic proximity, the Federal agencies may prepare one consistency determination for all the federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination shall be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies and shall comply with the requirements of § 930.39.

§ 930.41 State agency response.

(a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time, after providing for public participation in the State agency's review of the consistency determination. The Federal agency may presume State agency concurrence if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information required by § 930.39(a). The 60-day review period begins when the State agency receives the consistency determination and supporting information required by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall notify the Federal agency in writing within 14 days of receiving the determination and supporting information that the 60-day review period has not begun, identify missing information required by § 930.39(a), and that the 60-day review period will begin when the missing information is received by the State agency. If the State agency has not notified the Federal agency that information required by § 930.39(a) is missing within the 14 day notification period, then the 60-day review period shall begin on the date the State agency received the consistency determination and accompanying information. The State agency's determination of whether the information required by § 930.39(a) is complete is not a substantive review of the adequacy of the information provided. Thus, if a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by § 930.39(a) is substantively deficient. The failure to submit information not required by 930.39(a) shall not be a basis for asserting that the 60-day review period has not begun.

(b) State agency concurrence shall not be presumed in cases where the State agency, within the 60-day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final Federal agency action shall not be taken sooner than 90 days from the receipt by the State agency of the consistency determination unless the State concurs or concurrence is presumed, pursuant to paragraphs (a) and (b), with the activity, or unless both the Federal agency and the State agency agree to an alternative period.

(d) *Time limits on concurrences.* A State agency cannot unilaterally place an expiration date on its concurrence. If a State agency believes that an expiration date is necessary, State and Federal agencies may agree to a time limit. If there is no agreement, later phases of, or modifications to, the activity that will have effects not evaluated at the time of the original consistency determination will require either a new consistency determination, a supplemental consistency determination under §930.46, or a phased review under §930.36(d) of this subpart.

(e) *State processing fees.* The Act does not require Federal agencies to pay State processing fees. State agencies shall not assess a Federal agency with a fee to process the Federal agency's consistency determination unless payment of such fees is required by other federal law or otherwise agreed to by the Federal agency and allowed by the Comptroller General of the United States. In no case may a State agency stay the consistency review period or base its objection on the failure of a Federal agency to pay a fee.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 827, Jan. 5, 2006]

§930.42 Public participation.

(a) Management programs shall provide for public participation in the State agency's review of consistency determinations. Public participation, at a minimum, shall consist of public notice for the area(s) of the coastal zone likely to be affected by the activity, as determined by the State agency.

(b) *Timing of public notice.* States shall provide timely public notice after the consistency determination has been received by the State agency, except in cases where earlier public notice on the consistency determination by the Federal agency or the State agency meets the requirements of this section. A public comment period shall be provided by the State sufficient to give the public an opportunity to develop and provide comments on whether the project is consistent with management program enforceable policies and still allow the State agency to issue its concurrence or objection within the 60 day State response period.

(c) *Content of public notice.* The public notice shall:

(1) Specify that the proposed activity is subject to review for consistency with the enforceable policies of the management program;

(2) Provide sufficient information to serve as a basis for comment;

(3) Specify a source for additional information, e.g., a State agency web site; and

(4) Specify a contact for submitting comments to the State agency.

(d) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official State gazette, a local newspaper serving areas of coastal zone likely to be affected by the activity, individual State mailings, public notice through a management program newsletter, and electronic notices, e.g., web sites. However, electronic notices, e.g., web sites, shall not be the sole source of a public notification, but may be used in conjunction with other means. Web sites may be used to provide a location for the public to obtain additional information. States shall not require that the Federal agency provide public notice. Federal and State agencies are encouraged to issue joint public notices, and hold joint public hearings, to minimize duplication of effort and to avoid unnecessary delays, so long as the joint notice meets the other requirements of this section.

§ 930.43 State agency objection.

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe:

(1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and

(2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

(b) If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.

(c) State agencies shall send to the Director a copy of objections to Federal agency consistency determinations.

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless:

(1) the Federal agency has concluded that under the ''consistent to the maximum extent practicable'' standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or

(2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

§ 930.44 Availability of mediation for disputes concerning proposed activities.

In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed federal activity affecting any coastal use or resource, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G.

§ 930.45 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program.

(b) The State agency may request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a Federal agency activity, including those activities where the State agency's concurrence was presumed, which was:

(1) Previously determined to be consistent to the maximum extent practicable with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent to the maximum extent

practicable with the enforceable policies of the management program; or

(2) Previously determined not to be a Federal agency activity affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, the activity affects any coastal use or resource and is not consistent to the maximum extent practicable with the enforceable policies of the management program. The State agency's request shall include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G of this part.

§ 930.46 Supplemental coordination for proposed activities.

(a) For proposed Federal agency activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, Federal agencies shall further coordinate with the State agency and prepare a supplemental consistency determination if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The Federal agency makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or

(2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

(b) The State agency may notify the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the Federal agency to implement the proposed activity consistent with the enforceable policies of the management program. State agency notification under this paragraph (b) does not remove the requirement under paragraph (a) of this section for Federal agencies to notify State agencies.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 828, Jan. 5, 2006]

Subpart D—Consistency for Activities Requiring a Federal License or Permit

§ 930.50 Objectives.

The provisions of this subpart are intended to ensure that any required federal license or permit activity affecting any coastal use or resource is conducted in a manner consistent with approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for federal license or permit activities having interstate coastal effects.

§ 930.51 Federal license or permit.

(a) The term ''federal license or permit'' means any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant. The term ''federal license or permit'' does not include OCS plans, and federal license or permit activities described in detail in OCS plans, which are subject to subpart E of this part, or leases issued pursuant to lease sales conducted by a Federal agency (e.g., outer continental shelf (OCS) oil and gas lease sales conducted by the Minerals Management Service

or oil and gas lease sales conducted by the Bureau of Land Management). Lease sales conducted by a Federal agency are Federal agency activities under subpart C of this part.

(b) The term also includes the following types of renewals and major amendments which affect any coastal use or resource:

(1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and

(3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.

(c) The term ''major amendment'' of a federal license or permit activity means any subsequent federal approval that the applicant is required to obtain for modification to the previously reviewed and approved activity and where the activity permitted by issuance of the subsequent approval will affect any coastal use or resource, or, in the case of a major amendment subject to § 930.51(b)(3), affect any coastal use or resource in a way that is substantially different than the description or understanding of effects at the time of the original activity.

(d) The term ''renewals'' of a federal license or permit activity means any subsequent re-issuance, re-approval or extension of an existing license or permit that the applicant is required to obtain for an activity described under paragraph (b) of this section.

(e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency. The terms ''major amendment,'' ''renewals'' and ''substantially different'' shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed.

(f) *This subpart applies to active applications.* If an applicant withdraws its application to the Federal agency, then the consistency process is terminated. If the applicant reapplies to the Federal agency, then a new consistency review process will start. If a Federal agency stops or stays the Federal license or permit application process, then the consistency review period will be stopped or stayed for the same amount of time as for the Federal application process.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 827, Jan. 5, 2006]

§ 930.52 Applicant.

The term ''applicant'' means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any nation, State, or any State, regional, or local government, who, following management program approval, either files an application for a required individual federal license or permit, or who files a consistency certification for a required general federal license or permit under § 930.31(d) to conduct an activity affecting any coastal use or resource. The term ''applicant'' does not include Federal agencies applying for federal licenses or permits. Federal agency activities requiring federal licenses or permits are subject to subpart C of this part.

§ 930.53 Listed federal license or permit activities.

(a) State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the federal license or permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits). In the event the State agency chooses to review federal license or

permit activities, with reasonably foreseeable coastal effects, outside of the coastal zone, it must generally describe the geographic location of such activities.

(1) The geographic location description should encompass areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable. The State agency should exclude geographic areas outside of the coastal zone where coastal effects are not reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its coastal effects. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the State's coastal nonpoint pollution control program, or other ecologically identifiable areas. Federal lands located within the boundaries of a State's coastal zone are automatically included within the geographic location description; State agencies do not have to describe these areas. State agencies do have to describe the geographic location of listed activities occurring on federal lands located beyond the boundaries of a State's coastal zone.

(2) For listed activities occurring outside of the coastal zone for which a State has not generally described the geographic location of review, States must follow the conditions for review of unlisted activities under § 930.54 of this subpart.

(b) *General concurrences for minor activities.* To avoid repeated review of minor federal license or permit activities which, while individually inconsequential, cumulatively affect any coastal use or resource, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (*see* § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor federal license or permit activities and the relevant conditions which are covered by the general concurrence. Minor federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(c) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval by the Director pursuant to the program change requirements found at 15 CFR part 923, subpart H.

(1) Consultation with the affected Federal agency means, at least 60 days prior to submitting a program change request to OCRM, a State agency shall notify in writing the relevant regional or field Federal agency staff and the head of the affected Federal agency, and request comments on the listing change. The notification shall describe the proposed change and identify the regional Federal agency staff the State has contacted for consultation.

(2) A State agency must include in its program change request to OCRM a description of any comments received from the affected Federal agency.

(d) No federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses or permits of the requirements of this subpart.

§ 930.54 Unlisted federal license or permit activities.

(a)(1) With the assistance of Federal agencies, State agencies should monitor unlisted federal license or permit activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, FEDERAL REGISTER notices). State agencies shall notify Federal agencies, applicants, and the Director of unlisted activities affecting

any coastal use or resource which require State agency review within 30 days from notice of the license or permit application, that has been submitted to the approving Federal agency, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the federal license or permit application.

(2) Federal agencies or applicants should provide written notice of the submission of applications for federal licenses or permits for unlisted activities to the State agency. Notice to the State agency may be constructive if notice is published in an official federal public notification document or through an official State clearinghouse (*i.e.,* the FEDERAL REGISTER, draft or final NEPA EISs that are submitted to the State agency, or a State's intergovernmental review process). The notice, whether actual or constructive, shall contain sufficient information for the State agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

(b) The State agency's notification shall also request the Director's approval to review the unlisted activity and shall contain an analysis that supports the State agency's assertion that coastal effects are reasonably foreseeable. Following State agency notification to the Federal agency, applicant and the Director, the Federal agency shall not issue the license or permit until the requirements of this subpart have been satisfied, unless the Director disapproves the State agency's request to review the activity.

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Director regarding the State agency's request to review the activity. The sole basis for the Director's approval or disapproval of the State agency's request will relate to whether the proposed activity's coastal effects are reasonably foreseeable. The Director shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days from receipt of the State agency notice. The Director may extend the decision deadline beyond 30 days due to the complexity of the issues or to address the needs of the State agency, the Federal agency, or the applicant. The Director shall consult with the State agency, the Federal agency and the applicant prior to extending the decision deadline, and shall limit the extension to the minimum time necessary to make its decision. The Director shall notify the relevant parties of the expected length of an extension.

(d) If the Director disapproves the State agency's request, the Federal agency may approve the license or permit application and the applicant need not comply with the requirements of this subpart. If the Director approves the State agency's request, the Federal agency and applicant must comply with the consistency certification procedures of this subpart.

(e) Following an approval by the Director, the applicant shall amend the federal application by including a consistency certification and shall provide the State agency with a copy of the certification along with necessary data and information (*see* §§ 930.58, 930.62 and 930.63). For the purposes of this section, concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months from the original Federal agency notice to the State agency (*see* paragraph (a) of this section) or within three months from receipt of the applicant's consistency certification and necessary data and information, whichever period terminates last.

(f) The unlisted activity procedures in this section are provided to ensure that State agencies are afforded an opportunity to review federal license or permit activities with reasonably foreseeable coastal effects. Prior to bringing the issue before the Director, the concerned parties should discuss coastal effects and consistency. The applicant can avoid delay by simply seeking the State agency's expeditious concurrence rather than waiting for the Director's decision. If an applicant, of its own accord or after negotiations with the State agency, provides a consistency certification and necessary data and information to the State agency,

the review shall be deemed to have received the Director's approval, and all of the provisions of this subpart shall apply and the State agency need not request the Director's approval. If an applicant for an unlisted activity has not subjected itself to the consistency process within the 30 day notification period contained in paragraph (a) of this section, the State agency must adhere to the unlisted activity review requirements of this section to preserve its right to review the activity.

§ 930.55 Availability of mediation for license or permit disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a listed or unlisted federal license or permit activity is subject to the federal consistency requirement, either party may request the OCRM mediation or Secretarial mediation services provided for in subpart G of this part; notice shall be provided to the applicant. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding approval of a license or permit application for an activity on an approved management program list (*see* § 930.53) or individually approved by the Director (*see* § 930.54) pending satisfaction of the requirements of this subpart. Similarly, the existence of a serious disagreement will not prevent the Federal agency from approving a license or permit activity which has not received Director approval.

§ 930.56 State agency guidance and assistance to applicants.

As a preliminary matter, any applicant for a federal license or permit selected for review by a State agency should obtain the views and assistance of the State agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document. Upon request by the applicant, the State agency shall identify any enforceable policies applicable to the proposed activity, based upon the information submitted to the State agency.

§ 930.57 Consistency certifications.

(a) Following appropriate coordination and cooperation with the State agency, all applicants for required federal licenses or permits subject to State agency review shall provide in the application to the federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the management program. At the same time, the applicant shall furnish to the State agency a copy of the certification and necessary data and information.

(b) The applicant's consistency certification shall be in the following form: ''The proposed activity complies with the enforceable policies of (name of State) approved management program and will be conducted in a manner consistent with such program.''

§ 930.58 Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A copy of the application for the federal license or permit and

(i) All material relevant to a State's management program provided to the Federal agency in support of the application; and

(ii) To the extent not included in paragraphs (a)(1) or (a)(1)(i) of this section, a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information relied upon by the applicant to make its certification. Maps, diagrams, and technical data shall be submitted when a written description alone will not adequately describe the proposal;

(2) Information specifically identified in the management program as required necessary data and information for an applicant's consistency certification. The management program as originally approved or amended (pursuant to 15 CFR part 923, subpart H) may

describe data and information necessary to assess the consistency of federal license or permit activities. Necessary data and information may include completed State or local government permit applications which are required for the proposed activity, but shall not include the issued State or local permits. NEPA documents shall not be considered necessary data and information when a Federal statute requires a Federal agency to initiate the CZMA federal consistency review prior to its completion of NEPA compliance. States shall not require that the consistency certification and/or the necessary data and information be included in NEPA documents. Required data and information may not include confidential and proprietary material; and

(3) An evaluation that includes a set of findings relating the coastal effects of the proposal and its associated facilities to the relevant enforceable policies of the management program. Applicants shall demonstrate that the activity will be consistent with the enforceable policies of the management program. Applicants shall demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal effects for which the management program does not contain enforceable or recommended policies.

(b) At the request of the applicant, interested parties who have access to information and data required by this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by this section.

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal effects of the proposal.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 827, Jan. 5, 2006]

§ 930.59 Multiple permit review.

(a) Applicants shall, to the extent practicable, consolidate related federal license or permit activities affecting any coastal use or resource for State agency review. State agencies shall, to the extent practicable, provide applicants with a ''one-stop'' multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

(b) A State agency objection to one or more of the license or permit activities submitted for consolidated review shall not prevent the applicant from receiving Federal agency approval for those license or permit activities found to be consistent with the management program.

§ 930.60 Commencement of State agency review.

(a) The State agency's six-month review period (*see* § 930.62(a)) of an applicant's consistency certification begins on the date the State agency receives the consistency certification required by § 930.57 and all the necessary data and information required by § 930.58(a).

(1) If an applicant fails to submit a consistency certification, the State agency shall notify the applicant and the Federal agency, within 30 days of receipt of the incomplete submission, that a consistency certification satisfying § 930.57 was not received and that the State agency's six-month review period will commence on the date of receipt of the missing certification, subject to paragraph (a)(2) of this section.

(2) If an applicant fails to submit all necessary data and information required by § 930.58(a), the State agency shall notify the applicant and the Federal agency, within 30 days of receipt of the incomplete submission, that necessary data and information described in § 930.58(a) was not received and that the State agency's six-month review period will commence on the date of receipt of the missing necessary data and information, subject to the requirement in paragraph (a) of this section that the applicant has also submitted a

consistency certification. The State agency may waive the requirement in paragraph (a) of this section that all necessary data and information described in §930.58(a) be submitted before commencement of the State agency's six-month consistency review. In the event of such a waiver, the requirements of §930.58(a) must be satisfied prior to the end of the six-month consistency review period or the State agency may object to the consistency certification for insufficient information.

(3) Within 30 days of receipt of the consistency certification and/or necessary data and information that was deemed missing, pursuant to paragraphs (a)(1) or (2) of this section, the State agency shall notify the applicant and Federal agency that the certification and necessary data and information required pursuant to §930.58 is complete, the date the certification and/or necessary data and information deemed missing was received, and, that the State agency's consistency review commenced on the date of receipt. In the event of a State waiver under paragraph (a)(2) of this section, receipt of the necessary data and information deemed missing shall not alter the date the consistency review period commenced.

(b) State agencies and applicants (and persons under subpart E of this part) may mutually agree in writing to stay the six-month consistency review period. Such an agreement shall be in writing and state a specific date on when the stay will end. The State agency shall provide a copy of the written agreement to the Federal agency and the Federal agency shall not presume State agency concurrence with an applicant's consistency certification when such a written agreement to stay the six-month consistency review period is in effect. The State agency shall not stop, stay, or otherwise alter the consistency review period without such a written agreement with the applicant.

(c) The State agency's determination that a certification and necessary data and information under paragraph (a) of this section is complete is not a substantive review of the adequacy of the information received. If an applicant has submitted all necessary data and information required by §930.58, then a State agency's or Federal agency's assertion that the submitted information is substantively deficient, or a State agency's or Federal agency's request for clarification of the information provided, or information or data requested that is in addition to that required by §930.58 shall not extend the date of commencement of State agency review.

[71 FR 827, Jan. 5, 2006]

§930.61 Public participation.

(a) Following receipt of the material described in §930.60 the State agency shall ensure timely public notice of the proposed activity. Public notice shall be provided for the area(s) of the coastal zone likely to be affected by the proposed activity, as determined by the State agency. At the discretion of the State agency, public participation may include one or more public hearings. The State agency shall not require an applicant or a Federal agency to hold a public hearing. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to reasonably inform the public, obtain sufficient comment, and develop a decision on the matter.

(b) *Content of public notice.* The public notice shall:

(1) Specify that the proposed activity is subject to review for consistency under the policies of the management program;

(2) Provide sufficient information to serve as a basis for comment;

(3) Specify a source for additional information; and

(4) Specify a contact for submitting comments to the management program.

(c) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official State gazette, a local newspaper serving areas of the coastal zone likely to be affected by the activity, individual State mailings, public notice through a management program newsletter, and electronic notices, e.g., web sites. However, electronic notices, e.g.,

web sites, shall not be the sole source of a public notification, but may be used in conjunction with other means. Web sites may be used to provide a location for the public to obtain additional information. The State agency may require the applicant to provide the public notice. State agencies shall not require that the Federal agency provide public notice. The State agency may rely upon the public notice provided by the Federal agency reviewing the application for the federal license or permit (e.g., notice of availability of NEPA documents) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

(d) Federal and State agencies are encouraged to issue joint public notices, and hold joint public hearings, whenever possible to minimize duplication of effort and to avoid unnecessary delays.

§ 930.62 State agency concurrence with a consistency certification.

(a) At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification. The State agency may issue a general concurrence for minor activities (*see* § 930.53(b)). Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of State agency review.

(b) If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the applicant and the Federal agency of the status of the matter and the basis for further delay.

(c) If the State agency issues a concurrence or is conclusively presumed to concur with the applicant's consistency certification, the Federal agency may approve the federal license or permit application. Notwithstanding State agency concurrence with a consistency certification, the federal permitting agency may deny approval of the federal license or permit application. Federal agencies should not delay processing applications pending receipt of a State agency's concurrence. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant and the State agency.

(d) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt, if necessary, to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency responsible for approving the federal license or permit to ensure that proposed conditions satisfy federal as well as management program requirements (*see also* § 930.4).

§ 930.63 State agency objection to a consistency certification.

(a) If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Director of the objection. A State agency may assert alternative bases for its objection, as described in paragraphs (b) and (c) of this section.

(b) State agency objections that are based on sufficient information to evaluate the applicant's consistency certification shall describe how the proposed activity is inconsistent with specific enforceable policies of the management program. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

(c) A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 930.58 or other information necessary for the State agency to determine consistency. If the State agency objects on the grounds of insufficient information, the objection shall describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program. The objection may describe alternative measures (if they exist)

which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

(d) *Alternatives.* If a State agency proposes an alternative(s) in its objection letter, the alternative(s) shall be described with sufficient specificity to allow the applicant to determine whether to, in consultation with the State agency: adopt an alternative; abandon the project; or file an appeal under subpart H. Application of the specificity requirement demands a case specific approach. More complicated activities or alternatives generally need more information than less-complicated activities or alternatives. See § 930.121(c) for further details regarding alternatives for appeals under subpart H of this part.

(e) A State agency objection shall include a statement to the following effect:

Pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the [Name of State] management program and the federal permitting or licensing agency. The Secretary may collect fees from you for administering and processing your request.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 828, Jan. 5, 2006]

§ 930.64 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification, the Federal agency shall not issue the federal license or permit except as provided in subpart H of this part.

§ 930.65 Remedial action for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor federal license or permit activities in order to make certain that such activities continue to conform to both federal and State requirements.

(b) The State agency shall notify the relevant Federal agency representative for the area involved of any federal license or permit activity which the State agency claims was:

(1) Previously determined to be consistent with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent with the management program; or

(2) Previously determined not to be an activity affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having coastal effects substantially different than originally described and, as a result, the activity affects any coastal use or resource in a manner inconsistent with the management program.

(c) The State agency notification shall include:

(1) A description of the activity involved and the alleged lack of compliance with the management program;

(2) supporting information; and

(3) a request for appropriate remedial action. A copy of the request shall be sent to the applicant and the Director. Remedial actions shall be linked to coastal effects substantially different than originally described.

(d) If, after 30 days following a request for remedial action, the State agency still maintains that the applicant is failing to comply substantially with the management program, the governor or State agency may file a written objection with the Director. If the Director finds that the applicant is conducting an activity that is substantially different from the approved activity, the applicant shall submit an amended or new consistency certification and supporting information to the Federal agency and to the State agency, or comply with the originally approved certification.

(e) An applicant shall be found to be conducting an activity substantially different from the approved activity if the State agency claims and the Director finds that the activity affects any coastal use or resource substantially different than originally described by

the applicant and, as a result, the activity is no longer being conducted in a manner consistent with the enforceable policies of the management program. The Director may make a finding that an applicant is conducting an activity substantially different from the approved activity only after providing 15 days for the applicant and the Federal agency to review the State agency's objection and to submit comments for the Director's consideration.

§ 930.66 Supplemental coordination for proposed activities.

(a) For federal license or permit proposed activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, applicants shall further coordinate with the State agency and prepare a supplemental consistency certification if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The applicant makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or

(2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

(b) The State agency may notify the applicant, the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the applicant to implement the proposed activity consistent with the management program. State agency notification under subsection (b) does not remove the requirement under subsection (a) for applicants to notify State agencies.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 828, Jan. 5, 2006]

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

§ 930.70 Objectives.

The provisions of this subpart are intended to ensure that all federal license or permit activities described in detail in OCS plans and which affect any coastal use or resource are conducted in a manner consistent with approved management programs.

§ 930.71 Federal license or permit activity described in detail.

The term ''federal license or permit activity described in detail'' means any activity requiring a federal license or permit, as defined in § 930.51, which the Secretary of the Interior determines must be described in detail within an OCS plan.

§ 930.72 Person.

The term ''person'' means any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State; the federal government; any State, regional, or local government; or any entity of such federal, State, regional or local government, who submits to the Secretary of the Interior, or designee following management program approval, an OCS plan which describes in detail federal license or permit activities.

§ 930.73 OCS plan.

(a) The term ''OCS plan'' means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee

following management program approval and which describes in detail federal license or permit activities.

(b) The requirements of this subpart do not apply to federal license or permit applications filed after management program approval for activities described in detail in OCS plans approved by the Secretary of the Interior or designee prior to management program approval.

§930.74 OCS activities subject to State agency review.

Except for States which do not anticipate coastal effects resulting from OCS activities, management program lists required pursuant to §930.53 shall include a reference to OCS plans which describe in detail federal license or permit activities affecting any coastal use or resource.

§930.75 State agency assistance to persons.

As a preliminary matter, any person intending to submit to the Secretary of the Interior an OCS plan which describes in detail federal license or permit activities affecting any coastal use or resource should obtain the views and assistance of the State agency regarding the means for ensuring that such activities will be conducted in a manner consistent with the management program. As part of its assistance efforts, the State agency shall make available for inspection copies of the management program document. Upon request by such persons, the State agency shall identify any enforceable policies applicable to the proposed activities, based upon the information submitted to the State agency.

§930.76 Submission of an OCS plan, necessary data and information and consistency certification.

Any person submitting any OCS plan to the Secretary of the Interior or designee shall:

(a) Any person submitting any OCS plan to the Secretary of the Interior or designee shall submit to the Secretary of the Interior or designee:

(1) A copy of the OCS plan;

(2) The consistency certification;

(3) The necessary data and information required pursuant to §930.58; and

(4) The information submitted pursuant to the Department of the Interior's OCS operating regulations (*see* 30 CFR 250.203 and 250.204) and OCS information program regulations (*see* 30 CFR part 252).

(b) The Secretary of the Interior or designee shall furnish the State agency with a copy of the information submitted under paragraph (a) of this section (excluding confidential and proprietary information).

(c) The person's consistency certification shall be in the following form:

> The proposed activities described in detail in this plan comply with (name of State(s)) approved management program(s) and will be conducted in a manner consistent with such program(s).

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 828, Jan. 5, 2006]

§930.77 Commencement of State agency review and public notice.

(a)(1) Except as provided in §930.60(a), State agency review of the person's consistency certification begins at the time the State agency receives the certification and information required pursuant to §930.76(a) and (b). If a person has submitted the documents required by §930.76(a) and (b), then a State agency's assertion that the information contained in the submitted documents is substantively deficient, or a State agency's request for clarification of the information provided, or information and data in addition to that required by §930.76 shall not delay or otherwise change the date on which State agency review begins.

(2) To assess consistency, the State agency shall use the information submitted pursuant to §930.76. If a State agency wants to augment the necessary data and information required by §930.76 to start the six-month review period for OCS plans, then the State can only do so if it amends its management program to include the information under §930.58(a)(2).

(3) After the State agency's review begins, if the State agency requests additional information, it shall describe in writing to the person and to the Secretary of the Interior or its designee the reasons why the information provided under §930.76 is not adequate to complete its review, and the nature of

the information requested and the necessity of having such information to determine consistency with the enforceable policies of the management program. The State agency shall make its request for additional information no later than three months after commencement of the State agency's review period. The State agency shall not request additional information after the three-month notification period described in §930.78(a). However, the State agency may request additional information after the three-month notification period if the person or the Secretary of the Interior or its designee changes the OCS plan after the three-month notification period such that the plan describes activities or coastal effects not previously described and for which information was not previously provided pursuant to §930.76.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with §930.61.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 828, Jan. 5, 2006]

§930.78 State agency concurrence or objection.

(a) At the earliest practicable time, the State agency shall notify in writing the person, the Secretary of the Interior or designee and the Director of its concurrence with or objection to the consistency certification. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to reasonably inform the public, obtain sufficient comment, and develop a decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the person, the Secretary of the Interior or designee and the Director of the status of review and the basis for further delay in issuing a final decision. Notice shall be in written form and postmarked no later than three months following the commencement of the State agency's review. Concurrence by the State agency shall be conclusively presumed if the notification required by this subparagraph is not provided.

(b) Concurrence by the State agency shall be conclusively presumed if the State agency's response to the consistency certification is not received within six months following commencement of State agency review.

(c) If the State agency objects to one or more of the federal license or permit activities described in detail in the OCS plan, it must provide a separate discussion for each objection in accordance with §930.63.

§930.79 Effect of State agency concurrence.

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time federal applications are actually filed for the federal licenses or permits to which such concurrence applies.

(b) Unless the State agency indicates otherwise, copies of federal license or permit applications for activities described in detail in an OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§930.80 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification related to federal license or permit activities described in detail in an OCS plan, the Federal agency shall not issue any of such licenses or permits except as provided in subpart H of this part.

§930.81 Multiple permit review.

(a) A person submitting a consistency certification for federal license or permit activities described in detail in an OCS plan is strongly encouraged to work with other Federal agencies in an effort to include, for consolidated State agency review, consistency certifications and supporting data and information applicable to OCS-related

federal license or permit activities affecting any coastal use or resource which are not required to be described in detail in OCS plans but which are subject to State agency consistency review (e.g., Corps of Engineer permits for the placement of structures on the OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air and water quality permits for offshore operations and onshore support and processing facilities). In the event the person does not consolidate such OCS-related permit activities with the State agency's review of the OCS plan, such activities will remain subject to individual State agency review under the requirements of subpart D of this part.

(b) A State agency objection to one or more of the OCS-related federal license or permit activities submitted for consolidated review shall not prevent the person from receiving Federal agency approval:

(1) For those OCS-related license or permit activities found by the State agency to be consistent with the management program; and

(2) For the license or permit activities described in detail in the OCS plan provided the State agency concurs with the consistency certification for such plan. Similarly, a State agency objection to the consistency certification for an OCS plan shall not prevent the person from receiving Federal agency approval for those OCS-related license or permit activities determined by the State agency to be consistent with the management program.

§ 930.82 Amended OCS plans.

If the State agency objects to the person's OCS plan consistency certification, and/or if, pursuant to subpart H of this part, the Secretary does not determine that each of the objected to federal license or permit activities described in detail in such plan is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, and if the person still intends to conduct the activities described in the OCS plan, the person shall submit an amended plan to the Secretary of the Interior or designee along with a consistency certification and data and information necessary to support the amended consistency certification. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed federal license or permit activities described in detail in the amended plan will be conducted in a manner consistent with the management program. When satisfied that the person has met the requirements of the OCSLA and this subpart, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding confidential and proprietary information), necessary data and information and consistency certification.

[71 FR 829, Jan. 5, 2006]

§ 930.83 Review of amended OCS plans; public notice.

After receipt of a copy of the amended OCS plan, consistency certification, and necessary data and information, State agency review shall begin. The requirements of §§ 930.77, 930.78, and 930.79, apply to the review of amended OCS plans, except that the applicable time period for purposes of concurrence by conclusive presumption shall be three months instead of six months.

§ 930.84 Continuing State agency objections.

If the State agency objects to the consistency certification for an amended OCS plan, the prohibition in § 930.80 against Federal agency approval of licenses or permits for activities described in detail in such a plan applies, further Secretarial review pursuant to subpart H of this part may take place, and the development of an additional amended OCS plan and consistency certification may be required pursuant to §§ 930.82 through 930.83.

§ 930.85 Failure to substantially comply with an approved OCS plan.

(a) The Department of the Interior and State agencies shall cooperate in their efforts to monitor federally licensed or permitted activities described in detail OCS plans to make certain that such activities continue to conform to both federal and State requirements.

(b) If a State agency claims that a person is failing to substantially comply with an approved OCS plan subject to the requirements of this subpart, and such failure allegedly involves the conduct of activities affecting any coastal use or resource in a manner that is not consistent with the approved management program, the State agency shall transmit its claim to the Minerals Management Service region involved. Such claim shall include a description of the specific activity involved and the alleged lack of compliance with the OCS plan, and a request for appropriate remedial action. A copy of the claim shall be sent to the person.

(c) If a person fails to substantially comply with an approved OCS plan, as determined by Minerals Management Service, pursuant to the Outer Continental Shelf Lands Act and applicable regulations, the person shall come into compliance with the approved plan or shall submit an amendment to such plan or a new plan to Minerals Management Service. When satisfied that the person has met the requirements of the OCSLA and this subpart, and the Secretary of the Interior or designee has made the determination required under 30 CFR 250.203(n)(2) or § 250.204(q)(2), as applicable, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding proprietary information), necessary data and information and consistency certification. Sections 930.82 through 930.84 shall apply to further State agency review of the consistency certification for the amended or new plan.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 829, Jan. 5, 2006]

Subpart F—Consistency for Federal Assistance to State and Local Governments

§ 930.90 Objectives.

The provisions of this subpart are intended to ensure that federal assistance to applicant agencies for activities affecting any coastal use or resource is granted only when such activities are consistent with approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for federal assistance activities having interstate coastal effects.

§ 930.91 Federal assistance.

The term ''federal assistance'' means assistance provided under a federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid.

§ 930.92 Applicant agency.

The term ''applicant agency'' means any unit of State or local government, or any related public entity such as a special purpose district, which, following management program approval, submits an application for federal assistance.

§ 930.93 Intergovernmental review process.

The term ''intergovernmental review process'' describes the procedures established by States pursuant to E.O. 12372, ''Intergovernmental Review of Federal Programs,'' and implementing regulations of the review of federal financial assistance to applicant agencies.

§ 930.94 State review process for consistency.

(a) States with approved management programs should review applications from applicant agencies for federal assistance in accordance with E.O. 12372 and implementing regulations.

(b) The applicant agency shall submit an application for federal assistance to the State agency for consistency review, through the intergovernmental review process or by direct submission to the State agency, for any proposed federal assistance activity that is listed in the management program as a type of activity that will have a reasonably foreseeable effect on any coastal use or resource and occurring within the coastal zone (*see* § 930.95(a)) or within a described geographic area outside of the coastal zone (*see* § 930.95(b)).

(c) *Applicant agency evaluation.* The applicant agency shall provide to the State agency, in addition to the federal application, a brief evaluation on the

relationship of the proposed activity and any reasonably foreseeable coastal effects to the enforceable policies of the management program.

§930.95 Guidance provided by the State agency.

(a) State agencies should include within the management program a listing of specific types of federal assistance programs subject to a consistency review. Such a listing, and any amendments, will require prior State agency consultation with affected Federal agencies and approval by the Director as a program change.

(b) In the event the State agency chooses to review applications for federal assistance activities outside of the coastal zone but with reasonably foreseeable coastal effects, the State agency shall develop a federal assistance provision within the management program generally describing the geographic area (e.g., coastal floodplains) within which federal assistance activities will be subject to review. This provision, and any refinements, will require prior State agency consultation with affected Federal agencies and approval by the Director as a program change. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its effects on any coastal use or resource. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the coastal nonpoint pollution control program, or other ecologically identifiable areas.

(c) The State agency shall provide copies of any federal assistance list or geographic provision, and any refinements, to Federal agencies and units of applicant agencies empowered to undertake federally assisted activities within the coastal zone or described geographic area.

(d) For review of unlisted federal assistance activities, the State agency shall follow the same procedures as it would follow for review of listed federal assistance activities outside of the coastal zone or the described geographic area. (*See* §930.98.)

§930.96 Consistency review.

(a)(1) If the State agency does not object to the proposed activity, the Federal agency may grant the federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency. Federal agencies should not delay processing (so long as they do not approve) applications pending receipt of a State agency approval or objection. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant agency and the State agency.

(2) During the period when the State agency is reviewing the activity, the applicant agency and the State agency should attempt, if necessary, to agree upon conditions which, if met by the applicant agency, would permit State agency approval. The parties shall also consult with the Federal agency responsible for providing the federal assistance to ensure that proposed conditions satisfy federal requirements as well as management program requirements.

(b) If the State agency objects to the proposed project, the State agency shall notify the applicant agency, Federal agency and the Director of the objection pursuant to §930.63.

§930.97 Federal assisting agency responsibility.

Following receipt of a State agency objection, the Federal agency shall not approve assistance for the activity except as provided in subpart H of this part.

§930.98 Federally assisted activities outside of the coastal zone or the described geographic area.

State agencies should monitor proposed federal assistance activities outside of the coastal zone or the described geographic area (e.g., by use of the intergovernmental review process, review of NEPA documents, FEDERAL REGISTER) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the State in its intergovernmental review process

pursuant to E.O. 12372 of proposed activities which will have reasonably foreseeable coastal effects and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Director. The Director, in his/her discretion, may review the State agency's decision to review the activity. The Director may disapprove the State agency's decision to review the activity only if the Director finds that the activity will not affect any coastal use or resource. The Director shall be guided by the provisions in § 930.54(c). For purposes of this subpart, State agencies must inform the parties of objections within the time period permitted under the intergovernmental review process, otherwise the State agency waives its right to object to the proposed activity.

§ 930.99 Availability of mediation for federal assistance disputes.

In the event of a serious disagreement between a Federal agency and the State agency regarding whether a federal assistance activity is subject to the consistency requirement either party may request the OCRM mediation or Secretarial mediation services provided for in subpart G of this part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Director has disapproved a State agency decision to review an activity.

§ 930.100 Remedial action for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor federal assistance activities in order to make certain that such activities continue to conform to both federal and State requirements.

(b) The State agency shall notify the relevant Federal agency representative for the area involved of any federal assistance activity which the State agency claims was:

(1) Previously determined to be consistent with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent with the management program, or

(2) Previously determined not to be a project affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result the project affects a coastal use or resource in a manner inconsistent with the management program.

(c) The State agency notification shall include:

(1) A description of the activity involved and the alleged lack of compliance with the management program;

(2) supporting information; and

(3) a request for appropriate remedial action. A copy of the request shall be sent to the applicant agency and the Director.

(d) If, after 30 days following a request for remedial action, the State agency still maintains that the applicant agency is failing to comply substantially with the management program, the State agency may file a written objection with the Director. If the Director finds that the applicant agency is conducting an activity that is substantially different from the approved activity, the State agency may reinitiate its review of the activity, or the applicant agency may conduct the activity as it was originally approved.

(e) An applicant agency shall be found to be conducting an activity substantially different from the approved activity if the State agency claims and the Director finds that the activity affects any coastal use or resource substantially different than originally determined by the State agency and, as a result, the activity is no longer being conducted in a manner consistent with the management program. The Director may make a finding that an applicant agency is conducting an activity substantially different from the approved activity only after providing a reasonable opportunity for the applicant agency and the Federal agency to review the State agency's objection

and to submit comments for the Director's consideration.

§930.101 Supplemental coordination for proposed activities.

(a) For federal assistance activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, the applicant agency shall further coordinate with the State agency if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The applicant agency makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or

(2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

(b) The State agency may notify the applicant agency, the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the applicant agency to implement the proposed activity consistent with the management program. State agency notification under paragraph (b) of this section does not remove the requirement under paragraph (a) of this section for applicant agencies to notify State agencies.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 829, Jan. 5, 2006]

Subpart G—Secretarial Mediation

§930.110 Objectives.

The purpose of this subpart is to describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs.

§930.111 OCRM mediation.

The availability of mediation does not preclude use by the parties of alternative means for resolving their disagreement. In the event a serious disagreement arises, the parties are strongly encouraged to make every effort to resolve the disagreement informally. OCRM shall be available to assist the parties in these efforts.

§930.112 Request for Secretarial mediation.

(a) The Secretary or other head of a Federal agency, or the Governor or the State agency, may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees, to the Assistant Administrator, and to the Director.

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

§ 930.113 Public hearings.

(a) If the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.

(b) At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to public data and information related to the serious disagreement.

(c) Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in a timely fashion information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. A party may also provide the hearing officer with written comments. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written information provided to these agencies.

§ 930.114 Secretarial mediation efforts.

(a) Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(b) Secretarial mediation efforts shall last only so long as the Federal and State agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

§ 930.115 Termination of mediation.

Mediation shall terminate:

(a) At any time the Federal and State agencies agree to a resolution of the serious disagreement,

(b) If one of the agencies withdraws from mediation,

(c) In the event the agencies fail to reach a resolution of the disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period, or

(d) For other good cause.

§ 930.116 Judicial review.

The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

Subpart H—Appeal to the Secretary for Review Related to the Objectives of the Act and National Security Interests

§ 930.120 Objectives.

This subpart sets forth the procedures by which the Secretary may find that a federal license or permit activity, including those described in detail in an OCS plan, or a federal assistance activity, which a State agency has found to be inconsistent with the enforceable policies of the management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

§ 930.121 Consistent with the objectives or purposes of the Act.

A federal license or permit activity, or a federal assistance activity, is ''consistent with the objectives or purposes of the Act'' if it satisfies each of the following three requirements:

(a) The activity furthers the national interest as articulated in § 302 or § 303 of

the Act, in a significant or substantial manner,

(b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal. The Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 829, Jan. 5, 2006]

§930.122 Necessary in the interest of national security.

A federal license or permit activity, or a federal assistance activity, is ''necessary in the interest of national security'' if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed. Secretarial review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected-to activity directly supports national defense or other essential national security objectives.

§930.123 Definitions.

(a) The ''appellant'' is the applicant, person or applicant agency submitting an appeal to the Secretary pursuant to this subpart.

(b) For the purposes of this subpart, the ''Federal agency'' is the agency whose proposed issuance of a license or permit or grant of assistance is the subject of the appeal to the Secretary.

(c) The term ''energy project'' means projects related to the siting, construction, expansion, or operation of any facility designed to explore, develop, produce, transmit or transport energy or energy resources that are subject to review by a coastal State under subparts D, E, F or I of this part.

(d) The term ''consolidated record'' means the record of all decisions made or actions taken by the lead Federal permitting agency or by another Federal or State administrative agency or officer, maintained by the lead Federal permitting agency, with the cooperation of Federal and State administrative agencies, related to any federal authorization for the permitting, approval or other authorization of an energy project.

(e) The term ''lead Federal permitting agency'' means the Federal agency required to: issue a federal license or permit under subparts D or I of this part; approve an OCS plan under subpart E of this part; or provide federal financial assistance under subparts F or I of this part for an energy project.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 829, Jan. 5, 2006]

§930.124 Computation of time.

The first day of any period of time allowed or prescribed by these rules, shall not be included in the computation of the designated period of time. The last day of the time period computed shall be included unless it is a Saturday, Sunday or a Federal holiday, in which case the period runs until the next day which is not one of the aforementioned days.

§930.125 Notice of appeal and application fee to the Secretary.

(a) To obtain Secretarial review of a State agency objection, the appellant shall file a notice of appeal with the Secretary within 30 days of receipt of a State agency objection.

(b) The appellant's notice of appeal shall include a statement explaining the appellant's basis for appeal of the State agency's objection under §§930.121 and/or 930.122 of this title, including any procedural arguments pursuant to §930.129(b). Bases for appeal

(including procedural arguments) not identified in the appellant's notice of appeal shall not be considered by the Secretary.

(c) The appellant's notice of appeal shall be accompanied by payment of an application fee or a request for a waiver of such fees. An appeal involving a project valued in excess of $1 million shall be considered a major appeal and the application fee is $500.00. All other appeals shall be considered minor appeals and the application fee is $200.00.

(d) The appellant shall send the Notice of appeal to the Secretary, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230; a copy of the notice of appeal to the objecting State agency; and to the Assistant General Counsel for Ocean Services (GCOS), 1305 East West Highway, Room 6111 SSMC 4, Silver Spring, Maryland 20910.

(e) No extension of time will be permitted for the filing of a notice of appeal.

(f) The Secretary shall waive any or all fees if the Secretary concludes upon review of the appellant's fee waiver request that such fees impose an economic hardship on appellant. The request for a waiver and demonstration of economic hardship shall accompany the notice of appeal. If the Secretary denies a request for a waiver and the appellant wishes to continue with the appeal, the appellant shall submit the appropriate fees to the Secretary within 10 days of receipt of the Secretary's denial. If the fees are not received by the 10th day, then the Secretary shall dismiss the appeal.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 830, Jan. 5, 2006; 71 FR 75865, Dec. 19, 2006]

§ 930.126 Consistency appeal processing fees.

The Secretary shall collect as a processing fee such other fees from the appellant as are necessary to recover the full costs of administering and processing appeals to the Secretary under section 307(c) of the Act. All processing fees shall be assessed and collected no later than 60 days after publication of the Federal Register Notice closing the decision record. Failure to submit processing fees shall be grounds for extending the time for issuance of a decision pursuant to section 319(a)(2) of the Act (16 USC 1465(a)(2)) and § 930.130 of this subpart.

§ 930.127 Briefs and supporting materials.

(a) Within 30 days of submitting the notice of appeal, as specified in § 930.125, the appellant shall submit to the Secretary its principal brief accompanied by the appendix described in paragraph (c) of this section. Within 60 days of the appellant's filing of the notice of appeal, the State agency shall submit to the Secretary its principal brief accompanied by a supplemental appendix, if any, described in paragraph (c) of this section. Not later than 20 days after appellant's receipt of the State agency's brief, appellant may submit to the Secretary a reply brief accompanied by a supplemental appendix, if any, described in paragraph (c) of this section.

(b) A principal brief shall not exceed 30 double-spaced pages; appellant's reply brief shall not exceed 15 double-spaced pages. Any table of contents, table of citations, or certifications of mailing and/or service do not count toward the page limitations.

(c) The appellant must prepare and file an appendix with its brief containing:

(1) Its consistency certification;

(2) The State agency's objection; and

(3) All such supporting documentation and material as the appellant deems necessary for consideration by the Secretary. The State agency (or appellant on reply) shall cite to appellant's appendix or may file a supplemental appendix to include additional documentation and material as the State agency (or appellant on reply) deems necessary for consideration by the Secretary that was not included in appellant's appendix (or the State agency's supplemental appendix). The parties are encouraged to discuss the contents of appellant's appendix in order to include in the appendix as much of the supporting documentation and material as any party deems necessary for consideration by the Secretary. In an appeal for an energy project, supporting documentation and material shall be limited to the parts of the consolidated record described in

paragraph (i)(1) of this section to which the appellant or the State agency wishes to direct the Secretary's attention.

(d)(1) Both the appellant and State agency shall send two copies of their briefs and supporting materials to the Office of General Counsel for Ocean Services (GCOS), NOAA, 1305 East West Highway, Room 6111 SSMC4, Silver Spring, Maryland 20910. One copy must be in an electronic format compatible (to the extent practicable) with the website maintained by the Secretary to provide public information concerning appeals under the CZMA.

(2) The appellant and State agency shall serve on each other at least one copy of their briefs, supporting materials, and all requests and communications submitted to the Secretary, at the same time that materials are submitted to the Secretary.

(3) Each submission to the Secretary shall be accompanied by a certification of mailing and/or service on the other party. Service may be done by mail or hand delivery. Materials or briefs submitted to the Secretary not in compliance with this subpart may be disregarded and not entered into the Secretary's decision record of the appeal.

(e)(1) The Secretary has broad authority to implement procedures governing the consistency appeal process to ensure efficiency and fairness to all parties. The appeal decision record is composed of the briefs and supporting materials submitted by the State agency and appellant, public comments and the comments, if any, submitted by interested Federal agencies. As noted in §930.128(c)(1), the Secretary gives deference to the views of interested Federal agencies when commenting in their areas of expertise and takes notice of relevant administrative decisions, including licenses or permits, related to an appellant's proposed activity when submitted to the appeal decision record. The Secretary determines the content of the appeal decision record. The Secretary may determine, on the Secretary's own initiative, that additional information is necessary to the Secretary's decision, including documents prepared by Federal agencies pursuant to the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and the Endangered Species Act (16 U.S.C. 1531 *et seq.*), and may request such information.

(2) To promote efficient use of time and resources, the Secretary may, upon the Secretary's own initiative, require the appellant and the State agency to submit briefs and supporting materials relevant only to procedural or jurisdictional issues presented in the Notice of Appeal or identified by the Secretary. Following a decision of the procedural or jurisdictional issues, the Secretary may require briefs on substantive issues raised by the appeal if necessary.

(3) The Secretary may require the appellant and the State agency to submit briefs in addition to those described in paragraphs (a) and (e) of this section as necessary.

(4) Any briefs not requested or required by the Secretary may be disregarded and not entered into the Secretary's decision record of the appeal.

(f) The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion.

(g) The Secretary may extend the time for submission, and length, of briefs and supporting materials for good cause.

(h) Where a State agency objection is based in whole or in part on a lack of information, the Secretary shall limit the record on appeal to information previously submitted to the State agency and relevant comments thereon, except as provided for in §930.129(b) and (c).

(i) Appeal Decision Record for Energy Projects. The provisions of this paragraph apply only to appeals for energy projects.

(1) The Secretary shall use the consolidated record maintained by the lead Federal permitting agency as the initial record for an appeal under this subpart for energy projects.

(2) The appellant's notice of appeal required by §930.125(a) and (b) must be accompanied by two copies of the consolidated record maintained by the lead Federal permitting agency. One copy of the consolidated record must be in an electronic format compatible (to the extent practicable) with the website maintained by the Secretary to provide public information concerning appeals under the CZMA. Notwithstanding §930.125(e), the Secretary may

extend the time for filing a notice of appeal in connection with an energy project for good cause shown to allow appellant additional time to prepare the consolidated record for filing.

(3) The appellant and the State agency shall submit briefs as required by paragraphs (a), (b) and (c) of this section.

(4) Supplemental information may be accepted and included in the decision record by the Secretary only as allowed by § 930.130(a)(2).

[71 FR 830, Jan. 5, 2006, as amended at 71 FR 75865, Dec. 19, 2006]

§ 930.128 Public notice, comment period, and public hearing.

(a) The Secretary shall provide public notice of the appeal within 30 days after the receipt of the Notice of Appeal by publishing a Notice in the FEDERAL REGISTER and in a publication of general circulation in the immediate area of the coastal zone likely to be affected by the proposed activity.

(b) Except in the case of appeals involving energy projects, the Secretary shall provide a 30-day period for the public and interested Federal agencies to comment on the appeal. Notice of the public and Federal agency comment period shall be provided in the Notice required in paragraph (a) of this section.

(c)(1) The Secretary shall accord greater weight to those Federal agencies whose comments are within the subject areas of their technical expertise.

(2) The Secretary may, on the Secretary's own initiative or upon written request, for good cause shown, reopen the period for Federal agency comments before the closure of the decision record.

(d) Except in the case of appeals involving energy projects, the Secretary may hold a public hearing in response to a request or on the Secretary's own initiative. A request for a public hearing must be filed with the Secretary within 30 days of the publication of the Notice in the FEDERAL REGISTER required in paragraph (a) of this section. If a hearing is held by the Secretary, it shall be noticed in the FEDERAL REGISTER and guided by the procedures described within § 930.113. If a hearing is held by the Secretary, the FEDERAL REGISTER notice for the hearing shall reopen the public and Federal agency comment period and shall close such comment period 10 days after the hearing.

[71 FR 831, Jan. 5, 2006]

§ 930.129 Dismissal, remand, stay, and procedural override.

(a) The Secretary may dismiss an appeal for good cause. A dismissal is the final agency action. Good cause shall include, but is not limited to:

(1) Failure of the appellant to submit a notice of appeal within the required 30-day period.

(2) Failure of the appellant to submit a brief or supporting materials within the required period;

(3) Failure of the appellant to pay a required fee;

(4) Denial by the Federal agency of the federal license, permit or assistance application; or

(5) Failure of the appellant to base the appeal on grounds that the proposed activity is either consistent with the objectives or purposes of the Act, or necessary in the interest of national security.

(b) If the State agency's consistency objection is not in compliance with section 307 of the Act and the regulations contained in subparts D, E, F, or I of this part, the Secretary shall override the State's objection. The Secretary may make this determination as a threshold matter.

(c) The Secretary may stay the processing of an appeal in accordance with § 930.130.

(d) The Secretary may remand an appeal to the State agency for reconsideration of the project's consistency with the enforceable policies of the State's management program if significant new information relevant to the State agency's objection, not previously provided to the State agency during its consistency review, is submitted to the Secretary. The Secretary shall determine a time period for the remand to the State agency. The time period for remand must be completed within the period described in § 930.130 for the development of the Secretary's decision record. If the State agency responds that it still objects to the activity,

then the Secretary shall continue to process the appeal. If the State agency concurs that the activity is consistent with the enforceable policies of the State's management program, then the Secretary shall declare the appeal moot and notify the Federal agency that the activity may be federally approved.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 831, Jan. 5, 2006]

§930.130 Closure of the decision record and issuance of decision.

(a)(1) With the exception of paragraph (a)(2) of this section, the Secretary shall close the decision record not later than 160 days after the date that the Secretary's Notice of Appeal is published in the FEDERAL REGISTER under §930.128(a). After closing the decision record, the Secretary shall immediately publish a notice in the FEDERAL REGISTER stating that the decision record has been closed. The notice shall also state that the Secretary shall not consider additional information, briefs or comments.

(2) The Secretary may stay the closing of the decision record during the 160-day period described in paragraph (a)(1) of this section:

(i) For a specific period mutually agreed to in writing by the appellant and the State agency; or

(ii) As the Secretary determines necessary to receive, on an expedited basis:

(A) Any supplemental information specifically requested by the Secretary to complete a consistency review under the Act; or

(B) Any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency.

(3) The Secretary may only stay the 160-day period described in paragraph (a)(1) of this section for a period not to exceed 60 days.

(b) Not later than 60 days after the date of publication of a FEDERAL REGISTER notice stating when the decision record for an appeal has been closed, the Secretary shall issue a decision or publish a notice in the FEDERAL REGISTER explaining why a decision cannot be issued at that time. The Secretary shall issue a decision not later than 15 days after the date of publication of a FEDERAL REGISTER notice explaining why a decision cannot be issued within the 60-day period.

(c) The decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act.

(d) In reviewing an appeal, the Secretary shall find that a proposed federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information in the decision record supports this conclusion.

(e)(1) If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(2) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.

[65 FR 77154, Dec. 8, 2000, as amended at 71 FR 831, Jan. 5, 2006]

§930.131 Review initiated by the Secretary.

(a) The Secretary may, on her own initiative, choose to consider whether a federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review shall only be initiated after the completion of State agency review pursuant to the relevant subpart. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the relevant Federal and State agencies. The notice shall include a statement describing the reasons for the review.

(b) With the exception of application and processing fees, all other provisions under this subpart governing the processing and administering of appeals will apply to Secretarial reviews initiated under this section.

Subpart I—Consistency of Federal Activities Having Interstate Coastal Effects

§ 930.150 Objectives.

(a) A federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur. Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the management program of each affected State.

(b) The application of the federal consistency requirement to activities having interstate coastal effects is addressed by this subpart in order to encourage cooperation among States in dealing with activities having interstate coastal effects, and to provide States, local governments, Federal agencies, and the public with a predictable framework for evaluating the consistency of these federal activities under the Act.

§ 930.151 Interstate coastal effect.

The term ''interstate coastal effect'' means any reasonably foreseeable effect resulting from a federal action occurring in one State of the United States on any coastal use or resource of another State that has a federally approved management program. Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. The term ''affects'' means have an effect on. Effects on any coastal use or resource may also be referred to as ''coastal effects.''

§ 930.152 Application.

(a) This subpart applies to federal actions having interstate coastal effects, and supplements the relevant requirements contained in 15 CFR part 930, subparts C (Consistency for Federal Agency Activities), D (Consistency for Activities Requiring a Federal License or Permit), E (Consistency for OCS Exploration, Development and Production Activities) and F (Consistency for Federal Assistance to State and Local Governments). Except as otherwise provided by this subpart, the requirements of other relevant subparts of part 930 apply to activities having interstate coastal effects.

(b) Federal consistency is a requirement on federal actions affecting any coastal use or resource of a State with a federally-approved management program, regardless of the activities' locations (including States without a federally approved management program). The federal consistency requirement does not alter a coastal State's jurisdiction. The federal consistency requirement does not give States the authority to review the application of laws, regulations, or policies of any other State. Rather, the Act allows a management program to review federal actions and may preclude federal action as a result of a State objection, even if the objecting State is not the State in which the activity will occur. Such objections to interstate activities under subparts D, E and F may be overridden by the Secretary pursuant to subpart H of this part.

§ 930.153 Coordination between States in developing coastal management policies.

Coastal States are encouraged to give high priority to:

(a) Coordinating State coastal management planning, policies, and programs with respect to contiguous areas of such States;

(b) Studying, planning, and implementing unified coastal management policies with respect to such areas; and

(c) Establishing an effective mechanism, and adopting a federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to activities having interstate coastal effects.

§930.154 Listing activities subject to routine interstate consistency review.

(a) *Geographic location of listed activities.* Each coastal State intending to conduct a consistency review of federal activities occurring in another State shall:

(1) List those Federal agency activities, federal license or permit activities, and federal assistance activities that the State intends to routinely review for consistency; and

(2) Generally describe the geographic location for each type of listed activity.

(b) In establishing the geographic location of interstate consistency review, each State must notify and consult with the State in which the listed activity will occur, as well as with relevant Federal agencies.

(c) *Demonstrate effects.* In describing the geographic location for interstate consistency reviews, the State agency shall provide information to the Director that coastal effects from listed activities occurring within the geographic area are reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its effects on any coastal use or resource. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries under the State's coastal nonpoint pollution control program, or other ecologically identifiable areas.

(d) *Director approval.* State agencies shall submit their lists and geographic location descriptions developed under this section to the Director for approval as a routine program change under subpart H of 15 CFR part 923. Each State submitting this program change shall include evidence of consultation with States in which the activity will occur, evidence of consultation with relevant Federal agencies, and any agreements with other States and Federal agencies regarding coordination of activities.

(e) *State failure to list interstate activities.* A coastal State that fails to list federal activities subject to interstate review, or to describe the geographic location for these activities, under paragraphs (a) through (d) of this section, may not exercise its right to review activities occurring in other States, until the State meets the listing requirements. The listing of activities subject to interstate consistency review, and the description of the geographic location for those listed activities, should ensure that coastal States have the opportunity to review relevant activities occurring in other States. States may amend their lists and geographic location descriptions pursuant to the requirements of this subpart and subpart H of 15 CFR part 923. States which have complied with paragraphs (a) through (d) of this section may also use the procedure at §930.54 to review unlisted activities. States will have a transition period of 18 months from the date this rule takes effect. In that time a State may review an interstate activity pursuant to §930.54 of this part. After the transition period States must comply with this subpart in order to review interstate activities.

§930.155 Federal and State agency coordination.

(a) Identifying activities subject to the consistency requirement. The provisions of this subpart are neither a substitute for nor eliminate the statutory requirement of federal consistency with the enforceable policies of management programs for all activities affecting any coastal use or resource. Federal agencies shall submit consistency determinations to relevant State agencies for activities having coastal effects, regardless of location, and regardless of whether the activity is listed.

(b) *Notifying affected States.* Federal agencies, applicants or applicant agencies proposing activities listed for interstate consistency review, or determined by the Federal agency, applicant or applicant agency to have an effect

on any coastal use or resource, shall notify each affected coastal State of the proposed activity. State agencies may also notify Federal agencies and applicants of listed and unlisted activities subject to State agency review and the requirements of this subpart.

(c) *Notice of intent to review.* Within 30 days from receipt of the consistency determination or certification and necessary data and information, or within 30 days from receipt of notice of a listed federal assistance activity, each State intending to review an activity occurring in another State must notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur (either the State's management program, or if the State does not have a management program, the Governor's office), and the Director, of its intent to review the activity for consistency. The State's notice to the parties must be received by the 30th day after receipt of the consistency determination or certification. If a State fails, within the 30 days, to notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur, and the Director, of its intent to review the activity, then the State waives its right to review the activity for consistency. The waiver does not apply where the State intending to review the activity does not receive notice of the activity.

§ 930.156 Content of a consistency determination or certification and State agency response.

(a) The Federal agency or applicant is encouraged to prepare one determination or certification that will satisfy the requirements of all affected States with approved management programs.

(b) State agency responses shall follow the applicable requirements contained in subparts C, D, E and F of this part.

§ 930.157 Mediation and informal negotiations.

The relevant provisions contained in subpart G of this part are available for resolution of disputes between affected States, relevant Federal agencies, and applicants or applicant agencies The parties to the dispute are also encouraged to use alternative means for resolving their disagreement. OCRM shall be available to assist the parties in these efforts.

PARTS 932–933 [RESERVED]

SUBCHAPTER C—REGULATIONS OF THE NATIONAL WEATHER SERVICE

PART 946—MODERNIZATION OF THE NATIONAL WEATHER SERVICE

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APPENDIX A TO PART 946—NATIONAL WEATHER SERVICE MODERNIZATION CRITERIA
APPENDIX B TO PART 946—AIRPORT TABLES

AUTHORITY: Title VII of Pub. L. 102–567, 106 Stat. 4303 15 U.S.C. 313 note

SOURCE: 58 FR 64091, Dec. 3, 1993, unless otherwise noted.

§ 946.1 Purpose.

(a) This part sets forth the procedures for certification by the Secretary of Commerce that the closure, consolidation, automation or relocation of any field office of the National Weather Service (NWS) pursuant to the implementation of the Strategic Plan for the Modernization of the NWS will not result in any degradation of weather services. Section 706 of Pub. L. 102–567 requires that no such field office be closed, consolidated, automated, or relocated until such certification is made. This part distinguishes these modernization activities which require certification from those changes in operations at a field office which do not require certification.

(b) This part, including specifically these sections which specify when certifications are required, is intended to promote confidence that public safety is being adequately considered during the modernization process. While some of the terms used in these regulations may be identical to those used by the Office of Personnel Management, the General Services Administration, or by NOAA in personnel regulations, this part does not affect or supersede those regulations. In particular, a determination that the move of a field office is not a ''relocation'' for purposes of these regulations does not affect an employee's rights to relocation assistance, discontinued service retirement, severance pay, or grade and pay retention.

§ 946.2 Definitions.

Automate (or automation) means to replace employees performing surface observations at a field office with automated weather service observation equipment. For the purposes of this definition, an employee performing surface observations at a field office is replaced when that office, after installing such equipment, reduces or eliminates its responsibility for taking surface observations and removes the employee from that field office, or formally requests the employee to cease performing all observational responsibilities at that office. Automate does not include temporarily reducing the hours of operation during which a field office is responsible for surface observations or augmenting/backing up an ASOS when such reduction results from an unplanned decrease in staff.

Category 1 radar means an existing NWS radar which is to be replaced by a NEX-RAD on the same site or on an adjacent site from which the two radars cannot operate concurrently. A Category 1 radar must be dismantled when the existing tower prevents building a replacement NEX-RAD on the same site or operationally demonstrating and commissioning a replacement NEX-RAD on an adjacent site by physically blocking its beam. A Category 1 radar must be turned off when it prevents operationally demonstrating and commissioning a replacement NEX-RAD on an adjacent site by creating substantial electromagnetic interference.

Change operations at a field office means to transfer service responsibility, commission weather observation systems, decommission a NWS radar, move an entire field office to a new location inside the local commuting and service area, or significantly change the staffing level of a field office except where the staffing change constitutes a consolidation or automation or where there is an unplanned decrease in staff.

Close (or closure) means to remove all weather services, equipment, and personnel from a filed office. It does not include a consolidation, automation, or relocation or a move of a field office to another location within the current local commuting and service area.

Commission means to officially charge a new observational technology (e.g, NEXRAD and ASOS) with responsibility for providing weather data within a defined service area or to charge a new weather office support system (e.g, AWIPS) with responsibility for supporting office operations.

Committee means the Modernization Transition Committee established by sec. 707 of Pub. L. 102–567.

Consolidate (or consolidation) means to remove some positions from a field office (without closing that office) after those responsibilities have been reduced or eliminated by the commissioning of one or more NEXRADS, the decommissioning of the radar operated by that office, if any, and the combination of that office's responsibilities with those of another field office. Consolidate does not include temporarily reducing the hours during which a field office is responsible for operating a radar when such reduction results from an unplanned decrease in staff.

Decommission (or permanently decommission) means to permanently withdraw existing official responsibility for providing weather data or weather office support from an existing technology which includes turning off the technology. It does not include temporarily withdrawing responsibility for providing radar data where this action results from:

(1) System failure;

(2) The need to dismantle a Category 1 radar to allow the construction of or the operational demonstration and commissioning of a replacement NEXRAD; or

(3) The need to turn off a Category 1 radar to allow the operational demonstration and commissioning of a replacement NEX-RAD.

Field office means a National Weather Service Office (WSO) or a National Weather Service Forecast Office (WSFO).

Inventory of services means all of those weather services from those listed on the menu of services that are provided to the public by a field office in its service area prior to a transition action.

Local Commuting Area means the population center (or two or more neighboring ones) served by an existing field office and includes those surrounding localities that can reasonably be considered part of this single area for transportation purposes. The Local Commuting Area for any field office located in a Metropolitan Area defined by the Office of Management and Budget for statistical purposes shall be the Metropolitan Statistical Area or Primary Metropolitan Statistical Area.

Menu of services means the basic weather services provided by NWS field offices as listed in § 946.4.

National Implementation Plan means the plan submitted to Congress as part of the budget justification documents for Fiscal Year 1994 and for each subsequent fiscal year until the modernization is complete.

Regional Director means the Director of one of the six geographical regions of the NWS.

Relocate (or relocation) means to move an entire field office, including all personnel positions, equipment and service responsibility to a location outside the current local commuting or service area of that field office.

Responsible Meteorologist means an employee of the NWS in charge of the office that will be responsible for providing weather services to the area affected by a closure, consolidation, automation, or relocation of a field office.

Restructure means to close, consolidate, automate, or relocate a field office.

Secretary means the Secretary of Commerce or his or her delegate.

Service area means the geographical area for which an existing field office provides weather services or conducts observations.

Strategic Plan means the 10 year strategic plan for the modernization of NWS which was submitted to the Congress by the Secretary on March 10, 1989.

Unplanned decrease in staff means a temporary reduction in the number of employees available for duty at a field office resulting from employee retirement, resignation, extended sick leave or emergency leave, or voluntary acceptance of training or of a position outside that field office.

Weather service means a service or product provided to a service area by a field office.

[58 FR 64091, Dec. 3, 1993, as amended at 59 FR 44314, Aug. 29, 1994]

§946.3 Notification of changes in operations and restructuring.

(a) Beginning with the Fiscal Year 1994 budget submission to Congress and until the modernization is complete, the NWS will submit to Congress annually a National Implementation Plan. The NWS may amend a Plan prior to the submission of the next Plan to include modifications provided that notification of any additional proposed changes in operations or identification of any additional proposed restructuring actions shall be provided to Congress at least 90 days prior to the date of the action.

(b) The NWS will neither change operations at, nor restructure, any field office after September 30, 1993, pursuant to the implementation of the Strategic Plan unless it has provided notification of the relevant action in the most current edition of the National Implementation Plan, or an amendment thereof, and has complied with all requirements of these regulations.

§946.4 Menu of services.

The following are the basic weather services provided by NWS field offices:

(a) Surface Observations

(b) Upper Air Observations

(c) Radar Observations

(d) Public Forecasts, Statements, and Warnings

(e) Aviation Forecasts, Statements, and Warnings

(f) Marine Forecasts, Statements, and Warnings

(g) Hydrologic Forecasts and Warnings

(h) Fire Weather Forecasts and Warnings

(i) Agricultural Forecasts and Advisories

(j) NOAA Weather Radio Broadcasts

(k) Climatological Services

(l) Emergency Management Support

(m) Special Products and Service Programs

§946.5 Change in operations—commissioning and decommissioning.

(a) Before commissioning any new NEXRAD or ASOS weather observation system, the NWS shall prepare a Commissioning Report documenting that the system involved will perform to the Government's specifications; the system has been tested on site and performs reliably; satisfactory maintenance support is in place; sufficient staff with adequate training are available to operate the system; technical coordination with weather service users has been completed; and the system satisfactorily supports field office operations.

(b) The Report required by paragraph (a) of this section shall be based on the scientific and technical criteria set forth in the NWS' NEXRAD and ASOS Commissioning Plans, as appropriate, which criteria shall be published in the FEDERAL REGISTER as the final commissioning criteria in accordance with sec. 704(b)(1) of the Act. In the case of an ASOS commissioning, the Report shall also document that the NWS has consulted with the Federal Aviation Administration (FAA) and has determined that the weather services provided after commissioning will continue to be in full compliance with the applicable FAA flight aviation rules.

(c) Before decommissioning any NWS radar, the NWS shall prepare a Decommissioning Report documenting that all replacement radars needed to provide equal coverage have been commissioned; confirmation of services with users has been completed; and that the radar being decommissioned is no

longer needed to support field office operations. The Decommissioning Report shall be based on the scientific and technical criteria contained in the NWS' Radar Decommissioning Plan, which criteria shall be published in the FEDERAL REGISTER as the final decommissioning criteria in accordance with the requirements of sec. 704(b)(1) of the Act.

(d) If the final commissioning criteria significantly modify the criteria upon which the previous commissioning of a NEXRAD and/or ASOS were based, the NWS shall confirm that the relevant system conforms with the final criteria adopted. The NWS shall not decommission any NWS radar until the final criteria have been adopted.

§ 946.6 Change in operations—transferring responsibility and moving field offices.

(a) After providing any notification required by § 946.3(b), NWS may change operations at a field office to implement the Strategic Plan, including:

(1) Transferring official responsibility for taking radar observations to a NEXRAD Weather Service Forecast Office (NWSFO) or a NEXRAD Weather Service Office (NWSO) that is being established as a future Weather Forecast Office following commissioning of the NEXRAD at the new office;

(2) Transferring official responsibility for taking observations from a Category 1 radar to a backup radar or radars prior to constructing and/or operating a replacement NEXRAD. Before transferring responsibility, the Responsible Meteorologist shall document that technical coordination with users has been completed and that the transition to the replacement NEXRAD can be completed expeditiously;

(3) Transferring its service responsibility for issuing watches, warnings, forecasts and other products to a NWSFO or NWSO;

(4) Significantly reducing its staffing level by transferring or reassigning personnel to support the service responsibilities transferred under paragraph (a)(3) of this section provided that the field office continues to assign the appropriate number of positions established by the NWS Operations Manual to carry out its observation responsibilities; and

(5) Moving an entire field office to a location within the local commuting and service area of that office.

(b) A field office may not significantly reduce its staffing level assigned to support any observation responsibility, including those responsibilities transferred under paragraph (a)(2) of this section and those retained under paragraph (a)(4) of this section, until the Secretary has certified that the automation and/or consolidation will not degrade service in accordance with § 946.7.

§ 946.7 Preparation of proposed certification for restructuring.

(a) Whenever it becomes appropriate to restructure a field office identified in the National Implementation Plan, but prior to taking such action, the Responsible Meteorologist shall make a determination that there will be no degradation of service based on the final criteria published in the FEDERAL REGISTER in accordance with sec. 704 of the Act and recommend a proposed certification. The proposed certification may address all related restructuring actions that occur as part of a coordinated step described in the National Implementation Plan.

(b) The proposed certification shall include:

(1) A description of local weather characteristics and weather-related concerns which affect the weather services provided within the service area;

(2) A detailed comparison of the inventory of services provided within the service area prior to such action and the services to be provided after such action;

(3) Any recent or expected modernization of NWS operations which will enhance services to the affected area;

(4) An identification of any area within any state which will not receive NEXRAD coverage at an elevation of 10,000 feet;

(5) Evidence based upon operational demonstration of modernized NWS operations which support a determination that no degradation in service will result;

(6) Any report of the Committee issued under sec. 707(c) of the Act; and

(7) The Responsible Meteorologist's determination that there will be no degradation of service.

(c) If the restructuring proposed to be certified involves the commissioning of a NEXRAD, the Responsible Meteorologist shall also consider the following evidence from operational demonstration of modernized operations in reaching the conclusion that no degradation of service will result:

(1) The Commissioning Report containing the elements described in §946.5(a);

(2) The Decommissioning Report containing the elements described in §946.5(c); and

(3) The Confirmation of Services Report prepared by the NWS in accordance with paragraph (e) of this section.

(d) If the restructuring proposed to be certified involves the commissioning of an ASOS unit, the Responsible Meteorologist shall also consider the following evidence from operational demonstration of modernized operations in reaching the conclusion that no degradation of service will result:

(1) The Commissioning Report containing the elements described in §946.5(a);

(2) The NWS Surface Observation Modernization Report documenting that manual observations being discontinued are no longer needed to provide mission field services; based on the final scientific and technical criteria (including all requirements and procedures) published in the FEDERAL REGISTER in accordance with section 704(b)(2) of the act; and

(3) The Confirmation of Services Report prepared by the NWS in accordance with paragraph (e) of this section.

(e) The Confirmation of Services Report required by paragraphs (c) and (d) of this section shall include a list of those users who have been contacted during the confirmation process, to document that services have not been degraded. These users shall include the appropriate media and emergency managers in the service area and the appropriate federal and state agencies including specifically the FAA if the restructuring involves a field office located at an airport and consultation with the FAA has not been conducted in accordance with §946.5(b). This Report shall be based on the scientific and technical criteria set forth in the Internal and External Communication and Coordination Plan for the Modernization and Associated Restructuring of the National Weather Service, which criteria shall be included in the final certification criteria published in the FEDERAL REGISTER in accordance with sec. 704(b)(2) of the Act.

(f) If the restructuring proposed to be certified involves the relocation of a field office, the Responsible Meteorologist shall also consider the following evidence in reaching the conclusion that no degradation of service will result:

(1) Evidence based upon operational demonstration during earlier modernization actions in which an entire field office was moved from one location to another including specifically the impact of such moves on services;

(2) A checklist of all operational tests and inspections that will be performed at the new location to ensure that the relocated equipment is fully operational;

(3) A list of all users notified prior to the relocation, and a list of the contacts that will be made with the relevant users to confirm operational status after the relocation; and

(4) Comments received from notified users and those received during the public comment period.

§946.8 Review of proposed certification for restructuring.

The Responsible Meteorologist shall transmit the proposed certification and the accompanying documentation to the Regional Director for review. The Regional Director may amend or supplement the documentation provided subsequent readers can easily identify his or her amendments or supplements. If the Regional Director agrees with the proposed certification, he or she shall endorse the proposed certification, and transmit it along with all the accompanying documentation to the Secretary. A copy of any proposed certification shall be provided to the Committee upon request of the Committee.

§ 946.9 Certification of restructuring.

(a) The Secretary shall publish each proposed certification in the FEDERAL REGISTER at least 60 days prior to certification. If, after consideration of the public comments received, the Secretary agrees that the proposed restructuring will not result in any degradation of service to the service area, he or she shall so certify by submitting a certification report to Congress. Upon transmittal of the certification by the secretary, NWS shall promptly publish the certification in the FEDERAL REGISTER stating where copies of the certification and the accompanying documents may be obtained.

(b) The Responsible Meteorologist may restructure only after the certification has been submitted to Congress.

(c) Any field office for which restructuring has been certified under this section shall also be subject to additional certification if that office is closed during stage 2 of the modernization. No field office will close before January 1, 1996.

§ 946.10 Liaison officer.

Prior to restructuring a field office, the Responsible Meteorologist shall designate at least one person in the affected service area to act as a liaison officer for at least a 2-year period whose duties shall be:

(a) Provide timely information regarding the activities of the NWS which may affect service to the community including specifically modernization and restructuring activities; and

(b) Work with area users, including persons associated with general aviation, civil defense, emergency preparedness, and the news media, with respect to the provision of timely weather warnings and forecasts.

APPENDIX A TO PART 946—NATIONAL WEATHER SERVICE MODERNIZATION CRITERIA

I. Modernization Criteria for Actions Not Requiring Certification

(A) Commissioning of New Weather Observation Systems

(1) Automated Surface Observation Systems (ASOS)

Purpose: Successful commissioning for full operational use requires a demonstration, by tests and other means, that the ASOS equipment, as installed in the field office, meets its technical requirements; that the prescribed operating, maintenance, and logistic support elements are in place; that operations have been properly staffed with trained personnel and that the equipment can be operated with all other installed mating elements of the modernized NWS system.

NOTE: It may be necessary to incorporate work-arounds to complete some of the items listed below in a timely and cost-effective manner. A work-around provides for an alternative method of meeting a commissioning criteria through the application of a pre-approved operational procedure implemented on a temporary basis, for example, by human augmentation of the observation for the occurrence of freezing rain, until such time as a freezing rain sensor has been accepted for operational use with ASOS. The ASOS Plan referenced below includes a process for recommending, approving, and documenting work arounds and requires that they be tracked as open items until they can be eliminated by implementation of the originally intended capability.

References: The criteria and evaluation elements for commissioning are set forth and further detailed in the NWS-Sponsored Automated Surface Observing System (ASOS) Site Component Commissioning Plan (the ASOS Plan), more specifically in Addendum I, Appendix D of the ASOS Site Component Commissioning Evaluation Package (the ASOS Package).

Criteria: a. ASOS Acceptance Test: The site component acceptance test, which includes objective tests to demonstrate that the ASOS, as installed at the given site, meets its technical specifications, has been successfully completed in accordance with item 1a, p. D–2 of Appendix D of the ASOS Package.

b. Sensor Siting: Sensor sitings provide representative observations in accordance with Appendix C of the ASOS Package, Guidance for Evaluating Representativeness of ASOS Observations and item 1b, p. D–2 of Appendix D of the ASOS Package.

c. Initialization Parameters: Initialization parameters are in agreement with source information provided by the ASOS Program Office, in accordance with item 1c, pp. D–2 & D–3 of Appendix D of the ASOS Package.

d. Sensor Performance Verification: Sensor performance has been verified in accordance with the requirements stated in the ASOS Site Technical Manual and item 1d, p. D–3 of the ASOS Package.

e. Field Modification Kits/Firmware Installed: All critical field modification kits and firmware for the site as required by attachments 3a & b (pp. D–45 & D–46) or memorandum issued to the regions, have been installed on the ASOS in accordance with item 1e, p. D–4 of Appendix of the ASOS Package.

f. Operations and Maintenance Documentation: A full set of operations and maintenance documentation is available in accordance with items 2a-h, pp. D–5 & D–6 of Appendix D of the ASOS Package.

g. Notification of and Technical Coordination with Users: All affected users have been notified of the initial date for ASOS operations and have received a technical coordination package in accordance with item 2i, pp. D–6 & D–7 of Appendix D of the ASOS Package.

h. Availability of Trained Operations Personnel: Adequate operations staff are available, training materials are available, and required training has been completed, per section 3.2.3.1 of the ASOS Plan, in accordance with items 3a-c, p. D–8 of Appendix D of the ASOS package.

i. Maintenance Capability: Proper maintenance personnel and support systems and arrangements are available in accordance with items 4a-e, pp. D–9 & D–10 of Appendix D of the ASOS Package.

j. Performance of Site Interfaces: The equipment can be operated in all of its required modes and in conjunction with all of its interfacing equipment per the detailed checklists of items 5a-b, pp. D–11 & D–19 of Appendix D of the ASOS Package.

k. Support of Associated NWS Forecasting and Warning Services: The equipment provides proper support of NWS forecasting and warning services and archiving, including operation of all specified automatic and manually augmented modes per the checklist, items 6a-e, pp. D–20 to D–29, of Appendix D of the ASOS Package.

l. Service Backup Capabilities: Personnel, equipment, and supporting services are available and capable of providing required backup readings and services in support of operations when primary equipment is inoperable in accordance with items 7a-g, pp. D–30 to D–32, of Appendix D of the ASOS Package.

m. Augmentation Capabilities: Personnel are available and trained to provide augmentation of ASOS observations in accordance with augmentation procedures, items 8a-c, p. D–33 of Appendix D of the ASOS Package.

n. Representativeness of Observations: Observations are representative of the hydrometeorological conditions of the observing location as determined by a period of observation of at least 60 days prior to commissioning in accordance with Appendix C and item 6e, pp. D–27 to D–29 of Appendix D of the ASOS Package.

(2) WSR–88D Radar System

Purpose: Successful commissioning for full operational use requires a demonstration, by tests and other means, that the WSR–88D radar system, as installed in the field office, meets its technical requirements; that the prescribed operating, maintenance, and logistic support elements are in place; that operations have been properly staffed with trained personnel; and that the equipment can be operated with all other installed mating elements of the modernized NWS system.

NOTE: It may be necessary to incorporate work-arounds to complete some of the items listed below in a timely and cost-effective manner. A work-around provides for an alternative method of meeting a commissioning criteria through the application for a pre-approved operational procedure implemented on a temporary basis. The WSR–88D Plan referenced below includes a process for recommending, approving, and documenting work arounds and requires that they be tracked as open items until they can be eliminated by implementation of the originally intended capability.

Reference: The criteria and evaluation elements for commissioning are set forth and further detailed in the NWS-Sponsored WSR–88D Site Component Commissioning Plan (the 88D Plan) and an Attachment to that Plan, called the WSR–88D Site Component Commissioning Evaluation Package (the WSR–88D Package).

Criteria: a. WSR–88D Radar Acceptance Test: The site component acceptance test, which includes objective tests to demonstrate that the WSR–88D radar, as installed at the given site, meets its technical specifications, has been successfully completed in accordance with items 1a-f, p. A–2 of Appendix A of the WSR–88D Package.

b. Availability of Trained Operations and Maintenance Personnel: Adequate operations and maintenance staffs are available, training materials are available, and required training has been completed in accordance with items 2a-h, pp. A–3 & A–4 of Appendix A of the WSR–88D Package.

c. Satisfactory Operation of System Interfaces: The system can be operated in all of its required modes and in conjunction with all of its interfacing equipment in accordance with items 3a-e, p. A–5 of Appendix A of the WSR–88D Package.

d. Satisfactory Support of Associated NWS Forecasting and Warning Services: The system provides proper support of NWS forecasting and warning services, including at least 96 percent availability of the radar coded message for a period of 30 consecutive days prior to commissioning in accordance with items 4a-kk, pp. A–6 to A–17 of Appendix A of the WSR–88D Package.

e. Service Backup Capabilities: Service backup capabilities function properly when the primary system is inoperable in accordance with items 5a-e, p. A–18 of Appendix A of the WSR–88D Package.

f. Documentation for Operations and Maintenance: A full set of operations and maintenance documentation is available in accordance with items 6a-n, pp. A–19 to A–25 of Appendix A of the WSR–88D Package.

g. Spare Parts and Test Equipment: A full complement of spare parts and test equipment is available on site in accordance with items 7a-e, p. A–26, of Appendix A of the WSR–88D Package.

(B) Decommissioning an Outdated NWS Radar

Purpose: Successful decomissioning of an old radar requires assurance that the existing radar is no longer needed to support delivery of services and products and local office operations.

References: The criteria and evaluation elements for decommissioning are set forth and further detailed in the NWS-Sponsored Network and Local Warning Radars (Including Adjunct Equipment) Site Component Decommissioning Plan (the Plan), more specifically in Appendix B to that Plan, called the Site Component Decommissioning Evaluating Package, and in Section 3.3 of the Internal and External Communication and Coordination Plan for the Modernization and Associated Restructuring of the Weather Service.

Criteria: a. Replacing WSR–88D(s) Commissioning/User Service Confirmation: The replacing WSR–88D(s) have been commissioned and user confirmation of services has been successfully completed, *i.e.*, all valid user complaints related to actual system performance have been satisfactorily resolved, in accordance with items 1a-c, p. B–10 of Appendix B of the Plan.

b. Operation Not Dependent on Existing Radar: The outdated radar is not required for service coverage, in accordance with items 2a-c, p. B–11 of Appendix B of the Plan.

c. Notification of Users: Adequate notification of users has been provided, in accordance with items 3a-f, pp. B–12 & B–13 of Appendix B of the Plan.

d. Disposal of Existing Radar: Preparations for disposal of the old existing radar have been completed, in accordance with items 4a-d, pp. B–14 & B–15 of Appendix B of the Plan.

(C) Evaluating Staffing Needs for Field Offices in Affected Areas

References: The criteria and evaluation elements are set forth and further detailed in the ASOS and WSR–88D Evaluation Packages and in the Human Resources and Position Management Plan for the National Weather Service Modernization and Associated Restructuring (the Human Resources Plan).

Criteria: 1. Availability of Trained Operations and Maintenance Personnel at a NEXRAD Weather Service Forecast Office or NEXRAD Weather Service Office: Adequate operations and maintenance staffs are available to commission a WSR–88D, specifically criterion b. set forth in section I.A.2. of this Appendix which includes meeting the Stage 1 staffing levels set forth in chapter 3 of the Human Resources Plan.

2. Availability of Trained Operations and Maintenance Personnel at any field office receiving an ASOS: Adequate operations and maintenance staff are available to meet the requirements for commissioning an ASOS, specifically criteria h and i set forth in section I.A.1 of this Appendix.

II. Criteria for Modernization Actions Requiring Certification

(A) Modernization Criteria Common to all Types of Certifications (Except as Noted)

1. Notification: Advanced notification and the expected date of the proposed certification have been provided in the National Implementation Plan.

2. Local Weather Characteristics and Weather Related Concerns: A description of local weather characteristics and weather related concerns which affect the weather services provided to the affected service area is provided.

3. Comparison of Services: A comparison of services before and after the proposed action demonstrates that all services currently provided to the affected service area will continue to be provided with no degradation of services.

4. Recent or Excepted Modernization of NWS Operations in the Affected Service Area: A description of recent or expected modernization of NWS operations in the affected service area is provided.

5. NEXRAD Network Coverage: NEXRAD network coverage or gaps in coverage at 10,000 feet over the affected service area are identified.

6. Air Safety Appraisal (applies only to relocation and closure of field offices at an airport): Verification that there will be no degradation of service that affects aircraft safety has been made by conducting an air safety appraisal in consultation with the Federal Aviation Administration.

7. Evaluation of Services to In-state Users (applies only to relocation and closure of the only field office in a state): Verification that there will be no degradation of weather services provided to the state has been made by evaluating the effect on weather services provided to in-State users.

8. Liaison Officer: Arrangements have been made to retain a Liaison Officer in the affected service area for at least two years to provide timely information regarding the activities of the NWS which may affect service to the community, including modernization and restructuring; and to work with area weather service users, including persons associated with general aviation, civil defense, emergency preparedness, and the news media, with respect to the provision of timely weather warnings and forecasts.

9. Meteorologist-In-Charge's (MIC) Recommendation to Certify: The MIC of the future WFO that will have responsibility for the affected service area has recommended certification in accordance with 15 CFR 946.7(a).

10. Regional Director's Certification: The cognizant Regional Director has approved the MIC's recommended certification of no degradation of service to the affected service area in accordance with 15 CFR 946.8.

(B) Modernization Criteria Unique to Consolidation Certifications

1. WSR–88D Commissioning: All necessary WSR–88D radars have been successfully commissioned in accordance with the criteria set forth in section I.A.2. of this Appendix.

2. User Confirmation of Services: All valid user complaints related to actual system performance have been satisfactorily resolved in accordance with section 3.3 of the Internal and External Communication and Coordination Plan for the Modernization and Associated Restructuring of the National Weather Service.

3. Decommissioning of Existing Radar: The existing radar, if any, has been successfully decommissioned in accordance with the criteria set forth in section I.B. of this Appendix.

(C) Modernization Criteria Unique to Relocation Certifications

1. Approval of Proposed Relocation Checklist: The cognizant regional director has approved a proposed relocation checklist setting forth the necessary elements in the relocation process to assure that all affected users will be given advanced notification of the relocation, that delivery of NWS services and products will not be interrupted during the office relocation, and that the office to be relocated will resume full operation at the new facility expeditiously so as to minimize the service backup period.

Specific Elements: a. Notification of and Technical Coordination with Users: The proposed relocation checklist provides for the notification of and technical coordination with all affected users.

b. Identification and Preparation of Backup Sites: The proposed relocation checklist identifies the necessary backup sites and the steps necessary to prepare to use backup sites to ensure service coverage during the move and checkout period.

c. Start of Service Backup: The proposed relocation checklist provides for invocation of service backup by designated sites prior to office relocation.

d. Systems, Furniture and Communications: The proposed relocation checklist identifies the steps necessary to move all systems and furniture to the new facility and to install communications at the new facility.

e. Installation and Checkout: The proposed relocation checklist identifies all steps to install and checkout systems and furniture and to connect to communications at the new facility.

f. Validation of Systems Operability and Service Delivery: The proposed relocation checklist provides for validation of system operability and service delivery from the new facility.

2. Publishing of the Proposed Relocation Checklist and Evidence form Completed Moves: The proposed relocation checklist and the evidence from other similar office moves that have been completed, have been published in the FEDERAL REGISTER for public comment. The evidence from the other office moves indicates that they have been successfully completed.

3. Resolution of Public Comments Received: All responsive public comments received from publication, in the FEDERAL REGISTER, of the checklists and of the evidence from completed moves are satisfactorily answered.

(D) Modernization Criteria Unique to Automation Certifications

1. Compliance with flight aviation rules (applies on airports only): Consultation with the Federal Aviation Administration (FAA) has verified that the weather services provided after the commissioning of the relevant ASOS unit(s) will be in full compliance with applicable Federal Aviation Regulations promulgated by the FAA.

2. ASOS Commissioning: The relevant ASOS unit(s) have been successfully commissioned in accordance with the criteria set forth in section I.A.1 of Appendix A to the Weather Service Modernization Regulations, 15 CFR part 946.

3. User Confirmation of Services: Any valid user complaints related to actual system performance received since commissioning of the ASOS have been satisfactorily resolved

and the issues addressed in the MIC's recommendation for certification.

4. Aviation Observation Requirement: At sites subject to automation certification, all surface observations and reports required for aviation services can be generated by an ASOS augmented as necessary by non-NWS personnel.

a. The ASOS observation will be augmented/backed-up to the level specified in Appendix B as described in the Summary Chart of the FAA's Weather Observation Service Standards.

b. The transition checklist has been signed by the appropriate Region Systems Operations Division Chief (applies to service level A, B and C airports only).

c. Thunderstorm occurrence is reported in the ASOS observation through the use of a lightning sensor (applies to service level D airports only, excluding Homer, Alaska).

d. Freezing rain occurrence is reported in the ASOS observation through the use of a freezing rain sensor. Among service level D airports, this criterion is not applicable to Ely, Nevada and Lander, Wyoming.

5. Pilot Education and Outreach Completed: The Air Safety Foundation has conducted a pilot education and outreach effort to educate pilots on the use of automated observations and measure their understanding and acceptance of automated observing systems, and the MTC has had an opportunity to review the results of this effort (applies to service level D airports only).

6. General Surface Observation Requirement: The total observations available are adequate to support the required inventory of services to users in the affected area. All necessary hydrometeorological data and information are available through ASOS as augmented in accordance with this section, through those elements reported as supplementary data by the relevant Weather Forecast Office(s), or through other complementary sources. The adequacy of the total surface observation is addressed in the MTC's recommendation for certification.

Summary of FAA's Weather Observation Service Standards

```
"D" Level Service
Stand-Alone ASOS
        |
        v
"C" Level Service Add-Ons
• Backup basic service
• Augmentation of:
  - Thunderstorm occurrence
  - Tornadic activity
  - Hail
  - Virga
  - Volcanic ash
  - Tower visibility
        |
        v
"B" Level Service Augmentation Add-Ons
- Long-line Runway Visual Range (RVR)
  at designated sites
  (may be instantaneous readout)
- Freezing drizzle
- Ice pellets
- Snow depth on ground
- Snow increasing rapidly remark
- Thunderstorm/lightning location remark
- Observed significant weather not at station
        |
        v
"A" Level Service Augmentation Add-Ons
- Either 10-minute long-line RVR or visibility
  increments down to 1/8, 1/16, and 0 miles
- Sector visibility
- Variable sky
- Cloud types
- Cloud layers above 12,000 feet
- Widespread dust, sand, and smoke obstructions
- Volcanic eruptions
```

(E) Modernization Criteria Unique to Closure Certifications

1. Consolidation Certification: If the field office proposed for closure has or will be consolidated, as defined in §946.2 of the basic modernization regulations, this action has been completed as evidenced by the approved

certification or can be completed as evidenced by all of the documentation that all of the requirements of sections II.A. and II.B of this Annex have been completed.

2. Automation Certification: If the field office proposed for closure has or will be automated, as defined in §946.2 of the basic modernization regulations, this action has been completed as evidenced by the approved certification or can be completed as evidenced by documentation that all of the requirements of sections II.A. and II.C. of this Annex has been completed.

3. Remaining Services and/or Observations: All remaining service and/or observational responsibilities, if applicable to the field office proposed for closure, have been transmitted as addressed in the MIC's recommendation for certification.

4. User Confirmation of Services: Any valid user complaints received related to provision of weather services have been satisfactorily resolved and the issues addressed in the MIC's recommendation for certification.

5. Warning and Forecast Verification: Warning and forecast verification statistics, produced in accordance with the Closure Certification Verification Plan, have been utilized in support of the MIC's recommendation for certification.

[59 FR 9923, Mar. 2, 1994 as amended at 61 FR 39865, July 31, 1996; 61 FR 53311, Oct. 11, 1996; 62 FR 38903, July 21, 1997]

APPENDIX B TO PART 946—AIRPORT TABLES

"A" Level Service Airports:	
*Akron, OH	CAK
*Albany, NY	ALB
*Atlanta, GA	ATL
*Baltimore, MD	BWI
*Boston, MA	BOS
Charlotte, NC	CLT
*Chicago-O'Hare (AV), IL	ORD
Cincinnati, OH	CVG
Columbus, OH	CMH
*Dayton, OH	DAY
*Des Moines, IA	DSM
*Detroit, MI	DTW
*Fairbanks, AK	FAI
*Fresno, CA	FAT
*Greensboro, NC	GSO
*Hartford, CT	BDL
Indianapolis, IN	IND
*Kansas City, MO	MCI
*Lansing, MI	LAN
Las Vegas, NV	LAS
Los Angeles (AV), CA	LAX
*Louisville, KY	SDF
*Milwaukee, WI	MKE
*Minneapolis, MN	MSP
*Newark, NJ	EWR
*Oklahoma City, OK	OKC
Phoenix, AZ	PHX
*Portland, OR	PDX
*Providence, RI	PVD
*Raleigh, NC	RDU
*Richmoind, VA	RIC
*Rochester, NY	ROC
*Rockford, IL	RFD
*San Antonio, TX	SAT
San Diego, CA	SAN
*San Francisco, CA	SFO
*Spokane, WA	GEG
*Syracuse, NY	SYR
Tallahassee, FL	TUL
Tulsa, OK	TUL
"B" Level Service Airports:	
*Baton Rouge, LA	BTR
*Billings, MT	BIL
*Charleston, WV	CRW
*Chattanooga, TN	CHA
Colorado Springs, CO	COS
Daytona Beach, FL	DAB
El Paso, TX	ELP
Flint, MI	FNT
Fort Wayne, IN	FWA
Honolulu, HI	HNL
*Huntsville, AL	HSV
*Knoxville, TN	TYS
*Lincoln, NE	LNK
Lubbock, TX	LBB
*Madison, WI	MSN
*Moline, IL	MLI
*Montgomery, AL	MGM
*Muskegon, MI	MKG
*Norfolk, VA	ORF
Peoria, IL	PIA
*Savannah, GA	SAV
*South Bend, IN	SBN
Tucson, AZ	TUS
*West Palm Beach, FL	PBI
*Youngstown, OH	YNG
"C" Level Service Airports:	
Abilene, TX	ABI
Allentown, PA	ABE
Asheville, NC	AVL
Athens, GA	AHN
Atlantic City, NJ	ACY
Augusta, GA	AGS
Austin, TX	AUS
Bakersfield, CA	BFL
Bridgeport, CT	BDR
Bristol, TN	TRI
Casper, WY	CPR
Columbia, MO	COU
Columbus, GA	CSG
Dubuque, IA	DBQ
Elkins, WV	EKN
Erie, PA	ERI
Eugene, OR	EUG
Evansville, IN	EVV
Fargo, ND	FAR
Fort Smith, AR	FSM
Grand Island, NE	GRI
Helena, MT	HLN
Huntington, WV	HTS
Huron, SD	HON
Kahului, HI	OGG
Key West, FL	EYW
Lewiston, ID	LWS
Lexington, KY	LEX

Lynchburg, VA	LYH
Macon, GA	MCN
Mansfield, OH	MFD
Meridian, MS	MEI
Olympia, WA	OLM
Port Arthur, TX	BPT
Portland, ME	PWM
Rapid City, SD	RAP
Redding, CA	RDD
Reno, NV	RNO
Roanoke, VA	ROA
Rochester, MN	RST
Salem, OR	SLE
Santa Maria, CA	SMX
Sioux City, IA	SUX
Springfield, IL	SPI
Stockton, CA	SCK
Toledo, OH	TOL
Waco, TX	ACT
Waterloo, IA	ALO
Wilkes-Barre, PA	AVP
Williamsport, PA	IPT
Wilmington, DE	ILG
Worcester, MA	ORH
Yakima, WA	YKM
''D'' Level Service Airports:	
Alamosa, CO	ALS
Alpena, MI	APN
Astoria, OR	AST
Beckley, WV	BKW
Caribou, ME	CAR
Concordia, KS	CNK
Concord, NH	CON
Ely, NV	ELY
Havre, MT	HVR
Homer, AK	HOM
Houghton Lake, MI	HTL
International Falls, MN	INL
Kalispell, MT	FCA
Lander, WY	LND
Norfolk, NE	OFK
Sault Ste. Marie, MI	SSM
Scottsbluff, NE	BFF
Sheridan, WY	SHR
St. Cloud, MN	STC
Tupelo, MS	TUP
Valentine, NE	VTN
Victoria, TX	VCT
Wichita, Falls, TX	SPS
Williston, ND	ISN
Winnemucca, NV	WMC

*Long-line RVR designated site.

[62 FR 38905, July 21, 1997]

SUBCHAPTER D—GENERAL REGULATIONS OF THE ENVIRONMENTAL DATA SERVICE

PART 950—ENVIRONMENTAL DATA AND INFORMATION

Sec.
950.1 Scope and purpose.
950.2 Environmental Data and Information Service (EDIS).
950.3 National Climatic Center (NCC).
950.4 National Oceanographic Data Center (NODC).
950.5 National Geophysical and Solar-Terrestrial Data Center (NGSDC).
950.6 Environmental Science Information Center (ESIC).
950.7 Center for Environmental Assessment Services (CEAS).
950.8 Satellite Data Services Division (SDSD).
950.9 Computerized Environmental Data and Information Retrieval Service.
APPENDIX A TO PART 950—SCHEDULE OF USER FEES FOR ACCESS TO NOAA ENVIRONMENTAL DATA

AUTHORITY: (5 U.S.C. 552, 553). Reorganization Plan No. 4 of 1970.

SOURCE: 44 FR 54468, Sept. 20, 1979, unless otherwise noted.

§ 950.1 Scope and purpose.

This part describes the Environmental Data and Information Service (EDIS), a major program element of the National Oceanic and Atmospheric Administration, and EDIS management of environmental data and information.

§ 950.2 Environmental Data and Information Service (EDIS).

The Environmental Data and Information Service is the first Federal organization created specifically to manage environmental data and information. EDIS acquires, processes, archives, analyzes, and disseminates worldwide environmental (atmospheric, marine, solar, and solid Earth) data and information for use by commerce, industry, the scientific and engineering communities, and the general public, as well as by Federal, State, and local governments. It also provides experiment design and data management support to large-scale environmental experiments; assesses the impact of environmental fluctuations on food production, energy production and consumption, environmental quality, and other economic systems; and manages or provides functional guidance for NOAA's scientific and technical publication and library activities. In addition, EDIS operates related World Data Center-A subcenters and participates in other international data and information exchange programs. To carry out this mission, EDIS operates a network of specialized service centers and a computerized environmental data and information retrieval service.

§ 950.3 National Climatic Center (NCC).

The National Climatic Center acquires, processes, archives, analyzes, and disseminates climatological data; develops analytical and descriptive products to meet user requirements; and provides facilities for the World Data Center-A (Meteorology). It is the collection center and custodian of all United States weather records, the largest of the EDIS centers, and the largest climatic center in the world.

(a) Climatic data available from NCC include:

(1) Hourly Surface Observations from Land Stations (ceiling, sky cover, visibility, precipitation or other weather phenomena, obstructions to vision, pressure, temperature, dew point, wind direction, wind speed, gustiness).

(2) Three-Hourly and Six-Hourly Surface Observations from Land Stations, Ocean Weather Stations, and Moving Ships (variable data content).

(3) Upper Air Observations (radiosondes, rawinsondes, rocketsondes, low-level soundings, pilot-balloon winds, aircraft reports).

(4) Radar Observations (radar log sheets, radar scope photography).

(5) Selected Maps and Charts (National Meteorological Center products).

(6) Derived and Summary Data (grid points, computer tabulations, digital summary data).

(7) Special Collections (Barbados Oceanographic and Meteorological Experiment meteorological data, Global

Atmospheric Research Program basic data set, solar radiation data, many others).

(b) Queries should be addressed to: National Climatic Center, National Oceanic and Atmospheric Administration, Asheville, NC 28801, tel. 704–258–2850, Ext. 683.

§950.4 National Oceanographic Data Center (NODC).

The National Oceanographic Data Center acquires, processes, archives, analyzes, and disseminates oceanographic data; develops analytical and descriptive products to meet user requirements; and provides facilities for the World Data Center-A (Oceanography). It was the first NODC established and houses the world's largest usuable collection of marine data.

(a) Oceanographic data available from NODC include:

(1) Mechanical and expendable bathytheremograph data in analog and digital form.

(2) Oceanographic station data for surface and serial depths, giving values of temperature, salinity, oxygen, inorganic phosphate, total phosphorus, nitrite-nitrogen, nitrate-nitrogen, silicate-silicon, and pH.

(3) Continuously recorded salinity-temperature-depth data in digital form.

(4) Surface current information obtained by using drift bottle or calculated from ship set and drift.

(5) Biological data, giving values of plankton standing crop, chlorophyll concentrations, and rates of primary productivity.

(6) Other marine environmental data obtained by diverse techniques, e.g., instrumented buoy data, and current meter data.

(b) Queries should be addressed to: National Oceanographic Data Center, National Oceanic and Atmospheric Administration, Washington, DC 20235, tel. 202–634–7500.

§950.5 National Geophysical and Solar-Terrestrial Data Center (NGSDC).

The National Geophysical and Solar-Terrestrial Data Center acquires, processes, archives, analyzes, and disseminates solid Earth and marine geophysical data as well as ionospheric, solar, and other space environment data; develops analytical, climatological, and descriptive products to meet user requirements; and provides facilities for World Data Center-A (Solid-Earth Geophysics, Solar Terrestrial Physics, and Glaciology).

(a) Geophysical and solar-terrestrial data available from NGSDC include:

(1) *Marine geology and geophysics.* Bathymetric measurement; seismic reflection profiles; gravimetric measurements; geomagnetic total field measurements; and geological data, including data on heat flow, cores, samples, and sediments.

(2) *Solar-Terrestrial physics.* Ionosphere data, including ionograms, frequency plots, riometer and field-strength strip charts, and tabulations; solar activity data; geomagnetic variation data, including magnetograms; auroral data; cosmic ray data; and airglow data.

(3) *Seismology.* Seismograms; accelerograms; digitized strong-motion accelerograms; earthquake data list (events since January 1900); earthquake data service with updates on a monthly basis.

(4) *Geomagnetic main field.* Magnetic survey data and secular-change data tables.

(b) Queries should be addressed to: National Geophysical and Solar-Terrestrial Data Center, National Oceanic and Atmospheric Administration, Boulder, CO 80303, tel. 303–499–1000, ext. 6215.

§950.6 Environmental Science Information Center (ESIC).

ESIC is NOAA's information specialist, librarian, and publisher. ESIC coordinates NOAA's library and information services and its participation in the national network of scientific information centers and libraries. Computerized literature searches provide information from over 80 data bases. The complete list of data bases is available on request. All ESIC information facilities provide the normal library tailored information and reference services. As NOAA's publisher of scientific and technical information, ESIC reviews, edits, and processes NOAA manuscripts for publication.

(a) Services available from ESIC include:

(1) *Reference services.* Some services are provided on a cost-recovery basis to non-NOAA individuals.

(2) *Publication copy services.* Copies of NOAA publications are provided on request from qualified users, including governments, universities, non-profit organizations, professional societies, chambers of commerce, public information media, and individuals and organizations having cooperative or exchange agreements with NOAA.

(3) *Bibliographies.* Special bibliographies are prepared on request. When provided to non-NOAA individuals, service is on a full cost-recovery basis.

(4) *Current awareness services.* Periodically provides announcements of titles of newly published NOAA scientific and technical publications.

(5) *Lending services.* Materials are loaned to other libraries and to NOAA employees.

(6) On-site use of library collections.

(7) *Publishing services.* Includes providing refereeing, reviewing, editing, and publishing services for NOAA authors of manuscripts destined for both NOAA and non-NOAA publication series.

(b) Queries should be addressed to: Environmental Science Information Center, National Oceanic and Atmospheric Administration, Rockville, MD 20852, tel. 301–443–8137.

§ 950.7 Center for Environmental Assessment Services (CEAS).

EDIS assists National decision-makers in solving problems by providing data analyses, applications, assessments, and interpretations to meet their particular requirements. Many of these services are provided by the EDIS Center for Environmental Assessment Services (CEAS).

(a) The following are examples of CEAS projects and services:

(1) CEAS prepares data-based studies and weekly assessments of potential effects of climatic fluctuations on National and global grain production.

(2) CEAS provides environmental analyses and assessments to support efficient and effective planning, site selection, design, construction, and operation of supertanker ports and offshore drilling rigs. Such planning depends heavily upon environmental assessments.

(3) During the heating season, CEAS issues monthly and seasonal projections of natural gas demand for multi-State regions of the conterminous United States. Similar projections are made for electricity during the cooling season.

(4) CEAS has developed and makes available when needed a statistical oil spill trajectory risk model based on historical meteorological and oceanographic data.

(5) The center has analyzed the potential ecological effects of the planned disposal of huge volumes of saturated brine into Gulf waters for the National Strategic Petroleum Reserve and may be called on to provide similar services in other subject areas.

(6) CEAS provides experiment design, data analysis, and data management support to project managers and produces merged, validated multidisciplinary data sets for international and national study (such undertakings as the recent key role in the Global Atmospheric Research Program (GARP) experiments).

(7) CEAS provides special data or information as required. Currently the Center is assembling an inventory of cruises and a global oceanographic data base from observations taken during the First GARP Global Experiment (FGGE).

(b) Additional information on these or related services can be obtained by writing: Director, Center for Environmental Assessment Services, National Oceanic and Atmospheric Administration, Washington, DC 20235; or by calling (202) 634–7251.

§ 950.8 Satellite Data Services Division (SDSD).

The Satellite Data Services Division of the EDIS National Climatic Center provides environmental and earth resources satellite data to other users once the original collection purposes (*i.e.*, weather forecasting) have been satisfied. The division also provides photographs collected during NASA's SKYLAB missions.

(a) Satellite data available from SDSD include:

(1) Data from the TIROS (Television InfraRed Observational Satellite) series of experimental spacecraft; much of the imagery gathered by spacecraft of the NASA experimental NIMBUS series; full-earth disc photographs from NASA's Applications Technology Satellites (ATS) I and III geostationary research spacecraft; tens of thousands of images from the original ESSA and current NOAA series of Improved TIROS Operational Satellites; and both full-disc and sectorized images from the Synchronous Meteorological Satellites (SMS) 1 and 2, the current operational geostationary spacecraft. In addition to visible light imagery, infrared data are available from the NIMBUS, NOAA, and SMS satellites. Each day, SDSD receives about 239 negatives from the polar-orbiting NOAA spacecraft, more than 235 SMS–1 and 2 negatives, and several special negatives and movie film loops.

(2) Photographs (both color and black-and-white) taken during the three SKYLAB missions (May through June, 1973, July through September, 1973, and November 1973 through February 1974).

(b) Queries should be addressed to: Satellite Data Services Division, World Weather Building, Room 606, Washington, DC 20233, tel. 301–763–8111.

§ 950.9 Computerized Environmental Data and Information Retrieval Service.

The Environmental Data Index (ENDEX) provides rapid, automated referral to multidiscipline environmental data files of NOAA, other Federal agencies, state and local governments, and universities, research institutes, and private industry. A computerized, information retrieval service provides a parallel subject-author-abstract referral service. A telephone call to any EDIS data or information center or NOAA library will allow a user access to these services.

APPENDIX A TO PART 950—SCHEDULE OF USER FEES FOR ACCESS TO NOAA ENVIRONMENTAL DATA

Name of product/data/publication/information/service	Current fee	Commercial user fee
NOAA National Data Centers Standard User Fees		
Off-Line Products and Services:		
Magnetic Tape Copy	$155.00	$210.00
Diskette Copy	40.00	50.00
CD-ROM:		
Conventional	75.00	100.00
Specialized	130.00	175.00
Recordable Copy	170.00	225.00
Microfilm Reel copy:		
100 Feet	30.00	40.00
1,000 Feet	140.00	190.00
Paper Copies	0.30	0.40
Microprints	0.30	0.40
Posters	18.00	18.00
Slide Sets	25.00	25.00
Publications:		
Non-Serial Pubs less than 20 Pages	8.00	12.00
Non-Serial Pubs 20 or more Pages	15.00	20.00
DOC Certifications of Records	45.00	60.00
General Certifications	35.00	45.00
Priority Surcharge	45.00	60.00
Overnight Rush Surcharge	75.00	100.00
Domestic Fax Charge (Same Day Turnaround)	65.00	85.00
Foreign Fax Charge (Same Day Turnaround)	85.00	115.00
On-Line Products and Services*		
Publications:		
Limited Access	2.00	2.00
Unlimited Access	20.00	20.00
Observation Forms:		
Limited Access	5.00	5.00
Unlimited Access	50.00	50.00
Satellite Datasets:		
Limited Access	30.00	30.00

Name of product/data/publication/information/service	Current fee	Commercial user fee
Unlimited Access	200.00	200.00
In-situ Datasets:		
Limited Access	20.00	20.00
Unlimited Access	200.00	200.00
CD-ROM Access (unlimited)	20.00	20.00
Guide/Inventory/Browse Access	(1)	(1)
Additional National Climatic Data Center User Fees		
Local Climatological Data Publication	4.00	5.00
Climatological Data Publication	5.00	7.00
Storm Data Publication	5.00	7.00
Monthly Climatic Data of the World Publication	5.00	7.00
Hourly Precipitation Data Publication	5.00	7.00
Local Climatological Data Subscription	24.00	32.00
Climatological Data Subscription	32.00	45.00
Storm Data Subscription	53.00	70.00
Monthly Climatic Data of the World Subscriptions	43.00	55.00
Hourly Precipitation Data Subscription	47.00	65.00
Selected Data Elements (6250/Cart./8mm/4mm/FTP)	230.00	300.00
Diskette (Data Selection)	195.00	260.00’
Additional National Oceanographic Data Center User Fees		
Data Selection/Retrieval:		
Printout	103.00	140.00
Magnetic Tape	199.00	265.00
Magnetic Diskette	64.00	85.00
CD-ROM, Recordable	205.00	270.00
Computer Data Transfer (FTP)	145.00	190.00
CD-ROM Sets:		
World Ocean Atlas 1994:		
Individual Discs	36.00	50.00
Complete Set (10 Discs)	360.00	480.00
NOAA Buoy Database:		
Initial Set (thru July 1992):		
Individual Discs	42.00	55.00
Complete Set (14 Discs)	588.00	780.00
Update Discs (8/92–12/94)		
Individual Discs	42.00	55.00
Complete Set (7 Discs)	294.00	390.00
Update Disc 1995 (Full Year, Compressed)	75.00	100.00
Geosat Altimeter Crossover Difference (T2 GDRs):		
Individual Discs	28.00	40.00
Complete Set (6 Discs)	168.00	225.00
Geosat Altimeter Crossover Difference:		
Individual Discs	22.00	30.00
Complete Set (8 Discs)	176.00	235.00
Geosat Geodetic Mission Data:		
Individual Discs	38.00	50.00
Complete Set (4 Discs)	152.00	200.00

*Under Development.
[1] No charge.

[62 FR 24813, May 7, 1997]

PART 960—LICENSING OF PRIVATE REMOTE SENSING SYSTEMS

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AUTHORITY: 15 U.S.C. 5624.

SOURCE: 71 FR 24481, Apr. 25, 2006, unless otherwise noted.

Subpart A—General

§960.1 Purpose.

(a) The regulations in this part set forth the procedural and informational requirements for obtaining a license to operate a private remote sensing space system under Title II of the Land Remote Sensing Policy Act of 1992 (15 U.S.C. 5601 *et seq.*) (Public Law 102–555, 106 Stat. 4163) and applicable U.S. Policy, which addresses the U.S. commercial remote sensing satellite industry. (Available from NOAA, National Environmental Satellite Data and Information Service, 1335 East-West Highway, Room 7311, Silver Spring, MD 20910). In addition, this part describes NOAA's regulation of such systems, pursuant to the Act and applicable U.S. Policy. The regulations in this part are intended to:

(1) Preserve the national security of the United States;

(2) Observe the foreign policies and international obligations of the United States;

(3) Advance and protect U.S. national security and foreign policy interests by maintaining U.S. leadership in remote sensing space activities, and by sustaining and enhancing the U.S. remote sensing industry;

(4) Promote the broad use of remote sensing data, their information products and applications;

(5) Ensure that unenhanced data collected by licensed private remote sensing space systems concerning the territory of any country are made available to the government of that country upon its request, as soon as such data are available and on reasonable commercial terms and conditions as appropriate;

(6) Ensure that remotely sensed data are widely available for civil and scientific research, particularly environmental and global change research; and

(7) Maintain a permanent comprehensive U.S. government archive of global land remote sensing data for long-term monitoring and study of the changing global environment.

(b) In accordance with the Act and applicable U.S. Policy, decisions regarding the issuance of licenses and operational conditions (See Subpart B of this part) will be made by the Secretary of Commerce or his/her designee. Determinations of conditions necessary to meet national security, foreign policy and international obligations are made by the Secretaries of Defense and State, respectively.

(c) In accordance with U.S. Policy, NOAA encourages U.S. companies to build and operate commercial remote sensing space systems whose operational capabilities, products, and services are superior to any current or planned foreign commercial systems. However, because of the potential value of its products to an adversary, the U.S. Government may restrict operations of the commercial systems in order to limit collection and/or dissemination of certain data and products to the U.S. Government or to U.S. Government-approved recipients.

§960.2 Scope.

(a) The Act and the regulations in this part apply to any person subject to the jurisdiction or control of the United States who operates or proposes to operate a private remote sensing space system, either directly or through an affiliate or subsidiary, and/or establishes substantial connections with the United States regarding the operation of a private remote sensing system.

(b) In determining whether substantial connections exist with regard to a specific system, the factors NOAA may consider include, but are not limited to: the location of a system control

center or operations centers and stations; the administrative control of the system; use of a U.S. launch vehicle; location or administrative control of ground receiving stations; the investment, ownership, or technology included in the system.

(c) The regulations in this part apply to any action taken on or after May 25, 2006 with respect to any license, and to pre-existing licenses.

(d) If any provision of the regulations in this part or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the regulations in this part or the application of such provision to other persons and circumstances shall not be affected.

(e) Issuance of a license under the regulations in this part does not affect the authority of any Department or Agency of the U.S. Government including, but not limited to, the Federal Communications Commission under the Communications Act of 1934 (47 U.S.C. 151 et seq.), the Department of Transportation under the Commercial Space Launch Act of 1984 (49 U.S.C. app. 2601 et seq.), the Department of Commerce under the Export Administration Regulations (15 CFR parts 730–774), or the Department of State under the Arms Export Control Act (22 U.S.C. 2778) and the International Traffic in Arms Regulations (22 CFR parts 120–130).

§ 960.3 Definitions.

For purposes of the regulations in this part, the following terms have the following meanings:

Act means the Land Remote Sensing Policy Act of 1992 (Pub. L. 102–555, 106 Stat. 4163) as amended by the 1998 Commercial Space Act (Pub. L. 105–303, 112 Stat. 2846), 15 U.S.C. 5601 et seq.

Administrative control means the power or authority, direct or indirect, whether or not exercised through the legal or defacto ownership or possession thereof, ownership of voting securities of a licensee, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting the operations of the system; specifically, to determine, direct, take, manage, administer, influence, reach, or cause decisions regarding the:

(1) Sale, lease, mortgage pledge, or other transfer of any or all of the system or system control assets of the licensee, whether in the ordinary course of business or not;

(2) Operation of the system(s), including but not limited to orbit maintenance and other housekeeping functions, tasking and tasking prioritization, data acquisition, data storage, data transmission, processing and dissemination;

(3) Dissolution of the licensee;

(4) Closing and/or relocation of the command and control center of the system;

(5) Execution, substantive modification and/or termination or non-fulfillment of any significant or substantial foreign agreement of the licensee regarding direct readout or tasking obligations; or

(6) Amendment of the Articles of Incorporation or constituent agreement of the licensee with respect to the matters described in paragraphs (1) through (4) of this definition.

Administrator means the Administrator of NOAA and Under Secretary of Commerce for Oceans and Atmosphere or his/her designee.

Affiliate means any person:

(1) Which owns or controls more than a 5% interest in the applicant or licensee; or

(2) Which is under common ownership or control with the applicant or licensee.

Applicant means a person who has submitted an application for a NOAA license to operate a remote sensing space system.

Assistant Administrator means the Assistant Administrator of NOAA for Satellite and Information Services or his/her designee.

Authorized Officer means an individual designated by the Secretary of Commerce or his/her designee to enforce the regulations in this part.

Basic data set means those unenhanced data generated by the Landsat system or by any remote sensing space system licensed under the Act that have been selected by the Secretary of the Interior to be maintained in the National Satellite Land Remote

Sensing Data Archive, as described in Section 502(c) of the Act.

Beneficial owner means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, has or shares: The right to exercise administrative control over a licensee; and the power to dispose of or to direct the disposition of, any security interest in a license. All securities of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person. A person shall be deemed to be the beneficial owner of a security interest if that person has the right to acquire beneficial ownership, as defined in this definition, within sixty (60) days from acquiring that interest, including, but not limited to, any right to acquire beneficial ownership through: The exercise of any option, warrant or right; the conversion of a security; the power to revoke a trust, discretionary account, or similar arrangement; or the automatic termination of a trust, discretionary account or similar arrangement.

Data Protection Plan refers to the licensee's plan to protect data and information through the entire cycle of tasking, operations, processing, archiving and dissemination. At a minimum, this includes appropriate protection of communications links and/or delivery methods for tasking of the satellite, downlinking of data to a ground station (including relay stations), and delivery of data from the satellite to the licensee's central data storage facilities.

License means a grant of authority under the Act by the Administrator to a person to operate a private remote-sensing space system.

Licensee means a person who holds a NOAA license to operate a remote sensing space system.

National Satellite Land Remote Sensing Data Archive means the archive stablished by the Secretary of the Interior pursuant to the archival responsibilities defined in Section 502 of the Act.

NOAA means the National Oceanic and Atmospheric Administration.

Operate means to manage, run, authorize, control, or otherwise affect the functioning of a remote sensing space system, directly or through an affiliate or subsidiary. This includes:

(1) Commanding, controlling, tasking, and navigation of the system; or

(2) Data acquisition, storage, processing, and dissemination.

Operational control means the ability to operate the system or override commands issued by any operations center or station.

Orbital debris means all human-generated debris in Earth orbit. This includes, but is not limited to, payloads that can no longer perform their mission, rocket bodies and other hardware (e.g., bolt fragments and covers) left in orbit as a result of normal launch and operational activities, and fragmentation debris produced by failure or collision. Gases and liquids in free state are not considered orbital debris.

Person means any individual (whether or not a citizen of the United States) subject to U.S. jurisdiction; a corporation, partnership, association, or other entity organized or existing under the laws of the United States; a subsidiary (foreign or domestic) of a U.S. parent company; an affiliate (foreign or domestic) of a U.S. company; or any other private remote sensing space system operator having substantial connections with the United States or deriving substantial benefits from the United States that support its international remote sensing operations sufficient to assert U.S. jurisdiction as a matter of common law.

Proprietary information means any business or trade secrets or commercial or financial information explicitly designated as proprietary or confidential by the submitter, the public release of which would cause substantial harm to the competitive position of the submitter. Once the information is publicly-released by the submitter, it is no longer considered proprietary.

Remote sensing space system, Licensed system, or System means any device, instrument, or combination thereof, the space-borne platform upon which it is carried, and any related facilities capable of actively or passively sensing the Earth's surface, including bodies of

water, from space by making use of the properties of the electromagnetic waves emitted, reflected, or diffracted by the sensed objects. For purposes of the regulations in this part, a licensed system consists of a finite number of satellites and associated facilities, including those for tasking, receiving, and storing data, designated at the time of the license application. Small, hand-held cameras shall not be considered remote sensing space systems.

Secretary means the Secretary of Commerce.

Security means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting trust certificate, or certificate of deposit for a security; any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof); any put, call, straddle, option, or privilege entered into a national securities exchange relating to foreign currency; any interest or instrument commonly known as a ''security''; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Significant or Substantial foreign agreement (also referred to in this part as foreign agreement or agreement) means an agreement with a foreign nation, entity, consortium, or person that provides for one or more of the following:

(1) Administrative control which may include distributorship arrangements involving the routine receipt of high volumes of the system's unenhanced data;

(2) Participation in the operations of the system; including direct access to the system's unenhanced data; or

(3) An equity interest in the licensee held by a foreign nation and/or person, if such interest equals or exceeds or will equal or exceed twenty (20) percent of total outstanding shares, or entitles the foreign person to a position on the licensee's Board of Directors.

Subsidiary means a person over which the applicant or licensee may exercise administrative control.

Tasking means any action taken to command a remote sensing space system or its sensor to acquire data for transmission or storage on the satellite's recording subsystem. Such action can be in the form of commands sent to the system for execution or for storage in the satellite's memory for execution at a specified time or location within a given orbit.

Under Secretary means the Under Secretary of Commerce for Oceans and Atmosphere and Administrator of NOAA or his/her designee.

Unenhanced data means remote sensing signals or imagery products that are unprocessed or subject only to data preprocessing. Data preprocessing may include rectification of system and sensor distortions in remote sensing data as it is received directly from the satellite; registration of such data with respect to features of the Earth; and calibration of spectral response with respect to such data. It does not include conclusions, manipulations, or calculations derived from such data, or a combination of such data with other data. It also excludes phase history data for synthetic aperture radar systems or other space-based radar systems.

U.S. Policy means the policy(ies) announced by the President that specifically address U.S. commercial remote sensing space capabilities.

Subpart B—Licenses

§ 960.4 Application.

No person subject to the jurisdiction and/or control of the United States may operate a private remote sensing space system without a license issued pursuant to this part.

(a) Filing instructions, as well as a list of information to be included in the license application, are included in Appendix 1 of this part.

(b) If information in an application becomes inaccurate or incomplete prior to issuance of the license, the applicant must, within 14 days, file the new or corrected information with the

Assistant Administrator. If new or revised information is filed during the application process, the Assistant Administrator shall, within fourteen (14) days, determine whether the deadline imposed by Section 201(c) of the Act and §960.6(a) must be extended to allow adequate review of the revised application and, if so, for how long.

§960.5 Confidentiality of information.

(a) Any proprietary information related to a license application, application for amendment, foreign agreement, or any other supporting documentation submitted to NOAA will be treated as business confidential or proprietary information, if that information is explicitly designated and marked as such by the submitter. This does not preclude the United States Government from citing information in the public domain provided by the licensee in another venue (e.g., the licensee's Web site or a press release).

(b) Within thirty (30) days of the issuance of a license to operate a remote sensing space system, the licensee shall provide the Assistant Administrator with a publicly-releasable summary of the licensed system. The summary must be submitted in a readily reproducible form accompanied by a copy on electronic media. This summary shall be available for public review at a location designated by the Assistant Administrator and shall include:

(1) The name, mailing address and telephone number of the licensee and any affiliates or subsidiaries;

(2) A general description of the system, its orbit(s) and the type of data to be acquired; and

(3) The name and address upon whom service of all documents may be made.

§960.6 Review procedures for license applications.

The following procedures are consistent and have been harmonized with those procedures, including time lines, described in the Fact Sheet, at Appendix 2 of this part, which governs in lieu of this section and §§960.7 and 960.8 with respect to the process for reaching determinations of conditions necessary to meet national security, international obligations and foreign policy and which is outside the scope of the regulations in this part.

(a) The Assistant Administrator shall, within three (3) working days of receipt of an application, forward a copy of the application to the Department of Defense, the Department of State, the Department of the Interior, and any other Federal agencies determined to have a substantial interest in the license application. The Assistant Administrator shall advise such agencies of the deadline prescribed by paragraph (b) of this section to require additional information from the applicant. The Assistant Administrator shall make a determination on the application, in accordance with the Act and section 960.1(b), within 120 days of its receipt. If a determination has not been made within 120 days, the Assistant Administrator shall inform the applicant of any pending issues and any action required to resolve them.

(b) The reviewing agencies have thirty (30) days from receipt of application to notify the Assistant Administrator in writing whether the application omits any of the information listed in Appendix 1 of this part or whether additional information may be necessary to complete the application. This notification shall state the specific reasons why the additional information is sought. The Assistant Administrator shall then notify the applicant, in writing, what information is required to complete the license application. The 120-day review period prescribed in Section 201(c) of the Act will be stopped until the Assistant Administrator determines that the license application is complete.

(c) Within thirty (30) days of receipt of a complete application, as determined by the Assistant Administrator, each Federal agency consulted in paragraph (a) of this section shall recommend, in writing, to the Assistant Administrator approval or disapproval of the application in writing. If a reviewing agency is unable to complete its review in thirty (30) days, it is required to notify NOAA prior to the expiration of the interagency review period, in writing, of the reason for its delay and provide an estimate of additional time necessary to complete the review.

(d) If the license application is denied, the Assistant Administrator shall provide the applicant with written notification along with a concise statement of the facts in the record determined to support the denial. This denial will be considered final agency action twenty-one (21) days after the date the notice was mailed, unless the applicant files an appeal, as provided in § 960.10.

(e) The Assistant Administrator shall terminate the license application review process if:

(1) The application is withdrawn before the decision approving or denying it is issued; or

(2) The applicant, after receiving a request for additional information pursuant to paragraph (b) of this section, does not provide such information within the time stated in the request.

(f) No license shall be granted by the Secretary unless the Secretary determines, in writing, that the applicant will comply with the requirements of the Act, any regulations issued pursuant to the Act, and that the granting of such license and the operation of the license and system by the licensee would be consistent with the national security interest, foreign policy and international obligations of the United States.

§ 960.7 Amendments to licenses.

(a) Prior to taking any of the following actions a licensee must obtain an amendment to the license:

(1) Assignment of any interest in or transfer of the license from one entity to another, renaming, or any change in identity of the license holder;

(2) Change in or transfer of administrative control;

(3) Change of operational control; or

(4) Deviation from orbital characteristics, performance specifications, data collection and exploitation capabilities, operational characteristics identified under Appendix 1. of this part, or any other change in license parameters.

(b) Applications for an amendment to an existing license shall contain all relevant new information and shall be filed at the same address identified in Appendix 1 of this part. Amendment applications shall be filed in accordance with the procedures in § 960.4 and Appendix 1 of this part for original license applications.

(c) The Assistant Administrator shall, within three (3) working days of receipt of an application for amendment, forward a copy of the application to the Department of Defense, the Department of State, the Department of the Interior, and any other Federal agencies determined to have a substantial interest in the application. The Assistant Administrator shall advise such agencies of the deadline prescribed by paragraph (d) of this section to require additional information from the licensee. The Assistant Administrator shall make a determination on the application, in accordance with the Act and § 960.1(b), within 120 days of its receipt. If a determination has not been made within 120 days, the Assistant Administrator shall inform the licensee of any pending issues and any actions necessary to resolve them.

(d) The reviewing agencies have thirty (30) days from receipt of the application for amendment to notify the Assistant Administrator in writing whether the request omits any of the information listed in Appendix 1 of this part or whether additional information may be necessary to complete the request. This notification shall state the specific reasons why the additional information is sought. The Assistant Administrator shall then notify the licensee, in writing, what information is required to complete the application. The 120-day review period prescribed in Section 201(c) of the Act will be stopped until the Assistant Administrator determines that the application request is complete.

(e) Within thirty (30) days of receipt of a complete application for amendment, as determined by the Assistant Administrator, each Federal agency consulted in paragraph (c) of this section shall recommend, in writing, to the Assistant Administrator approval or disapproval of the application. If a reviewing agency is unable to complete its review in thirty (30) days, it is required to notify NOAA prior to the expiration of the interagency review period, in writing, of the reason for its

delay and provide an estimate of additional time necessary to complete the review.

(f)(1) When the licensee is seeking an amendment in order to transfer administrative control or change in the participation of the operations of the system to a foreign person or nation, pursuant to paragraph (a)(2) of this section, the licensee must provide the following information:

(i) The identity, residence and citizenship of the foreign person(s) or nation(s) who will acquire control;

(ii) The licensee's proposed plan to ensure that the licensee will protect the operational control of the licensed system from foreign influence and prevent technology transfer that would adversely impact national security, foreign policy or international obligations; and

(iii) Such additional information as the Assistant Administrator may prescribe as necessary or appropriate to protect the national security, foreign policy or international obligations of the United States.

(2) Such an application for amendment will be reviewed to determine whether the foreign person(s) or nation(s) that will exercise administrative control of the licensee will take no action that impairs the national security interests, foreign policy or international obligations of the United States.

(g) If the application for amendment is denied, the Assistant Administrator shall provide the licensee with written notification along with a concise statement of the facts in the record determined to support the denial. This denial will be considered final agency action twenty-one (21) days after the date the notice was mailed, unless the licensee files an appeal, as provided in §960.10.

(h) The Assistant Administrator shall terminate the application for amendment review process if:

(1) The application is withdrawn before the decision approving or denying it is issued; or

(2) The licensee, after receiving a request for additional information pursuant to paragraph (d) of this section, does not provide such information within the time stated in the request.

§960.8 Notification of foreign agreements.

Licensees must notify the Assistant Administrator of any significant or substantial agreement that they intend to enter into with any foreign nation, entity, or consortium, not later than sixty (60) days prior to concluding the agreement.

(a) Upon notification by a licensee, pursuant to §960.11(b)(5), the Assistant Administrator shall initiate review of the proposed agreement in light of the national security interests, foreign policy and international obligations of the U.S. Government.

(b) The Assistant Administrator shall, within three (3) working days of receipt of a proposed foreign agreement, forward a copy of the foreign agreement to the Department of Defense, the Department of State, the Department of the Interior, and any other Federal agencies determined to have a substantial interest in the foreign agreement. The Assistant Administrator, in consultation with other appropriate agencies, will review the proposed foreign agreement. As part of this review, the Assistant Administrator will ensure that the proposed foreign agreement contains the appropriate provisions to ensure compliance with all requirements concerning national security interests, foreign policy and international obligations under the Act or the licensee's ability to comply with the Act, these regulations and the terms of the license. These requirements include:

(1) The ability to implement, as appropriate, restrictions on the foreign party's acquisition and dissemination of imagery as imposed by the license or by the Secretary;

(2) The obligations of the licensee to provide access to data for the National Satellite Land Remote Sensing Data Archive; and

(3) The obligations of the licensee to convey to the foreign party the license's reporting and recordkeeping requirements and to facilitate any monitoring and compliance activities identified in the license.

(c) Within thirty (30) days of receipt of the proposed agreement, other agencies reviewing the agreement will notify the Assistant Administrator that

the proposed agreement sufficiently addresses the requirements in paragraph (b) of this section or identify what changes will need to be made to the agreement to meet these requirements.

(d)(1) Within sixty (60) days of notification by the licensee, if the Assistant Administrator determines that a proposed agreement will impair his or her ability to enforce the Act, or the licensee's ability to comply with the Act, these regulations, or the terms or conditions of the license, the licensee will be notified which terms and conditions of the license are affected and, specifically, how the agreement impairs their enforcement.

(2) The proposed agreement may not be implemented by the licensee until the licensee has been advised by the Assistant Administrator that the provisions of the proposed agreement are acceptable.

(e) The licensee is required to provide NOAA a signed copy of the foreign agreement within thirty (30) days of signature.

(f) Following approval of the agreement, if the factual circumstances surrounding this transaction change, the licensee must notify NOAA within twenty-one (21) days of the change. The licensee's failure to notify NOAA in a timely manner may result in penalties for noncompliance being levied, pursuant to Section 203(a)(3) of the Act.

(g) A licensee seeking to enter into a foreign agreement that would require the modification of the terms of an existing license shall also submit a license amendment request and the proposed foreign agreement shall be considered in the context of the amendment review process.

§ 960.9 License term.

(a) Each license for operation of a system shall be valid for the operational lifetime of the system or until the Secretary determines that the licensee is not in compliance with the requirements of the Act, the regulations issued pursuant to the Act, the terms and conditions of the license, or that the licensee's activities or system operations are not consistent with the national security, foreign policy and international obligations of the United States.

(b) The licensee shall notify the Assistant Administrator within seven (7) days of financial insolvency, dissolution, the demise of its system or of its decision to discontinue system operation. Upon notification, the Assistant Administrator will terminate the license. However, termination will not affect the obligations of the licensee with regard to provisions in its license, requiring the licensee to:

(1) Provide data to the National Satellite Land Remote Sensing Data Archive for the basic data set;

(2) Make data available to the National Satellite Land Remote Sensing Data Archive that the licensee intends to purge from its holdings;

(3) Make data available to a sensed state; and

(4) Restrict acquisition and dissemination of imagery as imposed by the license or by the Secretary; and

(5) Manage the re-entry segment, including but not limited to, the disposal of the system.

(c) The licensee shall notify the Assistant Administrator that specific actions leading to the development and operation of the licensed remote sensing space system have been completed. If the Assistant Administrator determines that a licensee has not completed such actions with respect to a licensed system, he/she may terminate the license. The actions required to be taken and associated timelines are as follows:

(1) Presentation to NOAA of the following formal review materials within five (5) years of the license issuance:

(i) Preliminary Design Review, and

(ii) Critical Design Review.

(2) Licensee certification to NOAA of the following milestones within five (5) years of the Critical Design Review:

(i) Execution of a binding contract for launch services, and

(ii) Completion of the pre-ship review of the remote sensing payload.

(3) Remote sensing space systems currently licensed by NOAA will have five (5) years from the effective date of these regulations to meet the milestones in Section 960.9(c)(1).

§960.10 Appeals/hearings.

(a) An applicant or licensee may submit a written appeal to the Administrator involving the granting, denial, or conditioning of a license; a license amendment; a foreign agreement; or enforcement action under this part. The appeal must state the action(s) appealed, must set forth a detailed explanation of the reasons for the appeal, and must be submitted within twenty-one (21) days of the action appealed. The appellant may request a hearing on the appeal before a designated hearing officer.

(b) The hearing shall be held no later than thirty (30) days after receipt of the appeal, unless the hearing officer extends the time. The appellant and other interested persons may appear personally or by counsel and submit information and present arguments, as determined appropriate by the hearing officer. Hearings may be closed to the public as necessary to protect classified or proprietary information. Hearings shall be transcribed, and transcripts made available to the public, as required by statute. Classified and proprietary information shall not be included in the public transcripts. Within thirty (30) days of the conclusion of the hearing, the hearing officer shall recommend a decision to the Administrator.

(c) The hearing requested under paragraph (a) of this section may be granted unless the issues being appealed involve the conduct of military or foreign affairs functions. Determinations concerning limitations on data collection or distribution, license conditions, or enforcement actions necessary to meet national security concerns, foreign policies or international obligations are not subject to a hearing under this Section. A determination to deny an appeal/hearing on this basis shall constitute final agency action.

(d) The Administrator may adopt the hearing officer's recommended decision or may reject or modify it. The Administrator will notify the appellant of the decision, and the reason(s) therefore, in writing, within thirty (30) days of receipt of the hearing officer's recommended decision. The Administrator's action shall constitute final Agency action.

(e) Any time limit prescribed in this section may be extended for a period not to exceed thirty (30) days by the Administrator for good cause, upon his/her own motion or written request from the appellant.

(f) The licensee shall be entitled to an expedited hearing on the review of a foreign agreement if the request is filed with the Administrator within seven (7) days of the date of mailing of the Assistant Administrator's notice under §960.8(d)(1). The request shall set forth the licensee's response to the determinations contained in the notice, and demonstrate that the time necessary to complete the normal hearing process will jeopardize the agreement.

(1) Expedited hearings shall commence within five (5) days after the filing of the request with the Administrator unless the Administrator or the hearing officer postpones the date of the hearing or the parties agree that it shall commence at a later time.

(2) Within five (5) days of the conclusion of the hearing, the hearing officer shall prepare findings and conclusions for consideration by the Administrator.

(3) Within fourteen (14) days after receipt of such material, the Administrator shall issue his/her findings and conclusions and a statement of the reasons on which they are based. This decision constitutes final agency action.

§960.11 Conditions for operation.

(a) Each license issued for the operation of a system shall require the licensee to comply with the Act and the regulations in this part. The licensee shall ensure that its license information is kept current and accurate. A licensee's failure to notify NOAA in a timely manner of any changes to that information on which the determination to issue the license or a subsequent licensing action was or will be made may result in penalties for noncompliance being levied, pursuant to Section 203(a)(3) of the Act

(b) The following conditions, as a minimum, shall be included in all licenses:

(1) The licensee shall operate its system in a manner that preserves the national security and observes the foreign policy and international obligations of the United States. Specific limitations on operational performance, including, but not limited to, limitations on data collection and dissemination, as appropriate, will be specified in each license.

(2) The licensee shall maintain operational control from a location within the United States at all times, including the ability to override all commands issued by any operations centers or stations.

(3) The licensee will maintain and make available to the Assistant Administrator records of system tasking, operations and other data as specified in the license for the purposes of monitoring and compliance. Periodic reporting and record keeping requirements will be specified in the license. The licensee shall allow the Assistant Administrator access, at all reasonable times, to all facilities which comprise the remote sensing space system for the purpose of conducting license monitoring and compliance inspections.

(4) The licensee may be required by the Secretary to limit data collection and/or distribution by the system as determined to be necessary to meet significant national security or significant foreign policy concerns, or international obligations of the United States, in accordance with the procedures set forth in the Interagency MOU Fact Sheet found in Appendix 2 of this part. During such limitations, the licensee shall, on request, provide unenhanced restricted images on a commercial basis exclusively to the U.S. Government using U.S. government-approved rekeyable encryption on the down-link and shall use a data down-link format that allows the U.S. Government access to these data during such periods.

(5) A licensee shall notify the Assistant Administrator of its intent to enter into any significant or substantial foreign agreement, and shall submit this agreement for review in accordance with § 960.8. The proposed agreement may not be implemented by the licensee until the licensee has been advised by the Assistant Administrator that the document's provisions are acceptable.

(i) Notification of any agreement that provides for an on-going or a continuous relationship serves as notification of specific transactions carried out within the scope of that agreement for purposes of the regulations in this part and the Act. Such notification does not relieve a licensee of any obligation under any other laws including U.S. export laws or regulations to secure necessary U.S. Government authorizations and/or licenses, to provide notification, or to comply with other requirements.

(ii) A licensee seeking to enter a foreign agreement that would require the modification of the terms of an existing license shall submit a license amendment, as provided in § 960.7.

(6) In accordance with Section 201(e) of the Act and § 960.12, a licensee shall make available on reasonable commercial terms and conditions, in accordance with the Act and § 960.12, any unenhanced data designated by the Assistant Administrator.

(7) A licensee shall provide to the U.S. Government, upon request, a complete list of all archived, unenhanced data which has been generated by its licensed system which is not already maintained in a public catalog. Any information on this list which is deemed proprietary by the licensee should be so noted by the licensee when the list is provided to the U.S. Government.

(8) A licensee shall make available unenhanced data requested by the Department of the Interior on reasonable cost terms and conditions as agreed by the licensee and the Department of the Interior. After the expiration of any exclusive right to sell, or after an agreed amount of time, the Department of Interior shall make these data available to the public at the cost of fulfilling user requests.

(9) Before purging any licensed data in its possession, the licensee shall offer such data to the National Satellite Land Remote Sensing Data Archive at the cost of reproduction and transmission. The Department of the Interior shall make these data available immediately to the public at the cost of fulfilling user requests.

(10) A licensee shall make available to the government of any country (including the United States) upon request by that government, unenhanced data collected by its system concerning the territory under the jurisdiction of such government. The data shall be provided as soon as the licensee is able to distribute the data commercially or as soon as the licensee has processed them into a format that the licensee uses for its own purposes, whichever occurs sooner, on reasonable terms and conditions. However, no data shall be provided to the sensed state if such release is contrary to U.S. national security concerns, foreign policy or international obligations or is otherwise prohibited by law, e.g. where transactions with the sensed state are prohibited by the laws of the United States. The U.S. Government may require, as a specific license condition, coordination with NOAA prior to fulfilling specific sensed state requests for unenhanced data.

(11) A licensee shall inform the Assistant Administrator immediately of any operational deviation or proposed deviation of the system which would violate the conditions of the license. If advance notice is not possible because of an emergency posing an imminent and substantial threat to human life, property, the environment or the system itself, the licensee shall notify the Assistant Administrator of the deviation as soon as circumstances permit.

(12) A licensee shall dispose of any satellites operated by the licensee upon termination of operations under the license in a manner satisfactory to the President. The licensee shall obtain approval from the Assistant Administrator of all plans and procedures for the disposition of satellites as part of the application process.

(13) The licensee shall submit a Data Protection Plan to the Assistant Administrator for review and approval. The licensee's Data Protection Plan shall contain the process to protect data and information throughout the entire cycle of tasking, operations, processing, archiving and dissemination.

(i) If the operating license restricts the distribution of certain data and imagery to the U.S. Government or U.S. Government-approved customers, including data whose public distribution is limited for 24 hours after collection, the Data Protection Plan should also provide for secure delivery of restricted data and imagery to U.S. Government-approved customer facilities.

(ii) Communications links that may require protection include, but are not limited to: Telemetry, tracking and commanding; narrowband and wideband data, including satellite platform and sensor data, imagery, and metadata; and terrestrial delivery methods including electronic and physical package delivery.

(iii) The licensee's Data Protection Plan must be approved by NOAA before the licensee's remote sensing space system may be launched. NOAA encourages the licensee's early submission and review of the Data Protection Plan to avoid any negative impacts on its system's development and launch schedule.

(iv) The Assistant Administrator may require the licensee to revise its Data Protection Plan if the system is altered from what was originally licensed.

(14) A license is not an asset of the licensee and shall not be mortgaged, sold or pledged as collateral.

(c) The Assistant Administrator may waive any of the conditions in §960.11(b) upon a showing of good cause and following consultations with the appropriate agencies.

§960.12 Data policy for remote sensing space systems.

(a) In accordance with the Act, if the U.S. Government has or will directly fund all or a substantial part of the development, fabrication, launch, or operation costs of a licensed system, the license shall require that all of the unenhanced data from the system be made available on a nondiscriminatory basis except on the basis of national security, foreign policy or international obligations.

(b) If the U.S. Government has not funded and will not fund, either directly or indirectly, any of the development, fabrication, launch, or operations costs of a licensed system, the licensee may provide access to its unenhanced data in accordance with

reasonable commercial terms and conditions, subject to the requirement of providing data to the government of any sensed state, pursuant to § 960.11(b)(10).

(c) If the U.S. Government has (either directly or indirectly) funded some of the development, fabrication, launch, or operations costs of a licensed system, the Assistant Administrator, in consultation with other appropriate U.S. agencies, shall, subject to national security concerns, determine whether the interest of the United States in promoting widespread availability of remote sensing data on reasonable cost terms and conditions requires that some or all of the unenhanced data from the system be made available on a nondiscriminatory basis in accordance with the Act. The license shall specify any data subject to this requirement. In making this determination, the Assistant Administrator may consider:

(1) The extent and proportion of private and Federal funding of the system;

(2) The extent of the governmental versus the commercial market for the unenhanced data;

(3) The effect of a nondiscriminatory data access designation on the applicant's commercial activity;

(4) The extent to which the applicant's proposed commercial data policies would encourage foreign operators to limit access, particularly for research and public benefit purposes; or

(5) The extent to which the U.S. interest in promoting widespread data availability can be satisfied through license conditions that ensure access to the data for non-commercial scientific, educational, or other public benefit purposes.

Subpart C—Prohibitions

§ 960.13 Prohibitions.

It is unlawful for any person who is subject to the jurisdiction or control of the United States, directly or through any subsidiary or affiliate to:

(a) Operate a private remote sensing space system in such a manner as to jeopardize the national security or foreign policy and international obligations of the United States;

(b) Operate a private remote sensing space system without possession of a valid license issued under the Act and/or the regulations in this part;

(c) Operate a private remote sensing space system in violation of the terms and conditions of the license issued for such system under the Act and the regulations in this part;

(d) Violate any provision of the Act or the regulations in this part or any term, condition, or restriction of the license;

(e) Violate or fail to comply with any order, directive, or notice issued by the Secretary or his/her designee, pursuant to the Act and/or the regulations in this part, with regard to the operation of the licensed private remote sensing space system;

(f) Fail or refuse to provide to the Secretary or his/her designee in a timely manner, all reports and/or information required to be submitted to the Secretary under the Act or the regulations in this part;

(g) Fail to update in a timely manner, the information required to be submitted to the Secretary in the license application; or

(h) Interfere with the enforcement of this part by:

(1) Refusing to permit access by the Secretary or his/her designee to any facilities which comprise the remote sensing space system for the purposes of conducting any search or inspection in connection with the enforcement of the regulations in this part;

(2) Assaulting, resisting, opposing, impeding, intimidating, or interfering with any authorized officer in the conduct of any search or inspection performed under the regulations in this part;

(3) Submitting false information to the Secretary, his/her designee or any authorized officer; or

(4) Assaulting, resisting, opposing, impeding, intimidating, harassing, bribing, or interfering with any person authorized by the Secretary or his/her designee to implement the provisions of the regulations in this part.

Subpart D—Enforcement Procedures

§960.14 In general.

(a) The Secretary shall conduct such enforcement activities as are necessary to carry out his/her obligations under the Act.

(b) Any person who is authorized to enforce the regulations in this part may:

(1) Enter, search and inspect any facility suspected of being used to violate the regulations in this part or any license issued pursuant to the regulations in this part and inspect and seize any equipment or records contained in such facility;

(2) Seize any data obtained in violation of the regulations in this part or any license issued pursuant to the regulations in this part;

(3) Seize any evidence of a violation of the regulations in this part or of any license issued pursuant to the regulations in this part;

(4) Execute any warrant or other process issued by any court of competent jurisdiction; and

(5) Exercise any other lawful authority.

§960.15 Penalties and sanctions.

As authorized by Section 203(a) of the Act, if the Secretary or his/her designee determines that the licensee has substantially failed to comply with the Act, the regulations in this part, or any term, condition or restriction of the license, the Secretary or his/her designee may request the appropriate U.S. Attorney to seek an order of injunction or similar judicial determination from the U.S. District Court for the District of Columbia Circuit or a U.S. District Court within which the licensee resides or has its principal place of business, to terminate, modify, or suspend the license, and/or to terminate licensed operations on an immediate basis.

(a) In addition, any person who violates any provision of the Act, any license issued there under, or the regulations in this part may be assessed a civil penalty by the Secretary of not more that $10,000 for each violation. Each day of operation in violation constitutes a separate violation. Civil penalties will be assessed in accordance with the procedures contained in paragraphs (b) through (g) of this section.

(b) A notice of violation and assessment (NOVA) will be issued by NOAA and served personally or by registered or certified mail, return receipt requested, upon the licensee alleged to be subject to a civil penalty.

(1) The NOVA will contain:

(i) A concise statement of the facts believed to show a violation;

(ii) A specific reference to the provisions of the Act, regulation, license, agreement, or order allegedly violated;

(iii) The findings and conclusions upon which NOAA based the assessment;

(iv) The amount of the civil penalty assessed; and

(v) An explanation of the licensee's rights upon receipt of the NOVA.

(2) In assessing a civil penalty, NOAA will take into account information available to the Agency concerning any factor to be considered under the Act and implementing regulations, and any other information that justice or the purposes of the Act require.

(3) The NOVA may also contain a proposal for compromise or settlement of the case.

(4) The NOVA may also contain a request for the licensee to cease and desist operations which are in violation of the Act, regulations, license, agreement, or order. If the NOVA contains such a request, it will advise the licensee:

(i) Of the amount of time the licensee has to cease and desist the violation. The amount of time will be decided on a case-by-case basis at the sole discretion of the Agency.

(ii) If the licensee fails to respond or comply with NOAA's request, an injunction or other judicial relief may be sought.

(iii) Paragraph (c) of this section applies only to those parts of the NOVA assessing monetary penalties.

(c) The licensee has 14 days from receipt of the NOVA to respond. During this time:

(1) The licensee may accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA.

(2) The licensee may request a hearing under section 960.10.

(3) The licensee may request an extension of time to respond. NOAA may grant an extension of up to 14 days unless it is determined that the requester could, exercising reasonable diligence, respond within the 14-day period. A telephonic response to the request is considered an effective response, and will be followed by written confirmation.

(4) The licensee may take no action, in which case the NOVA becomes final in accordance with paragraph (d) of this section.

(d) If no request for hearing is timely filed as provided in §960.10, the NOVA becomes effective as the final administrative decision and order of NOAA on the 30th day after service of the NOVA or on the last day of any delay period granted. If a request for hearing is timely filed in accordance with §960.10, the date of the final administrative decision is as provided in that section.

(e) The licensee must make full payment of the civil penalty assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of NOAA under paragraph (d) of this section or §960.10.

(1) Payment must be made by mailing or delivering to NOAA at the address specified in the NOVA a check or money order made payable in United States currency in the amount of the assessment to the ''Treasurer of the United States,'' or as otherwise directed.

(2) Upon any failure to pay the civil penalty assessed, NOAA may request the Justice Department to recover the amount assessed in any appropriate district court of the United States, or may act under paragraph (f) of this section.

(f) NOAA, in its sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty imposed.

(1) The compromise authority of NOAA under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of NOAA or in response to a request by the alleged violator or other interested person. Any such request should be sent to NOAA at the address specified in the NOVA.

(2) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which an assessment is final or payable.

(g) Factors to be taken into consideration when assessing a penalty may include the nature, circumstances, extent, and gravity of the alleged violation; the licensee's degree of culpability; any history of prior offenses; and such other matters as justice may require.

APPENDIX 1 TO PART 960—FILING INSTRUCTIONS AND INFORMATION TO BE INCLUDED IN THE LICENSING APPLICATION

Prospective applicants are encouraged to contact NOAA for a non-binding preconsultation prior to filing an application or other licensing actions.

(a) *Where to file.* Applications and all related documents shall be filed with the Assistant Administrator, National Environmental Satellite, Data and Information Service (NESDIS), NOAA, Department of Commerce, 1335 East West Highway, Silver Spring, Maryland 20910.

(b) *Form.* No particular form is required but each application must be in writing, must include all of the information specified in this subpart, and must be signed by an authorized principal executive officer. In addition, applicants must submit a copy on electronic media using commonly-available commercial word processing software.

(c) *Number of copies.* One (1) copy of each application must be submitted in a readily reproducible form accompanied by a copy on electronic media.

(d) The following information shall be filed by the applicant in order to evaluate its suitability to hold a private remote sensing space system license. Data provided regarding the applicant's proposed remote sensing space system must be in sufficient detail to enable the Secretary to determine whether the proposal meets requirements of the Act.

Sec. I Corporate Information

(1) The name, street address and mailing address, telephone number and citizenship(s) of (as applicable):

(i) Applicant as well as any affiliates or subsidiaries;

(ii) Chief executive officer of the applicant and each director;

(iii) Each general corporation partner;

(iv) All executive personnel or senior management of a partnership;

(v) Any directors, partners, executive personnel or senior management who hold positions with or serve as consultants for any foreign nation or person;

(vi) Each domestic beneficial owner of an interest equal to or greater than 10 percent in the applicant;

(vii) Each foreign owner of an interest equal to or greater than 5 percent in the applicant;

(viii) Each foreign lender and amount of debt where foreign indebtedness exceeds 25 percent of an applicant's total indebtedness;

(ix) A person upon who service of all documents may be made.

(2) A description of any significant or substantial agreements between the applicant, its affiliates and subsidiaries, with foreign nation or person, including copies if available;

(3) A copy of the charter or other authorizing instrument certified by the jurisdiction in which the applicant is incorporated or organized and authorized to do business.

Sec. II Launch Segment Information

Provide the characteristics of the launch segment to include:

(1) Proposed launch schedule;

(2) Proposed launch vehicle source;

(3) Proposed launch site;

(4) Anticipated operational date;

(5) The range of orbits and altitudes (nominal apogee and perigee);

(6) Inclination angle;

(7) Orbital period.

Sec. III Space Segment

(1) The name of the system and the number of satellites which will compose this system;

(2) Technical space system information at the level of detail typical of a request for proposal specification (including sensor type; spatial and spectral resolution; pointing parameters, etc.);

(3) Anticipated best theoretical resolution (show calculation);

(4) Swath width of each sensor (typically at nadir);

(5) The various fields of view for each sensor (IFOV, in-track, cross-track);

(6) On-board storage capacity;

(7) Navigation capabilities—GPS, star tracker accuracies;

(8) Time-delayed integration with focal plane;

(9) Oversampling capability;

(10) Image motion parameters—linear motion, drift; aggregation modes;

(11) Anticipated system lifetime.

Sec. IV Ground Segment

(1) The system data collection and processing capabilities proposed including but not limited to: Tasking procedures; scheduling plans; data format (downlinked and distributed data); timeliness of delivery; ground segment information regarding the location of proposed operations centers and stations, and tasking, telemetry and control; data distribution and archiving plans;

(2) The command (uplink and downlink) and mission data (downlink) transmission frequencies and system transmission (uplink and downlink) footprint, the downlink data rate, any plans for communications crosslinks;

(3) The plans for protection of uplink, downlink and any data links;

(4) The methods applicant will use to ensure the integrity of its operations, including plans for: Positive control of the remote sensing space system and relevant operations centers and stations; denial of unauthorized access to data transmissions to or from the remote sensing space system; and restriction of collection and/or distribution of unenhanced data from specific areas at the request of the U.S. Government.

Sec. V Other Information

A. The applicant's plans for providing access to or distributing the unenhanced data generated by the system including:

(1) A description of the plan for the sale and distribution of such data;

(2) The method for making the data available to governments whose territories have been sensed;

(3) A description of the plans for making data requested and purchased by the Department of the Interior available to the National Satellite Land Remote Sensing Data Archive for inclusion in the basic data set; and

(4) The licensee's plans to make the data available for non-commercial scientific, educational, or other public benefit purposes, such as the study of the changing global environment.

B. If the applicant is proposing to follow a commercial data distribution and pricing policy as provided for by §960.12, the application shall include the following additional financial information:

(1) The extent of the private investment in the system;

(2) The extent of any direct funding or other direct assistance which the applicant or its affiliates or subsidiaries have received or anticipate receiving from any agency of the U.S. Government for the development, fabrication, launch, or operation of the system including direct financial support, loan guarantees, or the use of U.S. Government equipment or services;

(3) Any existing or anticipated contract(s) between the applicant, affiliate, or subsidiary and U.S. Government agencies for the purchase of data, information, or services from the proposed system;

(4) Any other relationship between the applicant, affiliate, or subsidiary and the U.S.

Government which has supported the development, fabrication, launch, or operation of the system; and

(5) Any plans to provide preferred or exclusive access to the unenhanced data to any particular user or class of users.

C. The applicant will submit a plan for post-mission disposition of any remote-sensing satellites owned or operated by the applicant. If the satellite disposition involves an atmospheric re-entry the applicant must provide an estimate of the total debris casualty area of the system's components and structure likely to survive re-entry.

APPENDIX 2 TO PART 960—FACT SHEET REGARDING THE MEMORANDUM OF UNDERSTANDING CONCERNING THE LICENSING OF PRIVATE REMOTE SENSING SATELLITE SYSTEMS DATED FEBRUARY 2, 2000

The White House, Office of Science and Technology Policy and National Security Council

February 2, 2000.

FACT SHEET REGARDING THE MEMORANDUM OF UNDERSTANDING CONCERNING THE LICENSING OF PRIVATE REMOTE SENSING SATELLITE SYSTEMS

A Memorandum of Understanding (MOU) has been concluded between the Departments of Commerce, State, Defense, Interior and the Intelligence Community regarding interagency procedures on commercial remote sensing systems.

BACKGROUND

The Secretary of Commerce, through the National Oceanic and Atmospheric Administration, is responsible for administering the licensing of private remote sensing satellite systems pursuant to the Land Remote Sensing Policy Act of 1992. The Act also grants to the Secretaries of State and Defense the authority to determine conditions necessary to protect international obligations, foreign policy concerns, and national security concerns. The purpose of the MOU is to establish interagency procedures concerning the process for handling remote sensing licensing actions, and consultation regarding interruption of normal commercial operations consistent with the President's policy on remote sensing. In consultation with affected agencies, limitations on commercial remote sensing systems will be imposed by the Secretary of Commerce when necessary to meet international obligations and national security and foreign policy concerns and will be in accord with the determinations of the Secretary of Defense and the Secretary of State and with applicable law. Procedures for implementing this policy are set out below.

PROCEDURES

A. Consultation During Review of Licensing Actions

Pursuant to section 5621(c) of the Land Remote Sensing Policy Act of 1992, the Secretary of Commerce shall review any application and make a determination thereon within 120 days of receipt of such application. If final action has not occurred within such time, then the Secretary shall inform the applicant of any pending issues and of actions required to resolve them. Copies of requests for licensing actions received by the Department of Commerce (DOC) will be provided by DOC to the Department of State (DOS), the Department of Defense (DOD), the Department of the Interior (DOI), and the Intelligence Community (IC) within 3 working days.

DOC will defer its decision on such licensing actions until the other Parties concerned have had a reasonable time to review them, as provided in this section.

(1) Within 10 working days of receipt, DOS, DOD, DOI, or IC shall notify the Department of Commerce, in writing, of any additional information it believes is necessary to properly evaluate the licensing action, or notify DOC in writing of the additional time, not to exceed 10 working days, necessary to complete the review. This notification shall state the specific reasons why the additional information is sought.

(2) After receiving a complete license package or the information requested in paragraph (1), DOS, DOD, DOI, and IC will complete their review of the license package within 30 days or notify DOC in writing of additional time necessary to complete the review. If DOS, DOD, or IC conclude that imposition of conditions on the actions being reviewed may be necessary to protect international obligations, foreign policy concerns, or national security concerns, the agency identifying the concern will promptly notify DOC in writing with a copy to other interested agencies. Such notification shall: (i) Describe the national security interests, or the international obligations or specific foreign policies at risk if the applicant's system is approved as proposed; (ii) set forth in detail the basis for the conclusion that operation of the applicant's system as proposed will not preserve the national security interests or the international obligations or specific foreign policies identified; and (iii) specify the additional conditions necessary to preserve the relevant United States interests or set forth in detail why denial is required to preserve such interests.

(3) Within 10 days of sending this notification, representatives of DOS, DOD, DOC, DOI, and IC will meet to discuss and resolve any issues with regard to these proposed conditions.

(4) If, after such discussions, DOS or DOD conclude that such conditions are necessary but DOC does not concur, the Secretary of State or the Secretary of Defense may make such a determination of necessary conditions in writing. This function may not be delegated below the acting Secretary or the Deputy Secretary. Such determinations will be promptly forwarded to DOC and a copy will be provided to the Assistant to the President for National Security Affairs and the Assistant to the President for Science and Technology.

(5) Upon notification of such a determination, DOC will suspend any further action on the license that would be inconsistent with the DOS or DOD determination. If the Secretary of Commerce believes the limits defined by another Secretary are inappropriate, the Secretary of Commerce or Deputy Secretary shall then consult with his or her counterpart in the relevant department within 10 days regarding any unresolved issues. If the relevant Secretaries are unable to resolve any issues, the Secretary of Commerce will so notify the Assistant to the President for National Security Affairs, who, in coordination with the Assistant to the President for Science and Technology, will seek to achieve a consensus within the interagency, or failing that, by referral to the President. All efforts will be taken to resolve the dispute within 3 weeks of its submission to the Assistant to the President for National Security Affairs and the Assistant to the President for Science and Technology.

B. Consultation Regarding Interruption of Normal Commercial Operations

(1) This section establishes the process for requiring the licensee to limit data collection and/or distribution by the system during periods when national security or international obligations and/or foreign policies may be compromised, as determined by the Secretary of Defense or the Secretary of State. DOC will provide to the other Parties copies of licensee correspondence and documents that describe how the licensee will comply with such interruptions of its commercial operations.

(2) Conditions should be imposed for the smallest area and for the shortest period necessary to protect the national security, international obligations, or foreign policy concerns at issue.

Alternatives to prohibitions on collection and/or distribution shall be considered such as delaying the transmission or distribution of data, restricting the field of view of the system, encryption of the data if available, or other means to control the use of the data.

(3) Except where urgency precludes it, DOS, DOD, DOC and IC will consult to attempt to come to an agreement concerning appropriate conditions, if any, to be imposed on the licensee in accordance with determinations made by DOS or DOD. Consultations shall be constructed so that, in the event an agreement cannot be reached at the staff level, sufficient time will remain to allow the Secretary of Commerce to consult personally with the Secretary of State or the Secretary of Defense, as appropriate, prior to the issuance of a determination by the Secretary of State or the Secretary of Defense in accordance with (4) below. That function shall not be delegated below the acting Secretary.

(4) After such consultations, or when the Secretary of State or the Secretary of Defense specifically determines that urgency precludes consultation with the Secretary of Commerce, the Secretary of State or the Secretary of Defense, shall determine the conditions necessary to meet international obligations, significant foreign policy concerns, or significant national security concerns, especially where those interests identified in the National Security Strategy would be put at risk. This function shall not be delegated below the acting Secretary. The Secretary of State or the Secretary of Defense will provide to the Secretary of Commerce his or her determination regarding the conditions required to be imposed on the licensee. The determination will describe the international obligations, specific foreign policy, or national security interest at risk. Upon receipt of the determination, DOC shall immediately notify the licensee of the imposition of limiting conditions on commercial operations. Copies of the determination and any implementing DOC action will be provided promptly to the Assistant to the President for National Security Affairs and the Assistant to the President for Science and Technology.

(5) If the Secretary of Commerce believes the conditions determined by another Secretary are inappropriate, he or she will, simultaneous with notification of, and imposition of such conditions on, the licensee, so notify the Secretary of Defense or the Secretary of State, as appropriate, the Assistant to the President for National Security Affairs, and the Assistant to the President for Science and Technology. The Assistant to the President for National Security Affairs, in coordination with the Assistant to the President for Science and Technology, will initiate as soon as possible a Principals-level consultative process to achieve a consensus within the interagency, or, failing that, refer the matter to the President for decision. All efforts will be taken to resolve the disagreement within 7 working days of its submission to the Assistant to the President for National Security Affairs and the Assistant to the President for Science and Technology.

C. Coordination Before Release of Information Provided or Generated by Other Agencies

Before releasing any information provided or generated by another agency to a licensee or potential licensee, to the public, or to an administrative law judge, each agency agrees to consult with the agency that provided or generated the information. The purpose of such consultations will be to review the propriety of any proposed release of information that may be privileged because it is classified, pre-decisional, deliberative, contain proprietary information, or is protected for other reasons. No information shall be released without the approval of the agency that provided or generated it unless required by law.

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AUTHORITY: 30 U.S.C. 1401 *et seq.*

Subpart A—General

SOURCE: 46 FR 45896, Sept. 15, 1981, unless otherwise noted.

§970.100 Purpose.

(a) *General.* The purpose of this part is to implement those responsibilities and authorities of the National Oceanic and Atmospheric Administration (NOAA), pursuant to Public Law 96–283, the Deep Seabed Hard Mineral Resources Act (the Act), to issue to eligible United States citizens licenses for the exploration for deep seabed hard minerals.

(b) *Purposes of the Act.* In preparing these regulations NOAA has been mindful of the purposes of the Act, as set forth in section 2(b) thereof. These include:

(1) Encouraging the successful conclusion of a comprehensive Law of the Sea Treaty, which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory access to such resources for all nations;

(2) Establishing, pending the ratification by, and entering into force with respect to, the United States of such a treaty, an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens;

(3) Accelerating the program of environmental assessment of exploration for and commercial recovery of hard mineral resources of the deep seabed and assuring that such exploration and recovery activities are conducted in a manner which will encourage the conservation of such resources, protect the quality of the environment, and promote the safety of life and property at sea;

(4) Encouraging the continued development of technology necessary to recover the hard mineral resources of the deep seabed; and

(5) Pending the ratification by, and entry into force with respect to, the United States of a Law of the Sea Treaty, providing for the establishment of an international revenue-sharing fund the proceeds of which will be used for sharing with the international community pursuant to such treaty.

(c) *Regulatory approach.* (1) These regulations incorporate NOAA's recognition that the deep seabed mining industry is still evolving and that more information must be developed to form the basis for future decisions by industry and by NOAA in its implementation of the Act. They also recognize the

need for flexibility in order to promote the development of deep seabed mining technology, and the usefulness of allowing initiative by miners to develop mining techniques and systems in a manner compatible with the requirements of the Act and regulations. In this regard, the regulations reflect an approach, pursuant to the Act, whereby their provisions ultimately will be addressed and evaluated on the basis of exploration plans submitted by applicants.

(2) In addition, these regulations reflect NOAA's recognition that the difference in scale and effects between exploration for and commercial recovery of hard mineral resources normally requires that they be distinguished and addressed separately. This distinction is also based upon the evolutionary stage of the seabed mining industry referenced above. Thus, NOAA will issue separate regulations pertaining to commercial recovery, in part 971 of this chapter.

[46 FR 45896, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.101 Definitions.

For purposes of this part, the term:

(a) *Act* means the Deep Seabed Hard Mineral Resources Act (Pub. L. 96–283; 94 Stat. 553; 30 U.S.C. 1401 *et seq.*);

(b) *Administrator* means the Administrator of the National Oceanic and Atmospheric Administration, or a designee;

(c) *Applicant* means an applicant for an exploration license pursuant to the Act and this part;

(d) *Affiliate* means any person:

(1) In which the applicant or licensee owns or controls more than 5% interest;

(2) Which owns or controls more than 5% interest in the applicant or licensee; or

(3) Which is under common ownership or control with the applicant or licensee.

(e) *Commercial recovery* means:

(1) Any activity engaged in at sea to recover any hard mineral resource at a substantial rate for the primary purpose of marketing or commercially using such resource to earn a net profit, whether or not such net profit is actually earned;

(2) If such recovered hard mineral resource will be processed at sea, such processing; and

(3) If the waste of such activity to recover any hard mineral resource, or of such processing at sea, will be disposed of at sea, such disposal;

(f) *Continental Shelf* means:

(1) The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such submarine area; and

(2) The seabed and subsoil of similar submarine areas adjacent to the coast of islands;

(g) *Controlling interest*, for purposes of paragraph (t)(3) of this section, means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person;

(h) *Deep seabed* means the seabed, and the subsoil thereof to a depth of ten meters, lying seaward of and outside:

(1) The Continental Shelf of any nation; and

(2) Any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States;

(i) *Exploration* means:

(1) Any at-sea observation and evaluation activity which has, as its objective, the establishment and documentation of:

(i) The nature, shape, concentration, location, and tenor of a hard mineral resource; and

(ii) The environmental, technical, and other appropriate factors which must be taken into account to achieve commercial recovery; and

(2) The taking from the deep seabed of such quantities of any hard mineral resource as are necessary for the design, fabrication and testing of equipment which is intended to be used in the commercial recovery and processing of such resource;

(j) *Hard mineral resource* means any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which contains manganese, nickel, cobalt, or copper;

(k) *International agreement* means a comprehensive agreement concluded through negotiations at the Third United Nations Conference on the Law of the Sea, relating to (among other matters) the exploration for and commercial recovery of hard mineral resources and the establishment of an international regime for the regulation thereof;

(l) *Licensee* means the holder of a license issued under this part to engage in exploration;

(m) *New entrant* means any applicant, with respect to:

(1) Any application which has not been accorded a pre-enactment explorer priority of right under §970.301; or

(2) Any amendment which has not been accorded a pre-enactment explorer priority of right under §970.302.

(n) *NOAA* means the National Oceanic and Atmospheric Administration;

(o) *Permittee* means the holder of permit issued under NOAA regulations to engage in commercial recovery;

(p) *Person* means any United States citizen, any individual, and any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any nation;

(q) *Pre-enactment explorer* means a person who was engaged in exploration prior to the date of enactment of the Act (June 28, 1980);

(r) *Reciprocating state* means any foreign nation designated as such by the Administrator under section 118 of the Act;

(s) *United States* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States; and

(t) *United States citizen* means

(1) Any individual who is a citizen of the United States;

(2) Any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States; and

(3) Any corporation, partnership, joint venture, association, or other entity (whether organized or existing under the laws of any of the United States or a foreign nation) if the controlling interest in such entity is held by an individual or entity described in paragraph (t)(1) or (t)(2) of this section.

[46 FR 45896, Sept. 15, 1981, as amended at 47 FR 5967, Feb. 9, 1982]

§970.102 Nature of licenses.

(a) A license issued under this part will authorize the holder thereof to engage in exploration within a specific portion of the sea floor consistent with the provisions of the Act, this part, and the specific terms, conditions and restrictions applied to the license by the Administrator.

(b) Any license issued under this part will be exclusive with respect to the holder thereof as against any other United States citizen or any citizen, national or governmental agency of, or any legal entity organized or existing under the laws of, any reciprocating state.

(c) A valid existing license will entitle the holder, if otherwise eligible under the provisions of the Act and implementing regulations, to a permit for commercial recovery from an area selected within the same area of the sea floor. Such a permit will recognize the right of the holder to recover hard mineral resources, and to own, transport, use, and sell hard mineral resources recovered, under the permit and in accordance with the requirements of the Act.

§970.103 Prohibited activities and restrictions.

(a) *Prohibited activities and exceptions.* (1) Except as authorized under subpart C of this part, no United States citizen may engage in any exploration or commercial recovery unless authorized to do so under:

(i) A license or a permit issued pursuant to the Act and implementing regulations;

(ii) A license, permit, or equivalent authorization issued by a reciprocating state; or

(iii) An international agreement which is in force with respect to the United States.

(2) The prohibitions of paragraph (a)(1) of this section will not apply to any of the following activities:

(i) Scientific research, including that concerning hard mineral resources;

(ii) Mapping, or the taking of any geophysical, geochemical, oceanographic, or atmospheric measurements or random bottom samplings of the deep seabed, if such taking does not significantly alter the surface or subsurface of the deep seabed or significantly affect the environment;

(iii) The design, construction, or testing of equipment and facilities which will or may be used for exploration or commercial recovery, if such design, construction or testing is conducted on shore, or does not involve the recovery of any but incidental hard mineral resources;

(iv) The furnishing of machinery, products, supplies, services, or materials for any exploration or commercial recovery conducted under a license or permit issued under the Act and implementing regulations, a license or permit or equivalent authorization issued by a reciprocating state, or under an international agreement; and

(v) Activities, other than exploration or commercial recovery activities, of the Federal Government.

(3) No United States citizen may interfere or participate in interference with any activity conducted by any licensee or permittee which is authorized to be undertaken under a license or permit issued by the Administrator to a licensee or permittee under the Act or with any activity conducted by the holder of, and authorized to be undertaken under, a license or permit or equivalent authorization issued by a reciprocating state for the exploration or commercial recovery of hard mineral resources. For purposes of this section, interference includes physical interference with activities authorized by the Act, this part, and a license issued pursuant thereto; the filing of specious claims in the United States or any other nation; and any other activity designed to harass deep seabed mining activities authorized by law. Interference does not include the exercise of any rights granted to United States citizens by the Constitution of the United States, any Federal or State law, treaty, or agreement or regulation promulgated pursuant thereto.

(4) United States citizens must exercise their rights on the high seas with reasonable regard for the interests of other states in their exercise of the freedoms of the high seas.

(b) *Restrictions on issuance of licenses or permits.* The Administrator will not issue:

(1) Any license or permit after the date on which an international agreement is ratified by and enters into force with respect to the United States, except to the extent that issuance of such license or permit is not inconsistent with such agreement;

(2) Any license or permit the exploration plan or recovery plan of which, submitted pursuant to the Act and implementing regulations, would apply to an area to which applies, or would conflict with:

(i) Any exploration plan or recovery plan submitted with any pending application to which priority of right for issuance applies under this part;

(ii) Any exploration plan or recovery plan associated with any existing license or permit; or

(iii) Any equivalent authorization which has been issued, or for which formal notice of application has been submitted, by a reciprocating state prior to the filing date of any relevant application for licenses or permits pursuant to the Act and implementing regulations;

(3) A permit authorizing commercial recovery within any area of the deep seabed in which exploration is authorized under a valid existing license if such permit is issued to a person other than the licensee for such area;

(4) Any exploration license before July 1, 1981, or any permit which authorizes commercial recovery to commence before January 1, 1988;

(5) Any license or permit the exploration plan or recovery plan for which applies to any area of the deep seabed if, within the 3-year period before the date of application for such license or permit:

(i) The applicant therefor surrendered or relinquished such area under

an exploration plan or recovery plan associated with a previous license or permit issued to such applicant; or

(ii) A license or permit previously issued to the applicant had an exploration plan or recovery plan which applied to such area and such license or permit was revoked under section 106 of the Act; or

(6) A license or permit, or approve the transfer of a license or permit, except to a United States citizen.

Subpart B—Applications

SOURCE: 46 FR 45898, Sept. 15, 1981, unless otherwise noted.

§970.200 General.

(a) *Who may apply; how.* Any United States citizen may apply to the Administrator for issuance or transfer of an exploration license. Applications must be submitted in the form and manner prescribed in this subpart.

(b) *Place, form and copies.* Applications for the issuance or transfer of exploration licenses must be submitted in writing, verified and signed by an authorized officer or other authorized representative of the applicant, in 30 copies, to the following address: Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, suite 410, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, DC 20235. The Administrator may waive, in whole or in part, at his discretion, the requirement that 30 copies of an application be filed with NOAA.

(c) *Use of application information.* The contents of an application, as set forth below, must provide NOAA with the information necessary to make determinations required by the Act and this part pertaining to the issuance or transfer of an exploration license. Thus, each portion of the application should identify the requirement in this part to which it responds. In addition, the information will be used by NOAA in its function under the Act of consultation and cooperation with other Federal agencies or departments in relation to their programs and authorities, in order to reduce the number of separate actions required to satisfy Federal agencies' responsibilities.

(d) *Pre-application consultation.* To assist in the development of adequate applications and assure that applicants understand how to respond to the provisions of this subpart, NOAA will be available for pre-application consultations with potential applicants. This includes consultation on the procedures in subpart C. In appropriate circumstances, NOAA will provide written confirmation to the applicant of any oral guidance resulting from such consultations.

(e) *Priority of right.* (1) Priority of right for issuance of licenses to pre-enactment explorers will be established pursuant to subpart C of this part.

(2) Priority of right for issuance of licenses to new entrants will be established on the basis of the chronological order in which license applications, which are in substantial compliance with the requirements established under this subpart, pursuant to §970.209, are filed with the Administrator.

(3) Applications must be received by the Office of Ocean Minerals and Energy on behalf of the Administrator before a priority can be established.

(4) Upon (i) a determination that:

(A) An application is not in substantial compliance in accordance with §970.209 or subpart C, as applicable;

(B) An application has not been brought into substantial compliance in accordance with §970.210 or subpart C, as applicable;

(C) A license has been relinquished or surrendered in accordance with §970.903; or

(ii) A decision to:

(A) Deny certification of a license pursuant to §970.407; or

(B) Deny issuance of a license pursuant to §970.508,

and after the exhaustion of any administrative or judicial review of such determination or decision, the priority of right for issuance of a license will lapse.

(f) *Request for confidential treatment of information.* If an applicant wishes to have any information in his application treated as confidential, he must so indicate pursuant to 15 CFR 971.802.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 5968, Feb. 9, 1982; 54 FR 547, Jan. 6, 1989]

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§ 970.201 Statement of financial resources.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator the financial resources of the applicant to carry out, in accordance with this part, the exploration program set forth in the applicant's exploration plan. The information must show that the applicant is reasonably capable of committing or raising sufficient resources to cover the estimated costs of the exploration program. The information must be sufficient for the Administrator to make a determination on the applicant's financial responsibility pursuant to § 970.401.

(b) *Contents.* In particular, the information on financial resources must include:

(1) A description of how the applicant intends to finance the exploration program;

(2) The estimated cost of the exploration program;

(3) With respect to the applicant and those entities upon which the applicant will rely to finance his exploration activities, the most recent audited financial statement (for publicly-held companies, the most recent annual report and Form 10–K filed with the Securities and Exchange Commission will suffice in this regard); and

(4) The credit rating and bond rating of the applicant, and such financing entities, to the extent they are relevant.

§ 970.202 Statement of technological experience and capabilities.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator the technological capability of the applicant to carry out, in accordance with the regulations contained in this part, the exploration program set out in the applicant's exploration plan. It must contain sufficient information for the Administrator to make a determination on the applicant's technological capability pursuant to § 970.402.

(b) *Contents.* In particular, the information submitted pursuant to this section must demonstrate knowledge and skills which the applicant either possesses or to which he can demonstrate access. The information must include:

(1) A description of the exploration equipment to be used by the applicant in carrying out the exploration program;

(2) A description of the environmental monitoring equipment to be used by the applicant in monitoring the environmental effects of the exploration program; and

(3) The experience on which the applicant will rely in using this or similar equipment.

§ 970.203 Exploration plan.

(a) *General.* Each application must include an exploration plan which describes the applicant's projected exploration activities during the period to be covered by the proposed license. Generally, the exploration plan must demonstrate to a reasonable extent that the applicant's efforts, by the end of the 10-year license period, will likely lead to the ability to apply for and obtain a permit for commercial recovery. In particular, the plan must include sufficient information for the Administrator, pursuant to this part, to make the necessary determinations pertaining to the certification and issuance or transfer of a license and to the development and enforcement of the terms, conditions and restrictions for a license.

(b) *Contents.* The exploration plan must contain the following information. In presenting this information, the plan should incorporate the applicant's proposed individual approach, including a general description of how projected participation by other entities will relate to the following elements, if appropriate. The plan must present:

(1) The activities proposed to be carried out during the period of the license;

(2) A description of the area to be explored, including its delineation according to § 970.601;

(3) The intended exploration schedule which must be responsive to the diligence requirements in § 970.602. Taking into account that different applicants may have different concepts and chronologies with respect to the types of activities described, the schedule

should include an approximate projection for the exploration activities planned. Although the details in each schedule may vary to reflect the applicant's particular approach, it should address in some respect approximately when each of the following types of activities is projected to occur.

(i) Conducting survey cruises to determine the location and abundance of nodules as well as the sea floor configuration, ocean currents and other physical characteristics of potential commercial recovery sites;

(ii) Assaying nodules to determine their metal contents;

(iii) Designing and testing system components onshore and at sea;

(iv) Designing and testing mining systems which simulate commercial recovery;

(v) Designing and testing processing systems to prove concepts and designing and testing systems which simulate commercial processing;

(vi) Evaluating the continued feasibility of commercial scale operations based on technical, economic, legal, political and environmental considerations; and

(vii) Applying for a commercial recovery permit and, to the extent known, other permits needed to construct and operate commercial scale facilities (if application for such permits is planned prior to obtaining a commercial recovery permit);

(4) A description of the methods to be used to determine the location, abundance, and quality (*i.e.*, assay) of nodules, and to measure physical conditions in the area which will affect nodule recovery system design and operations (e.g., seafloor topography, seafloor geotechnic properties, and currents);

(5) A general description of the developing recovery and processing technology related to the proposed license, and of any planned or ongoing testing and evaluation of such technology. To the extent possible at the time of application, this description should address such factors as nodule collection technique, seafloor sediment rejection subsystem, mineship nodule separation scheme, pumping method, anticipated equipment test areas, and details on the testing plan;

(6) An estimated schedule of expenditures, which must be responsive to the diligence requirements as discussed in §970.602;

(7) Measures to protect the environment and to monitor the effectiveness of environmental safeguards and monitoring systems for commercial recovery. These measures must take into account the provisions in §§970.506, 970.518, 970.522 and subpart G of this part; and

(8) A description of any relevant activity that the applicant has completed prior to the submission of the application.

§970.204 Environmental and use conflict analysis.

(a) *Environmental information.* To enable NOAA to implement better its responsibility under section 109(d) of the Act to develop an environmental impact statement (EIS) on the issuance of an exploration license, the application must include information for use in preparing NOAA's EIS on the environmental impacts of the activities proposed by the applicant. The applicant must present physical, chemical and biological information for the exploration area. This information should include relevant environmental information, if any, obtained during past exploration activities, but need not duplicate information obtained during NOAA's DOMES Project. Planned activities in the area, including the testing of integrated mining systems which simulate commercial recovery, also must be described. NOAA will need information with the application on location and boundaries of the proposed exploration area, and plans for delineation of features of the exploration area including baseline data or plans for acquiring them. The applicant may at his option delay submission of baseline and equipment data and system test plans. However, applicants so electing should plan to submit this latter information at least one year prior to the initial test, to allow time for the supplement to the site-specific EIS, if one is required, to be prepared by NOAA, circulated, reviewed and filed with EPA. The submission of this information with the application is strongly encouraged, however, to minimize the

possibility that a supplement will be required. If such latter information is submitted subsequent to the original application such tests may not be undertaken in the absence of concurrence by NOAA (which, if applicable, will be required in a term, condition, or restriction in the license). NOAA has developed a technical guidance document which will provide assistance for the agency and the applicant, in consultation, to identify the details on information needed in each case. NOAA may refer to such information for purposes of other determinations under the Act as well. NOAA also will seek to facilitate other Federal and, as necessary, state decisions on exploration activities by functioning as lead agency for the EIS on the application and related actions by other agencies, including those pertaining to any onshore impacts which may result from the proposed exploration activities.

(b) *Use conflict information*. To assist the Administrator in making determinations relating to potential use conflicts between the proposed exploration and other activities in the exploration area, pursuant to §§970.503, 970.505, and 970.520, the application must include information known to the applicant with respect to such other activities.

§ 970.205 Vessel safety.

In order to provide a basis for the necessary determinations with respect to the safety of life and property at sea, pursuant to §§970.507, 970.521 and subpart H of this part, the application must contain the following information, except for those vessels under 300 gross tons which are engaged in oceanographic research if they are used in exploration.

(a) *U.S. flag vessel.* The application must contain a demonstration or affirmation that any United States flag vessel utilized in exploration activities will possess a current valid Coast Guard Certificate of Inspection (COI). To the extent that the applicant knows which United States flag vessel he will be using, the application must include a copy of the COI.

(b) *Foreign flag vessel.* The application must also contain information on any foreign flag vessels to be used in exploration activities, which responds to the following requirements. To the extent that the applicant knows which foreign flag vessel he will be using, the application must include evidence of the following:

(1) That any foreign flag vessel whose flag state is party to the International Convention for Safety of Life at Sea, 1974 (SOLAS 74) possesses current valid SOLAS 74 certificates;

(2) That any foreign flag vessel whose flag state is not party to SOLAS 74 but is party to the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60) possesses current valid SOLAS 60 certificates; and

(3) That any foreign flag vessel whose flag state is not a party to either SOLAS 74 or SOLAS 60 meets all applicable structural and safety requirements contained in the published rules of a member of the International Association of Classification Societies (IACS).

(c) *Supplemental certificates.* If the applicant does not know at the time of submitting an application which vessels he will be using, he must submit the applicable certification for each vessel before the cruise on which it will be used.

§ 970.206 Statement of ownership.

The application must include sufficient information to demonstrate that the applicant is a United States citizen, as required by §970.103(b)(6), and as defined in §970.101(t). In particular, the application must include:

(a) Name, address, and telephone number of the United States citizen responsible for exploration operations to whom notices and orders are to be delivered; and

(b) A description of the citizen or citizens engaging in such exploration, including:

(1) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(2) The state of incorporation or state in which the partnership or other business entity is registered;

(3) The name of registered agent or equivalent representative and places of business;

(4) Certification of essential and nonproprietary provisions in articles of incorporation, charter or articles of association; and

(5) The name of each member of the association, partnership, or joint venture, including information about the participation of each partner and joint venturer and/or ownership of stock.

§970.207 Antitrust information.

(a) *General.* Section 103(d) of the Act specifically provides for antitrust review of applications by the Attorney General of the United States and the Federal Trade Commission.

(b) *Contents.* In order to provide information for this antitrust review, the application must contain the following:

(1) A copy of each agreement between any parties to any joint venture which is applying for a license, provided that said agreement relates to deep seabed hard mineral resource exploration or mining;

(2) The identity of any affiliate of any person applying for a license; and

(3) For each applicant, its affiliate, or parent or subsidiary of an affiliate which is engaged in production in, or the purchase or sale in or to, the United States of copper, nickel, cobalt or manganese minerals or any metals refined from these minerals:

(i) The annual tons and dollar value of any of these minerals and metals so purchased, sold or produced for the two preceding years;

(ii) Copies of the annual report, balance sheet and income statement for the two preceding years; and

(iii) Copies of each document submitted to the Securities and Exchange Commission.

§970.208 Fee.

(a) *General.* Section 104 of the Act provides that no application for the issuance or transfer of an exploration license will be certified unless the applicant pays to NOAA a reasonable administrative fee, which must reflect the reasonable administrative costs incurred in reviewing and processing the application.

(b) *Amount.* In order to meet this requirement, the application must include a fee payment of $100,000, payable to the National Oceanic and Atmospheric Administration, Department of Commerce. If costs incurred by NOAA in reviewing and processing an application are significantly less than or in excess of the original fee, the agency subsequently will determine those differences in costs and adjust the fee accordingly. If the costs are significantly less, NOAA will refund the difference. If they are significantly greater, the applicant will be required to submit the additional payment prior to issue or transfer of the license. In the case of an application for transfer of a license to an entity which has previously been found qualified for a license, the Administrator may, on the basis of preapplication consultations pursuant to §970.200(d), reduce the fee in advance by an appropriate amount which reflects costs avoided by reliance on previous findings made in relation to the proposed transferee. If an applicant elects to pursue the 'banking' option under §970.601(d), and exercises that option by submitting two applications, only one application fee needs to be submitted with respect to each use of the 'banking' option.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 5966, 5968, Feb. 9, 1982]

PROCEDURES

§970.209 Substantial compliance with application requirements.

(a) Priority of right for the issuance of licenses to new entrants will be established on the basis of the chronological order in which license applications which are in substantial compliance with the requirements established under this subpart are filed with the Administrator pursuant to §970.200.

(b) In order for an application to be in substantial compliance with the requirements of this subpart, it must include information specifically identifiable with and materially responsive to each requirement contained in §§970.201 through 970.208. A determination on substantial compliance relates only to whether the application contains the required information, and does not constitute a determination on certification of the application, or on issuance or transfer of a license.

(c) The Administrator will make a determination as to whether the application is in substantial compliance. Within 30 days after receipt of an application and the opening of coordinates describing the application area, he will issue written notice to the applicant regarding such determination. The notice will identify, if applicable, in what respects the application is not in either full or substantial compliance. If the application is in substantial but not full compliance, the notice will specify the information which the applicant must submit in order to bring it into full compliance, and why the additional information is necessary.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 11513, Mar. 17, 1982]

§ 970.210 Reasonable time for full compliance.

Priority of right will not be lost in case of any application filed which is in substantial but not full compliance, as specified in § 970.209, if the Administrator determines that the applicant, within 60 days after issuance to the applicant by the Administrator of written notice that the application is in substantial but not full compliance, has brought the application into full compliance with the requirements of §§ 970.201 through 970.208.

[46 FR 45898, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.211 Consultation and cooperation with Federal agencies.

(a) Promptly after his receipt of an application and the opening of coordinates describing the application area, the Administrator will distribute a copy of the application to each other Federal agency or department which, pursuant to section 103(e) of the Act, has identified programs or activities within its statutory responsibilities which would be affected by the activities proposed in the application (*i.e.*, the Departments of State, Transportation, Justice, Interior, Defense, Treasury and Labor, as well as the Environmental Protection Agency, Federal Trade Commission, Small Business Administration and National Science Foundation). Based on its legal responsibilities and authorities, each such agency or department may, not later than 60 days after it receives a copy of the application which is in full compliance with this subpart, recommend certification of the application, issuance or transfer of the license, or denial of such certification, issuance or transfer. The advice or recommendation by the Attorney General or Federal Trade Commission on antitrust review, pursuant to § 970.207, must be submitted within 90 days after their receipt of a copy of the application which is in full compliance with this subpart. NOAA will use the benefits of this process of consultation and cooperation to facilitate necessary Federal decisions on the proposed exploration activities, pursuant to the mandate of section 103(e) of the Act to reduce the number of separate actions required to satisfy Federal agencies' statutory responsibilities.

(b) In any case in which a Federal agency or department recommends a denial, it will set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and will indicate how the application may be amended, or how terms, conditions or restrictions might be added to the license to assure compliance with such law or regulation.

(c) A recommendation from another Federal agency or department for denying or amending an application will not affect its having been in substantial compliance with the requirements of this subpart, pursuant to § 970.209, for purposes of establishing priority of right. However, pursuant to section 103(e) of the Act, NOAA will cooperate with such agencies and with the applicant with the goal of resolving the concerns raised and satisfying the statutory responsibilities of these agencies.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 11513, Mar. 17, 1982]

§ 970.212 Public notice, hearing and comment.

(a) *Notice and comments.* The Administrator will publish in the FEDERAL REGISTER, for each application for an exploration license, notice that such application has been received. Subject to 15 CFR 971.802, interested persons will be permitted to examine the materials relevant to such application. Interested persons will have at least 60

days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) After preparation of the draft EIS on an application pursuant to section 109(d) of the Act, the Administrator shall hold a public hearing on the application and the draft EIS in an appropriate location, and may employ such additional methods as he deems appropriate to inform interested persons about each application and to invite their comments thereon.

(2) If the Administrator determines there exists one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of subpart I of 15 CFR part 971. The record developed in any such formal hearing will be part of the basis of the Administrator's decisions on an application.

(c) Hearings held pursuant to this section and other procedures will be consolidated insofar as practicable with hearings held and procedures employed by other agencies.

[46 FR 45898, Sept. 15, 1981, as amended at 54 FR 547, Jan. 6, 1989]

§970.213 Amendment to an application.

After an application has been submitted to the Administrator, but before a determination is made on the issuance or transfer of a license, the applicant must submit an amendment to the application if required by a significant change in the circumstances represented in the original application and affecting the requirements of this subpart. Applicants should consult with NOAA to determine if changes in circumstances are sufficiently significant to require submission of an amendment. The application, as amended, would then serve as the basis for determinations by the Administrator under this part. For each amendment judged by the Administrator to be significant, he will provide a copy of such amendment to each other Federal agency and department which received a copy of the original application, and also will provide for public notice, hearing and comment on the amendment pursuant to §970.212. Such amendment, however, will not affect the priority of right established by the filing of the original application. After the issuance of or transfer of a license, any revision by the licensee will be made pursuant to §970.513.

Subpart C—Procedures for Applications Based on Exploration Commenced Before June 28, 1980; Resolution of Conflicts Among Overlapping Applications; Applications by New Entrants

SOURCE: 47 FR 24948, July 8, 1982, unless otherwise noted.

§970.300 Purposes and definitions.

(a) This subpart sets forth the procedures which the Administrator will apply to applications filed with NOAA covering areas of the deep seabed where the applicants have engaged in exploration prior to June 28, 1980, and to the resolution of conflicts arising out of such applications. This subpart also establishes the date on which NOAA will begin to accept applications or amendments filed by new entrants, and certain other procedures for new entrants.

(b) For the purposes of this subpart the term:

(1) *Amendment* means an amendment to an application which changes the area applied for;

(2) *Application* means an application for an exploration license which is filed pursuant to the Act and this subpart;

(3) *Conflict* means the existence of more than one application or amendment with the same priority of right:

(i) Which are filed with the Administrator or with the Administrator and a reciprocating state; and

(ii) In which the deep seabed areas applied for overlap in whole or part, to the extent of the overlap;

(4) *Original conflict* means a conflict solely between or among applications;

(5) *New conflict* means a conflict between or among amendments filed after July 22, 1982, and on or before October 15, 1982;

(6) *Domestic conflict* means a conflict solely between or among applications or amendments which have been filed with the Administrator.

(7) *International conflict* means a conflict arising between or among applications or amendments filed with the Administrator and a reciprocating state.

§ 970.301 Requirements for applications based on pre-enactment exploration.

(a) Pursuant to section 101(b) of the Act, any United States citizen who was engaged in exploration before the effective date of the Act (June 28, 1980) qualifies as a pre-enactment explorer and may continue to engage in such exploration without a license:

(1) If such citizen applies under this part for a license with respect to such exploration within the time period specified in paragraph (b) of this section; and

(2) Until such license is issued to such citizen or a final administrative or judicial determination is made affirming the denial of certification of the application for, or issuance of, such license.

(b) Any application for a license based upon pre-enactment exploration must be filed, at the address specified in § 970.200(b), no later than 5:00 p.m. EST on March 12, 1982 (or such later date and time as the Administrator may announce by regulation). All such applications filed at or before that time will be deemed to be filed on such closing date.

(c) Applications not filed in accordance with this section will not be considered to be based on pre-enactment exploration, and may be filed only as new entrant applications under § 970.303.

(d) To receive a pre-enactment explore priority of right for issuance of a license, and application must be, when filed, in substantial compliance with requirements described in § 970.209(b). An application which is in substantial but not full compliance will not lose its priority of right if it is brought into full compliance according to § 970.210.

(e) Any application based on pre-enactment exploration must be for a reasonably compact area with respect to which the applicant is a pre-enactment explorer, and, notwithstanding any part of § 970.601 which indicates otherwise, such area must be bounded by a single continuous boundary.

(f) The coordinates and any chart of the logical mining unit applied for in an application based on a pre-enactment exploration must be submitted in a separate, sealed envelope.

(g) On or before March 12, 1982, the applicants must indicate to the Administrator, other than in the sealed portion of the application:

(1) The size of the area applied for;

(2) Whether the applicant or any person on the applicant's behalf has applied, or intends to apply, for the same area or substantially the same area to one or more nations, and the number of such other applications; and

(3) Whether the other applicant is pursuing the ''banking'' option under § 970.601(d), and the number of applications filed, or to be filed, in pursuit of the ''banking'' option.

§ 970.302 Procedures and criteria for resolving conflicts.

(a) *General.* This section governs the resolution of all conflicts between or among applications or amendments having pre-enactment explorer priority of right.

(b) *Identification of applicants.* On June 21, 1982, the Administrator will meet with representatives of reciprocating states to identify their respective pre-enactment explorer applicants, and will identify the coordinates of the application areas applied for by such applicants.

(c) *Initial processing.* On or before July 13, 1982, the Administrator will determine whether each domestic application is entitled to a priority of right based on pre-enactment exploration in accordance with § 970.301.

(d) *Identification of conflicts.* On July 14, 1982, the Administrator will meet with representatives of reciprocating states to exchange lists of applications accorded pre-enactment explorer priorities of right, and will identify any conflicts existing among such applications.

(e) *Notification to applicants of conflicts.* If the Administrator identifies a conflict, he will send, no later than July 22, 1982, written notice of the conflict to each domestic applicant involved in the conflict. The notice will:

(1) Identify each applicant involved in the conflict in question:

(2) Identify the coordinates of the portions of the application areas which are in conflict;

(3) Indicate that the applicant may request from the Administrator the coordinates of the application areas from any other applications filed with the Administrator or with a reciprocating state (such coordinates will be provided subject to appropriate confidentiality arrangements);

(4) State whether;

(i) Each domestic application involved in the conflict is in substantial or, if known, full compliance with the requirements described in §970.209(b); and

(ii) Each foreign application involved in the conflict meets, if known, the legal requirements of the reciprocating state in which it is filed;

(5) Notify each domestic applicant involved in a conflict that he may, after July 22, 1982, and on or before November 16, 1982, resolve the conflict voluntarily according to paragraph (f) of this section, and that on or after November 17, 1982, any unresolved conflict shall be resolved in accordance with paragraph (j) or (k) of this section, as applicable; and

(6) In the case of an international conflict, include a copy of any applicable conflict resolution procedures in force between the United States and its reciprocating states pursuant to section 118 of the Act.

(f) *Voluntary resolution of conflicts.* Each U.S. applicant involved in a conflict may resolve the conflict after July 22, 1982, and on or before November 16, 1982, by:

(1) Unilaterally, or by agreement with each other applicant involved in the conflict, filing an amendment to the application eliminating the conflict; or

(2) Agreeing in writing with the other applicant(s) involved in the conflict to submit it to an agreed binding conflict resolution procedure.

(g) *Amendments.* (1) Amendments must be filed in accordance with the requirements for applications described in §970.200.

(2) The Administrator will:

(i) Accept no amendment prior to July 23, 1982;

(ii) Accord pre-enactment explorer priority of right only to amendments which:

(A) Pertain to areas with respect to which the applicant has engaged in pre-enactment exploration;

(B) Resolve an existing conflict with respect to that application;

(C) Do not apply for an area included in an application filed pursuant to §970.301 which is accorded pre-enactment explorer priority of right or an application identified pursuant to §970.302(b) which has been filed with a reciprocating state; and

(D) Are filed on or before October 15, 1982; and

(iii) Accord amendments which meet the requirements of this paragraph (g) the same priority of right as the applications to which they pertain.

(3) The area applied for in an amendment need not be adjacent to the area applied for in the original application.

(4) Amendments not accorded pre-enactment explorer priority of right may be filed as new entrant amendments under §970.303.

(h) *Notification of amendments and new conflicts.* The Administrator will:

(1) No later than October 25, 1982, notify each reciprocating state of any amendment accorded pre-enactment explorer priority of right pursuant to paragraph (g) of this section and, in cooperation with such states, identify any new conflicts;

(2) No later than October 27, 1982, notify each domestic applicant who is involved in a new conflict. The notice will:

(i) Identify each applicant with whom each new conflict has arisen;

(ii) Identify the coordinates of each area in which the applicant is involved in a new conflict;

(iii) Indicate that the applicant may request from the Administrator the coordinates of each area included in an amendment accorded pre-enactment explorer priority of right pursuant to paragraph (g) of this section, or for which notice has been received from a reciprocating state (such coordinates will be provided subject to appropriate confidentiality arrangements);

(iv) Notify the applicant that he may, on or before November 16, 1982,

resolve the conflict voluntarily according to paragraph (f) of this section, and that on or after November 17, 1982, any unresolved conflict shall be resolved in accordance with paragraph (j) or (k) of this section, as applicable; and

(v) In the case of an international conflict, include a copy of any applicable conflict resolution procedures in force between the United States and its reciprocating states pursuant to section 118 of the Act.

(i) *Government assistance in resolving international conflicts.* If, by October 26 1982, the applicants have not resolved, or agreed in writing to a specified binding procedure to resolve, an original international conflict, or new international conflict, the Administrator, the Secretary of State of the United States, and appropriate officials of the government of the reciprocating state to which the other applicant involved in the conflict applied will use their good offices to assist the applicants to resolve the conflict. After November 16, 1982, any unresolved international conflicts will be resolved in accordance with paragraph (k) of this section.

(j) *Unresolved domestic conflict*—(1) *Procedure.* (i) In the case of an original domestic conflict or a new domestic conflict, the applicants will be allowed until April 15, 1983, to resolve the conflict or agree in writing to submit the conflict to a specified binding conflict resolution procedure. If, by April 15, 1983, all applicants involved in an original or new domestic conflict have not resolved that conflict, or agreed in writing to submit the conflict to a specified binding conflict resolution procedure, the conflict will be resolved in a formal hearing held in accordance with Subpart I of 15 CFR Part 971, except that:

(A) The General Counsel of NOAA will not, as a matter of right, be a party to the hearing; however, the General Counsel may be admitted to the hearing by the administrative law judge as a party or as an interested person pursuant to 15 CFR 971.901 (f)(2) or (f)(3); and

(B) The administrative law judge will take such actions as he deems necessary and appropriate to conclude the hearing and transmit a recommended decision to the Administrator in an expeditious manner.

(ii) Notwithstanding the above, at any time on or after November 17, 1982, and on or before April 14, 1983, the applicants involved in the conflict may, by agreement, request the Administrator to resolve the conflict in a formal hearing as described above.

(2) *Decision principles for NOAA formal conflict resolution.* (i) The Administrator shall determine which applicant involved in a conflict between or among pre-enactment explorer applications or amendments shall be awarded all or part of each area in conflict.

(ii) The determination of the Administrator shall be based on the application of principles of equity which take into consideration, with respect to each applicant involved in the conflict, the following factors:

(A) The continuity and extent of activities relevant to each area in conflict and the application area of which it is a part;

(B) The date on which each applicant involved in the conflict, or predecessor in interest or component organization thereof, commenced activities at sea in the application area;

(C) The financial cost of activities relevant to each area in conflict and to the application area of which it is a part, measured in constant dollars;

(D) The time when the activities were carried out, and the quality of the activities; and

(E) Such additional factors as the Administrator determines to be relevant, but excluding consideration of the future work plans of the applicants involved in any conflict.

(iii) For the purposes of this paragraph (j) of this section, the word *activities* means the undertakings, commitments of resources investigations, findings, research, engineering development and other activities relevant to the identification, discovery, and systematic analysis and evaluation of hard mineral resources and to the determination of the technical and economic feasibility of commercial recovery.

(iv) When considering the factors specified in paragraph (j)(2)(ii) of this section, the Administrator shall hear,

and shall (except for purposes of apportionment pursuant to paragraph (j)(2)(v) of this section) limit his consideration to, all evidence based on the activities specified in paragraph (j)(2)(ii) of this section which were conducted on or before January 1, 1982, *Provided, however,* That an applicant must prove at-sea activities in the area in conflict prior to June 28, 1980, as a pre-condition to presentation of further evidence to the Administrator regarding activities in the area in conflict.

(v) In making his determination, the Administrator may award the entire area in conflict to one applicant involved in the conflict, or he may apportion the area among any or all of the applicants involved in the conflict. If, after applying the principles of equity, the Administrator determines that the area in conflict should be apportioned, the Administrator shall (to the maximum extent practicable consistent with the Administrator's application of the principles of equity) apportion the area in a manner designed to satisfy the plan of work set forth in the application of each applicant which is awarded part of the area.

(vi) Each applicant involved in the conflict must file an amendment to its application if necessary to implement the determination made by the Administrator.

(k) *Unresolved international conflicts.* (1) If, by November 17, 1982, all applicants involved in an original or new international conflict have not resolved that conflict, or agreed in writing to submit the conflict to a specified binding conflict resolution procedure, the applicants shall proceed in accordance with the conflict resolution procedures agreed to between the United States and its reciprocating states pursuant to section 118 of the Act.

(2) Each applicant whose application is involved in an international conflict shall be responsible for actions required in the conduct of the conflict resolution procedures, including bearing a proportional cost of implementing the procedures, representing himself in any proceedings, and assisting in the selection of arbitrators if necessary.

(l) *Continued opportunity for voluntary resolutions.* Each applicant may resolve any conflict by voluntary procedures at any time while that conflict persists.

(m) *Effect on priorities of new entrants.* (1) A pre-enactment explorer is entitled to a priority of right over a new entrant for any area in which the pre-enactment explorer has engaged in exploration prior to June 28, 1980 if, with respect to that area, the pre-enactment explorer files an application in accordance with this part on or after January 25, 1982 and on or before the closing date for pre-enactment explorer applications established under §970.301(b).

(2) Any amendment which is filed by a pre-enactment explorer on or before October 15, 1982, relates back to the date of filing of the original application and shall give the pre-enactment explorer priority of right over all new entrants if the amendment is accorded a pre-enactment explorer priority of right under paragraph (g) of this section.

[47 FR 24948, July 8, 1982, as amended at 54 FR 548, Jan. 6, 1989]

§970.303 Procedures for new entrants.

(a) *Filing of new entrant applications or amendments; priority of right.* New entrant applications or amendments must be filed in accordance with §970.200. A new entrant may file an application or amendment only at or after 1500 hours G.m.t. (11:00 a.m. EDT) January 3, 1983. All applications or amendments filed at that time shall be deemed to be filed simultaneously, and, if in accordance with §970.209, shall have priority of right over any application or amendment filed subsequently. Priority of right for any application or amendment filed after that time will be established as described in §970.209.

(b) *Conflicts.* (1) If a domestic conflict exists between or among new entrant applications or amendments, the applicants involved in the conflict shall resolve it.

(2) If an international conflict exists between or among new entrant applications or amendments, the conflict shall be resolved in accordance with applicable conflict resolution procedures agreed to between the United States and its reciprocating States pursuant

to section 118 of the Act. The Administrator will provide each domestic applicant involved in an international conflict a copy of any such procedures in force when the Administrator issues notice to the applicant that an international conflict exists. Each applicant whose application is involved in an international conflict shall be responsible for actions required in the conduct of the conflict resolution procedures, including bearing a proportional cost of implementing the procedures, representing himself in any proceedings, and assisting in the selection of arbitrators if necessary.

§ 970.304 Action on portions of applications or amendments not in conflict.

If an applicant so requests, the Administrator will proceed in accordance with this part to review that portion of an area included in an application or amendment that is not involved in a conflict. However, the Administrator will proceed with such review only if the applicant advises the Administrator in writing that the applicant will continue to seek a license for the proposed exploration activities in the portion of the application area that is not in conflict. To the extent practicable, the deadlines for certification of an application or amendment and issuance of a license provided in § 970.400 and § 970.500, respectively, will run from the date of filing of the original application.

Subpart D—Certification of Applications

SOURCE: 46 FR 45902, Sept. 15, 1981, unless otherwise noted.

§ 970.400 General.

(a) Certification is an intermediate step between receipt of an application for issuance or transfer of a license and its actual issuance or transfer. It is a determination which focuses on the eligibility of the applicant.

(b) Before the Administrator may certify an application for issuance or transfer of a license, he must determine that issuance of the license would not violate any of the restrictions in § 970.103(b). He also must make written determinations with respect to the requirements set forth in §§ 970.401 through 970.406. This will be done after consultation with other departments and agencies pursuant to § 970.211.

(c) To the maximum extent possible, the Administrator will endeavor to complete certification of an application within 100 days after submission of an application which is in full compliance with Subpart B of this part. If final certification or denial of certification has not occurred within 100 days after such submission of the application, the Administrator will inform the applicant in writing of the pending unresolved issues, the agency's efforts to resolve them, and an estimate of the time required to do so.

§ 970.401 Financial responsibility.

(a) Before the Administrator may certify an application for an exploration license he must find that the applicant has demonstrated that, upon issuance or transfer of the license, the applicant will be financially responsible to meet all obligations which he may require to engage in the exploration proposed in the application.

(b) In order for the Administrator to make this determination, the applicant must show to the Administrator's satisfaction that he is reasonably capable of committing or raising sufficient resources to carry out, in accordance with the provisions contained in this part, the exploration program set forth in his exploration plan.

§ 970.402 Technological capability.

(a) Before the Administrator may certify an application for an exploration license, he must find that the applicant has demonstrated that, upon issuance or transfer of the license, the applicant will possess, or have access to or a reasonable expectation of obtaining, the technological capability to engage in the proposed exploration.

(b) In order for the Administrator to make this determination, the applicant must demonstrate to the Administrator's satisfaction that the applicant will possess or have access to, at the time of issuance or transfer of the license, the technology and expertise, as needed, to carry out the exploration

program set forth in his exploration plan.

§970.403 Previous license and permit obligations.

In order to certify an application, the Administrator must find that the applicant has satisfactorily fulfilled all past obligations under any license or permit previously issued or transferred to the applicant under the Act.

§970.404 Adequate exploration plan.

Before he may certify an application, the Administrator must find that the proposed exploration plan of the applicant meets the requirements of §970.203.

§970.405 Appropriate exploration site size and location.

Before the Administrator may certify an application, he must approve the size and location of the exploration area selected by the applicant. The Administrator will approve the size and location of the area unless he determines that the area is not a logical mining unit pursuant to §970.601.

§970.406 Fee payment.

Before the Administrator may certify an application, he must find that the applicant has paid the license fee as specified in §970.208.

§970.407 Denial of certification.

(a) The Administrator may deny certification of an application if he finds that the requirements of this subpart have not been met. If, in the course of reviewing an application for certification, the Administrator becomes aware of the fact that one or more of the requirements for issuance or transfer under §§970.503 through 970.507 will not be met, he may also deny certification of the application.

(b) When the Administrator proposes to deny certification he will send to the applicant, and publish in the FEDERAL REGISTER, written notice of intention to deny certification. Such notice will include:

(1) The basis upon which the Administrator proposes to deny certification; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (the period of time may not exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny certification:

(1) On the 30th day after the date the notice is sent to the applicant, under paragraph (b) of this section, unless before such 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) of this section in which the applicant must correct a deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (c)(1) of this section is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I of 15 CFR part 971. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempts to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies certification, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying certification is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

[46 FR 45902, Sept. 15, 1981, as amended at 54 FR 547, Jan. 6, 1989]

§970.408 Notice of certification.

Upon making a final determination to certify an application for an exploration license, the Administrator will promptly send written notice of his determination to the applicant.

Subpart E—Issuance/Transfer/ Terms, Conditions and Restrictions

SOURCE: 46 FR 45903, Sept. 15, 1981, unless otherwise noted.

§ 970.500 General.

(a) *Proposal.* After certification of an application pursuant to Subpart D of this part, the Administrator will proceed with a proposal to issue or transfer a license for the exploration activities described in the application.

(b)(1) *Terms, conditions and restrictions.* Within 180 days (or such longer period as the Administrator may establish for good cause shown in writing) after certification, the Administrator will propose terms and conditions for, and restrictions on, the proposed exploration which are consistent with the provisions of the Act and this part as set forth in §§ 970.517 through 970.524. Proposed and final terms, conditions and restrictions will be uniform in all licenses, except to the extent that differing physical and environmental conditions require the establishment of special terms, conditions and restrictions for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The Administrator will propose these in writing to the applicant. Also, public notice thereof will be provided pursuant to § 970.501, and they will be included with the draft of the EIS on the issuance of a license which is required by section 109(d) of the Act.

(2) If the Administrator does not propose terms, conditions and restrictions within 180 days after certification, he will notify the applicant in writing of the reasons for the delay and will indicate the approximate date on which the proposed terms, conditions and restrictions will be completed.

(c) *Findings.* Before issuing or transferring an exploration license, the Administrator must make written findings in accordance with the requirements of §§ 970.503 through 970.507. These findings will be made after considering all information submitted with respect to the application and proposed issuance or transfer. He will make a final determination on issuance or transfer of a license, and will publish a final EIS on that action, within 180 days (or such longer period of time as he may establish for good cause shown in writing) following the date on which proposed terms, conditions and restrictions, and the draft EIS, are published.

ISSUANCE/TRANSFER; MODIFICATION/REVISION; SUSPENSION/REVOCATION

§ 970.501 Proposal to issue or transfer and of terms, conditions and restrictions.

(a) *Notice and comment.* The Administrator will publish in the FEDERAL REGISTER notice of each proposal to issue or transfer, and of terms and conditions for, and restrictions on, an exploration license. Subject to 15 CFR 971.802, interested persons will be permitted to examine the materials relevant to such proposals. Interested persons will have at least 60 days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) The Administrator will hold a public hearing in an appropriate location and may employ such additional methods as he deems appropriate to inform interested persons about each proposal and to invite their comments thereon.

(2) If the Administrator determines there exists one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of subpart I of 15 CFR part 971. The record developed in any such formal hearing will be part of the basis for the Administrator's decisions on issuance or transfer of, and of terms, conditions and restrictions for the license.

(c) Hearings held pursuant to this section will be consolidated insofar as practicable with hearings held by other agencies.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.502 Consultation and cooperation with Federal agencies.

Prior to the issuance or transfer of an exploration license, the Administrator will continue the consultation and cooperation with other Federal

agencies which were initiated pursuant to §970.211. This consultation will be to assure compliance with, among other statutes, the Endangered Species Act of 1973, as amended, the Marine Mammal Protection Act of 1972, as amended, and the Fish and Wildlife Coordination Act. He also will consult, prior to any issuance, transfer, modification or renewal of a license, with any affected Regional Fishery Management Council established pursuant to section 302 of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1852) if the activities undertaken pursuant to such license could adversely affect any fishery within the Fishery Conservation Zone, or any anadromous species or Continental Shelf fishery resource subject to the exclusive management authority of the United States beyond such zone.

§970.503 Freedom of the high seas.

(a) Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not unreasonably interfere with the exercise of the freedoms of the high seas by other nations, as recognized under general principles of international law.

(b) In making this finding, the Administrator will recognize that exploration for hard mineral resources of the deep seabed is a freedom of the high seas. In the exercise of this right, each licensee must act with reasonable regard for the interests of other nations in their exercise of the freedoms of the high seas.

(c)(1) In the event of a conflict between the exploration program of an applicant or licensee and a competing use of the high seas by another nation or its nationals, the Administrator, in consultation and cooperation with the Department of State and other interested agencies, will enter into negotiations with that nation to resolve the conflict. To the maximum extent possible the Administrator will endeavor to resolve the conflict in a manner that will allow both uses to take place in a manner in which neither will unreasonably interfere with the other.

(2) If both uses cannot be conducted harmoniously in the area subject to the exploration plan, the Administrator will decide whether to issue or transfer the license.

§970.504 International obligations of the United States.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not conflict with any international obligation of the United States established by any treaty or international convention in force with respect to the United States.

§970.505 Breach of international peace and security involving armed conflict.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not create a situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

§970.506 Environmental effects.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application cannot reasonably be expected to result in a significant adverse effect on the quality of the environment, taking into account the analyses and information in any applicable EIS prepared pursuant to section 109(c) or 109(d) of the Act. This finding also will be based upon the considerations and approach in §970.701.

§970.507 Safety at sea.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not pose an inordinate threat to the safety of life and property at sea. This finding will be based on the requirements reflected in §§970.205 and 970.801.

§970.508 Denial of issuance or transfer.

(a) The Administrator may deny issuance or transfer of a license if he finds that the applicant or the proposed exploration activities do not meet the requirements of this part for the issuance or transfer of a license.

(b) When the Administrator proposes to deny issuance or transfer, he will send to the applicant, and publish in the FEDERAL REGISTER, written notice of such intention to deny issuance or transfer. Such notice will include:

(1) The basis upon which the Administrator proposes to deny issuance or transfer; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (the period of time may not exceed 180 days except as specified by the Administrator for good cause).

The FEDERAL REGISTER notice will not include the coordinates of the proposed exploration area.

(c) The Administrator will deny issuance or transfer:

(1) On the 30th day after the date the notice is sent to the applicant under paragraph (b) of this section, unless before such 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) of this section in which the applicant must correct a deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (c)(1) of this section is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with subpart I of 15 CFR part 971. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies issuance or transfer, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying issuance of a license is subject to judicial review as provided in chapter 7 of title 5, United States Code.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.509 Notice of issuance or transfer.

If the Administrator finds that the requirements of this part have been met, he will issue or transfer the license along with the appropriate terms, conditions and restrictions. Notification thereof will be made in writing to the applicant and in the FEDERAL REGISTER.

§ 970.510 Objections to terms, conditions and restrictions.

(a) The licensee may file a notice of objection to any term, condition or restriction in the license. The licensee may object on the grounds that any term, condition or restriction is inconsistent with the Act or this part, or on any other grounds which may be raised under applicable provisions of law. If the licensee does not file notice of an objection within the 60-day period immediately following the licensee's receipt of the notice of issuance or transfer under § 970.509, he will be deemed conclusively to have accepted the terms, conditions and restrictions in the license.

(b) Any notice of objection filed under paragraph (a) of this section must be in writing, must contain the precise legal basis for the objection, and must provide information relevant to any underlying factual issues deemed by the licensee as necessary to the Administrator's decision upon the objection.

(c) Within 90 days after receipt of the notice of objection, the Administrator will act on the objection and publish in the FEDERAL REGISTER, as well as provide to the licensee, written notice of his decision.

(d) If, after the Administrator takes final action on an objection, the licensee demonstrates that a dispute remains on a material issue of fact, the Administrator will provide for a formal hearing which will proceed in accordance with subpart I of 15 CFR part 971.

(e) Any final determination by the Administrator on an objection to terms, conditions or restrictions in a license after the formal hearing provided in paragraph (d) of this section is subject to judicial review as provided in chapter 7 of title 5, United States Code.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§970.511 Suspension or modification of activities; suspension or revocation of licenses.

(a) The Administrator may:

(1) In addition to, or in lieu of, the imposition of any civil penalty under subpart J of 15 CFR part 971, or in addition to the imposition of any fine under subpart J, suspend or revoke any license issued under this part, or suspend or modify any particular activities under such a license, if the licensee substantially fails to comply with any provision of the Act, this part, or any term, condition or restriction of the license; and

(2) Suspend or modify particular activities under any license, if the President determines that such suspension or modification is necessary:

(i) To avoid any conflict with any international obligation of the United States established by any treaty or convention in force with respect to the United States; or

(ii) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

(b) Any action taken by the Administrator in accordance with paragraph (a)(1) will proceed pursuant to the procedures in 15 CFR 971.1003. Any action taken in accordance with paragraph (a)(2) will proceed pursuant to paragraphs (c) through (i) of this section, other than paragraph (h)(2).

(c) Prior to taking any action specified in paragraph (a)(2) of this section the Administrator will publish in the FEDERAL REGISTER, and send to the licensee, written notice of the proposed action. The notice will include:

(1) The basis of the proposed action; and

(2) If the basis for the proposed action is a deficiency which the Administrator believes the licensee can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (this period of time may not exceed 180 days except as specified by the Administrator for good cause).

(d) The Administrator will take the proposed action:

(1) On the 30th day after the date the notice is sent to the licensee, under paragraph (c) of this section, unless before such 30th day the licensee files with the Administrator a written request for an administrative review of the proposed action; or

(2) On the last day of the period established under paragraph (c)(2)(ii) of this section in which the licensee must correct the deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (d)(1) of this section is not pending or in progress.

(e) If a timely request for administrative review of the proposed action is made by the licensee under paragraph (d)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with subpart I of 15 CFR part 971. If the proposed action is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(f) The Administrator will serve on the licensee, and publish in the FEDERAL REGISTER, written notice of the action taken including the reasons therefor.

(g) Any final determination by the Administrator to take the proposed action is subject to judicial review as provided in chapter 7 of title 5, United States Code.

(h) The issuance of any notice of proposed action under this section will not affect the continuation of exploration activities by a licensee, except as provided in paragraph (i) of this section.

(i) The provisions of paragraphs (c), (d), (e) and (h) of this section will not apply when:

(1) The President determines by Executive Order that an immediate suspension of a license, or immediate suspension or modification of particular activities under such license, is necessary for the reasons set forth in paragraph (a)(2) of this section; or

(2) The Administrator determines that immediate suspension of such a license, or immediate suspension or modification of particular activities under a license, is necessary to prevent a significant adverse effect on the environment or to preserve the safety of life or property at sea, and the Administrator issues an emergency order in accordance with § 971.1003(d)(4).

(j) The Administrator will immediately rescind the emergency order as soon as he has determined that the cause for the order has been removed.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.512 Modification of terms, conditions and restrictions.

(a) After issuance or transfer of any license, the Administrator, after consultation with interested agencies and the licensee, may modify any term, condition, or restriction in such license for the following purposes:

(1) To avoid unreasonable interference with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. This determination will take into account the provisions of § 970.503;

(2) If relevant data and other information (including, but not limited to, data resulting from exploration activities under the license) indicate that modification is required to protect the quality of the environment or to promote the safety of life and property at sea;

(3) To avoid a conflict with any international obligation of the United States, established by any treaty or convention in force with respect to the United States, as determined in writing by the President; or

(4) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict, as determined in writing by the President.

(b) The procedures for objection to the modification of a term, condition or restriction will be the same as those for objection to an original term, condition or restriction under § 970.510, except that the period for filing notice of objection will run from the receipt of notice of proposed modification. Public notice of proposed modifications under this section will be made according to § 970.514. On or before the date of publication of public notice, written notice will be provided to the licensee.

[46 FR 45903, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.513 Revision of a license.

(a) During the term of an exploration license, the licensee may submit to the Administrator an application for a revision of the license or the exploration plan associated with it. NOAA recognizes that changes in circumstances encountered, and in information and technology developed, by the licensee during exploration may require such revisions. In some cases it may even be advisable to recognize at the time of filing the original license application that although the essential information for issuing or transferring a license as specified in §§ 970.201 through 920.208 must be included in such application, some details may have to be provided in the future in the form of a revision. In such instances, the Administrator may issue or transfer a license which would authorize exploration activities and plans only to the extent described in the application.

(b) The Administrator will approve such application for a revision upon a finding in writing that the revision will comply with the requirements of the Act and this part.

(c) A change which would require an application to and approval by the Administrator as a revision is a major change in one or more of:

(1) The bases for certifying the original application pursuant to §§ 970.401 through 970.406;

(2) The bases for issuing or transferring the license pursuant to §§ 970.503 through 970.507; or

(3) The terms, conditions and restrictions issued for the license pursuant to §§ 970.517 through 970.524.

A major change is one which is of such significance so as to raise a question as to:

(i) The applicant's ability to meet the requirements of the sections cited in paragraphs (c) (1) and (2) of this section; or

(ii) The sufficiency of the terms, conditions and restrictions to accomplish their intended purpose.

§970.514 Scale requiring application procedures.

(a) A proposal by the Administrator to modify a term, condition or restriction in a license pursuant to §970.512, or an application by a licensee for revision of a license or exploration plan pursuant to §970.513, is significant, and the full application requirements and procedures will apply, if it would result in other than an incidental:

(1) Increase in the size of the exploration area; or

(2) Change in the location of the area.

An incidental increase or change is that which equals two percent or less of the original exploration area, so long as such adjustment is contiguous to the licensed area.

(b) All proposed modifications or revisions other than described in paragraph (a) of this section will be acted on after a notice thereof is published by the Administrator in the FEDERAL REGISTER, with a 60-day opportunity for public comment. On a case-by-case basis, the Administrator will determine if other procedures, such as a public hearing in a potentially affected area, are warranted. Notice of the Administrator's decision on the proposed modification will be provided to the licensee in writing and published in the FEDERAL REGISTER.

§970.515 Duration of a license.

(a) Each exploration license will be issued for a period of 10 years.

(b) If the licensee has substantially complied with the license and its associated exploration plan and requests an extension of the license, the Administrator will extend the license on terms, conditions and restrictions consistent with the Act and this part for a period of not more than 5 years.

In determining substantial compliance for purposes of this section, the Administrator may make allowance for deviation from the exploration plan for good cause, such as significantly changed market conditions. However, a request for extension must be accompanied by an amended exploration plan to govern the activities by the licensee during the extended period.

(c) Successive extensions may be requested, and will be granted by the Administrator, based on the criteria, and for the length of time, specified in paragraph (b) of this section.

§970.516 Approval of license transfers.

(a) The Administrator may transfer a license after a written request by the licensee. After a licensee submits such a request to the Administrator, the proposed transferee will be deemed an applicant for an exploration license, and will be subject to the requirements and procedures of this part.

(b) The Administrator will transfer a license if the proposed transferee and exploration activities meet the requirements of the Act and this part, and if the proposed transfer is in the public interest. The Administrator will presume that the transfer is in the public interest if it meets the requirements of the Act and this part. In case of mere change in the form or ownership of a licensee, the Administrator may waive relevant determinations for requirements for which no changes have occurred since the preceding application.

TERMS, CONDITIONS, AND RESTRICTIONS

§970.517 Diligence requirements.

The terms, conditions and restrictions in each exploration license must include provisions to assure diligent development. The Administrator will establish these pursuant to §970.602.

§970.518 Environmental protection requirements.

(a) Each exploration license must contain such terms, conditions and restrictions, established by the Administrator, which prescribe actions the licensee must take in the conduct of exploration activities to assure protection of the environment. The Administrator will establish these pursuant to §970.702.

(b) Before establishing the terms, conditions and restrictions pertaining to environmental protection, the Administrator will consult with the Administrator of the Environmental Protection Agency, the Secretary of State and the Secretary of the department in which the Coast Guard is operating. He also will take into account and give due consideration to the information contained in the final EIS prepared with respect to that proposed license.

§ 970.519 Resource conservation requirements.

For the purpose of conservation of natural resources, each license issued under this part will contain, as needed, terms, conditions and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the license area. The Administrator will establish these pursuant to § 970.603.

§ 970.520 Freedom of the high seas requirements.

Each license issued under this part must include such restrictions as may be necessary and appropriate to ensure that the exploration activities do not unreasonably interfere with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law, such as fishing, navigation, submarine pipeline and cable laying, and scientific research. The Administrator will consider the provisions in § 970.503 in establishing these restrictions.

§ 970.521 Safety at sea requirements.

The Secretary of the department in which the Coast Guard is operating, in consultation with the Administrator, will require in any license issued under this part, in conformity with principles of international law, that vessels documented under the laws of the United States and used in activities authorized under the license comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the promotion of safety of life and property at sea. These requirements will be established with reference to subpart H of this part.

§ 970.522 Monitoring requirements.

Each exploration license must require the licensee:

(a) To allow the Administrator to place appropriate Federal officers or employees as observers aboard vessels used by the licensee in exploration activities to:

(1) Monitor such activities at such time, and to such extent, as the Administrator deems reasonable and necessary to assess the effectiveness of the terms, conditions, and restrictions of the license; and

(2) Report to the Administrator whenever such officers or employees have reason to believe there is a failure to comply with such terms, conditions, and restrictions;

(b) To cooperate with such officers and employees in the performance of monitoring functions; and

(c) To monitor the environmental effects of the exploration activities in accordance with a monitoring plan approved and issued by the Administrator as license terms, conditions and restrictions, and to submit such information as the Administrator finds to be necessary and appropriate to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects. This environmental monitoring plan and reporting will respond to the concerns and procedures discussed in Subpart G of this part.

§ 970.523 Special terms, conditions, and restrictions.

Although the general criteria and standards to be used in establishing terms, conditions, and restrictions for a license are set forth in this part, as referenced in §§ 970.517 through 970.522, the Administrator may impose special terms, conditions, and restrictions for the conservation of natural resources, protection of the environment, or the safety of life and property at sea when required by differing physical and environmental conditions.

§970.524 Other Federal requirements.

Pursuant to §970.211, another Federal agency, upon review of an exploration license application submitted under this part, may indicate how terms, conditions, and restrictions might be added to the license, to assure compliance with any law or regulation within that agency's area of responsibility. In response to the intent, reflected in section 103(e) of the Act, to reduce the number of separate actions to satisfy the statutory responsibilities of these agencies, the Administrator may include such terms, conditions, and restrictions in a license.

Subpart F—Resource Development Concepts

SOURCE: 46 FR 45907, Sept. 15, 1981, unless otherwise noted.

§970.600 General.

Several provisions in the Act relate to appropriate mining techniques or mining efficiency. These raise what could be characterized as resource development issues. In particular, under section 103(a)(2)(D) of the Act, the applicant will select the size and location of the area of an exploration plan, which will be approved unless the Administrator finds that the area is not a ''logical mining unit.'' Also, pursuant to section 108 of the Act the applicant's exploration plan and the terms, conditions and restrictions of each license must be designed to ensure diligent development. In addition, for the purpose of conservation of natural resources, section 110 of the Act provides that each license is to contain, but only as needed, terms, conditions, and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the resources.

§970.601 Logical mining unit.

(a) In the case of an exploration license, a logical mining unit is an area of the deep seabed which can be explored under the license, and within the 10-year license period, in an efficient, economical and orderly manner with due regard for conservation and protection of the environment, taking into consideration the resource data, other relevant physical and environmental characteristics, and the state of the technology of the applicant as set forth in the exploration plan. In addition, it must be of sufficient size to allow for intensive exploration.

(b) Approval by the Administrator of a proposed exploration logical mining unit will be based on a case-by-case review of each application. In order to provide a proper basis for this evaluation, the applicant's exploration plan should describe the seabed topography, the location of mineral deposits and the nature of planned equipment and operations. Also, the exploration plan must show the relationship between the area to be explored and the applicant's plans for commercial recovery volume, to the extent projected in the exploration plan.

(c) In delineating an exploration area, the applicant need not include unmineable areas. Thus, the area need not consist of contiguous segments, as long as each segment would be efficiently mineable and the total proposed area constitutes a logical mining unit. In describing the area, the applicant must present the geodetic coordinates of the points defining the boundaries, referred to the World Geodetic System (WGS) Datum. A boundary between points must be a geodesic. If grid coordinates are desired, the Universal Transverse Mercator Grid System must be used.

(d) At the applicant's option, for the purpose of satisfying a possible obligation under a future Law of the Sea Treaty, the applicant may propose an exploration area which includes two exploration logical mining units. The applicant should specify in the application if this ''banking'' option is chosen, and any applicant choosing this option and filing an application based on pre-enactment exploration under §970.301 shall so notify the Administrator in accordance with §970.301(g).

(e) Applicants are advised that NOAA will not accept an application or issue a license for an exploration area larger than 150,000 square kilometers unless the applicant can demonstrate the necessity of a larger area based on factors such as topography, nodule abundance,

distribution and ore grade. If the applicant elects to pursue the ''banking'' option described in paragraph (d) of this section, and wishes to apply for an exploration area larger than 150,000 square kilometers, the applicant must file a second application with respect to at least the area in excess of 150,000 square kilometers, unless the applicant justifies such excess area as part of a single application under the preceding sentence.

[46 FR 45907, Sept. 15, 1981, as amended at 47 FR 5968, Feb. 9, 1982]

§ 970.602 Diligent exploration.

(a) Each licensee must pursue diligently the activities described in his approved exploration plan. This requirement applies to the full scope of the plan, including environmental safeguards and monitoring systems. To help assure this diligence, terms, conditions and restrictions which the Administrator issues with a license will require such periodic reasonable expenditures for exploration by the licensee as the Administrator may establish, taking into account the size of the area of the deep seabed to which the exploration plan applies and the amount of funds which is estimated by the Administrator to be required during exploration for commercial recovery of hard mineral resources to begin within the time limit established by the Administrator. However, such required expenditures will not be established at a level which would discourage exploration by persons with less costly technology than is prevalently in use.

(b) In order to fulfill the diligence requirement, the applicant first must propose to the Administrator an estimated schedule of activities and expenditures pursuant to § 970.203(b) (3) and (6). The schedule must show, and the Administrator must be able to make a reasonable determination, that the applicant can complete his exploration activities within the term of the license. In this regard, there must be a reasonable relationship between the size of the exploration area and the financial and technological resources reflected in the application. Also, the exploration must clearly point toward developing the ability, by the end of the 10-year license period, to apply for and obtain a permit for commercial recovery.

(c) Ultimately, the diligence requirement will involve a retrospective determination by the Administrator, based on the licensee's reasonable conformance to the approved exploration plan. Such determination, however, will take into account the need for some degree of flexibility in an exploration plan. It also will include consideration of the needs and stage of development of each licensee, again based on the approved exploration plan. In addition, the determination will take account of legitimate periods of time when there is no or very low expenditure, and will allow for a certain degree of flexibility for changes encountered by the licensee in such factors as its resource knowledge and financial considerations.

(d) In order for the Administrator to make determinations on a licensee's adherence to the diligence requirements, the licensee must submit a report annually reflecting his conformance to the schedule of activities and expenditures contained in the license. In case of any changes requiring a revision to an approved license and exploration plan, the licensee must advise the Administrator in accordance with § 970.513.

§ 970.603 Conservation of resources.

(a) With respect to the exploration phase of seabed mining, the requirement for the conservation of natural resources, encompassing due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the area to which the license applies, may not be particularly relevant. Thus, since the Act requires such terms, conditions and restrictions only as needed, exploration licenses will require such provisions only as the Administrator deems necessary.

(b) NOAA views license phase mining system tests as an opportunity to examine, with industry, the conservation implications of any mining patterns used. Thus, in order to develop information needed for future decisions during commercial recovery, NOAA will

include with a license a requirement for the submission of collector track and nodule production data. Only if information submitted reflects that the integrated system tests are resulting in undue waste or threatening the future opportunity for commercial recovery of the unrecovered balance of hard mineral resources will the Administrator modify the terms, conditions or restrictions pertaining to the conservation of natural resources, in order to address such problems.

(c) If the Administrator so modifies such terms, conditions and restrictions relating to conservation of resources, he will employ a balancing process in the consideration of the state of the technology being developed, the processing system utilized and the value and potential use of any waste, the environmental effects of the exploration activities, economic and resource data, and the national need for hard mineral resources.

Subpart G—Environmental Effects

SOURCE: 46 FR 45908, Sept. 15, 1981, unless otherwise noted.

§970.700 General.

Congress, in authorizing the exploration for hard mineral resources under the Act, also enacted provisions relating to the protection of the marine environment from the effects of exploration activities. For example, before the Administrator may issue a license, pursuant to section 105(a)(4) of the Act he must find that the exploration proposed in an application cannot reasonably be expected to result in a significant adverse effect on the quality of the environment. Also, the Act requires in section 109(b) that each license issued by the Administrator must contain such terms, conditions and restrictions which prescribe the actions the licensee must take in the conduct of exploration activities to assure protection of the environment. Furthermore, the Act in section 105(c)(1)(B) provides for the modification by the Administrator of any term, condition or restriction if relevant data and other information indicates that modification is required to protect the quality of the environment. In addition, section 114 of the Act specifies that each license issued under the Act must require the licensee to monitor the environmental effects of the exploration activities in accordance with guidelines issued by the Administrator, and to submit such information as the Administrator finds to be necessary and appropriate to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects.

§970.701 Significant adverse environmental effects.

(a) *Activities with no significant impact.* NOAA believes that exploration activities of the type listed below are very similar or identical to activities considered in section 6(c)(3) of NOAA Directives Manual 02–10, and therefore have no potential for significant environmental impact, and will require no further environmental assessment.

(1) Gravity and magnetometric observations and measurements;

(2) Bottom and sub-bottom acoustic profiling or imaging without the use of explosives;

(3) Mineral sampling of a limited nature such as those using either core, grab or basket samplers;

(4) Water and biotic sampling, if the sampling does not adversely affect shellfish beds, marine mammals, or an endangered species, or if permitted by the National Marine Fisheries Service or another Federal agency;

(5) Meteorological observations and measurements, including the setting of instruments;

(6) Hydrographic and oceanographic observations and measurements, including the setting of instruments;

(7) Sampling by box core, small diameter core or grab sampler, to determine seabed geological or geotechnical properties;

(8) Television and still photographic observation and measurements;

(9) Shipboard mineral assaying and analysis; and

(10) Positioning systems, including bottom transponders and surface and subsurface buoys filed in *Notices to Mariners.*

(b) *Activities with potential impact.* (1) NOAA research has identified at-sea testing of recovery equipment and the

operation of processing test facilities as activities which have some potential for significant environmental impacts during exploration. However, the research has revealed that only the following limited effects are expected to have potential for significant adverse environmental impact.

(2) The programmatic EIS's documents three at-sea effects of deep seabed mining which cumulatively during commercial recovery have the potential for significant effect. These three effects also occur during mining system tests that may be conducted under a license, but are expected to be insignificant. These include the following:

(i) *Destruction of benthos in and near the collector track.* Present information reflects that the impact from this effect during mining tests under exploration licenses will be extremely small.

(ii) *Blanketing of benthic fauna and dilution of food supply away from mine site subareas.* The settling of fine sediments disturbed by tests under a license of scale-model mining systems which simulate commercial recovery could adversely affect benthic fauna by blanketing, diluation of their food supply, or both. Because of the anticipated slow settling rate of the sediments, the affected area could be quite large. However, research results are insufficient to conclude that this will indeed be a problem.

(iii) *Surface plume effect on fish larvae.* The impact of demonstration-scale mining tests during exploration is expected to be insignificant.

(3) If processing facilities in the United States are planned to be used for testing during exploration, NOAA also will assess their impacts in the site-specific EIS developed for each license.

(c) *NOAA approach.* In making determinations on significant adverse environmental effects, the Administrator will draw on the above conclusions and other findings in NOAA's programmatic environmental statement and site-specific statements issued in accordance with the Act. He will issue licenses with terms, conditions and restrictions containing, as appropriate, environmental protection or mitigation requirements (pursuant to § 970.518) and monitoring requirements (pursuant to § 970.522). The focus of NOAA's environmental efforts will be on environmental research and on monitoring during mining tests to acquire more information on the environmental effects of deep seabed mining. If these efforts reveal that modification is required to protect the quality of the environment, NOAA then may modify terms, conditions and restrictions pursuant to § 970.512.

§ 970.702 Monitoring and mitigation of environmental effects.

(a) *Monitoring.* If an application is determined to be otherwise acceptable, the Administrator will specify an environmental monitoring plan as part of the terms, conditions and restrictions developed for each license. The plan will be based on the monotoring plan proposed by the applicant and reviewed by NOAA for completeness, accuracy and statistical reliability. This monitoring strategy will be devised to insure that the exploration activities do not deviate significantly from the approved exploration plan and to determine if the assessment of the plan's acceptability was sound. The monitoring plan, among other things, will include monitoring environmental parameters relating to verficiation of NOAA's findings concerning potential impacts, but relating mainly to the three unresolved concerns with the potential for significant environmental effect, as identified in § 970.701(b)(2). NOAA has developed a technical guidance document, which includes parameters pertaining to the upper and lower water column and operational aspects, which document will provide assistance in developing monitoring plans in consultation with applicants.

(b) *Mitigation.* Monitoring and continued research may develop information on future needs for mitigating environmental effects. If such needs are identified, terms, conditions and restrictions can be modified appropriately.

Subpart H—Safety of Life and Property at Sea

§ 970.800 General.

The Act contains requirements, in the context of several decisions, that relate to assuring the safety of life and

property at sea. For instance, before the Administrator may issue a license, section 105(a)(5) of the Act requires that he find that the proposed exploration will not pose an inordinate threat to the safety of life and property at sea. Also, under section 112(a) of the Act the Coast Guard, in consultation with NOAA, must require in any license or permit issued under the Act, in conformity with principles of international law, that vessels documented in the United States and used in activities authorized under the license comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the safety of life and property at sea. In addition, under section 105(c)(1)(B) of the Act, the Administrator may modify terms, conditions and restrictions for a license if required to promote the safety of life and property at sea.

[46 FR 45909, Sept. 15, 1981]

§970.801 Criteria for safety of life and property at sea.

Response to the safety at sea requirements in essence will involve vessel inspection requirements. These inspection requirements may be identified by reference to present laws and regulations. The primary inspection statutes pertaining to United States flag vessels are: 46 U.S.C. 86 (Loadlines); 46 U.S.C. 395 (Inspection of seagoing barges over 100 gross tons); 46 U.S.C. 367 (Inspection of sea-going motor vessels over 300 gross tons); and 46 U.S.C. 404 (Inspection of vessels above 15 gross tons carrying freight for hire). All United States flag vessels will be required to meet existing regulatory requirements applicable to such vessels. This includes the requirement for a current valid Coast Guard Certificate of Inspection, as specified in §970.205. Being United States flag, these vessels will be under United States jurisdiction on the high seas and subject to domestic enforcement procedures. With respect to foreign flag vessels, the SOLAS 74 or SOLAS 60 certificate requirements or alternative IACS requirements, as specified in §970.205, apply.

[46 FR 45909, Sept. 15, 1981]

Subpart I—Miscellaneous

§970.900 Other applicable regulations.

The regulations in subparts H, I and J of 15 CFR part 971 are consolidated regulations and are applicable both to licenses under this part and to permits under 15 CFR part 971. The regulations in subparts H, I and J of part 971 govern records to be maintained and information to be submitted by licensees and permittees, public disclosure of documents received by NOAA, relinquishment and surrender of licenses and permits, amendment of regulations, competition of time, uniform hearing procedures, and enforcement under the Act.

[54 FR 548, Jan. 6, 1989]

Subparts J–W [Reserved]

Subpart X—Pre-enactment Exploration

§970.2401 Definitions.

(a) *Engage in exploration* means:

(1) To cause or authorize exploration to occur, including but not limited to a person's actions as a sponsor, principal, or purchaser of exploration services; or

(2) To conduct exploration on behalf of a person described in paragraph (a)(1) of this section.

(b) [Reserved]

[45 FR 76662, Nov. 20, 1980, as amended at 47 FR 5966, Feb. 9, 1982]

§970.2402 Notice of pre-enactment exploration.

(a) *General.* NOAA encourages any United States citizen who engaged in exploration for deep seabed hard mineral resources before June 28, 1980, to file not later than February 1, 1981, a written notice with the Administrator, in care of: The Director, Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, Department of Commerce, Page Building 1, Suite 410, 2001 Wisconsin Avenue, NW., Washington, DC 20235. Such notice shall not constitute an application for a license or permit and shall not confer or confirm any priority of right to any site.

(b) *Content of pre-enactment exploration Notice.* If a notice of exploration commenced prior to June 28, 1980, is filed pursuant to paragraph (a) it should be in writing and include the following:

(1) Names, addresses, and telephone numbers of the United States citizens responsible for exploration operations to whom notices and orders are to be delivered;

(2) A description of the citizen or citizens engaging in such exploration including:

(i) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(ii) The state of incorporation of state in which the partnership or other business entity is registered;

(iii) The name of registered agent and places of business;

(iv) Certification of essential and non-proprietary provisions in articles of incorporation, charter, or articles of association; and

(v) Membership of the association, partnership, or joint venture, including information about the participation of partners and joint venturers, and/or ownership of stock.

(3) A general description of the exploration activities conducted prior to June 28, 1980, including:

(i) The approximate date that the citizen, or predecessor in interest, commenced exploration activities;

(ii) A general estimate of expenditures made on the exploration program prior to June 28, 1980;

(iii) A statement of whether the citizen intends to file an application for an exploration license pursuant to section 101(b)(1)(A) of the Act after NOAA issues regulations implementing section 103(a) of the Act; and

(iv) A statement of whether the citizen intends to continue to engage in exploration as allowed by section 101(b) of the Act, pending a final determination on his application for an exploration license.

(c) *Exclusion of location information.* The information submitted in the notice of pre-enactment exploration required by this section shall *not* include the location of past or future exploration or prospective mine sites.

[45 FR 76662, Nov. 20, 1980]

Subpart Y—Pre-license Exploration

SOURCE: 45 FR 76662, Nov. 20, 1980, unless otherwise noted.

§ 970.2501 Notice of pre-license exploration voyages.

(a) *General.* Any United States citizen who schedules an exploration voyage to begin after November 20, 1980 shall file written notice with the Administrator which sets out:

(1) The name, address and telephone number of the citizen;

(2) The anticipated date of commencement of the voyage and its planned duration;

(3) The exploration activities to be carried out on the voyage, including a general description of the equipment and methods to be used, and an estimate of the anticipated extent of seabed disturbance and effluent discharge; and

(4) If the U.S. citizen has not filed a notice of pre-enactment exploration in accordance with § 970.2402, the information specified in § 970.2402(b).

(b) *When and where to file Notice of future exploration*—(1) *When.* (i) Except as allowed in paragraph (b)(2) of this section, the notice required by paragraph (a) of this section must be filed not later than 45 days prior to the date on which the exploration voyage is scheduled to begin.

(ii) With respect to filing of the information referred to in paragraph (a)(4) of this section, the filing dates specified in paragraph (b) of this section shall prevail over the date specified in § 970.2402(a).

(2) *Exception.* If an exploration voyage is scheduled to begin before January 5, 1981, the notice required by paragraph (a) of this section must be filed on or before December 22, 1980.

(3) *Where.* The notice required by paragraph (a) of this section must be filed in writing with the Administrator, at the address specified in § 970.2402(a) of this part.

§ 970.2502 Post voyage report.

Within 30 days of the conclusion of each exploration voyage, the United States citizen engaging in the voyage

shall submit to NOAA a report containing any environmental data or information obtained during that voyage.

§ 970.2503 Suspension of exploration activities.

(a) The Administrator may issue an emergency order, either in writing or orally with written confirmation, requiring the immediate suspension of exploration activities or any particular exploration activity when, in his judgment, immediate suspension of such activity or activities is necessary to prevent a significant adverse effect on the environment. Upon receipt of notice of the emergency order, the United States citizen engaged in the exploration shall immediately cease the activity that is the subject of the emergency order. During any suspension NOAA will consult with the citizen engaged in the activity suspended concerning appropriate measures to remove the cause of suspension. A suspension may be rescinded at any time by written notice from the Administrator upon presentation of satisfactory evidence by the citizen that the activity will no longer threaten a significant adverse effect on the environment.

(b) [Reserved]

Subpart Z—Miscellaneous

§ 970.2601 Additional information.

Any United States citizen filing notice under § 970.2402 or § 970.2501 of this part shall provide such additional information as the Administrator may require as necessary and appropriate to implement section 101 of the Act.

[45 FR 76662, Nov. 20, 1980]

PART 971—DEEP SEABED MINING REGULATIONS FOR COMMERCIAL RECOVERY PERMITS

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AUTHORITY: 30 U.S.C. 1401 *et seq.*

SOURCE: 54 FR 525, Jan. 6, 1989, unless otherwise noted.

Subpart A—General

§ 971.100 Purpose.

The purpose of this part is to implement the responsibilities and authorities of the Administrator of the National Oceanic and Atmospheric Administration (NOAA) pursuant to Public Law 96–283, the Deep Seabed Hard Mineral Resources Act (the Act), to issue to eligible United States citizens permits for the commercial recovery of deep seabed hard minerals.

§ 971.101 Definitions.

For purposes of this part, the term

(a) *Act* means the Deep Seabed Hard Mineral Resources Act (Pub. L. 96–283; 94 Stat. 553; 30 U.S.C. 1401 *et seq.*);

(b) *Administrator* means the Administrator of the National Oceanic and Atmospheric Administration, or the Administrator's designee;

(c) *Affected State* means any State with a coastal zone management program approved under Section 306 of the Coastal Zone Management Act, as amended, where coastal zone land and water uses are affected by the issuance of a commercial recovery permit under the provisions of the Act or this part;

(d) *Applicant* means an applicant for a commercial recovery permit pursuant to the Act and this part; as used in subparts H, I and J of this part, ''applicant'' also means an applicant for an exploration license pursuant to the Act and part 970 of the title. ''Applicant'' also means a proposed permit transferee;

(e) *Commercial recovery* means—

(1) Any activity engaged in at sea to recover any hard mineral resource at a substantial rate for the primary purpose of marketing or commercially using such resource to earn a net profit, whether or not such net profit is actually earned;

(2) If such recovered hard mineral resource will be processed at sea, such processing; and

(3) If the waste of such activity to recover any hard mineral resource, or of such processing at sea, will be disposed of at sea, such disposal;

(f) *Continental Shelf* means—

(1) The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of such submarine area; and

(2) The seabed and subsoil of similar submarine areas adjacent to the coast of islands;

(g) *Controlling interest,* for purposes of paragraph (v)(3) of this section, means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person;

(h) *Deep seabed* means the seabed, and the subsoil thereof to a depth of ten meters, lying seaward of and outside—

(1) The Continental Shelf of any nation; and

(2) Any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States;

(i) *Environment* or *environmental* as used in the definitions of ''irreparable harm'' and ''significant adverse environmental effect'' means or pertains to the deep seabed and ocean waters lying at and within the permit area, and in surrounding areas including transportation corridors to the extent that they might be affected by the commercial recovery activities, and the living and non-living resources of those areas;

(j) *Exploration* means—

(1) Any at-sea observation and evaluation activity which has, as its objective, the establishment and documentation of—

(i) The nature, shape, concentration, location, and tenor of a hard mineral resource; and

(ii) The environmental, technical, and other appropriate factors which must be taken into account to achieve commercial recovery; and

(2) The taking from the deep seabed of such quantities of any hard mineral resource as are necessary for the design, fabrication and testing of equipment which is intended to be used in the commercial recovery and processing of such resource;

(k) *Hard mineral resource* means any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which is manganese, nickel, cobalt, or copper;

(l) *Irreparable harm* means significant undesirable effects to the environment occurring after the date of the permit issuance which will not be reversed after cessation or modification of the activities authorized under the permit;

(m) *Licensee* means the holder of a license issued under NOAA regulations to engage in exploration;

(n) *NOAA* means the National Oceanic and Atmospheric Administration;

(o) *Permittee* means the holder of a permit issued or transferred under this part to engage in commercial recovery;

(p) *Person* means any United States citizen, any individual, and any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any nation;

(q) *Reciprocating state* means any foreign nation designated as such by the Administrator under section 118 of the Act;

(r) *Recovery plan* or *commercial recovery plan* means the plan submitted by an applicant for a commercial recovery permit pursuant to §971.203;

(s) *Significant adverse environmental effect* means: (1) Important adverse changes in ecosystem diversity, productivity, or stability of the biological communities within the environment; (2) threat to human health through direct exposure to pollutants or through

consumption of exposed aquatic organisms; or (3) important loss of aesthetic, recreational, scientific or economic values;

(t) *State agency* means the agency responsible for implementing the responsibilities of section 306(c)(5) under the Coastal Zone Management Act, as amended, and 15 CFR part 930;

(u) *United States* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States; and

(v) *United States citizen* means—

(1) Any individual who is a citizen of the United States;

(2) Any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States; and

(3) Any corporation, partnership, joint venture, association, or other entity (whether organized or existing under the laws of any of the United States or a foreign nation) if the controlling interest in such entity is held by an individual or entity described in paragraph (v)(1) or (v)(2).

§ 971.102 Nature of permits.

(a) A permit issued under this part authorizes the holder thereof to engage in commercial recovery within a specific portion of the sea floor consistent with the provisions of the Act and this part and consistent with the specific terms, conditions, and restrictions (TCRs) applied to the permit by the Administrator.

(b) A permit issued under this part is exclusive with respect to the holder thereof as against any other United States citizen or any citizen, national or governmental agency of, or any legal entity organized or existing under the laws of, any reciprocating state.

(c) A valid existing license under 15 CFR part 970 will entitle the holder, if otherwise eligible under the provisions of the Act and implementing regulations, to a permit for commercial recovery from an area selected from within the license area. Such a permit will recognize the right of the holder to recover hard mineral resources, and to own, tranport, use, and sell hard mineral resources recovered under the permit and in accordance with the requirements of the Act and this part.

§ 971.103 Prohibited activities and restrictions.

(a) *Prohibited activities and exceptions.* (1) No United States citizen may engage in any commercial recovery unless authorized to do so under—

(i) A permit issued pursuant to the Act and implementing regulations;

(ii) A license, permit or equivalent authorization issued by a reciprocating state; or

(iii) An international agreement which is in force with respect to the United States.

(2) The prohibitions of paragraph (a)(1) of this section do not apply to any of the following activities:

(i) Scientific research, including that concerning hard mineral resources;

(ii) Mapping, or the taking of any geophysical, geochemical, oceanographic, or atmospheric measurements or random bottom samplings of the deep seabed, if such taking does not significantly alter the surface or subsurface of the seabed or significantly affect the environment;

(iii) The design, construction, or testing of equipment and facilities which will or may be used for exploration or commercial recovery, if such design, construction or testing is conducted onshore, or does not involve the recovery of any but incidental hard mineral resources;

(iv) The furnishing of machinery, products, supplies, services, or materials for any exploration or commercial recovery conducted under a license or permit issued under the Act and implementing regulations, a license or permit or equivalent authorization issued by a reciprocating state, or any relevant international agreement; and

(v) Activities, other than exploration or commercial recovery activities, of the Federal Government.

(3) No United States citizen may interfere or participate in interference with any activity conducted by any permittee which is authorized to be undertaken under a permit issued by the Administrator to a permittee under the Act or with any activity conducted by

the holder of, and authorized to be undertaken under, a license or permit or equivalent authorization issued by a reciprocating state for the commercial recovery of hard mineral resources. For purposes of this section, interference includes physical interference with activities authorized by the Act, this part, and a license or permit issued pursuant thereto; the filing of a specious claim in the United States or any other nation; and any other activity designed to harass, or which has the effect of harassing, persons conducting deep seabed mining activities authorized by law. Interference does not include the exercise of any superior rights granted to United States citizens by the Constitution of the United States, or any Federal or State law, treaty, or agreement or regulation promulgated pursuant thereto.

(4) United States citizens shall exercise their rights on the high seas with reasonable regard for the interests of other states in their exercise of the freedoms of the high seas.

(b) *Restrictions on issuance of permits.* The Administrator will not issue any permit—

(1) After the date on which any relevant international agreement is ratified by and enters into force with respect to the United States, except to the extent that issuance of the permit is not inconsistent with that agreement.

(2) The recovery plan of which, submitted pursuant to the Act and implementing regulations, would apply to an area to which applies, or would conflict with:

(i) Any exploration plan or recovery plan submitted with any pending application to which priority of right for issuance applies under 15 CFR part 970 or this part;

(ii) Any exploration plan or recovery plan associated with any existing license or permit; or

(iii) An equivalent authorization which has been issued, or for which formal notice of application has been submitted, by a reciprocating state prior to the filing date of any relevant application for licenses or permits pursuant to the Act and implementing regulations;

(3) Authorizing commercial recovery within any area of the deep seabed in which exploration is authorized under a valid existing license if such permit is issued to a person other than the licensee for such area;

(4) Which authorizes commercial recovery to commence before January 1, 1988;

(5) The recovery plan for which applies to any area of the deep seabed if, within the 3-year period before the date of application for that permit:

(i) The applicant therefor surrendered or relinquished such area under an exploration plan or recovery plan associated with a previous license or permit issued to such applicant; or

(ii) A permit previously issued to the applicant had an exploration plan or recovery plan which applied to such area and such license or permit was revoked under section 106 of the Act;

(6) Or approve the transfer of a permit, except to a United States citizen; or

(7) That would authorize commercial recovery activities in an area other than for which the applicant therefore holds a valid exploration license under part 970 of this title.

§971.104 OMB control number.

The information collection requirements and reporting and recordkeeping requirements contained in this part were approved by the Office of Management and Budget under control number 0648–0170.

Subpart B—Applications

§971.200 General.

(a) *Who may apply; how.* Any United States citizen holding a valid exploration license may apply to the Administrator for issuance of a commercial recovery permit for all or part of the area to which the license applies. Any holder of a commercial recovery permit may apply to the Administrator for transfer of the permit. Applications must be submitted in the form and manner described in this subpart.

(b) *Place, form and copies.* An application for the issuance or transfer of a commerical recovery permit must be in writing, verified and signed by an authorized officer or other authorized

representative of the applicant. The application and 25 copies thereof must be submitted to:

Ocean Minerals and Energy Division, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, Suite 710, 1825 Connecticut Avenue, NW., Washington, DC 20235.

The Administrator may waive in whole or in part, at his discretion, the requirement that 25 copies of an application be filed with NOAA.

(c) *General contents.* The application must contain a proposed commerical recovery plan and the financial, technical, environmental and other information specified in this part, which in total are necessary for the Administrator to make the determinations required by the Act and this part. Although the ultimate standards for determinations under these rules are identical for both transferees and original preexisting licensees, NOAA anticipates that applicants who are transferees will have to supply more information with the application than licensees will [see subsection (e) in this section].

(d) *Identification of requirements.* Each portion of the application should identify the requirements of this part to which it responds.

(e) *Information previously submitted in connection with an exploration license.* Information previously submitted as part of an exploration license application, as well as information submitted during the course of license activities (such as data included in annual reports to NOAA), may be incorporated in the commercial recovery permit application by reference.

(f) *Request for confidential treatment of information.* If an applicant wishes to have any information in its application not be subject to public disclosure, it must so request, at the time of submitting the information, pursuant to § 971.802 which will govern disposition of the request.

(g) *Pre-application consultation.* The Administrator will make NOAA staff available to potential applicants for pre-application consultations on how to respond to the provisions of this part. In appropriate circumstances, the Administrator will provide written confirmation to the applicant of oral guidance resulting from such consultations. Such consultation is required for the purpose of § 971.207. The applicant is encouraged to consult with affected States as early as is practicable [see also §§ 971.213 and 971.606(b)].

(h) *Compliance with Federal consistency requirements.* An applicant for a commercial recovery permit must comply with all necessary requirements, including procedures, pursuant to 15 CFR part 930, subpart D. Applications and other necessary data and information must be transmitted to the designated State agency as prescribed under 15 CFR 930.50.

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§ 971.201 Statement of financial resources.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator pursuant to § 971.301 that, upon issuance or transfer of the permit, the applicant will have access to the financial resources to carry out, in accordance with this part, the commercial recovery program set forth in the applicant's commercial recovery plan.

(b) *Specific.* In particular, the information on financial resources is expected to be general in nature but must include the likely sources and timing of funds to meet the applicant's scheduled expenditures in the recovery plan. These sources may include cash flow, reserves, and outside funding.

§ 971.202 Statement of technological experience and capabilities.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator pursuant to § 971.301 that, upon issuance or transfer of the permit, the applicant will have the technological capability to carry out, in accordance with the regulations contained in this part, the commercial recovery program set out in the applicant's commercial recovery plan.

(b) *Specific.* In particular, the information submitted pursuant to this section must describe the equipment, knowledge, and skills the applicant

possesses, or to which it can demonstrate access [see §971.200(e)]. The information must include:

(1) A description of the technology or the equipment and methods to be used by the applicant in carrying out each step in the mining process, including nodule collection, retrieval, transfer to ship, environmental monitoring, transport to processing facilities, nodule processing, waste disposal and compliance with applicable water quality standards. The description must include:

(i) An analysis of the performance of experimental systems, sub-systems, or analogous machinery;

(ii) The rationale for extrapolating from test results to commercial mining. The more test data offered with the application the less analysis will be expected; and

(iii) Anticipated system reliability within the context of anticipated production time lost through equipment failure.

(2) A functional description of the types of technical persons on whom the applicant will rely to operate its equipment.

§971.203 Commercial recovery plan.

(a) *General.* The application must include a proposed commercial recovery plan which describes the applicant's projected commercial recovery activities, in a general way, for the twenty year period to be covered by the proposed permit. Although preliminary and subject to change, the plan must be more detailed for that portion of the permit term leading up to the initiation of commercial recovery. The plan must include sufficient information for the Administrator, pursuant to this part, to make the necessary determinations pertaining to the certification and issuance or transfer of a permit and to the development and enforcement of the TCRs for a permit.

(b) *Specific.* The plan must include:

(1) A description of the activities proposed to be carried out during the period of the permit;

(2) The intended schedule of commercial recovery (see ''Diligent commercial recovery,'' §971.503);

(3) Environmental safeguards and monitoring systems, which must take into account requirements under subpart F of this part, including best available technologies (BAT) (§971.604) and monitoring (§971.603);

(4) Details of the area or areas proposed for commercial recovery, which meet requirements for diligence (§971.503) and conservation of resources pursuant to subpart E (especially §971.502);

(5) A resource assessment of the area or areas proposed for commercial recovery which meets the requirements for resource assessment and logical mining unit (§971.501);

(6) A description of the methods and technology to be used for commercial recovery and processing (see §971.202(b)(1)); and

(7) The methods to be used for disposal of wastes from recovery and processing, including the areas for disposal and identification of any toxic substances in wastes.

§971.204 Environmental and use conflict analysis.

(a) *Environmental information submission.* The application must be supported by sufficient marine environmental information for the Administrator to prepare an environmental impact statement (EIS) on the proposed mining activities, and to determine the appropriate permit TCRs based on environmental characteristics of the requested minesite. The Administrator may require the submission of additional data, in the event he determines that the basis for a suitable EIS, or a determination of appropriate TCRs, is not available.

(b)(1) In preparing the EIS, the Administrator will attempt to characterize the environment in such a way as to provide a basis for judging the potential for significant adverse effects or irreparable harm triggered by commercial mining (see subpart F). In compiling these data, the Administrator will utilize existing information including the relevant license EIS, additional exploration data acquired by the applicant, and other data in the public domain.

(2) The EIS must present adequate physical, chemical, and biological information for the permit area. If the permit area lies within the area of

NOAA's Deep Ocean Mining Environmental Study (DOMES), the parameters listed in NOAA's Technical Guidance Document pertaining to the upper and lower water column should be included. Specifically, these parameters include:

(i) Upper water column—

Nutrients
Endangered species
Salinity, temperature, density
Currents.

(ii) Lower water column and seafloor—

Currents
Suspended particulate matter dispersion
Sediment characteristics (mineralogy, particle size, shape and density, and water content)
Topography
Benthos.

(3) For a permit area outside the DOMES area, the applicant is encouraged to consult with NOAA at the earliest opportunity in order to determine the specific parameters to be measured based on the location and specific environmental characteristics of the permit area. The Administrator, in consultation with the Administrator of the Environmental Protection Agency and with the assistance of other appropriate Federal agencies, may determine that a programmatic EIS is required for any new area.

(c) The application must include a monitoring plan for test mining and at-sea commercial recovery activities which meets the objectives and requirements of § 971.603.

(d) *Use conflict analysis.* The application must include information known to the applicant on other uses of the proposed mining area to support the Administrator's determination regarding potential use conflicts between commercial mining activities and those activities of other nations or of other U.S. citizens.

(e) *Onshore information.* Because of NEPA requirements, the Administrator must include in the EIS on the proposed permit the complete spectrum of activities resulting from the issuance of a permit. Therefore, onshore information including the location and operation of nodule processing facilities must be submitted with the application in accordance with the details in § 971.606.

§ 971.205 Vessel safety and documentation.

In order to provide a basis for the necessary determinations with respect to the safety of life and property at sea, pursuant to § 971.407, § 971.422 and Subpart G of this part, the application must contain the following information for vessels used in commercial recovery, except for those vessels under 300 gross tons which are engaged in oceanographic research:

(a) *U.S. flag vessel.* All mining ships and at least one of the transport ships used by each permittee must be documented under the laws of the United States. To the extent that the applicant knows which United States flag vessels it will use, it must include with its application copies of the vessels' current valid Coast Guard Certificates of Inspection.

(b) *Foreign flag vessels.* To the extent that the applicant knows which foreign flag vessel(s) it will be using for other purposes, the application must include evidence of the following:

(1) That any foreign flag vessel whose flag state is party to the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74) possesses current valid SOLAS 74 certificates;

(2) That any foreign flag vessel whose flag state is not party to SOLAS 74 but is party to the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60) possesses current valid SOLAS 60 certificates; and

(3) That any foreign flag vessel whose flag state is not a party to either SOLAS 74 or SOLAS 60 meets all applicable structural and safety requirements contained in the published rules of a member of the International Association of Classification Societies (IACS).

(c) *Supplemental certificates.* If the applicant does not know at the time of submitting an application which vessels it will be using, it must submit the applicable certification for each vessel before the cruise on which it will be used.

§971.206 Statement of ownership.

(a) *General.* The application must include sufficient information to demonstrate that the applicant is a United States citizen.

(b) *Specific.* In particular, the application must include:

(1) Name, address, and telephone number of the United States citizen responsible for commercial recovery operations;

(2) A description of the citizen or citizens engaging in commercial recovery, including:

(i) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(ii) The state of incorporation or state in which the partnership or other business entity is registered;

(iii) The name and place of business of the registered agent or equivalent representative to whom notices and orders are to be delivered;

(iv) Copies of all essential and nonproprietary provisions in articles of incorporation, charter or articles of association; and

(v) The name of each member of the association, partnership, or joint venture, including information about the participation and/or ownership of stock of each partner or joint venturer.

§971.207 Antitrust information.

In order to support the antitrust review referenced in §971.211, the application must contain information sufficient, in the applicant's view and based on preapplication consultations pursuant to §971.200(g), to identify the applicant and describe any significant existing market share it has with respect to the mining or marketing of the metals proposed to be recovered under the permit.

§971.208 Fee.

(a) *General.* Section 104 of the Act provides that no application for the issuance or transfer of a permit will be certified unless the applicant pays to NOAA an administrative fee which reflects the reasonable administrative costs incurred in reviewing and processing the application.

(b) *Amount.* A fee payment of $100,000, payable to the National Oceanic and Atmospheric Administration, Department of Commerce, must accompany each application. If the administrative costs of reviewing and processing the application are significantly less than or in excess of $100,000, the Administrator, after determining the amount of the under- or over-charge, as applicable, will refund the difference or require the applicant to pay the additional amount before issuance or transfer of the permit. In the case of an application for transfer of a permit to, or for a significant change to a permit held by, an entity which has previously been found qualified for a permit, the Administrator may reduce the fee in advance by an appropriate amount which reflects costs avoided by reliance on previous findings made in relation to the proposed transferee.

§971.209 Processing outside the United States.

(a) Except as provided in this section and §971.408, the processing of hard minerals recovered pursuant to a permit shall be conducted within the U.S., provided that the President or his designee does not determine that this restriction contravenes the overriding national interests of the United States.

(b) If foreign processing is proposed, the applicant shall submit a justification demonstrating the basis for a finding pursuant to §971.408(a)(1). The justification shall include an analysis of each factor which the applicant considers essential to its conclusion that processing at a site within the U.S. is not economically viable.

(c) If the Administrator determines that the justification provided by the applicant is insufficient, or if the Administrator receives during the public comment or hearing period what the Administrator determines to be a serious alternative U.S. processing site proposal, the Administrator may require the applicant to supply, within a specified reasonable time, additional information relevant to the §971.408(a)(1) finding.

(d) The applicant must include in its application satisfactory assurances that such resources after processing, to the extent of the permittee's ownership therein, will be returned to the United States for domestic use if the Administrator determines pursuant to §971.408

that the national interest necessitates such return. Assurances must include proposed arrangements with the host country.

PROCEDURES

§ 971.210 Determination whether application is complete for further processing.

Upon receipt of an application, the Administrator will review it to determine whether it includes information specifically identifiable with and fully responsive to each requirement in § 971.201 through § 971.209. The Administrator will notify the applicant whether the application is complete within 60 days after it is received. The notice will identify, if applicable, in what respects the application is not complete, and will specify the information which the applicant must submit in order to make it complete, why the additional information is necessary, and a reasonable date by which the application must be completed. Application processing will not begin until the Administrator determines that the application is complete.

§ 971.211 Consultation and cooperation with Federal agencies.

(a) Promptly after receipt of an application that the Administrator has determined pursuant to § 971.210 is complete, the Administrator will distribute a copy of the application to every Federal agency or department which, pursuant to section 103(e) of the Act, has identified programs or activities within its statutory responsibilities which would be affected by the activities proposed in the application (e.g., the Departments of State, Transportation, Justice, Interior, Defense, Treasury and Labor, as well as the Environmental Protection Agency, Federal Trade Commission, International Trade Administration and National Science Foundation). Based on its legal responsibilities and authorities, each such agency or department may, not later than 60 days after it receives a copy of the application, recommend certification of the application, issuance or transfer of the permit, or denial of such certification, issuance or transfer. The advice or recommendation by the Attorney General or Federal Trade Commission on antitrust review, pursuant to section 103(d) of the Act, must be submitted within 90 days after their receipt of a copy of the application.

(b) NOAA will use this process of consultation and cooperation to facilitate necessary Federal decisions on proposed commercial recovery activities, pursuant to the mandate of section 103(e) of the Act to reduce the number of separate actions required to satisfy Federal agencies' statutory responsibilities. The Administrator will not issue or transfer the permit during the 90 day period after receipt by the Attorney General and the Federal Trade Commission except upon written confirmation of the Attorney General and the Federal Trade Commission that neither intends to submit further comments or recommendations with respect to the application.

(c) In any case in which a Federal agency or department recommends a denial, it must set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and how the application may be amended, or how TCRs might be added to the permit, to assure compliance with such law or regulation.

(d) NOAA will cooperate with such agencies and with the applicant with the goal of resolving any concerns raised and satisfying the statutory responsibilities of these agencies.

(e) If the Administrator decides to issue or transfer a permit with respect to which denial of the issuance or transfer has been recommended by the Attorney General or the Federal Trade Commission, or to issue or transfer a permit without imposing TCRs recommended by the Attorney General or the Federal Trade Commission, as appropriate, the Administrator will, before or at issuance or transfer of the permit, notify the Attorney General and the Federal Trade Commission of the reasons for his decision.

§ 971.212 Public notice, hearing and comment.

(a) *Notice and comments.* The Administrator will publish in the FEDERAL

REGISTER, for each complete application for issuance or transfer of a commercial recovery permit, notice that the application has been received. Subject to §971.802, interested persons will be allowed to examine the materials relevant to the application, and will have at least 60 days after publication of notice to submit written comments to the Administrator.

(b) *Hearings.* After preparation of the draft environmental impact statement (EIS) on an application, the Administrator will hold a public hearing on the application and the draft EIS in an appropriate location and may employ additional methods he/she deems appropriate to inform interested persons about each application and to invite comments thereon. A hearing will be conducted in any State in which a processing plant or any of its ancillary facilities (such as a marine terminal or a waste disposal facility) are proposed to be located.

(c) If the Administrator determines there exist one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of Subpart I of this part. The record developed in any such formal hearing will be part of the basis of the Administrator's decisions on an application.

(d) Hearings held pursuant to this section and other procedures will be consolidated, if practicable, with hearings held and procedures employed by other Federal and State agencies.

§971.213 Amendment to an application.

After an application has been submitted to the Administrator, but before a determination is made on the issuance or transfer of a permit, the applicant must submit an amendment to the application if there is a significant change in the circumstances represented in the original application which affects the requirements of this subpart. Applicants should consult with NOAA to determine if changes in circumstances are sufficiently significant to require submission of an amendment. The application, as amended, would then serve as the basis for determinations by the Administrator under this part. For each amendment judged by the Administrator to be significant, the Administrator will provide a copy of that amendment to each other Federal agency and department which received a copy of the original application, and also will provide for public notice, hearing and comment on the amendment pursuant to §971.212. After the issuance or transfer of a permit, any revision of the permit will be made pursuant to §971.413. Any amendment or modification which would cause coastal zone effects substantially different than those originally reviewed by the state agency would be subject to Federal consistency review as prescribed in 15 CFR part 930.

§971.214 Consolidated license and permit procedures. [Reserved]

Subpart C—Certification of Applications

§971.300 General.

(a) Certification is an intermediate step between receipt of an application for issuance or transfer of a permit and actual issuance or transfer. It is a determination which focuses on the eligibility of the applicant.

(b) Before the Administrator may certify an application for issuance or transfer of a permit, the Administrator must determine that issuance of the permit would not violate any of the restrictions in §971.103(b). The Administrator also must make written determinations with respect to the requirements with respect to the requirements set forth in §971.301.

(c) To the maximum extent possible, the Administrator will endeavor to complete certification within 100 days after receipt of a complete application. If final certification or denial of certification has not occurred within 100 days after receipt of the application, the Administrator will inform the applicant in writing of the pending unresolved issues, the efforts to resolve them, and an estimate of the time required to do so.

§ 971.301 Required findings.

Before the Administrator may certify an application for a commercial recovery permit, the Administrator must:

(a) Approve the size and location of the commercial recovery area selected by the applicant, and this approval will occur unless the Administrator determines that (1) the area is not a logical mining unit under § 971.501, or (2) commercial recovery activities in the proposed area would result in a significant adverse environmental effect which cannot be avoided by imposition of reasonable restrictions; and

(b) Find that the applicant—

(1) Has demonstrated that, upon issuance or transfer of the permit, the applicant will be financially responsible to meet all obligations which may be required to engage in its proposed commercial recovery activities;

(2) Has demonstrated that, upon permit issuance or transfer, it will possess, or have access to, the technological capability to engage in the proposed commercial recovery;

(3) Has satisfactorily fulfilled all past obligations under any license or permit previously issued or transferred to the applicant under the Act;

(4) Has a commercial recovery plan which meets the requirements of § 971.203; and

(5) Has paid the permit fee specified in § 971.208.

§ 971.302 Denial of certification.

(a) The Administrator may deny certification of an application if the Administrator finds that the requirements of this subpart, or the requirements for issuance or transfer under § 971.403 through § 971.408, have not been met.

(b) When the Administrator proposes to deny certification the Administrator will send to the applicant, via certified mail, return receipt requested, and publish in the FEDERAL REGISTER, written notice of intention to deny certification. The notice will include:

(1) The basis upon which the Administrator proposes to deny certification; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny certification:

(1) On the 30th day after the date the notice is received by the applicant, under paragraph (b) of the section, unless before the 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) in which the applicant must correct a deficiency, if that deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (c)(1) is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempts to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies certification, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying certification is subject to judicial review as provided in chapter 7 of title 5, United States Code.

§ 971.303 Notice of certification.

Upon making a final determination to certify an application for a commercial recovery permit, the Administrator will promptly send written notice of the determination to the applicant.

Subpart D—Issuance/Transfer: Terms, Conditions and Restrictions

§971.400 General.

(a) *Proposal.* After certification of an application pursuant to subpart C of this part, the Administrator will proceed with a proposal to issue or transfer a permit for the commercial recovery activities described in the application.

(b) *Terms conditions and restrictions.* (1) Within 180 days after certification (or such longer period as the Administrator may establish for good cause shown in writing), the Administrator will propose terms and conditions for, and restrictions on, the proposed commercial recovery which are consistent with the provisions of the Act and this part as set forth in §§971.418 through 971.430. Proposed and final TCRs will be uniform in all permits, except to the extent that differing physical and environmental conditions and/or mining methods require the establishment of special TCRs for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The Administrator will propose TCRs in writing to the applicant, and public notice thereof will be provided pursuant to §971.401. The proposed TCRs will be included with the draft of the EIS on permit issuance.

(2) If the Administrator does not propose TCRs within 180 days after certification, the Administrator will notify the applicant in writing of the reasons for delay and of the approximate date on which the proposed TCRs will be completed.

(c) *Findings.* Before issuing or transferring a commercial recovery permit, the Administrator must make written findings in accordance with the requirements of §971.403 through §971.408. These findings will be made after considering all information submitted with respect to the application and proposed issuance or transfer. The Administrator will make a final determination of issuance or transfer of a permit, and will publish a final EIS on that action, within 180 days (or such longer period of time as the Administrator may establish for good cause shown in writing) following the date on which proposed TCRs and the draft EIS are published.

ISSUANCE/TRANSFER, MODIFICATION/REVISION; SUSPENSION/REVOCATION

§971.401 Proposal to issue or transfer and proposed terms, conditions and restrictions.

(a) *Notice and comment.* The Administrator will publish in the FEDERAL REGISTER notice of each proposal to issue or transfer, including notice of a draft EIS, and of proposed terms and conditions for, and restrictions on, a commercial recovery permit that will be included with the draft EIS [see §971.400(b)]. Subject to §971.802, interested persons will be permitted to examine the materials relevant to such proposals. Interested persons and affected States will have at least 60 days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) The Administrator will hold the public hearing(s) required by §971.212(b) in an appropriate location and may employ such additional methods as he deems appropriate to inform interested persons about each proposal and to invite their comments thereon. A copy of the notice and draft EIS will be provided to the affected State agency. Information provided by NOAA may be used to supplement information provided by the applicant, however it will not affect schedules for State agency review and decisions with respect to consistency determinations as required in 15 CFR part 930, subpart D.

(2) If the Administrator determines there exist one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing, which may be consolidated with a hearing held by another agency, will be held in the District of Columbia metropolitan area in accordance with the provisions of subpart I of this part. The record developed in any such formal hearing will be part of the basis for the Administrator's decisions on issuance or transfer of, and on TCRs for, the permit.

§ 971.402 Consultation and cooperation with Federal and State agencies.

Before issuance or transfer of a commercial recovery permit, the Administrator will conclude any consultations in cooperation with other Federal and State agencies which were initiated pursuant to §§971.211 and 971.200(g). These consultations will be held to assure compliance with, as applicable and among other statutes, the Endangered Species Act of 1973, as amended, the Marine Mammal Protection Act of 1972, as amended, the Fish and Wildlife Coordination Act, and the Coastal Zone Management Act of 1972, as amended. The Administrator also will consult, before any issuance, transfer, modification or renewal of a permit, with any affected Regional Fishery Management Council established pursuant to section 302 of the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. 1852) if the activities undertaken pursuant to the permit could adversely affect any fishery within the Fishery Conservation Zone (now known as the Exclusive Economic Zone), or any anadromous species or Continental Shelf fishery resource subject to the exclusive management authority of the United States beyond that zone.

§ 971.403 Freedom of the high seas.

(a) Before issuing or transferring a commercial recovery permit, the Administrator must find the recovery proposed in the application will not unreasonably interfere with the exercise of the freedoms of the high seas by other nations, as recognized under general principles of international law.

(b) In making this finding, the Administrator will recognize that commercial recovery of hard mineral resources of the deep seabed is a freedom of the high seas. In the exercise of this right, each permittee shall act with reasonable regard for the interests of other nations in their exercise of the freedoms of the high seas.

(c)(1) In the event of a conflict between the commercial recovery program of an applicant or permittee and a competing use of the high seas by another nation or its nationals, the Administrator, in consultation and cooperation with the Department of State and other interested agencies, will enter into negotiations with that nation to resolve the conflict. To the maximum extent possible the Administrator will endeavor to resolve the conflict in a manner that will allow both uses to take place such that neither will unreasonably interfere with the other.

(2) If both uses cannot be conducted harmoniously in the area subject to the recovery plan, the Administrator will decide whether to issue or transfer the permit.

§ 971.404 International obligations of the United States.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application will not conflict with any international obligation of the United States established by any treaty or international convention in force with respect to the United States.

§ 971.405 Breach of international peace and security involving armed conflict.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the recovery proposed in the application will not create a situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

§ 971.406 Environmental effects.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application cannot reasonably be expected to result in a significant adverse environmental effect, taking into account the analyses and information in any applicable EIS and any TCRs associated with the permit. This finding also will be based upon the requirements in subpart F. However, as also noted in subpart F, if a determination on this question cannot be made on the basis of available information, and it is found that irreparable harm will not occur during a period when an approved monitoring program is undertaken to further examine the significant adverse environmental effect issue, a permit

may be granted, subject to modification or suspension and, if necessary and appropriate, revocation pursuant to §971.417(a), or subject to emergency suspension pursuant to §971.417(h).

§971.407 Safety at sea.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application will not pose an inordiante threat to the safety of life and property at sea. This finding will be based on the requirements in §971.205 and subpart G.

§971.408 Processing outside the United States.

(a) Before issuing or transferring a commercial recovery permit which authorizes processing outside the U.S., the Administrator must find, after the opportunity for an agency hearing required by §971.212(b), that:

(1) The processing of the quantity concerned of hard mineral resource at a place other than within the United States is necessary for the economic viability of the commercial recovery activities of the permittee; and

(2) Satisfactory assurances have been given by the permittee that such resources, after processing, to the extent of the permittee's ownership therein, will be returned to the United States for domestic use, if the Administrator so requires after determining that the national interest necessitates such return.

(b) At or after permit issuance the Administrator may determine, or revise a prior determination, that the national interest necessitates return to the U.S. of a specified amount of hard mineral resource recovered pursuant to the permit and authorized to be processed outside the United States. Considerations in making this determination may include:

(1) The national interest in an adequate supply of minerals;

(2) The foreign policy interests of the United States; and

(3) The multi-national character of deep seabed mining operations.

(c) As appropriate, TCRs will incorporate provisions to implement the decision of the Administrator made pursuant to this section.

(d) Environmental considerations of the proposed activity will be addressed in accordance with §971.606(c).

§971.409 Denial of issuance or transfer.

(a) The Administrator may deny issuance or transfer of a permit if he finds that the applicant or the proposed commercial recovery activities do not meet the rquirements of this part for the issuance or transfer of a permit.

(b) When the Administrator proposes to deny issuance or transfer, he will send to the applicant, via certified mail, return receipt requested, and publish in the FEDERAL REGISTER, written notice of his intention to deny issuance or transfer. The notice will include:

(1) The basis upon which the Administrator proposes to deny issuance or transfer; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny issuance or transfer:

(1) On the 30th day after the date the notice is received by the applicant under paragraph (b) of this section, unless before the 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) in which the applicant must correct a deficiency, if the deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (c)(1) is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with subpart I. If the

proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies issuance or transfer, the Administrator will send to the applicant written notice of final denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying issuance or transfer of a permit is subject to judicial review as provided in chapter 7 of title 5, United States Code.

§ 971.410 Notice of issuance or transfer.

If the Administrator finds that the requirements of this subpart have been met, he will issue or transfer the permit along with the appropriate TCRs. Notice of issuance or transfer will be made in writing to the applicant and published in the FEDERAL REGISTER.

§ 971.411 Objections to terms, conditions and restrictions.

(a) The permittee may file a notice of objection to any TCR in the permit. The permittee may object on the grounds that any TCR is inconsistent with the Act or this part, or on any other grounds which may be raised under applicable provisions of law. If the permittee does not file notice of an objection within the 60-day period immediately following the permittee's receipt of the notice of issuance or transfer under § 971.410, the permittee will be deemed conclusively to have accepted the TCRs in the permit.

(b) Any notice of objection filed under paragraph (a) of this section must be in writing, must indicate the legal or factual basis for the objection, and must provide information relevant to any underlying factual issues deemed by the permittee as necessary to the Administrator's decision upon the objection.

(c) Within 90 days after receipt of the notice of objection, the Administrator will act on the objection and publish in the FEDERAL REGISTER, as well as provide to the permittee, written notice of the decision.

(d) If, after the Administrator takes final action on an objection, the permittee demonstrates that a dispute remains on a material issue of fact, the Administrator will provide for a formal hearing which will proceed in accordance with Subpart I of this part.

(e) Any final determination by the Administrator on an objection to TCRs in a permit, after the formal hearing provided in paragraph (d), is subject to judicial review as provided in chapter 7 of title 5, United States Code.

§ 971.412 Changes in permits and permit terms, conditions, and restrictions.

(a) During the duration of a commercial recovery permit, changes in the permit or its associated commercial recovery plan may be initiated by either the permittee or the Administrator.

(b) A significant change is one which, if approved, would result in:

(1) An increase of more than five percent in the size of the commercial recovery area; or

(2) A change in the location of five percent or more of the commercial recovery area.

(c) A major change is one affecting one or more of:

(1) The bases for certifying the original application pursuant to § 971.301;

(2) The bases for issuing or transferring the permit pursuant to § 971.403 through § 971.408;

(3) The TCRs issued as part of the permit pursuant to §§ 971.418 through 971.430; or

(4) The ownership of a permittee (or the membership of the joint venture, partnership or other entity on whose behalf the permit was issued); and which change is sufficiently broad in scope to raise a question as to:

(i) The permittee's ability to meet the requirements of the sections cited in paragraphs (c)(1) and (2) of this section;

(ii) The sufficiency of the TCRs to accomplish their intended purpose; or

(iii) The antitrust characteristic of the permittee.

(d) A minor change is one that is clearly more modest in scope than the changes described in paragraph (b) or (c) of this section.

(e) A permittee may not implement a significant or major change, as defined in paragraphs (b) and (c) of this section, until an application for revision of the permit or its associated commercial recovery plan has been approved by the Administrator. However, advance notice of proposed major changes in a permittee's corporate membership or legal structure is not required, unless practicable, but the Administrator expects prompt notification of the occurrence of such a major change.

(f) A proposed significant or major change, as defined in paragraphs (b) and (c) of this section, may trigger the need for additional review, under the Federal consistency provisions of the Coastal Zone Management Act of 1972, as amended.

§971.413 Revision of a permit.

(a) During the term of a commercial recovery permit, the permittee may submit to the Administrator an application for a revision of the permit or the commercial recovery plan associated with it to accommodate changes desired by the permittee. In some cases it may be advisable to recognize at the time of filing the original permit application that, although the essential information for issuing or transferring a permit as specified in §971.201 through §971.209 must be included in such application, some details may have to be provided in the future in the form of a revision. In such instances, the Administrator may issue or transfer a permit which would authorize commercial recovery activities and plans only to the extent described in the application.

(b) An application by a permittee for a revision of a permit or its associated commercial recovery plan involving a significant change, as defined in §971.412(b), must be followed by the full application procedures in this part, including a public hearing.

(c) An application by a permittee for a revision of a permit or its associated commercial recovery plan involving a major change, as defined in §971.412(c) (See also §971.425 of this part), will be acted on after notice thereof is published by the Administrator in the FEDERAL REGISTER with a 60-day opportunity for public comment and consultation with appropriate Federal agencies.

(d)(1) The Administrator will approve a revision if the Administrator finds in writing that the revision will comply with the requirements of the Act and this part.

(2) Notice of the Administrator's decision on the proposed revision will be provided to the permittee in writing and published in the FEDERAL REGISTER.

(e) A permittee may notify the Administrator of minor changes, as defined in §971.412(d), subsequently in the annual report (See §971.801 of this part).

(f) If the relative importance of the change is unclear to the permittee, the Administrator should be notified in advance so that the Administrator can decide whether a revision in accordance with §971.412(e) is required.

§971.414 Modification of permit terms, conditions, and restrictions.

(a) After issuance or transfer of any permit, the Administrator, after consultation with appropriate Federal agencies and the permittee, may modify the TCRs in a permit for the following purposes:

(1) To avoid unreasonable interference with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. This determination will take into account the considerations listed in §971.403;

(2) If relevant data and information (including, but not limited to, data resulting from activities under a permit) indicate that modification is required to protect the quality of the environment or to promote the safety of life and property at sea;

(3) To avoid a conflict with any international obligation of the United States, established by any treaty or convention in force with respect to the United States, as determined in writing by the President; or

(4) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict, as determined in writing by the President.

(b) A proposal by the Administrator to modify the TCRs in a permit is significant and must be followed by the full application procedures in this part, including a public hearing, if it would result in either of the changes identified in § 971.412(b).

(c) All proposed modifications other than those described in paragraph (b) of this section will be acted on after the Administrator provides:

(1) Written notice of the proposal to the permittee; and

(2) Publication of this proposal in the FEDERAL REGISTER with a 60-day opportunity for comment.

(d)(1) The Administrator will effect a modification of the TCRs if the Administrator finds in writing that the proposed modification will comply with the requirements of the Act and this part.

(2) Upon adopting a TCR modification, the Administrator shall issue to the permittee an amended permit including the modified TCRs, and shall publish notice of issuance in the FEDERAL REGISTER.

(3) The procedures for objection to modification of the TCRs are the same as those for objection to a TCR under § 971.411 of this part.

§ 971.415 Duration of a permit.

(a) Unless suspended or revoked pursuant to §§ 971.406 and 971.417, each commercial recovery permit will be issued for a period of 20 years and for so long thereafter as hard mineral resources are recovered annually in commercial quantities from the area listed in the permit.

(b) If the permittee has substantially complied with the permit and its associated recovery plan and requests an extension of the permit, the Administrator will extend the permit with appropriate TCRs, consistent with the Act, for so long thereafter as hard mineral resources are recovered annually in commercial quantities from the area to which the recovery plan associated with the permit applies. The Administrator may make allowance for deviation from the recovery plan for good cause, such as significantly changed market conditions. However, a request for extension must be accompanied by an amended recovery plan to govern the activities by the permittee during the extended period.

(c) Successive extensions may be requested, and will be granted by the Administrator, based on the criteria specified in paragraphs (a) and (b).

§ 971.416 Approval of permit transfers.

(a) The Administrator may transfer a permit after a written request by the permittee. After a permittee submits a transfer request to the Administrator, the proposed transferee will be deemed an applicant for a commercial recovery permit, and will be subject to the requirements and procedures of this part.

(b) The Administrator will transfer a permit if the proposed transferee is a United States citizen and proposed commercial recovery activities meet the requirements of the Act and this part, and if the proposed transfer is in the public interest. The Administrator will presume that the transfer is in the public interest if it meets the requirements of the Act and this part. In case of mere change in the form or ownership of a permittee, the Administrator may waive relevant determinations for requirements for which no changes have occurred since the preceding application.

§ 971.417 Suspension or modification of activities; suspension or revocation of permits.

(a) The Administrator may:

(1) In addition to, or in lieu of, the imposition of any civil penalty under subpart J of this part, or in addition to the imposition of any fine under subpart J, suspend or revoke any permit issued under this part, or suspend or modify any particular activities under such a permit, if the permittee substantially fails to comply with any provision of the Act, this part, or any term, condition or restriction of the permit; and

(2) Suspend or modify particular activities under any permit, if the President determines that such suspension or modification is necessary:

(i) To avoid any conflict with any international obligation of the United States established by any treaty or convention in force with respect to the United States; or

(ii) To avoid any situtation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

(b) Any action taken by the Administrator in accordance with paragraph (a)(1) will proceed pursuant to the procedures in §971.1003. Any action taken in accordance with paragraph (a)(2) will proceed pursuant to paragraphs (c) through (i) of this section, other than paragraph (h)(2).

(c) Prior to taking any action specified in paragraph (a)(2) the Administrator will publish in the FEDERAL REGISTER, and send to the permittee, written notice of the proposed action. The notice will include:

(1) The basis of the proposed action; and

(2) If the basis for the proposed action is a deficiency which the Administrator believes the permittee can correct:

(i) The action necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(d) The Administrator will take the proposed action:

(1) On the 30th day after the date notice is sent to the permittee, under paragraph (c) of this section, unless before the 30th day the permittee files with the Administrator a written request for an administrative review of the proposed action; or

(2) On the last day of the period established under paragraph (c)(2)(ii) in which the permittee must correct the deficiency, if such deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (d)(1) is not pending or in progress.

(e) If a timely request for administrative review of the proposed denial is made by the permittee under paragraph (d)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with subpart I of this part. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(f) The Administrator will serve on the permittee, and publish in the FEDERAL REGISTER, written notice of the action taken including the reasons therefor.

(g) Any final determination by the Administrator to take the proposed action is subject to judicial review as provided in chapter 7 of title 5, United States Code.

(h) The issuance of any notice of proposed action under this section will not affect the continuation of commercial recovery activities by a permittee. The provisions of paragraphs (c), (d), (e) and the first sentence of this paragraph (h) of this section will not apply when:

(1) The President determines by Executive Order that an immediate suspension or modification of particular activities under that permit, is necessary for the reasons set forth in paragraph (a)(2); or

(2) The Administrator determines that immediate suspension of such a permit or immediate suspension or modification of particular activities under a permit, is necessary to prevent a significant adverse environmental effect or to preserve the safety of life or property at sea, and the Administrator issues an emergency order in accordance with §971.1003(d)(4).

(i) The Administrator will immediately rescind the suspension order as soon as he has determined that the cause for suspension has been removed.

TERMS, CONDITIONS AND RESTRICTIONS

§971.418 Diligence requirements.

The TCRs in each commercial recovery permit must include provisions to assure diligent development consistent with §971.503, including a requirement that recovery at commercial scale be underway within ten years from the date of permit issuance unless that deadline is extended by the Administrator for good cause.

§971.419 Environmental protection requirements.

(a) Each commercial recovery permit must contain TCRs established by the Administrator pursuant to subpart F which prescribe actions the permittee

must take in the conduct of commercial recovery activities to assure protection of the environment. Factors to be taken into account regarding the potential for significant adverse environmental effects are discussed in §§ 971.601 and 971.602.

(b) Before establishing the TCRs pertaining to environmental protection, the Administrator will consult with the Administrator of the Environmental Protection Agency, the Secretary of State and the Secretary of the department in which the Coast Guard is operating. The Administrator also will take into account and give due consideration to formal comments received from the public, including those from the State agency, and to the information contained in the final site-specific EIS prepared with respect to the proposed permit.

§ 971.420 Resource conservation requirements.

For the purpose of conservation of natural resources, each permit issued under this part will contain, as needed, TCRs which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the recovery area. The Administrator will establish these requirements pursuant to § 971.502.

§ 971.421 Freedom of the high seas requirements.

Each permit issued under this part must include appropriate restrictions to ensure that commercial recovery activities do not unreasonably interfere with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. The Administrator will consider the factors in § 971.403 in establishing these restrictions.

§ 971.422 Safety at sea requirements.

The Secretary of the department in which the Coast Guard is operating, in consultation with the Administrator, will require in any permit issued under this part, in conformity with principles of international law, that vessels documented under the laws of the United States and used in activities authorized under the permit comply with conditions regarding design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the promotion of safety of life and property at sea. These requirements will be established with reference to subpart G of this part.

§ 971.423 Best available technology.

The Administrator will require in all activities under new permits, and wherever practicable in activities under existing permits, the use of the best available technologies for the protection of safety, health, and the environment wherever such activities would have a significant adverse effect on safety, health, or the environment, (see §§ 971.203(b)(3), 971.602(f), and 971.604(a)), except where the Administrator determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies.

§ 971.424 Monitoring requirements.

Each commercial recovery permit will require the permittee:

(a) To allow the Administrator to place appropriate Federal officers or employees as observers aboard vessels used by the permittee in commercial recovery activities to:

(1) Monitor activities at times, and to the extent, the Administrator deems reasonable and necessary to assess the effectiveness of the TCRs of the permit; and

(2) Report to the Administrator whenever those officers or employees have reason to believe there is a failure to comply with the TCRs;

(b) To cooperate with Federal officers and employees in the performance of monitoring functions; and

(c) To monitor the environmental effects of the commercial recovery activities in accordance with a monitoring plan approved and issued by NOAA as permit TCRs and to submit data and other information as necessary to permit evaluation of environmental effects. The environmental monitoring plan and reporting will respond to the concerns and procedures discussed in subpart F.

§971.425 Changes of circumstances.

Each permit must require the permittee to advise the Administrator of any changes of circumstances which might constitute a revision which would be a major change under §971.412(c). Changes in ownership, financing, and use conflicts are examples, as are technology or methodology changes including those which might result in significant adverse environmental effects.

§971.426 Annual report and records maintenance.

Each permit will require the permittee to submit an annual report and maintain information in accordance with §971.801 including compliance with the commercial recovery plan and the quantities of hard mineral resources recovered and the disposition of such resources.

§971.427 Processing outside the United States.

If appropriate TCRs will incorporate provisions to implement the decision of the Administrator regarding the return of resources processed outside the United States, in accordance with §971.408.

§971.428 Other necessary permits.

Each permit will provide that securing the deep seabed mining permit for activities described in the recovery plan and accompanying application does not eliminate the need to secure all other necessary Federal, State, and local permits.

§971.429 Special terms, conditions and restrictions.

Although the general criteria and standards to be used in establishing TCRs for a permit are set forth in this part, as referenced in §§971.418 through 971.428, the Administrator may impose special TCRs for the conservation of natural resources, protection of the environment, or the safety of life and property at sea when required by differing physical and environmental conditions.

§971.430 Other Federal requirements.

Pursuant to §971.211, another Federal agency, or a State acting under Federal authority, upon review of a commercial recovery permit application submitted under this part, may propose that certain TCRs be added to the permit, to assure compliance with any law or regulation within that agency's area of responsibility. The Administrator will include appropriate TCRs in a permit.

Subpart E—Resource Development

§971.500 General.

Several provisions in the Act relate to appropriate mining techniques or mining efficiency. These raise what could be characterized as resource development issues. In particular, section 103(a)(2)(C) requires a resource assessment to be provided with the recovery plan. Section 103(a)(2)(D) of the Act provides that the applicant will select the size and location of the area of a recovery plan, which will be approved unless the Administrator finds that the area is not a ''logical mining unit'' or the commercial recovery activities in the proposed site would result in a significant adverse environmental effect which cannot be avoided by the imposition of reasonable restrictions. Also, pursuant to section 108 of the Act, the applicant's recovery plan and the TCRs of each permit must be designed to ensure diligent development. In addition, for the purpose of conservation of natural resources, section 110 of the Act provides that each permit is to contain, as needed, terms, conditions, and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the resources.

§971.501 Resource assessment, recovery plan, and logical mining unit.

(a) The applicant must submit with the application a resource assessment to provide a basis for assessing the area applied for. This assessment must include a discussion of mineable and unmineable areas, taking into account nodule grade, nodule concentration, and other factors such as seafloor topography. These areas may be delineated graphically. The resources in the area must be described in relation to

the applicant's production requirements, operating period, and recovery efficiency in order to justify the area applied for.

(b) The applicant shall select the size and location of the area of the recovery plan, which area shall be approved unless the Administrator finds that, among other considerations (see § 971.301(a)), the area is not a logical mining unit. In the case of a commercial recovery permit, a logical mining unit is an area of the deep seabed:

(1) In which hard mineral resources can be recovered in sufficient quantities to satisfy the permittee's estimated production requirements over the initial 20-year term of the permit in an efficient, economical, and orderly manner with due regard for conservation and protection of the environment, taking into consideration the resource data, other relevant physical and environmental characteristics, and the state of the technology of the applicant set out in the recovery plan;

(2) Which is not larger than necessary to satisfy the permittee's estimated production requirements over the initial 20-year term of the permit; and

(3) In relation to which the permittee's estimated production requirements are not found by the Administrator to be unreasonable.

(c) Approval by the Administrator of a proposed logical mining unit will be based on a case-by-case review of each application. The area need not consist of contiguous segments, as long as each segment would be efficiently mineable and the total proposed area constitutes a logical mining unit.

(d) In describing the area, the applicant must present the geodetic coordinates of the points defining the boundaries referred to the World Geodetic System (WGS) Datum. A boundary between points must be a geodesic. If grid coordinates are desired, the Universal Transverse Mercator Grid System must be used.

§ 971.502 Conservation of resources.

(a) If the Administrator establishes terms, conditions and restrictions relating to conservation of resources, he will employ a balancing process in the consideration of the state of the technology being developed, the processing system utilized and the value and potential use of any waste, the environmental effects of the recovery activities, economic and resource data, and the national need for hard mineral resources.

(b) The application must set forth how the applicant's proposed method of collecting nodules will conserve resources by providing for the future opportunity for commercial recovery of the unrecovered balance of the resources in the proposed permit area. Although preliminary and subject to change, the discussion must include a plan for the chronology of areas to be mined. This is needed in order for the Administrator to determine if selective mining, expected to be carried out in the early years to improve cash flow, is part of a long range recovery plan.

(c) If the applicant proposes a refining process that does not include the use of manganese in a productive manner, it may not render the manganese unavailable to future users by dispersing the tailings over a vast area unless such a scheme is necessary for the financial practicability of the commercial recovery activities of the applicant. A permittee must advise the Administrator in the annual report of the location, composition and quantity of manganese in tailings which remain after processing. Should national needs for manganese develop during the duration of a permit, e.g., in case of national emergency, the Administrator may cancel the exception granted involving dispersion of tailings. Applicants seeking an exception would be required to demonstrate how and in what time frame their commercial recovery processing activities could be modified to respond to new national needs.

§ 971.503 Diligent commercial recovery.

(a) Each permittee must pursue diligently the activities described in its approved commercial recovery plan. This requirement applies to the full scope of the plan, including environmental safeguards and monitoring systems. Permit TCRs will require periodic reasonable expenditures for commercial recovery by the permittee, taking into account the size of the area

of the deep seabed to which the recovery plan applies and the amount of funds estimated by the Administrator to be required to initiate commercial recovery of hard mineral resources within the time limit established by the Administrator. However, required expenditures will not be established at a level which would discourage commercial recovery or operational efficiency.

(b) To meet the diligence requirement, the applicant must propose to the Administrator an estimated schedule of activities and expenditures pursuant to §971.203(b)(2). The schedule must show, and the Administrator must be able to make a reasonable determination, that the applicant can reasonably develop the resources in the permit area within the term of the permit. There must be a reasonable relationship between the size of the recovery area and the financial and technological resources reflected in the application. The permittee must initiate the recovery of nodules in commerical quantities within ten years of the issuance of the permit unless this deadline is extended by the Administrator for good cause.

(c) Once commercial recovery is achieved, the permittee must, within reasonable limits and taking into consideration all relevant factors, maintain commercial recovery throughout the period of the permit. However, the Administrator will, for good cause shown, authorize temporary suspension of commercial recovery activities. The duration of any suspension will not exceed one year, unless the Administrator determines that conditions justify an extension of the suspension.

(d) Ultimately, the diligence requirement will involve a retrospective determination by the Administrator, based on the permittee's reasonable conformance to the approved recovery plan. This determination, however, will take into account the need for some degree of flexibility in a recovery plan. It also will include consideration of the needs and stage of development of the permittee based on the approved recovery plan; legitimate periods of time when there is no or very low expenditure; and allowance for a certain degree of flexibility for changes encountered by the permittee in market conditions or other factors.

(e) The permittee must submit a report annually reflecting its conformance to the schedule of activities and expenditures contained in the permit and its associated recovery plan. In case of any changes requiring a revision to an approved permit and recovery plan, the permittee must advise the Administrator in accordance with §971.413.

Subpart F—Environmental Effects

§971.600 General.

The Act contains several provisions which relate to environmental protection. For example, section 105(a)(4) requires that, before the Administrator may issue a commercial recovery permit, he must find that the commercial recovery proposed in the application cannot reasonably be expected to result in a significant adverse environmental effect. In addition, each permit issued must contain TCRs which prescribe actions the permittee must take in the conduct of commercial recovery activities to assure protection of the environment (section 109(b)). The Act also provides for modification by the Administrator of any TCR if relevant data and information indicate that modification is required to protect the quality of the environment (section 105(c)(1)(B)). The Administrator also may order an immediate suspension or modification of activities (section 106(c)), or require use of best available technologies (section 109(b)), to prevent a significant adverse environmental effect. Furthermore, each permit issued under the Act must require the permittee to monitor the environmental effects of commercial recovery activities in accordance with guidelines issued by the Administrator, and to submit information the Administrator finds necessary and appropriate to assess environmental effects and to develop and evaluate possible methods of mitigating adverse effects (section 114).

§971.601 Environmental requirements.

Before issuing a permit for the commercial recovery of deep seabed hard mineral resources, the Administrator must find that:

(a) The issuance of a permit cannot reasonably be expected to result in a significant adverse environmental effect, or, if there is insufficient information to make that determination, that no irreparable harm will result during a period when monitoring of commerical recovery is undertaken to gather sufficient information in order to determine the potential for or occurrence of any significant adverse environmental effect. In examining this issue, NOAA will give consideration to the following Ocean Discharge Criteria of the Clean Water Act (40 CFR part 125, subpart M), as they may pertain to discharges and other environmental perturbations related to the commercial recovery operations:

(1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;

(2) The potential transport of such pollutants by biological, physical or chemical processes;

(3) The composition and vulnerability of the biological communities which may be exposed to such pollutants including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem such as those important for the food chain;

(4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism;

(5) The existence of special aquatic sites including but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(6) The potential impacts on human health through direct and indirect pathways;

(7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;

(8) Any applicable requirements of an approved Coastal Zone Management plan;

(9) Such other factors relating to the effects of the discharge as may be appropriate;

(10) Marine water quality criteria developed pursuant to section 304(a)(1) of the Clean Water Act; and

(b) The applicant has an approved monitoring plan (§ 971.603) and the resources and other capabilities to implement it.

§ 971.602 Significant adverse environmental effects.

(a) *Determination of significant adverse environmental effects.* The Administrator will determine the potential for or the occurrence of any significant adverse environmental effect or impact (for the purposes of sections 103(a)(2)(D), 105(a)(4), 106(c) and 109(b) (second sentence) of the Act), on a case-by-case basis.

(b) *Basis for determination.* Determinations will be based upon the best information available, including relevant environmental impact statements, NOAA-collected data, monitoring results, and other data provided by the applicant or permittee, as well as consideration of the criteria in § 971.601(a).

(c) *Related considerations.* In making a determination the Administrator may take into account any TCRs or other mitigation measures.

(d) *Activities with no significant adverse environmental effect.* NOAA believes that exploration-type activities, as listed in the license regulations (15 CFR 970.701), require no further environmental assessment.

(e) *Activities with potential for significant adverse environmental effects.* NOAA research has identified at-sea testing of recovery equipment, the recovery of manganese nodules in commercial quantities from the deep seabed, and the construction and operation of commercial-scale processing facilities as activities which may have some potential for significant adverse envirnomental effects.

(f) *Related terms, conditions and restrictions.* Permits will be issued with TCRs containing environmental requirements with respect to protection (pursuant to § 971.419), mitigation (pursuant to § 971.419), or best available technology requirements (pursuant to

§971.423), as appropriate, and monitoring requirements (pursuant to §971.424) to acquire more information on the environmental effects of deep seabed mining.

§971.603 At-sea monitoring.

(a) An applicant must submit with its application a monitoring plan designed to enable the Administrator to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects, to validate assessments made in the EIS, and to assure compliance with the environmental protection requirements of this part.

(b) The monitoring plan shall include a characterization of the proposed mining system in terms of collector contact, benthic discharge and surface discharge.

(c) The monitoring plan shall include determination of (1) the spatial and temporal characteristics of the mining ship discharges; (2) the spatial extent and severity of the benthic impact, including recovery rate and pattern of benthic recolonization; and (3) any secondary effects that result from the impact of the mining collector and benthic plume.

(d) The monitoring of benthic impact shall involve the study of two types of areas, each selected by the permittee in consultation with NOAA, which areas shall be representative of the environmental characteristics of the permittee's site:

(1) An impact reference area, located in a portion of a permit area tentatively scheduled to be mined early in a commercial recovery plan; and

(2) An interim preservational reference area, located in a portion of a permit area tentatively determined: to be non-mineable, not to be scheduled for mining during the commercial recovery plan, or to be scheduled for mining late in the plan.

Reference areas may be selected provisionally prior to application for a commercial recovery permit.

(e) The following specific environmental parameters must be proposed for examination in the applicant's monitoring plan:

(1) Discharges—

(i) Salinity, temperature, density.

(ii) Suspended particulates concentration and density.

(iii) Particulate and dissolved nutrients and metals.

(iv) Size, configuration, and velocities of discharge.

(2) Upper water column—

(i) Nutrients.

(ii) Endangered species (observations).

(iii) Salinity, temperature, density.

(iv) Currents and direct current shear.

(v) Vertical distribution of light.

(vi) Suspended particulate material advection and diffusion.

(vii) In-situ settling velocities of suspended particulates.

(viii) Zooplankton and trace metals uptake.

(ix) Fish larvae.

(x) Behavior of biota, including commercially and recreationally valuable fish.

(3) Lower water column and seafloor—

(i) Currents.

(ii) Suspended particulate material advection and diffusion.

(iii) In-situ settling velocities of suspended particulates.

(iv) Benthic scraping and blanketing, and their impacts and recovery.

(f) The monitoring plan shall include provision for monitoring those areas impacted by the permittee's mining activities, even if such areas fall outside its minesite, where the proposed activities have the potential to cause significant adverse environmental effect or irreparable harm in the outside area.

(g) After the Administrator's approval of the monitoring plan, this plan will become a permit TCR. The monitoring plan TCR will include, to the maximum extent practicable, identification of those activities or events that could cause suspension or modification due to environmental effects under §971.417, or permit revocation in the event that these effects cannot be adequately mitigated. The TCR also will authorize refinement of the monitoring plan prior to testing and commercial-scale recovery, and at other appropriate times, if refinement is necessary to reflect accurately proposed operations or to incorporate recent research or monitoring results.

(h) If test mining is proposed, the applicant shall include in the monitoring plan a monitoring plan for the test(s) as well as a strategy for using the result to monitor more effectively commercial-scale recovery. This monitoring shall address concerns expressed in the PEIS and in the permit EIS.

(i) The monitoring plan shall include a sampling strategy that assures: that it is based on sound statistical methods, that equipment and methods be scientifically accepted, that the personnel who are planning, collecting and analyzing data be scientifically well qualified, and that the resultant data be submitted to the Administrator in accordance with formats of the National Oceanographic Data Center and other formats as may be specified by the Administrator.

(j) Pursuant to section 114(1) of the Act, the Administrator intends to place observers onboard mining vessels, not only to ensure that permit TCRs are followed, but also to evaluate the effectiveness of monitoring strategies, both in terms of protecting the environment and in being cost-effective (See § 971.1005), and if necessary, to develop potential mitigation measures. If modification of permit TCRs or regulations is required to protect the quality of the environment, the Administrator may modify TCRs pursuant to § 971.414, or the regulations pursuant to § 971.804.

§ 971.604 Best available technologies (BAT) and mitigation.

(a) The Administrator shall require in all activities under new permits, and wherever practicable in activities under existing permits, the use of the best available technologies for the protection of safety, health, and the environment wherever such activities would have a significant adverse effect on safety, health, or the environment, except where the Administrator determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies. Because of the embryonic nature of the industry, NOAA is unable either to specify particular equipment or procedures comprising BAT or to define performance standards. Until such experience exists, the applicant shall submit such information as is necessary to indicate, as required above, the use of BAT, the alternatives considered to the specific equipment or procedures proposed, and the rationale as to why one alternative technology was selected in place of another. This analysis shall include a discussion of the relative costs and benefits of the technologies considered.

(b) NOAA is not specifying particular mitigation methodologies or techniques at this time (such as requiring the sub-surface release of mining vessel discharges), but expects applicants and permittees to develop and carry out their operations, to the extent possible, to minimize adverse environmental effects and to be able to demonstrate efforts to that end. The applicant must submit a plan describing how he would mitigate a problem, if it were caused by the surface release of mining vessel discharges, including a plan for the monitoring of any discharges. Based upon monitoring results, NOAA may find it necessary in the future to specify particular procedures for minimizing adverse environmental effects. These procedures would be incorporated into permit TCRs.

(c) NOAA will require the permittee to report, prior to implementation, any proposed technological or operational changes that will increase or have unknown environmental effects. Changes in composition, concentration or size distribution of suspended particulates discharged from the mining vessel, water depth of vessel discharges, depth of cut in the seafloor of the mining collector, and direction or amount of sediment discharged at the seafloor are factors of concern to NOAA. In reporting any such change, the permittee shall submit information to indicate the use of BAT, alternatives considered, and rationale for selecting one technology in place of another, in a manner comparable to and to the extent required in paragraph (a) of this section. If proposed changes have a high potential for increasing adverse environmental effects, the Administrator may disapprove or require modification of the changes.

§971.605 Stable Reference Areas. [Reserved]

§971.606 Onshore information.

(a) To assist the Administrator in complying with NEPA requirements and to enable NOAA to function as lead agency in preparing permit site-specific environmental impact statements (EISs) and facilitating the preparation and processing of other environmental documents and permits, the applications must include the following information:

(1) The location and affected environment of port, transport, processing and waste disposal facilities and associated facilities (e.g., maps, land use and layout);

(2) A description of the environmental consequences and socio-economic effects of construction and operation of the facilities, including waste characteristics and toxicity;

(3) Any mitigating measures that may be proposed;

(4) Certification of consistency with the federally approved State coastal management program, where applicable, and evidence of the status of compliance with other State or local requirements relating to protection of the environment; and

(5) Alternative sites and technologies considered by the applicant and the considerations which eliminate their selection.

(b) The applicant must consult with NOAA as early as possible concerning the information to be submitted to NOAA to prepare an adequate environmental impact statement. The applicant is encouraged to consult with potentially affected States as early as is practicable [see also §§971.200(g) and 971.213].

(c) The requirements of paragraphs (a)(1)–(3) and (5) of this section also apply if approval of processing outside the United States is requested by the applicant, in accordance with Executive Order 12114 which requires the environmental review of major Federal actions abroad. Information detailing the socio-economic impacts of foreign processing activities is not required.

Subpart G—Safety of Life and Property at Sea

§971.700 General.

The Act contains several requirements that relate to assuring the safety of life and property at sea. For example, before the Administrator may issue a permit, he must find that the proposed recovery will not pose an inordinate threat to the safety of life and property at sea (section 105(a)(5)). The Coast Guard, in consultation with NOAA, must require in any permit issued under the Act, in conformity with principles of international law, that vessels documented in the United States and used in activities authorized under the permit comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the safety of life and property at sea (section 112(a)). The Administrator may impose or modify TCRs for a permit if required to promote the safety of life and property at sea (section 105(c)(1)(B)).

§971.701 Criteria for safety of life and property at sea.

Response to the safety at sea requirements in essence will involve vessel inspection requirements, as identified by present laws and regulations. The primary inspection statutes pertaining to United States flag vessels are: 46 App. U.S.C. 86 (Loadlines) and 46 U.S.C. 3301 (Inspection of Seagoing Barges, Seagoing Motor Vessels, and Freight Vessels). United States flag vessels will be required to meet all applicable regulatory requirements, including the requirement for a current valid Coast Guard Certificate of Inspection (pursuant to §971.205(a)). United States flag vessels are under United States jurisdiction on the high seas and subject to domestic enforcement procedures. With respect to foreign flag vessels, the SOLAS 74 or SOLAS 60 certificate requirements specified in §971.205(b) apply.

Subpart H—Miscellaneous

§ 971.800 General.

The subpart contains miscellaneous provisions pursuant to the Act which are applicable to exploration licenses and commercial recovery permits.

§ 971.801 Records to be maintained and information to be submitted by licensees and permittees.

(a)(1) In addition to the information specified elsewhere in the part and in 15 CFR part 970, each licensee and permittee must keep such records, consistent with standard accounting principles, as specified by the Administrator in the license or permit. Such records shall include information which will fully disclose expenditures for exploration for, or commercial recovery of hard mineral resources in the area under license or permit, and any other information which will facilitate an effective audit of these expenditures.

(2) The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for purposes of audit and examination to any books, documents, papers, and records of licensees and permittees which are necessary and directly pertinent to verification of the expenditures referred to in paragraph (a)(1) of this section.

(b) In addition to the information specified elsewhere in this part and in 15 CFR part 970, each applicant, licensee or permittee will be required to submit to the Administrator, upon request, data or other information the Administrator may reasonably need for purposes of:

(1) Making determinations with respect to the issuance, revocation, modification, or suspension of the license or permit in question;

(2) Evaluating the effectiveness of license or permit TCRs;

(3) Compliance with the biennial Congressional report requirement contained in section 309 of the Act; and

(4) Evaluation of the exploration or commercial recovery activities conducted by the licensee or permittee.

At a minimum, licensees and permittees shall submit an annual written report within 90 days after each anniversary of the license or permit issuance or transfer, discussing exploration or commercial recovery activities and expenditures. The report shall address diligence requirements (see § 971.503 and 15 CFR 970.602), implementation of any approved monitoring plan (see § 971.602 and 15 CFR 970.522(c) and 970.702(a)), and applicable changes which do not constitute revisions (see § 971.413(e) and 15 CFR 970.513(c)). Permittees must also report the tonnage of nodules recovered (§ 971.426) and discuss manganese conservation measures (see § 971.502).

§ 971.802 Public disclosure of documents received by NOAA.

(a) *Purpose.* This section provides a procedure by which persons submitting information pursuant to this part and 15 CFR part 970 may request that certain information not be subject to public disclosure. The substantiation requested is intended to assure that NOAA has a complete and proper basis for determining the legality and appropriateness of withholding or releasing the identified information if a public request for disclosure is received.

(b) *Written requests for confidential treatment.* (1) Any person who submits any information pursuant to this part or 15 CFR part 970, which information is considered by that person to be protected by the Trade Secrets Act (18 U.S.C. 1905) or otherwise to be a trade secret or commercial or financial information which is privileged or confidential, may request that the Administrator give the information confidential treatment.

(2)(i) Any request for confidential treatment of information:

(A) Should be submitted at the time of submission of information;

(B) Should state the period of time for which confidential treatment is desired (e.g., until a certain date, or until the occurrence of a certain event, or permanently);

(C) Must be submitted in writing; and

(D) Must include the name, mailing address, and telephone number of an agent of the submitter who is authorized to receive notice of requests for disclosure of the information pursuant to paragraph (d) of this section.

(ii) If information is submitted to the Administrator without an accompanying request for confidential treatment, the notice referred to in paragraph (d)(2) of this section need not be given. If a request for confidential treatment is received after the information itself is received, the Administrator will make efforts to the extent administratively practicable to associate the request with copies of the previously submitted information in the files of NOAA and the Federal agencies to which the Administrator distributed the information.

(3)(i) Information subject to a request for confidential treatment must be segregated from information for which confidential treatment is not being requested, and each page (or segregable portion of each page) subject to the request must be clearly marked with the name of the person requesting confidential treatment, the name of the applicant, licensee or permittee, and an identifying legend such as ''Proprietary Information'' or ''Confidential Treatment Requested.'' Where this marking proves impracticable, a cover sheet containing the identifying names and legend must be securely attached to the compilation of information for which confidential treatment is requested. Each copy of the information for which confidential treatment has been requested must be cross-referenced to the appropriate section of the application or other document. All information for which confidential treatment is requested pertaining to the same application or other document must be submitted to the Administrator in a package separate from that information for which confidential treatment is not being requested.

(ii) Each copy of any application or other document with respect to which confidential treatment of information has been requested must indicate, at each place in the application or document where confidential information has been deleted, that confidential treatment of information has been requested.

(4) Normally, the Administrator will not make a determination as to whether confidential treatment is warranted until a request for disclosure of the information is received. However, on a case-by-case basis, the Administrator may make a determination in advance of a request, where it would facilitate obtaining voluntarily submitted information (rather than information required to be submitted under this part).

(c) *Substantiation of request for confidential treatment.* (1) Any request for confidential treatment may include a statement of the basis for believing that the information is deserving of confidential treatment, which addresses the issues relevant to a determination of whether the information is a trade secret, or commercial or financial information which is privileged or confidential. To the extent permitted by applicable law, part or all of any substantiation statement submitted will be treated as confidential if so requested, and must be segregated, marked, and submitted in accordance with the procedure described in paragraph (b)(3) of this section.

(2) Issues addressed in the statement should include:

(i) The commercial or financial nature of the information;

(ii) The nature and extent of the competitive advantage enjoyed as a result of possession of the information;

(iii) The nature and extent of the competitive harm which would result from public disclosure of the information;

(iv) The extent to which the information has been disseminated to employees and contractors of the person submitting the information;

(v) The extent to which persons other than the person submitting the information possesses, or have access to, the same information; and

(vi) The nature of the measures which have been and are being taken to protect the information from disclosure.

(d) *Requests for disclosure of trade secrets, privileged, or confidential information.* (1) Any request for disclosure of information submitted, reported or collected pursuant to this part must be made in accordance with 15 CFR 903.7.

(2) Upon receipt of a request for disclosure of information for which confidential treatment has been requested, the Administrator immediately will issue notice by an expeditious means

(such as by telephone, confirmed by certified or registered mail, return receipt requested) of the request for disclosure to the person who requested confidential treatment of the information or to the designated agent. The notice also will:

(i) Inquire whether that person continues to maintain the request for confidential treatment;

(ii) Notify that person of the date (generally, not later than the close of business on the seventh working day after issuance of the notice) by which the person is strongly encouraged to deliver to the Administrator a written statement that the person either:

(A) Waives or withdraws the request for confidential treatment in full or in part; or

(B) Confirms that the request for confidential treatment is maintained;

(iii) Inform that person that by a date the Administrator specifies (generally, not later than the close of business on the seventh working day after issuance of the notice), the person:

(A) Is strongly encouraged to deliver to the Administrator a written statement addressing the issues listed in paragraph (c)(2) of this section, describing the basis for believing that the information is deserving of confidential treatment, if this statement was not previously submitted;

(B) Is strongly encouraged to deliver to the Administrator an update of or supplement to any statement previously submitted under paragraph (c) of this section; and

(C) May present to the Administrator in a form the Administrator deems appropriate (such as by telephone or in an informal conference) agruments against disclosure of the information; and

(iv) Inform that person that the burden is on him to assure that any response to the notice is delivered to the Administrator within the time specified in the notice.

(3) To the extent permitted by applicable law, part or all or of any statement submitted in response to any notice issued under paragraph (d)(2) will be treated as confidential if so requested by the person submitting the response. Any response for which confidential treatment is requested must be segregated, marked and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(4) Upon the expiration of the time allowed for response under paragraph (d)(2) of this section, the Administrator will determine, in consultation with the General Counsel for the Department of Commerce, whether confidential treatment is warranted based on the information then available to NOAA.

(5) If the person who requested confidential treatment waives or withdraws that request, the Administrator will proceed with appropriate disclosure of the information.

(6) If the Administrator determines that confidential treatment is warranted, he will so notify the person requesting confidential treatment, and will issue an initial denial of the request for disclosure of records in accordance with 15 CFR 903.8.

(7) If the Administrator determines that confidential treatment is not warranted for part or all of the information, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested) to the person who requested confidential treatment. The notice will state:

(i) The basis for the Administrator's determination;

(ii) That the Administrator's determination constitutes final agency action on the request for confidential treatment;

(iii) That the final agency action is subject to judicial review under chapter 7 of title 5, United States Code; and

(iv) That on the seventh working day after issuance of the notice described in this paragraph (d)(7), the Administrator will make the information available to the person who requested disclosure unless the Administrator has first been notified of the filing of an action in a Federal court to obtain judicial review of the determination, and the court has issued an appropriate order preventing or limiting disclosure.

(8) The Administrator will keep a record of the date any notice is issued and the date any response is received,

by the Administrator, under this paragraph (d).

(9) In all other respects, procedures for handling requests for records containing information submitted to, reported to, or collected by the Administrator pursuant to this part will be in accordance with 15 CFR Part 903. For example, if ten working days have passed after the receipt of a request for disclosure and, despite the exercise of due diligence by the agency, the Administrator cannot make a determination as to whether confidential treatment is warranted, the Administrator will issue appropriate notice in accordance with 15 CFR 903.8(b)(5).

(e) *Direct submission of confidential information.* If any person has reason to believe that it would be prejudiced by furnishing information required from it to the applicant, licensee or permittee, that person may file the required information directly with the Administrator. Information for which the person requests confidential treatment must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(f) *Protection of confidential information transmitted by the Administrator to other agencies.* Each copy of information for which confidential treatment has been requested which is transmitted by the Administrator to other Federal agencies will be accompanied by a cover letter containing:

(1) A request that the other Federal agency maintain the information in confidence in accordance with applicable law (including the Trade Secret Act, 18 U.S.C. 1905) and any applicable protective agreement entered into by the Administrator and the Federal agency receiving the information;

(2) A request that the other Federal agency notify the Administrator immediately upon receipt of any request for disclosure of the information; and

(3) A request that all copies of the information be returned to the Administrator for secure storage or disposal promptly after the Federal agency determines that it no longer needs the information for its official use.

(g) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

§971.803 Relinquishment and surrender of licenses and permits.

(a) Any licensee or permittee may at any time, without penalty:

(1) Surrender to the Administrator a license or permit issued to the licensee or permittee; or

(2) Relinquish to the Administrator, in whole or in part, any right to conduct any exploration or commercial recovery activities authorized by the license or permit.

(b) Any licensee or permittee who surrenders, or relinquishes any right under, a license or permit will remain liable with respect to all violations and penalties incurred, and damage to persons or property caused, by the licensee or permittee as a result of activities engaged in by the licensee or permittee under the license or permit.

§971.804 Amendment to regulations for conservation, protection of the environment, and safety of life and property at sea.

The Administrator may amend the regulations in this part and 15 CFR part 970 at any time as the Administrator determines to be necessary and appropriate in order to provide for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The amended regulations will apply to all exploration or commercial recovery activities conducted under any license or permit issued or maintained pursuant to this part or 15 CFR part 970, except that amended regulations which provide for conservation of natural resources will apply to activities conducted under an existing license or permit during the present term of that license or permit only if the Administrator determines that the amended regulations providing for conservation of natural resources will not impose serious or irreparable economic hardship

on the licensee or permittee. Any amendment to regulations under this section will be made pursuant to the procedures in subpart I of this part.

§ 971.805 Computation of time.

Except where otherwise specified, Saturdays, Sundays and Federal Government holidays will be included in computing the time period allowed for filing any document or paper under this part or 15 CFR part 970, but when a time period expires on any of these days, that time period will be extended to include the next following Federal Government work day. Filing periods expire at the close of business on the day specified, for the office specified.

Subpart I—Uniform Procedures

§ 971.900 Applicability.

The regulations of this subpart govern the following hearings conducted by NOAA under this part and under 15 CFR part 970:

(a) All adjudicatory hearings required by section 116(b) of the Act to be held on the following actions upon a finding by the Administrator that one or more specific and material issues of fact exist which require resolution by formal process, including but not limited to:

(1) All applications for issuance or transfer of licenses or permits;

(2) All proposed TCRs on a license or permit; and

(3) All proposals to modify significantly a license or permit;

(b) Hearings conducted under section 105(b)(3) of the Act on objection by a licensee or permittee to any term, condition or restriction in a license or permit, or to modification thereto, where the licensee or permittee demonstrates, after final action by the Administrator on the objection, that a dispute remains as to a material issue of fact;

(c) Hearings conducted in accordance with section 106(b) of the Act pursuant to a timely request by an applicant or a licensee or permittee for review of:

(1) A proposed denial of issuance or transfer of a license or permit; or

(2) A proposed suspension or modification of particular activities under a license or permit after a Presidential determination pursuant to section 106(a)(2)(B) of the Act;

(d) Hearings conducted in accordance with section 308(c) of the Act to amend regulations for the purpose of conservation of natural resources, protection of the environment, and safety of life and property at sea;

(e) Hearings conducted in accordance with § 971.302 or 15 CFR 970.407 on a proposal to deny certification of an application; and

(f) Hearings conducted in accordance with 15 CFR part 970, subpart C to determine priority of right among preenactment explorers.

§ 971.901 Formal hearing procedures.

(a) *General.* (1) All hearings described in § 971.900 are governed by subpart C of 15 CFR part 904, as modified by this section. The rules in this subpart take precedence over 15 CFR part 904, subpart C, to the extent there is a conflict.

(2) Hearings held under this section will be consolidated insofar as practicable with hearings held by other agencies.

(3) For the purposes of this subpart, *involved applicant, licensee or permittee* means an applicant, licensee or permittee the status of whose application, license, permit or activities conducted under the license or permit may be altered by the Administrator as a result of proceedings under this subpart.

(b) *Decision to hold a hearing.* Whenever the Administrator finds that a formal hearing is required by the provisions of this part or 15 CFR part 970, he will provide for a formal hearing. Upon deciding to hold a formal hearing, the Administrator will refer the proceeding to the Department of Commerce Office of Administrative Law Judges for assignment to an Administrative Law Judge to serve as presiding officer for the hearing.

(c) *Notice of formal hearing.* (1) The Administrator will publish notice of the formal hearing in the Federal Register at least 15 days before the beginning of the hearing, and will send written notice by registered or certified mail to any involved applicant, licensee or permittee and to all persons who submitted written comments upon the action in question, or who testified at any prior informal hearing on the

action or who filed a request for the formal hearing under this part or 15 CFR part 970.

(2) Notice of a formal hearing will include, among other things:

(i) Time and place of the hearing and the name of the presiding judge, as determined under paragraph (b) of this section;

(ii) The name and address of the person(s) requesting the formal hearing or a statement that the formal hearing is being held by order of the Administrator;

(iii) The issues in dispute which are to be resolved in the formal hearing;

(iv) The due date for filing a written request to participate in the hearing in accordance with paragraphs (f)(2) and (f)(3) of this section; and

(v) Reference to any prior informal hearing from which the issues to be determined arose.

(d) *Powers and duties of the administrative law judge.* In addition to the powers enumerated in 15 CFR part 904. Subpart C, judges will have the power to:

(1) Regulate the course of the hearing and the conduct of the parties, interested persons and others submitting evidence, including but not limited to the power to require the submission of part or all of the evidence in written form if the judge determines a party will not be prejudiced thereby, and if otherwise in accordance with law;

(2) Rule upon requests submitted in accordance with paragraph (f)(2) of this section to participate as a party, or requests submitted in accordance with paragraph (f)(3) of this section to participate as an interested person in a proceeding, by allowing, denying, or limiting such participation; and

(3) Require at or prior to any hearing, the submission and exchange of evidence.

(e) *Argument.* At the close of the formal hearing, each party will be given the opportunity to submit written arguments on the issues before the judge.

(f) *Hearing participation.* (1) Parties to the formal hearing will include:

(i) The NOAA General Counsel;

(ii) Any involved applicant, licensee or permittee; and

(iii) Any other person determined by the judge, in accordance with paragraph (f)(2) below, to be eligible to participate as a full party.

(2) Any person desiring to participate as a party in a formal hearing must submit a request to the judge to be admitted as a party. The request must be submitted within ten days after the date of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. Such person will be allowed to participate if the judge finds that the interests of justice and a fair determination of the issues would be served by granting the request. The judge may entertain a request submitted after the expiration of the ten days, but such a request may only be granted upon an express finding on the record that:

(i) Special circumstances justify granting the request;

(ii) The interests of justice and a fair determination of the issues would be served by granting the request;

(iii) The requestor has consented to be bound by all prior written agreements and stipulations agreed to by the existing parties, and all prior orders entered in the proceedings; and

(iv) Granting the request will not cause undue delay or prejudice the rights of the existing parties.

(3)(i) Any interested person who desires to submit evidence in a formal hearing must submit a request within ten days after the dates of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. The judge may waive the ten day rule for good cause, such as if the interested person, making this request after the expiration of the ten days, the formal hearing, and the evidence he proposes to submit may significantly affect the outcome of the proceedings.

(ii) The judge may permit an interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning the issue(s) being adjudicated. The fact that an interested person may submit evidence under this paragraph at a hearing does not entitle the interested person to participate in other ways in the hearing unless allowed by the judge under paragraph (f)(3)(iii) below.

(iii) The judge may allow an interested person to submit oral testimony, oral arguments or briefs, or to cross-examine witnesses or participate in other ways, if the judge determines:

(A) That the interests of justice would be better served by allowing such participation by the interested person; and

(B) That there are compelling circumstances favoring such participation by the interested person.

(g) *Definition of issues.* (1) Whenever a formal hearing is conducted pursuant to this section the Administrator may certify the issues for decision to the judge, and if the issues are so certified, the formal hearing will be limited to those issues.

(2) Whenever a formal hearing is conducted pursuant to a request by an applicant, licensee or permittee for review of a denial of certification, issuance or transfer of a license or permit in accordance with section 106(a)(4) of the Act, or pursuant to an objection to any term, condition, or restriction in a permit in accordance with section 105(b)(3) or (c)(4) of the Act, no issues may be raised by any party or interested person that were not previously raised in the administrative proceedings on the action pursuant to any such section, unless the judge determines that good cause is shown for the failure to raise them. Good cause includes the case where the party seeking to raise the new issues shows that it could not reasonably have ascertained the issues at a prior stage in the administrative process, or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

(h) *Decisions*—(1) *Proposed findings of fact and conclusions of law.* The judge will allow each party to file with the judge proposed findings of fact, and in appropriate cases conclusions of law, together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs must be filed within ten days after the hearing or within such additional time as the judge may allow. Such proposals and briefs must refer to all portions of the record and to all authorities relied upon in support of each proposal. Reply briefs must be submitted within ten days after receipt of the proposed findings and conclusions to which they respond, unless the judge allows additional time.

(2) *Recommended decision.* (i) As soon as practicable, but normally not later than 90 days after the conclusion of the formal hearing, the judge will evaluate the record of the formal hearing and prepare and file a recommended decision with the Administrator. The decision will contain findings of fact, when appropriate, conclusions regarding all material isuses of law, and a recommendation as to the appropriate action to be taken by the Administrator. The judge will serve a copy of the decision on each party and upon the Administrator.

(ii) Within thirty days after the date the recommended decision is served, any party may file with the Administrator exceptions to the recommended decision. The exceptions must refer to all portions of the record and to all authorities relied on in support of the exceptions.

(3) *Final decision.* (i) As soon as practicable, but normally not later than 60 days after receipt of the recommended decision, the Administrator will issue a final decision. The final decision will include findings of fact and conclusions regarding material issues of law or discretion, as well as reasons therefor. The final decision may accept or reject all or part of the recommended decision. The Administrator shall assure that the record shows the ruling on each exception presented.

(ii) With respect to hearings held pursuant to section 116(b), the Administrator may defer announcement of his findings of fact until the time he takes final action with respect to any action described in section 116(a).

(iii) The Administrator will base the final decision upon the record already made except that the Administrator may issue orders:

(A) Specifying the filing of supplemental briefs; or

(B) Remanding the matter to the judge for the receipt of further evidence, or otherwise assisting in the determination of the matter.

(i) *Filing and service of documents.* (1) Whenever the regulations in this subpart or an order issued hereunder require a document to be filed within a certain period of time, such document will be considered filed as of the date of the postmark, if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods will begin to run on the day following the date of the document, paper, or event which begins at the time period.

(2) All submissions must be signed by the person making the submission, or by the person's attorney or other authorized agent or representative.

(3) Service of a document must be made by delivering or mailing a copy of the document to the known address of the person being served.

(4) Whenever the regulations in this subpart require service of a document, such service may effectively be made on the agent for the service of process or on the attorney for the person to be served.

(5) Refusal of service of a document by the person, his agent, or attorney will be deemed effective service of the document as of the date of such refusal.

(6) A certficate of the person serving the document by personal delivery or by mailing, setting forth the manner of the service, will be proof of the service.

Subpart J—Enforcement

§971.1000 General.

(a) *Purpose and scope.* (1) Section 302 of the Act authorizes the Administrator to assess a civil penalty, in an amount not to exceed $25,000 for each violation, against any person found to have committed an act prohibited by section 301 of the Act. Each day of a continuing violation is a separate offense.

(2) Section 106 of the Act describes the circumstances under which the Administrator may suspend or revoke a license or permit, or suspend or modify activities under a license or permit, in addition to or in lieu of imposing of a civil penalty, or in addition to imposing a fine.

(3) Section 306 of the Act makes provisions of the customs laws relating to, among other things, the remission or mitigation of forfeitures, applicable to forfeitures of vessels and hard mineral resources. The Administrator is authorized to entertain petitions for administrative settlement of property seizures made under the Act which would otherwise proceed to judicial forfeiture.

(4) Section 114 of the Act authorizes the Administrator to place observers on vessels used by a licensee or permittee under the Act to monitor compliance and environmental effects of activities under the license or permit.

(5) Section 117 of the Act describes the circumstances under which a person may bring a civil action against an alleged violator or against the Administrator for failure to perform a nondiscretionary duty, and directs the Administrator to issue regulations governing procedures prerequisite to such a civil action.

(6) The regulations in this subpart provide uniform rules and procedures for the assessment of civil penalties (§§971.1001–971.1002), and license and permit sanctions (§971.1003); the remission or mitigation of forfeitures (§971.1004); observers (§971.1005); protection of certain information related to enforcement (§971.1006); and procedures requiring persons planning to bring a civil action under section 117 of the Act to give advance notice (§971.1007).

(b) *Filing and service of documents.* (1) Except as otherwise provided by this subpart, filing and service of documents required by this subpart will be in accordance with §971.901(i). The method for computing time periods set forth in §971.901(i) also applies to any action or event, such as payment of a civil penalty, required by this subpart to take place within a specified period of time.

(2) If an oral or written request is made to the Administrator within ten days after the expiration of a time period established in this subpart for the required filing of documents, the Administrator may permit a late filing if the Administrator finds reasonable grounds for an inability or failure to file within the time periods. All extensions will be in writing. Except as provided by this paragraph, by 15 CFR 904.102 or by order of an administrative

law judge, no requests for an extension of time may be granted.

§ 971.1001 Assessment procedure.

Subpart B of 15 CFR part 904 governs the procedures for assessing a civil penalty under the Act, and the rights of any person against whom a civil penalty is assessed.

§ 971.1002 Hearing and appeal procedures.

(a) *Beginning of hearing procedures.* Following receipt of a written request for a hearing timely filed under 15 CFR 904.102, the Administrator will begin procedures under this section by forwarding the request, a copy of the NOVA, and any response thereto to the Department of Commerce, Office of Administrative Law Judges.

(b) Subpart C of 15 CFR part 904 governs the hearing and appeal procedures for civil penalties assessed under the Act.

§ 971.1003 License and permit sanctions.

(a) *Application of this section.* This section governs the suspension or revocation of any license or permit issued under the Act, or the suspension or modification of any particular activity or activities under a license or permit, which suspension, revocation or modification is undertaken in addition to, or in lieu of, imposing a civil penalty under this subpart, or in addition to imposing a fine.

(b) *Basis for sanctions.* The Administrator may act under this section with respect to a license or permit issued under the Act, or any particular activity or activities under such a license or permit, if the licensee or permittee substantially fails to comply with any provision of the Act, any regulation or order issued under the Act, or any term, condition, or restriction in the license or permit.

(c) *Nature of sanctions.* In the Administrator's discretion and subject to the requirements of this section, the Administrator may take any of the following actions or combinations thereof with respect to a license or permit issued under the Act:

(1) Revoke the license or permit;

(2) Suspend the license or permit, either for a specified period of time or until certain stated requirements are met, or both; or

(3) Modify any activity under the license or permit, as by imposing additional requirements or restraints on the activity.

(d) *Notice of sanction.* (1) The Administrator will prepare a notice of sanction (NoS) setting forth the sanction to be imposed and the basis therefore. The NoS will state:

(i) A concise statement of the facts believed to show a violation;

(ii) A specific reference to the provisions of the Act, regulation, license or permit, or order allegedly violated;

(iii) The nature and duration of the proposed sanction;

(iv) The effective date of the sanction, which is 30 days after the date of the notice unless the Administrator establishes a different effective date under paragraph (d)(4) or paragraph (e) of this section;

(v) That the licensee or permittee has 30 calendar days from receipt of the notice in which to request or waive a hearing, under paragraph (f) of this section; and

(vi) The determination made by the Administrator under paragraph (e)(1) of this section, and any time period that the Administrator provides the licensee or permittee under paragraph (e)(1) to correct a deficiency.

(2) If a hearing is requested in a timely manner, the sanction becomes effective as provided in the final decision of the Administrator issued pursuant to paragraph (g) of this section, unless the Administrator provides otherwise under paragraph (d)(4) of this section.

(3) The NoS will be served personally or by registered or certified mail, return receipt requested, on the licensee or permittee. The Administrator will also publish in the FEDERAL REGISTER a notice of his intention to impose a sanction.

(4) The Administrator may make the sanction effective immediately or otherwise earlier than 30 days after the date of the NoS if the Administrator finds, and issues an emergency order summarizing such finding and the basis therefor, that an earlier date is necessary to:

(i) Prevent a significant adverse environmental effect; or

(ii) Preserve the safety of life and property at sea.

If the Administrator acts under this paragraph (d)(4), the Administrator will serve the emergency order as provided in paragraph (d)(3) of this section.

(5) The NoS will be accompanied by a copy of this subpart and the applicable provisions of 15 CFR part 904 and 15 CFR part 971, subpart I.

(e) *Opportunity to correct deficiencies.* (1) Prior to issuing the NoS, the Administrator will determine whether the reason for the proposed sanction is a deficiency which the licensee or permittee can correct. Such determination, and the basis therefor, will be set forth in the NoS.

(2) If the Administrator determines that the reason for the proposed sanction is a deficiency which the licensee or permittee can correct, the Administrator will allow the licensee or permittee a reasonable period of time, up to 180 days from the date of the NoS, to correct the deficiency. The NoS will state the effective date of the sanction, and that the sanction will take effect on that date unless the licensee or permittee corrects the deficiency within the time prescribed or unless the Administrator grants an extension of time to correct the deficiency under paragraph (e)(3) of this section.

(3) The licensee or permittee may, within the time period prescribed by the Administrator under paragraph (e)(2) of the section, request an extension of time to correct the deficiency. The Administrator may, for good cause shown, grant an extension. If the Administrator does not grant the request, either orally or in writing before the effective date of the sanction, the request will be considered denied.

(4) When the licensee or permittee believes that the deficiency has been corrected, the licensee or permittee shall so advise the Administrator in writing. The Administrator will, as soon as practicable, determine whether or not the deficiency has been corrected and advise the licensee or permittee of such determination.

(5) If the Administrator determines that the deficiency has not been corrected by the licensee or permittee within the time prescribed under paragraph (e)(2) or (e)(3) of this section, the Administrator may:

(i) Grant the licensee or permittee additional time to correct the deficiency, for good cause shown;

(ii) If no hearing has been timely requested under paragraph (f)(1) of this section, notify the licensee or permittee that the sanction will take effect as provided in paragraph (e)(2) or (e)(3) of this section; or

(iii) If a request for hearing has been timely filed under paragraph (f)(1) of this section, and hearing proceedings have not already begun, or if the Administrator determines under paragraph (f)(3) of this section to hold a hearing, notify the licensee or permittee of the Administrator's intention to proceed to a hearing on the matter.

(f) *Opportunity for hearing.* (1) The licensee or permittee has 30 days from receipt of the NoS to request a hearing. However, no hearing is required with respect to matters previously adjudicated in an administrative or judicial hearing in which the licensee or permittee has had an opportunity to participate.

(2) If the licensee or permittee requests a hearing, a written and dated request shall be served either in person or by certified or registered mail, return receipt requested, at the address specified in the NoS. The request shall either attach a copy of the relevant NoS or refer to the relevant NOAA case number.

(3) If no hearing is requested under paragraph (f)(2) of this section, the Administrator may nonetheless order a hearing if the Administrator determines that there are material issues of fact, law, or equity to be further explored.

(g) *Hearing and decision.* (1) If a timely request for a hearing under paragraph (f) of this section is received, or if the Administrator orders a hearing under paragraph (f)(3) of this section, the Administrator will promptly begin proceedings under this section by forwarding the request, a copy of the NoS and any response thereto to the Department of Commerce Office of Administrative Law Judges which will

docket the matter for hearing. Written notice of the referral will promptly be given to the licensee or permittee, with the name and address of the attorney representing the Administrator in the proceedings (the agency representative). Thereafter, all pleading and other documents must be filed directly with the Department of Commerce Office of Administrative Law Judges, and a copy must be served on the opposing party (respondent or agency representative).

(2) Except as provided in this section, the hearing and appeal procedures in 15 CFR part 904, subpart C apply to any hearing held under this section.

(3) If the proposed sanction is the result of a correctable deficiency, the hearing will proceed concurrently with any attempt to correct the deficiency unless the parties agree otherwise or the Administrative Law Judge orders differently.

(4) As soon as practicable, but normally not later than 90 days after the conclusion of the formal hearing, the judge will file with the Administrator a recommended decision prepared in accordance with § 971.901(h)(2).

(5) The Administrator will issue a final decision in accordance with § 971.901(h)(3). The decision will be a final order of the Administrator.

(6) The Administrator will serve notice of the final decision on the licensee or permittee in the manner described by paragraph (d)(3) of this section.

§ 971.1004 Remission or mitigation of forfeitures.

(a) Authorized enforcement officers are empowered by section 304 of the Act to seize any vessel (together with its gear, furniture, appurtenances, stores, and cargo) which reasonably appears to have been used in violation of the Act, if necessary to prevent evasion of the enforcement of this Act, or of any regulation, order or license or permit issued pursuant to the Act. Enforcement agents may also seize illegally recovered or processed hard mineral resources, as well as other evidence related to a violation. Section 306 of the Act provides for the judicial forfeiture of vessels and hard mineral resources.

(b) Subpart F of 15 CFR part 904 governs procedures regarding seized property that is subject to forfeiture or has been forfeited under the Act, including the remission or mitigation of forfeitures.

(c) Unless otherwise directed in a notice concerning the seized property, a petition for relief from forfeiture under the Act and pursuant to 15 CFR 904.506(b) shall be addressed to the Administrator and filed with the Ocean Minerals and Energy Division at the address specified in § 971.200(b).

§ 971.1005 Observers.

(a) *Purpose of observers.* Each licensee and permittee shall allow, at such times and to such extent as the Administrator deems reasonable and necessary, an observer (as used in this section, the term ''observer'' means ''one or more observers'') duly authorized by the Administrator to board and accompany any vessel used by the licensee or permittee in exploration or commercial recovery activities (hereafter referred to in this section as a ''vessel''), for the purpose of observing, evaluating and reporting on:

(1) The effectiveness of the terms, conditions, and restrictions of the license or permit;

(2) Compliance with the Act, regulations and orders issued under the Act, and the license or permit terms, conditions, and restrictions; and

(3) The environmental and other effects of the licensee's or permittee's activities under the license or permit.

(b) *Notice to licensee or permittee.* (1) If the Administrator plans to place an observer aboard a vessel, the Administrator will so notify the affected licensee or permittee.

(2) The Administrator normally will issue any such notice as far in advance of placement of the observer as is practicable.

(3) *Contents of notice.* The notice given by the Administrator will include, among other things:

(i) The name of the observer, if known at the time notice is issued;

(ii) The length of time which the observer likely will be aboard the vessel;

(iii) Information concerning activities the observer is likely to conduct, such as:

(A) Identification of special activities that the observer will monitor;

(B) Planned tests of equipment used for monitoring;

(C) Activities of the observer that are likely to require assistance from the vessel's personnel or crew or use of the vessel's equipment; and

(D) Planned tests of alternative operating procedures or technologies for mitigation of environmental effects.

(iv) Information concerning the equipment that will be brought aboard the vessel, such as a description of the monitoring equipment, and any special requirements concerning the handling, storage, location or operation of, or the power supply for, the equipment.

(c) *Initial monitoring period.* The Administrator shall require the placement of an observer on each permittee's mining vessel(s) at least once during the initial year of the permittee's commercial recovery activities.

(d) *Licensee's and permittee's responsibilities for observer placement.* (1) Upon request by the Administrator, a licensee or permittee shall facilitate observer placement by promptly notifying the Administrator regarding the timing of planned system tests and the departure date of the next voyage, or, if the vessel is at sea, suggesting a time and method for transporting the observer to the vessel.

(2) In addition, the licensee or permittee shall notify NOAA of the date of departure of planned cruises 60 days in advance of ship departure from port for purposes of NOAA's determination of whether to place Federal observers onboard. If cruise plans are changed by more than 30 days from the date stated by the exploration or commercial recovery plan, the licensee or permittee shall notify NOAA as soon as such changes are made, or 90 days prior to the previously scheduled departure.

(e) *Duties of licensee, permittee, owner or operator.* Each licensee, permittee, owner or operator of a vessel aboard which an observer is assigned shall:

(1) Allow the observer access to and use of the vessel's communications equipment and personnel when the observer deems such access necessary for the transmission and receipt of messages;

(2) Allow the observer access to and use of the vessel's navigation equipment and personnel when the observer deems such access necessary to determine the vessel's location;

(3) Provide all other reasonable cooperation and assistance to enable the observer to carry out the observer's duties; and

(4) Provide temporary accommodations and food to the observer aboard the vessel which are equivalent to those provided to officers of the vessel.

(f) *Reasonableness of observer activities.* (1) To the maximum extent practicable, observation duties will be planned and carried out in a manner that minimizes interference with the licensee's or permittee's activities under the license or permit.

(2) The Administrator will assure that equipment brought aboard a vessel by the observer is reasonable as to size, weight, and electric power and storage requirements, taking into consideration the necessity of the equipment for carrying out the observer's functions.

(3) The observer will have no authority over the operation of the vessel or its activities, or the officers, crew, or personnel of the vessel. The observer will comply with all rules and regulations issued by the licensee or permittee, and all orders of the Master or senior operations official, with respect to ensuring safe operation of the vessel and the safety of its personnel.

(g) *Non-interference with observer.* Licensees, permittees and other persons are reminded that the Act (see, for example, sections 301(3) and 301(4)) makes it unlawful for any person subject to section 301 of the Act to interfere with any observer in the performance of the observer's duties.

(h) *Confidentiality of information.* NOAA recognizes the possibility that an observer, in performing observer functions, will record information which the licensee or permittee considers to be proprietary. NOAA intends to protect such information consistent with applicable law. The Administrator may in appropriate cases provide the licensee or permittee an opportunity:

(1) To review those parts of the observer's report which may contain proprietary information; and

(2) To request confidential treatment of such information under § 971.802.

§ 971.1006 Proprietary enforcement information.

(a) Proprietary and privileged information seized or maintained under Title III of the Act concerning a person or vessel engaged in commercial recovery will not be made available for general or public use or inspection.

(b) Although presentation of evidence in a proceeding under this subpart is not deemed general or public use of information, the Administrator will, consistent with due process, move to have records sealed, under 15 CFR part 904 subpart C, or other applicable provisions of law, in any administrative or judicial proceeding where the use of proprietary or privileged information is required to serve the purpose of the Act.

§ 971.1007 Advance notice of civil actions.

(a) *Actions against alleged violators.* (1) No civil action may be filed in a United States District Court under section 117 of the Act against any person for alleged violation of the Act, or any regulation, or license or permit term, condition, or restriction issued under the Act, until 60 days after the Administrator and any alleged violator receive written and dated notice of alleged violation.

(2) The notice shall contain:

(i) A concise statement of the facts believed to show a violation;

(ii) A specific reference to the provisions of the Act, regulation or license or permit allegedly violated; and

(iii) Any documentary or other evidence of the alleged violation.

(b) *Action against the Administrator.* (1) No civil action may be filed in a United States District Court under section 117 of the Act against the Administrator for an alleged failure to perform any act or duty under the Act which is not discretionary until 60 days after receipt by the Administrator of a written and dated notice of intent to file the action.

(2) The notice shall contain:

(i) A specific reference to the provisions of the Act, regulation or permit believed to require the Administrator to perform a nondiscretionary act or duty;

(ii) A precise description of the nondiscretionary act or duty believed to be required by such provision;

(iii) A concise statement of the facts believed to show a failure to perform the act or duty; and

(iv) Any documentary or other evidence of the alleged failure to perform the act or duty.

SUBCHAPTER E—OIL POLLUTION ACT REGULATIONS

PART 990—NATURAL RESOURCE DAMAGE ASSESSMENTS

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AUTHORITY: 33 U.S.C. 2701 *et seq.*

SOURCE: 61 FR 500, Jan. 5, 1996, unless otherwise noted.

Subpart A—Introduction

§ 990.10 Purpose.

The goal of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident).

This goal is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery. The purpose of this part is to promote expeditious and cost-effective restoration of natural resources and services injured as a result of an incident. To fulfill this purpose, this part provides a natural resource damage assessment process for developing a plan for restoration of the injured natural resources and services and pursuing implementation or funding of the plan by responsible parties. This part also provides an administrative process for involving interested parties in the assessment, a range of assessment procedures for identifying and evaluating injuries to natural resources and services, and a means for selecting restoration actions from a reasonable range of alternatives.

§ 990.11 Scope.

The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides for the designation of federal, state, and, if designated by the Governor of the state, local officials to act on behalf of the public as trustees for natural resources and for the designation of Indian tribe and foreign officials to act as trustees for natural resources on behalf

of, respectively, the tribe or its members and the foreign government. This part may be used by these officials in conducting natural resource damage assessments when natural resources and/or services are injured as a result of an incident involving an actual or substantial threat of a discharge of oil. This part is not intended to affect the recoverability of natural resource damages when recoveries are sought other than in accordance with this part.

§ 990.12 Overview.

This part describes three phases of a natural resource damage assessment. The Preassessment Phase, during which trustees determine whether to pursue restoration, is described in subpart D of this part. The Restoration Planning Phase, during which trustees evaluate information on potential injuries and use that information to determine the need for, type of, and scale of restoration, is described in subpart E of this part. The Restoration Implementation Phase, during which trustees ensure implementation of restoration, is described in subpart F of this part.

§ 990.13 Rebuttable presumption.

Any determination or assessment of damages to natural resources made by a Federal, State, or Indian trustee in accordance with this part shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under OPA.

§ 990.14 Coordination.

(a) *Trustees.* (1) If an incident affects the interests of multiple trustees, the trustees should act jointly under this part to ensure that full restoration is achieved without double recovery of damages. For joint assessments, trustees must designate one or more Lead Administrative Trustee(s) to act as coordinators.

(2) If there is a reasonable basis for dividing the natural resource damage assessment, trustees may act independently under this part, so long as there is no double recovery of damages.

(3) Trustees may develop pre-incident or incident-specific memoranda of understanding to coordinate their activities.

(b) *Response agencies.* Trustees must coordinate their activities conducted concurrently with response operations with response agencies consistent with the NCP and any pre-incident plans developed under § 990.15(a) of this part. Trustees may develop pre-incident memoranda of understanding to coordinate their activities with response agencies.

(c) *Responsible parties*—(1) *Invitation.* Trustees must invite the responsible parties to participate in the natural resource damage assessment described in this part. The invitation to participate should be in writing, and a written response by the responsible parties is required to confirm the desire to participate.

(2) *Timing.* The invitation to participate should be extended to known responsible parties as soon as practicable, but not later than the delivery of the ''Notice of Intent to Conduct Restoration Planning,'' under § 990.44 of this part, to the responsible party.

(3) *Agreements.* Trustees and responsible parties should consider entering into binding agreements to facilitate their interactions and resolve any disputes during the assessment. To maximize cost-effectiveness and cooperation, trustees and responsible parties should attempt to develop a set of agreed-upon facts concerning the incident and/or assessment.

(4) *Nature and extent of participation.* If the responsible parties accept the invitation to participate, the scope of that participation must be determined by the trustees, in light of the considerations in paragraph (c)(5) of this section. At a minimum, participation will include notice of trustee determinations required under this part, and notice and opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment. Increased levels of participation by responsible parties may be developed at the mutual agreement of the trustees and the responsible parties. Trustees will objectively consider all written comments provided by the responsible parties, as well as any other recommendations or proposals that the responsible parties submit in writing to the Lead Administrative Trustee. Submissions by the responsible parties

will be included in the administrative record. Final authority to make determinations regarding injury and restoration rest solely with the trustees. Trustees may end participation by responsible parties who, during the conduct of the assessment, in the sole judgment of the trustees, cause interference with the trustees' ability to fulfill their responsibilities under OPA and this part.

(5) *Considerations.* In determining the nature and extent of participation by the responsible parties or their representatives, trustees may consider such factors as:

(i) Whether the responsible parties have been identified;

(ii) The willingness of responsible parties to participate in the assessment;

(iii) The willingness of responsible parties to fund assessment activities;

(iv) The willingness and ability of responsible parties to conduct assessment activities in a technically sound and timely manner and to be bound by the results of jointly agreed upon studies;

(v) The degree of cooperation of the responsible parties in the response to the incident; and

(vi) The actions of the responsible parties in prior assessments.

(6) *Request for alternative assessment procedures.* (i) The participating responsible parties may request that trustees use assessment procedures other than those selected by the trustees if the responsible parties:

(A) Identify the proposed procedures to be used that meet the requirements of §990.27 of this part, and provide reasons supporting the technical adequacy and appropriateness of such procedures for the incident and associated injuries;

(B) Advance to the trustees the trustees' reasonable estimate of the cost of using the proposed procedures; and

(C) Agree not to challenge the results of the proposed procedures. The request from the responsible parties may be made at any time, but no later than, fourteen (14) days of being notified of the trustees' proposed assessment procedures for the incident or the injury.

(ii) Trustees may reject the responsible parties' proposed assessment procedures if, in the sole judgment of the trustees, the proposed assessment procedures:

(A) Are not technically feasible;

(B) Are not scientifically or technically sound;

(C) Would inadequately address the natural resources and services of concern;

(D) Could not be completed within a reasonable time frame; or

(E) Do not meet the requirements of §990.27 of this part.

(7) *Disclosure.* Trustees must document in the administrative record and Restoration Plan the invitation to the responsible parties to participate, and briefly describe the nature and extent of the responsible parties' participation. If the responsible parties' participation is terminated during the assessment, trustees must provide a brief explanation of this decision in the administrative record and Restoration Plan.

(d) *Public.* Trustees must provide opportunities for public involvement after the trustees' decision to develop restoration plans or issuance of any notices to that effect, as provided in §990.55 of this part. Trustees may also provide opportunities for public involvement at any time prior to this decision if such involvement may enhance trustees' decisionmaking or avoid delays in restoration.

§990.15 Considerations to facilitate restoration.

In addition to the procedures provided in subparts D through F of this part, trustees may take other actions to further the goal of expediting restoration of injured natural resources and services, including:

(a) *Pre-incident planning.* Trustees may engage in pre-incident planning activities. Pre-incident plans may identify natural resource damage assessment teams, establish trustee notification systems, identify support services, identify natural resources and services at risk, identify area and regional response agencies and officials, identify available baseline information, establish data management systems, and identify assessment funding

issues and options. Potentially responsible parties, as well as all other members of the public interested in and capable of participating in assessments, should be included in pre-incident planning to the fullest extent practicable.

(b) *Regional Restoration Plans.* Where practicable, incident-specific restoration plan development is preferred, however, trustees may develop Regional Restoration Plans. These plans may be used to support a claim under § 990.56 of this part. Regional restoration planning may consist of compiling databases that identify, on a regional or watershed basis, or otherwise as appropriate, existing, planned, or proposed restoration projects that may provide appropriate restoration alternatives for consideration in the context of specific incidents.

Subpart B—Authorities

§ 990.20 Relationship to the CERCLA natural resource damage assessment regulations.

(a) *General.* Regulations for assessing natural resource damages resulting from hazardous substance releases under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 *et seq.,* and the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1321 *et seq.,* are codified at 43 CFR part 11. The CERCLA regulations originally applied to natural resource damages resulting from oil discharges as well as hazardous substance releases. This part supersedes 43 CFR part 11 with regard to oil discharges covered by OPA.

(b) *Assessments commenced before February 5, 1996.* If trustees commenced a natural resource damage assessment for an oil discharge under 43 CFR part 11 prior to February 5, 1996 they may complete the assessment in compliance with 43 CFR part 11, or they may elect to use this part, and obtain a rebuttable presumption.

(c) *Oil and hazardous substance mixtures.* For natural resource damages resulting from a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 CFR part 11 in order to obtain a rebuttable presumption.

§ 990.21 Relationship to the NCP.

This part provides procedures by which trustees may determine appropriate restoration of injured natural resources and services, where such injuries are not fully addressed by response actions. Response actions and the coordination with damage assessment activities are conducted pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300.

§ 990.22 Prohibition on double recovery.

When taking actions under this part, trustees are subject to the prohibition on double recovery, as provided in 33 U.S.C. 2706(d)(3) of OPA.

§ 990.23 Compliance with NEPA and the CEQ regulations.

(a) *General.* The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 CFR chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. Thus, when a federal trustee proposes to take restoration actions under this part, it must integrate this part with NEPA, the CEQ regulations, and NEPA regulations promulgated by that federal trustee agency. Where state NEPA-equivalent laws may apply to state trustees, state trustees must consider the extent to which they must integrate this part with their NEPA-equivalent laws. The requirements and process described in this section relate only to NEPA and federal trustees.

(b) *NEPA requirements for federal trustees.* NEPA becomes applicable when federal trustees propose to take restoration actions, which begins with the development of a Draft Restoration Plan under § 990.55 of this part. Depending upon the circumstances of the incident, federal trustees may need to consider early involvement of the public in restoration planning in order to meet their NEPA compliance requirements.

(c) *NEPA process for federal trustees.* Although the steps in the NEPA process may vary among different federal trustees, the process will generally involve the need to develop restoration

plans in the form of an Environmental Assessment or Environmental Impact Statement, depending upon the trustee agency's own NEPA regulations.

(1) *Environmental Assessment.* (i) *Purpose.* The purpose of an Environmental Assessment (EA) is to determine whether a proposed restoration action will have a significant (as defined under NEPA and §1508.27 of the CEQ regulations) impact on the quality of the human environment, in which case an Environmental Impact Statement (EIS) evaluating the impact is required. In the alternative, where the impact will not be significant, federal trustees must issue a Finding of No Significant Impact (FONSI) as part of the restoration plans developed under this part. If significant impacts to the human environment are anticipated, the determination to proceed with an EIS may be made as a result, or in lieu, of the development of the EA.

(ii) *General steps.* (A) If the trustees decide to pursue an EA, the trustees may issue a Notice of Intent to Prepare a Draft Restoration Plan/EA, or proceed directly to developing a Draft Restoration Plan/EA.

(B) The Draft Restoration Plan/EA must be made available for public review before concluding a FONSI or proceeding with an EIS.

(C) If a FONSI is concluded, the restoration planning process should be no different than under §990.55 of this part, except that the Draft Restoration Plan/EA will include the FONSI analysis.

(D) The time period for public review on the Draft Restoration Plan/EA must be consistent with the federal trustee agency's NEPA requirements, but should generally be no less than thirty (30) calendar days.

(E) The Final Restoration Plan/EA must consider all public comments on the Draft Restoration Plan/EA and FONSI.

(F) The means by which a federal trustee requests, considers, and responds to public comments on the Draft Restoration Plan/EA and FONSI must also be consistent with the federal agency's NEPA requirements.

(2) *Environmental Impact Statement.* (i) *Purpose.* The purpose of an Environmental Impact Statement (EIS) is to involve the public and facilitate the decisionmaking process in the federal trustees' analysis of alternative approaches to restoring injured natural resources and services, where the impacts of such restoration are expected to have significant impacts on the quality of the human environment.

(ii) *General steps.* (A) If trustees determine that restoration actions are likely to have a significant (as defined under NEPA and §1508.27 of the CEQ regulations) impact on the environment, they must issue a Notice of Intent to Prepare a Draft Restoration Plan/EIS. The notice must be published in the FEDERAL REGISTER.

(B) The notice must be followed by formal public involvement in the development of the Draft Restoration Plan/EIS.

(C) The Draft Restoration Plan/EIS must be made available for public review for a minimum of forty-five (45) calendar days. The Draft Restoration Plan/EIS, or a notice of its availability, must be published in the FEDERAL REGISTER.

(D) The Final Restoration Plan/EIS must consider all public comments on the Draft Restoration Plan/EIS, and incorporate any changes made to the Draft Restoration Plan/EIS in response to public comments.

(E) The Final Restoration Plan/EIS must be made publicly available for a minimum of thirty (30) calendar days before a decision is made on the federal trustees' proposed restoration actions (Record of Decision). The Final Restoration Plan/EIS, or a notice of its availability, must be published in the FEDERAL REGISTER.

(F) The means by which a federal trustee agency requests, considers, and responds to public comments on the Final Restoration Plan/EIS must also be consistent with the federal agency's NEPA requirements.

(G) After appropriate public review on the Final Restoration Plan/EIS is completed, a Record of Decision (ROD) is issued. The ROD summarizes the trustees' decisionmaking process after consideration of any public comments relative to the proposed restoration actions, identifies all restoration alternatives (including the preferred alternative(s)), and their environmental

consequences, and states whether all practicable means to avoid or minimize environmental harm were adopted (e.g., monitoring and corrective actions). The ROD may be incorporated with other decision documents prepared by the trustees. The means by which the ROD is made publicly available must be consistent with the federal trustee agency's NEPA requirements.

(d) *Relationship to Regional Restoration Plans or an existing restoration project.* If a Regional Restoration Plan or existing restoration project is proposed for use, federal trustees may be able to tier their NEPA analysis to an existing EIS, as described in §§ 1502.20 and 1508.28 of the CEQ regulations.

§ 990.24 Compliance with other applicable laws and regulations.

(a) *Worker health and safety.* When taking actions under this part, trustees must comply with applicable worker health and safety considerations specified in the NCP for response actions.

(b) *Natural Resources protection.* When acting under this part, trustees must ensure compliance with any applicable consultation, permitting, or review requirements, including but not limited to: the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; the National Marine Sanctuaries Act, 16 U.S.C. 1431 *et seq.*; the National Historic Preservation Act, 12 U.S.C. 470 *et seq.*; the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*; and the Archaeological Resources Protection Act, 16 U.S.C. 470 *et seq.*

§ 990.25 Settlement.

Trustees may settle claims for natural resource damages under this part at any time, provided that the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest, with particular consideration of the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services. Sums recovered in settlement of such claims, other than reimbursement of trustee costs, may only be expended in accordance with a restoration plan, which may be set forth in whole or in part in a consent decree or other settlement agreement, which is made available for public review.

§ 990.26 Emergency restoration.

(a) Trustees may take emergency restoration action before completing the process established under this part, provided that:

(1) The action is needed to avoid irreversible loss of natural resources, or to prevent or reduce any continuing danger to natural resources or similar need for emergency action;

(2) The action will not be undertaken by the lead response agency;

(3) The action is feasible and likely to succeed;

(4) Delay of the action to complete the restoration planning process established in this part likely would result in increased natural resource damages; and

(5) The costs of the action are not unreasonable.

(b) If response actions are still underway, trustees must coordinate with the On-Scene Coordinator (OSC), consistent with the NCP, to ensure that emergency restoration actions will not interfere with or duplicate ongoing response actions. Emergency restoration may not address residual oil unless:

(1) The OSC's response is complete; or

(2) The OSC has determined that the residual oil identified by the trustee as part of a proposed emergency restoration action does not merit further response.

(c) Trustees must provide notice to identified responsible parties of any emergency restoration actions and, to the extent time permits, invite their participation in the conduct of those actions as provided in § 990.14(c) of this part.

(d) Trustees must provide notice to the public, to the extent practicable, of these planned emergency restoration actions. Trustees must also provide public notice of the justification for, nature and extent of, and results of emergency restoration actions within a reasonable time frame after completion of such actions. The means by

which this notice is provided is left to the discretion of the trustee.

[61 FR 500, Jan. 5, 1996, as amended at 67 FR 61492, Oct. 1, 2002]

§ 990.27 Use of assessment procedures.

(a) *Standards for assessment procedures.* Any procedures used pursuant to this part must comply with all of the following standards if they are to be in accordance with this part:

(1) The procedure must be capable of providing assessment information of use in determining the type and scale of restoration appropriate for a particular injury;

(2) The additional cost of a more complex procedure must be reasonably related to the expected increase in the quantity and/or quality of relevant information provided by the more complex procedure; and

(3) The procedure must be reliable and valid for the particular incident.

(b) *Assessment procedures available.* (1) The range of assessment procedures available to trustees includes, but is not limited to:

(i) Procedures conducted in the field;

(ii) Procedures conducted in the laboratory;

(iii) Model-based procedures, including type A procedures identified in 43 CFR part 11, subpart D, and compensation formulas/schedules; and

(iv) Literature-based procedures.

(2) Trustees may use the assessment procedures in paragraph (b)(1) of this section alone, or in any combination, provided that the standards in paragraph (a) of this section are met, and there is no double recovery.

(c) *Selecting assessment procedures.* (1) When selecting assessment procedures, trustees must consider, at a minimum:

(i) The range of procedures available under paragraph (b) of this section;

(ii) The time and cost necessary to implement the procedures;

(iii) The potential nature, degree, and spatial and temporal extent of the injury;

(iv) The potential restoration actions for the injury; and

(v) The relevance and adequacy of information generated by the procedures to meet information requirements of restoration planning.

(2) If a range of assessment procedures providing the same type and quality of information is available, the most cost-effective procedure must be used.

Subpart C—Definitions

§ 990.30 Definitions.

For the purpose of this rule, the term:

Baseline means the condition of the natural resources and services that would have existed had the incident not occurred. Baseline data may be estimated using historical data, reference data, control data, or data on incremental changes (e.g., number of dead animals), alone or in combination, as appropriate.

Cost-effective means the least costly activity among two or more activities that provide the same or a comparable level of benefits, in the judgment of the trustees.

CEQ regulations means the Council on Environmental Quality regulations implementing NEPA, 40 CFR chapter V.

Damages means damages specified in section 1002(b) of OPA (33 U.S.C. 1002(b)), and includes the costs of assessing these damages, as defined in section 1001(5) of OPA (33 U.S.C. 2701(5)).

Discharge means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping, as defined in section 1001(7) of OPA (33 U.S.C. 2701(7)).

Exclusive Economic Zone means the zone established by Presidential Proclamation 5030 of March 10, 1983 (3 CFR, 1984 Comp., p. 22), including the ocean waters of the areas referred to as ''eastern special areas'' in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, as defined in section 1001(8) of OPA (33 U.S.C. 2701(8)).

Exposure means direct or indirect contact with the discharged oil.

Facility means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes:

exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes, as defined in section 1001(9) of OPA (33 U.S.C. 2701(9)).

Fund means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), as defined in section 1001(11) of OPA (33 U.S.C. 2701(11)).

Incident means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone, as defined in section 1001(14) of OPA (33 U.S.C. 2701(14)).

Indian tribe (or tribal) means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe, as defined in section 1001(15) of OPA (33 U.S.C. 2701(15)).

Indirect costs means expenses that are jointly or commonly incurred to produce two or more products or services. In contrast to direct costs, indirect costs are not specifically identifiable with any of the products or services, but are necessary for the organization to function and produce the products or services. An indirect cost rate, developed in accordance with generally accepted accounting principles, may be used to allocate indirect costs to specific assessment and restoration activities. Both direct and indirect costs contribute to the full cost of the assessment and restoration, as provided in this part.

Injury means an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service. Injury incorporates the terms ''destruction,'' ''loss,'' and ''loss of use'' as provided in OPA.

Lead Administrative Trustee(s) (or LAT) means the trustee(s) who is selected by all participating trustees whose natural resources or services are injured by an incident, for the purpose of coordinating natural resource damage assessment activities. The LAT(s) should also facilitate communication between the OSC and other natural resource trustees regarding their activities during the response phase.

Legal costs means the costs of attorney actions performed for the purpose of assessment or developing a restoration plan, in accordance with this part.

(1) When making a determination of the nature of attorneys' actions for purposes of this definition, trustees must consider whether:

(i) The action comprised all or part of an action specified either in this part or in OPA section 1006(c);

(ii) The action was performed prior to, or in the absence of, the filing of ligation by or on behalf of the trustee in question to recover damages; and

(iii) The action was performed by an attorney who was working for or on behalf of the trustee agency, as opposed to a prosecutorial agency.

(2) If all of the criteria in paragraph (1) of this definition are met, the costs associated with attorney's actions are deemed assessment costs. If the criteria are not met, the trustee must explain why the action was not performed for the primary purpose of furthering litigation in order to support a characterization of the action as an assessment action.

(3) Examples of common or routine assessment actions that may be most appropriately performed by trustee attorneys, in accordance with this part, include, but are not limited to:

(i) Providing written and oral advice on the requirements of OPA, this part, and other applicable laws;

(ii) Preparing public notices, including the Notice of Intent to Conduct Restoration Planning issued to responsible parties and the Notice of Availability of Draft Restoration Plans;

(iii) Developing and managing administrative records;

(iv) Preparing binding agreements with potentially responsible parties in

the context of the assessment, including study agreements, funding agreements, and restoration agreements;

(v) Preparing co-trustee cooperative agreements;

(vi) Preparing formal trustee determinations required under this part; and

(vii) Procuring title searches, title insurance, and/or conservation easements when property agreements are part of restoration packages.

NCP means the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan) codified at 40 CFR part 300, which addresses the identification, investigation, study, and response to incidents, as defined in section 1001(19) of OPA (33 U.S.C. 2701(19)).

Natural resource damage assessment (or assessment) means the process of collecting and analyzing information to evaluate the nature and extent of injuries resulting from an incident, and determine the restoration actions needed to bring injured natural resources and services back to baseline and make the environment and public whole for interim losses.

Natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the Exclusive Economic Zone), any state or local government or Indian tribe, or any foreign government, as defined in section 1001(20) of OPA (33 U.S.C. 2701(20)).

Navigable waters means the waters of the United States, including the territorial sea, as defined in section 1001(21) of OPA (33 U.S.C. 2701(21)).

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*

Oil means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil. However, the term does not include petroleum, including crude oil or any fraction thereof, that is specifically listed or designated as a hazardous substance under 42 U.S.C. 9601(14)(A) through (F), as defined in section 1001(23) of OPA (33 U.S.C. 2701(23)).

On-Scene Coordinator (or OSC) means the official designated by the U.S. Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct response actions under the NCP, or the government official designated by the lead response agency to coordinate and direct response actions under the NCP.

OPA means the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*

Pathway means any link that connects the incident to a natural resource and/or service, and is associated with an actual discharge of oil.

Person means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body, as defined in section 1001(27) of OPA (33 U.S.C. 2701(27)).

Public vessel means a vessel owned or bareboat chartered and operated by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce, as defined in section 1001(29) of OPA (33 U.S.C. 2701(29)).

Reasonable assessment costs means, for assessments conducted under this part, assessment costs that are incurred by trustees in accordance with this part. In cases where assessment costs are incurred but trustees do not pursue restoration, trustees may recover their reasonable assessment costs provided they have determined that assessment actions undertaken were premised on the likelihood of injury and need for restoration. Reasonable assessment costs also include: administrative costs, legal costs, and other costs necessary to carry out this part; monitoring and oversight costs; costs associated with public participation; and indirect costs that are necessary to carry out this part.

Recovery means the return of injured natural resources and services to baseline.

Response (or *remove* or *removal*) means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines,

and beaches, as defined in section 1001(30) of OPA (33 U.S.C. 2701(30)).

Responsible party means:

(a) *Vessels.* In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(b) *Onshore facilities.* In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a federal agency, state, municipality, commission, or political subdivision of a state, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(c) *Offshore facilities.* In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable state law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301–1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a federal agency, state, municipality, commission, or political subdivision of a state, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(d) *Deepwater ports.* In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501–1524), the licensee.

(e) *Pipelines.* In the case of a pipeline, any person owning or operating the pipeline.

(f) *Abandonment.* In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility, as defined in section 1001(32) of OPA (33 U.S.C. 2701(32)).

Restoration means any action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services. Restoration includes:

(a) *Primary restoration,* which is any action, including natural recovery, that returns injured natural resources and services to baseline; and

(b) *Compensatory restoration,* which is any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.

Services (or *natural resource services*) means the functions performed by a natural resource for the benefit of another natural resource and/or the public.

Trustees (or *natural resource trustees*) means those officials of the federal and state governments, of Indian tribes, and of foreign governments, designated under 33 U.S.C. 2706(b) of OPA.

United States and *State* means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States, as defined in section 1001(36) of OPA (33 U.S.C. 2701(36)).

Value means the maximum amount of goods, services, or money an individual is willing to give up to obtain a specific good or service, or the minimum amount of goods, services, or money an individual is willing to accept to forgo a specific good or service. The total value of a natural resource or service includes the value individuals derive from direct use of the natural resource, for example, swimming, boating, hunting, or birdwatching, as well as the value individuals derive from knowing a natural resource will be available for future generations.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel, as defined in section 1001(37) of OPA (33 U.S.C. 2701(37)).

[61 FR 500, Jan. 5, 1996, as amended at 67 FR 61493, Oct. 1, 2002]

Subpart D—Preassessment Phase

§ 990.40 Purpose.

The purpose of this subpart is to provide a process by which trustees determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so.

§ 990.41 Determination of jurisdiction.

(a) *Determination of jurisdiction.* Upon learning of an incident, trustees must determine whether there is jurisdiction to pursue restoration under OPA. To make this determination, trustees must decide if:

(1) An incident has occurred, as defined in § 990.30 of this part;

(2) The incident is not:

(i) Permitted under a permit issued under federal, state, or local law; or

(ii) From a public vessel; or

(iii) From an onshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. 1651, *et seq.*; and

(3) Natural resources under the trusteeship of the trustee may have been, or may be, injured as a result of the incident.

(b) *Proceeding with preassessment.* If the conditions listed in paragraph (a) of this section are met, trustees may proceed under this part. If one of the conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. Trustees may recover all reasonable assessment costs incurred up to this point provided that conditions in paragraphs (a)(1) and (a)(2) of this section were met and actions were taken with the reasonable belief that natural resources or services under their trusteeship might have been injured as a result of the incident.

§ 990.42 Determination to conduct restoration planning.

(a) *Determination on restoration planning.* If trustees determine that there is jurisdiction to pursue restoration under OPA, trustees must determine whether:

(1) Injuries have resulted, or are likely to result, from the incident;

(2) Response actions have not adequately addressed, or are not expected to address, the injuries resulting from the incident; and

(3) Feasible primary and/or compensatory restoration actions exist to address the potential injuries.

(b) *Proceeding with preassessment.* If the conditions listed in paragraph (a) of this section are met, trustees may proceed under § 990.44 of this part. If one of these conditions is not met, trustees may not take additional action under this part, except action to finalize this determination. However, trustees may recover all reasonable assessment costs incurred up to this point.

§ 990.43 Data collection.

Trustees may conduct data collection and analyses that are reasonably related to Preassessment Phase activities. Data collection and analysis during the Preassessment Phase must be coordinated with response actions such that collection and analysis does not interfere with response actions. Trustees may collect and analyze the following types of data during the Preassessment Phase:

(a) Data reasonably expected to be necessary to make a determination of jurisdiction under § 990.41 of this part, or a determination to conduct restoration planning under § 990.42 of this part;

(b) Ephemeral data; and

(c) Information needed to design or implement anticipated assessment procedures under subpart E of this part.

§ 990.44 Notice of Intent to Conduct Restoration Planning.

(a) *General.* If trustees determine that all the conditions under § 990.42(a) of this part are met and trustees decide to proceed with the natural resource damage assessment, they must prepare a Notice of Intent to Conduct Restoration Planning.

(b) *Contents of the notice.* The Notice of Intent to Conduct Restoration Planning must include a discussion of the trustees' analyses under §§ 990.41 and 990.42 of this part. Depending on information available at this point, the notice may include the trustees' proposed strategy to assess injury and determine the type and scale of restoration. The contents of a notice may vary, but will typically discuss:

(1) The facts of the incident;

(2) Trustee authority to proceed with the assessment;

(3) Natural resources and services that are, or are likely to be, injured as a result of the incident;

(4) Potential restoration actions relevant to the expected injuries; and

(5) If determined at the time, potential assessment procedures to evaluate the injuries and define the appropriate type and scale of restoration for the injured natural resources and services.

(c) *Public availability of the notice.* Trustees must make a copy of the Notice of Intent to Conduct Restoration Planning publicly available. The means by which the notice is made publicly available and whether public comments are solicited on the notice will depend on the nature and extent of the incident and various information requirements, and is left to the discretion of the trustees.

(d) *Delivery of the notice to the responsible parties.* Trustees must send a copy of the notice to the responsible parties, to the extent known, in such a way as will establish the date of receipt, and invite responsible parties' participation in the conduct of restoration planning. Consistent with §990.14(c) of this part, the determination of the timing, nature, and extent of responsible party participation will be determined by the trustees on an incident-specific basis.

§ 990.45 Administrative record.

(a) If trustees decide to proceed with restoration planning, they must open a publicly available administrative record to document the basis for their decisions pertaining to restoration. The administrative record should be opened concurrently with the publication of the Notice of Intent to Conduct Restoration Planning. Depending on the nature and extent of the incident and assessment, the administrative record should include documents relied upon during the assessment, such as:

(1) Any notice, draft and final restoration plans, and public comments;

(2) Any relevant data, investigation reports, scientific studies, work plans, quality assurance plans, and literature; and

(3) Any agreements, not otherwise privileged, among the participating trustees or with the responsible parties.

(b) Federal trustees should maintain the administrative record in a manner consistent with the Administrative Procedure Act, 5 U.S.C. 551–59, 701–06.

Subpart E—Restoration Planning Phase

§ 990.50 Purpose.

The purpose of this subpart is to provide a process by which trustees evaluate and quantify potential injuries (injury assessment), and use that information to determine the need for and scale of restoration actions (restoration selection).

§ 990.51 Injury assessment—injury determination.

(a) *General.* After issuing a Notice of Intent to Conduct Restoration Planning under §990.44 of this part, trustees must determine if injuries to natural resources and/or services have resulted from the incident.

(b) *Determining injury.* To make the determination of injury, trustees must evaluate if:

(1) The definition of injury has been met, as defined in §990.30 of this part; and

(2)(i) An injured natural resource has been exposed to the discharged oil, and a pathway can be established from the discharge to the exposed natural resource; or

(ii) An injury to a natural resource or impairment of a natural resource service has occurred as a result of response actions or a substantial threat of a discharge of oil.

(c) *Identifying injury.* Trustees must determine whether an injury has occurred and, if so, identify the nature of the injury. Potential categories of injury include, but are not limited to, adverse changes in: survival, growth, and reproduction; health, physiology and biological condition; behavior; community composition; ecological processes and functions; physical and chemical habitat quality or structure; and public services.

(d) *Establishing exposure and pathway.* Except for injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil,

trustees must establish whether natural resources were exposed, either directly or indirectly, to the discharged oil from the incident, and estimate the amount or concentration and spatial and temporal extent of the exposure. Trustees must also determine whether there is a pathway linking the incident to the injuries. Pathways may include, but are not limited to, the sequence of events by which the discharged oil was transported from the incident and either came into direct physical contact with a natural resource, or caused an indirect injury.

(e) *Injuries resulting from response actions or incidents involving a substantial threat of a discharge.* For injuries resulting from response actions or incidents involving a substantial threat of a discharge of oil, trustees must determine whether an injury or an impairment of a natural resource service has occurred as a result of the incident.

(f) *Selection of injuries to include in the assessment.* When selecting potential injuries to assess, trustees should consider factors such as:

(1) The natural resources and services of concern;

(2) The procedures available to evaluate and quantify injury, and associated time and cost requirements;

(3) The evidence indicating exposure;

(4) The pathway from the incident to the natural resource and/or service of concern;

(5) The adverse change or impairment that constitutes injury;

(6) The evidence indicating injury;

(7) The mechanism by which injury occurred;

(8) The potential degree, and spatial and temporal extent of the injury;

(9) The potential natural recovery period; and

(10) The kinds of primary and/or compensatory restoration actions that are feasible.

§ 990.52 Injury assessment—quantification.

(a) *General.* In addition to determining whether injuries have resulted from the incident, trustees must quantify the degree, and spatial and temporal extent of such injuries relative to baseline.

(b) *Quantification approaches.* Trustees may quantify injuries in terms of:

(1) The degree, and spatial and temporal extent of the injury to a natural resource;

(2) The degree, and spatial and temporal extent of injury to a natural resource, with subsequent translation of that adverse change to a reduction in services provided by the natural resource; or

(3) The amount of services lost as a result of the incident.

(c) *Natural recovery.* To quantify injury, trustees must estimate, quantitatively or qualitatively, the time for natural recovery without restoration, but including any response actions. The analysis of natural recovery may consider such factors as:

(1) The nature, degree, and spatial and temporal extent of injury;

(2) The sensitivity and vulnerability of the injured natural resource and/or service;

(3) The reproductive and recruitment potential;

(4) The resistance and resilience (stability) of the affected environment;

(5) The natural variability; and

(6) The physical/chemical processes of the affected environment.

§ 990.53 Restoration selection—developing restoration alternatives.

(a) *General.* (1) If the information on injury determination and quantification under §§ 990.51 and 990.52 of this part and its relevance to restoration justify restoration, trustees may proceed with the Restoration Planning Phase. Otherwise, trustees may not take additional action under this part. However, trustees may recover all reasonable assessment costs incurred up to this point.

(2) Trustees must consider a reasonable range of restoration alternatives before selecting their preferred alternative(s). Each restoration alternative is comprised of primary and/or compensatory restoration components that address one or more specific injury(ies) associated with the incident. Each alternative must be designed so that, as a package of one or more actions, the

alternative would make the environment and public whole. Only those alternatives considered technically feasible and in accordance with applicable laws, regulations, or permits may be considered further under this part.

(b) *Primary restoration*—(1) *General.* For each alternative, trustees must consider primary restoration actions, including a natural recovery alternative.

(2) *Natural recovery*. Trustees must consider a natural recovery alternative in which no human intervention would be taken to directly restore injured natural resources and services to baseline.

(3) *Active primary restoration actions.* Trustees must consider an alternative comprised of actions to directly restore the natural resources and services to baseline on an accelerated time frame. When identifying such active primary restoration actions, trustees may consider actions that:

(i) Address conditions that would prevent or limit the effectiveness of any restoration action;

(ii) May be necessary to return the physical, chemical, and/or biological conditions necessary to allow recovery or restoration of the injured natural resources (e.g., replacing substrate or vegetation, or modifying hydrologic conditions); or

(iii) Return key natural resources and services, and would be an effective approach to achieving or accelerating a return to baseline (e.g., replacing essential species, habitats, or public services that would facilitate the replacement of other, dependent natural resource or service components).

(c) *Compensatory restoration*—(1) *General.* For each alternative, trustees must also consider compensatory restoration actions to compensate for the interim loss of natural resources and services pending recovery.

(2) *Compensatory restoration actions.* To the extent practicable, when evaluating compensatory restoration actions, trustees must consider compensatory restoration actions that provide services of the same type and quality, and of comparable value as those injured. If, in the judgment of the trustees, compensatory actions of the same type and quality and comparable value cannot provide a reasonable range of alternatives, trustees should identify actions that provide natural resources and services of comparable type and quality as those provided by the injured natural resources. Where the injured and replacement natural resources and services are not of comparable value, the scaling process will involve valuation of lost and replacement services.

(d) *Scaling restoration actions*—(1) *General.* After trustees have identified the types of restoration actions that will be considered, they must determine the scale of those actions that will make the environment and public whole. For primary restoration actions, scaling generally applies to actions involving replacement and/or acquisition of equivalent of natural resources and/or services.

(2) *Resource-to-resource and service-to-service scaling approaches.* When determining the scale of restoration actions that provide natural resources and/or services of the same type and quality, and of comparable value as those lost, trustees must consider the use of a resource-to-resource or service-to-service scaling approach. Under this approach, trustees determine the scale of restoration actions that will provide natural resources and/or services equal in quantity to those lost.

(3) *Valuation scaling approach*. (i) Where trustees have determined that neither resource-to-resource nor service-to-service scaling is appropriate, trustees may use the valuation scaling approach. Under the valuation scaling approach, trustees determine the amount of natural resources and/or services that must be provided to produce the same value lost to the public. Trustees must explicitly measure the value of injured natural resources and/or services, and then determine the scale of the restoration action necessary to produce natural resources and/or services of equivalent value to the public.

(ii) If, in the judgment of the trustees, valuation of the lost services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time frame or at a reasonable cost, as determined by § 990.27(a)(2)

of this part, trustees may estimate the dollar value of the lost services and select the scale of the restoration action that has a cost equivalent to the lost value. The responsible parties may request that trustees value the natural resources and services provided by the restoration action following the process described in § 990.14(c) of this part.

(4) *Discounting and uncertainty.* When scaling a restoration action, trustees must evaluate the uncertainties associated with the projected consequences of the restoration action, and must discount all service quantities and/or values to the date the demand is presented to the responsible parties. Where feasible, trustees should use risk-adjusted measures of losses due to injury and of gains from the restoration action, in conjunction with a riskless discount rate representing the consumer rate of time preference. If the streams of losses and gains cannot be adequately adjusted for risks, then trustees may use a discount rate that incorporates a suitable risk adjustment to the riskless rate.

[61 FR 500, Jan. 5, 1996, as amended at 67 FR 61493, Oct. 1, 2002]

§ 990.54 Restoration selection—evaluation of alternatives.

(a) *Evaluation standards.* Once trustees have developed a reasonable range of restoration alternatives under § 990.53 of this part, they must evaluate the proposed alternatives based on, at a minimum:

(1) The cost to carry out the alternative;

(2) The extent to which each alternative is expected to meet the trustees' goals and objectives in returning the injured natural resources and services to baseline and/or compensating for interim losses;

(3) The likelihood of success of each alternative;

(4) The extent to which each alternative will prevent future injury as a result of the incident, and avoid collateral injury as a result of implementing the alternative;

(5) The extent to which each alternative benefits more than one natural resource and/or service; and

(6) The effect of each alternative on public health and safety.

(b) *Preferred restoration alternatives.* Based on an evaluation of the factors under paragraph (a) of this section, trustees must select a preferred restoration alternative(s). If the trustees conclude that two or more alternatives are equally preferable based on these factors, the trustees must select the most cost-effective alternative.

(c) *Pilot projects.* Where additional information is needed to identify and evaluate the feasibility and likelihood of success of restoration alternatives, trustees may implement restoration pilot projects. Pilot projects should only be undertaken when, in the judgment of the trustees, these projects are likely to provide the information, described in paragraph (a) of this section, at a reasonable cost and in a reasonable time frame.

§ 990.55 Restoration selection—developing restoration plans.

(a) *General.* OPA requires that damages be based upon a plan developed with opportunity for public review and comment. To meet this requirement, trustees must, at a minimum, develop a Draft and Final Restoration Plan, with an opportunity for public review of and comment on the draft plan.

(b) *Draft Restoration Plan.* (1) The Draft Restoration Plan should include:

(i) A summary of injury assessment procedures used;

(ii) A description of the nature, degree, and spatial and temporal extent of injuries resulting from the incident;

(iii) The goals and objectives of restoration;

(iv) The range of restoration alternatives considered, and a discussion of how such alternatives were developed under § 990.53 of this part, and evaluated under § 990.54 of this part;

(v) Identification of the trustees' tentative preferred alternative(s);

(vi) A description of past and proposed involvement of the responsible parties in the assessment; and

(vii) A description of monitoring for documenting restoration effectiveness, including performance criteria that will be used to determine the success of restoration or need for interim corrective action.

(2) When developing the Draft Restoration Plan, trustees must establish

restoration objectives that are specific to the injuries. These objectives should clearly specify the desired outcome, and the performance criteria by which successful restoration will be judged. Performance criteria may include structural, functional, temporal, and/or other demonstrable factors. Trustees must, at a minimum, determine what criteria will:

(i) Constitute success, such that responsible parties are relieved of responsibility for further restoration actions; or

(ii) Necessitate corrective actions in order to comply with the terms of a restoration plan or settlement agreement.

(3) The monitoring component to the Draft Restoration Plan should address such factors as duration and frequency of monitoring needed to gauge progress and success, level of sampling needed to detect success or the need for corrective action, and whether monitoring of a reference or control site is needed to determine progress and success. Reasonable monitoring and oversight costs cover those activities necessary to gauge the progress, performance, and success of the restoration actions developed under the plan.

(c) *Public review and comment.* The nature of public review and comment on the Draft and Final Restoration Plans will depend on the nature of the incident and any applicable federal trustee NEPA requirements, as described in §§ 990.14(d) and 990.23 of this part.

(d) *Final Restoration Plan.* Trustees must develop a Final Restoration Plan that includes the information specified in paragraph (a) of this section, responses to public comments, if applicable, and an indication of any changes made to the Draft Restoration Plan.

§ 990.56 Restoration selection—use of a Regional Restoration Plan or existing restoration project.

(a) *General.* Trustees may consider using a Regional Restoration Plan or existing restoration project where such a plan or project is determined to be the preferred alternative among a range of feasible restoration alternatives for an incident, as determined under § 990.54 of this part. Such plans or projects must be capable of fulfilling OPA's intent for the trustees to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and services and compensate for interim losses.

(b) *Existing plans or projects*—(1) *Considerations.* Trustees may select a component of a Regional Restoration Plan or an existing restoration project as the preferred alternative, provided that the plan or project:

(i) Was developed with public review and comment or is subject to public review and comment under this part;

(ii) Will adequately compensate the environment and public for injuries resulting from the incident;

(iii) Addresses, and is currently relevant to, the same or comparable natural resources and services as those identified as having been injured; and

(iv) Allows for reasonable scaling relative to the incident.

(2) *Demand.* (i) If the conditions of paragraph (b)(1) of this section are met, the trustees must invite the responsible parties to implement that component of the Regional Restoration Plan or existing restoration project, or advance to the trustees the trustees' reasonable estimate of the cost of implementing that component of the Regional Restoration Plan or existing restoration project.

(ii) If the conditions of paragraph (b)(1) of this section are met, but the trustees determine that the scale of the existing plan or project is greater than the scale of compensation required by the incident, trustees may only request funding from the responsible parties equivalent to the scale of the restoration determined to be appropriate for the incident of concern. Trustees may pool such partial recoveries until adequate funding is available to successfully implement the existing plan or project.

(3) *Notice of Intent To Use a Regional Restoration Plan or Existing Restoration Project.* If trustees intend to use an appropriate component of a Regional Restoration Plan or existing restoration project, they must prepare a Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project. Trustees must make a copy of the notice publicly available. The notice must include, at a minimum:

(i) A description of the nature, degree, and spatial and temporal extent of injuries; and

(ii) A description of the relevant component of the Regional Restoration Plan or existing restoration project; and

(iii) An explanation of how the conditions set forth in paragraph (b)(1) of this section are met.

Subpart F—Restoration Implementation Phase

§ 990.60 Purpose.

The purpose of this subpart is to provide a process for implementing restoration.

§ 990.61 Administrative record.

(a) *Closing the administrative record for restoration planning.* Within a reasonable time after the trustees have completed restoration planning, as provided in §§ 990.55 and 990.56 of this part, they must close the administrative record. Trustees may not add documents to the administrative record once it is closed, except where such documents:

(1) Are offered by interested parties that did not receive actual or constructive notice of the Draft Restoration Plan and the opportunity to comment on the plan;

(2) Do not duplicate information already contained in the administrative record; and

(3) Raise significant issues regarding the Final Restoration Plan.

(b) *Opening an administrative record for restoration implementation.* Trustees may open an administrative record for implementation of restoration, as provided in § 990.45 of this part. The costs associated with the administrative record are part of the costs of restoration. Ordinarily, the administrative record for implementation of restoration should document, at a minimum, all Restoration Implementation Phase decisions, actions, and expenditures, including any modifications made to the Final Restoration Plan.

§ 990.62 Presenting a demand.

(a) *General.* After closing the administrative record for restoration planning, trustees must present a written demand to the responsible parties. Delivery of the demand should be made in a manner that establishes the date of receipt by the responsible parties.

(b) *When a Final Restoration Plan has been developed.* Except as provided in paragraph (c) of this section and in § 990.14(c) of this part, the demand must invite the responsible parties to either:

(1) Implement the Final Restoration Plan subject to trustee oversight and reimburse the trustees for their assessment and oversight costs; or

(2) Advance to the trustees a specified sum representing all trustee direct and indirect costs of assessment and restoration, discounted as provided in § 990.63(a) of this part.

(c) *Regional Restoration Plan or existing restoration project.* When the trustees use a Regional Restoration Plan or an existing restoration project under § 990.56 of this part, the demand will invite the responsible parties to implement a component of a Regional Restoration Plan or existing restoration project, or advance the trustees' estimate of damages based on the scale of the restoration determined to be appropriate for the incident of concern, which may be the entire project or a portion thereof.

(d) *Response to demand.* The responsible parties must respond within ninety (90) calendar days in writing by paying or providing binding assurance they will reimburse trustees' assessment costs and implement the plan or pay assessment costs and the trustees' estimate of the costs of implementation.

(e) *Additional contents of demand.* The demand must also include:

(1) Identification of the incident from which the claim arises;

(2) Identification of the trustee(s) asserting the claim and a statement of the statutory basis for trusteeship;

(3) A brief description of the injuries for which the claim is being brought;

(4) An index to the administrative record;

(5) The Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project; and

(6) A request for reimbursement of:

(i) Reasonable assessment costs, as defined in § 990.30 of this part and discounted as provided in § 990.63(b) of this part;

(ii) The cost, if any, of conducting emergency restoration under § 990.26 of this part, discounted as provided in § 990.63(b) of this part; and

(iii) Interest on the amounts recoverable, as provided in section 1005 of OPA (33 U.S.C. 2705), which allows for prejudgment and post-judgment interest to be paid at a commercial paper rate, starting from thirty (30) calendar days from the date a demand is presented until the date the claim is paid.

(f) *Cost accounting procedures.* Trustees must use methods consistent with generally accepted accounting principles and the requirements of § 990.27 of this part in determining past assessment and restoration costs incurred by trustees. When cost accounting for these costs, trustees must compound these costs using the guidance in § 990.63(b) of this part.

(g) *Cost estimating procedures.* Trustees must use methods consistent with generally accepted cost estimating principles and meet the standards of § 990.27 of this part in estimating future costs that will be incurred to implement a restoration plan. Trustees also must apply discounting methodologies in estimating costs using the guidance in § 990.63(a) of this part.

[61 FR 500, Jan. 5, 1996, as amended at 67 FR 61493, Oct. 1, 2002]

§ 990.63 Discounting and compounding.

(a) *Estimated future restoration costs.* When determining estimated future costs of implementing a Final Restoration Plan, trustees must discount such future costs back to the date the demand is presented. Trustees may use a discount rate that represents the yield on recoveries available to trustees. The price indices used to project future inflation should reflect the major components of the restoration costs.

(b) *Past assessment and emergency restoration costs.* When calculating the present value of assessment and emergency restoration costs already incurred, trustees must compound the costs forward to the date the demand is presented. To perform the compounding, trustees may use the actual U.S. Treasury borrowing rate on marketable securities of comparable maturity to the period of analysis. For costs incurred by state or tribal trustees, trustees may compound using parallel state or tribal borrowing rates.

(c) Trustees are referred to Appendices B and C of OMB Circular A–94 for information about U.S. Treasury rates of various maturities and guidance in calculation procedures. Copies of Appendix C, which is regularly updated, and of the Circular are available from the OMB Publications Office (202–395–7332).

§ 990.64 Unsatisfied demands.

(a) If the responsible parties do not agree to the demand within ninety (90) calendar days after trustees present the demand, the trustees may either file a judicial action for damages or present the uncompensated claim for damages to the Oil Spill Liability Trust Fund, as provided in section 1012(a)(4) of OPA (33 U.S.C. 2712(a)(4)) or seek an appropriation from the Oil Spill Liability Trust Fund as provided in section 1012(a)(2) of OPA (33 U.S.C. 2712(a)(2)).

(b) Judicial actions and claims must be filed within three (3) years after the Final Restoration Plan or Notice of Intent to Use a Regional Restoration Plan or Existing Restoration Project is made publicly available, in accordance with 33 U.S.C. 2717(f)(1)(B) and 2712(h)(2).

[61 FR 500, Jan. 5, 1996, as amended at 67 FR 61493, Oct. 1, 2002]

§ 990.65 Opening an account for recovered damages.

(a) *General.* Sums recovered by trustees in satisfaction of a natural resource damage claim must be placed in a revolving trust account. Sums recovered for past assessment costs and emergency restoration costs may be used to reimburse the trustees. All other sums must be used to implement the Final Restoration Plan or all or an appropriate component of a Regional Restoration Plan or an existing restoration project.

(b) *Joint trustee recoveries*—(1) *General.* Trustees may establish a joint account for damages recovered pursuant to

joint assessment activities, such as an account under the registry of the applicable federal court.

(2) *Management.* Trustees may develop enforceable agreements to govern management of joint accounts, including agreed-upon criteria and procedures, and personnel for authorizing expenditures out of such joint accounts.

(c) *Interest-bearing accounts.* Trustees may place recoveries in interest-bearing revolving trust accounts, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)). Interest earned on such accounts may only be used for restoration.

(d) *Escrow accounts.* Trustees may establish escrow accounts or other investment accounts.

(e) *Records.* Trustees must maintain appropriate accounting and reporting procedures to document expenditures from accounts established under this section.

(f) *Oil Spill Liability Trust Fund.* Any sums remaining in an account established under this section that are not used either to reimburse trustees for past assessment and emergency restoration costs or to implement restoration must be deposited in the Oil Spill Liability Trust Fund, as provided by section 1006(f) of OPA (33 U.S.C. 2706(f)).

§ 990.66 Additional considerations.

(a) Upon settlement of a claim, trustees should consider the following actions to facilitate implementation of restoration:

(1) Establish a trustee committee and/or memorandum of understanding or other agreement to coordinate among affected trustees, as provided in § 990.14(a)(3) of this part;

(2) Develop more detailed workplans to implement restoration;

(3) Monitor and oversee restoration; and

(4) Evaluate restoration success and the need for corrective action.

(b) The reasonable costs of such actions are included as restoration costs.

SUBCHAPTER F—QUALITY ASSURANCE AND CERTIFICATION REQUIREMENTS FOR NOAA HYDROGRAPHIC PRODUCTS AND SERVICES

PART 995—CERTIFICATION REQUIREMENTS FOR DISTRIBUTORS OF NOAA HYDROGRAPHIC PRODUCTS

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APPENDIX A TO SUBPART C OF PART 995—CERTIFICATION APPLICATION TEMPLATES

AUTHORITY: 33 U.S.C. 892b(b)(1).

SOURCE: 70 FR 52909, Sept. 6, 2005, unless otherwise noted.

Subpart A—General

§ 995.1 Purpose and scope.

(a) The National Oceanic and Atmospheric Administration (NOAA) produces electronic navigational charts (ENCs) as one of its products under its Nautical Charting Program. According to Federal regulations, official NOAA ENCs® meet nautical chart carriage requirements when used in a type-approved display system, such as an Electronic Chart Display and Information System (ECDIS). NOAA distributes these official ENCs to the public for free over its Web site on the Internet. This Part establishes the requirements by which entities may be certified to download, redistribute, repackage, or in some cases reformat, official NOAA ENCs and retain the NOAA ENC's official status. When a NOAA ENC® retains its official status, it will comply with Federal chart carriage requirements. These requirements for re-distributing NOAA ENC data or incorporating it into value-added navigational products are to ensure the quality and content of official NOAA ENCs remains intact throughout the redistribution process. No other processes result in redistributed NOAA ENC products that comply with Federal chart carriage requirements.

(b) Two types of certification are offered. The first type, ''Certified NOAA ENC Distributor'' (CED), covers NOAA ENC downloading, exact copying, and redistribution of those copies. The second type, ''Certified NOAA ENC Value Added Distributor'' (CEVAD), permits reformatting official NOAA ENCs into a System Electronic Navigational Chart (SENC) using type-approved software, and distribution of that SENC. Both types of certification permit, but do not require, compression, encryption, and packaging with other data. Because NOAA ENC® data is the primary concern of this rule, and it is mandatory for certification that the official NOAA ENCs remain unaltered for positional accuracy and informational content, NOAA is, in effect, certifying that a CED's or CEVAD's products contain official NOAA ENC data, and therefore meets chart carriage requirements.

(c) Any entity may continue to download from an official NOAA ENC® Web site and use NOAA ENCs for any

purpose. As long as it is not redistributed, that ENC will still be considered as official Federal data. If the NOAA ENC is successfully imported unaltered into a type-approved system, it will comply with Federal nautical chart carriage requirements. While without certification anyone can download an official NOAA ENC for any use, if a NOAA ENC® is redistributed by an uncertified entity to another entity, the NOAA ENC is no longer considered as official Federal data and thus does not comply with Federal chart carriage requirements. An example follows.

(1) One example is if an uncertified individual downloads a NOAA ENC and uses it according to Federal requirements, that individual will be meeting Federal chart carriage requirements. If an uncertified tug boat company has 9 boats in its fleet and an individual on one of the boats downloads a NOAA ENC and uses it according to Federal requirements that individual will be meeting Federal chart carriage requirements. However, if that same uncertified tug boat company downloads a NOAA ENC and redistributes it to its 9 boats, the NOAA ENC will not be considered official Federal data and therefore the 9 boats will not be meeting Federal carriage requirements. The company should become a CED or CEVAD under this part in order to be able to redistribute NOAA ENC's and retain the official status of those ENC's.

(2) To reiterate, NOAA ENCs must not be redistributed by an uncertified entity if the end output needs to have official NOAA ENCs in it that will comply with Federal carriage requirements. Any company, entity or individual must be certified if the goal is to redistribute NOAA ENCs and have those NOAA ENCs remain as official Federal data and as such continue to meet Federal carriage requirements administered by the Coast Guard.

§995.2 Incorporation by reference.

Certain material listed in this section is incorporated by reference with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. The materials listed in this section are incorporated by reference in the corresponding sections noted. The materials are available for purchase at the corresponding addresses noted below, and all are available for inspection at the National Archives and Records Administration (NARA) or at the U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(a) The material listed below is available for purchase from the International Hydrographic Bureau, 4 quai Antoine 1er, B.P. 445, MC 98011 MONACO CEDEX; telephone: (377) 93.10.81.00; fax: (377) 93.10.81.40; e-mail: *info@ihb.mc*. Orders may be submitted by letter, fax, or e-mail.

(1) IHO Technical Resolution A3.11—''ENC/SENC Distribution Option'', as published in the ''Resolutions of the International Hydrographic Organization'' updated June 2005, incorporation by reference approved for §995.26.

(2) [Reserved]

(b) [Reserved]

§995.3 Availability of other publications.

(a) For further guidance you may obtain the following:

(1) IEC 61174—The International Electrotechnical Commission identified and described the necessary performance tests and checks for an International Maritime Organization (IMO) compliant ECDIS. The IMO Performance Standards permit National Maritime Safety Administrations to consider ECDIS as the functional equivalent to charts required by Regulation V, Chapter 20 of the 1974 SOLAS Convention. IEC Publication 61174, dated August 1998, can be purchased from the IEC Web site: *http://www.iec.ch*.

(2) IHO Special Publication S57—The IHO Transfer Standard for Hydrographic Data, edition 3.1, dated November 2000, describes the data structure and format to be used for the exchange of ENC data, product specification for the production of ENC data, and an updating profile. IHO S–57 documentation is available for free download at *http://www.iho.shom.fr*. Send written requests

to the International Hydrographic Bureau, 4 quai Antoine 1er, B.P. 445, MC 98011 MONACO CEDEX; telephone: (377) 93.10.81.00; e-mail: *info@ihb.mc*.

(3) IHO Special Publication S58—The IHO Validation Checks for Hydrographic Data, edition 2.0, dated October 2003, describes the validation checks to be used on ENC data. This document was formally published as S–57 Appendix B.1, Annex C, but has been renamed to S–58 due to the S–57 publication having been frozen (*i.e.* will not change) for a fixed time period. IHO S–58 documentation is available for free download at *http://www.iho.shom.fr*. Send written requests to the International Hydrographic Bureau, 4 quai Antoine 1er, B.P. 445, MC 98011 MONACO CEDEX; telephone: (377) 93.10.81.00; e-mail: *info@ihb.mc*.

(b) [Reserved]

§ 995.4 Definitions.

Certified NOAA ENC Distributor (CED) means an entity that is certified as a distributor of NOAA ENC files by NOAA. This certification indicates that the distributor meets certain requirements (in Subparts A, B, and D of this part) that ensure timely and accurate dissemination of NOAA ENC data.

Certified NOAA ENC Value Added Distributor (CEVAD) means an entity that creates a derived product that has been produced from NOAA ENC files using a process certified by NOAA. This certification indicates that the CEVAD meets certain requirements (in Subparts A, C, and D of this part) that ensure timely and accurate dissemination of NOAA ENC data in a non-ENC format.

Derived product means a navigational product produced by transforming the NOAA ENC files to another format while preserving the content and accuracy. It may contain information from other sources.

Distributor means a person or company that redistributes a NOAA ENC to end users in its original format.

Electronic Chart Display and Information System (ECDIS) means the internationally adopted computer-assisted navigation system which, when complying with all of the required specifications, can be accepted as the up-to-date chart required by V/20 of the 1974 SOLAS Convention.

Electronic Navigational Chart (ENC) means a database, standardized as to content, structure, and format, issued for use with ECDIS on the authority of government authorized hydrographic offices. The ENC contains all the chart information necessary for safe navigation and may contain supplementary information in addition to that contained in the paper chart (e.g., sailing directions), which may be considered necessary for safe navigation.

Entity means one person, one person within a company, or one company.

NOAA ENC® means Electronic Navigational Charts produced by the National Oceanic and Atmospheric Administration. NOAA ENC files comply with the IHO S–57 standard, Edition 3.1 and the ENC Product Specification. The phrase ''NOAA ENC'' is a registered trademark and may not be used without permission.

Redistributed means to distribute again, either as a direct copy or in a different way. A redistributed NOAA ENC is one that has been downloaded from an official NOAA ENC Web site by one entity and provided to another entity.

System Electronic Navigational Chart (SENC) means a database resulting from the transformation of the ENC by ECDIS for appropriate use, updates to the ENC by appropriate means and other data added by the mariner. It is this database that is actually accessed by ECDIS for the display generation and other navigational functions, and is equivalent to an up-to-date paper chart. The SENC may also contain information from other sources.

Value Added Distributor means a person or company that redistributes a NOAA ENC with additional data included or in a different format to create newly derived products used by end users.

§ 995.5 Abbreviations.

CED Certified NOAA ENC Distributor
CEVAD Certified NOAA ENC Value Added Distributor
CRC Cyclical Redundancy Checksum
ECDIS Electronic Chart Display and Information System
ENC Electronic Navigational Chart
IEC International Electrotechnical Commission

IHO International Hydrographic Organization
IMO International Maritime Organization
ISO International Organization for Standardization
NOAA National Oceanic and Atmospheric Administration
NOS National Ocean Service
OCS Office of Coast Survey
SENC System Electronic Navigational Chart
SOLAS Safety of Life at Sea
VAD Value Added Distributor

§995.6 Fees.

(a) The Office of Coast Survey, NOAA, may charge a fee for costs incurred to process each request for certification pursuant to 33 U.S.C. 892b(b)(1)(C) and 892b(b)(2). The amount of the fee, if one is charged, will be determined by the Director, Office of Coast Survey, and charged to all Applicants based on the time and effort involved.

(b) If a fee is charged, it will be charged for each application for certification submitted by an Applicant. A fee may also be charged for resubmissions of revised requests that were initially unacceptable and are sent in within 90 days as described in §995.11(b)(2).

§995.7 Liability.

Distributors and value added distributors certified under this part shall indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind, the extent caused by the negligence of certified distributors or value added distributors or their employees, arising out of the use by a distributor or value added distributor, or any party acting on its behalf or under its authorization, of NOAA data.

Subpart B—Certification and Procedures

§995.10 Correspondence and applications.

(a) Distributors or value-added distributors desiring certification from NOAA shall provide a written request and application for certification to the Office of Coast Survey, Attention: Distribution Certification, N/CS, 1315 East West Highway, Silver Spring, Maryland 20910. Such a distributor or value-added distributor is hereafter referred to as Applicant. The Office of Coast Survey (OCS) is the approving office for certification under these requirements.

(b) Applicant shall provide an application for certification that describes how each element in the applicable sections of this part has been met. The application will also contain an acknowledgment, signed by a company principal, of all terms and conditions described in this part.

(c) Applicant shall use the appropriate template provided in Appendix A to subpart C of this part to prepare their request for certification.

(d) Applicant shall provide, with its application, a point of contact with mailing address, phone number, and e-mail address. Applicant shall immediately notify NOAA, through the Office of Coast Survey, of any changes to point of contact information. Failure to do so will be considered a violation of this part and may lead to termination of certification.

§995.11 Government review and approval.

(a) An application will be reviewed by NOAA within 90 days of receipt. If all requirements, as defined by this part, are adequately addressed, certification will be granted. If for any reason NOAA will be unable to process the application for certification within the 90-day time frame, Applicant will be notified and a revised date will be provided for a decision on the request.

(b)(1) NOAA will determine if the request for certification is complete and that it demonstrates that Applicant has met all of the applicable requirements described in this part.

(2) In the event that a request is incomplete or does not demonstrate that Applicant has met all of the applicable requirements, NOAA will consider the application unacceptable. NOAA will notify the Applicant of the deficiencies in writing. Applicant may re-submit a revised application within 90 days of receipt of NOAA's denial notice. NOAA will review applications received within the 90-day resubmission period in the time frame described in paragraph

(a) of this section. After the second review, if the application is still unacceptable, Applicant will be again notified of the deficiencies in writing and the process continues as stated is this section.

§ 995.12 Certification designation.

An Applicant that has been certified by NOAA as a CED may use the phrase ''Certified NOAA ENC Distributor'' on products and marketing materials. An Applicant that has been certified by NOAA as a CEVAD may use the phrase ''Certified NOAA ENC Value Added Distributor'' on products and marketing materials. Use of these phrases must include labeling to identify the product's contents and suitable use. (See § 995.24(a)(4), (5) and (6) and (b)(3), (4) and (5)). Use of the NOAA emblem is described in § 995.28 and is not automatically granted with certification.

§ 995.13 Transfer of certification.

A CED or CEVAD may not transfer its certification to another entity. If it is transferred the existing certification will be terminated.

(a) If prior to certification it is known that another entity will be assisting the entity applying for certification in the production or redistribution of the data, that other entity must be documented in the application process. Listed entities will be considered as falling under the umbrella of the parent company's certification. The name of the entity and its duties should be included as part of the application.

(b) If, subsequent to certification, a CED or CEVAD wishes to add another entity to assist it, a request in writing with the name of the entity and its duties shall be provided to the Office of Coast Survey, NOAA for acceptance. The Office of Coast Survey, NOAA will provide written notification of acceptance to the CED or CEVAD within 30 days of receipt of the request.

§ 995.14 Auditing.

NOAA reserves the right to audit CED or CEVAD to ensure that the certification requirements are being met. Such an audit may consist of: visits to the production facilities, product testing, confirmation of ISO 9001 certification, or confirmation of type approval for conversion software, and so forth.

§ 995.15 Termination of certification.

(a) In the event that NOAA determines that a CED or CEVAD is not meeting the requirements described in this part, the Office of Coast Survey, NOAA (OCS) will provide initial written notification of potential termination to the CED or CEVAD. OCS/NOAA will state in its notification to CED or CEVAD that termination of certification is under consideration.

(b) The initial notification of potential termination will be provided in writing by OCS to the CED or CEVAD, and shall state the reason for the potential termination. Reasons for termination may include, but are not limited to:

(1) CED or CEVAD contracts or in any way seeks to transfer the production or redistribution of all or part of the NOAA official data in the product to another entity.

(2) CED or CEVAD fails to, or is unable (in the opinion of NOAA) to carry out its responsibilities as described in this part.

(c) CED or CEVAD may submit written comments to OCS within 30 days of receipt of the OCS's initial written notification of potential termination, explaining why CED or CEVAD's certification should not be terminated.

(1) The written comments shall be submitted to: Director, Office of Coast Survey, National Ocean Service, NOAA (N/CS), 1315 East West Highway, Silver Spring, MD 20910.

(2) The written comments shall contain at least:

(i) Identification and contact information of the CED or CEVAD;

(ii) A statement that CED or CEVAD is responding to an initial written notification of potential termination by OCS; and

(iii) A thorough but concise argument as to why CED or CEVAD believes that its certification should not be terminated.

(d) The Director of OCS will take all timely written comments into account before taking final action, and in no case will the Director take final action until at least 45 days after CED or

CEVAD's receipt of the initial written notification. A decision to terminate by the Director of OCS will state the reasons for termination and respond to all timely written comments submitted. Any final action taken by OCS constitutes final agency action on the matter.

(e) CED or CEVAD shall notify all recipients of its products that its certification has been revoked, and that the product may no longer be valid for use. In addition, the CED or CEVAD shall provide the dates of non-compliance.

§ 995.16 Term of certification.

The term of certification is five years from the date of issuance. At the end of the certification term, the process must be re-certified by the distributor or value added distributor submitting a request for certification as described in § 995.10. It may also be revoked prior to the end of the term under the conditions described in § 995.15.

Subpart C—Requirements for Certified Distributors and Value Added Distributors of NOAA ENC Products

§ 995.20 General.

The requirements for certification as a ''Certified NOAA ENC Distributor'' (CED) and ''Certified NOAA ENC Value Added Distributor'' (CEVAD) are described in this subpart.

§ 995.21 Registry of data users.

(a) CED or CEVAD shall maintain a registry of customers receiving NOAA ENC data. CED or CEVAD shall provide said registry to NOAA on a biannual basis for internal NOAA planning and product evaluation use. NOAA agrees to treat such information as proprietary (if requested to do so by the CED or CEVAD).

(b)(1) The registry shall include, but not be limited to:

(i) Which NOAA ENC® cells were provided to each customer;

(ii) Edition number of each cell provided;

(iii) Updates provided for each cell;

(iv) Method of distribution for each customer.

(2) The registry may also include information about the type and size of vessel that the NOAA ENC data has been provided for as well as an anonymous unique identifier for the vessel.

§ 995.22 Training of data users.

CED or CEVAD shall provide some form of product training and education materials to the customer to ensure that the end user has a sufficient level of information about the intended use of the derived product and what is needed to properly use it (e.g., requires certain equipment).

§ 995.23 Acquisition of data.

(a) CED or CEVAD shall obtain official NOAA ENC® files only by directly downloading them from an official NOAA ENC site on the Internet.

(b)(1) After downloading NOAA ENC files, CED or CEVAD shall uncompress the files and compute a CRC checksum value for each NOAA ENC file and verify that it matches the CRC checksum value contained in the CATALOG.031 file provided with the NOAA ENC files by NOAA. This is to ensure that no NOAA ENC files have been corrupted during the download process.

(2) In the event that said CRC checksum value does not match that in the CATALOG.031 file, CED or CEVAD agrees to:

(i) Repeat the download process;

(ii) In the event that said CRC checksum value for the repeat download does not match that in the CATALOG.031 file, immediately notify the NOAA ENC Production Manager at *enc.chartproduction@noaa.gov*, and;

(iii) Not redistribute any NOAA ENC that does not have a valid CRC checksum.

§ 995.24 Distribution of data.

(a) *Distribution of data by CEDs*—(1) *Format of redistributed data*—(i) *General.* Except as listed in paragraphs (a)(1)(ii) and (iii) of this section, CED agrees to redistribute NOAA ENC data only in the original form provided by NOAA after uncompressing and shall not change the file format (S–57 Edition 3.1 ENC or other formats specified by NOAA), or contents, or alter the NOAA ENC data in any way.

(ii) *Compression*. The NOAA ENC files may be compressed using a lossless compression technique provided that CED makes the decompression software available to the end user as part of the redistribution service. Decompressed files must have the same CRC checksum value as the original files. The CED agrees to make the compression/decompression software and documentation available to NOAA for testing.

(iii) *Encryption*. The NOAA ENC files may be encrypted by CED, providing that the encryption/decryption process does not result in any information loss and that CED makes the decryption software available to the end user as part of the redistribution service. Decrypted files must have the same CRC checksum value as the original files. CED shall make the encryption/decryption software and documentation available to NOAA for testing.

(2) *Frequency of distribution*. CED shall make all current editions of NOAA ENC files and all updates to or new editions of NOAA ENC files available to its customers within five working days of the files or updates being posted by NOAA. Documentation shall be provided to the customer concerning any time delays that may occur between official release of a NOAA ENC or update, and CED providing same to end users.

(3) *Distribution report*. CED shall provide a bi-annual report on when NOAA ENC files were downloaded and when they were redistributed to end-users.

(4) *Additional data*. (i) If CED provides other data to customers in addition to NOAA ENC data (e.g., ENC data from other nations, raster chart data, privately produced data, etc.), CED shall provide a clear indication to the customer which files are official NOAA ENC data and which files are not. This may be accomplished through means such as package labeling, notifications in software, or other means.

(ii) Additionally, any data that is included with NOAA ENC data must not result in embarrassment to the Department of Commerce or NOAA. There must be no conflict with any trademark rights and the inclusion of non-NOAA data will not constitute any endorsement of or favoritism toward the non-NOAA data or CED.

(5) *Identification of type and contents*. CED shall ensure that NOAA ENC® files provided to an end user are clearly identified as to the type (e.g., direct unaltered copies) and contents (cells, updates, and ancillary files) and authenticity of the exchange set. This may be accomplished through means such as package labeling, notifications in software, or other means.

(6) *Use of product*. CED shall provide a clear indication to the customer the purpose of its products; for example, indicating whether or not the product, and the data contained within it, is suitable for navigation and if it meets Federal chart carriage requirements. If only some of the files meet Federal carriage requirements, CED shall provide clear indication which files do and which files do not. This may be accomplished through means such as package labeling, notifications in software, or other means.

(b) *Distribution of data by CEVADs*—(1) *Frequency of distribution*. CEVAD shall make all current editions of NOAA ENC files and all updates to or new editions of NOAA ENC files available to its customers within five working days of the files or updates being posted by NOAA. Documentation shall be provided to the customer concerning any time delays that may occur between official release of a NOAA ENC or update, and CED providing same to end users.

(2) *Distribution report*. CEVAD shall provide a bi-annual report to NOAA on when NOAA ENC files were downloaded and when they were redistributed or made available to end users.

(3) *Additional data*. (i) If CEVAD provides products to customers that incorporate other data in addition to NOAA ENC data (e.g., ENC data from other nations, raster chart data, privately produced data, etc.), CEVAD shall provide a clear indication in the product which data are from official NOAA ENC data and which data are not. This shall be done in a way that allows the navigation system to give the end user an automatic notification or warning that particular data elements within the product are not from the official NOAA ENC. Any such data shall not

degrade the official NOAA ENC data or information.

(ii) Additionally, any data that is included with NOAA ENC data must not result in embarrassment to the Department of Commerce or NOAA. There must be no conflict with any trademark rights and the inclusion of non-NOAA data will not constitute any endorsement of or favoritism toward the non-NOAA data or CEVAD.

(4) *Identification of type and contents.* CEVAD shall ensure that data provided to an end user clearly identify which NOAA ENC® files are included in the product as to the type (e.g., NOAA ENCs in another form than that provided by NOAA without degradation to positional accuracy or informational content) and the contents (cells, updates, and ancillary files) and authenticity of the NOAA ENC files used. This may be accomplished through means such as package labeling, notifications in software, or other means.

(5) *Use of product.* CEVAD shall provide a clear indication to the customer of the purpose of its products; for example, indicating whether or not the product, and the data contained within it, is suitable for navigation and if it meets Federal chart carriage requirements. If only some of the files meet Federal carriage requirements, CEVAD shall provide clear indication which files do and which files do not. This may be accomplished through means such as package labeling, notifications in software, or other means.

§ 995.25 Quality management system.

(a) *Quality management system for CEVADs.* (1) CEVAD shall operate a quality management system, based on ISO 9001–2000 or equivalent, which embraces all elements of the process used to process and redistribute NOAA ENC files. The minimum requirements for such a quality management system are those defined in this part. The quality management system must ensure that the production process complies with all relevant requirements of this part.

(2) The quality management system must, at a minimum, include an adequate account of:

(i) The quality objectives and the organizational structure, responsibilities, and powers of management with regard to production quality;

(ii) The techniques, processes, and systematic actions that will be used for quality management throughout the production process, including NOAA ENC conversion and the quality of the product being redistributed;

(iii) The examination and tests that will be carried out before, during, and after processes essential for the quality of the product, and the frequency with which they will be carried out;

(iv) The quality records, such as inspection records and test data, qualification reports of personnel concerned resulting from the program specified herein; and

(v) The means for monitoring the achievement of the required quality of the product and the effective operation of the quality management system.

(3) Design and development changes shall be reviewed, verified, and validated as appropriate and approved by the ISO 9001 certification authority (or equivalent if another quality management system is used) before implementation.

(4) If the type approved conversion software is maintained by a third party, CEVAD shall ensure that no changes made to the conversion software render the type approval of the conversion software invalid, and shall evaluate the effects of such changes on the end users of the product.

(5) CEVAD shall analyze both internal information and that received from external parties in order to continually monitor and improve the production process and the product being redistributed.

(6) CEVAD shall ensure that personnel performing work affecting the production process are competent with regard to appropriate education, training, skills, and expertise.

(7) CEVAD shall conduct internal audits at planned intervals to determine whether the quality management system conforms to the requirements of this part and is effectively implemented and maintained. The audit program shall take into consideration the individual processes' importance in relation to the product quality, as well as results of previous audits. Selection of auditors and conducting of audits

shall, as far as practicable, insure objectivity and impartiality in the audit process.

(8) CEVAD shall ensure that actions are taken without undue delay to eliminate detected non-conformities and their causes. Follow-up activities shall include the verification of the actions taken and the reporting of verification results.

(b) [Reserved]

§ 995.26 Conversion of NOAA ENC® files to other formats.

(a) *Conversion of NOAA ENC files to other formats*—(1) *Content*. CEVAD may provide NOAA ENC data in forms other than that provided by NOAA. However, CEVAD shall not change the information content provided by the NOAA ENC. This means that all features and their associated attribution must be preserved in the CEVADs data files without degradation to positional accuracy or informational content.

(2) *Software certification*. Conversion of NOAA ENC data to other formats must be accomplished within the constraints of IHO Technical Resolution A3.11: ''ENC/SENC Distribution Option'' (incorporated by reference, see § 995.2)—in particular, paragraph three:

Distributors who are to supply the SENC service must operate under the regulations of the issuing authority. The onshore ENC to SENC conversion must be performed using type-approved software.

(3) *Error reporting*. Any errors detected during the conversion process shall be logged and investigated prior to releasing the data in which the errors occurred. Any errors that apparently originate in the NOAA ENC files shall be immediately reported to NOAA.

(4) *Format check*. CEVAD shall ensure that the converted data conforms to the CEVAD's own format specifications and shall test load the converted data to ensure that it will correctly load and display on the intended equipment.

(b) [Reserved]

§ 995.27 Format validation software testing.

Tests shall be performed verifying, as far as reasonable and practicable, that CEVAD's data testing software performs the checks, as specified by CEVAD, for verifying that the converted data conforms to its own proprietary product specification. These tests may be combined with testing of the conversion software.

§ 995.28 Use of NOAA emblem.

(a) Permission for the use of the NOAA emblem must be obtained by formally requesting such permission from NOAA and the Department of Commerce through NOAA's Office of Coast Survey.

(b) Use of the NOAA emblem must satisfy an interest of the Department; the use may not result in embarrassment to the Department; there must be no conflict with any trademark rights, as stated in § 995.24(a)(4)(ii) and (b)(3)(ii); and there can be no endorsement or favoritism toward the distributor or value added distributor using the emblem, or other appearance of impropriety.

(c) Certification under this part does not automatically grant the distributor or value added distributor the right to use the NOAA logo. Use of the NOAA logo without express permission from NOAA and the Department of Commerce will be considered grounds for denial of an application for certification or termination of certification.

(d) *Emblem use by certified distributors or certified value added distributors of NOAA electronic products*. (1) After receiving separate, written permission from NOAA and the Department of Commerce as described in paragraph (a) of this section, a CED or CEVAD may use the NOAA emblem in product labeling and advertising materials, but only in conjunction with the phrase ''Certified NOAA ENC Distributor'' or ''Certified NOAA ENC Value Added Distributor,'' as applicable, and only after receiving separate, written permission from NOAA and the Department of Commerce as described in paragraph (d)(2) of this section.

(2) If the NOAA emblem is used with products that include other data, clear indication must be provided to the customer indicating that the emblem and the phrase ''Certified NOAA ENC Distributor'' or ''Certified NOAA ENC Value Added Distributor'' does not apply to the entire product delivered.

Information on the effects of such limitation must be provided to the customer (See §995.24(a)(4) and (5) and (b)(3) and (4).)

§995.29 Limitation on endorsements.

By certifying compliance with this part, NOAA does not automatically, directly, or indirectly endorse any product or service provided, or to be provided, by distributor or value added distributor or its successors, assignees, or licensees. The distributor or value added distributor shall not in any way imply that this certification is an endorsement of any such product or service without separate, written permission from NOAA and the Department of Commerce.

APPENDIX A TO SUBPART C OF PART 995—CERTIFICATION APPLICATION TEMPLATES

Notice to respondents:

This information is being collected by NOAA to ascertain qualifications for certification as an authorized distributor of official NOAA ENC® data. NOAA developed these certification requirements under the authority of Section 104 of the Hydrographic Services Improvement Act Amendments of 2002, 33 U.S.C. 892b(b)(1).

The information on these forms is not associated with performance of agency functions.

Public reporting burden for this collection of information is estimated to average 16 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to *Jim.Gardner@noaa.gov*.

Responses to this collection are considered voluntary, though they are required for certification.

The information requested on these forms will not be disseminated to the public or used to support information that will be disseminated to the public. Any disclosure of propriety information will be held in confidentiality as regulated under the Trade Secrets Act. NOAA will not violate that Act's prohibitions against unauthorized agency disclosures of trade secrets or other confidential business information.

Notwithstanding any other provision of the law, no person is required 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. [OMB Control *#0648–0508* Expires *05/31/2008*]

APPLICATION FOR CERTIFICATION AS "CERTIFIED NOAA ENC DISTRIBUTOR"

Company Name
Company Address
Company Phone Number
Company Fax Number
Company E-Mail Address
Point of Contact
Point of Contact Address
Point of Contact Phone Number
Point of Contact Fax Number
Point of Contact E-Mail Address

This is a request for the above named company or individual (hereinafter referred to as Distributor) to be certified as a "Certified NOAA ENC Distributor" (CED). This document describes how each of the requirements for certification is being met. Descriptive titles after each number in parenthesis on this application correspond to section titles in 15 CFR, chapter IX, Subchapter F, Part 995—Certification requirements for Distributors of NOAA hydrographic products. The numbers after each descriptive title refer to the section number within 15 CFR part 995. The Distributor should use these section numbers to insure that the requirements are being fully understood and met by the Distributor prior to submitting the application.

(1) *Correspondence and applications/requests for certification (995.10 (a))*. Distributor acknowledges and agrees to all procedures and requirements pertaining to the certification process described in 15 CFR part 995.

(2) *Correspondence and applications/point of contact (995.10 (d))*. Distributor agrees to immediately notify the Government of any changes to point of contact information.

(3) *Transfer of certification (995.13)*. Document other entities that will be assisting in the production or redistribution of the derived product. Provide the names and duties of those entities to meet this requirement.

(4) *Auditing (995.14)*. Distributor acknowledges that NOAA reserves the right to audit Distributor to ensure that all requirements in 15 CFR part 995 are being met.

(5) *Termination of certification (995.15)*. Distributor acknowledges the conditions leading to and procedures for the termination of certification as described in this requirement.

(6) *Term of certification (995.16)*. Distributor acknowledges that the duration of certification is five years from the date of issuance.

(7) *Registry of data users (995.21)*. Include a description of the data user registry, including:

(a) What data elements it contains, specifically showing how the required elements are included;

(b) A hardcopy sample of the report that will be periodically submitted to NOAA;

(c) A short description of how the registry is maintained.

(8) *Training of data users (995.22)*. Include a copy of any documentation provided to users that is intended to meet this requirement.

(9) *Acquisition of data (995.23)*. Distributor asserts that all procedures described in this requirement for the acquisition of NOAA ENC® data for redistribution are being followed.

(10) *Distribution of data/general (995.24(a)(1)(i))*. Distributor asserts that all NOAA ENC® data redistributed will be in the format described by this requirement.

(11) *Distribution of data/compression (995.24(a)(1)(ii))*. Distributor shall indicate if data compression techniques are used. If Distributor uses data compression techniques, Distributor asserts that the process meets the necessary regulations described by this requirement.

(12) *Distribution of data/encryption (995.24(a)(1)(iii))*. Distributor shall indicate if data encryption techniques are used. If Distributor uses data encryption techniques, Distributor asserts that the process meets the necessary regulations described by this requirement.

(13) *Distribution of data/frequency of distribution (995.24(a)(2))*. Distributor asserts that any updates will be transmitted to their users within the time constraints described by this requirement.

(14) *Distribution of data/distribution report (995.24(a)(3))*. Distributor shall provide an example of the distribution report described by this requirement.

(15) *Distribution of data/additional data (995.24(a)(4))*. Distributor shall indicate if additional data is to be distributed with the NOAA ENC® data. If so, Distributor shall provide examples of how the data users will be informed as to the official and unofficial contents of the data as described by this requirement.

(16) *Distribution of data/identification of contents (995.24(a)(5))*. Distributor shall provide examples of how the contents of the NOAA ENC® files will be identified to the users.

(17) *Distribution of data/use of product (995.24(a)(6))*. Distributor shall provide examples of how the data users will be informed as to the purpose of its products as described in this requirement.

(18) *Use of NOAA emblem (995.28)*. Distributor acknowledges that a separate request for the use of the NOAA emblem must be submitted according to the procedure described in this requirement.

(19) *Limitation on endorsements (995.29)*. Distributor acknowledges that NOAA does not automatically, directly, or indirectly endorse any product or service provided, or to be provided, by Distributor, its successors, assignees, or licensees. Distributor shall not in any way imply that this certification is an endorsement of any such product or service without separate, written permission.

(20) *Liability (995.7)*. By signing this request for certification, Distributor pledges to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind, the extent caused by the negligence of Distributor or its employees, arising out of the use by the Distributor, or any Party acting on its behalf or under its authorization, of NOAA ENC® data.

Signature of this request constitutes an acknowledgement by Distributor of ALL applicable terms and conditions described in the certification requirements in 15 CFR part 995.

Signed: _____

Title: _____

Date: _____

[OMB Control #*0648–0508* Expires *05/31/2008*]

APPLICATION FOR CERTIFICATION AS ''CERTIFIED NOAA ENC VALUE ADDED DISTRIBUTOR''

Company Name
Company Address
Company Phone Number
Company Fax Number
Company E-Mail Address
Point of Contact
Point of Contact Address
Point of Contact Phone Number
Point of Contact Fax Number
Point of Contact E-Mail Address

This is a request for the above named company (hereinafter referred to as Value Added Distributor) to be certified as a ''Certified NOAA ENC Value Added Distributor'' (CEVAD). This document describes how each of the requirements for certification is being met. Descriptive titles after each number in parenthesis on this application correspond to section titles in 15 CFR, chapter IX, Subchapter F, Part 995—Certification requirements for Distributors of NOAA hydrographic products. The numbers after each descriptive title refer to the section number within 15 CFR, part 995. The Distributor should use these section numbers to insure that the requirements are being fully understood and met by the Distributor prior to submitting the application.

(1) *Correspondence and applications/requests for certification (995.10 (a))*. Distributor acknowledges and agrees to all procedures and requirements pertaining to the certification process described in 15 CFR part 995.

(2) *Correspondence and applications/point of contact (995.10 (d))*. Distributor agrees to immediately notify the Government of any changes to point of contact information.

(3) *Transfer of certification (995.13).* Document other entities that will be assisting in the production or redistribution of the derived product. Provide the names and duties of those entities to meet this requirement.

(4) *Auditing (995.14).* Distributor acknowledges that NOAA reserves the right to audit Distributor to ensure that all requirements in 15 CFR part 995 are being met.

(5) *Termination of certification (995.15).* Distributor acknowledges the conditions leading to and procedures for the termination of certification as described in this requirement.

(6) *Term of certification (995.16).* Distributor acknowledges that the duration of certification is five years from the date of issuance.

(7) *Registry of data users (995.21).* Include a description of the data user registry, including:

(a) What data elements it contains, specifically showing how the required elements are included;

(b) A hardcopy sample of the report that will be periodically submitted to NOAA;

(c) A short description of how the registry is maintained.

(8) *Training of data users (995.22).* Include a copy of any documentation provided to users that is intended to meet this requirement.

(9) *Acquisition of data (995.23).* Distributor asserts that all procedures described in this requirement for the acquisition of NOAA ENC® data for redistribution are being followed.

(10) *Distribution of data/frequency of distribution (995.24(b)(1)).* Value Added Distributor asserts that any updates will be transmitted to their users within the time constraints described by this requirement.

(11) *Distribution of data/distribution report (995.24(b)(2)).* Value Added Distributor shall provide an example of the distribution report described by this requirement.

(12) *Distribution of data/additional data (995.24(b)(3)).* Value Added Distributor shall indicate if additional data is to be distributed with the NOAA ENC data. If so, Value Added Distributor shall provide examples of how the data users will be informed as to the official and unofficial contents of the data as described in this requirement.

(13) *Distribution of data/identification of contents (995.24(b)(4)).* Value Added Distributor shall provide examples of how the contents of the NOAA ENC files will be identified to the users.

(14) *Distribution of data/use of product (995.24(b)(5)).* Distributor shall provide examples of how the data users will be informed as to the purpose of its products as described in this requirement.

(15) *Quality management system (995.25).* Value Added Distributor shall provide a copy of the ISO 9001–2000 certification or certification of compliance with an equivalent program of quality management that covers the processes described in this section of the requirements.

(16) *Conversion of NOAA ENC files to other formats (995.26(a)(1)).* Value Added Distributor asserts that all NOAA ENC® content and accuracy are preserved during the conversion process as described in this section of the requirements.

(17) *Conversion of NOAA ENC files to other formats/software certification (995.26(a)(2)).* Value Added Distributor shall provide a copy of the type approval certificate for the software used to convert the NOAA ENC files to the Value Added Distributor's format.

(18) *Conversion of NOAA ENC files to other formats/error reporting (995.26(a)(3)).* Value Added Distributor asserts that they shall log and report any errors in the NOAA ENC data detected during the conversion process. Value Added Distributor shall provide an example of the report format that they will use.

(19) *Conversion of NOAA ENC files to other formats/format check (995.26(a)(4)).* Value Added Distributor asserts that all data shall be checked for conformance with Value Added Distributor's own format specifications and shall test load the converted data as described in this section of the requirements.

(20) *Format validation software testing (995.27).* The validation software used by Value Added Distributor shall be tested according to this requirement and the results stated in this section of the request for certification.

(21) *Use of NOAA emblem (995.28).* Value Added Distributor acknowledges that a separate request for the use of the NOAA emblem must be submitted according to the procedure described in this requirement.

(22) *Limitation on endorsements (995.29).* Value Added Distributor acknowledges that NOAA does not automatically, directly, or indirectly endorse any product or service provided, or to be provided, by Value Added Distributor, its successors, assignees, or licensees. Value Added Distributor shall not in any way imply that this certification is an endorsement of any such product or service without separate, written permission.

(23) *Liability (995.7).* By signing this request for certification, Value Added Distributor pledges to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind, the extent caused by the negligence of Value Added Distributor or its employees, arising out of the use by the Value Added Distributor, or any party acting on its behalf or under its authorization, of NOAA ENC data.

Signature of this request constitutes an acknowledgement by Value Added Distributor of ALL applicable terms and conditions described in the certification requirements.

Signed: _____

Title: _____

Date: _____

PART 996—QUALITY ASSURANCE AND CERTIFICATION REQUIREMENTS FOR NOAA HYDROGRAPHIC PRODUCTS AND SERVICES

Subpart A—General

Sec.
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996.2 Definitions.
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Subpart B—The Quality Assurance Program for Hydrographic Products

996.10 Submission and selection of hydrographic products for the development of standards and compliance tests.
996.11 Development of standards for a hydrographic product or class.
996.12 Development of standards compliance tests for a hydrographic product or class.
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Subpart C—Certification of a Hydrographic Product and Decertification.

996.20 Submission of a hydrographic product for certification.
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AUTHORITY: 33 U.S.C. 892b.

SOURCE: 70 FR 698, Jan. 5, 2005, unless otherwise noted.

Subpart A—General

§ 996.1 Purpose and scope.

The National Oceanic and Atmospheric Administration (NOAA) was mandated to develop and implement a quality assurance program that is equally available to all applicants, under which the Administrator may certify hydrographic products that satisfy standards promulgated by the Administrator. ''Hydrographic products'' are any publicly or commercially available products produced by a non-Federal entity that include or display hydrographic data. The procedures established here by which hydrographic products are proposed for certification; by which standards and compliance tests are developed, adopted, and applied for those products; and by which certification may be awarded or denied are the mandated Quality Assurance Program. The execution of those procedures for specific hydrographic products is the implementation of the program.

§ 996.2 Definitions.

Agency means the National Oceanic and Atmospheric Administration.

Applicant means a non-Federal entity that is submitting a hydrographic product to the Quality Assurance Program for certification.

Certification means a determination made by NOAA that a hydrographic product submitted by a non-Federal entity has met the requirements established by NOAA for a particular hydrographic product or class.

Department means the Department of Commerce.

Hydrographic data means information acquired through hydrographic or bathymetric surveying, photogrammetry, geodetic, geospatial, or geomagnetic measurements, tide and current observations, or other methods, that is used in providing hydrographic services.

Hydrographic product means any publicly or commercially available product produced by a non-Federal entity that includes or displays hydrographic data.

Hydrographic product class means a group of hydrographic products with similar traits, attributes, purposes, or users.

Hydrographic services means

(1) The management, maintenance, interpretation, certification, and dissemination of bathymetric, hydrographic, geodetic, geospatial, geomagnetic, and tide and current information, including the production of

nautical charts, nautical information databases, and other products derived from hydrographic data;

(2) The development of nautical information systems; and

(3) Related activities.

Quality Assurance Program means a set of procedures by which hydrographic products are proposed for certification; by which standards and compliance tests are developed, and, if suitable, are adopted by NOAA for those products; and by which certification of individual products may be awarded or denied.

Quality Assurance Program implementation means the execution of the Quality Assurance Program procedures for specific hydrographic products.

Sponsor means a non-Federal entity that is submitting a hydrographic product to the Quality Assurance Program for the development of standards and compliance tests.

§996.3 Fees.

NOAA may charge for its Quality Assurance Program activities such sums as may be permitted or required under this Act, or under other statutory authorities. Such sums are non-refundable. NOAA will attempt to identify any such charges upon first submission of a hydrographic product. However, the intent to charge and the amounts may change. NOAA will promptly notify the sponsor of any such changes, and will permit the sponsor to withdraw hydrographic products from consideration under the Quality Assurance Program should they so choose.

§996.4 Liability.

The Government of the United States shall not be liable for any negligence by producers of hydrographic products certified under this part.

Subpart B—The Quality Assurance Program for Hydrographic Products

§996.10 Submission and selection of hydrographic products for the development of standards and compliance tests.

(a) Any non-Federal entity may submit a hydrographic product to be considered for the development of standards and compliance tests under this Quality Assurance Program.

(b) Submission shall be made to the Quality Assurance Program address below, or to such other address as may be indicated in the future: Director (N/CS), ATTN: Hydrographic Product Quality Assurance Program, Office of Coast Survey, NOAA, 1315 East West Highway, Silver Spring, MD 20910.

(c) The submission shall include

(1) Name and description of the proposed hydrographic product.

(2) The non-Federal entity submitting the product for the development of standards and compliance tests, and contact information for that entity. This non-Federal entity shall be known as the sponsor.

(3) The names and contact information of proposed representatives of the affected communities who have committed to participate substantively in the writing of standards and compliance tests. Affected communities might include: manufacturers, users, regulators, resellers, developers of products that use certified hydrographic products such as datasets, and manufacturers of competing or substitute products.

(4) The names and contact information of the standards setting body, and the compliance testing body under whose authority it is proposed that the standards and compliance tests be written and adopted.

(5) Information deemed relevant by the sponsor for NOAA to consider in deciding whether to proceed with the development of standards, compliance tests, and certification. Such information should address at a minimum:

(i) The type and magnitude of the public benefits and enhancement of public safety that would be achieved;

(ii) The breadth of support for standards and certification among all the affected communities;

(iii) The practicality of writing and enforcing an effective and appropriate standard;

(iv) The availability of suitable, similar products that may already meet the needs of the public; and

(v) The required expertise needed to write an appropriate standard.

(d) NOAA may, at its option, define a hydrographic product class of which

the proposed hydrographic product is a specific instance. Standards and compliance tests may then be prepared for the class rather than for an individual non-Federal entity's specific product.

(e) NOAA shall publicize, in the FEDERAL REGISTER or by other appropriate means, the hydrographic product or class in order to solicit comments on the proposal that standards and compliance tests be written and certification be offered for that hydrographic product or class. Comments might include, but are not limited to, general information; statements of interest in participating in the development of standards and compliance tests; or objections to acceptance of the hydrographic product or class into this Quality Assurance Program. Instructions for commenting and the duration of the comment period will be included in the announcement.

(f) NOAA shall decide, if its other obligations permit, within 60 calendar days of the close of the comment period whether to proceed with the development of standards, compliance tests, and certification for the proposed hydrographic product or class. NOAA may request further information, and shall have additional time as required to consider the information once received. NOAA's decision on whether to proceed shall be based on the following criteria:

(1) The magnitude of the public benefit and enhancement of public safety that would be achieved compared to the commitment of federal resources that would be required;

(2) The breadth of support for standards and certification among all the affected communities;

(3) The practicality of writing and enforcing an effective and appropriate standard;

(4) The availability of suitable, similar products that may already meet the needs of the public;

(5) NOAA's expertise related to the expertise needed to write an appropriate standard;

(6) Availability of resources; and

(7) Other relevant criteria as they become apparent.

(g) NOAA's decision as to whether the proposed hydrographic product or class is accepted into the Quality Assurance Program shall be publicly announced in the FEDERAL REGISTER or by other appropriate means, and a written notification shall be provided to the sponsor. The response shall include NOAA's reason for its decision based on the criteria enumerated above.

(h) Any party, including the sponsor, shall have an opportunity to request reconsideration of NOAA's decision. Said request shall be submitted in writing, to the Quality Assurance Program address, postmarked within 30 days of NOAA's announcement of its decision, and shall contain written material supporting the requestor's position. NOAA shall have, if its other obligations permit, 60 calendar days from the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision.

(i) NOAA's decision, either the original decision if unappealed within 30 days, or the decision after the request for reconsideration, shall be considered final.

(j) NOAA itself may choose to identify a hydrographic product or class, which may or may not yet exist, but for which it intends to adopt standards, compliance tests, and to offer certification. In such cases, NOAA will be considered the sponsor. The procedures to be followed for NOAA-sponsored hydrographic products or classes shall be the same as for those sponsored by non-Federal entities, including the procedures for announcement, comment, and reconsideration.

§ 996.11 Development of standards for a hydrographic product or class.

(a) NOAA shall work, to the extent practicable, through existing, recognized, standards bodies in the writing and adopting of standards for a hydrographic product or class that NOAA has accepted into this program. It shall be the responsibility of the sponsor to propose an appropriate standards writing body. NOAA may accept this body at its discretion, or may select an alternate body. NOAA will then undertake, jointly with the sponsor and acknowledged representatives of the affected communities, to submit the proposal for writing standards to, and to

secure the cooperation of, the selected standards writing body.

(b) Once accepted as a work item by the standards writing body, NOAA shall undertake, jointly with representatives of the affected community, members of the standards body, other governmental representatives, and the sponsor as appropriate, to write standards for the hydrographic product or class according to the practices of the standards body and the technical needs of the product. Participation in the writing of standards shall be determined according to the procedures of the standards writing body.

(c) NOAA shall then undertake, jointly with representatives of the affected community, members of the standards body and the body itself, other governmental representatives, and the sponsor as appropriate, to have the resulting standard officially adopted by the standards body according to the procedures of that body.

(d) NOAA may, at its option, proceed without the participation of an existing, recognized, standards body should it so choose. Such action might be taken, for example, if there were no appropriate standards body. In this eventuality, NOAA shall adhere to the following general procedure.

(1) Announce, in the FEDERAL REGISTER or by other appropriate means, NOAA's intention to organize and chair a working group to write and publish standards for the proposed hydrographic product or class;

(2) Solicit, via the FEDERAL REGISTER or by other appropriate means, participation and select, reject, and/or revoke permission to participate as NOAA deems appropriate so as to proceed in an orderly and representative manner in writing a standard;

(3) Initiate, schedule, host, and chair, or designate a chair for, the work of the working group;

(4) Circulate, via the FEDERAL REGISTER or by other appropriate means, the drafts of the working group;

(5) Announce, via the FEDERAL REGISTER or by other appropriate means, the NOAA proposed standard and provide an opportunity for public comment;

(6) Announce, via the FEDERAL REGISTER or by other appropriate means, and make available as a standard, the final version of the standard; and

(7) Provide the necessary administrative support.

(e) NOAA may, at its option, adopt an existing standard as the NOAA standard for this program. In this eventuality, NOAA shall adhere to the following general procedure.

(1) Announce, in the FEDERAL REGISTER or by other appropriate means, NOAA's intention to adopt an existing standard for the proposed hydrographic product or class; and

(2) Solicit, via the FEDERAL REGISTER or by other appropriate means including public meetings, comment on the standard that NOAA proposes to adopt, and shall consider the comments received.

(f) Alternatively, NOAA may at its option, proceed by writing a standard by itself. Such action might be used, for example, in cases where the standard is obvious. Producing exact copies of existing NOAA products might be one such case. Once written, this NOAA-authored standard shall be made publicly available for comment, and comments shall be considered before NOAA publishes the final standard.

(g) At the conclusion of the standards writing, whether through an existing standards body, by a NOAA-convened working group, by adopting an existing standard, or by NOAA itself, NOAA shall consider the resulting standard and comments, and either adopt or reject the standard as the NOAA Quality Assurance Program Standard for the particular hydrographic product or class. NOAA's decision shall be publicly announced in the FEDERAL REGISTER or by other appropriate means.

(h) Any party may request NOAA to reconsider its decision to adopt or reject the standard by submitting its request in writing to the Quality Assurance Program address within 30 days of NOAA's announcement of its decision. NOAA shall have, if its other obligations permit, 60 calendar days from the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision. NOAA's original decision if unappealed within 30 days, or its decision upon reconsideration shall be considered final.

§ 996.12 Development of standards compliance tests for a hydrographic product or class.

(a) NOAA shall work, to the extent practicable, through existing, recognized, compliance testing bodies in the writing and adopting of compliance tests for a hydrographic product or class. It shall be the responsibility of the sponsor to propose an appropriate compliance testing body. NOAA may accept this body at its discretion, or may select an alternate body. NOAA will then undertake, jointly with the sponsor and acknowledged representatives of the affected communities, to secure the cooperation of the selected compliance testing body.

(b) NOAA shall undertake, jointly with representatives of the affected community, members of the compliance testing body, other governmental representatives, and the sponsor as appropriate, to write compliance tests for the hydrographic product or class according to the practices of the compliance testing body and the Quality Assurance Program standard adopted by NOAA. Participation in the writing of compliance tests may be determined according to the procedures of the compliance testing body.

(c) NOAA shall then undertake, jointly with representatives of the affected community, members of the compliance testing body and the body itself, other governmental representatives, and the sponsor as appropriate, to have the resulting compliance tests adopted according to the procedures of that body.

(d) NOAA may, at its option, proceed without the participation of an existing, recognized, compliance testing body should it so choose. Such action might be taken, for example, if there were no appropriate compliance testing body. In this eventuality, NOAA will adhere to the following general procedure:

(1) Announce, in the FEDERAL REGISTER or by other appropriate means, NOAA's intention to organize and chair a working group to write and publish compliance tests for the hydrographic product or class;

(2) Solicit, via the FEDERAL REGISTER or by other appropriate means, participation and select, reject, and/or revoke permission to participate as NOAA deems appropriate so as to proceed in an orderly and representative manner in writing compliance tests;

(3) Initiate, schedule, host, and chair, or designate a chair for, the work of the working group;

(4) Circulate, via the FEDERAL REGISTER, or by other appropriate means, the drafts of the working group;

(5) Announce, via the FEDERAL REGISTER or by other appropriate means, a NOAA proposed final version of the compliance tests and provide an opportunity for public comment;

(6) Announce, via the FEDERAL REGISTER or by other appropriate means, and make available the final version of the compliance tests, and

(7) Provide the necessary administrative support.

(e) NOAA may, at its option, adopt existing compliance tests as the NOAA compliance tests for this program. In this eventuality, NOAA shall adhere to the following general procedure:

(1) Announce, in the FEDERAL REGISTER or by other appropriate means, NOAA's intention to adopt existing compliance tests for the proposed hydrographic product or class; and

(2) Solicit, via the FEDERAL REGISTER or by other appropriate means including public meetings, comment on the proposed compliance tests that NOAA proposes to adopt, and shall consider the comments received.

(f) Alternatively, NOAA may, at its option, proceed by writing compliance tests by itself. Such action might be used, for example, in cases where the tests are obvious. Producing exact copies of existing NOAA products might be one such case. Once written, these NOAA-authored tests shall be made publicly available for comment, and comments shall be considered before NOAA publishes the final compliance tests.

(g) At the conclusion of the compliance test writing, whether through an existing body, by a NOAA-convened working group, by adopting existing compliance tests, or by NOAA itself, NOAA shall consider the resulting compliance tests and comments, and either adopt or reject them as the NOAA Quality Assurance Program

compliance tests for the particular hydrographic product standard. NOAA's decision shall be publicly announced in the FEDERAL REGISTER or by other appropriate means.

(h) Any party may request NOAA to reconsider its decision to adopt or reject the compliance tests by submitting its request in writing to the Quality Assurance Program address within 30 days of NOAA's announcement of its decision. NOAA shall have, if its other obligations permit, 60 calendar days after the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision. NOAA's original decision if unappealed within 30 days, or its decision upon reconsideration shall be considered final.

§ 996.13 Determination of whether to offer certification for a hydrographic product or class.

(a) Certification of a hydrographic product or class shall be at the option of NOAA. NOAA may decide at any time whether or not to offer certification for a product or class. However, it is most likely that a determination will be made only after a non-Federal entity has submitted a specific product for certification. NOAA's decision shall be based on the following criteria:

(1) The suitability of the adopted standards and tests for their intended purpose;

(2) The availability of a qualified entity to perform the compliance tests;

(3) Availability of resources; and

(4) Other relevant criteria as they become apparent.

(b) NOAA's decision as to whether certification for a hydrographic product or class is offered shall be publicly announced in the FEDERAL REGISTER or by other appropriate means.

(c) Any entity may request NOAA to reconsider its decision to offer or not offer certification by submitting its request in writing to the Quality Assurance Program address within 30 days of NOAA's announcement of its decision. NOAA shall have, if its other obligations permit, 60 calendar days after the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision.

(d) NOAA's original decision if unappealed within 30 days, or its decision upon reconsideration, shall be considered final.

Subpart C—Certification of a Hydrographic Product and Decertification.

§ 996.20 Submission of a hydrographic product for certification.

(a) Upon adoption by NOAA of standards and compliance tests, any non-Federal entity may submit a hydrographic product for certification under a particular standard. This non-Federal entity shall be known as the applicant. Submission shall be made in writing to the Quality Assurance Program address. The submission shall include:

(1) Name and description of the hydrographic product and its product class if any;

(2) Identification and contact information for the non-Federal entity submitting the product for certification.

(3) The identification of the standard and compliance tests adopted by this Quality Assurance Program under which the hydrographic product is to be certified;

(4) A proposed, qualified, competent, independent compliance testing body to perform the compliance tests, which NOAA may accept at its discretion, or for which NOAA may select an alternative testing body;

(5) Other information deemed relevant by the sponsor or requested by NOAA.

(b) [Reserved]

§ 996.21 Performance of compliance testing.

(a) NOAA and the applicant shall submit the applicant's hydrographic product to the testing body for performance of the compliance tests. That body shall determine compliance or non-compliance of the hydrographic product with the NOAA-adopted standard, and shall provide to NOAA written documentation stating the results of the compliance tests according to its usual practices.

(b) Alternatively, NOAA may choose, at its option, to perform, have performed by a NOAA-designated entity,

or waive the compliance tests for a hydrographic product. This alternative may be used, for example, when there is no qualified entity to perform the compliance tests, where the compliance tests are simple, or when self-certification of compliance would be appropriate.

(c) Items failing the compliance tests may be changed by the applicant and retested. Items passing the compliance test upon retest shall be deemed compliant as if they had passed said tests initially.

§ 996.22 Certification.

(a) A hydrographic product that has passed the compliance tests shall automatically be considered for certification by NOAA. NOAA shall make its certification determination, if its other obligations permit, within 60 calendar days following receipt of the compliance test results. NOAA shall make a certification determination based upon the following criteria:

(1) The results of the compliance tests;

(2) The potential for the hydrographic product to impair public safety;

(3) Successful completion of any administrative requirements, including the payment of required fees, as may be specified by NOAA;

(4) The potential for certification to cause embarrassment to the Agency or the Department;

(5) Other relevant criteria as they become apparent.

(b) Hydrographic products receiving a certification determination in the affirmative shall be designated as ''certified'' by NOAA. NOAA shall provide a written document to the sponsor indicating such, and shall announce its determination in the FEDERAL REGISTER or by other appropriate means. Certification shall mean that the hydrographic product has been found to be in compliance with the NOAA-adopted standard for that hydrographic product or class. Certification conveys no express or implied warranty as to the merchantability or fitness for a particular purpose; conveys no express or implied liability on the part of the Government of the United States for the hydrographic products; and conveys no automatic, direct or indirect NOAA endorsement of any product or service.

(c) Certification shall be for a term of 3 years unless otherwise specified by the Administrator.

(d) A certification may be renewed, at the request of sponsor and the option of NOAA, for a period of 2 years. Sponsors may request the renewal of a certification by writing to the Quality Assurance Program address at least 120 calendar days before the expiration of an existing certification. The request shall include:

(1) Identifying and contact information for the sponsor;

(2) Identifying information for the relevant hydrographic product(s) and the standard(s) under which they were certified;

(3) Evidence sufficient to assure NOAA that the hydrographic product still meets the standard under which it was certified; and

(4) Other information as may be requested by NOAA.

(e) NOAA shall decide within 60 calendar days, if its other obligations permit, whether to renew a certification. NOAA's decision shall be based on whether the hydrographic product continues to meet the applicable standard, and other relevant criteria as they become apparent.

(f) The sponsor shall have an opportunity to request reconsideration of NOAA's decision. Said request shall be submitted in writing, to the Quality Assurance Program address, postmarked within 30 days of NOAA's announcement of its decision, and shall contain written material supporting the requestor's position. NOAA shall have, if its other obligations permit, 30 calendar days from the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision.

(g) NOAA's decision, either the original decision if unappealed within 30 days, or the decision after the request for reconsideration, shall be considered final.

§ 996.23 Audit and decertification of hydrographic products.

(a) NOAA may audit hydrographic products it has certified. NOAA may

conduct audits without advance notification. However, visits to companies' facilities will be scheduled. Audits may include, but are not limited to:

(1) The producing companies as it may affect the certified product;

(2) Certified products;

(3) Processes used in making, distributing, and marketing certified products;

(4) Use of the NOAA emblem;

(5) Examination of manufacturers' public claims about certified hydrographic products;

(6) Other relevant criteria as they become apparent.

(b) NOAA may decertify a hydrographic product based on the findings of an audit. In general, a hydrographic product may be decertified if:

(1) The results of an audit indicate that the product no longer meets the standards under which it was certified;

(2) The product has been substantively changed from the product that was tested and certified;

(3) Implied or actual claims about the product, and/or other data or products linked to the product, are judged by NOAA to be untrue or misleading;

(4) The NOAA emblem was improperly or inappropriately displayed;

(5) Other relevant reasons as they become apparent.

(c) A producing company may decline to reveal information during an audit that it declares to be proprietary or for other reasons. In this eventuality, NOAA reserves the right to decertify based on lack of information should it deem that action appropriate.

(d) The entity producing the certified hydrographic product shall be notified in writing of NOAA's intent to decertify that product. Said entity shall have 30 days to request reconsideration of that intended action in writing to the Quality Assurance Program address. Said request shall contain the identification of the hydrographic product, the requestor, and sufficient information for NOAA to make a determination on the request for reconsideration. Alternatively, the entity may correct the deficiencies cited by NOAA within 30 days, notify NOAA in writing at the Quality Assurance Program address of the corrective action taken, and provide sufficient evidence for NOAA to judge the correctness and effectiveness of the corrective action taken.

(e) If a request for reconsideration is submitted, or if the producing entity asserts that the deficiencies have been corrected, NOAA shall have 60 calendar days, if its other obligations permit, to consider the request for reconsideration or the corrective action, at which time NOAA shall issue its decertification decision. The decision and NOAA's reason for its action shall be made public in the FEDERAL REGISTER or by other appropriate means, and the producing entity shall be notified in writing.

(f) NOAA's decertification, if unappealed or uncorrected within 30 days, shall be considered final. NOAA shall notify the producing entity of this action in writing, and announce the decertification in the FEDERAL REGISTER or by other appropriate means.

(g) Upon decertification, manufacturers shall discontinue all claims of certification, and shall discontinue use of the NOAA emblem.

Subpart D—Other Quality Assurance Program Matters

§ 996.30 Use of the NOAA emblem.

(a) Use of the NOAA emblem on certified hydrographic products requires separate written permission. Use of the NOAA emblem must satisfy an interest of the Agency, and must not result in embarrassment to the Agency or the Department. If the NOAA emblem is used on products that include other data or products, clear indication shall be made as to what is NOAA certified, and what is not NOAA certified. The inclusion of other data or products will not constitute any endorsement of, or favoritism toward, the other data or products by NOAA. Requests for use of the NOAA emblem shall be submitted in writing to the Quality Assurance Program address, and shall include:

(1) Name and description of the hydrographic product(s) on which the emblem will be displayed.

(2) Name and contact information for the entity requesting use of the NOAA emblem.

(3) Exact samples of all uses intended for the NOAA emblem including text claims with, within, or associated with the hydrographic product, its packaging, and advertising that a reasonable person might associate with the NOAA emblem.

(4) Proof of NOAA certification.

(5) Other relevant information as may later be specified.

(b) [Reserved]

§ 996.31 Termination of the Quality Assurance Program.

(a) NOAA reserves the right to terminate the Quality Assurance Program for a particular hydrographic product or class at any time before certification is awarded if it is deemed to be in the public interest to do so. NOAA shall give written notification to the sponsor and other interested parties should it decide to exercise this option, and shall state the reasons for its action. Reasons for termination may include, but are not limited to:

(1) The inability of the standards-drafting group to reach a consensus on the content of the standard;

(2) Valid objections to the existence of NOAA-certification of a particular hydrographic product or class;

(3) A negative impact on public safety should the hydrographic product receive certification;

(4) Other relevant reasons as they become apparent.

(b) The sponsor or other interested parties shall have 30 days to request a reconsideration of the termination action. Said request shall be in writing to the Quality Assurance Program address, and shall include written material supporting the appeal. NOAA shall have, if its other obligations permit, 60 calendar days from the receipt of a request for reconsideration to either deny the request, or to reconsider and announce its decision.

(c) NOAA's decision, either the original decision if unappealed within 30 days, or the decision after the request for reconsideration, shall be considered final.

§ 996.32 Appeals.

(a) Any entity may appeal a final decision made by the Agency under this Quality Assurance Program. Said appeal shall be submitted in writing to the Quality Assurance Program address, and shall contain at least:

(1) Identification and contact information of the appealing entity;

(2) A statement that this is an appeal to a final decision of the Quality Assurance Program;

(3) A description of what decision is being appealed;

(4) A thorough but concise argument as to why the requestor believes the Quality Assurance Program decision being appealed should be set aside.

(5) Other information as may later be determined to be relevant.

(b) Appeals shall be arbitrated by the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA, using procedures to be established at the time of the appeal, and which shall be appropriate to the nature and circumstances of the appeal. The determination from this arbitration shall be final for purposes of judicial review under the Administrative Procedure Act and other statutes.

§ 996.33 Acceptance of program by non-Federal entities.

By their voluntary entrance or participation in this Quality Assurance Program or its activities, all parties acknowledge and accept the procedures established by this program, including the finality of decisions. All parties acknowledge and accept that information submitted to NOAA under this Program shall be deemed to be in the public domain, and no representation is made as to the protection of confidential, proprietary or otherwise restricted information.

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

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PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

Sec.
1150.1 Applicability.
1150.2 Prohibitions.
1150.3 Approved markings.
1150.4 Waiver.
1150.5 Preemption.

AUTHORITY: Section 4 of the Federal Energy Management Improvement Act of 1988, 15 U.S.C. 5001.

SOURCE: 54 FR 19358, May 5, 1989, unless otherwise noted.

§ 1150.1 Applicability.

This part applies to toy, look-alike, and imitation firearms (''devices'') having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898;

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F 589–85, Standard Consumer Safety Specification for Non-Powder Guns, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*; and

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

[57 FR 48453, Oct. 26, 1992, as amended at 69 FR 18803, Apr. 9, 2004]

§ 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm (''device'') covered by this part as set forth in § 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in § 1150.3 of this part, or unless this prohibition has been waived by § 1150.4 of this part.

[54 FR 19358, May 5, 1989]

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the federal standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the National Archives and

Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the Federal Standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director for the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

[54 FR 19358, May 5, 1989, as amended at 57 FR 48454, Oct. 26, 1992; 69 FR 18803, Apr. 9, 2004]

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part may be waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries. A request for such a waiver should be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, Washington, DC 20230. The request must include a sworn affidavit which states that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie or television industry. A sample of the item must be included with the request.

[57 FR 48454, Oct. 26, 1992]

§ 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

[54 FR 19358, May 5, 1989]

PART 1160—PRODUCTIVITY, TECHNOLOGY AND INNOVATION

Subpart A—Promotion of Private Sector Industrial Technology Partnerships

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Subpart B—Strategic Partnership Initiative

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1160.24 Antitrust considerations.
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1160.27 Amendment of procedures.

AUTHORITY: 15 U.S.C. 1512 and 3710, 15 U.S.C. 205a, DOO 10–17 and DOO 10–18.

Subpart A—Promotion of Private Sector Industrial Technology Partnerships

SOURCE: 48 FR 52289, Nov. 17, 1983, unless otherwise noted. Redesignated at 56 FR 41282, Aug. 20, 1991.

§ 1160.1 Purpose.

The purpose of this part is to establish procedures under which the Department of Commerce will provide assistance for the establishment by the private sector of Industrial Technology Partnerships (as defined in § 1160.2).

§ 1160.2 Definitions.

(a) *Industrial Technology Partnerships (ITPs).* As used in this subpart, ITPs include research and development limited partnerships (RDLPs) and cooperative R&D arrangements of companies, non-profit organizations, and Federal agencies or some combination thereof.

(b) *Research and Development Limited Partnership (RDLP).* In general, the RDLP is a type of business organization to raise venture capital from the private sector to fund specified research and development projects. Additional characteristics are as follows:

(1) *Establishment in general.* An RDLP can be established by an existing firm, or by an independent entrepreneur, to finance specified research and development projects. It can effectively finance both small and large scale projects. It is established by a partnership agreement tailored to the particular projects to be funded.

(2) *Classes of partners.* In general, a partnership agreement establishing an RDLP will provide for two classes of partners, as follows:

(i) The *General Partner* or partners provide the management for the partnership, obtain funding, make arrangements for the conduct of research, and ultimately either manufacture any new products resulting from the research and development or license out the resulting technology; and

(ii) The *Limited Partners* invest in the partnership, bear most or all of the financial risk, share in the financial success from proceeds of manufacture, royalties or other paybacks, and receive tax benefits, but exercise no active management role in the partnership.

§ 1160.3 Assistance to industrial technology partnerships.

(a) *General.* The types of assistance available to Industrial Technology Partnerships (ITPs) are described in the following subsections. Additional assistance which is specific to Research and Development Limited Partnerships (RDLPs) is described in paragraph (f) of this section.

(b) *Workshops.* Upon request, the Secretary may hold workshops with representatives from the private sector and government in order to further the objectives of this part. Such workshops are designed to explore interest in specific potential ITPs. They will be structured to avoid antitrust problems.

(c) *Clearinghouse.* The Department's experience with Industrial Technology Partnerships, notably RDLPs, indicates that numerous potential participants in RDLPs, especially General Partners, need access to specialized information. Accordingly, the Department will develop and maintain a list of specific public and private sector specialists in such categories as venture capitalists, tax accountants, legal specialists, university and non-profit laboratories, brokers, technical and economic feasibility analysts, and proprietary information specialists (especially in patents). Persons wishing to be included in the list or wishing to received a copy of the list should write to the following address:

Industrial Technology Partnerships Program, Herbert C. Hoover Building, Room 4816, Box B, U.S. Department of Commerce, Washington, DC 20230.

Inclusion on the list is voluntary, and is free of charge to all parties, as is receipt of the list. The Department of Commerce, however, makes no representation about the qualifications, experience or ability of any individual identified in these lists.

(d) *Small business.* The Department is aware of the significant contributions of technology-related small business to the economic health of the Nation. Accordingly, the Department shall identify sources of information for them on

innovation services and resources including, for example: Technologies available for licensing; markets for new technology-based products and services; financing; techniques and incentives for innovation; organizations providing feasibility testing and demonstration services; and information on production and distribution methods. This assistance may be supplemented by the list of referrals described in paragraph (c) of this section.

(e) *Patent licensing.* To assist industrial technology partnerships, the Patent Licensing Program of the National Technical Information Service (NTIS) will provide ITPs with current announcements of the availability of licenses to use government-owned technology (on an exclusive or non-exclusive basis). Write to:

David T. Mowry, Director, Center for the Utilization of Federal Technology, NTIS, 5285 Port Royal Road, Springfield, Virginia 22101.

(f) *Additional assistance for Research and Development Partnerships (RDLPs).* The Department has no funds available for direct financial support for the establishment or operation of any ITP. Anyone wishing to apply for any of the services listed below should direct their inquiry to:

Industrial Technology Partnerships Program, Herbert C. Hoover Building, Room 4816, Box B, U.S. Department of Commerce, Washington, DC 20230.

(1) *Introductory training.* The Department will accept a limited number of businesspersons, academicians and other persons for purposes of providing introductory training in the concept of RDLPs. Such training will be tailored to the needs of the trainee, wherever possible. Travel and other expenses of the trainees will be borne by the trainees.

(2) *Information on RDLPs.* The Department will make available information on research and development limited partnerships. A fee may be charged for the printing costs of Departmental publications.

(3) *Data bases.* The Department will provide after May, 1984 as available, technical and marketing data on specific technologies, which may be useful to potential general partners in drafting business plans.

§ 1160.4 Antitrust considerations.

The Department of Commerce will offer no opinion on the antitrust merits of the formation of any industrial technology partnership. The Secretary, upon request, may seek the Attorney General's opinion as to whether proposed joint research activities would violate any of the antitrust laws.

§ 1160.5 Coordination/cooperation with other Federal agencies.

Where relevant, the Department may seek the cooperation of other Federal agencies and laboratories that may be of assistance to industrial technology partnerships.

§ 1160.6 Proprietary data.

All persons making a request under this part are cautioned that data submitted to the Department may be available for dissemination under the Freedom of Information Act. The Department would, however, withhold any information it deemed proprietary on the basis of the provision of 5 U.S.C. 552(b)(4). The Department will consult with the submitter of any data requested under the Freedom of Information Act prior to the release of such information, if the data is clearly marked ''Proprietary'' or ''Company-Confidential.''

§ 1160.7 Amendment of procedures.

The right to amend or withdraw these procedures is expressly reserved.

Subpart B—Strategic Partnership Initiative

SOURCE: 56 FR 41282, Aug. 20, 1991, unless otherwise noted.

§ 1160.20 Purpose.

The purpose of this notice is to notify interested parties of procedures under which the Department of Commerce provides a forum for discussion by private sector interests on the feasibility of establishing strategic partnerships, especially for the development and exploitation of large scale enabling technologies.

§ 1160.21 Definitions.

(a) *Strategic Partnerships. Strategic Partnerships* are multi-industry teams of firms and others formed to create and commercialize proprietary technologies, especially large scale enabling technologies, using a systems management approach. The design of and participants in a specific partnership will be solely at the discretion of the private sector. However, since these partnerships will be most effective when comprised of firms which can share proprietary information, it will probably be most useful if there are no competitors in the venture.

(b) *Large Scale Enabling Technologies. Large Scale Enabling Technologies* are technologies that are too complex and costly for a single firm to create and that have more potential applications than a single firm or a single industry can readily exploit. In some cases investments in these technologies may only be recouped if the results are used in several applications, often in different industries. Since speed of recoupment is often critical to continued competitiveness, it is often essential that multiple major applications are introduced simultaneously.

[56 FR 41282, Aug. 20, 1991; 56 FR 51257, Oct. 10, 1991]

§ 1160.22 Goal of the Strategic Partnership initiative.

(a) This new initiative is designed to provide the private sector with the opportunity to discuss the possible benefits of forming Strategic Partnerships among firms representing the entire food chain of specific technologies. By focusing on a specific technology, these partnerships will have the capability to integrate the innovation activities for a broad range of applications made possible by that technology. The integrative function differentiates this initiative from earlier Department of Commerce initiatives which deal with only one stage of the commercial process. Strategic Partnerships differ from traditional cooperative R&D consortia which are composed primarily of competitors who cooperate only in the early precompetitive stage of innovation. In contrast, Strategic Partnerships are made up generally of non-competing companies (see § 1160.21(a)) and are capable of accomplishing the entire process of innovation working on a proprietary basis.

(b) The immediate goal of this initiative is to hold workshops upon a request from the private sector in key technologies at which the stakeholder industries in the food chain for each technology will have a chance to consider potential applications of the technology, current status of the technology, what R&D needs to be performed, the competitive position of U.S. industry in that technology, including the status of foreign competition, and the ways in which U.S. stakeholders might organize themselves to maximize commercial benefits. The ultimate outcome of such workshops will be entirely at the discretion of the private sector and may include the formation of one or more Strategic Partnerships, other types of multifirm ventures, or no action at all. The Department will not undertake to form specific partnerships. This will be solely at the discretion of the participants.

[56 FR 41282, Aug. 20, 1991; 56 FR 51257, Oct. 10, 1991]

§ 1160.23 Assistance in establishing Strategic Partnerships.

(a) General. The Department has no funds available for direct financial support for the establishment or operation of a Strategic Partnership.

(b) Information Briefings. The Department plans to hold an initial briefing to acquaint the private sector with the dynamics of the systems approach used in Strategic Partnerships, including how they may offer a means for firms to collaborate primarily in large scale enabling technologies. Additional information and technical assistance may be obtained from the Director, Office of Technology Policy Analyses and Studies, Technology Administration, room 4835, Herbert C. Hoover Building, U.S. Department of Commerce, Washington, DC 20230 (202) 377–1518.

(c) Workshops. Upon request the Department may hold workshops to explore interest in Strategic Partnerships for a specific technology. Working with the requester, Commerce will determine which industries have a stake in the technology, invite the

firms from those industries, and design the meeting agenda and background materials. Anyone wishing to apply for such a workshop should direct their inquiry to the Assistant Secretary for Technology Policy, Technology Administration, room 4818, Herbert C. Hoover Building, U.S. Department of Commerce, Washington, DC 20230.

(d) All workshops will be held on a fee basis at no cost to the Department.

§ 1160.24 Antitrust considerations.

(a) The Department of Commerce will offer no opinion on the antitrust merits of the formation of any proposed Strategic Partnership. The Department may seek an opinion from the Antitrust Division of the Department of Justice as to whether a proposed Strategic Partnership would raise antitrust issues. Furthermore, the role played by the Department of Commerce confers no special immunity to any given Strategic Partnership.

(b) Strategic Partnerships may be formed without any consultation with or involvement by the Department of Commerce; the purpose of the Strategic Partnership Initiative is to make the private sector aware of this vehicle and, where requested, conduct workshops to discuss the formation of such partnerships in general. Commerce will not select the technologies, the number of partnerships, or the specific firms in a given partnership.

§ 1160.25 Coordination/cooperation with other Federal agencies.

Where relevant, the Department may seek the cooperation of other Federal agencies and laboratories that may be of assistance to Strategic Partnerships.

§ 1160.26 Proprietary data.

All persons making a request under this part are cautioned that data submitted to the Department may be available for dissemination under the Freedom of Information Act. The Department, however, would withhold any information it deemed proprietary (confidential commercial or financial) on the basis of 5 U.S.C. 552(b)(4). The Department will consult with the submitter of any data requested under the Act, prior to release of such information, if the data is clearly marked ''Company Confidential.'' (See 15 CFR 4.7).

§ 1160.27 Amendment of procedures.

The right to amend or withdraw these procedures is expressly reserved.

PART 1170—METRIC CONVERSION POLICY FOR FEDERAL AGENCIES

Sec.
1170.1 Purpose.
1170.2 Definition.
1170.3 General policy.
1170.4 Guidelines.
1170.5 Recommendations for agency organization.
1170.6 Reporting requirement.
1170.7–1170.199 [Reserved]

AUTHORITY: 15 U.S.C. 1512 and 3710, 15 U.S.C. 205a, DOO 10–17 and DOO 10–18.

SOURCE: 56 FR 160, Jan. 2, 1991, unless otherwise noted. Redesignated at 56 FR 41283, Aug. 20, 1991.

§ 1170.1 Purpose.

To provide policy direction for Federal agencies in their transition to use of the metric system of measurement.

§ 1170.2 Definition.

Metric system means the International System of Units (SI) established by the General Conference of Weights and Measures in 1960, as interpreted or modified from time to time for the United States by the Secretary of Commerce under the authority of the Metric Conversion Act of 1975 and the Metric Education Act of 1978.

Other business-related activities means measurement sensitive commerical or business directed transactions or programs, *i.e.*, standard or specification development, publications, or agency statements of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency. ''Measurement sensitive'' means the choice of measurement unit is a critical component of the activity, *i.e.*, an agency rule/regulation to collect samples or measure something at specific distances or to specific depths, specifications requiring intake or discharge of a product to certain volumes or flow

rates, guidelines for clearances between objects for safety, security or environmental purposes, etc.

§ 1170.3 General policy.

The Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418, section 5164) amended the Metric Conversion Act of 1975 to, among other things, require that each Federal agency, by a date certain and to the extent economically feasible by the end of the fiscal year 1992, use the metric system of measurement in its procurements, grants, and other business-related activities, except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to United States firms, such as when foreign competitors are producting competing products in nonmetric units.

(a) The Secretary of Commerce will appoint a Commerce Department Under Secretary to assist in coordinating the efforts of Federal agencies in meeting their obligations under the Metric Conversion Act, as amended.

(b) Federal agencies shall coordinate and plan for the use of the metric system in their procurements, grants and other business-related activities consistent with the requirements of the Metric Conversion Act, as amended. Federal agencies shall encourage and support an environment which will facilitate the transition process. When taking initiatives, they shall give due consideration to known effects of their actions on State and local governments and the private sector, paying particular attention to effects on small business.

(c) Each Federal agency shall be responsible for developing plans, establishing necessary organizational structure, and allocating appropriate resources to carry out this policy.

§ 1170.4 Guidelines.

Each agency shall:

(a) Establish plans and dates for use of the metric system in procurements, grants and other business-related activities;

(b) Coordinate metric transition plans with other Federal agencies, State and local governments and the private sector;

(c) Require maximum practical use of metric in areas where Federal procurement and activity represents a predominant influence on industry standards (e.g.: weapon systems or space exploration). Strongly encourage metrication in industry standards where Federal procurement and activity is not the predominant influence, consistent with the legal status of the metric system as *the preferred system of weights and measures for United States trade and commerce*;

(d) Assist in resolving metric-related problems brought to the attention of the agency that are associated with agency actions, activities or programs undertaken in compliance with these guidelines or other laws or regulations;

(e) Identify measurement-sensitive agency policies and procedures and ensure that regulations, standards, specifications, procurement policies and appropriate legislative proposals are updated to remove barriers to transition to the metric system;

(f) Consider cost effects of metric use in setting agency policies, programs and actions and determine criteria for the assessment of their economic feasibility. Such criteria should appropriately weigh both agency costs and national economic benefits related to changing to the use of metric;

(g) Provide for full public involvement and timely information about significant metrication policies, programs and actions;

(h) Seek out ways to increase understanding of the metric system of measurement through educational information and guidance and in agency publications;

(i) Consider, particularly, the effects of agency metric policies and practices on small business; and

(j) Consistent with the Federal Acquisition Regulation System (48 CFR), accept, without prejudice, products and services dimensioned in metric when they are offered at competitive prices and meet the needs of the Government, and ensure that acquisition planning considers metric requirements.

§ 1170.5 Recommendations for agency organization.

Each agency shall:

(a) Participate, as appropriate, in the Interagency Council on Metric Policy (ICMP), and/or its working committee, the Metrication Operating Committee (MOC), in coordinating and providing policy guidance for the U.S. Government's transtion to use of the metric system.

(b) Designate a senior policy official to be responsible for agency metric policy and to represent the agency on the ICMP.

(c) Designate an appropriate official to represent the agency on the Metrication Operating Committee (MOC), an interagency committee reporting to the ICMP.

(d) Maintain liaison with private sector groups (such as the American National Metric Council and the U.S Metric Association) that are involved in planning for or coordinating National transition to the metric system.

(e) Provide for internal guidelines, training and documentation to assure employee awareness and understanding of agency metric policies and programs.

§ 1170.6 Reporting requirement.

Each Federal agency shall, as part of its annual budget submission each fiscal year, report to the Congress on the metric implementation actions it has taken during the previous fiscal year. The report will include the agency's implementation plans, with a current timetable for the agency's transition to the metric system, as well as actions planned for the budget year involved to implement fully the metric system, in accordance with this policy. Reporting shall cease for an agency in the fiscal year after it has fully implemented metric usage, as prescribed by the Metric Conversion Act (15 U.S.C. 205b(2).)

§§ 1170.7–1170.199 [Reserved]

PART 1180—TRANSFER BY FEDERAL AGENCIES OF SCIENTIFIC, TECHNICAL AND ENGINEERING INFORMATION TO THE NATIONAL TECHNICAL INFORMATION SERVICE

Sec.

1180.1 Purpose and scope.
1180.2 Definitions.
1180.3 General rule.
1180.4 Preparing a product for transfer.
1180.5 Timeliness.
1180.6 Production of additional copies.
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1180.11 Relation to other laws and procedures.

APPENDIX TO PART 1180—SAMPLE FUNDING AGREEMENT CLAUSE FOR DIRECT SUBMISSION OF PRODUCTS

AUTHORITY: Sec. 108 of Pub. L. 102–245, 106 Stat. 7 (15 U.S.C. 3704b–2).

SOURCE: 59 FR 10, Jan. 3, 1994, unless otherwise noted.

§ 1180.1 Purpose and scope.

(a) The purpose of this regulation is to facilitate public access to the vast amount of scientific, technical and engineering information (STEI) that is produced by and for federal agencies.

(b) This regulation provides a variety of methods for federal agencies to adopt to ensure the timely transfer to the National Technical Information Service (NTIS) of all unclassified STEI that is available for public dissemination and that results from federal funding. It is issued pursuant to the authority contained in Section 108 of the American Technology Preeminence Act (Pub. L. 102–245).

§ 1180.2 Definitions.

Agency means a federal agency as that term is defined in Section 4 of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3703(8));

Director means the Director of the National Technical Information Service.

Federally funded refers to STEI which results from federal research and development activities funded in whole or in part with federal funds, whether performed by the agency itself or by contractors, grantees, cooperative research partners, joint venture partners, or under any similar arrangement involving federal funds.

Final when used to describe an STEI product means a product that the originating agency or contractor/grantee

thereof intends for public dissemination and may exclude interim status reports routinely furnished to agencies by contractors and grantees for monitoring and other internal purposes and which are not intended for public dissemination.

Product includes, but is not limited to, any report, manual, standard, specification, book, paper, chart, map, graph, data collection, data file, data compilation, software, audio/video production, technology application assessment generated pursuant to Section 11(c) of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710(c)), as well as materials pertaining to training technology and other federally owned or originated technologies, and applies to items produced in-house or outside the agency through the Government Printing Office, its contractors, Federal Prison Industries or any other producer, provided that such material is intended by the agency for public dissemination.

Scientific, technical and engineering information means—

(1) Basic and applied research that results from the efforts of scientists and engineers in any medium (including new theory and information obtained from experimentation, observation, instrumentation or computation in the form of text, numeric data or images), and

(2) Information that bears on business and industry generally, such as economic information, market information and related information, if the agency determines such information would be of value to consumers of the information described in paragraph (1) of this definition.

Summary means information relating to an ongoing research project likely to result in a final product.

§ 1180.3 General rule.

Unless an exception applies under section 1180.7, each federal agency shall, within the time period specified in this regulation, transfer to NTIS—

(a) At least one copy of every final STEI product resulting from the agency's federally funded research and development activities, and

(b) A summary of the agency's new and on-going research that is likely to result in a final STEI product

if such final product or summary is unclassified and is intended by the agency for public dissemination.

§ 1180.4 Preparing a product for transfer.

(a) Every final STEI product or summary shall, to the extent practicable, be prepared in a format that is consistent with one of the various formats found in NTIS guidelines. In addition, every such product shall—

(1) Be accompanied by a report documentation page (SF 298) or its electronic equivalent;

(2) Be in a form capable of high quality reproduction appropriate to the medium;

(3) In the case of software, be accompanied by relevant documentation, such as operating manuals, but not including printed source code; and

(4) In the case of a product not printed by the Government Printing Office, be accompanied by a statement as to whether the product has been made available for depository distribution by the Government Printing Office.

(b) Each federal agency shall transfer or have transferred to NTIS those STEI products funded by it that are protected by copyright only if there is a license reserved to the Government. In such cases, the agency shall inform NTIS of the terms of the license. Suggested language for inclusion in agency funding instruments is contained in the Appendix to this part.

(c) If an agency has generated or funded an STEI product which should be available for public dissemination but has embedded within it any copyrighted material, the designated liaison appointed pursuant to § 1180.8 should work with NTIS to determine if it would be appropriate to seek a license from the copyright holder in order to make the STEI product available.

§ 1180.5 Timeliness.

A single copy of a final product or summary described in § 1180.3 must be transferred to NTIS within fifteen days of the date it is first made available for

public dissemination through any distribution channel, and, whenever practical, as soon as it has been approved by the agency for final printing or other reproduction, unless the agency and the Director have otherwise agreed.

§ 1180.6 Production of additional copies.

Unless the agency determines that such action would not be feasible, it shall make appropriate arrangements to enable NTIS, from time to time and at NTIS's own discretion and expense, to ride agency printing and other reproduction orders.

§ 1180.7 Exceptions.

(a) An agency shall not be required to take any further action to submit a copy of a final STEI product to NTIS or one of its affiliates if—

(1) It has designated NTIS to receive a single copy of each STEI product once it has been produced, has made the arrangements specified in § 1180.6, if appropriate, and has made arrangements to receive appropriate certification from a contractor, grantee or other external performer of federally funded research that a copy has been sent to NTIS or one of its affiliates within the appropriate time period pursuant to obligations incurred in the applicable funding agreement (see Appendix to this part) or pursuant to such other system as the agency has established to ensure timely transfer;

(2) The agency and the Director have executed an appropriate agreement or memorandum of understanding establishing an alternative system for compliance; or

(3) The federally funded STEI is protected by copyright for which no license has been reserved to the Government that would allow distribution by NTIS;

(4) The product is an agency generated article that is published in a privately produced journal; or

(5) The agency and the Director, pursuant to paragraph (b) of this section, have agreed that the transfer of a product otherwise covered by these regulations would not be appropriate.

(b) An agency and the Director shall be deemed to be in agreement within the meaning of paragraph (a)(3) of this section if the Director has not objected within 30 days to an agency's written notification of its determination that timely transfer of a product or category of products would not be appropriate under section 108 of the American Technology Preeminence Act. Examples of inappropriate transfers include:

(1) Transfers that could cause significant harm to an agency's existing dissemination program that is operating on a cost recovery basis, is operating in compliance with the policies described by OMB Circular A–130, and for which special arrangements that would permit supplemental distribution by NTIS cannot be negotiated.

(2) Federally funded STEI that has received, or is likely to receive, widespread distribution to most potential users at no charge.

§ 1180.8 Appointment of Agency Liaison Officers.

The head of each agency shall appoint or designate an officer or employee to serve as the STEI Liaison. The Liaison shall, to the extent authorized by the head of the agency—

(1) In cooperation with the Director, determine what products or summaries produced by the Government shall be transferred to NTIS on an ongoing basis;

(2) Determine which funding agreements are to require contractors and grantees to submit products directly to NTIS (for which purpose the Appendix to this part contains suggested language that agencies may wish to include in applicable funding instruments);

(3) Appoint additional liaison officers for major units or components of an agency if the Director and Liaison officer agree this would further the purposes of this regulation; and

(4) Enter into appropriate agreements with the Director and perform any other agency responsibilities described in this regulation.

§ 1180.9 Affiliates.

(a) The Director may recognize any federal agency or component of an agency as an affiliate for the purpose of receiving, on behalf of NTIS, any STEI

product that is required to be transferred under these regulations if NTIS has entered into a memorandum of understanding with the Liaison Officer under which the recognized affiliate agrees to the ongoing transfer of all STEI products to NTIS in a timely manner and otherwise agrees to assume the role of an affiliate.

(b) A transfer by an agency to an approved affiliate shall be deemed a transfer to NTIS within the meaning of these regulations.

§ 1180.10 NTIS permanent repository.

A product, or category of product, will normally be accepted and maintained as part of NTIS' permanent repository as a service to agencies unless the Director advises the Liaison Officer that it has not been so accepted. In general, transferred products will not be accepted if they have not been properly prepared as required by Section 1180.4 or if NTIS believes that the cost of adding them to the repository will significantly exceed anticipated benefits to the public as measured by foreseeable demand. A product announced by NTIS as being available from NTIS shall be deemed to have been accepted by NTIS as part of its permanent repository.

§ 1180.11 Relation to other laws and procedures.

(a) Nothing in these regulations shall be deemed to exempt an agency from any of the following requirements:

(1) Compliance with the Freedom of Information Act (5 U.S.C. 552);

(2) Compliance with any requirements to protect material that contains classified national security information;

(3) Compliance with requirements to protect personal or other information that may not be disclosed without appropriate authority under applicable laws and procedures, such as the Privacy Act (5 U.S.C. 552a);

(4) Compliance with laws and regulations applicable to federal records under Title 44 of the United States Code or regulations issued by the National Archives and Records Administration (36 CFR, chapter XII);

(5) Compliance with requirements to distribute publications through the Depository Library Program either directly or through NTIS as prescribed in subsection (d) of this section; and

(6) In the case of an agency that is also a component of an agency as that term is defined in § 1180.2, compliance with all applicable requirements and procedures of the parent agency regarding these regulations.

(b) Nothing in these regulations shall be deemed to require an agency to take any of the following actions:

(1) To use NTIS as an agency's exclusive distribution channel;

(2) To transfer to NTIS information on matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order; or

(3) to transfer, produce, or disseminate any other information that is required by law to be withheld, which the agency is authorized to withhold, or which is not intended by the agency for public dissemination.

(c) No contractor, grantee, or employee of a Federal agency shall submit a final STEI product directly to NTIS unless authorized to do so by the Liaison or the Liaison's designate, which authorization may be provided in an approved funding agreement (see Appendix to this part).

(d) In order to facilitate cooperation between agencies and the Depository Libraries—

(1) NTIS will, as soon as possible, but not later than six months from the effective date of these regulations, provide each Depository Library at no charge, online access to a current list of all final STEI products provided to NTIS under these regulations that have been entered into the NTIS system.

(2) The online system described in subsection (d) of this section will include an option that will allow each Depository Library thirty days from the date a product is added to the online listing to identify a product that it wishes to receive and that has not otherwise been made available to it.

(3) NTIS will accumulate these requests and, within a reasonable time,

transfer them to the originating agency for fulfillment of each of the identified products.

(4) In lieu of the procedures described in paragraph (d)(3) of this section, NTIS will offer to enter into simple cost recovery arrangements with the originating agency to duplicate and ship the identified products to the requesting Libraries in the format that the agency determines to be most cost effective, including microfiche, paper, diskette, or disc.

(5) NTIS will also establish, as soon as practical, a system of full text online access to final STEI products for the Depository Libraries at no charge to them. Those final STEI products provided to NTIS in a format prescribed by NTIS as suitable for online dissemination under this system will be made available to the Libraries at no charge to the originating agency, will be maintained online indefinitely, and will be available to the Libraries without regard to the thirty day selection time limit described in paragraph (d)(2) of this section.

(6) The services in this paragraph will be provided to Depository Libraries on the condition that they agree to ensure that online access to the NTIS listing described in paragraph (d)(1) of this section is restricted to the Library and its staff and that the full text products provided online pursuant to paragraph (d)(5) of this section are available only to the community served by that Library.

APPENDIX TO PART 1180—SAMPLE FUNDING AGREEMENT CLAUSE FOR DIRECT SUBMISSION OF PRODUCTS

Agencies electing to allow for their contractors, grantees, etc. to submit final products directly to NTIS are encouraged to employ a provision similar to the following in the applicable funding agreement:

''The (contractor)/(recipient) shall certify to the (contracting) (grants) officer—

''(1) a copy of all scientific, technical and engineering information products created or finalized in whole or in part with the funds requested has been or will be transferred to NTIS or a recognized affiliate (at the same time that it is provided to the sponsoring agency) (when the agency has determined that the product is approved for public dissemination) but no later than fifteen days after it is first made available for public dissemination through any other distribution channel, and

''(2) NTIS, or a recognized affiliate, has been advised as to whether the product is protected by copyright and, if so, a copy of the terms of any licenses reserved to the Government has been sent to NTIS, along with a copy of the SF 298.''

CHAPTER XIII—EAST-WEST FOREIGN TRADE BOARD

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PART 1300—REPORTS ON EXPORTS OF TECHNOLOGY

§ 1300.1 Reporting of exports of technology to nonmarket economy countries.

(a) For purposes of complying with the reporting requirements of section 411 of the Trade Act of 1974 (19 U.S.C. 2441) relating to the export of technology to a nonmarket economy country, exporters of such technology shall be deemed to have complied with the requirements of such section by complying with the applicable provisions of the export control regulations of the Department of Commerce (15 CFR 368.1 through 399.2) issued pursuant to the Export Administration Act of 1969, as amended, (50 U.S.C. App. 2401 through 2413).

(b) Nonmarket Economy Country. For purposes of section 411(b) of the Trade Act of 1974 (19 U.S.C. 2441) the term ''nonmarket economy country'' includes those countries included in Country Groups Q, W, Y, and Z of the export control regulations of the Department of Commerce (15 CFR Part 370 (Supplement 1)).

(Sec. 411, Pub. L. 93–618, 88 Stat. 2065 (19 U.S.C. 2441); E.O. 11846 (40 FR 14291))

[40 FR 29534, July 14, 1975]

CHAPTER XIV—MINORITY BUSINESS DEVELOPMENT AGENCY

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PART 1400—DETERMINATION OF GROUP ELIGIBILITY FOR MBDA ASSISTANCE

Sec.
1400.1 Purpose and scope.
1400.2 Definitions.
1400.3 Request for determination.
1400.4 Evidence of social or economic disadvantage.
1400.5 Decision.
1400.6 Construction.

AUTHORITY: 15 U.S.C. 1512, E.O. 11625, 3 CFR 616 (1971–75), 36 FR 19967 (1971); and E.O. 12432, 3 CFR 198 (1983), 48 FR 32551 (1983).

SOURCE: 49 FR 42698, Oct. 24, 1984, unless otherwise noted.

§ 1400.1 Purpose and scope.

(a) The purpose of this part is to set forth regulations for determination of group eligibility for MBDA assistance.

(b) In order to be eligible to receive assistance from MBDA funded organizations, a concern must be a minority business enterprise. A minority business enterprise is a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Executive Order 11625 designates Blacks, Puerto-Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts as persons who are socially or economically disadvantaged and thus eligible for MBDA assistance. Other groups designated are listed below in paragraph (c). The purpose of this regulation is to provide guidance to groups not previously designated as eligible for assistance who believe they are entitled to formal designation as ''socially or economically disadvantage'' under the Executive Order. Upon adequate showing by representatives of the group that the group is, as a whole, socially or economically disadvantaged the group will be so designated and its members will be eligible for MBDA assistance. Designation under Executive Order 11625 establishes eligibility status only for MBDA funded programs. It will not establish eligibility for any other Federal or Federally funded program.

(c) In addition to those listed in E.O. 11625, members of the following groups have been designated as eligible to receive assistance: Hasidic Jews, Asian Pacific Americans, and Asian Indians.

§ 1400.2 Definitions.

For the purpose of this part:

(a) Minority business enterprise means a business which is owned or controlled by one or more socially or economically disadvantaged persons.

(b) Socially disadvantaged persons means those persons who have been subjected to cultural, racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.

(c) Economically disadvantaged persons means those persons whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities because of their identity as members of a group without regard to their individual qualities, as compared to others in the same line of business and competitive market area.

(d) Person means a citizen of the United States or an alien lawfully admitted for permanent residence.

§ 1400.3 Request for determination.

A group wishing to apply for designation as socially or economically disadvantaged under Executive Order 11625 shall submit a written application to the Director of the Minority Business Development Agency, United States Department of Commerce, Washington, DC, 20230, containing the following information:

(a) *Statement of request:* a brief statement clearly indicating that the applicant seeks formal recognition as socially or economically disadvantaged.

(b) *Description of applicants:* a detailed sociological, ethnic and/or racial description, as appropriate, of the group they represent which indicates that the group and the traits of its members are sufficiently distinctive to warrant a determination of social or economic disadvantage.

(c) *Summary of the applicant's submission:* a brief summary of their Submission.

(d) *Presentation of argument:* a narrative description of the documentation in support of their claim of social or economic disadvantage.

(Applicants should support their claim of social or economic disadvantage with the criteria described under 1400.4 ''Evidence of Social or Economic Disadvantage'')

(e) *Conclusion:* summary of applicant's arguments in support of the claims of social or economic disadvantage.

(Approved by the Office of Management and Budget under control number 0640–0011)

§ 1400.4 Evidence of social or economic disadvantage.

(a) The representatives of the group requesting formal designation should establish social or economic disadvantage by a preponderance of the evidence. Social or economic disadvantage must be chronic, long standing, and substantial, not fleeting or insignificant. In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, a determination will be made as to whether this group has suffered the effects of discriminatory practices over which its members have no control. Applicants must demonstrate that such social or economic conditions have produced impediments in the business world for members of the group which are not common to all business people in the same or similar business and market place.

(b) Evidence which will be considered in determining whether groups are socially or economically disadvantaged includes but is not limited to:

(1) Statistical profile outlining the national income level and standard of living enjoyed by members of the group in comparison to the income level and standard of living enjoyed by individuals not considered to be members of socially or economically disadvantaged groups.

(2) Evidence of employment discrimination suffered by members of the group in comparison to employment opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(3) Evidence of educational discrimination in comparison to educational opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(4) Evidence of denial of access to organizations, groups, or professional societies, whether in business or in school, based solely upon racial and/or ethnic considerations.

(5) Kinds of businesses and business opportunities available to group members in comparison to the kinds of businesses and business opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(6) Availability of capital to group members in comparison to the availability of capital to individuals not considered to be members of socially or economically disadvantaged groups.

(7) Availability of technical and managerial resources to group members in comparison to the technical and managerial resources available to individuals not considered to be members of socially or economically disadvantaged groups.

(8) Any other evidence of denial of opportunity or access to those things which would enable the individual to participate more successfully in the American economic system, available to individuals not considered to be members of social or economically disadvantaged groups.

§ 1400.5 Decision.

(a) *Procedure.* After receipt of an application requesting formal designation as a socially or economically disadvantaged group, the Department of Commerce will publish a notice in the FEDERAL REGISTER that formal designation of this group will be considered. This notice will request comment from the public on the propriety of such a designation. The Department may gather additional information which supports or refutes the group's request. Any member of the public, including Government representatives, may submit information in written

form. It is the responsibility of the applicant, however, to submit all relevant information which it wishes considered in its request for a determination of group eligibility.

(b) *Decision*. A decision will be made within 180 days of the receipt of the request. The decision will be published in the FEDERAL REGISTER. Applicants will also be informed in writing.

(c) *Appeal.* All questions of eligibility and procedural requirements shall be resolved by the Director, MBDA whose decision shall be final. An applicant may appeal this decision to the Secretary of Commerce. Applicants requesting an appeal should provide any information discovered subsequent to the Director's initial decision which would further their claim. The right to appeal shall be granted at the absolute discretion of the Secretary.

§ 1400.6 Construction.

Nothing in this regulation shall be construed as subjecting any functions vested in, or assigned pursuant to law to any Federal department or agency or head thereof to the authority of any other agency or office exclusively, or as abrogating or restricting such functions in any manner.