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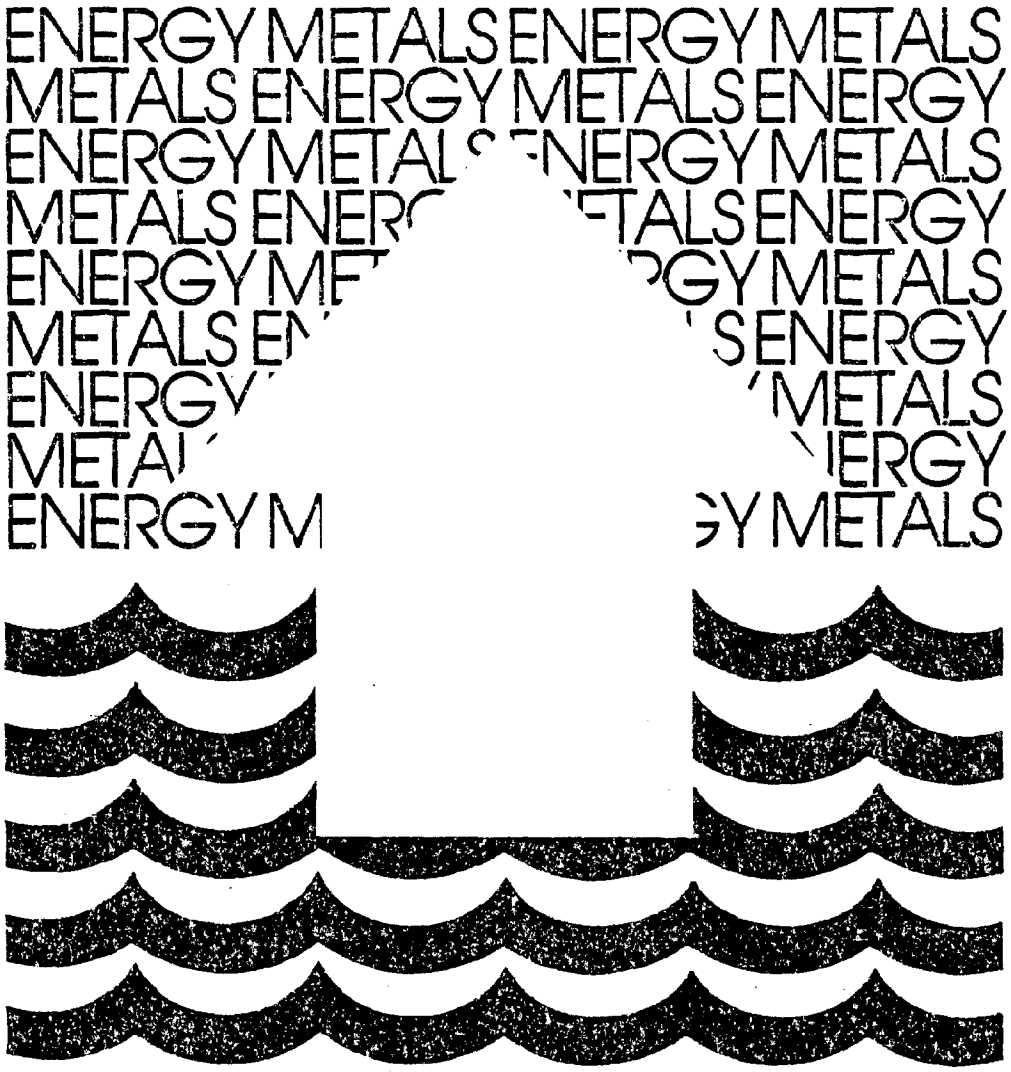


# Ocean Thermal Energy Conversion

Licensing Regulations

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of Ocean Minerals and Energy
July 1981

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federal register

Friday
July 31, 1981

# Part IV

# Department of Commerce

## National Oceanic and Atmospheric Administration

## Licensing of Ocean Thermal Energy Conversion Facilities and Plantships

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 981

## Licensing of Ocean Thermal Energy Conversion Facilities and Plantships

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NOAA is establishing a stable legal system and a streamlined licensing process to facilitate commercial development of ocean thermal energy conversion (OTEC) facilities and plantships. This Final Rule sets out the details of a simplified licensing system for ownership, construction, location, and operation of OTEC facilities and plantships which are associated with the United States or U.S. citizens, and is being issued in accordance with the responsibilities assigned to NOAA by the Ocean Thermal Energy Conversion Act of 1980, Pub. L. 96-320, ("the Act").

**EFFECTIVE DATE:** September 3, 1981.

**ADDRESS:** Requests for documents associated with this rulemaking should be made to the Director, Office of Ocean Minerals and Energy, NOAA, Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW, Washington, D.C. 20235.

**FOR FURTHER INFORMATION CONTACT:** Richard Norling or Lowell Martin, Office of Ocean Minerals and Energy, NOAA, Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW, Washington, D.C. 20235; Telephone: (202) 254-3483.

**SUPPLEMENTARY INFORMATION:**

### I. Principal Author

The principal author of this Final Rule is Lowell F. Martin of the Office of Ocean Minerals and Energy, NOAA, assisted by the NOAA Office of General Counsel.

### II. Prior Actions in the Rulemaking

*A. Environmental Scoping Process*

To provide for an early and open process to determine the scope of environmental issues associated with development of OTEC licensing regulations, NOAA developed an environmental issues discussion document and held a public "scoping" meeting on October 30, 1980. Notice of the scoping meeting and the availability of the discussion paper was published at 45 FR 63543 and 63544 on September 25, 1980. A draft environmental impact statement on this rulemaking was made available for public comment on April 3, 1981, 46 FR 20283. (See Section VI. E of this preamble for information on the final environmental impact statement developed as part of the rulemaking.)

*B. Rulemaking*

To provide an early opportunity for interested persons to contribute to development of these regulations, NOAA published an Advance Notice of Proposed Rulemaking (ANPR) at 45 FR 77038 on November 21, 1980. The ANPR identified three general alternative regulatory approaches under consideration by NOAA as well as 20 specific issues on which NOAA invited public comment. The ANPR was mailed to several hundred interested persons. A public hearing was held on January 7, 1981. A Notice of Proposed Rulemaking (NPR) was published in the Federal Register on March 30, 1981, 46 FR 19418. Public hearings on the NPR were held in Honolulu, Hawaii, San Juan, Puerto Rico, and Washington, D.C.

### III. Availability of Comments

Comments received in response to the ANPR and NPR are available for public examination and copying during normal business hours in Room 410, Page 1 Building, 2001 Wisconsin Avenue, N.W., Washington, D.C.

### IV. NOAA's Responses to Comments Received on the NPR

As noted in section II.B. of this preamble, NOAA published an NPR on the OTEC licensing program on March 30, 1981. In response to the written comments received and statements made at the public hearings NOAA has developed these final rules.

*A. General Comments*

The eight general comments received on the NPR were favorable to the positions taken by NOAA in the NPR. In particular there was strong endorsement for the voluntary Consolidated Application Review or CAR process which has been incorporated into these final rules in Subpart C. Numerous commentors strongly favored the procedural deadlines proposed in the NPR, which were derived from the Act, and they have been codified in these final rules.

*B. Land-based OTEC Facilities*

NOAA took the position in the NPR that the legislative history of the Act demonstrated Congressional intent that OTEC facilities located in part on land be subject to the licensing requirements of these regulations. However, the difficulty in documenting such "land-based" facilities under existing U.S. vessel documentation laws was recognized. All commentors on this issue except the U.S. Coast Guard endorsed NOAA's position as necessary for orderly commercial development of OTEC, particularly from the perspective of protection of the thermal resource necessary to the economic viability of an OTEC facility. The Coast Guard comment expressed continuing reservations regarding the documentation issue. NOAA and the Coast Guard have reviewed this problem and determined that its solution rests in recommending to Congress that the Act be amended so that documentation as a prerequisite to licensing will not be required for an OTEC facility located in part above the highwater mark, i.e. a "land-based" facility. NOAA and the Coast Guard will work together to achieve this legislative result.

*C. Specific Comments*

This section of the preamble describes specific comments received on the NPR and NOAA's responses as reflected in the final rules. Section numbers refer to sections of the final rules, which have been renumbered to a 981 series from the 1001 series used in the NPR.

§ 981.40 *Definitions.* One commentor suggested that the definition of "designated application area" be changed to refer only to impacts of the proposed OTEC facility or plantship on existing OTEC facilities or plantships. Because section 102(e) of the Act requires consideration of the effect of licensing the proposed OTEC operation on other potential OTEC operations in the same geographic area, the suggestion has not been adopted. Another commentor suggested that the definition of "pollutant" be changed by substituting the words "temperature difference" for the word "heat" because an OTEC facility or plantship could discharge water drawn up from the deep ocean at a temperature below that of the surrounding waters. This change has been adopted in the final regulations.

§ 981.50 *Who must apply for an OTEC license? (and who does not need one).* One commentor requested that this section be changed to make clear that site evaluation and pre-construction testing activities conducted prior to receiving an OTEC license are not subject to the requirements of these regulations. NOAA believes that the wording of § 1001.50 of the NPR adequately addresses this situation and no change has been made in these final rules. Note, however, that Subpart H of this Part is reserved for such regulations, should they become necessary in the future. Another commentor expressed

displeasure over the fact that the Department of Energy would exercise control over the operation of OTEC demonstration projects so designated by the Secretary of Energy under the proposed wording of this section. That situation is a requirement of section 118 of the Act and no change has been made in these final regulations.

A commentor questioned whether or not an existing fossil fueled power plant or other source of waste heat would be required to obtain an OTEC license if the waste heat from that installation were used to augment the thermal resource of an OTEC facility. The existing source of waste heat would not be subject to licensing under these regulations. However, a change in the discharge conditions associated with the existing power plant, or other heat source, might well require review and revision of the Federal, State and local permits associated with the existing operation.

The question was raised in public hearings as to the status of domestic OTEC activities related to export of facilities and plantships. Under the Act such activities do not require a license under these regulations unless they involve construction activities "conducted at sea." See the meaning of the term "construction" as defined in § 981.40 of the final regulations.

§ 981.70 *Pre-application consultation.* One commentor requested clarification as to whether NOAA would assist potential license applicants in approaching other agencies involved in the license review process under the provisions of this section. NOAA believes that such assistance to potential applicants is within the scope of its role in facilitating the Federal and State permitting processes and the final rules clearly state that such assistance will be made available to potential applicants under this section.

§ 981.100 *Confidentiality of information.* Several commentors requested that this section be changed to allow for provision of the justification for confidential treatment of information at the time that its release was requested, rather than at the time the information was submitted to NOAA. Other commentors requested that copies of license applications available for public review be clearly marked to indicate where material had been deleted due to requests for confidential treatment. One commentor requested that a process for appeal be provided in the event the Administrator initially determined to release information for which confidential treatment had been requested and one commentor proposed that a more vigorous effort be made to assure that other agencies receiving confidential information for review did not improperly release it. NOAA is of the opinion that most of these suggestions have merit for assuring proper treatment of information for which confidential treatment has been requested and for reducing administrative burdens both on applicants and members of the public. Accordingly, this section of the final rules has been revised to make optional provision of the justification for confidential treatment at the time information is submitted. A person may choose to defer submitting the justification until such time as NOAA receives a request for release of the confidential information. At that time the submitter is given an opportunity to provide the justification, amend one previously submitted, or to waive the claim of confidentiality. To enable reviewers to better determine the extent to which portions of an application are subject to confidential treatment, provision has been made for assuring that review copies of applications are clearly marked to indicate where material has been deleted. To assist NOAA in properly maintaining the confidentiality of protected information, the submitter has been required to segregate those portions of the information for which confidential treatment has been requested from those for which no claim of confidentiality is asserted. Finally, the contents of the letter which NOAA will forward to other agencies along with protected information are described. The letter will advise other government entities of the extent of protection required and of the procedures to be followed in the event that the other government entity should receive a request for disclosure. NOAA has not provided for an administrative appeal process prior to actual disclosure of confidential information. However, NOAA will provide advance notice of impending release sufficient to allow the person requesting confidential treatment to seek judicial review before disclosure occurs.

In response to comments, NOAA has considered a pre-submission or contemporaneous-with-submission determination of confidentiality. This approach has been rejected because of its potential for creating a significant administrative burden while providing little countervailing benefit, since the correctness of any determination may change over time. NOAA has, however, modified the regulations to authorize, on a case-by-case basis, determinations that information not required to be submitted, but submitted voluntarily, be afforded confidential treatment.

§ 981.130 *Application Fee.* A number of commentors requested justification of the amount of the application fee, which totals $250,000 for full processing of an application. The amount of the fee is fixed at the estimated incremental cost to NOAA of processing the application, including costs to prepare the site-specific consolidated environmental impact statement required by section 107(e) of the Act. That consolidated statement must fulfill the requirements of all Federal agencies in carrying out their permitting and authorizing responsibilities on the license application. NOAA developed the overall cost estimate on the basis that two person-years of effort would be required within the NOAA program office to process a single application. The estimate also includes costs of holding the required public hearings on the application in the District of Columbia and in adjacent coastal States, as well as support costs for environmental analysis and technical review of the application. The processing cost estimate does not include general administrative overhead or costs associated with other Federal agency actions on the application. Because of comments received, NOAA has reviewed the basis for its original cost estimate, and has found no reason to change it. Accordingly, the overall license application fee remains set at $250,000 to cover NOAA's reasonable administrative costs, as required by the Act.

Several commentors requested that NOAA defer collection of the fee until such time as the OTEC operation actually commenced commercial activities or began to generate revenues. NOAA believes that the Act does not allow such deferral of payment of the fees. Thus the phased collection schedule proposed in the NPR has been retained in these final regulations. One commentor proposed that NOAA establish a post-issuance annual rental fee for use of the thermal resource by an OTEC facility or plantship. NOAA has reviewed its authority under the Act and finds no mandate to impose such a fee. One commentor noted that the proposed rules did not make it clear that the full application fee must be remitted before NOAA would issue a license. The final version of § 981.130 has been amended to make this clear.

§ 981.150 *Public Inspection and Copying.* One commentor noted that this section did not expressly provide for an application to be available for public inspection and copying in each adjacent

coastal State so designated for the application. The final version of this section has been changed to make it clear that the application will be available in all designated adjacent coastal states for the application. Provision has been added for public notice of the locations where the application will be available for public inspection and copying.

§ 981.180 *Information about the applicant and its affiliates.* Several commentors questioned the scope of information required by this and subsequent sections of Subpart B, information to be submitted with application, of the NPR. The Act requires that NOAA complete processing of the application and make a decision on issuance of the license within 356 days after its receipt. To meet this deadline and properly coordinate the activities of other State and Federal government agencies involved in the review, complete information on the proposed OTEC plantship or facility must be available at the start of the review. The need to stop the review process while additional or clarifying information is sought from the applicant must be reduced to a minimum. NOAA anticipates that an applicant will have completed a thorough preliminary design study, an economic analysis in sufficient detail to prepare a program prospectus, and have acquired environmental data sufficient for NOAA to prepare a draft environmental impact statement on the proposed OTEC operation by the time an application is submitted.

The possibility of a two phase-application process in which general information would be provided initially, to be followed later in the review process with more detailed information, was proposed by a commentor. However, the Act requires the Administrator of NOAA to determine within 21 days of receipt of an application whether or not it appears to contain all of the information necessary to make a decision on license issuance. Further, the processing schedule mandated by the Act requires that full information on the OTEC proposal be available at an early stage if the deadlines for license issuance are to be met. Accordingly the phased approach to provision of application information has not been incorporated into the final regulations.

The commentor who proposed the phased approach to provision of information based it in part on the concept of establishing a "priority of right" to a particular geographic site for an OTEC facility through provision of the initial application information. However, the Act does not provide for establishment of such a "priority of right" through the application mechanism. In the event only a single application is received for a particular site, the issue of priority access to it is moot. In the event multiple OTEC facility applications are received for a particular geographic location, the provisions of section 102(i) of the Act for weighing the national interest in deciding among competing applications come into play. The only case where a "quasi priority of right" situation is recognized in the Act is in the case where more than one application is received for a particular area and no individual application would more clearly serve the national interest than another. In that situation, the Act requires that decisions on the applications be made in order of their receipt by the NOAA Administrator.

Several commentors noted that the information requested in §§ 1001.180(e)(4)(iii) and 1001.180(e)(6) on unit cost of produced electricity or other products and on estimated amounts of fuel or other raw materials to be saved through operation of the proposed OTEC facility did not appear to be necessary if only one application for an OTEC facility in a particular area were pending before the Administrator. NOAA concurs that this information is only necessary under the Act when competing OTEC facility applications are received for a single designated application area. Accordingly, the requirement to provide that information has been moved to § 981.290 and has been made conditional on receipt of multiple applications for a specific designated application area, in which case NOAA must address the national interest criteria set forth in the Act when deciding among the competing applications.

Several commentors questioned the requirement for information on the applicant's prior involvement in similar energy or product manufacturing activities required by § 1001.180(e)(7) of the NPR and requested NOAA to consult with the Department of Justice (DOJ) regarding the need for it in the context of antitrust review of an OTEC license application. NOAA has done so, and while DOJ concurs in making the provision of product pricing and fuel and raw materials savings information contingent upon receipt of multiple applications for a designated application area, DOJ has requested that information on prior related activities be required of all applicants for use in the application antitrust review required by the Act. DOJ also felt strongly that the required 3 years of such information was necessary for assessing trends. Accordingly, the requirement appears in § 981.180(e)(5) of these final regulations.

§ 981.190 *General Information on the OTEC facility or plantship.* Several minor changes to this section have been made in response to comments received. The requirement for information on projected annual gross and net production of electricity or other products contained in § 1001.180(e)(4)(i) and (e)(4)(ii) of the NPR has been placed in § 981.190(a) of the final regulations. Section 981.190(b) has been clarified to indicate that information on the thermodynamic cycle to be employed in the OTEC operation is what is being requested. Section 981.190(h) has been reworded to make clear that information on biofouling control methods is being solicited.

§ 981.220 *OTEC site information.* One commentor noted that national defense restricted areas in the vicinity of a proposed OTEC site should be identified and that change has been incorporated into § 981.220(c). It was noted by one commentor that a reconnaissance or engineering hydrographic survey would be unnecessary in the case of a plantship application, and that change has been made. A requirement to describe onshore vessel on/off loading facilities which are part of the OTEC proposal has been added in response to comments received.

§ 981.230 *Operational information.* Several commentors noted that emergency shutdown and evacuation procedures for the OTEC facility or plantship should be described in the application. That requirement has been added to the final regulations.

§ 981.240 *Design information.* One commentor noted that the NPR did not contain any explicit requirement for an applicant to describe the proposed configurations of cold and warm ocean water intake and discharge structures. While this section of the NPR inferred such a requirement, it has been explicitly stated in the final regulations.

§ 981.280 *Environmental information.* Several changes have been made in this section of the NPR on the basis of comments received. Section 981.280(a)(1) has been reworded to make it clear that the applicant must describe the boundaries of the geographic area in which the proposed OTEC operation would impact or be impacted by another OTEC operation. Section 981.280(a)(4) has been revised to make it clear that potential impacts of entrainment and impingement on biological communities

must be described. Section 981.260(a)(7) has been clarified by noting that archeological resources are among the special sites to be identified. Section 981.260(a)(12)(iii) has been modified to require a description of the applicant's proposed program to monitor the effects of cold and warm water intakes as well as discharges.

§ 981.290 *Publication of notice of application; contents of notice; call for additional applications for OTEC facilities.* This section has been amended to require that the original applicant and all subsequent applicants for a designated application area submit information on unit cost to the end user of produced electricity or product, and on fuel or other raw material savings, not later than 30 days after expiration of the 90 day period for filing additional applications for a designated application area. As noted earlier this change has been made so that such information is to be submitted only when it is necessary to a national interest determination between competing applications for the same application area.

§ 9981.320 *Antitrust review.* As noted earlier in the discussion of changes made to § 1001.180(e) of the NPR, NOAA has had additional discussions with the Department of Justice concerning the information necessary for the antitrust review required by the Act and has modified that section of the final rules accordingly. Section 981.320 has been modified to provide notice to the Attorney General if the NOAA Administrator does not accept the Attorney General's recommendation on an application that may create a situation inconsistent with the antitrust laws. In response to one question received on the NPR, NOAA has asked the Antitrust Division at the Department of Justice whether a mechanism exists for obtaining an opinion on the antitrust implications of an OTEC proposal prior to making formal application to NOAA for a license. The Antitrust Division has indicated that such a procedure does exist and that a non-binding opinion in the form of a "business review letter" describing the Department's preliminary views on antitrust issues may be obtained by consulting with the Division. The procedures for obtaining such a review are contained in 28 CFR 50.6. NOAA will assist potential applicants in obtaining these views under the pre-application consultation provisions contained in § 981.70 of these final regulations.

The Department of Justice noted that it might require information beyond that initially required by these regulations to properly conduct its antitrust review of an OTEC license application. Accordingly, the Department requested assurance that the mechanism of § 981.90 of these regulations for seeking additional information from the applicant would be available to cover that eventuality. NOAA has included that procedure to cover such situations and it will be available to the Department of Justice and other involved government agencies, if necessary, provided good cause exists for seeking the additional information.

§ 981.330 *Adjacent Coastal States.* A number of comments were received on the adjacent coastal state designation provisions of the proposed regulations. One commentor suggested that the NOAA Administrator provide the actual terms of a proposed license to the governor of an adjacent coastal State for review prior to issuance if that governor had required specific terms and/or conditions in the license to make it consistent with that State's approved Coastal Zone Management Plan. A request was made to automatically designate the governor of each adjacent coastal State as a "necessary party" in the event a formal adjudicatory hearing became necessary during the license review process. It was also requested that such a formal adjudicatory hearing be held in the adjacent coastal State. NOAA views its relation with all designated adjacent coastal States as one of continuing dialogue throughout the license application review process. Close consultation will be maintained and the concerns of each adjacent coastal State will be fully factored into the licensing decision. Section 981.560(f)(2)(i) has been amended to clarify that the administrative law judge in charge of the hearing will give special consideration to whether each adjacent coastal State should be a full party in the hearing. If the issue requiring a formal hearing concerns one of the adjacent coastal States, the administrative law judge has sufficient flexibility to admit a state as a party to the hearing. Similarly, NOAA believes that the administrative law judge has authority under § 981.560(e)(14) to hold part of the hearing in the relevant adjacent coastal State.

One commentor expressed concern that designation as an adjacent coastal State could somehow extend that State's taxing power to include an OTEC plantship which did not operate in that State's waters. Such a situation is impossible because such extraterritorial taxing authority is not granted the States by section 403(b)(2) of the Act. Although a State might achieve adjacent coastal State status under § 981.330(b) of these rules relative to plantship operations conducted on the high seas, that designation does not confer any taxing power under the terms of section 403(b)(2) of the Act.

§ 981.380 *Steps in the voluntary Consolidated Application Review (CAR) process.* Numerous commentors strongly supported the CAR concept and its potential for streamlining the OTEC license application review process. NOAA has left it essentially unchanged in these final rules. One commentor did note, however, that, as worded in the NPR, it did not appear to be available for use where multiple applications had been received for the same designated application area. Minor technical changes have been made to allow for its use in this circumstance.

§ 981.390 *Voluntary Nature of the CAR Process.* One commentor requested clarification of the impact of the CAR process on agreements with agencies other than NOAA reached prior to making application for an OTEC license. This section has been amended to make clear that such agreements are not affected by an applicant's later decision to make use of the CAR process. Another commentor requested information on the status of an agency other than NOAA which chose not to participate in CAR. While NOAA will encourage all involved agencies to participate, CAR is voluntary, and other Federal, State, or local agencies may choose not to participate in it. Such a decision would have no impact on their existing statutory authority, or on NOAA's authority to issue an OTEC license.

§ 981.440 *Inter-agency CAR team meeting.* One commentor requested that the meeting provided for in this section of the NPR be held in a designated adjacent coastal State. NOAA concurs in the suggestion and this section of the final rules provides for holding the meeting in an adjacent coastal State, if it is practicable to do so.

§ 981.460 *Timely approval or denial of application for a license.* In response to a comment, NOAA has clarified this section to indicate that the license will be issued within 30 days after a favorable decision on the application is made.

§ 981.470 *Criteria for approval or denial.* Several commentors noted that this section of the NPR stated that the Administrator "may" issue a license, rather than that he "shall" issue one if the criteria set out in the section are satisfied by the applicant. The permissive language is derived directly from section 101(c) of the Act and has

been retained in the final regulations. While NOAA has every intention to issue licenses to qualified applicants in timely fashion, other events could intercede to make that impossible—for instance a judicial order to delay issuance of a license.

§ 981.490 *Condition precedent to issuance of license: Compliance with conditions and prior approval of changes.* Several commentors noted that this section of the NPR did not provide a mechanism for routinely requesting changes to the terms and conditions of an issued OTEC license. NOAA concurs in the need for such a mechanism. Accordingly, a new § 981.525, *Review, modification and revision of license terms and conditions*, has been added to these final regulations. That section provides for processing of changes to license terms and conditions upon request of the licensee or upon the initiative of the Administrator, and also for a periodic review by NOAA to determine if operational experience indicates the need for such changes. Commentors requested that these procedures include procedural safeguards. Section 981.525 of these final regulations includes such safeguards.

§ 981.510 *Duration of licenses and renewals.* A commentor noted that the maximum duration of the initial license was set at 25 years in the NPR and requested that provision be made for a longer duration. The 25-year maximum is specified in the Act and has been retained in the final regulations.

§ 981.520 *Terms and conditions of a license.* One commentor requested an opinion as to whether or not the coastal zone consistency provisions of § 981.520(c) superseded those 15 CFR 930, Subpart D. NOAA believes that the provisions in this section supersede those of 15 CFR 930, Subpart D, only to the extent that there are actual conflicts between the Act and Coastal Zone Management Act statutory requirements. Where the statutes can be implemented compatibly, we believe no supersession need be found.

A number of commentors requested that the wording of § 1001.520(h) of the NPR related to diligence be changed to allow for reasonable delay resulting from "unforeseen" circumstances rather than from "unforeseeable" circumstances. NOAA concurs in this approach and the final regulations have been amended accordingly. However, the "unforeseen" circumstances still will be evaluated from the prospective of a reasonable person in the position of the licensee.

§ 981.550 *Suspension, revocation, termination, relinquishment or surrender of a license.* One commentor requested that NOAA not seek Federal district court action to revoke a license under this section except for "major" violations of license terms and conditions. NOAA believes that the difficulties in developing a regulatory definition of "major" under these circumstances outweigh the uncertainty a licensee will be subject to in depending on the Administrator's discretion not to seek court action for insignificant violations of license terms and conditions. Accordingly, no change has been made to this section in the final regulations. NOAA does not expect to seek license revocation unless NOAA believes a major violation or a pattern of violations has occurred.

§ 981.560 *Formal hearing procedures.* One commentor noted that the requirement of § 1001.560(1)(2) of the NPR that the administrative law judge issue a recommended decision as soon as practicable, but normally not later than 30 days after the conclusion of the formal hearing, was a tight time constraint. NOAA recognizes this, but points out that the Act sets a deadline of 45 days after completion of hearings for agencies other than NOAA to make their final views on the license application known. Since the decision reached in a formal hearing may affect those views, it is imperative that the recommended decision be available as soon as possible after the hearing is concluded. Accordingly the 30-day provision remains the same in these final regulations.

§ 981.570 *Ex parte communications.* Several changes have been made in this section in response to comments received on the NPR. Section 981.570(c) has been revised to make its language conform to section 554(d) of the Administrative Procedures Act. A definition of the term "agency representative" has been added to § 981.570(e), which is the first place that it appears in the regulations. The exemption which would have allowed the agency representative to participate in the initial decisional process which developed the record which was the subject of the formal adjudicatory proceeding has been deleted in the final regulations as recommended in comments of the Administrative Conference of the United States.

§ 981.630 *Observers.* One commentor interpreted this section of the NPR as requiring that accommodations dedicated to observers be included in the initial design of the OTEC facility or plantship. This was not intended, and the final regulations have been amended to make clear that the requirement is to provide temporary accommodations for observers if necessary due to the remote location of the licensed OTEC facility or plantship. The language of this section in the final regulations has been changed to clarify that it relates to one or more observers at a given time.

The provision of § 1001.830(e) of the NPR under which the Administrator would have reimbursed the licensee for reasonable costs directly related to the quartering and maintaining of observers on OTEC facilities or plantships has been deleted from the final regulations. Current Administration policy is to place the financial costs of necessary regulation on the regulated industry itself, wherever feasible and appropriate. As we receive further guidance from the Administration on government cost recovery policy NOAA will clarify who will bear the cost of observers.

The observer provisions also have been modified to help assure that observer activities are reasonable, to clarify that the Master or senior operations personnel and not the observer are in charge of the safe operation of the OTEC facility or plantship, and to protect confidential information that may be included in the observer's reports.

## V. Organization of the Rules

NOAA has organized these regulations so that a potential applicant can readily find the information relevant to making application for an OTEC license. The provisions have been grouped into subparts, as follows, in an effort to consolidate information on procedures and information requirements and to assist a potential applicant in orderly development of the application materials.

*Subpart A—General Program Requirements.* This subpart describes the purpose and scope of 15 CFR Part 981, provides definitions of terms used throughout the regulations and specifies who must (and who is not required to) apply for an OTEC license. The procedures for application, amendment of an application, and withdrawal or termination of a license application are given. The application fee and method of payment are specified.

*Subpart B—Information to be Submitted with Application.* This subpart specifies what information the applicant must provide with the OTEC license application. The required information relates to the siting, design, construction and deployment of the proposed OTEC facility or plantship. Information on the financial situation and organization of the applicant is specified. Environmental information

necessary to evaluate potential impacts of the proposed OTEC operation is prescribed. Information necessary to assure that the applicant's proposal complies with Federal laws and regulations other than the Act is also specified.

*Subpart C—License Application Review Procedures.* This subpart sets out the steps in the OTEC application review process which are mandated by the Act. The steps in the voluntary Consolidated Application Review (CAR) process which provides the applicant with the option of requesting a more integrated, coordinated review process than the minimum provided for in the Act are also prescribed.

*Subpart D—Criteria for Approval or Denial of Application and Establishment of License Terms and Conditions; Renewal, Transfer, Modification, Revision, Suspension, Revocation and Termination.* This subpart sets out the criteria which the NOAA Administrator will use in reaching the decision to issue or deny a particular OTEC license application. The criteria the Administrator will use for deciding among multiple applications for the same OTEC site area are also prescribed. Criteria for establishing license terms and conditions are set out. This subpart also provides for transfer and renewal of licenses and prescribes modification, revision, suspension, revocation, and termination procedures.

*Subpart E—Formal Hearing Procedures.* Under certain circumstances a formal adjudicatory hearing on the record may become necessary as part of the OTEC licensing or license modification or revision process. Such formal hearings are also necessary as part of the OTEC enforcement program. This subpart sets forth the basic procedures to be followed in such hearings.

*Subpart F—Enforcement Procedures.* This subpart prescribes the administrative procedures which will be followed in OTEC enforcement proceedings, including those related to license suspension, termination, or revocation proceedings; to issuance of compliance orders; and to assessment of civil penalties in connection with enforcement activities. This subpart also establishes rules concerning placement of authorized Federal observers on and in OTEC facilities and plantships, and describes how a person wishing to sue an alleged violator or the Administrator must give advance notice of the intended lawsuit.

## VI. Other Actions Associated With These Regulations

### *A. Classification under Executive Order 12291 of February 17, 1981.*

The NOAA Administrator considers these regulations to be major with respect to the criteria of Executive Order 12291 (EO 12291) of February 17, 1981, because they will foster and govern development of the United States commercial OTEC industry. NOAA has prepared and transmitted to the Office of Management and Budget (OMB) a final Regulatory Impact Analysis as specified by section 3 of EO 12291. The Administrator of NOAA has determined that these final rules are clearly within the authority delegated by law and consistent with Congressional intent. The rules are authorized or mandated by sections 102(a), 102(d)(2), 102(h), 106, 110(3), 112(a), 114(b)(2), 303(a) and other sections of the Act. Congressional intent is, generally, apparent in the statement of purposes of the Act, which is restated in relevant part at § 981.20 of the final regulations.

### *B. Regulatory Impact Analysis*

NOAA has prepared a final Regulatory Impact Analysis. This analysis, which examines the potential economic impact of the proposed regulations, is available to all interested parties. The analysis examines the various alternatives NOAA considered in preparing the regulations, considered the economic benefit and cost implications of the alternatives, and explains NOAA's reasons for making the choices reflected in these regulations. The analysis has been done in such a way as to include a final regulatory flexibility analysis in compliance with the Regulatory Flexibility Act, Pub. L. 96–354. Copies of the analysis may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified in the ADDRESS section of this preamble.

### *C. Summary of Final Regulatory Flexibility Analysis*

Because of the large size and cost of commercial OTEC projects, the primary involvement of small business concerns in the OTEC industry is expected to be as contractors or subcontractors, rather than sole owners or operators of OTEC facilities or plantships. Only one license, obtained by the owner, is required. The general regulatory approach selected by NOAA for these regulations was designed to provide the greatest flexibility for, and to minimize any adverse economic impact on, any entity—large or small—which may be involved in OTEC development. The regulations do not impose any reporting, record keeping, or other compliance requirements on small governmental jurisdictions or small organizations. Copies of the combined final Regulatory Flexibility Analysis and final Regulatory Impact Analysis may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified in the Address section of this preamble.

### *D. Paperwork Reduction Act, Pub. L. 96–511*

Because of the limited number of persons initially subject to these regulations (NOAA anticipates a maximum of 3 OTEC license applications in the first year of the program), NOAA believes they do not contain a "collection of information" request within the meaning of 44 U.S.C. 3502(4) and 3502(11). Accordingly, § 981.155 of these regulations contains a statement that the information requested is not subject to the requirements of 44 U.S.C. 3507. Section 117 of the Act requires the NOAA Administrator to review these regulations periodically, at intervals of not more than every three years, and to revise them as necessary based on that review. During the review, or earlier if necessary, NOAA will review its projections of the expected number of license applications and take any actions necessary under the Paperwork Reduction Act on that basis.

### *E. Environmental Impact Statement*

The NOAA Administrator considers issuance of final regulations implementing the Act to be a major Federal action significantly affecting the quality of the human environment. Accordingly, NOAA has prepared a Final Environmental Impact Statement (FEIS) under section 102(2)(C) of the National Environmental Policy Act of 1969 as part of this rulemaking. The FEIS has been filed with the Environmental Protection Agency. Copies may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified in the Address section of this preamble.

For the reasons set out in the preamble, Title 15 of the Code of Federal Regulations is amended by adding a new *Part 981, Ocean Thermal Energy Conversion Licensing Program.* The text of the final rules follows.

Dated: July 24, 1981.

John V. Byrne,

*Administrator, National Oceanic and Atmospheric Administration.*

## PART 981—OCEAN THERMAL ENERGY CONVERSION LICENSING PROGRAM


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Authority: Ocean Thermal Energy Conversion Act of 1980, Pub. L. 96-320, 94 Stat. 974 (42 U.S.C. 9101, *et seq.*).

### Subpart A—General Program Requirements

**§ 981.10 What are the Ocean Thermal Energy Conversion Program Regulations?**

(a) *Coverage.* These regulations implement NOAA's responsibilities under the Ocean Thermal Energy Conversion Act of 1980. The regulations provide the procedures and information necessary to apply to NOAA for a license for the ownership, construction, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. They also establish a voluntary consolidated process for review of license applications by NOAA and other Federal, State, and local government entities; state the criteria which will be used for issuance or denial of a license; prescribe criteria for establishing license terms and conditions; prescribe procedures for enforcement of the Act and this Part, and for renewal, transfer, modification, revision, suspension, revocation, termination, relinquishment, or surrender of a license.

**§ 981.20 Purpose of the OTEC licensing regulations.**

The regulations in this Part carry out the purposes of the Act, which include:

(a) Authorize and regulate the construction, location, ownership, and operation of OTEC facilities connected to the United States by pipeline or cable, or located in the territorial seas of the United States, consistent with the Convention on the High Seas, and general principles of international law;

(b) Authorize and regulate the construction, location, ownership, and operation of OTEC plantships documented under the laws of the United States, consistent with the Convention on the High Seas and general principles of international law;

(c) Authorize and regulate the construction, location, ownership, and operation of OTEC plantships by United States citizens, consistent with the Convention on the High Seas and general principles of international law;

(d) Establish a legal regime which will permit and encourage the development of OTEC as a commercial energy technology;

(e) Provide for the protection of the marine and coastal environment, and consideration of the interests of ocean users, to prevent or minimize any adverse impact which might occur as a consequence of the development of such OTEC facilities or plantships;

(f) Protect the interests of the United States in the location, construction, and

operation of OTEC facilities and plantships; and

(g) Protect the rights and responsibilities of adjacent coastal States in ensuring that Federal actions are consistent with approved State coastal zone management programs and other applicable State and local laws.

**§ 981.30 Scope of the OTEC licensing regulations.**

(a) *Subpart A* of Part 981 contains definitions and basic procedures related to any application for a license for an OTEC facility or plantship, including application fees and procedures for termination or withdrawal of an application.

(b) *Subpart B* of Part 981 prescribes the information which must be included in a license application to enable the Administrator to make the determinations required by the Act as conditions precedent to issuance or denial of an OTEC license.

(c) *Subpart C* of Part 981 prescribes license application review procedures including the Consolidated Application Review (CAR) process which will be used by NOAA and, on a voluntary basis, by the applicant and those other Federal, State, and local government entities with authority over any aspect of the OTEC operations proposed in an application.

(d) *Subpart D* of Part 981 contains the criteria upon which the Administrator will base the decision to issue or deny an OTEC license, including the criteria which will be used to decide among multiple applications for the same designated application area. This Subpart also prescribes criteria for establishing license terms and conditions, and for renewal, transfer, modification, revision, suspension, revocation, and termination of a license.

(e) *Subpart E* of Part 981 prescribes the procedures which will be used by the Administrator to conduct any formal hearings under this Part.

(f) *Subpart F* of Part 981 sets forth the administrative procedures which will be used for enforcement proceedings under the Act and this Part.

**§ 981.40 Definitions.**

For the purposes of this part, the following terms have the following meanings:

"Act" means the Ocean Thermal Energy Conversion Act of 1980 (Pub. L. 96-320; 94 Stat. 974; 42 U.S.C. 9101 *et seq.*);

"Adjacent coastal State" means any coastal State which is required to be designated as such by § 981.330(a) of this part or is designated as such by the Administrator in accordance with § 981.330(b) of this part;

"Administrator" means the Administrator of NOAA or a person to whom appropriate authority has been delegated;

"Affiliate" means any person, (A) in which the applicant or licensee owns or controls more than 5% interest, (B) which owns or controls more than 5% interest in the applicant or licensee, or (C) which is under common ownership or control with the applicant or licensee;

"Antitrust laws" include the Act of July 2, 1890, as amended, the Act of October 15, 1914, as amended, and sections 73 and 74 of the Act of August 27, 1894, as amended;

"Application" means any application submitted under this Part, (A) for issuance of a license for the ownership, construction, or operation of an OTEC facility or plantship; (B) for transfer or renewal of any such license; or (C) for any substantial change in any of the terms and conditions of any such license;

"CAR" means the Consolidated Application Review process described in subpart C of this part;

"Cleanup" means removal of pollutants from the water and shorelines or the taking of such 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, public and private property, shorelines, and beaches;

"Coastal State" means a State 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;

"Construction" means any activities conducted at sea to supervise, inspect, actually build, or perform other functions incidental to the building, repairing, or expanding of an OTEC facility or plantship or any of its components, including but not limited to, piledriving, emplacement of mooring devices, emplacement of cables and pipelines, and deployment of the cold water pipe, and alterations, modifications, or additions to an OTEC facility or plantship;

"Controlling interest" 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;

"Designated application area" means the projected area or areas in which the OTEC activities of the applicant might impact so as to significantly degrade the operation of another OTEC facility or plantship, and in which the operation of another OTEC facility or plantship might impact so as to significantly degrade the OTEC operation proposed by the applicant;

"EIS" means an environmental impact statement prepared under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C));

"Facility" means an OTEC facility;

"Governor" means the Governor of a State or the person designated by law to exercise the powers granted to the Governor pursuant to this Part;

"High seas" means that part of the oceans lying seaward of the territorial sea of the United States and outside the territorial sea, as recognized by the United States, of any other nation;

"Licensee" means the holder of a valid license for the ownership, construction, or operation of an OTEC facility or plantship that was issued, transferred, or renewed pursuant to this Part;

"Major component" means any component of an OTEC facility or plantship with a value exceeding $500,000;

"NOAA" means the National Oceanic and Atmospheric Administration;

"OTEC" means ocean thermal energy conversion;

"OTEC facility" means any facility which is standing or moored in or beyond the territorial sea of the United States and which is designed to use temperature differences in ocean water to produce electricity or another form of energy capable of being used directly to perform work, and includes any equipment installed on such facility to use such electricity or other form of energy to produce, process, refine, or manufacture a product, and any cable or pipeline used to deliver such electricity, fresh water, or product to shore, and all other associated equipment and appurtenances of such facility, to the extent they are located seaward of the high-water mark. If part of the OTEC facility is built on land, the definition includes that portion of the warm water intake structure, cold water intake structure, effluent discharge structure, and any other parts of the facility, located seaward of the high-water mark;

"OTEC plantship" means any vessel which is designed to use temperature differences in ocean water while floating unmoored or moving through such water, to produce electricity or another form or energy capable of being used directly to perform work, and includes any equipment installed on such vessel to use such electricity or

other form of energy to produce, process, refine, or manufacture a product; and any equipment used to transfer such product to other vessels for transportation to users, and all other associated equipment and appurtenances of such vessel;

"Person" means any individual (whether or not a citizen of the United States), any corporation, partnership, association, or other entity organized or existing under the laws of any nation, and any Federal, State, local or foreign government or any entity of any such government;

"Plantship" means an OTEC plantship;

"Pollutant" means (A) oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes; (B) dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, temperature change, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water; and (C) hazardous substances as that term is defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

"Pollutant discharge" means, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of pollutants;

"Significant contract" means any contract in an amount exceeding five hundred thousand dollars ($500,000);

"State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession over which the United States has jurisdiction;

"Test platform" means any floating or moored platform, barge, ship, or other vessel which is designed for limited-scale, at-sea operation in order to test or evaluate the operation of components or all of an OTEC system and which will not operate as an OTEC facility or plantship after the conclusion of such tests or evaluation; and

"United States citizen" means (A) any individual who is a citizen of the United States by law, birth, or naturalization; (B) any Federal, State, or local government in the United States, or any entity of any such government; or (C) any corporation, partnership, association, or other entity, organized or existing under the laws of the United States, or of any State, which has as its president or other executive officer and as its chairman of the board of directors, or holder of similar office, an individual who is a United States citizen and which has no more of its directors who are not United States citizens than constitute a minority of the number required for a quorum necessary to conduct the business of the board.

**§ 981.50 Who must apply for an OTEC license (and who does not need one)?**

(a) *OTEC facilities.* No person may engage in the ownership, construction, or operation of an OTEC facility which is:

(1) Documented under the laws of the United States; or

(2) Located in the territorial sea of the United States; or

(3) Connected to any State by pipeline or cable;

except in accordance with a license issued pursuant to this part.

(b) *OTEC plantships.* No citizen of the United States may engage in the ownership, construction or operation of an OTEC plantship except in accordance with a license issued pursuant ot this part, or in accordance with a license issued by a foreign nation whose licenses are found by the Administrator, after consultation with the Secretary of State, to be compatible with licenses issued pursuant to this part.

(c) *Activities which do not require a license.* The requirements of this section to obtain an OTEC license do not apply to the following activities:

(1) Ownership, construction, or operation of any ocean thermal energy conversion facility or plantship which the Secretary of Energy has designated in writing as a demonstration project for the development of alternative energy sources for the United States which is conducted by, participated in, or approved by the Department of Energy, for so long as the Secretary of Energy maintains such designation in effect. The Secretary of Energy, after consultation with the Administrator, will require such demonstration projects to abide by as many of the substantive requirements of Title I of the Act as he deems to be practicable without damaging the nature of or unduly delaying such projects;

(2) Ownership, construction, or operation of any test platform which will not operate as an OTEC facility or plantship after conclusion of the testing period;

(3) OTEC construction activities which are conducted on land or in a shipyard; and

(4) Manufacture or supplying of components for construction of an OTEC facility or plantship unless such activity takes place seaward of the high-water mark.

**§ 981.60 Federal applications.**

The application filed with the Administrator constitutes an application for all Federal authorizations required for ownership, construction, and operation of an OTEC facility or plantship, except for authorizations required by documentation, inspection, certification, construction, and manning laws and regulations administered by the Secretary of the department in which the Coast Guard is operating and application to the Maritime Administration for financial assistance under Title XI of the Merchant Marine Act of 1936. Procedures for review of the application by Federal agencies and departments (other than the Coast Guard) are set forth in Subpart C of this part.

**§ 981.70 Pre-application consultation.**

(a) *Consultation.* If requested, the Administrator will consult with any prospective applicant to assist the applicant in properly preparing the application and in contacting other Federal and State agencies involved in the application review process to discuss the prospective application.

(b) *Request.* A prospective applicant who wishes a pre-application consultation in accordance with this section should make such request in writing to the Director, Office of Ocean Minerals and Energy, NOAA, Room 410, Page 1 Building, 2001 Wisconsin Avenue, N.W., Washington, D.C. 20235.

**§ 981.80 How to apply for an OTEC license.**

(a) *Form.* Each application must be in writing and must include the information specified in Subpart B of this part in the order specified.

(b) *Number of copies.* 45 copies of each application must be submitted.

(c) *Where to file the application and all related documents.* Applications and all related documents shall be filed with the Administrator of NOAA, in care of the Director, NOAA Office of Ocean Minerals and Energy, Room 410, Page 1 Building, 2001 Wisconsin Avenue, N.W., Washington, D.C. 20235.

(d) *Signature.*

(1) *Who.* Each application for an OTEC license submitted under this part shall be signed by the applicant as follows:

(i) *For a corporation:* by a principal executive officer of at least the level of vice-president;

(ii) *For a partnership or sole proprietorship:* by a general partner or the proprietor, respectively;

(iii) *For a Federal, State, or local government in the United States, or any entity of any such government:* by either a principal executive officer or ranking elected official; or

(iv) *For an association or other entity:* by a principal executive officer.

(2) *Verification.* Each application shall contain a statement at the end of the application subscribed and sworn to before a notary public that the individual who signed the application has read it and that its contents are true to the individual's best knowledge and belief.

**§ 981.90 Provision of additional information.**

(a) *Supplemental documents.* The Administrator may require, by written notice to the applicant, that the applicant file as a supplement to the application any analysis, explanation or detailing of information in the application or any other information determined by the Administrator to be required to review or process the application.

(b) *Other Federal and State requests.* Any Federal or adjacent coastal State department or agency may file with the Administrator a request or recommendation for further information related to its authorization(s) required for ownership, construction, or operation of the proposed OTEC facility or plantship. Requests and recommendations received by the Administrator within 30 days after notice of the initial application has been published in the Federal Register will be fully considered before any final determination is made to require additional information of the applicant. Requests and recommendations must contain a brief statement of the need for additional information, including the nature of any safety, health, environmental, economic, or other legitimate concerns.

(c) *Time limits.* In exercising the authority to require supplemental information under this section, the Administrator may fix a reasonable time by which an applicant must meet the requirement. If an application states that required information is not yet available but will be furnished at a later date, the Administrator may specify a reasonable time by which the information must be provided. If any requirement is not met by a time fixed in accordance with this paragraph, the Administrator shall determine whether compliance with the requirement is material to processing of the application within the time deadlines prescribed in Subpart C of this part. If the Administrator determines that an unmet requirement for supplemental information is material, the Administrator may disapprove the application or suspend the application pending a determination that processing can be resumed. The period of any suspension shall not be counted in determining the dates of the deadlines prescribed in Subpart C of this part.

(d) *Copies.* 45 copies of additional information required under this section must be submitted unless the Administrator determines otherwise.

**§ 981.100 Confidentiality of information.**

(a) *Purpose.* This section provides a procedure by which persons submitting information pursuant to this part may request that certain information not be subject to public disclosure.

(b) *Written requests for confidential treatment.*

(1) Any person who submits any information pursuant to this part, which information is considered by him to be a trade secret, or commercial or financial information which is privileged or confidential, may request that the information be given confidential treatment.

(2)(i) Any request for confidential treatment of information:

(A) Should be submitted at the time of submission of the 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 such information pursuant to paragraph (d) of this section.

(ii) If information is submitted to NOAA 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, NOAA will make such efforts as are administratively practicable to associate the request with copies of the previously submitted information in the files of NOAA and the Federal and State agencies to which NOAA distributed the information. However, NOAA cannot assure that such efforts will be effective, in light of the prior distribution to Federal and State agencies and the possibility of prior disclosure of 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 or licensee, 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 NOAA 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.

(iii) With respect to information submitted as part of an application, forty-five copies of the information for which confidential treatment is requested must be submitted.

(iv) Normally, NOAA 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 decide to make a determination in advance of a request for disclosure where it would facilitate NOAA's 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 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 such statement

submitted will be treated as confidential if so requested by the person requesting confidential treatment. Any such statement 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.

(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 possess, 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.*

(1) Any request for disclosure of information submitted, reported or collected pursuant to this Part shall 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 such person continues to maintain the request for confidential treatment;

(ii) Notify such person of the date (generally, not later than the close of business on the fourth working day after issuance of the notice), by which the person is strongly encouraged to deliver to NOAA 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 such person that by such date as the Administrator specifies (generally, not later than the close of business on the fourth working day after issuance of the notice), the person:

(A) Is strongly encouraged to deliver to NOAA 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 such a statement was not previously submitted;

(B) Is strongly encouraged to deliver to NOAA an update of or supplement to any statement previously submitted under paragraph (c) of this section; and

(C) May present to the Administrator, in such forum as the Administrator deems appropriate (such as by telephone or in an informal conference), such person's arguments against disclosure of the information; and

(iv) Inform such person that the burden is on him to assure that any response to the notice is delivered to NOAA within the time specified in the notice.

(3) To the extent permitted by applicable law, part or all 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 such response for which confidential treatment is requested must be segregated, marked and submitted in accordance with the procedures described in paragraphs (b)(3)(i) and (b)(3)(ii) of this section.

(4) Upon the expiration of the time allowed for response under paragraph (d)(2) of this section, or sooner if authorized under paragraph (e) of this section, the Administrator will determine, in consultation with the NOAA Office of General Counsel, 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)(i) 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:

(A) The basis for the Administrator's determination;

(B) That the Administrator's determination constitutes final agency action on the request for confidential treatment;

(C) That such final agency action may be subject to judicial review under Chapter 7 of Title 5, United States Code; and

(D) That, except as otherwise provided by paragraph (d)(7)(ii) of this section, on the fourth working day after issuance of the notice described in this paragraph (d)(7)(i) the Administrator will make the information available to the person who requested disclosure unless NOAA 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.

(ii) The disclosure of information described in paragraph (e) of this section will be subject to the additional standards and procedures for disclosure set forth in that paragraph. For example, the notice under paragraph (d)(2) of this section may be omitted, or the time period allowed for response to that notice may be very short, if the Administrator makes an appropriate determination under paragraph (e)(1) of this section that the delay resulting from following the procedures of this paragraph (d) would be detrimental to the public health or safety or the environment.

(8) NOAA will keep a record of the date any notice is issued, and of the date any response is received, by NOAA 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 10 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) *Special limitations on disclosure of certain information.* Any information submitted to, reported to, or collected by the Administrator under this Part which is exempt from disclosure pursuant to section 552(b)(4) of Title 5, United States Code (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information

which is privileged or confidential), will not:

(1) Be publicly disclosed by the Administrator or by any other officer or employee of the United States, unless the Administrator has:

(i) Determined that the disclosure is necessary to protect the public health or safety or the environment against an unreasonable risk of injury, and

(ii) Notified the person who provided the information 10 working days before the disclosure is to be made, unless the delay resulting from such notice would be detrimental to the public health or safety or the environment, or

(2) Be otherwise disclosed except:

(i)(A) To other Federal and adjacent coastal State government departments and agencies for official use,

(B) To any committee of the Congress of appropriate jurisdiction, or,

(C) Pursuant to court order, and

(ii) When the Administrator has taken appropriate steps to inform the recipient of the confidential nature of the information.

(f) *Direct Submissions of Confidential Information.* If any person (for example, an affiliate) has reason to believe that it would be prejudiced by furnishing information required from it to the applicant or licensee, such person may file the required information directly with NOAA. 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.

(g) *Protection of confidential information transmitted by NOAA to other agencies.* Each copy of information for which confidential treatment has been requested which is transmitted by NOAA to other Federal and adjacent coastal State government departments and agencies will be accompanied by a cover letter containing:

(1) A request that the other Federal or State department or agency maintain the information in confidence in accordance with applicable law and any applicable protective agreement entered into by the Administrator and the Federal or State department or agency receiving the information;

(2) A request that the other Federal or State department or agency notify the Administrator immediately upon receipt of any request for disclosure of the information;

(3) A notification that information which is exempt from disclosure under 5 U.S.C. 552(b)(4) (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information which is privileged or confidential) shall not be disclosed except in the limited circumstances provided by section 112 of the Act, and § 981.100(d) and (e) of this part; and

(4) A request that all copies of the information be returned to NOAA for secure storage or disposal promptly after the Federal or State department or agency determines that it no longer needs the information for its official use.

**§ 981.110 Amendment of an application.**

(a) *Requirement to amend.* If information in an application becomes materially inaccurate or incomplete after it is filed but before the license application proceeding is terminated, the applicant must promptly file an amendment furnishing the corrected or additional information. Forty-five copies of the amendment must be submitted to the Administrator.

(b) *Effect of amendment.* If the administrator determines that any amendment constitutes a major and substantial change to the applicant's original proposal, the Administrator may:

(1) Suspend the time deadlines prescribed in Subpart C of this part for processing of an application pending review of the amendment; or

(2) Require the applicant to commence a new license application proceeding.

**§ 981.120 Termination of processing and withdrawal of an application.**

(a) An applicant may withdraw an application at any time before the license application proceeding is terminated by delivering or mailing written notice of withdrawal to the Administrator.

(b) The Administrator will terminate a proceeding if:

(1) All applications are withdrawn before the decision approving or denying them is issued; or

(2) The applicant after written notice by the Administrator pursuant to § 981.90 of this part does not provide adequate further information to complete the application within the time fixed in the written notice, and the Administrator elects to disapprove the application under § 981.90(c) of this part.

**§ 981.130 Application fees.**

(a) *Schedule of payment.* The applicant must submit the application fee in accordance with the following schedule:

(1) A nonrefundable payment of one hundred thousand dollars ($100,000.00) must be submitted with each application for issuance of a license.

(2) An additional payment of one hundred thousand dollars ($100,000.00) must be submitted not later than the date of the first public hearing held by NOAA on the license application in accordance with § 981.340 of this part.

(3) A final payment of fifty thousand dollars ($50,000.00) must be submitted not later than 45 days after notice of completion of public hearings on the application is published in the Federal Register in accordance with § 981.360 of this part. The Administrator will not issue a license under this part unless the entire application fee has been paid.

(b) *Effect of withdrawal or termination of application.* Withdrawal of the application by the applicant or termination of the application proceedings by the Administrator will reduce the application fee due to NOAA as follows:

(1) If the application is withdrawn or terminated prior to publication in the Federal Register of notice of receipt of an application which appears to be complete in accordance with § 981.290 of this part, the applicant will not be liable for the additional payment of one hundred thousand dollars ($100,000.00).

(2) If the application is withdrawn or terminated before the date of the first public hearing held by NOAA on the application in accordance with § 981.340 of this part, the applicant will not be liable for the final payment of fifty thousand dollars ($50,000.00).

(c) *Payment.* The fees assessed under this section must be made payable to the "National Oceanic and Atmospheric Administration, U.S. Department of Commerce."

**§ 981.140 Clerk, docket, and record of application proceeding.**

(a) The mailing address for the clerk in each license application proceeding is: OTEC Docket Clerk, Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, Room 410, Page I Building, 2001 Wisconsin Ave., NW., Washington, D.C. 20235.

(b) The clerk will maintain a docket and the record for each license application proceeding. The docket will list each document in the record. The record will contain all documents filed or issued in the proceeding that the clerk has received and any other documents in the proceeding that are listed on the docket in accordance with this part.

(c) Comments submitted by Federal agencies and departments on each licensing proceeding will be listed on the docket when they are received. The draft and final environmental impact statements prepared in accordance with § 981.310 of this part will be listed on the docket when they are transmitted to the Environmental Protection Agency.

**§ 981.150 Public inspection and copying.**

(a) A copy of each application, except information for which confidential treatment is requested (for example, as trade secrets or commercial or financial information which is privileged or confidential); will be available for public inspection and copying at:

(1) NOAA, Office of Ocean Minerals and Energy, Room 410, Page I Building, 2001 Wisconsin Ave., NW., Washington, D.C. 20235; and

(2) At least one location in each designated adjacent coastal state. The Federal Register notice published under § 981.290, or equivalent public notice, will announce the location.

(b)(1) The Administrator will designate a custodian of all information for which confidential treatment is requested under § 981.100 of this part. The custodian will keep a record of all persons known to have custody of any copy or copies of information which is given confidential treatment.

(2) The custodian will not make public for inspection information for which confidential treatment is requested nor otherwise disclose such information unless the Administrator, after consultation with the NOAA Office of General Counsel, is of the opinion that the applicable requirements of § 981.100 of this part have been satisfied.

**§ 981.155 Compliance with Paperwork Reduction Act.**

In accordance with 44 U.S.C. 3506(c)(5) and 3512, NOAA hereby informs affected persons that the requests for information under this Part requiring:

(a) Submission of specified information with applications; and

(b) Compliance with specified recordkeeping and reporting requirements,

are not subject to the requirements of Chapter 35 of title 44, United States Code, including 44 U.S.C. 3507.

**§ 981.158 Computation of time periods for filing documents.**

Saturdays, Sundays and Federal Government holidays will be included in computing the time period allowed for filing any document under this Part, but when such time period expires on such a day, such time period will be extended to include the next following Federal Government work day. Also, with respect to documents filed with the Federal Government, filing periods expire at the close of business for the office specified on the day specified.

## Subpart B—Information To Be Submitted With Application

**§ 981.160 Why is this information required?**

(a) *Information for NOAA.* The Act requires the Administrator to make a number of factual determinations with respect to issuance of a license. This subpart prescribes the information which the applicant must provide with the application. If additional information later becomes necessary to enable the Administrator to make those determinations, the Administrator will use the procedures in § 981.90 of this part to obtain it from the applicant.

(b) *Information for other Federal agencies and departments.* The Act requires the Administrator not to issue a license if it is determined that the applicant cannot or will not comply with applicable laws and regulations. This Subpart prescribes information which the applicant must provide with the application to enable the Administrator to make that determination. If additional information later becomes necessary to complete the application proceeding, the Administrator will use the procedures in § 981.90 of this part to obtain it from the applicant.

**§ 981.170 Request for use of the Consolidated Application Review (CAR) process.**

(a) *Request.* If the applicant wishes to have the CAR process used the application shall so indicate.

(b) *CAR team representative.* If the applicant requests use of the CAR process, the applicant shall designate a representative to the CAR team in his application.

**§ 981.180 Information about the applicant and its affiliates.**

(a) *General.* The following information on the applicant and its affiliates shall be provided by the applicant with the application:

(1) The name, mailing address, telephone number, citizenship, and the ownership interest in the applicant and its affiliates, of each person having any controlling interest in the applicant or its affiliates or any ownership interest in the applicant or its affiliates of greater than 5 per centum; and

(2) The name, address, and citizenship of any person with whom the applicant and its affiliates have made, or propose to make, a significant contract for the construction or operation of the OTEC facility or plantship, or for any major component of the OTEC facility or plantship, and a copy of such contract.

(b) *Proof of citizenship and authority* (1) If the applicant is a partnership or sole proprietorship, an affidavit from each partner or the proprietor, respectively, stating that the individual is a citizen of the United States of America.

(2) If the applicant is a corporation, one copy of its charter or instrument by which the corporation is formed and organized under general corporation laws, certified by the Secretary of State or other appropriate authority of the State in which incorporated, a copy of its by-laws certified by its Secretary or an Assistant Secretary, and an affidavit from its president, or holder of similar office, and each member of its board of directors stating the individual's citizenship.

(3) If the applicant is a Federal, State, or local government in the United States, or any entity of any such government, a copy of the laws authorizing the operations detailed in the application.

(4) If the applicant is an association or other entity, a copy of its charter or instrument by which the entity is organized or existing under the laws of the United States, or of any State and an affidavit from its principal executive officer, or holder of similar office, and from each member of its board of directors, stating the individual's citizenship.

(c) *Address for service of documents.* Each application shall contain the name, address and telephone number of a person upon whom service of a notice may be made if a formal hearing is to be held on the application and the name, address and telephone number of a person to whom documents not required to be served may be sent.

(d) *Technical competence.* The following information on the experience of the applicant shall be provided with the application:

(1) A description of the technical competence in offshore operations of the applicant and each consultant, naval architect, or marine engineering firm, if known, that will participate in the design of the OTEC facility or plantship, with particular emphasis on involvement in offshore construction, deployment of large structures, submarine electrical transmission cables, submarine pipelines, seabed foundations, mooring systems, and other experience that would bear on one's qualifications to participate in the construction or operation of an OTEC facility or plantship.

(2) A listing and abstract of each study relied upon by the applicant and a listing and abstract of each ongoing or completed study pertaining to OTEC facilities or plantships conducted by or for the applicant.

(e) *Finances and production.* The following information on the financial situation and production history and plans of the applicant and each of its affiliates shall be provided by the applicant with the application:

(1) The most recent annual financial statement of the applicant and each of its affiliates, including an income statement and a balance sheet, accompanied by an opinion of a certified public accountant;

(2) An estimate of construction costs, by phases;

(3) A detailed estimate of the cost of removal or at sea disposal of all marine components of the OTEC facility or plantship other than electrical transmission cables or pipelines lying below the seabed;

(4) A copy of every agreement or proposal of the applicant and each of its affiliates relating to the ownership, lease, charter, or operation of the OTEC facility or plantship or any of its components and to the financing of the construction or operation of the OTEC facility, plant, or plantship or component thereof, including those relating to production of electricity or other products, capital contributions, loans, guarantees, and commitments therefor; and

(5) From each applicant, and each affiliate of an applicant, engaged in the production of electricity or other product to be produced by the OTEC facility or plantship which is the subject of the application, for each of the three calendar years immediately prior to the date of application, its:

(i) Locations; and

(ii) Total U.S. and total worldwide:

(A) Gross and net production of electricity; and

(B) Production of products of the type which would be produced by the OTEC facility or plantship which is the subject of the application.

**§ 981.190 General information on the OTEC facility or plantship.**

The following general information shall be submitted with the application in the order specified in this section:

(a) The proposed physical size and location (for a plantship, a description of the area in which the plantship is intended to be operated) of the OTEC facility or plantship, and the intended capacity of such facility or plantship to produce electricity, fresh water, or other products, including an estimate of the total annual gross and net production of electricity or other products;

(b) A description of the thermodynamic cycle and working fluid to be employed by the OTEC facility or plantship;

(c) A description of any production, processing, refining, or manufacturing process which will be used to make a product;

(d) A description of the methods which will be used to deliver electricity, fresh water, or other product to shore;

(e) A general description of the major components of the OTEC facility or plantship; and any pipeline or electrical transmission system or other product transfer system associated with such OTEC facility or plantship;

(f) If construction and deployment is expected to proceed in phases, a description of each phase, including the anticipated date of completion for each phase;

(g) The intended daily volumes of warm and cold water flow through the OTEC facility or plantship;

(h) A description of the procedures to be used in constructing, operating, and maintaining the OTEC facility or plantship, including procedures to be used to control biofouling and to minimize the volume of any Federally permitted pollutant discharge from the OTEC facility or plantship;

(i) A description of the procedures to be used in constructing, operating, and maintaining the OTEC facility or plantship to prevent any unpermitted pollutant discharge; and

(j) An emergency pollutant discharge contingency plan which describes the equipment, training, procedures, and maintenance required to respond to or conduct cleanup of any unpermitted pollutant discharge from the OTEC facility or plantship. (Standards for such a plan and for review of the adequacy of such a plan will be determined by the Coast Guard).

**§ 981.200 Requested duration of license.**

The applicant shall submit with the application a statement of the requested duration of the license he is seeking, along with the economic, technical, or other basis for the requested duration.

**§ 981.210 Compliance with other Federal laws and regulations.**

(a) If the proposal of the applicant is subject to regulation under the cited authority, the information specified in this section shall be submitted with the application.

(b) *Clean Water Act.* The information required to be submitted to the Environmental Protection Agency to obtain a *National Pollutant Discharge Elimination System* (NPDES) permit under section 402 of the *Clean Water Act* (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. 1251 *et seq.*). The procedures and information required for such submittals are set out in 33 CFR Part 122, 33 CFR Part 124, and 40 CFR 125.120 *et seq.* In addition, NPDES permits for discharges into marine waters are issued in compliance with guidelines developed by EPA under section 403(c) of the Clean Water Act. For the Ocean Discharge Criteria see 40 CFR Part 125, Subpart M (45 FR 65942; October 3, 1980).

(c) *Clean Water Act.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Discharges of Dredged or Fill Material into Waters of the United States* under section 404 of the *Clean Water Act* (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. 1251 *et seq.*). The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 323, and 33 CFR Part 325.

(d) *Marine Protection, Research, and Sanctuaries Act of 1972.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Ocean Dumping of Dredged Material* under section 103 of the *Marine Protection, Research, and Sanctuaries Act of 1972*, as amended (33 U.S.C. 1413). The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 324, and 33 CFR Part 325.

(e) *River and Harbor Act of 1899.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Structures or Work in or Affecting Navigable Waters of the United States* under section 10 of the *River and Harbor Act of 1899*, 33 U.S.C. 403. The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 322, and 33 CFR Part 325.

(f) *Endangered Species Act of 1973.* The information required to determine whether the activities of the OTEC facility or plantship are likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their critical habitats, as determined under the *Endangered Species Act of 1973* (16 U.S.C. 1531 *et seq.*). For the lists of endangered species, see 50 CFR Parts 17 and 222; for the lists of threatened species, see 50 CFR Parts 17 and 227; for the lists of designated critical habitats, see 50 CFR Parts 17 and 228.

(g) *Coastal Zone Management Act of 1972.* The certification or certifications required to be submitted to NOAA under section 307(c) of the *Coastal Zone Management Act of 1972* (CZMA) (16

U.S.C. 1456(c)]. The procedures and information required for such submittals are set out in 15 CFR Part 930.

(h) *Outer Continental Shelf Lands Act Amendments of 1978.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Artifical Islands, Installations, and Other Devices, Installed on the Outer Continental Shelf, which May Obstruct Navigation,* under section 4(e) of the *Outer Continental Shelf Lands Act* (16 U.S.C. 203(e)]. The procedures and information required for such submittals are set out in 33 CFR Part 322.

(i) *Clear Air Act.* The information required to be submitted to a State or to the Environmental Protection Agency to determine compliance with the *Clean Air Act* (42 U.S.C. 7401 *et seq.*). The procedures and information required for such submittals are set out in 40 CFR Part 50–87.

(j) *Fish and Wildlife Coordination Act (FWCA).* Information to assist NOAA in complying with the consultation requirements of the FWCA (16 U.S.C. 661 *et seq.*; in particular, section 662), with a view to the conservation of fish and wildlife resources by planning and incorporating measures to prevent loss of and damage to such resources. NOAA strongly encourages each applicant to contact NOAA at the pre-application stage of the project, to facilitate early consultation with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and State agencies administering affected wildlife resources.

(k) *Additional Federal authorizations required.* All other applications for Federal authorizations required for ownership, construction, location, and operation of the proposed OTEC facility or plantship not listed elsewhere in this Part.

**§ 981.220 OTEC site information.**

(a) *General.* The following information on the proposed OTEC facility site or proposed OTEC plantship operating site(s), as appropriate, shall be submitted with an application.

(b) *Site plan.* Single-line drawings and descriptions showing the location and type of each major component and appurtenance of the proposed OTEC facility or plantship, including floating structures, fixed structures, electrical power transmission cables, aids to navigation, industrial process systems, offshore and onshore pipelines, electrical substations and switching stations. One of these drawings must be a large-scale nautical chart of the area in which the proposed OTEC facility or plantship would operate.

(c) *Existing human uses.* Single-line drawings of the marine area within five miles of the proposed site showing the nature and location of any cables, pipelines, offshore drilling or production platforms, aids to navigation, sewage outfalls, or other man-made structures and equipment. These drawings must also show the boundary lines and identification of each Outer Continental Shelf lease block, shipping lane, submarine transit lane, fishing ground, national defense restricted area, or other special area noted on navigation charts for the area covered by the drawings, or otherwise known to the applicant. The information required in §§ 981.280(a)(7) and (a)(8) of the part must also be included on these drawings.

(d) *Marine components.* A description of:

(1) The proposed size and location of:

(i) All fixed and floating structures associated with the OTEC facility or plantship;

(ii) In the case of a moored OTEC facility, watch circles;

(iii) Maneuvering areas;

(iv) Recommended ships' routing measures considered necessary or appropriate for the protection of the OTEC facility or plantship;

(v) Recommended anchorage areas, if any;

(vi) Recommended mooring area for support vessels;

(vii) Pipelines and cables within the marine site;

(2) The water depth throughout the proposed marine site.

(3) In the case of an OTEC facility, a reconnaissance hydrographic survey of the proposed marine site.

Note.—A requirement to submit an engineering hydrographic survey of the final marine site for an OTEC facility will be imposed as a license condition.

(e) *Soil data.* For an OTEC facility, an analysis of the general character and condition of the ocean bottom and sub-bottom strata throughout the marine site and along the path of any cold or warm water intake or discharge piping, electrical transmission cable, or pipeline to the shore, including an opinion by a registered professional engineer with appropriate expertise and training, concerning:

(1) The suitability of the ocean bottom and sub-bottom strata to accommodate the anticipated design load of each marine component that will be fixed to or supported on the ocean floor as evidenced by foundation tests, geo-hazard reports, and geo-technical reports; and

(2) The stability of the seabed when exposed to the environmental forces resulting from severe storms, or to lesser forces that continue for an extended period, including any history of accretion or erosion of the coast line in proximity to the marine site.

(f) *Onshore components.* A description of the size and location of major onshore components of the OTEC facility, including:

(1) Onshore electrical transmission cables or pipelines;

(2) Electrical substations;

(3) Switching stations;

(4) Electrical transmission lines;

(5) Storage facilities;

(6) Industrial plants; and

(7) Vessel on/off loading facilities.

**§ 981.230 Operational information.**

(a) Each applicant shall specify the wind, wave, and current conditions during which the licensee would initiate the following actions:

(1) Shutdown of electrical power or other product production operations.

(2) Prohibition on supply vessels or product transport vessels mooring to an OTEC facility or plantship.

(3) Shutdown of all operations and evacuation of the OTEC facility or plantship.

(b) Each application shall contain a description of the calculations and other information used to specify the conditions described in paragraph (a) of this section.

(c) Each application shall contain a description of the procedures to be followed in shutdown and evacuation of the facility or plantship under the conditions described in paragraph (a) of this section.

(d) Each application shall state the personnel capacity of the OTEC facility or plantship.

**§ 981.240 Design information.**

(a) The applicant shall submit the design information specified in this section with his application.

(b) *Major floating components data.*

(1) A description and preliminary design drawing of each major floating component, including any electrical transmission riser cable, product transfer system, cold and warm water intake and discharge structures, or cold water pipe suspension system if they are floating systems in whole or in part, along with any floating anchoring or securing structure.

(2) The design criteria to which each major floating component is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description and the results of any design and evaluation studies performed by or for the applicant on a major floating component.

(6) A description of safety, lifesaving, and firefighting equipment to be used on each major floating component.

(c) *Major fixed marine components.*

(1) A description and preliminary design drawing of each major fixed marine component, including cold and warm water intake and discharge structures, if they are fixed marine components in whole or in part.

(2) The design criteria to which each major fixed marine component is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description and the results of any design and evaluation studies performed by or for the applicant for any major fixed marine component and utilized in the development of the application.

(6) A description of safety, lifesaving, and firefighting equipment to be used on each major fixed marine component.

(d) *Major onshore components.*

(1) A description and preliminary design drawing of each major onshore component.

(2) A description and the results of any design and evaluation studies performed by or for the applicant for any major onshore component and used in development of the application.

(3) A description of the safety and firefighting equipment to be used in each major onshore component.

(e) *Offshore electrical transmission cable or pipeline components.*

(1) A description and preliminary design drawing of any submarine electrical transmission cable or pipeline, including size, capacity, length, depth and protective devices.

(2) The design criteria to which the submarine electrical transmission cable or pipeline is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description of the manner in which all submerged or buried communications cables, electrical transmission cables, and pipelines will be crossed by the offshore submarine electrical transmission cable or pipeline.

(f) *Miscellaneous components data.*

(1) A description of the navigation safety equipment required under 33 CFR Part 164 for a plantship.

(2) A description of aids to navigation to be established on the OTEC facility in accordance with 33 CFR Part 64 and 33 CFR Part 66.

(3) A description of the proposed navigational lighting for the OTEC plantship in accordance with the International Regulations for Prevention of Collisions at Sea, 33 CFR Part 87.

(4) A description of the radio stations or other communications facilities and the proposed method of operation to serve the OTEC facility or plantship during construction and operation, including systems to communicate with transient shipping for safety at sea.

Note.—Federal Communications Commission applications for the OTEC facility or plantship may be submitted directly to the Federal Communications Commission when sufficient technical information is available to meet the rules of that agency. The holding of appropriate Federal Communications Commission licenses will be made a condition on each OTEC facility or plantship license.

(5) A description of plans and methods of operating vessels supplying, or transporting products from, the OTEC facility or plantship.

(6) Type, size and number of vessels to be used in supplying or transporting products from the OTEC facility or plantship.

(7) A description and exact location of any shore-based support facilities to be provided for vessels described in paragraphs (f)(5) and (f)(6) of this section.

**§ 981.250 Construction and deployment procedures.**

A description of the locations, methods and procedures to be used in constructing and deploying each major marine component of the OTEC facility or plantship must be submitted. This description must include an explanation of the method for emplacing any submarine electrical transmission cable.

**§ 981.260 Environmental information.**

(a) The following environmental information and assessments shall be provided with the application:

(1) A description of the area or areas of the ocean and their boundaries, in which the OTEC activities of the applicant might impact so as to significantly degrade the operation of another OTEC facility or plantship, and in which the potential operation of another OTEC facility or plantship might impact so as to significantly degade the OTEC operation proposed by the applicant.

(2) An assessment of the quantities, composition and potential for bioaccumulation or persistence of any pollutants which may be discharged into the water or atmosphere from the facility or plantship;

(3) An assessment of the potential transport of such pollutants by biological, physical or chemical processes;

(4) An assessment of the composition and vulnerability of the biological communities which may be affected by entrainment, impingement, or by 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, the presence of species of marine mammals, or the presence of those species critical to the structure or function of the ecosystems, such as those important for the food chain;

(5) An assessment of the potential impacts on human health of such pollutants through direct and indirect pathways;

(6) An assessment of the importance of the receiving water area and atmosphere 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;

(7) A description of special sites which might be impacted by the proposed OTEC operations including, but not limited to, estuarine or marine sanctuaries and refuges, parks, national and historic monuments, archeological resources, national seashores, wilderness areas and coral reefs, and an assessment of the potential significance of such impacts. The location of these sites must be included on the drawings required by § 981.220(c) of this part;

(8) A description of existing or potential recreational and commercial fishing areas, including finfishing and shellfishing areas, which might be significantly impacted by the proposed OTEC operation. The locations of these areas must be included on the drawings required by § 981.220(c) of this part;

(9) A description of expected meteorological and climatic conditions in the area(s) described in paragraph (a)(1) of this section, including estimates of the frequency and severity of extreme meteorological events;

(10) For an OTEC facility, a description of the seismological conditions at the proposed site, including estimates of the frequency and severity of extreme seismological events;

(11) A description of the physical oceanographic conditions in the area(s) described in paragraph (a)(1) of this

section, including surface and subsurface currents, density gradients and tides;

(12) A description of the environmental monitoring program proposed by the applicant to:

(i) Demonstrate compliance with applicable Federal, State, or other pertinent air and water quality standards;

(ii) Provide for early detection of potential releases of pollutants from the OTEC facility or plantship; and

(iii) Monitor the effects of cold and warm water intakes and of discharges from the OTEC facility or plantship on air, water, sediment, and biological quality. Note that numerical limits for conventional, non-conventional, and toxic pollutants for marine waters are identified in the Environmental Protection Agency publication *Quality Criteria for Water* (the "Red Book"); and in water quality criteria for toxic pollutants set out in 45 FR 79318–79370, November 28, 1980.

(b) A description and the results of any study or evaluation used by the applicant to develop the information and assessments required by this section must be submitted with the application.

## Subpart C—License Application Review Procedures

### § 981.270 What is the license application review process?

This subpart describes the process which is used by NOAA to review an application for an OTEC license. The Act prescribes certain mandatory steps in the process and establishes deadlines for their completion. The mandatory steps in the license application review process are set out first in this Subpart in §§ 981.280 through 981.370. NOAA has also developed a voluntary Consolidated Application Review (CAR) process which will be used by NOAA and, on a voluntary basis, by other involved Federal, State, and local government entities, to coordinate reviews associated with all Federal, State, and local government authorizations required for ownership, construction, and operation of an OTEC facility or plantship. The steps in the CAR process are set out in this Subpart after the mandatory review procedures, beginning at § 981.380.

### § 981.280 NOAA review for completeness.

(a) Within 21 days after the receipt of an application, the Administrator will determine whether the application appears to contain all of the information required by Subpart B of this part. In making this determination the Administrator will consult with other involved Federal agencies and departments.

(b) If the Administrator determines that such information appears to be contained in the application, the Administrator will take the actions under § 981.290 of this part.

(c) If the Administrator determines that all of the required information does not appear to be contained in the application, the Administrator will notify the applicant in accordance with § 981.90 of this part. The Administrator may decide to take no further action with respect to processing the application until such deficiencies have been remedied.

(d) The time limitations of this Subpart do not begin to run until the date on which the Administrator determines under paragraph (b) of this section that the application appears to be complete.

### § 981.290 Publication of notice of application; contents of notice; call for additional applications for OTEC facilities.

(a) Not later than 5 days after determining under § 981.280 of this part that an application appears to be complete, the Administrator will publish notice of receipt of the application, together with a summary of the plans specified in the application, in the Federal Register.

(b) In the case of an application for an OTEC facility the published notice also will include:

(1) A description of the designated application area encompassing the proposed OTEC facility, and within which:

(i) The OTEC activities proposed by the applicant might impact so as to significantly degrade the operation of another OTEC facility; and

(ii) The potential operation of another OTEC facility might impact so as to significantly degrade the OTEC operation proposed by the applicant;

(2) A call for submission of any other applications for licenses for the ownership, construction, and operation of an OTEC facility within the designated application area.

(c) Any person intending to file an application referred to in paragraph (b)(2) of this section shall submit a notice of intent to file an application to the Administrator not later than 60 days after the publication of notice pursuant to paragraph (a) of this section, and shall submit the completed application no later than 90 days after publication of such notice. No application for a license for the ownership, construction, and operation of an OTEC facility within the designated application area for which a notice of intent to file was received after such 60-day period, or which is received after such 90-day period has elapsed, shall be considered until action has been completed on all timely filed applications pending with respect to such application area.

(d) Not later than 5 days after determining under § 981.280 of this part that an application submitted in accordance with paragraph (c) of this section appears to be complete, the Administrator will publish notice of receipt of the application, together with a summary of the plans specified in the application, in the Federal Register. The notice will also contain a description of the application area described in the original notice published by the Administrator for that area under paragraph (b) of this section.

(e) If additional applications for a designated application area are received pursuant to paragraph (c) of this section, the original applicant and all subsequent applicants for licenses in the designated application area shall submit the following information not later than 30 days after expiration of the 90-day period provided for in paragraph (c) of this section:

(1) Projections or estimates of the unit cost to the end user of produced electricity or product during the first, third, sixth, ninth, etc., year of operation throughout the requested duration of the OTEC facility license; and

(2) An estimate of the amount of fuel or other raw materials which would be saved or made available for other uses because of the operation of the OTEC facility, projected on an annual basis through the expected useful life of the OTEC facility.

The estimates provided under this paragraph should be supported by an analysis of the specific markets in which the OTEC facility would compete.

### § 981.300 Other Federal agencies and departments.

(a) At the time notice of any application is published pursuant to § 981.290 of this part, the Administrator will forward a copy of such application to those Federal agencies and departments with jurisdiction over any aspect of OTEC facility or plantship ownership, construction, or operation for review, comment, and recommendation as to license conditions and for such other action as may be required by law. The Federal agencies involved shall include, but are not limited to, the Environmental Protection Agency and the Departments of Energy, Transportation, State, the Interior, Justice and Defense.

(b) Each Federal agency or department involved (other than the Department of Justice, which shall conduct its review in accordance with § 981.320 of this part) shall review the application and, based upon legal considerations within its area of responsibility, recommend to the Administrator the approval, approval subject to conditions, or disapproval of the application not later than 45 days after public hearings are concluded pursuant to this part. In any case in which an agency or department recommends disapproval, it shall set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and shall notify the Administrator of the manner in which the application may be amended or the license conditioned so as to bring it into compliance with the law or regulation involved.

(c) In addition to the requirements of paragraph (b) of this section, each Federal agency or department is strongly encouraged to conduct its review of the application and to make its initial or tentative recommendation of approval or denial to the Administrator before public hearings begin under § 981.340 of this part, so that the public hearings can address those tentative recommendations. The NOAA Administrator will also attempt to make his preliminary views on the application and possible license terms and conditions available before the first public hearing is held under § 981.340 of this part.

**§ 981.310 EIS for each application.**

(a) *General.* (1) The issuance of any license for ownership, construction, and operation of an OTEC facility or plantship will be deemed to be a major Federal action significantly affecting the quality of the human environment for purposes of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)).

(2) Whether other actions concerning a license, such as transfer or renewal of the license, require full EIS procedures will be determined on a case-by-case basis in accordance with NEPA.

(b) *NOAA as lead agency.* For all timely applications covering proposed OTEC facilities in a single application area, and for each application relating to a proposed OTEC plantship, the Administrator will, pursuant to section 102(2)(C) of NEPA and in cooperation with other involved Federal agencies and departments, prepare a single EIS which will fulfill the requirements of all Federal agencies in carrying out their responsibilities pursuant to the Act to prepare an EIS.

**§ 981.320 Antitrust review.**

(a) Promptly after determining under § 981.280 of this part that an application appears to be complete, the Administrator will transmit to the Attorney General a complete copy of such application.

(b) Within 90 days after receipt of the application under § 981.300(a) of this part, the Attorney General shall conduct such antitrust review of the application as he deems appropriate, and submit to the Administrator, in writing, any advice or recommendations he deems advisable to avoid any action upon such application by the Administrator which would create a situation inconsistent with the antitrust laws.

(c) The Administrator will not issue the license during the 90-day period, except upon written confirmation by the Attorney General that he does not intend to submit any further advice or recommendation on the application during such period.

(d) If the Attorney General fails to file such views within the 90-day period, the Administrator will proceed as if such views had been received.

(e) If the Administrator decides to issue the license even though the Attorney General has recommended against it, or to issue the license without terms and/or conditions recommended by the Attorney General, the Administrator will inform the Attorney General in writing of the reasons for such a decision.

**§ 981.330 Adjacent coastal States.**

(a) *Automatic designation.* (1) The Administrator will designate as an "adjacent coastal State" any coastal State:

(i) Which would be directly connected by electric transmission cable or pipeline to an OTEC facility as proposed in an application;

(ii) In whose waters any part of such proposed OTEC facility would be located; or

(iii) In whose waters an OTEC plantship would be operated as proposed in an application.

(2) The Administrator will announce the designation of an adjacent coastal State under paragraph (a)(1) of this section in the notice of application published in the Federal Register under § 981.290 of this part.

(b) *Other designation.* (1) The Administrator will, upon request of a State, designate such State as an "adjacent coastal State" if he determines:

(i) That there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State required to be designated as an "adjacent coastal State" by paragraph (a)(1) of this section, or

(ii) that the proposed OTEC activities of the applicant are likely to impact at possible locations for OTEC facilities which could reasonably be expected to be directly connected by electric transmission cable or pipeline to such State, so as to significantly degrade OTEC operations at such possible locations.

(2) Any State requesting designation as an "adjacent coastal State" under paragraph (b)(1) of this section must make its request to the Administrator, in writing, not later than the 14th day after the date of publication of notice of application for a proposed OTEC facility or plantship in the Federal Register under § 981.290 of this part. The request must be signed by the Governor of the requesting State, and must specify in detail the reasons why the State believes the Administrator should make a determination under paragraph (b)(1) of this section.

(3) The Administrator will make any designation required by paragraph (b)(1) of this section not later than the 45th day after the date he receives such a request from a State.

(c) *Transmittal of application; "Federal Register" notice.* Not later than 5 days after the designation of an adjacent coastal State pursuant to this section, the Administrator will transmit a complete copy of the application to the Governor of such State, and publish notice of the designation in the Federal Register.

(d) *Consultation with adjacent coastal States with approved Coastal Zone Management programs on license conditions.*

(1) The Administrator will not issue a license without consultation with the Governor of each adjacent coastal State which has an approved Coastal Zone Management (CZM) program in good standing pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et. seq.*).

(2)(i) If the Governor of a State referred to in paragraph (d)(1) of this section determines that an application is inadequate or inconsistent in some respect with the State's CZM program or other applicable State or local laws, the Governor may so notify the Administrator, including the following information:

(A) The part of the State's CZM program, or the other applicable State or local law, with respect to which the

application is inadequate or inconsistent:

(B) The manner in which or reason why the application is inadequate or inconsistent; and

(C) How the application may be amended, or the license conditioned, so as to make activities conducted under the license consistent with the State's CZM program and other applicable State and local laws.

(ii) Any notice given to the Administrator by a Governor under paragraph (d)(2)(i) of this section must be in writing, and must contain the information described in paragraphs (d)(2)(i) (A) through (C) of this section.

(3) If the Governor of a State referred to in paragraph (d)(1) of this section has not transmitted his approval, or disapproval under paragraph (d)(2) of this section, to the Administrator by the 45th day after public hearings on the application are concluded under this part, his approval shall be conclusively presumed.

(4) Upon timely receipt of notice from a Governor under paragraph (d)(2) of this section, the Administrator will condition any license granted to make activities conducted under the license consistent with the State's CZM program and other applicable State and local laws. If a license cannot be so conditioned, the Administrator will not issue the license.

(e) *Consideration of views of other States.* Any adjacent coastal State which does not have an approved CZM program in good standing, and any other interested State, will have the opportunity to make its views known in writing to, and to have them given full consideration by, the Administrator regarding any application for a license for the ownership, location, construction, or operation of an OTEC facility or plantship.

(f) *Tentative recommendations.* In addition to the provisions of paragraphs (d) and (e) of this section, each adjacent coastal State is strongly encouraged to conduct its review of the application and to make its initial or tentative recommendations to the Administrator before public hearings begin under § 981.340 of this part, so that the public hearings can address those tentative recommendations.

**§ 981.340 Informal public hearings on license application.**

(a) *General.* (1) A license may be issued only after public notice, opportunity for comment, and public hearings in accordance with this part.

(2) Hearings held under this part will be consolidated insofar as practicable with hearings held by other agencies.

(b) *Multiple applications for OTEC facilities.* If two or more license applications for OTEC facilities have been filed for the same designated application area, the Administrator will consolidate the hearings on the applications.

(c) *Location.* With respect to each license application, at least one public hearing will be held in the District of Columbia and in any adjacent coastal State in which an OTEC facility which is the subject of the application is proposed to be located or to which it would be directly connected by pipeline or electric transmission cable.

(d) *Notice of public hearing.* After all applications in a proceeding are filed, the Administrator will publish a notice of public hearing in the Federal Register and mail or deliver a copy of the notice to any person who requests it and to each applicant and to the Governor of each adjacent coastal State. Each notice will list the applicant(s), state the time and place for the hearing, and describe any factual issues in the proceeding. A notice may prescribe procedural matters to govern the hearing, may designate the presiding officer assigned by the Administrator for the hearing, and may contain such other information as the Administrator determines may facilitate the conduct of the hearing.

(e) *Participation by interested persons.* Interested persons may attend any public hearing, present relevant material at the hearing, and submit written material and oral statements during the hearing at a time and in a manner determined by the presiding officer.

(f) *Report of public hearing.* Within 21 days after a public hearing is completed, the presiding officer will prepare a report of the hearing. The report at a minimum will contain a summary of the materials presented and factual issues raised at the hearing and will have attached to it a transcript of the hearing and all relevant written materials submitted to the presiding officer.

**§ 981.350 Formal hearings on material factual issues.**

(a) If, on the basis of the hearing report required by § 981.340 of this part, the Administrator determines that there exists one or more specific and material factual issues which must be resolved by a formal evidentiary hearing, the Administrator will issue a notice of formal hearing under § 981.560(d) of this part.

(b) If the Administrator determines under paragraph (a) of this section that a formal hearing is necessary, at least one adjudicatory hearing will be held in the District of Columbia in accordance with 5 U.S.C. 554 and the procedures set forth in Subpart E of this Part. The record developed in any such adjudicatory hearing will be part of the basis for the Administrator's decision to approve or deny a license.

**§ 981.360 Timely conclusion of public hearings.**

(a) All public hearings on all applications with respect to OTEC facilities for any designated application area will be concluded not later than 240 days after notice of the initial application has been published under § 981.290 of this part.

(b) All public hearings on applications with respect to OTEC plantships will be concluded not later than 240 days after notice of the application has been published pursuant to § 981.290 of this part.

(c) Upon conclusion of all public hearings with respect to an OTEC license application under this part, the Administrator will publish a notice in the Federal Register stating that all such public hearings have been concluded, and specifying the date by which recommendations or notice must be submitted under §§ 981.300(b) and 981.330(d)(3) of this part.

**§ 981.370 Timely issuance of draft and final EIS's on the application.**

(a) *Draft EIS.* Each draft EIS relating to proposed OTEC facilities or plantships will be prepared and issued within 180 days after notice of the initial application has been published pursuant to § 981.290 of this part.

(b) *Final EIS.* Each final EIS shall be issued not later than 90 days following the date on which public hearings are concluded pursuant to § 981.360 of this part.

(c) *Extension of time periods.* The Administrator may extend the deadlines specified in paragraphs (a) and (b) of this section for issuance of a specific draft or final EIS to a later specified date if the Administrator notifies the applicant in writing and describes the good cause for such extension.

**§ 981.380 Steps in the voluntary Consolidated Application Review (CAR) process.**

(a) The voluntary CAR process, which supplements the preceding mandatory steps in this subpart, includes the following procedures:

(1) Early designation of a representative from each participating Federal, State, and local government entity, as well as each OTEC license applicant, to serve as members of the Consolidated Application Review (CAR) team;

(2) Development and signing of a Joint Agreement among the participating Federal, State, and local government entities and each applicant. The Joint Agreement identifies the members of the CAR team, details the regulatory and review responsibilities of each participating government agency having jurisdiction over any aspect of the construction or operation of OTEC facilities or plantships, and outlines the responsibilities of each applicant in the CAR process;

(3) Conducting an inter-agency meeting with all members of the CAR team which includes a briefing by each applicant on the details of each proposed OTEC facility or plantship, and a briefing by the government members on the procedures to be used in processing all necessary permits, authorizations, and approvals; and

(4) Implementation of the CAR schedule, including completion of required regulatory reviews, conduct of necessary public hearings, preparation of an Environmental Impact Statement, and other CAR team activities necessary to ensure close coordination of the OTEC license review process.

**§ 981.390 Voluntary nature of the CAR process.**

(a) *Applicant.* Participation by each applicant in the CAR process is voluntary. If an applicant desires to have the application processed by the CAR process the application shall so indicate and shall contain a designation of a CAR team representative.

(b) *Other Federal, State, and local government entities.* Participation by other Federal, State, and local government entities in the CAR process is voluntary. If an applicant indicates a desire to use the CAR process, NOAA will contact other Federal, State, and local government entities with expertise concerning, or jurisdiction over, any aspect of the construction or operation of the OTEC facility or plantship proposed by the applicant and invite them to designate a representative to serve on the CAR team for that application.

(c) *Other application review agreements.* Agreements other than the Joint Agreement may, at the option of the affected parties, be negotiated between any applicant and individual regulatory agencies, or between regulatory agencies, regarding any aspect of the regulatory reviews necessary pursuant to any government permit, license, or authorization required for construction or operation of the OTEC facility or plantship which is the subject of the application. Such agreements may be negotiated before or after an application for an OTEC license is submitted to NOAA. Such agreements will not be affected by an applicant's later decision to use the CAR process.

**§ 981.400 Effect of Joint Agreement on authorities.**

Nothing in the Joint Agreement developed by the CAR team shall abrogate the statutory, regulatory, or administrative responsibilities and rights of any party, agency, or jurisdiction. The CAR agreement is voluntary, and all parties will, in good faith, work in a cooperative and coordinated fashion to carry out the responsibilities stated therein.

**§ 981.410 Request for designation of Federal CAR team members.**

Not later than the time the Administrator forwards copies of the application to other Federal agencies and departments pursuant to § 981.300 of this part, the Administrator will request that each such agency and department designate a representative to serve on the CAR team for the application, if the applicant has requested that the CAR process be used for application review. Such Federal agencies and departments will be requested to make CAR team member designations within 14 days of receipt of the Administrator's request.

**§ 981.420 Request for designation of State and local CAR team members.**

(a) *State members.* Not later than the time the Administrator forwards copies of the application to designated adjacent coastal States pursuant to § 981.330 of this part, the Administrator will request that each such adjacent coastal State designate a representative to serve on the CAR team for the application, if the applicant has requested that the CAR process be used for review of the application. Such designated adjacent coastal States will be requested to make CAR team member designations within 14 days of receipt of the Administrator's request.

(b) *Local government members.* The request from the Administrator pursuant to paragraph (a) of this section will include a request that the designated adjacent coastal State coordinate with affected local government entities within such State to assist such entities in designating CAR team members to serve on the CAR team for the application. Such designated adjacent coastal States will be requested to forward local government CAR team member designations to the Administrator within 14 days of receipt of the Administrator's request.

**§ 981.430 Development of Joint Agreement by CAR team.**

(a) *Schedule.* Within 45 days after all members of the CAR team for the application are designated pursuant to this part, the CAR team will develop and sign a Joint Agreement among the participants.

(b) *Content.* The Joint Agreement will include, as a minimum:

(1) An identification of all members of the CAR team;

(2) A statement of the regulatory and review responsibilities of each government entity represented on the CAR team;

(3) A statement of the responsibilities of the representative of each applicant during the CAR process to be conducted on the application;

(4) A schedule of meetings, hearings, and decisions which must be completed during the CAR process; and

(5) A brief description of the OTEC facility or plantship proposal which is the subject of the application.

(c) *Availability.* After the Joint Agreement is completed and signed by CAR team participants, it will be listed on the docket and made a part of the record of the application proceeding in accordance with § 981.140 of this part. The Joint Agreement will then be available for public inspection and copying in accordance with § 981.150 of this part.

**§ 981.440 Inter-agency CAR team meeting.**

(a) *Schedule.* After completion of the Joint Agreement and prior to any public hearing on the application required by the Act, the CAR team will hold an initial public meeting. If practicable, the meeting will be held in an adjacent coastal State designated as such under § 981.330 of this part.

(b) *Content.* The inter-agency CAR team meeting will consist of a briefing by each applicant on the details of the proposed OTEC facility or plantship and briefings by each government member of the CAR team on the procedures to be used in processing all necessary permits, authorizations, and approvals.

(c) *Public participation.* Interested persons may attend the inter-agency CAR team meeting, present relevant material, and submit written and oral statements at a time determined by the presiding officer.

**§ 981.450 Implementation of the CAR schedule.**

(a) *Cooperation.* All members of the CAR team will, in good faith, work in a cooperative and coordinated fashion to address the responsibilities stated in the Joint Agreement and to assure that the

schedule in the Joint Agreement is adhered to.

(b) *Delays.* All parties to the Joint Agreement will make good faith efforts to adhere to the schedule agreed to therein. However, if unavoidable delays occur in submittal and review of information during the CAR process, the CAR team members will revise the Joint Agreement schedule accordingly. A copy of any such revised schedule will be listed in the docket and made part of the record of the application proceeding.

## Subpart D—Criteria for Approval or Denial of Application and for Establishment of License Terms and Conditions; Renewal, Transfer, Suspension, Revocation, Termination, Relinquishment, and Surrender

### § 981.460 Timely approval or denial of application for a license and issuance of a license.

(a) The Administrator will approve or deny any timely filed application for a license for ownership, construction, and operation of an OTEC facility for a designated application area not later than 90 days after public hearings on the applications for that application area are concluded pursuant to § 981.360 of this part.

(b) The Administrator will approve or deny an application for a license for ownership, construction, and operation of an OTEC plantship not later than 90 days after the public hearings on the application are concluded pursuant to § 981.360 of this part.

(c) If an application is approved, the Administrator will issue a license to the applicant not later than 30 days after approval of the application, provided the application fee has been paid in accordance with § 981.130 of this part.

### § 981.470 Criteria for approval or denial.

(a) The Administrator may issue a license in accordance with the provisions of this part unless:

(1) The Administrator determines that the applicant cannot or will not comply with applicable laws, regulations, and license terms and conditions;

(2) The Administrator determines that the construction and operation of the OTEC facility or plantship will not be in the national interest and consistent with national security and other national policy goals and objectives, including energy self-sufficiency and environmental quality;

(3) The Administrator determines, after consultation with the Secretary of the department in which the Coast Guard is operating, that the OTEC facility or plantship will not be operated with reasonable regard to the freedom of navigation or other reasonable uses of the high seas and authorized uses of the Continental Shelf, as defined by United States law, treaty, convention, or customary international law;

(4) The Administrator has been informed, within 45 days after the conclusion of public hearings on that application, or on multiple applications for OTEC facilities for the designated application area, by the Administrator of the Environmental Protection Agency that the OTEC facility or plantship will not conform with all applicable provisions of any law for which EPA has regulatory authority;

(5) The Administrator has received the opinion of the Attorney General, pursuant to § 981.320 of this part, stating that issuance of the license would create a situation in violation of the antitrust laws, or the 90-day period provided in § 981.320 of this part has not expired;

(6) The Administrator has consulted with the Secretary of Energy, the Secretary of Transportation, the Secretary of State, the Secretary of the Interior, and the Secretary of Defense, to determine their views on the adequacy of the application, and its effect on programs within their respective jurisdictions and determines on the basis thereof that the application for a license is inadequate;

(7) The proposed OTEC facility or plantship will not be documented under the laws of the United States;

(8) The applicant has not agreed to the condition that no vessel may be used for the transportation to the United States of things produced, processed, refined, or manufactured at the OTEC facility or plantship unless such vessel is documented under the laws of the United States;

(9) When the license is for an OTEC facility, the Administrator determines that the facility, including any submarine electric transmission cables and equipment or pipelines which are components of the facility, will not be located and designed so as to minimize interference with other uses of the high seas or the Continental Shelf, including cables or pipelines already in position on or in the seabed and the possibility of their repair;

(10) The Governor of any adjacent coastal State with an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq.*) notifies the Administrator under § 981.330(d) of this part that the application is inadequate or inconsistent with respect to programs within his jurisdiction and the license cannot be conditioned as described in § 981.330(d)(4) of this part;

(11) When the license is for an OTEC facility, the Administrator determines that the operations of the facility are expected to impact so as to significantly degrade the operations of any other OTEC facility already licensed or operating, without the consent of its owner;

(12) When the license is for an OTEC facility, the Administrator determines that the operations of the facility are expected to impact so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation, unless the Secretary of State approves such impact after consultation with such nation;

(13) When the license is for an OTEC plantship, the Administrator determines that the applicant has not provided adequate assurance that the plantship will be operated in such a way as to prevent its operations from impacting so as to significantly degrade the operation of any other OTEC facility or plantship without the consent of its owner, and from impacting so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation unless the Secretary of State approves such impact after consultation with such nation;

(14) If a regulation has been adopted which places an upper limit on the number or total capacity of OTEC facilities or plantships to be licensed under this part for simultaneous operation, either overall or within specific geographic areas, the Administrator determines that issuance of the license will cause such upper limit to be exceeded;

(15) The Administrator determines that the person to whom the license would be issued is not a United States citizen; or

(16) The Administrator cannot insure that activities authorized by the license are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species, unless an appropriate exemption has been granted under section 7(h) of the Endangered Species Act (16 U.S.C. 1536(h)).

### § 981.480 Multiple applications.

(a) In the event more than one application for a license for ownership, construction, and operation of an OTEC facility is submitted for the same designed application area, the Administrator will make decisions on license applications in the order in

which they were submitted, unless the Administrator determines that one or a specific combination of the proposed facilities clearly best serves the national interest.

(b) In determining whether any one or a specific combination of the proposed OTEC facilities clearly best serves the national interest, the Administrator, in consultation with the Secretary of Energy, will consider the following factors:

(1) The goal of making the greatest possible use of ocean thermal energy conversion by installing the largest capacity practicable in each application area;

(2) The amount of net energy impact of each of the proposed OTEC facilities;

(3) The degree to which the proposed OTEC facilities will affect the environment;

(4) Any significant differences between anticipated dates of commencement of operation of the proposed OTEC facilities; and

(5) Any differences in costs of construction and operation of the proposed OTEC facilities, to the extent that such differentials may significantly affect the ultimate cost of energy or products to the consumer.

**§ 981.490 Condition precedent to issuance of license: Compliance with conditions and prior approval of changes.**

(a) *General.* No license will be issued under this Part unless the prospective licensee first agrees in writing that:

(1) There will be no substantial change from the plans, operational systems, and methods, procedures, and safeguards set forth in his application, as approved, without prior approval in writing from the Administrator;

(2) There will be no change in the:

(i) Ownership of the licensee; or

(ii) Citizenship of the president or other executive officer or the chairman of the board of directors, or holder of similar office, of any member of the board of directors, of the licensee; without prior reporting, in writing, to the Administrator; and

(3) The prospective licensee will comply with license terms and conditions the Administrator may prescribe in accordance with the provisions of this part.

(b) *Emergencies.* In case of an emergency posing an imminent and substantial threat of harm to the OTEC facility or plantship, to human life, or to the environment, the licensee is not required to obtain written approval from the Administrator before making a substantial change referred to in paragraph (a)(1) of this section. If circumstances allow, the licensee should seek oral approval from the Administrator before making a substantial change. The licensee must immediately notify the Administrator, orally or in writing, of each substantial change made.

**§ 981.500 Contents of license.**

(a) Each license issued will contain, among other information, the following:

(1) The name and number or other identification of the OTEC facility or plantship;

(2) The name of the person to whom the license is issued;

(3) If different from the person to whom the license is issued, the name(s) of the owner and operator of the OTEC facility or plantship; and

(4) Terms and conditions on the ownership, construction, location, and operation of the OTEC facility or plantship to which the license is subject pursuant to § 981.520 of this part.

**§ 981.510 Duration of licenses and renewals.**

(a) *Original license.* Each license issued under this Part will be for such period of years as the Administrator may specify, but not exceeding 25 years.

(b) *Renewals.* Each renewal issued under this Part will be for such period of years as the Administrator may specify, but not exceeding 10 years.

**§ 981.520 Terms and conditions of a license.**

(a) *General.* Each license issued for an OTEC facility or plantship will contain such terms and conditions on the ownership, construction, location, and operation of the facility or plantship as specified in this section, and such other terms and conditions as the Administrator may prescribe as necessary to carry out the provisions of the Act and this part, or which are required by any Federal department or agency pursuant to the terms of the Act and this part.

(b) *Disposal or removal of components of OTEC facility or plantship.* The Administrator will establish as license conditions such bonding requirements or other assurances as he deems necessary to assure that, upon the revocation, termination, relinquishment, or surrender of a license, the licensee will dispose of or remove all components of the OTEC facility or plantship as directed by the Administrator. The requirement to remove or dispose of all components may be waived by the Administrator if:

(1) In the case of components another applicant or licensee requests to use, the Administrator has not yet reached a decision on the request for continued use of the components; or

(2) In the case of components lying on or in the seabed, the Administrator finds that such removal is not otherwise necessary and that the remaining components do not constitute any threat to the environment, navigation, fishing, or other uses of the seabed.

(c) *Consistency with programs of an adjacent coastal State.* If the Governor of any adjacent coastal State which has an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*), gives timely notice to the Administrator under § 981.330(d) of this part that an application is inadequate or inconsistent with the State's coastal zone management program or other applicable State or local laws, the Administrator will condition any license granted to make activities conducted under the license consistent with the State's coastal zone management program and other applicable State and local laws.

(d) *Prevention of interference with other uses of the high seas.* Each license will include such conditions as the Administrator may determine to be necessary and appropriate to ensure that construction and operation of the OTEC facility or plantship are conducted with reasonable regard for navigation, fishing, energy production, scientific research, or other uses of the high seas, either by citizens of the United States or by other nations in their exercise of the freedoms of the high seas as recognized under the Convention on the High Seas and the general principles of international law.

(e) *Discharge impacts.*

(1) Each license will include such conditions as the Administrator deems necessary to ensure that discharges from the OTEC facility or plantship will not:

(i) Significantly degrade the operation of another OTEC facility or plantship, or

(ii) Create a significant adverse effect on the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation.

(f) *Additional license condition for OTEC plantships.* Each license issued for an OTEC plantship will contain a condition requiring that the licensee comply with such regulations concerning movement and navigation of OTEC plantships as the Coast Guard may issue under 109(c) of the Act.

(g) *Monitoring of license's activities.* Each license will contain terms or conditions requiring the licensee:

(1) To allow the Administrator to place appropriate Federal officers or employees aboard the OTEC facility or plantship to which the license applies, at such times and to such extent as the Administrator deems reasonable and necessary to assess compliance with any terms, conditions, or regulations applicable to the license, and to report to the Administrator whenever such officers or employees have reason to believe there is a failure to comply;

(2) To cooperate with such officers and employees in the performance of monitoring functions; and

(3) To monitor the environmental effects of the operation of the OTEC facility or plantship in accordance with these terms and conditions.

(h) *Diligence.* Each license will contain a condition that the licensee diligently pursue the construction and operation of the OTEC facility or plantship to which the license applies, as determined by the Administrator's estimate of a reasonable schedule for construction and operation, based on information submitted with the application. The diligence condition established by the Administrator will allow for reasonable delay resulting from unforeseen circumstances. If the Administrator determines that a licensee is not pursuing diligently the construction and operation of the OTEC facility or plantship to which the license applies, or that the project has apparently been abandoned, the Administrator will cause proceedings to be instituted under section 111 of the Act to terminate the license.

(i) *Reports and records.* Each license will contain a condition that the licensee keep such records and report periodically to the Administrator such information as the Administrator finds to be necessary and appropriate:

(1) To assess compliance with diligence conditions established under paragraph (h) of this section;

(2) To assess environmental impacts of the OTEC operations of the licensee and to develop mitigation methods; and

(3) To comply with the requirements of Federal law and regulation.

(j) *U.S.-flag transportation vessels.* Each license will contain a condition that no vessel may be used for the transportation to the United States of things produced, processed, refined, or manufactured at the OTEC facility or plantship unless such transportation vessel is documented under the laws of the United States.

(k) *Foreign-flag vessels.* Each license will contain a condition that, except in a situation involving force majeure, the licensee will not permit a vessel, registered in or flying the flag of a foreign state, to call at, load or unload cargo at, or otherwise utilize the facility or plantship which is the subject of the license unless:

(1) The foreign state involved has agreed, by specific agreement with the United States, to recognize the jurisdiction of the United States over the vessel and its personnel while the vessel is located within any safety zone around the facility or plantship established by the Secretary of the department in which the Coast Guard is operating, pursuant to section 108(d) of the Act; and

(2) The vessel owner or operator has designated an agent in the United States for receipt of service of process in the event of any claim or legal proceeding resulting from activities of the vessel or its personnel while located within such safety zone.

(l) *Compliance with other Federal law.* Each license may contain conditions imposed by the Administrator as necessary to assure the compliance of activities conducted under the license with other Federal laws and regulations. Such conditions will be based upon the review of and comment upon the application as conducted by Federal agencies and departments under Subpart C of this Part.

**§ 981.525 Review, modification and revision of license terms and conditions.**

(a) *NOAA review.* Periodically, at intervals not to exceed 3 years, the Administrator will conduct a review of each licensed OTEC facility or plantship operation in conjunction with the licensee to determine the need, if any, for modification of license terms and conditions.

(b) *Modification.* As the result of a review conducted under paragraph (a) of this section or at any other time, the Administrator, after consultation with interested Federal and State departments and agencies and the licensee, and after an opportunity for public comment, may modify any term or condition in a license consistent with the purposes of the Act and this Part.

(c) *Revision.*

(1) At any time during the term of a license, the licensee may submit to the Administrator a request for a revision of a license.

(2) The Administrator will approve such requests for a revision upon a finding in writing that the license with such revision would continue to meet the requirements of the Act and this Part.

(3) A change which would require a request to and approval by the Administrator as a revision is any change:

(i) Which would have significance for the findings contained in § 981.470(a) which would permit the Administrator to refuse to issue a license; or

(ii) Which would result in ownership, construction, location or operation of an OTEC facility or plantship contrary to existing terms and conditions in the license.

(d) *Public notice and opportunity to comment.* The Administrator will publish in the Federal Register notice of each proposed modification, and of each request for revision, of a license term or condition. Interested persons will be allowed at least 30 days after publication of the notice to submit written comments to the Administrator. On a case-by-case basis, the Administrator will determine whether to provide additional public participation procedures, such as conducting an informal public hearing in a potentially affected adjacent coastal State.

(e) *Notice to the licensee and to Federal agencies and adjacent coastal States.*

(1) The Administrator will issue written notice of each proposed modification, and of each proposed revision, of a license term or condition, to:

(i) The licensee;

(ii) Each Federal department or agency with jurisdiction over any aspect of the ownership, construction, location, or operation of the OTEC facility or plantship, which aspect may be affected by the proposed modification or revision; and

(iii) The Governor of each adjacent coastal State designated with respect to the OTEC facility or plantship involved.

(2) Each recipient of the notice may submit to the Administrator such written comments or recommendations regarding the proposed modification or revision as the recipient deems appropriate. Each Federal or State department or agency also may take such actions as may be required by law. If a Federal or State department or agency recommends that the proposed modification or revision not be approved, it shall set forth in detail:

(i) The manner in which the proposed modification or revision does not comply with any law or regulation within its area of responsibility; and

(ii) The manner in which the proposed modification or revision may be amended so as to bring it into compliance with the law or regulation involved.

(3) Each recipient of the notice issued under paragraph (e)(1) of this section

will be allowed 30 days from the date of issuance of that notice, or until the last day of the public comment period allowed under paragraph (d) of this section, whichever time period extends longer, in which to submit written comments and recommendations to the Administrator.

(f) *Initial decision.*

(1) After the close of the opportunity for comment provided in paragraphs (d) and (e) of this section, the Administrator will initially approve or disapprove the proposed modification or revision.

(2) The Administrator will publish notice of the initial decision in the Federal Register and provide written notice of the initial decision to the licensee and to each Federal department and agency, and to the Governor of each adjacent coastal State, to which notice was issued under paragraph (e).

(g) *Acceptance or objection by licensee.*

(1) The licensee will be deemed conclusively to have accepted the initial decision of the Administrator, if the licensee does not notify the Administrator, within 30 days after issuance of the written notice to the licensee under paragraph (f)(2) of this section, that the licensee objects to the initial decision. Any objection filed by a licensee must state, in writing:

(i) Why the initial decision is legally inconsistent with the Act or this Part; and

(ii) Information concerning any underlying factual issue deemed by the licensee to be necessary to the Administrator's decision upon the objection.

(2) The Administrator will promptly take action on any licensee's objection which meets the requirements of paragraph (g)(1). If the Administrator determines that there exist one or more specific and material issues of fact pertaining to the initial decision on the proposed modification or revision, which must be resolved by a formal evidentiary hearing, the Administrator will provide for a formal hearing which will proceed in accordance with Subpart E of this part, except that for the purposes of a formal hearing under this section, references in Subpart E to:

(i) The "applicant" will be deemed to mean the "licensee";

(ii) The "application" will be deemed to mean "the modification or revision of the license"; and

(iii) "Issuance, transfer or renewal of a license" will be deemed to mean "modification or revision of a license."

(h) *Final action by the Administrator.*

(1) After the close of the 30-day period described in paragraph (g)(1) of this section, or after taking action on a licensee's objection under paragraph (g)(2), the Administrator will take final action on the license modification or revision.

(2) The Administrator will implement a license modification or revision by issuing an appropriate document amending the license.

**§ 981.530 Renewal of a license.**

Each licensee shall have a preferential right to renew a license subject to the requirements of this part, upon such terms and conditions and for such period of years, not to exceed an additional 10 years for each renewal, as the Administrator determines to be reasonable and appropriate.

**§ 981.540 Transfer of license.**

Upon application, a license issued under this part may be transferred if the Administrator determines that such transfer is in the public interest and that the prospective transferee meets the requirements, and the prerequisites to issuance, of this part. When a licensee intends to apply for transfer of the license, the licensee and the prospective transferee shall consult with the Administrator regarding applicability of the requirements of this part to the proposed transfer.

**§ 981.550 Suspension, revocation, termination, relinquishment or surrender of a license.**

(a) *Suspension or revocation.* Whenever a licensee fails to comply with any applicable provision of the Act or any applicable rule, restriction, or license term or condition issued or imposed by the Administrator under this Part, the Administrator may request that the Attorney General file an action in an appropriate United States district court

(1) To suspend the license; or

(2) To revoke such license, if such failure is knowing and continues for a period of 30 days after the Administrator sends notification of such failure by registered letter to the licensee at his record post office address.

(b) *Automatic operation of license terms.* The Administrator may provide in the terms of a license for automatic suspension or termination of the license upon the occurrence of a fixed or agreed-upon condition, event, or time. In such cases, judicial proceedings under paragraph (a) of this section are not required to effect a suspension or termination.

(c) *Emergency orders.* The Administrator may order the licensee to cease or alter construction or operation activities pending the completion of a judicial proceeding pursuant to paragraph (a) of this section if the Administrator determines that immediate suspension of such activities is necessary to protect public health and safety or to eliminate any imminent and substantial danger to the environment as recognized in any treaty or convention to which the United States is a party.

(d) *Relinquishment or surrender.*

(1) Any licensee may at any time, without penalty, surrender to the Administrator a license issued to him, or relinquish to the Administrator, in whole or in part, any right to conduct construction or operation of an OTEC facility or plantship, including part or all of any right of way which may have been granted in conjunction with such license. However, such surrender or relinquishment shall not relieve the licensee of any obligation or liability established by applicable law, or of any obligation or liability for actions taken by him prior to such surrender or relinquishment, or during disposal or removal of any components required to be disposed of or removed pursuant to this Part.

(2) If part of all of a right of way which is relinquished, or for which the license is surrendered, to the Administrator under paragraph (d)(1) of this section contains an electric transmission cable or pipeline which is used in conjunction with another license for an OTEC facility, the Administrator shall allow the other licensee an opportunity to add such right of way to his license before informing the Secretary of the Interior that the right of way has been vacated.

## Subpart E—Formal Hearing Procedures

**§ 981.560 Formal hearing procedures.**

(a)(1) *General.* All formal hearings described in §§ 981.350 and 981.525 of this part are governed by 5 U.S.C. 554 through 557 and the procedures contained in this section.

(2) Hearings held under this section will be consolidated insofar as practicable with hearings held by other agencies.

(b) *Decision to hold a hearing.*

(1) Whenever, after holding an informal hearing under § 981.340 of this part, the Administrator determines that there are one or more specific and material issues of fact pertaining to the application which must be resolved by a formal hearing, he will provide for a formal hearing.

(2) Whenever, under § 981.525 of this part, the Administrator determines that there are one or more specific and

material issues of fact pertaining to the proposed modification or revision to the terms or conditions of the license which must be resolved by a formal hearing, he will provide for a formal hearing.

(3) The record developed in any formal hearing under this paragraph will be part of the basis for the Administrator's decision to approve or deny issuance, modification, or revision of a license, as applicable.

(c) *Assignment of Administrative Law Judge.* Upon deciding to hold a formal hearing, the Administrator will refer the proceeding to the NOAA Office of Administrative Law Judges for assignment to an Administrative Law Judge (judge) to serve as presiding officer for the hearing.

(d) *Notice.*

(1) The Administrator will publish public 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 or by personal delivery to:

(i) Each applicant;

(ii) The Governor of each adjacent coastal State;

(iii) Each person who submitted written comments upon the application, or testified at any prior informal hearing on the application; and

(iv) Each person who requests a copy of the notice.

(2) Notice of a formal hearing will include, among other things:

(i) Time and place of the hearing;

(ii) The issues in dispute which are to be resolved in the formal hearing;

(iii) 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

(iv) Reference to any prior informal hearing from which the issues to be determined arose.

(e) *Powers and duties of the administrative law judge.* Judges have all the powers and duties necessary to preside over the parties and proceedings and to conduct fair and impartial hearings, as specified by 5 U.S.C. 554–557 and this section, including 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;

(3) Hold conferences in accordance with paragraph (i) of this section for the simplification or, if appropriate, settlement of the issues by consent of the parties or to otherwise expedite the proceedings;

(4) Administer oaths and affirmations;

(5) Rule upon requests for, and issue subpoenas for the attendance and testimony of witnesses and the production of books, records, and other evidence upon proper application under paragraph (p) of this section;

(6) Rule on discovery requests, establish discovery schedules, and take or cause to be taken depositions or interrogatories;

(7) Rule on requests for protective orders to protect persons in the discovery process from undue burden or expense, or for other good cause;

(8) Require, at or prior to any hearing, the submission and exchange of evidence;

(9) Rule upon offers of proof and evidence and receive, exclude, and limit evidence as set forth in paragraph (j)(3) of this section;

(10) Introduce documentary or other evidence into the record;

(11) Examine and cross-examine witnesses;

(12) Consider and rule upon motions, procedural requests, and similar matters;

(13) Take such measures as may be necessary (such as sealing portions of the hearing record) to protect information consisting of trade secrets or commercial or financial information which is privileged or confidential;

(14) Schedule the time and place of the hearing (in accordance with the Act), or the hearing conference, 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 recommended or initial decision, having due regard for the convenience and necessity of the parties;

(15) Establish rules, consistent with applicable law, for media coverage of the proceedings and for the closure of the hearing in the interest of justice;

(16) Strike testimony of a witness refusing to answer a question ruled to be proper;

(17) Make and file decisions in conformity with this subpart; and

(18) Take any action authorized by the rules in this section or in conformance with 5 U.S.C. 554 through 557.

(f) *Hearings: Participation.*

(1) Parties to the formal hearing will include:

(i) The NOAA General Counsel;

(ii) The applicant; 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)(i) 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. Such person will be allowed to participate as a party 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 will give special consideration to each request from a designated adjacent coastal State to participate as a party.

(ii) Any request to participate as a party must be submitted to the judge within 10 days after the date of mailing or publication of notice of a decision to hold a formal hearing under paragraph (d) of this section, whichever occurs later. The judge may entertain a request submitted after the expiration of the 10 days, but such a late request may be granted only upon an express finding on the record that:

(A) Special circumstances justify granting the request;

(B) The interests of justice and a fair determination of the issues would be served by granting the request;

(C) 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

(D) 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 to the judge within 10 days after the date of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. The judge may waive the 10 day rule for good cause, such as if the interested person, making this request after the expiration of the 10 days, shows that he lacked actual knowledge of the formal hearing during the 10 days, and the evidence he proposes to submit may significantly affect the outcome of the proceedings.

(ii) The judge may permit any interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning an issue 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) of this section.

(iii) The judge may allow any interested person to submit oral testimony, oral arugments, briefs, or to cross-examine witnesses or participate in other ways if the judge determines that the interests of justice and a fair determination of the issues would be better served by allowing such participation by the interested person.

(g) *Certification of issues.* Whenever a formal hearing is conducted pursuant to this section, the Administrator will certify the issues for decision to the judge and the formal hearing will be limited to those issues.

(h) *Obligation to submit evidence and raise issues before a formal hearing is held.* No party or interested person may submit evidence which was not submitted previously for the administrative record as part of the comment on the application for issuance, transfer or renewal of a license, unless the judge finds that good cause exists for the failure to submit it. Good cause includes the case where the person seeking to raise the new issues or introduce new information shows that the person could not reasonably have ascertained the issues or made the information available at a prior stage in the administrative process; or that the person could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

(i) *Conferences.*

(1) At any time the judge considers appropriate, he may, upon his own motion or the motion of any party or interested person, direct the parties and interested persons, or their attorneys to meet (in person, by telephone conference call, or otherwise) in a conference to consider:

(i) Simplification of the issues;

(ii) Settlements in appropriate cases;

(iii) Stipulations and admissions of fact, and contents and authenticity of documents;

(iv) Exchange of evidence, witness lists, and summaries of expected testimony;

(v) Limitation of the number of witnesses; and

(vi) Such other matters as may tend to expedite the disposition of the proceedings.

(2) The record will show how the matters were disposed of by order and by agreement in such conferences.

(j) *Hearings: Appearance and presentation of evidence.*

(1) *Representative.* A party or interested person may appear at a hearing under this Part in person, by attorney, or by other representative.

(2) *Failure to appear.*

(i) Absent a showing of good cause, failure of a party to appear at a hearing:

(A) Constitutes waiver of the right to a hearing under this section;

(B) Constitutes consent of the party to the making of a decision on the record of the hearing; but

(C) Will not be deemed to be a waiver of the right to be served with a copy of the judge's decision.

(ii) If a party fails to appear for a hearing, the judge will cause to be placed in the record all of the facts concerning the issuance and service of the notice of the time and place of the hearing.

(3) *Evidence.*

(i) The order of presentation of evidence will be at the judge's discretion.

(ii) The testimony of witnesses will be upon oath or affirmation administered by the judge and will be subject to such cross-examination as may be required for a full and true disclosure of the facts. The formal rules of evidence do not apply, but the judge will exclude evidence which is immaterial, irrelevant, non-probative, or unduly repetitious. Hearsay evidence is not inadmissable as such.

(iii) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, the party must state briefly the grounds for such objections. Rulings on each objection will appear in the record.

(iv) Formal exception to an adverse ruling is not required.

(v) At any time during the proceedings, the judge may require a party or a witness to state his position on any issue, and the theory in support of such position.

(vi) Upon the failure of a party or interested person to effect the appearance of a witness or the production of a document or other evidence ruled relevant and necessary to the proceeding, the judge may take appropriate action, as authorized by law.

(vii) The parties may, by stipulation, agree upon any facts involved in the proceedings and include them in the record with the consent of the judge. Written stipulations shall be signed in accordance with paragraph (r)(2) of this section, and shall be served upon all parties of record within the time period specified by the judge.

(4) *Authority of judge to expedite adjudication.* To prevent unnecessary delays or an unnecessarily large record, the judge may:

(i) Limit the number of witnesses whose testimony may be cumulative;

(ii) Strike argumentative, repetitious, cumulative, immaterial, non-probative, or irrelevant evidence;

(iii) Take necessary and proper measurses to prevent argumentative, repetitious, or cumulative cross-examination; and

(iv) Impose such time limitations on arguments as the judge determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved;

(5) *Argument.* At the close of any formal hearing any party shall be given the opportunity to submit written arguments on issues before the judge.

(6) *Official notice.* Official notice may be taken of any matter not appearing in evidence in the record, which is among the traditional matters of judicial notice, or concerning which the Department of Commerce, by reason of its functions, is deemed to be expert, or of a non-privileged document required by law to be filed with, prepared or published by a government body, or of any reasonably available public document. The parties will be given adequate notice, at the hearing or otherwise before the judge's decision, of the matters so noticed, and upon timely request by a party will be given reasonable opportunity to show the contrary.

(7) *Record.* (i) The judge or the Administrator will arrange for a verbatim tape or other record of any oral hearing proceedings. An official transcript of the proceedings will be prepared and copies may be obtained upon written request filed with the reporter and upon payment of the fees at the rate provided in the agreement with the reporter.

(ii) The official transcript, exhibits, briefs, reply briefs, proposed findings of fact, requests and other documents and papers filed will constitute the exclusive record for decision on the issues concerning which the hearing was held.

(iii) The record developed in any hearing held pursuant to § 981.350 of this part will be part of the basis for the Administrator's decision to approve or deny the license.

(k) *Interlocutory appeals.*

(1) At the request of a party or on the judge's own motion, the judge may certify to the Administrator for review a ruling which does not finally dispose of the proceeding if the judge determines that such a ruling involves a controlling question of law and that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(2) Upon certification by the judge of an interlocutory ruling for review, the Administrator will expeditiously decide the matter, taking into account any briefs in this respect filed by the parties within 10 days after certification. The Administrator's order on an interlocutory appeal will not be considered the final decision of the Administrator except by operation of other provisions in this section.

(3) No interlocutory appeal will lie as to any ruling not certified to the Administrator by the judge. Objections to rulings not certified to the Administrator by the judge will be a part of the record and will be subject to review at the same time and in the same manner as the Administrator's review of the recommended or initial decision of the judge.

(l) *Decision.*

(1) *Proposed findings of fact.* The judge will allow each party to file with the judge proposed findings of fact together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs must be filed on or before the date specified by the judge. 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 10 days after receipt of the proposed findings to which they respond, unless the judge allows additional time.

(2) *Recommended decision.* As soon as practicable, but normally not later than 30 days after the close of the record in the proceedings, the judge will evaluate the record of the formal hearing and prepare and file a recommended decision with the Administrator. The formal hearing must be concluded within 240 days after the publication of the notice of application pursuant to § 981.290(a) of this part.

(3) *Final decision.*

(i) As soon as practicable, but normally not later than 30 days after receipt of the recommended decision, the Administrator will issue a final decision. The final decision may accept or reject all or part of the recommended decision.

(ii) 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 a judge for the receipt of further evidence, or for other assistance in the determination of the matter.

(iii) With respect to hearings to resolve material issues of fact pursuant to § 981.350 of this part, the Administrator may defer announcement of his final decision on the findings of fact until the time he takes final action on the issuance, transfer or renewal of a license.

(m) *Motions and requests.* Motions and requests must be filed in writing with the judge or must be stated orally and made part of the hearing record. Each motion or request must state the particular order, ruling, or action desired, and the legal and factual grounds therefor.

(n) *Witnesses and fees.* Witnesses subpoenaed will be paid the same fees and mileage, and in the same manner, as are paid for like services in the District Court of the United States for the district in which the hearing is located.

(o) *Depositions.*

(1) Any party desiring to take the deposition of a witness shall make application in writing to the judge, setting forth the reasons why such deposition should be taken; the time when, the place where, and the name and mailing address of the person before whom the deposition is requested to be taken; the name and address of each witness to appear for deposition; and the subject matter concerning which each witness is expected to testify.

(2) Depositions may be taken orally or upon written interrogatories before any person designated by the judge.

(3) Such notice as the judge shall order will be given for the taking of a deposition, but this ordinarily will not be less than 5 days' written notice when the deposition is to be taken within the United States and ordinarily will not be less than 20 days' written notice when the deposition is to be taken elsewhere.

(4) Each witness testifying upon deposition will be sworn and any party will have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, will be reduced to writing, read to the witness, signed by the witness unless waived, and certified by the person presiding. Thereafter, the person presiding will deliver or mail a copy of the document to each party. Subject to such objection to the questions and answers as were noted at the time of taking the deposition which would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by any party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

(p) *Subpoenas.* A party may request the judge to issue or the judge on the judge's own motion may issue a subpoena for the attendance and testimony of witnesses and for the production of documentary or other evidence. Applications for subpoenas must be in writing, and must specify the general relevance and reasonable scope of the evidence sought to be produced.

(q) *Extension of time.* The time for the filing of any document under this section may be extended by the judge if:

(1) The request for the extension of time is made before or on the final date allowed for the filing; and

(2) The judge, after giving written or oral notice to and considering the views of all other parties (when practicable), determines that there is good reason for the extension.

(r) *Filing, submission 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 or event which begins 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 to be served, his agent, or attorney, will be deemed effective service of the document as of the date of such refusal.

(6) A certificate 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.

**§ 981.570 Ex parte communications.**

(a) "*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 requests for status reports.

(b) Except to the extent required for disposition of *ex parte* matters as authorized by law, upon assignment of a matter to an administrative law judge and until the final decision of the Administrator is effective under these regulations, no *ex parte* communication relevant to the merits of the proceeding

shall be made, or knowingly caused to be made:

(1) By the judge or by an agency employee involved in the decisional process of the proceeding to any interested person outside NOAA; or

(2) By an interested person outside NOAA to the judge or to any agency employee involved in the decisional process of the proceeding.

(c) The judge may not consult any person or party on a fact in issue unless on notice and opportunity for all parties to participate.

(d) An agency employee or judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the judge, or Administrator, as appropriate, may take action in this respect consistent with these regulations, the Act, and 5 U.S.C. 556(d) and 557(d).

(e) This section does not apply to communications to or from the attorney representing the Administrator in the proceedings (agency representative). However, the agency representative may not participate or advise in the initial or recommended decision of the judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with these regulations.

(f)(1) Paragraphs (b) through (d) of this section do not apply to communications concerning national defense or foreign policy matters. Such Ex Parte communications:

(i) On national defense or foreign policy matters to or from an agency employee; or

(ii) From employees of the United States Government involving inter-governmental negotiations;

are permitted 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 paragraph (f) of this section shall be made a part of the public record to the extent that they do not include information classified pursuant to Executive Order. Classified information shall be included in a classified portion of the record which shall be available for review only in accordance with applicable law.

## Subpart F—Enforcement Procedures

### § 981.580 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 twenty-five thousand dollars ($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 111 of the Act describes the circumstances under which the Administrator may suspend or terminate a license, or seek revocation of a license, for violation of the Act or of any regulation, restriction or condition issued under the Act.

(3) Section 302 of the Act authorizes the Administrator to issue orders directing any person subject to section 301 of the Act to comply with the Act, or any rule, regulation, order, license, term, or condition issued under the Act. Section 302 also authorizes the Administrator to bring a civil action for appropriate relief, including temporary or permanent injunctive relief, to halt or redress any such violation.

(4) Section 110 of the Act authorizes the Administrator to place observers on ocean thermal energy conversion facilities and plantships licensed under the Act to monitor compliance and environmental effects of activities under the license.

(5) Section 114 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 (§§ 981.590 and 981.600 of this part); establishment of license sanctions (§ 981.610 of this part); issuance of compliance orders (§ 981.620 of this part); placement of observers on or in OTEC facilities and plantships (§ 981.630 of this part); and the giving of advance notice of private civil actions (§ 981.640 of this part).

(b) *Filing and service of documents.*

(1) Filing and service of documents required by this Subpart shall be in accordance with §§ 981.560(r) and 981.158 of this part. The method for computing time periods set forth in §§ 981.560(r) and 981.158 of this part 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 10 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 period. All extensions will be in writing. Except as provided by this paragraph, by § 981.590(b) of this part or by order of an administrative law judge, no requests for an extension of time may be granted.

### § 981.590 Assessment procedure.

(a) *Notice of violation and assessment (NOVA).*

(1) A Notice of violation and assessment (NOVA) will be issued by the Administrator and served personally or by registered or certified mail, return receipt requested, upon the person alleged to be subject to a civil penalty (the respondent). A copy of the NOVA will similarly be served upon an affected licensee, or the owner of an affected vessel (defined in paragraph (f) of this section), if the licensee or owner is not the respondent. Although no specific form is prescribed, 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, or order allegedly violated;

(iii) The findings and conclusions upon which the Administrator based the proposed assessment; and

(iv) The amount of penalty proposed to be assessed.

(2) With respect to the amount of civil penalty, the Administrator will take into account information available to the agency concerning the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the respondent, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3) The NOVA may also contain an initial proposal for compromise or settlement of the case. The Administrator may also attach documents which illuminate the facts believed to show a violation. The NOVA will advise of the respondent's rights at that point in the proceeding, and will be accompanied by a copy of regulations governing civil enforcement procedures, this Subpart, and the applicable provisions of Subpart E of this part.

(b) *Procedures upon receipt of a NOVA.*

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

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

(ii) Seek to have the NOVA amended or modified as prescribed in paragraph (b)(2) of this section;

(iii) Request a hearing, as prescribed in paragraph (b)(5) of this section;

(iv) Take no action, in which case the NOVA becomes final in accordance with paragraph (c) of this section; or

(v) Request an extension of the time allowed to respond to the NOVA under paragraph (b)(3) of this section.

Options (ii), (iii), (iv) and (v) above may also be exercised by the affected licensee or the owner of an affected vessel.

(2) The respondent, the affected licensee, or the owner of an affected vessel, may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying the Administrator at the telephone number or address specified in the NOVA. Where amendment or modification is sought, the Administrator will either amend the NOVA or decline to amend it, and will so notify the respondent, affected licensee or owner, as appropriate.

(3) The respondent, affected licensee or owner of an affected vessel may, within the 30-day period specified in paragraph (b)(1) of this section, request an extension of time to respond. The Administrator may grant an extension of up to 30 days, unless the Administrator determines that the requestor could, exercising reasonable diligence, prepare a response within the 30-day period specified in paragraph (b)(1) of this section. If the Administrator does not respond to the request within 48 hours of its receipt by the Administrator, the request will be granted automatically for the extension requested, up to a maximum of 30 days. A telephone response to the request within the 48-hour period will be considered effective response, and will be followed by written confirmation.

(4) The Administrator may, for good cause, grant an additional extension beyond the 30-day period specified in paragraph (b)(3) of this section.

(5) If the respondent, the affected licensee, or the owner of an affected vessel wishes 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 NOVA. The request shall either attach a copy of the relevant NOVA or refer to the relevant NOAA case number.

(6) Any denial, in whole or in part, of any request under this section which is based upon untimeliness will be made in writing.

(7) The Administrator may, in the Administrator's discretion, treat any communication from a respondent, an affected licensee, or owner of an affected vessel as a request for a hearing under paragraph (b)(5) of this section.

(c) *Final decision.*

(1) If no request for hearing is filed under paragraph (b)(5) of this section, the NOVA becomes effective and constitutes the final decision and order of the Administrator on the 30th day after service of the NOVA, or on the last day of any delay period granted under § 981.580(b)(2) of this Subpart or paragraph (b)(3) or (b)(4) of this section.

(2) If a request for hearing is filed in accordance with paragraph (b)(5) of this section, the date of the final decision will be as provided in § 981.600 of this Subpart.

(d) *Payment of final assessment.*

(1) Respondent shall make full payment of the civil penalty assessed within 30 days after the date upon which the assessment becomes effective as the final decision and order of the Administrator under paragraph (c) of this section or § 981.600(k) of this part or, if judicial review of the assessment is initiated under section 302(b) of the Act during the 30-day period, within 10 days after the appropriate court has entered final judgment in favor of the Administrator, unless the court's order provides otherwise. Payment shall be made by mailing or delivering to the Administrator 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."

(2) Upon any failure to pay the civil penalty assessed, the Administrator may request the Attorney General of the United States to recover the amount assessed in any appropriate district court of the United States, or may take action under paragraph (e) of this section. In any court action under this paragraph (d)(2), the validity and appropriateness of the final order imposing the civil penalty is not subject to review.

(e) *Compromise of civil penalty.*

(1) In the Administrator's sole discretion, the Administrator may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty which has been imposed under this Subpart, or which is subject to imposition.

(2) The compromise authority of the Administrator under this paragraph (e) is in addition to any similar authority provided in the Act or in these regulations, and may be exercised either upon the initiative of the Administrator or in response to a request by the alleged violator or other interested person.

(3) If the Administrator acts under this paragraph (e) prior to issuing a NOVA or after a final assessment becomes payable under paragraph (d) of this section, the Administrator will prepare a document indicating the reasons for the action taken and citing this paragraph and section 302(c) of the Act as authority. Once the case has been assigned for hearing under § 981.600(a) of this part, the Administrator will, except in unusual circumstances, defer any compromise action under this paragraph (e) until the administrative law judge has rendered an initial decision in the matter. Neither the existence of the compromise authority of the Administrator under this paragraph (e) nor the Administrator's exercise thereof at any time changes the date upon which an assessment becomes final or payable.

(f) *Application of this section to licensees and vessel owners.*

(1) This section applies to affected licensees. "Affected licensee" means the holder of a license issued under this Part which license may be subject to sanction as a result of civil penality proceedings under this Subpart.

(2) This section also applies to owners of affected vessels. "Affected vessel" means any vessel of the United States that, under section 302(e) of the Act, may be liable *in rem* for any civil penalty assessed as a result of civil penalty proceedings under this Subpart.

**§ 981.600 Hearing and appeal procedures.**

(a) *Beginning of hearing procedures.* Following receipt of a written request for hearing timely filed under § 981.590(b) of this part, the Administrator will begin procedures under this section by forwarding the request, a copy of the NOVA, and any response thereto to the NOAA Office of Administrative Law Judges, which will docket the matter for hearing. Written notice of the referral will be given promptly to the respondent, the affected licensee, and the owner of an affected vessel (if the affected licensee or owner is not the respondent), with the name and address of the attorney representing the Administrator in the proceedings (the agency representative). Thereafter, all pleadings and other documents shall be filed directly with the NOAA Office of Administrative Law Judges, and a copy shall be served on each party.

(b) *Ex parte communications.* Upon assignment of the case to an administrative law judge, and until an assessment or other action on the matter

becomes effective under these regulations as the final decision of the Administrator. *ex parte* communications are governed by § 981.570 of Subpart E of this part. However, § 981.570 of this part will not be interpreted to diminish the Administrator's compromise authority under § 981.590(e) of this Subpart.

(c) *Duties and powers of judge.*

(1) To the extent consistent with this Subpart, the administrative law judge has all powers and responsibilities enumerated in § 981.560(e) of Subpart E of this part, except that paragraph (e)(2) thereof does not apply. Instead, the judge has the power to rule on a request to participate as a party in the proceedings by allowing, denying, or limiting such participation, except that the respondent, the affected licensee, the owner of an affected vessel and the agency representative will be parties. The judge will, prior to ruling on a request to be admitted as a party, ascertain the views of the other parties and base the ruling on whether the request is from a person who could be directly and adversely affected by the final decision and who may contribute materially to the disposition of the proceedings.

(d) *Participation by parties.*

(1) The respondent, the affected licensee, the owner of an affected vessel, the agency representative, and to the extent permitted by the judge any other party, may appear in person, by counsel or by other representative, and may examine and cross-examine witnesses to the extent required for a full and true disclosure of the facts, present documentary or other evidence in support of that party's case or defense, and conduct oral argument at the close of testimony. This paragraph shall not be interpreted to diminish the powers and duties of the judge provided in paragraph (c) of this section.

(2) Failure of any party to appear at the hearing will be deemed a waiver of the right to a hearing and consent to the making of a decision on the record of the hearing.

(e) *Appearance and presentation of evidence.* Appearance and the presentation of evidence are governed by § 981.560(j) of Subpart E of this part.

(f) *Settlements.* An agreement by respondent and the agency representative to settle the matter, if filed before an assessment or other action in the case becomes effective under these regulations as the final decision of the Administrator, will terminate the proceedings and vacate any initial or administrative appellate decision issued. However, if settlement is reached before the judge submits the initial decision and certifies the record under paragraph (i) of this section, the judge may require submission of a copy of the agreement solely to assure that the judge's consideration of the case is completed and to order the matter dismissed on the basis of the agreement.

(g) *Interlocutory appeals.* Appeals of interlocutory rulings by the judge under this subpart are governed by § 981.560(k) of Subpart E, except that objections to rulings not certified to the Administrator by the judge are subject to review at the same time and in the same manner as the Administrator's review of the initial decision of the judge upon any appeal therefrom under paragraph (j) of this section.

(h) *Proposed findings and conclusions.* Unless a different schedule is established in the discretion of the judge, the parties must file any proposed findings of fact and conclusions of law, together with supporting briefs, within 30 days after the judge closes the hearing. Any reply briefs must be submitted within 15 days after receipt of the proposed findings and conclusions to which they respond, unless the judge sets a different schedule.

(i) *Initial decision.*

(1) After expiration of the period provided in paragraph (h) of this section for filing reply briefs, the judge will render a written initial decision upon the record in the case, setting forth:

(i) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record. In determining the amount of a penalty assessment, the judge is not bound by the amount proposed or assessed in the NOVA, or elsewhere, but will decide the matter *de novo*, stating the reasons in view of the factors set forth in section 302(c)(2) of the Act and § 981.590(a)(2) of this Subpart;

(ii) Reasons for the rejection of findings and conclusions proposed by the parties;

(iii) A statement of facts officially noticed and relied upon in the decision, if the parties have not previously been advised of such notice; and

(iv) Such other matters as the judge considers appropriate, including recommendations, if any, regarding license sanctions and forfeiture actions.

(2) The judge will submit the initial decision to the Administrator, serve copies on the parties, and transmit to the Administrator the record of the proceeding together with a certification to the effect that, to the best of the judge's knowledge and belief, the record is a complete and accurate compilation of all evidence and other documents in the proceeding, except in such particulars as are specified.

(j) *Appeals.*

(1) Any party may appeal the initial decision of the judge by filing a notice of appeal with the Administrator within 45 days after the date of the initial decision. The notice of appeal shall concisely state such exceptions as the appellant takes to the initial decision and shall contain citations to the record or other authority relied upon. The appellant shall serve a copy of the notice of appeal on each other party.

(2)(i) The Administrator will decide the appeal 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 an administrative law judge for receipt of further evidence or other assistance in the determination of the matter.

(ii) The decision of the Administrator will be in writing and will state the reasons for accepting or rejecting the exceptions taken by the appellant. To the extent the Administrator's decision is silent as to a material issue of fact, law, or discretion presented on the record, the decision will be deemed to adopt the findings and conclusions thereon, and the reasons or basis therefor, contained in the initial decision.

(k) *Final decision.*

(1) Unless a notice of appeal is timely filed in accordance with paragraph (j) of this section, the initial decision of the judge becomes effective and constitutes the final decision and order of the Administrator on the 45th calendar day after the date it is rendered.

(2) If a notice of appeal is timely filed as provided in paragraph (j) of this section, the Administrator's decision becomes effective and constitutes the final decision and order of the Administrator on the date the decision is issued, or as otherwise specified by the Administrator in the decision.

(3) Payment of any assessment which becomes final under this paragraph (k) shall be made in accordance with § 981.590(d) of this part.

(l) *Application of this section to licensees and vessel owners.* The provisions of this section apply to affected licensees and owners of affected vessels, as defined in § 981.590(f).

**§ 981.610 License sanctions.**

(a) *Application of section.* This section governs the suspension, revocation, termination or modification of any license issued under this Part for

failure to comply with any provision of the Act, or any regulation, order, license condition or restriction issued under the Act.

(b) *Basis for sanctions.*

(1) The Administrator may act under this section with respect to a license issued under the Act, if:

(i) The terms of the license call for suspension or termination of the license upon the occurrence of a fixed or agreed upon condition, event or time and the Administrator determines that such condition, event, or time has occurred; or

(ii) The Administrator determines in accordance with paragraph (d)(1)(ii) of this section that immediate suspension of the license, or immediate suspension or modification of any activity under the license, is necessary; or

(iii) An appropriate court issues an order of suspension or revocation with respect to the license.

(2) The Administrator may suspend a license in accordance with paragraph (b)(1) and the other provisions of this section, on the basis that the licensee has failed to pay any penalty assessed or fine imposed, under section 302 of the Act. The license may be reinstated by affirmative order of the Administrator upon receipt, as prescribed in paragraph (d) of this section, of full payment of the penalty assessed, together with interest thereon at the annual rate provided by current regulations of the Department of the Treasury as to late payments of amounts due the Government, computed from the date payment first became overdue, or upon full payment, in accordance with any applicable court order, of the fine imposed.

(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 issued under the Act:

(1) Revoke the license;

(2) Suspend the license or any activity under the license, either for a specified period of time or until certain stated requirements are met, or both;

(3) Modify the license, for example by imposing additional conditions and restrictions in order to aid future enforcement efforts; or

(4) Terminate the license in accordance with the provisions of this Subpart.

(d) *Notice of license sanction.*

(1) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with any applicable provision of the Act, or any regulation, order or any license condition or restriction issued under the Act, the Administrator may issue the licensee a notice of license sanction (NOLS) stating that the Administrator has requested the Attorney General to file an action in an appropriate United States district court, seeking a sanction against the license involved. The NOLS will state the sanction proposed by the Administrator to be imposed as provided in paragraph (c) of this section, and the basis therefor and will advise that issuance of the NOLS does not preclude the Administrator from taking, at any time, any other enforcement action under section 302 or any other applicable provision of the Act.

(i) If the Administrator expects to seek revocation of the license, the NOLS will advise that:

(A) If the violation set forth in the NOLS continues for a period of 30 days from the date of issuing the NOLS, the Administrator may request the Attorney General to seek revocation of the license in an appropriate United States district court;

(B) The licensee may, within 30 days after the date of issuing the NOLS, submit to the Administrator evidence of compliance; and

(C) If the Administrator determines, on the basis of evidence submitted during the 30-day period, that the licensee has complied, the Administrator will not seek revocation of the license.

(ii) The Administrator may immediately suspend the license or suspend or modify any activity under the license pending completion of judicial proceedings under section 111(a) of the Act if the Administrator finds, and issues an emergency order summarizing the finding and the basis therefor, that such action is necessary to:

(A) Protect public health and safety; or

(B) Eliminate imminent and substantial danger to the environment.

(iii) If the Administrator acts under paragraph (d)(1)(ii) of this section, the Administrator will serve the emergency order in the manner described in paragraph (d)(4) of this section, and will seek to expedite judicial proceedings.

(iv) The licensee may request the Administrator to review any emergency order issued under paragraph (d)(1)(ii) of this section. The Administrator will determine whether any review of the emergency order should be granted, and whether any review granted will be in the form of an informal or formal hearing. The Administrator's granting of a review will not change the effective date of the emergency order unless the Administrator specifies such a change in writing when granting the review of the emergency order.

(2) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with the license, and if the license provides for a license sanction on the basis of such failure to comply, the Administrator may issue a NOLS setting forth the sanction to be imposed and the basis therefor. If an opportunity for a hearing is provided by paragraph (e) of this section, the NOLS will advise that the licensee has 30 days from receipt of the notice in which to request or waive a hearing. The notice will further state the effective date of the sanction, which will not be earlier than 30 days after the date of the notice except as provided in paragraph (d)(1)(ii) of this section or in the license. If a hearing opportunity is provided and a hearing is requested in a timely manner, the sanction becomes effective under paragraph (h) of this section.

(3) If a United States district court issues an order calling for a license sanction, the Administrator will issue a NOLS setting forth the sanction to be imposed and the effective date of the sanction. The NOLS will advise that an appeal of the district court's order will not stay the taking effect of the sanction unless provided otherwise by the court.

(4) The NOLS will be served personally or by registered or certified mail, return receipt requested, on the licensee.

(e) *Opportunity for hearing on an NOLS issued under paragraph (d)(2) of the section.*

(1) The licensee has 30 days from receipt of the NOLS to request a hearing with respect to an NOLS issued under paragraph (d)(2) of this section. However, no hearing is required with respect to matters previously adjudicated in an administrative or judical hearing in which the licensee has been given notice and has had an opportunity to participate.

(2) If the licensee wishes a hearing, a written and dated request shall be served on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the NOLS. The request shall either attach a copy of the relevant NOLS or refer to the relevant NOAA case number.

(3) If no hearing is required by or requested under paragraph (e)(1) 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.

(4) The Administrator may apply to the administrative law judge for an interim order suspending the license, or suspending or modifying any activity under the license, pending completion of proceedings under this section if the Administrator serves prior notice of the application for an interim order on the licensee in the manner described in paragraph (d)(4) of this section. The judge may issue an interim order consistent with the purposes of the Act, unless preliminary evidence presented to the judge indicates a likelihood that the licensee will prevail in the matters at issue.

(5) If the license provides an effective date for the sanction, a request for hearing will not delay the effectiveness of the sanction, except to the extent extended by the Administrator for good cause shown.

(f) *Hearing and initial decision.* If a timely request for a hearing under paragraph (e)(1) of this section is received or the Administrator orders a hearing under paragraph (e)(3) of this section, the Administrator will appoint a hearing officer to hear the matter and render an initial decision.

(g) *Appeals.*

(1) Any party may appeal the initial decision of the hearing officer by filing a notice of appeal with the Administrator within 30 days after the date of the initial decision. The notice of appeal shall concisely state such exceptions as the appellant takes to the initial decision and shall contain citations to the record or other authority relied upon. The appellant shall serve a copy of the notice of appeal on each other party.

(2)(i) The Administrator will decide the appeal 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 a hearing officer for the receipt of further evidence, or other assistance in the determination of the matter.

(ii) The decision of the Administrator will be in writing and will state the reasons for accepting or rejecting the exceptions taken by the appellant. To the extent the Administrator's decision is silent as to a material issue of fact, law, or discretion at issue in the hearing, the decision will be deemed to adopt the findings and conclusions, and the reasons and basis therefor, contained in the initial decision.

(h) *Final decision.*

(1) Unless a notice of appeal is timely filed in accordance with paragraph (g) of this section, the initial decision of the hearing officer becomes effective and constitutes the final decision and order of the Administrator on the 30th calendar day after the date it is rendered.

(2) If a notice of appeal is timely filed as provided in paragraph (g) of this section, the Administrator's decision becomes effective and constitutes the final decision and order of the Administrator on the date it is issued, or as otherwise specified by the Administrator in the decision. The Administrator will serve notice of the decision on the licensee in the manner described in paragraph (d)(4) of this section.

**§ 981.520 Compliance orders.**

(a) The Administrator may issue a compliance order, served personally or by registered or certified mail, return receipt requested, to any person subject to section 301 of the Act who is found by the Administrator, on the basis of available information, to be in violation of the Act, or any regulation, order, license term or condition issued under the Act or this Part. Although no specific form is prescribed, the compliance order will contain:

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

(2) A specific reference to the provisions of the Act, regulation, order or license determined to be violated; and

(3) The time period in which the person shall comply with the order.

(b) With respect to the time period for compliance with the order, the Administrator will specify a reasonable time period, up to 30 days, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(c) The compliance order will advise the person to whom it is issued that:

(1) Failure to comply within the specified time period will subject that person to adverse enforcement action under the Act (in addition to any such action already begun); and

(2) The order may be challenged during any enforcement proceeding brought under the Act as a result of the violation specified in the order or an alleged failure to comply with the order.

(d) The person to whom a compliance order is issued may seek amendment or modification of the order to conform to the facts or law as that person sees them by notifying the Administrator at the telephone number or address specified in the order. The Administrator will either amend the order or decline to amend it, and will so notify the person concerned.

(e) Evidence of compliance with an order issued under this section shall be presented to the Administrator in writing within the time period specified in the order. The Administrator will, as soon as practicable, determine whether or not there is timely compliance with the order, and advise the person concerned of the determination.

(f) Issuing a compliance order under this section, or complying with such an order, does not preclude other enforcement proceedings under the Act or this Part if such proceedings serve the purposes of the Act, except if expressly so stated in the order, or as provided in section 111 of the Act with respect to license revocation.

**§ 981.530 Observers.**

(a) *Purpose of Observers.* Each licensee 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, enter or accompany any OTEC facility or plantship to which a license applies, for the purposes of observing and reporting on:

(1) The effectiveness of the terms and conditions of the license;

(2) Compliance with the Act, regulations and orders issued under the Act, and the license terms and conditions; and

(3) The environmental and other effects of the licensee's activities under the license.

(b) *Notice to Licensee.*

(1) The Administrator may notify a licensee that the Administrator plans to place an observer in or aboard the OTEC facility or plantship to which the license applies.

(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 may include, among other things:

(i) the name of the observer, if known at the time the notice is issued;

(ii) the length of time which the observer likely will be in or aboard the OTEC facility or plantship;

(iii) information concerning activities the observer is likely to conduct; and

(iv) information concerning any special requirements for the handling, storage, location, or operation of, or the power supply for, equipment to be used by the observer.

(c) *Licensee's Response.* Upon request by the Administrator, each licensee shall promptly notify the Administrator regarding the suggested time and method for transporting the observer to the OTEC facility or plantship.

(d) *Duties of Licensee.* Each licensee of an OTEC facility or plantship to which an observer is assigned shall assure that the observer is provided:

(1) access to and use of the OTEC facility or plantship's communications equipment and personnel when the observer deems such access necessary for the transmission and receipt of messages;

(2) access to and use of the OTEC facility or plantship's navigation equipment and personnel when the observer deems such access necessary to determine the facility or plantship's location;

(3) All other reasonable cooperation and assistance to enable the observer to carry out the observer's duties; and

(4) temporary accommodations and food to the observer in or aboard the OTEC facility or plantship which are equivalent to those provided to officers or senior operations personnel of the OTEC facility or plantship.

(e) *Reasonableness of Observer activities.*

(1) To the maximum extent practicable, observation duties will be carried out in a manner that minimizes interference with the licensee's activities under the license.

(2) The Administrator will assure that equipment brought into or aboard an OTEC facility or plantship 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 OTEC facility or plantship or its activities, or the officers, crew, or personnel of the OTEC facility or plantship. The observer will comply with all orders of the master or senior operations official which are necessary to ensure the safe operation of the OTEC facility or plantship and the safety of its personnel.

(f) *Non-interference with Observer.* Licensees and other persons are reminded that the Act (see, for example, sections 301(2) and 301(3)) 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.

(g) *Confidentiality of Information.* NOAA recognizes the possibility that an observer, in performing observer functions, will record information which the licensee considers to be proprietary. NOAA intends to protect such information consistent with applicable law. The Administrator may in appropriate cases provide the licensee an opportunity:

(1) to review those parts of the observer's reports which may contain proprietary information; and

(2) to request confidential treatment of such information under § 981.100 of this part.

**§ 981.540. 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 114 of the Act against any person for alleged violation of the Act, or any regulation, or license term or condition issued under the Act, until 60 days after the Administrator and any alleged violator receive written and dated notice of the 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 allegedly violated; and

(iii) Any documentary or other evidence of the alleged violation.

(b) *Actions against the Administrator.*

(1) No civil action may be filed in a United States district court under section 114 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 the Administrator receives 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, regulations or license believed to require the Administrator to perform a nondiscretionary act or duty;

(ii) A precise description of the act or duty believed to be required by such provisions;

(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.

## Subpart G—Upper Limits on the Number or Total Capacity of OTEC Facilities and Plantships to be Licensed Under This Part [Reserved]

## Subpart H—OTEC Site Evaluation and Preconstruction Testing Regulations [Reserved]

## Subpart I—Procedures for Mediation of Disputes Among Licensees Regarding Interference Between OTEC Facilities or Plantships [Reserved]

[FR Doc. 81-22195 Filed 7-30-81; 8:45 am]
BILLING CODE 3510-12-M

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