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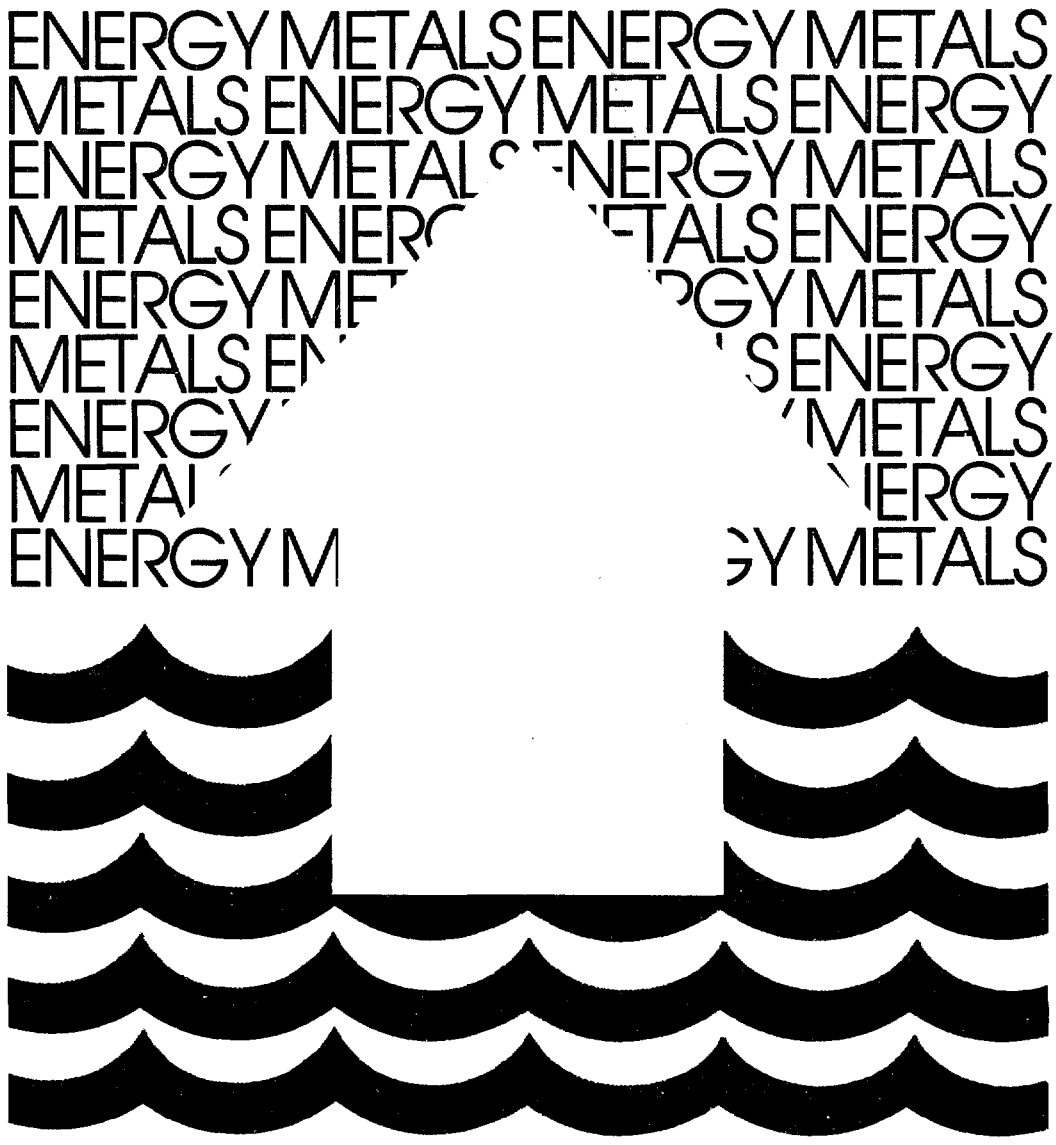

Ocean Thermal Energy Conversion

Proposed Regulations

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

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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

Licensing of Ocean Thermal Energy Conversion Facilities and Plantships; Proposed Rulemaking

DEPARTMENT OF COMMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 1001

Licensing of Ocean Thermal Energy Conversion Facilities and Plantships

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice of proposed rulemaking.

SUMMARY: NOAA proposes to establish a stable legal system and a streamlined licensing process to facilitate commercial development of ocean thermal energy conversion (OTEC) facilities and plantships. This Notice of Proposed Rulemaking (NPR) 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, Public Law 96-320, ("the Act").

Interested persons are invited to review the NPR and to contribute to the development of final OTEC licensing regulations by submitting comments.

DATES:

(1) Comments on the NPR should be received by NOAA on or before May 18, 1981.

(2) NOAA will hold a public hearing on the NPR in Washington, D.C. on May 11, 1981, between 9 a.m. and 12 noon.

(3) NOAA will hold a public hearing on the NPR in San Juan, Puerto Rico, on May 1, 1981, between 10 a.m. and 1 p.m.

(4) NOAA will hold a public hearing on the NPR in Honolulu, Hawaii, on April 27, 1981, between 9 a.m. and 12 noon.

ADDRESSES:

(1) Send written comments on the NPR and requests for documents associated with this rulemaking to Robert W. Knecht, Director, Office of Ocean Minerals and Energy, NOAA, Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW, Washington, D.C. 20235. Please mark the outside of the envelope with "OTEC NPR."

(2) The public hearing in Washington, D.C. will be held in Room 6802, Department of Commerce Building, 14th Street between Pennsylvania and Constitution Avenue, NW, Washington, D.C.

(3) The public hearing in San Juan, Puerto Rico will be held in Room A1 and B1, Institute of Engineers and Surveyors of Puerto Rico, Antolin Nin and Eskeret Streets, Hato Rey, Puerto Rico.

(4) The public hearing in Honolulu, Hawaii will be held in U.S. District Court Room No. 4, 4th Floor, Prince Kuhio Federal Building, 300 Ala Moana Blvd., Honolulu, Hawaii 96850.

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 proposed rulemaking 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 this 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. (See Section VIII. D of this notice or proposed rulemaking for information on the environmental impact statement being developed as part of the rulemaking.)

B. Advance Notice of Proposed Rulemaking

To provide an early opportunity for interested persons to contribute to development of the proposed regulations contained in this NPR, 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 sought public comment. The ANPR invited public comment and was mailed to several hundred interested persons. A public hearing was held on January 7, 1981.

III. Availability of Comments

All comments received in response to the ANPR and this NPR will be available for public examination and copying during normal business hours in Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, D.C.

IV. Final Rules

NOAA will issue final rules to implement the Act after comments received in response to this NPR have been evaluated. Public hearings on the NPR will be held as noted in the ADDRESSES and DATES sections of this NPR. NOAA plans to issue final rules in August 1981.

V. Background

Ocean Thermal Energy Conversion (OTEC) is a process for using solar energy stored in the warm surface waters of the ocean as a renewable source of power to produce electricity or other energy intensive products such as ammonia or aluminum. The OTEC process is driven by the temperature differential between warm ocean surface waters and cold, deep waters. It can be implemented by means of an OTEC facilitiy, which is moored or fixed to the ocean bottom, or located on land with intake and discharge piping running out to appropriate locations in the ocean. OTEC plantships which float unmoored or move through the ocean can also use the OTEC process.

The OTEC principle can be applied efficiently in areas where the temperature difference between surface waters and deep waters is about 20° C or more. This makes the most probable U.S. locations for OTEC facilitaties or plantships the Gulf of Mexico area, the southeastern continental United States, and the island areas under U.S. jurisdiction such as the State of Hawaii, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands and American Samoa.

The OTEC industry is in a formative stage at present because, although the basic principles of OTEC power generation have been developed and demonstrated at sea, the hardware, engineering, and operational requirements of commercial-scale OTEC operations have not yet been fully developed, and to conduct that developement will require substantial private sector capital investment, on the order of $25-100 million or more per OTEC facility or plantship.

Estimates in the report of the House of Representative Committee on Merchant Marine and Fisheries on H.R. 6154, which was a predecessor to the OTEC Act, indicate that OTEC could provide from 5 to 20 percent of all new electrical generating capacity coming on line in the U.S. by the year 2000 if commercial development of OTEC is agressively pursued. The OTEC Research, Development and Demonstration Act, Public Law 96-310, sets a goal of 10,000 megawatts of installed U.S. OTEC capacity by the year 1999.

Meeting that goal would stimulate capital investment on the order of $25

billion in the evolving OTEC industry and its suppliers. If that projected OTEC capacity replaced the use of imported oil for electricity generation and other product production, an import reduction of 360,000 barrels per day would result, with a concurrent reduction of $4.6 billion per year in oil import costs (as $35 per barrel).

Later development of OTEC technology to produce energy intensive products, such as ammonia, could also have significant implications for reducing fossil fuel consumption in the United States. The substitution of OTEC produced ammonia for ammonia currently produced from natural gas could conserve the equivalent of 300,000 to 500,000 barrels of oil per day, based on the fact that approximately 3% of U.S. natural gas production is currently used in ammonia production.

Commercial OTEC technology also represents a major export opportunity for the United States. Approximately 70 countries and territories, many of them lesser developed counties which are now dependent on imported oil, are located near exploitable OTEC resource areas. If even a small fraction of the projected demand for new electrical generating capacity in those countries between the years 1990 and 2010 were met through export of U.S.-built OTEC facilities and plants, the OTEC export market potential would be on the order of $200–300 billion dollars.

Achieving these ambitious objectives requires governmental action where necessary to remove legal and other institutional barriers before they would seriously impede commercial OTEC development. Federal legislation which clearly states jurisdictional authority and governmental policies applicable to commercial OTEC ventures, and which, in particular, provides legal protection for OTEC facilities and plantships from interference with the thermal resource on which their economic viability depends, is a necessary prerequisite to the private capital investment necessary for OTEC commercialization. The Congress recognized and responded to this need in passing the Ocean Thermal Energy Conversion Act of 1980, Public Law 96–320 (the Act). The Act establishes United States jurisdiction over OTEC facilities located in the U.S. territorial sea or connected to the United States by pipeline or cable, OTEC facilities or plantships documented under U.S. laws, and OTEC plantships owned or operated by U.S. citizens; specifies which Federal and State laws apply to OTEC facilities under U.S. jurisdiction; and establishes a fair and expeditious "one-stop" licensing regime which will insure compliance by U.S. OTEC facilities and plantships with both U.S. and international law.

The Act assigns responsibility for establishing and maintaining the OTEC licensing regime to the Administrator of NOAA. This rulemaking responds to that responsibility and is a major step by NOAA in responding to the goal of the Act to, "establish a legal regime which will permit and encourage the development of ocean thermal energy conversion as a commercial energy technology . . [.]"

VI. NOAA's Responses to Comments Received on the ANPR

As noted in section II.B. of this preamble, NOAA published an ANPR on the OTEC licensing program on November 21, 1980. That notice raised the general issue of the regulatory approach to be used in the licensing program and also posed twenty specific issues related to implementation of the Act for public review and comment. In response to the nine written comments received and statements made at the public hearing held in January 1981, NOAA has established positions on the issues which are reflected in this NPR.

A. General Regulatory Approach

NOAA has evaluate three general regulatory approaches to OTEC licensing: (1) establishment of initial regulations specifying the designs to be used for OTEC plant components and requiring use of specific operating procedures, (2) establishment of detailed performance standards and guidelines in initial regulations with the burden on the applicant to prove compliance with each of the detailed performance standards and guidelines as a prerequisite to obtaining a license, or (3) establishment of general guidelines and performance standards in initial regulations and use of detailed guidelines and performance standards as license terms and conditions coupled with subsequent operational and environmental monitoring to ascertain whether additional requirements are necessary in the future. All written comments received, as well as several statements made at the public hearing, encouraged NOAA to adopt the third approach as most appropriate to the developmental state of the OTEC industry and the need to accommodate to site- and technology-specific issues which will be raised when an OTEC application is submitted for licensing. NOAA has done so as reflected in this rulemaking.

B. Specific Issues Raised in ANPR

The Application and License Process

Issue No. 1: Information to be Submitted with an Application. NOAA raised the general issue of the types and level of detail of financial, technical and other information which should be reqired with an application for an OTEC license. Specific issues regarding the information necessary for the Attorney General to conduct the antitrust review required under § 104 of the Act, and the need, if any, for information related to granting of financial assistance by the Maritime Administration under Title XI of the Merchant Marine Act of 1936, were also raised. NOAA's initial view was that the information required in an application should be minimized, consistent with the requirements of the Act. Several commentors endorsed this approach and it has been adopted in this NPR.

One commentor suggested NOAA contact the Justice Department to obtain their views on necessary antitrust review information and then incorporate those requirements into the NPR. This has been done and the information requirements proposed by the Justice Department have been incorporated into the proposed regulations. These requirements include reporting on those persons with ownership or control interests in the applicant and its affiliates.

Several commentors noted that information required for granting of financial assistance under Title XI of the Merchant Marine Act of 1936 might be better provided directly to the Maritime Administration later in the OTEC licensing process since the obtaining of such assistance is optional on the part of an OTEC license applicant and since the Act does not mention financial conditions, other than antitrust considerations, as among the conditions specified for restricting issuance of a license. NOAA agrees with this view, and the proposed rules do not require submission of Title XI information with a license application. Potential applicants for Title XI assistance should be aware, however, that citizenship requirements related to eligibility for such assistance are more rigorous than those under the Act related to eligibility for an OTEC license. Early consultation with MARAD is encouraged.

The Act assigns significant responsibilities to the Secretary of the department in which the Coast Guard is operating, under Section 108, "Marine Environmental Protection and Safety of Life at Sea" and Section 109(c), "Prevention of Interference With other Uses of the High Seas", among others. NOAA has consulted with the Coast Guard to determine their views on information required in an application to enable the Coast Guard to carry out

their responsibilities. Those requirements are incorporated into the proposed rules in § 1001.190 and §§ 1001.230 through 1001.250. Similarly to the situation with respect to the MARAD citizenship requirements, Coast Guard citizenship requirements related to documentation of vessels are more rigorous than those of the Act, and early consultation with the Coast Guard by potential OTEC license applicants is encouraged.

Issue No. 2: Amount of Application Fees. Section 102(h) of the Act requires an OTEC license applicant to submit a nonrefundable application fee with the application. The Act further requires that the total fee reflect reasonable administrative costs incurred in reviewing and processing the application. NOAA has estimated those costs, including preparation of the application-specific Environmental Impact Statement required by the Act, at two hundred fifty thousand dollars ($250,000.00). Accordingly, this NPR sets the application fee at that amount.

Several commentors suggested that payment of the application fee be spread out over the license application review period and that it be based on actual incurred review costs. NOAA concurs in the concept of phased payment as a means of reducing the burden of initial capital outlay on the applicant, and that approach is reflected in § 1001.130 of this rulemaking. The initial, nonrefundable payment due with the application has been set at one-hundred thousand dollars ($100,000.00) to discourage speculative applications.

NOAA considered assessing the remainder of the application fee on the basis of actual incurred review costs rather than as a flat fee based on estimated processing costs. That concept was rejected, however, due to the increased administrative burden, and thus increased cost to the applicant, which would be associated with detailed record keeping, accounting, and billing over the license application review period.

Issue No. 3: "One-stop" Application and Licensing Process. The Act specifies that the application to NOAA constitutes application for all Federal authorizations required to be obtained by the applicant, except for those administered by the Secretary of the Department in which the Coast Guard is operating. Application to the Maritime Administration for Title XI financial assistance is also not within the ambit of the single application provided for in the Act. A further requirement of the Act is that NOAA consolidate its public hearings on a license application with those of other agencies, insofar as practicable. A number of commentors encouraged NOAA to take an active role in assuring coordinated and efficient processing of all governmental authorizations required for the applicant's OTEC proposal. NOAA has responded to those comments with the voluntary Consolidated Application Review (CAR) process proposed in *Subpart C—License Application Review Procedures* of this NPR. The proposed process involves early designation of Federal, State, and local government members to serve, with the applicant, on a CAR team for the application. NOAA would chair the CAR team, and its initial responsibility would be to develop a Joint Agreement identifying the CAR team members; specifying the responsibilities of all CAR team members, including the applicant, in the application review process; and scheduling each government member's review process for the application, including necessary hearings and decision points. The next step in the process would be holding a public meeting at which the applicant would describe the details of his OTEC proposal and the government members of the CAR team would explain their respective roles in the review process. This meeting would most likely also cover environmental issues specific to the application as part of the Environmental Impact Statement (EIS) "scoping" process mandated by the National Environmental Policy Act (NEPA). After the public meeting, the role of the CAR team would be to continue coordination and exchange of information to assure meeting the Joint Agreement schedule to the maximum practicble extent. The propsoed CAR process would provide the applicant with a single focus for processing of the application and assure that governmental review activities were integrated wherever possible. The goal of the process is to minimize the burden on the applicant by providing early identification of all steps necessary to obtain governmental approvals as well as a mechanism for setting schedule goals and meeting them. Initial contact with other Federal agencies and departments which will likely be involved in the review process has been positive with regard to employing the proposed CAR process, which is voluntary on the part of the applicant and government entities other than NOAA. NOAA feels that the approach is workable and that it will contribute significantly to an efficient OTEC license application review process.

Issue No. 4: "Land-based" OTEC Facilities. Several commentors took the position that "land-based" OTEC facilities would be adequately addressed under State building and planning codes and that further Federal regulation of them was unnecessary. One commentor felt that "land-based" OTEC facilities were not within the ambit of the Act. The Coast Guard noted that existing U.S. documentation laws do not provide for "documenting" buildings.

The legislative history of the Act demonstrates Congressional intent that, "If an OTEC facility is built on land with warm and cold water pipes extending out into the ocean, the definition includes that portion of the warm and cold water pipes, and any other parts of the facility, located seaward of the highwater mark," (House of Representatives Committee on Merchant Marine and Fisheries report on H.R. 6154, H. Rept. 96–994, p. 40). Further, a basic purpose of the Act is to establish Federal jurisdiction over U.S. OTEC activities to assure legal protection of such activities from interference with the thermal resource necessary for their economic viability. For these reasons, NOAA is of the opinion that "landbased" OTEC facilities are subject to licensing under the Act, to the extent portions of the facility are located seaward of the highwater mark. In general, the licensing requirements are not intended to preempt State or local regulations which would apply to matters such as siting the shoreside portions of land-based OTEC facilities. The information on shoreside portions of an OTEC facility required by this rulemaking is necessary to enable the NOAA Administrator to prepare the Environmental Impact Statement required by section 107(e) of the Act, and should be of use to state and local governments as they assess the suitability of an OTEC facility proposal.

Issue No. 5: Adjacent Coastal States. NOAA asked for comment with respect to whether more detailed guidance on designation of "adjacent coastal states" under section 105(a)(2) of the Act during the OTEC license review process was needed or whether the guidance provided in the Act was sufficient. Most commentors felt that the statutory guidance was adequate and NOAA has accordingly adopted it in §§ 1001.330 (a) and (b) of the proposed regulations.

Issue No. 6: Opportunities for Public Participation. No significant comments have been received by NOAA on this issue. However, the CAR process discussed in *Issue No. 3* of this preamble is designed to assure early and informed

public participation in the OTEC license application review process. In addition, NOAA will attempt to provide its preliminary views on the acceptability of the license application at or before the first NOAA public hearing on the application is held under § 1001.340 of this rulemaking. This commitment, coupled with encouragement to other involved Federal agencies and departments to make their preliminary views available in advance of public hearings, as contained in § 1001.300 of this rulemaking, should ensure that public hearings on a specific license application provide the opportunity for more informed discussion of the application.

In an earlier effort to facilitate public participation in this rulemaking NOAA announced (45 FR 70475) the availability of limited funding to compensate participants in the rulemaking who met the eligibility criteria of NOAA regulations governing "Financial Compensation of Participants in Administrative Proceedings" (15 CFR Part 904). Due to budgetary constraints, those funds are no longer available.

Approval or Disapproval of an Application

Issue No. 7: "The National Interest." As part of the license application review process, the Act requires that NOAA determine whether the application is or is not "in the national interest and consistent with national security, and other national policy goals and objectives, including energy self-sufficiency and environmental quality." In the ANPR, NOAA noted that the Declaration of Policy in the Act, the Act's criteria for deciding among multiple applications for the same site, and the findings and conclusions in the Ocean Thermal Energy Conversion Research, Development, and Demonstration Act, Public Law 96-310, could be used as guidance in making the national interest determination. One commentor noted that the goals set out in Public Law 96-310 were demonstration goals subject to continued Federal funding for the technology development program conducted by the Department of Energy, and were thus inappropriate for use in making national interest determinations in a commercial OTEC licensing program. NOAA concurs in this view and will consider the decision criteria for multiple applications contained in section 102(i)(3) as well as the Declaration of Policy in the Act in making the national interest determination on individual OTEC license applications.

Issue No. 8: Multiple Applications for the Same Site. In the ANPR, NOAA solicited comments as to whether the guidance provided in section 102(i)(3) of the Act was sufficient for use in choosing between two or more OTEC applications at the same site. Most commentors expressed the opinion that the guidance in the Act was sufficient and NOAA has incorporated it into § 1001.480 of the proposed rules.

This issue also addressed the question of what criteria or factors NOAA should use in specifying the geographic bounds of the "application area" encompassing the site proposed in an application for an OTEC facility. Commentors proposed a variety of approaches including issuance in the licensing regulations of a specific calculational procedure by which NOAA would define the "application area." Because the potential impact of one OTEC facility on the operation of another OTEC facility is a complex issue highly dependent on the physical configuration and operational characteristics of the OTEC facility which is the subject of the application as well as the physical, chemical, and biological oceanographic conditions in the area of the proposed site, NOAA has not adopted the commentor's proposal.

In determining the "application area," NOAA must consider two projected impacts. The first is the impact of the applicant's proposed OTEC activities on the potential OTEC activities of others in the area of the proposed site. The other is the potential impact of other possible OTEC activities in the area of the proposed site on the OTEC activity proposed by the applicant. NOAA believes it must address both impact potentialities in designating the "application area." As noted earlier these impacts are highly technology- and site-specific. For that reason NOAA has incorporated a requirement into § 1001.260 of the proposed rules that the applicant provide an estimate of an appropriate "application area," along with the supporting scientific and environmental basis for it, as part of the license application. During the initial review of the application NOAA will evaluate the validity and reasonableness of the proposed application area using the best scientific and environmental judgment available and will specify a designated "application area" in the notice of receipt of a complete application provided for in § 1001.290 of the proposed rules.

General Requirements Applicable to Licensees

Issue No. 9: Diligence. The Act requires NOAA to issue regulations requiring a licensee to pursue diligently the construction and operation of the OTEC facility or plantship to which the license applies. NOAA invited comment on appropriate diligence requirements and there was general agreement among commentors that any such requirements should take account of the developmental nature of the OTEC industry, at least for the first license applicants. One commentor further suggested that NOAA refrain from enforcing any diligence requirements against a licensee unless a third party intervened claiming lack of diligence on the part of the licensee. NOAA has rejected that approach as inconsistent with NOAA's role as "trustee" for the thermal resource.

Several commentors proposed that NOAA require an applicant to provide the schedule for construction, deployment, and operation of the proposed OTEC facility or plantship and that NOAA use that schedule as the basis for establishing diligence requirements for the licensee. NOAA has adopted that approach in this NPR subject to NOAA review of the schedule for reasonableness during the application process. The final schedule agreed to by NOAA, along with appropriate provisions for dealing with unforeseeable delays, would then form the basis for diligence conditions in the OTEC license, as provided for in § 1001.520(h) of the proposed rules.

Issue No. 10: Reports and Records. This issue addresses the question of what reports and records NOAA should require of a licensee under § 112 of the Act. All commentors concurred in NOAA's initial view that such requirements should be minimized. In keeping with that approach, NOAA has reduced reporting requirements to a minimum consistent with the Act. Section 1001.520(i) of this notice requires the licensee to report such environmental monitoring information as the Administrator finds to be necessary and appropriate to assess environmental impacts of the licensee's OTEC activities. That section also requires periodic reporting of normal business records regarding electricity or product production as part of the license condition related to diligence. License conditions related to compliance with Federal law other than the Act (addressed in § 1001.520(1) of the proposed rules), may also involve reporting requirements, for instance in relation to a National Pollutant Discharge Elimination System (NPDES) permit issued for the facility or plantship under authority of the Clean Water Act.

Issue No. 11: Removal of Components. Section 101(d)(3) of the Act requires the NOAA Administrator to establish bonding requirements or other assurances to assure that a licensee properly removes or otherwise disposes of OTEC facility or plantship components upon termination, revocation, relinquishment, or surrender of a license. The one comment received on this issue encouraged the NOAA Administrator to retain the flexibility in the Act regarding imposition of bonding or other assurances regarding removal or disposal of components. This suggestion has been adopted and is incorporated in § 1001.520(b) of the proposed legislation.

Issue No. 12: Confidentiality. No commentor felt that NOAA should establish any criteria or procedures concerning confidentiality of certain types of trade secrets or commercial or financial information additional to those set out in section 112 of the Act and other existing statutes and regulations, including NOAA's general "Public Information" and Freedom of Information Act regulations. NOAA has adopted that approach and it is set out in § 1001.100 of the proposed rules.

Issue No. 13: Site Evaluation and Preconstruction Testing. Section 102(b) of the Act authorizes the NOAA Administrator, if he determines it to be necessary, to issue regulations related to site evaluation and preconstruction testing at potential OTEC facility or plantship locations. Those regulations would apply to initial activities conducted prior to issuance of a license by NOAA. Commentors who addressed this issue felt that minimal or no regulation by NOAA of initial site evaluation and preconstruction testing activities was the appropriate approach. NOAA has also consulted the Coast Guard and the Department of the Interior on this issue and been advised that they see no need for such regulation at this time. It should be noted that site preparation and OTEC construction activities conducted in the ocean by the recipient of a NOAA OTEC license can be made subject to regulation under the Act by means of license terms and conditions. For these reasons, NOAA has determined that site evaluation and preconstruction testing regulations are not necessary at this time. However, Subpart H of Part 1001 has been reserved for use in the event such regulations become necessary in the future.

Issue No. 14: Environmental Protection Measures. NOAA raised the issue in the ANPR of the types of environmental protection measures which should be applied by regulation, or as license conditions, to operation of OTEC facilities and plantships. Mention was made of the question of how any such measures should relate to the requirements of the Environmental Protection Agency under the National Pollutant Discharge Elimination System (NPDES). The possibility of imposing generic or "across the board" requirements for all OTEC facilities and plantships, such as to bury submarine cables and pipelines, to mix hot and cold ocean water discharges, or to discharge at a specified depth below the ocean surface, was suggested. A number of commentors noted that existing environmental statutes and regulations should be adequate to ensure reasonable protection of the environment from significant adverse consequences resulting from OTEC operations. Other commentors noted that additional information on environmental effects of OTEC operations was necessary before meaningful environmental protection measures could be developed for inclusion as specific OTEC license conditions.

NOAA generally concurs in both of these views and has analyzed the potential environmental impacts of OTEC operations, and the present state of information regarding them, in the Environmental Impact Statement (EIS) being prepared on development of these OTEC licensing regulations. The preliminary conclusion of that effort, as reflected in the draft EIS, is that the net environmental impact due to commercial development of OTEC is expected to be minimal compared to the impact of fossil and nuclear fueled power production. However, there are uncertainties which must be assessed associated with redistribution of large volumes of ocean water during OTEC operations.

NOAA is also developing the OTEC Environmental Effects Assessment Program Plan required by Section 107 of the Act. That activity, and the EIS work to date, confirm that existing environmental protection statutes and regulations provide a relatively comprehensive framework for controlling OTEC environmental effects. In particular, EPA's NPDES program, and the Ocean Discharge Criteria established by EPA under Section 403(c) of the Clean Water Act, provide a rational set of criteria for evaluating OTEC environmental impacts and establishing an appropriate mix of discharge conditions and monitoring requirements to assure that no unreasonable degradation of the marine environment occurs as a result of OTEC operations. However, NOAA has concluded that the complexities of the interaction between the proposed OTEC facility or plantship and its surrounding environment, including other potential OTEC activities, require that the analysis and establishment of environmental protection measures for OTEC operations be done on a case-by-case basis. For these reasons, the proposed rules require, in § 1001.260, that an applicant submit with the application to NOAA the environmental information which EPA has specified in its regulations implementing Section 403(c) of the Clean Water Act, along with a description of any studies or evaluations used in developing the information. Section 1001.260 of these regulations also requires the applicant to submit its assessment of the area of the marine environment in which the proposed OTEC operation would impact, or be impacted by, the operation of other OTEC facilities or plantships. To assist license applicants in providing the environmental information, NOAA is preparing a Technical Support Document (TSD). The TSD will provide guidance on the types of specific information and analyses an applicant might wish to provide to satisfy the requirements of § 1001.260. NOAA will make the TSD available for public comment and will have a final version available for use by potential applicants when final regulations are issued under the Act.

NOAA, in close consultation with the EPA, will use the environmental information provided by the applicant as a basis for determining the potential environmental impacts of the proposed OTEC operation, and for developing appropriate site-specific technological and monitoring requirements for incorporation as license conditions pursuant to § 1001.520 of the proposed rules. The site-specific EIS on each license application required by Section 107 of the Act will provide a mechanism for informed public involvement in this process.

Issue No. 15: Environmental Monitoring. NOAA's initial view on this issue, as expressed in the ANPR, was that a licensee should be required to implement a monitoring program sufficient to demonstrate compliance with applicable water quality standards, to provide for early detection of potential releases of pollutants from OTEC operations, and to monitor the effects of the OTEC discharge plume. Most commentors concurred in this view. NOAA has concluded it is a practical approach to developing OTEC

license conditions related to environmental monitoring, and has required, in § 1001.260 of these proposed regulations, that the applicant provide a proposed monitoring program with his application. Review of that proposal will form a part of the process discussed in *Issue No. 14* above for developing site-specific environmental protection measures.

Issue No. 16: Criteria for Immediate Suspension. NOAA invited comment in the ANPR on whether or not the criteria for immediate suspension of OTEC construction or operation activities provided in § 111(b) of the Act were sufficient. Those commentors who addressed this issue expressed the opinion that the statutory guidance was sufficient. NOAA concurs in this opinion and will use the Section 111(b) criteria in any immediate suspension action.

Issue No. 17: Prevention of Interference with Other Ocean Uses, and Other Nations. In the ANPR, NOAA raised the issue of what types of OTEC-related potential interferences with other legitimate uses of the ocean and with other nations' territorial seas of national resource jurisdiction zones NOAA should seek to prevent. Specific issues noted included the types of other ocean uses that should be specifically recognized, the criteria of standards to be used to determine significant interference, and the specific methods and/or standards which should be used to reduce or prevent interference. Most commentors stated the view that significant interference by OTEC facilities or plantships with other ocean uses was a highly complex factual issue which would not become a major problem, other than on a site-specific basis, until the OTEC industry had developed to a considerable extent. NOAA concurs in this view and adopts the position that the site-specific OTEC licensing process, including EIS preparation as required by the Act, provides an adequate forum for raising and resolving potential OTEC interference issues, at least for the near term development of the commercial OTEC industry. Accordingly, § 1001.520(d) of the proposed rules provides for inclusion of OTEC license conditions on a case-by-case basis, as necessary to prevent such interference. In addition, Subpart I of Part 1001 has been reserved for use in the event regulations specifying procedures for mediating disputes related to interference between OTEC facilities or plantships become necessary in the future.

Issue No. 18: Upper Limit on Number of OTEC Facilities and Plantships. NOAA noted in the ANPR that section 101(c)(14) of the Act provides for establishment of an upper limit on the number or total capacity of OTEC facilities and plantships, either overall or in a specific geographic area, if the NOAA Administrator determines that such a limit is necessary. NOAA's initial view was that sufficient information was not now available to support establishment of such a limit. All commentors who addressed this issue concurred in the initial NOAA view. Accordingly, this NPR does not propose any upper limit and NOAA does not contemplate establishing one in the near future. However, Subpart G of Part 1001 has been reserved for use in the event regulations establishing such a limit become necessary in the future.

Issue No. 19: Compliance Orders. NOAA requested views on criteria which should be applied under section 302(a)(2) of the Act to govern issuance of compliance orders. No commentor chose to address this issue substantively. However, one commenter noted that the language of section 302 provided sufficient guidance and another commentor indicated a desire for NOAA to issue procecures for dealing with compliance orders. NOAA has done so in § 1001.620 of *Subpart F—Enforcement Procedures* of the proposed rules.

Issue No. 20: Suspension, Revocation, or Termination of a License. No commentor substantively addressed this issue or proposed suspension, revocation, or termination criteria other than those specified in the Act. NOAA has determined that the guidance in the Act, coupled with license terms and conditions established under § 1001.520 of the proposed rules generally would provide sufficient guidance to a licensee as to what situations would warrant institution of license suspension, revocation or termination proceedings. *Subpart F—Enforcement Procedures* of the proposed rules sets out procedures for such proceedings.

VII. Organization of the Proposed Regulations

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

Subpart A—Definitions and General Program Requirements

This subpart describes the purposes and scope of 15 CFR Part 1001, provides definitions of terms used throughout the proposed regulations and specifies who must (must 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 applications 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, Suspension, Revocation and Termination

The 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 suspension, revocation, and termination procedures.

Subpart E—Formal Hearing Procedures

Under certain circumstances a formal ajudicatory hearing on the record may become necessary as part of the OTEC licensing process. Such formal hearings are also necessary as part of the OTEC enforcement program. This subpart sets forth the 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 panalties in connection with enforcement activities. This subpart also establishes rules concerning placements 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 lawsuits.

VIII. Other Actions Associated With This NPR

Subpart A—Classification Under Executive Order 12291 of February 17, 1981

The NOAA Administrator considers the regulations proposed in this NPR to be major with respect to the criteria of Executive Order 12291 (EO 12291) of February 17, 1981, because the provisions of the NPR will foster and goven development of the United States commerical OTEC industry. However, the Administrator has determined that it is impracticable for NOAA to adhere completely to the procedures of EO 12291 because to do so would conflict with deadlines imposed by the OTEC Act on issuance of these regulations.

NOAA has prepared and transmitted to the Office of Management and Budget (OMB) a preliminary Regulatory Impact Analysis as specified by Section 3 of EO 12291 and will prepare a Final Regulatory Impact Analysis, which will be transmitted, along with the final rule, to the OMB Director at least 30 days prior to the publication of the final rule. However, Section 102(a) of the OTEC Act imposes a deadline of August 3, 1981 for issuance of final OTEC licensing regulations. Compliance by the Administrator with this deadline and the requirements of the Administrative Procedures Act make it impracticable to provide for a 60 day review of the Preliminary Regulatory Analysis by OMB prior to publication of this NPR. In order to allow for a 60 day OMB review period it would have been necessary to commence the review on February 2, 1981. Therefore, the procedures outlined in Section 8(a)(2) of EO 12291 related to exemptions from its requirements apply to this rulemaking. NOAA has reported to the OMB Director its intention to satisfy EO 12291 in this manner to the maximum extent practicable.

This approach to compliance supports the underlying objectives of EO 12291 and will allow NOAA to meet its statutory obligations in a timely fashion. To delay would unnecessarily restrict the development of the private OTEC industry, which requires the legal regime proposed in this rulemaking as a prerequisite to aggressive development of commercial OTEC technology.

B. Regulatory Impact Analysis

While NOAA finds that, due to impracticability, it cannot completely adhere to the provisions of EO 12291 regarding transmittal of a draft Regulatory Impact Analysis to OMB 60 days prior to publication of the NPR in the **Federal Register**, NOAA has prepared a draft 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, considers the economic benefit and cost implications of the alternatives, and explains NOAA's reasons for making the choices reflected in this NPR. The draft analysis has been done in such a way as to include an initial regulatory flexibility analysis in compliance with the Regulatory Flexibility Act, Public Law 96-354. The major conclusions of the draft Regulatory Impact Analysis are summarized in sections V (BACKGROUND) and VI.A (GENERAL REGULATORY APPROACH) of the preamble to this NPR. Copies of the draft analysis may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified in the ADDRESSES section of this rulemaking.

C. Summary of Initial Regulatory Flexibility Analysis

The major conclusions of NOAA's Initial Regulatory Flexibility Analysis are summarized in sections V (BACKGROUND) and VI.A. (GENERAL REGULATORY APPROACH) of this preamble. 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 as 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 proposed 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 proposed regulations do not impose any reporting, recordkeeping, or other compliance requirements on small governmental jurisdictions or small organizations. Copies of the combined Initial Regulatory Flexibility Analysis and Preliminary Regulatory Impact Analysis may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified, in the ADDRESSES section of this rulemaking.

D. Paper Reduction Act of 1980 (Public Law 96-511)

NOAA anticipates a maximum of 3 OTEC license applications in the first year of the program. Because of the limited number of persons initially subject to these proposed regulations, NOAA believes they do not contain a "collection of information" request within the meaning of 44 U.S.C. §§ 3502(4) and 3502(11). The final regulations will contain the statements referred to in 44 U.S.C. §§ 3506 and 3512, as applicable.

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 draft Environmental Impact Statement (DEIS) under Section 102(2)(C) of the National Environmental Policy Act of 1969 as part of this rulemaking. The DEIS has been filed with the Environmental Protection Agency and is available for public comment. 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 rulemaking.

F. 45-Day Public Comment Period

The public comment period on this rulemaking is 45 days, rather than the customary 60 day period. This is necessary to assure meeting the August 3, 1981, deadline the OTEC Act establishes for issuance of final licensing regulations while providing 30 days for OMB review of them under EO 12291. To minimize the impact of this shortened comment period, NOAA is

providing copies of this rulemaking directly to all persons who responded to the OTEC ANPR.

For the reasons set out in the preamble, it is proposed to amend Title 15 of the Code of Federal Regulations by adding a new *Part 1001, Ocean Thermal Energy Conversion Licensing Program.* The text of the proposed rules follows.

Dated: March 25, 1981.

James P. Walsh,

Signed: *Acting Administrator, National Oceanic and Atmospheric Administration.*

PART 1001—OCEAN THERMAL ENERGY CONVERSION LICENSING PROGRAM

Subpart A—Definitions and General Program Requirements

Sec.

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Subpart E—Formal Hearing Procedures

1001.560 Formal hearing procedures.
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Subpart F—Enforcement Procedures

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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]

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 and Definitions

§ 1001.10 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, suspension, revocation, termination, relinquishment, or surrender of a license.

§ 1001.20 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 sea 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, and 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.

§ 1001.30 Scope of the OTEC licensing regulations.

(a) *Subpart A* of Part 1001 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 1001 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 1001 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 1001 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, suspension, revocation, and termination of a license.

(e) *Subpart E* of Part 1001 prescribes the procedures which will be used by the Administrator to conduct any formal hearings under this Part.

(f) *Subpart F* of Part 1001 sets forth the administrative procedures which will be used for enforcement proceedings under the Act and this Part.

§ 1001.40 Definitions.

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

"Act" means the Ocean Thermal Energy Conversion Act of 1980 (Public Law 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 § 1001.330(a) of this Part or is designated as such by the Administrator in accordance with § 1001.330(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 subtantially 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 highwater 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 highwater 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 of 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, heat, 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 § 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 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 chairmen 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.

§ 1001.50 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 to 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 an OTEC facility or plantship unless such activity takes place seaward of the highwater mark.

§ 1001.60 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.

§ 1001.70 Pre-application consultation.

(a) *Consultation.* If requested, the Administrator will consult with any prospective applicant to assist the applicant in properly preparing the application.

(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.

§ 1001.80 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 Building #1, 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 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.

§ 1001.90 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 requirements. 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 will be provided unless the Administrator determines otherwise.

§ 1001.100 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 afforded confidential treatment.

(2) Requests for confidential treatment of information must be in writing and must be submitted at the time of submission of the information. Information subject to the request 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 legend "Confidential Treatment Requested." Where this marking proves impracticable, a cover sheet containing the legend must be securely attached to the compilation of information.

(c) *Substantiation of request for confidential treatment.* (1) Any request for confidential treatment must 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. Such statement itself will be treated as confidential to the extent permitted by applicable law.

(2) Issues addressed should include:

(i) The commercial or financial nature of the information;

(ii) The nature of the competitive advantage enjoyed as a result of possession of the information;

(iii) The nature 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 of trade secrets, privileged, or confidential information.* Any request for disclosure of information submitted, reported, or collected pursuant to this Part shall be made in accordance with the requirements of 15 CFR Part 903. Upon receipt of a request for disclosure, the officer authorized in 15 CFR 903.11 to make initial denials of requests for records shall determine, in consultation with the NOAA Office of General Counsel, whether confidential treatment is warranted. If the officer determines that confidential treatment is not warranted, the officer shall promptly notify the person requesting confidential treatment. Except as allowed under paragraph (e)(1)(ii) of this section, no information subject to a request for confidential treatment shall be released until the expiration of 10 calendar days from the date of issuance of such notice. In all other respects, procedures for handling requests for records containing information submitted, reported, or collected pursuant to this Part shall be in accordance with 15 CFR Part 903.

(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 (relating to trade secrets and confidential commercial and financial information), 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 calendar 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.

§ 1001.110 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 when the revisions are filed.

(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.

§ 1001.120 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 § 1001.90 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 § 1001.90(c) of this Part.

§ 1001.130 Application Fee.

(a) *Schedule of payment.* The application fee must be submitted to NOAA as follows:

(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 § 1001.340 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 § 1001.360 of this Part.

(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 § 1001.290 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 § 1001.340 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."

§ 1001.140 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 Building No. 1, 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 § 1001.310 of this Part will be listed on the docket when they are transmitted to the Environmental Protection Agency.

§ 1001.150 Public Inspection and Copying.

(a) A copy of each application, except material for which protection is claimed as trade secrets or privileged or confidential information, will be available for inspection and copying at NOAA, Office of Ocean Minerals and Energy, Room 410, Page Building No. 1, 2001 Wisconsin Ave. NW., Washington, D.C. 20235.

(b) The Administrator will designate a custodian of all documents filed in a proceeding for which protection is claimed under § 1001.100 of this Part. The custodian will not make public for inspection documents for which protection is claimed nor otherwise disclose such information, unless the NOAA General Counsel is of the opinion that the requirements of § 1001.100(c) of this Part have been satisfied. The custodian will keep a record of all officers and employees of the Department having custody of any copy or copies of protected documents.

Subpart B—Information To Be Submitted With Application

§ 1001.160 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 § 1001.90 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 § 1001.90 of this Part to obtain it from the applicant.

§ 1001.170 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.

§ 1001.180 Information about the applicant and its affiliates.

(a) *General.* The following information on the applicant and its affiliates shall be provided 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 and address of a person upon whom service may be made if a formal hearing is to be held on the application and the name and address 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 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) Annualized projections or estimates of each of the following, for the first, third, sixth, ninth, etc. year of operation throughout the requested duration for the OTEC facility or plantship license:

(i) Total gross and net production of electricity;

(ii) Total production of other products;

(iii) Estimated unit cost to the end user of produced electricity or product;

(5) A copy of every agreement or proposal of the applicant and each of its affiliates relating to the ownership, lease, charter, or management 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;

(6) 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 or plantship, projected on an annual basis extending throughout the expected useful life of the OTEC facility or plantship. The estimates provided under this paragraph should be supported by analysis of the specific markets in which the OTEC facility or plantship would compete; and

(7) 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 which would be produced by the OTEC facility or plantship which is the subject of the application.

§ 1001.190 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;

(b) A description of the thermal energy conversion cycle to be used 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 conduct 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 clean up 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).

§ 1001.200 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.

§ 1001.210 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.*

(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 226.

(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)).

(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 Artificial 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) *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.

§ 1001.220 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, submarine transit lane, fishing ground, military use area, or other special area noted on navigation charts for the area covered by the drawings, or otherwise known to the applicant.

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

(1) The proposed size and location of:

(i) All fixed and floating structures;

(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) A reconnaissance hydrographic survey of the proposed marine site; and

(3) The charted water depth throughout the proposed marine site as verified by the reconnaissance hydrographic survey.

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

(e) *Soil data.* An analysis of the general character and condition of the ocean bottom and sub-bottom strata throughout the marine site and long 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 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; and

(6) Industrial plants.

§ 1001.230 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.

§ 1001.240 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 the electrical transmission riser cable, product transfer system, 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 fire fighting equipment to be used on each major floating component.

(7) The personnel capacity of each OTEC plantship.

(c) *Major fixed marine components.* (1) A description and preliminary design drawing of each major fixed marine component.

(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 fire fighting equipment to be used on each major fixed marine component.

(7) The personnel capacity of each OTEC facility.

(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 the 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 of 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.

§ 1001.250 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. This description must include an explanation of the method for emplacing any submarine electrical transmission cable.

§ 1001.260 Environmental information.

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

(1) A description of the area or areas of the ocean 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 degrade the OTEC operation proposed by the applicant;

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

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

(4) The composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystems, such as those important for the food chain;

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

(6) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism.

(7) The existence of special aquatic sites which might be significantly impacted by the proposed OTEC operations including, but not limited to estuarine or marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(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 operations;

(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 currents 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 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 Federally permitted discharges from the OTEC facility or plantship on water, sediment, and biological quality.

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

Subpart C—License Application Review Procedures

§ 1001.270 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 prescribed 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 §§ 1001.280 through 1001.370. 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 § 1001.380.

§ 1001.280 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 § 1001.290 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 § 1001.90 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.

§ 1001.290 Publication of notice of application; contents of notice; call for additional applications for OTEC facilities.

(a) Not later than 5 days after determining under § 1001.280 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 or plantship; and

(ii) The potential operation of another OTEC facility or plantship might impact so as to significantly degrade the OTEC operation proposed by the applicant, unless the application is for a license for an OTEC facility to be located within an application area which has already been designated; and

(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. the Administrator shall publish notice of any such application received in accordance with paragraph (a) of this section. 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.

§ 1001.300 Other Federal agencies and departments.

(a) At the time notice of any application is published pursuant to § 1001.290 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 § 1001.320 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 § 1001.340 of this Part, so that such 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 hearings is held under § 1001.340 of this Part.

§ 1001.310 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.

§ 1001.320 Antitrust review.

(a) Promptly after determining under § 1001.280 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 § 1001.300(a), 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.

§ 1001.330 Designation of 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 § 1001.290 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 that:

(i) 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 such OTEC activities.

(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 § 1001.290 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) *Adjacent coastal State review of application.* 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.

(d) *Consultation with adjacent coastal States with approved Coastal Zone Management programs 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 notify the Administrator, as to:

(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.

§ 1001.340 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 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.

§ 1001.350 Formal hearings on material factual issues.

(a) If, on the basis of the hearing report required by § 1001.340 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, he will issue a notice of formal hearing under § 1001.560(d).

(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.

§ 1001.360 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 § 1001.290 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 § 1001.290 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 §§ 1001.300(b) and 1001.330(d)(3).

§ 1001.370 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 § 1001.290 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 § 1001.360 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 states in writing good cause for such extension.

§ 1001.380 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 the 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 the 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 the applicant in the CAR process.

(3) Conducting an inter-agency meeting with all members of the CAR team which includes a briefing by the applicant on the details of the 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.

(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.

§ 1001.390 Voluntary nature of CAR process.

(a) *Applicant.* Participation by the applicant in the CAR process is voluntary. If the 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 the 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.

§ 1001.400 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.

§ 1001.410 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 § 1001.300 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.

§ 1001.420 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 § 1001.330 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 is 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.

§ 1001.430 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 the 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.

(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 § 1001.140 of this part. The Joint Agreement will then be available for public inspection and copying in accordance with § 1001.150 of this Part.

§ 1001.440 Interagency 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 a public meeting.

(b) *Content.* The inter-agency CAR team meeting will consist of a briefing by the 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.

§ 1001.450 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

§ 1001.460 Timely approval or denial of application for a license.

(a) The Administrator will approve or deny any timely filed application with respect to 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 § 1001.360 of this Part.

(b) The Administrator will approve or deny an application for a license for ownership, construction, or operation of an OTEC plantship not later than 90 days after the public hearings on the application are concluded pursuant to § 1001.360 of this Part.

§ 1001.470 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 § 1001.320 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 § 1001.320 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 determined 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 piplelines 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 § 1001.330(d) that the application is inadequate or inconsistent with respect to programs within his jurisdiction and the license cannot be conditioned as described in § 1001.330(d)(4);

(11) When the license is for an OTEC facility, he 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, he 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) When 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)).

§ 1001.480 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.

§ 1001.490 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 citizenship or ownership of the licensee, as approved, 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.

§ 1001.500 Contents of license.

(a) If an application is approved, a license will be issued containing, 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 § 1001.520 of this Part.

§ 1001.510 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.

§ 1001.520 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 § 1001.330(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 inference with other uses of the high seas.* Each license will include such conditions as the Adminsitrator 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 Federally permitted discharges from the OTEC facility or plantship will not:

(i) Significantly degrade the operation of another OTEC facility of 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 licensee'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 those 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 Adminsitrator will allow for reasonable delay resulting from unforseeable circumstances.

(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.

§ 1001.530 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.

§ 1001.540 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.

§ 1001.550 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 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 to the licensee.

(b) *Automatic operation of license terms.* The Administrator may provide in the terms of a license for automatic suspension or termination 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 or 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

§ 1001.560 Formal hearing procedures.

(a)(1) *General.* All formal hearings described in § 1001.350 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 § 1001.340 of this Part, the Administrator determines that there are one or more specific and material issues of fact pertaining to the application, which may be resolved by a formal hearing, he will provide for a formal hearing.

(2) The record developed in any such formal hearing will be part of the basis for the Administrator's decision to approve or deny issuance, transfer, or renewal of a license.

(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. sections 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)(2) 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 depositions or interrogatories to be taken;

(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 and confidential commercial and financial information;

(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 latter 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) of this section, to be eligible to participate as a full party.

(2) Any person desiring to participate as a party in a formal hearing must submit a request to the judge to be admitted as a party. The request must be submitted within 10 days after the date of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. Such person will be allowed to participate if the judge finds that the interests of justice and a fair determination of the issues would be served by granting the request. The judge may entertain a request submitted after the expiration of the 10 days, but such a request may be granted only upon an express finding on the record that:

(i) Special circumstances justify granting the request;

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

(iii) The requestor has consented to be bound by all prior written agreements and stipulations agreed to by the existing parties, and all prior orders entered in the proceedings; and

(iv) Granting the request will not cause undue delay or prejudice the rights of the existing parties.

(3)(i) Any interested person who desires to submit evidence in a formal hearing must submit a request within 10 days after the dates of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. The judge may waive the 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 prior knowledge of the formal hearing, and the evidence he proposes to submit may significantly affect the outcome of the proceedings.

(ii) The judge may permit an interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning 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 arguments, briefs, or to cross-examine witnesses or participants in other ways if the judge determines:

(A) That the interests of justice would be better served by allowing such participation by the interested persons; and

(B) That there are compelling circumstances favoring such participation by the interested person.

(g) *Hearings: 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.* Failure of a party to appear at a hearing:

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

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

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

(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 repetitous. 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.

(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, nonprobative, or irrelevant evidence;

(iii) Take necessary and proper measures 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) *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.

(6) *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, 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 § 1001.350 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 within 10 days after the hearing or within such additional time as the judge may allow. Such proposals and briefs must refer to all portions of the record and to all authorities relied upon in support of each proposal. Reply briefs must be submitted within 10 days after receipt of the proposed findings to which they respond, unless the judge allows additional time.

(2) *Recomended decision.* As soon as practicable, but normally not later than 30 days after the conclusion of the formal hearing, the judge will evaluate the record of the formal hearing and prepare and file a recommended decision with the Administrator. The formal hearing must be concluded within 240 days after the publication of the notice of application pursuant to § 1001.290(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 § 1001.350 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 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 despoition 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 in 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.

(s) *Computation of time.* 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.

§ 1001.570 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 the substance of the matter 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. sections 556(d) and 557(d).

(e) This section does not apply to communications to or from the agency representative. However, except in rulemaking proceedings under the Act and these regulations and in proceedings determining applications for initial licenses, 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) This section will not apply to communications concerning national defense or foreign policy matters. Any communications:

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

(2) From employees of the United States Government involving intergovernmental 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.

Subpart F—Enforcement Procedures

§ 1001.580 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 (sections 1001.590 and 1001.600); establishment of license sanctions (section 1001.610); issuance of compliance orders (section 1001.620); placement of observers on or in OTEC facilities and plantships (section 1001.630); and the giving of advance notice of private civil actions (section 1001.640).

(b) *Filing and service of documents.* (1) Filing and service of documents required by this Subpart shall be in accordance with § 1001.560 (r) and (s) of Subpart E. The method for computing time periods set forth in § 1001.560 (r) and (s) 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 section 1001.590(b) or by order of an administrative law judge, no requests for an extension of time may be granted.

§ 1001.590 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 telephonic response to the request within the 48-hour period will be considered effective responsive, and will be followed by written confirmation.

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

(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 NOVA 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 § 1001.580(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 Section 1001.600 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 § 1001.600(k) 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 action taken and citing this paragraph and section 302(c) of the Act as authority. Once the case has been assigned for hearing under section 1001.600(a), 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 sanctions as a result of civil penalty 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.

§ 1001.600 Hearing and appeal procedures.

(a) *Beginning of hearing procedures.* Following receipt of a written request for hearing timely filed under § 1001.590(b), 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 § 1001.570 of Subpart E of this Part. However, § 1001.570 will not be interpreted to diminish the Administrator's compromise authority under § 1001.590(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 § 1001.560(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 § 1001.560(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 § 1001.560(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 § 1001.590(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 § 1001.590(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 § 1001.590(f).

§ 1001.610 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).* (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 judicial hearing in which the licensee 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 relevent NOLS or refer to the relevent 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.

§ 1001.620 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 Administor 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.

§ 1001.630 Observers.

(a) Each licensee shall allow, at such times and to such extent as the Administrator deems reasonable and necessary, an observer 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, conditions, and restrictions 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) The Administrator may notify a licensee, by certified or registered mail, return receipt requested, that the Administrator plans to place an observer aboard the OTEC facility or plantship to which the license applies.

(c) A licensee who is notified under paragraph (b) of this section that he is required to carry an observer aboard the OTEC facility or plantship shall promptly notify the official specified in the Administrator's notice, regarding the licensee's suggested time and method for transporting the observer to the OTEC facility or plantship.

(d) Each licensee of an OTEC facility or plantship to which an observer is assigned shall:

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

(3) Provide all other reasonable cooperation and assistance to enable the observer to carry out his duties; and

(4) Provide accommodations and food to the observer 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) The Administrator will provide for payment to the licensee of all reasonable costs directly related to the quartering and maintaining of observers on board OTEC facilities or plantships.

(f) 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.

(g) 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.

§ 1001.640 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.

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